TERRITORY OFTHE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2010/032

On appeal from the Commercial Division

BETWEEN:

ECHINACASH INC.

Appellant

and

LIGHT YEAR PARTNERS LLC

First Respondent

ELLIOTFRIEDMAN

Second Respondent

Before:

The Hon. Mr. Hugh A. Rawlins	Chief Justice
The Hon. Mde. Ola Mae Edwards	Justice of Appeal
The Hon. Mde. Janice M. Pereira	Justice of Appeal

Appearances:

Mr. Stephen Moverly-Smith, QC for the Appellant
Mr. Andrew Lenon, QC and Mrs.Tana'ania Small-Davis for the Respondents

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2011: March 17;
October 19.

Commercial appeal – Ownership of shares – Inferences made by the trial judge from the intention of the parties at the time of issuance of shares – Whether the trial judge was correct in holding that the documentary evidence at the time of issuance of the shares was clear as to legal and beneficial ownership such that evidence of the parties' subsequent conduct was irrelevant in determining the intention of the parties at the time of issuance of the shares – Resulting trust – Rebuttable presumption of resulting trust; evidence of subsequent conduct supporting presumption – Estoppel – Whether the respondents were estopped by their subsequent conduct from denying that the first respondent held the shares on trust for the appellant

In early 2000, the second respondent, Mr. Elliot Friedman, incorporated the first respondent, Light Year Partners LLC ("LY"), as an internet company incubator to develop and manage

internet companies carrying on the business of providing electronic payment cards to consumers and others. The appellant, eChinaCash Inc. ("Inc"), was one of five internet portfolio companies formed by LY with the intention of exploiting this business plan.

In its early days, Inc was funded by LY and Mr. Friedman, who was LY's manager. LY was run by Mr. Friedman with the help of one Mr. Andrew Beck. In late 1999 or early 2000, Mr. Beck invited one Mr. Peter Norton to invest. Mr. Norton later became a director of Inc as well as one of its shareholders. The intention was to exploit the Chinese market, taking advantage of a corporate vehicle which was a Wholly Foreign Owned Entity ('WFOE"). The plan was therefore to have a BVI registered company as the holding company of the WFOE for this purpose.

eChinaCash (BVI) Ltd. ("BVI") was incorporated and became the holding company of the WFOE company called Beijing eChinaCash Network Technology Company Limited ("eChina"), incorporated in the People's Republic of China ("PRC") about a few days after the incorporation of BVI. eChina carried on a successful business there by providing a gasoline credit card payment programme based on the loyalty point principle, in conjunction with Sinopec, one of PRC's largest oil and gas companies.

The entirety of the issued shares of BVI ("the Shares") was registered as from the date of its incorporation, on 26th April 2001, in the name of LY. This was based on emails from Freshfields (a firm of lawyers acting for Inc) to Harneys, a firm of lawyers in BVI who were doing the incorporating of the BVI entity. Even though earlier Freshfields emails to Harneys had instructed that Inc was to be the parent of the BVI entity, the instructions changed on 26th April to LY as being the parent. Later in 2001 however, Mr. Friedman is said to have executed a document on behalf of LY called: "Action by Written Consent of the Manager of LightYear Partners LLC" ("the ABM"), which stated that the Shares had been mistakenly issued to LY and instead, should have been issued to Inc. The ABM was accompanied by an undated letter ("the Acknowledgment Letter"), the said letter to be signed by Mr. Friedman on behalf of LY and addressed to the CEO of Inc, substantively in the same terms as the ABM. Mr. Friedman denied signing these documents. Mr. Friedman had also signed earlier in 2002, an open letter on behalf of Inc referring in effect, to Inc's Chinese subsidiary.

Sometime in 2003, one Mr. Robert Posner was appointed to the board of Inc, becoming CEO in 2007. Sometime after (between 2003/2004), the relationship between Mr. Friedman and the group made up of Inc, BVI, eChina and Messrs. Norton, Beck and Posner ("the Inc Parties"), broke down. Mr. Friedman was removed from all his directorships and executive positions in Inc, BVI and eChina. Litigation ensued. In the course of that litigation, Mr. Friedman deposed to the fact that BVI was owned by Inc. The litigation gave way to settlement negotiations. On 9th August 2005, the parties entered into a Settlement Agreement. In May 2007, the respondents commenced further proceedings, alleging breach of contract and fraud. In that complaint, verified on oath, the respondents stated that BVI was owned by Inc. In fact, from the time of incorporation of BVI and eChina, Inc's and eChina's business was operated as if Inc was the ultimate owner of eChina. Inc managed and directed eChina's affairs. eChina's profits flowed up to Inc. Sometime prior to July 2008 however, the Inc Parties discovered that LY was still on BVI's

share register as owner of the Shares. Jones Day, then acting for Inc, came across photocopies of the ABM and Acknowledgment Letter bearing purportedly the signature of Mr. Friedman, amongst Inc's papers. No original ever surfaced. On 17th July 2008, Jones Day contacted Arent Fox LLP, acting for Mr. Friedman, about the fact that LY was still registered as owner of the Shares. Arent Fox LLP replied by letter on 19th August 2008, essentially denying that the Shares belonged to Inc. Jones Day responded to Arent Fox LLP referring to the Settlement Agreement and enclosing resolutions for the transfer of the Shares as well as a blank share transfer for transferring the Shares in BVI. LY and Mr. Friedman however, did not honour Jones Day's request. The result was that in November 2008,Inc issued the proceedings out of which this appeal arises, against BVI, LY and Mr. Friedman. In essence, Inc sought declarations that it is the true beneficial owner of the Shares, as well as orders for rectification of BVI's share register and related injunctive relief against the respondents. The action was vigorously defended by the LY Parties and after a full trial, the learned judge dismissed Inc's claim, in essence holding that the Freshfields emails at the time of the issuance of the shares in BVI were clear and conclusive as to BVI's legal and beneficial ownership. The trial judge also concluded that Mr. Friedman had signed the ABM and Acknowledgement Letter, and that Inc had paid for the Incorporation of BVI and the subscription monies for the Shares in BVI (if indeed the subscription monies had been paid). Inc appealed to the Court of Appeal. The respondents cross appealed, primarily against the judge's findings that Mr. Friedman had signed the ABM and Acknowledgment Letter and that Inc had, in essence, funded BVI, having allowed Inc to amend its case.

Held: allowing the appeal and dismissing the respondents' counter-notice, ordering that the appellant be declared as the beneficial owner of the 100 ordinary shares in eChinaCash (BVI) Ltd., setting aside the costs order of the learned trial judge and ordering that the respondents bear the costs of the appellant in the court below and on this appeal, that:

1. The threshold warranting a disturbance of the trial judge's finding that Mr. Friedman had executed the ABM and Acknowledgment Letter, has not been reached. Having reviewed the evidence and having regard to the advantage enjoyed by the trial judge in seeing and hearing the relevant witnesses, the Court is of the view that it was quite open to him to arrive at this finding.

2. The trial judge erred in construing the Freshfields emails as being clear and unequivocal as to beneficial ownership when they were not. This led him to disregard or not have sufficient regard for the entire mass of evidence of the parties' subsequent conduct, and in particular, the express statements made under oath by Mr. Friedman and LY which all point in one direction –that is, that Inc was and was always intended to be the beneficial owner of BVI.

3. The Court is unable to treat, as the trial judge did, the Freshfields emails of 26th April 2001, as being dispositive of the beneficial ownership of the shares; they are at best, equivocal as to beneficial ownership. When all of the circumstances of Inc's actions at the time are viewed, then something more must be shown apart

from the emails to rebut the presumption of a resulting trust in Inc's favour, in respect of the ownership of BVI.

4. The trial judge ought to have accorded greater weight to the open letter of 24th April 2002, which was signed by Mr. Friedman on behalf of Inc, having found a resulting trust in Inc's favour. This letter had been written notwithstanding that Mr. Friedman knew that the Shares had been registered to LY. The contemporary evidence in the nature of the Freshfields emails was not clear and unequivocal so as to render the consideration of this letter unnecessary in determining Inc's and the respondents' intentions at the time of the acquisition of the Shares.

5. In the absence of clear evidence at the time of issuance and allotment of the Shares as to where the beneficial interest in them was to lie, and given the circumstances which the trial judge rightly found gave rise to a resulting trust, the subsequent statements and the parties' conduct demonstrate and are explicable only upon the basis that the parties' common intention at the time of the acquisition of the Shares was that Inc was to be the beneficial owner.

6. The case of estoppel relied on by Inc in the court below was abandoned. The trial judge was right to dismiss the estoppel case as pleaded. It would be improper and unfair to entertain on appeal a case of estoppel advanced on wholly different grounds to the case pleaded in the court below.

JUDGMENT

[1] PEREIRA, J.A.: The appellant, eChinaCash Inc. ("Inc"), a Delaware corporation, appeals the order of the trial judge of the Commercial Division made on 18th October 2010, in which he dismissed Inc's claim to being the 100% beneficial owner of eChinaCash (BVI) Ltd. ("BVI"), a company incorporated in the Virgin Islands.[1] The entirety of the issued shares ("the Shares") of BVI was registered as from the date of its incorporation on 26th April 2001, in the name of the first respondent, Light Year Partners LLC ("LY"), a Delaware limited liability company of which the second respondent, Mr. Friedman, holds a substantial majority share (86%). Mr. Friedman is also LY's Manager. In this judgment, the respondents for ease of reference will be referred to as the "LY Parties". In other parts of the judgment, a reference to the "Inc Parties" is to be understood as a reference to Inc, BVI, eChina, and Messrs. Norton, Beck and Posner.

[1] eChinaCash (BVI) Ltd. was the first defendant in the court below.

[2] It is common ground that BVI's sole purpose is that of a holding company and is the sole owner of a company called Beijing eChinaCash Network Technology Company Limited ("eChina"), incorporated in the People's Republic of China ("PRC"). eChina carried on, a successful business in PRC by providing a gasoline credit card payment programme based upon the loyalty point principle, in conjunction with a PRC owned oil and gas entity called Sinopec, one of the PRC's largest oil and gas companies. eChina's contract with Sinopec may be considered as the main stay of eChina's business. Accordingly, at stake as between the parties is the ownership, and control of BVI which in turn directs and controls eChina.

[3] A background summary, placing the dispute into context would be helpful and rather than re-invent the wheel, I shall borrow considerably from the judgment of the trial judge who quite adequately captured it in his judgment.

The Background

[4] The relevant chapter of the story begins in the year 2000. In early 2000, Mr. Friedman incorporated LY, he said, as an internet company incubator to develop and manage internet companies carrying on the business of providing electronic payment cards to consumers and others. Mr. Friedman ran LY with the help of one Andrew Beck ("Mr. Beck"). In March 2000, LY formed Inc as one of five internet portfolio companies with the intention of exploiting this business plan.

[5] In its early days, Inc was funded by LY and Mr. Friedman. According to Mr. Friedman, they loaned some US$1million to Inc by way of start-up capital. In late 1999 or early 2000, Mr. Beck met one Mr. Peter Norton ("Mr. Norton"), the creator of world renowned computer application "Norton Antivirus". Mr. Norton is indisputably a high net worth individual. Mr. Norton is a director and shareholder of Inc. He explained how Mr. Beck brought him on board in the setting up of an enterprise in PRC in order to exploit Mr. Friedman's idea. He said that Mr. Beck explained that the PRC entity to be formed would be a wholly owned subsidiary of

a US incorporated company and that the investors in the US company would be "part owners" of the PRC company. The trial judge accepted this evidence. On this basis, Mr. Norton decided to and invested in Inc.

[6] It would appear from a document[2] produced by Mr. Friedman at the trial that by January 2001, Mr. Norton had invested some US$550,000.00, thus giving him some 14% of Inc's then issued share capital. At some stage, Mr. Norton was appointed to Inc's board. But he says he did not attend any meetings of Inc's board prior to 15th January 2001 and, from all accounts, played no active role in the day to day management of Inc.

[7] Harneys, based on a series of email instructions from Freshfields (who the trial judge found to be expressly acting on behalf of Inc[3]), incorporated BVI on 26th April 2001. Westlaw Ltd. ("Westlaw"), as the sole director of BVI, resolved (having acknowledged receipt of $100.00 subscription money) to allot 100 shares to LY, and to issue to LY the relevant share certificate. Westlaw then and there also appointed Messrs. Beck, Norton andFriedman as additional directors and immediately thereupon, Westlaw resigned as a director.

[8] eChina, it appears, was incorporated more or less at the same time as BVI. Mr. Norton was also made a director of eChina. He says that he understood eChina to be owned by BVI and that BVI was owned by Inc. Mr. Friedman says it was explained to Mr. Norton that LY was to own BVI (and thus eChina). He relied on the same Exhibit 1 which was produced for the purposes of a proposed investment into Inc (which never materialized) around June 2001 and which showed BVI as owned by LY and which was available for Mr. Norton to look at. Mr. Norton said that he had never seen the document until shortly before trial. The trial judge accepted Mr. Norton's evidence on this. Mr. Norton was under the impression that BVI was owned by Inc until the true state of BVI's share register was discovered in 2008. I remark by way of comment, that under this arrangement as put forward by

[2]Produced by Mr. Friedman only at the trial and marked Exhibit 1.
[3]See paras. 13 and 14 of his judgment.

Mr. Friedman, Inc would, in essence, own nothing and an investor in Inc would clearly be bereft of any returns on his investment.

[9] The next relevant act relating to BVI appears to have occurred in September 2001, when Mr. Friedman is said to have executed a document on behalf of LY called "Action by Written Consent of the Manager" ("the ABM"). The recitals and action evidenced by the ABM under the heading "CORRECTION OF ERROR AND CONTRIBUTION OF SHARES" set out as follows:[4]

> "WHEREAS, it has been brought to the attention of the Company [LY] that eChinaCash (BVI) Ltd., ... ("eChina BVI") has mistakenly issued 100 shares, representing all of the outstanding shares of eChina BVI ("the Shares") to the Company, and that the Shares of eChina BVI should have been issued to eChinaCash. com, Inc., a Delaware corporation ("eChina DEL"); and
>
> WHEREAS, it is in the best interests of the Company to correct this error and to contribute the Shares, mistakenly issued to the Company, to eChina DEL.
>
> NOW, THEREFORE, BE IT RESOLVED, that the Shares, mistakenly issued to the Company, be, and they hereby are, contributed to eChina DEL." (My emphasis).

Accompanying the ABM was an undated letter ("the Acknowledgement Letter"), said to be signed by Mr. Friedman on behalf of LY addressed to the CEO of Inc, substantively in the same terms as the ABM. The learned trial judge found that Mr. Friedman executed both documents.

[10] Even though the ABM is dated as of September 2001, it would appear from a chain of emails beginning on 21st January 2002,[5] that this was not initiated until 31stJanuary 2002 by an email from one Casper Partovi,[6] (a lawyer in the firm Gibson Dunn) to Mr. Friedman wherein he attached the ABM and Acknowledgement Letter. That email stated in part:

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[4]See Core Bundle – Tab 9.
[5]See Core Bundle – Tab 21.
[6]Of Gibson Dunn & Crutcher, a law firm in California, USA, and who according to Mr. Friedman was acting on behalf of LY and Inc.

> "If you recall, when Harney's[sic] formed the BVI entity, shares of eChina BVI were mistakenly issued to [LY] instead of eChina Delaware. This Action by Manager simply corrects this error and documents the issue. I have also included a short letter from [LY] to eChina Delaware explaining the correction. These documents should be placed in the records of [LY] and eChina Delaware"

Mr. Friedman, on 4th February 2002 (and apparently in China at the time), in essence responded as follows:

> "Will execute shortly and return a copy to you."

Partovi, replied on 5thFebruary2002 to say that a fax copy was sufficient for his records and that the originals could await his (Mr. Friedman's) return to California. Then on 29thOctober 2002, Mr. Friedman emailed Partovi to say in part this:

> "We seemed to have lost our amendment changing BVI ownership from [LY] to eChinaCa do you have a copy."

Partovi replied on 31stOctober 2002, again explaining what the ABM was intended to effect in terms of correcting the mistaken issuance of the Shares to LY instead of Inc, and attaching another copy of the ABM and Acknowledgment Letter, as well as explaining where the executed documents were to be kept. Again he requested an executed copy for his records. Later on, an executed copy was still being followed up by email from Partovi[7] apparently to Mr. Beck. The email trail, so far as is in evidence before the court on this aspect, goes cold here.

[11] In an open letter dated 24thApril 2002, Mr. Friedman wrote, in effect, that Inc wholly owned a foreign entity in Beijing. It is not clear whether this was sent to any particular person(s).

[12] Inc, carried on the management and control of eChina with all profits from eChina's business flowing up to Inc from eChina's inception. To all intents and purposes Inc was the de facto owner of eChina. No challenge was ever raised by anyone in Inc (including Mr. Friedman) to this position until 2008 when the LY

[7]See Core Bundle – Tab 21, p.73: undated portion of email from Partovi to "Andy" seeking help in tracking down the ABM.

Parties for the first time asserted that LY owned BVI (and thus eChina) legally and beneficially from the inception of BVI.

[13] Sometime in 2003, one Robert Posner ("Mr. Posner")[8] was appointed to the board of Inc, becoming CEO in 2007. At some stage he acted (at least de facto) as a director of eChina. He also made some investments (unspecified) in Inc. He said that he was under the impression given by Mr. Friedman, that Inc owned BVI (and thus eChina). Draft consolidated statements for Inc's year ended 31st December 2006, showed that Messrs. Norton and Posner, as well as the auditors and other members of Inc (except the LY Parties) were under the impression that Inc owned BVI.

[14] Sometime thereafter, the relationship between Mr. Friedman and the other Inc Parties went downhill. By March 2004, the relationship between the parties had soured drastically. There was a parting of ways in circumstances which can only be described as acrimonious. Mr. Friedman was removed from all his directorships and executive positions in Inc, BVI and eChina. Litigation ensued. The Inc Parties sued the LY Parties generally for breach of duty. The LY Parties counterclaimed.

[15] This litigation then gave way to settlement negotiations. On 9th August 2005, the parties entered into a Settlement Agreement. Pursuant to the Settlement Agreement the Inc Parties paid just over US$7 million to the LY Parties, as a global sum for: (1) settlement of the claims made by the LY Parties in respect of Mr. Friedman's dismissal from his various offices; (2) the grant by LY to Inc and BVI of a Non-Exclusive licence entitling the Inc Parties to continue the use of LY's intellectual property on a worldwide basis; and (3) the cancellation of LY's 80% holding of Inc's issued share capital. The trial judge stated[9] that he had no difficulty accepting that Messrs. Norton and Posner would never have entered into the Settlement Agreement had they not believed, as they claimed, that Inc owned

[8]The trial judge described him as having impressive business credentials and being a forceful and determined individual.
[9]At para.11 of his judgment.

BVI in its entirety. Indeed it would appear to me that items (2) and (3) above which were expressly covered in the settlement sum are predicated on or based on the assumption that Inc wholly owned BVI, for why else would the Inc Parties need licences from LY for use by BVI if BVI was considered to be wholly owned by LY? Surely, there would be no need for the Inc Parties to purchase a licence for BVI from LY if indeed Inc did not own and control BVI. The trial judge went on to say[10]however, that although the Inc Parties held this belief, this was not the case legally.

[16] The Settlement Agreement was not the end of litigation between the parties. In May 2007, the LY Parties commenced further proceedings, alleging breach of contract and fraud.

