Clayton Comments

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NEW DEVELOPMENTS IN COMMERCIAL LAW

IN THE PRIVY COUNCIL

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In this paper we discuss some important recent civil /commercial law appeals to the Privy Council. We consider how successful claims to the Privy Council can result from new landmark decisions made by the UK Supreme Courts. Although the appeals emanate from the Caribbean, they involve often complex legal issues which concern other international jurisdictions and have broader impact.

We discuss the following appeals:

1. *Broad Idea International v Convoy Collateral* [2021] UKPC 24 - a significant decision on the court's jurisdiction to grant freezing injunctions preserving assets where no cause of action is, currently, in play within the jurisdiction.
2. *Mohammed v Gomez* [2021] 1 P & CR 19 - a case concerning adverse possession /equitable interests in properties built on another's land.
3. *Charles Lawrence v Intercommercial Bank* [2021] UKPC 30 - the first of two cases dealing with loss. This case concerned the loss recoverable by a lender for a valuer's negligent valuation. The Privy Council discusses the impact of two new pathbreaking decisions of the UK Supreme Court, *Manchester Building Society v Grant Thornton* [2021] 3 WLR 81 and *Meadows v Khan* [2021] 3 WLR 147.
4. *Primeo Fund (In Liquidation) v Bank of Bermuda (Cayman) Ltd* [2021] UKPC 22 - the second case dealing with loss considering the reflective loss principle (that shareholders cannot claim for loss suffered by the company of which they are members) and the impact of the UK Supreme Court decision in *Sevilla v Marex* [2021] AC 39.
5. *Central Bank of Ecuador v Conticorp* [2016] 1 BCLC 26 - which is a slightly older authority regularly cited before the Privy Council dealing with breach of fiduciary duty in the context of nominee directors, dishonest assistance, and concurrent findings of fact. These principles were recently applied in *Byers v Chen* [2021] UKPC 4.

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***Broad Idea International v Convoy Collateral* [2021] UKPC 24**

In *Broad Idea International v Convoy Collateral* [2021] UKPC 24, the Privy Council was asked to consider the possibility, in the BVI, of securing a freezing injunction in support of foreign proceedings. Convoy Collateral applied for a freezing injunction in support of an action in Hong Kong brought against a defendant resident in Hong Kong, but also against Broad Idea, a BVI company.

The first issue before the Board was whether the civil procedure rules in the BVI permitted an injunction of this type to be granted in support of overseas proceedings. On a plain reading it did not. In a sense, though important for the litigants, this aspect of the judgment is less important than the discussion that followed. In the UK, legislation has long since provided a basis for this form of injunction (s. 25 of the Civil Jurisdiction and Judgments Act 1982), and the rules applicable to the BVI have been amended to achieve this.

There was an important discussion, however, on the more general question of the need to an existing cause of action when applying for a freezing injunction. Traditionally, freezing injunctions have been granted in support of existing claims or at least a claim about to be brought. Those practitioners familiar with this area of law will recall, even if applying on an urgent basis for ex parte relief, having to commit to the judge to file particulars of claim within so-many days after the hearing (and before the return date).

There are, however, occasional cases in which this can cause difficulties. One is where urgent relief is required in support of overseas proceedings that have not yet been commenced and which perhaps still require further work or investigation. A recent experience of one of the authors concerned a cross-border claim by an underwriter against its coverholder. The duty to account in respect of premiums (and therefore also the cause of action) accrued only at the end of the binder year. Faced with evidence of the risk of imminent dissipation, this aspect of the basis for a freezing order was made out. The lack of an existing cause of action, however, created real problems. The doctrine of anticipatory breach may come to the rescue, but this is fact sensitive and depends on the relevant timings. The decision in *Broad Idea* may provide some assistance.

Lord Leggatt for the majority (Lords Briggs, Sales, Hamblen; Lords Reed and Hodge with Sir Geoffrey Vos dissenting as to reasoning on the freezing injunction point), undertook an impressive and thorough review of the law on freezing injunctions and its development in recent years. It was important to recognise that there was no reason in principle to inextricably link such relief to an existing cause of action. The "essential purpose of a freezing injunction is to facilitate the enforcement of a judgment" – i.e. by ensuring that prior dissipation of assets does not defeat a judgment (para 85). This was described as the "enforcement principle." Accordingly, it is necessary that a judgment at some stage is envisaged but this does not mean that a claim must be issued or even a cause of action exist at the time the relief is sought.

