COURT OF APPEAL FOR ONTARIO

CITATION: Belokon v. Krygyz Republic, 2016 ONCA 981
DATE: 20161229
DOCKET: C62499; C62501; C62530

Cronk, Juriansz and Roberts JJ.A.

DOCKET: C62499

BETWEEN

Valeri Belokon

Applicant (Appellant)

and

The Krygyz Republic, Kyrgyzaltyn JSC and Centerra Gold Inc.

Respondents (Respondents)

DOCKET: C62501

BETWEEN

Sistem Mühendislik İnşaat Sanayi Ve Ticaret Anonim Sirketi

Applicant (Appellant)

and

Kyrgyz Republic and Kyrgyzaltyn JSC

Respondents (Respondents)

DOCKET: C62530

BETWEEN

Entes Industrial Plants Construction & Erection Contracting Co. Inc.

Applicant (Appellant)

and

The Kyrgyz Republic, Kyrgyzaltyn JSC and Centerra Gold Inc.

Respondents (Respondents)

Robb C. Heintzman and Chloe A. Snider, for the appellant, Valeri Belokon

Steven G. Frankel and George J. Pollack, for the appellant, Sistem Mühendislik İnşaat Sanayi Ve Ticaret Anonim Sirketi

Robert Wisner and Stephen J. Brown-Okruhlik, for the appellant, Entes Industrial Plants Construction & Erection Contracting Co. Inc.

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Matthew J. Latella and Christina Doria, for the respondent, Kyrgyzaltyn JSC

Heard: December 14, 2016

On appeal from the judgment of Justice Barbara A. Conway of the Superior Court of Justice, dated July 11, 2016, with reasons reported at 2016 ONSC 4506.

Juriansz J.A.:

OVERVIEW

[1] These appeals are about whether the Kyrgyz Republic (the "Republic") owns shares in Centerra Gold Inc. (a Canadian company) registered in the name of Kyrgyzaltyn JSC (a Kyrgyz corporation wholly owned by the Republic, "Kyrgyzaltyn"). The appellants hold various foreign arbitral awards against the Republic that they hope to enforce against the shares. To that end, they each brought an application for a declaration that the Republic owns the shares. Hearing the applications together, the applications judge declined to grant the declarations. She concluded that the applicants had not demonstrated, either as a matter of contract or under trust principles, that the Republic owned the shares. She held that the Republic does not have any "equitable or other right, property, interest or equity of redemption" in the Centerra shares that is subject to seizure and sale pursuant to s. 18 of the *Execution Act*, R.S.O. 1990, c. E.24.

[2] Hence these appeals.

[3] The appellants repeat their arguments below. First, they submit that the 2009 Agreement on New Terms between the Republic, Kyrgyzaltyn, Cameco[1] and Centerra and subsidiaries (the "ANT"), considered with the Republic's conduct and statements, all demonstrate that the Republic is the owner of the shares. Second, and in the alternative, they submit that Kyrgyzaltyn holds the

[1] Cameco is a Canadian gold company. It is not involved in these appeals. It was a major partner in the gold mining project which the ANT governs, discussed below.

shares for the Republic on an express trust. Third, and in the further alternative, they submit Kyrgyzaltyn holds the shares on a resulting trust for the Republic.

[4] I see no reason to disturb the applications judge's conclusions on any of those subjects. I would dismiss the appeals. Since the applications judge provided a clear and concise summary of the facts at paras. 4 – 23 of her reasons, I turn directly to the issues on appeal.

ISSUE 1: THE CUMULATIVE EFFECT OF THE ANT AND OTHER EVIDENCE

(1) The appellants' conceptual challenge

[5] The appellants' first ground of appeal relates to the applications judge's refusal to find that the ANT (which I will discuss in the next section), either on its own or in combination with other evidence, establishes the Republic owned the shares.

[6] At the outset, I note the lack of a solid conceptual underpinning for the appellants' argument. The shares are registered in Kyrgyzaltyn's name, and the appellants recognize they cannot pierce the corporate veil. As the applications judge noted, at para. 51, the applicants "do not argue that the Republic exerted such control over Kyrgyzaltyn that the separate legal personalities of Kyrgyzaltyn and the Republic should be ignored and the assets of Kyrgyzaltyn regarded as those of the Republic".

