

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVI HC (COM) 2013/0098

BETWEEN:

ALEXANDER PLESHAKOV

Respondent/Claimant

AND

[1] SKY STREAM CORPORATION

Defendant

[2] SERGEY LINKOV

[3] IRINA KAZANTSEVA

Respondents/Defendants

Appearances:

Mr Grant Carroll for the Claimant/Applicant

Mr. David Welford for the Second and Third Defendants/Respondents

2015: November 20;
December 22.

JUDGMENT

Application for post-judgment relief – Application for injunctions and disclosure of information and documents – Claimant adjudged beneficial owner of shares in BVI Company – Whether application misconceived – Whether shareholder can obtain reliefs sought – Whether reflective loss principle applicable.

[1] **FARARA J (Ag)**: In this matter, which came before me on 20th November 2015, the Claimant applied by Notice of Application filed 13th May 2015¹ for certain orders post judgment. These are for:-

- (i) payment over to the Claimant of the sum of US\$150,000 ordered on 12th November 2014 as an interim payment of the Claimant's costs in these proceedings and held by Walkers pending the outcome of an appeal by the Second and Third Defendants ("the first interim costs payment");
- (ii) a second interim costs payment in the sum of US\$235,337.24 to be paid to the Claimant ("the second interim costs payment");
- (iii) an order requiring the Second and Third Defendants to deliver up "any and all original and copy documents within their custody or control relating to Sky Stream Corporation", to include the documents specified at sub-paragraphs (a) to (g) of paragraph 1 of the Notice of Application;
- (iv) the Second and Third Defendants to give specific disclosure of certain information, in the form of lists and schedules, of the First Defendants' assets and their location, of all payments including distributions or dividends effected by the First Defendant, and of all assets transferred by the First Defendant to the Second and Third Defendants for their benefit ("the disclosure orders");
- (v) orders requiring the Second and Third Defendants to take steps to ensure that all assets of the First Defendant "will be brought immediately under the control of the Company and its directors," and prohibiting the said Defendants from dealing in any way with the assets of the First

¹ See Tab 7

Defendant, including the proceeds of sale of an apartment in Florida formerly held by Sky Ocean International, Inc. ("Sky Ocean"), a wholly own subsidiary of the First Defendant, and from dissipating the assets of the First Defendant; and

- (vi) preventing the Second and Third Defendant from holding themselves out as directors of the First Defendant.

[2] Having heard argument, I declined to make an order for payment over of the first interim costs sum to the Claimant at this stage, particularly since the appeal had been heard some 6 months ago and a decision thereon is imminent.

[3] Also, during the hearing, I granted the Claimant's application for a second interim payment, albeit not in the sum requested, but in the sum of \$150,000, and ordered the Second and Third Defendants to pay this sum over to Walkers within 28 days, to be held by them pending the outcome of the appeal.

[4] At the conclusion of the hearing, I reserved judgment on the other matters sought in the Claimant's Notice of Application, and indicated that I would give my decision with reasons as soon as practicable. Accordingly, this is my ruling on the other reliefs.

The Judgment

[5] On 12th November 2014, Bannister J, after a trial lasting from 27 to 31 October 2014, delivered a written judgment² granting the claim. In the statement of claim³ the Claimant sought declarations against the Second and Third Defendants respectively, that the 25,000 shares held by each of them in the First Defendant, ("the Shares") were held on trust for the Claimant, and that the Claimant was

² See Tab 9

³ See Tab 2

entitled to be registered as the holder of the Shares. As against the First Defendant, the Claimant sought an order for rectification of its share register to have the Claimant entered as the registered owner of the Shares. These reliefs were all granted by the learned judge on 12th November 2014, and a formal order entered on 14th November 2014⁴.

[6] In addition to the declarations and the order for rectification of the share register, the judge made orders restraining the Claimant from disposing of the Shares (once he became the registered holder) pending the outcome of an appeal by the Second and Third Defendants. He also made orders restraining the Second and Third Defendants and the Claimant, until 4:00pm on Wednesday 19 November 2014, from disposing or diminishing the value of any assets of the First Defendant, with permission to apply on short notice for a continuation of such injunctive relief; and for the Second and Third Defendants to pay the Claimant's costs of these proceedings to be assessed if not agreed. It was further ordered that the Second and Third Defendants make an interim costs payment in the sum of \$150,000 to be held by Walkers pending the outcome of their appeal, and leave was granted to the Claimant "to seek an additional interim payment by further application made on notice to Maples and Calder."

