EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2015/0011

In the matter of Pioneer Freight Futures Company Limited (In Liquidation)

and

In the Matter of the Insolvency Act 2003

BETWEEN:

[1] MARK BYERS
[2] MARK Mc DONALD
(As joint liquidators of the above-named company)
[3] PIONEER FREIGHT FUTURES COMPANY LIMITED
(in liquidation)

Appellants

and

CHEN NINGNING (also known as DIANA CHEN)

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Mario F. Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Mr. Stephen Smith, QC, with him, Ms. Blair Leahy for the Appellants
Mr. Victor Joffe, QC, for the Respondent

2016: January 11;
2018: June 12.

Commercial appeal – Insolvency – Findings of fact – Whether the learned trial judge erred

in making factual findings – The appellate court's approach to factual findings and findings of credibility – Credibility of witnesses – Virgin Islands Insolvency Act 2003 – Section 245 of the Insolvency Act 2003 – Unfair preference – Apparent predetermination – Whether predetermination was made out by learned trial judge – Shadow director – Fiduciary duties

The appellants are the joint liquidators of Pioneer Freight Futures Company Limited ("PFF") and the respondent, Ms. Chen Ninging ("Ms. Chen" also known as Diana Chen) was the sole beneficial owner of PFF and a de jure director on incorporation. PFF went into provisional liquidation and the liquidators were appointed as joint liquidators on 15th February 2010. In December 2013 a declared interim dividend of 5.4 million dollars payable to Ms Chen was withheld from her. Subsequently Ms Chen filed a claim against the joint liquidators for the declared dividend. The joint liquidators in turn, instituted a claim against Ms Chen. The liquidators in the court below raised issues on unfair preference, in which they claimed the repayment of an unsecured loan from Zenato, a BVI company, was unfair preference. The appellants also raised issues of a breach of fiduciary duty by Ms Chen.

The appellants' primary case is that Ms. Chen remained a de jure director of PFF or alternatively a de facto or shadow director from incorporation until liquidation.

Justice Bannister dismissed the claim and in so doing made various findings of fact. Bannister J found that Ms. Chen remained a de jure director of PFF until around the beginning of August 2009. The learned judge also found was no evidence that she was involved in the affairs of PFF at any level or at all between then and the time when it came to put PFF into an insolvency procedure in November/December 2009, and then only in relation to the insolvency process itself.

After considering all the facts, the learned judge found that there was no evidence to support any finding that Ms. Chen was a de facto director of PFF. He held that Ms Chen owed no fiduciary duties to PFF when the repayment of the loan was made to Zenato and that any claim based on unfair preference would therefore not succeed.

Being dissatisfied, the liquidators appealed against the judgment of Justice Bannister.

Held: dismissing the appeal, that:

1. A transaction will be deemed to be an unfair preference given by a company to a creditor if the transaction is entered into at a time when the company is insolvent, if it is entered into during the period commencing six months prior to the application for the appointment of a liquidator and ending on the appointment of the liquidator or if the transaction has the effect of putting the creditor in a position which is better than the position that the creditor would have been in if the transaction had not been entered into. The repayments of the Zenato loan constituted an unfair preference and fell within the meaning of "unfair preference" found in the Insolvency Act ("The Act"). The Court has a broad discretion pursuant to the Act and may make orders against a creditor once it is satisfied that the transaction is an unfair preference. The court is only able to exercise its discretion against a third

party, (in this case Ms Chen) if the order was required as part of the process of restoring the position of the company to what it would otherwise have been. In this case, an order is not required to restore PFF's position to what it would have been in if it had not entered into the transaction with Zenato.

Sections 245 and 249 of the Insolvency Act 2003, Act No. 5 of 2003, Laws of the Virgin Islands applied; Oxford Pharmaceuticals Ltd, Re; Wilson v Masters International Ltd [2010] BCC 834 applied.

2. The reluctance of the appellate court to interfere with findings of fact unless compelled to do so applies not only to findings of primary facts but also to the evaluation of those facts and the inferences drawn from them. The mere fact that a judge did not discuss a point or certain evidence in depth is not a sufficient ground for an appellate court to interfere. What matters is whether the decision under appeal is one which no reasonable judge would have reached.

   Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5 applied; Henderson v Foxworth Investments Limited [2014] UKSC 41 applied; re B (A Child) (FC) [2013] UKPC 33 applied.

3. The question whether a director is a shadow or de facto director, is a question of fact and degree. The question is whether that person was part of the corporate governance system of the company and whether he assumed the status and function of a director so as to make himself responsible as if he were a director. The court must look at the circumstances in the round. Without actively assuming duties to act during the relevant period, fiduciary duties could not be imposed on the respondent.

   Revenue and Customs Commissioners v Holland [2010] UKSC 51 applied; Vivendi SA and another v Richards and another [2013] EWHC 3006 (Ch) considered.

4. An appeal court is rarely justified in overturning a finding of fact by a trial judge which turns on the credibility of a witness. Any appellant, who challenges the judge's finding on credibility, has a particularly difficult task. In assessing the credibility of a witness it is unnecessary to accept or reject an account in its entirety or to find that a witness who is wrong in one or more respects is untruthful. The question of whether a witness' evidence was truthful is essentially one for the learned trial judge. A judge upon the review of all the evidence inclusive of documentary evidence can make a finding that a witness' evidence is reliable, despite being in conflict with other evidence.

   Mutual Holdings (Bermuda) Limited and others v Diane Hendricks and others [2013] UKPC 13 applied; Langsam v Beachcroft [2012] EWCA Civ 1230 applied; Armogas v Mundogas (The Ocean Frost) [1985] 1 Lloyd's Report 1 applied.

5. Pre-determination on the part of a judge renders the decision unlawful. The

learned trial judge did not show a closed mind, neither did he fail to apply his mind to the task before him. It cannot be said that the fair-minded and informed observer, having considered the facts would conclude that there was a real possibility that the learned judge had predetermined the case against the appellants. There is nothing wrong in a judge outlining the difficulties a party may face on issues before the court.

R (on the application of Persimmon Homes Ltd) v Vale of Glamorgan Council [2010] EWHC 535 applied.

6. The judge's conclusions on the central issues were supported by the evidence. It is clear from his reasoning that the learned judge grappled with all the potential difficulties presented by the evidence and came to conclusions which will not occasion appellate intervention. It cannot be said that his findings were such that no reasonable judge could have reached or his conclusions were plainly wrong. The conclusions were reasonably justifiable on the evidence. Accordingly, this Court will not interfere.

Thomas v Thomas [1947] AC 484 applied; Henderson v Foxworth Investments Limited [2014] UKSC 41 applied; re B (A Child) (FC) [2013] UKPC 33 applied; Central Bank of Ecuador and others v Centicorp SA and others [2015] UKPC 11 applied.

JUDGMENT

[1] BAPTISTE JA: This appeal stems from Bannister J's dismissal of the appellants' claim against the respondent ("Ms. Chen"). The claim was based on the allegation that Ms. Chen caused or procured Pioneer Freight Futures Company Limited ("PFF") to repay a loan of $US 13 million made to it by Zenato Investments Limited ("Zenato") and that the payment constituted an unfair preference under the Insolvency Act[1] 2003 of the British Virgin Islands.

Background

[2] The appellants are the joint liquidators of PFF. PFF was incorporated in the British Virgin Islands in 2006 for the purpose of trading in Forward Freight Agreements ("FFAs"). Ms. Chen was the sole beneficial owner of PFF and a de jure director on incorporation. In about May 2009, PFF obtained an unsecured loan of $13 million from Mr. Song, a business acquaintance of Ms. Chen, via his BVI Company,

[1] Act No. 5 of 2003, Laws of the Virgin Islands.

Zenato. The loan agreement stipulated repayment in two years. The loan was repaid in three monthly instalments in November 2009. At that time, PFF's formal insolvency was inevitable and shortly before it entered into liquidation. PFF went into provisional liquidation on 17th December 2009. The liquidators were appointed as joint liquidators on 15th February 2010.

[3] In about December 2013, the joint liquidators declared an interim dividend of $5.4 million, payable ultimately to Ms. Chen, but withheld payment from her. Ms. Chen commenced proceedings for the declared interim dividend. The joint liquidators then instituted a claim against Ms. Chen alleging that: the repayment of the Zenato loan was an unfair preference within the meaning of sections 244 and 245 of the Insolvency Act; that Ms. Chen was in breach of fiduciary duty to PFF by causing or procuring the repayment of Zenato's loan; and that Ms. Chen was liable to pay PFF US$13 million under section 249 of the Insolvency Act (remedies in a case of unfair preference), under section 254 (misfeasance) or under the general law, together with interest.

[4] Bannister J viewed the claim as primarily framed as an unfair preference one but reasoned that the joint liquidators claim was simpler than that. Bannister J's understanding of the claim was that Ms. Chen caused or procured the payment in circumstances where insolvent liquidation was inevitable; that the repayment to Zenato was of no benefit to PFF's continuing existence (or alternatively had no commercial justification); and that since Ms. Chen was a de facto or shadow director of PFF at the time, she was in breach of fiduciary duties she owed to PFF in causing the repayment to be made, so she is liable to restore the US $13 million paid away. Bannister J stated that since it was common ground that a director who realizes that a company cannot avoid insolvent liquidation, and yet uses company money to pay a particular creditor without any proper reason for doing so, misapplies company funds in breach of fiduciary duty, the question turns into one of fact.

[5] Bannister J made various important findings of fact some of which are challenged on appeal and held, inter alia, that Ms. Chen owed no fiduciary duties to PFF when PFF repaid the loan to Zenato, therefore the joint liquidators claim against her based on the alleged breach of fiduciary duty failed. Bannister J also held that Ms. Chen did not cause or procure the repayment of the Zenato loan. Further, a claim against Ms. Chen based on unfair preference as in the Insolvency Act could not succeed if Ms. Chen had not breached any fiduciary duties.

