EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANGUILLA

AXAHCVAP2018/0012

BETWEEN:

[1] SKYNET LTD.

[2] GLORY TRADING HOLDING LTD.

Appellant

[3] OLEG DOVBNYA
[4] BALTHASAR HEFTI

and

[1] GLOBAL SKYNET INTERNATIONAL LTD.
[2] ALEXANDER BLOCH

Respondents

Before:

The Hon. Dame. Janice M. Pereira, DBE — Chief Justice
The Hon. Mde. Louise Esther Blenman — Justice of Appeal
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]

Appearances:

Ms. Tara Carter and Ms. Kristy Richardson for the Appellants
Ms. Jean Dyer for the Respondents

2019: June 5;
October 3.

Civil appeal — Approach of appellate court to trial judge's findings of fact — Validity of Share Purchase Agreement — Interpretation of Share Purchase Agreement — Ratification — Whether actions of director subsequently ratified — Consideration — Whether consideration paid in full under terms of Share Purchase Agreement — Whether Share Purchase Agreement transferred legal and beneficial ownership in capital stock of Skynet to Global Skynet — Allotment of shares — Whether allotment of shares by director was for improper purpose — Whether allotment of shares by director valid and effective

The appellant, Glory Trading Holding Ltd. ("Glory Trading"), is a company which owns all of the 50,000 shares comprising Skynet Ltd.'s ("Skynet") capital stock. The respondents

Global Skynet International Ltd. ("Global Skynet") and Mr. Alexander Bloch ("Mr. Bloch"), are a company incorporated in the British Virgin Islands and a Swiss national respectively. Mr. Bloch desired to acquire a parcel of land in Israel to erect on it a 'World Peace Monument'. However, the owner of the land had already contracted to sell the land to Skynet Ltd. ("Skynet"). Mr. Bloch therefore authorised his attorney to negotiate, with one Mr. Alphons NG Van Spaendonik ("Mr. AvS") who he believed was the ultimate beneficial owner of Skynet, to acquire Skynet's outstanding share capital and in turn acquire the land so that the project could be realised. The negotiations resulted in the Share Purchase Agreement (the "SPA"), between Mr. AvS, Skynet and Holyland, Mr. Bloch being the beneficial owner of Holyland. Skynet decided to acquire the land and authorised Mr. AvS, who was a director of Skynet, to act on its behalf. Skynet was registered as the owner of the land and Intertrust (Curacao) N.V. ("Intertrust") in its capacity as Skynet's managing director caused Intertrust (Anguilla) Ltd. to issue bearer share certificate No. 1, which represented one fully paid share. The bearer share was delivered to Holyland and Holyland became the sole shareholder of Skynet. Holyland subsequently changed its name to Global Skynet.

Intertrust and Mr. AvS resigned as directors of Skynet and Mr. Balthasar Hefti ("Mr. Hefti") was appointed as the sole director of Skynet. Mr. Bloch also became a director of Skynet. A few years later, a dispute arose between them and Mr. Hefti resigned. By the time Mr. Hefti had resigned, he had appointed Mr. Andrey Kravchuk as a director of Skynet and resolved that the issued and outstanding share of Skynet held by Mr. Bloch be transferred to Mr. Kravchuk, and that the remaining 49,999 unissued shares of Skynet's capital be issued to Mr. Kravchuk. As a result, Global Skynet and Mr. Bloch sued Skynet, Glory Trading and Mr. Hefti and alleged that notwithstanding Mr. Hefti's resignation, he had purported to act as Skynet's director by issuing the outstanding share of Skynet held by Mr. Bloch and the remaining 49,999 unissued shares of Skynet's capital to Mr. Kravchuk. They alleged that Mr. Hefti's actions were improper as being without lawful authority and oppressive and that Mr. Hefti was not acting bona fide for Skynet's benefit but for his own personal benefit. Global Skynet and Mr. Bloch also alleged that Mr. Hefti was in breach of his fiduciary obligations and section 14 of the International Business Companies Act and as a result the allotment of shares to Mr. Kravchuk is null and void or voidable. Skynet denied the allegations and contended that the company was owned by Glory Trading. Skynet also denied that it had acted fraudulently and argued that Mr. Hefti's actions were intra vires, lawful and in accordance with Skynet's by-laws and the applicable statutes.

The learned judge granted Global Skynet and Mr. Bloch's claim and set aside the allotment of the 50,000 shares in Skynet to Mr. Kravchuk. The judge held that Skynet was beneficially owned by Global Skynet in accordance with the terms of the SPA. The judge also held that Mr. Hefti, in his capacity as a director of Skynet, in cancelling the share issued to Global Skynet and allotting all the 50,000 shares in Skynet to Mr. Kravchuk was acting for his own personal benefit and without regard to the interests of Skynet and its existing shareholder. In a word, that he acted for an improper purpose.

Glory Trading is dissatisfied with the judgment of the learned judge and has appealed. The first issue arising for this Court's determination is whether the SPA was valid and enforceable against Skynet and operated to transfer all the legal and beneficial ownership

in Skynet from Mr. AvS to Holyland. Glory Trading argued that the SPA is invalid as: (i) the SPA purported to transfer shares that were not issued and referred to land that was not owned by Skynet at the time of its execution; (ii) the SPA was signed by Mr. AvS who was not a director at the time of its execution; and (iii) consideration was not paid in full in accordance with the terms of the SPA. The second issue arising for determination is whether Mr. Hefti's actions taken as a director of Skynet in cancelling the bearer share and the one share issued to Global Skynet and then issuing and allotting all of the shares of Skynet to Mr. Kravchuk were valid and effective acts.

Held: dismissing the appeal; ordering that Glory Trading shall pay both Global Skynet and Mr. Bloch on this appeal two-thirds of the assessed costs in the court below, that:

1. An appellate court should not interfere with the findings of fact of a trial judge unless it is satisfied that any advantage enjoyed by the trial judge, having seen and heard the witnesses, could not be sufficient to justify the judge's conclusion. A review of the judgment reveals that the learned judge correctly construed the terms of the SPA in light of the surrounding circumstances relating to the genesis and objective of the parties which led to the execution of the SPA. The intention of the parties seems to be fairly clear and in any event, the learned judge drew certain inferences of the intention of the parties based on the material before him. The learned judge considered all of the circumstances and he was satisfied, based on the evidence, that the purpose of the SPA was to transfer the land in Israel to Holyland. Therefore, the learned judge's conclusion that the purpose of the SPA was to transfer the land in Israel to Holyland; that both parties must have known that when the SPA was signed that shares were not issued; and that the land in Israel was not yet owned by Skynet cannot be impugned.

