EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2017/0010

BETWEEN:

ANTOW HOLDINGS LIMITED

Appellant

and

[1] BEST NATION INVESTMENTS LIMITED
[2] EAST CROWN GROUP LIMITED

Respondents

[1] QIUJIAJUN
[2] ZHU YAQING
[3] LIN HUI
[4] GONG YUDA

First–Fourth Defendants

Before:

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]

Appearances:

Mr. Peter McMaster, QC with him Ms. Laure-Astrid Wigglesworth for the Appellant
Mr. David Fisher for the Respondent

2018: May 16;
September 21.

Civil appeal – Fiduciary duties – Directors' duties – Sections 120, 121 and 124 BVI Business Companies Act, 2004 Laws of the Virgin Islands – Directors' duty to act in best interest of company; for a proper purpose and duty to disclose personal interest – Abuse of power

The appellant, Antow Holdings Limited ("Antow") was incorporated on 29th June 2010 and was at all material times owned and controlled by Mr. QIU Jiajun ("Mr. QIU") who held 100% of the shares on trust for himself and his associates (together the "QIU Parties"). The respondents, Best Nation Investments Limited ("Best Nation") and East Crown Group Limited ("East Crown") are two holding vehicles for a group of companies which include

Zhejiang Guobang Pharmaceutical Co. Ltd. ("ZG"), an operating company in the People's Republic of China ("PRC") and formerly, a wholly owned subsidiary of Best Nation.

The family of the late Mr. JIN Biao ("Mr. JIN B") held 55.34% of the registered shares in East Crown, and the QIU Parties held 44.66%. East Crown held 60% of the shares in Best Nation and Antow held 40%. The shares in ZG were held as to 60% by Best Nation and 40% by Xinchang Guobang ("XG"), a company in the PRC. The directors of East Crown were Mr. JIN X and Mr. QIU. Due to the death of Mr. JIN B in 2009, and the appointment of the second defendant, Mr. Zhu Yaqing, and the fourth defendant, Mr. Gong Yuda, as directors of Best Nation, the Board of Directors of Best Nation comprised only QIU Parties.

In 2011, a shareholding transfer agreement with Antow, whereby Best Nation would transfer 24% of its shareholding in ZG to Antow, at a consideration of RMB33,312,000.00 as effected. The effect of these transactions reduced Best Nation's shareholding in ZG to 36% and its cash reserves by HK$14,688,386.75, gave the QUI Parties 64% of the shares in ZG (24% - Antow and 40% - XG), allowed Antow to gain cash of HK$14,688,385.75 and resulted in Best Nation becoming a wholly owned subsidiary of East Crown. At the same time, the issued share capital of Best Nation was reduced from US$50,000.00 to US$30,000.00.

On 15th March 2012, Best Nation, acting through Mr. Yuda, Antow and a group of eight individuals, headed by Mr. QUI, entered into a "Shareholder Restructuring Agreement". In this agreement, Best Nation purportedly agreed to transfer 13,398 shares out of its remaining 30,000 issued shares and what was referred to as its corresponding 16.078% shareholding in ZG to Antow, together with a cash sum of HK$907,749.62. Further transactions were agreed, and the end result was that Best Nation's shareholding in ZG was reduced from 36% to 19.922% and Antow became a 40.078% (24% + 16%) shareholder in ZG.

The judge ordered that the transactions be set aside. The learned judge held that the QIU Parties, as directors of Best Nation, were in breach of section 120 of the BVI Business Companies Act, 2004 ("the Act"), as they failed to act honestly and in good faith and in the best interests of Best Nation. It was found that the directors failed the proper purpose test.

Antow appealed and, in essence, complains that the learned trial judge erred in finding that the directors of Best Nation were in breach in sections 120(1) and 121 of the Business Companies Act.

Held: dismissing the appeal and ordering that Antow Holdings Limited pay the costs on the appeal to the respondents to be assessed, if not agreed within 21 days, that:

1. A director of a company, in exercising his powers or performing his duties, shall act honestly and in good faith and in what the director believes to be in the best interests of the company. The subjective test for breach of the duty expressed in section 120(1) of the Business Companies Act 2004 applies only where the director did in fact consider the interests of the company. If a director either totally

or partially failed to consider the interests of the company, he will not be able to rely on his subjective honesty as a defence.

Section 120 Business Companies Act, 2004 Act No. 16 of 2004 Laws of the Virgin Islands applied; Regentcrest plc (in liquidation) v Cohen and another [2001] 2 BCLC 80 applied; Re Smith & Fawcett Ltd [1942] 1 All ER 542 applied; Hutton v West Corp Railway (1883) 23 Ch D 654 applied; Equiticorp Finance Ltd v Bank of New Zealand (1993) 32 NSWLR 50 considered.

2. The proper test, in the absence of actual separate consideration of the interests of the company, is whether an intelligent and honest man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company. The directors had no regard for the interests of the company and as such cannot be allowed to rely on the subjective test. Thus, in this case the "Charterbridge test" is applicable.

   Charterbridge Corporation, Ltd v Lloyds Bank Ltd. and Another [1969] 2 All ER 1185 applied; Colin Gwyer & Associates Ltd and another v London Wharf (Limehouse) Ltd and others [2002] EHWC 2748 (Ch) applied.

3. A director has a duty to disclose his or her interest. Any interest in a transaction entered by the company for which he is a director must be disclosed to the board of the company. If the director discloses his interest, and the transaction is otherwise in the best interest of the company, it will not be set aside simply because of the director's self-interest.

   Section 124 Business Companies Act, 2004 Act No.16 of 2004 Laws of the Virgin Islands applied; Howard Smith Ltd v Ampol Petroleum Ltd [1974] 1 All ER 1126

4. A director must act in accordance with the company's constitution and must exercise his powers for the purpose for which they are conferred. Directors must not exercise their powers for any collateral purpose. The proper purpose is the reason for which that power was conferred on the directors. It is not enough that the directors may have acted in what they believe to be in the best interests of the company, if the purpose for which the power was exercised is improper.