[6] The appellants' primary case is that Ms. Chen remained a de jure director of PFF, or alternatively a de facto or shadow director from incorporation until liquidation. Ms. Chen's evidence was that she had resigned as the sole director of PFF on 29th May 2009 (about six months before the Zenato payments were made) and had been replaced by Mr. Gan. The appellants contend that the overwhelming contemporaneous evidence to the contrary was that Ms. Chen continued to manage PFF's affairs after the date she claimed to have resigned. The appellants submit that Bannister J ought to have found that Ms. Chen owed PFF fiduciary duties at the time of the repayment of the loan and that she breached those duties.

[7] The appellants submit that Bannister J should have found that the claim was soundly based in law and had been established on the evidence. He, therefore, should have made orders requiring Ms. Chen to restore the insolvent estate to the position it would have been in if the Zenato payment had not been made. The appellants complain that Bannister J made erroneous conclusions of law; failed to take advantage of seeing and hearing the witnesses; failed to conduct a careful analysis of the evidence; made internally inconsistent findings; evinced hostility to their case from the very inception; and was predisposed to find for Ms. Chen.

Factual findings

[8] Bannister J had to make findings of fact on the disputed issues as to the period of Ms. Chen's de jure directorship of PFF, as well as whether she was a de facto or shadow director. Bannister J found that Ms. Chen wrote a letter of resignation

from her directorship of PFF on 29th May 2009 but there was evidence that she did not cease, or at any rate was treated as not having ceased to be a de jure director on that date. There was nothing contrived about Ms. Chen's resignation and he was satisfied that she had originally intended it to have effect as from 29th May 2009. Shortly before that time, she had been held incommunicado for some six weeks by law enforcement agencies of the Peoples Republic of China, in connection with an investigation, subsequently abandoned, into economic fraud. Bannister J accepted Ms. Chen's evidence that that event traumatised her and it was the basis behind her resignation as director, not only of PFF, but also another company, PML.

[9] Bannister J found that there was clear evidence that PFF staff continued to behave as if Ms. Chen remained as de jure director of PFF well after 29th May 2009. In July 2009, they sought Ms. Chen's signature to board resolutions of PFF authorising her to execute settlement agreements with FFA creditors. On 14th July 2009, Ms. Chen gave advice as to the form of a letter to one of PFF's FFA debtors and Ms. Chen was copied draft letters on the point. Then there was an email from Eddie Chen (the Chief Operations Officer of PFF) dated 20th July 2009, stating that Ms. Chen had instructed him to call default on two of PFF's FFA debtors. On 29th July 2009, the Chief Legal Officer of Pioneer Group (of which Ms. Chen was the ultimate beneficial owner) told "HFW" that she was going to do a note to Ms. Chen to approve the execution of a settlement agreement and of two consent orders. Bannister J then pointed to distinct and complete gap, so far as the documents in evidence disclose, in Ms. Chen's involvement in the affairs of PFF, until mid-November 2009.

[10] Bannister J also found that Ms. Chen remained a de jure director of PFF until around the beginning of August 2009. There was no evidence that she was involved in the affairs of PFF at any level or at all between then and the time when it came to put PFF into an insolvency procedure in November/December 2009, and then only in relation to the insolvency process itself. Ms. Chen's involvement

in the insolvency proceedings was most naturally explained by the fact that she was PFF's ultimate owner. The evidence is clear that Ms. Chen withdrew from any involvement in the affairs of PFF after, at the least, early August 2009, leaving Eddie Chen in charge of its affairs, as its sole de facto director. There is no material capable of supporting a suggestion that after Ms. Chen ceased to be a de jure director she continued as a director de facto. There is no evidence that after Ms. Chen's resignation took effect she acted as a shadow director of PFF.

Grounds of appeal 1 to 3: **appellants' arguments on G**round 1

[11] The appellants advanced several grounds of appeal. Grounds 1 to 3 are in the alternative. These grounds challenge Bannister J's finding that Ms. Chen owed no fiduciary duties to PFF at the time of the repayment of the Zenato loan: whether as a de jure director (Ground 1); whether as a de facto or shadow director (Ground 2); or as a result of her pivotal role in PFF (Ground 3).

[12] With respect to Ground 1, the appellants contend that Bannister J erred in finding that Ms. Chen ceased to be a de jure director of PFF "around the beginning of August 2009". They posit that this finding is contrary to her pleaded case and the entirety of the evidence. The appellants contend that Bannister J was plainly wrong in finding that Ms. Chen resigned in August 2009, as there was no evidence of that; further, that was neither sides' case. The appellants argue that in order to find that Ms. Chen had resigned in August 2009, Bannister J had to ignore (a) the fact that Ms. Chen had herself put in evidence formal documents recording her resignation and her replacement by Mr. Gan all dated 29th May and (b) that there was not a single formal document that referred to a resignation in August. They also challenge the finding that Ms. Chen's involvement in the affairs of PFF thereafter and the decision to place PFF into liquidation in particular, could be "most naturally explained by the fact that she was PFF's ultimate beneficial owner". The appellants opine that in order to make those findings, Bannister J had to ignore much of the evidence on the point.

[13] The appellants complain about what they claim to be the absence or insufficiency of evidential support for the conclusion that: (i) Ms. Chen intended to resign as a de jure director of PFF with effect from 29th May 2009; (ii) Ms Chen ceased to be de jure director of PFF in August 2009 or at any other time prior to liquidation of PFF; and (iii) Ms. Chen withdrew from any involvement in PFF's affairs in early August 2009; alternatively, the appellants contend that Bannister J's conclusion that Ms. Chen withdraw from such involvement, is contrary to the weight of the evidence and contrary to his finding that she was involved in the arrangement to liquidate PFF. The appellants also assert that Bannister J was wrong that none of the communications with Ms. Chen between November 2009 and the appointment of provisional liquidators in December 2009 "concern the day to day conduct of PFF's business". Further, Bannister J erred in concluding that from the lack of documentary evidence generally in the period between August and November 2009, Ms. Chen must not have been involved in PFF's affairs during that period.

[14] The appellants argue that to accept Ms. Chen's evidence that she had decided to resign from PFF because she could no longer cope with being a director, Bannister J had to ignore the following: (a) Ms. Chen's evidence that when she was a director her role was only over very "big picture"; (b) the fact that Ms. Chen continued as a director of PFF's parent company post the liquidation of PFF; and (c) the affidavit evidence of Mr. Perrot, who advised PFF on insolvency and contractual matters, that he "believed or assumed that [his] instructions were fully authorized by PFF's management and specifically by Ms. Chen" and that he "was led to believe and considered that Ms. Chen was the key decision maker in relation to [PFF]".

[15] The appellants also contend that in order to make a positive finding that Ms. Chen played no part in the affairs of PFF after early August 2009; Bannister J had to ignore significant gaps in the documentation after that date (especially in relation to the repayment of the Zenato loan). He was also forced to explain away all the documents showing that Ms. Chen was the key decision maker in relation to the

liquidation of PFF on the footing that she was PFF's ultimate owner. This, the appellants contend, ignores two further matters: (a) the documents show Ms. Chen was not being consulted as a director; she was the only person making decisions about the future of PFF; and (b) it is the role of the director, not the shareholder of an insolvent company, to determine what is in the best interests of creditors and whether formal insolvency is required.

[16] The appellants further posit that Bannister J's finding that Ms. Chen had resigned as de jure director, raised the question as to who had replaced her. Ms. Chen's case was that Mr. Gan had replaced her in May 2009 and she had put in evidence a resolution to this effect and a witness statement from Mr. Gan. The appellants' case was that Ms. Chen had never resigned. Bannister J rejected Ms. Chen's case that Mr. Gan had replaced her. The appellants argue that Bannister J's finding that the question as to who had replaced Ms. Chen as de jure director was "hopelessly confused" failed to address the issue that in order for Ms. Chen's resignation as the sole de jure director to be effective, someone had to replace her, as BVI Company law required a company to have at least one director. The appellants submit that any proper evaluation of the twin circumstances (a) that Ms. Chen had not resigned on 29th May 2009 and (b) that the question of her succession to the de jure directorship was "hopelessly confused" would have inevitably led to a finding on the balance of probabilities that Ms. Chen had actually remained in office throughout. To accept Ms. Chen's case and make a coherent evaluation of the evidence required Bannister J to identify the replacement director; as that was not possible, Ms. Chen's case had to be rejected.

[17] The appellants posit that Eddie Chen was emphatic on oath that he had to and did obtain approval for payments after 29th May 2009 from PFF's de jure director. Bannister J's dismissal of the notion that Mr. Gan or Mr. Song had replaced Ms. Chen ought to have led him to conclude that the director whose approval Eddie Chen sought was Ms. Chen. The appellants further state that Bannister J failed to

address their contention that if Ms. Chen had at any point resigned as the de jure director, she was reinstated in October 2009 and remained the de jure director until (at the earliest) 13 November 2009 by which time two of the three Zenato repayments had already been made.

Reversing findings of fact

[18] The appellants' arguments lead to the question as to whether Bannister J's factual findings can be upset. The legal principles relating to appellate interference with factual findings of a trial judge are well settled. An appeal court is constrained when called upon to review factual findings by a trial judge who has seen and heard the witnesses give oral evidence in court. In Thomas v Thomas,[2] Lord Thankerton stated:

> "(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion. (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. (3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

[19] The Court of Appeal will not lightly interfere with a judge's findings of fact. Where a trial judge has reached conclusions on the primary facts, it is in only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it.[3] As Lord Kerr explained at paragraph 108:

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[2] [1947] AC 484, pp. 487-488.
[3] Re B (A Child) (FC) [2013] UKPC 33, para. 53, per Lord Neuberger.

> "A conclusion by a judge of first instance on which facts have been proved, and which have not been, involves the judge sifting the evidence that has been led, assessing it and then deciding whether it has brought him or her to the necessary point of conviction of its truth and accuracy."

