

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2011/0070

BETWEEN

HARVEY ZABUSKY

Appellant

and

[1] VISCAYA ARMADORA S.A.

[2] P.M.P ANGUILLA LIMITED

[3] VIRGTEL LIMITED

Respondents

Before

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

The Hon. Mde. Ola Mae Edwards

Justice of Appeal [Ag.]

The Hon. Mde. E. Ann Henry

Justice of Appeal [Ag.]

Appearances:

Mr. Harvey Zabusky, the appellant in person

Mr. Paul Dennis KC, with him, Ms. Nadine Whyte-Lang for the
First and Second Respondents

2014: January 17;
2023: March 29.

Civil appeal – Appellate interference with finds of fact made by trial judge – Whether learned judge erred in finding that Virgtel Limited was the 85% shareholder in Virgin Technologies Limited – Whether learned judge erred in finding that Mr. van Leeuwen was appointed as director of Virgtel – Whether learned judge erred in finding that Viscaya Armadora S.A. (Panama) was the legal owner of 318,001 shares in Virgtel - Court's power to make declarations – Declarations by learned judge as to directors of Virgtel - Whether first and second respondents had a legal interest in the issue pertaining to the directors of Virgtel - Costs – Rule 64.6 of the Civil Procedure Rules 2000 – General rule that successful party entitled to costs – CPR 64.6(1) - Departure from general rule – CPR

64.6(2) - Whether learned judge erred by departing from the general rule as to costs by awarding 50% costs to first respondent

Virgtel Limited ("Virgtel") was incorporated in 1999 to invest in Virgin Technologies Limited ("VTL"). VTL had been established by Mr. Harvey Zabusky ("Mr. Zabusky") and he held his interest through a company registered in the Territory of the Virgin Islands (the "BVI"). Other shareholders in VTL included BZ Investments Limited ("BZ"), a Nigerian company owned by Mr. Mohammed Shuiabu ("Mr. Shuiabu"). Sometime before May 1999, Mr. Zabusky persuaded one Mr. Gazal to invest in VTL. The investment was to be structured through Virgtel and on 16th May 1999, a shareholder's agreement (the "SHA") was entered into between White Owl Limited ("WOL") a BVI company owned by Mr. Gazal, BZ and Amalia Investments Limited ("Amalia") which was owned by Mr. Zabusky and his wife.

On the terms of the SHA, Virgtel's issued share capital was to be held 50% by WOL, 40% by Amalia and 10% by BZ. Shares were issued to the parties so that WOL held 300,000 shares, Amalia 240,000 and BZ 60,000. Clause 7.2 provided that the initial board of directors would consist of Mr. Alan Robertson, Mr. Zabusky, Mr. Gazal, Mr. Shuiabu and one Mr. Gulotta. By September 1999, VTL got into difficulties and Mr. Gazal agreed to lend sufficient funds to Virgtel to enable it to meet VTL's operating costs. Mr. Gazal's condition was the transfer of one share in Virgtel from Amalia to WOL.

Amalia and BZ agreed to this condition and a written agreement entered into on 30th September 1999 by Mr. Gazal, Amalia and BZ, provided for the transfer. On 1st October 1999, the transfer from Amalia to WOL of the single share was approved by Virgtel. On the same day, WOL was issued with a share certificate showing it as the holder of 300,001 shares in Virgtel and Amalia was also issued a new certificate showing it as the holder of 239,999 shares. On 12th October 2000, an agreement was entered into between WOL and Viscaya Armadora S.A. (Panama) ("VP"), a company owned by Mr. Hendrick van Leeuwen ("Mr. van Leeuwen"), for the transfer of the 300,001 shares in Virgtel from WOL to VP. VP was registered as the holder of the 300,001 shares in Virgtel's register of members on 3rd November 2000.

A Protocol of Understanding and Undertaking ("the Protocol") was entered into between Amalia and VP on 20th October 2000. In recital 4 of the Protocol, VP, Amalia and BZ were described as having 85% of the shares in VTL, with the remaining 15% being held by Nigerian investors. By clause 1 of the Protocol, it was agreed that VP and Amalia would establish a new company with its location in the Netherlands ("the new Dutch company"). Clause 2 stated that VP, Amalia and BZ would bring in all their shares of Virgtel and in exchange, the new Dutch company would issue

new shares. Clause 3 obliged Mr. Zabusky to approach and negotiate with the 15% Nigerian investors in VTL and offer them shares in the proposed new Dutch company or buy them out at a rate to be agreed by Mr. van Leeuwen. Clause 4 provided that VTL would be wholly owned by the new Dutch company. Further provisions were laid out in the Protocol for the constitution of the board of directors. Although VTL submitted forms purporting to show a company called Virgin Global Networks NV as the 99% holder of the shares of VTL, nothing else envisaged by the Protocol actually happened.

In January 2001, BZ entered into a written agreement with VP for the sale to VP of 18,000 out of its 60,000 shares in Virgtel. Virgtel issued VP with a certificate to include both the previously acquired 300,001 shares and the 18,000 acquired from BZ. As a result, VP became the holder of 53.002% of Virgtel's issued share capital and was registered as the holder of the 18,000 shares on 25th January 2001. By a document dated 7th August 2009, there was a purported transfer from VP to Viscaya Armadora S.A. (Anguilla) ("VA") (a company owned and controlled by Mr. van Leeuwen) of its 318,001 Virgtel shares. Despite this, VA was never registered in Virgtel's register of members as the holder of any of its shares. The result of this was that VP was the legal holder of 318,001 shares in the capital of Virgtel, which it held as nominee for VA.

In 2005, Mr. van Leeuwen caused Virgtel to launch a derivative claim on behalf of VTL in Australia, claiming misfeasance on the part of Mr. Zabusky, in relation to the affairs of VTL. In April 2010, Mr. Zabusky took steps in the BVI to assert that he was the sole director of Virgtel and to change its registered office. In response to Mr. Zabusky's actions, VA and P.M.P Anguilla Limited ("PMP Anguilla") initiated proceedings in the lower court claiming that: (i) VA was the 53.002% majority shareholder in Virgtel; (ii) a declaration that PMP Anguilla was the sole director of Virgtel; (iii) a declaration that Mr. Zabusky was not a director of Virgtel, (iv) alternatively, that if Mr. Zabusky was a director of Virgtel, he was not the sole director and was not entitled to make decisions or pass resolutions on behalf of Virgtel on his own. They also sought an injunction to restrain Mr. Zabusky from holding himself out as a director or sole director of Virgtel and to prevent him from taking steps to change Virgtel's registered office and agent.

By judgment delivered on 14th October 2011, Bannister J [Ag.] (as he then was) ordered, *inter alia*, that: (i) VA was not the 53.002% majority shareholder of Virgtel within the meaning of section 78 of the BVI Business Companies Act 2004 ("BCA"), (ii) PMP Anguilla was not a director of Virgtel, (iii) Mr. Zabusky was a director, but not the sole director (the other director being Mr. van Leeuwen), and (iv) Mr. Zabusky was to

pay to VA 50% of its costs of the claim to be assessed. Being dissatisfied with the learned judge's ruling, Mr. Zabusky appealed.

Mr. Zabusky posited 6 main grounds of appeal. He contended that the judge erred in finding that Virgtel was the 85% shareholder in VTL when this matter was not essential to the judge's decision on the issues before him. He further submitted that the judge, having found that VA was not a shareholder and PMP Anguilla was not a director in Virgtel, erred in making the declarations as to the directors of Virgtel, since neither VA nor PMP Anguilla had standing to seek such declarations. He also argued that the judge's findings that he was not appointed as a director of Virgtel on 16th May 1999 by agreement of all the shareholders and that Mr. van Leeuwen was appointed a director of Virgtel by a resolution of 20th October 2000, were erroneous since neither finding was supported by the evidence. His final grounds of appeal posited that the judge erred in finding that VP was the legal owner of 318,0001 shares in Virgtel and in awarding 50% of the costs to VA.

Held: dismissing the appeal, affirming the orders of the trial judge and awarding costs to VA to be assessed by a judge or a master of the High Court at no more than two-thirds of the 50% costs awarded below, if not agreed within 21 days of the date of this judgment, that:

1. An appellate court would not interfere with the findings of fact by a trial judge unless compelled to do so, in that, the judge must have been plainly wrong. This applies not only to findings of primary facts, but also to the evaluation of those facts and inferences to be drawn from them. Where the judge reaches a conclusion on the primary facts, it is only in rare cases such as where that conclusion was: (i) unsupported by the evidence; (ii) based on a misunderstanding of the evidence; or (iii) a conclusion which no reasonable judge could have reached, that an appellate tribunal will interfere with it. The judge's finding that Virgtel was and remained the 85% shareholder in VTL was a finding of fact which would only be interfered with had the judge been plainly wrong. Despite Mr. Zabusky's contention that the finding was not essential to the judge's determination of the issues before him, it was open to the judge to make this finding since the issue of the composition of VTL's shareholding was a live issue during the proceedings as it arose on the pleadings and evidence was given on it at trial. The judge considered the oral and documentary evidence before him and properly reasoned how he arrived at that fact. It therefore cannot be said that he was plainly wrong to find that Virgtel was and remained the 85% shareholder in VTL.

Watt (or Thomas) v Thomas 1947 SC HL 45 applied; **Fage UK Ltd v Chobani UK Ltd** [2014] EWCA Civ 5 applied; **McGraddie v McGraddie and another** [2013] 1 WLR 2477 applied; **Henderson v Foxworth Investments Limited** [2014] UKSC 41 applied.

2. A declaration is a discretionary remedy and the court has power to make a declaration even where the party to which the declaration is being made in favour of has no cause of action. Provided the court is satisfied that the party before it has a legal interest within the law, the court can take cognizance of that interest. The judge had to deal with the issue pertaining to the directors of Virgtel. Whether Mr. Zabusky or Mr. van Leeuwen were directors was an issue. Based on the evidence before the judge, it was clear that VA and PMP Anguilla had an interest in that issue since VA was supposed to be registered as a member in Virgtel and PMP Anguilla was claiming to be the sole director of Virgtel. In the circumstances, it was open to the judge to make these declarations as both parties had sufficient interest in the issue of who were Virgtel's directors. The judge therefore did not err in this regard.
3. The learned judge's findings that Mr. van Leeuwen was appointed as a director of Virgtel by a resolution of 20th October 2000 and that Mr. Zabusky was not appointed as a director of Virgtel on 16th May 1999 by agreement of all the shareholders of Virgtel were findings of fact which would only warrant appellate interference if the judge had been plainly wrong. Mr. Zabusky contended that the learned judge erred by failing to consider his evidence but in his judgment, the judge clearly explained that Mr. Zabusky's evidence was not favoured and was instead rejected. On the facts, there was no evidence to support Mr. Zabusky's claim that he was appointed a director of Virgtel by agreement of the shareholders on 16th May 1999, since the SHA only evinced an intention to appoint. On the other hand, the evidence clearly showed that, by virtue of the resolution of 20th October 2000, Mr. van Leeuwen's appointment was supported by the evidence. In those circumstances, it cannot be said that the learned judge, having arrived at his findings based on the evidence before him, was plainly wrong.

Re Duomatic Limited [1969] 2 Ch 365 distinguished.

4. As to VP's legal title to the 318,001 shares in Virgtel, this was a finding of fact made by the trial judge, which would not be interfered with unless he was plainly wrong. The evidence before the judge was that WOL transferred its 300,001 shares to VP and BZ transferred 18,000 of its shares to VP so that by 25th January 2001, VP was the registered owner of 318,001 shares. Even though VP

purported to transfer its shares to VA, the judge found that VA was never registered as the holder of Virgtel's shares. Having regard to the totality of the evidence before him, it was open to the learned judge to find that VP was the legal owner of the 318,001 shares and that it held these shares as nominee for VA even though VP was not a party to the proceedings, since the issue was raised by the parties on the pleadings. Despite Mr. Zabusky's arguments to the contrary, the judge found that his evidence was inconsistent with the pleadings and uncorroborated by documentary evidence. The learned judge therefore did not err in finding that VP was the legal owner of the 318,001 shares in Virgtel.

5. As per rule 64.6(1) of the Civil Procedure Rules 2000 ("CPR"), the general rule about costs is that the unsuccessful party pays the costs of the successful party. However, the CPR affords the court a very wide discretion and the court may depart from the general rule. The court may order a successful party to pay all or part of the costs of an unsuccessful party or make no order as to costs under rule 64.6(2). Mr. Zabusky contended that as he was successful in the lower court, the judge erred in awarding 50% of the costs to VA. On the facts, the learned judge had regard to all the circumstances of the case including the conduct of the parties, the manner in which the parties pursued the matter and the amount of success the parties enjoyed on the issues in the case. Having regard to the totality of the evidence before him, it cannot be said that the judge erred in the exercise of his discretion in awarding 50% of the costs to VA or that he was plainly wrong to so do.

Rule 64.6 of the Civil Procedure Rules 2000 applied; **Rochamel Construction Limited v National Insurance Corporation** SLUHCVP2003/0010 (delivered 24th November 2003, unreported) followed.

JUDGMENT

- [1] **BAPTISTE JA:** Mr. Harvey Zabusky ("Mr. Zabusky") appeals to this Court against the judgment of Bannister J [Ag.] (as he then was) made on 14th October 2011, wherein the judge granted declaratory and injunctive relief in a claim brought by Viscaya Armadora S.A. (Anguilla) Virgtel, (P.M.P Anguilla Limited ("PMP Anguilla") in which they claimed: (i) VA was the 53.002% majority shareholder in Virgtel Limited ("Virgtel"); (ii) a declaration that PMP Anguilla was

the sole director of Virgtel; (iii) a declaration that Mr. Zabusky was not a director of Virgtel, (iv) alternatively, that if Mr. Zabusky was a director of Virgtel, he was not the sole director and was not entitled to make decisions or pass resolutions on behalf of Virgtel on his own.

- [2] An interim injunction was also sought restraining Mr. Zabusky, his servants or agents or otherwise howsoever, from holding himself out to Virgtel's registered agents, or otherwise, as a director or as the sole director of Virgtel, or otherwise being entitled to represent Virgtel, and in particular, restraining Mr. Zabusky from taking steps to change the registered office and registered agent of Virgtel in the Territory of the Virgin Islands (the "BVI"), or to instruct the registered agents or any other persons concerning its affairs. An order (if necessary) for the rectification of the register of directors of Virgtel to show that PMP Anguilla was the sole director was likewise requested.

Background

- [3] In the lower court, Bannister J [Ag.] (as he then was) gave his judgment and ordered, *inter alia*, that:

(1) VA was not the 53.002% majority shareholder of Virgtel within the meaning of section 78 of the **BVI Business Companies Act 2004**¹ ("BCA").

(2) PMP Anguilla was not a director of Virgtel and that Mr. Zabusky was a director, but not the sole director; the other director being Mr. Hendrick van Leeuwen ("Mr. van Leeuwen").

¹ Act No. 16 of 2004, Laws of the Virgin Islands.

(3) Mr. Zabusky was to pay to VA 50% of its costs of the claim to be assessed.

[4] The learned judge stated that at issue in the proceedings before him was who controlled Virgtel. Virgtel was incorporated in 1999 as an international business company to invest in Virgin Technologies Limited (“VTL”), a Nigerian telecommunication company. It appeared that VTL had been established by Mr. Zabusky around 1995 and that Mr. Zabusky held his interest through a BVI registered company beneficially owned by him and his wife. Other shareholders in VTL included BZ Investments Limited (“BZ”) (a Nigerian registered company) owned by Mr. Mohammed Shuiabu (“Mr. Shuiabu”). Sometime before May 1999, Mr. Zabusky persuaded one Mr. Gazal to invest in VTL. The investment was to be structured through Virgtel and on 16th May 1999, a shareholder’s agreement (the “SHA”) was entered into between White Owl Limited (“WOL”) a BVI registered company beneficially owned by Mr. Gazal, BZ and a BVI registered company, Amalia Investments Limited (“Amalia”). Amalia was beneficially owned by Mr. Zabusky and his wife. Virgtel was a party to the SHA, its then sole director having approved it and authorized its execution by Virgtel.

[5] The judge summarised the principal terms of the SHA as thus: Virgtel’s issued share capital was to be held 50% by WOL, 40% by Amalia and 10% by BZ. Shares were issued to those parties in the following proportions: WOL held 300,000 shares, Amalia 240,000 and BZ 60,000. The SHA entitled WOL and Amalia to appoint two directors each to the Virgtel board. Clause 7.2 provided that the initial board of directors would consist of Mr. Alan Robertson (“Mr.

Robertson”) (a Hong Kong solicitor who appeared to have acted as formation agent for Virgtel and its shareholders and who was Virgtel’s first director), Mr. Zabusky, Mr. Gazal, Mr. Shuiabu and one Mr. Gulotta. Clause 8 of the SHA contained a preemption provision requiring a proposing transferor to offer the shares to the remaining shareholders in proportion to their existing holdings. There was an exemption for transfers to wholly owned subsidiaries and by wholly owned subsidiaries to their parents.

- [6] Around September 1999, VTL appears to have gotten into difficulties and Mr. Gazal, through a company of his, agreed to lend sufficient funds to Virgtel to enable it to meet VTL’s operating costs for three months, beginning 1st October 1999. Mr. Gazal’s condition was the transfer of one share in Virgtel from Amalia to WOL, thus giving WOL an overall majority. Amalia and BZ agreed to this condition and on 30th September 1999 a written agreement was entered into by Mr. Gazal, Amalia (by Mr. Zabusky) and BZ (by Mr. Shuiabu) providing for the transfer. On 1st October 1999, Mr. Zabusky wrote to Mr. Robertson instructing him to prepare a transfer of the single share from Amalia to WOL; this was done and the transfer was approved by Virgtel, acting by Mr. Robertson as sole director and executed by Amalia and WOL on the same date. The transfer document was unconditional. On the same day, WOL was issued with a share certificate showing it as the holder of an additional share in Virgtel and Amalia was issued a new certificate showing it as the holder of 239,999 shares.
- [7] On 12th October 2000, an agreement was entered into between WOL and Viscaya Armadora S.A. (Panama) (“VP”), a Panamanian registered company owned and controlled by Mr. van Leeuwen, for the transfer of 300,001 shares in Virgtel from WOL to VP. The

agreement recited the facts of the SHA and that WOL was the holder of 300,001 shares in Virgtel. By clause 1, WOL agreed to sell to VP its parcel of 300,001 shares for its book value. VP was registered as the holder of the 300,001 shares in Virgtel's register of members on 3rd November 2000.

- [8] The judge found as a fact that Mr. van Leeuwen was aware, when VP bought the WOL shares on 12th October 2000, that Virgtel's other shareholders had demanded the single share back upon Mr. Gazal's failure to provide the additional working capital.
- [9] A Protocol of Understanding and Undertaking ("the Protocol") was entered into between Amalia (by Mr. Zabusky) and VP (by Mr. van Leeuwen) on 20th October 2000, just a few days after VP had acquired its majority equitable interest in Virgtel but before it was registered with legal title to the shares. In recital 4 of the Protocol, VP, Amalia and BZ were described as having 85% of the shares in VTL, with the remaining 15% being held by Nigerian investors. By clause 1 of the Protocol, it was agreed that VP and Amalia had decided to establish a new company with its location in the Netherlands ("the new Dutch company"). Clause 2 stated that VP, Amalia and BZ would bring in all their shares of Virgtel and in exchange, the new Dutch company would issue new shares in the following proportion: VP 42.5%, Amalia 42.5%, BZ 10%, with the Nigerian investors being issued with 5%.
- [10] Clause 3 obliged Mr. Zabusky to approach and negotiate with the 15% Nigerian investors in VTL and offer them shares in the proposed new Dutch company or buy them out at a rate to be agreed by Mr. van Leeuwen. Clause 4 provided that VTL would be wholly owned by the new Dutch company. Further provisions were

laid out in the Protocol for the constitution of the board of directors of the new Dutch company.

- [11] Although VTL submitted forms to the Nigerian Corporate Affairs Commission in 2001 purporting to show a company called Virgin Global Networks NV as the 99% holder of the shares of VTL (the other 1% being held by VP), and though it appears that a Mr. Malami, holder of 5% of VTL's shares, may have disposed of them, nothing else envisaged by the Protocol actually happened. There was no share exchange as envisaged by the Protocol and Mr. Zabusky did not (with the possible exception of Mr. Malami) arrange for the Nigerian shareholders in VTL to exchange their shares in the new Dutch company or buy them out at a price agreed by Mr. van Leeuwen. Since the Protocol envisaged and required an exchange of shares involving a transfer by Amalia to the new Dutch company, and the issue by that company of shares to Amalia in exchange, Mr. Zabusky must have known that what had been envisaged by the Protocol had simply not happened.
- [12] Mr. Zabusky's contention that no shares in Virgtel were capable of being acquired or transferred since 20th October 2000 was rejected as hopeless. It relied upon the artificial device of supposing that what was intended to happen did indeed happen, in circumstances when Mr. Zabusky/Amalia knew that it had not happened. The learned judge therefore found that VP became the beneficial owner of 300,001 shares in Virgtel on 12th October 2000 and their legal owner on 3rd November 2000.
- [13] In January 2001, BZ entered into a written agreement with VP for the sale to VP of 18,000 out of its holding of 60,000 shares in the capital of Virgtel. There was evidence which purported to be an

instrument of transfer from BZ to VP of 18,000 shares but it was not executed and named both BZ and WOL as transferor. Virgtel issued VP with a certificate to include both the previously acquired 300,001 shares and the 18,000 acquired from BZ. As a result of the transfer, VP became the holder of 53.002% of Virgtel's issued share capital and was registered as the holder of the 18,000 shares on 25th January 2001.

[14] Amalia did not consent to this transfer nor did it waive its rights under the SHA. Mr. Zabusky pleaded that this transfer was in breach of the SHA and in breach of the agreement between VP and Amalia that they would acquire 3% of BZ's shares equally. The learned judge referred to Mr. Zabusky's witness statement and concluded that his evidence was inconsistent with his pleadings and was uncorroborated by any documentary evidence; he therefore rejected it. The judge then concluded that VP became the legal owner of the 18,000 BZ shares when it was registered as their holder on 25th January 2001.

[15] The learned judge referred to a document dated 7th August 2009 purporting to be a transfer from VP of its 318,001 Virgtel shares to VA. He noted that it was common ground that Mr. van Leeuwen was the owner and controller of VA. He further observed that the document purported to be executed on behalf of VP by Mr. van Leeuwen as 'proxyholder', by PMP Anguilla for VA; and by PMP Anguilla again on behalf of Virgtel (it being VA's case that by this time PMP Anguilla was the sole director of Virgtel). Although there are certificates signed by PMP Anguilla to the effect that VA was the registered holder of the 318,001 shares, it was common ground that VA was not in fact registered in Virgtel's register of members as the holder of any of its shares. It followed therefore that VA was

not a shareholder of Virgtel within the meaning of section 78 of the **BCA** which provided that a “shareholder in relation to a company, means a person whose name is entered in the register of members as the holder of one or more shares, or fractional shares, in the company.” It therefore went without saying that VP did not offer the shares to any other member of Virgtel before transferring them to VA, being under no obligation to do so as it was not a party to the SHA.

- [16] The transfer to VP must have been impliedly approved by the resolution of 20th October 2000 appointing the new board, which was predicated upon VP’s membership of Virgtel and must have embraced the transfer of the single share. VP was the registered holder of 318,001 shares in Virgtel. The judge held that the only persons with any standing to complain about that were the other members of Virgtel, who could have brought proceedings pursuant to section 43 of the **BCA** if so advised. Meanwhile, section 42 (1) of the **BCA** provided prima facie that VP was duly registered as the holder of its shares. The upshot of all this was that VP was the legal holder of 318,001 shares in the capital of Virgtel, which it held as nominee for VA. Amalia held 239,999 shares and BZ 42,000.
- [17] The judge stated that whether Virgtel ever became a shareholder in VTL remained a subject of confusion from start to finish of the trial. He examined the material before him and found as a fact that Virgtel was and remained the holder of 85% of the issued share capital of VTL.
- [18] Although VTL went into receivership several years ago and has ceased trading, the question as to who controls it is important. In 2005, Mr. van Leeuwen caused Virgtel to launch a derivative claim

on behalf of VTL in the High Court in Queensland, Australia, claiming misfeasance on the part of Mr. Zabusky, in relation to the affairs of VTL. In April 2010, Mr. Zabusky took steps in the BVI to assert that he was the sole director of Virgtel and to change its registered office.

- [19] The proceedings before the lower court judge included Mr. van Leeuwen's response. On 6th May 2010, the judge granted an injunction restraining Mr. Zabusky from holding himself out in the BVI as solely entitled to give instructions on behalf of Virgtel. This injunction was continued after an *inter partes* hearing on 23rd May 2010. The claim was tried on 3rd to 6th October 2011. The judge recognised that what Mr. Zabusky wanted was a decision that he was, or was in a position to become, the only person with authority to give instructions on behalf of Virgtel and thus to bring the Australian proceedings to an end. The judge acknowledged that this required an exhaustive consideration of the dealings with Virgtel's shares and of the constitution from time to time of its board.
- [20] The learned judge held that VA was not the 53.002% majority shareholder of Virgtel within the meaning of section 78 the **BCA**, although subject to compliance with regulation 15 of its Memorandum of Association, Virgtel was obliged by Article 50 of its Articles of Association to register VA as a member. PMP Anguilla was not a director of Virgtel. Mr. Zabusky was a director of Virgtel but not its sole director. The judge granted a final injunction in the same terms as the interlocutory injunction he granted on 6th May 2010 restraining Mr. Zabusky from holding himself out in the BVI as solely entitled to give instructions on behalf of Virgtel. Being dissatisfied with the judge's decision, Mr. Zabusky appealed.

The Appeal

[21] Mr. Zabusky appealed on several grounds that:

- (1) The learned judge erred in law in finding that Virgtel was and remained the 85% shareholder in VTL.
- (2) The learned judge having found that VA was not a shareholder of Virgtel and that PMP Anguilla was not a director of Virgtel, erred in law in proceeding to make any further findings of fact or declarations that he was not the sole director of Virgtel or that Mr. van Leeuwen was a director of Virgtel as neither VA nor PMP Anguilla had standing to seek such declarations.
- (3) The judge erred in his finding that Mr. van Leeuwen had been appointed as director by the resolution of 20th October 2000.
- (4) The learned judge erred in finding that he was not appointed as director of Virgtel by agreement of all shareholders of the company on 16th May 1999.
- (5) The learned judge erred in finding that VP was the legal owner of 318,0001 shares in Virgtel; and
- (6) The learned judge erred in principle and was blatantly wrong in awarding 50% of the costs to VA.

Ground 1

[22] Ground 1 asserts that the learned judge erred in law in finding that Virgtel was and remained the 85% owner of shares in VTL. For the reasons indicated by the judge, the issue as to who controlled Virgtel mattered, and he recognised that whether Virgtel ever

became a shareholder in VTL remained a subject of confusion from the start to finish of the trial.

- [23] The statement of claim asserted that Virgtel held 85% of VTL's issued shares. Mr. Zabusky's further amended defence appeared to impliedly accept that Virgtel held shares in VTL up to 1st November 1999. Mr. Zabusky, however, denied in his witness statement that Virgtel ever held shares in VTL. The judge stated that although there was some support for this in the Protocol, a summary of VTL's position as at 31st July sent by Mr. Gazal to Mr. van Leeuwen described Virgtel as the holder of the 85% stake in VTL.
- [24] On 12th October 2000, an agreement was entered into between WOL and VP (which Mr. van Leeuwen owned and controlled) for the transfer of 300,001 shares in Virgtel from WOL to VP. The share sale agreement of 12th October 2000 between WOL and VP recited Virgtel as having 85% of VTL's shares.
- [25] The learned judge's finding that Virgtel was and remained the holder of 85% of the issued share capital of VTL is a finding of fact and the usual impediments which attend a successful prosecution of such an appeal are engaged. The principles regarding appellate interference with the factual findings of a trial judge are well settled. An appellate court should not interfere with the findings of fact by a trial judge unless compelled to do so.² This applies not only to findings of primary facts, but also to the evaluation of those facts and inferences to be drawn from them. Where the judge reaches a conclusion on the primary facts, it is only in rare cases such as where that conclusion was: (i) unsupported by the evidence; (ii)

² See *Watt (or Thomas) v Thomas* 1947 SC HL 45 per Lord Simonds at page 61.

based on a misunderstanding of the evidence; or (iii) one which no reasonable judge could have reached, that an appellate tribunal will interfere with it.³

- [26] As stated in **McGraddie v McGraddie and another**,⁴ it is a long-settled practice that an appellate court should not interfere with the trial judge's conclusion on primary facts unless satisfied that he was plainly wrong. As Lord Reed stated in **Henderson v Foxworth Investments Limited**:⁵

"It follows that, in the absence of some other identifiable error such as a material error of law, or the making of a critical finding of fact which has no basis in evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

- [27] In my judgment, the judge properly reasoned how he arrived at the finding that Virgtel was and remained the 85% owner of shares in VTL. It cannot be said that the finding was not open to him, nor can it be said that he was plainly wrong in so finding.

- [28] Mr. Zabusky says that the finding was not essential to the judge's decision on the issues before him since none of the parties in the proceedings claimed to be shareholders of VTL nor was VTL a party to the proceedings. VTL was a Nigerian company and the substantive issue of who were its shareholders was to be determined under Nigerian law, of which no evidence was led.

- [29] The issue of the composition of the shareholding of VTL was certainly a live issue before the learned trial judge. It arose on the

³ See *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5.

⁴ [2013] 1 WLR 2477 at paragraph 2.

⁵ [2014] UKSC 41 at paragraph 67.

pleadings and the witness statement of Mr. Zabusky. Furthermore, the respondents submitted that evidence was given by both parties on the issue at trial. In my view, the judge cannot be faulted for making a finding on a matter which was in issue before him.

- [30] Mr. Zabusky further argued that VTL was a Nigerian company and that the judge ought to have applied equivalent BVI law which corresponded with Nigerian law. Mr. Zabusky argued that under BVI law the membership of a company was determined by the entries on the register of members which was not entered into evidence during the trial. On the issue of whether the court should have, in the absence of Nigerian law determined the issue of VTL's shares under BVI law, the respondents properly argued that the judge was left to decide the issue based on the evidence before the court. Accordingly, based on oral and documentary evidence, he held "as a matter of fact" that Virgtel was and remained the holder of 85% of the issued shares in VTL. In all the circumstances, this ground of appeal fails.

Ground 2

- [31] Ground 2 complains that the judge, having found that VA was not a shareholder of Virgtel and that PMP Anguilla was not a director of Virgtel, erred in law in proceeding to make any further findings of fact or declarations that Mr. Zabusky was not the sole director of Virgtel or that Mr. van Leeuwen was a director of Virgtel, as neither VA nor PMP Anguilla had standing to seek such declaration.
- [32] Mr. Zabusky submitted that in order to claim declaratory relief the respondents must have had an interest in the subject matter, relying on **Wilson, Walton International (Offshore Services) Ltd v Tees**

& Hartlepoons Port Authority.⁶ Mr. Paul Dennis, QC argued that VA undoubtedly had an interest in the subject matter of the claim. Mr. Dennis, QC contended that the company was the beneficial owner of the shares and was supposed to be registered by Virgtel as a member. Essentially, the point advanced is, as beneficial owner, the interest was sufficient to warrant declaratory relief. I agree.

[33] A declaration is a discretionary remedy. It is generally accepted that the court has power to make a declaration even where the party to which the declaration is being made in favour of has no cause of action. Provided the court is satisfied that the party before it has a legal interest within the law, the court can take cognizance of that interest.⁷ The judge had to deal with the issue pertaining to the directors of Virgtel. Whether Mr. Zabusky or Mr. van Leeuwen were directors was an issue. Based on the evidence, it was clear that the respondents had an interest in that issue, and it was open to the judge to make his findings. Given the applicable legal principles, the facts of this case and the findings of the learned judge, I see no reason to interfere with the exercise of his discretion in granting declaratory relief. Ground two is accordingly dismissed.

Grounds 3 and 4

[34] In ground 3, Mr. Zabusky avers that the trial judge erred in his finding that Mr. van Leeuwen had been appointed as director by resolution of 20th October 2000. Mr. Zabusky submits that there was no evidence of a meeting of shareholders of Virgtel on 20th October 2000. Additionally, Mr. Zabusky contends that the judge accepted the evidence of Mr. Shuiabu who was the director and shareholder of BZ who died on 20th September 2000. Mr.

⁶ [1969] 1 Lloyd's Rep 120.

⁷ See Halsbury Laws of England Vol. 1(1) para. 163. (4th Edition) Reissue.

Zabusky also says that the judge erred in finding that a proxy could have been appointed for that company.

[35] Mr. Zabusky also says that having found that Mr. Robertson was a meticulous lawyer and the sole director at the material time, the judge failed to consider that there was no evidence that a meeting of shareholders had been summoned by the director in accordance with the articles of association of the company. Mr. Zabusky also contends that the judge contradicted himself by finding that Mr. Zabusky would sign the alleged resolution of 20th October 2000 as “director” after finding he had not been appointed as director on 16th May 1999.

[36] Ground 4 asserts that the judge erred in finding that Mr. Zabusky was not appointed as director of Virgtel by agreement of all shareholders of the company on 16th May 1999. Mr. Zabusky alleges that in so finding, the judge failed to consider the case of **Re Duomatic Limited**.⁸ Mr. Zabusky states that **Re Duomatic** is authority for the proposition that a binding resolution to appoint directors can be made by agreement of all shareholders of a company.

[37] Ground 4 also complains that the judge failed to give proper weight to the “unchallenged” evidence of the resignations of Mr. Gazal and Mr. Gulotta who Mr. Zabusky argues could have only been appointed by the agreement dated 16th May 1999. Mr. Zabusky also asserts that the judge failed to consider the prima facie evidence of the register of directors had been rebutted by the unchallenged evidence of the agreement to appoint additional directors on 16th May 1999.

⁸ [1969] 2 Ch 365.

- [38] The respondents address grounds 3 and 4 together. The respondents submit that **Re Duomatic** does not apply to this matter as there was no agreement by all shareholders. They argue that the agreement Mr. Zabusky references is only an agreement evidencing an intention to appoint the appellant and others but that there was no actual evidence that the men were directors. Accordingly, the respondents state the language used in the SHA clearly evidences only intent as the words “their intention” were used. The respondents submit that the judge was correct in his findings that Mr. Zabusky was not appointed as director of Virgtel Limited by agreement of shareholders on 16th May 1999.
- [39] Mr. Dennis, QC further submits that the judge clearly considered relevant evidence on this issue. Learned Queen’s Counsel asserted that Mr. Zabusky’s argument that the trial judge failed to give proper weight to the unchallenged evidence of the subsequent resignations of Mr. Gazal and Mr. Gulotta is without merit, as those individuals were not appointed in the first place as the judge so found. Mr. Dennis, QC also argued that Mr. Shuiabu died on 20th September 2000 and that it made no sense for the shareholders to have accepted his resignation on 20th October 2000. On the judge’s findings that Mr. van Leeuwen was appointed director on 20th October 2000, Mr. Dennis, QC submits that if Mr. Zabusky’s contention was correct and the 20th October 2000 resolution was invalid then Mr. Robertson would have been the sole director of Virgtel up until his resignation on 3rd November 2000. Learned Queen’s Counsel submitted that to accept Mr. Zabusky’s submissions would mean that PMP Anguilla was the de facto director of Virgtel as it acted as the sole director from its purported appointment on 15th June 2009.

- [40] Grounds three and four essentially represent a challenge to the judge's findings of fact and do not give rise to an occasion meriting appellate intervention. It was open to the judge to make these findings of fact. It cannot be said that he was plainly wrong. The conclusion was reasonable and justifiable on the evidence.
- [41] The evidence before the court showed that Mr. Zabusky signed a document which appointed himself and Mr. van Leeuwen along with a Mr. Droppert as "new directors" on 20th October 2000. I agree with the judge that Mr. Zabusky would not have signed the document if he was already a director at the time in 1999. The judge clearly rejected Mr. Zabusky's evidence and stated he did not accept counsel for the appellant's submissions on the point. The learned judge preferred the evidence of Mr. Robertson, who he described as "meticulous".
- [42] Mr. Zabusky's evidence is the resignation of Messrs. Gazal and Gulotta but the trial judge found them to not have been appointed in the first place. Thus, that evidence cannot, as the respondents correctly point out, have rebutted the other evidence in the mind of the learned trial judge. At paragraph 34 of his judgement the learned trial judge states "there being no evidence of any later appointment as envisaged by the [SHA], I find that Messrs. Gazal, Shuiabu and Gulotta were never appointed as directors of Virgtel".
- [43] The judge's findings that the SHA only envisioned or provided for the appointments and did not execute actual appointments of the individuals as directors is correct by the wording and interpretation of the agreement. No evidence is provided that Messrs. Gazal and Gulotta were indeed appointed directors. On 16th May 1999, the

SHA stated the intent to appoint Messrs. Gazal and Gulotta as directors. That intent was not executed. The judge found on evidence no appointment was made. He made a finding of fact. There was no evidence to suggest otherwise.

- [44] Mr. Zabusky claims that the learned judge failed to consider and apply **Re Duomatic**. I cannot conclude that the trial judge failed to do so. The **Re Duomatic** principles require the unanimous assent of all shareholders who have a right to attend and vote at a general meeting, not simply those that may be available. As stated by Buckley J:

“[W]here it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in a general meeting would be.”⁹

- [45] In **EIC Services Ltd and another v Phipps and others**¹⁰ Neuberger J explained the basis of the Duomatic principle thus:

“The essence of the Duomatic principle ... is that where the articles of a company require a certain course to be approved by a group of shareholders at a general meeting, that requirement can be avoided if all members of the group, being aware of the relevant facts, either give their approval to that course, or so conduct themselves as to make it inequitable for them to deny that they have given their approval. Whether the approval is given in advance or after the event, whether it is characterized as agreement, ratification, waiver or estoppel, and whether the members of the group give their consent in different ways at the different times, does not matter.”¹¹

- [46] I cannot accept Mr. Zabusky’s contention that the trial judge failed to consider his evidence. Paragraphs 34 and 35 of his judgment clearly show that said evidence was not favoured and was rejected.

⁹ Supra n. 9 at 373.

¹⁰ [2003] EWHC 1507 (Ch).

¹¹ Ibid at paragraph 122.

The learned trial judge cannot be faulted in concluding on the evidence before him that Mr. Zabusky was not appointed as director of Virgtel on 16th May 1999 and that Mr. van Leeuwen was appointed as director on 20th October 2000.

The findings of fact as it relates to grounds three and four were reasonably justifiable on the evidence. Accordingly, the judge's findings and conclusion should not be interfered with. Grounds three and four are dismissed.

Ground 5

[47] The judge rejected Mr. Zabusky's claim that he was the sole director in Virgtel. He rejected as clearly hopeless, Mr. Zabusky's contention that no shares in Virgtel were capable of being acquired or transferred since 20th October 2000. He further noted that since the Protocol envisaged and required an exchange of shares involving a transfer by Amalia to a new Dutch company and the issue by that company of shares to Amalia in exchange, Mr. Zabusky must have known that what had been envisaged by the Protocol had simply not happened. Mr. Zabusky's claim relied upon the artificial device of supposing that what was intended to happen did indeed happen, in circumstances when Mr. Zabusky/Amalia knew that it had not happened. The learned judge found that VP became the beneficial owner of 300,001 shares in Virgtel on 12th October 2000 and their legal owner on 3rd November 2000.

[48] Ground 5 challenges the finding of fact that VP was the legal owner of 318,001 shares in Virgtel. Mr. Zabusky's evidence is inconsistent with his pleadings and uncorroborated by any documentary evidence. VP became the legal owner of the 18,000 BZ shares when it was registered as their holder on 25th January 2001.

- [49] The judge found that Mr. Zabusky was not appointed a director of Virgtel at any time before 20th October 2000. This is in part because that corresponds to the information contained in both versions of Virgtel's register of directors and in part because on 20th October 2000 he signed a Shareholder's Meeting Resolution purporting to appoint Mr. van Leeuwen, an associate of Mr. van Leeuwen and himself as "the new directors" of Virgtel. I do not believe that Mr. Zabusky would have signed this document if he had considered that he was already a director.
- [50] The trial judge said that it was common ground that VA was not registered in Virgtel's register of members as the holder of any of its shares. It follows, therefore, that VA was not a shareholder of Virgtel within the meaning of section 78 of the **BCA**. It goes without saying that VP did not offer the shares to any other member of Virgtel before transferring them to VA. It had no obligation to do so, not being a party to the SHA.
- [51] With respect to Virgtel's board, the judge stated that it was common ground that before the execution of the SHA, the sole director of Virgtel was Mr. Robertson. In arriving at his decision, the judge considered how shares were dealt with in Virgtel. Before the judge was a series of shareholder agreements and protocols of understanding and undertaking. One of the findings of fact the judge arrived at was that VP became the beneficial owner of 300,001 shares in Virgtel on 12th October 2000 and became legal owner of the shares on 3rd November 2000. After examining all of the relevant factors, the judge was of the opinion that Mr. Zabusky's argument on the issue was flawed.

- [52] The facts showed that there were other shareholders in VTL, namely BZ. The judge examined and weighed a written agreement between BZ and VP for the sale of 18,000 shares in Virgtel to VP. Furthermore, a certificate issued by Virgtel showed consideration for the transfer of the BZ shares as \$18,000.00 USD. On 25th January 2001, VP was registered as holder of 18,000 shares. With regard to the appellant's argument on this issue of fact, the learned judge stated that "Mr. Zabusky's evidence is inconsistent with his pleadings and uncorroborated by any documentary evidence. I have no hesitation rejecting it." It is unequivocal that the judge considered, but did not believe the evidence of Mr. Zabusky.
- [53] It was adjudged that VP was the holder of 53.002% shares in Virgtel as it became the registered owner of 18,000 additional shares on 25th January 2001. The factual conclusion was that VP was the legal owner of 318,001 shares in Virgtel as the evidence, a certificate issued by Virgtel, showed that VP held "both the previously acquired 300,001 shares and the 18,000 acquired from BZ."
- [54] The learned judge held that looking at the evidence, VP transferred its shares to VA and that Mr. van Leeuwen, the sole owner of VP and VA had "clearly ratified the transfer of 7th August 2009." According to the judge, VP was the legal owner of 318,001 shares in Virgtel but crucially, it held those shares as a nominee for VA. The reality is that VA was not registered in Virgtel's register as a member and thus as a result, does not in fact currently hold any shares.
- [55] Importantly, the judge made other findings of fact as to the constitution of Virgtel's board. At paragraph 34 he found that Mr.

Gazal, Mr. Shuiabu and Mr. Gulotta were never directors of Virgtel. He also found as a fact that Mr. Zabusky was never appointed director of Virgtel before 20th October 2000. From the evidence he surmised that the shareholder agreement which provided for the appointment of Mr. Shuiabu, Mr. Gulotta and Mr. Zabusky reflected only an intention and not actual appointments.

- [56] The judge held that the SHA only envisaged the appointments, but the appointments were never actually made. He stated that:

“The language is not of appointment but of approval of an agreement, and although the named individuals appear in a version of Virgtel’s register of directors, no dates are given for their appointment...”

- [57] It was clear from the judgment that the learned judge accepted the evidence of a different register of Virgtel’s register of directors which the judge described as similar to the format of Mr. Robertson’s. The judge described Mr. Robertson as very meticulous. Arriving at his decision, the judge found that Mr. van Leeuwen (owner of VP and VA), Mr. Droppert and Mr. Zabusky were appointed directors on 20th October 2000. The judge took into consideration a shareholders’ meeting resolution which Mr. Zabusky signed himself. The document purported to appoint Mr. van Leeuwen, Mr. Droppert and Mr. Zabusky as new directors of Virgtel.

- [58] The learned trial judge held that the 2009 shareholders’ resolution attempting to appoint PMP Anguilla as sole director was in fact defective. Mr. van Leeuwen himself admitted the document was a forgery. With the death of Mr. Droppert, the judge concluded that the directors of Virgtel were Mr. van Leeuwen and Mr. Zabusky.

[59] Although not a majority shareholder within the meaning of the **BCA**, the judge found that VA was entitled to be registered as a member since VP held the 318,001 shares in Virgtel as nominee for VA. PMP Anguilla was not a director of Virgtel and though Mr. Zabusky was a director, he was not the sole director.

[60] Mr. Zabusky argued that the judge failed to consider his “unchallenged” evidence that he did not participate in any resolution for the updating of the register of members to include VP as a member of the company. Mr. Zabusky complains that with a resolution of directors updating the register the prima facie evidence of the register was rebutted. Mr. Zabusky also submitted that having found that Mr. Robertson kept meticulous records, the learned judge wrongly ignored the evidence of the register provided by Mr. Robertson, as secretary of Virgtel, to Icaza Gonzalez-Ruiz Aleman Limited (“Icaza”), which did not contain any entries relating to VP. In articulating his point, Mr. Zabusky stated that having found that the respondents had no standing there should not have been any findings in relation to the status of VP since: (i) the company was not party to the proceedings, (ii) no other shareholders of Virgtel were parties to proceedings, and (iii) Virgtel itself was enjoined as a result of the injunction against Mr. Zabusky from stating its case in the proceedings.

[61] Mr. Dennis, QC contended in respect of ground 5 that section 42 of the **BCA** provided that the entry of a name of a person on the register of members is prima facie evidence of legal title vesting in the said person. While Mr. Zabusky claimed that the judge failed to consider that he did not participate in any resolution of directors, Mr. Dennis, QC argued that neither Virgtel’s articles of association nor

the **BCA** required a resolution of directors to update its register of members. Learned Queen's Counsel further submitted that Mr. Zabusky had no standing to challenge the legal or beneficial title to the shares held by VP as the learned judge observed in paragraph 13 of the judgment that Mr. Zabusky had no *locus standi* as he was not a party to the agreement. According to Mr. Dennis, QC, the court was fully provided with and properly relied on a certified copy of the register of members from Icaza dated 2nd August 2001 and that the copy that Mr. Zabusky was attempting to rely on was not certified. Learned Queen's Counsel stated that Mr. van Leeuwen always spoke on the correctness of the share register and the court had to determine the shareholding composition of Virgtel and whether VP was entitled to the shares.

- [62] The learned trial judge's findings that VP was the legal owner of 318,001 shares in Virgtel is a finding of fact and must be examined within the principles set out above. On this ground there is absolutely no evidence on the record that could support a conclusion that the learned trial judge erred in arriving at the conclusion he did. The evidence before the trial judge was telling. The trial judge relied on a shareholder agreement which showed that Virgtel's share capital was as follows: 50% held by WOL, 40% by Amalia and 10% by BZ. Shares were issued to those parties in those proportions, paid up by capitalizing US\$300,000 of loans made by WOL and another US\$300,000 lent by Amalia and BZ. The result was that WOL held 300,000 shares, Amalia 240,000 and BZ 60,000. The evidence showed that a single share was transferred to WOL from Amalia. Thus, WOL held 300,001 shares in Virgtel.

[63] Mr. Zabusky's witness statement stated that the 300,001 shares were transferred to VP by WOL following an agreement. By the learned judge's indication, the evidence of Mr. van Leeuwen was not challenged while the evidence of Mr. Zabusky was inconsistent. The evidence shows that VP was registered as holder of 300,001 shares in Virgtel's register of members on 3rd November 2000.

[64] It is evident that BZ sold some of its shares to VP. The arguments made by Mr. Zabusky were clearly considered but even more so emphatically rejected by the learned trial judge. Based on the evidence of the share transfer, this Court is of the opinion that the learned trial judge did no wrong when he dismissed the appellant's arguments. A written agreement shows BZ selling 18,000 shares to VP. The evidence again showed that Virgtel issued a certificate to VP indicating that the company held the previously acquired 300,001 shares from WOL and the 18,000 shares from BZ. In stating that Mr. Zabusky's evidence was inconsistent with his pleadings and not corroborated by any documents or evidence contrary to those before the court and previously mentioned, the learned trial judge in his entitlement, rejected Mr. Zabusky's submissions.

[65] The evidence shows that VP was the legal owner of 318,001 shares in Virgtel. Mr. Dennis, QC argued that in the court below the respondents claimed VP transferred the shares to VA. I agree that this was an issue that the learned trial judge must have explored before he could determine whether VP was indeed the holder of the 318,001 shares in Virgtel. It is a fact that VA is not on Virgtel's register of members as a holder of shares. The judge found that within the meaning of the **BCA** that VA could not be said to be a shareholder of Virgtel. Two expert witnesses were called,

and the trial judge accepted the evidence of one Mr. Quijano who he expressed was “more composed...and gave his evidence with greater clarity.” What was deduced was that Mr. van Leeuwen as owner of both VP and VA could have ratified the transfer of 7th August 2009 of the 318,001 shares in Virgtel.

[66] Now whether that finding of fact was to be made since the company was not a party to the proceedings is the next issue to be decided. It is to be determined whether the learned trial judge erred in law in coming to this decision. I do not agree with Mr. Zabusky on this ground of appeal. I find that the trial judge was entitled to make a decision on this issue as it was raised within the pleadings before the court below.

[67] There is no basis that would justify this Court in reversing the finding made by the learned trial judge. In my judgment there is no reason to overturn the finding of fact. Ground 5 of the appeal is dismissed. The fact that VP holds 318,001 shares in Virgtel therefore stands.

Ground 6

[68] The general rule on costs is detailed by rule 64.6 of the **Civil Procedure Rules 2000** (“CPR”) which states that where the Court of Appeal makes an order about the costs of proceedings it must order the unsuccessful party to pay the costs of the successful party.¹² The CPR affords the court a very wide discretion and the court can depart from the general rule.¹³ The court can order a

¹² Rule 64.6(1) of the CPR.

¹³ See *Rochamel Construction Limited v National Insurance Corporation* SLUHCVP2003/0010 (delivered 24th November 2003, unreported)

successful party to pay all or part of the costs of an unsuccessful party or make no order as to costs.¹⁴

[69] On the issue of costs and the 6th ground of appeal, Mr. Zabusky submits that he was successful in the proceedings below and that the general rule is that costs follow the event for the successful party. Mr. Zabusky is of the view that he was successful because neither VA nor PMP Anguilla (the claimants in the court below) had standing to bring the claim as the judge held. He thus submits that the learned judge erred in awarding costs to them. Mr. Zabusky contends that the learned judge failed to consider the evidence that his actions were only a reaction to the acts of PMP Anguilla and that Mr. van Leeuwen had consistently represented that he was not a director of Virgtel. According to him, VA and PMP Anguilla's only success was in their alternative claim that he was not the sole director of Virgtel. He therefore alleges that the judge had no regard to their conduct in the court below.

[70] It was submitted that the claim failed on the reliefs sought and it was even wrong for the claimants in the court below to pursue claims with respect to Virgtel, having known that they were neither shareholders nor directors in the company. Mr. Zabusky contended that he was the successful party if the claimants in the court below had no standing to prosecute the claim in the first place. Therefore, according to him, the general rule is that the successful party should be entitled to costs and the learned judge's reasoning in refusing to do this was insufficient. He submits that by the operation of rule 64.6(1) of the CPR, his costs (being the successful party) ought to be paid by the respondents. He then

¹⁴ Rule 64.6(2) of the CPR.

argues that the appeal should be allowed, and the respondents should pay his costs in the court below and in this Court.

- [71] On the contention that the learned trial judge erred in principle and was blatantly wrong in awarding 50% of the costs to VA, the respondents submit that CPR 64.6(1) provides the general rule governing costs; which is firstly a discretionary rule which sets out that the unsuccessful party is to pay the costs of the successful party. Continuing their argument, CPR 64.6(2) provides that the court may order a successful party to pay all or part of the costs of an unsuccessful party or make no order as to costs.
- [72] The respondents submit that the trial judge had the power to make the costs order which was made and that in coming to the decision, he properly gave regard to all the circumstances of the case. In their arguments, the respondents state that the judge took into consideration the fact that although the respondent's name (VA) was not actually entered on the register of members of Virgtel, it was the beneficial owner of the relevant shares and was entitled under the **BCA** to be placed on the register of members immediately. As such, it would not have been just to deprive it entirely of the costs incurred to protect its interest in Virgtel. The respondents submit that the trial judge was correct in his determination to award a proportion of 50% of the costs to VA.
- [73] Mr. Dennis, QC also pointed out that the trial judge considered the behavior of Mr. Zabusky which effectively caused the proceedings in the first place. One such action was Mr. Zabusky's attempt to grab control of Virgtel and also the fact that Mr. Zabusky raised a misconceived defence based on estoppel. The respondents suggest that the fact that Mr. Zabusky was appealing

demonstrated that the learned trial judge was correct in treating VA as the successful party for the purposes of costs. They conclude by stating that the trial judge exercised his discretion properly.

[74] In addition, the CPR outlines that the court must have regard to all the circumstances of the case in deciding who should be liable to pay costs. Factors such as the conduct of the parties, the manner in which the parties pursued the matter, the amount of success the parties enjoy on the issues of the case and whether it was reasonable for the party to pursue a particular allegation or raise a particular issue are taken into consideration by the court.

[75] Mr. Zabusky raised an issue with the trial judge deciding to award costs to the respondents after finding that they had no standing to bring the claim in the first place. On the other hand, the respondents argue that the judge exercised his wide discretion, considered all the relevant factors and correctly awarded costs to them.

[76] I am of the view that it was within the discretion of the judge to award 50% of the costs to VA. Having considered all the circumstances, I agree with the respondents' submissions on the issue of costs and affirm the costs order of the judge.

[77] I do not find that the trial judge was "plainly wrong" on any of his factual findings. Mr. Zabusky failed to prove that the learned trial judge came to a finding which could not be supported by the evidence.

Order

[78] By reason of the foregoing, I make the following orders:

(1) The appeal is dismissed.

(2) The orders of the judge below are affirmed.

(3) Costs are awarded to VA to be assessed by a judge or a master of the High Court at no more than two-thirds of the 50% costs awarded below, if not agreed within 21 days of the date of this judgment.

[79] I wish to extend my profound apologies to the parties for the delay in the delivery of this judgment, which is very much regretted. I am grateful to the parties for their patience in that regard.

I concur.
Ola Mae Edwards
Justice of Appeal [Ag.]

I concur.
E. Ann Henry
Justice of Appeal [Ag.]

By the Court

**Chief
Registrar**