   Watt (or Thomas) v Thomas [1947] AC 474 applied; **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21 applied; **Yates Associates Construction Company Ltd. v Blue Sand Investments Ltd.** BVIHCVAP2012/0028 (delivered 20th April 2016, unreported followed; **Central Bank of Ecuador and others v Conticorp SA and others** [2015] UKPC 11 applied; **Reardon Smith Line Ltd. v Hansen-Tangen** [1976] 3 All ER 570 applied.

2. Ratification will be implied from conduct where the conduct of the person on whose behalf the unauthorised act has been done is such as to amount to clear evidence that he adopts or recognises the act or transaction. In this case, notwithstanding that Mr. AvS was not a director when the SPA was executed, there was ample evidence before the learned judge for him to conclude that the actions of Skynet amount to clear evidence that it ratified the actions of Mr. AvS in doing all things to buy the land on behalf of Skynet. Therefore, there is no basis for concluding that the learned judge erred in finding that Skynet had ratified the actions of Mr. AvS. In addition, the learned judge's finding that consideration had been paid in full by Global Skynet is supported by the evidence.

   Hilary Shillingford v Angel Peter Andrew and another DOMHCVAP2011/0032

(delivered 24th November 2016, unreported) followed; **Morris v Kanssen and Others** [1946] 1 All ER 586 distinguished; **New Falmouth Resorts Ltd. v International Hotels Jamaica Ltd.** [2013] UKPC 11 distinguished.

3. The critical question in the appeal was who owns Skynet and therefore who owned the land in Israel and whether there was a proper divesting of ownership from one party to the other. There is no doubt that the learned judge properly concluded based on the evidence that it was only by instrument of the SPA that Holyland, which was issued the bearer share, was able to take control of Skynet and that the SPA and the purchase of the land in Israel were integrally bound up. Accordingly, the SPA is valid and had the effect of transferring all the legal and beneficial ownership in Skynet to Holyland (now Global Skynet).

4. An allotment of shares made by directors must be in keeping with their fiduciary obligations and where shares are issued for an improper purpose, the allotment is liable to be set aside. It was clearly open to the learned judge to conclude on the evidence that the allotment of shares was for an improper purpose. This finding was properly reinforced by the absence of evidence by Mr. Hefti which provided the reason for the allotment and which indicated the benefit Skynet had acquired from the allotment. In the context of Mr. Hefti's undoubtable knowledge that the legal and beneficial rights to all of the capital stock in Skynet was held by Global Skynet, there is no doubt that the shares were issued by Mr. Hefti to Mr. Kravchuk for an improper purpose. Therefore, there is no basis upon which this Court can properly interfere with the learned judge's reasoning and conclusion.

   Independent Asset Management Company Ltd. v Swiss Forfaiting Ltd. BVIHCMAP2016/0034 (delivered 24th November 2017, unreported) followed; **Howard Smith Ltd. v Ampol Petroleum Ltd.** [1974] 1 All ER 1126 applied.

JUDGMENT

Introduction

[1] **BLENMAN JA:** This is an appeal by the appellant, Glory Trading Holding Ltd. ("Glory Trading") against the decision of the learned acting Justice Ramdhani holding that: (i) the Share Purchase Agreement (the "SPA") entered into on 5th May 2000 between Mr. Alphons NG Van Spaendonik ("Mr. AvS"), Holyland International Ltd. ("Holyland") and Skynet Ltd. ("Skynet") is valid and binding as against Skynet; and that (ii) Mr. Balthasar Hefti ("Mr. Hefti") in his capacity as a director of Skynet in cancelling the share issued to Global Skynet International Ltd. ("Global Skynet") and allotting all of the 50,000 shares in Skynet to Mr. Andrey Kravchuk ("Mr. Kravchuk") was acting for his own personal benefit and without regard to the interests of Skynet and its existing shareholder.

Background

[2] The appellant, Glory Trading, is a Belizean company which is listed as owning all the 50,000 shares comprising Skynet's capital stock. Be that as it may, the respondents, Global Skynet, a company incorporated in the British Virgin Islands, and Mr. Alexander Bloch ("Mr. Bloch"), a Swiss national, assert that as a consequence of the SPA, Skynet, an Anguillan offshore company, and the parcel of land it owned now belongs to Global Skynet.

[3] In or about April 2000, the second named respondent, Mr. Bloch desired to acquire a parcel of land located in Israel known as parcel 29945/25 (the "land") to erect on it what has been described as a 'World Peace Monument'. However, the owner of the land had already contracted to sell the land to Skynet. On discovering this, Mr. Bloch authorised his attorney Avi Meyer to enter into negotiations with one Mr. Alphons NG Van Spaendonik ("Mr. AvS") whom he believed was the 'ultimate beneficial owner' of Skynet. The purpose of those negotiations was to acquire Skynet's outstanding share capital and in turn acquire the land so that the project could be realised. The negotiations resulted in the SPA dated 5th May 2000, between Mr. AvS, Skynet and Holyland, Mr. Bloch being the beneficial owner of Holyland.

[4] At a special meeting of Skynet's board of directors, the Board formally resolved to acquire the land in two stages and authorised Mr. AvS or his nominee to act on its behalf. At the time the resolution was made, Intertrust (Curacao) N.V. ("Intertrust") was Skynet's managing director and Mr. AvS was an additional director of Skynet. Mr. Bloch caused the purchase price to be wired from ZHR Swiss Bank in Switzerland to Canadian Imperial Bank in Israel and the land was purchased in August 2000 at the office of Avi Meyer in Israel. On 17th August 2000, Skynet was registered in the Registration Office of Real Estate in Jerusalem as the owner of the land.

[5] The respondents say that on 21st August 2000, Intertrust, in its capacity as Skynet's managing director caused Intertrust (Anguilla) Ltd. to issue bearer share certificate No. 1, which represented one fully paid share. Avi Meyer, who acted as trustee for the parties to

the SPA, delivered the bearer share to Holyland pursuant to the terms of the SPA. Holyland thus became the sole shareholder of Skynet. They also claim that the bearer share was on 1st July 2000 and at all material times pledged to Multiple Consultants International Inc., which was beneficially owned by Mr. Bloch, as security for payment of US$1.5 million due as compensation for certain activities.

[6] Subsequently, Intertrust and Mr. AvS resigned as directors of Skynet and Mr. Bloch's business partner, Mr. Hefti was appointed as the sole director of Skynet. Soon after, Holyland changed its name to Global Skynet, the first named respondent in this appeal.

[7] On 21st August 2006, Mr. Bloch became a co-director of Skynet along with Mr. Hefti. A few years later, a dispute arose between them. Mr. Hefti, acting as Skynet's director, had by a resolution dated 20th May 2010 appointed Mr. Andrey Kravchuk ("Mr. Kravchuk") as a director of Skynet and then, by that resolution, he resigned as a director. The dispute resulted in a claim by Global Skynet and Mr. Bloch against Skynet, Glory Trading and Mr. Hefti in which it was alleged that notwithstanding Mr. Hefti's resignation, effective on 20th May 2010,[1] Mr. Hefti purported to act as Skynet's director by resolving on 21st May 2010 that the issued and outstanding share of Skynet held by Mr. Bloch be transferred to Mr. Kravchuk, and that the remaining 49,999 unissued shares of Skynet's capital be issued to Mr. Kravchuk. Global Skynet and Mr. Bloch claimed that Mr. Hefti's actions were improper as being without lawful authority and oppressive and that Mr. Hefti thereby reduced Global Skynet's shareholding in Skynet from 100% to 0%, which had the effect of destroying Global Skynet's majority bloc in Skynet. They also said that Mr. Hefti was not acting bona fide for Skynet's benefit but for his own personal benefit and as a result, the transfer of the share from Mr. Bloch and the issue of unissued shares to Mr. Kravchuk is null and void or voidable.

[8] Global Skynet and Mr. Bloch also stated that Mr. Hefti was in breach of his fiduciary duty to Global Skynet in cancelling the one issued share Global Skynet held in Skynet, which represented the total issued and outstanding share capital of Skynet.

[1] The parties to the appeal are in dispute as to whether Mr. Hefti resigned on 20th May 2010.

[9] In the court below, Skynet denied Global Skynet and Mr. Bloch's allegations and contended that it was owned by the appellant, Glory Trading, which holds all its issued 50,000 shares. Skynet asserted that the SPA could not be relied on to assert any interest in land and that Mr. AvS had no authority to enter into agreements to bind Skynet. Skynet also denied that that any consideration was paid in relation to the SPA and that any bearer share was issued under the terms of the SPA. It stated that the bearer share certificate relied on was issued on 21st August 2000 and was subsequently cancelled and in any event disabled by operation of law. In addition, Skynet resisted the allegation of fraud and argued that Mr. Hefti's actions which led to the transfer of shares and ownership of Skynet to Mr. Kravchuk was intra vires, lawful and in accordance with Skynet's bylaws and the applicable statutes.

Judgment in the High Court

[10] In a very detailed and carefully reasoned judgment, the learned judge, having seen and heard the evidence of Mr. Kravchuk and Mr. Bloch, who were the only witnesses at the trial, granted Global Skynet and Mr. Bloch's claim. It will become apparent later in this judgment that the appeal primarily challenges findings of fact made by the learned judge. As such, it is useful to reproduce some aspects of the learned judge's findings in detail. In construing the SPA to determine the intention of the parties to the agreement, the learned judge observed at paragraphs 47-50 of the judgment thus:

> "47. The defendants contend that first, the SPA could not be valid to transfer any shares, as at the date of execution Skynet had not issued any shares, all of its shares being unissued, and AvS could not own any shares on that date. I am unable to agree with the defendants first contention. It is to be noted that the SPA specifically required a 'closing'. Events were to take place before the full purchase price was paid. Thus, the fact that there were no shares issued at the date of the execution of the SPA and Skynet had not acquired the parcel of land does not at all show that the SPA could not be valid and binding. Further, the fact that AvS did not legally own any shares on that date does not mean that he could not enter an agreement to divest himself of this ownership rights to any shares to which he might be beneficially entitled. For me, this more appears to be a lack of the drafting skill, whether grounded in language issues or legal savvy.

48. If this court were still in doubt as to the intention of the parties of the SPA, as to whether it was an agreement to sell one issued share out of a 50,000 share-capital to Holyland, or whether it was an agreement to transfer the legal and beneficial ownership and control of Skynet to Holyland, this doubt must disappear when the surrounding circumstances are considered. In doing so, I ask the question as to what was the genesis of this SPA and what was the aim of this transaction? I now turn to the surrounding circumstances as known to the parties.

49. The evidence which related to the surrounding circumstances relating to genesis and objective of the parties which led to the execution of the SPA came from four primary sources. It was first the Share Purchase Agreement itself, second, the oral testimony of Mr. Bloch, third, documentary evidence from Skynet corporate record, and fourth certain agreed documentary evidence.

50. The oral evidence of Mr. Bloch speaks to the genesis and objective of the agreement. He has stated that it was his personal desire to acquire the land in Israel for a World Peace Monument, and that he gave Avi Meyer authority on behalf of Holyland to negotiate with Skynet and Mr. AvS to acquire same. In considering whether Mr. Bloch was a witness of truth, I agree with the good sense approach espoused in the English case of Gestmin SGOS SA v Credit Suisse (UK) Ltd. and Another [2013] EWHC…"

[11] The learned judge then recorded his evaluation of Mr. Bloch's evidence as follows:

"51. I have seen and heard Mr. Bloch testify. I have looked at his demeanor. I have noted his enthusiasm and somewhat indignant and excitable nature. Overall, I was left with the impression that he was a credible witness. He appeared as having one version only of his case fixed in his mind. I have looked at the SPA which was addressed above, and I have seen the other relevant documentary exhibits which I shall detail shortly. I have also considered all the legal arguments and authorities in my approach on making findings. On this narrow question as to reason why Mr. Bloch gave Avi Meyer instructions to negotiate the agreement, there was no real evidence from the defendants which was contradictory.

52. There is no doubt in my mind that Mr. Bloch was speaking the truth when he stated that it was his desire to acquire the land in Israel. I considered that he was not at all shaken in this regard by any cross examination. I have gone further to find that his desire to acquire this land was for the establishment of a World Peace Monument and that this had the blessings of the Pope.

53. Apart from Mr. Bloch's oral testimony, context also comes from a

document admitted into evidence by agreement. This is a letter from Avi Meyer dated 4th July 2000 and addressed to 'Mr. Hefti', 'Holyland International Ltd.'. This letter speaks to the purchase of the land in Israel. Specifically, it advised Mr. Hefti and Holyland International Ltd. that: 'Actually, if it is not necessary to split up the land as originally planned, we can start the registration of the complete land in the name of Skynet Ltd. with the Land Registration Office (TABU) immediately'."

[12] At paragraphs 57-58 of the judgment, the learned judge observed that:

> "57. The defendants' evidence does not in any way detract from Mr. Bloch's evidence. It hardly could, because, on this question, the defendants, apart from demanding that the claimants strictly prove their case, are relying only on what the records of Skynet show as Mr. Kravchuk cannot speak to any of these events personally. I do not see how the negotiations by Avi Meyer which led to the SPA and the purchase of the land which involved Avi Meyer acting for both sides, could lead to any other conclusion but that these two things were integrally bound up. I therefore find that the claimants have proven that Mr. Bloch intended Advocate Avi Meyer to enter into negotiations to acquire the land through the acquisition of Skynet.
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> 58. There is no doubt in my mind that the genesis of the SPA was that, Mr. Bloch desired to establish a world peace project by building a Peace Monument on the land and gave instructions for Holyland to acquire the land through the acquisition of Skynet. That Skynet was, shortly after the execution of SPA, giving authorization to the very Avi Meyer to buy and sell land makes it very probable that Mr. AvS and Skynet itself were aware of the purpose of the SPA, which was to transfer the land to Holyland. All of this is strong evidence to find that the SPA was intended to transfer all legal and beneficial ownership in Skynet from Mr. AvS as beneficial owner to Holyland."