Lord Kerr pointed out that an appellate court's review of factual findings is, of necessity:

> "…constrained by the circumstances that, usually, the initial fact-finder would have been exposed to a wider range of impressions that influence a decision on factual matters than will be available to a court of appeal. This is not simply a question of assessing the demeanour of the witnesses who gave evidence on factual matters, although that can be important. It also involves considering the initial impact of the testimony as it unfolds – did it appear frank, candid, spontaneous and persuasive or did it seem to be contrived, lacking in conviction or implausible. These reactions and experience cannot be confidently replicated by an analysis of a transcript of the evidence. For this reason a measure of deference to the conclusions reached by the initial fact finder is appropriate. Unless the finding is insupportable on any objective analysis, it will be immune from review."

[20] An appellate court should only interfere with a judge's factual conclusions if it was one which "no reasonable judge could have reached" or the judge's reasoning "cannot be reasonably explained or justified." As Lord Reed explained in Henderson v Foxworth Investments Limited,[4] an appellate court should not interfere with a trial judge's conclusion on primary facts unless it is satisfied that the judge was "plainly wrong". Lord Reed elucidated the meaning of the phrase "plainly wrong". He recognized the risk that the phrase may be misunderstood and cautioned at paragraph 62:

> "The adverb" plainly" does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one which no reasonable judge could have reached."

[4] [2014] UKSC 41.

Lord Reed stated at paragraph 67:

> "It follows that, in the absence of some identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence or a demonstrable misunderstanding of relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if satisfied that his decision cannot be reasonably explained or justified."

[21] The reluctance of the appellate court to interfere with findings of fact unless compelled to do so, applies not only to findings of primary fact but also to the evaluation of those facts and to inferences to be drawn from them. In Fage UK Ltd v Chobani UK Ltd,[5] Lewison LJ identified the reasons for this approach as including: the expertise of the trial judge in determining what facts are relevant to the legal issues to be decided and what those facts are if they are disputed; the fact that in making his decision the trial judge will have regard to the whole sea of the evidence presented to him, whereas an appellate court will only be island hopping; and that the atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

[22] In Central Bank of Ecuador and others v Conticorp SA and others,[6] the Privy Council cautioned at paragraph 5 :

> "any appeal court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the judge's findings and position, and in particular the extent to which, he or she had, as the trial judge, an advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere. Some conclusions of fact are, however, not conclusions of primary fact, but involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ …"

[23] As stated in Central Bank of Ecuador and others v Conticorp SA and others, the principles with respect to appellate interference also "assume that the judge has taken proper advantage of having heard and seen the witnesses, and has in

[5] [2014] EWCA Civ 5, para. 111.
[6] [2015] UKPC 11.

that connection tested their evidence by reference to a correct understanding of the issues against the background of the material available and the inherent probabilities". [7]

Discussion

[24] In my judgment, it cannot be said that the challenged findings are unsupported by the evidence or were ones one which no reasonable judge could have reached or were not reasonably justified or explained. It is clear from his reasoning that Bannister J grappled with all the potential difficulties presented by the evidence and came to a conclusion which does not attract appellate intervention. It cannot be said that Banister J turned a blind eye to the inconsistencies in the evidence. The evaluation of a case of that nature is quintessentially a matter for the trial judge. Bannister J addressed and analysed the central issues which were necessary for his decision. Even if he had not mentioned some matters, he would be presumed to have taken the whole of the evidence into consideration.[8]

[25] Bannister J squarely addressed the issue of Ms. Chen's letter of resignation from her directorship of PFF on 29th May 2009. He considered the evidence that Ms. Chen did not cease or was treated as not having ceased, to be a de jure director on that date. Bannister J was satisfied that her resignation was not contrived and that she had originally intended it to have effect from 29th May 2009.

[26] Bannister J noted that that no valid appointment of Mr. Song as de jure director was in evidence. Likewise, there was no evidence of a valid appointment of Mr. Gan. Bannister J however stated that the issue whether or not Mr. Gan was ever a director of PFF, was immaterial for present purposes. I note Ms Chen's observation that the joint liquidators "did not ask the court to make findings as to the directorship of PFF other than that of Ms. Chen" and that Bannister J was not

[7] ibid, para. 8.
[8] Thomas v Thomas, per Lord Simmons.

obliged to make findings as to who else might have been a director of PFF when she resigned.

[27] Bannister J's findings that Ms. Chen had not resigned on 29th May 2009 and the hopeless confusion as to who or if anyone had succeeded her as sole de jure director of PFF and Bannister J not identifying a replacement does not lead to the conclusion or have the consequences contended for by the appellants, that is, the inevitability of a finding on a balance of probabilities that Ms. Chen had remained in office throughout or that her case should be rejected.

[28] Bannister J was not obliged to make a finding as to who had replaced Ms. Chen as de jure director if he formed the view that it was not possible to make that particular finding, nor was he required to make a finding on every disputed item of evidence. Further, Bannister J was entitled not to mention evidence that he did not find helpful in determining any particular issue. Bannister J made findings on matters which he needed to resolve before coming to his decision. Such an approach was countenanced by Lady Justice Arden in Sohal v Suri,[9] where she stated:

> "The judge does not have to make a finding on every disputed item of evidence. It is enough if he makes findings on matters which he needs to resolve before coming to his conclusion. Likewise, there is no obligation on the judge to make findings if, after having considered the matter conscientiously, he forms the view that it is not possible to make a particular finding."

[29] Regarding the appellants' complaint that Bannister J failed to refer to Mr. Perrot's affidavit evidence, I note Ms. Chen's argument that Mr. Perrot expressly stated that he had no knowledge of her involvement in the repayments to Zenato. I agree with Ms. Chen that Mr. Perrot's evidence cannot assist in determining her directorship at the time of the repayments of the Zenato loan.

[9] [2012] EWCA Civ 1064, para 6.

[30] The appellants' contention that in making his finding that Ms. Chen remained a de jure director until sometime in early August 2009 and the nature her involvement in the affairs of PFF thereafter, Bannister J inevitably had to ignore much of the evidence on the point is not well-founded. As stated earlier, an appellate court is bound, unless there is compelling reason to the contrary to assume that the trial judge has taken the whole evidence into his consideration. I find no reason to assume that Bannister J did not take the whole of the evidence into account. It can be assumed that Bannister J viewed the evidence in its entirety and based his factual findings on that review. I am satisfied that Bannister J dealt with the evidence in sufficient detail to justify the conclusion he arrived at.

[31] The mere fact that a judge did not discuss a certain point or certain evidence in depth is not a sufficient ground for appellate interference. As indicated earlier, a trial judge is not required to deal expressly with every single piece of evidence or inconsistency that manifests itself in the course of the trial. What matters is whether the decision under appeal is one which no reasonable judge could have reached. I am of the view that the evidence as a whole can reasonably be regarded as justifying Bannister J's conclusion. Bannister J. stated his understanding of the appellants' case, evaluated the evidence, made findings of fact and came to his conclusion. There is no basis to infer or suggest that Bannister J did not discharge his task properly by not referring to every alleged inconsistency or implausibility in the evidence. I am not of the view that any omission in Bannister J's reasoning reflected a misapprehension or neglect of the evidence. None of the challenged findings can be said to be unsupported by the evidence and the decision is not one no reasonable judge could have reached. I am not satisfied that is this one of the rare cases in which the appellate court is compelled to set aside findings of fact made by an experienced judge.

[32] The appellants take exception to Bannister J's finding that none of the communications with or involving Ms. Chen between November 2009 and the appointment of provisional liquidators "concern the day to day conduct of PFF's

business". In that regard, they state that PFF's English solicitors had disclosed an email to the liquidators from Ms. Chen dated 10th December 2009 in which she gave instructions to seek an adjournment of a hearing in proceedings against one of PFF's counter parties.

[33] The impugned finding is at paragraph 24 of the judgment where Bannister J refers to the inevitability, from around early to mid-November, of PFF entering into administration or liquidation and Ms. Chen being kept abreast of discussions on these matters. Bannister J found that despite there being a considerable quantity of traffic with and involving Ms. Chen between then and the appointment of the joint provisional liquidators, none of it concerned the conduct of PFF's business, but was confined exclusively to the question of insolvent administration of PFF. Put in context, I am not of the view that there is much merit in the appellants' criticism when one considers the thrust of the finding. An important part of the context was the evident inevitability of PFF being put into liquidation.

[34] With respect to the appellants' argument that Bannister J should have found that the director that Eddie Chen sought approval for payment (including the Zenato loan) was Ms. Chen, I agree with Ms. Chen that the director that Eddie Chen was referring to was Mr. Gan. I can do no better than adopt Ms. Chen's position that it is not possible for Eddie Chen to have had the foresight in 2009 (or even in the BVI courtroom in early March 2015) to predict that sometime in March 2015 a judge in the BVI would make a finding that Mr. Gan may not have been validly appointed. It defies logic for the joint liquidators to suggest that, just because Mr. Gan's appointment is now in question, the learned judge should have concluded that "the director whose approval Eddie Chen sought was Miss Chen when Eddie Chen was unequivocal in the witness box that he was referring to Mr. Gan.

[35] The appellants' primary case was that Ms. Chen remained a de jure director of PFF, Bannister J found to the contrary. It was a finding that was open to him on

the evidence. It cannot be said to be a conclusion which no reasonable judge could have reached. The first ground of appeal accordingly fails.

Was Ms. Chen a de facto or shadow director? (Ground 2)

[36] The appellants challenge Bannister J's finding that there is no material capable of supporting a suggestion that after Ms. Chen ceased to be a de jure director she somehow continued as a director de facto. "Nor is there any evidence to support a contention that, after her resignation took effect, she acted as a shadow director of PFF". Ms. Chen, on the other hand, submits that based on the evidence (or lack thereof) Bannister J was entitled to so find.

[37] The appellants posit that if, contrary to their primary case, Ms. Chen had ceased to be a de jure director of PFF in 2009, she continued to direct its affairs until its liquidation and accordingly owed fiduciary duties. The appellants point out that the two definitions of "director" in section 6 (1) of the Insolvency Act correspond to the English law concepts of "de facto" director and "shadow" director, respectively. Section 6(1) of the Insolvency Act defines director as:

> "a person occupying or acting in the position of director by whatever name called" and "a person in accordance with whose directions or instructions a director or the board of a corporate body may be required or accustomed to act."