[17] Sometime prior to July 2008, the Inc Parties apparently discovered that LY was still on BVI's share register as owner of the Shares Jones Day, then acting for Inc, in July 2008 came across, at different times, among Inc's papers, two sets of photocopies of the ABM and Acknowledgement Letter bearing purportedly the signature of Mr. Friedman. No original ever surfaced. On 17thJuly 2008, Inc's attorneys in China (Jones Day) contacted Arent Fox LLP, acting for Mr. Friedman, about the fact that LY was still registered as owner of the Shares in BVI. Arent Fox sent to Inc's CEO a letter on 19thAugust 2008, essentially denying that the Shares belonged to Inc.

[18] Jones Day on behalf of Incresponded to Arent Fox referring to the Settlement Agreement and enclosing resolutions for the transfer of the Shares as well as a blank share transfer for transferring the Shares in BVI.

[19] Clearly, LY and Mr. Friedman did not honour Jones Day's request. The result was that in November 2008, Inc issued the proceedings out of which this appeal arises against BVI, LY and Mr. Friedman, in essence, seeking declarations that it (Inc) is the true beneficial owner of the Shares in BVI, orders for rectification of BVI's

[10]At para.12 of his judgment.

share register and related injunctive relief against the LY Parties. The action was vigorously defended by the LY Parties. After a full trial, the learned judge dismissed Inc's claim.

Inc's complaints on appeal

[20] Inc challenges the dismissal of its claim to beneficial ownership of the Shares on ten main grounds some of which contain sub-grounds. They are in the main challenges to the judge's conclusions drawn from primary facts. Inc says that it seeks not to challenge the primary facts, but rather the inferences drawn by the trial judge from those primary facts which essentially are not in dispute. Inc relies on the well settled statement of principle set out in several decisions such as Benmax v Austin Motor Co. Ltd.[11]and by this court in Jada Construction Caribbean Limited v The Landing Limited[12] that an appellate court will very rarely disturb findings of primary fact, but that where the position concerns the inferences to be drawn from those primary facts which are either agreed or not in dispute, then the appellate court is as well placed as the judge of first instance in drawing the appropriate inferences from those primary facts. There is no demur as to the applicability of this principle.

[21] The issues raised by Inc may broadly be considered under the following heads:

(a) Whether the trial judge was correct in determining ownership of the Shares by inferring the intention of the parties at the time of issuance of the Shares by having regard only to the contemporaneous evidence at the time of the issuance of the Shares;

(b) Whether the trial judge was correct in holding that the evidence as to the parties' subsequent conduct could not and did not override the intention to be inferred as to ownership at the time of issuance of the Shares.

[11][1955] 1All E.R. 326.

[12] Saint Lucia HCVAP 2009/011 (delivered 8th March 2011 – unreported). See also Grenada Electricity Services Limited v Isaac Peters, Grenada Civil Appeal No. 10 of 2002 (delivered 28th January 2003 – unreported); Luella Mitchell et al v Maurice Jones, Saint Vincent and the Grenadines HCVAP 2006/016 (delivered 31st May 2010 – unreported).

(c) Whether the trial judge was correct in dismissing Inc's estoppel plea.

LY's counter-notice

[22] LY and Mr. Friedman cross appealed and whilst essentially seeking to uphold the trial judge's findings, they say that he erred:

(a) in finding as a fact that Mr. Friedman signed the ABM and the Acknowledgment Letter;

(b) in permitting Inc to change its Statement of Case during the trial to assert that Inc had incorporated BVI and had funded BVI's incorporation;

(c) in reducing the costs payable by Inc and in ordering the LY Parties to pay the costs of Inc's expert witness.

[23] I propose to deal with the issues raised on appeal in turn and in so far as any of the issues raised on the cross appeal overlap or touch upon them, incorporate them.

The evidence of intention

[24] The contemporaneous evidence of intention relates to a series or chain of emails between Freshfields and Harneys in BVI. The link originates with Freshfields sometime around 18th April 2001 enquiring about the suitability of a BVI company for use as a parent of the proposed Chinese Wholly Foreign Owned Entity ("WFOE"). Then, after being satisfied about using a BVI company, Mr. Hilken of Freshfields on 20thApril 2001 emailed Mr. Ritter of Harneys in the following terms:[13]

> "Dear Scott,
>
> Your standard M&As appear broad enough, since the IBC's purpose is only to act as the WFOE's holding company. …
>
> Name of company: eChinaCash (BVI), Ltd.

[13] See Core Bundle – Tab 13, p. 6.

> Shareholder: eChinaCash, Inc. (100% shareholding), a Delaware company
> Directors: Andrew Beck, Elliot Friedman, Peter Norton, all U.S. citizens.
> Please go ahead today to establish the company."(My emphasis).

After a few more email exchanges between 20th and 21st April, Mr. Hilken emailed Michelle Frett, a colleague of Mr. Ritter, to clarify the name of the parent company to the proposed BVI company. He stated:[14]

> "I have discovered that the name of the Delaware parent is in fact 'eChinaCash.com, Inc.', not 'eChinaCash, Inc.'. Please amend the application accordingly."

[25] Thereafter, following queries regarding Hong Kong listings of BVI companies, Mr. Hilken emailed Mr. Ritter the critical email of 26th April 2001 as follows:[15]

> "Dear Scott
>
> eChinaCash [i.e.Inc] has decided to continue with incorporating the WFOE's parent in BVI after all…"

The relevant portion of the penultimate paragraph of that email was in these terms:

> "Please note that the parent of the BVI IBC will no longer be the Delaware company, but instead will be LightYear Partners LLC, a California company (100% owner)." (My emphasis).

On the basis of these emails ('the Freshfieldsemails') the trial judge concluded[16]that when Freshfields instructed Harneys in their email of 20th April, to form BVI with Inc as 100% shareholder, they were expressly acting on behalf of Inc. Similarly, that when Freshfields sent its further email on 26th April 2001 stating the parent of the BVI IBC will no longer be the Delaware company but instead will be LY, a California company (100% owner) they were acting and taking their instructions from Inc.[17]

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[14] See Core Bundle – Tab 13, p. 5.
[15] See Core Bundle – Tab 13, p. 3.
[16]At para.13 of his judgment.
[17]See paras. 13 and 14 of the trial judge's judgment.

[26] The trial judge also referred to other emails of 26th April 2001 from Freshfields but this time addressed to Messrs. Beck and Friedman. Freshfields, in this email, said:[18]

> "However, we think it prudent that you should proceed with obtaining a letter in relation to the parent, LightYear Partners LLC, in any event.
>
> The Haidian[19] authorities have said that the LightYear letter should expressly state that:
>
> - LightYear and eChinaCash(BVI) maintain good relations with the US bank;
>
> - the bank deems both Lightyear and its subsidiary eChinaCash (BVI) Ltdto have good standing and financial capabilities.
>
> In this way, they say, it can be logically concluded that the US Bank is ultimately granting due credit to eChinaCash (BVI) Ltd.
>
> ... ...
> ... ...
> ... ..."

[27] Thereafter, from paragraphs 17 to 22 of his judgment, the learned trial judge went on to consider the ABM and Acknowledgment Letter. Inc's pleaded case was that the Shares had been issued to LY by mistake and relied on the ABM and the Acknowledgement Letter. Mr. Friedman denied executing these documents. Accordingly, the trial judge then had to decide whether or not Mr. Freidman had executed them. After considering the evidence of the various handwriting experts as well as the explanations proffered by Mr. Freidman as to why he had not done so, coupled with the chain of email exchanges relating to the said documents he concluded that he had.[20]

[28] I consider this a convenient point to deal with the LY Parties' challenge to this finding. They say that:

(a) there was no evidence from the Inc witnesses involved in the email exchanges relating to the purportedly signed versions. There were no accompanying documents such as an email as one would expect to find, confirming that signed copies had been sent;

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[18]See para. 15 of the trial judge's judgment.
[19]Haidan is said to be a district in Beijing.
[20]Seeparas. 23-31 of his judgment.

(b) up to the time of Partovi's undated email chaser (presumably to Mr. Beck), no signed copies had been sent by Mr. Friedman and that, as Mr. Posner conceded, it was highly unlikely that Mr. Friedman would have sent them after the relationship broke down.[21]

(c) the trial judge failed to take into account the fact that there was no follow up by the completion of a share transfer and no explanation for that failure;

(d) the existence of two different sets of the signed documents;

(e) the trial judge ought to have given greater weight to the fact that the handwriting experts were in agreement that it was difficult to come to any conclusion as to the authenticity of the purportedly signed documents having regard to the simplicity of Mr. Friedman's signature and the absence of any original document thereby making it impossible to rule out an electronic forgery, and the fact that they were photocopies;

(f) Insufficient weight was given to the fact that Inc had been found to have forged other important documents on other occasions.

[29] Having reviewed the evidence including the documentary evidence and also, having regard to the advantage enjoyed by the trial judge in seeing and hearing the relevant witnesses, coupled with the reasons he gave, it was quite open to him to arrive at the finding which he made. The threshold warranting a disturbance of this finding has not been reached. The LY Parties' complaint on this ground accordingly fails.

[30] I return to the issuance of the Shares. Inc, during the trial applied for and obtained leave to amend its statement of case to plead, in essence, that the placing of the

[21]See Record of Appeal – Vol. 7, Part 1,pp. 78-79, where Mr. Posner agreed that by 2003 Mr. Friedman was in dispute with Mr. Norton and that it was unlikely that if the ABM and cover letter had not been signed by then that Mr. Friedman would have subsequently signed them.

Shares in the name of LY was to facilitate the opening of BVI's bank accounts in PRC (Hong Kong) and to allege that the Shares were held by LY upon trust for Inc. This was a pleading in the alternative[22] for it would have no doubt been fully appreciated by Inc that if its case is that the Shares were placed in the name of LY to obtain some facility whether temporary or otherwise, then the act of so doing would be, as the trial judge found, a deliberate and intentional act on the part of Inc which negatives any notion of a mistaken issuance of the Shares to LY. At paragraph 37 of his judgment the trial judge concluded that the pleaded case on mistake was unsustainable and in any event was not persisted in at trial.

[31] In respect of the amended pleading alleging a trust, as the trial judge pointed out,[23] no further particulars as to the basis for Inc's alleged beneficial ownership of the Shares were pleaded save for the subsequent conduct of the parties from which the inference of beneficial ownership in Inc's favour was being sought to be drawn by way of establishing the parties' intention at the time of the issuance of the Shares. In this regard, the trial judge had this to say:[24]

> "It became clear at the hearing, however, that Inc was now making a case on the basis of that species of resulting trust which arises when a person purchases property, but has it put into the name of another. In such cases, a rebuttable presumption arises that the person holding the property holds it on trust for the person who paid for it."

[32] At paragraph 36 of his judgment the trial judge found, based on a statement of account sent by Harneys Corporate Services ("HCS") covering a period from 2001 and up to 2002, that BVI's incorporation costs, its issued share capital (if actually paid up) and its regulatory expenses down at least to the end of 2002, were met by Inc. He rejected Mr. Friedman's evidence (for the reasons he gave) to the effect that the subscription money for the Shares had actually been paid by him or LY. At paragraph 43 the trial judge then stated thus:

> "It is clear that those facts raise a rebuttable presumption that Light Year held the BVI shares on resulting trust for Inc, but that presumption must

[22]See Record of Appeal – Vol. 6A,paras.8, 9 and 18 of Amended Statement of Claim and para.(ii) of the relief claimed.
[23]At para.32 of his judgment.
[24]At para.33 of his judgment.

> yield to evidence of an actual intention on the part of Inc that Light Year was to hold the shares beneficially. In my judgment, Freshfields' emails of 26 April, 2001 are more than sufficient to rebut the presumption. Their terms are plain and they are the best evidence of the intentions of all concerned when BVI was formed." (My emphasis).

[33] It is with the judge's treatment and inferences drawn from Freshfields' emails of 26thApril 2001 that Inc first takes issue. Before dealing with that aspect however, I consider this a convenient point to deal with the LY Parties' second ground of complaint in as much as it touches upon whether or not the trial judge was correct in concluding that Inc incorporated and funded BVI, and the basis (presumably coupled with Freshfields' emails of 26th April) on which he concluded that, a presumption of a resulting trust had arisen.

[34] The LY Parties contend that given the fact that Inc was allowed to amend its pleaded case during the trial (the second day) to assert that Inc had incorporated and in essence funded BVI when they had not been afforded an opportunity to investigate or to obtain or give disclosure, the trial judge ought not to have relied on the fee notes addressed to eChinaCash (Inc) at an address used by both sides to conclude that Inc had paid the costs of incorporation or otherwise funded BVI. They say that this finding was not justified and that there was no direct evidence save for Mr. Friedman's who said that the incorporation costs had been met by LY or himself, and that this was consistent with the board minutes of BVI of 26th April 2001 which referred to the application of LY for shares having been made accompanied by the requisite subscription money.

[35] From the Record it is clear that HCS directed its statement of account[25] which referred to other invoices (not in evidence) to Inc. The first relevant fee note referred to bears a date of 19th October 2001, for $192.00 and another generated 1st February 2002, for $660.00. The statement also reflects a payment for those sums on 26th June 2002. In July 2002 however, a credit note for the fee note for $660.00 was issued and two other fee notes were generated which were shown to

[25]See Core Bundle – Tab 19, pp. 71A-71D.

be for registered office/agent services, the government licence fee for 2002 and for a late administration fee. There was no direct evidence as to who made the payments. The trial judge inferred that payment was made by Inc. He did not accept that LY or Mr. Friedman paid the subscription money for the Shares.[26] He also inferred that HCS must have billed Freshfields who in turn would have passed on those costs to their client Inc and that this would have included the subscription money if indeed it ever was actually paid. He then concluded that BVI's incorporation costs, its issued share capital (if actually paid up) and its regulatory expenses at least up to the end of 2002 were met by Inc.[27]

[36] There was already in evidence the Freshfields emails, which showed the they were acting on behalf of Inc. It is reasonable to infer that Inc was driving the instructions to Freshfields and thus the services being performed by Harneys and Freshfields were on behalf of Inc. In my view, the inferences drawn by the trial judge were reasonable in all the circumstances. The evidence shows that at that time Mr. Friedman was very much involved in Inc. Indeed, Mr. Friedman had formed Inc and was its directing mind. Inc and LY were at that time operating like inseparable entities. Their controlling minds appeared to be one and the same person, namely, Mr. Friedman. Mr. Norton then had a hands-off approach and Mr. Posner was not yet in the picture. It was open to the trial judge, for the reasons he gave, to reject Mr. Friedman's evidence to the effect that the subscription monies for the Shares were either paid by him or LY. I also find it difficult to comprehend how the subscription monies coming from LY or Mr. Friedman distinctly, could have reached HCS on the same day that the very instructions for changing the parent company from Inc to LY occurred – that is, on 26th April 2001. It was Freshfields' email of 26th April 2001 which said:[28]

> "eChinaCash[Inc] has decided to continue with incorporating WFOE's parent in BVI after all..."(My emphasis).

[26]See paras. 35 and 36 of the trial judge's judgment.
[27]See para. 36 of the trial judge's judgment.
[28]See Core Bundle – Tab 13, p. 3.

This to my mind clearly supports the inference, as found by the trial judge, that Freshfields was being instructed by Inc to form BVI and the statement of account sent by HCS to Inc also supports the inference that the setting up and other regulatory expenses, so far as HCS's statement shows, were met by Inc at least up to 2002. Accordingly, I see no reason to disturb the trial judge's finding that BVI's incorporation costs, its issued share capital and regulatory expenses were met by Inc. The LY Parties' challenge of this finding therefore fails.

Rebuttal of presumption of a resulting trust

[37] I now revert to the Freshfields emails of April 26th2001 and the judge's conclusion that they were "more than sufficient to rebut the presumption" of a resulting trust. At paragraph 41 of his judgment, the trial judge has this to say:

> "In my judgment it is clear from the exchanges which I have set out in paragraphs [14] and [15] above that while it had been the original intention that BVI should be wholly owned by Inc, that intention had changed by 26 April 2001. Freshfields' e-mail to Harneys of that date puts that beyond doubt. The language ('the parent of the BVI IBC will no longer be [Inc], but instead will be [Light Year](100% owner)')shows, in my judgment, that Light Year was to be full beneficial owner. No lawyer, giving instructions for shares to be issued in the name of a bare nominee, would use the language of 'parent' and '100% owner'. Had that been the intention, Freshfields would have said something reflecting that (for example, that the BVI shares were to be held in the name of Light Year). The word 'parent' is again used in Freshfields' e-mail to Mr Beck and Mr Friedman of the same date."

At paragraph 42 the trial judge continued thus:

> "In other words, the prima facie inference to be drawn from the making of an allotment (that the allottee is to take the shares beneficially) is confirmed by the only other possible contender as beneficial owner, which was Inc. That is apparent from the opening words of Freshfields' e-mail to Harneys: '[Inc] has decided...' Inc, in other words, not only knew that BVI was to issue the shares to Light Year as beneficial owner, but concurred in that result."

[38] Inc contends that the judge's conclusion that the presumption was rebutted by Freshfields' 26th April emails is untenable based on an analysis of those emails. Inc says that the emails do not address the issue of beneficial ownership at all. I

agree, on a literal reading of them, that they do not. They mention nothing whatsoever of beneficial ownership. Taking them at face value and without regard to the surrounding circumstances, one could only say that, prima facie, the word 'parent' and the term "100% owner" would incorporate both legal and beneficial ownership but given the other contemporaneous evidence of the circumstances can such an assumption be made without more, from the bare text of an email in language which, in my view, is equivocal?

[39] Inc makes the following points on the Freshfields' email of 26th April 2001 to Harneys:

(a) That the trial judge concluded that the reference to 'eChinaCash' was a reference to Inc. Therefore, Inc was doing the incorporating – not LY and the natural presumption is that Inc was incorporating a BVI company for its own benefit. The trial judge found that Inc paid the incorporation costs and (to the extent it was actually paid up) the subscription money for the Shares.

(b) That it is curious that Freshfields, having referred to Inc as eChinaCash elsewhere in the email, would then use the term '*the Delaware company*' as referring to eChinaCash[Inc]. Inc says that this suggests that Freshfields did not have clearly in mind that the previous proposal[29] was to have Inc itself as the registered holder of the Shares. Further, it described LY as a "California company" (in fact, LY was also a Delaware Company). These facts, they say, show that Freshfields were not on top of the facts.

(c) That if the intention was that Inc should have no interest in BVI (thus no interest in the WFOE, (eChina), then Mr. Norton was investing in Inc on a wholly false premise, as it would mean that Inc essentially owned nothing and this would be a fraud.

[29] See Freshfields' email of 20th April 2001.

(d) That Freshfields would be expected to know their client and since by then Mr. Norton would have been on Inc's board they would be taken to know of him as an investor in Inc and thus if they were acting with knowledge of the background facts and knew that LY was to be both the legal and beneficial owner of the Shares, then they would be party to a fraud which would be incredible. Accordingly, the only other explanation is that Freshfields did not consider that LY would be beneficial owner.

(e) That the trial judge took the reference to '*100% owner'* to mean only that LY would be both legal and beneficial owner, but the expression could also mean legal owner of 100% as opposed to some lesser percentage.

(f) That the trial judge concluded without the benefit of evidence or authority to justify the assertion, that no lawyer could use the word *'parent'* in relation to a company unless he meant that the company was legal and beneficial owner of its subsidiary. And that there was and is no dispute that LY was and is the legal parent of BVI and that there is nothing one way or the other to indicate whether Freshfields was intending to convey more than that fact.

[40] I do not accept that the word "parent" necessarily means legal and beneficial owner. Similarly the term '100% owner' does not necessarily mean sole legal and beneficial owner. It could also mean the entirety of the Shares as distinct from some lesser percentage. The Freshfields emails are, in my view, inconclusive.

[41] In relation to the other emails of 26th April 2001, Inc says that there is nothing in any of them which suggest that the Hong Kong Bank or Chinese authorities were in any way interested in the beneficial ownership of BVI which warranted the trial judge's conclusion that they were dispositive of LY's legal and beneficial ownership of the Shares. Inc takes issue with what the trial judge says that Mr. Friedman says, at paragraph 39 of his judgment. At paragraph 39, the trial judge, speaking of Mr. Friedman, says this:

> "He said that in April of 2001 Light Year had helped BVI to open an account with HSBC in Hong Kong and that for money laundering purposes the Hong Kong authorities require that the account must be opened by the beneficial owner. Light Year was BVI's beneficial owner and particulars were sought by HSBC of the Light Year partnership."

Inc says that from the transcript of the evidence it becomes clear that Mr. Friedman was not for himself saying that LY was the beneficial owner of BVI but rather was doing no more than saying what he understood the various emails between Gibson Dunn and Freshfields to be saying.[30] The relevant portion of the email of 27th June 2001 from Freshfields to Harneys copied to Mr. Beck and Mr. Freidman at an Inc address says this:[31]

> "Our application to open bank accounts for your client in Hong Kong has met with difficulty.
>
> The Hong Kong Bank, as part of its approval procedure, requires the information showing the ultimate owners of LightYear Partners LLC."

At page 161 of the transcript,[32] Mr. Friedman speaks of Gibson Dunn and Freshfields needing documents in respect of the Hong Kong account on the beneficial owners of LY. Then at page 162 he speaks of LY opening a bank account in Hong Kong on behalf of BVI. At pages 161-162 an excerpt of Mr. Friedman's evidence on this aspect reads like this:

> "A: There's a, in June of '01, in April of '01 there was a bank account opened in HSBC in Hong Kong.
> Q: By whom?
> A: By Light Year on behalf of BVI. So Light Year was the beneficial owner and opened the bank account for its subsidiary, BVI, sort of in mid to late April.
> In June, I don't know where the e-mail is, but in June Freshfields came back and said if Light Year's a partnership that owns BVI and owns this bank account, we need to know who the members of this partnership is[sic], and I for one over 10 percent member, and so there's some e-mails between Freshfields and myself and Casper Partovi and Gibson looking to get all the members of Light Year to back up the documentation for HSBC."

[30] See Record of Appeal – Volume 7 Part 1, Tab 1, pp. 161-162.
[31] See Core Bundle – Tab 16.
[32] See Record of Appeal – Vol. 7 Part 1, Tab 1, pp. 161-162.

Again at page 55 of the Record of Appeal,[33] it is also clear that Mr. Friedman was interpreting the emails. This portion of Mr. Friedman's evidence is as follows:

> "Q: What is the e-mail on 21, what's it about? What is it dealing with?
> A : Well, it looks like it's dealing with the bank account that we needed to open up in Hong Kong and Light Year indeed opened up that bank account and then a couple of months later with the same cast, being Hilken and Partovi , HSBC came back and said. Okay. Yes, Light Year is the owner, that's great, of BVI, eCC BVI but we need to know more about Light Year who the beneficial owners are and we had to go back and forth and there are some email [sic] in June about who are the owners of Light Year."

Based on the above, I am unable to attribute to Mr. Friedman the statements with which he is credited at paragraph 39 of the judgment. What is clear is that none of the emails say anything about the beneficial ownership of BVI. Indeed no documents are produced from any source, whether from Mr. Friedman or Light Year or any other person and directed to any entity (including the bank in Hong Kong), stating that BVI was beneficially owned by LY.

[42] The following observations may also be made:

(a) The Freshfields emails of 26th April sent to Mr. Beck and Mr. Friedman bears an address for eChinaCash (Inc) – not LY.

(b) The email of 26th April putting Harneys in direct contact with Messrs.Friedman and Beck refers to them as the Chairman and CEO of eChinaCash (Inc) – not LY– for obtaining any other information for instructions on appointment of directors and establishing bank accounts for BVI.[34]

(c) Mr. Norton, who by then was a director of Inc and indisputably a large investor in Inc, is not copied on any of the April 26th emails at all. The clear inference is that at this time Messrs. Beck[35] and Friedman were, so

[33]Vol. 7 Part 1, Tab 2.
[34]See Core Bundle – Tabs 13 and 13A.
[35]Mr. Beck was not called as a witness by either side.

to speak, running the show as far as the management and decisions of Inc were concerned. Mr. Lenon, QC, counsel for LY, and Mr. Friedman say that Mr. Friedman was indeed Inc's controlling shareholder and directing mind at the time. The irresistible conclusion is that Mr. Norton was at that time to all intents and purposes "out of the loop".

The reasonable inference to draw was that Inc (through Messrs. Friedman and Beck) was controlling and making decisions for BVI as Inc's entity (and not LY's) despite the fact that the Shares were issued to LY.

[43] Inc also says that the trial judge rejected the best contemporaneous evidence of the parties' intention at the time which came from Mr. Norton in terms of Mr. Beck's representations to him to the effect that the PRC entity would be a wholly owned subsidiary of the US company, Inc. The trial judge accepted this evidence.[36]

[44] The LY Parties counter with the following arguments:

(a) That the natural presumption or inference to be drawn from the fact that Inc gave the instructions for the incorporation of BVI and arranged for the Shares to be allotted to LY rather than to itself and expressed that LY was to be '*100% owner'* and *'parent'* of BVI is that LY and not Inc was intended to be the beneficial owner. And that this corresponds to the actual intention of Inc as confirmed by Mr. Friedman's evidence as to his intention, him being the directing mind behind Inc at the time. But this does not address the question as to why in this wholly commercial transaction Inc would be purchasing shares and incurring expenses gratuitously for LY. It is natural to expect that if Inc is giving all the instructions and meeting all the set up and operating costs for a new entity, then it was so doing for its own benefit.

[36]See paragraph 5 of the trial judge's judgment.

(b) That the assertion that Freshfields were not on top of the facts is unfounded as they referred to Inc as "*the Delaware company*" in their 11:54 email of 26th April 2001, no longer being the parent, as in their earlier email of 20th April they also spoke of Inc as *'a Delaware company'* being the shareholder.

(c) As to the assertion that unless Inc was intended to be the beneficial owner of BVI then Mr. Norton was investing in a fraud, they say that Mr. Norton has brought no proceedings in respect of any alleged wrongs done to him and no allegations of fraud were pleaded and cannot be advanced on appeal. Accordingly they say, that the intention or understanding of Mr. Norton as a third party investor, as found by the trial judge, was irrelevant; that the relevant intention to be inferred was that of Inc (as determined by the actions and instructions of Mr. Friedman who was Inc's controlling and directing mind at the time) and LY.[37]

(d) That the trial judge was right in construing the word *"parent"* and the expression *'100% ownership'* as denoting legal and beneficial ownership. That, as held by the trial judge, there is a prima facie presumption that on an allotment of shares the allottee also takes the beneficial ownership of the shares. They rely on the dictum of Lady Hale in Stack v Dowden[38] where she states thus:[39]

> "Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all."

(e) Further, the LY Parties contend that Inc has failed to put forward any reason for the Shares being issued to LY, if it was intended that Inc was to be the beneficial owner of them with no reference being made of that fact.

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[37]Also controlled by Mr. Friedman.
[38][2007] 2 A.C. 432; [2007] 2 W.L.R. 831.
[39]At paragraph 56.

They refer to paragraph 49 of the judgment where the learned trial judge opines as to the manner in which Inc's case fluctuated at trial: Firstly advanced on the basis that the Shares were issued to LY by mistake then abandoning that course and advancing its case on the basis of a resulting trust predicated on a deliberate issuance of the Shares to LY as a temporary expedient to facilitate the opening of BVI's bank account in China. Both bases were rejected by the trial judge.

(f) As to whether the Haidian[40] authorities required information as to beneficial ownership, the LY Parties contend that the judge accepted Freidman's evidence as to what the Haidian authorities required in respect of beneficial ownership and this evidence was not challenged at trial and is not a finding which Inc may now challenge on appeal.

[45] I am unable to treat, as the trial judge did, the Freshfields emails of 26th April, as being dispositive of the beneficial ownership of the Shares. They are, at best, equivocal as to beneficial ownership. When all of the circumstances of Inc's action at the time (albeit controlled through Mr. Friedman) are viewed – the fact that all correspondence with regard to BVI was with Inc and not LY; Inc was giving the instructions, not LY – and the fact that Inc funded the setup and upkeep of BVI, despite LY being the 100% owner, then, in my view, something more must be shown apart from the emails to rebut the presumption of a resulting trust in Inc's favour (as found by the trial judge) in respect of the ownership of BVI. I would be prepared to give little weight to Freidman's evidence at trial as to what the intention was at the time. I view it as being self-serving. It is in these circumstances, where the contemporaneous documentary evidence proves to be inconclusive, that resort must be had to the extrinsic aids in discovering the parties' intentions in respect of beneficial ownership.

[46] Beginning at paragraph 47, the learned trial judge addressed subsequent conduct. At paragraph 48, he cited the relevant passage from the opinion of Lord Diplock in

[40]This is said to be a district or province in China.

Gissing v Gissing[41] in respect of the applicable principles relating to the equitable concept of a constructive, implied or resulting trust. It warrants setting out.

> "As in so many branches of English law in which legal rights and obligations depend upon the intentions of the parties to a transaction, the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party. On the other hand, he is not bound by any inference which the other party draws as to his intention unless that inference is one which can reasonably be drawn from his words or conduct. It is in this sense that in the branch of English law relating to constructive, implied or resulting trusts effect is given to the inferences as to the intentions of parties to a transaction which a reasonable man would draw from their words or conduct and not to any subjective intention or absence of intention which was not made manifest at the time of the transaction itself. It is for the court to determine what those inferences are.
>
> "In drawing such an inference, what spouses said and did which led up to the acquisition of a matrimonial home and what they said and did while the acquisition was being carried through is on a different footing from what they said and did after the acquisition was completed. Unless it is alleged that there was some subsequent fresh agreement, acted upon by the parties, to vary the original beneficial interests created when the matrimonial home was acquired, what they said and did after the acquisition was completed is relevant if it is explicable only upon the basis of their having manifested to one another at the time of the acquisition some particular common intention as to how the beneficial interests should be held." (My emphasis).

[47] In Gray'stext: Elements of Land Law,[42] a helpful passage appears under the heading: "Extrinsic aids to the discovery of intention." After referring to Pettitt v Pettitt [43] and the classic terms in which Lord Upjohn explained the method by which beneficial ownership is determined and pointed to "the extrinsic aids which may be called into play when the documentary title performs only its minimal function of dealing with the legal ownership." This text then says this:

> "Certain residual evidential devices exist to enable the court to discover the parties' intentions in respect of beneficial ownership and the court has

[41][1971] A.C. 886 at 906.
[42]Kevin Gray and Susan Francis Gray, 5th Ed., para. 7.1.10.
[43][1970] A.C. 777.

> recourse to these devices in the following order. *First*, the court may have regard to the parol evidence as to the beneficial interests intended by the parties at the date of acquisition of the legal title. *Second*, if such parol evidence is lacking or inadmissible or simply inconclusive, the court may draw inferences as to intention from the conduct of the parties both before and after the acquisition of the legal estate. *Third*, if even this fails to illuminate the relevant intentions of the parties, the court may apply certain equitable presumptions as to intention."

Further down in the passage he says this:

> "These presumptions of equity are decisive of beneficial title only in the last resort and they prevail only in the absence of other more compelling evidence of actual intention. Indeed, so fragile are these equitable presumptions of intention that recent case law discloses a strong inclination to regard them as no longer applicable in the context of domestic (as distinct from commercial) property relationships." (My emphasis).

The property dispute here is very much a commercial dispute.

[48] The trial judge opined that there was no need to resort to inferences. He considered the Freshfields emails to be clear –*'in black and white'*.[44] He also made specific reference to the way in which the case was run – firstly on the basis that the Shares had been issued to LY by mistake and then abandoning this course and running the case on the basis that the Shares had been issued to LY as a temporary expedient for enabling BVI to open bank accounts in Hong Kong.[45] The two positions being inconsistent with each other, necessitated jettisoning one course in order to advance the other. Although inconsistent pleadings are permissible, nevertheless this course did not augur well for Inc. Although Mr. Norton's lack of knowledge of the intimate workings of Inc at the relevant time are understandable, the concerns and the criticisms made by the trial judge, of the manner in which Inc ran their case at trial are, in my view justified. The trial judge also disregarded what Mr. Norton may have been told before he invested in Inc. What was critical were the intentions of Inc, BVI and LY at the time of issuance of the Shares.[46] I agree.

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[44]At para.48 of his judgment.
[45]See para.49 of the trial judge's judgment.
[46]See para. 50 of the trial judge's judgment.

[49] Inc complains that the trial judge, in relying on Gissing v Gissing, applied too strict a test and said that the law had moved on since Gissing v Gissing as seen from the more modern and recent decision in Stack v Dowden[47] where the House of Lords[48] endorsed a holistic approach with the court considering the whole range of the course of dealings between the parties both before and after. The LY Parties say that Stack v Dowden is not a departure from the principles expounded in Gissing v Gissing but is an application of the law to changing social and economic conditions in particular with regard to the respective rights of an unmarried couple to the family home.

[50] In Stack it was held:

> "That where a domestic property was conveyed into the joint names of cohabitants without any declaration of trust there was a prima facie case that both the legal and beneficial interests in the property were joint and equal; that the onus of proof lay upon any party seeking to establish that equity should not follow the law; that such a party had to prove that the parties had held a common intention that their beneficial interests be different from their legal interests, and in what way; that in order to discern the parties' common intention the court should look at the parties' whole course of conduct in relation to the property; that the law had moved on from the presumption of a resulting trust and many more factors other than the parties respective financial contributions might be relevant to divining their true intentions; and that when all relevant factors had been taken into account, cases in which the joint legal owners were to be taken to have intended that their beneficial interests should be different from their legal interests would be very unusual."

[51] At paragraph 60, Baroness Hale of Richmond, after stating that the law has moved on in response to changing social and economic conditions, had this to say:

> "The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it."

[52] These cases were set within a domestic context. Here the concept of a constructive or resulting trust is cast within a commercial context. These were businessmen forming companies to carry out a business venture. The trial judge

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[47] [2007] 2 A.C. 432; [2007] 2 W.L.R. 831.
[48] Now the Supreme Court.

concluded, in short, that Inc having paid for the setting up and funding of BVI and Inc having directed that the Shares be held by LY, gave rise to a rebuttable presumption that LY held the Shares on trust for Inc. I have already stated that the Freshfields emails which the trial judge found to be clear as establishing that LY also held the beneficial title and thus as being sufficient to rebut the presumption, are, in my view, not the case at all. Indeed it must be taken to be the April 26th email when Inc's instructions changed to state LY as the '*100% owner'*, coupled with the fact that Inc nonetheless made the acquisition by payment of the necessary funds for the creation and maintenance of BVI, which gave rise to the resulting trust. If the emails were clear and unequivocal as to beneficial ownership, then the presumption of a resulting trust would not arise at all as the legal and beneficial ownership will have been clearly established.

[53] The starting point, as was said in Stack v Dowden, is where there is sole legal ownership, is sole beneficial ownership and the onus is on the person seeking to show that the beneficial ownership is different from the legal ownership. I also agree with the principle that where the intentions of the parties are clearly established at the time of the transaction there is no need and would be wholly undesirable to consider their course of dealing. Whilst I do not consider that Stack v Dowden established any new principle which departs from Gissing v Gissing, I am of the view that the holistic approach in applying the principles as advanced in Stack v Dowden is more in keeping with the reality of the situations which present themselves in such cases where the contemporaneous evidence as to the parties' intentions is inconclusive.

[54] Inc contends however, that even on the application of Gissing v Gissing there is evidence aplenty in terms of the parties post acquisition words and conduct which compel a particular conclusion as to the parties' intention at the time of acquisition. Before going to that evidence however, a passage from Snell's Equity[49] under the general heading '*Rebutting the Presumptions'* which I consider most relevant

[49]John McGhee, QC, 32nd Ed.,para. 25-013.

to the circumstances of this case, warrants recital. It appears under the subhead "Contemporaneous and subsequent conduct":

> "The acts and declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration. It has been held that subsequent acts and declarations may only be admissible as evidence against the party who made them, and not in his favour. The preferable approach nowadays may be to treat the parties' subsequent conduct as admissible even in their own favour, and to leave the court free to assess its probative weight. This approach would be consistent with the looser significance attached to the presumptions of resulting trust and of advancement in the modern authorities.
>
> "Thus, if a father buys property, and has it conveyed into the name of his son, the father's declaration at the time of the purchase that he wished the son to hold as trustee for him would be admissible to rebut the presumption of advancement; although the father's subsequent declarations could be used by the son to support the presumption of advancement, they could not be used in evidence by the father to rebut it. On the other hand, the subsequent acts and declarations of the son may be used against him by the father, and may rebut the presumption of advancement if there is insufficient evidence of the intention of the father at the time of the purchase to counteract the effect of those acts or declarations."(My emphasis)

The trial judge, having found that a resulting trust in Inc's favour had arisen, the onus would then have been on the LY Parties to rebut the presumption. Further, according to the passage above, subsequent acts and declarations made by LY and/or Mr. Friedman could be used by Inc against LY and Mr. Friedman to support the presumption.

[55] Firstly, Inc points out that neither LY nor Mr. Friedman has at any stage sought to suggest that there was any change in beneficial ownership of the Shares and thus all statements made about ownership could only be referable as to what the intention of LY was at the time the Shares were acquired.

The evidence of subsequent conduct

(a) The de facto ownership and control of eChina by Inc

[56] The trial judge[50] stated that there was a mass of evidence showing that Inc was treated as the de facto owner of eChina. Indeed he said it was common ground that Inc's board effectively managed the Chinese operation as if it was eChina's ultimate holding company. Significantly, a telephonic board meeting of Inc in April 2002 has Mr. Friedman, then a member of Inc's board, updating the board on the negotiations with SinoPec. It is not in dispute that the SinoPec contract formed the core of eChina's business. Inc received eChina's profits which the learned trial judge found presumably must have been paid out to Inc's shareholders.

[57] The trial judge held however, that this mass of evidence could not assist as "it assumes what is required to be proved, which is that Inc owned BVI de jure." The LY Parties contend that the trial judge was right in so concluding. In addition they refer to two other matters:

(a) That Mr. Friedman, after he had been ousted from Inc's board in 2004, obtained confirmation from BVI's registered agent in BVI that LY was the sole shareholder of BVI, thus demonstrating that he understood and intended that the Shares would continue to be held by LY; that he had decided, in essence, to *'let sleeping dogs lie'* not having the stomach or wherewithal for a bloody fight at the time. It is reasonable to infer that he kept this information to himself as everyone on Inc's board appeared to be none the wiser in terms of any awareness of a different position regarding the true ownership BVI and eChina until 2008.

(b) The fact that after his ouster, Inc, in 2006 had prepared consolidated financial statements which showed Inc as the 100% equity interest in BVI and eChina on which the trial judge concluded that they did not assist in deciding the terms on which the Shares were issued on 26th April 2001. This is accepted as clearly it could not be relied as shedding any light as to the LY Parties' intentions, Mr. Friedman by then having been separated from Inc, and interestingly, BVI and eChina.

[50] At para. 52 of his judgment.

[58] The more critical question to my mind is not with respect to the operations of Inc after Freidman's ouster, but rather the operations and actions of Inc when Mr. Friedman was on the board and in control. As asked by Inc, with regard to the de facto ownership and control of eChina by Inc with all of eChina's profits from its SinoPec deal flowing directly up to Inc: on what basis could the LY Parties' actions be explicable other than that they regarded Inc as the beneficial owner of BVI and thus eChina? As Inc has pointed out, and in my view quite rightly, during all this period – from BVI's incorporation up to 2008 and even during all the acrimonious litigation between the LY parties and the Inc Parties in 2004-2005, there is not a whisper or murmur from the LY Parties seeking to suggest otherwise. In my view such behaviour is nothing short of remarkable. Indeed, if LY considered itself as also being the 100% beneficial owner of BVI, the stance of saying and doing nothing and simply allowing Inc to continue managing and controlling eChina's business even after the relationship went sour is incomprehensible. This conduct in my view is explicable only on the basis that LY and Mr. Friedman considered Inc to be the beneficial owner of BVI and thus it was intended that Inc be the beneficial owner. As Counsel for Inc said, on each occasion that Freidman had an opportunity to say that BVI is owned by LY he has never said so.

(b) The ABM and Acknowledgement Letter

[59] Secondly, there are the ABM and Acknowledgement Letter prepared by Gibson Dunn and emailed to Mr. Friedman on 31st January 2002. Gibson Dunn were acting for both LY and Inc. The trial judge found that Mr. Friedman did execute them.[51] The ABM and Acknowledgment Letter were drafted on the basis that the Shares had been issued to LY by mistake and LY therein resolved to *'contribute'* the Shares to Inc. Inc says that the ABM and Acknowledgment Letter shows that LY's and Inc's lawyers understood that the Shares were to be owned by Inc and that if legal title had been acquired by LY it was a mistake. Inc

[51]See paras. 30-31 of his judgment.

says that Gibson Dunn could not have simply made this up and that what the trial judge failed to consider is the possibility that there was indeed a mistake in that Freshfields had gotten their instructions wrong and that indeed it had been intended that Inc would be the registered holder of the Shares.

[60] Inc further contends that even if Gibson Dunn got it wrong and there was no actual mistake, nonetheless the execution of the documents by Mr. Friedman was consistent and consistent only with the intention that Inc should be the owner of the Shares beneficially. The LY Parties say that the ABM and the Acknowledgment Letter were, as the judge found, consistent with the fact that LY was intended to take the Shares as legal and beneficial owner from the time they were allotted and that they were premised on the Shares being issued to LY by mistake. I am inclined to agree with Inc however that whether the ABM and Acknowledgment Letter mistakenly referred to LY's holding of the Shares as a mistake or whether there was in actual fact no mistake, the act by Mr. Friedman of executing them is significant and ought not to be disregarded as far as the exercise of divining the parties' actual intention at the time of the acquisition of the Shares are concerned. Whether or not the ABM and Acknowledgment letter were based on a mistaken premise, the objective was to *'contribute'* the Shares to Inc. The word *'contributes'* can only be construed in its natural sense of 'giving' something. In my view the documents, even if they did no more, provided evidence of the LY Parties intention that at the time the Shares were issued they belonged to Inc and not LY. Not only did Mr. Friedman not protest what the ABM purported to do but clearly agreed with it. He chased after a second set of the documents some months later.[52] It is to be remembered that at that time he was controlling not only LY but also actively managing Inc.

(c) The open letter of 24th April 2002

[52]See Core Bundle – Tab 21, pp. 73-74.

[61] This letter,[53] was signed by Mr. Friedman on behalf of Inc. It was on Inc's letterhead. It was addressed "To whom it may concern." Its opening sentence stated thus: "eChinaCash.com, Inc. is a California based company with a wholly owned foreign entity in Beijing."It went on to detail the start-up expenses in relation to "opening our office in Beijing." It is common ground that there was only one Chinese entity which is eChina. Inc says that this letter was significant in that it was a clear acknowledgement by Mr. Friedman of Inc's ownership of eChina (and thus BVI). The LY Parties say that the trial judge was right to give this letter little weight as it was not known whether it was sent to anyone, nor was there evidence as to why it was written. I do not consider that these factors make a meaningful difference, in the context of this exercise. Whatever its purpose, whether delivered to persons or not, does not detract from the fact that it is a statement in writing by Mr. Friedman acknowledging, at a time devoid of pressures of litigation, hostility or conflict with the Inc Parties, that eChina was wholly owned by Inc. This was written notwithstanding that Mr. Friedman (even if Mr. Norton had no knowledge) knew that the Shares had been registered to LY. The trial judge in my view ought to have accorded greater weight to it, having found a resulting trust in Inc's favour. The contemporary evidence in the nature of the Freshfields emails was not clear and unequivocal so as to render the consideration of this letter unnecessary in determining Inc's and the LY Parties' intentions at the time of the acquisition of the Shares.

(d) The US Proceedings

[62] In 2004, after Mr. Friedman was dismissed, litigation ensued between the Inc Parties and the LY Parties. Mr. Freidman stated on oath in his Deposition that he knew which entity owned eChina (referred to in the Deposition as eCC Beijing). An excerpt of the transcript[54] reads like this:

> "Q. … Now, are you aware of what individual or entity owns the shares of eCC Beijing?
> A. Yes.

[53]See Core Bundle – Tab 13A.
[54]SeeCore Bundle – Tab 23.

Q: I believe its eChinaCash BVI, Limited.
Q. And eChinaCash BVI, Limited is another corporation, not -- separate and distinct from eCC, Inc.?
A. Yes
Q. Okay. And who owns the shares of eChinaCash BVI, Limited?
A. 100 percent by eChinaCash Delaware Inc., Delaware.
Q. Okay. So eChinaCash or eCC, Inc. owns all the shares of eChinaCash BVI, Limited, correct?
A. To the best of my knowledge.
Q. Okay. And then eCC BVI owns all the shares of eCC Beijing?
A. Yes.
Q. Okay. Were eCC Beijing and eCC BVI incorporated at the same time?
A. I don't remember one way or the other.
Q. Okay. Did you participate in the incorporation of those two companies?
A. Yes.
Q. Okay. … Were you a director of eCC Beijing when it was first created?
A. Yes.
Q. Were you a director of eCC BVI when it was first created?
A. Yes."

The Deposition goes on to detail when Mr. Freidman ceased holding any offices or positions in those entities.

[63] The learned judge[55] said that these answers given by Mr. Friedman were "wrong and to the extent that they referred to legal ownership, were known by Mr Friedman to be wrong, since he had checked the state of BVI's register of members with HSC in February 2004 and knew that Light Year was registered as the owner of the shares."He rejected Mr. Friedman's explanation of being stressed for giving these answers. He concluded as follows:

> "A wrong answer to a question asked in a deposition made over four years after the events in question does not compel me to reject or reinterpret the contemporaneous evidence as to the allotment of the BVI shares. Of course, if there had been no such contemporaneous evidence, then these answers would no doubt have had to be evaluated and their worth established. In the present case however, they are, in my judgment and for the reasons given by Lord Diplock in Gissing v Gissing, inadmissible."

[55]At para.55 of his judgment.

[64] As I have said, for the reasons given, I do not consider that the Freshfields emails, on which the trial judge relied, provided clear contemporaneous evidence as to the intended beneficial ownership at the time of the issuance of the Shares. As the trial judge appreciated, in the absence of such, these statements by Mr. Friedman were accordingly relevant and admissible not only applying Gissing v Gissing, but as declarations against interest in support of the presumption of a resulting trust which the trial judge found in favour of Inc. In my view, in as much as Mr. Friedman knew that LY was still the registered holder of the Shares (having checked with HCS in BVI in or about the same year of the US litigation), then, unless he was deliberately seeking to give false evidence (though no reason has been advanced as to why he would make such a statement against his own interest), the irresistible inference in the light of his knowledge, is that he was speaking the truth and was speaking of actual ownership – that is, that Inc was the beneficial owner of the Shares, as intended, from the onset. I am unable to think of any other sensible explanation for his answers which, as the judge found, "are so definite and so unambiguous as to fix him with them."

(e) The Complaint following the Settlement Agreement.

[65] In May 2007, the LY Parties brought proceedings in California against, (among others) Inc, BVI and eChina. In his Complaint verified under penalty of perjury,[56] he stated, among other things, the following:[57]

> "9. Defendant eChinaCash, Inc. ('eCC') [Inc] is a Delaware corporation with its principal place of business in Santa Monica, CA.
> 10. Defendant eChinaCash, Ltd. is a British Virgin Islands company that is a wholly-owned subsidiary of eCC. ...
> 11.Defendant Beijing eChinaCash Network Technologies, Ltd. ("eCC Beijing") is a wholly foreign owned China company, and a wholly-owned subsidiary of eChinaCash, Ltd." (My emphasis).

The trial judge rejected these statements and stated that although they were correct de facto, they were wrong as a matter of law for the same reasons as he gave in respect of the evidence in Mr. Friedman's earlier Deposition. For the

[56] See Core Bundle – Tab 20A, pp. 229-246.
[57] See Core Bundle – Tab 20A, p. 232.

same reasons given above, I am of the view that the trial judge erred in disregarding these statements. Furthermore, these statements (as emphasised) are so definitive that I disagree with the LY Parties suggestion that this was boiler plate language in the Complaint and that no focus was placed on them. The more critical question to my mind is why would Mr. Friedman make such categoric statements against his interest particularly given his peculiar knowledge, unless he was speaking about the true state of affairs in terms of the actual ownership – that is, knowing that Inc was indeed the beneficial owner and was always intended as the beneficial owner of BVI. What did he stand to gain by making deliberate false statements if, as the trial judge concluded, were wrong and knew them to be wrong? On the other hand, all of the LY Parties statements and conduct are consistent with one scenario – that of Inc being the beneficial owner of the Shares. In the absence of clear evidence at the time of issuance and allotment of the Shares, as to where the beneficial interest in the Shares was to lie, and given the circumstances which the trial judge found (in my view rightly) gave rise to a resulting trust, the subsequent statements and the parties' conduct demonstrate and are explicable only upon the basis that the parties' common intention at the time of the acquisition of the Shares was that Inc was to be the beneficial owner.

The explanation for the Shares being registered to LY

[66] The trial judge did not accept the explanation given by Inc to the effect that the placing of the Shares were recorded to LY as a temporary expedient to facilitate BVI in opening a bank account in Hong Kong. The LY Parties in their argument have pointed to the fact that Inc has failed to explain why Freshfields arranged to have the Shares issued to LY with no mention being made of Inc's beneficial ownership. Counsel for the LY Parties say that Inc has put forward various explanations for the Shares being issued to LY: (i) by mistake; (ii) as a temporary expedient[58] (iii) per Mr. Norton for setting up a bank account.

[58]See Mr. Norton's witness statement – paras. 38-39.

[67] The LY Parties also make the point that Mr. Norton had not mentioned in his witness statement about the setting up of a bank account as being the temporary expedient for LY holding the Shares.[59] Indeed this does not comport with what is averred in paragraphs 38 and 39 of Mr. Norton's witness statement. When paragraphs 38-40 of Mr. Norton's witness statement are read together however, Mr. Norton does say, in essence, that the Shares being registered to LY was to be a temporary measure to facilitate swift incorporation of BVI. At paragraph 40 he says this:

> "... The initial registration in the Second Defendant [LY] was merely a mechanism to swiftly create BVI, nothing more. BVI was always intended to be a holding company for the Claimant's [Inc's] ownership of Beijing [eChina]."

However, what is clear from the transcript is that Mr. Norton, as the judge found, was relying for most of his information from records produced and not on the basis of his independent knowledge. He was unable to specify the corporate records to which he referred, in respect of the statements made at paragraphs 38 and 39. That is hardly surprising. Mr. Norton at that time was very much uninvolved in Inc's affairs. The persons in the forefront at that time were Mr. Friedman in the first instance and Mr. Beck. Mr. Beck was not a witness in the proceedings, and the other persons who may have been able to throw some light on the matter would have been the lawyers engaged at the time. But does this mean that Mr. Norton was not given an explanation, whatever variation that explanation might have taken, for LY being issued the Shares as a temporary expediency? If, as Inc puts it, Mr. Norton was made aware that the Shares were issued to LY, then why would Mr. Norton be under the impression, as the trial judge found,[60] that Inc owned BVI right up to 2008, unless he was made to understand that notwithstanding LY being registered as the owner of the Shares, that they still belonged to Inc? If Mr. Norton thought otherwise, would he not have voiced concerns having invested

[59]See Record of Appeal – Vol. 7 Part 1, Tab 1, pp. 119-121.
[60]At para.8 of his judgment.

substantially in Inc which was to own the Chinese entity? In this regard, I consider this portion ofMr. Norton's evidence at trial to be relevant:[61]

> "Q. ... Well, I put to you again that there were [sic] no such expediency as you have referred to. There was no relevant distinction as regards to bank accounts and what does appear from documents such as , in particular documents at page 19 of Bundle B, that it was a deliberate decision to make Light Year the parent company of BVI.
>
> A. As an investor in the US Corporation I can't see - - if I understood that in the way you're speaking, why would I have, in any way, agreed to it or not protested it? I was an investor in a US company that expected to own an oversees [sic],a Chinese entity, a WOFE, as they say, a wholly owned foreign enterprise, and if an intermediary was necessary, then the company that I'd invested in should have cross-owned that, and I know of no honest reason why the US company would not be the owner of that intermediary except as it's been represented to me as a temporary expediency."

[68] The person who would clearly be '*in the know*' is Mr. Friedman, as the controlling mind at the time of Inc. He was the person representing Inc in doing the setting up of BVI. On this aspect, Inc makes the following points in respect of Freidman's evidence:

(a) That the Freshfields email of 26th April was directing Harneys to set up the Hong Kong bank account.

(b) Mr. Friedman stated,[62] as referred to by the trial judge,[63]that he had helped BVI open an account with HSBC in Hong Kong in April 2001, and that for money laundering purposes, Hong Kong authorities required the account to be opened by the beneficial owner. But based on Freshfields' email of 26th June, BVI's application for opening a bank account was still being processed; the inference being that if an account was opened in April 2001, then it could only be LY's account and not BVI's, BVI having been recently formed.

[61]See Record of Appeal – Vol. 7 Part 1, Tab 1, pp. 121-122.
[62]See Record of Appeal – Vol. 7 Part 1, Tab 1, p. 161.
[63]At para.39 of his judgment.

(c) Crucially, no evidence has been produced by the LY Parties of the information supplied to the bank in response to the request for information about beneficial ownership.

[69] It is my view that the evidence on this aspect is far from full and complete – in respect of Mr. Norton due to his lack of involvement at the time, and in respect of Mr. Friedman, who was clearly intimately involved, not having produced some information or documentation in respect of what was furnished to the Bank in respect of beneficial ownership. What is clear is that the parties were working on a tight time frame for setting up the WFOE, eChina, which was dependant on the setting up of BVI and that BVI needed to establish a bank account. I consider that the evidence given by Mr. Norton in terms of his understanding and acceptance of the reason as a temporary expedient, is credible and not only explains Mr. Norton's belief that Inc owned BVI and thus eChina, but also explains why Inc, from the onset (with Mr. Friedman on the board) operated Inc and eChina as '*parent and subsidiary*' without demur from Mr. Friedman. It also explains Mr. Friedman's own conduct including his willingness to execute the ABM and the Acknowledgment Letter. I would be minded to approach Mr. Friedman's evidence on this aspect of the matter with some caution, coming as it does only now and without any supporting documentation, and after all his definitive statements to the contrary in respect of who owned eChina and thus BVI and in circumstances where one would have expected him to assert his right to full ownership of BVI if this was in fact the way he viewed and intended it.

Conclusion

[70] Accordingly, for the reasons I have given, I am of the view that the trial judge erred in construing the Freshfields emails as being clear and unequivocal as to beneficial ownership when they were not. This then led him to disregard or not have sufficient regard for the entire mass of evidence of the parties' subsequent conduct, and in particular the express statements made under oath by Mr. Friedman and LY which all point in one direction – that is that Inc was and was

always intended to be the beneficial owner of BVI. This led the trial judge to dismiss (in my view wrongly) Inc's primary claims for declaratory relief.

[71] This conclusion is sufficient to dispose of this appeal. Inc however also argued that the LY Parties were estopped by its subsequent conduct from denying that LY held the Shares on trust for Inc. I address this argument for completeness. Inc says that two species of estoppel have been raised namely (i) estoppel by representation and (ii) proprietary estoppel. Inc concedes that the estoppel point being raised on appeal is different from the estoppel point raised below. Further the estoppel point as pleaded below was to all intents and purposes abandoned at trial. The trial judge in any event described it as hopeless on the basis that Inc was in full possession of the facts, and it knew that LY had been issued the Shares, Inc having so directed. What Inc seeks to say on appeal, in short, is that Inc cannot be fixed with knowledge of the facts of Mr. Friedman's actions and wrongdoings, which were not known to Mr. Norton, who was also a director of Inc at the time. Counsel relies on the case of In Re Hampshire Land Company.[64]

[72] The LY Parties make the following points in relation to the estoppel argument raised by Inc:

(a) As to estoppel by representation, they say that estoppel by representation functions only as a defence and not as a basis, in essence, for advancing a cause of action. They rely on Baird Textile Holdings Limited v Marks& Spencer Plc[65] and Spencer Bower's text: The Law Relating to Estoppel by Representation.[66] I agree.

(b) Inc now seeks to make a case as to estoppel which was not raised in the court below based on factual allegations that were not pleaded or proved and ought not to be permitted to advance it on appeal. I agree.[67]Inc's

[64][1896] 2 Ch. 743.
[65][2001] EWCA Civ 274.
[66]Spencer Bower, 4th Ed., paras. XIV. 4.1-XIV.4.5.
[67]See: The Owners of the Ship "Tasmania" and the Owners of the Freight v Smith and Others, The Owners of the Ship "City of Corinth", The "Tasmania" (1890) 15 App. Cas. 223 H.L.(E.); Colonial Life Insurance Co. Holdings (Barbados) Ltd. v Royal Bank of Canada (Barbados) Ltd. (2001) 61 WIR 49.

estoppel point set out at paragraph 19 of its statement of case was essentially grounded (a) on in–action to assert a claim to the Shares, (b)the documents such as the ABM and (c) the sworn actions and sworn admissions of Mr. Friedman which suggested that the parties all behaved as if the intention to return the Shares to Inc had been effected.

[73] I agree with counsel for the LY parties that had Inc raised the allegations as to question of the knowledge of Inc's directors then these matters could have been fully explored and canvassed at the trial by way of disclosure and witness statements and the like. The issue of knowledge of Inc's directors and the question of Inc's detriment was simply not pleaded or proved at the trial. In essence the case of estoppel on which Inc based its case in the court below was in any event abandoned. Accordingly, in my view it would be improper to advance it on appeal in the circumstances. The trial judge was accordingly right to dismiss the estoppel case as pleaded, and the case now being advanced cannot, in fairness and proper practice, be permitted.

Conclusion and orders

[74] For the reasons I have set out, I would allow Inc's appeal and order that the appellant (Inc) be declared as the beneficial owner of the 100 ordinary shares in eChinaCash (BVI) Ltd held in the name of the first respondent, Light Year Partners LLC.

Costs

[75] The parties each appealed the costs orders made by the trial judge which were, in essence, that Inc pays 85% of the assessed costs of the LY Parties. He ordered that the LY Parties must pay the actual costs of Inc's expert witness. The general rule is that costs follow the event unless there is good reason for departure. Inc, having succeeding on appeal, I would set aside the costs order of the learned trial judge and order that the respondents, the LY Parties, bear the costs of the appellant in the court below and on this appeal. Applying CPR 65.13, the costs on

appeal shall be two thirds of the amount fixed below, either by agreement within twenty one [21] days, or as ordered on assessment.

Janice M. Pereira
Justice of Appeal

I concur.

Hugh A. Rawlins
Chief Justice

I concur.

Ola Mae Edwards
Justice of Appeal