This said, the focus must remain on the prospects of securing a judgment, in due course, that will need protection against prior dissipation. Lord Leggatt summarised the applicable principles at para 101:

> i) the applicant has already been granted or has a good arguable case for being granted a judgment or order for the payment of a sum of money that is or will be enforceable through the process of the court;
>
> ii) the respondent holds assets (or, as discussed below, is liable to take steps other than in the ordinary course of business which will reduce the value of assets) against which such a judgment could be enforced; and
>
> iii) there is a real risk that, unless the injunction is granted, the respondent will deal with such assets (or take steps which make them less valuable) other than in the ordinary course of business with the result that the availability or value of the assets is impaired and the judgment is left unsatisfied.

His Lordship confirmed, at para 102, that whilst other discretionary factors would or may be engaged "there are no other relevant restrictions on the availability in principle of the remedy". In particular:

> i) There is no requirement that the judgment should be a judgment of the domestic court - the principle applies equally to a foreign judgment or other award capable of enforcement in the same way as a judgment of the domestic court using the court's enforcement powers.

ii) Although it is the usual situation, there is no requirement that the judgment should be a judgment against the respondent.

iii) There is no requirement that proceedings in which the judgment is sought should yet have been commenced nor that a right to bring such proceedings should yet have arisen: it is enough that the court can be satisfied with a sufficient degree of certainty that a right to bring proceedings will arise and that proceedings will be brought (whether in the domestic court or before another court or tribunal).

This is an important, and in many respects common sense and practical, clarification of the law. To state the obvious, the judgment does not provide a basis for seeking a truly "freestanding" injunction. The relief remains tied to the prospects of securing a judgment, but is no longer artificially and (depending on the facts) unfairly linked to the arbitrary existence of a current claim or cause of action. Any party on the receiving end of such an order will be well advised to carefully monitor the progression of proceedings. If the intimated claim is in the end not brought or there is delay, either or both of these factors may justify the court withdrawing the relief.

***Mohammed v Gomez* [2021] 1 P & CR 19**

Mohammed v Gomez [2021] 1 P & CR 19 - concerned adverse possession /equitable interests in properties built on another's land. This is a Trinidad case but raises issues which arise in cases throughout the Caribbean. The Privy Council addressed proprietary estoppel and fine distinctions that can be made between different categories of proprietary estoppel: oral assurances, conduct, acquiescence, and assurance.

The parties to the appeal were all related and well-known to each other. They all lived on a 10-acre plot of land owned the appellant. The respondents had occupied their respective plots before 1969, when the land was acquired by the appellant's father. The appellant, himself, acquired ownership in 2012. But the respondents claimed to have entered into possession pursuant to an agreement with the father's predecessors in title that they would clear land, pay rent, and have the right to buy at market value assessed at the date of the agreements. They, in fact, cleared the land and spent

substantial sums of money building, expanding and maintaining their homes. The respondents continued to pay rent until 2011, after which the appellant declined to accept further payment and subsequently sought to recover possession.

We shall focus on the Privy Council's approach to the principles of proprietary estoppel. It upheld the Trinidad Court of Appeal's decision to consider the issue of acquiescence by the father and the respondents' belief in the permanence and security of their tenure. The Court of Appeal decided it was entitled to revisit the trial judge's findings of fact, since she had misdirected herself on the application of the Rent Restriction Act. The Court of Appeal then held that it could consider that the alternative case based on estoppel by acquiescence, which was open to it on the pleadings. The Court of Appeal ruled that, in the statutory and family context, there was sufficient material to support a finding of proprietary estoppel.

The appellant appealed the Court of Appeal's decision. Lord Carnwath carefully analysed several authorities on proprietary estoppel decided by Lord Walker in a succession of cases in the Court of Appeal and House of Lords: *Gillett v Holt* [2001] Ch 210; *Jennings v Rice* [2002] EWCA Civ 159, and *Thorner v Major* [2009] 1 WLR 776.