The appellants also contend that the proposition that since Ms. Chen was not conducting day-to-day affairs of PFF, she could not be a de facto or shadow director is wrong, positing that there is no requirement, statutory or otherwise, for a de facto or shadow director to conduct day-to-day operations. The appellants argue that the paradigm case of a shadow director is to the contrary, as he dictates the course of the company's affairs to those actually carrying them out while making sure that his role in so doing is concealed.

Discussion

[38] The question whether a director is a shadow or de facto director, is a question of fact and degree. There was no one definitive test for a de facto director. The

question is whether that person was part of the corporate governance system of the company and whether he assumed the status and function of a director so as to make himself responsible as if he were a director. The court must look at the circumstances in the round: Revenue and Customs Commissioners v Holland.[10]

[39] The question as to the nature of Ms. Chen's directorship being one of fact and degree, and Bannister J having made his finding on that matter, the well-established principles pertinent to appellate review are engaged. The test is: was Bannister J plainly wrong? Bannister J undoubtedly considered the matter in the round and concluded that there was no evidence to support a finding that Ms. Chen was a de facto director in November 2009. Bannister J referred to the striking contrast between Ms. Chen's pre - August 2009 interventions and her total lack of involvement thereafter (until the insolvency process was embarked upon and then only in respect of that process as the ultimate beneficial owner).

[40] In my judgment, it was plainly open to Bannister J, on the material before him to find that there was no material capable of supporting a suggestion that after Ms. Chen ceased to be a de jure director she somehow continued as de facto director. Further, there is no evidence to support the conclusion that after Ms. Chen's resignation she acted as shadow director of PFF. The appellants' challenge reflects a disagreement with Bannister J's findings of fact about the capacity in which Ms. Chen acted. On Bannister J's view, Ms. Chen was protecting her interest as the ultimate beneficial owner, and was not, on the evidence, a de facto director; he was similarly entitled to conclude that she was not on the evidence a shadow director.

Ground 3 - Fiduciary duties

[41] The appellants submit that in the further alternative, if Ms. Chen is not properly to be described as a director of any description within the meaning of the Insolvency

[10] [2010] UKSC 51; [2010] 1 WLR 2793.

Act, she nonetheless owed fiduciary duties to PFF. The appellants posit that PFF did not have any regular business; it was trying to stave off liquidation; Ms. Chen was the sole signatory on its account and Ms. Chen was very involved in the company's affairs. The appellants complain that Bannister J erred in failing to consider the question whether Ms. Chen owed fiduciary duties to PFF at the time the Zenato loan was repaid. They argue that had Bannister J considered that question, and if Ms. Chen was not a director of PFF when the Zenato loan was repaid, he ought to have held that Ms. Chen assumed responsibility for PFF's affairs, including in particular, the making of payments to Zenato and that such assumption of responsibility justified the imposition of fiduciary duties on Ms. Chen, which she had breached. In support of their contention, the appellants cite the cases of Ultraframe (UK) Ltd v Fielding and others,[11] F&C Alternative Investments (Holdings) Ltd v Barthelemy (No.2),[12] and Vivendi SA and another v Richards and another.[13]

[42] Ms. Chen submits that fiduciary duties cannot be imposed on a person arbitrarily without any form of directorship or without management responsibility. Ms. Chen also points out that the cases the appellants rely on mainly deal with shadow directorship and the quotes extracted from those authorities do not support the appellants' case. I agree.

[43] In Ultraframe, Lewison J stated that the real question is not what is the proper label to attach? It is: "in what circumstances will equity impose fiduciary obligations on a person with regard to property belonging to another?".[14] Ms. Chen submits and I agree, that based on Bannister J's findings of primary facts that Ms. Chen ceased to be a director in whatever form after early August 2009 and at the time of the repayments, it cannot have been equitable to impose fiduciary obligations on her at the time of the repayments to Zenato.

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[11] [2005] EWHC 1638 (Ch), para. 1285.
[12] [2012] Ch 613, p. 625.
[13] [2013] EWHC 3006 (Ch).
[14] [2005] EWHC 1638 (Ch), para. 1285.

[44] In F&C Alternative Investments (Holdings) Ltd, Sales J stated: "Fiduciary duties are obligations imposed by law as a reaction to a particular circumstances of responsibility assumed by one person in respect of the conduct or affairs of another".[15] I agree with Ms. Chen's submission that this clearly hinges on the particular circumstances, which is a matter of fact for the trial judge. The matter is really fact sensitive. On Bannister J's finding of fact, the particular circumstances of this case did not warrant a reaction of imposing fiduciary duties on Ms. Chen in the absence of her involvement in the PFF's day to day affairs at the relevant time.

[45] In Vivendi, Newey J said: "Assuming to act in relation to the property or affairs of another can thus attract fiduciary duties".[16] I agree with Ms. Chen's argument that this clearly requires the element of "assuming to act" on her part. Bannister J found to the contrary. Without Ms. Chen assuming to act during the relevant period, fiduciary duties cannot be imposed on her.

[46] The appellants viewed as significant, the fact that Ms. Chen was the sole signatory of the two bank accounts out of which the Zenato payments were made. For the reason advanced in paragraph 22 of his judgment, Bannister J attached no significance to that. Bannister J recognised that the appellants "rely upon the undoubted fact that Miss Chen had sole signing rights on PFF's banking accounts".[17] He however explained that "The uncontroverted evidence, however, was that all PFF's banking transactions were carried out electronically from its offices by PFF account staff. The point goes nowhere".[18] It was plainly open to Bannister J on the evidence to so conclude. It is the duty of the judge to decide what weight or importance he attaches to the evidence. In the circumstances, there is no justification for interfering with Bannister J's conclusion that Ms. Chen having sole signatory rights to PFF's accounts "goes nowhere".

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[15] [2012] Ch 613, p. 652.
[16] Para. 141.
[17] Mark Byers et al v Chen Ningning BVIHC(Com) No. 430 of 2009, paragraph 22.
[18] ibid.

[47] In my judgment, given Bannister J's factual findings that: Ms. Chen remained de jure director of PFF until around the beginning of August 2009; Ms. Chen withdrew from any involvement in the affairs of PFF after, at the latest, early August 2009, leaving Eddie Chen in charge of its affairs as its sole de facto director; there is no evidence capable of supporting a suggestion that that after Ms. Chen ceased to be a de jure director she continued as a de facto director; or that after her resignation took effect she acted as a shadow director of PFF; after early August 2009 PFF appears, for all the evidence shows, to have been managed by Eddie Chen alone as he saw fit in all the circumstances, Bannister J was correct in finding that Ms. Chen owed PFF no fiduciary or other duties after about the beginning of August 2009. In the circumstances, there is no room to impose on Ms. Chen any fiduciary duties owed to PFF at the time of the repayments of the Zenato loan. Accordingly, there being no fiduciary duties owed by Ms. Chen, there was no fiduciary duties to be breached. This ground of appeal accordingly fails.

Ground 4: **Eddie Chen's** credibility; parties submissions

[48] In Ground 4, the appellants complain that Eddie Chen's evidence should have been rejected as untruthful on at least three key points: They contend that Eddie Chen's evidence was material to three points Bannister J had to decide; whether Ms. Chen remained a director of PFF at the time of the repayment of the Zenato loan about Ms. Chen's involvement with the payment; and about the lack of documentation available to the court. The appellants submit that Bannister J erred in accepting Eddie Chen's evidence that Ms. Chen ceased to be a director of PFF at the end of May 2009 and did not cause or procure the payments to Zenato in November 2009. The appellants reject that the explanation Bannister J gave at paragraph 21 of his judgment for finding that Eddie Chen was a witness of truth. The appellants claim that it was not a satisfactory explanation of why Eddie Chen's testimony in 2015 was to be preferred where it conflicts with contemporaneous documents, or the testimony of other witnesses who gave evidence at the trial whose veracity was not challenged.

[49] The appellants submit that the current tendency is to distrust the demeanour of a witness as a reliable pointer to his honesty and that a more reliable test of accuracy is to be found in a comparison of the witness' evidence with the contemporaneous documents and with the testimony given by other witnesses whose veracity is not in dispute. They contend that if the discrepancy between these sources cannot be satisfactorily explained, the challenged evidence must be unreliable. The appellants complain that Bannister J did not carry out that exercise.

[50] In support of their position, the appellants assert that Eddie Chen's evidence should have been rejected for any of several reasons including:

(i) Bannister J's conclusion that Ms. Chen remained a director of PFF beyond the end of May 2009 undermined the credibility of both Eddie Chen and Ms. Chen on this point as both witnesses had testified that Ms. Chen resigned at the end of May;

(ii) There was an acute conflict of evidence between the liquidators' witnesses and Eddie Chen about what was said at the meeting on 28th January 2010 in respect of which there was a contemporaneous note prepared by the liquidators' assistant. Bannister J was wrong to find (implicitly) that the liquidators' account was wrong and Eddie Chen's account was right. There being no good reason to disbelieve Mark Byers' and Andrew Charters' evidence that the part of the Note which records Eddie Chen as saying that Ms. Chen tried to pay back as much of the loans as possible in order to protect her reputation was accurate, and accurately recorded what Eddie Chen had said. The appellants mention the lack of challenge of Andrew Charters' evidence on this point and state that Eddie Chen's evidence was evasive and inconsistent with his written evidence;

(iii) Bannister J was wrong to find that "all the court has" about the meeting between the liquidators and Eddie Chen was the Note. The court also had the testimony of Mr. Byers, Mr. Charters and Eddie Chen, which it was obliged to consider and decide between, giving reasons for preferring one account to the other; and

(iv) Bannister J was wrong to find that the Note of the meeting was of no assistance and of no probative value.

Discussion

[51] Eddie Chen was the Chief Operations Officer of PFF and was responsible for its day to day operation; his testimony covered all aspects that relate to PFF's operation at the relevant time. Eddie Chen's evidence was undoubtedly important in determining the critical issues of Ms. Chen's directorship at the material time; whether Ms. Chen caused or procured the repayment of the Zenato loan; and whether documentary evidence had been withheld from the court. Bannister J assessed Eddie Chen to be a witness of truth.

[52] As indicated earlier, one of the issues raised by the appellants concerned the question of Eddie Chen's demeanour. As Lord Pearce stated in Onassis and Calogeropoulos v Vergottis,[19] credibility involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. The issue of 'demeanour' was also addressed in Re Mumtaz Properties Ltd; Wetton (as Liquidator of Mumtaz Properties Ltd) v Ahmed and others.[20] Arden LJ stated at paragraph 12 that witness choice is an essential part of the function of a trial judge and the judge has to decide whose evidence and how much evidence to accept. Arden LJ cautioned that this task is not to be carried out merely by reference to the impression that a witness made giving evidence in the witness box. It is not only a matter of body

[19] [1968] 2 Lloyd's Rep. 403, p. 431.
[20] [2011] All ER (D) 237.

language or the tone of the voice or other factors that might generally be called the 'demeanour' of a witness.

[53] In assessing credibility, objective facts and contemporaneous documents, the witnesses' motive – whether the witness has a motive for misleading the court - and overall probabilities are key criteria and are more important than demeanour. The court has to pay attention to the inherent probability or improbability of representations of fact. Ms. Chen submits, and I agree, that there are other important factors other than demeanour to warrant Bannister J's finding that Eddie Chen was a truthful witness. In that regard, Ms. Chen points in particular to the undisputed evidence that Eddie Chen has always been a professional executive in risk management with the corresponding qualifications and experience, who operated PFF from the end of 2008 to December 2009. The undisputed evidence is that both PFF and its parent company PISG have gone into voluntary liquidation, accordingly Eddie Chen no longer worked for either of them. There is no evidence that Eddie Chen was motivated by any reason other than to testify to the truth at trial. No allegation has been made against Eddie Chen that he is in any particular way motivated to hide the truth in relation to his knowledge of the activities of PFF.

The law – overturning finding of credibility

[54] An appeal court is rarely justified in overturning a finding of fact by a trial judge which turns on the credibility of a witness.[21] Any appellant, who challenges the judge's finding on credibility, has a particularly difficult task. Lady Justice Arden stated in Langsam v Beachcroft: [22]

> "It is well established that, where a finding turns on the judge's assessment of the credibility of a witness, an appellate court will take into account that the judge had the advantage of seeing the witnesses give their oral evidence, which is not available to the appellate court. It is, therefore, rare for an appellate court to overturn a judge's finding as to a person's credibility. Likewise, where any finding involves an evaluation of

[21] Mutual Holdings (Bermuda) Limited and others v Diane Hendricks and others [2013] UKPC 13.
[22] [2012] EWCA Civ 1230, para. 72.

facts, an appellate court must take into account that the judge has reached a multi-factorial judgment, which takes into account his assessment of many factors. The correctness of the evaluation is not undermined, for instance, by challenging the weight the judge has given to elements in the evaluation unless it is shown that the judge was clearly wrong and reached a conclusion which on the evidence he was not entitled to reach."

[55] In Armagas v Mundogas (The Ocean Frost)[23] Robert Goff LJ held:

> "Much argument was directed to the circumstances in which this court could and should reverse the findings of fact by a trial judge who had based himself upon his view of the credibility of witnesses which this court has not had the advantage of seeing and hearing give evidence. The principles are well established … I have found particularly helpful the statement made by Lord McMillan in Powell v Streatham Manor Nursing Home, when he said, [1935] A.C 243, 256l:
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> > "Where, however, as in the present instance, the question is one of credibility, where either story told in the witness box may be true, where the possibilities are evenly balanced and where the personal motives and interests of the parties cannot but affect their testimony, this House has always been reluctant to differ from the judge who has seen and heard witnesses, unless it can be clearly shown that he has fallen into error."

[56] The Ocean Frost was a case involving allegations of fraud. Robert Goff LJ stated:[24]

> "I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not: and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motive and to the overall probabilities can be of very great assistance to a Judge in ascertaining the truth."

[57] The salutary approach advised by Robert Goff LJ of testing the witness' account against objective facts proved independently of their testimony, particularly by

[23] [1985] 1 Lloyd's Rep. 1, p.57.
[24] [1985] 3 WLR 640, pp. 675-676.

reference to the documented history, has general application when attempting to assess the reliability of witnesses of fact. This approach was endorsed by the Privy Council in Central Bank of Ecuador at paragraph 164. In Central Bank of Ecuador, the Privy Council overturned findings of fact of the trial judge; in essence replacing finding of honesty with findings of dishonesty. The Ocean Frost approach to the assessment of credibility had an important impact on the decision.

[58] At paragraph 21 of his judgment, Bannister J had this to say about Eddie Chen's evidence:

> "I heard Mr. Chen give evidence. He could be a pernickety witness, taking fine points and making fine distinctions, but I found him anxious to answer questions truthfully and to assist the court where he felt that he could."

[59] The appellants complain that this is not a satisfactory explanation as to why Eddie Chen's evidence was to be preferred when it conflicted with contemporaneous documents or the testimony of other witnesses whose veracity was not challenged. The appellants argue that Bannister J did not explain how Eddie Chen could properly be said to have been anxious to answer questions truthfully, when it was his firm stance at the trial that Ms. Chen had as a director of PFF in May 2009 and had played no role in its affairs thereafter. Bannister J rejected Ms. Chen's evidence to that effect. The appellants state that in expressly rejecting Ms. Chen's evidence, Bannister J, by necessary implication rejected Eddie Chen's evidence as well, but nowhere did he explain how he could nonetheless find Eddie Chen was a witness of truth. The appellants submit that the two findings that Eddie Chen was truthful and that Ms. Chen continued as a director of PFF beyond May 2009, cannot sit together.

[60] I note that in assessing the credibility of a witness, it is unnecessary to accept or reject an account in its entirety or to find that a witness who is wrong in one or more respects is untruthful. There may be a broad range of reasons why a witness might be incorrect in reporting an incident or describing a situation. Although the appellants pointed to aspects of the evidence which they claim

undermined Eddie Chen's credibility, the question of whether Eddie Chen's evidence was truthful was essentially one for Bannister J. Further, a judge upon the review of all the evidence– inclusive of documentary evidence can make a finding that a witness evidence is reliable, despite being in conflict with other evidence.

[61] It appears to me that an important consideration here is that Bannister J expressly accepted that Ms. Chen's genuine intention was to resign on 29th May 2009. As Ms. Chen properly argues, no one could have foreseen Bannister J's ruling on Ms. Chen's period of de jure directorship before the delivery of his judgment because it was not anyone's case that Ms. Chen's de jure directorship ended at the beginning of August 2009. Accordingly, I agree with Ms. Chen's submission that there is no conflict between Eddie Chen's testimony that he believed that Ms. Chen resigned on 29th May 2009 and Bannister J's accepting that Ms. Chen did genuinely intend to resign on that date, even though emails indicating PFF staff's residual treatment of Ms. Chen as director in the following two months caused Bannister J to conclude that her de jure directorship continued until the beginning of August 2009.

[62] The appellants allege that Eddie Chen was not truthful in his first witness statement in stating that Ms. Chen was not involved in determining or verifying PFF's payment details and did not authorise payments made from PFF's account, when subsequently, during cross-examination he seemed to say at one point that he would seek authority from her regarding PFF's payment when she was still a director. Ms Chen invited the court to note that Eddie Chen is not a native English speaker and all the questions were interpreted through an interpreter and the interpretation was not spontaneous. Ms. Chen contends that the appellants are cherry picking only part of the evidence and when the full version of the relevant part of the cross-examination is considered, it is clear that Eddie Chen did not change his stance or act untruthfully regarding his testimony that Ms. Chen was

not involved in in verifying and authorizing bank payments even when she was a director and bank signatory; and unlike Ms. Chen, Mr. Gan was. I agree.

Email deletion

[63] The appellants attack Eddie Chen's credibility by questioning the circumstances relating to his laptop computer which he handed over to the joint liquidators in January 2010. The appellants say that Bannister J erred in accepting Eddie Chen's evidence to the effect that the absence of emails and documents on his laptop was because he had a programme which automatically deleted emails after a few days. The appellants dismiss the evidence as absurd and self-serving and posit that it was directly contradicted by other evidence to which Bannister J failed to refer.

[64] The appellants submit that Bannister J ought to have held that the laptop had been deliberately sanitized before delivery to the liquidators in order to ensure that nothing potentially damaging to Ms. Chen could be recovered by the liquidators. Further, whether as part of the process of sanitization or otherwise, Eddie Chen had deliberately deleted all e-mails, (and in particular those for the period from Ms. Chen's purported resignation as a director of PFF to the date of liquidation) to ensure that nothing potentially damaging to Ms. Chen could be recovered by the liquidators.

[65] Bannister J dealt with the matter of the documents and laptop at paragraph 21 of his judgment. He accepted Eddie Chen's explanation and rejected the suggestion that the absence of documents was sinister. Banister J was clearly entitled to do so. Bannister J stated:

> "His [Eddie Chen's] explanation, which I accept, is that he operated a system where all e-mails are self-deleted after a few days, leaving only draft agreements and other such transactional material saved. The JL's suggest that this absence is (a) sinister and (b) enables them to plug in some way the evidential gap which, as I find, precludes them from fixing Miss Chen with responsibility for the repayment of the Zenato loan. I do not accept that line of argument. It appears to be to be founded upon a suspicion that, whereas Mr Chen [Eddie Chen] was well aware that there

> was a mass of available email traffic (to some of which I have referred above) involving Miss Chen (but none of which involves her in the repayment of the Zenato loan) he had the forethought to anticipate that a claim might be made against him and/or Miss Chen over the Zenato repayment and so deleted emails surrounding that event and then, for the sake of consistency, I suppose, deleted all other emails on his laptop, whether or not they existed in other devices."

[66] I am not of the view that Bannister J was plainly wrong in accepting Mr. Chen's evidence and coming to his finding.

[67] The appellants contend that Eddie Chen's evidence about Ms. Chen's lack of involvement in the Zenato payments should be rejected. Bannister J's finding on the issue was clear. At paragraph 28 he found that: "Mr. Chen [Eddie Chen] gave credible reasons for paying the loan when he did. He said that agents of Mr. Song were threatening staff and besieging PFF's offices in search of repayment." Bannister J accepted Eddie Chen's denial that Ms. Chen instructed him to repay the loan. On a central issue Bannister J found Eddie Chen to be credible. It was a finding he was entitled to make. The words of Viscount Simon in Thomas v Thomas[25] are relevant:

> "If there is no evidence to support a particular conclusion (and this is really a question of law), the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight."

I see no reason to upset Bannister J's finding.

The Note

[68] Eddie Chen was interviewed in Beijing on 28th January 2010, within three months after the Zenato payments. The meeting was attended by one of the liquidators; by Andrew Charles (a director of Grant Thornton UK LLP) and Ms. Alex Welch

[25] 1947 SC (HL) 45, 61; [1947] AC 484, p. 486.

("Ms. Welch"), his colleague. Ms. Welsh prepared a note of the meeting soon after under Mr. Charters' supervision. The appellant submits that the Note, on its face records Eddie Chen as saying that the repayment of the Zenato loan was arranged by PISG, (a company for which Ms. Chen was the sole director and ultimate beneficial owner at the time) and that the payment of the loan was to protect Ms. Chen's personal reputation. The appellants challenge Bannister J's finding that the Note had no probative value and "all the court had" was the Note. The appellants argue that far from having no probative value, the Note is in fact very supportive of their case.

[69] The relevant part of the note records that Eddie Chen advised that the loan from Zenato was fully repaid by a few payments between September and December 2009. The Zenato payment was queried by the joint provisional liquidators and Eddie Chen advised that he does not know any further details and that anything in relation to this payment and this funding was arranged by [the parent company]. Eddie Chen advised that Ms. Chen tried to pay back as much of the loans made to the company as possible, because she is reliant on her reputation. In their written statements, Mr. Byers and Mr. Charters confirmed the accuracy of the note of the discussion at the meeting in Beijing; and in cross-examination Mr. Byers confirmed the accuracy of the note.

[70] Banister J dismissed the appellants' reliance on the note, at paragraph 23 of his judgment and stated:

> "All that the court has is a summary note of the meeting. It is demonstrably inaccurate in at least one respect; does not set out any of the questions to which Mr. Chen's statements are supposed to be responsive and, despite Mr. Chen's being assured that he would be permitted to review and comment on its contents, he has never, during the more than five years which have elapsed between the interview and this trial, been afforded an opportunity to do so. As evidence of the circumstances surrounding, or the motivation for, the repayment of the Zenato loan, it is thus of no assistance; and attempts by the JLs liquidators to extract meaning which suited their case from ambiguous or non-committal responses by Mr. Chen demonstrated only the folly of treating this material as having any probative value."

[71] The appellants contend that Bannister J made serious errors at paragraph 23, the most egregious of which was his finding that "all the Court had" was the note. They argue that the court also had the testimony of one of the liquidators and Mr. Charters that the note was an accurate summary of what Eddie Chen said at the meeting, on which point neither witness was challenged in cross-examination. The appellants submit that Bannister J entirely overlooked the evidence before him on the key point of what Eddie Chen told the joint liquidators and their assistant soon after the payments were made and that his conclusions are inconsistent with that evidence and are therefore plainly wrong.

[72] The appellants also posit that the inaccuracy referred to, is in respect to the currency depicted in another part of the note, has no bearing to the material part, and ought not to have influenced the judge's decision. The appellants argue that the note was what it purported to be, a summary of the discussion and not a transcript. The fact that Mr. Chen did not have an opportunity to approve the Note does not mean that it was materially inaccurate, nor does it cast doubt on its probative value. The appellants contend that there is no ambiguity in Mr. Chen's responses; the liquidators' witnesses gave unchallenged evidence that the Note was accurate and submit that the Note had strong probative value.

Approach to contemporary documents

[73] Undoubtedly, it is important to assess the veracity and reliability of witnesses by reference to the objective facts proved independently of their testimony, in particular by reference to contemporary documentary evidence. The contemporaneity of a document does not, however, disengage issues of reliability and weight. The trial judge has the responsibility of deciding whether the document is a reliable record and what weight to attach to it. The nature of the document being considered has to be taken into account. There could be a wide spectrum of contemporaneous documents ranging from a formal contract document drawn up with the benefit of legal advice, to which pre-eminence would be given, to a document like the Note under consideration. The circumstance

under which the document was made also has to be taken into account. The document has to be judged alongside the other evidence in the case. The witness' motive and overall probabilities are also relevant.

[74] Bannister J followed the correct approach in assessing the note. Bannister J had to decide on the reliability and weight of the note and the circumstances under which it was made. He fully reasoned why he came to the conclusion that the Note was of no assistance and lacked probative value. In short, Bannister J did not find the Note helpful because in part, it did not contain the questions asked by the joint liquidators which supposedly elicited Eddie Chen's purported comments and it had never been shown to him despite his repeated requests to review a draft of the Note. Bannister J would have paid due regard to all the evidence inclusive of the Note and the overall probabilities. Was Bannister J wrong in his conclusion? Although the appellants sought to criticise some aspects of his reasoning, the conclusion Bannister J arrived at was one which was open to him. It cannot be said that the conclusion was plainly wrong or was one which no reasonable judge could have reached.

[75] The appellants' reliance on the evidence of Messrs. Charters and Byer, as providing independent evidence in support of the note seems to me to be misplaced. While a witness's reliability can be tested by reference to objective facts proved independently of their testimony, I agree with Ms. Chen that the evidence of Messrs. Charters and Byer "merely goes back to and stems from the Note itself" as opposed to other evidence. In that regard, their evidence can hardly be viewed as independent evidence. In the circumstances, Bannister J cannot be faulted for saying that "all the court had was the Note".

Ground 5 - Causing or procuring the Zenato repayment

[76] Ground 5 deals with the question whether Ms. Chen arranged payment of the Zenato loan or caused and or procured the repayment. Bannister J stated that he did not find Ms. Chen's evidence that she had no knowledge about the repayment

of the Zenato loan easy to accept. He found that the figures were insignificant by comparison with the problems generally of PFF. He opined that: "I think that the probability is that Ms. Chen knew of and did not object to the repayment." "That of course is not the same thing as causing or procuring the repayment, which is the charge levelled against Miss Chen".

[77] The appellants complain that Bannister J erred in holding that Ms. Chen did not arrange the repayment of the Zenato loan when the evidence as a whole conclusively demonstrated that she had. The appellants contend that Ms. Chen's case challenged credulity. Much more credible was the appellants' case that Ms. Chen was behind the repayment. The appellants argue that Bannister J ought to have found that Ms. Chen did much more than not "object" to the repayments, but ought to have found that she arranged them. She wanted to save face in China where she lived and work. The appellants contend that their primary case is that Ms. Chen caused or procured the payment to Zenato. She sees that it is going to be made and does nothing to stop it; so she causes or procures it.

[78] The appellants submit that Bannister J ought to have found that Ms. Chen had arranged the repayment of the Zenato loan for several reasons. The reasons advanced are that Bannister J should have accepted the liquidators' note of the meeting with Eddie Chen as accurate; Ms. Chen was a director of PFF at the time of the Zenato repayments and she knew about the repayments; Eddie Chen's evidence was that he sought approval for payments from PFF's director including the payments to Zenato; Bannister J ought to have found that the absence of documents relating to the Zenato payment supported the case that Ms. Chen was involved in arranging the payments; and Bannister J was wrong to find that it was not pleaded; that Ms. Chen derived any benefit from the repayments to Zenato or that she had any motive for making the payments.

[79] I note that the appellants pled a benefit – a reputational benefit for the repayments of the Zenato loans. This reputational benefit does not really advance their case

for the reason that, as Ms. Chen asserts, there were other substantial unsecured loans (amounting to over USD 180 million) that remained outstanding as at the date of liquidation, compared to the payment of US $13 million to Zenato. In the circumstances, the repayment to Zenato cannot be said to have contributed to the preservation of Ms. Chen's reputation. Bannister J addressed this issue when he said that "the figures were insignificant by comparison with the problems generally of PFF."[26]

[80] The other reasons advanced by the appellants assume the correctness of matters which were properly rejected by Bannister J and accordingly, do not advance this ground of appeal. For instance, Banister J found that Ms. Chen was not a director of PFF at the time of the Zenato payments; the director Eddie Chen sought payment approval from was not Ms. Chen; the absence of documents from the laptop computer was not sinister and Bannister J's rejection of the note.

[81] Ms. Chen contends that the only minimal piece of evidence the appellants rely on to link her with the Zenato repayments amounts to a few purported words attributed to Eddie Chen in the note ("EC advised that Diana Chen tried to pay back as much of the loans made to the company as possible, because she is reliant on her reputation") which was authored by the joint liquidators, unchecked by anyone for accuracy, and which Eddie Chen is now refuting. Ms. Chen submits that even if the note has probative value (and Bannister J rightly found that it did not), the sentence relied on falls far short of any sufficient evidence to establish she specifically caused and or procured the repayments to Zenato. I agree. It cannot be shown that Bannister J was plainly wrong in stating that there is an obvious lack of evidence indicating that Ms. Chen caused or procured the repayments to Zenato. The affidavit evidence of Mr. Perrot to the effect that he believed Ms. Chen was in charge of PFF and the evidence of Messrs. Byers and Charters in relation to their meetings with Eddie Chen, do not detract from the correctness of Bannister J's conclusion.

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[26] Mark Byers and others v Chen Ningning, per Bannister J, para. 28.

[82] The pleaded alleged breach was that Ms. Chen caused or procured the repayments to Zenato. Bannister J found that Eddie Chen gave credible reasons for repaying the Zenato loan when he did. He denied that Ms. Chen instructed him to repay the loan. Bannister J accepted that denial. Bannister J disposed of the pleaded breach in paragraph 28 and 29 of his judgment:

> "I think that the possibility is that Miss Chen knew of and did not object to the repayment. That, of course, is not the same as causing or procuring the repayment [to Zenato] which is the charge levelled against Ms. Chen. There is no evidence at all that she did that."

This finding of Bannister J was plainly open to him on the evidence; accordingly, this court will not interfere with it.

Knowing and not objecting and causing or procuring

[83] The appellants challenge Bannister J's finding that knowing and not objecting to a preferential payment is not the same as causing or procuring a payment. This challenge stems from paragraphs 28 and 29 of his judgment. Bannister J stated:

> "Miss Chen said she had no idea about the repayment of the Zenato loan until the commencement of the present proceedings. I do not find that easy to accept … I think the probability is that Miss Chen knew of and did not object to the repayment. That, of course is not the same as causing or procuring the payment, which is the charge levelled against Miss Chen... There is no evidence that she did."

It seems to me that Bannister J was making reference to a pleading point, in essence stating that the pleaded case was not supported by the evidence.

[84] On 3rd October 2009 a Deed of Assignment was entered into between PFF and Zenato. The appellants state that the loan was repaid in full very soon after the Deed of Assignment and that the Deed was given for the purpose of pacification. The appellants complain that Bannister J did not refer to that Deed in his judgment. As Ms. Chen rightly points out, there is no evidence that Eddie Chen and Ms. Chen decided to pay the Zenato debt after the assignment. In my view, there is not much to this complaint.

Ground 6

[85] Bannister J found that discussions about liquidation were not part of the day-to-day operations of PFF, and there were no emails or anything else after the end of July 2009 that indicate any involvement of Ms. Chen with PFF, except those that relate to the discussions about the liquidation of PFF. Ground 6 seeks to challenge that finding. It avers that Bannister J should not have found that there were no documents showing the involvement of Ms. Chen in the affairs of PFF after July 2009 and in any event should not have held that any absence of such documents was a reason for finding that she was not so involved. The appellants' position is that there were numerous documents showing Ms. Chen's involvement; further, Bannister J wrongly attributed her involvement, as disclosed by those documents, not to "the day to day conduct of PFF's business" but to her role as PFF'S beneficial owner on the footing that they related to the liquidation of PFF. The appellants posit that PFF was no longer trading and was hopelessly insolvent. The most important or significant decision that had to be taken was how and when PFF should be placed into a formal insolvency process. That was properly the decision of its director, not its shareholder.

[86] In my judgment, it was open to Bannister J to find that discussions about winding up a company do not constitute the day-to-day operation of that company. I also note that there were other important decisions made after the end of July 2009 involving settlement with counter parties that did not involve Ms. Chen. In these circumstances, Bannister J was entitled to hold that there were no documents showing Ms. Chen's involvement in PFF's affairs after the end of July 2009.

[87] The appellants state that Bannister J's approach in viewing the gaps in PFF's books and records after July 2009 as justifying a finding that Ms. Chen was no longer involved in its management is inconsistent with the authority of Wetton (as liquidator of Mumtaz Properties) which was cited to Bannister J. The appellants also take issue with Bannister J's statement that the court was shown no authority

permitting it to treat an absence of evidence as probative of anything other than the very absence itself.

[88] Bannister J pointed to the "distinct and complete gap" of documentary evidence indicating Ms. Chen's involvement in PFF's affairs from the beginning of August 2009 to mid-November 2009 but declined to draw adverse inferences against Ms. Chen from this lack of evidence. The appellant submits that Bannister J ought to have drawn the conclusion that Ms. Chen's continuing involvement in the affairs of PFF as its director in the period down to August 2009 carried on thereafter, notwithstanding the absence of documentary corroboration.

[89] The appellants further argue that even viewed on its own, and absent any relevant authority, on the facts of this case, Bannister J's approach was misconceived. The appellants contend that at most, any absence of documents was a neutral factor, not supportive of an inference one way or another as to Ms. Chen's continued involvement. The appellants submit that in circumstances where Ms. Chen was plainly involved in the management of PFF's affairs at all material times, highly material documents were missing and the laptop and hard drive had been deliberately sanitized, the only proper inference was that there were missing documents which supported the appellants' case and Bannister J ought to have so held. It appears to me that aspects of the appellants' submissions presuppose the correctness of assertions which were properly rejected by Bannister J, namely that Ms. Chen was plainly involved in the management of PFF's affairs at all material times, and the laptop and hard drive had been deliberately sanitized.

[90] The appellants contend that case of Wetton (as liquidator of Mumtaz Properties) supports their proposition that as PFF's books, records and contemporaneous documents in relation to the repayments of the Zenato loan are conspicuous by their absence, and as Ms. Chen is a former director of PFF, it was open to the court to draw the inference that the documents, had they been produced, would have borne out the appellants' case. It is certainly not open to

Ms. Chen to assert that if the missing documents existed they would support her case.

[91] Ms. Chen seeks to distinguish Mumtaz and contends that it is inapplicable to the facts and circumstances. In that regard, Ms. Chen says that: (i) in Mumtaz, the appellants had been found to hold directorship of the company and such directorship was not in dispute in the appeal; and (ii) the missing documents in Mumtaz were identified and confirmed to be in the possession of the parties. Negative inferences were therefore drawn against the parties who were deemed to have been in possession of the missing documents and failed to deliver them up. Ms. Chen contends that in Mumtaz, the parties were not allowed to rely on the absence of documentation to assert that, had it been available, it would have exonerated them. Ms. Chen states that the present case is the opposite in that the absence of documents evidencing her involvement in PFF's affairs and the repayment to Zenato per se supports her case that she was not a director at the material time and did not cause or procure the said repayments. Ms. Chen submits that notably, there is no authority which holds that adverse inferences should be drawn against a party because of an absence of documents which cannot be identified or confirmed to have existed in the first place.

[92] Ms. Chen contends that the main thrust of the appellants' complaint about lack of documentary evidence seems to be directed at Eddie Chen, in particular, the alleged insufficient documents in his laptop. Ms. Chen argues that even if Eddie Chen failed to deliver up all documents to the appellants at the time when PFF was put into liquidation as alleged, the Mumtaz approach does not allow any adverse inference to be drawn against her, given that (i) Eddie Chen was not a party to the proceedings; and (ii) there is no plea or suggestion that she (Ms. Chen) had a duty to keep /preserve PFF's records after she resigned.

Discussion

[93] The relevant law as to the drawing of adverse inferences is stated in Wetton (as liquidator of Mumtaz Properties) v Ahmed and others. Arden LJ stated:

> "In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence."[27]

[94] The question is, was Bannister J wrong in not drawing the inference that had the documents been produced, they would have borne out the appellants' case? For the appellants to succeed in their challenge, they would have to show that Bannister J was plainly wrong in not drawing that inference. Where a challenge is to an inference not drawn or drawn by the judge from other facts, an appellant has to show that the failure to draw the inference or as the case may be, the making of the inference, was plainly wrong. The appellant will in general have to show that the inference, which it is contended should have been drawn, was one that should inevitably have been drawn, so as to entitle the appellate court to interfere.[28]

[95] Bannister J noted the appellants' reliance on the absence of any emails on the hard drive of Mr. Chen's computer after PFF had gone into liquidation and accepted Mr. Chen's explanation for that absence. As has been mentioned, Bannister J rejected the suggestion that the absence of the emails was sinister. I agree with Ms. Chen that the approach in Mumtaz does not allow for an adverse inference to be drawn against her, given that Eddie Chen was not a party to the proceedings and it was not pleaded or suggested that she (Ms. Chen) had a duty to preserve or keep PFF's record after she resigned. I am not of the view that Bannister J was plainly wrong in not drawing an adverse inference against Ms.

[27] [2011] ALL ER (D) 237, para 14.
[28] Sohal v Suri [2012] EWCA Civ. 1064, paras. 30-31, per Arden LJ.

Chen. It was clearly open to Bannister J on the facts and on the law not to draw such an inference.

Ground 7- Insolvency Act claim

[96] Ground 7 challenges Bannister J's finding that the Insolvency Act claim could not succeed if the claim for breach of fiduciary duty failed. Bannister J held that if Ms. Chen was not liable for breach of fiduciary duty, it followed that she was not liable under sections 244 and 245 of the Insolvency Act to repay the Zenato payments. The appellants complain that Bannister J gave no reasons for this conclusion (which they label as erroneous) and he dismissed the unfair preference claim without any consideration of the facts and analysis of the law. The appellants submit that whether or not Ms. Chen was in breach of fiduciary duty in relation to the Zenato payment, the payment constituted unfair preferences within the meaning of the Insolvency Act and on that basis too, Ms. Chen is liable to repay the $US13 million to PFF.

[97] In advancing their argument, the appellants posit that a finding of breach of fiduciary duty is not a necessary element of the preference claim, nor is it necessary to establish any of the elements of a breach of fiduciary duty in order to succeed on the preference claim. In particular, the preference claim did not require proof that Ms. Chen was a director of PFF, or otherwise owed fiduciary duties to PFF at the time the Zenato payments were made.

[98] Ms. Chen accepts that Bannister J refrained from making findings in relation to whether the Zenato repayment constituted unfair preference under the Insolvency Act but argues that he made findings of primary fact which support the conclusion that the repayment to Zenato do not constitute unfair preference transactions. Ms. Chen relies on the finding in paragraph 10 of the judgment that Eddie Chen did, on behalf of PFF, promise Zenato that the loan would be repaid in two to three months' time, before Zenato made the loan in May 2009. Ms. Chen submits that this finding leads to the natural conclusion that the term of the written loan

agreement was varied before Zenato actually made the loan and repaying the loan in November 2009 was merely honouring contractual obligations in the ordinary course of business. Ms. Chen submits that unless Bannister J's finding of primary fact is overturned, the argument as to whether Bannister J should have considered the insolvency claim remains entirely academic. Ms. Chen avers that there is no basis for concluding that Bannister J was in any way wrong in accepting Eddie Chen's evidence that he promised Zenato to repay the loan in two to three months.

Discussion

[99] Bannister J reasoned that an appeal to sections 244/ or 245 of the Insolvency Act cannot add anything to any liability Ms. Chen may have for breach of fiduciary duty. Conversely, if Ms. Chen is not liable for breach of fiduciary duty, then sections 244 and 255 are not capable of generating such an obligation on their own.

[100] Section 245 (1) of the Insolvency Act provides that a transaction entered into by a company is an unfair preference given by the company to the creditor if the transaction:

(a) is an insolvency transaction (that is, if It is entered into at a time when the company is insolvent);

(b) is entered into within the "vulnerability period" (being the period commencing six months prior to the application for the appointment of a liquidator and ending on the appointment of the liquidator);

(c) has the effect of putting the creditor into a position which, in the event of the company going into insolvent liquidation, will be better than the position that creditor would have been in if the transaction had not been entered into.

[101] The three criteria established by section 245(1) of the Insolvency Act for determining whether a transaction is an unfair preference have been satisfied: The repayments of the Zenato loan were made at a time that PFF was insolvent. The payments were made within the vulnerability period - six months of the appointment of liquidators to PFF. The payments had the effect of putting Zenato into a better position in PFF's liquidation than it would have been in had the payments not been made to it: Zenato had been repaid in full, where it would otherwise have received only a small dividend had it have to prove in the liquidation.

[102] What now falls for determination is whether the Zenato repayment is caught by section 245 (2) of the Insolvency Act, which provides that a transaction is not an unfair preference if it took place in the ordinary course of business. The appellants argue that the payment to Zenato was not in the ordinary course of business because there was no contractual entitlement on the part of Zenato to be repaid in November 2009. The payment was made at a time when there was no real prospect of PFF avoiding insolvent liquidation; and the payment was not in the interests of the general body of creditors.

Ordinary course of business

[103] Was the Zenato payment made in the ordinary course of business? One would be hard pressed to say that it was. The appellants submit and I agree that the ordinary course of business defence is intended to enable a company to continue to make payments to ordinary trade creditors so that they continue to supply goods and services to the company thereby enabling the company to continue to trade as a going concern. However, once an insolvency process is inevitable, payments to ordinary creditors can no longer be justified on the basis of continuity of trade. There justification would only lie if their result is an overall positive benefit to creditors as a whole. From the foregoing, it is clear that Zenato payments were not in the ordinary course of business.

[104] Ms. Chen states that Bannister J found that PFF was contractually obliged to pay the Zenato loan in November 2009; hence it was repaid in the ordinary course of business and cannot therefore be an unlawful preference. The appellants dispute that Bannister J found that PFF was contractually obliged to repay the Zenato loan before its original due date and that there was a variation to that effect. I have looked at paragraph 10 of the judgment. Bannister J found that the Zenato payments were made earlier than as required by the terms of the written loan agreement. Bannister J accepted Eddie Chen's evidence that he had orally assured Mr. Song, when the advances were actually made in May 2009, that PFF would repay them within two to three months. I accept the appellants' submission that even if the Zenato loan was due for repayment in November 2009, it does not follow that it was a payment in the ordinary course of business. To suggest otherwise, is to render the rules on unlawful preferences wholly otiose as, on Ms. Chen's logic, no payment to a creditor in accordance with obligations under a commercial contract could ever be susceptible to challenge as a preference.

[105] In my judgment, the repayment of a loan during a contractually obligated time does not necessarily engage the conclusion that the repayment was in the ordinary course of business so as to save the transaction from the unfair preference provision of section 245 of the Insolvency Act. Any proposition to the contrary would be unpalatable as a matter of law as it would probably render immune from challenge as an unfair preference, any payment to a creditor in accordance with obligations under a commercial contract. In my judgment, the payment to Zenato constituted an unfair preference within the meaning of the Insolvency Act. Following from that conclusion would be the permissibility of making orders against Ms. Chen under the Insolvency Act.

Permissibility of orders against Ms. Chen

[106] Subject to section 250, section 249 of the Insolvency Act deals with orders the court may make in respect of an unfair preference. In respect of an unfair preference, section 249(1) confers discretion upon the court to make such orders

as it considers fit for restoring the position to what it would have been if the company had not entered into that transaction. Section 249(3) provides that subject to section 250, in respect of an unfair preference, an order under sub section (1) may affect the assets of, or impose any obligation on, any person whether or not he is the person with whom the company in question entered into the transaction.

[107] Ms. Chen argues that even if the Zenato payment was an unlawful preference, it is not possible, as a matter of law, for the appellants to seek orders under sections 249 (1), (2) and (3) against her in relation to the payment. Ms. Chen accepts that section 249 (3) of the Insolvency Act envisages the making of orders against third parties but seeks to circumscribe its plenitude by limiting its application to third parties who have received a benefit from the preference claim. Ms. Chen argues that remedies under the Insolvency Act provisions (sections 244 and 245) are founded on the concept of restitution; and for her to be liable to make restitution, she must be unjustly preferred (most likely in a monetary sense) in the first place, so that she can restore the benefit she received. Ms. Chen submits that in circumstances where it is neither pleaded nor proved that she received any benefit as a result of the repayment to Zenato, (so that she can restore that benefit), it is impermissible as a matter of law for the appellants to seek orders against her.

[108] Ms. Chen submits that an order under section 249(3) is only appropriate if it is required as part of the process of restoring the position to what it otherwise would have been: Oxford Pharmaceuticals Ltd, Re; Wilson v Masters International Ltd.[29] Ms. Chen further submits that where, as here, the relevant money has not been paid by its recipient to the third party (there being no allegation that the money is now with Ms. Chen), it is inappropriate to make an order against her for the purpose of restoring the position of PFF.

[29] [2009] EWHC 1753 (Ch).

[109] The appellants contend that there is no justification for cutting down the purview of the provision in the manner suggested. The matter is one of discretion and the perceived innocence of the director in the Oxford Pharmaceutical case was plainly an important discretionary factor in the court's decision. By contrast, it is accepted that Ms. Chen knew about the Zenato payments bud did not object to them. The appellants posit that if Oxford Pharmaceutical went so far as to hold that the absence of benefit effectively precludes an order against a non-recipient, it went too far and should not be followed. Further, it was expressly pleaded that Ms. Chen received a benefit from the payment to Zenato. The appellants' position is that the Zenato payment was made to preserve Ms. Chen's reputation in China.

[110] There is no doubt that section 249(3) of the Insolvency Act specifically envisages the making of orders against third parties. In that regard, I do not accept the proposition that it is not permissible in law for the appellants to seek orders against Ms. Chen under the preference provisions of the Insolvency Act. Once the court is satisfied - as it is, that it is an unfair preference, it has a broad discretion pursuant to section 249(1) of the Insolvency Act. to "make such order as it considers fit for restoring the position to what it would have been if the company had not entered into that transaction". In Re Oxford Pharmaceuticals, a deputy judge of the High Court (Mark Cawson, QC) considered the kindred provision in the United Kingdom and gave some guidance with respect to matters to be considered in the exercise of discretion. He stated:

> "It is correct that section 241 (2) does specifically envisage the making of orders against third parties (i.e. parties that were not in fact preferred themselves). However, as I see it, the court could only properly exercise its discretion against such a third party if the order was required as part of the process of restoring the position of the company to what it would otherwise have been, and the third party was in possession of assets applied in making the preference, or, at least, had otherwise personally benefited in monetary terms from the payment in some direct and tangible way,…"[30]

[30] ibid, para. 84.

[111] I agree with Re Oxford Pharmaceuticals, that the court could only exercise its discretion against a third party if the order was required as part of the process of restoring the position of the company to what it would otherwise have been. This is reflective of section 249(1). The starting point for the court's consideration is whether an order against Ms. Chen is required for restoring PFF's position to what it would have been in if it had not entered into the transaction with Zenato. I would say no. I note Bannister J's finding that at the time PFF repaid the Zenato loan of USD $13 million, insolvent liquidation was inevitable. The fact is that PFF was insolvent. In passing, I also note that at around September 2008, PFF received funding of USD $187 million. That sum remained unpaid or largely unpaid when PFF went into liquidation.

[112] While the absence of a benefit does not necessarily preclude an order pursuant to section 249(3), it is a factor which the court can take into account in the exercise of its discretion, whether or not to make an order against a third party. Ms. Chen was not the recipient of the money. She did not receive any benefit from the Zenato repayment. In so far as a reputational benefit is concerned, the Zenato repayment was miniscule compared to the USD $187 million PFF owed. No weight can be attached to that alleged benefit. The finding that Ms. Chen probably knew about the Zenato payment but did not object to it is just one of the factors that fall to be considered in the exercise of the court's discretion, but that by itself, considering all the circumstances would not carry much weight. I would, in the exercise of the Court's discretion, refuse to make an order against Ms. Chen pursuant to section 249(3) of the Insolvency Act.

Ground 8 – Predetermination

[113] In Ground 8, the appellants complain that Bannister J had "a strong predisposition to find in favour of Ms. Chen and this rendered the trial unfair". The appellants' essentially contend that Bannister J was hostile to them and predetermined the matter.

[114] Pre-determination on the part of a judge renders the decision unlawful. Pre-determination is the surrender by a decision maker of his judgment by having a closed mind and failing to apply his mind to the task before him as stated by Beatson J in R on the application of Persimmon Homes Ltd v Vale Glamorgan Council.[31] Pre-determination arises when a judge reaches a final conclusion before being possessed of all the relevant evidence and arguments.[32]

[115] In my judgment, the appellants' complaint is not made out. Bannister J made remarks at the beginning and in the course of the hearing which indicated his views on the difficulties the appellant may face upon one or more of the points in issue. There is nothing wrong with that, provided that he does not show a closed mind. Bannister J did not show a closed mind neither did he fail to apply his mind to the task before him. It cannot be said that the fair minded and informed observer, having considered the facts would conclude that there was a real possibility that Bannister J had predetermined the case against the appellants. This ground accordingly fails.

Disposition

[116] For the reasons indicated, I would dismiss the appeal.

[117] The delay in delivering this judgment is regretted.

I concur.
Mario F. Michel
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar

[31] [2010] EWHC 535 (Admin).
[32] Lanes Group plc v Galliford Try Infrastructure Ltd [2011] EWCA Civ 1617, para. 45.