[7] Understandably, the appellants argue Kyrgyzaltyn holds the Centerra shares in trust for the Republic. I deal with their trust arguments below. However, quite apart from trust principles, in order to avoid the legal consequence of Kyrgyzaltyn's separate legal identity, they advance a different argument. They maintain that the cumulative effect of the ANT and the Republic's conduct in various instruments, including resolutions of its Parliament, support the inference that there has been a transfer of rights in the Centerra shares from Kyrgyzaltyn to the Republic.

[8] At the same time, however, the appellants submit it is unnecessary for them to identify any document or agreement that effects such a transfer or pinpoint when and where such a transfer took place. Nor do they address the nature of the rights in the shares they allege have been transferred, though in their notices of application they ask for declarations that the Republic "owns" or "beneficially owns" the shares. They stop short of arguing the shares have been actually transferred. They do not assert, nor did they argue before the applications judge, that the conduct of the Republic and Kyrgyzaltyn had the legal effect of transferring the Centerra shares from Kyrgyzaltyn to the Republic.

[9] Nevertheless, the appellants argue that, on a consideration of all the evidence, the applications judge should have inferred that Kyrgyzaltyn had transferred to the Republic sufficient rights in the Centerra shares to enable them to execute against the shares.

[10] In advancing this argument, the appellants rely on Article 222(3) of the Republic's Civil Code. Article 222(3) allows an owner of property to transfer rights in that property to another person while still remaining the owner of the property. I am not persuaded Article 222(3) is of much assistance. Neither was the applications judge.

[11] The appellants did not lead expert evidence on the meaning of Article 222(3). The only evidence before the applications judge was that of the respondents' expert, who explained Article 222(3) allows an owner to delegate certain rights to another while retaining ownership. The difficulty for the appellants is that, apart from the ANT, the rest of their evidence focuses on what the Republic has done. That evidence does not address what Kyrgyzaltyn, as owner of the shares, has done to delegate or confer rights in the shares to the Republic.

[12] The appellants' theory is that, considered cumulatively, the ANT and the Republic's conduct and statements support the inference that Kyrgyzaltyn must have transferred rights in the Centerra shares from Kyrgyzaltyn to the Republic under Article 222(3). As noted above, the assertion of such a transfer is made at large without being situated in time and place.

[13] The appellants complain that the applications judge misunderstood this argument. In their view, she erred in focusing solely on the ANT and considering

the other evidence only as extrinsic evidence intended to assist the interpretation of the ANT, rather than as additional circumstantial evidence to be considered cumulatively together with the ANT.

[14] I do not accept that submission. The applications judge's decision to focus on the ANT was entirely reasonable. It is clear from her reasons that she appreciated the rest of the appellants' circumstantial evidence focused on the putative delegatee rather than the delegator of rights under Article 222(3). At footnote 13, she writes: "[t]he Applicants rely on the ability of an owner under Article 222(3) of the Code to transfer rights in its property to another person while still remaining the owner of the property. That section does not assist the Applicants. The fact that an owner has the ability to transfer rights does not establish that the Republic does in fact own the Centerra shares."

[15] The following example illustrates this point. The appellants point to Resolution 254 of the Jogorku Kenesh (the Republic's Parliament), which ratified the ANT. They say it contains language that suggests the Republic owns the shares and, by implication, that suggests that Kyrgyzaltyn merely holds them for the Republic. The problem is that, even if the appellants' interpretation of it is correct[2], Resolution 254 only expresses the Republic's understanding or intention regarding the ownership of the shares. It is thus not capable of establishing that

[2] The applications judge did not agree with the appellants' interpretation: at paras. 47 – 48.

the registered owner, Kyrgyzaltyn, intended to effect some sort of transfer of rights in the shares, under Article 222(3) or otherwise, to the Republic.

[16] Counsel for Kyrgyzaltyn argued persuasively before this court that unilateral statements such as this are of little value. He suggested it was understandable that the Republic may have used legally imprecise language on occasion given that it is a developing post-Soviet democracy that has experienced “growing pains” in establishing a robust system of private property free of government interference.

[17] In light of this difficulty, it is apparent why the applications judge focused her attention on the ANT. She regarded it as the only document capable of proving there had been a transfer. In fact, as she observed in footnote 7, “apart from the ANT, the Applicants do not rely on any document or agreement that purports to legally transfer any ownership rights in the Centerra shares from Kyrgyzaltyn to the government.” The same may be said of the appellants’ position before this court.

[18] Against this backdrop, I turn now to the ANT itself and the appellants’ complaints regarding the applications judge’s interpretation of it.

(2) The ANT

(a) Overview

[19] In April 24, 2009, the Republic, Kyrgyzaltyn, Cameco, Centerra and its subsidiaries signed the ANT. It resolved disputes that were then in arbitration and set out the basis for amended agreements governing the development of the Republic's largest gold mine (the "Kumtor Project"). The Republic agreed to expand the Kumtor mining concession and implement a more favourable tax regime for one of Centerra's operating subsidiaries. In consideration, Kyrgyzaltyn received additional shares in Centerra that raised its shareholding from about 17% to about 33%. Kyrgyzaltyn acquired some of the additional shares through a share transfer from Cameco, and others from the issuance of treasury shares by Centerra to Kyrgyzaltyn.

[20] The appellants say that the terms of the ANT establish the Republic's ownership interest in the shares. They rely on the recitals to the ANT, in particular, the second recital, which describes the existing shareholders of Centerra, and refers to "Kyrgyzaltyn, which holds the shares of Centerra on behalf of the Government". The appellants also rely on the use of the phrase the "Kyrgyz Side" in several places in the ANT. Properly interpreted, the use of this term, they say, expresses the parties' understanding that Kyrgyzaltyn held the shares for the Republic, the true owner.

[21] For their part, the Respondents contend that the operative provisions of the ANT unambiguously demonstrate that Kyrgyzaltyn owns the shares outright.

[22] It is common ground that the ANT provided it is governed by New York law. The applications judge noted, at para. 33, that the experts of both sides were agreed that:

> - The fundamental principle is that agreements are construed in accordance with the parties' intent, and the best evidence of what parties to a written agreement intend is what they say in their writing.
> - A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. Extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide.
> - Recitals in a contract do not control the operative clauses of the contract unless the latter are ambiguous. Where a recital clause and operative clause are inconsistent and the recital clause is clear, but the operative clause is ambiguous, the recital clause should prevail. Where a recital clause and an operative clause are inconsistent, the operative clause, if unambiguous, should prevail.

(b) Standard of Review

[23] Before considering the applications judge's interpretation of the ANT, it is necessary to make a brief comment regarding standard of review.

[24] The appellants acknowledge the general rule that an appellate court will defer to a lower court's interpretation of a contract absent a palpable and overriding error: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633. They submit, however, that the Supreme Court's decision in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] S.C.J. No. 37 created an exception to that rule for all cases where the contractual interpretation does not depend on the factual matrix. Given that under New York law (which all parties agree applies here) extrinsic evidence is not to be considered absent ambiguity in the language of the contract, the appellants submit that the standard of review of the applications judge's interpretation of the ANT is correctness. The appellants recognize that the standard of review of the applications judge's consideration of the other evidence is one of palpable and overriding error.

[25] In my view, *Ledcor Construction Ltd*. does not set out so broad an exception as the appellants contend. The Supreme Court in *Ledcor*, and this court in *MacDonald v. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842, 127 O.R. (3d) 663, gave several reasons for applying a correctness standard of review to the interpretation of standard form contracts. The irrelevance of the factual matrix was only one of them. Another important reason was that the interpretation of a standard form contract on appeal is of precedential value. Also

important is the need to avoid inconsistent interpretive results regarding standard form contracts.

[26] These considerations are not engaged here. The ANT was a complex, multi-party contract carefully negotiated by sophisticated parties. Beyond this dispute, it is unlikely its interpretation will be of any importance to litigants in the Ontario courts. I see no reason to broaden the *Ledcor* exception on the facts of this case. The standard of review of palpable and overriding error applies both to the applications judge's interpretation of the ANT, as well as her treatment of the other or "extrinsic" evidence relied on by the appellants.

(c) The applications judge's interpretation of the ANT

[27] The applications judge's reasons interpreting the ANT are thorough and persuasive. In my view, a careful review of her reasons provides a complete answer to the issues the appellants raise before this court. The applications judge considered ss. 2.1, 2.2, and 2.3 of the ANT, which she referred to as the key operative provisions. Of these, she said, at paras. 34 – 36:

> Section 2.1 states that the Cameco Contributed Shares are to be held by the custodian "for the benefit of" Kyrgyzaltyn (or Cameco, as the case may be). Section 2.3 provides that the Cameco Contributed Shares are to be released by the custodian to Kyrgyzaltyn. There is no reference to the Government having any ownership interest in the Cameco Contributed Shares.
>
> Likewise, Section 2.2 states that the Treasury Shares are to be issued to Kyrgyzaltyn and that Kyrgyzaltyn

> "will beneficially own and be entitled to all the benefits arising from (including the exercise of all rights attaching to) such shares". There is no reference to the Government having any ownership interest in the Treasury Shares.
>
> There are additional references in the ANT to Kyrgyzaltyn's rights and status as a Centerra shareholder – for example, the right to vote shares (s. 2.2(b)); the right to receive dividends (s. 2.2(d)); a right of first refusal on a rights issue (s. 2.4(a)); and its status as an accredited investor under Canadian securities regulations (s. 2.5(c)).

[28] She then correctly observed, at para. 36, that "none of these sections refers to the Government as having any ownership interest in the Centerra shares."

[29] The applications judge rejected the appellants' submission that the ANT was evidence that the Republic owns the Centerra shares for several reasons.

[30] First, she observed, at para. 41, that if the parties had intended that the Republic be owner of both the initial and the additional Centerra shares, they "would not have done so on the strength of a few words and a definition contained in a recital". She added that "there is nothing in the operative sections of the ANT that addresses the ownership of the Initial Shares or states that they are owned by the [Republic]." Nothing in the ANT conveys any rights in either the initial shares or the additional shares to anyone.

[31] Second, the key operative clauses, sections 2.1, 2.2 and 2.3, are clear that Kyrgyzaltyn is to be the registered and beneficial owner of the additional shares issued and transferred to it under the ANT.

[32] Third, even if the language of the second recital were relevant, her view was that the words “Kyrgyzaltyn, which holds the shares on behalf of the Government” simply reflect the fact that the government is Kyrgyzaltyn’s sole shareholder and “ultimately derives the benefit of the Centerra shares that are owned by (and are the property of) its subsidiary”: at para. 43.

[33] Pausing here, the appellants submit this passage shows that the applications judge engaged in circular reasoning, at para. 43, by using what they characterize as extrinsic evidence to support her conclusion that the language of the contract was unambiguous. Specifically, they say that the fact of the Republic being Kyrgyzaltyn’s sole shareholder was not spelled out in the contract. Therefore, it was extrinsic evidence that could not be used to determine whether the ANT was ambiguous.

[34] I do not accept the premise of the submission. In para. 43, the application judge was not offering support for her conclusion that the language of the contract was unambiguous. The application judge reached her ultimate conclusion that the operative clauses of the ANT were not ambiguous on a reading those provisions alone. As a result, given the governing New York

principles of contract interpretation, she had no need to address the recitals at all. She indicates, at para. 39, that she is offering several reasons for rejecting the appellants' submission "the Government owns the Centerra shares based on (i) the wording of the second recital that reads "Kyrgyzaltyn, which holds the shares of Centerra on behalf of the Government"; and (ii) the use of the term "the Kyrgyz Side" in various sections of the ANT". She makes clear that she is addressing an alternative analysis in para. 43 by beginning the impugned passage by saying "even if I consider the language in the second recital…", an analysis the appellants had urged her to undertake. She then went on to explain the recital was consistent with simply reflecting that the Republic was Kyrgyzaltyn's sole shareholder.

[35] Fourth, she read the use of the term "the Kyrgyz side" in several sections to be "general references to the shareholdings on the Kyrgyz Side, as opposed to the shareholdings on the other 'side', namely Cameco": at para. 44. The use of the term was entirely consistent with the fact that the Republic and Kyrgyzaltyn are on the same side. It does not, however, establish that the Republic owns shares registered in Kyrgyzaltyn's name.

[36] The applications judge concluded, at para. 45, "that the agreement unambiguously provides that Kyrgyzaltyn, the existing shareholder of Centerra and owner of the Initial Shares under Kyrgyz law, acquired the Additional Shares

as part of an overall resolution of the dispute between Centerra and the Government, the sole shareholder of Kyrgyzaltyn."

[37] While the applications judge considered the additional evidence tendered by the appellants, it is unnecessary to review that evidence and her analysis of it in any detail. The cumulative weight of the additional evidence without the ANT is weak. As stated above, that evidence focuses mainly on the actions of the Republic and not on any act of Kyrgyzaltyn to support an inference that Kyrgyzaltyn delegated some ownership interest in its registered shares to the Republic. It is also, as the applications judge noted, capable of multiple interpretations. Her interpretation of it is entitled to deference on appeal.

[38] More to the point, there was in the record other evidence that undermined the appellants' position. For example, the applications judge referred, at para. 37, to an agreement described as the Restated Shareholders Agreement ("RSA"). The ANT provided that existing shareholders' agreements for Centerra would be restated to reflect the new arrangements in the ANT. The RSA is particularly significant extrinsic evidence as it was expressly contemplated in the ANT. The Republic was not a party to the RSA and that agreement explicitly refers to Kyrgyzaltyn as the registered and beneficial owner of the Centerra shares.

[39] Further, the applications judge referred to a special working group of senior representatives of the Republic and Kyrgyzaltyn that was struck in 2006.

The working group considered whether Kyrgyzaltyn's shares in Centerra could be transferred to state ownership so the Republic could pledge those shares to the International Monetary Fund. The applications judge noted, at para. 54, that "[t]he working group concluded that the Centerra shares are 'the ownership of Kyrgyzaltyn JSC' and that any transfer of the shares to the Republic would have to be done through a repurchase on the Toronto Stock Exchange."

[40] Having considered all the evidence and the arguments of the parties, the applications judge stated she was not persuaded, on a balance of probabilities, that the parties intended and agreed that the Republic owns the Centerra shares.

[41] The appellants have not pointed to any palpable error in the applications judge's conclusion or her reasons. Their submissions ultimately boil down to the contention that the applications judge failed to infer that the owner of shares had, at some unknown time and in some unknown manner, transferred an unspecified interest in the shares to another. I see no basis to interfere with the applications judge's rejection of this contention.

ISSUE 2: EXPRESS TRUST

(1) Standard of Review

[42] Whether an express trust exists is generally a question of mixed fact and law, reviewable on a standard of palpable and overriding error.

[43] The appellants advance two arguments for why the applications judge's decision that Kyrgyzaltyn did not hold the shares on express trust for the Republic is reviewable on a standard of correctness. I would accept neither.

[44] First, the appellants submit that the express trust issue turns on the interpretation of the ANT, and then reiterate their arguments regarding *Ledcor* and *Sattva*. As I have rejected that argument above, I reject it here.

[45] Second, the appellants submit that the applications judge committed extricable errors of law. As will become clear in the discussion below, I regard the applications judge's articulation and application of the relevant legal principles as entirely correct. Accordingly, I would also reject this submission.

(2) The Substantive Issue

[46] To begin, I note the respondents submit that Kyrgyz law ought to govern the existence of any express trust in this case and the evidence before the applications judge established there is no such concept as a trust under Kyrgyz law. Therefore, the respondents submit there can be no express trust.

[47] In my view, it is not necessary to decide whether Kyrgyz law or Ontario law governs. Assuming that Ontario law governs, as the appellants urge us to, I see no basis to interfere with the applications judge's conclusions.

[48] The appellants say that the applications judge erred in two respects in her express trust analysis.

[49] First, they contend that the applications judge erred in insisting on explicit trust language to establish an express trust. I agree that certainty of intention can be established by words or conduct other than explicit trust language, provided the words or conduct convey the requisite intention. However, the applications judge did not hold that the absence of explicit trust language on its own determined the issue. Rather, at para. 59 of her reasons, she held that the language in the second recital of the ANT and in Resolution 254 were not sufficient to establish certainty of intention in light of all the evidence. In particular, she contrasted the language in the second recital with the "explicit language in Sections 2.1 and 2.2 of the ANT" that Kyrgyzaltyn, not the Republic, was the beneficial owner of the shares. It was entirely proper for her to consider the absence of explicit trust language in the provisions on which the appellants relied when clear language indicating a contrary intention had been used elsewhere in the agreement.

[50] Second, the appellants take issue with the applications judge's view of the evidence regarding certainty of intention. In effect, they reiterate their complaints regarding her interpretation of the ANT. As I have said, her findings on that subject are unassailable.

[51] The applications judge's findings regarding the meaning of the ANT inexorably preclude a finding of express trust. She found that the ANT unambiguously establishes that the parties understood Kyrgyzaltyn owns the

shares beneficially in its own right. That finding is an insurmountable obstacle for the appellants in advancing an argument that there was certainty of intention by Kyrgyzaltyn to establish an express trust for the benefit of the Republic.

[52] I see no basis to interfere with the applications judge's conclusion on this issue.

ISSUE 3: RESULTING TRUST

(1) Standard of Review

[53] The existence of a resulting trust is a question of mixed fact and law. The applications judge's findings are to be reviewed on the standard of palpable and overriding error.

(2) The Substantive Issue

[54] The appellants argue Kyrgyzaltyn holds the shares on a "purchase money" resulting trust for the Republic because the Republic provided the consideration for Kyrgyzaltyn's acquisition of the additional shares under the ANT. The applications judge held that Kyrgyzaltyn and the Republic, its sole shareholder, are related parties such that the presumption of resulting trust does not apply. She based this holding on Rothstein J.'s statement in *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33, [2013] 2 S.C.R. 438 that the presumption of resulting trust applies only between "unrelated" persons. The appellants submit this was an error.

[55] It may well be that Rothstein J. in *Rascal Trucking* meant “related” in the more specific and literal sense of parent-child relationships in which the presumption of advancement would apply. In *Andrade v. Andrade*, 2016 ONCA 368, 131 O.R. (3d) 532, van Rensburg J.A. stated the rule in these more specific terms: “[e]xcept where title is taken in the name of a minor child, where property is acquired with one person’s money and title is put in the name of another, there is a presumption of resulting trust”: at para. 59.

[56] The presumption of resulting trust flows from the principle that equity presumes bargains and not gifts. Accordingly, in my view, there is some sense in the submission that outside of the very specific context in which there is a presumption of advancement, the presumption of resulting trust should apply.

[57] That said, the appellants provided no Canadian authority to the applications judge or to this court for the proposition that where a corporation acquires an asset paid for by its shareholder, the corporation is presumed to hold the asset in trust for the shareholder. Different considerations may well apply to the relationships of parent-subsidiary or corporation and sole shareholder. In such contexts, it may well be that while a presumption of gift may not be sensible, a presumption of loan might be.

[58] It is not necessary to resolve this issue here. The applications judge held, at para. 60, that even if the presumption applied “it is rebutted by the language of

Sections 2.1 and 2.2, which states that Kyrgyzaltyn is the beneficial owner of the Additional Shares, as well as the provisions of the RSA to the same effect". I agree.

[59] In *Andrade*, van Rensburg J.A. held as follows, at para. 61:

> A presumption is of greatest value in cases where evidence concerning the transferor's intention may be lacking (for example where the transferor is deceased). "[T]he focus in any dispute over a gratuitous transfer is the actual intention of the transferor at the time of the transfer." … "[T]he presumption will only determine the result where there is insufficient evidence to rebut it on a balance of probabilities" [Citations omitted].

[60] The applications judge had before her clear evidence of the Republic's intention at the time of provision of the consideration for the shares. It was open to her to hold, as she did, that the ANT established the Republic's intention that Kyrgyzaltyn was to be the beneficial owner of the shares. Her holding is entitled to considerable deference on appeal. While I agree with the appellants that the provisions of the RSA (to which the Republic was not a party) could not furnish strong evidence of the Republic's intention, I can see no reversible error in the applications judge's reference to them at para. 60 of her reasons. Reading her reasons as a whole, it is clear she was persuaded on the entirety of the evidence that <u>all</u> parties intended that Kyrgyzaltyn was to be the beneficial owner of the shares. The appellants can point to no palpable error in that finding, as I have said. Therefore, I would not interfere with her conclusion.

CONCLUSION

[61] I would dismiss the appeals. Each of the respondents is entitled to the costs of the appeal, fixed in the total amount of $60,000, inclusive of disbursements and HST and payable jointly and severally by the appellants.

[62] I note that the applications judge took into account the October 1, 2015 costs order of the Court of Appeal in setting costs below. No further order is required to give effect to this court's prior costs order.

Released:

"DEC 29 2016" "R.G. Juriansz J.A."

"RGJ" "I agree E.A. Cronk J.A."

"I agree L.B. Roberts J.A."