In *Thorner v Major* Lord Walker discussed the difficulty of precisely defining the elements of proprietary estoppel. He pointed out that there was general agreement that proprietary estoppel involved three essentials: (i) a representation or assurance made to the claimant; (ii) reliance on it by the claimant; and (iii) detriment to the claimant in consequence of his (reasonable) reliance. Lord Walker next grappled with trying to define what is involved in the representation or assurance. He preferred to hold that to establish a proprietary estoppel, the relevant assurance must be clear enough, whilst accepting that this formulation was thoroughly question-begging. Lord Walker stressed that identifying whether the relevant assurance was sufficient depends on the particular context in which that assurance was made.

Lord Carnwath in *Mohammed v Gomez* doubted how far it is possible or useful in the context of proprietary estoppel to draw fine distinctions between different categories- although this attracted lively academic debate. As Lord Walker had made clear in the earlier cases, once one has moved beyond claims based on specific contractual rights, there may be no bright light division between the

nature and quality of any alleged verbal assurances, and the conduct of the respective parties in response. Indeed, depending on the factual context, acquiescence can be seen as an aspect of an assurance sufficient to satisfy the requirements of proprietary estoppel by acquiescence. The Privy Council concluded on the facts of the particular case that the Court of Appeal's approach could not be faulted, and dismissed the appeal.

Charles Lawrence v Intercommercial Bank **[2021] UKPC 30**

On 21 November 2021the Privy Council decided *Charles Lawrence v Intercommercial Bank*. The appeal concerned the loss recoverable by a lender for a valuer's negligence valuation. The Privy Council examined the development and modern understanding of the House of Lords' decision in *South Australia Asset Management Corpn v York Montague Ltd* ("SAAMCO") [1979] AC 191 concerning the relationship between scope of duty and loss- in light of two new and important UK Supreme Court decisions, *Manchester Building Society v Grant Thornton* [2021] 3 WLR 81 and *Meadows v Khan* [2021] 3 WLR 147. On 30 June 2021 the Supreme Court had given judgment in those two appeals concerning the proper approach to the question of damages for negligent advice or information given by an auditor and a doctor respectively.

In *Charles Lawrence* Lord Burrows and Lady Rose were dealing with a case concerning the loss recoverable by a lender for a valuer's negligent valuation of land where the borrower's guarantor had provided as security for the loan a mortgage over that land. In the famous case SAAMCO the House of Lords held that a valuer is not liable in the tort of negligence (or in contract) for loss caused by the valuer's negligence that falls outside the scope of the valuer's duty of care. It was therefore critical, to the question of liability and damages, to carefully delineate the scope of the duties in the first place.

The "scope of duty principle" (or "*SAAMCO* principle") had been explored and explained by Supreme Court in *Manchester Building Society v Grant* and *Meadows v Khan*. In *Charles Lawrence* the appeal involved an interesting twist since it turned out that the guarantor had no legal title to the land which had been mortgaged. Consequently, the land was of no value to the lender and the security was worthless. The lender recovered substantial damages when settling the claim against its attorneys for negligence for the guarantor's defective title to the land. However, the central question for the Privy

Council to decide when assessing damages was how precisely the scope of duty principle applies on these unusual facts.

The appellant submitted that the decision of the Trinidad Court of Appeal (and of the trial judge) was incorrect in law. Their approach was contrary to the "scope of duty principle" established in *SAAMCO*, as explained in *Manchester Building Society v Grant Thornton* and *Meadows v Khan*.

The appellant submitted that the Bank's loss can, and should properly, be split into two distinct losses. First, there was loss because the land was overvalued for commercial rather than residential use, on the assumption there was good title to the land. Secondly, the Bank suffered loss because the title to the land, itself was defective.

The appellant submitted that this second loss was outside the scope the valuer's duty of care and was, therefore, irrecoverable. It was no part of the valuer's job to investigate the land's title. That was the job of the conveyancing attorneys.

The Board agreed with the Appellant's submissions. *Manchester Building Society v Grant Thornton* and *Meadows v Khan* made it clear that, in determining the scope of the duty of care, it is particularly important to consider the purpose of the advice or information being given. This critical question when identifying the purpose of the advice is to assess it objectively- by reference to the purpose for which the advice is being given.

The Privy Council, therefore, excluded from the total loss factually caused to the Bank by the valuer's negligence attributable to the defect in title- it said that this was outside the scope of the valuer's s duty of care. The starting point for damages was the loan made ($3m) and deducting the actual residential value of the land at the date of the loan, assuming there was good title ($2,375,000).