   Section 121 Business Companies Act, 2004 Act No. 16 of 2004 Laws of the Virgin Islands applied; Independent Asset Management Company Limited v Swiss Forfaiting Ltd BVIHCMAP2016/0034 (delivered 24th November 2017, unreported) applied; Hogg v Cramphorn Ltd [1967] Ch 254 applied; Re Smith & Fawcett Ltd [1942] 1 All ER 542 applied; Éclairs Group Limited v JKX Oil and Gas Plc et al [2015] UKSC 71 applied; Hindle v John Cotton Ltd (1919) 56 ScLR 625 considered

5. The second series of transactions was rightly set aside as the first step, which was the transfer of 13,398 shares, held by East Crown in Best Nation, to Antow, was not simply voidable but void ab initio, as. Mr. QIU had no authority to sign the instrument of transfer on behalf of East Crown. All transactions which therefore flowed from that first step were consequentially invalid. The learned trial judge was correct in setting aside the second series of transactions and was entitled to set it aside on this basis alone.

6. Best Nation was, self-evidently, much worse off after the first and second series of transactions than it was before. The directors did not act in the best interests of Best Nation. The learned judge did not err in finding that there was never any consideration whatsoever for Best Nation's best interest. On the evidence before him, it was open to the trial judge to find that the directors of Best Nation were not motivated by what was in the best interests of the company but on the contrary, their own self interests.

   Independent Asset Management Company Limited v Swiss Forfaiting Ltd BVIHCMAP2016/0034 (delivered 24th November 2017, unreported) applied; Hogg v Cramphorn Ltd [1967] Ch 254 applied; Re Smith & Fawcett Ltd [1942] 1 All ER 542 applied.

JUDGMENT

[1]. PEREIRA CJ: This appeal is concerned, in the main with, the validity of two series of transactions which were set aside by the learned trial judge for being in breach of sections 120(1) and 121 of the BVI Business Companies Act, 2004 ("the Act")[1] and having been undertaken without due authority. At the hearing of the appeal, counsel was asked to file written submissions on the impact of this Court's decision in Independent Asset Management Company Limited v Swiss Forfaiting Ltd.[2] Those submissions were filed, and the effect will be addressed later in the judgment.

[2]. The detailed background facts giving rise to the appeal are helpfully set out in the decision of the learned trial judge. It is not intended to set out those details here but rather to provide a summary to the extent necessary for the treatment of the issues raised on appeal.

[1] Act No. 16 of 2004, Laws of the Virgin Islands.
[2] BVIHCMAP2016/0034 (delivered 24th November 2017, unreported).

Background Summary

[3]. The appellant, Antow Holdings Limited ("Antow") was incorporated on 29th June 2010 and was at all material times owned and controlled by Mr. QUI Jiajun ("Mr. QIU"), who held 100% of the shares on trust for himself and his associates (together the "QIU Parties"). The respondents, Best Nation Investments Limited ("Best Nation") and East Crown Group Limited ("East Crown") are two holding vehicles for a group of companies which include Zhejiang Guobang Pharmaceutical Co. Ltd. ("ZG"), an operating company in the People's Republic of China ("PRC") and formerly, a wholly owned subsidiary of Best Nation. They were incorporated in the BVI in 2003, both with an authorized share capital of US$50,000.00 divided into 50,0000 shares with a par value of US$1 each.

[4]. Before the impugned transactions, the family of the late Mr. JIN Biao ("Mr. JIN B" together the "JIN Parties") held 55.34% of the registered shares in East Crown, and the QIU Parties held 44.66%. East Crown held 60% of the shares in Best Nation and Antow held 40%. The shares in ZG were held as to 60% by Best Nation and 40% by Xinchang Guobang ("XG"), a company in the PRC.

[5]. As mentioned, Antow was entirely controlled by the QIU Parties, so too was XG. At that time the Board of Directors of Best Nation comprised only QIU Parties. This was due to the death of Mr. JIN B in 2009 and the appointment, as directors of Best Nation, of the second defendant, Mr. Zhu Yaqing, and the fourth defendant, Mr. Gong Yuda,. The directors of East Crown were Mr. JIN X and Mr. QIU.

The Impugned Transactions - First Transaction

[6]. On 28th April 2011, the directors of Best Nation, all QIU Parties and all having a beneficial interest in Antow, produced a Board resolution. This recorded that as at that date, Best Nation's assets comprised only of its 60% shareholding in ZG and HK$36,720,964.38 and that it did not have any other assets and liabilities. Further, that with the death of Mr. JIN B, who was described as the leader and Executive Director, the initial purpose of the cooperation of the shareholders of Best Nation could

not be achieved. It recorded that pursuant to a request of Antow, it was unanimously agreed that the 40% shareholding in Best Nation held by Antow would be "withdrawn" in exchange for a payment of HK$14,688,385.75, being 40% of Best Nation's cash, and that after these changes, Best Nation would become the wholly owned subsidiary of East Crown. There was also to be a transfer of 24% of Best Nation's shareholding in ZG to Antow. Mr. Yuda was elected as the new Executive Director of Best Nation.

[7]. The resolution was implemented. The first step in doing so was for the Board to pass a written resolution, on 10th May 2011, to redeem Antow's shareholding in Best Nation, at their described "fair" par value of US$1 per share.

[8]. Thereafter, on 17th June 2011, Mr. Yuda entered into a shareholding transfer agreement with Antow whereby Best Nation would transfer 24% of its shareholding in ZG to Antow at a consideration of RMB33,312,000.00.

[9]. The effect of these transactions reduced Best Nation's shareholding in ZG to 36%[3] and its cash reserves by HK$14,688,386.75, gave the QUI Parties 64% of the shares in ZG (24% - Antow and 40% - XG), allowed Antow to gain cash of HK$14,688,385.75 and resulted in Best Nation becoming a wholly owned subsidiary of East Crown. At the same time, the issued share capital of Best Nation was reduced from US$50,000.00 to US$30,000.00.

[10]. The first series of transactions was completed by the end of June 2011.

[11]. While the transactions were being implemented, Madam MA (Mr. JIN B's widow), as well as Mr. JIN X (Mr. JIN B's son) were appointed as administrators of the estate of Mr. JIN B in the BVI. This occurred on 1st April 2011. On 19th July 2011, pursuant to an order of the BVI Commercial Court, Mr. JIN X and Madam MA were registered as the holders of the shares formerly held by JIN B. On 21st July 2011, Madam Ma was appointed an additional director of East Crown.

[3] It was formerly 60%.

[12]. As at the end of July 2011, and following the completion of the first series of transactions and the registration of Mr. JIN X and Madam MA as shareholders of East Crown, the group structure was:

(i) the shareholding in East Crown remained, that is, 55.34% as to the JIN Parties (then, Mr. JIN X and Madam MA, as personal representative of Mr. JIN B, and Ms. WEN Liming[4]) and 44.66% by the QIU Parties;

(ii) the shares in Best Nation were held as to 100% by East Crown;

(iii) the shares in ZG were held as to 36% by Best Nation, 24% by Antow and 40% by XG, which meant that ZG was controlled by the QIU Parties;

(iv) the directors of East Crown were Mr. JIN X, Mr. QIU and Madam MA;

(v) the directors of Best Nation remained QIU Parties.

The Impugned Transactions - Second Transaction

[13]. On 15th March 2012, Best Nation, acting through Mr. Yuda, Antow and a group of eight individuals headed by Mr. QUI ("the Group of Eight") entered into a "Shareholder Restructuring Agreement". The Group of Eight was described in the preamble to the agreement as the legally registered shareholders of East Crown. They did not include Ms. WEN, Madam MA, neither Mr. JIN X but in another part recognised that they held a 55.34% stake, whereas the Group of Eight together held 44.66%. East Crown was not a party to this agreement. Nor were Mr. JIN X, Madam MA and Ms. WEN.

[14]. In this agreement, Best Nation purportedly agreed to transfer 13,398 shares out of its remaining 30,000 issued shares and what was referred to as its corresponding 16.078% shareholding in ZG to Antow, together with a cash sum of HK$907,749.62.

[4] Mr. JIN X's wife

The QIU Parties apparently considered that by virtue of their combined 44.66% shareholding in East Crown they continued to have an interest in 16.078% of the issued shares of ZG (44.66% of the 36% owned by Best Nation).

[15]. The agreement details that by way of consideration payable by Antow to Best Nation for the transfer of the 13,398 shares to Antow, the Group of Eight agreed to "give up" their respective shares in East Crown. The JIN Parties would therefore own all of the issued shares in East Crown, which would own 100% of the shares in Best Nation. This agreement was followed by a resolution, passed by the QUI Party Directors of Best Nation, unanimously approving this second series of transactions.

[16]. Also, on 16th March 2012, the same directors passed a resolution of Best Nation purporting to cancel the share certificate for East Crown's shareholding in Best Nation. This resolution purported to annex a copy of an instrument of transfer dated 16th March 2012, wherein East Crown transferred to Antow those 13,398 shares (amounting to 44.66% of the issued shares in Best Nation) for a consideration of $13,398. This instrument was signed on behalf of East Crown by Mr. QIU. This was a necessary precursor to the transfer to Antow of the 16.078% of the shares in ZG because, Antow, having surrendered all its shares in Best Nation in the first series of transactions, had no further direct interest in Best Nation or indirect interest, through Best Nation, in ZG. The effect of this was to constitute Antow as a 44.66% shareholder in Best Nation, and East Crown as a 55.34% shareholder in Best Nation.

[17]. On 20th March 2012, the QIU Party directors of Best Nation resolved to redeem the 13,398 shares held by Antow at par value of US$13,398 in exchange for the transfer by Best Nation to Antow of 16.078% of the issued share capital of ZG and HK$907,749.62. The end result was that Best Nation's shareholding in ZG was reduced from 36% to 19.922% and Antow became a 40.078% (24% + 16%) shareholder in ZG. As the remaining shares in ZG were held as to 40% by XG, this

gave the QIU Parties an 80.078% stake in ZG. The JIN Parties' shares in East Crown remained unaltered as did the QIU Parties' shares.

[18]. The consequence of these transactions was to remove the power to control ZG, which was the operating company, of the JIN Parties' stake in East Crown and place it in the hands of Mr. QIU or the QIU Parties.

The Judgment of the Lower Court

[19]. In relation to the first series of transactions, the learned judge ordered that it be set aside as:

(i) the QIU Parties, as directors of Best Nation, were in breach of section 120(1) of the Act as they failed to act honestly and in good faith and in what they believed to be in the best interests of Best Nation.

(ii) the QIU Parties were in breach of section 121 of the Act as their motive, which was the personal advantage of gaining control over ZG, failed the proper purpose test.

[20]. In relation to the second series of transactions, the learned judge concluded, in effect, that they were flawed on the same basis which vitiated the first series of transactions. He also found that Mr. QIU had no authority to sign the instrument of transfer dated 16th March 2012 and that Best Nation had no power of disposal over the issued share capital which was held by East Crown. He accordingly held that by the first step in the second transaction being invalid for want of authority, all subsequent steps flowing therefrom were of no effect. The learned judge ordered that both series of transactions be set aside, shares be re-transferred, and the register updated. It is against that backdrop that Antow has appealed.

The Appeal

[21]. Antow in essence complains that the learned trial judge erred in finding that the directors of Best Nation were in breach of sections 120(1) and 121 of the Act.

Law

[22]. A useful starting point is to identify the core fiduciary duty of a director. This is prescribed under section 120 of the Act which states that a director of a company, in exercising his powers or performing his duties, shall act honestly and in good faith and in what the director believes to be in the best interests of the company.

[23]. The salient observation is that a section 120(1) enquiry is largely, though by no means entirely, a subjective one. The courts have adopted a non-interventionist attitude when reviewing business decisions. The authorities uncontroversially establish this. Jonathan Parker J in Regentcrest plc (in liquidation) v Cohen and another[5] elucidated that good faith is ascertained by reference to actual subjective state of mind. He stated:

> "The duty imposed on directors to act bona fide in the interests of the company is a subjective one...The question is not whether viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the **director's state of mind.** No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interests; but that does not detract from the subjective nature of the test."[6] (My emphasis).

[24]. Regentcrest plc further expanded on the words of Lord Greene MR in the case of Re Smith & Fawcett Ltd[7] where he held that directors must exercise their discretion bona fide in what they consider – not what a court may consider – is in the interest of the company, and not for any collateral purpose.

[25]. Nonetheless, a section 120(1) enquiry has an objective overlay as bona fides cannot be the sole test, "otherwise you might have a lunatic conducting the affairs

[5] [2001] 2 BCLC 80.
[6] At para. 120.
[7] [1942] 1 All ER 542.

of the company and paying away its money with both hands in a manner perfectly bona fide yet perfectly irrational".[8] The courts will look for independent, objective evidence to test the director's claim to be acting bona fide.

[26]. Where there has been a failure by a director to consider the separate interests of their company or a challenge by an applicant on the "good faith" of a director, the test then becomes an objective one. In Charterbridge Corporation, Ltd v Lloyds Bank Ltd. and Another,[9] Pennycuick J held that the proper test in the absence of actual separate consideration of the interests of the company, is whether an intelligent and honest man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company. As stated in Colin Gwyer & Associates Ltd and another v London Wharf (Limehouse) Ltd and others,[10] "[t]he effect is therefore to substitute an objective test for the normal subjective one".[11]

Analysis

[27]. Mr. McMaster, QC, on behalf of Antow, argues that the finding by the learned judge that the directors did not have any regard to the best interests of Best Nation is a non sequitur. He submits firstly that Best Nation was a substantial shareholder in ZG and that the evidence showed that the directors desired to bring about positive effects at the level of ZG. He contends that it is an error of fact or law that because the positive effects intended were in different companies, the directors could not have honestly considered them to have been in the best interest of Best Nation. Learned Queen's Counsel contends also that on the facts as found by the judge the directors of Best Nation plainly could have reasonably believed that the transactions were for the benefit of ZG.

[8] Hutton v West Corp Railway (1883) 23 Ch D 654, at p. 671.
[9] [1969] 2 All ER 1185.
[10] [2002] EHWC 2748 (Ch).
[11] At para. 73.

[28]. As I understand the complaint of Mr. McMaster, QC, the directors of Best Nation honestly considered the best interests of the company when they completed the first series of transactions. However, even if the learned judge had found that they did not have Best Nation's best interest at heart, he ought then to have applied the Charterbridge test and come to the conclusion that the directors could have reasonably believed that the transactions were for the benefit of ZG.

[29]. The flaw in Mr. McMaster, QC's submission is that the Charterbridge test states that a person who is a director of a number of different companies owes fiduciary duties to each one of them. Every company in a group is a separate legal entity, and a director of one company is not entitled to sacrifice the interests of that company in favour of another in the group of which he is also a director. In that regard, the words of Pennycuick J are worth restating:

> "As I have already found, the directors of Castleford looked to the benefit of the group as a whole and did not give separate consideration to the benefit of Castleford. Counsel for the plaintiff company contended that in the absence of separate consideration, they must, ipso facto, be treated as not having acted with a view to the benefit of Castleford. That is, I think, an unduly stringent test and would lead to really absurd results, i.e., unless the directors of a company addressed their minds specifically to the interest of the company in connection with each particular transaction, that transaction would be ultra vires and void, notwithstanding that the transaction might be beneficial to the company. Counsel for the bank contended that it is sufficient that the directors of Castleford looked to the benefit of the group as a whole. Equally I reject that contention. Each company in the group is a separate legal entity and the directors of a particular company are not entitled to sacrifice the interest of that company. This becomes apparent when one considers the case where the particular company has separate creditors. The proper test, I think, in the absence of actual separate consideration, must be whether an intelligent and honest man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company." (My emphasis).

[30]. The subjective test for breach of a section 120(1) duty applies only where the director did in fact consider the interests of the company. If therefore, a director

either totally or partially failed to consider the interests of the company, as in this circumstance, he will not be able to rely on his subjective honesty as a defence.

[31]. In such circumstances, the court will examine the relevant decision objectively and assess whether it was within the range of decisions which a hypothetical director, acting bona fide in the apparent best interests of the company could reasonably have made in all the circumstances. This principle can be found in the case of Equiticorp Finance Ltd v Bank of New Zealand.[12] In that case, the majority ruling of the court was that:

> "The directors are bound to exercise their powers, bona fide, in what they consider is in the interests of the company and not for any collateral purpose. Whether they did so or not is a question of fact…Accordingly there seems to us to be difficulties in substituting an objective test (How would an intelligent and honest man have acted?) for the factual question raised in the proceedings…A careful analysis of the factual situation will usually reveal the answer to the factual question posed although no doubt on some occasions the problem may very well be a difficult one. We are mindful of the fact that Pennycuick J was not substituting the objective test for the subjective one which had traditionally been applied. In his view the occasion to apply the objective test only arose when it was clear that the directors had not considered the interests of the relevant company at all. In a sense he proposed a legal test to be applied only in limited cases to avoid what he regarded as an absurd situation."[13] ("My emphasis").

[32]. Flowing from this, the directors of Best Nation were not entitled to have the subjective test applied as, and as found by the trial judge, they did not at all consider the interests, far less the best interests of Best Nation. There is no evidential perspective to their alleged subjective honesty.

[33]. Applying the objective test, the question then is, could a hypothetical director of Best Nation, in the whole of the existing circumstances, have reasonably believed that the transaction was for the benefit of the company?

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[12] (1993) 32 NSWLR 50.
[13] At p. 148.

[34]. Mr. McMaster, QC submits that the learned judge had accepted that the directors of Best Nation had been motivated by a desire to give shareholder control to the management of ZG to re-assure, incentivise and reward the management and staff of ZG, in the face of a perception that Mr. JIN X was a disruptive influence over ZG. In considering the observations made by the trial judge, it is clear that he seemingly, quite deliberately, did not adjudicate on the allegations that Mr. JIN X was a disruptive influence over ZG, an allegation unheralded within the pleadings or the witness statement of Mr. QIU. This submission by Mr. McMaster, QC is therefore not one which I would accept.

[35]. It may well be that one of the reasons that the directors wanted to gain control of ZG is that they believed that the management would be happier if they had control and that they would be able to run ZG better if they did have control, but that is of no relevance at all, unless the directors also honestly believed that their actions would also benefit Best Nation. There was no evidence at all that they so believed or that they gave it any consideration at all.

[36]. Best Nation is a legal entity owning its own property, which was taken away by the action of its directors. The directors helped themselves to the assets of Best Nation. Not only were shares transferred, control was also transferred. Although there was no analysis of this issue as it was never pleaded, I accept that this is an obvious statement of commerce. Further, Mr. QIU did concede that control has value.

[37]. It is difficult to see how the directors could have thought that the changes effected could be a benefit to Best Nation – to have taken away so much of its assets, through the reduction in its cash reserves, reduction of its shareholding (from 60% to 19.922% in ZG), and the loss of control in ZG (the operating company and the company with real substantial value). The result was not just a change in control below but a change in control all the way through as East Crown's control was also

removed. This could not be reasonably considered as being in the best interests of Best Nation.

[38]. I accept the submission of Mr. Fisher, that as a matter of arithmetic, following the reduction of Best Nation's shareholding in ZG from 60% to 19.922%, the distributable profits of ZG would have to be 3 times more what they were before that reduction in Best Nation's shareholding, if the reduction in Best Nation's cash reserves was to be made good. There was no evidence either that the directors of Best Nation, when approving the first and second series of transactions, had any expectation that the distributable profits of ZG would increase significantly, let alone threefold, following the conclusion of those transactions, or that they did in fact increase, either threefold or at all. I agree with Mr. Fisher that Best Nation was self-evidently much worse off after the first and second series of transactions than it was before. Its shareholding in ZG had reduced from 60% to 19.922% and its cash reserves had been depleted by over HK$15 million.

[39]. In those circumstances, I would hold that the answer to the question posed at paragraph 33 is no. I am satisfied that the directors did not act in the best interests of Best Nation. I agree with the learned judge that there was never any consideration whatsoever for Best Nation. It is noteworthy that the findings of fact of the trial judge remain unchallenged.

[40]. The learned trial judge was entitled to conclude, as he did that, there was no consideration of the best interests of Best Nation and that the directors had failed the Charterbridge test. The learned judge was required to look at all of the evidence to see what the nature of the transaction was, to see whose interest was served. He found, and I agree, that the transactions served the interests of Antow.

[41]. Secondly, learned Queen's Counsel argues that a director who is motivated by a desire to further his own interest, does not, for that reason alone, breach his duty to act in what he believes to be the best interests of the company.

[42]. Section 124 of the Act reflects a director's duty to disclose his interest. It states that a director of a company shall, forthwith after becoming aware of the fact that he is interested in a transaction entered into or to be entered into by the company, disclose the interest to the board of the company. If the director discloses his interest, and the transaction is otherwise in the best interest of the company, it will not be set aside simply because of the director's self-interest. However, the overriding consideration continues to be whether the transaction as a whole is in the best interest of the company, whether or not a voting director was interested in the transaction.

[43]. It is well-established that directors cannot use their powers to perpetuate their or their friends' control of their company.[14] Lord Wilberforce in Howard Smith Ltd v Ampol Petroleum Ltd[15] observed: "it is correct to say that where the self-interest of the directors is involved, they will not be permitted to assert that their action was thought to be bona fide , or was, in the interest of the company; pleas to this effect have invariably been rejected". I adopt the words of Lord Wilberforce and apply them to this present situation. The directors of Best Nation were not motivated by what was in the best interests of the company. They were motivated by a completely different purpose. This will be addressed under the proper purpose test below.

[44]. Thirdly, Mr. McMaster, QC contends that the finding by the learned trial judge that the directors of Best Nation did not mention Best Nation at all in their explanation of what they were seeking to achieve is an error of fact and law because (i) it does not follow from the fact that the question was not posed that the directors were not acting in what they honestly believed to be the best interests of Best Nation; (ii) it is not the law that in taking decisions a board must formally pose itself the question on each occasion, what is in the best interests of the company?; and (iii) even if

[14] Per Lord Justice Dillon at page 29 of Lee Panavision Ltd v Lee Lighting Ltd [1992] BCLC 22.
[15] [1974] 1 All ER 1126.

the directors were required to formally pose the question about the company's best interests, then the exercise by them of their powers is not liable to be set aside without more because they failed to pose the question.

[45]. I reiterate that a court will look for objective independent evidence to determine whether there was an honest belief on the part of a director. For a director to rely on his honest belief, there must be some evidence that he has actually considered the matter. A court will not accept in an unquestioning way a director's assertion that he acted bona fide when the facts might appear to suggest otherwise.[16] The law is that where directors fail to have regard to the separate interests of their company but act instead in the interests of what they perceive to be, for example, the interests of the group of companies of which the company is a member, the court will apply the Charterbridge test. This was the position taken by the learned judge.

[46]. The learned judge conducted, as he was entitled to do, a wide scope of inquiry and he found no evidence that there was in fact any consideration of Best Nation's interest. If there was in fact no evidence that consideration was given to Best Nation it is difficult to perceive the basis on which a consideration as to whether or not an honest belief was held, could be undertaken. It was therefore open to him to conclude that the directors of Best Nation were not acting on an honest belief neither could it be reasonably said that they considered Best Nation's interests. They therefore failed the Charterbridge test. I see no error in the judge's conclusion that the directors of Best Nation breached their duty under section 120(1) of the Act.

Proper purpose rule (section 121)

[47]. The fiduciary obligation which constrains a director to act in the interests of the company also finds expression in what is known as the proper purpose test, codified in section 121 of the Act. This section provides that a director shall

[16] Brenda Hannigan, Company Law, 4th edn., Oxford University Press, 2016 at p. 214, para. 10-10.

exercise his powers as a director for a proper purpose and shall not act, or agree to the company acting, in a manner that contravenes this Act or the memorandum or articles of the company.

Law

[48]. A director must act in accordance with the company's constitution and must exercise his powers for the purpose for which they are conferred. As Lord Greene MR stated in Re Smith & Fawcett Ltd,[17] directors must exercise their powers for proper purposes and not for any collateral purpose. This duty is important as it is not sufficient for directors to state that they acted in good faith in the best interest of the company, unless they can also establish that their actions where within the powers conferred on them. This view of the proper purpose rule emerged as a separate rule, taking precedence over the bona fide rule in the case of Hogg v Cramphorn Ltd.[18]

[49]. In Hogg v Cramphorn Ltd, the directors of a target company which was faced with an unwanted bid implemented a scheme which had the primary purpose of ensuring the directors' control of the company. The scheme consisted of the establishment of a trust to acquire shares in the target company and hold them for the benefit of the target company's employees, the issue of preference shares to the trustees carrying special voting rights sufficient to give the directors the support of the majority of shareholder votes, together with a loan to the trust to enable it to subscribe for the preference shares and a further loan to the trustees to enable them to buy existing preference shares from shareholders.

[50]. The directors' scheme was challenged by a shareholder and the court decided that the entire scheme, including the issue of the new shares to the trust, was ultra vires the directors' powers unless ratified in a general meeting. The court accepted that the directors of the target company had no unworthy motives and were acting

[17] [1942] 1 All ER 542.
[18] [1967] Ch 254.

on an honest belief that this scheme was for the good of the company. The court opined that the power to issue shares was a fiduciary power and if exercised for an improper purpose was liable to be set aside. As the scheme was being implemented for an improper purpose it could not be justified on the basis that the directors bona fide believed that the issue was in the interests of the company.

[51]. Before one can say that a fiduciary power has been exercised for the purpose for which it was conferred, a wider investigation may have to be made. Where directors can be shown to have exercised a power conferred by the articles for a purpose other than that for which it was given, their conduct is open to challenge. In the Privy Council case of Howard Smith Ltd v Ampol Petroleum Ltd it was stated that when a dispute arises as to whether directors of a company made a particular decision for one purpose or for another, or whether, there being more than one purpose, one or another purpose was the substantial or primary purpose, the court is entitled to look at the situation objectively in order to estimate how critical or pressing, or substantial, or per contra insubstantial, an alleged requirement may have been. If it finds that a particular requirement, though real, was not urgent, or critical, at the relevant time, it may have reason to doubt, or discount the assertions of individuals, that they acted solely in order to deal with it, particularly when the action they took was unusual or even extreme.[19] Their Lordships quoted an oft cited passage from the case of Hindle v John Cotton Ltd:[20]

> "Where the question is one of abuse of powers, the state of mind of those who acted, and the motive on which they acted, are all important, and you may go into the question of what their intention was, collecting from the surrounding circumstances all the materials which genuinely throw light upon that question of the state of mind of the directors so as to show whether they were honestly acting in discharge of their powers in the interests of the company or were acting from some bye-motive, possibly of personal advantage, or for any other reason."[21]

[19] At p. 832.
[20] (1919) 56 ScLR 625.
[21] At pp. 630-631.

[52]. Their Lordships stated that in the investigative approach to the analysis of the proper purpose rule:

> "it is necessary to start with a consideration of the power whose exercise is in question….Having ascertained, on a fair view, the nature of this power, and having defined as can best be done in the light of modern conditions the, or some, limits within which it may be exercised, it is then necessary for the court, if a particular exercise of it is challenged, to examine the substantial purpose for which it was exercised, and to reach a conclusion whether that purpose was proper or not. [I]n doing so it will necessarily give credit to the bona fide opinion of the directors, if such is found to exist, and will respect their judgment as to matters of management; having done this, the ultimate conclusion has to be as to the side of a fairly broad line on which the case falls."[22]

[53]. Howard Smith produced what is known as the "substantial purpose" test. This test was discussed in the case of Independent Asset Management Company Limited v Swiss Forfaiting Ltd, a case from this Court, wherein which it was accepted that Howard Smith is a good example of how the proper purpose rule works.

[54]. In Independent Asset Management Company Limited, the respondent was a British Virgin Islands company that operated as an open-ended mutual fund which specialised in investments in the field of forfaiting ("the Fund"). The Fund issued two classes of shares. The class A shares carried all the voting rights but did not entitle the holders to participate in the profits of the Fund nor in any distribution of its assets on a winding up. The class B shares carried no voting rights but shared in the profits and in the assets on a winding up.

[55]. The Fund was set up by Mr. Rinaldo Invernizzi and Mr. Salvatore Chiappinelli. Mr. Invernizzi held the majority of the B shares through his company SIX SIS AG. The appellant was a Hong Kong registered company and was, up to July 2014, the sole class A shareholder of the Fund holding 100 A shares. The appellant was also the Fund's investment manager pursuant to an investment management agreement

[22] At p. 835.

dated 8th January 2007. Mr. Chiappinelli owns SFC Swiss Forfaiting Company Ltd ("SFC") and through it, he managed the Fund.

[56]. Due to a break down in the relationship between the Fund and Mr. Chiappinelli, a reorganization plan was devised to deal with the impasse. The plan noted that the Fund desired to issue 500 class A voting shares to CTS Nominees Ltd. On 10th July 2014, the directors of the Fund passed a resolution approving the issue of the 500 class A voting shares to CTS Nominees Ltd which shares were transferred to Sunimar Private Ltd, a Singaporean company, beneficially owned and under the control of Mr. Invernizzi. On that same day, the Fund also commenced legal proceedings against SFC, to recover sums estimated at €8.3 million held by SFC on trust for the Fund ("the July Issuance").

[57]. The appellant filed a claim alleging that the directors did not carry out the July Issuance for a proper purpose and it was therefore in breach of section 121 of the Act. The learned trial judge rejected the claim holding that the substantial purpose for which the directors had issued 500 A shares to CTS Nominees was to take control of the Fund from Mr. Chiappinelli) and to pass it to a company controlled by Mr. Invernizzi. The learned judge did not consider that the substantial purpose was improper.

[58]. On appeal, Webster JA [Ag.] stated that where there is a power struggle between different groups of shareholders, the directors should not issue additional shares in such a way as to affect the balance of power in the company or influence in any way the outcome of shareholders' resolutions, even if this results in additional capital or other benefits for the company. This restriction is not written into the company's articles and it is for this reason that equity imposes on the directors the additional requirement that the shares must be issued for a proper purpose. Webster JA [Ag.] stated further that where there are concurrent mixed purposes, the court should look at all the circumstances in order to determine the primary purpose of the directors. If the primary purpose is improper, then the exercise of

the powers will be flawed, and the issue is liable to be set aside. The appeal was therefore allowed.

[59]. In Independent Asset Management Company Limited, Webster JA [Ag.] confirmed that the Howard Smith case is even more instructive "on how the Court should deal with the situation that obtains in this case, where there is a substantial purpose which is not, as a matter of law, a proper purpose, and a secondary purpose or motive of the directors which is for the benefit of the company as a whole".[23] Thus, Independent Asset Management Company Limited is relevant to the case at bar as Antow, in its amended defence, had submitted a different motivation to the one given in evidence at trial, thereby resulting in a dispute as to the directors' purpose and whether there were actually multiple purposes.

[60]. The scope and contours of the proper purpose rule was the key aspect in the relatively new decision of Eclairs Group Limited v JKX Oil and Gas plc et al.[24] The case concerned a company called JKX Oil & Gas plc ("JKX"). The appellants between them held around 39% of the share capital of JKX. In 2013, the Board of JKX considered that the company was the subject of a "corporate raid" by the appellants. The Board therefore served notices seeking information about interests in the shares held by the appellants. JKX's articles allowed the directors to impose voting and transfer restrictions where information provided was known or reasonably thought to be false or materially incorrect. The Board considered that it had reasonable cause to believe that the responses to its notices were false or materially incorrect. In response, it issued voting and transfer restrictions on the shares held by the appellants. An effect of these was to prevent the appellants from voting at the company's AGM.

[61]. The appellants challenged the propriety of the Board's purpose in exercising its power to issue restriction notices. The appellants contended that the predominant

[23] At para. 42
[24] [2015] UKSC 71.

purpose of the Board was to prevent the appellants from voting, rather than information gathering. The Supreme Court unanimously found that directors who exercise powers in the company's articles to issue restriction notices must do so for a proper purpose. The proper purpose is the reason for which that power was conferred on the directors. It is not enough that the directors have acted in what they believed to be in the best interests of the company. JKX's directors had acted with the purpose of preventing Eclairs and Glengary from voting at the AGM, therefore the restrictions were set aside.

[62]. In a minority decision, Lord Sumption went further and propounded a "but for" test, in that where the directors have in mind more than one purpose for exercising a power and one of the purposes is illegitimate, if without the improper purpose(s) the decision would not have been made, then it should not stand even if the directors also had other, proper considerations in mind. This test was expressly not endorsed by the other three judges.

Analysis

[63]. Returning to the case, Mr. McMaster, QC argues that the learned judge ought to have found that the directors of Best Nation had been motivated by a desire to give shareholder control to the management of ZG to re-assure, incentivise and reward the management and staff of ZG. He contends that it was an error of fact or law to conclude that the desire to gain control of ZG for this reason was an improper purpose.

[64]. Learned Queen's Counsel submits that to the extent that the learned judge was correct to find that the directors were motivated by an improper purpose, in that they were pursuing a personal advantage, he ought to have made a further finding that the board was concurrently moved by multiple purposes, one proper and one improper. In that regard, he ought to have applied the "but for" test.

[65]. Mr. McMaster, QC urges this Court to accept the "but for" test as the test to be applied in these present circumstances. Learned Queen's Counsel submits that the test is not an expansion of the "substantial purpose" test; rather, it is the same test as applied in Howard Smith. Therefore, this Court having applied Howard Smith in Independent Asset Management Company Limited is not constrained by the principle of stare decisis.

[66]. Mr. Fisher on the other hand disagrees. He submits that in Antow's amended defence, it had contended that the real purpose of the first and second series of transactions was to regularise the ownership of ZG following the decision not to merge ZG with another entity called Aida, and to give effect to the Framework Agreement of 24th April 2009 (the aim of this agreement was to facilitate the exit of Dragonlink, an outside investor, which, at that time, had owned a 40% stake in Best Nation; East Crown would become the holder of 100% of Best Nation. Best Nation would sell 40% of its 100% shareholding in ZG to XG for RMB32.32 million and would use that RMB32.32 million to redeem the 40% holding of Dragonlink in Best Nation). Mr. Fisher noted that Antow did not feature as a party to agreement, indeed it had not yet come into existence.

[67]. Mr. Fisher submits that in Mr. QIU's witness statement, dated 23rd June 2016, Mr. QIU (the only witness for Antow) stated, at paragraph 194, that by the first series of transactions, the purpose of the Framework Agreement (i.e. the Framework Agreement dated 24th April 2009) was achieved. Mr. Fisher says that this is the sole allusion by Mr QIU, in his witness statement, to the motives of the directors of Best Nation for procuring the first series of transactions. That purpose clearly could not hold good for the second series of transactions if the purpose had already been achieved by the first series of transactions.

[68]. Mr. Fisher contends that on appeal however Antow's pleaded motive for the actions of the directors of Best Nation, repeated in Mr QIU's witness statement, is not even advanced before this Court as being their motive. Mr. Fisher points to Mr.

QIU's witness statement which contains what he says is the additional motive advanced by Mr. QIU for the second series of transactions, that was to "rationalize the shareholdings of the two groups of shareholders in ZG and to withdraw from the offshore structure that had been set up only to facilitate a listing which did not proceed". He submits that this professed motive for the actions of the directors is also not advanced in this Court.

[69]. Mr. Fisher posits that the purpose for which the directors of Best Nation exercised their powers was to vest control of ZG in themselves and their fellow QIU Parties. Their secondary purpose was to incentivise the management of ZG by making them masters of their own destiny. He argues that these are not proper purposes for the exercise by the directors of Best Nation of their powers. In his supplemental submissions, filed on 6th June 2018, Mr. Fisher submits that even if there had been an overriding secondary proper purpose of establishing a more stable and rewarding environment in ZG for the benefit of all its shareholders, there was no evidence on which the trial judge could have made a finding that, even absent the improper purpose, the directors would nevertheless have exercised their powers in the manner they did. He urges the Court to reject Mr. McMaster, QC's invitation to adopt the "but for" test as propounded by Lord Sumption in Eclairs Company Limited.

[70]. As stated earlier, Independent Asset Management Company Limited applied and adopted the learning in Howard Smith. As was gleaned, Independent Asset Management Company Limited is a case concerning concurrent mixed purposes where the substantial purpose for which the directors exercised their power (change of control) was improper but there was a secondary purpose or motive that was proper (the benefiting of the company overall).

[71]. In my view, the test to be applied at present is the "substantial purpose" test derived from the Howard Smith case. In Extrasure Travel Insurances Ltd

and another v Scattergood and another[25] Mr. Crow, Q.C (then an acting Deputy Judge), helpfully formulated the proper or substantial purpose test as involving a four-stage approach. This approach commends itself to me. Furthermore, this approach was adopted by this court in Independent Asset Management. It therefore requires me to identify the (i) power whose exercise is in question, (ii) proper purpose for which that power was delegated to the directors, (iii) substantial purpose for which the power was in fact exercised and decide (iv) whether that purpose was a proper purpose.

[72]. The power being considered is the power to enter into the transactions concerning the issuance/redemption of shares. The second step is the reason for exercising the power. Shares are usually issued to raise capital for the company, although shares may be issued for other purposes so long as the issue provides benefit to the company as a whole.[26] I accept Mr. Fisher's contention that the entering of the first series of transactions in which shares were issued was to change the control in the company. The third step is to determine the substantial or dominant purpose for issuing the shares/entering into the transactions. The learned judge found that the real purpose and sole motive of the directors was to further their own interests by taking control of ZG. On the facts, as found by the learned trial judge, I agree that on the whole of the circumstances, the directors had one purpose. The fourth step is to determine whether the transactions were entered into for a proper purpose.

[73]. Applying the above-mentioned cases, (Hogg v Cramphorn, Howard Smith, Independent Asset Management Company Limited and Eclairs Company Limited), directors must exercise their corporate powers for the purposes for which they were granted the position of director, it being immaterial that their belief was honest.

[25] [2002] EWHC 3093 (Ch.) at paragraph 92
[26] At para. 29 of Independent Asset Management Company Limited.

[74]. The directors of Best Nation essentially disposed of the company's assets. This could certainly not be a proper purpose as contemplated under section 121. Best Nation's share capital was reduced by means of share redemption and its control over ZG considerably diminished. They also removed East Crown's control in Best Nation and transferred it to Antow. The directors then submitted "moving causes" as to what was the purpose for the transactions. Different reasons were pleaded with no evidential support.

[75]. In the pleadings before the learned trial judge a different motivation was advanced by the directors. At the trial, a further one was advanced, that is, that what had motivated the directors of Best Nation in making the transfers was that Mr. JIN X was a disruptive influence over the smooth management of ZG. This was a bald assertion without any evidence whatsoever. They claimed as well, that in order to re-assure, incentivize and reward the management and staff of ZG, the QIU Parties therefore decided to restructure the group so that the indirect interests would be converted into direct interests. Mr. QIU stated also that one of the purposes, but not the only purpose, was to give shareholder control over ZG to ZG's management, to further the purpose of establishing a more stable and rewarding environment.

[76]. Before this Court, the directors claim that the substantial purpose was to reassure, incentivise and reward the management and staff of ZG, which was an advantage that was not personal to XG or Antow but which accrued to all the shareholders in ZG.

[77]. The learned judge did not accept the various motives proffered by the directors as the reason for the transactions. He made an assessment on the evidence before him. The learned judge investigated the surrounding circumstances, he saw and heard the witnesses and came to a finding of fact, that the sole purpose was the personal advantage of gaining control over ZG. The law on an appeal against the findings of fact is trite and bears no repeating. I see no fault with the learned judge's conclusion.

[78]. It is clear the motive behind the transactions. The motives were self-serving and for the director's personal advantage, that is, to gain control of ZG and further their own interests. How could the disposal of company assets by directors, persons who are bound by their fiduciary obligation, for the purpose of control be considered a proper purpose? As opined by the learned judge, it would be erroneous to treat Best Nation as "only" a holding company. It is a corporate entity entitled to receive the income of its shareholding in ZG. Due to the improper purpose of the transactions, this income has been greatly reduced.

[79]. Mr. McMaster, QC urges this Court to apply the "but for" test. I respectfully decline to do so. In any event, the "but for" test as suggested by Lord Sumption is one to be considered when the directors are motivated by multiple purposes. In this case, on the facts, it is clear that there was one purpose and that purpose was improper. I agree with Mr. Fisher that in any event, even if there had been an overriding secondary proper purpose of establishing a more stable and rewarding environment in ZG for the benefit of all its shareholders, there was no evidence on which the trial judge could have made a finding that, even absent the improper purpose, the directors would nevertheless have exercised their powers in the manner they did.

[80]. The primary or dominant purpose for which the decision was made was improper. The learned judge conducted a forensic inquiry and found, as he stated, that "When Mr QIU explained the Director's motives and purpose he spoke only of the positive effects he sought to bring about in relation to ZG. Mr QIU did not mention Best Nation at all. It is clear that his goal was to gain control of ZG". As Lord Wilberforce stated in Howard Smith "once this primary purpose was rejected…there is nothing legitimate left as a basis for their action, except honest behaviour. That is not, in itself, enough."[27] In the case at bar, there is not even an altruistic leg to stand on.

[27] At p. 1136

[81]. Accordingly, I agree with the learned judge that the directors were in breach of section 121 of the Act.

Second Series of Transactions

[82]. Mr. McMaster, QC complains that there was no basis for the judge's finding that the second redemption involved a breach of fiduciary duty or an improper use of powers because it was motivated by a desire to gain control of ZG. He says that the learned trial judge erred in arriving at the conclusion that, as the pillar of the whole transaction had been the initial, unauthorized, transfer of the 13,398 shares from East Crown to Antow, once the pillar goes, the whole transaction falls.

[83]. Mr. Fisher's response is that without the 13,398 shares, Antow had nothing to surrender in exchange for the 16.078% shareholding in ZG which was transferred to it in consideration for the surrender of those shares in East Crown. He agrees with the learned judge that neither the directors of Best Nation, nor Mr. QIU as one of 3 directors of East Crown, had the power to transfer those 13,398 shares from East Crown to Antow. Mr. Fisher submits that the board of East Crown had not appointed any officers or agents and could only act by its directors. In other words, only a majority of the directors of East Crown could have sanctioned the transfer of the 13,398 shares from East Crown to Best Nation. Consequently, the resolution to transfer the shares, and the instrument of transfer, both signed only by Mr. QIU were void and of no effect. Mr. Fisher argues that Antow was never the owner of the 13,398 shares and could not, therefore, 'surrender' them in exchange for the transfer to it of 16.078% of the shares in ZG, plus some cash.

[84]. I agree entirely with Mr. Fisher. The purported transfer was not voidable; it was void ab initio. As indicated above, the first step in the second series of transactions was the transfer of 13,398 shares held by East Crown in Best Nation to Antow. This was the foundation of the second series of transactions. Mr. QIU had no authority to sign the instrument of transfer. If that pillar goes, the whole transaction falls. Antow had nothing to redeem. The learned trial judge was, in my view,

entirely right to set aside the second series of transactions and was entitled to set it aside on this basis alone.

Conclusion

[85]. For the reasons set out above, I would dismiss the appeal. I would order Antow to pay the costs on the appeal to the respondents to be assessed, if not agreed within 21 days.

I concur.
Mario Michel
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar