EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2018/0001 and BVIHCMAP2018/0002

IN THE MATTER of Successful Trend Investments Corporation

IN THE MATTER OF Section 1841 of the BVI Business Companies Act 2004

BETWEEN:

KATHRYN MA WAI FONG
(as the personal representative, executrix and trustee, and in her personal capacity as a beneficiary of the estate of the late Wong Kie Nai)

Appellant

and

[1] WONG KIE YIK
[2] WONG KIE CHIE
[3] SUCCESSFUL TREND NVESTMENTS CORPORATION

Respondents

Before:

The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mr. Rolston Nelson, SC	Justice of Appeal [Ag.]
The Hon. Mr. Douglas Mendes, SC	Justice of Appeal [Ag.]

Appearances:

Mr. Jonathan Crow, Q.C. with him, Mr. Herman Boeddinghaus and Mr. James Noble for the Appellant
Mr. David Alexander, Q.C. with him, Mr. Simon Hall for the 1st and 2nd Respondents
Mr. Oliver Clifton for the 3rd Respondent

2018: October 9, 10 and 11;
2019: March 27.

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The late Wong Tuong Kwang ("WTK") was a successful businessman who created a valuable business empire mainly in Malaysia known as the WTK Group. He had three sons - the 1st respondent, Wong Kie Yik ("WKY") and the 2nd respondent Wong Kei Chie ("WKC"), who are the respondents to this appeal ("the Respondents"), and the late Wong Kie Nai ("WKN") who died in 2013. WKN's widow, Kathryn Ma Wai Fong ("the Appellant" or "Ms. Ma"), is the appellant. The 3rd respondent, Successful Trend Investments Corporation ("STIC") is a British Virgin Islands ("BVI") company over which the Respondents have de facto control. STIC was acquired "off the shelf" for the sole purpose of holding convertible preference shares issued to it by a Malaysian company, WTK Realty Sdn Bhd ("Realty"). Realty is the primary company in the WTK Group.

On 1st July 2004, STIC resolved to enter into a subscription agreement by which it agreed to subscribe for 55 million non-voting convertible preference shares ("CPS") in Realty with a par value of RM0.01 per share. The subscription price for the CPS was RM1 per share made up of the RM .01 par value and a premium of RM0.99 per share, resulting in a total subscription price of RM 55 million. The holder of the CPS was entitled to convert the shares to ordinary voting shares in Realty at a conversion ratio of 20 convertible shares to 1 ordinary share. STIC paid the par value of RM550,000 for the CPS and on 30th August 2004, the CPS were duly issued to STIC. It is disputed whether STIC paid the subscription price of RM550,000. The ordinary shares have a par value of RM1 each.

On 25th March 2013, STIC resolved to elect to convert the 55 million CPS to 2,750,000 ordinary shares in Realty and to give notice of its election to Realty ("the Conversion"). The Conversion was completed on 8th April 2013 when STIC paid the balance of the subscription price to Realty, having received credit of the RM550,000 paid for the CPS in 2004. Realty issued a share certificate to STIC for the 2,750,000 ordinary shares which represented 14.4% of the voting shares in Realty. The effect of the Conversion was that it diluted the shareholding of all the ordinary shareholders in Realty. By virtue of the combination of their control of STIC and their own shares in Realty, the Respondents gained effective voting control of Realty and reduced the Appellant and her family, to minority voting shareholders in the company. It is the Conversion and the resulting loss of

voting control of Realty to the Respondents that are at the heart of the disputes between the parties.

The Appellant applied to the Court on 4th May 2015 for relief under section 181I of the BVI Business Companies Act ("the BC Act") on the basis that the affairs of STIC are being or have been conducted by the Respondents in a manner that is oppressive, unfairly discriminatory and/or unfairly prejudicial to her. She sought orders including the setting aside of the Conversion on various grounds, and/or a buy-out of her shares in STIC, and/or the appointment of a liquidator of STIC under section 159(1) and 162 of the Insolvency Act on the just and equitable ground.

The matter came before the learned trial judge ("the Judge" who, having heard all the evidence, granted a short adjournment of the trial to allow counsel for the parties to file written closing submissions prior to making their oral closing arguments. The day before the scheduled resumption of the trial and two days after the filing of the submissions, the Appellant's legal representatives served a draft application on the legal representatives for the Respondents, and the representatives for STIC, for an amendment of her claim to include alternative, independent claims for the appointment of a liquidator of STIC under section 159(1) and 162 of the Insolvency Act on the just and equitable ground, and for breaches of sections 121 and 175 of the BC Act. Prior to that, the Appellant's claim was made pursuant to section 184I of the BC Act. A formal application for the amendment was filed while oral closing submissions were being made.

The Judge refused the amendment application, dismissed the claim and ordered a buy-out of the Appellant's shares in STIC by the Respondents. The Appellant, being dissatisfied with the Judge's decisions, appealed. Subsequent to the hearing of the appeals, she applied to adduce fresh evidence in the form of a bank statement from HSBC Bank for Lismore Trading Limited ("the Lismore Statement"). This evidence, the Appellant said, would have an important influence on the result of the appeal.

The main appeal concerns the validity of the Conversion ("the Main Appeal"). This is primarily an appeal against the Judge's findings of fact. The Appellant's position is that the conversion of the CPS contravened section 121 of the BC Act in that it was for the improper purpose of changing the voting power in Realty. *Ipso facto* it was unfairly prejudicial to her as a shareholder thereby entitling her to relief under section 184I. Alternatively, if the Conversion was for a proper purpose it was nonetheless unfairly prejudicial to her because it resulted in the loss of majority control of Realty. In attempting to prove her unfair treatment, the Appellant relied on a shareholders agreement and a family agreement regarding the Conversion and submitted that those agreements were breached in that the CPS were converted without the unanimous consent of the three brothers. The Appellant also submitted that the Conversion should be set aside because it breached section 175 of the BC Act dealing with the disposition of more than 50% of a company's assets, as well as section 59 of the Companies Act of Malaysia 1965 ("the MCA") dealing with issuing shares at a discount.

The Court therefore had to determine the application to adduce fresh evidence ("the Fresh Evidence Application"), the appeal against the refusal of the amendment application ("the Amendment Appeal"), and the Main Appeal.

Held: dismissing the Fresh Evidence Application, the Amendment Appeal and the Main Appeal; affirming the orders made by the Judge; awarding costs of the Fresh Evidence Application to the Respondents to be assessed, if not agreed, within 21 days of the date of this order and costs of both appeals to the Respondents and STIC of two-thirds of the costs assessed in the lower court, that:

1. The Lismore Statement satisfies the first and third limbs of the Ladd v Marshall test because it could not have been obtained with reasonable diligence for use at the trial and it is presumably to be believed. The onus was on the Appellant to demonstrate that, if admitted, the Lismore Statement would have an important influence on the result, though it need not be decisive. The three reasons advanced by Ms. Ma for submitting that the Lismore Statement is important do not demonstrate that the statement would have an important influence on the result of the trial and the application is therefore dismissed.

   Ladd v Marshall [1954] 1 WLR 1489 applied.

2. On an application under the BVI Insolvency Act on the just and equitable ground, once a member of a company satisfies the Court that it is just and equitable to appoint a liquidator for any of the reasons recognised by the decided cases, he can ask the Court to make an order appointing a liquidator. On the other hand, a member applying under section 184I of the BC Act for the appointment of a liquidator must satisfy the Court that he is or has been unfairly prejudiced or discriminated against to get relief, and that it is just and equitable to wind up the company. In this case, the Appellant is seeking to move from having to prove unfairly prejudicial or discriminatory conduct to get a winding up order on the just and equitable ground, to one where she does not have to prove such conduct, only that it is just and equitable to wind up the company. If the proposed amendments were to be granted, the Appellant would achieve this transition without adequate notice to the Respondents and to STIC and without complying with the statutory regime in the insolvency legislation. The Respondents and STIC would be facing a different case and the lateness of the application would be to them. The Judge was therefore correct in recognising the differences between the procedures and in exercising his discretion to refuse the application.

   Section 184I(1) of the Business Companies Act Act No. 16 of 2004, Laws of the Virgin Islands considered; Sections 162 and 168 of the Insolvency Act Act No. 5 of 2003, Laws of the Virgin Islands considered.

3. An appellate court is rarely justified in overturning a finding of fact which turns on credibility of a witness as the trial Judge would have had the benefit of hearing and seeing the witnesses give their evidence and would be in a far better position than

an appellate court to assess their credibility and make findings of fact. However, the appellate court may interfere if it is satisfied that the Judge did not take proper advantage of having seen and heard the witnesses and/or if the finding is plainly wrong. In this appeal, the Judge made several findings of fact which led to the conclusion that the Appellant was not unfairly treated by the Respondents in their conduct of the affairs of STIC and the guiding principles relating to assessing a judge's findings of fact apply.

Watt (or Thomas) v Thomas [1947] 1 All ER 582 applied; Mark Byers and Mark McDonald (as joint liquidators Pioneer Freight Futures Company Limited) v Chen Ningning (also known as Diana Chen BVIHCVAP2015/0011 (delivered 12th June 2018, unreported) followed; Central Bank of Ecuador and others v Conticorp SA and others (The Bahamas) [2015] UKPC 11 applied; Janan Harb v Prince Abdul Aziz Bin Fahd Bin Abdul Aziz [2016] EWCA Civ 556 considered.

4. Under section 121 of the BC Act, directors are mandated to exercise their management powers for a proper purpose and not act in a manner that contravenes the BC Act or the memorandum or articles of the company. The issue in the instant appeal turns on what was the primary purpose of the Respondents in causing the conversion of the CPS. It is clear from the judgment that the Judge considered the evidence of both sides relating to the reason for converting the CPS and found as a primary fact that the dominant reason was Realty's need for financing. This is a sufficient and proper basis for finding that the Conversion was for a proper purpose within the meaning of section 121 of the BC Act. There was no breach of section 121 of the BC Act or the memorandum and articles of association of STIC. Further, the Conversion benefited STIC by enhancing its investment in Realty. The fact that Ms. Ma lost majority control of Realty was the natural consequence of a corporate act that benefitted both Realty and STIC. Accordingly, there is no basis for this Court to interfere with the Judge's finding.

   Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821 applied.

5. The Judge erred in not giving reasons for his finding on the expert evidence relating to the Malaysian Companies Act 1965 ("the MCA"). This Court, in its discretion, will make its own finding. There are no provisions in the MCA allowing companies to issue convertible shares, and consequently, no provisions on the procedure for converting the CPS to ordinary shares. The CPS were issued pursuant to the subscription agreement and Realty's memorandum of association (as amended). The experts on both sides were required to opine on whether the ordinary shares were issued at a discount or as fully paid shares. The reasoning and conclusions of the expert for the Respondents is preferred. The ordinary shares were not issued at a discount, there was no reduction of the share capital of Realty and no breach of section 59 of the MCA. Therefore, court approval of the Conversion was not necessary. Even if there was a breach of section 59, the officers of Realty would be liable to punishment in separate criminal proceedings.

A breach of section 59 of the MCA would not be unfairly prejudicial to the Appellant in her capacity as a shareholder of STIC.

Re Arrowfield Group Ltd (1995) 17 ACSR 649 applied.

6. In relation to the breach of section 175 of the BC Act, the exercise of a contractual right attaching to the preference shares to convert them to ordinary shares is not a sale or other disposition of more than 50 per cent in value of the assets of STIC. The Conversion was not made outside the usual or regular course of its business, although STIC effected no other transaction during the period under reference. Therefore, the Conversion did not contravene section 175 of the BC Act.

   Ciban Management Corporation v Citco (BVI) Limited et al BVIHCV2007/0301 (delivered 27th November 2012, unreported) followed.

7. The Appellant, though losing majority control of Realty, was not unfairly prejudiced by the Conversion or any of the other alleged actions by the Respondents and/or STIC such as non-payment of dividends, withholding information, or breach of the alleged shareholders agreement and/or family agreement. Further, there is no proper basis to interfere with the Judge's finding that STIC was not operated as a quasi-partnership and that there was no breakdown of trust and confidence between the alleged quasi-partners. In light of the role of the appellate court, there is no basis for disturbing the Judge's findings on the Main Appeal.

8. Section 167(3) of the Insolvency Act provides that the Court should not appoint a liquidator on just and equitable grounds if it is of opinion that some other remedy is available to the applicant and he or she is acting unreasonably in pursuing the winding up of the company. In this case, the remedy of a buy-out was available to the Appellant. It is a remedy that she herself claimed (but has not pursued), and the Judge has already ordered a buy-out of her share in STIC.

JUDGMENT

[1] WEBSTER JA [AG.]: This is the judgment of the Court to which all members of the panel have contributed.

Introduction

[2] The central issue in this appeal is the validity of the conversion of 55 million non-voting convertible preference shares held by the 3rd respondent, Successful Trend Investments Corporation ("STIC"), in a Malaysian company, WTK Realty Sdn Bhd ("Realty"), effected at the instigation of the 1st and 2nd respondents ("the Conversion"). The Conversion resulted in the 1st and 2nd respondents gaining

effective voting control of Realty and reducing the appellant, Kathryn Ma Wai Fong ("the Appellant" or "Ms. Ma"), and her family, to minority shareholders in the company. Ms. Ma's interest in STIC, which is the target company in these proceedings, remained unchanged. The learned trial Judge ("the Judge") rejected the appellant's challenge to the validity of the Conversion and refused her claim to appoint a liquidator of STIC on the just and equitable ground. Ms. Ma appealed against the decision of the learned Judge ("the Main Appeal").

[3] The Main Appeal was consolidated with an appeal by the Appellant against the Judge's refusal to grant a late amendment to the claim. This appeal is referred to as "the Amendment Appeal".

Background

[4] Wong Tuong Kwang ("WTK") was a successful Malaysian businessman. He built up an immensely valuable business enterprise, principally in Malaysia, dealing primarily in forest ownership and management, palm oil production and construction ("the WTK Group"). The businesses of the Group have since diversified into several other areas. WTK had three sons and three daughters. The three sons are the 1st respondent Wong Kie Yik ("WKY"), the 2nd respondent Wong Kie Chie ("WKC"), and the late Wong Kie Nai ("WKN"). All three sons were involved in various ways in the running of the businesses. The daughters did not participate in the businesses. WKY and WKC are referred to together in the remainder of this judgment as "the Respondents", and all three brothers together as "the Brothers".

[5] The principal company in the WTK Group's business empire was Realty. WTK and his eldest son, WKY, were the founders as well as the first directors and shareholders of Realty. WKN was at all material times the managing director of Realty. WKN and WKY resided in Sibu, Malaysia, where the WTK Group is headquartered. WKC has lived in Australia since 1984 where he looks after the family's business there.

[6] WKN was married to the Appellant and together they had two children, Wong Hou Liang Neil Wong ("Neil") and Wong Hou Wai Mimi ("Mimi"). Reference to some of the parties in this judgment by their first names is for convenience only and no disrespect is meant.

[7] In May 2004, WTK became seriously ill. He was hospitalised and died in November 2004. WKN became the managing director of most of the companies in the WTK Group, including Realty, until 2011 when he left for Australia to receive medical treatment. After he left, WKY took over as managing director of Realty and other companies in the WTK Group.

[8] Each of the Brothers originally held equal amounts of ordinary (voting) shares in Realty. However, in August 2004, WKN completed blank share transfer forms signed by WTK transferring 1,252,000 ordinary shares in Realty to himself, and in September 2007 he caused Realty to issue 4 million ordinary shares to him. As a result, he became the majority voting shareholder of Realty with 54% of the ordinary shares. He later transferred 4.88% or 800,000 of his shares to his son, Neil. The issue of the 4 million ordinary shares and the transfer of the 1,252,000 ordinary shares to WKN was challenged by WKC in separate proceedings in Malaysia and we deal with this below under the heading "Malaysian Proceedings".

[9] The third respondent, STIC, is a British Virgin Islands company that was incorporated in 1996 and acquired "off the shelf" for the sole purpose of holding the convertible preference shares to be issued by Realty to STIC. STIC issued three shares to Gainesville Limited, a BVI company. Gainesville held the three shares on trust as to one each for each of the Brothers.

[10] The sole director of STIC is and was at all material times Mr. Fui Kium Lo, and his alternate is and was at all material times Mrs. Virginia Kwan Suet Fun. They are not members of the Wong family. It is common ground that the Respondents

have de facto control over STIC with the Appellant saying that they do so as de facto directors of the company and the Respondents saying that they exercise control as the beneficial owners of the majority of the shares. We deal with this issue at paragraphs 90-91 below.

[11] On 1st July 2004, STIC resolved to enter into a subscription agreement by which it agreed to subscribe for the 55 million non-voting convertible preference shares ("the CPS") in Realty with a par value of RM0.01 per share. The agreement is dated 1st August 2004 ("the Subscription Agreement").[1] The subscription price for the CPS was RM 1 per share made up of the RM .01 par value and a premium of RM 0.99 per share, resulting in a total subscription price of RM 55 million. The holder of CPS was entitled to convert the shares to ordinary voting shares in Realty at a conversion ratio of 20 convertible shares to 1 ordinary share. The ordinary shares have a par value of RM 1.

[12] On 30th August 2004, the CPS were duly issued to STIC. It is disputed whether STIC paid the subscription price of RM 55 million.[2]

[13] In March 2011, WKN went to Sydney, Australia to receive treatment for cancer. On 5th December 2012, the Respondents and Janice Ting ("Janice"), the chief financial officer of Realty and other companies in the WTK Group, visited WKN in the hospital in Sydney. During the visit, it was agreed that they would meet with WKN at the hospital the following day to discuss the future of the companies in the WTK Group. The meeting was held on 6th December 2012 ("the Family Meeting"). It was attended by the Brothers, Neil, Peter Bobbin (Neil's lawyer), and Janice. There are disputes over what was agreed and not agreed at the Family Meeting which we will deal with later in this judgment. The only undisputed agreement coming out of the meeting was that the two sides would explore the separation of the assets of the companies in the WTK Group and

[1] Record of appeal, bundle E, Vol. 1 at pp. 33-95.
[2] See paras.112-115 under the heading "Payment of the subscription price".

thereafter arrange for valuations of the assets to be carried out. Further details of the meeting are discussed below.[3]

Conversion of the CPS

[14] On 25th March 2013, STIC, acting by its sole de jure director, resolved to elect to convert the 55 million CPS to 2,750,000 ordinary shares in Realty and to give notice of its election to Realty. The Conversion was completed on 8th April 2013 when STIC paid the balance of the subscription price to Realty and Realty issued a share certificate to STIC for the 2,750,000 ordinary shares. The Conversion of the CPS and the payment for the newly issued ordinary shares are heavily contested issues in this appeal.

[15] The obvious effect of the Conversion was that it diluted the shareholding of the ordinary shareholders. In the case of WKN's estate, which was represented by the Appellant and Neil, their combined percentage fell from 54.68% to 46.80%. In the case of the Respondents, their combined percentage fell from 45.32% to 38.80%. However, when the newly issued 2,750,000 ordinary shares issued to STIC which represent 14.40% ordinary shares of Realty are added to their shares, the Respondents exercised majority voting rights in Realty. It is this Conversion of the CPS and the resulting loss of control of Realty to the Respondents that are at the heart of the disputes between the parties.

The claim

[16] The Appellant, in her personal capacity and as the personal representative, executrix and trustee of the estate of WTK, applied to the Commercial Court on 4th May 2015 for relief under section 181I of the BVI Business Companies Act 2004[4] ("the BC Act") on the basis that the affairs of STIC are being or have been conducted by the Respondents in a manner that is oppressive, unfairly discriminatory and/or unfairly prejudicial to her, and sought orders including the

[3] See paras. 68-84 below.
[4] Act No. 16 of 2004, Laws of the Virgin Islands.

setting aside of the Conversion on various grounds, and/or the appointment of a liquidator of STIC under section 159(1) of the Insolvency Act 2003[5] on the just and equitable ground, and/or that the Respondents buy out the interest of the Appellant without a minority discount at a value to assessed. The buy-out order was not pursued at the trial or on appeal. The Appellant's main focus was and still is to obtain an order for the appointment of a liquidator of STIC.

[17] The claim was heard by the Judge over seven days in October and November 2017. When the evidence was completed on 26th October 2017, he granted a short adjournment of the trial to allow counsel for the parties to file written closing submissions prior to making their oral closing arguments. The submissions were filed on Friday, 3rd November 2017. On Sunday, 5th November 2017, the day before the scheduled resumption of the trial, the Appellant's legal representatives served a draft application on the legal representatives for the Respondents, including the representatives for STIC, for an amendment of her claim to include alternative, independent claims for the appointment of a liquidator of STIC under section 162 of the Insolvency Act on the just and equitable ground, and for breaches of sections 121 and 175 of the BC Act. A formal application for the amendments was filed during the oral submissions on 6th November 2017. The application was opposed by the Respondents and STIC.

[18] The Judge reserved his decision and on 14th December 2017 delivered a written judgment by which he refused the amendment application and dismissed the claim. He made a further order under section 184I(2)(a) of the BC Act that the Respondents purchase the Appellant's one share in STIC. He awarded the costs of the amendment application and of the claim to the Respondents and STIC. The Respondents were ordered to pay the costs of an earlier application for an order that WKY be permitted to give his evidence at the trial by video link on account of his ill health. The application was refused.

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

[19] The Appellant appealed against the decisions to refuse the amendment application (the Amendment Appeal) and the dismissal of the claim (the Main Appeal). The appeals were consolidated and heard together. This Court reserved judgment in both appeals. We will deal with the Amendment Appeal first.

[20] On 29th October 2018, subsequent to the hearing of the appeals, the Appellant filed an application to admit fresh evidence to be considered by the Court in its deliberations. The application is opposed by the Respondents and STIC. We will rule on the application after dealing with the Amendment Appeal.

The Amendment Appeal

[21] In paragraph 17 above, we outlined briefly the circumstances of the Appellant's application to amend the amended claim form and the re-amended statement of claim to include and assert independent claims for appointing a liquidator under the provisions of section 162 of the Insolvency Act, and for breaches of duty by the Respondents of sections 121 of the BC Act and/or the company's memorandum and articles of association (improper purpose), and of section 175 of the BC Act (disposing of more than 50% of the STIC's assets). Mr Crow, QC contended that the application to include these claims as independent claims is essentially cosmetic to confirm that each of the four claims against the Respondents is independent and has been so since the filing of the claim.

[22] Mr Alexander, QC contended that the Appellant had only one claim before the court – for relief under section 184I of the BC Act. The claims for the appointment of a liquidator under the Insolvency Act, and for breaches of sections 121 and 175 of the BC Act are not independent claims. It is therefore necessary to review the pleadings to determine the true nature of the Appellant's claim.

[23] The claim form as originally filed stated that the Appellant –

> "… makes an application to the Court pursuant to section 184I of the BVI Companies act 2004 (the *BCA*) on the basis that the affairs of the Company… are being or have been conducted by the 1st Defendant, Wong Kie Yik (KY Wong), and the 2nd Defendant, Wong Kie Chie (KC Wong), in a manner that is oppressive, unfairly discriminatory and/or unfairly prejudicial to the Claimant in the aforesaid capacity. The full particulars are set out in the attached Statement of Claim. The Claimant seeks the following relief:-"

Full particulars of the alleged oppressive, unfairly discriminatory and/or unfairly prejudicial conduct are indeed set out in numbered paragraphs in the statement of claim attached to the claim form. The final paragraph of the statement of claim states: 'Accordingly, the Claimant seeks such relief as is just and equitable pursuant to section 184I of the Business Companies Act 2004 (the *BCA*) as set out below.'

[24] The reliefs sought were:

(1) A declaration that the conversion resolution passed on 25th March 2013 was unlawful, void and of no effect.

(2) Orders that STIC and/or its directors, officers and others be restrained from taking any further steps to convert the CPS or issuing further shares or altering the issued share capital of STIC without the prior consent of the Appellant, and delivering up the Company's books, records and accounts.

(3) Further and/or in the alternative, an order that the Respondents buy out the estate's interest in STIC without discount, at a value to be assessed.

(4) Further and/or in the alternative, an order for compensation be made against the respondents.

(5) Alternatively, an order that a liquidator be appointed over STIC under section 159(1) of the Insolvency Act 2003 on the ground specified in section 162(1)(b) thereof.

(6) Alternatively, an order otherwise regulating the affairs of STIC or an order that a receiver be appointed over it.

(7) Such other order as may be made pursuant to section 184(1) of the BC Act as the court thinks fit.

[25] It is interesting to compare the reliefs claimed in the original claim form with the reliefs that are available to a claimant under section 184I of the Business Companies Act. Section 184I(2) reads_

> "If, on an application under this section, the Court considers that it is just and equitable to do so, it may make such order as it thinks fit, including, without limiting the generality of this subsection, one or more of the following orders
>
> (a) in the case of a shareholder, requiring the company or any other person to acquire the shareholder's shares;
> (b) requiring the company or any other person to pay compensation to the member;
> (c) regulating the future conduct of the company's affairs;
> (d) amending the memorandum or articles of the company;
> (e) appointing a receiver of the company;
> (f) appointing a liquidator of the company under section 159(1) of the Insolvency Act on the grounds specified in section 162(1)(b) of that Act;
> (g) directing the rectification of the records of the company;
> (h) setting aside any decision made or action taken by the company or its directors in breach of this Act or the memorandum or articles of the company."

It is immediately apparent that all of the reliefs claimed by the Appellant in the claim form are included in the reliefs that are available under section 184I(2). The only differences between the reliefs claimed and the reliefs that are available under section 184I(2) are the sequence in which they are claimed in the claim form and the fact that items (d) and (g) in section 184I(2) were not included in the claim form. The reason for the non-inclusion of items (d) and (g) is obvious. The

Appellant was not seeking amendments to the STIC's memorandum or articles of association, nor rectification of the share register or other records of the company. The similarity between the reliefs sought and the reliefs available under section 184I are at least an indication that the original claim was for relief under section 184I.

[26] The claim form and statement of claim were amended by consent on 1st September 2017 to include a new claim in sub-paragraph 1A of the relief sought for a declaration that the Conversion resolution passed on 25th March 2013 is voidable and an order setting aside the Conversion; and an amendment to sub-paragraph 7 of the reliefs sought to include relief under section 184B of the BC Act. Section 184B deals with claims for orders restraining a company or its directors from engaging in conduct that contravenes the BC Act or the memorandum and articles of association of a company. The statement of claim was also amended by inserting a new paragraph 50A to the effect that the Conversion resolution was passed by the respondents in breach of their fiduciary and/or statutory duties under section 121 of the BC Act and as such the Conversion of the CPS into ordinary shares contravened the BC Act within the meaning of section 184B. There were other amendments to the statement of claim by an order made at the pre-trial review on 25th September 2017, but those amendments do not affect in a material way the Amendment Appeal that we are now considering. The proposed amendments that resulted in this appeal were first brought to the attention of the legal teams representing the Respondents and STIC on Sunday, 5th November 2017, the day before closing submissions in the trial. The application to further amend the pleadings was filed on 6th November 2017 while oral submissions were being made.

[27] The proposed amendments were:

(a) To change the heading of the claim by inserting the words underlined: "IN THE MATTER OF SECTIONS 184B AND 184I OF THE BVI BUSINESS COMPANIES ACT 2004 AND IN THE MATTER OF

SECTIONS 159(1) AND 162(1)(b) OF THE INSOLVENCY ACT 2003"

(b) By including new claims in the body of the amended claim form as follows "(ii) section 162 of the Insolvency Act 2003 on the basis that it is just and equitable that a liquidator of the company should be appointed under section 159(1) thereof; and (iii) section 184B of the BCA on the basis that the company and/or its director or directors have engaged in conduct that contravenes section 121 and/or section 175 of the BCA and/or the memorandum or articles of the Company (STIC)".

(c) By inserting a new paragraph in the re-amended statement of claim as paragraph 50B: "50B. In the alternative, in all premises it is just and equitable that a liquidator of the company should be appointed under section 159(1) of the Insolvency Act 2003, pursuant to section 162(1)(b) thereof."

[28] Both Mr Alexander, QC on behalf of the Respondents and Mr Oliver Clifton who appeared for STIC objected to the application and we will deal with their objections below.

Discussion

[29] In our opinion, the Appellant's claim up to this point was a single claim for relief under section 184I of the BC Act relying on allegations such as the conversion of the CPS was in breach of the provisions of sections 121, 175 and 184B of the BC Act. To succeed, the Appellant had to prove that the Respondents conducted the affairs of STIC in a manner that was oppressive or unfairly discriminatory or prejudicial to her as a shareholder, thereby entitling her to relief under the section. That is how the case was pleaded and presented and at no stage during the trial did the Appellant amend her claim to say that she was making independent claims for winding up the company, or for orders under sections 121

or 175 of the BC Act on account of the alleged breaches set out in the statement of claim. The Respondents and STIC were entitled to rely on the case as pleaded by the Appellant.

[30] In the circumstances, Mr Alexander, QC was entitled to state in his written closing submissions that the Appellant had only one claim before the court and in order to get relief such as the appointment of a liquidator over STIC she had to first prove that she was unfairly prejudiced by the conduct of the Respondents within the meaning of section 184I. This was not a change of tack by the Respondents as suggested by Mr Crow. It was simply the Respondents' way of setting out their response to the claim in their submissions. In the circumstances, we do not accept that the proposed amendments were essentially cosmetic and were being added at the time of closing submissions to clarify the claims brought by the Appellant.

The Judge's decision

[31] The Judge's decision to dismiss the amendment application was focused on the proposed amendment to add the independent claim for the appointment of a liquidator under section 159(1) of the Insolvency Act. The Judge found that the procedure for appointing a liquidator under the BC Act is different from the procedure under the Insolvency Act. We agree with this basic position. A person who applies under section 184I(1) of the BC Act alleging that the affairs of the company have been conducted in a manner that is oppressive, unfairly discriminatory, or unfairly prejudicial to him in his capacity as a shareholder, and proves the allegation, may be granted relief under sub-section (2), including an order appointing a liquidator of the company on the just and equitable ground. The application under section 184I is by claim form and follows the procedures appropriate to claims initiated by a claim form. Importantly, the application is not caught by the provisions of the Insolvency Act such as section 168 which stipulates that an application to appoint liquidators must be determined within six

months, and by the procedures in the Insolvency Rules, 2005 for appointing a liquidator.

[32] On an application under the Insolvency Act on the just and equitable ground, a member of a company does not have to satisfy the court that he is or has been unfairly prejudiced or discriminated against to get relief. Once he satisfies the court that it is just and equitable to appoint a liquidator for any of the reasons recognised by the decided cases, he can ask the Court to make an order appointing a liquidator. This distinction is of vital importance in this case where the appellant is seeking to move from having to prove unfairly prejudicial or discriminatory conduct to get a winding up order on the just and equitable ground, to one where she does not have to prove such conduct, only that it is just and equitable to wind up the company. If the proposed amendments were to be granted, the Appellant would achieve this transition without adequate notice to the Respondents and to STIC and without complying with the statutory regime in the insolvency legislation.

[33] In the circumstances, the Judge was correct to find that the two procedures are different. He also found that separate claims had to be filed. We do not think this is essential and applications for both reliefs can be included in a single claim, provided that the procedures under both statutory regimes are followed. The prudent way of proceeding is to do as the claimants did in Wang Zhongyong et al v Union Zone Management Ltd et al[6] – file separate claims and ensure compliance with both procedures. In appropriate cases, both claims could be consolidated and heard together. In the circumstances, we do not think that the Judge erred in finding that separate claims should have been filed. What is important is that he recognised that there are differences between the two procedures.

[6] BVIHCMAP2013/0024 (delivered 12th January 2015, unreported).

[34] Where we do not agree with the Judge is when he relied on the UK Companies (Unfair Prejudice Applications) Rules 2009 (UK) to come to his decision. The UK Rules do not apply in the Virgin Islands and there are adequate provisions in our rules for dealing with the procedures for approaching the court for the appointment of a liquidator. We also disagree with his finding that a member's application for the appointment of a liquidator is subject to dismissal if not advertised. Rule 168 of the Virgin Islands Insolvency Rules, 2005 provides that a member's application shall not be advertised unless directed by the Court.

[35] In refusing the application the Judge was exercising his discretion. The test for setting aside the exercise of a trial Judge's discretion is well-known and has been repeated in many cases by this Court. The passage most often relied on is that of Sir Vincent Floissac, CJ in Dufour and Others v Helen Air Corporation Ltd and Others [7] where the learned Chief Justice said:

> "We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and consideration; and (2) that as a result of the error or degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

The test is in two stages – the trial Judge must have erred and as a result his or her decision was outside the generous ambit of reasonable disagreement or was blatantly wrong. In this case, the Judge erred by applying the 2009 UK Rules and by misconstruing the local rules for advertising a member's petition. However, we do not think that his decision was outside the generous ambit within which reasonable disagreement is possible or was clearly or blatantly wrong. In fact, we think that his overall decision in refusing the application to amend the pleadings was correct. In

[7] (1996) 52 WIR 188 at pp. 190-191.

any event, if we were to set aside his decision and exercise our discretion afresh, we would refuse the application for the following reasons:

(a) The Respondents and STIC defended the claim on the basis that it was a section 184I application where unfair prejudice or discrimination had to be proved. If the amendments were to be granted, the Respondents would be facing a different case and would be entitled to file pleadings in response to the amendments.

(b) The need to rely on the Insolvency Act as an independent claim to appoint a liquidator should have been apparent to the Appellant much earlier in the proceedings and the lateness of the application is prejudicial to the Respondents and STIC.

(c) If the appellant had applied independently under section 162 of the Insolvency Act, the application would have had to conform to the provisions of the Act which include section 168. Section 168 states that if an application for the appointment of a liquidator is not determined within six months after filing it is deemed to have been dismissed. The section reflects Parliament's deliberate intention to deal with applications to appoint liquidators under the Insolvency Act expeditiously. An application for just and equitable winding up cannot benefit from the lower threshold in the Insolvency Act of not having to prove unfairly prejudicial conduct, and not take the burdens imposed by the provisions of the Act such as the time for determining the application. We have also taken note of the point raised by Mr. Clifton that this Court has ruled that the six-month period in section 168 for determining an application to appoint liquidators cannot be extended by conduct – there must be an application under section 168(2) of to extend the period for determining the application.[8]

[8] KMG International NV v DP Holdings SA BVIHCMAP2017/0013 (delivered 18th April 2018, unreported).

(d) This is not an appropriate case for the Court to exercise its discretion under Rule 26.9(3) of the Civil Procedure Rules 2000 to rectify an error of procedure or a failure to comply with a rule, practice direction, court order or direction.

[36] The Judge did not give separate reasons for dismissing the application in respect of the sections 121 and 175 claims ("the BC Act Claims"). This is regrettable because the considerations in respect of these claims are not necessarily the same as the winding up claim.

[37] The BC Act Claims were brought under the same statutory regime as the section 184I claim and follow the same procedure. There are no time limits for determining the BC Act claims. However, the basic position is the same – the Respondents were defending a case where proof of unfairly prejudicial conduct was necessary before any relief could be granted. In this respect, the Appellant's change of position is no different from, and just as prejudicial as, the requested change of position for the winding up claim. The Respondents would be prejudiced by the late amendment. To a large extent, the reasons for dismissing the application in respect of the BC Act Claims would be the same as those for the winding claim, except for the considerations in the Insolvency Act. We do not think that the Appellant was prejudiced by the failure to state specific reasons for refusing the application in respect of the BC Act Claims.

[38] In all circumstances, we would affirm the Judge's decision to refuse the proposed amendments to the claim and dismiss the Amendment Appeal with costs to the Respondents and STIC. We will deal with the Main Appeal on the basis that it is a claim under section 184I of the BC Act with the pleadings as they stood at the completion of the evidence in the trial on 26th October 2017.

The Fresh evidence application

[39] The Court completed the three-day hearing of this appeal on 11th October 2018 and reserved judgment. Twelve days later, on 23rd October 2018, the Appellant filed an application for permission to adduce fresh evidence in the form of a bank statement from HSBC Bank for Lismore Trading Limited ("Lismore") showing a payment of US$750,000 (equivalent to RM 2.25 million) from Lismore to Centre View Ltd (Centre View") on 3rd April 2013. Both Lismore and Centre view are under the control of the Respondents. The application is opposed and both sides filed written submissions in support of their respective positions.

[40] The background to the application is that during the trial, the Respondents gave evidence through Janice that at a meeting of the board of Realty on 22nd March 2013 she advised the directors that the shareholders would not have to put any cash into Realty in order to effect the Conversion. However, on 5th April 2013, she was advised by the company's lawyers in Malaysia that the RM2,250,000 increase in paid-up capital that was required by AmBank as a special condition of the loan should be paid to Realty in cash. The payment of RM2,250,000 represented the balance of the subscription price for the 2,750,000 ordinary shares. The amount that was actually paid was RM2,283,576.44. The payment exceeded the required amount by RM33,576.44, but we do not think anything turns on this. The payment was made by a deposit into Realty's Standard Chartered bank account from Centre View Ltd, also on 5th April 2013. The Appellant disputed that the payment was for the ordinary shares acquired by STIC in the Conversion. The Lismore statement shows that on 3rd April 2013, two days prior to when Janice said that she had been advised that the cash payment was needed, the equivalent amount of money was paid by Lismore to Centre View. The Appellant submitted that the new evidence supports her contention at the trial and the hearing of the appeal that the payment by Centre View (on behalf of STIC) had nothing to do with the payment for the ordinary shares and as such it is relevant and compelling evidence.

[41] The Appellant's solicitors received the Lismore statement on or about 25th May 2018 from the Respondents' solicitors in Singapore as part of the Respondents' disclosure obligations in proceedings in that country, but only became aware of its significance in late October after the hearing of the appeal.

[42] The Appellant relied on the three principles for the admission of fresh evidence on appeal in Ladd v Marshall.[9] The Respondents conceded that the proposed new evidence satisfies the first and third principles in that the Appellant could not have obtained the Lismore bank statement with reasonable diligence for use at the trial, and it is presumably to be believed. The Appellant must therefore satisfy this Court that the new evidence, if admitted, would have an important influence on the result of the case, though it need not be decisive.

[43] The Appellant submitted that the Lismore bank statement is important for three reasons:

(i) It significantly undermines Janice's credibility

(ii) It provides good evidence that there was a breach of section 59 of the Malaysian Companies Act.

(iii) It demonstrates that the Respondents (WKY and WKC) were in breach of their disclosure obligations, which undermines their credibility.

We will examine the three reasons in turn.

(i) **Janice Ting's credibility**

[44] Two things come to mind when considering the potential impact of the Lismore statement on Janice's credibility. Firstly, the Judge made very clear findings as to her credibility. He said at paragraph 151 that '…in my judgment she was essentially a truthful witness and was credible on the material issues.' Secondly, she did not make

[9] [1954] 1 WLR 1489.

the arrangements for the payment from Centre View. The arrangements were handled by WTK. Any mistake that she made in the chronology of events should not be sufficient to damage Janice's credibility.

(ii) Effect of the Lismore statement on the alleged breach of section 59 of the Malaysian Companies Act

[45] Aisling Dwyer, a solicitor for the Respondents, deposed in her affidavit opposing the application that a factual issue before the Judge in assessing the alleged breach of section 59 of the Malaysian Companies Act 1965 ("MCA") was whether the RM2,283,576.44 million that was paid to Realty by or on behalf of STIC at the time of the Conversion was for the ordinary shares. The Judge found as a fact that the RM2,283,576.44 million that was deposited into Realty's account at Standard Chartered Bank on 5th April was for the ordinary shares. His finding was based on documentary evidence and Janice's evidence. It would be a strange coincidence that an almost identical amount that was due for the shares was deposited by Lismore into Realty's bank account by Centre View on the due date for the payment for some other purpose, and not as payment for the shares. The Judge's finding of fact is amply supported by the evidence and any reasonable interpretation of it, and the Lismore bank statement, would not have any important influence on the issue of whether the Conversion breached section 59 of the MCA. In any event, the admission of the Lismore bank statement at this stage would do nothing to resolve the question whether the potential liability of Realty and its directors under section 59 could amount to unfair prejudice.

(iii) **Respondents' breach of disclosure obligations**

[46] The third reason why the Appellant says that the Lismore statement is important is that it demonstrates that the Respondents were in breach of their disclosure obligations, which undermines their credibility. This point lacks substance. The alleged breach of a disclosure obligation is not one of the criteria for allowing fresh evidence on appeal. The Respondents have explained why the statement was not disclosed and that is now a disputed issue that we cannot resolve in this appeal. The alleged non-

disclosure can only go to credibility and any issue of credibility can only be in respect of WKC because WKY was not a witness in the case. As to WKC, he was not involved in the daily operations of Realty and therefore he would not have been aware of the details of the payment by Lismore to Centre View.

[47] We are satisfied that the Appellant has not satisfied the second principle in Ladd v Marshall – the Lismore bank statement, if admitted, would not have had an important influence on the trial as a whole nor the issue of the breach of section 59 of the MCA.

[48] The application for permission to admit fresh evidence is dismissed with costs to the Respondents.

The Main Appeal

[49] The amended notice of appeal in the Main Appeal contains 24 grounds of appeal with many of the grounds having sub-grounds, and some of the grounds overlap. We will attempt to classify the grounds into groups for convenience only with no particular legal significance attached to the categorisation. A recurring theme in many of the grounds is the Judge's errors on issues of credibility and findings of fact. This theme is obvious in eight of the grounds, namely numbers 10, 11, 12, 13 19, 20, 22 and 24. As a result we have dedicated an unusually large space in this judgment to revisiting and reviewing the role of an appellate court in reviewing a trial Judge's findings of fact.

[50] Our categorisation of the grounds of appeal is as follows:

(a) Grounds10, 11, 12 and 13 raise issues, mainly of fact, relating to the shareholders' agreement and the family agreement.

(b) Grounds 22 and 24 challenge findings of pure credibility and the resulting wrong conclusions of fact.

(c) Grounds 3, 8, 19 and 20 raise issues relating to the purpose and effect of the Conversion and breaches of the director's fiduciary and statutory duties under section 121 of the BC Act.

(d) Grounds 15, 16, 17 and 18 cover various ways that the Appellant claims she is entitled to an order under section 184I of the BC Act because she was unfairly prejudiced within the meaning of section 184I.

(e) Grounds 1, 2, 6, 7, 9 and 21 deal with the Appellant's claim for a winding up order on the just and equitable ground.

(f) Ground 14 deals with an alleged breach of section 175 of the BCA

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(g) Ground 23 considers the non-appearance of WKY and other potential witnesses for the Respondents to give evidence at the trial.

(h) Finally, grounds 4 and 5 are to the effect that the Judge erred in finding that he did not have jurisdiction to order the appointment of liquidators of STIC and/or to grant relief under sections 121 and 175 of the BC Act. These grounds were effectively considered in the Court's decision on the Amendment Appeal.

[51] The main issues considered on this appeal, in summary form, are:

(i) The role of the Court of Appeal in reviewing findings of fact by the Judge.

(ii) The shareholders agreement.

(iii) The family agreement.

(iv) Relief under section 184I of the BC Act

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(v) The conversion of the CPS and directors' duties under section 121 of the BC Act

(vi) Payments by STIC for the Conversion.

(vii) Expert evidence and section 59 of the Malaysian Companies Act.

(viii) The Malaysian cases

(ix) The alleged disposal of more than 50% of STIC's assets (the CPS) in breach of section 175 of the BC Act.

(x) Whether the Appellant was unfairly prejudiced by the Conversion, the alleged breaches of the Shareholders Agreement and the Family Agreement, the non-payment of dividends to the Appellant, and/or the withholding of information about STIC from the Appellant.

(xi) Whether the Appellant is entitled to an order appointing a liquidator of STIC on the just and equitable ground.

Approach of appellate courts to findings of fact by the trial Judge

[52] The approach of appellate courts to findings of fact by a trial Judge are well-known and have been repeated, developed and refined by the appellate courts in numerous judgments in England, including the Privy Council, and the Caribbean. The principles barely need to be repeated but the Appellant placed heavy reliance on them to persuade this Court to overturn several of the Judge's important findings of fact. We will therefore deal with the main principles relating to challenging findings of fact insofar as they relate to the challenges in this case.

[53] In its simplest form, the basic and long-standing rule is that an appellate court will rarely reverse a trial Judge's findings of fact because the trial Judge had the benefit of hearing and seeing the witnesses give their evidence and is in a far better position than an appellate court to assess their credibility and make findings of fact. The basic rule has been developed by the decided cases, and it is qualified by the appellate court's overriding power to set aside a finding of fact, even one based purely on credibility, if it is satisfied that the Judge did not take proper advantage of having seen and heard the witnesses.

[54] The starting point in any discussion of the principles for reviewing findings of fact by a trial Judge is the decision of the House of Lords in Watt (Or Thomas) v

Thomas[10] where Lord Thankerton set out the basic principles. In a passage that has been quoted in numerous decisions since then, Lord Thankerton said:

> "I do not find it necessary to review the many decisions of the House, for it seems to me that the principle embodied therein is a simple one, and may be stated thus: –
>
> (i) 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.
>
> (ii) 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.
>
> (iii) 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 a large for the appellate court."

[55] Lead counsel for the appellant, Mr Jonathan Crow, QC, relied on this passage, in particular point III. He submitted that, in this case, the Judge did not take proper advantage of seeing and hearing the witnesses give their evidence, and his conclusions on many important issues were plainly wrong in the sense that no reasonable Judge would have made them. He submitted that the Judge's conclusions cannot reasonably be explained or be justified. Therefore, this Court can and should make up its own mind on questions of primary fact and the inferences to be drawn from them in appropriate circumstances. He submitted that the Judge made critical findings of fact that have no basis in the evidence, or reflected a clear misunderstanding of the relevant evidence, and also did not give reasons for some of his findings. As such, this Court can set aside those findings and reach its own conclusions based on the printed material or remit the case to the Commercial Court for retrial.

[10] [1947] 1 All ER 582 at 587.

[56] Mr Crow, QC relied on the recent decision of the Privy Council in Central Bank of Ecuador and others v Conticorp SA and others (The Bahamas)[11] on appeal from the Court of Appeal of the Commonwealth of the Bahamas. The opinion of the Board was by delivered Lord Mance. The Board found, contrary to the findings of the lower courts, that the disputed transactions were not transactions that persons in the position of the respondents could, in the light of what they knew, honestly have considered to be in the appellant's interest. The lower courts erred in relying on factors that they wrongly viewed as being significant and did not address factors and issues that were really significant. Further, they failed to test the witnesses' evidence against the documentary history of the transactions. In short, they did not take proper advantage of observing and hearing the witnesses as they gave their evidence. We will refer to dicta from Lord Mance's opinion that illustrate the two stages of the approach to challenging findings of fact.

[57] At paragraph 5 of the opinion, after referring to the role of the Privy Council in dealing with challenges to concurrent findings of fact by the lower courts, Lord Mance went on to deal with the importance of respecting findings of a trial Judge by an appellate court. He opined that-

> "Second, quite apart from the settled rule relating to concurrent findings, 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."

Lord Mance also referred in paragraph 7 to the opinion of Lord Hoffman in Mutual Holdings (Bermuda) Ltd v Diane Hendricks:[12]

[11] [2015] UKPC 11.
[12] [2013] UKPC 13 at para. 28.

> "An appellate court is rarely justified in overturning a finding of fact by a trial Judge which turns on the credibility of a witness. There are particular reasons for caution in a case like this. The allegation was one of fraud, which fell to be proved to the high standard on which the courts have always insisted, even in civil cases. The critical issues were (i) what was said at an informal and undocumented meeting eight years before the trial, and (ii) what the four personal defendants believed to be the exposure of the Hendricks and AMPAT to losses that penetrated through the stop loss layer. Any findings about these matters necessarily had to be based on the oral evidence of those defendants and of Mr Bossard and Mr Agnew. The judge had to assess their character, the honesty and candour of their evidence, and the quality of their recollection. As Lord Hoffmann observed in *Biogen Inc v Medeva plc* [1997] RPC 1, 45,
>
> 'The need for appellate caution in reversing the Judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous Judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, *la vérité est dans une nuanc*), of which time and language do not permit exact expression, but which may play an important part in the Judge's overall evaluation.'"

[58] Lord Mance then went on to deal with the second stage of the reviewing process where the appellate court may intervene and upset the trial Judge's findings. At paragraph 8, he stated:

> "[T]hese principles do not mean that an appellate court is never justified, indeed required, to intervene. They only concern appeals on fact, not issues of law. But they also assume that the judge has taken proper advantage of having heard and seen the witnesses, and has in 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. In this connection, a valuable coda to the above statements of principle is found in a passage from the judgment of Robert Goff LJ in *Armagas Ltd v Mundogas SA, (The "Ocean Frost")* [1985] 1 Lloyd's Rep 1, 56–57. Robert Goff LJ noted that Lord Thankerton had said in *Watt (or Thomas) v Thomas* that—
>
> > 'It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, according to the individual case in question.'

Robert Goff LJ then added this important practical note:

> 'Furthermore it is implicit in the statement of Lord MacMillan in *Powell v Streatham Manor Nursing Home* at p 256 that the probabilities and possibilities of the case may be such as to impel an appellate court to depart from the opinion of the trial judge formed upon his assessment of witnesses whom he has seen and heard in the witness box. Speaking from my own experience 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 to the 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' motives and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth.'"

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The Board concluded that this was one of the very rare cases when it must interfere with the decisions of the lower courts. Their Lordships overturned the finding by the trial judge and the Court of Appeal that the respondents were not guilty of lack of probity and set aside the disputed transactions.

[59] Mr. Crow, QC also relied on Janan Harb v Prince Abdul Aziz Bin Fahd Bin Abdul Aziz[13] where the Court of Appeal set aside the findings of the trial Judge mainly on the ground that even if he was right in his conclusions he did not identify the relevant evidence, discuss its significance and explain why he had reached the particular conclusion. In delivering the judgment of the Court, the Master of the Rolls stated at paragraph 39:

> "Our system of civil justice has developed a tradition of delivering judgments that describe the evidence and explain the findings in much greater detail than is to be found in the judgments of most civil law jurisdictions. This requires that a judgment demonstrates that the essential issues that have been raised by the parties have been addressed by the court and how they have been resolved. In a case (such as this) which largely turns on oral evidence and where the credibility of the evidence of a main witness is challenged on a number of grounds, it is necessary for the court to address at least the principal grounds. A failure to do so is likely to undermine the fairness of the trial. The party who has raised the grounds of challenge can have no confidence that the court has considered them at all; and he will have no idea why, despite his grounds

[13] [2016] EWCA Civ 556.

> of challenge, the evidence has been accepted. That is unfair and is not an acceptable way of deciding cases.

[60] Lead counsel for the Respondents, Mr. David Alexander, QC, did not take serious issue with the cases cited by Mr. Crow, nor did he take issue with the legal principles that Mr. Crow extracted from the cases. He repeated the basic principle of respect for the trial Judge's findings of fact in cases such as Watt (Thomas) v Thomas,[14] and continued that the appellate court should only interfere with a trial Judge's factual conclusions if the trial Judge was plainly wrong. He explained the meaning of plainly wrong by reference to the cases of Henderson v Foxworth Investments Ltd and another,[15] a decision of the Supreme Court on appeal from the Court of Sessions in Scotland, and Mark Byers and Mark McDonald (as joint liquidators Pioneer Freight Futures Company Limited) v Chen Ningning (also known as Diana Chen),[16] a decision of this Court. In the Henderson case, the Lord Ordinary made findings of fact that were overturned on appeal by the Court of Sessions. On further appeal to the Supreme Court, their Lordships allowed the appeal and restored the judgment of the Lord Ordinary. In delivering the judgment of the Supreme Court, Lord Reed took the opportunity to clarify the meaning of the expression "plainly wrong". At paragraph 62 his Lordship said:

> "Given that the Extra Division correctly identified that an appellate court can interfere where it is satisfied that the trial judge has gone "plainly wrong", and considered that that criterion was met in the present case, there may be some value in considering the meaning of that phrase. There is a risk that it may be misunderstood. 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 appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."

[61] This Court cited the Foxworth case and the passage set out in the preceding paragraph with approval in the Mark Byers case and confirmed the difficulty that an

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[14] (n10).
[15] [2014] 1 WLR 2600.
[16] BVIHCVAP2015/0011 (delivered 12th June 2018, unreported).

appellant has in persuading an appellate court to overturn a finding fact of a trial Judge.

[62] There is no substantial difference between counsel's position on the principles of law regarding the assessment of factual findings of a trial Judge. Where they disagree is with the application of the principles to the facts of this case.

Application to the facts

[63] During the course of his written and oral submissions to this Court Mr. Crow, QC referred to several instances in the judgment where he submitted that the Judge misunderstood the facts, made findings on which there was no evidentiary basis, did not assess the weight of the evidence properly, misapplied the law to the facts, and/or failed to consider relevant evidence. Mr Crow, QC also handed up to the Court a revised copy of his closing submissions at the trial with yellow highlights of what he submitted were issues that were not addressed by the judge in his judgment. The document is 94 pages long and from a visual inspection the highlighted portions comprise what appears to be about a half of the document. It has the following note on the cover page: "Note: all text shown as highlighted text in this document comprises submissions not addressed in the Judgment of Adderley, J of 14.12.17." This note is consistent with the stated aim of the document and suggests that the Judge did not address very many of the Appellant's closing submissions in his judgment. We have reviewed the document and make the following comments:

I. A trial judge, especially in a long trial of complex commercial disputes with several thousand pages of documents, is not expected to comment in his written judgment on each and every submission made by counsel. In the leading case of English v Emery Reimbold & Strick Ltd,[17] Lord Phillips, writing for the Court of Appeal, set out the test as follows:

> "It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has

[17] [2002] 1 WLR 2409 at para. 19.

> to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could be relied upon." (Underlining added)

The principles in English v Emery Reimbold apply with full force to some of the highlighted comments in the document that were not critical to the Judge's decision.

II. Many of the Appellant's highlighted comments are criticisms and/or disagreements with the Judge's findings, and not indications that he did not deal with the issues in the judgment. For example, much was made of the judge's findings relating to the credibility of the witnesses. The Appellant obviously disagreed with those findings but that is not a good reason for saying that the judge did not deal with a witness' credibility. The judge gave ample reasons why he preferred the evidence of WKC and Janice to that of Ms. Ma.[18]

III. Finally, comments were made about the judge's failure to deal with critical issues, for example, the expert evidence on Malaysian law. These comments are justified, and we have attempted to deal with them in the judgment.

[64] We now turn to an analysis of the main issues in the appeal to determine whether the Appellant was treated unfairly by the Respondents in their conduct of the affairs of STIC and if she is entitled to relief under section 184I(2) of the BC Act. In doing so,

[18] See examples in the lower court judgment at paras. 76-78 and 90-93 dealing with the Appellant's credibility; paras. 113-115 dealing with WKC; and paras.135, 136, 145 and 151-152 dealing with Janice.

we will incorporate the principles relating to assessing findings of fact by a trial judge outlined in the preceding paragraphs.

The shareholders agreement

[65] The Appellant's case on the Conversion was that it was agreed or understood between the Brothers from 2004 when the CPS were issued that the shares would not be converted without the unanimous consent of the Brothers ("the Shareholders Agreement"). The Appellant agreed that there was no contemporaneous document confirming the agreement and that she did not know where it was made. The best that she could do was to rely on the fact that the three shares issued by STIC were held by Gainsville Limited, a BVI company, under three separate trust deeds; that Gainsville held the three shares as trustee for the Brothers; and that, '[y]ou must get three trustees [to] unanimously agree before Gainsville can use (sic) direction to STIC to convert.'[19] It follows, she contended, that there must be unanimity among the Brothers before making any decision to convert the CPS.

[66] The Judge rejected the Appellant's evidence of an implied Shareholders Agreement, noting in the process that the Appellant was not involved in the issuing of the shares.[20] There is no evidence of such an implied agreement between the Brothers and none should be implied by the bald statements of the Appellant who had no involvement with the issuing of the shares to Gainsville, and in the face of clear evidence to the contrary by WKC. The observation that the Appellant did not appear to understand the difference between legal and beneficial ownership is a matter entirely for the Judge and is demonstrated by her evidence on day 1 of the trial at pages 140-143 of the transcript, and in particular the short statement in her evidence set out in the previous paragraph that you must get the three trustees to agree before Gainsville could give directions to STIC. There was only one trustee. There is no proper basis to interfere with the Judge's findings on these issues or his overall conclusion that there was no Shareholders Agreement.

[19] Record of appeal II, bundle H, vol. 1, trial transcript day 1 at p. 143, lines 6-8.
[20] Para. 171(3) of the lower court judgment.

[67] Before leaving the issue of the Shareholders Agreement, we should mention the submission by Mr Crow that Gainsville, as a professional trustee, would not hold the shares as trustee for the Brothers unless there was an implied agreement not to deal with the shares without their unanimous consent (as the beneficiaries). We were not referred to any evidence to this effect nor any rule that a professional trustee holding trust property can only deal with the trust property with the unanimous consent of all the beneficiaries. We do not think that the submission takes the matter any further.

The Family Agreement – (A) Issues of credibility

[68] The Appellant further contends that there was another agreement about how the CPS could be converted. She claimed that a further agreement was made by implication or understanding at the Family Meeting referred to in paragraph 13 above, when the Brothers, Neil and Janice were discussing the separation of the assets between the two sides of the family. The essence of the further agreement is that it was understood that the assets of the companies would be separated in proportion to the parties' respective shareholdings in Realty, and that the CPS would not be converted without unanimous agreement ("the Family Agreement"). The discussion about separating the companies was initiated by Janice.

[69] Before dealing with the substantive issue of whether there was a Family Agreement we must deal with certain findings on the credibility of witnesses relating to the Family Agreement that were raised and criticised by the Appellant.

[70] The Appellant's original position, as set out in the statement of claim filed on 4th May 2015, was that there was an actual agreement made at the Family Meeting to separate the assets in proportion to the parties' respective shareholdings in Realty. The Respondents would assume control of WTK Holdings (another major company in the WTK Group), and the estate and Neil would take control of the private companies including Realty. Any difference in value between the separated companies would be reconciled by the parties. The conversion of the CPS was not raised at the meeting

and because of the trust and confidence between the parties the Family Agreement was not put into writing.[21]

[71] The Appellant changed her position in the amended statement of claim filed on 26th September 2017. The allegation of an actual agreement to separate the assets as set out in paragraphs 22-24 of the original statement of claim was deleted and replaced by new terms of the Family Agreement. The Appellant pleaded that there was an understanding that the companies would be separated in proportion to the parties' respective shareholdings in Realty. Further, the Respondents and Neil would explore the separation of the companies and their assets between the two sides of the family and thereafter proceed to consider the appointment of valuers. The conversion of the CPS was not discussed but since the Conversion would have affected the parties' respective shareholdings in Realty, it follows that it would have a direct impact on the idea of separating the assets in accordance with the respective shareholdings in Realty. She concluded on this issue in paragraph 24 of the amended statement of claim that -

> "In the premises, by the conclusion of the Family Meeting it was by implication agreed or understood by the Brothers and Neil that the CPS would not be converted into ordinary shares in the absence of their unanimous agreement (as part and parcel of any future separation agreement or by reason of any agreement not to pursue the idea further) (the *Family Agreement*). Due to the mutual trust and confidence which existed among the parties at the time, the above Family Agreement was not put into writing."

The Family Agreement, in either its original or amended form, was not mentioned in the Appellant's witness statement.

[72] The Respondents denied that there was any discussion at the meeting, far less an agreement, implied or understood, to separate the assets in accordance with the shareholders' respective shareholdings in Realty, and confirmed that there was no discussion about converting the CPS. They pleaded that the possibility of separating

[21] Record of appeal II, bundle A, original statement of claim at pp. 10-12, paras. 22-24.

the assets was discussed and it was agreed that the parties would explore the matter further and, when appropriate, proceed to value the assets.

[73] The Appellant's complaint in grounds of appeal 12 and 13 is that the Judge misunderstood her pleaded case in respect of what was agreed at the meeting at the hospital and, as a result, he did not consider the elements of the Family Agreement. Mr Crow directed the Court's attention to paragraph 96 of the judgment where the Judge, in commenting on the Appellant's evidence, said –

> "Based on the evidence of Ms Ma reviewed in the context of the contemporary documents, in my judgment the claimant has failed to prove on a balance of probability essential elements of her case namely that there was an agreement not to convert the CPS without the approval of all three of the Brothers, that there was a "Family Meeting" on 6 December 2012, or an agreement at the alleged Family Meeting to dismantle the WTK Group of companies and split up the assets between the two families namely Ms Ma and Neil on the one part and WKY and WKC on the other. The evidence also clearly did not support her claim that there was ever trust and confidence between her and WKY and WKC either before or after the death of WKN.

It is apparent that the Judge overstated what the Appellant pleaded as her case on the Family Agreement. She did not aver in the amended statement of claim that there was an agreement to dismantle the companies and split the assets between the two sides of the family, only that there was an understanding about separation that was to be explored by the Respondents and Neil. Mr. Crow submitted that this misunderstanding of the Appellant's evidence, especially when the Judge described it as one of 'the essential elements of her case', led to two further errors by the Judge. Firstly, it had an impact on the Judge's assessment of the Appellant's credibility because it meant that he would have rejected her evidence and not consider her amended case that the Family Agreement was to explore the possibility of separation of the assets, not that there was an agreement to separate the assets. Secondly, it affected his assessment of an important part of WKC's evidence in cross examination. We will deal with these two submissions.

(i) **Impact on the Appellant's credibility**

[74] The Judge's statement at paragraph 96 of the judgment should be viewed in context. The Appellant had pleaded in the original statement of claim that an agreement to split up the assets was reached at the Family Meeting.[22] This was denied by the Respondents in their defence. The Appellant filed an amended statement of claim in which she changed her position to say that the agreement that was reached was to explore the possibility of separating the assets. On the second day of the trial during her cross examination, the following exchange took place –

> "Q. Do you accept now that what you called the family agreement in paragraph 22 of the original Statement of Claim, had plainly and obviously not been reached at the meeting at the hospital?
> A. I still think it's been reached. It's not in writing. A framework of agreement was reached that how to separate the companies, the 50 different companies.
> Q. And all that had taken place is that there had been some discussions about that sort of thing, isn't that correct?
> A. No, I disagree, because the arrangement follows the agreement. Otherwise, why should we appoint valuers to look at the value of the companies?"[23]

The exchange shows that the Appellant was still hanging on to the idea that an agreement was made at the meeting to separate the assets, notwithstanding the amendment of the statement of claim.

[75] The Judge's misunderstanding, in so far as it relates to credibility, should also be viewed in the context of his full analysis of the Appellant's evidence at paragraphs 66-96 of the judgment and his clear finding at paragraphs 90-93 that he found the Appellant to be a "guarded" and "careful" witness, and that her primary aim was to prove her case. Put less elegantly, he did not find her to be a credible witness.

[76] In the circumstances, we do not think that the Judge's misunderstanding of the Appellant's case on the Family Agreement was sufficient to undermine his overall assessment that she was not a credible witness.

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[22] Record of appeal II, bundle A, original statement of claim at p. 10.
[23] Record of appeal II, bundle H, trial transcript day 2 at p.27, lines 14 -28 and p.28 lines 1 and 2.

(ii) **Impact on WKC's credibility**

[77] Mr. Crow placed heavy reliance on the evidence of WKC in cross examination when he said that it was understood at the meeting that none of the parties would do anything to significantly change the value of the assets. Again, this must be viewed in context. Prior to being asked the crucial question that led to his answer about the understanding at the meeting, he was confused as to the difference between valuing the assets and an understanding not to do anything to change the value of the assets. He was then asked –

> "Q. I know. I wasn't talking about the valuation process. My suggestion to you is that if you parted, having agreed to explore a separation of your interests, it must have been understood that while that process was going on, you would not do, none of you would do anything that would significantly change the value of the assets that you are then going away to have valued?
> A. I don't understand your question.
> Q. If you were discussing a separation, you would need to have the assets you each held valued, correct?
> A. (unclear).
> Q. And if you were looking to value the assets that each of you held, it must have been understood that none of you would do anything significantly to change the value of those assets while that process of valuation was going ahead?
> A. Yes."[24]

The Judge did not treat this answer by WKC as an admission that there was an understanding or agreement not to do anything to change the value of the assets and he explained why in paragraphs 113 to 114 of his decision–

> "113. Although the witness had moments of lucidity I made a note to myself during the hearing that he did not appear to be engaged at times, frequently answering "I don't know", "I don't understand", "I was told by the CFO" "WKY sent it to me to sign, he had signed it so I signed it". Some of his conduct, especially in accounting matters is understandable because WKY was a qualified accountant and he trusted him. At one stage WKC said "I trusted WKY instinctively".
> 114. It appeared that he frequently relied on advice rather than exercising his own independent judgment as a director particularly when it came to accounts which he admitted he was not very good at. However, on maters for which he did not rely on for advice he was quite clear: He was at the

[24] Record of appeal II, bundle H, trial transcript day 3 at p.31, lines 19 - 25 and p.32 lines 1 and 12.

> meeting on 6 December, 2012, and there was no family agreement, there was no agreement not to convert the CPS, and there was no relationship between Ms Ma and the other two brothers. I found his explanations in this regard credible within the context of the contemporaneous documents."

[78] The trial Judge who had command of the courtroom and was seeing and hearing the witnesses give their evidence was obviously aware that WKC, a 69 year old man with Parkinson's disease, [25] was not always "on the ball" in answering questions. That is why he made a note to himself that WKC did not appear to be engaged at all times. That is the privilege and duty of a trial judge. He is duty bound to not only listen to the evidence as it unfolds, but to observe and note the demeanour of the witnesses. If the Judge thought that WKC did not answer the question and simply answered "yes" to a long question that he probably did not understand, that was his right and privilege and an appellate court should not interfere with his assessment of the evidence, except in the rarest of cases. That is why Baptiste JA said in the Mark Byers case that '…the trial judge will have regard to the whole sea of 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 the evidence)".[26]

[79] For the foregoing reasons, this Court affirms the Judge's finding that WKC's monosyllabic answer "yes" should not be treated as an admission that there was an understanding or implied agreement not to do anything to significantly affect the value of the assets during the valuation process. Nor should the short answer or his evidence as a whole be interpreted as an acknowledgment by him that there was an understanding or implied agreement between the Brothers and Neil not to convert the CPS without the unanimous consent of Respondents and Neil.

[25] Appeal transcript day 3 at p. 90 lines 10-15.
[26] (n 16) para. 21.

(iii) Janice Ting's credibility

[80] Another attack on the Judge's findings in relation to the credibility of the witnesses is in the fresh evidence application that we dealt with above.[27] In dismissing, the application we found that the fresh evidence in the form of a bank statement for Lismore Trading Limited would not have affected the Judge's finding that Janice was a credible witness.

The Family Agreement **– (B) The Judge's finding**

[81] We now turn to the Judge's finding that there was no agreement coming out of the family meeting to separate the assets in proportion to the parties' respective shareholdings in Realty, and that the parties did not agree that the CPS could only be converted with the unanimous consent of the shareholders of STIC. The Judge's finding is set out at paragraph 171(4) of the judgment where he states –

> "No Family Agreement was ever reached between the three Brothers and Neil that the CPS would not be converted into ordinary shares in WTK Realty in the absence of unanimous agreement. Further, there was no proposal or any discussion by the parties at the meeting between the three Brothers and Neil on 6 December 2012 that any separation of the assets of the three Brothers' families, if agreed upon, would be in accordance with the respective shareholdings of the three Brothers and Neil in WTK Realty."

This is a finding of primary fact based on the Judge's assessment of the witnesses and the principles regarding interfering with findings of fact outlined in the section of this judgment headed "Approach of appellate courts to findings of fact by the trial Judge" apply with full force.

[82] The Judge's finding that there was no Family Agreement is supported by at least the following findings on the evidence at paragraphs 152 and 153 of his judgment:

(i) The Appellant was not at the meeting on 6th December 2012 and her evidence was based on reports from her son Neil.

[27] See paras. 39-48 above.

(ii) The two witnesses who were at the meeting, WKC and Janice, deny that there was any agreement. The contemporaneous documents do not suggest that there was an agreement.

(iii) The Judge accepted Janice as a credible witness and did the same for WKC at paragraph 114, although in a more guarded way.

(iv) He noted that Neil, who was present at the meeting, was not called as a witness and that he was present in court throughout the trial.

The Judge's reference to contemporaneous documents in sub-paragraph (ii) above would include Neil's email to Helen Lo, a chief financial officer in the WTK Group, on 15th December 2012, nine days after the meeting, in which he said, '[t]hey want to break up and divide up the companies and want everything to be valued...Thus there is no agreement in place except getting valuation organized.'[28] Neil's failure to mention that there was a Family Agreement coming out of the meeting is not conclusive of the fact that there was no agreement, but it is evidence that the Judge could rely on, and did so rely, in finding that there was no Family Agreement.

[83] The Judge decided as a matter of fact that there was no agreement coming out of the family meeting that the CPS would not be converted without the unanimous consent of the Brothers. In doing so, he accepted the evidence of WKC and Janice Ting, who were at the meeting, that the conversion of the CPS was not even discussed at the meeting, far less that an agreement was made, or an understanding reached regarding their conversion. By extension, he considered and rejected the Appellant's evidence that there was a Family Agreement along the lines suggested by the Appellant. The only agreement was to explore the possibility of a separation. The Judge also referred to the documentary evidence, in particular the email sent by Neil to Helen Lo eight days after the meeting, stating that no agreement was made at the Family Meeting. The Appellant's challenge to the Judge's findings is therefore a challenge to his findings of primary fact and the principles discussed above outlining

[28] Neil's email is set out in full at para. 84 of the lower court judgment.

the difficulties of upsetting findings of fact by a trial Judge apply. We do not think that there is any proper basis to interfere with the Judge's finding of fact.

[84] The finding that the Appellant has failed to prove that there was a Shareholders Agreement and a Family Agreement regarding the conversion of the CPS means that her further allegation that the breaches of those agreements were unfairly prejudicial to her does not arise.

Relief under section 184I of the BC Act

[85] Having dismissed the Amendment Appeal and decided that the Appellant's claim falls under section 184I, we will now consider whether the Appellant has established that she was entitled to relief under the section. Section 184I(1) reads:

> "A member of a company who considers that the affairs of the company have been, are being or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, likely to be oppressive, unfairly discriminatory, or unfairly prejudicial to him in that capacity, may apply to the Court for an order under this section."

The section gives a member the right to apply for relief in his or her capacity as a member. The Respondents submitted in the lower court that the Appellant did not have status as a member of STIC to apply under the section. The submission was rejected, and the Judge found that the Appellant was a member of STIC with status to apply under the section. There is no appeal against this finding.

[86] The principles that are involved in an application under section 184I and its equivalent provision in England have been considered, refined and developed by many courts and it unnecessary for us to repeat them in detail. The two basic principles that we wish to emphasise are: (1) a company is a formal association of persons governed by rules contained in its memorandum and articles of association and/or shareholders agreements and/or other formal document; and (2) equity and fairness impose restrictions on the strict legal positions in the formal documents. Commenting on

these two basic principles in the leading case of Re a company (No 00709 of 1992); **O'Neill and another v Phillips and others**,[29] Lord Hoffman said:

> "The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith."

Applied to this case, the Appellant's position is that the conversion of the CPS contravened section 121 of the BC Act in that it was for the improper purpose of changing the voting power in Realty. *Ipso facto* it was unfairly prejudicial to her as a shareholder thereby entitling her to relief under section 184I. Alternatively, if the Conversion was for a proper purpose it was nonetheless unfairly prejudicial to her because the Conversion resulted in the loss majority control of Realty.

[87] The Respondents' response is that the Conversion was for a proper purpose and was not unfairly prejudicial to the Appellant.

The Conversion – improper purpose – section 121 of the Business Companies Act

[88] We come now to deal with what we described earlier in this judgment as the heart of the disputes between the parties – the conversion of the CPS and its effect on the Appellant as a shareholder of STIC.

[89] Section 109 of the BC Act entrusts the management of the affairs of a company incorporated under the Act to the directors of the company. In exercising their powers of management, the directors must act in accordance with section 121 of the Act which provides –

[29] [1999] 2 All ER 961 at p. 967.

> "A director shall 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."

The section is geared towards controlling the conduct of the directors of a company when exercising their fiduciary powers. The conduct in question in this case is that of the directors of STIC in converting the CPS. STIC's sole director is Mr. Lo and, on the evidence, his role in the Conversion was limited to taking instructions from the Respondents and signing the documents that were necessary for the Conversion. The Appellant's pleaded case is that the Respondents were *de facto* directors of STIC in accordance with section 2 of the BC Act and were therefore subject to the fiduciary and statutory duties imposed on directors by provisions of the BC Act, and in particular section 121, in carrying their role in the Conversion.

[90] The Respondents denied that they were *de jure* or *de facto* directors of STIC and pleaded that their involvement in the control of the company was by virtue of being the beneficial owners of the majority of the shares in the company. The issue does not appear to have been heavily debated at trial or on appeal and the Judge did not make a finding on the status of the directors. He conducted the proceedings as if the Respondents were *de facto* directors of STIC and therefore were subject to the provisions of the BC Act relating to directors' fiduciary and statutory duties. The Respondents did not counter-appeal against this implied finding by the Judge. We will proceed as the Judge did and treat the Respondents as de facto directors of STIC.

[91] Challenges to the exercise of directors' powers under section 121 frequently arise in the context of the issuing of shares for purposes that are said to be improper.[30] The cases establish that the directors' power to issue shares is fiduciary in nature and it must not be exercised for an improper purpose such as changing the balance of power in the company. For example, in Howard Smith Ltd v Ampol Petroleum Ltd and others [31] the majority of the directors were motivated by the need to bring in capital for the

[30] Howard Smith Ltd v Ampol Petroleum Ltd and others [1974] AC 821; See also: International Asset Management Company Limited v Swiss Forfaiting Ltd BVIHCMAP2016/0034 (delivered 24th November 2017, unreported).

[31] Howard Smith Ltd v Ampol Petroleum Ltd and others [1974] AC 821.

company by issuing the new shares. However, the trial Judge found that their primary purpose was to change the balance of power in the company and the issue was therefore an improper exercise of their powers. The trial Judge set aside the allotment of new shares. On appeal to the Privy Council, the Board affirmed the decision of the trial judge. The directors' secondary purpose of raising capital for the company could not take away from their primary but improper purpose. The issue in the instant appeal therefore turns on what was the primary purpose of the Respondents in causing the conversion of the CPS.

[92] This appeal does not involve the issuing of shares, but in our opinion the fiduciary duties that apply in the context of issuing shares apply equally to the facts of this case which involve STIC converting non-voting preference shares already issued by Realty into ordinary voting shares, and by doing so affecting the balance of power in Realty. If the directors' primary purpose for converting the CPS was for STIC and its shareholders to benefit by making it possible for Realty to secure the loan from AmBank, that would, *prima facie*, be a proper commercial purpose. If the securing of the loan was only a collateral purpose and the real or primary purpose was to give the Respondents the majority voting power in Realty, that would be an improper use of directors' powers and the STIC resolution approving the Conversion, and the Conversion itself, would be liable to be set aside.

[93] The Respondents' position on the Conversion was that it was effected for commercial reasons to replace credit facilities for Realty that were urgently needed given that the current facilities were about to expire. The Appellant contended that the respondents' only reason for effecting the Conversion was to wrest control of Realty from the Appellant and her family, and the Conversion was therefore a nullity and should be set aside.

[94] The factual background to the Conversion is that towards the end of 2012, Realty had credit facilities with HSBC Bank Malaysia Berhad ("HSBC") and Standard Chartered Bank ("SCB") of RM5 million and RM14 million respectively. Both banks were

pressuring Realty to adopt more environmentally friendly forestry policies. This would have involved additional expenditures and the company was unwilling to adopt these policies. The company also had other pressing financial needs. HSBC advised Realty that it would be terminating its facility as of 31st December 2012. This was later extended to 31st March 2013. SCB's facility was due to expire on 30th June 2013. In the circumstances, WKY instructed Janice to seek alternative financing. Following oral enquiries, Janice applied for financing by letters dated 16th January 2013 and 17th January 2013[32] to RHB Bank Berhad and AmBank Berhad ("RHB Bank" and "AmBank") respectively. She did not receive a positive response from RHB Bank but received a positive response from AmBank. She entered into negotiations with a Mr. Gary Sim of AmBank and on 19th March 2013, the bank issued an unsigned offer letter to Realty agreeing to lend the company RM9,000,000 on condition that Realty increased its issued and paid in capital by RM2.5 million to RM1 9,450,000, and that WKC, Patrick Wong (WKY's son and a director of Realty), and Neil issue a joint and several guarantee of the loan. A signed copy of the letter was received on 21st March 2013.

[95] Janice advised the board of directors of Realty at its meeting on 22nd March 2013 that, the best way of complying with the AmBank's stipulated condition of increasing the capital was by converting the 55 million CPS that STIC held in Realty to 2,750,000 ordinary shares at the stipulated rate of twenty to one. That way, the shareholders would not have to come up with any cash.

[96] On 22nd March 2013, the directors resolved by majority vote to accept the AmBank offer.[33] Also, on 22nd March 2013, Realty issued a notice of an extraordinary general meeting to be held on 6th April 2013 to consider a resolution to allot and issue 2,750,000 ordinary shares to STIC and to take all necessary steps to give effect to the conversion of the CPS into ordinary shares.[34]

[32] Record of appeal II, bundle E, vol. 1 at pp.182.1 and 183.
[33] Record of appeal II, bundle E, vol. 1 at p. 224.
[34] Record of appeal II, bundle E, vol. 1 at p. 209.

[97] On 25th March 2013, STIC, acting by its sole director, Mr. Lo Fui Kiun, resolved to elect to convert the 55 million CPS into 2,750,000 ordinary shares. It is common ground that the sole director acted on the instructions of the Respondents.[35]

[98] On 28th March 2013, the Appellant wrote to the board of Realty requesting an adjournment of the extraordinary general meeting scheduled for 6th April 2013 to give her more time to secure a grant of probate of WKN's estate[36] (which would allow her to vote his shares at the meeting). The request was denied. She received the grant on 11th April 2013.

[99] On 6th April 2013, the majority of the shareholders of Realty resolved at the extraordinary general meeting to effect the Conversion and on 8th April 2013 the balance of the subscription price was paid by Centre View into Realty's account at SCB[37] and STIC became a registered holder of the 2,750,000 ordinary shares in Realty. The shareholders also authorised the chairman (WTK) to do all acts necessary to complete the loan from AmBank.

[100] The Respondents justified the Conversion on the basis that the loan facility from AmBank was urgently needed to address Realty's cash flow issues and to replace the HSBC facility that was expiring. However, the Ambank loan was subject to a special condition of increasing Realty's paid up capital by RM2.5 million RM19.45 million by 30th June 2013, and the Conversion was chosen as the best way to of complying with the condition. In other words, the Conversion was implemented for commercial reasons.

[101] The Appellant's contention is that the loan was not urgently needed, and that Realty had sufficient cash and bank balances to make the borrowing unnecessary, especially on an urgent basis. This was not borne out by the evidence, but in any event it is a notorious fact that courts do not interfere with the decisions of business persons except

[35] See for example para. 48 of witness statement of Wong Kie Chie filed on 16th August 2018.
[36] Record of appeal II, bundle E, vol. 1 at p. 241-242.
[37] Record of appeal II, bundle E, vol. 2 at p. 357.1.

on legal grounds. If authority is needed for this trite point it can be found in Pussers Limited et al v Citco Banking Corporation NV[38] where Gordon JA issued the salutary warning that, '[w]here, however, the learned trial Judge went wrong in principle was when he attempted to step into the commercial arena…'. The Judge was correct to not criticise or draw any adverse inferences from the decision of the directors of Realty to borrow from AmBank on commercial grounds such as urgency or necessity.

[102] The Appellant's more substantive challenge to the Conversion is that the real reason or motive of the Respondents and Janice for effecting the Conversion was to gain majority voting control of Realty thereby taking control of issues such as maintaining their positions in the company. In other words, the Respondents, as the persons who have *de facto* control of the board of directors of STIC, exercised their power as directors for an improper purpose, namely, to get control of Realty.

[103] There was correspondence before the Judge that in February and March 2013, Neil, representing the majority shareholders of Realty, wrote to the company demanding the dismissal of Janice as Realty's chief financial officer and Patrick as a director. WKY, representing the minority, opposed the requests and questioned Neil's authority to make them. The request for the removal of Janice was considered at the meeting of the directors on 22nd March 2013 and was rejected. The meeting also considered Neil's attempt to take over the position of chairman of the company from WKY. Mr. Crow submitted that the real reason why Janice recommended the Conversion was that the Respondents, who were friendly to her and would protect her position in the Group, would have control of Realty.

[104] The Judge considered the Appellant's suggested motivation for the Conversion as well as the Respondents' commercial reasons of urgency and necessity and found at paragraph 147 of the judgment that –

> **"**There was also the suggestion that Janice and WKY expedited the Conversion in reaction to Neil's threatening their positions after returning following an 11 year absence, to claim the throne as managing director by

[38] BVIHCVAP2003/0008 (delivered 20th September 2004, unreported) at para. 16.

> attempting to fire Janice. Janice and WKY denied this motivation. Although this was one of the topics of a separate Board meeting, the real evidence and contemporaneous documents show on a balance of probability, at the very least, that the need for funding was the dominant reason for the Conversion."

He repeated the substance of this finding at paragraph 171(1) of the judgment –

> "The ultimate or predominant reason for the conversion of the CPS was to replace the credit facilities of WTK Realty which were about to expire, and which facilities were only finalized the month before a deadline which had been extended by 6 months. The conversion of the CPS was not to force a dilution in the percentage shareholding of Ms Ma and her side of the family namely Neil."

[105] It is clear from the judgment that the Judge considered the evidence of both sides relating to the reason for converting the CPS and found as a primary fact that the dominant reason for the Conversion was the need for financing. Based on cases such as Howard Smith v Ampol,[39] this is a sufficient and proper basis for finding that the Conversion was for a proper purpose within the meaning of section 121 of the BC Act. There is no basis for this Court to interfere with the Judge's finding. Subject to paragraphs 107-111 below dealing with benefit to STIC, this finding disposes of ground 19 of the grounds of appeal.

[106] In ground 20, the Appellant complained that the Judge erred in concluding that the Conversion did not adversely affect the estate's indirect interests in Realty. There is no doubt that the estate's interest was adversely affected by the Conversion to the extent that they lost majority control of Realty. However, the important point for our purposes is that the Judge, by his overall conclusion that the Conversion was for a proper purpose of raising urgently needed financing, would have taken account of the fact that the estate's interest in Realty would become the minority interest. As such, he did not err in finding that the Appellant's side of the family would become the minority shareholders of Realty. This was the natural consequence of his overall conclusion that the Conversion was for a proper purpose of securing loan financing for Realty.

Benefit of Conversion to STIC

[39] (n 31).

[107] Ground 19 disputes the Judge's finding that the conversion of the CPS was for commercial purposes which we have already dealt with. In sub-ground (2) of ground 19 the Appellant referred to the Judge's finding at paragraph 171(8) of the judgment that, '[a]lthough there is no evidence that consideration was given to the interest of STIC, the Conversion benefitted all the beneficial owners of STIC who were also shareholders of WTK Realty', and submitted that had the Judge given due regard to this finding, he would have concluded (correctly) that the decision by STIC's directors to convert the CPS was taken for an improper purpose because it is not sufficient for the Conversion to benefit the beneficial shareholders of STIC. The benefit must accrue to STIC itself.

[108] In response, Mr. Alexander submitted that section 120, which is not directly relevant in this case, provides that a director must act honestly and in good faith in what he believes to be for the benefit of the company. Applying this subjective test, it is necessary to show that the directors actually considered if the proposed action was for the benefit of the company. If there is no evidence that they considered the potential benefit to the company, they will not be able to rely on their subjective views. However, the test in section 121 is different. It imposes an objective test and what becomes important is what an honest director in the position of the directors would consider to be for the benefit of the company, taking all the circumstances into consideration. In support of his submission, he referred the Court to the recent decision of this Court in Antow Holdings Limited v Best Nation Investment Limited et al[40] where the learned Chief Justice said:

> "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 [1969] 2 All ER 1185], 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

[40] BVIHCMAP2017/0010 (decided 21st September 2018, unreported) at para. 26.

> [2002] EWHC 2748 (Ch)], '[t]he effect is therefore to substitute an objective test for the normal subjective one'".

Relying on this authority, which is binding on this Court, Mr. Alexander concluded that the Judge carried out an objective assessment, as he was required to do, and concluded that the dominant purpose of the Conversion was to allow Realty to get the loan from Ambank, which was for the benefit of Realty and the beneficial shareholders of STIC who were also shareholders of Realty. Put another way, STIC benefited by facilitating the borrowing by Realty in which it holds its only asset, the 14.40% shareholding, and it does not matter that there is no evidence of whether the directors took this into consideration in effecting the Conversion.

[109] Mr. Alexander also referred the Court to other objective considerations such as the fact that STIC was converting the non-voting CPS which yielded a modest annual dividend, to voting shares representing 14.40% of the equity of what was indisputably a very valuable company. In the circumstances the Judge was not blatantly wrong in deciding that the directors' decision to convert the CPS was for a proper purpose, and, objectively assessed, their decision was for the benefit of STIC.

[110] We agree with Mr. Alexander's submissions and repeat our conclusion above that the Conversion was for a proper purpose, and, objectively assessed, was for the benefit of STIC. There was no breach of section 121 of the BC Act or the memorandum and articles of association of STIC, and there was a benefit to STIC. In the circumstances, we do not see how the Appellant was unfairly prejudiced by the Conversion. The fact that she lost majority control of Realty was the natural consequence of a corporate act that benefitted both Realty and STIC. She has failed to make out a case that she was entitled to relief under section 184I on account of a breach of section 121.

[111] We will deal with Ms. Ma's further claims for relief under section 184I in relation to non-payment of dividends and withholding information later in this judgment, but first we must dispose of other issues relating to the Conversion itself.

Payment of the subscription price

[112] The Appellant also disputed the payment by STIC of the subscription price for the ordinary shares to Realty. The subscription price for the 55 million CPS of RM550 million was made up of a par value of RM0.1 and a premium of RM0.99 per share. The Respondents' case is that the par value of RM550,000 was paid on subscription in 2004 and the subscription price for the ordinary shares of RM2,750,000 was the RM2,283,576.44 that was paid on Conversion and the RM550,000 paid in 2004 for par value of the CPS. The Judge found that both payments were made.[41] The Appellant disputed the payments and submitted that the Judge's finding was a bare finding without analysis of the evidence.

[113] In response, Mr Alexander directed the Court to places in the evidence where he said that there was evidence that the par value of RM550,000 was paid, and we can do no better than to repeat four of his references:

(a) Both the Subscription Agreement and the directors' resolution of Realty dated 30th August 2004 state expressly that the total subscription price of RM55 million was payable for the CPS on conversion.

(b) The audited financial statements of Realty from 2005 to 2012 reflect the sum of RM550,000 as part of the issued and fully paid in capital of the company. The audited financial statements would not have contained these entries if the RM550,000, being the par value for the CPS, had not been paid into the company.

(c) Janice deposed in her second witness statement that STIC "paid RM550,000 plus a premium of RM54,450,000 totalling RM55 million" for the CPS.[42]

[41] Para. 171(11) of the lower court judgment.
[42] Record of appeal II, bundle B, at p.115.17.

(d) During the cross-examination of the Appellant, she accepted that in proceedings in Malaysia she said that Realty had received the RM550,000 for the CPS in 2004.[43]

[114] As regards the payment of the RM2.2 million for the balance of the subscription price on the ordinary shares, there is abundant evidence that this amount was paid to Realty when the CPS were converted on 8th April 2013. The evidence includes Janice's oral evidence and her references to the relevant documents, bank statement entries showing the receipt of RM2,283,576.44 into Realty's account on 8th April 2013 from Centre View Ltd, an official receipt from Realty confirming the payment of RM2,283,576.44, and other evidence. The authenticity of the official receipt was challenged by the Appellant and there is no direct reference to the appellant's challenge in the Judge's judgment. However, in dealing with the evidence relating to the two disputed payments the Judge made findings of fact that clearly took account of the challenge to the authenticity of the official receipt in coming to his findings on the payments. He found at paragraph 145 that:

> "Even without the official receipt for the payment from STIC to Realty, the above evidence including the coincidence of the amount appearing in WTK Realty's accounts on the same day, the bank records showing the remittance, and the time difference between Malaysia and New York of which I take judicial notice, was sufficient on balance to show that the transfer of the money in for the credit of WTK Realty from Centre view was for the payment by or on behalf of STIC to WTK Realty. On the face of it, the documents support the view that as between Ambank and WTK Realty the shares were paid for by cash provided to WTK Realty, and the cash went into the capitalization as required by the bank to satisfy its special condition."

Paragraph171(11)is also relevant:

> "The Conversion was paid for at par value by STIC to WTK Realty and comprised the RM550,000 paid at the time of subscription and the RM2,200,000 at the time of Conversion."

[43] Record of appeal II, bundle H, trial transcript day 2 at p. 103, lines 3-21.

[115] In the circumstances, we do not accept the Appellant's criticism of the Judge's finding, that the two payments were made, was a bare finding without analysing the evidence. It is apparent from paragraph 145, and also paragraphs 139-143, that the Judge had regard to the evidence in the case, including the oral evidence of Janice and WKC, in coming to his conclusion about the payments. He referred to the disputed receipt, the bank records and Realty's relationship with Ambank in coming to his conclusions. All of this was in the context of his acceptance of Janice and WKC as truthful witnesses and Ms. Ma as a guarded witness. The Judge did not have to state in detail the evidence and documents that he relied on in coming to his conclusions on this or other findings of fact. What is required on appeal is that there was evidence to support his conclusions.[44] There is no basis for interfering with the Judge's finding that the two payments were made.

Expert evidence and breach of section 59 of the Malaysian Companies Act

[116] The Appellant submitted that the conversion of the CPS involves a breach of section 59 of the MCA because the 2.75 million ordinary shares of RM1.00 each that were issued for the converted CPS were issued at a discount. The discount would have come about either because the nominal subscription price of RM0.1 per share (RM550,000) for the CPS that was credited to the price of the ordinary shares was not paid in 2004 when the CPS were issued, and/or the balance of the subscription price of RM2.2 million for the ordinary shares was not paid on conversion in 2013. In either case, the full subscription price RM2.75 million for the ordinary shares was not paid and they were issued at a discount. Alternatively, even if these amounts were paid, the nominal price of RM550,000 for the CPS could not be credited to the subscription price for the ordinary shares thereby resulting in a discount of 20% on the price for the ordinary shares.

[117] This raises issues of fact and of Malaysian company law. The issues of fact have been disposed of earlier in this judgment by this Court's findings that the payments of the nominal price for the CPS of RM550,000 and the balance of the subscription price

[44] English v Emery (n 17)

for the ordinary shares of RM2.2 million were paid. This leaves the legal issue of Malaysian company law of whether the nominal price of RM550,000 for the CPS can be credited to the subscription price for the ordinary shares. Both sides led expert evidence of Malaysian company law to support their respective positions and the experts were cross examined. The judge dealt with the issue summarily by finding at paragraph 144 of the judgment that he preferred the expert evidence of the respondents' expert witness, Mr Gopal Sreenevasan, that the nominal price for the CPS could be credited to the subscription price for the ordinary shares and therefore there was no breach of section 59 of the MCA. He did not give reasons for his decision.

[118] Mr Crow, QC submitted, quite correctly in our opinion, that this was not good enough. He relied on the case of English v Emery Reimbold[45] where Lord Phillips MR observed at paragraph 20 of the judgment of the Court of Appeal that-

> "The first two appeals with which we are concerned involved conflicts of expert evidence. In *Flannery*'s case [2000] 1 WLR 377 Henry LJ quoted from the judgment of Bingham LJ in *Eckersley v Binnie* (1988) 18 ConLR 1, 77-78 in which he said that 'a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal'. This does not mean that the judgment should contain a passage which suggests that the judge has applied the same, or even a superior, degree of expertise to that displayed by the witness. He should simply provide an explanation as to why he has accepted the evidence of one expert and rejected that of another. It may be that the evidence of one or the other accorded more satisfactorily with facts found by the judge. It may be that the explanation of one was more inherently credible than that of the other. It may simply be that one was better qualified, or manifestly more objective, than the other. Whatever the explanation may be, it should be apparent from the judgment."

The judge's failure to give reasons for preferring the Respondents' expert's evidence over the Appellant's expert puts this Court in a difficult position. Conclusions based on the assessment of expert evidence of foreign law are findings of fact that should be made by the trial judge who had the benefit of observing the experts give their evidence. The role of the Court of Appeal is to review the findings of fact made by the

[45] (n 17).

trial judge. This leaves us with two options: to send the case back to the Commercial Court for retrial or to review the material that was before the Judge and make the necessary findings. The inconvenience and expense of a retrial in this case are enormous and for obvious reasons it is undesirable for this Court to make the necessary findings. But both options must be considered.

[119] We have reviewed the expert evidence consisting of the reports by the two experts, the transcript of their oral evidence in the lower court, and counsels' submissions. The trial lasted seven days, the material before the Judge and this Court is extremely voluminous (the record of appeal consisting of just over forty thick binders), and the judgment of this Court is anxiously awaited by the parties and the courts in Malaysia and elsewhere. We have decided, on balance, that the better way forward is for this Court to make the necessary findings of Malaysian law relating to conversion of the CPS based on the printed material before us.

[120] The experts were required to opine on whether the ordinary shares were issued at a discount or as fully paid shares by applying the payment of the RM550,000 for the CPS in 2004 as a credit towards the subscription price, all in the context of the MCA, and in particular section 59 of the Act. Section 59(1) reads -

> "(1) Subject to this section, a company may issue shares at a discount of a class already issued if –
> The issue of the shares at a discount is authorised by a resolution passed in general meeting of the company, and is confirmed by order of the Court;"

It is not disputed that section 59(1) is aimed at preserving the capital of a company and if shares are to be issued at a discount the resolution authorising the issue must be approved by the company in general meeting and confirmed by the court. If the ordinary shares in this case were issued at a discount (as contended by the Appellant) the Conversion would have required court approval under section 59(1) which would have given Ms. Ma the opportunity, as a shareholder of Realty, to object to the Conversion. She contends further that the breach of section 59 and the loss of

the opportunity to challenge the Conversion resulted in unfairly prejudicial conduct to her.

[121] There are no provisions in the MCA allowing companies to issue convertible shares, and consequently, no provisions saying how they can be converted. In this case, the CPS were issued as a matter of contract pursuant to the Subscription Agreement and Realty's memorandum of association (as amended). No issue was raised that the CPS were illegally issued. The issues of foreign law relate to the procedure for converting the CPS to ordinary shares.

[122] The Appellant's expert, Mr. P. Gananathan Pathmanathan, opined that the procedure for converting the CPS had to comply with the provisions of the MCA and the only provision that could be used to effect the Conversion was section 61 dealing with the redemption of shares. Further, that the RM550,000 could not be credited to the subscription price for the ordinary shares which were therefore issued at a discount. As a result, the procedure for the Conversion in this case had to be in three steps. First, the CPS had to be cancelled which necessarily involves a reduction in Realty's capital, and the reduction had to be approved by the court. In step two, the paid-up capital for the CPS, that is, the RM550,000, had to be returned to STIC. And finally, STIC had to return the RM550,000 that it had just received to Realty to complete the subscription payment for the ordinary shares. Mr. Pathmanathan agreed that the payment out and back into Realty was a paper transaction, but it had to be done that way to comply with the requirements of the MCA.

[123] The Respondents' expert, Mr. Gopal Sreenevasan, did not agree with the suggested procedure posited by Mr. Pathmanathan. In his Supplemental Report, he expressed the following view –

> "13 In answering this question, I would first reiterate the rationale for Section 59 of the Act … In short, it is to protect creditors by ensuring that shareholders are liable up to the par value of the shares issued to them.
>
> 14. The question posed at paragraph 4.2 above must be looked at against this backdrop, in other words, whether the RM550,000.00 formed part of

> the paid up capital, such that it could not be taken into account as part payment for the ordinary shares that were issued as a result of the Conversion.
>
> 15. I should begin by saying that I have not been able to find a Malaysian case that deals specifically with the treatment of such a payment in the event of conversion.
>
> 16. That said, in my view the answer to this question lies not so much in asking the fate of the RM550,000.00 but rather the fate of the CPS themselves. The starting point for this analysis is a consideration of what transpires as a matter of contract as a result the Conversion, followed by its effect on the share capital of WTKR from a statutory perspective.
>
> 17. Clause 4 of the First Schedule of the Subscription Agreement…as amended by Special Resolution No. 2, provides that the CPS shall be converted into ordinary shares in WTKR at the conversion ratio of 1 ordinary share in the company for every 20 CPS. There is no provision for the life of the issued CPS beyond this in the Subscription Agreement or in the Memorandum of WTKR. In my view, therefore, as a matter of contract between WTKR and STIC, the CPS are surrendered upon conversion, and extinguished therefore."[46]

In short, Mr. Sreenevasan posited that the RM550,000 could be credited to the subscription price for the ordinary shares because the Conversion did not involve a reduction of capital requiring court approval (as in a redemption of shares), but a substitution of one type of share for another. The paid-up capital of the Realty remained unchanged.

[124] Both experts agreed that there are no decided cases in Malaysia dealing with the procedure for converting preference shares. However, Mr. Sreenevasan relied on two external authorities to support his position.

[125] He referred to the third edition of Robert R Pennington's Company Law textbook, at page 253, where the learned author lists five alternate ways that shares can be converted. The first of the five listed methods is –

> "By the company consolidating or subdividing the original shares into ordinary shares with a higher or lower nominal value each, the paid up capital

[46] Paras.13-17 of the supplemental expert report of Gopal Sreenevasan.

in respect of the original shares being allocated proportionately to the new shares;"

He opined that this supports his view that the CPS could be converted to ordinary shares with the paid-up capital in respect of the CPS being allocated proportionately to the new ordinary shares.

[126] Mr. Sreenevasan also relied on a decision from the Supreme Court of New South Wales in Re Arrowfield Group Ltd[47] where Cohen J had to deal with an application to approve a scheme that included resolutions for reduction of capital and the conversion of "converting preference shares" to ordinary shares. The converting preference shares were entitled to a fixed cumulative dividend and were convertible to ordinary shares within two years. A shareholder objected on several grounds including that the conversion of the converting preference shares would involve a reduction of capital when they were converted to ordinary shares within the two year period. Cohen J approved the resolution for converting the shares. Mr. Sreenevavsan referred extensively to the judgment of Cohen J in particular pages 654-655. He noted the distinction made by Cohen J between the redemption of preference shares and the conversion of such shares, noting that the former necessarily involves the return of capital to the shareholder while a conversion involves the substitution of shares. We will mention just two of the passages cited by Mr. Sreenevasan that are directly relevant to the facts of this case. At page 655 Cohen J opined that –

> "In the proposed scheme, there is no right for the converting preference shares to be paid out at all. The only right is to receive, in lieu of those shares, ordinary shares in the company. Although the capital is maintained, this is not brought about by the issue of shares producing cash, which then becomes available to pay the holders of the preference shares. There is merely the substitution of one type of share for another, and in my opinion, this could not be regarded as a right of redemption."

[47] (1995) 17 ACSR 649.

He went on to state:

> "As to the first of those matters, it is said that there will be a loss of capital by the disappearance of the converting shares. What is being protected however by legislation dealing with reduction of capital, is a wrongful loss of capital. If new [ordinary] shares are allotted and converting shares are surrendered, on a one for one basis, there will be a reduction in the converting preference shares but not in the company's capital.
>
> A distinction must be drawn between a loss of capital and a loss of shares. In the latter case, if they are replaced by other shares, then there is no loss of capital of the company. What will happen is that those shares are represented by different shares, and the subscribed capital is not any way reduced."

[127] We agree with Mr Sreenevasan's summary of the Arrowfield case at paragraph 22 of his supplemental report that -

> "What emerges from *Re Arrowfield* is that a distinction must be drawn between a loss of capital and loss of the shares. Converting the CPS therefore results in the surrender and extinguishment of the CPS meaning the shares, but not WTKR's capital because those shares are replaced by different shares, namely, in our case, the ordinary shares. Accordingly, a conversion of the CPS does not mean that the paid up capital is also correspondingly reduced."

[128] Mr. Crow submitted that Mr Sreenevasan's analysis of the Arrowfield case was incorrect, and that the case was decided *per incuriam* because Cohen J did not deal with the decision of the Simons J sitting in the Chancery Division in England in **In re St. James' Court Estate, Limited.**[48] The *per incuriam rule* does not apply to Cohen J's decision in Arrowfield because decisions of the Chancery Division in England are not binding on Cohen J sitting as a judge of the Supreme Court of New South Wales. Also, we are not satisfied that if the St James Court case was brought to the attention of Cohen J it would have made a difference to his decision. St James Court was an entirely different case. It dealt with redeemable preference shares that were not convertible, and section 46 of the 1929 Companies Act which concerns the redemption of preference shares. Simons J , in a 17 line judgment, noted that the conversion of redeemable preference shares necessarily

[48] [1944] 1 Ch 6.

involves a reduction of capital when the shares are redeemed, and an increase in capital when the new shares are issued. The facts of this appeal are different. The CPS were issued as convertible shares and upon conversion the shareholder was not entitled to a return of the consideration that he paid for the shares, but to the issue of a proportionate amount of ordinary shares. There was no loss of capital. This, as pointed out by Cohen J, is different from the conversion of preference shares.

[129] The Arrowfield case was applied in the later case of HIH Insurance Limited (in liquidation)[49] that was handed up to the Court by Mr Alexander during his oral submissions. The case is a decision of the Supreme Court of Australia where Graham J considered and approved the reasoning of Cohen J in the Arrowfield case and quoted extensively with approval the dicta from pages 654-655 of his judgment dealing with the conversion of shares. These are substantially the same dicta that Mr. Sreenevasan relied on in his supplemental report

[130] Finally, we accept Mr Sreenevasan's conclusion at paragraph 27 of the Supplemental Report that –

> "Whilst there is no Malaysian authority on this point, I would suggest that it is more likely than not that the reasoning in *Arrowfield* and *Pennington* would be accepted if the point were to arise in Malaysia, for reasons I have stated in paragraphs 17 and 18 above."

[131] Having considered the printed material before this Court on the issues of Malaysian law, we prefer the reasoning and conclusions of Mr Sreenevasan. We do so mainly because of his conclusions about the basic principles of convertible shares; he made the important distinction between convertible shares and redeemable shares; there was no reduction of capital by the conversion which is the mischief that section 59 is aimed at preventing; and he supported his conclusions by a decided case from the New South Wales Supreme Court which we have found was not decided *per incuriam* and was approved by a later case of

[49] (2008) 66 ACSR 20.

the Federal Court of Australia. We therefore agree with his findings that the RM550,000 was properly credited to the subscription price for the ordinary shares; that there was no reduction of the share capital of Realty; and that there was no breach of section 59 of the MCA. Therefore, court approval of the conversion was not necessary.

[132] We have also considered the Respondents' submissions that there are no provisions in the MCA that a failure to comply with the requirements of section 59 nullifies the transaction in the conversion of shares that are being challenged. The consequences of a breach of the section are set out section 59(7) which provides that -

> "(7) If default is made in complying with this section, the company and every officer of the company who is in default shall be guilty of an offence against this Act."

Even if there was breach of section 59 it would be the officers of the Realty who would be liable to punishment in separate criminal proceedings. It is difficult to see how a breach of section 59 of the MCA would be unfairly prejudicial to the Appellant in her capacity as a shareholder of STIC.

Section 175 of the BC Act

[133] The Appellant also contended that the conversion of the CPS by WKY and WKC was a breach of section 175 of the BC Act and that as a result the CPS should be set aside by the Court. Section 175, so far as is material, provides:

> "175. Disposition of assets
>
> Subject to the memorandum or articles of a company, any sale, transfer, lease, exchange or other disposition, other than a mortgage, charge or other encumbrance or the enforcement thereof, of more than 50 per cent in value of the assets of the company, other than a transfer pursuant to the power described in section 28(3), if not made in the usual or regular course of the business carried on by the company, shall be made as follows:
>
> (a) the sale, transfer, lease, exchange or other disposition shall be approved by the directors;

(b) upon approval of the sale, transfer, lease, exchange or other disposition, the directors shall submit details of the disposition to the members for it to be authorised by a resolution of members;

(c) if a meeting of members is to be held, notice of the meeting, accompanied by an outline of the disposition, shall be given to each member, whether or not he is entitled to vote on the sale, transfer, lease, exchange or other disposition; and

(d) if it is proposed to obtain the written consent of members, an outline of the disposition shall be given to each member, whether or not he is entitled to consent to the sale, transfer, lease, exchange or other disposition."

It is correct, as the Appellant contends, that the section 175 does not provide for the consequences of a breach of the section. However, that contention fails to recognise that the purpose of the section is to confer certain rights on shareholders who dissent from a proposed disposition of more than 50% value of the assets of the company. Such a shareholder is entitled to exercise his or her rights pursuant to section 179(1)(c) to obtain the fair value of his shares.

[134] However, the critical issue is whether section 175 applies to a transaction involving the conversion of shares as in this case. The Appellant contended that the only question was whether the rights attached to the ordinary shares represented a different set of rights attaching to different property. STIC had purchased preference shares which carried a built-in right to be converted into ordinary shares. In our view, the Judge rightly concluded that, 'all that the Company had done is to exercise its contractual right to "convert".' It was the exercise of the right inherent in the preference shares. Accordingly, the exercise of that right did not come within section 175.

[135] The Appellant further submitted that STIC held the CPS as its only asset with the result that the Conversion was neither usual nor in the ordinary course of business. We are unable to accept the proposition that the sale or other disposition of a holding company of its only asset renders such sale or other

disposition outside the usual or regular course of business. In Ciban Management Corporation v Citco (BVI) Limited et al, [50] at paragraph 67, Bannister J said in relation to the forerunner of section 175:

> "Its purpose is to ensure that directors do not use their powers in order to dispose of assets of a company on ventures to which its members have not signed up. I cannot see how it can be said that a sale of the property was not in the usual or regular course of Spectacular's business. Spectacular's business was that of a property holding company. In the nature of things property holding companies dispose of, as well as acquire property."

The dicta of Bannister J apply to the section 175 point in this case, mutatis mutandis.

[136] In conclusion, the Court rejects the Appellant's submissions that the Conversion contravened section 175 and that the contravention constituted a separate ground for relief under section 175. The Court is not persuaded that the exercise of a contractual right attaching to the preference shares to convert them to ordinary shares is a sale or other disposition of more than 50 per cent in value of the assets of STIC. The Conversion was not made outside the usual or regular course of its business, although STIC effected no other transaction during the period under reference.

Loss of Substratum

[137] Apart from contending that the Conversion of the CPS was in breach of section 175 of the BC Act, the Appellant also contended that as STIC's only function was to hold the CPS, and since the CPS have been converted to ordinary shares, that function can no longer be performed. We do not agree with this submission for two reasons. First, the Judge found that none of the objects listed in STIC's memorandum of association say that the company's object was to hold the convertible preference shares in Realty.[51] Put another way, there is nothing in STIC's memorandum of association restricting the company to holding the CPS

[50] BVIHCV2007/0301 (delivered 27th November 2012, unreported).
[51] Para.175 of the lower court judgment.

as convertible preference shares. Secondly, the submission loses sight of the true nature of the CPS that we outlined in the preceding section of this judgment - STIC had a contractual right to convert the CPS, and, having converted them, the company held the 2,750,000 ordinary shares and had a continuing obligation to do so.

[138] The Judge rejected the argument that STIC lost its substratum and we affirm his decision on the point.

Dividends not paid

[139] The Appellant complained in her pleadings, witness statement and oral evidence that as a beneficial shareholder of STIC she has not received any dividends. This is unsurprising since she acquired her beneficial interest in the shares after the Conversion when the non-cumulative preference dividend on the CPS was no longer payable to STIC, and there is no evidence that STIC has had any other distributable profit since the Conversion.

[140] The evidence is unclear whether dividends were paid by STIC to its shareholder prior to the Conversion. The judge found, and it is not disputed, that the only dividend that was being paid up to the time of the Conversion was the annual dividend on the CPS from Realty to STIC. The annual payment was the equivalent of US$5,550 per annum. If the entire amount was distributed by STIC to its sole shareholder, the three beneficial shareholders would have received US$1,800 per annum each. In the context of STIC acquiring a 14.4% equity interest in Realty which has a value of approximately US$250 million, the non-payment of dividends (on the CPS) was de minimis. The Judge concluded by noting that the Appellant had not been unfairly prejudiced by the non-payment of dividends and suggested that if there are any dividends to which she (or the estate) is entitled it should be paid forthwith. In the context of this case, we affirm the judge's finding that the non-payment of dividends did not amount to unfair prejudice to the Appellant.

Withholding Information

[141] The Appellant complained in ground 18 of the notice of appeal that the Judge did not consider the withholding of information by STIC to be unfairly prejudicial, or unfairly discriminatory or oppressive. The Respondents disputed this complaint. They submitted that the Appellant was provided with all the information to which she was entitled under section 100 of the BC Act as soon as she became a shareholder of STIC. The Judge also referred to a higher duty of disclosure in the case of Oak Investment Partners XII Limited Partnership v Boughtwood[52] where the requesting party is a shareholder of a company that is operated as a quasi-partnership and the shareholders are entitled to all relevant information about the company. However, he went on to find that STIC was not operated as a quasi-partnership and therefore did not have to disclose more information than is required by section 100 of the BC Act. He concluded as a fact that:

> "There is no evidence to support the claim that STIC has been oppressive, unfairly prejudicial or unfairly discriminatory in not providing Ms Ma with information. On the evidence she has been supplied with what is required by law and the circumstances."[53]

This is a finding of fact by the judge that has both a statutory and evidentiary basis and there is no reason why we should interfere with it. There was no breach of STIC's disclosure obligation to the Appellant.

Witnesses not called

[142] The Appellant complained in ground 23 that the Judge should have drawn adverse inferences from the Respondents' failure to call certain witnesses namely, WKY, Mr. Lo, and Mr. Gary Sim, and in any event the Judge should not have relied on the two witness statements of WTK unless they were verified independently by other reliable evidence. The Judge dealt with the absence of WTK and Gary Sim at paragraph 153 of the judgment and did not make an adverse finding as to their absence. He said that he relied on the contemporary documents and circumstances themselves. We

[52] [2010] 2 BCLC 459 at para. 119.
[53] Para. 171(10) of the lower court judgment.

were not directed to any part of the judgment where the Judge's findings were dependent on the WTK's witness statements. For example, WTK was at the family meeting in Sydney and could have given important evidence of what transpired at the meeting. However, direct evidence of what was said and agreed at that meeting was given by WKC and Janice and the Judge accepted their evidence. Further, his finding of the dominant purpose for the Conversion was supported by the evidence of WKC and Janice and contemporaneous documents including Neil's email to Helen Lo referred to above. He did not have to rely on the WTK's witness statements to make his findings.

[143] This Court does not doubt that the presence of the potential witnesses could have contributed to the Respondents' case, but their absence can be seen more as a lost opportunity to support the Respondents' case, rather than a reason to draw adverse inferences.

[144] We should also mention that Neil, who was at the family meeting, could have given evidence that supported the Appellant's second-hand evidence of what was said at the meeting. He was not called as a witness for the Appellant even though he was present in court during the trial and was therefore available. We do not find any merit in this ground of appeal.

Cases in Malaysia

[145] The parties in this appeal are involved in numerous court proceedings in five different countries regarding the companies and individuals in the WTK Group. Most of the on-going litigation is in Malaysia. Three of the proceedings in Malaysia were mentioned in the evidence in the Commercial Court and are relevant to this appeal.

[146] The Appellant applied in case number SBW-28NCC-2/5-2017 to the High Court of Malaysia for the winding up of Realty. She made similar applications in respect of two other companies in the WTK Group. The High Court ordered the winding up of the three companies on the just and equitable ground on account of the irretrievable

breakdown of the family relationship.[54] The winding-up orders were made on 6th November 2017, the final day of the trial in the Commercial Court. The order in respect of Realty was mentioned by counsel on both sides during their oral closing submissions. Realty and the other two companies have appealed against the High Court's decisions and the hearing of the appeals is pending. The Judge did not deal with the winding-up order for Realty, nor the appeal against the order.

[147] Mr. Crow submitted that the winding up order in respect of Realty is important for two reasons. First, it shows that Realty is part of a family of companies and that the relationships extend beyond the Brothers. Second, the winding up order could have an impact on the issue of the claimed loss of substratum of STIC. If the High Court's decision is confirmed on appeal these issues may become important. For the time being we will attach little, if any, significance to the findings in the case.

[148] On 28th March 2013, WKC applied to the High Court in Malaysia in claim number OS 39 to set aside the issue of the 4 million shares issued to WKN in September 2007. The claim was heard and a decision is pending.

[149] On 29th April 2014, WKC applied in a claim number SBW-22NCvC-14/4-2014 (HC) ("14/4") to set aside the transfer of the 1,252,000 shares from WTK to WKN in August 2004.[55] On 3rd July 2018, the High Court set aside the transfer of the 1,252,000 shares as being made unlawfully and fraudulently, and declared it to be null and void. The Appellant has appealed against the decision.

[150] The Judge's conclusion on claims OS 39 and 14/4 is set out at paragraph 170 of the judgment:

> "These cases are well advanced in the Malaysian courts. In the interest of comity, I will not decide on these issues which have been fully ventilated in the Malaysian courts and [are] awaiting judgment in one case. The court agrees with Mr. Crow QC that it is not necessary to do so to decide the issues in this case."

[54] Record of appeal II, bundle E, vol. 14 at pp. 4737- 4740.
[55] Record of appeal II, bundle E, vol.4 at p. 993.

We propose to adopt a similar approach in considering the Malaysian cases. There are no settled decisions in any of the cases and it is not necessary to adopt any of the findings made to date for the purpose of disposing of this appeal.

[151] Before leaving the issues raised by the Malaysian proceedings, we should mention a submission made by Mr. Crow when he was dealing with the Appellant's claim under section 121 of the BC Act that the Conversion was for an improper purpose. He submitted that the Respondents' position was that, but for the issue and transfer of additional shares to WKN, they would have had two-thirds of the shares of Realty and therefore majority control of the company. Therefore, the real reason why WKC filed OS 39, and the proper inference to be drawn from the filing, is that the Respondents felt justified in effecting the Conversion to take back voting control of the Realty (and not for any commercial purpose). In effect, it was the second part of an attack on two fronts,[56] the Conversion being the first part of the attack.

[152] The Judge should not be faulted for not drawing this inference or even mentioning it in his judgment. It was not included in the very elaborately drafted grounds and sub-grounds of appeal, and arose only in cross-examination of WKC and in the submissions in this Court and in the court below. WKC's evidence is that he filed claim OS 39 as soon as he became aware of the issue of the 4 million shares to WKN shortly before the board meeting of Realty on 22nd March 2013.[57] The object of the claim, as stated in the originating summons, was to set aside the issuance of the 4 million shares in breach of the MCA. The Judge obviously did not accept that the claim to set aside the issue of the shares was to regain control of Realty. Further, the suggested inference is even more difficult to draw with respect to the filing of claim 14/4 in April 2014, more than one year after the Conversion.

[56] Para. 31 of Appellant's closing submissions at trial. See also appeal transcript pp. 100-105.
[57] Record of appeal, bundle H, vol.2 at p. 16 lines 12-13; See also para. 29 of witness statement of WKC, Core bundle C at p. 80.

Summary on the Main Appeal

[153] The Judge's findings on the main issues in the trial are affirmed and we find that the CPS were not converted for an improper purpose. The Conversion benefited STIC by enhancing its investment in Realty and it did not breach the provisions of section 59 of the MCA. The Appellant, though she lost majority control of Realty, was not unfairly prejudiced by the Conversion or any of the other alleged actions by the Respondents and/or STIC such as non-payment of dividends or withholding information.

[154] The foregoing conclusions are sufficient to dismiss the Main Appeal, but out of deference to the very complete and eloquent written and oral submissions of counsel we will deal with the issue of the winding up of STIC under section 159(1) of the Insolvency Act on the just and equitable ground. This will only be relevant if it is later found that the 6th November 2017 amendment was wrongly refused, or the Appellant was unfairly prejudiced by the conduct of the Respondents.

Just and equitable winding up

[155] Section 159(1) of the Insolvency Act provides that the Court may appoint a liquidator of a company on an application under section 162. Section 162(1)(b) provides:

> "(1) The Court may on the application by a person specified in subsection (2), appoint a liquidator of a company under section 159(1) if…
>
> (b) the Court is of the opinion that it is just and equitable that a liquidator should be appointed;"

Section 162(1)(b) creates a statutory judicial discretion to wind up a company on the basis of shareholder expectation. Section 162 must be read with section 167(3) of the Act which provides that the Court ought not to appoint a liquidator on just and equitable grounds if it is of opinion that some other remedy is available to the applicant. In the instant case the remedy of a buy-out was reasonably available to Ms Ma. She herself had claimed it (but not pursued it), and the learned judge has already ordered a buy-out of her shares. The BVI courts have also expressed the view that

before a winding up order is made "the Court must be convinced that there is no other remedy or relief available to the applicant."[58]

[156] It is also useful to bear in mind the dicta of Neil LJ in Re Saul D Harrison v Harrison and Sons plc[59] – '…whereas a winding-up order on just and equitable grounds will terminate the existence of the company a wider range of remedies is available under s. 461.' Section 461 of the UK Companies Act 1985 sets out the remedies that are available to a person who petitions under section 459 on the ground unfair prejudice.

[157] Each application for a winding-up on just and equitable grounds must be based on findings of fact. For the reasons set out earlier in this judgment, we do not find on the facts evaluated by the learned judge, that he was plainly wrong or that his findings on credibility, especially the credibility of Janice Ting, were glaringly improbable or compellingly erroneous when viewed in the light of all the evidence.

[158] The classic case on winding up on the just and equitable ground is Re Westbourne Galleries Ltd.[60] On appeal, the sole issue was whether the company and the individual respondents were entitled to a restoration of a winding-up order made on the basis that the court was 'of the opinion that it was just and equitable that the company should be wound up' under section 222(f) of the Companies Act 1948. The House of Lords restored the winding-up order. Lord Wilberforce described the statutory judicial discretion to wind up thus:

> "The words [just and equitable] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure… The "just and equitable" provision does not… entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations;

[58] See: Imran Saeed Chaudhry v Sat Star Distribution Ltd. BVIHCV2005/0111 (delivered 24th January 2006, unreported).
[59] [1994] BCC 475 at 499.
[60] [1973] AC 320.

> considerations, that is, of a personal character arising between one individual and another which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way."[61]

[159] Lord Wilberforce then said that it would be undesirable and perhaps impossible to list all the circumstances in which equitable considerations might arise. He continued thus: '[c]ertainly the fact that a company is a small one, or a private company, is not enough.'

[160] The details of STIC have already been set out in this judgment. It is a small company having been bought "off the shelf" to hold the CPS. It is not involved in the running of the businesses operated by the companies in the WTK Group. Its sole shareholder is Gainsville Limited, a BVI company, which held the shares in trust for the Brothers equally. The sole director and the alternate director are not members of the Wong family.

[161] In the instant appeal, the event that the Appellant complains of is the Conversion of the CPS into ordinary shares. We have found that the Conversion was for a proper purpose and that it benefitted STIC. In fact, viewed in isolation there is nothing unusual about the conversion. It was the exercise of a contractual right. It only assumes importance in this case because of its effect on the voting power in Realty.

[162] Each application for a winding-up on just and equitable grounds must be based on findings of fact. For the reasons set out earlier in this judgment, we do not find on the facts evaluated by the Judge that he was glaringly wrong or that his findings on credibility were plainly wrong when viewed in the light of all the evidence. The Judge found that there was no common understanding, consensus or agreement between the Brothers in relation to the conversion of the CPS and the terms and conditions for same.[62] He also found as fact that STIC was not operated as a quasi-partnership and

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[61] [1973] AC 320 at p.379.

[62] Para.171(3) of the lower court judgment.

there was no common understanding, consensus or agreement between the three Brothers as to how matters in relation to STIC would continue after the three Brothers' deaths.[63] These are all findings of fact by the Judge which we have found have bases in the evidence. Further, there is no evidential basis for thinking that the deceased WKN had any expectation that his executrix or his heirs would not agree to the conversion of the CPS in the absence of unanimous agreement by the beneficial shareholders.

[163] Thus, the Judge found that there was no Shareholders' Agreement and no Family Agreement. Further, he held that in the absence of a quasi-partnership between the three Brothers and/or a quasi-partnership between the Claimant on the one hand and WKY and WKC on the other, there was no basis for a claim of breakdown of mutual trust and confidence between the quasi-partners.

[164] The suggestion that STIC's purpose was spent because it no longer held the CPS was rejected because the objects of STIC in its memorandum do not refer to the holding of shares in Realty, and the very nature of the CPS means that the company still has a real function to perform.

[165] In our view, based on the findings of fact by the Judge at paragraph 171 of the judgment, which, on the principles enunciated earlier in this judgment, we do not disturb, we are constrained to find that this is not a proper case for a winding up on the just and equitable ground.

[166] The Appellant sought to rely on Chow Kwok Chuen v Chow Kwok Chi and another,[64] a decision of the Court of Appeal of Singapore, which the Appellant contended was the basis on which her claim for a winding-up principally rested. The case involved three companies that were set up by the deceased to hold the assets that he had accumulated over the years. He had three sons and a daughter. The

[63] Para. 171(5) of the lower court judgment.
[64] [2008] 4 SLR(R) 362.

three sons took over the business after his death. They were the directors of the companies. The relationship between the brothers broke down to the point where the companies became mired in a three-way deadlock. One of the brothers petitioned to wind up the companies. The High Court granted the petition and the winding up order was appealed. Another brother, Chuen, appealed because he did not want the companies to be wound up. The Court of Appeal affirmed the winding up order noting in the process that the companies were family companies in the nature of quasi-partnerships, trust and confidence had broken down, and the companies were deadlocked. Further, all but one of the siblings wanted the companies wound up so that they could get their share of the assets and there was no way, other than winding up, to achieve this. The following observations of the Court are noteworthy:

Paragraph 47 –

> "Given the clear desires of the majority of the family members to wind up the Companies, liquidate their assets, and go their separate ways, it is unfair to allow one sibling to thwart the intentions of the other three… just because he holds enough shares in each of the Companies to prevent a voluntary winding-up."

Paragraph 45 –

> "In view of the brothers' equal contributions to the three-way impasse in the Companies' management, it would not be right, in the circumstances, to allow Chuen to effectively freeze the assets of his two brothers and sister, since Chuen cannot afford to buy them out, nor would a sale of their shares to third parties be practically viable. Therein lies the unfairness in the present case warranting a court ordered winding up."

Paragraph 37 –

> "Therefore the Judge did not hold that the breakdown in the relations in the family companies would, *per se*, be a ground for just and equitable winding up without the need to show deadlock in management. She did not create a novel ground for winding up as the appellant appears to suggest; instead she considered the parties' desires and accordingly weighed these factors in coming to her decision."

[167] The ultimate decision in the case turned on the fact that the companies were deadlocked and court's view that the feuding siblings should not be forced to stay in a relationship where all but one wanted liquidation and distribution of the companies' assets. It was not the breakdown of the relationship per se that led to the making of the winding up order, but the unfairness of locking the majority into a highly undesirable situation.

[168] It is immediately apparent that the Chow Kwok Chuen is distinguishable from the instant case. The Respondents comprise the majority shareholders of STIC and can make decisions and pass resolutions. The director is a non-family person and can make decisions and pass resolutions. There was no deadlock, actual or practical, in the management of the company, and it continued to function after the Conversion. Further, in Chow Kwok Chuen the companies had been founded by the patriarch, Mr. Chow 'to accumulate wealth. All the directors and shareholders were members of the same family whom the late patriarch expected to get along and uphold the family name and legacy. Thus mutual trust and confidence were inherently essential to Mr. Chow's objective in incorporating the companies.'[65]

[169] Counsel for the Respondents pointed out, rightly in our view, that there was no evidence in the present case of the circumstances in which STIC was incorporated in 1996. We were told by counsel that it was acquired "off the shelf" and that it was not used for any purpose other than to hold the CPS.[66] There is no evidence to dispute this and we accept counsel's assistance on the point. There is also nothing to suggest that the patriarch, WTK, was involved in the setting up of STIC. He was seriously ill in 2004 when STIC was used to hold the CPS. WTK was never a shareholder or a director of STIC. Further, none of the children of the Brothers were shareholders or directors of STIC. The sole director and alternate director were not members of the Wong family. The company was not an integral part of the businesses comprising the WTK Group – its function was to hold the CPS and that function continued after the

[65] [2008] 4 SLR(R) 362 at para. 34.
[66] Appeal transcript day 1 at pp.17-18

Conversion. The company is not deadlocked and a buy-out of Ms Ma's shares is a viable option. For these reasons, we consider that Chow Kwok Chuen is distinguishable on its facts from the instant case.

[170] Mr. Crow also relied on the Chow Kwok Chuen case and the decision of the High Court in Singapore in Lin Choo Mee v Tat Leong Development (Pte) Ltd and others,[67] to submit that STIC was a family company and as such when the trust and confidence broke down following WKN's death the company should be wound up. We are not satisfied that these cases establish a rule that where there is a so-called family company it must be wound up once there is a breakdown in trust and confidence. The headnote of the Chow Kwok Chuen case recognised that "…not all family companies would automatically be analogous to a quasi-partnerships".[68] In our opinion, the Singapore cases go no further than saying that where a company is closely held and controlled by members of the same family, and there is a breakdown of trust and confidence, the court is more likely to find that the company should be wound up if there is unfairness such as what occurred in the case. The breakdown of trust and confidence *per se* was not enough. The decision to order winding up remains a matter of fact in each case.

[171] Having regard to the Judge's decision on the application for the late amendment of the claim and the sharp factual distinctions between the present appeal and the *Chow Kwok Chuen* case, the Judge did not err in not mentioning the latter in his judgment.

[172] We have also had regard to the English case of Fisher v Cadman and others[69] which is referred to in Lin Choo Mee v Tat Leong Development (Pte) Ltd and others. The case involved a small family company run as a quasi-partnership owned equally by three siblings. On the death of one of the siblings, his widow did not get along with the remaining siblings and she petitioned for relief under the equivalent provision to our section 184I of the BC Act. The court did not order the winding up of the company

[67] [2015] SGHC 99.
[68] See 3rd held point in the headnote.
[69] [2005] EWHC 377.

which was still viable and operating. It ordered the remaining siblings to purchase the shares of the widow of the deceased sibling.

Conclusion

[173] In the present case, the Judge properly refused the application to amend the claim to include a free-standing claim for just and equitable winding-up. But even if he had granted the amendment, or if he had found that Ms. Ma was unfairly prejudiced and entitled to relief under section 184I, we think that the judge would have rejected the claim for winding up. The Judge made critical findings of fact (already upheld) that would have precluded an order to wind-up on the just and equitable ground. Further, we do not accept the concept of a dynastic or family company on the facts of this case. But even if STIC was in law a family company, there was a clear alternative remedy of a buy-out. It is more likely that the Judge would have done as the judge did in Fisher v Cadman and order a buy-out. In fact, this is what the Judge did, only that the buy-out that he ordered was not pursuant to a winding up or unfairly prejudicial order.

[174] In all the circumstances, we confirm the Judge's finding that the Appellant was not unfairly prejudiced by the conduct of the Respondents' and was not entitled to relief under section 184I of the BC Act. We go one step further and find that even if there was a finding of unfair prejudice there was an alternative remedy available of a buy-out of the Appellant's shares in STIC which is the subject of this appeal.

Order

(1) The Amendment Appeal and the Main Appeal are dismissed, and the orders made by the Judge are affirmed.

(2) Costs of both appeals to the Respondents and STIC at the rate of two-thirds of the costs assessed in the lower court.

(3) The Fresh Evidence Application is dismissed with costs to the Respondents to be assessed if not agreed within 21 days of the date of this order.

(4) This order will become effective when the written judgment is delivered to the legal practitioners for the parties.

[175] We gratefully acknowledge the immense help received from lead counsel and those assisting them.

Paul Webster
Justice of Appeal [Ag.]

Rolston Nelson
Justice of Appeal [Ag.]

Douglas Mendes
Justice of Appeal [Ag.]

By the Court

Chief Registrar