[13] The learned judge concluded at paragraph 59 of the judgment thus:

> 59. From all the matters set out, I find on a balance of probabilities that Mr. AvS and Skynet intended to sell, and that the SPA was an agreement to sell under the terms of the SPA, the legal and beneficial ownership of Skynet to Holyland. Any other conclusion does not make any business sense. Why would Mr. Bloch and Holyland effectively pay the entire purchase price of a parcel of land so that this could be placed in the name of a company which would own no other asset, while at the same time only seek to have a fraction of percent of that company. (Ignoring at this stage that even this one share was sought to be nullified later by Skynet). This contract only makes for business efficacy it is construed to give this meaning. The issuance of only one share issued as a Bearer Share

> together with the other terms of the SPA, must be seen as the delivery of legal right to the only issued share and the beneficial right to the unissued capital stock of the company. I am satisfied that under the terms of the SPA, Skynet could not 'dispose of its unissued shares to someone other than Holyland."

[14] The learned judge then considered whether Mr. AvS was given express authority or had ostensible authority to execute the SPA on behalf of Skynet and whether, if he had no such authority, his actions were subsequently ratified by Skynet. If not, as the learned judge highlighted, the SPA would not be effective to transfer legal or beneficial ownership of anything. At paragraphs 67-69 of the judgment, the judge stated:

> "67. The first director of Skynet made resolutions and declarations to show that Skynet was either confirming all it had earlier authorized Mr. AvS to do, or that it was ratifying and adopting all that Mr. AvS had done and confirming that Mr. AvS was indeed the beneficial owner of all of Skynet's shares. Without repeating all that is stated above, after the SPA was executed, Skynet authorized Avi Meyer to buy and sell land and to open bank accounts. Skynet authorized Avi Meyer to buy and sell land and to open bank accounts. Skynet authorized Mr. AvS to negotiate the purchase of the parcel of land in Israel. It issued declarations in keeping with the SPA. It consented to its first and sole director resigning and the appointment of one of Holyland's directors, Mr. Hefti being appointed as director. I accept that it issued bearer share certificate No. 1 and delivered it to Holyland.
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> 68. There is no doubt in this Court's mind that Mr. AvS was fully authorized or at the very least his statements in the SPA were confirmed as being true and his actions were fully ratified and adopted.
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> 69. If only for completeness, having regard to all my findings, I must state that I have also found on a balance of probabilities that the seal which was placed on the SPA, is the common seal of Skynet."

[15] The learned judge also held, based on the evidence, that consideration was paid in full by Global Skynet and Mr. Bloch under the terms of the SPA which in turn went towards the purchase of the land.

[16] In relation to whether Mr. Hefti's actions taken as a director of Skynet, in cancelling the bearer share and the one share issued to Global Skynet and then issuing and allotting all shares of Skynet to Mr. Kravchuk, were valid and effective to allot all of the capital stock of Skynet to Mr. Kravchuk, the learned judge found that Mr. Hefti's actions as director must

be taken as converting the bearer share into one share which represented all the legal rights to one share and beneficial rights in the remaining capital stock of Skynet. The learned judge also held that, in the context of Mr. Hefti's undoubtable knowledge that the legal and beneficial rights to all of the capital stock in Skynet was held by Global Skynet, Mr. Hefti by adopting the resolution which sought to cancel one share registered to Global Skynet and to issue and allot all the unissued shares of Skynet to Mr. Kravchuk, acted fraudulently, in breach of section 29 of the **International Business Companies Act**,[2] and in breach of his fiduciary obligations.

[17] The learned judge also held that Mr. Hefti's act of cancelling Global Skynet's share and issuing shares to Mr. Kravchuk had the effect of diluting Global Skynet's shareholding from 100% to 0% and the manner in which it was done was also contrary to section 14(4) of the **International Business Companies Act**, as no notice was ever sent to Global Skynet. As a consequence, the learned judge set aside the allotment of the 50,000 shares in Skynet to Mr. Kravchuk and found that Skynet was beneficially owned by Global Skynet in accordance with the terms of the SPA. The learned judge also declared that Mr. Bloch was the sole director of Skynet and made an order that the register of shareholders and the register of directors of Skynet be rectified.

[18] Glory Trading is dissatisfied with the decision of the learned judge and has appealed to this Court. Global Skynet and Mr. Bloch resist Glory Trading's appeal and contend that the learned judge's decision should be upheld.

Issues on the Appeal

[19] Glory Trading has pursued several grounds of appeal which can helpfully be condensed into two principal issues, namely:

(i) whether the SPA was valid and enforceable against Skynet and operated to transfer all the legal and beneficial ownership in Skynet from Mr. AvS to Holyland; and

[2] Cap. I20, Revised Statutes of Anguilla 2006.

(ii) whether Mr. Hefti's actions taken as a director of Skynet in cancelling the bearer share and the one share issued to Global Skynet and then issuing and allotting all shares of Skynet to Mr. Kravchuk were valid and effective acts.

[20] I will now address each issue in turn.

Issue 1 – Validity of SPA
Submissions on behalf of Glory Trading

[21] Learned counsel, Ms. Tara Carter, stated that the learned judge erred in concluding that the SPA was valid and binding. She argued that the learned judge failed to appropriately balance the evidence and incorrectly relied upon the recitals of the SPA to give validity to the agreement. Ms. Carter then referred this Court to the first recital and clause 3.5 of the SPA which refers to the land as Skynet's sole property in Israel and highlighted that Skynet only resolved in June 2000 to formally acquire the land. She therefore contended that at the time the SPA was signed, Skynet did not own the land and therefore the SPA referred to land which was not owned by Skynet at the time of its execution.

[22] Ms. Carter said that the learned judge, having correctly determined that when the SPA had been entered there were no issued shares, erred in finding that this did not render the SPA invalid and non-binding. She further contended that the learned judge, having acknowledged that Mr. AvS did not own shares at the date the SPA had been signed, wrongly concluded that he could enter into the agreement to divest himself of the ownership and rights to those shares. Ms. Carter stated that the SPA could not be legally enforceable as no shares could have been transferred in May 2000, having been first issued by Skynet in August 2000. She claimed that only the one share issued in August 2000 remained with the company subject to Mr. Hefti's discretion with respect to transfer.