The Privy Council took the view that, when applying the scope of duty principle, it was particularly helpful to compare *Charles Lawrence* with *Meadows v Khan*. In *Meadows v Khan* a general practitioner breached the patient when she indicated to her that she was not a carrier of the haemophilia gene. The patient had approached GP surgery, as the GP knew or ought to have known, for the specific purpose of ascertaining whether she was a carrier of the haemophilia gene and how this might affect

her pregnancy. The patient then gave birth to a son who suffered not only from haemophilia but also autism.

The Supreme Court held that, while the losses for haemophilia were within the scope of the defendant's duty of care, the extra losses attributable to autism were outside the scope of the GP's s duty of care. They were irrecoverable as the purpose of the GP's advice or information was to advise or inform the patient about the risks of giving birth to a child with haemophilia. Its purpose was not to ascertain the general risks of pregnancy, including the risk of autism.

Furthermore, the Supreme Court in *Manchester Building Society* and *Meadows v Khan* explained that the counterfactual test, put forward by Lord Hoffmann in *SAAMCO*, should be regarded as a flexible and useful cross-check for deciding on the scope of the duty of care in most- but not all cases.

The Privy Council pointed out that applying that counterfactual test to the facts of *Charles Lawrence* would contradict its holding that the defective title loss was outside the scope of *George Lawrence*'s duty of care. Had the *George Lawrence*'s valuation of $15m been correct, the Bank would still have entered into the loan, taking the mortgage over the land as security, but would not have suffered the same (or indeed any) loss. This is because, as the land would have been worth $15m (assuming no defect in title), the Bank would have had adequate security to cover the guarantor's default in repaying the loan.

As a result, the Privy Council concluded that result of the counterfactual it undertook reinforced the Supreme Court's point that the counterfactual is only of secondary importance when establishing the scope of the duty of the duty of care. The Privy Council emphasised that the counterfactual is a helpful cross-check of the scope of the duty of care in most cases but not all. *George Lawrence*, itself was one of those cases where the counterfactual was unhelpful.

***Primeo Fund (In Liquidation) v Bank of Bermuda (Cayman) Ltd* [2021] UKPC 22**

Prime Fund (In Liquidation) v Bank of Bermuda (Cayman) Ltd concerns a recent application of the evolving law on reflective loss. The nature of the apparent bar to recovery of reflective loss was the subject of extensive review by a 7-judge panel of the UK Supreme Court in *Sevilleja v Marex* [2020]

UKSC 31; [2021] AC 39. The Board's decision in *Primeo Fund* is itself an important judgment clarifying several points left undecided in *Marex*.

Starting with the basic rule, the bar on the recovery of reflective loss:

a. Suppose a shareholder and a company are both owed duties by a third party, for example the provider of services to the company and its members.

b. Suppose the third party breaches those duties, (i) causing loss to the company but also (ii) causing loss to the shareholder by diminishing the value of his or her shares and/or reducing the prospect of enjoying dividends from distributable reserves.

c. The rule against recovery of reflective loss (subject to certain very narrow exceptions) bars the shareholder from pursing his or her action against the wrongdoer. Any loss suffered by the shareholder is said merely to reflect that suffered by the company. The company should bring its own action which, if successful, will restore the company's asset position and in turn the value of its issued shares.

The rule is of some pedigree, being most firmly articulated by the Court of Appeal in *Prudential v Newman* [1982] Ch 204 (COA). The true basis and justification of the rule has been the subject of detailed and considered debate, as has its potential to cause unfairness. Some cases have emphasised the practical difficulties flowing from the fact that the shareholders and the company have suffered the same or at least overlapping loss. If they are both allowed to sue, how does the court prevent double recovery? Other cases have emphasised the importance of the independent legal status of companies and the rights that accrue as a result thereof, others still the need not to prejudice other creditors of the company (in this latter respect, see further below).

In the *Marex* case, Marex had secured a judgment against two BVI companies. Mr Sevilleja was the owner and controller of those two companies. It was alleged that, in the face of the judgment debt, Mr Sevilleja stripped the BVI companies of assets to render them judgment proof. Marex sought permission to serve out of the jurisdiction on Mr Sevilleja, seeking damages for inducing or procuring the violation of its rights under the judgment and /or otherwise for causing it loss by unlawful means.

The Court of Appeal had held that, although Marex was not a shareholder of the BVI companies, its claim was nonetheless caught by the reflective loss principle. The essential point was the same: the parties which had truly suffered the loss were the two BVI companies, Marex's loss being merely reflective of the dissipation of those companies' assets. The Court of Appeal focused, in particular, on the potential prejudice to other creditors of the BVI companies if Marex was able to steal a march on them by suing Mr Sevilleja. This was a claim which, in due course, the liquidators of the BVI companies might pursue to the benefit of all creditors not just Marex.

The UK Supreme Court overturned the decision. Not taking the opportunity to abandon the rule altogether, the Supreme Court was keen to restrict its application only to shareholders. It was a "substantive rule" not one of procedure. Concerns about double recovery and so on could all be addressed by firm case management decisions, including staying claims to allow others to proceed and related orders.

The policy behind the rule was recognition that, when shareholders invest in a company, that investment "follows the fortune of the company and that [they] can only exercise [their] influence over the fortunes of the company by the exercise of… voting rights in general meeting." (para 35, citing the *Prudential* case). In other words, shareholders are deemed to have given up their individual rights having thrown their lot in with the company. As a matter of principle (not practicability or procedural niceties), their individual loss sits behind that of the company in which they decided to invest. Marex was not in this position and it was wrong to extend the rule to creditors generally.

The impact of the Supreme Court's clarification of the true juridical basis of the rule against reflective loss can be seen in the *Primeo Fund* case. As with so much of the common law, proper appreciation of the principles and policies laying behind the rules dictates their future application to new fact scenarios.

Primeo Fund was an open-ended mutual investment fund. Investors would purchase shares in the Fund which would in turn make investments in stocks and other funds. Most of the Fund was invested, directly, with Bernard L Madoff Investment Securities LLC (the "Madoff Scheme"). The Madoff Scheme was, famously, a Ponzi scheme depriving investors of billions of pounds /dollars. In 2007 the

Fund restructured the way it held investments, with a large proportion of its investments being held through an intermediary company, Herald (together with another company – both in fact funds or "feeder funds" – though for present purposes these details do not matter). The Fund held the shares in Herald, and Herald invested the share capital into the Madoff Scheme.

The Fund proposed several claims against its Administrator and Custodian, in essence alleging that they had negligently allowed the Fund to invest in the Madoff Scheme (not picking up on obvious warning signs and so on). The Court of Appeal held that these claims could not proceed, as the Fund's loss was merely reflective of Herald's. It was open to Herald to issue claims against the Administrator /Custodian and, if they succeeded, its assets would be reconstituted and, in turn, would affect the value of its shares.

The Privy Council overturned the decision, at least in respect of the pre-2007 losses. It was critical to recognise the decoupling, in the *Marex* decision, of the link between the reflective loss principle and concerns about double recovery and practical difficulties with respect to overlapping claims. These concerns were "not sufficient… to bring the reflective loss into operation" (para 60). As clarified in *Marex*, the rule applied only at the point in time at which the Fund had decided to restructure the investment and thus "follow the fortunes" of Herald. This decision, in 2007, could not retrospectively rob the Fund of its existing causes of action in respect of its prior direct investment. These losses "were not suffered by Primeo in its capacity as a shareholder" (para 53), such that the rule did not apply.

As to the effect of the rule post-2007, the Board clarified that the "follow the fortunes bargain which arises from membership of a company is forward-looking" (para 66). The Board appeared to accept therefore that Primeo would not enjoy a separate cause of action in respect of Herald's post-2007 investments. To the extent that there was overlap between the losses claimable by Herald and those claimable by Primeo (relating to its direct investments), would "have to be managed in some way" (para 71). The Board appeared to envisage that these matters could be left to the good sense case management of trial courts. Quite how this will work in practice is not clear, particularly in complex cases involving multiple jurisdictions and courts that do not necessarily speak to each other's procedures and timings. The process would have to be very closely managed and tightly controlled to prevent abuse and confusion.

