

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANIGUILLA CIRCUIT
(CIVIL)
A.D. 2018

CLAIM NO. AXAHCV 2014/0039

BETWEEN:

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

Claimants

AND

[1] SKYNET LTD.
[2] GLORY TRADING HOLDING LTD.
[3] OLEG DOVBNYA
[4] BALTHASAR HEFTI

Defendants

Appearances

Ms. Jean Dyer for the Claimants
Ms. Tara Carter and Ms. Kristy Richardson for the First, Second and Third Defendants
The Fourth Defendant being absent.

2018: April 23; 24; (Written Closing
Arguments filed on 18th June, 20th July
and 20th August 2018)

September 27.

JUDGMENT

[1] **RAMDHANI, J.: (Ag.)** A desire to promote world peace through a peace project in the middle east took a turn into conflict and resulted in this claim which has brought to a head, years of cross borders litigation between the claimants and the defendants. The claim

involves the ownership of the shares in an Anguillian Offshore Company, Skynet Ltd and a parcel of land that it owned in Israel. For the claimants, a company incorporated in the British Virgin Islands, and a swiss national, they asserted that the company Skynet Ltd. and the land it owned, belonged to them. For those of the defendants who defended the matter, the claim was a baseless one meriting only dismissal and an award of damages against the claimants.

[2] The trial took place on the 23rd and 24th of April 2018 and it was agreed that the parties would file written closing arguments. Written closing arguments were filed by the claimants on the 18th June 2018 and the defendants closing arguments followed on the 20th July 2018 with a written reply filed on the 20th August 2018.

[3] Having considered the oral testimony of Mr. Alexander Bloch led on behalf of the claimants and the evidence of Mr. Kravchuk led on behalf of the Skynet Ltd., the documentary evidence and the written arguments, the court has found in favour of the claimants. Judgment for the claimants is accordingly granted in the terms set out in the order for the reasons now set out.

The Claimants' Case

[4] The substantial underlying factor which has resulted in this claim is the ownership in a parcel of land located in Israel and known as parcel 29945/25. The essence of the claimants' case is that in 2000, the second named claimant desired to establish a peace project in Israel and sought to acquire this parcel of land on behalf of the first named claimant (of which he was part owner at the time) for that purpose. When he discovered that Skynet had already contracted with the then owner to acquire the land, he instructed his advocate in Israel to enter into negotiations with the beneficial owner of Skynet for the acquisition of Skynet. These negotiations led the second named claimant to pay in full for the land and the acquisition of the legal and beneficial ownership in Skynet through a Share Purchase Agreement executed on the 5th May 2000. The claimants are asserting fraud, contending that one of the second claimant's business partner, the fourth named

defendant, who was later installed as a director of Skynet, knowing that the capital stock in Skynet was legally and beneficially owned by the first named claimant, acted in breach of the Share Purchase Agreement, and fraudulently purported to transfer all shares in Skynet to one Mr. Andre Kraschuk for a debt which he owed to Mr. Kravchuk. The latter also became director of Skynet, also subsequently purported to transfer all shares in Skynet to the second named Defendant.

[5] The claimants have sought declarations that Global Skynet International Ltd ("Global Skynet") is the true legal and beneficial owner of Skynet. They have also sought rectification of Skynet's share register pursuant to section 25 of the International Business Company's Act, R.S.A. c. 120 ("the Act").

[6] Briefly as pleaded, the claimants' case begins in or about April 2000 when the second claimant Mr. Alexander Bloch decided to acquire the plot of land situated in Jerusalem to erect what has been described as a 'World Peace Monument'. Attempts to purchase the land in the name of Holyland International Ltd. ('Holyland' which later changed its name to 'Global Skynet') revealed that the then owner had earlier contracted to sell the land to Skynet. On discovering this, Mr. Bloch authorized his attorney Avi Meyer to enter into negotiations with one Mr. Alphons NG Van Spaendonik ("Mr. AvS") who he believed was the 'ultimate beneficial owner' of Skynet. The purpose of these negotiations was to acquire Skynet's outstanding share capital and in turn acquire the land so that the project could be realized.

[7] The claimants' pleaded that the negotiations culminated in a Share Purchase Agreement ("SPA") dated the 5th May 2000, between Mr. AvS and Skynet and Holyland International Limited ("Holyland"), Mr. Bloch being at all material times the beneficial owner of Holyland. In fact, on the 28th December 2001, Holyland later changed its name to Global Skynet International Ltd, the first named claimant.

[8] The claimants further pleaded that at a special meeting of Skynet's Board of Director held on or about the 5th June 2000, Skynet's Board of Directors formally resolved to acquire the

land in two stages and authorized Mr. AvS or his nominee to act on its behalf. At the time this resolution was made, Intertrust (Curacao) NV was Skynet's sole managing director and Mr. AvS was an 'additional managing director' of Skynet, the latter having been so appointed earlier that same day.

- [9] The claimants further pleaded that 'closing of the transaction contemplated by the SPA and the purchase of the land took place in August of 2000 at the office of the attorney, Avi Meyer in Israel. Mr. Bloch caused the purchase price to be wired from ZHR Swiss Bank in Switzerland to Canadian Imperial Bank in Israel.
- [10] On the 17th August 2000, Skynet was registered in the Registration Office of Real Estate Jerusalem as the owner of the land.
- [11] It was pleaded that on the 21st August 2000, Intertrust (Curacao) NV, in its capacity as Skynet's Managing Director caused Intertrust (Anguilla) Ltd. to issue one bearer share, 'Certificate No.1 which represented one fully paid share. The attorney, Avi Meyer, who acted as trustee for the parties to the SPA delivered this bearer share to Holyland pursuant to the SPA. Holyland then became the sole shareholder of Skynet.
- [12] The claimants have pleaded that the bearer share was on the 1st July 2000, and at all material times pledged to Multiple Consultants International Inc (which the claimants asserted was beneficially owned by Mr. Bloch) as security for payment of US\$1.5 million due as compensation for certain activities.
- [13] Then Intertrust (Curacao) NV and Mr. AvS resigned as directors of Skynet. On the 24th August 2000, Mr. Bloch's business partner, one Baltasar Hefti was appointed as the sole director of Skynet. On the 21st August 2006, Mr. Bloch became a co-director of Skynet along with Mr. Hefti.

- [14] A dispute arose between Mr. Hefti and Mr. Bloch, and on or about the 24th May 2010, the former gave written notice of his resignation to Mr. Bloch. Mr. Hefti later resigned as Skynet's director with effect from the 7th September. On the 4th May 2011, Mr. Bloch was again appointed a director of Skynet.
- [15] The claimants have alleged fraud on the part of Mr. Hefti. In particularizing this allegation they state that without their knowledge, Mr. Hefti acting as Skynet's director, had by a resolution dated the 20th May 2010, appointed Mr. Andrey Kravchuk as a director of Skynet and then by that very resolution he himself resigned as a director. They go further to assert that notwithstanding this resignation effective on the 20th May 2010, Mr. Hefti purported to act as Skynet's director resolved on the 21st May 2010 that all issued and outstanding shares of Skynet held by Mr. Bloch be transferred to Mr. Kravchuk and that further the remaining 49,999 unissued shares in Skynet's capital be issued to Mr. Kravchuk. The claimants contend that all the actions here described were improper as being without lawful authority, and oppressive. Further that Mr. Hefti was not acting bona fide for Skynet's benefit but for his own personal benefit. The claimants contend that transfer of the share from Mr. Bloch and the issue of 'unissued shares' is null and void or voidable.
- [16] At the trial Mr. Alexander Bloch was the only witness who gave evidence for the claimants. they also relied on the other documentary evidence led at trial.

The Defendants' Case

- [17] Only the first, second and third named defendants defended this claim. The first named defendant is Skynet Ltd. the company whose shareholding and ownership is in contest. The second named defendant, Glory Trading Holdings Ltd, is a Belize company which currently is listed as owning all the 50,000 shares comprising of the first defendant capital stock. The third named defendant is Mr. Oleg Dovbyna of Russia and was a director of the first defendant from 26th December 2011 until 2017 when Mr. Andrey Kravchuk took over from him. The fourth-named defendant, Mr. Balthasar Hefti though served did not enter an

acknowledgement and did not appear at the trial. (Reference to the 'defendants' means the first, second and third defendants. The fourth defendant, Mr. Balthasar Hefti will continue to be referred to by his surname 'Mr. Hefti')

- [18] By their defence, the defendants are contending the claim is without merit. Their pleaded case state that today the records show that Skynet is owned by Glory Trading Holding Ltd., the second defendant who holds all its issued 50,000 shares. In their pleaded case they deny that any fraud took place and that all the actions of Mr. Hefti which led to the transfer of shares and ownership of Skynet to Mr. Kravchuk was intra vires, lawful and in accordance of the Skynet bylaws and the applicable statutes.
- [19] They state that they are unable to admit or deny whether Mr. Hefti was a business partner of Mr. Bloch and put the claimants to strict proof. They further deny that Mr. Bloch ever instructed Mr. Avi Meyer to enter into negotiations with the 'ultimate beneficiary' of Skynet in 2000 and again ask that the claimant prove this. As far as the SPA is concerned they assert that it cannot be relied on to assert any interest in the land. They say that Mr. AvS did not hold any beneficial interest or shares in Skynet and he had no authority to enter into agreements to bind Skynet, and that further on the 5th May 2000, Mr. AvS was not a director of Skynet; he only became a director on the 5th June 2000.
- [20] The defendants also deny that any consideration was paid in relation to the SPA and deny that the claimants ever paid for the land. They deny that Skynet ever had a bank account held by the Canadian Imperial Bank. They put the claimants on proof of all these matters.
- [21] The defendants also dispute the contention that Mr. Bloch was the sole beneficiary or even a director of the first claimant in 2000 and that he could have been therefore authorized by the first claimant to enter into negotiations with Mr. AvS.
- [22] They further deny that any bearer share was ever issued under the terms of the SPA. They effectively ask the court to note that the SPA was signed on the 5th May 2000 and provided for the delivery of a share certificate. The 'Bearer Share Certificate' relied on was issued

on the 21st August 2000. This was subsequently cancelled by Skynet's director and in any event was disabled by operation of law. In any event, the defendants assert that the SPA only related to one share and did not account for the remaining 49,999 shares which Skynet was authorized to issue. Even if the SPA is valid, which they deny, they assert that it only related to one share.

- [23] The defendants also take issue with the claimants' assertion that the bearer share was on the 1st July 2000, and at all material times pledged to Multiple Consultants International Inc (which the claimants asserted was beneficially owned by Mr. Bloch) as security for payment of US\$1.5 million due as compensation for certain activities. The defendants say that this could not be true as the bearer share was supposedly issued on the 21st August 2000. Further they contend that Multiple Consultants International Inc was at the material time struck from the company's register and so could not transact business.
- [24] As far as the allegations of fraud were concerned the defendants pleaded that it is untrue to say that Mr. Hefti did not resign on the 20th May 2010; he did so on the 21st May 2010, and that Mr. Kravchuk was validly appointed by a resolution of the shareholders on the 21st May 2010.
- [25] The defendants further pleaded that on the 17th June 2002, Mr. Hefti, acting as a director of Skynet cancelled the Bearer Share held under Certificate No. 1 and issued one nominal share valued \$1.00 to the first Claimant. This became Share No. 1 under Certificate No. 2. On the 20th May 2010 Mr. Hefti acting as director of Skynet wrote a letter to confirm that in his error as director he did not destroy Certificate No. 1, but if found the Certificate carries no legal rights.
- [26] The defendants further plead, that on the 21st May 2010, Mr. Hefti acting as director of Skynet transferred the share held under Certificate No. 2 from the first claimant to Mr. Kravchuk and for the first time issued the remaining 49,999 shares of Skynet unissued capital to Mr. Kravchuk. Mr. Hefti cancelled Certificate No. 2 and issued Certificate No. 3 for 50,000 shares (1 share plus 49,999 shares) to Mr. Kravchuk.

- [27] On the 25th August 2011, the 50,000 shares were transferred to Glory Trading Holding Ltd. Certificate No.3 was cancelled, and Certificate No. 4 for 50,000 shares each valued \$1.00 to be held in the name of Glory Trading Holding Ltd.
- [28] The defendants further plead that on the 15th October 2013, Certificate No. 5 was issued to the second defendant for 49,999 shares (shares with numbers 2 to 50,000). The remaining one share, being Share Number 1 under Certificate No. 4 was transferred to unallotted shares.
- [29] At the trial, the defendants relied on the current director of the first defendant, Mr. Andrey Kravchuk and the documentary evidence of Skynet and other documents. No-one else gave any evidence.

The Issues Raised on the Pleadings

- [30] The primary issue in this case is whether the Share Purchase Agreement is valid and enforceable agreement against Skynet and whether it operates to transfer all the legal and beneficial ownership in the capital stock of Skynet. Did it operate to vest legal and beneficial ownership from Skynet to Global Skynet International?
- [31] The second Issue (which really arises if the first is answered in the affirmative) 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 shares of Skynet to Mr. Kravchuk were valid acts.
- [32] Various questions would arise for consideration under this broad issue heading. This will be stated as the court considers each issue.

The Court's Considerations on the Issues and Findings

Issue No. 1

Whether the Share Purchase Agreement is valid and enforceable agreement against Skynet and whether it operates to transfer all the legal and beneficial ownership in the capital stock of Skynet. Did it operate to vest legal and beneficial ownership in Skynet to Global Skynet International?

[33] This is the primary issue in this case. There are a number of questions which arise for consideration in this regard. First, it is of course, the question of the construction of the Share Purchase Agreement. Second, there is the question as to whether Mr. AvS was authorized by Skynet to enter this agreement, or whether Skynet subsequently ratified his actions related to the execution of the Share Purchase Agreement. Third, it is whether any consideration was paid in accordance with the Share Purchase Agreement.

[34] As a matter of approach, it is useful to consider what the terms of the SPA means, and so the questions will be dealt with in order.

Issue No. 1 - Question – What was the intention of the Parties to the Share Purchase Agreement? The Interpretation of the Share Purchase Agreement.

[35] As far as the SPA is concerned, on the one hand the claimants are claiming that the Share Purchase Agreement is an agreement by which all of the capital stock of Skynet was transferred to Holyland (as it was named at the time) and the whole purpose of that agreement was so that Holyland could acquire land in Israel known as parcel 29945/25. On the other hand the defendants are contending that the SPA is invalid as Mr. AvS had no legal authority to execute it on behalf of Skynet, and that it could not transfer any issued shares as there were no such shares existing at the date of the agreement and in any event it had nothing to do with any parcel of land and at most transferred one Bearer Share from Skynet to Holyland. The defendants have also raised questions which go outside the strict interpretation of the agreement but which touch and concern the validity of the agreement. These include whether Mr. Boch had any authority to negotiate this

agreement on behalf of Holyland and whether any consideration was paid by Holyland for the share.

- [36] I am mindful that where the meaning of a commercial agreement is in dispute, the court must consider the whole of the agreement to determine the intention of the parties. The modern view on the construction of such agreements, allows the courts, even in the absence of ambiguity, vagueness or uncertainty, to consider extrinsic evidence to ascertain the intention of the parties. As the authors of Chitty on Contracts have stated:

“Since the purpose of the inquiry is to ascertain the meanings the words would convey to a reasonable man against the backdrop of the transaction in question, the court is free (subject to certain exceptions) to look at all the relevant circumstances surrounding the transaction, not merely in order to choose between the possible meanings of words which are unambiguous but even to conclude that the parties must, for whatever reason have used the wrong words of syntax.”

- [37] In making these points, the learned authors relied on Lord Wilberforce’s statement in **Reardon Smith Line Ltd v Hansen-Tangen** [1976] 3 All ER 570 p 574 when he stated:

“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.

- [38] The scope and extent of the background examination was dealt with in **Prenn v Simmonds** [1971] 3 All ER 237 which stated in part that in looking to the surrounding circumstances the court should not consider evidence of the prior negotiations as an aid to construction of the written contract, but as Lord Wilberforce stated that the:

“...evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the ‘genesis’ and objectively the ‘aim’ of the transaction.”

- [39] The Share Purchase Agreement is an inelegantly drafted document. But there are various terms which one of the other parties here rely on argue that it supports their case. I agree

that much of the parties' intention can actually be gleaned from the actual expressed words of the SPA. The recital clauses are a significant starting point in this regard. There are three of them. They state:

"WHEREAS Skynet's sole property and asset is a parcel of land in Israel known as 29945/25

WHEREAS AvS is the sole owner of all issued and outstanding shares of Skynet; and

WHEREAS Holyland desires to purchase from AvS all of the outstanding share capital of Avs desires to sell its holdings in Skynet to Holyland."

[40] These recitals are immediately followed by Section 1 of the Agreement. This contains three clauses:

SECTION 1.
SALE AND PURCHASE OF SHARES OF SKYNET

1.1 Subject to the terms and conditions hereof, AvS shall sell, transfer and deliver to Holyland, and Holyland shall purchase, accept and receive from AvS one (1) Ordinary Share of Skynet (the "Skynet Share"), having a par value of one (1) U.S. Dollar, constituting all of the issued and outstanding shares of Skynet.

1.2 In consideration for the sale of the Skynet Shares to Holyland, Holyland shall transfer to AvS, or its designee, at the Closing (as defined below) a sum of 864.084 U.S. Dollars (the "Purchase Price").

1.3 The execution of this Agreement by Skynet and AvS or on their behalf shall be conclusive evidence of the receipt by them of the full Purchase Price.

[41] The inclusion of the first recital clause provides a strong inference that the question of Skynet's assets was a significant matter for the parties. The fact that this parcel of land is referenced at the very beginning of the agreement indicates that both sides had this specific parcel of land in contemplation.

- [42] While the second recital speaks to **issued and outstanding** shares held by AvS, the question of Skynet's beneficial ownership comes sharply into focus when this is placed alongside the warranty given by AvS and Skynet by section 3 of the SPA which states:

SECTION 3.

REPRESENTATIONS AND WARRANTIES OF INTERTRUST AND SKYNET

AvS and Skynet hereby represent and warrant to Holyland as of the date hereof as follows:

3.1 *Skynet is a company duly organized and validly existing under the laws of Anguilla. Skynet has all requisite corporate power and authority to own its assets.*

3.2 *Attached hereto as Schedule 3.2 is an excerpt regarding Skynet from the Registrar of Companies in Anguilla.*

3.3 *To the best of their knowledge the information included in the excerpt attached hereto as Schedule 3.2 is accurate. To the best of their knowledge there are no obligations, options, warrants or other undertakings, whether pursuant to any convertible securities or otherwise, of Skynet or its shareholders to issue or sell shares or other securities of Skynet to any person or entity.*

3.4 *AvS is a director of Skynet with full power to execute this Agreement on behalf of Skynet.*

3.5 *Other than a parcel of land in Israel known as 29945/25 Skynet has no other real property or assets.*

3.6 *There are no outstanding suits, decrees, judgments, proceedings, actions, claims, or investigations of any nature pending or, to their best knowledge, threatened against Skynet.*

3.7 *Skynet is not restrained or limited pursuant to any agreement, by law or otherwise, from entering into this Agreement and performing the obligations contemplated herein. The Company has full corporate power and authority to enter into this Agreement.*

- [43] These clauses give rise to an inference that what was being sold was every issued share and that there was no-one else who had acquired any other shares in Skynet as neither Mr. AvS nor Skynet had any obligation to issue any share to such a third person.

- [44] This inference becomes stronger when it is considered in context of 'Section 5' of the SPA. 'Section 5' contains one clause. It reads:

"Until otherwise resolved by Holyland, the current board of directors of Skynet shall remain in place and shall continue to have the power to execute and sign documents on behalf of Skynet and to legally bind it."

- [45] There can be no doubt that this clause effectively gave Holyland the right to remove the entire Board of Directors of Skynet, and to replace that Board with directors of Holyland's choosing. This last term in the contract only makes sense if Holyland was effectively taking over control of Skynet. It is to be noted that this is exactly what happened. The original managing director shortly thereafter resigned office and one of the two owners in Holyland (Mr. Hefti, the fourth defendant) was appointed director. In my view, it was only by the instrument of the SPA that Mr. Hefti of Holyland was able to take control of Skynet.¹
- [46] The fact that the current Board is allowed to remain in place until otherwise resolved fits in with the oral evidence that it was Skynet who was negotiating the purchase of the parcel of land.
- [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

¹ See a letter from Mr. Hefti to Skynet by which he consented to being appointed sole director of Skynet with effect from the 24th August 2000 – three days after the Bearer Share was issued, and the same day Skynet declared that the Bearer Share was all the 'total and outstanding share capital' of Skynet. The letter from Mr. Hefti is an agreed document. Trial Bundle Part III, Tab 15.; The records also show that Mr. Bloch himself and the fourth defendant, Mr. Hefti were appointed directors of Skynet on 21st August 2006. (paragraph 23 of witness statement of Mr. Kravchuk.)

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, when the UK Court spoke to the court's approach to evidence from witness speaking of historical events. In that case, the point was made that a court should 'place little reliance on witnesses' recollection of what is said in meetings and conversations, [but] to base findings on inferences drawn from the documentary evidence and known and probable facts.' Even so, a court must use its experience in assessing that witnesses' veracity when the witness speaks not of details but of underlying fundamental matters, matters which do not require recall of details of meetings and conversations but of life events. On such matters it is

whether or not the witness is telling the truth. Of course, the court must also look at the documentary evidence in arriving at conclusions as to whether the witnesses accords with everything else or at the very least is not at dissonance.

[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.²

[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 the 4th July 2000 and addressed to "Mr. Hefti", 'Holly Land International Ltd'. This letter speaks to the purchase of land in Israel. Specifically, it advised Mr. Hefti and Holly Land 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 Skynet Ltd. with the Land Registration Office (TABU) immediately."³

[54] Mr. Bloch's oral testimony that he received this document and he had to sign along with Mr. Hefti to release the funds which paid for the land ties in with this document. Then a

² The photograph evidence was admitted and considered.

³ Trial Bundle, Part IV, Tab 46

proximate event is the registration of Skynet's legal ownership over the parcel of land in the Registration Office of Real Estate Jerusalem on the 17th August 2000. The following Monday, the 21st August 2000 Skynet issued the Bearer Share. On the 24th August 2000, Skynet issued a 'Director's Resolution' and a 'Declaration'. This is consistent with Clause 2.2 of the SPA.⁴ The Director's Resolution resolved: "*to accept the resignation of Intertrust (Curacao) N.V. and Mr. A.N.G. van Spaendock; to appoint Mr. B. Hefti as sole Managing Director until he resigns or is replaced; to confirm that the registered agent in Anguilla is not authorized to act without the written approval of Mr. B. Hefti*". The declaration used language similar to that used in the SPA; It was declared: "That to the best of its knowledge only one (1) share has been issued representing the total issued and outstanding share capital of Skynet."⁵

[55] These events concord with what the agreed documentary evidence shows. Skynet was incorporated on the 13th April 2000 by Intertrust (Anguilla) Ltd. and on incorporation Intertrust (Curacao) N.V. was appointed as the sole Managing Director. Just over a month later, on the 26th May 2000, the managing director of Skynet executed a Power of Attorney to Advocate Avi Meyer granting him 'worldwide' authority to do all things on behalf of Skynet including buying and selling property and opening and maintaining bank accounts.⁶ A few days later on the 5th June 2000, as the minutes of Skynet shows, Mr. AvS was authorized to do all things to buy the land on behalf of Skynet.⁷

[56] I have not yet addressed this court's views and findings on whether Mr. AvS had power to enter the SPA on behalf of Skynet and to bind Skynet under its terms, but as far as the present narrative is concerned about whether Holyland, through Mr. Bloch and Advocate Avi Meyer was seeking to acquire the land in Israel, this last document, Skynet's minutes of a special meeting dated the 5th June 2000 lends credence to this conclusion. Skynet clearly held a meeting in which it was also authorizing the very advocate Avi Meyer who

⁴ Clause 2.2 states: Transaction at closing... ... Skynet shall deliver to Holyland the following documents: (a) a copy of a Resolution of Skynet's shareholders and board of directors approving the execution and performance of this agreement; (b) a validly executed share certificate covering the Skynet share."

⁵ Trial Bundle, Part III, Tab 14.

⁶ Trial Bundle, Part III, Tab 9

⁷ Trial Bundle, Part III, Tab 10

had been entrusted by Mr. Bloch to negotiate on behalf of Holyland. I accept that when Avi Meyer wrote to Holyland on the 4th July 2000 he had been authorized by Skynet to buy and sell land, and he was also confirming to Holyland: “As your legal representative and trustee in this matter I confirm that I have already registered your right to purchase the second half of the captioned real estate...”⁸

- [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.
- [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.
- [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

⁸ Trial Bundle, Part IV, Tab 46

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'⁹.

Issue No. 1 – Questions - Whether Mr. AvS was given express authority or had ostensible authority to execute the SPA on behalf of Skynet? Were his actions subsequently ratified?

- [60] That brings me then to the question as to whether, Mr. AvS was at all expressly authorized or had apparent or ostensible authority to sell the legal and beneficial rights held in the capital stock of Skynet? If he had no such authority, were his actions ratified? Notwithstanding all that was discussed above, if Mr. AvS had no such authority, or his actions were not subsequently ratified, then the SPA would not be effective to transfer any legal or beneficial ownership of anything.
- [61] The defendants made a number of submissions on this point. First, they argue that it cannot be doubted that Mr. AvS was not a director of Skynet on the 5th May 2000 when he entered the SPA; he only became a director on the 5th June 2000. They say that he therefore could not have lawfully entered the SPA on behalf of Skynet for the purchase of shares.
- [62] Second, it was argued on their behalf, that 'even if AvS was appointed to act as an agent, he could not lawfully enter into an agreement which could not be lawfully entered into'. They point to the authority of **Morris v Kanssen and Others** [1946] 1 All ER 586 – "*An ostensible agent cannot bind his principal to that which the principal cannot lawfully do.*"

⁹ Adopting the language used by the claimant at paragraph 58 in their submissions dated the 18th June 2018

They say that it is indisputable that there were no shares capable of being sold at May 2000 as the first shares were only issued in August 2000. It is also undisputed that Skynet did not own land in May 2000 and the evidence is clear that Skynet only became owner of land in August 2000.' They relied on the Privy Council's decision in **New Falmouth Resorts Ltd. v International Hotels Jamaica Ltd** [2013] UKPC 11.

[63] I agree with the defendants that there was no actual express authority given to Mr. AvS by Skynet to enter the SPA. He was appointed after the SPA was executed. The question for me is whether he was possessed ostensible authority or whether his actions were later ratified by Skynet.

[64] I have considered the learning in **Freeman & Lockyer** which was set out in the Privy Council's decision in **New Falmouth's** decision at paragraph 22 where Lord Diplock is quoted as saying at 503 to 505:

"'apparent' or 'ostensible' authority . . . is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract . . .

The representation which creates 'apparent' authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has usually 'actual' authority to enter into . .

The commonest form of representation by a principal creating an 'apparent' authority of an agent is by conduct, namely, by permitting the agent to act in the management or conduct of the principal's business. Thus, if in the case of a company the board of directors who have 'actual' authority under the memorandum and articles of association to manage the company's business permit the agent to act in the management or conduct of the company's business,

they thereby represent to all persons dealing with such agent that he has authority to enter on behalf of the corporation into contracts of a kind which an agent authorised to do acts of the kind which he is fact permitted to do usually enters into in the ordinary course of such business. The making of such a representation is itself an act of management of the company's business. Prima facie it falls within the 'actual' authority of the board of directors, and unless the memorandum or articles of the company either make such a contract ultra vires the company or prohibit the delegation of such authority to the agent, the company is estopped from denying to anyone who has entered into a contract with the agent in reliance upon such 'apparent' authority that the agent had authority to contract on behalf of the company."

[65] Having regards to my own findings above on the factual genesis leading up to this SPA, I am of the view that Skynet, by its conduct permitted Mr. AvS to act on its behalf in treating with and negotiating the terms of the SPA with Avi Meyer who was acting on behalf of Holyland. From the circumstances as I have found them and, in particular, my finding that the SPA and the purchase of the land were integrally bound up, Skynet must have represented to Avi Meyer and Holyland that Mr. AvS was authorized to act on behalf of Skynet. It is highly probable that Skynet held out Mr. AvS during the course of the negotiaitons, as having authority to bind Skynet. It has not missed this court, the struggle the defendants have had to seek to separate the SPA from the purchase of the land. Once the two matters are found to be intertwined, and I have so found, this issue as to whether Skynet held out Mr. AvS as acting with apparent or ostensible authority in large part, goes away.

[66] Even if I am wrong about this finding, I am of the view that everything that Skynet did subsequently is to be taken as ratifying all that Mr. AvS did, binding Skynet to all the terms of the SPA. The principles relating to ratification have been confirmed by our own Court of Appeal in **Hilary Shillingford v Angel Peter Andrew and another** Civil Appeal No. 32 of 2011, where the court stated:

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 on 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.

42. 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. (citations omitted)

[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 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.

[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.

[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.

Issue No. 1 – Question - Whether Consideration was Paid under the Terms of the Share Purchase Agreement?

- [70] A related question is the defendants' assertion that no consideration was paid for the acquisition of the share and the property. They called upon the claimants to prove this.¹⁰
- [71] I have considered the receipt clause at section 1.3 of the SPA which stated: "The execution of this Agreement by Skynet and AvS or on their behalf shall be conclusive evidence of the receipt by them of the full purchase price." I have also noted 'Section 2' of the SPA does go on to say that the 'actual payment of the full purchase price shall take place at a Closing (the Closing) to be held at the offices ofon..., 2000 local time or on such other date times as shall be agreed by the parties, but not later than September 10, 2000."
- [72] As an important matter, I have considered that Avi Meyer was writing to Holyland on the 4th July 2000, to remit the balance of the purchase price, and that days later, the property was transferred into Skynet's name and then shortly after a Bearer Share issued.
- [73] These matters were sufficient for me to find that consideration was paid in full under the terms of the SPA which in turn went towards the purchase of the land.
- [74] I give little weight to the question as to whether Skynet ever owned any bank account in Canadian Imperial Bank to throw doubt on Mr. Bloch's evidence. The evidence in my view points to funds not going directly to any bank account held by Skynet, but rather going from Holyland as Mr. Bloch's asserts, to Avi Meyer in probably his own account as he was acting for both Holyland and Skynet with regards the purchase.
- [75] The defendants did not present the court with any record of Skynet with negative any of these conclusions. Specifically, there was no record from Skynet which showed the land was paid for by Skynet itself or by any other person or entity. I noted that Mr. Kravchuk testified quite out of the blue that he had paid for the land.¹¹ This matter had never pleaded

¹⁰ Mr. Krachuk himself could not speak to this personally as he only relied on the documents from Skynet's archives. (Trial Transcripts Page 253) For this reason, his expressed views and conclusions could not be considered evidence, as forming conclusions and deciding on principle were matters for the court.

¹¹ Trial Transcript page 309

by the defendants and they were all along putting the claimants to strict proof as to who paid for the land.

[76] In fact, there is a letter dated the 13th November 2013¹² sent by the third defendant acting as then director of Skynet to one Eitan S. Erez, speaking of Mr. Bloch and containing this statement: "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." This amounts to an admission against interest and was given some weight.¹³ There is no doubt in my mind that consideration was paid and it was paid by the claimants.

Issue No. 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 to allot all of the capital stock of Skynet to Mr. Kravchuk?

[77] Several questions arise under this broadly stated issue. First, it is whether the Bearer Share was disabled by operation of law? Second, and what logically flows from this question is whether if the bearer share was so disabled, and one nominal share issued to Global Skynet, whether this means that all Global held was the legal right to one share? Third, it is whether Mr. Hefti had resigned as director of Skynet on the 20th May 2010? Fourth, it is whether Mr. Hefti acted contrary to the by-laws of Skynet, and or fraudulently, oppressively and in breach of his fiduciary obligations when he cancelled the one share issued to Global Skynet and issued all of the unissued shares of the Company and allotted them to Mr. Kravchuk? Fifth, whether the bearer share was pledged to multiple consultants, so that all rights to Skynet resides ultimately in Multiple Consultants.

¹² Trial Bundle Part III, Tab 31.

¹³ The rest of the letter was self-serving. The third defendant did not attend to give evidence and these portions of the letter could not be assessed.

Issue No. 2 – Question Number 1 and 2 – Whether the Bearer Share was disabled by operation of law? If this was so disabled, and one nominal share issued to Global Skynet does that not mean that all Global held was the legal right to one share?

- [78] The claimants' argument on this point start with the contention that the bearer share (held under Certificate No.1) which was issued by Skynet represented, as I understand it, all of the legal and beneficial rights to all of the capital stock in Skynet. They say that on the 17th June 2002, when this bearer share was converted to one nominal registered share which became share no. 1 under certificate No. 2, it became subject to (Holyland's) Global Skynet's contractual rights under the Share Purchase Agreement.
- [79] The claimants submitted that when Mr. Hefti, 'unbeknownst' to the claimants purported to cancel this share and issued Share No. 1 under Certificate No. 2 to Mr. Kravchuk, this was an irregular act and did not constitute a valid cancellation within the meaning of section 29 of the International Business Companies Act R.S.A. c. 120 ('the IBC Act'). They further contend that Mr. Hefti's purported exercise of power section 14 of the IBC Act was invalid.
- [80] The claimants submit that as a matter of principle that 'a company may cancel its shares in one of two ways, namely: (i) share buy-back (redemption) or (ii) share capital reduction.' And that whichever option is employed by the company the shareholder affected must be given notice.'
- [81] The defendants' arguments start with the premise that the bearer share only represented one share out of the share capital stock comprising of 50,000 shares and that this share could not represent all the legal and beneficial rights to all the unissued shares in the company.
- [82] They contend that in any event that this bearer share was not converted and remains as a bearer share, then the fact that it was not deposited with a custodian under section 2 of the Custody of Bearer Share Regulations by 31st December 2010, meant that it was disabled by operation of law. The effect of this, they contend, is that pursuant to section 27(3) and

(4) of the IBC Act, the bearer share does not carry any of the entitlements which it would otherwise carry, including an entitlement to vote, an entitlement to a dividend and an entitlement to share in the assets of the company on its winding up or dissolution.’ And that ‘any purported transfer of an interest in the bearer share is void and of no effect.’

[83] They further submit that if the court were to find that the bearer share certificate was in fact converted to an ordinary share by the sole director of Skynet in June 2002, then it follows that certificate No. 2 which was issued to Global Skynet was valid, but this would have been only for 1 of 50,000 shares.

[84] In the court’s view much of this has already been addressed in the earlier discussion. This court has found as a fact that the SPA was valid and binding against Skynet and that it operated to transfer all legal and beneficial interests in all of the capital stock to Global Skynet (Holyland). It further operated to allow Global Skynet (Holyland) to appoint a new Board of directors which happened when Mr. Hefti was appointed.

[85] Mr. Hefti was one of the directors of Global Skynet (Holyland) when this happened. He was integrally involved in the purchase of the parcel of the land. It is impossible to now conclude that he could not have known that Gobal Skynet (Holyland) was entitled to all of the capital stock of Skynet. He was served with this claim and has not entered an appearance. As far as his involvement with Mr. Bloch is concerned, and his knowledge of the events leading up to the SPA and the purchase of the land, it is only Mr. Bloch’s evidence, and some of Skynet’s documents which speaks to that period. Mr. Hefti has chosen not to answer any of the allegations against him. This court has already stated that it has accepted Mr. Bloch’s evidence as credible.

[86] Even before he became a director of Skynet, Mr. Hefti was agreeing with Mr. Bloch and purporting to make a resolution¹⁴ on behalf of Skynet, to transfer the one share issued by Skynet and the ownership of Skynet to Multiple Consultants, the company which was owned by Mr. Bloch. I am satisfied that Mr. Hefti must have known that by the SPA, Skynet

¹⁴ Trial Bundle Part IV Tab 49; trial transcript pages 120 to 122

had transferred ownership from the original board of directors and person beneficially entitled.

[87] It is in this context that the question whether the bearer share was disabled or whether it became converted to one nominal share under Certificate No. 2 which was issued to Global Skynet (Holyland) must be considered.

[88] This was not a transfer of the bearer share, but this was an act of cancellation by the company itself which fact was then recorded in the share register. Whatever else Mr. Hefti may have done, the nominal share issued must be taken as preserving the rights of Global Skynet (Holyland) under the SPA, as any other consequence would be contrary to section 29 of the Act and in breach of the intention of the parties. For these reasons, I am compelled to find that Mr. Hefti's actions as director must be taken as converting the bearer share into that one share which represented all the legal right to one share and beneficial rights in the remaining capital stock of Skynet. This finding makes it unnecessary for this Court to rule on whether the bearer share was pledged to Multiple Consultants Ltd. I must say that I found as a fact that this latter company is a viable company¹⁵. I also found as a fact that Mr. Bloch evidence on this issue of the pledge was credible evidence.¹⁶ For the purpose of this judgment I will leave this issue here by stating that it would appear to me that Global Skynet has an obligation to regularize their commitment to Multiple Consultant for the monies paid out to Global Skynet.

[89] This being so, section 2 of the Custody of Bearer Share Regulations has no bearing on this matter. I do not have to decide whether, in a case such as this, where contractual rights were deliberately interfered with in a fraudulent manner by one of the parties, the court has a power to make a declaration as to the entitlement of the first claimant under the SPA where the only share it actually possesses is a bearer share which has been disabled by law. For my own part, if this were at all necessary, the circumstances of this

¹⁵ Note Trial Bundle, Part III, Tab 35 which

¹⁶ Trial Bundle, Part IV, Tab 57

case would have compelled the court to make an order that Skynet honour the obligations in the SPA. The effect is the same, but the court's reasoning travelled another path.

- [90] I go on to consider the effect of the cancellation of the nominal share by Mr. Hefti. It was contended that Mr. Hefti as director of Skynet had a right to cancel this nominal share as it was not paid for. I have already found that there was proper consideration paid and I am of the view that this cancellation was not only in breach of section 29 but that it was also fraudulent. Mr. Hefti would have been seized of knowledge that it belonged to Global Skynet (Holyland), and so at the very least, if he were at all acting properly, send notice to Global Skynet of Skynet's intention to cancel a share. His chicanery is further shown by the 'to whom it may concern' letter in which he was telling someone at large about his intention to cancel. Why was he not writing to Mr. Bloch, or Global Skynet? It is more probable he simply placed this in the file to cover his tracks and offer, like a tree falling in a forest, an unheard explanation.

Issue No. 2 - Question No. 3 – Whether Mr. Hefti has resigned as director of Skynet on the 20th May 2010?

- [91] The claimants submitted that Mr. Hefti has resigned as a director of Skynet on the 20th May 2010 and so he had no lawful power to issue and allot shares to Mr. Kravchuk on the 21st May 2010.
- [92] The defendants on the other hand submitted that the claimants could not prove this, and the documentary evidence should be accepted together with Mr. Kravchuk's evidence that this resignation in fact took place on the 21st May 2010.
- [93] Mr. Andrey Kravchuk (also called 'Andrei Kravchuk') is a citizen of the Federation of Russia. He stated that he served as past director of Skynet from 21st May 2010 to 26th December 2011. In his oral testimony he stated that he is currently a director of Skynet having been reappointed on the 24th April 2017.¹⁷ With regards to Mr. Kravchuk's

¹⁷ Trial Transcript page 200.

evidence I have approached it in the same careful manner as I did in relation to Mr. Bloch. Where there was contemporary documentary evidence these were considered in relation to his oral testimony. Mr. Kravchuk was not able to speak personally about matters before 2010 related to the management of Skynet before he became a director.¹⁸ But he did speak about meeting with Mr. Bloch and Mr. Hefti when he stated that he spoke to Mr. Bloch to advise him that the bearer share was not worth anything. He also spoke about various matters related to the resignation of Mr. Hefti in 2010 and his own appointment and the issuance of shares. I considered that Mr. Kravchuk is an intelligent man. His was a forceful personality and he held strong views which also made him somewhat excitable.

[94] The defendants maintain that Mr. Hefti did not resign on the 20th May 2010 but he did so on the 21st May 2010. The claimants have asked me to look at the actual resignation and note that it was not authenticated until the 15th June 2010. The inference I am being asked to draw is that this somehow throws the veracity of this document in question. That by itself could not do that. The claimants urged the court to consider Mr. Kravchuk's evidence and how it compares to the resolution which was purportedly made on the 21st May 2010. In his witness statement, Mr. Kravchuk stated that all of the documents containing decisions which were signed by Mr. Hefti on the 20th May 2010 were done in draft. I considered the resolution dated the 21st May 2010 signed by Mr. Hefti which on its face stated that it was revoking the said decisions made on the 20th May 2010. I recall that Mr. Kravchuk initially denied that Mr. Hefti revoked the resolution dated the 20th May 2010 and testified that Mr. Hefti had only done drafts on the 20th May 2010. However, the resolution of the 21st May 2010 does state on its face that the resolution dated the 20th May 2010 be revoked.¹⁹

[95] Mr. Kravchuk's evidence that he had spent considerable time on this matter trying to get the resolution right and that there were many mistakes, rings true to this court. I am unable to find that Mr. Hefti resigned on the 20th May 2010. And so, I am unable to find that he was not acting as a director when he sought to appoint Mr. Kravchuk, cancel the Global

¹⁸ See the trial transcript at page 244 – 245.

¹⁹ See Trial Bundle Part IV, Tab 94

Skynet share and transfer all 50,000 shares to Mr. Kravchuk. The question that arises is whether these actions were valid and effective.

Issue No. 2 – Question No. 4 - Whether Mr. Hefti acted contrary to the by-laws of Skynet, and or fraudulently, oppressively and in breach of his fiduciary obligations when he cancelled the one share issued to Global Skynet and issued all of the unissued shares of the Company and allotted them to Mr. Kravchuk?

- [96] The claimants have argued that the allotment of shares to Mr. Kravchuk was an improper exercise of power by Mr. Hefti. They say that under section 14(4) of the **IBC Act** which provides, subject to certain qualifications which have not been invoked, 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.
- [97] The claimants contend that Mr. Hefti's actions to issue and allot 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 for an improper purpose as Mr. Hefti was clearly pursuing his own interest. They relied on **Howard Smith Ltd. v Ampol Petroleum Ltd.** [1974] 1 All ER 1126.
- [98] The defendants have argued that all corporate actions taken by Mr. Hefti on the 21st May 2010 are valid actions.
- [99] As it relates to the issuance of the shares, they contend that section 1.3 of Skynet's By-Laws gives the directors a power and a discretion to cancel shares and issue new shares. They effectively contend that even if it were found that Mr. Hefti was acting in bad faith (which they deny) the allotment of shares would not be void but be voidable at the instance of the company; there could be no question that the allotment could be void from the

inception. They relied on the UK's Court of Appeal decision in **Bamford and Another v Bamford and Another** [1968] 3 WLR 317.

- [100] The legal principles applicable to this question were clearly dealt with by the Privy Council in the **Howard Smith** case. The **Bamford** decision was dealt with in **Howard Smith** and is distinguishable in this matter. It is now to be accepted that an *intra vires* issuance and allotment of shares made by the directors must be in keeping with their fiduciary obligations. They are of course expected to act bona fide in the interest of the company as a whole' including, and for some legitimate corporate purpose. The question of directors' failure to act in keeping with their fiduciary obligations was seen vividly on the facts of **Howard Smith**. The headnote reads *inter alia* as follows:

Two companies ('Ampol' and 'Bulkships') owned between them 55 per cent of the issued share capital of a third company ('Millers'). On 15 June 1972 Ampol made an offer for all the issued shares in Millers at \$2·4327 per share. On 22 June a fourth company ('Howard Smith') announced its intention to make a take-over offer at \$2·4350 per share. On 23 June the directors of Millers unanimously decided to recommend the rejection of the Ampol offer as too low. On 27 June Ampol and Bulkships issued a statement that they intended to 'act jointly in relation to the future operation' of Millers and that they had decided to reject any offer whether from Howard Smith or any other source. Under Millers' articles of association the directors had the power to allot unissued shares to such persons on such terms and conditions and either at a premium or otherwise and at such time as they thought fit. A majority of the Millers' directors were in favour of the Howard Smith offer and a scheme was evolved to make an issue of shares to Howard Smith of sufficient size to convert Ampol and Bulkships together into minority shareholders. The exact number of shares to be issued was worked out on the basis of Millers' capital requirements. Millers did in fact require some \$10,000,000 to finance a transaction in which it was engaged and to secure its financial position. It was therefore calculated that 4,500,000 shares should be issued at \$2·4330 per share. On 6 July Howard Smith addressed a letter to Millers applying for the allotment of

4,500,000 \$1 ordinary shares at a premium of \$1.4330 per share. The letter was considered by the board of Millers on the same day and the proposal was accepted by a majority decision. The allotment and issue of the shares to Howard Smith was made immediately after the meeting. On 7 July Ampol commenced proceedings against, *inter alios*, Howard Smith and Millers in the Equity Division of the Supreme Court of New South Wales to set aside the issue of shares to Howard Smith. At the trial the judge found (i) that the allotment had not been made by the Millers' directors for any reason of self interest; and (ii) that the primary purpose of the allotment was not to satisfy Millers' need for capital but to destroy the majority holding of Ampol and Bulkships, thus opening the way to the success of the Howard Smith offer. On the basis of those findings the judge ordered that the issue of shares be set aside. Howard Smith appealed, contending that once it had been found that the Millers' directors had not been motivated by self interest, *ie* by a desire to retain control of the company or their positions on the board, it was not open to the court to enquire into the validity of their reasons for making the issue.

The court held that

(i) *Although the majority of cases in which an issue of shares had been challenged were cases in which the self-interest of the directors was the vitiating element, it did not follow that the absence of any element of self-interest was enough to make an issue valid. On the other hand, it was too narrow an approach to say that the only valid purpose for which shares might be issued was to raise capital for the company. The proper approach was to start with a consideration of the power whose exercise was in question and, having ascertained, on a fair view, the nature of the power, and having defined so far as possible the limits within which it might be exercised, to examine the substantial purpose for which it had been exercised, and to reach a conclusion whether that purpose was proper or not...; dictum of Viscount Finlay in Hindle v John Cotton Ltd (1919) 56 SLR at 630, 631 applied.*

(ii) Just as directors, within their management powers, were entitled to make decisions against the wishes of the majority of shareholders, so it was unconstitutional for directors to use their fiduciary powers over the shares in the company purely for the purpose of destroying an existing majority, or creating a new majority which did not previously exist; furthermore the exercise by the directors of their fiduciary power solely for the purpose of shifting the power to decide to whom and at what price shares were to be sold could not be related to any purpose for which the power over the share capital had been conferred on them.

- [101] The exercise which the court must embark upon is to examine the state of mind and the motive of the directors who have sought to issue and allot shares. As Lord Wilberforce stated in **Howard Smith** at page 1134:

“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 recognized in several well-known statements of the law. Their Lordships quote the clearest which has so often been cited:

‘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 honestly acting in discharge of their powers in the interests of the company or were acting from some bye-motive, possibly of personal advantage, or for any other reasons.’ (Hindle v John Cotton Ltd. (1919) 56 Sc.L.R. 625-631, per Viscount Finlay.”

- [102] The answer to this question therefore has to turn on what was Mr. Hefti's intention and motive. What did he know and what did he do? Did he act honestly bona fide in the interests of the company and were his actions in keeping with his corporate fiduciary obligations? I turn to address this.

- [103] Mr. Hefti was intimately involved in the negotiations and execution of the Share Purchase Agreement, and the purchase of the land. He must be taken to know that Global Skynet was entitled to ownership of Skynet. I find that his knowledge is underscored by the

resolution of the 7th September 2010 by which he purported to act as a director of Skynet and by which he appointed Mr. Bloch a director and resigned as a director of Skynet. This is someone who had resigned on the 21st May 2010, and not only appointed a third party (Mr. Kravchuk) as director but had also transferred all the shares in the company to that person. In fact, about 6 days before he appointed Mr. Kravchuk by a letter dated the 15th May 2010 from Mr. Hefti²⁰ for the attention of Mr. Bloch, (was admitted without objection at the trial) he confirmed that the *'Share (1) representing 100% of the company Skynet Ltd. which has been handed over to you, on a fiduciary basis, as per Board resolution of the 31st July 2000, that the owner of Skynet Ltd is Global Skynet International Ltd.'*

- [104] In the context of Mr. Hefti's undoubtable knowledge that legal and beneficial rights to all of the capital stock in Skynet was held by Global Skynet International, his actions were clearly fraudulent and there is nothing to point to any bona fide or other corporate purpose for the issue and allotment of shares to Mr. Kravchuk was designed to achieve. On this side of the coin there was no evidence to show whether, for instance, any capital was raised for the company from any consideration received for the shares allotted.²¹
- [105] The inference is compelling that Mr. Hefti, in acting as a director of Skynet and cancelling the share issued to Global Skynet and allotting all of the 50,000 shares to Mr. Kravchuk was acting for his own personal benefit and without regard to the interests of the company and its existing shareholder. It is probable that he acted to repay Mr. Kravchuk for some debt owed to him as Mr. Bloch relates in paragraph 29 of his witness statement.
- [106] I am therefore of the view that Mr. Hefti's action of cancelling Global Skynet's share and issuing shares had the effect of diluting Global Skynet's shareholding from 100% to 0%.²² The manner in which it was done was also contrary to section 14(4) of the IBC Act, as no notice was ever sent to Global Skynet.

²⁰ Trial Bundle Part IV, Tab 57

²¹ Noting section 14(1) of the IBC Act.

²² The claimants submitted that 'indeed, Global Skynet's holding in Skynet was diluted from 100% to 0.002% as a result of the purported share issue.' This relates to the claimants' position that they continued to hold one share which was pledged. I have earlier found that that bearer share was replaced with one nominal share issued to Global Skynet. This was later cancelled by Mr. Hefti. The effect being that Global Skynet was reduced to owning nothing.

[107] I am satisfied therefore on the authority of **Howard Smith** and the facts as I have found them in this case, that Mr. Hefti acted purely for his own self-interest and further that his actions were not bona fide for any corporate purpose. The issue and allotment of shares to Mr. Kravchuk was improper, in breach of section 14(1) and (4), and in breach of Mr. Hefti's fiduciary obligations. The fraud followed the shares to the second defendant.

[108] It has not been pleaded at all or raised as an issue that Mr. Kravchuk was a *bona fide* purchaser for value without notice. Even if it were, this court would have been unable too find that he had no knowledge of Global Skynet's claim of interest. First, it was his own involvement in getting Mr. Hefti to issue the 'to whom it may concern letter of the 15 May 2010. Second, and significantly, it was his own statement given in evidence near to the end of his testimony when he said:

"Share certificate was not paid, that's why it could not have been delivered to Holyland. Holyland didn't pay for share and didn't pay for land. This company had never ever had even bank account. The land was bought with my money."²³

[109] This last statement to me was telling and on one view, pointed possibly to his own involvement at very early stages of this matter as the parcel of land was bought in 2000. On another view, if he were at all saying that he found out later about his money being used for land (all this being only speculative) why did he not explain this in his case? The claimants' pleaded case was that Mr. Bloch caused the purchase price for the land to be 'wired'²⁴ and the land was paid for. The defendants' case in relation to payment for the parcel was simply putting the claimants to strict proof as they denied any consideration was paid in relation to the land.²⁵It startles this court that the defendants were asking the claimants to prove that they paid for the land, and to now have Mr. Kravchuk state clearly that it was he who paid for the land! Why was this not pleaded? Why did Mr. Kravchuk and the defendants not make this evidence available? In fact, the defendant not so long ago made an application for specific disclosure seeking among other things any and all evidence from the claimants which showed that they had paid consideration. These

²³ Trial Transcripts at page 309 lines 8 to 12. The court itself re-asked the question and the witness insisted that he had paid for the land.

²⁴ Paragraph 13 of the Amended Statement of Claim.

²⁵ Paragraph 12 (referring to paragraph 9) of the Re-Amended Defence

matters create a real adverse inference and finding against Mr. Kravchuk as to what he knew and did not know and how involved he was. He could not stand as any bona fide purchaser for value without notice.

Conclusion

[110] This Court finds that the claimants have proven their case. Judgment is granted in favour of the claimants. The order of the Court is as follows:-

- (1) A declaration is granted that the fourth named defendant acted fraudulently and in breach of section 29 of the International Business Companies Act, and in breach of his fiduciary obligations when he purported to adopt the resolution dated the 21st May 2010 which sought to cancel one nominal share registered to Global Skynet International Ltd. and issue and allocate all unissued shares of the company Skynet Ltd. to Mr. Andrey Kravchuk.
- (2) An order is hereby granted setting aside the allotment of the 50,000 shares in Skynet Ltd. to Mr. Andrey Kravchuk.
- (3) A declaration is granted that the first defendant, Skynet Ltd., is beneficially owned by the first claimant, Global Skynet International Ltd. in accordance with the terms of the Share Purchase Agreement dated the 5th May 2000.
- (4) A declaration is granted declaring that the second claimant Mr. Alexander Bloch is the sole director of the first defendant, Skynet Ltd.
- (5) A declaration that the certificate of incumbency issued by Mossack Fonseca & Co on the 27th January 2013 naming the third defendant as the sole director of the first defendant Skynet Ltd., and the second named defendant, Glory

Trading Holding Ltd. as the sole shareholder of the first defendant, Skynet Ltd.
is void and of no legal effect.

(6) A permanent injunction is granted restraining the third named defendant, Mr. Oleg Dovbyna and Mr. Andrey Kravchuk from holding themselves out to be directors of the first defendant, Skynet Ltd.

(7) An order directing pursuant to section 25 of the International Business Companies Act that Mossack Fonseca & Co rectifies the register of shareholders of the first named defendant, Skynet Ltd., to remove the second named defendant as sole shareholder and to record in the register that the first named claimant, Global Skynet International Ltd. is its sole shareholder.

(8) An order directing that Mossack Fonseca & Co rectifies the register of directors of the first defendant, Skynet Ltd. to reflect that the second named claimant is the sole director.

(9) An order directing that Mossack Fonseca & Co issue a new certificate of Incumbency showing that the first named claimant, Global Skynet International Ltd. as the sole shareholder of the first defendant, Skynet Ltd. and the second named claimant, Mr. Alexander Bloch as the sole director of the first named defendant.

(10) There shall be an inquiry as to damages.

(11) Costs to be assessed if not agreed within 21 days.

[111] This matter has raised many interesting issues, and the Court is grateful to the parties for their assistance.

Darshan Ramdhani
High Court Judge (Ag.)

By the Court

Registrar