[7] In the Claimant's Skeleton Argument filed 19th November 2015, learned counsel, Mr. Carroll, submitted that the judge, in effect, found the Second and Third Defendants to be 'prolific liars'⁵. In this regard, he relied on certain extracts from paragraphs 55 to 57, 59 and 62 of the judgment:-

"...it is my judgment significantly more probable that the [Company] was formed to further Mr. Pleschakov's intentions in relation to the incoming

⁴ See Tab 10

⁵ See para 5

Transaero shares than to further any private intentions on the part of Mr. Linkov and Ms Kazantseva. As Mr Pleshakov himself said, why should he go to the trouble of obtaining the additional shares only to give the best part of half of them away to the Defendants.”([55])

These inferences are consistent with the events surrounding the incorporation [of the Company] and its immediate aftermath. The Deed of Trust is compelling evidence that it was the intention of the Defendants that [the Company] was to be and remain under the control of Mr Pleshakov”([56])

“The Defendants’ explanation for the genesis of the Deed of Trust, that it was intended as some sort of civil law fideicommission to justify the fact that Mr Pleshakov was in possession of the original share certificates, was fanciful” ([57])

“In any case, Mr Pleshakov has now held the original share certificates for nearly ten years. Had the Defendants believed that they were theirs, they would surely have demanded their return so soon as it had become clear that no depositary was in the slightest way interested in viewing the original share certificates of [the Company]” ([59])

“In my judgment the evidence establishes that the Defendants acquired [the Company] shares as nominees for Mr Pleshakov. Nothing that has happened subsequent to that acquisition is inconsistent with that finding. Indeed, it fully harmonises with it.” ([62])

- [8] With regards to the luxury apartment in Miami, Florida owned by the Sky Ocean the judge held that there was no agreement that the Claimant would purchase the apartment from the First Defendant at a 10 percent uplift or profit to Sky Ocean, as was the evidence of the Second and Third Defendants. At paragraph 34 of the judgment, the learned judge states-

“Mr Lindov claimed that the arrangement regarding this apartment was for Mr Pleshakov to use it, but with an agreement that he would later purchase it from Sky Ocean with a ten per cent uplift, thus providing a profit for Sky Ocean (a Florida corporation of which Mr Lindov was

President) and, on the Defendants' case, ultimately for the Defendants. I have no hesitation in rejecting this version of events. Contemporary email traffic, which I do not need to set out in this judgment, makes it clear that the intention was that Mr Pleshakov should own the apartment beneficially. This was certainly the impression gained by Mr Arkady Kats, the Florida realtor engaged in the transaction, who on 11 February 2011 received an email from Mr Lindov promising to provide him with an access authorization from Mr Pleshakov to enable a firm of renovators and decorators to enter the apartment, as well as 'Authorization for [Mr Pleshakov] being the owner.' There was no reason why Mr Pleshakov should have entered into an agreement, which he denies, to purchase the apartment at an increased price at some later date and I reject the suggestion that he did so." ([34])

The Appeal and Stay Application

[9] As mentioned, the Second and Third Defendants filed an appeal from the judgment and decision of Bannister J. The appeal was heard and the decision of the Court of Appeal is pending. On 13 November 2014, the Second and Third Defendants applied to the Court of Appeal for a stay of the order of Bannister J⁶, which application was supported by an affidavit of Ms. Arabella D'Iorio⁷. At paragraph 26 she averred: "...it can reasonably be assumed that – absent a stay - the Claimant will take control of Sky Stream and seek to pursue the Second and Third Defendants for, inter alia, a full account. Indeed, such an immediate demand was intimated by Counsel for the Claimant at the handing down."

[10] On 14 November 2014, the learned Chief Justice, Dame Janice Pereira, refused the application for a stay⁸. At the hearing of the appeal, the application for a stay of the judgment was not renewed. It is the submission of the Claimant that he is entitled to the fruits of the judgment, as there exists no stay or other impediment to

⁶ See Tab 11

⁷ See Tab 14

⁸ See Tab 16

the enforcement of the judgment, pending the outcome of the appeal - **Smith v Wheatley** (BVIHCMAP 4 of 2005).

The Pre-Trial Undertakings

- [11] On 23 September 2013, (just over a year before the trial), following an application to the court by the Claimant on 15 August 2013 for an interim injunction against the Company and the Second and Third Defendants preventing them from dissipating the assets of the First Defendant, a written undertaking was given by the Second and Third Defendants through Maples & Calder⁹ (“the first undertaking”). By the first undertaking they agreed, inter alia, not to dispose of the shares or any shares held by the First Defendant in any company, including Transaero. Specifically, the Defendants undertook to provide, within 14 days, evidence demonstrating the First Defendant’s shareholding and underlying property in Florida, evidence of the members and directors of the First Defendant, and the most recent bank statements for the First Defendant. Pursuant to these undertakings, the Second and Third Defendants supplied certain bank certificates¹⁰, which show that the First Defendant had no substantial cash assets¹¹. However, Mr Pleshakov subsequently obtained bank statements showing some bank accounts not previously disclosed by the Second and Third Defendants.¹²
- [12] In his Fourth Affidavit, Mr. Pleshavov states¹³ that, on 13 August 2014, he discovered that the luxury apartment in Florida had been sold for US\$4.3 million. This prompted a letter from Walkers to Maples & Calder on the same day, expressing their concerns about this, and requested that an undertaking be given by the Second and Third Defendants not to take any steps to dissipate the

⁹ See pages 165 and 166

¹⁰ See pages 167 to 170

¹¹ See para 10 Pleshakov’s Fourth Affidavit, exhibit AP4, Tab 18, pages 167 to 170

¹² See para 11, pages 171 to 273

¹³ See para 13

proceeds of sale of the apartment¹⁴. Maples responded by letter dated 19 August 2014 offering an undertaking that the “... *proceeds of sale of the property will only be used in the ordinary course of business*”¹⁵. This undertaking was eventually accepted by the Claimant in a letter from Walkers dated 27 August 2014.¹⁶ On 11 February 2015, Walkers wrote to Maples stating that it had come to the Claimant’s attention that the Second and Third Defendants may have been removing, from the bank account of Sky Ocean, funds derived from the proceeds of sale of the Florida apartment, and asking for the Second and Third Defendants to confirm that they had not taken any steps to deal with and had not misappropriated the proceeds of sale¹⁷. Perhaps not surprisingly, as subsequent events revealed, there has been no response to this letter.

- [13] Produced during the hearing of the Claimant’s application was a copy of a letter dated 18 November 2015 from ‘The Behar Law Firm’ in Florida, USA, who is stated therein as acting for Sky Ocean. The letter refers to a Complaint having been brought by Sky Ocean against Sergio Linkov (Second Defendant) in Florida, USA, and Sky Ocean having obtained an ‘entry of default’ on 10 September 2015, and a final judgment on 21 September 2015 from the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach, Florida. The final judgment is for the sum of US\$10,976,547.48, being treble damages. The Complaint in this Florida action is said to relate to Mr. Linkov’s unauthorized sale of real property in Florida belonging to the First Defendant, Sky Ocean, and from which Mr. Linkov had misappropriated US\$3.6 million of the sale proceeds, together with \$58,849.16 siphoned by Mr. Linkov from Sky Ocean’s bank accounts. Attached to the said letter is a copy of the ‘Final Judgment’ in the Florida action.

¹⁴ See pages 274 and 275

¹⁵ See pages 115

¹⁶ See page 282

¹⁷ See Tab 18 page 334

[14] It is unclear where the proceeds of sale, or the balance of the proceeds of sale, of the Florida apartment currently are, whether they or a portion thereof are in a bank account in the name of Sky Ocean, or whether they have been misappropriated by Mr Lindov. Suffice it to be said that, pursuant to the Florida judgment, the Second Defendant is a judgment debtor of Sky Ocean in the sum of \$10,076,547.48 plus judgment interest at the rate of 4.75% until the judgment is paid. It is not known whether the judgment has been served on Mr Linkov and what steps, if any, have been taken in execution of the judgment

Steps taken Post-Judgment to obtain documents and information

[15] On 17 November 2014, Walkers, on behalf of the Claimant, wrote to Maples seeking disclosure of the First Defendant's books, records and information relating to the whereabouts of the Company's assets¹⁸. By letter dated 19 November 2015 from Maples, the Second and Third Defendants agreed to provide such documents as are in their possession, but insisted that the originals be preserved by Walkers pending determination of the appeal¹⁹.

[16] On 5 March 2015, following several exchanges of correspondence, Walkers received a DHL package from the Second and Third Defendants, which apparently had been sent since 20 December 2014 and were obtained by Walkers from the local post office and not, as one would expect, by delivery from the local DHL office. From this Mr Pleshakov deduces, perhaps correctly, that the package was deliberately sent by the slowest possible method of delivery and is demonstrative of the Second and Third Defendants acting in an obstructive manner.

¹⁸ See Tab 18, pages 317 to 319

¹⁹ See Tab 18, pages 320 to 321

- [17] The DHL package contained documents relating to the First Defendant²⁰. They consisted of certain corporate documents, including the Memorandum and Articles of Association of the First Defendant, and contained no useful financial information about the Company or its assets. Reference is made at paragraph 33 of the Claimant's Skeleton Argument that, in re-examination, Mr Linkov had given evidence to the effect that the First Defendant was involved in a portfolio of investments through its financial consultants at a bank in Luxembourg, including "a field of construction gravel and sand not far from the city of Smolensk".²¹ No documents or information about such assets were included in the DHL package. However, included was a postcard with the words 'Shit happens. BUT LIFE GOES ON'.²²
- [18] The Claimant also refers to correspondence received on 18 March 2015 by the Company's registered agent, SHRM Trustees (BVI) Limited²³, from a Mr John Galea of International Company Services (Malta) Limited, purporting to act for the 'administrators' of the First Defendant. In this correspondence, Mr Galea states that he understands the Company was transferred to SHRM at the request of a mutual client, Mr Linkov.²⁴ This is said to be further evidence of the Second and Third Defendants not providing all documents in their control relating to the First Defendant. This correspondence was followed by letters from Walkers to Maples on 23 March and 30 April 2015²⁵ requesting copies of the bank statements, documents and information of the First Defendant²⁶.

²⁰ See Tab 18, pages 374 to 545

²¹ See Tab 18, page 284

²² Claimant's Fourth Affidavit para 46 Tab 8

²³ See para 48 and 49

²⁴ See Tab 18, page 370

²⁵ See Tab 18, pages 371 to 373

²⁶ See Exhibit 18, pages 371 to 373

[19] The Claimant contends that the Second and Third Defendants, as nominees and hence fiduciaries of the Claimant, are individually bound to account to him. It is surmise that these Defendants have demonstrated an unwillingness to supply documents and information, which they are bound to provide to the Claimant as their principal and, accordingly, the Claimant has sought the assistance of the court in compelling them to do so. As regards the bank account of Sky Ocean, the Claimant states at paragraph 51 of his Fourth Affidavit, that he has engaged lawyers in Florida “to assist with taking steps to freeze the bank account of Sky Ocean.” However, thus far he has been unable to gain access to the books and records of Sky Ocean from Mr Linkov, and is unaware of what has happened to the proceeds of sale of the Florida apartment.

The Claimant’s Submissions

[20] There can be no doubt that the Second and Third Defendants, who were found to have been holding the Shares in the First Defendant on trust for the Claimant, are bound, as fiduciaries, to account to the Claimant for their actions in relation to the Shares - ***Schmidt v Rosewood Schmidt Ltd*** [2003] 2 AC 709. Furthermore, as the directors of the First Defendant, they are also bound as fiduciaries of the Company to account to the Company for its assets, including its shares in Sky Ocean and its Transaero shares.

[21] However, Mr Carroll makes a different submission. He says that the Second and Third Defendants, as fiduciaries of the Claimant, are bound to account to him in relation to all assets of the trust, including not only the Shares, but also the First Defendant’s shares in Transaero and in Sky Ocean, and the latter’s interest in the Florida apartment. As such, the Claimant is entitled in these proceedings to seek the reliefs set out in the Notice of Application. In support of this proposition, Mr Carroll relied on ***Lewin on Trusts at paragraphs 23-024, 23-025, 23-026, 23-027.***

23-029 and 23-030. In particular, Mr Carroll relies on this statement of principle at paragraph 23-030: –

‘Ordinarily a beneficiary may seek reasonable information and supporting documents about transactions concerning the trust property and property owned by companies owned by the trust entered into by or with the authority of the trustees.’

- [22] The crucial question, therefore, is what constitutes the trust in question and what property is owned by the trust, as found by the court in the judgment of Bannister J.
- [23] In relation to the Florida apartment, Mr. Carroll places some reliance on the statement of Bannister J at paragraph 34 of the judgment where the learned judge, referred to certain email traffic produced in evidence at the trial, as: *“making it clear that the intention was that Mr Pleshakov should own the apartment beneficially.”* Mr Carroll points to this as a positive finding that the Claimant beneficially owns the said apartment, albeit through the instrumentality of the First Defendant and its wholly owned subsidiary, Sky Ocean.
- [24] Reliance was also placed by the Claimant on the court’s jurisdiction and powers under section 24 of the Eastern Caribbean Supreme Court (Virgin Islands) Act Cap. 80, whereby the court may grant injunctions in circumstances where it is just and convenient to do so. I entertain no doubt that the court has the power under section 24 to grant injunctions, whether as pre-trial interim relief, permanent injunctions or post-judgment injunctions as a means of given effect to a judgment of the court.

[25] It is Mr Carroll's submission that the court has the power to grant the reliefs sought by the Claimant in the application, as these are all in aid of the judgment and findings of the court. This submission is underpinned by the further submission that the Second and Third Defendants, as fiduciaries, are bound to account to the Claimant for the handling and use of all property entrusted to them by the Claimant, not just the shares in the First Defendant, but also the Florida apartment, and its interest in Transaero. As I understand Mr Carroll, the First Defendant and Sky Ocean are merely the means or mechanisms by which assets belonging beneficially to the Claimant were held by his trustees, the Second and Third Defendants. It will be important for me to examine the judgement in determining whether this submission has been made out.

The Second and Third Defendants' Submissions

[26] The issue is well joined. Mr Welford, who appeared for the Second and Third Defendants, submits that the application is misconceived to the extent that it seeks injunctive relief and orders for an account and disclosure.

[27] It is his submission that the only 'trust property' involved here, as found by the judgment, are the Shares in the First Defendant. The learned judge found these shares to be beneficially owned by the Claimant. Accordingly, Mr Welford submits, it is not competent for the Claimant to apply, in this way, for the kinds of reliefs and orders which he seeks in the Notice of Application. In his view, these matters can only be pursued by means of a separate action brought by the First Defendant.

[28] Mr. Welford pointed to the reliefs in the Statement of Claim which are limited to declarations of beneficial ownership of the Shares and rectification of the share register. The submission that the trust property extends beyond the Shares he says is simply wrong. He also submitted that paragraph 23-024 of Lewin on

Trusts, cited by Mr Carroll, makes it clear that a trustee is bound to account in relation to 'the property he administers', and the Second and Third Defendants administered the Shares in the First Defendant upon trusts for the Claimant. It is clear that the First Defendant owns the Transaero shares and wholly owns Sky Ocean, which in turn owned the Florida apartment. However, Mr Welford contends that any fiduciary duty *qua* trustee must relate only to the Shares in the First Defendant.

[29] He further submits that this is a classic ***Foss v Harbottle*** situation, whereby it is for the Company, that is, the First Defendant, to make any claim relating to the Florida apartment and any other assets directly or indirectly owned by the First Defendant, and not the Claimant as the shareholder of the First Defendant. Any loss which the Claimant may be said to have suffered would be merely 'reflective' of the First Defendant's loss and therefore, on well-established reflective loss principles, not claimable by the Claimant. In short, the Claimant is not competent to seek the reliefs in the application and, in any event, the reliefs sought would have to be by way of a separate claim filed by the First Defendant, unless the Claimant is able to make out some loss or damage different or separate from that which the Company would have sustained.

[30] Mr Welford also submits that this application is not, strictly speaking, enforcement of the order made by Bannister J, which relates simply to rectification of the share register. This order having been given effect to in furtherance of the declarations of beneficial ownership of the Shares made by the judge, there is nothing further which the Second or Third Defendants are required to do by virtue of the judgment or orders of the court. Accordingly, there is and has not been a breach of the order by the Second Defendant or Third Defendant. In his submission, the Claimant's application is simpliciter a claim' for breach by trustees of their fiduciary duty, a

matter with which the court was not concerned in the Claim, and in respect of which no finding or order has been made by the court. Accordingly, judgment having been rendered, the claim has now merged with the judgment of the court, and it is impermissible for the Claimant to seek the kind of orders and reliefs which he now seeks against the Second and Third Defendants.

[31] That these are claims to be properly made by the Company, Mr Welford contends, was recognised by the Claimant himself and those representing him, in correspondence passing between the lawyers post-judgment, and also in the Notice of Application. In this regard, Mr Welford took me to letters of 5 December 2014 and 10 February 2015²⁷ from Walkers, whereby they requested that documents be returned to the Company, and complained of the Company not being supplied with information. I was also taken to ground (7) of the Claimant's Notice of Application filed 13 May 2015²⁸, which states in part: "*The Respondents have been held to be nominees of the Company.*" Mr Welford emphasises that nowhere is it alleged in the Notice of Application that there has been a breach of fiduciary duty on the part of the Second and Third Defendants. Instead, the application alleges un-particularised breaches of duty, prompting the rather pointed characterization from him that this is 'a trial by application pleaded by Skeleton Argument'.

[32] Specifically, as regards the application for injunctive relief, Mr Welford submits that they each relate to assets of the First Defendant and not of the Claimant. Any loss which the Claimant may suffer would be reflective of the loss the Company would have suffered - ***Johnson v Gore Wood & Co*** [2002] 2 AC 1 at 225E-F, and ***Providence Estate Limited and Another v Walter Wood III and Others*** - Claim

²⁷ See Tab 18 pages 326 and 332 of the Hearing Bundle

²⁸ See page 49

No. 20 of 2013 - Montserrat²⁹. He submits, further, that the fiduciary duties relative to the Company's assets are owed to the First Defendant and not to the Claimant, whereas the fiduciary duties owed to the Claimant relate to the Shares in the First Defendant.

[33] Turning to the 'freezing orders' sought by the Claimant at paragraphs 5 and 6 of the Notice of Application Application, Mr Welford submits that this relief cannot get off the ground, since there is not even a cursory attempt made to address the legal requirements for obtaining such an injunction, including risk of dissipation and balance of convenience. He also contends that the bald assertion at paragraph 53 of Mr Pleshakov's Fourth Affidavit regarding, inter alia, dissipation of the assets of Sky Ocean, is not sufficient to satisfy the requirements for obtaining such an injunction.

Likewise, no attempt has been made to address issues relating to service out of the jurisdiction of any claim brought by the Claimant - ***Nilon Limited and Others v Royal Westminster Investments SA and Others*** [2015] UKPC 2

[34] As regards the letter of 18 November 2015 from 'The Behar Law Firm', he submits that, since the judgment in this matter in BVI, the Second and Third Defendants were removed as shareholders and directors of the First Defendant. As a result, since then the Claimant has been in control of the First Defendant and its subsidiary, Sky Ocean and, accordingly, it is inconceivable that he did not know of the court proceedings taken out in Florida by Sky Ocean.

[35] As regards the request for disclosure of financial information of the First Defendant, Mr Welford stated that one such account was disclosed in 2013 which had no cash in it. Specifically as regards the interest of the First Defendant in

²⁹ See para 63

Transaero, a Russian airline business, the Second and Third Defendants contend that Transaero is in dire financial straits, and is either bankrupt or facing imminent bankruptcy. This conclusion is based on documents exhibited as “AD-1” to the Affidavit of Ms. Arabella di Iorio filed 19 November 2015.

- [36] Finally, Mr Welford submits that if the court is not minded to dismiss the application, it should be adjourned pending the outcome of the appeal since, if his clients succeed in their appeal, all relief being claimed in the application will fall away, and his clients would have suffered significant prejudice if they were forced to disclose the documents and information being sought. This aspect is more substantively addressed at paragraphs 8 to 14 of the Second and Third Defendants’ Skeleton Argument received 19 November 2015, which I have fully considered. Furthermore, he submits that the application is not urgent as it was filed in May 2015, and the court did not accept that it was urgent based on the certificate of urgency filed by the Claimant on 15 May 2015³⁰.

Letter from First Defendant

- [37] Thus far, the First Defendant has taken no part in these proceedings. However, during the hearing of the application, Mr Carroll produced a copy of a letter dated 19 November 2015 (the day before the hearing) which purports to have been sent by the First Defendant, Sky Stream Corporation, on its letterhead and signed by a Sergey Tkachenko, described therein as a director of the Company. It is addressed to Maples and Calder in their capacity as the legal practitioners for the First and Second Defendants. By this letter, the First Defendant refers to the Claimant’s application before me and draft order filed 13 May 2015, and makes a “request by Sky Stream addressed to Mr Linkov and Mrs Kazantseva that they immediately take the steps set out at paragraphs 1 to 7 of the Draft Order.”

³⁰ See Tab 6

[38] As far as I was made aware during the hearing, this request, having just been received, had not been complied with up to that point in time. Further, the Claimant, as I understand Mr. Carroll, does not rely on this letter as a ground or basis for the court granting any of the reliefs.

Analysis

[39] As the statement of claim in this matter reveals, the claim was for declarations that the Second and Third Defendants each held their shares in the First Defendant in trust for the Claimant, and for consequential rectification of the share register of the First Defendant to have the Claimant registered as the owner of the Shares. On this claim, Bannister J ruled in favour of the Claimant and made the appropriate declarations and order for rectification of the share register of the First Defendant. This order has been given effect to and the shares registered in the Claimant's name.

[40] The Claimant's pleaded case rested, almost exclusively, on his intention and plan to acquire a substantial stake in Transaero from a group of Russian companies associated with a Russian businessman Boris Berezovsky ("the BB Group"). It is pleaded that, at the time of the negotiations for the acquisition of this interest, the Claimant already held more than 32% of Transaero's issued shares.³¹ Certain matters are pleaded at paragraph 5 relative to advice rendered by the Second Defendant at meetings and discussions in Moscow in 2005 with the Claimant, as to how to best structure this acquisition. This is said to have included the Second Defendant taking steps, on behalf of the Claimant, 'to have a suitable investment company incorporated.' It is for this purpose the First Defendant company was incorporated in BVI by the Second and Third Defendants. The Claimant also

³¹ See para 4 SOC

pleaded that, in consideration of the Second and Third Defendants agreeing to act as the Claimant's nominee shareholders and directors of the investment company, the Claimant agreed to pay them a monthly salary of EUR 4,000.³²

[41] The Claimant pleaded further that the Second and Third Defendants signed a Trust Deed on 28 December 2005 as settlor "which evidence the trust over the Shares in the Claimant's favour."³³ It is significant that the deed of trust purported to create a trust that the Shares only, and not any other property. The learned judge found that while the Trust Deed, which was never signed by the Claimant, did not create any trust of the Sky Stream shares, it "is compelling evidence that it was the intention of the [Second and Third Defendants] that Sky Stream was to be and remain under the control of the [Claimant]."³⁴

[42] A number of transactions by the First Defendant, some of purchase and others of sale, of shares in Transero were pleaded at paragraph 11 of the statement of claim, as being carried out "on instructions given by the Claimant to the Second and Third Defendants, and for the benefit of the Claimant and his family." These transactions, and the involvement of the Claimant, were found by the learned judge to have taken place as pleaded.³⁵

[43] There is no pleading or mention in the statement of claim of the incorporation of Sky Ocean and the purchase of the Florida apartment. However, this was a matter addressed in the evidence given on both sides. At paragraph [32] of the judgment, Justice Bannister, having stated that little is known of what happened to the proceeds of sale by the First Defendant of some of its Transaero shares, states: 'It

³² See para 6 SOC

³³ See para 8 SOC

³⁴ See para 56 Judgment

³⁵ See paras 24 to 28 Judgment

is known that a little short of \$4 million was spent upon the acquisition of an apartment in Miami for the use of Mr Pleshakov and Mr Lindov spoke vaguely about an investment in an enterprise exploiting sand and gravel deposits in the Smolensk region...At trial Mr Pleshakov expressed himself uninterested in any of the current assets of Sky Stream other than its remaining Transasero shares and the shares in its wholly owned subsidiary ('Sky Ocean') which held the apartment in Miami (and which now, presumably, holds the proceeds of its sale).' This is the context in which the learned judge stated at paragraph [34] that 'the intention was that Mr Pleshakov should own the apartment beneficially'.

[44] Importantly, at paragraph [52] of the judgment, the learned judge stated: "At times it seemed as though what was in issue was the beneficial ownership of the Transaero shares. It is not. **The sole question in this case** is whether the [Second and Third] Defendants acquired Sky Stream pursuant to an arrangement with Mr Pleshakov that they should do so as his nominees." (emphasis added) The learned judge found that the First Defendant "was acquired on 14 December 2005 for the purpose of taking a transfer, to be procured at some unknown time in the future by Mr Pleshakov, of Transaero shares."³⁶ Finally, at paragraph [61] the learned judge found as a fact that the Third Defendant had drawn a monthly sum of EUR 4,000 since April 2007, ostensibly as payment for her acting as nominee of the Claimant, and he also accepted the Claimant's evidence that he accounted to the Second Defendant from time to time in cash for whatever was due to him.³⁷

[45] It is pellucidly clear from a reading of the judgment that the learned judge was concerned with only one issue, namely, the beneficial ownership of the Shares in the First Defendant, as he said. In fact, all of his analysis from paragraph [52]

³⁶ See para 53 Judgment

³⁷ See para 61 Judgment

onwards puts this beyond doubt. He was not dealing with, and the claim was not concerned with, the beneficial ownership of either the Transaero shares or the Florida apartment and, accordingly, he made no findings in relation thereto.

[46] The judgment was based on a finding of a constructive trust between the Claimant and the Second and Third Defendant, as it related to the Shares held by them in the First Defendant. The claim was not concerned with whether the Second and Third Defendants held, through the First Defendant, the shares in Sky Ocean in trust for the Claimant or whether, through that company, they held the Florida apartment in trust for the Claimant. Neither was the claim concerned with whether the Second and Third Defendants held, through the First Defendant, the Transaero shares in trust for the Claimant³⁸.

[47] Turning to the Claimant's application, paragraph 1 seeks orders for the delivery-up of certain documents relating to the First Defendant. In my judgment this is an application which can only be made by the First Defendant as the person entitled to its documents. These are not the class of documents to which a shareholder is entitled to request copies pursuant to section 100(2) of the BVI Business Companies Act, 2004. It is therefore not competent for such a claim or application to be made by a shareholder of the First Defendant. The latter company is a party to these proceedings in which the past directors and shareholders are also parties. It is for the Company to bring such an application against its former directors and shareholders.

[48] The reliefs sought at paragraph 3 (note there is no numbered paragraph 2) of the application, relate to providing a list of all officers and service providers of the First Defendant; and a full accounting of the Company's dealings with its assets since

³⁸ See para 52 Judgment

its incorporation, including its shares in Transaero Airlines, showing their physical location, details of all payments and details of assets transferred and a detailed schedule of all payments, including distributions or dividends, made by the Company to the Second and Third Defendants. Again, these are not the type of documents and information which a shareholder is entitled to demand or to receive from the directors of the company pursuant to section 100 (2) of the BVI Business Companies Act, 2004. To be so entitled, a shareholder must be able to point to some right or entitlement either under the Articles of Association or a separate shareholders agreement. Neither of these apply here and, accordingly, the Claimant's application in this respect is misconceived.

[49] At paragraph 4 of the application, the Claimant seeks an order requiring the Second and Third Defendants to 'ensure that all assets belonging either directly or indirectly to the Company will be brought under the control of the Company and its directors.' This smacks of a claim for recovery from third parties of assets belonging to the First Defendant, and is therefore one which only the owner of the assets or property, the Company, is competent to bring. There can arise, in circumstances where the wrongdoers are in control of a company, that a shareholder (usually a minority shareholder) can bring an action, in the name and on behalf of the company, against the wrongdoers and others to recover property owned by the company. This is not such a case.

[50] Paragraph 5 seems targeted mainly the proceeds of the sale of the Florida property. There is much uncertainty as to what has happened to these proceeds and where they are currently being held, assuming they have not been fully spent. The Florida apartment has been shown to be property owned directly by the First Defendant. The statement by Bannister J at paragraph 34 of the judgment that the "intention was that Mr Pleshakov should own the apartment beneficially," was not

a finding that the apartment was being held under trust by the Second and Third Defendants for the Claimant. Simply put, this was not the case, as the Complaint filed by Sky Ocean in the court in Florida illustrates. That Complaint was brought, not by or on behalf of the Claimant, but by Sky Ocean for recovery from the Second Defendant the proceeds of sale of its said property in the sum of \$3.5 million and for treble damages. This complaint has now crystalized into judgment (albeit in default) in favour of Sky Ocean.

[51] It is therefore not correct in principle for the court to grant this relief in favour of the beneficiary of the trusts of the Shares in the First Defendant. Furthermore, to the extent that past directors of a company may have misappropriated assets belonging to the company, the company can bring an action to recover its property or to be compensated for its loss. This is Sky Ocean's loss, and to the extent that a shareholder of its parent has suffered loss as a result of such misappropriation by a past director or shareholder, that loss would be reflective first of Sky Ocean's loss and, indirectly, that of the First Defendant, and thus not recoverable by the Claimant, as a shareholder - **Johnson v Gore Wood & Co (A firm) supra**.

[52] Paragraph 6 of the application seeks an order preventing the Second and Third Defendants from dissipating 'any assets derived from the Company, including any payments, distributions, or dividends.' Mr Welford submits that this is akin to an application for a worldwide freezing order. By that type of order, an applicant seeks to 'freeze' the assets of a defendant so as to ensure that, should the claimant succeed in its claim, there will be assets of the defendant available to satisfy the judgment. Alternatively, such an application seeks to freeze assets belonging to a claimant in the hands of a defendant, especially in the case of a constructive trust giving rise to a proprietary claim. The type of relief sought by the Claimant falls within this latter type of injunction. In this instance, the asset or

property, such as dividends or distributions would, if paid out, be derived from the Shares which were held by the Second and Third Defendants' in trust for the Claimant, and for which they are liable to account to the Claimant for any benefits or property qua shareholders. Accordingly, the Claimant would be entitled to have any such property 'frozen' pending a full accounting and payment over. While, there is no evidence before me of any such payments, whether of dividends or distributions, having actually been made to or received by the Second or Third Defendants, I am nevertheless prepared to grant this relief post-judgment.

- [53] As regards paragraph 7 of the Notice of Application, whereby the Claimant seeks an order restraining the Second and Third Defendants from holding themselves out as directors of the First Defendant, no cogent evidence has been produced to show that they or any of them are currently so acting. Accordingly, I decline to make such an order.

Conclusion

- [54] For the reasons set out above, the application for reliefs at paragraphs 1, 3, 4, 5 and 7 of the Notice of Application filed 13 May 2015 by the Claimant are dismissed. The relief at paragraph 6 is granted.
- [55] Cost of the application to the Second and Third Defendants reduced by 30 per cent to take account of the Claimant's success in respect of the reliefs at paragraphs 6 and 9 of the application, (albeit at a lesser sum).

Gerard St.C Farara QC
Judge Commercial Court (Ag)