[23] Ms. Carter also argued that the SPA is invalid because Mr. AvS, who signed the SPA as a director, was not an appointed director when it was executed. She stated that it was clear on the documentary evidence that Mr. AvS was not empowered by Skynet to enter into the SPA. She posited that it is clear that the SPA was signed one month before Mr. AvS was

actually appointed as a director of Skynet, according to the Minutes of Special Meeting.[3]

[24] Ms. Carter, also claimed that Mr. AvS' actions in executing the SPA were not subsequently ratified by Skynet. She stated that there was no evidence of ratification and even if there were, it is legally impossible to ratify the acts of a person who has not been appointed to act. Relying on the decisions of **Morris v Kanssen and Others**[4] and **New Falmouth Resorts Ltd. v International Hotels Jamaica Ltd.**,[5] she argued that the actions of a director before appointment cannot be ratified as a matter of law. Ms. Carter stated that there was no appointment of Mr. AvS as at May 2000 when the SPA was signed and therefore he could not have lawfully entered into the SPA. She further stated that even if Mr. AvS was appointed to act as an agent, he could not lawfully enter into an agreement as an agent for Skynet or bind Skynet to an agreement which could not be lawfully entered.

[25] Ms. Carter then argued that the learned judge erred in concluding that consideration had been paid for the share and the land under the terms of the SPA and that Global Skynet has not presented any evidence to confirm payment of consideration under the SPA.

[26] Ms. Carter stated that the company seal for Skynet did not exist at the date of execution of the SPA. She argued that the share certificate should be deemed void for absence of the corporate seal and non-compliance with section 1.4 of the bylaws of Skynet, which requires any bearer shares of the company to be issued under the seal of the company and signed autographically by a director.

[27] Ms. Carter contended that if this Court finds that the bearer share validly exists, then the bearer share was not capable of being pledged or delivered to Multiple Consultants International Inc. for several reasons. First, she argued that the bearer share was incapable of being transferred as it was disabled upon failure to comply with section 2 of

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[3] Minutes of Special Meeting, Record of Appeal Bundle 1 of 4, p. 145.
[4] [1946] 1 All ER 586.
[5] [2013] UKPC 11.

the **Custody of Bearer Shares Regulations**[6] which requires all bearer shares to be converted or deposited with a custodian by 31st December 2000. Second, Ms. Carter claimed that there was no delivery of the bearer share certificate. She stated that on 31st July 2000, the date the resolution purported to authorise the transfer of one share in Skynet to Multiple Consultants International Inc., there were no issued shares in Skynet. Therefore, there was no share certificate capable of delivery. Further, Ms. Carter stated that, on the date Mr. Hefti signed the resolution, he had not yet been appointed a director of Skynet.

[28] Ms. Carter therefore argued that the learned judge erred in holding that the SPA operated to vest legal and beneficial ownership of Skynet in Holyland (Global Skynet) and as such Skynet could not dispose of the unissued shares to someone other than Holyland.

Submissions on behalf of Global Skynet and Mr. Bloch

[29] Learned counsel, Ms. Jean Dyer, argued that the learned judge rightly found that the SPA was valid and binding against Skynet. She stated that the fact that there were no shares issued at the date of the execution of the SPA and Skynet had not acquired the land did not invalidate the SPA. Ms. Dyer also stated that the fact that Mr. AvS did not legally own any shares on that date does not mean that he could not enter an agreement to divest himself of his ownership rights to any shares to which he might be beneficially entitled. She argued that it was open to the learned judge to find on the basis of oral evidence and contemporaneous documentary evidence, that the SPA and the purchase of the land in Israel were integrally bound up and that the intention of the SPA was to acquire the land owned by Skynet to establish a world peace project that Mr. Bloch desired. Further, Ms. Dyer was adamant that it was open to the learned judge on the evidence to find that the shares in Skynet were initially beneficially owned by Mr. Avs. She therefore contended that the learned judge correctly found that the fact that there were no shares issued at the date of execution of the SPA and that Mr. AvS did not legally own any shares on the date the SPA was executed did not mean that he could not enter into an agreement to divest himself of ownership rights to any shares to which he might be beneficially entitled.

[6] Custody of Bearer Share Regulations, c.120.

Ms. Dyer maintained that Glory Trading and Mr. Bloch have not provided any basis on which this Court ought to interfere with the learned judge's finding.

[30] On the point of ratification, Ms. Dyer contended that there was sufficient evidential basis for the learned judge's conclusion that everything Skynet did should be taken as ratifying all that Mr. AvS did, binding Skynet to all the terms of the SPA. She argued that the learned judge properly found, on the basis of resolutions and declarations made by the first director of Skynet, that Skynet was either confirming all it had earlier authorised Mr. AvS to do, or that it was ratifying and adopting all that Mr. AvS had done and confirming that Mr. AvS was indeed the beneficial owner of all of Skynet's shares. Ms. Dyer asserted that **Morris v Kanssen and Others** and **New Falmouth Resorts Ltd. v International Hotels Jamaica Ltd.** relied on by Glory Trading are distinguishable from the circumstances of the case at bar. She therefore stated that Glory Trading had not demonstrated that the learned judge's finding on ratification was wrong and this Court has no basis upon which to interfere with the judge's conclusion.

[31] Additionally, Ms. Dyer contended that there was sufficient evidence for the learned judge to conclude that consideration was paid in full by Global Skynet under the terms of the SPA. Ms. Dyer also contended that Glory Trading has not shown that the learned judge was plainly wrong in finding that the seal which was placed on the SPA was the common seal of Skynet. In addition, she stated that, as the SPA is valid and binding, it was open to the learned judge to find that its effect was to transfer all the legal and beneficial ownership in Skynet from AvS to Holyland, having construed the SPA and considered the surrounding circumstances relating to its execution. Ms. Dyer therefore urged this Court to uphold the learned judge's finding that Skynet could not dispose of its unissued shares to someone other than Holyland.

Discussion
Issue 1 – Validity of SPA

[32] In my view, the issues on this appeal turn fundamentally on the correctness of various findings of fact made by the learned judge. The principles guiding the approach of an

appellate court to findings of fact are well-known and need no extensive recitation. Essentially, an appellate court reviewing a trial judge's findings of fact should not substitute its own views for those of the court below, unless it can be shown that the trial judge's findings were clearly wrong. The principles were first propounded in **Watt (or Thomas) v Thomas**[7] and have been restated by the Privy Council in **Beacon Insurance Company Limited v Maharaj Bookstore Limited**.[8] More recently, in **Yates Associates Construction Company Ltd. v Blue Sand Investments Limited**[9] this Court stated as follows:

> "1. An appellate court reviewing the findings of a trial judge on the printed evidence in relation to a question of fact tried by the judge without a jury and where there is no question of the judge misdirecting himself, should not interfere with the trial judge's decision 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 judge's conclusion. In the circumstances, the appellate court may consider that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. However, either because the reasons given by the trial judge are unsatisfactory, or because it is clearly appears so from the evidence, an appellate court may be satisfied that the trial judge 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.
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> 2. Appellate court restraint against interfering with findings of fact, unless compelled to do so, applies not only to findings of primary fact, but also to the evaluation of those facts and inferences to be drawn from them. 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 has to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole. 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 witness, particularly when the judge has referred favourably to the demeanour of the witness concerned.
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> …
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> 3. Where the trial judge fails to make proper use of the advantage he or she possesses in analyzing and carrying out an evaluation of the evidence, the judge's decision cannot stand if the decision does not comport with the

[7] [1947] AC 484.
[8] [2014] UKPC 21.
[9] BVIHCVAP2012/0028 (delivered 20th April 2016, unreported).

