



DIRECTORS DUTIES – THE PRIVY COUNCIL OVERTURNS CONCURRENT FINDINGS OF FACT OF ITS LOWER COURTS

The Privy Council has recently handed down its decision in the case of *Byers v Chen Ningning* [2021] UKPC 4. The decision provides an example of the rare occasions in which the Privy Council will overturn findings of fact from the lower courts and provides important guidance and findings of breach of fiduciary duty of a director in a BVI registered company.

The liquidators' legal team was comprised of Stephen Smith QC and Ben Griffiths of Erskine Chambers, together with HFW (as Privy Council agents) and Lennox Paton.

This decision is of significance to commercial practice in the BVI and provides welcome guidance to directors of BVI companies as well as to appointed insolvency practitioners who might be faced with bringing proceedings for and on behalf of a company against former directors for breach of their duties whilst in office. This judgment also provides further commentary and assistance on when it will be appropriate for an appellate court to intrude upon and reassess findings of facts by lower courts. In this case the Privy Council overturned decisions of both the BVI High Court and the Eastern Caribbean Court of Appeal.

1. The facts of this case relate to a BVI company called Pioneer Freight Futures (“PFF”) which was incorporated and established for the purpose of trading forward freight agreements. The futures contracts that PFF entered into related to rates for the shipment of freight, which allow shipowners and traders to manage their future exposure to the volatility of freight rates and costs.
2. In October 2009, and as a result of litigation that had taken place in London, PFF acknowledged that it was commercially insolvent. Shortly thereafter, in November 2009, PFF repaid a loan of US\$13 million in three tranches to a company called Zenato Investments Limited (“Zenato”), which had been entered into in May 2009. A matter of weeks after the loan was repaid, in December 2009, PFF was caused to enter into liquidation at the hands of its sole director (“Miss Chen”).
3. In 2014, after carrying out their investigations, the liquidators from Grant Thornton were in a position to make a proposed interim dividend to PFF’s creditors of 6%. Pursuant to that dividend, Miss Chen would have been due a personal payment of US\$5.4 million as a result of an assignment which had placed the debts of PFF to its parent company. The liquidators

withheld the payment of this dividend to Miss Chen on the basis that they contested that Miss Chen had wrongfully caused for the repayment of the US\$13 million loan to Zenato.

4. Miss Chen made an application to the BVI High Court for the payment of the interim dividend which had been withheld by the liquidators. Shortly thereafter, the liquidators also issued proceedings in the BVI High Court against Miss Chen for the sum of US\$13 million together with interest. The liquidators’ claim was based on Miss Chen’s: (i) alleged breach of fiduciary duty as a *de jure*, *de facto* or shadow director of PFF, or someone whose role in the affairs of PFF justified the imposition of fiduciary duties, and (ii) for the restoration of an unfair preference (as a voidable transaction within the meaning of, respectively, sections 245 and 244 of the Insolvency Act 2003).
5. It was common ground between the parties that Miss Chen had been PFF’s sole director until the end of May 2009. However, there was a dispute as to when Miss Chen had resigned her directorship and the extent of her involvement in effecting the repayment of the loan to Zenato (this was despite the fact that Miss Chen had been the sole signatory for the bank accounts of PFF at the time when the relevant transfers were ordered/made).
6. A 4 day trial at first instance took place before Bannister J in March 2015 and a short judgment was handed down less than 2 weeks after that trial concluded. Bannister J dismissed the liquidators’ claims and expressed himself in “*forthright and robust*” terms (as described by the Privy Council) when considering and addressing the claims brought by the liquidators.
7. The liquidators appealed this decision, and the subsequent appeal was heard over a period of

2 days in January 2016. Judgment for the appeal was not handed down by the Eastern Caribbean Court of Appeal until June 2018 (being 2 ½ years later), upholding the first instance decision.

8. The appeal before the Privy Council was heard in June 2020 before a board comprised of Lord Kerr, Lord Briggs, Lady Arden, Lord Kitchin and Lord Leggatt. Judgment was given on 22 February 2021. In its judgment the Privy Council found that:
 - The BVI Commercial Court and Eastern Caribbean Court of Appeal had been wrong to accept that Miss Chen had resigned her sole directorship in May 2009 (or at all). The Privy Council found that Bannister J’s findings of fact on this issue were not supported by any evidence, and as such, that the Judge had made an error of law. The Eastern Caribbean Court of Appeal had also failed to intervene and had therefore promulgated that error.
 - Having found that Miss Chen had not resigned from her directorship of PFF, and that by implication she had continued to owe fiduciary duties to PFF, the Privy Council then went on to assess whether the duties owed by Miss Chen to PFF had been breached. The Board was definitive on that question and found that Miss Chen had breached her fiduciary duties in allowing the repayment of the Zenato loan. Miss Chen, as the person who was the sole signatory of the company’s trading account, had a fiduciary duty to PFF to take all reasonable steps to prevent a payment being made from that account for an improper purpose. The Board re-stated well-worn principles in this respect and commented that:

“ [Miss Chen] could not evade [her fiduciary duties] to PFF and, through PFF, to its creditors, simply by delegating to an

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employee or a de facto director her authority to make payments from PFF’s account.”

“It has been held in a number of cases, correctly, in the Board’s opinion, that a director may not knowingly stand by idly and allow a company’s assets to be depleted improperly: see, for example, *Walker v Stones* [2001] QB 902, at 921D-E per Sir Christopher Slade; *Neville v Krikorian* [2006] EWCA Civ 943; [2007] 1 BCLC 1, paras 49-51 per Chadwick LJ; *Lexi Holdings v Luqman* [2007] EWHC 2652 (Ch), paras 201-205 per Briggs J (as he then was). To the contrary, a director who knows that a fellow director is acting in breach of duty or that an employee is misapplying the assets of the company must take reasonable steps to prevent those activities from occurring.”

- With respect to the delay in the Court of Appeal delivering its judgment, the Board accepted that the delay had been excessive and that this therefore justified the careful consideration of the merits of the appeal by the Privy Council.

Conclusion

Byers v Chen Ningning is a timely reminder of the duties which BVI directors owe to the companies to which they are appointed and the need for directors to take reasonable steps to prevent any breach of duty or misapplication of the assets of the company concerned. The decision also offers further additional judicial guidance and commentary as to when an aggrieved party can ask an appellate court to intervene in substance due to excessive delays in the usual processes of the court and the administration of justice.

This article was co-authored by HFW and Lennox Paton. The HFW team which acted for the successful liquidators in this case included Rick Brown (Partner, London) and Scott Cruickshank (Partner, BVI), assisted by Joshua Prest (Associate, London).

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