It is worth noting that the Board also overturned the Court of Appeal's ruling in respect of the Administrator on another ground, namely that Herald did not itself have a claim against the Administrator. It was a fundamental aspect of the rule against recovery of reflective loss that there was a common wrongdoer, not merely that the loss overlapped. The headline point is that, in those States which follow English common law (with or without local modification clauses), the rule against recovery of reflective loss is likely to be narrowly constrained, only applying to shareholders and even then only where it can truly be said that the shareholder has aligned themselves with the fortunes of the company and that their loss is merely "a knock-on consequence of a wrong suffered by the company itself" (para 54). Careful assessment in each case will be required to identify the diving line.

***Central Bank of Ecuador v Conticorp* [2016] 1 BCLC 26 and *Byers v Chen* [2021] UKPC 4**

The Privy Council decision in *Central Bank of Ecuador v Conticorp* concerns breach of fiduciary duty in the context of nominee directors, dishonest assistance, and application of the well-known practice of the Board in not revisiting on appeal concurrent findings of fact of the two courts below.

The primary claimant was a company incorporated and based in The Bahamas. It brought proceedings in the Bahamas against the defendants, an Ecuadorian company and three individuals, the claimant's principal shareholders and officers. The claimant alleged that the defendants had dishonestly procured or assisted its nominee director to commit breaches of his fiduciary duties. It alleged that this arose from the three individual defendants' instructions and the nominee director's failure to exercise any independent judgment concerning the best interests of the Ecuadorian company. In fact, the Ecuadorian company entered into three transactions with the defendant to transfer to it loans and shares in return for global depository receipts, which subsequently proved to be valueless.

The trial judge conducted a detailed factual investigation and found that the nominee director had breached his fiduciary duties. However, he accepted the probity of the three transactions being challenged and rejected the claim for dishonest assistance and related fraud allegations. The plaintiff appealed to the Court of Appeal of the Bahamas. The Court of Appeal overturned the judge's ruling in respect of the nominee director, but affirmed the judge's conclusions otherwise and dismissed the appeal.

The claimant appealed to the Privy Council. Lord Mance analysed the position with great care and in considerable detail. The trial judge had based his conclusion on the position under English law: that (i) a director had to act in good faith; (ii) had positively to apply his mind to what were the best interests of the company; (iii) had to exercise his independent judgment and (iv) could fetter his discretion. Lord Mance held that a nominee director was in no different a position. In this case the nominee director did nothing to consider the probity of the transactions, he simply complied with the defendants' instructions. He failed in his duties to the company and the Court of Appeal was wrong to hold otherwise. He held that it was the nominee director's duty to understand the plaintiff's affairs and to apply his own independent mind when considering its interests. It did not matter that his remuneration was very small or that he was a nominee director for many other international business companies, as was the usual practice in the Bahamas. Herein lies a salutary warning to corporate and trustee service providers (note, too, non-exec directors).

Lord Mance then considered whether it was open to the Privy Council to reverse the trial judge, upheld by the Court of Appeal, in respect of his rejection of the fraud claims. He emphasised, first, the Privy Council, as a matter of settled practice, will decline to interfere with concurrent findings of pure fact, except in very limited circumstances: see *Devi v Roy* [1946] AC 508. He stressed that 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 trial judge's findings and position, and in particular the extent to which the trial judge, an advantage over any appellate court. An appellate court may, therefore, determine that, without having seen or heard the witnesses, it is no position to come to any satisfactory conclusion on the printed evidence before it. The position before the Board is more difficult still, it having before it a second appeal which has already been considered by the local Court of Appeal. Particular weight was to be given to the rule where the court (as in this case) is being asked "to upset the decision of a trial judge exonerating a party of a want of probity" (para 7).

However, Lord Mance remarked that there are some conclusions of fact which are not conclusions of primary fact, but involve an assessment of different factors which have to be weighed against one another. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ.

The UK Supreme Court had recently emphasised this in *McGraddie v McGraddie* (AP) [2013] 1 WLR 2477, citing Lord Thankerton's speech in *Thomas v Thomas* [1947] AC 484 , 487-488:

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

The rule /practice developed by the Board does not mean that it is never justified in intervening. The practice "assume[s] 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" (para 8).

Lord Mance ruled that this was exceptional case, falling outside the scope of the general rule. The Courts below, held Lord Mance, had advanced a series of reasons for concluding that the dishonesty claims must fail which were "unsustainable" (para 163). Furthermore, whilst it was necessary to consider the actual state of knowledge of the defendants at the time, "it is also common ground that, if objectively no honest person would in that light have acted as they did, it is unnecessary to show that the respondents actually recognised that what they were doing was dishonest" (para 9). The trial judge's consideration of the "critical question" of whether the defendants could honestly have believed the transactions to have been in the claimant's best interests was answered "only in the most general terms without analysis of the contrary factors relied upon by the [claimants]… and without testing the answer in the light of the documented history and probabilities."

Lord Mance went on to conduct his own detailed factual examination of the transactions. He concluded that the defendants were jointly and severally liable for dishonestly procuring or assisting

the nominee director's breaches of fiduciary duty in entering into the transactions and that the plaintiff was entitled to recover from the defendants the face value of the loans and shares so transferred.

It is important to appreciate the limits of Lord Mance's stated exceptions to the Privy Council's principle that it will not entertain appeals of fact on the basis of concurrent findings of fact. The approach adopted in *Central Bank of Ecuador* is really very exceptional. This said, the matter arose again in the case of *Byers v Chen* [2021] UKPC 4. The liquidators of Pioneer Freight Futures Ltd sued its former director for breach of fiduciary duty. The basis of the claim was that the director had wrongly procured the company to make a payment to a creditor which constituted an unfair preference. The trial judge rejected the claim on the basis that the director had already resigned by the time of the transaction. She did not, in any event, held the judge, procure or cause the payments to be made although she probably knew of them. After a long delay, the Court of Appeal issued a judgment upholding the trial judge.

It was common ground throughout that a director who realises the company of which they are a director cannot avoid insolvent liquidation and yet uses company money to pay a particular creditor without any proper reason for doing so, misapplies company funds in breach of fiduciary duty (para 17). The Board emphasised that the practice of not interfering with concurrent findings would be departed from only in cases of "a most unusual nature" (para 30), particular in a case where a party has been exonerated from an allegation of a lack of probity (para 31). There were concerns, however, with respect to some of the trial judge's intemperate and immoderate interventions during the trial. The suggestion was that he had prejudged the issues, though this was not in the end accepted by the Board. To this had also to be considered the long delay of 2.5 years before the matter was addressed by the Court of Appeal. Whilst the delay alone did not justify a conclusion that the Court of Appeal's decision was wrong "the delay demands a careful consideration of the merits of the substantive grounds of appeal to see if this is one of those cases in which, on the settled practice of the Board, it is appropriate to intervene" (para 44).

In fact, the Board then simply revisited the findings made below, overturing both courts. The trial judge was wrong to have considered it common ground that the director had resigned by the time of the transaction (para 75). It was in any event the liquidators' case that she remained a de facto

director (para 49). The Board rejected as unpersuasive the judge's reliance on the director's lack of involvement in the day-to-day management of the company after her alleged resignation (para 77). In any event, the evidence suggested that her consent and approval was being sought during this period in relation to various management matters (paras 78-79). The critical point in any event was whether there was positive evidence that she had in fact resigned as de jure director. There was none, and both courts below were wrong to hold otherwise (para 84).

The Board concluded that the director was in office at the material time, did owe fiduciary duties to the company, and was in breach. As to the latter, the director could not avoid her duty to act honestly and in the interests of the company (and, it being insolvent, the creditors too) "simply by delegating to an employee… her authority to make payments" (para 92). A director "may not knowingly stand by idly and allow a company's assets to be depleted improperly" (ibid).

The precise basis upon which the Board felt able to depart from the concurrent findings of fact made below was not articulated. In reality, it is probably right to say that it was a mixture (a) of a sense that the parties had not had a full and proper run of things below and (b) that the substantive decisions made below (notwithstanding that the local courts and not the Board had seen and heard the evidence and were closer to the facts) were inadequately reasoned and generally poor.

The specific practice concerning concurrent findings of fact and the prospects of succeeding in an appeal to the Board in such a case, is a thorny and difficult area. The authors will be focusing on this issue in more detail in an upcoming seminar and will produce a similar note in due course providing practical guidance and case law examples.

This paper is based on a webinar Richard Clayton QC richard.claytonqc@exchequerchambers.com and Rowan Pennington-Benton rowanbenton@3harecourt.com gave to the Commonwealth Lawyers Association on 2 December 2021.

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