> evidence that was adduced. The critical question before an appellate court is whether there was evidence before the trial judge from which the judge could properly have reached the conclusions that he or she did or whether, on the evidence, the reliability of which it was for the judge to assess, that the judge was plainly wrong."

[33] Of similar effect is the dictum of Lord Mance in **Central Bank of Ecuador and others v Conticorp SA and others**:[10]

> "…any appeal court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the judge's findings and position, and in particular the extent to which, he or she had, as the trial judge, as advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere. Some conclusions of fact are, however, not conclusions of primary fact, but 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: see Assicurazioni Generali SpA v Arab Insurance Group (Practice Note) [2003] 1 WLR 577, paras 15-17, per Clarke LJ, cited with approval in Datec Electronics Holdings Ltd. v United Parcels Service Ltd. [2007] UKHL 23, [2007] 1 WLR 1325, para 46."

[34] In my view, the main limbs of Glory Trading's argument that the SPA is invalid are that: (i) the SPA purported to transfer shares that were not issued and referred to land that was not owned by Skynet at the time of its execution; (ii) the SPA was signed by Mr. AvS who was not a director at the time of its execution; (iii) consideration was not paid in full in accordance with the terms of the SPA; and (iv) the company seal for Skynet did not exist at the date of execution of the SPA.

[35] In relation to the first limb, in my view, the fact that there were no shares issued at the date of the execution of the SPA and Skynet had not acquired the parcel of land did not invalidate the SPA. Further, simply because Mr. AvS did not legally own any shares on that date does not mean that he could not enter an agreement to divest himself of his ownership rights to any shares to which he might be beneficially entitled. The learned judge in arriving at his conclusion referred to **Reardon Smith Line Ltd. v Hansen-Tangen**[11] where Lord Wilberforce stated that:

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[10] [2015] UKPC 11, at para.5.
[11] [1976] 3 All ER 570.

> "No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the Court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, and market in which the parties are operating."

[36] It is noteworthy that the learned judge stated at paragraph 49 of the judgment that the evidence which related to the genesis and objective of the parties which led to the execution of the SPA came from: the SPA itself; the oral testimony of Mr. Bloch; the documentary evidence from Skynet's corporate record and agreed documentary evidence. The learned judge thoroughly examined the recitals of the SPA and considered their provisions against the evidence of Mr. Bloch, whom he found to be a credible witness, that it was his personal desire to acquire the land in Israel for a 'World Peace Monument' and that he gave Avi Meyer authority on behalf of Holyland to negotiate with Skynet and Mr. AvS to acquire the land. The learned judge then considered documentary evidence including the letter from Avi Meyer dated 4th July 2000 advising Mr. Hefti and Holyland that: 'Actually, if it is not necessary to split up the land as originally planned, we can start the registration of the complete land in the name Skynet Ltd., with the Land Registration Office immediately'. The learned judge then examined a power of attorney executed on 26th May 2000 granting Avi Meyer 'worldwide' authority to do all things on behalf of Skynet including buying and selling property and opening and maintaining back accounts. Further, the learned judge considered the minutes of Skynet dated 5th June 2000 which disclosed that Mr. AvS was authorised to do all things to buy the land on behalf of Skynet.

[37] A review of the judgment reveals that the learned judge in fact quite properly construed the terms of the SPA in light of the surrounding circumstances relating to the genesis and objective of the parties which led to the execution of the SPA. It is quite clear that both parties must have known that when the SPA was signed that shares were not issued, and the land in Israel was not yet owned by Skynet. Yet, the SPA reads as if both events have already happened. The learned judge quite properly regarded this as resulting from 'a lack of the drafting skill, whether grounded in language issues or legal savvy'. Nonetheless, in my view, the intention of the parties seems to be fairly clear, or at the very least, the

inferences which the learned judge drew in relation to the intention of the parties were open to him based on the evidence. There is no doubt that the learned judge considered all the circumstances and he was satisfied on the evidence that AvS had the right to sell the share even though it was not yet in existence. The judge was also satisfied on the evidence that Skynet in authorising Avi Meyer to buy and sell land shortly after the execution of the SPA, made it very probable that Mr. AvS and Skynet itself were aware of the purpose of the SPA which was to transfer the land to Holyland.

[38] It is noteworthy that the learned judge observed that Glory Trading's evidence in relation to this issue did not detract in any way from Mr. Bloch's evidence as Mr. Kravchuk could not speak to any of these events personally, having been appointed a director on 21st May 2000. Therefore, in my view, the evidence before the learned judge, consisting of Mr. Bloch's oral testimony and documentary evidence, supported the judge's conclusion that the negotiations by Avi Meyer which led to the SPA and the purchase of the land which involved Avi Meyer acting for both sides, could only mean that the two things were integrally bound up. Accordingly, the evidence when considered cumulatively could only lead to the conclusion that Mr. Bloch intended Avi Meyer to enter into negotiations to acquire the land through the acquisition of Skynet.

[39] Applying the above guiding principles on findings of fact to the case at bar, in my view, the learned judge quite properly analysed and evaluated the evidence before him and reached the relevant conclusions. There is no merit in the contention that his findings have no basis in the evidence or can be described as plainly wrong. Reviewing the evidence cumulatively, there is no doubt that the documentary evidence supports the oral evidence of Mr. Bloch and the learned judge properly concluded that Mr. Bloch intended Avi Meyer to enter negotiations to acquire the land in Israel through the acquisition of Skynet. Further, as the learned judge expressed, Skynet in giving authorisation to Avi Meyer to buy and sell land makes it probable that Mr. AvS and Skynet itself were aware of the purpose of the SPA. In my view, the evidence leads to the ineluctable conclusion that the SPA was intended to transfer all legal and beneficial ownership in Skynet from Mr. AvS as beneficial owner to Holyland. There is therefore no basis for contending that the learned judge failed

to appropriately assess the evidence and incorrectly relied upon the recitals of the SPA to give validity to the agreement. The learned judge's analysis was far wider than the terms of the SPA itself and he was clearly entitled to do so. Accordingly, the learned judge's finding that the SPA is valid and binding cannot be impugned.

[40] Next, Glory Trading argued that the SPA is invalid because it was signed by Mr. AvS who was not a director of Skynet at the time of its execution. On this point, the learned judge found that there was no actual express authority given to Mr. AvS by Skynet to enter the SPA as he was appointed after the SPA was executed. However, he found that notwithstanding that Mr. AvS was not a director when the SPA was executed, Skynet ratified Mr. AvS' actions, binding it to all the terms of the SPA. The issue therefore turns on whether the learned judge correctly found that Skynet ratified Mr. Avs' actions. The learned judge referred to **Hilary Shillingford v Angel Peter Andrew and another**[12] in which this Court restated the principles of ratification. The Court stated at paragraphs 42-43 of the judgment that:

> "42. …The relevant principles with respect to ratification are not in doubt. The acts which will constitute ratification are discussed in Bowstead & Reynolds on Agency at paragraph 2-070: ratification may be express or by conduct. An express ratification is a clear manifestation by one whose behalf an unauthorized act has been done that he treats the act as authorized and becomes a party to the transaction in question. The express manifestation need not be communicated to the third party or to the agent. **Ratification will be implied from conduct where the conduct of the person on whose behalf the unauthorized act has been done is such as to amount to clear evidence that he adopts or recognises such act or transaction and such can be implied from the mere acquiescence or inactivity of the principal.** (emphasis mine)
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> 43. Ratification may be of one act or a series of acts and as a general rule every act, other than one which is void at its inception may be ratified, whether legal or illegal provided that it was capable of being done by the principal himself. Ratification must be evidenced either by clear adoptive acts or by acquiescence equivalent thereto. The act or acts of adoption or acquiescence must be accompanied by full knowledge of all the essential facts."

I can do no more than apply the helpful principles enunciated by this Court in **Hilary**

[12] DOMHCVAP2011/0032 (delivered 24th November 2016, unreported).

Shillingford. I will now discuss whether Skynet ratified Mr. AvS' actions, binding it to the terms of the SPA.

[41] Let me say straight away, I find no merit in learned counsel Ms. Carter's submission that there was no evidence of ratification of Mr. AvS' actions by Skynet. The learned judge's finding on this point was based on resolutions and declarations made by the first director of Skynet to show that Skynet was either confirming all it had authorised Mr. AvS to do, or that it was ratifying and adopting all that he had done and confirming that Mr. AvS was the beneficial owner of Skynet's shares. On a close examination of the circumstances of this case, it is apparent that after the SPA was executed, Skynet authorised Avi Meyer to buy and sell land and to open bank accounts. Skynet then authorised Mr. AvS on 5th June 2000 to do all things to buy the land on behalf of Skynet and issued declarations in keeping with the SPA. On 21st August 2000, Skynet issued the bearer share and on 24th August 2000, Skynet issued a director's resolution and a declaration, which approved the resignation of its first and sole director, Intertrust (Curacao) N.V., and the appointment of one of Holyland's directors, Mr. Hefti as sole managing director. In my view, there was overwhelming cogent evidence before the learned judge for him to find that the actions of Skynet amount to clear evidence that it adopted or recognised the actions of Mr. AvS in doing all things to buy the land on behalf of Skynet. Mr. AvS' actions were merely in furtherance of the SPA.

[42] As indicated earlier, learned counsel Ms. Carter relying on the **Morris** and **New Falmouth Resorts** cases argued that even if there were evidence of ratification, it is legally impossible to ratify the acts of a person who has not been appointed to act. This is a short point. Suffice it to say that, I agree with Ms. Dyer that the **Morris** case is distinguishable from the circumstances in the case at bar. In the **Morris** case the acts to be ratified, that is the allotment and issuance of shares, were ultra vires because the shares were allotted by three persons purporting to act as directors without the authority of the company. In this case, Mr. AvS' execution of the SPA could not be ultra vires as clause 17.1 of Skynet's by-laws authorises persons acting under the express or implied authority of Skynet to execute contracts, documents or instruments on its behalf. I will go further to state that Skynet in

the SPA would have held out Mr. AvS as being a director and therefore cannot state that Mr. AvS somehow did not have ostensible or apparent authority when it represented to Global Skynet that Mr. AvS was a director. It is also noteworthy that Skynet has never disavowed the SPA which was signed by Mr. AvS as a director. In the circumstances, Glory Trading has not established that the learned judge's finding on ratification was plainly wrong or was not based on the evidence. Accordingly, the learned judge's finding that Syknet ratified Mr. AvS' actions binding it to the SPA cannot be impugned.

[43] In relation to whether consideration had been paid in full under the terms of the SPA, I am of the view that the learned judge's finding was clearly and properly based on the evidence before him. In finding that consideration had been paid in full for the land in Israel, the learned judge considered the receipt clause at section 1.3 of the SPA which provided that the execution of the SPA by Skynet and AvS shall be conclusive evidence of the receipt by them of the full purchase price. The learned judge also took into account a letter dated 4th July 2000 from Avi Meyer to Holyland asking it to remit the balance of the purchase price and the fact that the property was transferred a few days later into Skynet's name and shortly thereafter a bearer share was issued. There is also the matter of a letter dated 13th November 2013 sent by Oleg Dovbnya, then director of Skynet, to Eitan S. Erez, speaking of Mr. Bloch and stating 'if your client was honest with you, you would discover the real origin of funds which Mr. Hefti and Mr. Bloch used to purchase share certificate No. 1 in Skynet Ltd. in the beginning'. The learned judge regarded that letter as an admission against interest and gave it some weight, and this was clearly within his discretion.

[44] On any view of the facts and in considering the circumstances cumulatively, the learned judge's finding that consideration had been paid in full by Global Skynet is supported by the evidence. Considering the terms of the SPA, it was appropriate for the learned judge to have concluded that the funds represented payment for the shares. It is apparent that the funds should have gone to Skynet as payment for the shares, but the funds were then used to buy the land which was registered in the name of Skynet. Having regard to the receipt clause of the SPA, it is passing strange that the SPA would be executed and the property transferred into Skynet's name if consideration had not been paid in full in

accordance with the terms of the SPA. In fact, the judge noted that Skynet had not presented the court with any of its records to establish that no consideration was paid by it. In the circumstances, the learned judge could not be faulted for finding that the funds represented payment for the shares because as a result of the payment, Global Skynet owns a valuable asset. In my opinion, there is no basis for this Court to interfere with the learned judge's conclusion that consideration was paid in full by Global Skynet in accordance with the terms of the SPA which in turn went towards the purchase of the land.

[45] In relation to whether the company seal for Skynet existed at the date of execution of the SPA, I am of the view that nothing turns on this issue and therefore I will address it briefly only for the sake of completeness. I find that Glory Trading has not shown that the learned judge had no basis for finding that the seal on the SPA was the common seal of Skynet. This point is a very minor one.

[46] The learned judge was faced with the critical question of who owns Skynet and therefore who was in ownership of the land in Israel and whether there was a proper divesting of ownership from one party to the other. Those were the key questions in this case. The learned judge, having considered the oral evidence and the contemporaneous documentary evidence, concluded that it was only by instrument of the SPA that Holyland, which was issued the bearer share, was able to take control of Skynet. Skynet, by its conduct, authorised Mr. AvS to act on its behalf in negotiating the terms of the SPA. There was also sufficient evidence for the learned judge to find that consideration was paid in full. There is therefore no basis for contending that the SPA is invalid and not binding as against Skynet and operated to transfer all the legal and beneficial ownership in Skynet from Mr. AvS to Holyland and the judge's decision cannot be impugned. Accordingly, Glory Trading's appeal in relation to the first issue fails.

[47] I will now address the second issue in the appeal.

Issue 2 – Whether Mr. Hefti's actions taken as a director of Skynet in cancelling the

bearer share and the one share issued to Global Skynet and then issuing and allotting all shares of Skynet to Mr. Kravchuk were valid and effective acts

Submissions on behalf of Glory Trading and Mr. Bloch

[48] Learned counsel Ms. Carter argued that, as a director of Skynet, Mr. Hefti had the authority under the by-laws to issue shares and there was no evidence to the contrary as to what the purpose was. She also stated that there was no evidence to suggest that Mr. Hefti stood to benefit from the transfer of shares personally. Ms. Carter said that Mr. Hefti had not participated in the trial in the court below and there was no allegation pursued in the court below that he stood to benefit from the allotment of shares. However, Ms. Carter, when invited by this Court to indicate the reason for Mr. Hefti's allotment of the shares, was unable to do so and indicated that she had no instructions on this point. In fact, Ms. Carter came very close to conceding the issue in my view.

Submissions on behalf of Global Skynet

[49] Learned counsel, Ms. Dyer, contended that the allotment of the shares by Mr. Hefti to Mr. Kravchuk was an improper exercise of Mr. Hefti's power to allot shares. Relying on the decision of the Board in **Howard Smith Ltd. v Ampol Petroleum Ltd.**[13] she stated that Mr. Hefti's allotment of the shares to Mr. Kravchuk was invalid because: (i) it had the effect of destroying Global Skynet's majority bloc in Skynet; (ii) the purported issuance and allotment was not made bona fide for the benefit of Skynet as a whole; (iii) no corporate purpose was involved; and (iv) it was an improper purpose as Mr. Hefti was clearly pursuing his own interest. Ms. Dyer also argued that the share issue to Mr. Kravchuk was in any case not intra vires because Skynet's unissued shares were not at Mr. Hefti's disposal since they were beneficially owned by Global Skynet pursuant to the terms of the SPA.

[50] Ms. Dyer also relied on **Independent Asset Management Company Ltd. v Swiss Forfaiting Ltd.**[14] and reminded this Court that an intra vires issuance and allotment of

[13] [1974] 1 All ER 1126.
[14] BVIHCMAP2016/0034 (delivered 24th November 2017, unreported).

shares made by directors must be in keeping with their fiduciary obligations and that where shares are issued for an improper purpose, the issue is liable to be set aside. She highlighted that the learned judge correctly found that Mr. Hefti issued the shares to Mr. Kravchuk for an improper purpose and that he was in breach of his fiduciary obligations and section 14 of the **International Business Companies Act**, which provides, subject to certain qualifications, that shares shall be under the control of the directors, who may without limiting or affecting any rights previously conferred on the holders of existing shares, allot or otherwise dispose of the same to such persons on such terms and conditions and at such time as the directors may deem fit. Ms. Dyer stated that Mr. Hefti had undisputable knowledge that legal and beneficial rights to all of the capital stock in Skynet was held by Global Skynet. She further stated that there was no evidence before the learned judge which pointed to any bona fide or other corporate purpose which the issuance of the shares was designed to achieve. She therefore urged this Court to not interfere with the learned judge's finding on this issue.

Discussion

[51] In **Howard Smith Ltd. v Ampol Petroleum Limited**, Lord Wilberforce stated that in determining the state of mind and the motive of a director who has sought to issue and allot shares:

> "Self-interest is only one, though no doubt the commonest instance of improper motive: and, before one can say that a fiduciary power has been exercised for the purpose for which it was conferred, a wider investigation may have to be made. This is recognised in several well-known statements of the law. Their Lordships quote the clearest which has so often been cited:
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> > 'Where the question is one of abuse of powers, the state of mind of those who acted, and the motive on which they acted, are all important, and you may go into the question of what their intention was, collecting from the surrounding circumstances all the material which genuinely throw light upon that question of the state of mind of the directors so as to show whether they were honestly acting in discharge of their powers in the interests of the company or were acting from some bad-motive, possibly of personal advantage, or for any other reasons.' (Hindle v John Cotton Ltd. (1919) 56 S.C.L.R. 625-631, per Viscount Findlay."

[52] This is a very short point. At the hearing of the appeal, Ms. Carter pointed out that Mr. Hefti had not participated in the proceedings before the learned judge. It became

apparent that in the absence of a defence or evidence by Mr. Hefti that provided the reason for the allotment and which indicated the benefit the company had acquired, learned counsel Ms. Carter could not establish that the allotment of the shares by Mr. Hefti was for a proper purpose. It is noteworthy that the learned judge found as a fact that the shares were issued by Mr. Hefti for an improper purpose in the context of Mr. Hefti's undoubtable knowledge that the legal and beneficial rights to all of the capital stock in Skynet was held by Global Skynet. I find Ms. Dyer's submissions on this point persuasive and I accept them. Therefore, in accordance with the well-established principles discussed above regarding appellate court interference with a trial judge's findings of fact, I am of the view that this Court ought not to interfere with that finding in the absence of any reason. Applying the principles stated in **Howard Smith Ltd. v Ampol Petroleum Ltd.**, I have no doubt that the learned judge correctly found that Mr. Hefti issued the shares to Mr. Kravchuk for an improper purpose and that he was in breach of his fiduciary obligations and section 14 of the **International Business Companies Act**.

[53] In view of the totality of circumstances, I would dismiss Glory Trading's appeal against the judgment of the learned acting Justice Ramdhani.

Costs

[54] Glory Trading having been unsuccessful in its appeal against the judgment of the learned acting Justice Ramdhani shall pay each of Global Skynet and Mr. Bloch on this appeal two-thirds of the assessed costs in the court below.

Conclusion

[55] In view of the reasons above, I would make the following orders:

(1) Glory Trading's appeal against the judgment of the learned acting Justice Ramdhani is dismissed.

(2) The judgment and orders of the learned acting Justice Ramdhani are hereby affirmed.

(3) Glory Trading shall pay each of Global Skynet and Mr. Bloch on this appeal two-thirds of the assessed costs in the court below.

[56] I gratefully acknowledge the assistance of all learned counsel.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar