Trinity Term

[2021] UKPC 15

Privy Council Appeal No 0084 of 2019

JUDGMENT

Pleshakov (Appellant) v Sky Stream Corporation and others (Respondents) (British Virgin Islands)

From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

before

Lord Briggs

Lady Arden

Lord Sales

Lord Hamblen

Lord Stephens

JUDGMENT GIVEN ON

14 JUNE 2021

Heard on 28 January 2021

Appellant	Respondents
Robert Levy QC	Barbara Dohmann QC
Daniel Warents	Ajay Ratan
Oliver Clifton	Barnaby Lowe
(Instructed by Blake Morgan LLP (Oxford))	(Instructed by GSC Solicitors LLP)

LORD SALES:

1.
This case is concerned with questions of trust law in respect of the beneficial ownership of the shares in the first respondent ("SSC") and the proper approach for an appellate court in deciding whether to overturn findings by a judge at first instance.

2.
This is an appeal from the decision of the Eastern Caribbean Court of Appeal which allowed an appeal against the decision of Bannister J ("the judge"). The judge had found that the appellant ("Mr

Pleshakov") was the beneficial owner of the shares in SSC, which were registered as to 50% in the name of the second respondent ("Mr Linkov") and as to 50% in the name of the third respondent ("Ms Kazantseva"). SSC played no part in the appeal, so I will refer to Mr Linkov and Ms Kazantseva together as "the respondents". Mr Pleshakov submits that the Court of Appeal was wrong to overturn the decision of the judge and to dismiss Mr Pleshakov's case as to the beneficial ownership of the shares.

The factual background

3.
Mr Pleshakov is a prominent Russian businessman. In 1990 he was behind the foundation of a Russian company, Transaero Airlines OJSC ("Transaero"), which carried on business providing air travel from the Russian Federation. Mr Pleshakov was the Chairman and Chief Executive Officer of Transaero and, together with members of his family, held a significant shareholding in it.

4.
The judge found that since at least 2005 Mr Pleshakov has had as one of his aims the achievement of direct or indirect shareholder control of Transaero. In 2005 he held, directly or indirectly, about 32% of Transaero's shares and members of his family held about a further 11%. At that time, a group of companies under the control of another prominent Russian businessman, the late Boris Berezovsky, and his associates ("the Berezovsky Group") held about 43% of Transaero's shares.

5.
Mr Linkov is a Russian advocate, now resident in Germany. At the material time he was practising as senior partner in the Russian law firm Linkov and Partners. From about 1998, Mr Linkov had been a friend and business associate of Mr Pleshakov.

6.
Ms Kazantseva is also a lawyer and partner in Linkov and Partners. She started work with the firm in 2002 and became a partner in 2004. In 2012 she married Mr Linkov.

7.
According to Mr Pleshakov, in late 2005 or early 2006 he caused arrangements to be entered into for the purchase of the Berezovsky Group's shareholding in Transaero. The precise details of this transaction were not clarified at trial, but the judge found that Mr Pleshakov did arrange for the transfer of 19.99% of the shares in Transaero to SSC on 31 March 2006.

8.
The respondents arranged for SSC to be incorporated in the British Virgin Islands on 14 December 2005. It has an authorised share capital of 50,000 shares of US$1 each. Upon its formation, half those shares were allotted to Mr Linkov and the other half to Ms Kazantseva. They were also appointed as SSC's directors. They remained its only directors until 27 December 2010, when Mr Pleshakov and his daughter Tatiana were appointed in addition. But the Pleshakovs were removed by members' resolution on 30 March 2013, leaving Mr Linkov and Ms Kazantseva as the only directors.

9.
The present dispute concerns the circumstances in which SSC was incorporated and the beneficial ownership of the shares in SSC at the time they were first allotted to Mr Linkov and Ms Kazantseva. The respondents raise an issue regarding the nature of Mr Pleshakov's case about this, so it is necessary to say something about the pleadings. Mr Pleshakov's case is that SSC was set up on his

instructions and for his benefit and that the shares in it are beneficially owned by him. In his claim form issued in August 2013 he claimed declarations against the respondents that the shares in SSC registered in their names “are held on trust for [Mr Pleshakov] absolutely”. Such declarations were also set out in the relief sought in Mr Pleshakov’s Statement of Claim.

10.
In paragraph 5 of the Statement of Claim, Mr Pleshakov pleaded that at meetings between Mr Linkov and himself in Moscow in late 2005 Mr Linkov advised him that if the effect of acquisition of the Berezovsky Group shares in Transaero were that he held more than 50% of the shares in that company he would be required to make a bid to acquire all of its shares held by other shareholders as well; that this could be avoided if part of the Berezovsky Group shares in Transaero were held on Mr Pleshakov’s behalf by a newly formed investment company, the shares in which were held on Mr Pleshakov’s behalf but were not registered in his name; and that Mr Linkov was willing, if instructed by Mr Pleshakov, to take the steps necessary to put this arrangement in place and, together with Ms Kazantseva, to hold the shares in the investment company on behalf of Mr Pleshakov and to act as its directors. At paragraph 7, Mr Pleshakov pleaded that on his instructions Mr Linkov caused SSC to be incorporated for this purpose, with the shares held in the names of the respondents.

11.
In paragraph 6 of his Statement of Claim, Mr Pleshakov also pleaded an agreement between himself and Mr Linkov and Ms Kazantseva according to which, in consideration for them agreeing to act as nominee shareholders and directors of SSC, he agreed to pay each of them a monthly salary of €4,000.

12.
The respondents denied that SSC was incorporated on Mr Pleshakov’s instructions or for the purpose pleaded by him. Their case is that they set up SSC to be beneficially owned by themselves. They say that Mr Pleshakov negotiated the acquisition of the 19.99% shareholding in Transaero on behalf of SSC, pursuant to a power of attorney from SSC and a board resolution of SSC dated 3 January 2006.

13.
In support of his case, Mr Pleshakov relies on a Deed of Trust of the shares in SSC dated 28 December 2005 signed by the respondents as settlors, naming Mr Pleshakov as trustee, which they gave him in blank form with space for the name of the beneficiary or beneficiaries to be filled in (“the Deed of Trust”). Mr Pleshakov maintains that the Deed of Trust and the share certificates issued by SSC in the names of the respondents were provided to him as evidence of, and assurance for, the fact that the respondents held the SSC shares on trust for him. The respondents admit signing the Deed of Trust but say that it was not effective to create a trust of the SSC shares and that its purpose was to enable Mr Pleshakov to continue to act for SSC should the power of attorney not be renewed after the expiry of its three year term. The respondents admitted that they provided the SSC share certificates to Mr Pleshakov, but only for the same purpose and in order for them to be translated into Russian and notarised. They point out that the shares are not bearer shares so possession of them does not carry any rights in relation to them.

14.
The respondents’ case at trial was that Mr Pleshakov provided them with an opportunity to acquire the shareholding in Transaero at a favourable price by way of belated remuneration for their having acted unpaid for Transaero in litigation in 2003/4 which threatened its existence. They set up SSC as the vehicle for them to acquire this shareholding and they themselves paid the costs of incorporation in the sum of US$1,000, provided by Ms Kazantseva. The Transaero shareholding was acquired by

SSC from a company called Housecroft Holdings Ltd ("Housecroft") at a price of US$55,000 using funds provided by Mr Linkov. The respondents did not admit that Housecroft was associated with the Berezovsky Group. They said that the money for the purchase price and the costs of incorporation had not been reimbursed by Mr Pleshakov.

15.
Against this, Mr Pleshakov said that the respondents had been reimbursed these costs out of large sums in cash given by him to Mr Linkov from time to time and out of a monthly salary paid to them by SSC using the proceeds from sales of parcels of Transaero shares carried out at his direction from time to time. Mr Pleshakov also relied on the fact that all sales of the Transaero shares owned by SSC had taken place on his instructions, including on one occasion at a heavily discounted price to an associate of his which he agreed as a favour to that associate. These points were disputed by the respondents.

16.
By early 2013 Mr Pleshakov had fallen out with the respondents. On 27 May 2013 Mr Pleshakov demanded that they transfer their shares in SSC to him, but they refused. They also denied that Mr Pleshakov was entitled to have SSC's register of members rectified to show him as their owner. Therefore, Mr Pleshakov commenced this claim against them.

17.
The trial before the judge took place between 27 and 31 October 2014. The judge heard evidence from Mr Pleshakov and the respondents and from Ms Olga Simonova, secretary to the board of Transaero, who worked closely with Mr Pleshakov at the relevant time.

18.
In a careful and balanced judgment handed down on 12 November 2014, the judge rejected parts of Mr Pleshakov's account of events. In particular, the judge found that Mr Pleshakov and Mr Linkov did not meet in Moscow in late 2005. However, he made critical findings of fact in Mr Pleshakov's favour and disbelieved the respondents' evidence about what had happened and why. The principal findings made by the judge were as follows.

19.
The judge found that in 2005 Mr Pleshakov's objective was to gain control of Transaero as set out in para 4 above and that it was improbable that he would have arranged for the acquisition of 19.99% of the shares in it to direct them into the hands of the respondents for their benefit. He also found that the respondents proceeded to incorporate SSC without knowing any of the details of the opportunity to acquire shares in Transaero. He accepted that Ms Kazantseva used US$1,000 of her own money for that purpose, but this had been more than covered by her drawings of salary of €4,000 per month from SSC between April 2007 and March 2013 and he found that she had been indemnified in this way.

20.
The judge placed weight on an email dated 20 December 2005 from Mr Linkov to Ms Simonova, for Mr Pleshakov, which stated that "everything is proceeding according to plan" and that SSC was to be "our new partner". The judge interpreted the email in its context as referring to the fact that the respondents were assisting Mr Pleshakov in a plan of his and disbelieved Mr Linkov's explanation for it. He found Mr Linkov's reaction to questions about it "highly defensive". The judge also placed weight on an email of 11 January 2006 from Ms Simonova to Mr Linkov identifying the law firm which was "going to assist us", accepting her evidence that this concerned the acquisition of the Transaero

shares. The judge observed that Mr Linkov would not have needed to be supplied with such information if his involvement in the acquisition was in a purely personal capacity.

21.
The respondents' explanation for the genesis of the Deed of Trust was found to be "fanciful" and was disbelieved, as was their account of why they had given Mr Pleshakov the original SSC share certificates. In the judge's assessment, the provision of the Deed of Trust and the share certificates to Mr Pleshakov supported his case that the respondents held the SCC shares on trust for him. Even though the SSC shares were not bearer shares, possession of them by Mr Pleshakov gave him practical means to control to a degree what was done with the shares. The judge found that "[t]he Deed of Trust is compelling evidence that it was the intention of [the respondents] that [SSC] was to be and remain under the control of Mr Pleshakov" and that "[t]he most natural explanation for the fact that the certificates were placed in Mr Pleshakov's possession and left permanently in his custody is that he is beneficially entitled to the shares which they represent."

22.
The judge referred to the facts that the SSC board resolution of 3 January 2006 was silent as to the amount SSC was to pay for each Transaero share and that both respondents said they were unaware of the actual purchase price for the shareholding being acquired until they saw the purchase agreement dated 31 March 2006 between SSC and Housecroft, which provided for the transfer of 307,540 Transaero shares for a consideration of US$55,000. In the judge's view, these features of the case indicated that it was improbable that the respondents procured the incorporation of SSC for their own benefit, and much more likely that it was done at the request of Mr Pleshakov.

23.
The judge found that the funds for SSC's payment of the consideration for the Transaero shares came from an account owned by Mr Linkov. However, relying on evidence from Ms Simonova, whom the judge described as an impressive witness and whose evidence he accepted, he found that Mr Pleshakov had given Mr Linkov cash-filled envelopes from time to time and that by these means he had reimbursed Mr Linkov for the provision of the money used to fund SSC's payment for the Transaero shares.

