

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS

CLAIM NO: 76 of 2008

IN THE MATTER OF
SHANGRI-LA INTERNATIONAL DEVELOPMENT HOLDING LIMITED
AND IN THE MATTER OF SECTION 43 OF THE BVI BUSINESS COMPANIES
ACT, 2004

BETWEEN:

SINO UNION (CARIBBEAN) HOLDING LIMITED

Claimant

- (1) SHANGRI-LA INTERNATIONAL DEVELOPMENT HOLDING LIMITED
- (2) MOSSACK FONSECA CO. (BVI) LTD.
- (3) RICH VICTORY INVESTMENT LIMITED
- (4) THE GOVERNMENT OF THE COMMONWEALTH OF DOMINICA

Defendants

Appearances: Mr Paul Chaisty, Q.C., Richard Evans and Jerry Samuel for Rich Victory. Mr Reginald Armour, S.C. Vanessa Gopaul and Keisha Durham for Sino Union. Mr Anthony Astaphan, S.C., Ms Francine Baron-Royer, Attorney General Dominica, Mr Alick Lawrence and Mrs Tana'ania Small-Davis for Government of Dominica.

JUDGMENT

[2009; July 27, 28, 29 2009:
October 20, 21, 22 2009; November 11]

[Share transfer – whether conditional – whether cancelled]

- [1] **Bannister J [ag]:** In these proceedings the claimant ('Sino Union') seeks rectification of the register of members of Shangri-La International Development Holding Limited

(‘Shangri-La’). Sino Union holds 40% of the issued shares in Shangri-La and it is common ground that it has *locus* to apply for rectification under section 43 of the Business Companies Act, 2004 (‘the Act’). Unusually, however, Sino-Union does not apply for rectification in its favour, but in favour of the fourth defendant, the Government of the Commonwealth of Dominica (‘the Government’) by asking that the register of members be rectified to record the transfer from the third defendant, Rich Victory Investment Limited (‘Rich Victory’) to the Government of 25,500 shares in the capital of Shangri-La, effected by an instrument of transfer dated 12 February 2006 (‘the transfer’). The other parties to the proceedings are Shangri-La itself, as first defendant and Mossack Fonseca & Co (BVI) Limited (‘Mossack Fonseca’) as second defendant. Mossack Fonseca is Shangri-La’s registered agent.

- [2] The registered shareholders in Shangri-La are currently Sino-Union, with, as I have said, 40% and Rich Victory, with 55%. Two individuals, who play no part in these proceedings, hold the remaining 5%.

The pleadings

- [3] Because these proceedings were commenced by way of fixed date claim form, the pleadings are exiguous. The Government has not put in any pleading at all and the only pleadings of any significance are the defence and amended defence of Rich Victory. Rich Victory’s defence denies that the transfer was effective to transfer legal title of the 25,500 shares since it was not executed with that intention. This pleading is odd, because no transfer of shares passes legal title. That is obtained only by the act of registration. All that passes under an unconditional transfer is the beneficial interest¹. In any event, the defence goes on to plead that the transfer was executed pursuant to an oral agreement between the parties that the transfer was conditional upon the conduct by the Government of a process of due diligence into Shangri-La; the completion of the first phase of a development in which Shangri-La was interested known as the High School project; and

¹ Re Rose [1952] 1 All ER 1217

the approval of the instrument of transfer at a general meeting of Shangri-La. The defence goes on to plead that none of these conditions was fulfilled.

[4] The defence was amended on 14 May 2008 to plead in addition that the transfer was cancelled on 24 November 2006 by one Kieron Pinard-Byrne ('Mr Pinard-Byrne'), who was the self described 'escrow agent' who had custody of the transfer, following instructions given to him by the Government on 8 November 2006 that it did not wish to proceed further and the acceptance by Rich Victory on 24 November 2006 of the Government's 'intention'. Finally, the amended pleading says that the Government was notified of the cancellation by letter dated 11 January 2007.

[5] This amendment was subsequent to and closely follows the contents of a letter sent by Mr Pinard-Byrne to the Honourable Prime Minister of the Commonwealth of Dominica ('the Prime Minister') on 1 April 2008, by which the Government was informed for the first time that the transfer had been 'cancelled'.

The witnesses

[6] The witnesses, in the order in which they gave their evidence were the Prime Minister; Mr Felix Chen ('Mr Chen'); Mr Pinard-Byrne; and Mr David King Hsui ('Mr Hsui').

[7] I found the Prime Minister to be a truthful witness. There was at least one occasion when I thought that he would have been better advised to admit that he had simply failed to spot something or not reacted to some communication in a manner more consistent with the Government's case rather than to attempt to justify the absence of a reaction. Mr Chaisty QC, who appeared together with Mr Richard Evans and Mr Jerry Samuel for Rich Victory, made much of the fact that when lost for an answer the Prime Minister would frequently say 'good question', or make some similar response. I think that that criticism is a valid one, but it does not alter the fact that I felt able to accept with confidence every answer given to me by the Prime Minister on all the central questions of fact which were within his knowledge.

- [8] Mr Chen was an impressive witness. He is the sole director and chairman of Sino Union and clearly an experienced business man. He was also chairman of the board of Shangri-La for the bulk of the period with which these proceedings are concerned. Although accused by Rich Victory and Mr Hsiu of delinquencies in relation to his stewardship of the affairs of Shangri-La, I had no hesitation in accepting his evidence.
- [9] Mr Pinard-Byrne has practised as a Chartered Accountant in the Commonwealth of Dominica for upwards of 23 years under the style of KPB Chartered Accountants ('KPB'). I did not find him a satisfactory witness. I had to remind myself more than once that he was not, in fact, party to the proceedings. His oral, like his written evidence was partisan and argumentative. He appeared, if I may so put it, to be promulgating a version of events rather than trying to assist by giving purely factual evidence. When faced with evidence which contradicted his thesis, he became agitated and emotional. He appeared immune to appeals to recognise plain and obvious fact when it appeared to him that it was against Rich Victory's interest to do so. I have to treat his evidence with the greatest caution.
- [10] Mr Hsiu gave evidence through an interpreter. He had been an acquaintance of the Prime Minister and had been appointed by him to be Ambassador for the Commonwealth of Dominica to the Peoples Republic of China. He was heavily involved with and for a time represented the Government in and about the development which forms the underlying subject matter of these proceedings. He and the Prime Minister have subsequently fallen out. He is clearly associated with and claimed to be authorised to speak for Rich Victory, although the precise nature of his relationship with that company never became wholly clear. He had a tendency to give long speeches rather than to answer the few questions that were put to him and he displayed a visceral animosity towards the Prime Minister and Mr Chen whenever he got (or seized) the opportunity to do so. On the other hand, I found that when he was asked a specific question and could be persuaded to focus on it, he did his best to answer truthfully.

The facts

- [11] Shangri-La has a wholly owned subsidiary called International Development and Management Limited ('IDM'). IDM is a Cayman registered company. IDM in turn has two wholly owned subsidiaries: one, Paradise Property Holding Limited ('PPH') is a company registered in the Commonwealth of Dominica; the other, also incorporated under the laws of Dominica, is called Clark Hall International High School Inc ('CHS'). Between them IDM and PPH own some 400 acres of land in Dominica known as the Clark Hall Estate. That land is the subject matter of a proposed development which at present lies stalled.
- [12] The Prime Minister has made an affidavit in these proceedings. In it he sets out that in about 1993 Dominica made an agreement with one Grace Tung, as promoter, for the development of the Clark Hall Estate under which a number of concessions were granted by Dominica. Despite this, the development never got off the ground. On being elected in early 2004, the Prime Minister embarked on discussions with various parties in an attempt to get things moving. Among the persons with whom the Prime Minister discussed these matters was Mr Hsiu. The Prime Minister's evidence is that Mr Hsiu represented himself to the Prime Minister as the owner or controller of Rich Victory and as a person who spoke for and was able to make decisions on its behalf. By this stage Rich Victory was the owner of the entire issued share capital of Shangri-La which in turn owned the entire issued share capital of IDM. In the witness box Mr Hsiu denied that he had any beneficial or other interest in Rich Victory. In his witness statement sworn in support of an application for the appointment of liquidators over Shangri-La and which he adopts as part of his evidence in the present proceedings, Mr Hsiu 'accepts' that he was the appointed agent of Rich Victory in respect of its dealings with Shangri-La.
- [13] Mr Hsiu also conducted negotiations for a supposed investment of US\$20 million into the project by Sino Union. What actually happened was that in about January 2005 Sino Union paid Rich Victory US\$20 million for 40% of the issued share capital of Shangri-La. On 26 May 2005 Rich Victory, Sino Union and Shangri-La signed a shareholders agreement governing the rights of Sino Union as 40% and Rich Victory as 55%

shareholders of Shangri-La ('the shareholders agreement'). It was pursuant to this agreement that Mr Chen became chairman of Shangri-La's board of directors. I may say at this point that of the US\$20 million paid by Sino Union for that shareholding, US\$5 million found its way into Shangri-La as a term loan. The rest, for all the evidence goes, is no-where to be found. As a result, Mr Chen, who is the sole director and Chairman of Sino Union, is understandably aggrieved.

[14] The Prime Minister says in his affidavit that some time after March 2005 the Clark Hall project was in the doldrums. He therefore agreed with Mr Hsiu's suggestion that the best solution would be a joint venture between the Government and Rich Victory, with the Government participating via a shareholding in Shangri-La. The Government's contribution lay in its ability to offer concessions and inducements to investors and others.

[15] On 18 November 2005 the Prime Minister received a memorandum from Ms Lucy Ma. The Prime Minister says that he was told by Mr Hsiu that Lucy Ma was a director or officer of Rich Victory. I do not think that her precise status is in evidence in these proceedings but nobody suggests that she did not have authority to bind Rich Victory and I so find as a fact. Her letter was in the following terms:

'18 November 2005
Hon Roosevelt Skerrit
Prime Minister
Government of Dominica
Financial Services Centre
Roseau
Dominica

Dear Honourable Prime Minister Skerrit:

I am pleased to confirm that the reorganization and restructuring of IDM has been completed successfully and that it is now in a position to develop Clark Hall Estate.

As the controlling shareholder and chairman of Rich Victory Investment Limited, owner of 51% of the equity of IDM's new parent company, and in accordance with prior covenants and undertakings to achieve economic development for Dominica, I have deposited with KPB Chartered Accountants signed documents transferring Rich Victory's entire 51% equity to the Government of the Commonwealth of Dominica. These transfer documents will be effective and will be handed over to your Government as agreed on the eve of the official opening of the First Phase completed development project at Clark Hall Estate or sooner if mutually agreed. Meanwhile I shall continue to work tirelessly to bring this project to fruition as soon as possible and with your continuing support. Should you wish copies of the said transfer documents for your records, Mr. Kieron Pinard-Byrne is instructed to release same to you upon your request.

Yours truly,

Lucy Ma'

- [16] This document is misleading in two respects. First, because Rich Victory held 55%, not 51% of the equity in Shangri-La; and, secondly, because at the date when it was written there were no transfer documents in existence. As to the first point, the first mention of the 51% seems to me no more than a *falsa demonstratio* and thus harmless, while as to the second mention it will be seen that the transfer document comprises only 51% of Rich Victory's Shangri-La shares. No one has suggested that it should be rectified to cover 55%. As to the second point, Mr Pinard-Byrne said that he did not have such documents in his possession at that time because, so he said, he did not have enough information to prepare them. He said that Rich Victory's lawyers sent him a form of transfer in February 2006

- [17] On 26 November 2005 Mr Chen wrote to the Prime Minister on behalf of the Shangri-La board saying that it had no objection to the transfer of 51% of Rich Victory's shares in IDM to the Government. The reference to IDM is obviously intended to be a reference to Shangri-La. Mr Chen's evidence was that this letter was prepared by Mr Hsiu who handed it to him for signature while Mr Chen was staying at the Layou Hotel in Dominica and took it back once Mr Chen had signed it. Mr Chen had been unable to copy it since the hotel had no copier. I accept this evidence.
- [18] On 28 November 2005 the Prime Minister wrote to Mr Chen complaining about lack of progress with the project but also stating that the Government 'has officially received from Rich Victory Investments Limited transfer of its 51% equity of record in IDM's parent company.'
- [19] On 12 February 2006 Rich Victory as transferor and the Government as transferee executed an instrument of transfer of 51% of Shangri-La's issued shares. A copy of the transfer is in evidence. It is in the following terms:

'SHANGRILA INTERNATIONAL DEVELOPMENT HOLDING LIMITED
INSTRUMENT OF TRANSFER

We, Rich Victory Investment Limited, a company incorporated under the laws of the British Virgin Islands (hereinafter referred to as the "Transferor") in consideration of the sum of one US dollar (\$1.00) paid to us by Government of the Commonwealth of Dominica headquartered at Kennedy Avenue, Roseau, Commonwealth of Dominica (hereinafter referred to as the "Transferee") do hereby transfer to the Transferee twenty five thousand five hundred shares of Shangrila International Development Holding Limited as evidenced in share certificate number 0005 standing in our name in the Register of Members of Shangrila International Development Holding Limited to hold unto the Transferee his Executors, Administrators or Assignees, subject to the several conditions

upon which we hold the same at the time of execution hereof. And the Transferee does hereby agree to take the shares subject to the same conditions.

Witness our hands this twelfth day of February 2006.'

The document is executed by Lucy Ma for Rich Victory and by the Prime Minister for the Government. Apart from the usual reservations as to title, it is on its face unconditional. The evidence of the Prime Minister is that he signed it after it had been agreed that the transfer should be made without awaiting the official opening of the first phase of the Clark Hall development, since it had become clear that that particular development project had failed (it will be recalled that Lucy Ma's memorandum of 18 November 2005 had said that the transfer documents would be effective and would be handed over at the official opening or sooner if mutually agreed). It was the Prime Minister's evidence that he thought that the consequence of the execution of this transfer was that the Government became the absolute owner of the shares, although he accepted that he knew in November 2007 that they had not by then been registered. It is common ground that the executed transfer was delivered into the custody of Mr Pinard-Byrne. The Prime Minister's evidence is that that was done because his firm was the auditor to Shangri-La. Mr Pinard-Byrne insisted that he held the executed transfer as 'escrow agent'.

[20] Mr Pinard-Byrne's account of the manner in which the transfer came to be executed is set out in one of the two affidavits sworn by him upon which Rich Victory relies in these proceedings. He says that in February 2006 he had two meetings with the Prime Minister as well as 'several' telephone discussions with an interpreter for Lucy Ma in order, as he puts it, to agree his functions as escrow agent. Quite why he should have thought that necessary in view of the unambiguous terms of Lucy Ma's memorandum of 18 November 2005 was never made clear. He says that at the second of the two meetings with the Prime Minister he discussed with him what he calls the 'public interest conditions' that had been 'communicated to him by Rich Victory', presumably during the telephone conversations with the interpreter referred to above. These conditions are described by Mr Pinard-Byrne in his affidavits as being 'a requirement for unqualified audited financial

statements and such other due diligence as the Government may consider advisable'. Mr Pinard-Byrne mentions a concern of the Prime Minister that Sino Union was a subsidiary of a Taiwanese corporation, which was potentially embarrassing given the decision of the Commonwealth of Dominica to pursue a so-called One China policy of aligning itself with the Peoples Republic. There was some debate whether the due diligence which Mr Pinard-Byrne refers to was as to the status of Sino Union's holding company or the financial and general business affairs of Shangri-La (or, as pleaded in Rich Victory's defence, both). I do not think that it is necessary for me to lengthen this judgment by attempting to resolve this issue. Mr Pinard-Byrne goes on to say that:

'At the second in-person meeting with the Prime Minister in February 2006, he executed the instrument of transfer, I believe in good faith, and subject to and agreed the following conditions thereof as agreed by both the intended transferor and the intended transferee to be observed by them and by me in my capacity as the agreed escrow agent.

I pause to note that in cross examination Mr Pinard-Byrne at one point said that the conditions were the result of oral discussions with the Prime Minister, Lucy Ma *and* Mr Chen. He may, however, have been referring to his evidence that Mr Chen had been aware of the due diligence condition at an earlier stage. Mr Pinard-Byrne continues:

It was made clear to me by the Prime Minister that the Government . . . would only accept the transfer of a 51% shareholding in [Shangri-La] if the following conditions were fulfilled, to its satisfaction:

- (a) Unqualified audited financial statements of [Shangri-La] for the year ended 31 December 2005 and such other due diligence as may be advisable,
- (b) Completion of the 1st phase High School Project.

In addition, there was a requirement that the Government's position as shareholder would be agreed by the existing shareholders of Shangri-La.'

It will be noticed that Mr Pinard-Byrne's version of the 'first phase' condition omits (I have no doubt by design) the qualification in Lucy Ma's memorandum of 18 November 2005 – 'or sooner if earlier agreed'. The same omission may be noticed in Rich Victory's defence.

- [21] It was by this stage clear that Sino Union had no objection to the transfer. Although his letter of 26 November 2005 was written by Mr Chen in his capacity as chairman of Shangri-La, I have no doubt, having heard him give evidence, that he would never have signed such a letter had he had any reservation about the transfer from the point of view of Sino Union. Since this meant that 95% of the existing membership had effectively expressed themselves as in favour, the insistence on a condition requiring the prior agreement of Shangri-La's shareholders does not readily make commercial sense.
- [22] The Prime Minister accepted that there had been one meeting between himself and Mr Pinard-Byrne in February 2006, but denied that there had been a second. He said that the first phase High School condition ('the first phase condition') (which he insisted was the only condition that he had ever discussed) had simply fallen away, because the project had failed and that he had agreed no other conditions to which the transfer document which he had executed was to be subject. He accepted that there had been discussions as to the need for financial statements to be prepared but only so that a general meeting of Shangri-La could be convened and that that discussion had nothing to do with the question whether the transfer was conditional. He said that the Government was looking to Mr Hsiu alone as its adviser on the Clark Hall project and that in those circumstances it had no requirement for further due diligence to be carried out. Later he said that KPB never told him that due diligence and a clean audit were pre-conditions for the transfer to take effect.
- [23] Mr Hsiu gave evidence about these alleged additional conditions. In cross examination he began by saying that the Prime Minister was correct when he said that so far as he was

concerned the only condition that had ever applied was the 'first phase' condition (which, together with the provision of assistance from the People's Republic of China, he described, through the interpreter, as a 'firewall'), although he said he knew that Rich Victory were 'claiming', as he put it, the other conditions set out in Mr Pinard-Byrne's evidence referred to above. Later, however, he said that the Prime Minister was incorrect when he said that there was only one condition.

[24] In re-examination Mr Hsiu said that the Prime Minister was wrong when he said that approval of the transfer at the Annual General Meeting was unnecessary and that he was not telling the truth when he said that there was no condition of due diligence. But he went on to say that originally there had been the first phase condition 'and then we asked Mr Pinard-Byrne to proceed with the transfer.' Mr Pinard-Byrne, however, had told Rich Victory that due diligence should be provided and that shareholders' rights needed to be concerned in the process. Mr Hsiu said that he had agreed that this was necessary to protect the interests of all parties because of 'the past questionable activities of 'a person'' – presumably a reference to Mr Chen.

[25] This evidence from Mr Hsiu was to an extent muddled and contradictory. What is certain is that it fails to establish that any conditions (other than the first phase condition) were ever agreed or accepted between the parties. Instead, it establishes that in the face of the stated wishes of Rich Victory to proceed with the transfer Mr Pinard-Byrne at some stage made what amounted to officious suggestions to Rich Victory that further steps should be taken before the transfer should be treated as effective. Overall, I understood Mr Hsiu to be saying that apart from the first phase condition, the only others were those urged on Rick Victory by Mr Pinard-Byrne and that it was those 'conditions' which it was 'wrong' of the Prime Minister not to recognise. I shall have to consider later in this judgment when this intermeddling by Mr Pinard-Byrne took place.

[26] Lucy Ma did not give evidence in the proceedings.

- [27] Mr Chen's evidence is that he was unaware on 12 February 2006 that the transfer had been executed, but he was shown a photocopy of it by Mr Pinard-Byrne when they met on 17 April 2006.
- [28] Mr Pinard-Byrne says that in April 2006 Rich Victory proposed *to Mr Pinard-Byrne* that it would consider what he described as an accelerated transfer (at other times he described it as a fast track solution) whereby the transfer would be 'effected' at the annual general meeting to be held as soon as the audited financial statements were available. Mr Pinard-Byrne does not say who at Rich Victory made this proposal. If it really was the case that Rich Victory had communicated with Mr Pinard-Byrne as he says it did, it is noticeable that Rich Victory does not seem to have thought it worth mentioning its alleged thinking on the matter to the Government. Mr Pinard-Byrne seems, for all the evidence goes, to have considered that there was no need to share the fact that this was Rich Victory's plan with anyone at all until his witness statement of 8 May 2008 was served in the insolvency proceedings brought by Rich Victory. At all events, his next step (on his account) was to prepare a resolution of Shangri-La's board approving the transfer for consideration, he says, at the upcoming annual general meeting of Shangri-La. Mr Pinard-Byrne does not explain why it was thought to be any business of the annual general meeting to consider a resolution of the board of directors approving a transfer of shares, still less one that had already effectively received 95% shareholder approval. At one point in cross examination he said that the purpose of holding an annual general meeting was in order that the 'first phase' condition in Lucy Ma's memorandum of 18 November 2005 could be waived. Again, it was not made clear why it would take the convening of an annual general meeting to bring that about.
- [29] On 12 April 2006 Mr Pinard-Byrne wrote to the board of Shangri-La. His letter complains that information needed for the audit for the year ended 31 December 2005 was not forthcoming and that KPB was owed audit fees. The letter also says that Mr Pinard-Byrne understood that a meeting of the Shangri-La board had been called for 18 April 2006.

- [30] On 17 April 2006 Mr Chen had a meeting with Mr Pinard-Byrne in KPB's offices. Mr Chen said that the meeting lasted about 30 minutes and that during the meeting Mr Pinard-Byrne 'presented' the document of transfer, telling Mr Chen that he would get it registered immediately and adding that that was what the Government wished. Mr Chen said that this was the first time he became aware of the first phase condition. I take him to mean that although he became aware on 17 April 2006 that there had been a first phase condition, he understood that that condition had ceased to apply, given the decision to effect immediate registration. I accept Mr Chen's evidence.
- [31] On 18 April 2006 Mr Chen had a meeting with the Prime Minister. He told me that at that meeting the Prime Minister handed him a letter about the minutes (by which I took Mr Chen to be referring to draft minutes for Shangri-La's next annual general meeting (which in the event has yet to take place)). He said that it was the Prime Minister's wish that KPB should be appointed auditors. Although there is a reference to the need for financial statements in a letter from the Prime Minister to Mr Chen dated 19 April 2006, which I will mention later, Mr Chen said that this topic was not discussed at the meeting. He also said that he was unaware of any insistence by the Government on a full unqualified audit of Shangri-La before it would accept the shares. At this meeting Mr Chen signed what he called the 'resolution for transfer' (clearly a reference to the resolution of Shangri-La's board approving the transfer). His evidence is that the Prime Minister told him that he wanted Mr Pinard-Byrne to register the transfer as soon as possible. He said that the Prime Minister did not mention that the transfer was subject to any conditions. He said that when he signed 'nobody mentioned clean audit statements' and that Mr Hsiu (who was not present at the meeting with the Prime Minister) never told him that either unqualified audit reports or due diligence or cabinet approval were conditions of the transfer. I accept Mr Chen's evidence.
- [32] The written resolution of the board of Shangri-La approving the transfer from Rich Victory to the Government of the Commonwealth of Dominica of the 25,500 shares in Shangri-La directs the cancellation of Rich Victory's certificate for 27,500 shares and the issue in its place of certificates recognising the Government as the holder of 25,500 shares and Rich

Victory as the holder of the balance of 2,000. The resolution is in two identical parts, one signed by Mr Chen as Sino Union's appointee to the Shangri-La board and the other signed by Rich Victory's appointee, Mr Zhao.

[33] When cross examined about this resolution Mr Pinard-Byrne contended that it had never become part of the 'statutory records' of Shangri-La. He said that he held it as 'escrow agent' because he had suggested that it be passed in order to clear up what he repeatedly described as 'the mess' at Shangri-La. He seemed by this to be suggesting that it had yet to be perfected and was thus ineffective or, perhaps he meant, revocable. If that was his drift, it was misconceived. The reason why resolutions of members and directors are required to be kept in a company's records is precisely because they are effective (according their tenor) when passed. Those who are entitled to know about the fact that resolutions have been passed are thus to be afforded the opportunity to inspect them among the company's books and papers. If resolutions did not become effective until they found their way into the company's statutory records there would be no need for these provisions. In the present case, the board resolution was unqualified and unconditional. It took effect as soon as it was passed on 18 April 2006. That does not mean, of course, that as between the parties to the transfer, the resolution meant that it had (if previously conditional) gone unconditional. It means only that the transfer, whether conditional or not, had the approval of the board. This appeal to the fact that he had kept the board resolution instead of forwarding it to Shangri-La was another example of Mr Pinard-Byrne attempting to argue Rich Victory's case instead of confining himself to whatever relevant facts lay within his knowledge.

[34] On 17 April 2006 Boss & Young, a firm of Hong Kong attorneys acting for Rich Victory wrote to Mr Chen, objecting to a letter which he had sent out calling a board meeting of Shangri-La for 18 April 2008 in Dominica on grounds of short notice and alleged conflict with an outstanding meeting notice served by Rich Victory for a meeting to be held on the same day. The letter insisted that the Government would not become a member of Shangri-La until the first phase of the Clark Hall development had been completed (repeating part of the qualification as stated in Ms Ma's memorandum of 18 November

2005 but omitting the words 'or sooner if mutually agreed') and that Rich Victory remained a shareholder (sc for the entire 55%). Mr Pinard-Byrne was asked whether he could throw any light upon the fact that the writers, although describing themselves as 'counsel' to Rich Victory, appeared to be unaware of (or at any rate did not feel it necessary to refer to) the additional conditions of which Mr Pinard-Byrne says he himself had been made aware in February 2006 during his several telephone discussions via an interpreter with Lucy Ma. He was unable to.

[35] Mr Chen (who did not receive this letter until after his meeting with the Prime Minister on 18 April 2006) was asked about the reference in this letter to the first phase condition. He said that he disregarded it, no doubt for the reasons he gave in relation to his meeting on 17 April 2006 at the offices of KPB.

[36] Mr Hsiu (to whom the Boss & Young letter was copied) was asked why he did not complain to Boss & Young that it was incorrect inasmuch as it omitted reference to all suspensive conditions other than the first phase condition – and even then inaccurately. He gave no reason, but admitted that he did not raise the point with them.

[37] On 19 April 2006 Mr Pinard-Byrne had another meeting with Mr Chen. A copy letter from Mr Pinard-Byrne to Mr Chen dated 19 April 2006 bears a manuscript note at its foot:

'Met with Chen 11 am 19/4. He advised that the fees would be paid soonest & audit can then be completed.'

Mr Pinard-Byrne says he made this note as 'an audit issue' because Mr Chen was not co-operating. He says that at this meeting he told Mr Chen that due diligence was essential in order to avoid what he described as a 'poisoned chalice' being passed to the Government. He said that at this meeting Mr Chen was already aware of the due diligence condition and that it was at this meeting that he explained to Mr Chen the 'fast track' proposal under which a clear audit report would be obtained, an annual general meeting would be held at which the Government would as it were be welcomed, for want of a better word, as holder

of 51% of Shangri-La's shares. Mr Chen's consistent evidence was that he had only ever been told about one condition affecting the transfer of the shares and that was the first phase condition. I accept that evidence and reject the evidence of Mr Pinard-Byrne.

[38] I might add that while Mr Pinard-Byrne regularly alluded to what he called 'the mess' at Shangri-La, he was never able to say with any precision what it added up to. I took him to refer to the disputes between Rich Victory and Shangri-La which led to the appointment of Mr Pinard-Byrne some time in July 2006 as mediator between the parties. Mr Chen for his part frankly said that he was unhappy with KPB as auditor of Shangri-La because he thought that he was not independent (something amply illustrated during the course of these proceedings). He said that he refused to co-operate with him and that the only reason why he had told him to get on with the audit was because that was what the Prime Minister wanted.

[39] On 19 April 2006 the Prime Minister wrote to Mr Chen as Chairman of Shangri-La. The final two paragraphs of the Prime Minister's letter read as follows:

'Having regard to the long passage of time I would expect such submissions to be made within the next two months. It is also imperative that the audited financial statements of 'Shangri-La' be submitted to government within that time. In that connection, the appointment of KPB chartered Accountants as the Company's auditors is hereby ratified. It is therefore expected that the Company's annual shareholders' meeting can be held very soon to enable all shareholders to take appropriate decisions for the future direction and development of the Company.

Finally I would note that the existing disputes amongst Company shareholders needs to be resolved to ensure the future success of the Company. I therefore hereby mandate that the Company expand the scope of the auditor's engagement to make

recommendations for the resolution of all such disputes and that the disputing shareholders fully cooperate with the Company's auditors to ensure that mediation process is carried out as a matter of urgency.'

This letter had been drafted by Mr Pinard-Byrne.

[40] Mr Pinard-Byrne relies on the penultimate paragraph of the Prime Minister's letter as confirming the existence of the conditions to which he claims the transfer remained subject. They do nothing of the sort. Concerned, however, that astute minds might latch on to the reference to a shareholders meeting as an indication that the Government believed, when the letter was written, that it was a shareholder already, he anxiously moves in his witness statement to forestall any such suspicion by saying that it is 'his belief and understanding that the letter is not inconsistent with the position that at that point the Government was not a shareholder'. I have taken time to mention this evidence, which is summarised from paragraph 34 of Mr Pinard-Byrne's 8 May 2008 affidavit, as providing a good example of his casuistic and partisan approach to the case.

[41] On 27 April 2006 Mr Pinard-Byrne wrote to Mr Chen as follows:

'Registration of Government Shares

As you are aware I have been holding the executed transfer in escrow pending completion of the first phase project but recent instructions are that registration must now proceed. In this connection I now have the Directors Resolution duly executed to effect registration and issue of share certificate through Shangri-la's registered agent. Your VP Thomas Yeh had been responsible for such communications with Shangri-La's registered agent. However you will recall your November instructions to me that I discontinue communications with him effective March 31. I understand that he was dealing with the agent of the Company's

BVI registered agent in Hong Kong, a Jennifer Chen. Can I please now have instructions to forward the documents for registration and issue of share certificates with the address of Jennifer Chan of Mossack Fonseca & Co. (BVI) Ltd in Hong Kong.

Shareholders Disputes

With reference to the Prime Minister's letter of April 19, 2006 can you please inform me if the Shangri-La Board intend to honour Government's mandate to have the auditor mediate the disputes.

Outstanding Audit Fees

I have received an e-mail dated April 20, 2006 from Frank Cheng advising that our fee notes have been approved and are being processed for payment. However to date we have not received such payment.'

[42] When asked why this letter appeared impossible to reconcile with his evidence that the transfer remained conditional until 8 (or possibly 24) November 2006, Mr Pinard-Byrne said that it had to be construed in the light of the meeting of 19 April 2006 and that he was well aware when he wrote it of the existence of the conditions. Elsewhere in his cross examination he said that he had mentioned only the first phase condition because he was referring to a process of trying to facilitate 'an AGM solution' and wished to have all the documents available at that meeting. It was unclear what documents Mr Pinard-Byrne had in mind when he gave that evidence. It seems to me that this letter is the clearest contemporaneous evidence that on 27 April 2006 there were no conditions standing in the way of an immediate registration of the transfer and that Mr Pinard-Byrne knew as much.

[43] Mr Chen's personal assistant replied as follows:

"Thank you for your email dated on April 27.

Refer to your three questions, the answer is as follows:

I will inform Ms. Jennifer Chen, the contact person of Mossack Fonseca & Co. (BVI) Ltd in Hong Kong for your intention on May 2 after Labor Day.

Since the Government is the major shareholder now, there will be no disputes between Mr. Chen and Government. Therefore, your service will not be needed on this matter. Besides, who will be the director to be the representative of Government in Shangri-La? Please advise.

The outstanding fee had been proceed on April 26 and Mr. Cheng will send you the receipt of wire transfer shortly. The Government fee will also be arranged to pay on May 2.'

Mr Pinard-Byrne knew as a result of receiving this e-mail that the process of registration was being put in train in accordance with his request of 27 April 2006.

[44] On 30 May 2006, Mr Pinard-Byrne wrote to Mr Chen (via Mr Chen's personal assistant) by e-mail. He referred to the change in the representation of the Rich Victory appointee on the Shangri-La board and concluded:

'I trust this procedural matter will be brought to closure soonest so that I may proceed to have the Government's shares registered'.

When invited to comment on this document, Mr Pinard-Byrne said that it was being considered out of context. In fairness to Mr Pinard-Byrne, his running explanation for this and other inconvenient documents with which he was confronted during the course of his

evidence was (insofar as I was able to understand him) that they were merely part of a series of preparatory steps leading up to the Annual General Meeting of Shangri-La at which all problems would be resolved. According to Mr Pinard-Byrne, it was Mr Chen's and the Prime Minister's refusal or inability to understand, or at any rate admit, this 'context' (as Mr Pinard-Byrne frequently said) which led them to misunderstand or misinterpret otherwise plain documents.

[45] By 13 June 2006 Mr Pinard-Byrne appears to have detected what he conceived to be a problem arising out of the transfer of 51% of Rich Victory's shareholding to the Government, because he wrote to the board of Shangri-La on that day and part of what he said was:

'We also note that pursuant to the transfer of 51% majority control of the Group to the Government of Dominica in February 2006 that certain provisions of the [shareholders] Agreement may in the future be incompatible to the equity voting rights of the new majority shareholder and/or may be unenforceable by the parties.

In the circumstances the status of this [shareholders] Agreement as a matter of priority needs to be reviewed as between the parties thereto.'

The perceived difficulty appears to have consisted in restrictions on transfer contained in the shareholders agreement of May 2005 between Sino Union and Rich Victory. Since Rich Victory had executed the instrument of transfer and since Sino Union, which was aware of all the facts through Mr Chen, had raised no objections, it is not easy to see why there should be any practical problem.

[46] In cross examination Mr Pinard-Byrne explained that he needed to address the possible conflict between the terms of the shareholders agreement and the fact of the transfer 'in this transitional period.' The problem with this evidence, again, is that there is nothing

transitional in the language he used in his 13 June 2006 letter, which presents the problem as arising out of a transfer that had already taken place.

- [47] On 19 June 2006 Mr Hsiu, who at this time was the ambassador of the Commonwealth of Dominica to the Peoples Republic of China, wrote to the Prime Minister resigning as the Government's honorary liaison for the Clark Hall project. His letter of resignation contained the following passage:

'In July 2005, the joint-venture's strategic plan was submitted to the Government. The projected cost of the approval Phase 1 project was US\$22 million which had a completion date of July 2006. Despite my best efforts and endeavours that project did not proceed timely at all. It was therefore just and fitting, in the long term best interests of Dominica, that 51% of the equity ownership of Clark Hall Estate be formally transferred to the Government of Dominica. I so advised and the formal transfer from the silent (majority) joint-venture partner was executed in February 2006.'

As of 19 June 2006, therefore, Mr Hsiu had no difficulty with the concept that Rich Victory, for whom he was, by his own account, authorised to speak, had parted with 51% of its Shangri-La shares in February 2006.

- [48] On 23 June 2006 Mr Chen wrote to Mr Pinard-Byrne asking (among other things) when the transfer to the Government of Dominica was going to be completed so that he could know who the shareholder is and have an AGM in July. Mr Pinard-Byrne replied on the same day and with regard to this question he said that he was awaiting word from Mr Chen's personal assistant that the directors register had been updated as required before the transfer could be submitted for registration. When he was cross examined about this exchange, Mr Pinard-Byrne became agitated and could say no more than that Mr Chen was trying to jump the gun (no doubt a reference to Mr Pinard-Byrne's scenario under which all was to be resolved at the annual general meeting which never happened). What

is clear from this exchange is that as far as he was concerned on 23 June 2006 registration of the transfer was going forward, subject to the updating of the register of directors, which was a mere formality.

[49] On 29 June 2006 Mr Pinard-Byrne wrote to Mr Chen as Chairman of Shangri-La enclosing a draft resolution which would effect what amounted to a scheme of arrangement under which the Clark Hall estate would be transferred from Shangri-La's subsidiaries into a Dominica registered company, with the parties exchanging their Shangri-La shares for shares in the new company. The intention was to make the Clark Hall estate the property of a domestic entity Shangri-La. He said that it was the wish of the Prime Minister that this scheme be carried into effect. The draft resolution enclosed with Mr Pinard-Byrne's letter envisaged that the Government of Dominica would receive a 51% shareholding in the new company.

[50] On 4 July 2006, Mr Pinard-Byrne wrote to Mr Chen as follows:

'By email of June 3, 2006 I received confirmation from Ms. Emma Weng of the registration of the appointment of Zhao Ya Qing and the resignation of Geng Yanan with a request that I proceed with the registration of the Government Stock Transfer from Rich Victory. However as you are aware there are significant anomalies between the Shangri-La register of members submitted to me by your management for audit purposes and the copy of the registered agent's register e-mailed to me on May 4, 2006. These anomalies concern you and Sino Union (Caribbean) Holding Limited and audit representations from your management that Sino Union was a subsidiary of a publicly traded company in Taiwan in 2005. I therefore await clarification from you of those anomalies, representations and finalisation of the '05 audited financial statements. I would note that this further delay in procedure to register the subject transfer does not in any way

affect Government's 51% ownership of the Shangri-La group in accordance with the approved transfer document.'

Mr Chen told me that this was the last he heard from Mr Pinard-Byrne on the subject of registration of the transfer.

[51] Mr Pinard-Byrne was asked why this letter was cast in this form if the transfer remained conditional. He admitted that the letter was wrong not to have referred to the conditions he says were agreed in February 2006. Becoming agitated once more, he said that it was 'horrifying' to him that the letter was being misconstrued.

[52] On 8 July 2006 Mr Chen wrote to the Prime Minister. I had better set out the letter's second paragraph in full:

'Once your honorable government becomes the officially registered shareholder of the Company, your government and Sino Union (Caribbean) Holding Limited will become the two majority shareholders of the Company. Therefore, I sincerely believe it is advisable that we have a thorough and candid conversation in person to spell out all the current issues, future expectations and effective course of action to address such issues and achieve future expectations. I do not think the involvement of any other third party in this matter will lead to any fruitful result that could benefit all the shareholders. Particularly, we were told a lot about Mr. Kieron Pinard-Byrne's questionable reputation at the local community. His business relationship with Grace Tung in the past years has been lashed out by the opposition party and the people of Dominica. To rely on him as the voice of the government and to appoint him as the General Counsel of the proposed new company can be detrimental to the

image of the Company and the shareholders' efforts to achieve the ultimate goals.'

This passage is significant not only as contemporaneous evidence of what Mr Chen, as Chairman of the holder of 40% of the Shangri-La shares and the executive director of Shangri-La itself, thought about the entitlement of the Government to be registered as a member of Shangri-La, but also as revealing a deep animosity between Mr Chen and Mr Pinard-Byrne.

[53] On 18 July 2006 KPB signed off Shangri-La's financial statements for the year ended 31 December 2005, heavily qualifying their audit report. There is no mention within the financial statements of a transfer of 51% of Rich Victory's holding to the Commonwealth of Dominica (of course any such reference would have been post balance sheet). Mr Pinard-Byrne argued (there is no other word for it) at one point in his witness statement that had the transfer been unconditional, such a reference would have had to have been made in order to comply with international auditing standards. When asked, however, in cross examination, why the audit report did not refer to the conditions for which he contends, Mr Pinard-Byrne's answer was that there was no need to do so, since the audit report is made to the company and is not concerned with private arrangements between shareholders. This seems to me to be a perfectly fair answer to a misconceived question, but it also disposes of his argument that failure to refer in the financial statements to the transfer demonstrates that it must have been conditional.

[54] On 24 July 2006 Rich Victory, by Lucy Ma, wrote to Mr Pinard-Byrne seeking consultation/mediation under the shareholders agreement of May 2005. Her letter contained the following passage:

'3. Breach of Purpose of the [shareholders] Agreement

Mr. Felix T. Chen has frustrated the purpose of the Agreement. In consequence, and due to his failure to specifically perform and his defaults; on February 12, 2006 Rich Victory Investment Ltd

transferred 51% of its equity in Shangri-La to the Government of Dominica for US\$1 to compensate the Commonwealth of Dominica for that failure of specific performance and default; resulting in Rich victory investment Ltd suffering substantial financial loss and damage. Mr. Felix T. Chen approved the said transfer on April 18, 2006. Notwithstanding, he has continued to frustrate the purpose of the Agreement.

4. Material Default

Because the foregoing substantial breaches of the Agreement materially affects and affected the operation and continuity of Shangri-La and its subsidiaries and the purpose of the Agreement, such breaches shall, under Clause 14.1.3 of the purpose of the Agreement, be regarded as a material default and the Party (i.e. Mr. Felix Chen/and/or Sino Union (Caribbean) Holding Ltd) in material default shall pay the other parties the actual damage.'

Rich Victory clearly had no difficulty in July 2006 in treating the transfer as unconditional.

[55] On 14 August 2006 Mr Pinard-Byrne signed off his mediation report. At page 4 of the report Mr Pinard-Byrne writes as follows:

"It was against this background that on February 12, 2006 Rich Victory transferred 51% of its equity in the Shangri-La Group for US\$1 to the Government, which transfer was approved by the Directors of Shangri-La on April 18, 2006.

Government's April 19, 2006 requested submissions having not been made, Shareholders of Shangri-La executed express resolutions in July 2006. In addition to the aforementioned

resolution for a mediated consultation the following additional resolutions were effected.

"WHEREAS it was just and fitting to transfer 51% of the Company's issued share capital to the Government of the Commonwealth of Dominica, AND WHEREAS the said transfer of shares was approved by the Company's Board of Directors on the 18th day of April, 2006; AND WHEREAS there is now no legal, commercial or developmental rationale for ownership of the Company's freehold lands in the Commonwealth of Dominica to be vested in British Virgin Islands or Caymanian international business companies; AND WHEREAS it is in the best interests of all the Company's shareholders to do so; BE IT RESOLVED that all the company's subsidiaries freehold lands known as Clark Hall Estate, Layou in the Commonwealth of Dominica and comprising in total 403.7 Acres and all buildings thereon be and are hereby to be transferred and vested in a Dominica company to be incorporated under the Companies Act 1994 of the Commonwealth of Dominica, the shareholding of which company on vesting shall be as follows:

Government of the Commonwealth of Dominica	51%
Sino Union (Caribbean) Holding Ltd or nominee	40%
Rich Victory Investment Ltd or nominee	4%
Tsao King Ling or nominee	2.5%
Lan Tina or nominee	<u>2.5%</u>
	100%"

[56] It appears from a letter written to Shangri-La's board on 29 August 2006 that Mr Pinard-Byrne had invited applications from the shareholders of Shangri-La for shares in the replacement holding company on 23 August 2006. Mr Pinard-Byrne informed the board in

his letter that by that date application forms had been received from the Government of Dominica (51%) and from Rich Victory (4%). He said he was awaiting completed application forms from Sino Union (40%) and two minor investors (2.5% each). He ended by asking the board to chase up the outstanding applications.

[57] Mr Pinard-Byrne was asked in cross examination about the reference in his mediation report (in fact, there are two such) to the transfer of Rich Victory's shares to the Government. His response was to say that he meant that Rich Victory was the majority shareholder. I accept that there are passages in the report where the expression 'majority shareholder' is intended to refer to Rich Victory (after all, in point of law it still was the majority shareholder). But that cannot be the sense in the passage to which I have just referred. Mr Pinard-Byrne was also asked why he had not mentioned the conditions which he asserted applied to the transfer in his mediation report. He said that there had been no need to mention them. As for the resolution set out above and which the report says had been 'effected', Mr Pinard-Byrne said that that was a way of trying to bring the parties together. He said that the resolution was merely a 'round robin for mediation' and had never become part of the statutory records of Shangri-La. The resolution was among several which had been sent to the board of Shangri-La for distribution and execution under cover of a letter from KPB dated 6 July 2006, a copy of which had been sent to the Prime Minister. The terms of the mediation report make it clear that they had evidently been duly executed by 14 August 2006, although Mr Pinard-Byrne claimed in cross examination that only Rich Victory had signed. Mr Chen treated this resolution as binding and said that it had never been revoked.

[58] On 28 September 2006 Mr Pinard-Byrne sent the certificates of title of the land forming the Clark Hall estate to the Prime Minister in anticipation of its vesting in the proposed new Dominica registered vehicle – Mr Pinard-Byrne referred to this as 'Plan B'. At around the same time Mr Chen was removed as chairman of Shangri-La as part of Mr Pinard-Byrne's recommendations in his mediation report.

[59] On 4 November 2006 the Prime Minister wrote a long letter to Mr Hsiu complaining that the Government had been kept in the dark about the sale of the 40% holding in Shangri-La to Sino Union and that the US\$20 million received by Rich Victory amounted to an exploitation for the private commercial purposes of Rich Victory of the Government concessions which had been granted with the intention of encouraging investment into the Clark Hall project, rather than being exploited by Rich Victory in order to sell shares in Shangri-La at a profit. The letter finished by requiring that the transfer to Sino Union be rescinded and the US\$20 million returned. The deep bitterness displayed by Mr Hsiu in the witness box towards the Prime Minister may have had its origins or part of its origins in this complaint. Mr Hsiu did not reply to this letter.

[60] Mr Pinard-Byrne says in his 8 May 2008 witness statement that on 8 November 2006 he 'learned from the Prime Minister via telephone' that it would be unacceptable to the Government to pursue the intended transfer further.' If Mr Pinard-Byrne made a note of this important communication, he has not shown it to anyone for the purposes of these proceedings. He certainly did not write to the Prime Minister to confirm it or to seek his written instructions. He goes on:

'With Rich Victory's magnanimous acceptance of that fact via an interpreter for Ms Ma by telephone on 24 November 2006 I cancelled the conditional 12 February 2006 Instrument of Transfer on 24 November 2006, by physically recording the cancellation on the face of the document.'

[61] Mr Pinard-Byrne 'cancelled' the instrument of transfer by drawing two diagonal lines across it, rather in the manner of an old fashioned cheque crossing and between those lines he wrote in manuscript:

'CANCELLED
Kieron Pinard-Byrne
Pp KPB Chartered Accountants

24/11/2006'

[62] There is no evidence that Mr Pinard-Byrne told anyone at the time – or until 1 April 2008 - that he had done this.

[63] I asked Mr Chaisty QC whether it was contended that Mr Pinard-Byrne's act had any and, if so, what legal effect, but received no satisfactory answer.

[64] On 11 January 2007, Mr Pinard-Byrne, writing as KPB Chartered Accountants, wrote to the board of Shangri-La. I had better set out his letter in full:

'THE BOARD OF DIRECTORS

SHANGRI-LA INTERNATIONAL DEVELOPMENT HOLDING LIMITED

In our capacity as Auditors of Shangri-La International Holding Limited (Shangri-La) we hereby confirm the following:

1. The proposal of Shangri-La's 55% majority shareholder (Rich Victory Investment Limited) to grant by transfer 51% of Shangri-La's equity to the Government of the Commonwealth of Dominica, due to management's irregularities could not be proceeded with and had to be aborted based on professional advice.
2. As an alternative Rich Victory Investment Limited proposed that all the real estate of Shangri-La be vested in a Dominica incorporated company with the Government of the Commonwealth of Dominica having an entitlement by grant to 51% of that Company's equity. For divers reasons that proposal has not been and could not be consummated. Consequently all Shangri-La's real estate continues to be owned by its wholly owned subsidiary companies IDM Ltd and Paradise Property Ltd and the shareholders of Shangri-La are:

Rich Victory Investment Limited	55%
Sino Union (Caribbean) Holding Ltd (Sino Union)	40%
Lan Tina	2.5%

Tsao King Ling

2.5%

100%

3. In our opinion, based on our reported audit findings and the corporate governance requirements of Shangri-La, Mr. Felix T. Chen was not prima facie a fit and proper person to be a director or Chairman of Shangri-La and Sino Union (whose Chairman was also Mr. Chen) was not prima facie a fit and proper person to be Shangri-La's Manager. We concur with the shareholders actions which removed Mr. Chen from Shangri-La's Board of Directors.'

Contrary to what is pleaded in Rich Victory's amended defence, this letter does not notify Shangri-La of the cancellation of the 'proposed' transfer.

[65] The foot of the letter contains a 'cc' to the Prime Minister and Mr Pinard-Byrne produced his firm's correspondence log showing that (as the Prime Minister accepted) a letter had been signed for as received by the Prime Minister's personal assistant on 11 January 2007. The Prime Minister said that he had not seen the letter and that a search of his office had failed to turn up any trace of it. I think that the balance of probabilities is that a copy of the 11 January 2007 letter was delivered to the Prime Minister's office but there is no evidence that the Prime Minister himself ever read the document and I find as a fact that he did not. When the Prime Minister received a letter from Mr Pinard-Byrne dated 1 April 2008 setting out the conditionalities which Mr Pinard-Byrne claims affected the shares and telling the Prime Minister that the shares had been 'cancelled', the Prime Minister replied expressing astonishment at both pieces of news and stating that he had never been told of either previously. I am sure that had he read the letter of 11 January 2007, he would have reacted in a similar fashion. The fact that he did not corroborates his evidence that he never read it. For reasons which will appear, it does not seem to me to be a matter of any significance and I record my findings of fact purely because some reliance was placed by Rich Victory on these events.

[66] It is striking that the letter of 11 January 2007 does not say that the transfer had to be aborted because the conditions to which Mr Pinard-Byrne maintains that it was subject had

not been fulfilled. Instead, it says that it had to be 'aborted based upon professional advice', which is something completely different, although that itself ignores the fact that there is no evidence that there was ever any professional advice given to either party in this regard. When he was asked in cross examination how these matters could be reconciled, he said that the reference in the letter to 'management irregularities' was a 'diplomatic' reference to the non-fulfilment of the due diligence condition. This answer seems to me yet another example of Mr Pinard-Byrne's propensity to resort to any device, however implausible, to explain away documents which do not fit with the version of events which he wished the court to accept.

[67] On 12 January 2007 Mr Hsiu wrote to the Prime Minister from the Dominican embassy in Beijing. The letter contained a passage dealing with the Clark Hall project:

'Clark Hall Estate Development Projects

As you are aware, by certification of the project's auditors, all hopes to recognize and save the projects under the equity control of your Government have been frustrated and for divers reasons all resolutions to do so stand revoked. In order to greatly assist in the fostering of a resolution of the corporate issues which now dominate agendas, I hereby request again, that the documents handed to you under cover letter dated September 28, 2006 (see attached for ease of reference) be returned for safekeeping to the projects' auditors, so that a new focus to develop Clark Hall Estate may be contemplated.

I am satisfied that the Board of Directors of Shangri-La International Development Holding Ltd and it's 55% majority shareholder and financier (Rich Victory Investment Ltd) have been pursuing all lawful corporate means to have such issues

resolved. I understand and summarise those issues to be as follows:

- 1) The public interest for the Commonwealth of Dominica.
- 2) The breaches of contract and breaches of fiduciary duties by Shangri-La's former Chairman and Manager (Mr. Felix Chen and Sino Union) as reported by the Company's Auditors.
- 3) The default by Shangri-La's Chairman and Manager (Mr. Felix Chen and Sino Union) with respect to Rich Victory's loan of US\$5 million to Shangri-La.
- 4) The untrue, malicious, mischievous and slanderous allegations circulating in Dominica by Mr. Felix Chen.'

[68] The Prime Minister was asked about his reaction to this letter. I have to say that I did not find all of his responses entirely convincing and his failure convincingly to explain the Government's lack of challenge to Mr Hsiu's assertion that Rich Victory remained a 55% shareholder (which in context must mean beneficial shareholder) was not impressive. For the reasons which I will give later, however, it has no bearing on the outcome.

[69] On 17 January 2007 the Government sent back the certificates of title to the Clark Hall Estate. Mr Pinard-Byrne says in his affidavit of 8 May 2008 that they were sent back because it had not been possible to pursue 'Plan B' further.

[70] On 31 May 2007 KPB resigned as auditor of Shangri-La.

[71] On 25 June and 2 July 2007 the Prime Minister sent Mr Hsiu documents for signature which, if executed, would have had the effect of transferring the land forming the Clark Hall estate to a company owned or controlled by Mr Chen. Mr Hsiu replied on 13 July 2007 refusing to do anything of the sort. The Prime Minister said that the idea of sending this letter was Mr Chen's.

[72] On 25 October 2007 the Prime Minister met Mr Hsiu in Las Vegas. Mr Chaisty cross examined the Prime Minister at length on a copy document which purports to be a minute of this meeting. Neither the document nor Mr Chaisty QC's cross examination threw any light on the issues which are for decision in these proceedings.

[73] On 10 February 2008 Mr Hsiu sent an e-mail to the Prime Minister. After a long and intemperate diatribe against the alleged iniquities of Mr Chen, it recommended that the Prime Minister sign a letter 'to the lawyer in the BVI' stating that the Government had no interest in Shangri-La. Significantly, the reason given by Mr Hsiu why the Prime Minister should sign such a letter was not because it corresponded with a factual position resulting from non-fulfilment of conditions to which the transfer had been subject, but

'In order not to complicate the Government, and more importantly,
not to have you associated with Chen in any way . . . '

As I understand the effect of Mr Hsiu's e-mail, he was suggesting that it would be politic for the Prime Minister to distance himself from Mr Chen. He was not suggesting that the Prime Minister should merely acknowledge an already existing state of affairs arising out of the fact that the transfer had never become unconditional and/or had been cancelled.

[74] The draft letter for signature by the Prime Minister was attached. It reads as follows:

'Date:

Conyers Dill and Pearman
PO Box 3140
Romasco Place
Wickhams Cay 1
Road Town
Tortola
British Virgin Islands

VG1 110
(Attn: Mr. Richard Evans)

Dear Sirs

Shangri-la international Development Holding Limited

I write to confirm that the Government of Dominica does not have any legal or equitable interest in the shareholdings of the above company. Nevertheless, It would be in our best interest to see that the dispute between shareholders of this company be resolved as soon as practicable.

Yours faithfully

ROOSEVELT SKERRIT
PRIME MINISTER OF DOMINICA'

- [75] A meeting took place between Mr Hsiu and the Prime Minister in London on 18 February 2008. The Prime Minister said it lasted no more than 15 minutes. Mr Hsiu says that the Prime Minister told him that he had already signed a letter in the terms of the draft set out above and that Mr Hsiu should ask Mr Pinard-Byrne to pick up a copy from the Prime Minister's secretary. The Prime Minister's evidence was that Mr Hsiu arrived in London with an engrossed copy of the letter on letterhead of the Prime Minister of Dominica and that the Prime Minister told him that he would not sign any documents. It is clear that no letter was signed by the Prime Minister at the meeting with Mr Hsiu in London, otherwise Mr Hsiu would have been given it, or a copy of it, on the spot. The Prime Minister denied ever having told Mr Hsiu that he had signed the letter in Dominica or that he had said that Mr Hsiu or Mr Pinard-Byrne should collect a copy from his office. Indeed, a later e-mail from the Prime Minister to Mr Hsiu made it plain that the draft had been sent to the Attorney General for her comments. On 25 February 2008 Mr Hsiu sent the Prime Minister a further copy to fax to Conyers Dill & Pearman in the BVI and supplying him with their fax number. That request makes clear that by that date no copy of the letter had been delivered to Mr Hsiu. No copy of any such letter was produced at trial.

- [76] In an affidavit made in these proceedings on 26 May 2008, Mr Pinard-Byrne says that he was informed (by whom he does not say) on 18 February 2008 that he was to phone the Prime Minister's secretary and tell her that the Prime Minister had told Mr Hsiu that the Prime Minister had signed a letter confirming that the Government was not a shareholder in Shangri-La and that that letter was ready for collection by Mr Pinard-Byrne. He goes on to say that he made daily calls until 22 February 2008, when he claims that he was told that the Attorney General was going to fax the letter direct to Conyers Dill & Pearman, attorneys for Rich Victory. That never happened.
- [77] On the day after Mr Hsiu's request, Rich Victory applied in this Court for the appointment of joint liquidators over Shangri-La. It is impossible to resist the inference that the attempt to obtain the Prime Minister's signature to the draft letter was connected with the intended issue of those proceedings.
- [78] I found the Prime Minister's evidence on the London meeting and its aftermath wholly convincing. There is a difficulty, however, because although he tendered himself for cross examination, Mr Hsiu was not cross examined about either the Las Vegas meeting or the London meeting, nor was the Prime Minister's account of events put to him. Mr Chaisty QC referred me to a short passage from Phipson on Evidence, 16th Ed, at paragraph 12-12. I was not taken to any of the authorities referred to in this passage, but it seems to me to be confusing two separate rules of evidence. One is that a party who wishes to submit that a witness' evidence is not to be accepted because it is untruthful should challenge it; the other is that a party who intends to submit that it should not be accepted because it is inconsistent with other evidence should not only challenge the witness but also put that other evidence to the witness in order that he should have an opportunity to deal with it. I do not think that either rule means that in the absence of an outright challenge, or offering a witness the opportunity to deal with inconsistent evidence, the court is forced to ignore otherwise credible and compelling evidence. In my judgment the true rule is that in the absence of either a challenge or 'putting', the court must give serious consideration to the

fact that neither step has been taken. In an extreme case a party may be debarred from submitting that a witness' evidence should be disbelieved.

[79] Approaching the matter in that way, it seems to me that I am entitled to accept the Prime Minister's evidence that he did not sign the letter which Mr Hsiu had invited him to sign and did not tell Mr Hsiu that he had already signed a copy. I rely on the contemporary e-mail showing that the Prime Minister had forwarded the draft letter to the Attorney General for consideration as much as on the oral evidence of the Prime Minister under strenuous cross examination.

[80] I take full account of the fact that Mr Hsiu was not afforded the opportunity of dealing with the Prime Minister's account or of giving the Court the chance to assess his own credibility on these matters, but I place little weight on that because at the end of the day Mr Hsiu's evidence, even if accepted, seems of very little, if any, probative value. Mr Hsiu's suggestion was, as I have already said, made quite independently of the legal status of the transfer. In any case, if the transfer had indeed been 'cancelled' in November 2006, the signature of a letter to that effect by the Prime Minister would not have affected the position. At best it would have amounted to a handy admission for use in the forthcoming liquidator application. If, on the other hand, the transfer was of unconditional effect, then nothing in the letter, even if the Prime Minister had signed it, would have operated to divest the Government of the equitable interest which it had obtained under it. That could have been done only by way of transfer or other disposition. Thus, except to the extent that the letter admitted that the Government had no legal interest, it would simply have been an untruth.

[81] So, even if I had accepted Mr Hsiu's evidence about the London meeting and rejected that given by the Prime Minister, it would not have affected my decision.

[82] For all these reasons, therefore, I do not think that the fact that Mr Hsiu was not challenged on these matters precludes me from accepting the Prime Minister's credible evidence

about them, although by parity of reasoning, the acceptance of his evidence has no bearing on my conclusion.

[83] On 20 March 2008 Sino-Union commenced these proceedings. Mr Chen said that he did so without any collaboration with the Government of the Commonwealth of Dominica because, Rich Victory having brought its application for liquidators to be appointed to Shangri-La he wished it to be established for the purposes of those proceedings that Rich Victory was entitled only to a four per cent holding. He said that he was uncertain whether the Government would be concerned to oppose Rich Victory because of the connection with Mr Hsiu. I accept Mr Chen's evidence as to his motivation in causing Sino Union to bring the present proceedings.

[84] On 1 April 2008, some two months after Rich Victory had commenced the insolvency proceedings and some ten days after Sino Union had served its claim form in the present proceedings, Mr Pinard Byrne wrote to the Prime Minister announcing his intention to give evidence for Rich Victory in the present proceedings. He went on to say

3. As escrow agent for the referenced (conditional) Instrument if the Transfer I observed the fact that the referenced Instrument of Transfer was subject to the following conditionalities:

- (a) Unqualified audited financial statements of the subject company for the year ended December 31, 2005
- (b) Completion of the 1st phase High School Project
- (c) Such other due diligence as may be advisable

As none of these conditionalities were met the reference (conditional) instrument of transfer stands cancelled since 24th November 2006.

4. My duties as escrow agent were finalized by my letter to the subject company's Board of Directors dated 11th January 2007 and copied to you. (copy attached for your ease of reference)
5. This firm resigned for professional cause as the auditors of the subject company on May 31, 2007.

In conclusion I would reiterate that our audits and audit reports have both served all the shareholders of the subject company and Dominica's public interest well. Moreover our expressed professional judgment with respect to the bona fides of Felix Chen, the Director of Sino Union, have been vindicated by subsequent official public record disclosure.

If I can be of any further professional service to the Government of Dominica in this matter please let me know.

All the Best.

Sincerely
KIERON PINARD-BYRNE

Copied to: Mrs. Francine Baron-Royer, Attorney General
Conyers Dill and Pearman, Legal Counsel for Rich Victory
Investment Ltd.'

[85] Mr Pinard-Byrne accepted, as he had to, that this was the first express reference to the conditions which he claimed were attached to the transfer. He was asked what he meant by the curious expression 'I observed the fact' in the third paragraph. He said that this

was a reference to the two meetings which he claimed he had had with the Prime Minister in February 2006.

- [86] On 19 May 2008 the Prime Minister replied to Mr Pinard-Byrne's letter of 1 April 2008 saying that he has absolutely no recollection of having been informed of the conditionalities mentioned by Mr Pinard-Byrne and that so far as he was concerned the shares were transferred and delivered to the Government unconditionally following Lucy Ma's memorandum and the execution of the transfer. He went on to say that he was never informed, until he received Mr Pinard-Byrne's letter, that the shares had been cancelled.
- [87] In my judgment the letter of 1 April 2008 was nothing more than a self serving after the event attempt by Mr Pinard-Byrne to manufacture evidence for the purposes of Rich Victory's defence. It is no coincidence that this letter was followed by an amendment on 14 May 2008 to the points of defence in order to plead the material which it contained.
- [88] I should mention that there is no evidence after about September 2006 that the Government pressed to have its status as member confirmed or did anything to progress the process of registration. The Prime Minister's answers when asked about this were the least satisfactory part of his evidence. Nevertheless, just as in the case of the letter which he refused to sign for Mr Hsiu, inactivity in this regard on the part of the Government cannot affect any legal or equitable entitlement if already accrued. For the reasons I am about to give, in my judgment the position had crystallised on 12 February 2006. It cannot have been affected by subsequent inactivity on the part of the Government. I quite accept that had the evidence been equivocal, and if it had been necessary for me to decide the issue of equitable entitlement on a balance of probabilities and in the absence of clear documentary evidence, then inactivity might have had an evidential role to play. But that is not the case.

Analysis and conclusions

[89] In my judgment this case is a simple one. The unconditional nature of the transfer itself and its execution by both parties shows that the parties had agreed to ignore the first phase condition and instead had agreed, consistently with Lucy Ma's memorandum, to make the transfer effective forthwith. I accept the Prime Minister's clear evidence on this point (paragraphs [19] and [22] above), which is amply corroborated by the references in the contemporaneous documents to which I have drawn attention and I reject Mr Pinard-Byrne's evidence that some time in February 2006 the Prime Minister accepted the conditions for which Rich Victory contends.

[90] I reject Mr Pinard-Byrne's uncorroborated evidence that he had conversations in February 2006 through an interpreter with Lucy Ma or that she communicated 'public interest' conditions to him at that time. I find as a fact that no such conditions were mentioned to, let alone agreed by the Government before the transfer was executed or at any time thereafter. Any such public interest 'conditions' were proposed by Mr Pinard-Byrne himself to Rich Victory, as Mr Hsiu made clear in evidence given against Rich Victory's interest, and I find that such suggestions were put forward in late summer or autumn of 2006 when, for whatever motives, Mr Pinard-Byrne became concerned to prevent the registration of the transfer. It cannot have been earlier than that, because in late July of 2006 Rich Victory itself was complaining about its unconditional disposal in favour of the Government. Mr Hsiu's letter of 19 June, 2006, it will be recalled, also acknowledged that the transfer had been effected in February 2006. I also find as a fact that there never was any 'fast track' proposal, something which was unsupported by any evidence from Rich Victory and which in my judgment existed only in the imagination of Mr Pinard-Byrne.

[91] Any other findings would be inconsistent with the mass of contemporary documents, many of them emanating from Mr Pinard-Byrne himself, but I wish to make it quite plain that my finding that the execution of the transfer on 12 February 2006 was unconditional rests as much on my acceptance of the evidence of the Prime Minister as it does on the fact that no other finding would be consistent with the documents to which I have made reference.

[92] By unconditionally executing the transfer Rich Victory had done everything in its power to transfer the beneficial interest to the Government. It is correct that Rich Victory had not handed a share certificate to the Government, but that is not required either by Shangri-La's Articles of Association or by section 54 of the Act. In any event, since Rich Victory's shareholding was to be split as a result of the transfer, the procedure would have been for the certificate to be sent not to the transferee but to the company, which would cancel it and issue two new certificates as directed by the resolution of 18 April 2006.

[93] In my judgment, therefore, the position reached on 12 February 2006 was the same as that which obtained in **Re Rose**² on the death of the transferor in that case. He having done all in his power, when he executed a transfer in favour of his wife and handed it to her together with the relative share certificate, to transfer the ownership of the shares, the entire beneficial interest in the shares thereon vested in her. In those circumstances, the gift was irrevocable. By unconditionally executing a transfer in favour of the Government, Rich Victory had put the Government in the same position as the wife in **Re Rose**. The board resolution of 18 April 2006 underlined, although it did not add to, the strength of the Government's position. The fact that the executed transfer was handed to Mr Pinard-Byrne, rather than held by the Government, does not affect the matter. As the contemporaneous correspondence makes clear, that was so that he could execute his instructions to register it, instructions which he deliberately disobeyed. There was no question of his holding the transfer after it had been executed as some sort of escrow agent, for the simple reason that it no longer remained in escrow.

[94] Mr Pinard-Byrne's wholly unauthorised attempted to 'cancel' of the share transfer was misconceived. By the time Mr Pinard-Byrne indorsed the document, the beneficial interest in the shares was irrevocably vested in the Government. I should add that I reject Mr Pinard-Byrne's evidence that he was told by the Prime Minister on 8 November 2006 (or at any other time) that the Government did not wish to proceed any further with the transaction. Mr Pinard-Byrne's reliance on 'professional advice' in his letter of 11

² [1952] 1 All ER 1217

January 2007 is merely further evidence of how far removed from reality his position was. There was no professional advice and in any case it was impossible by that stage for the transaction to be 'aborted' otherwise than by rescission.

[95] This claim therefore succeeds.

Commercial Court Judge

11 November 2009