2022 UKPC 35
Privy Council Appeal No 0058 of 2020

JUDGMENT

Glory Trading Holding Ltd (Appellant) v Global Skynet International Ltd and another (Respondents) (Anguilla)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Anguilla)

before

LORD HODGE
LORD BRIGGS
LORD HAMBLEN
LORD LEGGATT
LORD STEPHENS

JUDGMENT GIVEN ON
30 September 2022

Heard on 19 July 2022

Appellant
Edward Knight
(Instructed by Costigan King (London) and Carter and Associates)

Respondent
Jean M Dyer
Liska Hutchinson
(Instructed by Blake Morgan LLP and JM Dyer & Co (Anguilla))

LORD HAMBLEN:

Introduction

1. This appeal concerns the legal and beneficial ownership of an Anguillian company, Skynet Ltd ("Skynet"), and, indirectly, the beneficial ownership of a plot of land in Israel which is owned by it.

2. The courts below held that Skynet had been purchased by Holyland International Ltd ("Holyland") under a Share Purchase Agreement ("the Agreement") dated 5 May 2000. Pursuant to the Agreement Holyland had delivered to it the only issued share in Skynet, being one fully paid bearer share. On 28 December 2001 Holyland changed its name to Global Skynet International Ltd ("Global"), the first respondent. On 17 June 2002 the bearer share held under Certificate no. 1 was transferred to Global. This was effected by the cancellation of share Certificate no. 1 and the issue to Global of Certificate no. 2. Global thereby became the owner of the only issued share in Skynet, representing a 100% interest in the company.

3. On 21 May 2010 Mr Hefti, a director of Skynet, caused Skynet: (1) to issue the entire unissued share capital (of 49,999 shares) to a Mr Kravchuk; (2) to transfer the share under Certificate no. 2 to Mr Kravchuk; (3) to cancel Certificate no.2, and (4) to issue Mr Kravchuk with Certificate no. 3 for all 50,000 shares. Ownership of Skynet was thereby transferred from Global to Mr Kravchuk.

4. On 25 August 2011 Mr Kravchuk transferred the shares in Skynet to the appellant, Glory Trading Holding Ltd ("Glory Trading") whose shareholding was registered under Certificate no. 4. On 15 October 2013 Mr Dobvyna, as a director of Glory Trading, transferred 49,999 shares to Glory Trading under Certificate no. 5 and transferred the remaining one share to unallotted shares.

5. On 9 May 2014 Global and its beneficial owner, the second respondent, Mr Bloch, a Swiss national, commenced the present proceedings, alleging that Global was the ultimate beneficial owner of Skynet and that in cancelling the share issued to Global and transferring all of the shares in Skynet to Mr Kravchuk, Mr Hefti was acting for an improper purpose, in breach of his fiduciary duty and for his own personal benefit and that the transfer ought to be set aside.

6. In a judgment dated 27 September 2018 the High Court of Anguilla (Ramdhani J) found in favour of Global and Mr Bloch, ordered that the transfer of the shares in

Skynet to Mr Kravchuk should be set aside, and declared that Global was the ultimate beneficial owner of Skynet.

7. On 3 October 2019 the Eastern Caribbean Court of Appeal (Pereira CJ, Blenman JA and Webster JA(Ag)) gave judgment dismissing the appeal. Glory Trading now appeals to the Board.

The appeal

8. The central issue on the appeal is whether there are grounds for challenging the finding of the trial judge, upheld by the Court of Appeal, that in cancelling the share issued to Global and transferring all of the shares in Skynet to Mr Kravchuk, Mr Hefti was acting for an improper purpose, in breach of his fiduciary duty and for his own personal benefit.

9. It is accepted that the judge directed himself correctly in law by reference to the Board's decision in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 (a case involving the exercise of a director's power to issue shares). As Lord Wilberforce stated in that case at p 835:

> "In their Lordships' opinion it is necessary to start with a consideration of the power whose exercise is in question, in this case a power to issue shares. Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not. In doing so it will necessarily give credit to the bona fide opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls."

10. The determination of the purpose for which the power was exercised generally requires an investigation into the state of mind of those who acted. As Lord Wilberforce stated at pp 834-835:

> "Self-interest is only one, though no doubt the commonest, instance of improper motive: and, before one can say that a fiduciary power has been exercised for the purpose for which it was conferred, a wider investigation may have to be made. This is recognised in several well-known statements of the law. Their Lordships quote the clearest which has so often been cited.
>
> '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 materials which genuinely throw light upon that question of the state of mind of the directors so as to show whether they were honestly acting in discharge of their powers in the interests of the company or were acting from some bye-motive, possibly of personal advantage, or for any other reason.' *(Hindle v John Cotton Ltd (1919) 56 ScLR 625* , 630-631, *per* Viscount Finlay.)"

11. In the light of this guidance the judge considered the intention and motive of Mr Hefti in cancelling the only share in Skynet, the registered share issued to Global, and then issuing and allotting 50,000 shares in Skynet to Mr Kravchuk. His findings were as follows (at paras 103-107):

> (i) Mr Hefti was intimately involved in the negotiations and execution of the Agreement and the purchase of the land in Israel and knew that Global was entitled to ownership of Skynet.
>
> (ii) Mr Hefti knew that Global, as its sole shareholder, was the owner of Skynet.
>
> (iii) Mr Hefti's action of cancelling Global's share and issuing shares to Mr Kravchuk had the effect of diluting Global's shareholding from 100% to 0%.

(iv) There was no evidence of any bona fide or other corporate purpose, such as the need to raise capital, for the issue and allotment of the shares to Mr Kravchuk.

(v) Mr Hefti was acting for his own personal benefit and without regard to the interests of the company.

(vi) It is probable that Mr Hefti was acting to repay Mr Kravchuk for some debt owed to him, as stated in para 29 of Mr Bloch's witness statement.

(vii) Mr Hefti acted purely for his own self interest and not bona fide for any corporate purpose.

(viii) His actions were "clearly fraudulent".

(ix) It was not pleaded or averred that Mr Kravchuk was a bona fide purchaser for value without notice. He knew of Global's claim to be owner of Skynet as the holder of a share representing a 100% interest.

12. These findings were made on the basis of the documentary evidence and the oral evidence of Mr Bloch and Mr Kravchuk. Mr Hefti did not give evidence or otherwise participate in the proceedings, although the claim form was served on him.

13. The Court of Appeal upheld the judge's decision on this issue, stating as follows at para 52:

> "It is noteworthy that the learned judge found as a fact that the shares were issued by Mr Hefti for an improper purpose in the context of Mr Hefti's undoubtable knowledge that the legal and beneficial rights to all of the capital stock in Skynet was held by Global Skynet….Applying the principles stated in **Howard Smith Ltd v Ampol Petroleum Ltd**, I have no doubt that the learned judge correctly found that Mr Hefti issued the shares to Mr Kravchuk for an improper purpose and that he was in breach of his fiduciary obligations… ."

14. The finding that in cancelling Global's share and issuing 50,000 shares to Mr Kravchuk Mr Hefti acted for an improper purpose and in breach of fiduciary duty is a

concurrent finding of the trial judge and the Court of Appeal. It justifies the judge's setting aside of those actions regardless of whether Mr Hefti was acting fraudulently, although the judge so found.

15. As frequently emphasised, it is the settled practice of the Board not to go behind concurrent findings of fact made by the courts below save in very limited circumstances. Unless there is a legal error undermining those findings, it will generally be necessary to show that there has been some miscarriage of justice or violation of a principle of law or procedure which means that what has occurred is not in a proper sense a judicial procedure – see *Devi v Roy* [1946] AC 508, 521; *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11, paras 4-7; *Desir v Alcide* [2015] UKPC 24, paras 24-26; *Al Sadik v Investcorp Bank BSC* [2018] UKPC 15, paras 43-45; *Pickle Properties Ltd v Plant* [2021] UKPC 6, para 3.

The appellant's case

16. Mr Edward Knight, counsel for Glory Trading, has said all that could possibly be said in support of the appeal. He put forward two grounds for setting aside the findings made by the courts below. The first is that in making those findings the courts were unduly influenced by their erroneous view that Global had a proprietary right in the unissued shares. The second is that they wrongly inverted the burden of proof.

17. In relation to the first ground, Mr Knight relies in particular on the following passage at para 59 of the judge's judgment:

> "The issuance of only one share issued as a Bearer Share together with the other terms of the [Agreement], 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 [Agreement], Skynet could not … dispose of its unissued shares to someone other than Holyland"

This passage was cited with apparent approval by the Court of Appeal at para 13 of its judgment.

18. Mr Knight also relies on the judge's statement in para 104 of his judgment that:

> "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…"

Mr Knight submits that "all of the capital stock" means the issued and unissued shares and that this was an important part of the judge's reasoning.

19. In a new argument, not advanced below, Mr Knight submits that the Agreement did not transfer any proprietary interest in unissued shares to Holyland, that the courts mistakenly thought otherwise and that this fatally infected their reasoning.

20. Assuming, without deciding, that it is open to Glory Trading to put forward this new argument, the Board rejects it. The essence of the reasoning of the courts below was that Global was the legal and beneficial owner of Skynet and that Mr Hefti knew this at the time of the purported share cancellation and share issue in 2010. Whether that involved legal and beneficial ownership through the one bearer share held or through all the company's shares, including unissued shares, is nothing to the point. It is the fact of legal and beneficial ownership which matters. On the judge's findings, as Mr Hefti knew and intended, the cancellation of the one bearer share and the issue of the 50,000 shares to Mr Kravchuk would divest Global of that ownership.

21. It follows that it is not necessary to consider the detailed arguments put forward by the parties as to the proper construction of the Agreement. Nor is it necessary to consider the arguments advanced challenging the ostensible authority for concluding the Agreement on behalf of Skynet or the ratification by Skynet of the Agreement, as to which there are again concurrent findings by the courts below. Regardless of the contractual history, what matters is the fact that Global was the legal and beneficial owner of Skynet in 2010 and indeed had been ever since it became the owner of the only share in the company. This is effectively accepted by Glory Trading who acknowledge in their written case at para 44 that the Agreement was put into effect through Global becoming "the owner of one share in Skynet, being the only share in issue".

22. In relation to the second ground, Mr Knight submits that the courts below wrongly considered that it was for Glory Trading to establish a proper purpose for the exercise by Mr Hefti of his fiduciary power, whereas the burden was on the respondents to prove an improper exercise of that power. In this connection he refers in particular to the judge's statement at para 104 that:

> "....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."

He also refers to the Court of Appeal's statement at para 52 of its judgment that:

> "Ms Carter could not establish that the allotment of the shares by Mr Hefti was for a proper purpose".

23. The Board does not consider that these passages are addressing the legal burden of proof. In so far as they are addressing the burden of proof at all, they reflect the reality that the evidential burden of proof had shifted to Glory Trading to explain the purpose of the exercise of the fiduciary powers. The context was the exercise of those powers to deprive the 100% owner of the company of any continuing ownership in it and to confer that ownership on Mr Kravchuk for no apparent consideration. That clearly called out for explanation - but there was none.

24. In any event the judge's conclusion did not rest on the absence of proof of purpose. He positively found that there was a purpose, and that that purpose was the personal benefit of Mr Hefti. It was open for him to do so.

25. Para 29 of Mr Bloch's witness statement, to which the judge referred, stated that:

> "During a conversation with Mr Hefti in or about 2012, he revealed that while he was acting in his role as bank manager, he performed various acts which were in excess of his authority. These actions resulted in losses to some of the bank's customers including Andrey Kravchuk. When Andrey Kravchuck discovered that Mr Hefti caused him severe financial losses, he threatened that he would act against him by various means. To evade Andrey Kravchuck's long arm, Mr Hefti conspired and acted with him in order to transfer full ownership of Skynet to him."

26. Whilst this was hearsay evidence, it was not and is not disputed that it was admissible. There was no evidence from either Mr Hefti or Mr Kravchuk to gainsay it. Whilst Mr Hefti did not give evidence, Mr Kravchuk provided a witness statement and gave oral evidence. He did not, however, address this allegation, nor did he put forward any explanation for the issue of the shares to him.

27. The judge found as follows in relation to the evidence of Mr Bloch at para 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."

28. In all the circumstances, it was clearly open to the judge to accept the evidence of Mr Bloch in para 29 of his witness statement and to find, as he did, that Mr Hefti acted to repay Mr Kravchuk for a debt owed to him. That is manifestly an improper purpose and breach of fiduciary duty. It also provides ample justification for the judge's finding of fraud.

29. For all these reasons no sufficient reason has been shown for the Board to go behind the concurrent findings of fact made by the courts below or to otherwise interfere with the judge's findings, as upheld by the Court of Appeal.

Conclusion

30. The Board will humbly advise His Majesty that the appeal be dismissed.