24.
The judge found that between SSC's acquisition of the shares in Transaero and 2 February 2012 SSC entered into seven transactions for the sale of Transaero shares, none of which was arranged by the respondents. On 3 October 2006, without the knowledge or approval of the respondents, Mr Pleshakov arranged for the sale of 1% of Transaero to an associate for US$20,000, which was apparently at a substantial undervalue since they had then been sold on by the associate for in excess of US$5 million. The respondents did not protest. The judge found that all the other transactions were carried out on Mr Pleshakov's instructions, which were invariably complied with by the respondents. The respondents had never refused to carry out a transaction in Transaero shares proposed by Mr Pleshakov and the evidence to the contrary given by Ms Kazantseva was rejected. The judge placed weight on an email dated 9 September 2010 in which Mr Linkov wrote to Mr Pleshakov, "… all your instructions will be rigorously performed …".

25.
On 5 October 2010 SSC passed a members' resolution amending its articles of association to provide that a resigning director should receive a bonus of €1.2 million. The judge's view was that this was inconsistent with the idea that SSC was owned beneficially by the respondents, its only directors, and

was not persuaded by Mr Linkov's attempt at an explanation. Instead, the judge found that this measure was adopted to provide protection for the respondents in case their relationship with Mr Pleshakov broke down, ie if he then took back from them the shares in SSC.

26.
The judge also made findings regarding the use by SSC of funds it received from the sale of Transaero shares. In particular, he found that they had been used to acquire an apartment in Miami via a wholly owned subsidiary called Sky Ocean. The judge rejected Mr Linkov's evidence about this transaction and, on the basis of contemporaneous correspondence, found that the intention was that Mr Pleshakov should own the apartment beneficially (the implication being that he did so through his ownership of SSC).

27.
A further matter relied on by the judge as support for Mr Pleshakov's case was that Mr Linkov followed Mr Pleshakov's instructions as to how he should exercise the voting rights attached to the Transaero shares at general meetings of Transaero. Mr Linkov said that he had discussed this with Mr Pleshakov, but did not accept that he had been given instructions. However, the judge accepted the evidence of Ms Simonova that she had passed on instructions from Mr Pleshakov and that these were invariably followed.

28.
As for Mr Pleshakov's pleaded case (paragraph 6 of the Statement of Claim) that the respondents agreed to act as nominee shareholders of SSC in return for €4,000 per month, the judge referred to the monthly salary paid to Ms Kazantseva by SSC and to the cash payments to Mr Linkov by Mr Pleshakov. However, he did not make a finding that there had been such an agreement.

29.
At para 62 the judge said:

"In my judgment the evidence establishes that [the respondents] acquired the [SSC] shares as nominees for Mr Pleshakov. Nothing that happened subsequent to that acquisition is inconsistent with that finding. Indeed, it fully harmonises with it. …"

30.
The order made by the judge reflected Mr Pleshakov's claim in the claim form and in the relief sought in the Statement of Claim. He made declarations that the SSC shares registered in the names of the respondents are held on trust for Mr Pleshakov absolutely and that he is entitled to be registered as their owner.

The judgment of the Court of Appeal

31.
Mr Linkov and Ms Kazantseva appealed to the Court of Appeal, which allowed the appeal and set aside the orders made by the judge. The hearing in the Court of Appeal took place on 20 May 2015, but judgment was only handed down on 1 November 2018. Baptiste JA gave the only substantive judgment, with which Thom and Gonsalves JJA agreed.

32.
The Court of Appeal reminded themselves of well-known authority to the effect that an appellate court should not interfere with the evaluation of facts and inferences to be drawn from findings of fact unless the trial judge was plainly wrong. At para 33 Baptiste JA referred to the judgment of Lord

Neuberger of Abbotsbury in In re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33; [2013] 1 WLR 1911, para 53, where he said that an appellate court could only interfere with a finding of fact made by a judge after hearing live evidence where there was no evidence to support the finding, where the finding was based on a misunderstanding of the evidence or where the finding was one which no reasonable judge could have reached. Baptiste JA also referred to Assicurazioni Generali SpA v Arab Insurance Group [2002] EWCA Civ 1642; [2003] 1 WLR 577, paras 15 and 16 (Clarke LJ) and Langsam v Beachcroft LLP [2012] EWCA Civ 1230, para 72 (Arden LJ). At para 36 he noted that an appellate court is rarely justified in overturning a finding of fact by a trial judge which turns on the credibility of a witness and referred to Beacon Insurance Co Ltd v Maharaj Bookstore Ltd [2014] UKPC 21, para 17, where Lord Hodge said:

“Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses, who have given oral evidence… an appellate court may have to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole.”

Baptiste JA also referred to Central Bank of Ecuador v Conticorp SA [2015] UKPC 11 and guidance given by Lord Thankerton in Watt (or Thomas) v Thomas [1947] AC 484, 487-488:

“I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.”

The Board also finds it helpful to refer to the speech of Viscount Simon in that case, at p 486:

“… an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”

33.
However, according to the Court of Appeal, the judge had made fundamental errors in his assessment of the evidence, including in particular that he had based his decision on a finding that there had been an oral agreement between Mr Pleshakov and the respondents, but in circumstances where he failed

to explain or make relevant findings as to how, when and where it was made. This meant that the Court of Appeal was free to carry out its own evaluation and arrive at its own conclusion on the facts. Proceeding in that way, the Court of Appeal held that having regard to the inherent probabilities and objective facts, Mr Pleshakov failed to establish that there had been an oral agreement that the respondents would act as his nominees. In the view of the Court of Appeal, this was a case in which an oral agreement had to be proved and Mr Pleshakov failed to establish that there had been one. That was so in relation to both respondents. In particular, so far as Ms Kazantseva was concerned, as the respondents complained, it had never been alleged by Mr Pleshakov that she was a party to the alleged nominee agreement, nor that she had authorised Mr Linkov to make such an agreement on her behalf, nor that she had ratified it. The Court of Appeal found that no oral agreement had been made between Mr Pleshakov and the respondents and relied on this and other matters to conclude that the respondents were the beneficial owners of the SSC shares registered in their names.

34.
Baptiste JA said (para 43) that the judge had found that on Mr Pleshakov's case there was an entitlement on the part of the respondents to indemnification of their expenses in setting up SSC, but "[a]lthough the learned judge thought that it was likely that indemnification would have occurred there was … no evidence of reimbursement". Therefore, the respondents' payment of the costs of incorporation and provision of funds to acquire the Transaero shares "went a long way in demonstrating that the appellants were the beneficial and legal owners of the shares in [SSC]".

35.
According to Baptiste JA (para 45) the judge had made a fundamentally flawed evaluation of the issue whether Mr Pleshakov owned the Transaero shares which were acquired by SSC and "this ownership issue should have weighed so heavily as to disprove the alleged oral agreement", by itself or alongside other factors. The judge found that Mr Pleshakov had failed to establish that he had ever acquired a beneficial interest in any of the shares in Transaero owned by the Berezovsky Group and according to Baptiste JA (para 46) this meant "it was not open to him to find that [SSC] had been incorporated as part of a plan to disguise such beneficial ownership" and it was "inherently self-contradictory for the judge to reason that Mr Pleshakov would not have parted with the Transaero shares when he had never owned them and they were never his to part with." Baptiste JA accepted (para 48) the respondents' submission that the judge "should have found that the whole basis of Mr Pleshakov's case was destroyed by the fact that he did not own the Transaero shares in the first place, either directly or through [Housecroft]" and said "Mr Pleshakov's inability to establish the oral agreement and the fundamental building block of the ownership of the Transaero shares meant that his case fell apart." He accepted (para 49) the respondents' submissions that the judge's rejection of Mr Pleshakov's pleaded case as regards the time, place and existence of the alleged oral nominee agreement along with the other matters referred to above showed that his case as regards the existence of the oral agreement was bound to fail. These matters supported the respondents' case that they were intended to be the beneficial owners of the shares in SSC.

36.
As regards the conduct of the parties after SSC acquired the Transaero shares, the respondents emphasised features which tended to support their account that they were the beneficial owners of the SSC shares, including that Mr Pleshakov had shown no interest over the years in millions of dollars of income received by SSC, that after the initial sale of Transaero shares to an associate of his on 3 October 2006 Mr Pleshakov undertook to the respondents not to enter into any further sales on behalf of SSC without the respondents' consent and that on 12 December 2011 a SSC board

resolution was passed, in the period when Mr Pleshakov and his daughter were directors, that Mr Linkov had sole executive power over SSC. Baptiste JA accepted their case, placing particular emphasis on this last point. He also observed (para 54) that the evidence about how Mr Linkov exercised the voting rights attached to the Transaero shares was "not … probative of the existence of the alleged oral agreement."

37.
Baptiste JA discounted the weight given by the judge to the fact that the respondents had given Mr Pleshakov the original SSC share certificates, as they were not bearer shares and possession of the certificates did not give power or rights to the possessor (paras 56-57), and (at paras 58-61) discounted the weight he had placed on the Deed of Trust, concluding (para 61) "[i]n the circumstances, reference to the [Deed of Trust] cannot hide Mr Pleshakov's inability to identify the agreement on which his case was said to be based."

38.
The Court of Appeal set aside the order made by the judge.

39.
Mr Pleshakov now appeals to the Board.

Discussion

40.
Mr Robert Levy QC for Mr Pleshakov submits that the Court of Appeal erred in a number of ways. It misunderstood the basis of the judge's decision, which was focused on examining whether the SSC shares were held on trust for Mr Pleshakov rather than on whether there was a contract between him and the respondents. The judge had not found that there was a contract and did not need to for the purposes of the trust analysis he carried out. The Court of Appeal was wrong to focus in its judgment on whether a contract had been made or not. Further, the Court of Appeal had wrongly interfered with factual findings and factual evaluations made by the judge, which he had been entitled to make on the evidence before him. Mr Levy also submitted that the Court of Appeal's own evaluation of the case, made without seeing the witnesses, was fundamentally flawed, in that it ignored important findings by the judge.

41.
Mr Levy contends that the judge was entitled on the evidence before him to make the findings of primary fact and to draw inferences from that evidence and those findings as he did. On the judge's evaluation of the facts, the three certainties necessary to create a trust had been established (see Snell's Equity, 34th ed, para 22-012): (i) there was certainty of intention, in that the respondents were found to have set up SSC on the instructions of Mr Pleshakov with the intention that the shares in it would be held for his benefit; (ii) there was certainty of subject matter, ie the shares in SSC held by each of the respondents; and (iii) there was certainty as to the object of the trust, in that Mr Pleshakov was to be the beneficial owner of the shares.

42.
Ms Barbara Dohmann QC for the respondents supported the decision of the Court of Appeal and the reasons given by Baptiste JA. She also submitted that the argument presented by Mr Levy, based on trust rather than contract, was completely new and was not open to him on the appeal to the Board.

A new argument on the appeal?

43.
The Board will deal first with Ms Dohmann's submission that the way Mr Levy puts Mr Pleshakov's case to the Board is materially different from the way it was pleaded and presented in the lower courts. The Board does not accept this submission. Mr Pleshakov's case throughout was that, in the circumstances in which SSC was set up, the respondents held the shares in it on trust for him.

44.
The relevant parts of Mr Pleshakov's claim form and Statement of Claim are referred to above. From the outset, his case was based on an allegation of a trust. It is true that, in support of that claim, at paragraph 6 of the Statement of Claim he pleaded that there had been a nominee agreement between him and the respondents, but that was not the only matter relied upon in support of the trust alleged, nor was it an essential part of his case based on trust principles.

45.
The Board is satisfied that Mr Pleshakov's case in the lower courts was presented throughout on this basis. This was clear from, among other things, Mr Pleshakov's witness statement at trial and the skeleton arguments both at first instance and in the Court of Appeal. It is clear from the judge's judgment that he understood this. As pointed out above, he made no finding that there was a contract between Mr Pleshakov and the respondents, but nonetheless concluded that a trust had arisen in relation to the SSC shares. Counsel then appearing for Mr Pleshakov (Mr Terence Mowschenson QC) made it clear in his oral submissions to the Court of Appeal that his case was based on trust principles and did not depend on whether there was a contract.

46.
The same point has been properly raised by Mr Pleshakov in his grounds of appeal to the Board. It is not a new point and Mr Pleshakov is entitled to pursue it at this level.

Applicable principles of trust law

47.
The Board agrees with Mr Levy's submission that as a matter of law it was not necessary for the judge to determine whether or not there was an oral contractual agreement between Mr Pleshakov and the respondents in order to reach the conclusion that the SSC shares were held by the respondents on trust for Mr Pleshakov absolutely. The creation of an express trust, whether a bare trust or otherwise, does not require any form of contractual agreement between the settlor and the beneficiaries. As Mr Levy points out, trusts can be created (and often are created) by the unilateral act of the settlor without any involvement on the part of the beneficiaries. All that is required for the valid creation of a trust is the three certainties identified in Snell's Equity, 34th ed, para 22-012, referred to at para 41 above. The issue in the present case is whether it has been established that the settlor (ie the respondents) intended to create a trust of their shares when they set up SSC.

48.
As Mr Levy submits, in relation to establishing certainty of intention to create a trust neither a written trust instrument nor any formal language is required (this may be subject to formality requirements imposed by statute, but there are none in this case). Informal language can be sufficient and the necessary intention can be inferred from conduct: Paul v Constance [1977] 1 WLR 527, 531G (Scarman LJ); Dhingra v Dhingra (1999) 2 ITELR 262 (CA), 265d (Lindsay J); and Ong v Ping [2017] EWCA Civ 2069, para 58 (Sir Colin Rimer). As Megarry J said in In re Kayford Ltd [1975] 1 WLR 279, 282, "the question is whether in substance a sufficient intention to create a trust has been manifested."

49.
In the present case, the judge was satisfied on the evidence that the respondents intended to acquire the SSC shares to hold them on a bare trust for Mr Pleshakov. It does not appear that these authorities were cited to him, but as Mr Levy pointed out he was an experienced commercial judge well versed in trust law who may be taken to have understood these basic principles very well. It is evident from his judgment that he did and that he focused on the correct question.

50.
Ms Dohmann submitted that the judge had concentrated in his analysis on the position of Mr Linkov and did not analyse the position of Ms Kazantseva separately as he should have done, nor did he give adequate reasons to conclude that she intended to hold her shares in SSC on trust for Mr Pleshakov. However, the Board considers that on a fair reading of the judgment the judge's reasoning covers both respondents. The evidence was that the respondents acted together in setting up SSC and it was a fair inference in the circumstances that their intention was the same in doing so. On the judge's findings, they acted together to implement a plan devised by Mr Linkov for Mr Pleshakov's benefit. Ms Kazantseva signed the Deed of Trust and gave the originals of her share certificates to Mr Pleshakov in the same way as Mr Linkov. There was still less reason for Mr Pleshakov to wish to have the Transaero shares transferred for Ms Kazantseva's benefit than there was reason for him to wish Mr Linkov to have the benefit of them. The judge found that she was reimbursed for her outlay in setting up SSC.

51.
Ms Dohmann made submissions to the Board regarding different meanings which might attach to the idea of nomineeship. However, it is not necessary to go into this, since it is clear that the judge focused on whether the respondents held the SSC shares on a bare trust for Mr Pleshakov and, in so far as he described them as nominees for Mr Pleshakov, he used the term in that sense.

Errors by the Court of Appeal

52.
The Court of Appeal directed themselves correctly concerning the general principles regarding the caution to be exercised by an appellate court before it can properly overturn findings of fact or inferences drawn from facts by a first instance judge who has heard oral evidence and in doing so has had a full opportunity to weigh all the competing elements in the evidence against each other. The Board does not find it necessary to add to the case-law on that topic in this judgment.

53.
In the Board's view, this was a classic case in which there was a good deal to be said on each side regarding the primary facts and what inferences should be drawn from the primary facts and the circumstances in which the parties were acting. It is the function of the trial judge in such a case to weigh carefully the points made by each side and come to definite conclusions. That is what the judge did. He rejected parts of Mr Pleshakov's evidence and aspects of his case, but still found that the inference was to be drawn that the respondents acquired the SSC shares intending to hold them on trust for Mr Pleshakov absolutely. In the Board's opinion, the judge was fully entitled to weigh the evidence as he did and come to that conclusion.

54.
The Court of Appeal considered that the judge committed certain fundamental errors in evaluating the facts which meant that his assessment of the evidence and the conclusions to be drawn in the light of

it could not stand. With all respect to the Court of Appeal, the Board cannot agree that the judge made any fundamental error.

55.
The principal error identified by Baptiste JA was that the judge based his judgment on a finding that there was a contractual agreement between Mr Pleshakov and the respondents which was unsupported by his analysis of the evidence and was wrong. In the Board's view, however, it is clear that the judge did not base his decision on any such finding. As explained above, the judge's judgment was based on an orthodox trusts analysis which did not depend in any way on a contract between Mr Pleshakov and the respondents. As to the contract pleaded in paragraph 6 of the Statement of Claim, it is notable that the judge made no finding that such a contract had been made.

56.
Baptiste JA criticised the judge for finding that the costs of incorporating SSC and of providing it with the funds required to acquire the Transaero shares which were originally borne by the respondents had been reimbursed by Mr Pleshakov. However, the judge made express findings that they had been and such findings were properly available to him on the evidence. The circumstances were murky, but the judge investigated them carefully and was entitled to find that Mr Linkov was reimbursed out of cash payments he received from Mr Pleshakov and Ms Kazantseva was reimbursed for the modest incorporation costs out of the monthly payments she received from SSC over a long period.

57.
Next, Baptiste JA said that the judge committed a fundamental error of analysis regarding the effect of Mr Pleshakov not being the owner of the 19.99% of the shares in Transaero at the time they were acquired by SSC. The Board does not share that view. In the Board's opinion, the judge's approach was cogent and legitimate. On his findings, Mr Pleshakov had gained access to a source of Transaero shares in the hands of the Berezovsky Group which he wished to acquire to add to his own existing shareholding to gain control of Transaero and, in line with Mr Linkov's advice, SSC was set up to be the vehicle to acquire part of those shares. The judge's finding that SSC was set up in circumstances in which the respondents intended to hold their shares in it on trust for Mr Pleshakov in no way involved him having to find that Mr Pleshakov owned the relevant Transaero shares in the first place, and he did not consider that he did. The important point was that Mr Pleshakov was in control of the process of acquiring the shares from the Berezovsky Group and was in a position to divert the opportunity of acquiring them to himself or any acquisition vehicle he chose. In circumstances where, as the judge found, Mr Pleshakov was trying to gain control of Transaero and where, as the judge found, there was no plausible reason why he should divert the opportunity to acquire the shares to the respondents for their benefit, the judge was entitled to give weight to these matters when seeking to establish the intention of the respondents in setting up SSC and holding shares in it.

58.
The other matters referred to by Baptiste JA were points on which the Court of Appeal would have been disposed to draw different inferences had they been hearing the case at trial, but they were not conducting the trial and had not heard the evidence given by the relevant witnesses. It is well-established that this is not a proper basis on which an appellate court can interfere with the findings and conclusions reached by a judge after hearing evidence at trial.

Conclusion

59.

For these reasons, the Board will humbly advise Her Majesty that the appeal should be allowed and the orders made by the judge restored.

60.
The Board cannot leave this case without commenting on the extraordinary period that elapsed between the hearing in the Court of Appeal and the handing down of judgment, for which the Board has been unable to find any explanation in the papers. This was most unsatisfactory both for the parties and for the administration of justice more generally.