Chen v Byers & Ors

Statement of Facts and Issues

Background facts

1. The Appellant, Chen Ningning, was a director of Pioneer Freight Futures Company Limited (the "**Company**"). The Respondents are the Company's joint liquidators.

2. The Company entered into a loan agreement with Zenato Investments Ltd ("**Zenato**") on 15 May 2009 pursuant to which Zenato agreed to lend PFF up to US$ 13m for a term of two years at an interest rate of 9% per annum. Sums totalling approximately US$ 13m were advanced by Zenato to the Company in three tranches during May 2009.

3. The Company repaid its indebtedness to Zenato in three tranches on 3, 4 and 27 November 2009 (the "**Zenato Payments**"). The Appellant was a director of the Company at the time of the Zenato Payments.

4. At the time of the Zenato Payments (and at all times from, at the latest, 29 October 2009) the Company was insolvent and an insolvent liquidation or some other protective insolvency process was inevitable.

5. On 17 December 2009, the Company applied in the BVI for the immediate appointment of joint provisional liquidators on the ground of its insolvency and the need to protect its assets.

The liability proceedings

6. On 23 May 2014, the Respondents commenced proceedings in the BVI against the Appellant as a *de jure*, *de facto* or shadow director and claiming (1) US$ 13m plus interest for breach of her fiduciary duties in causing and procuring the Zenato Payments; and (2) under section 249 of the 2003 BVI Insolvency Act, for restoration of the Zenato Payments on the basis that they constituted an unfair preference and so were voidable transactions.

7. The Respondents' claim was dismissed at first instance in March 2015, and the Respondents' appeal was dismissed in June 2018. The BVI Court of Appeal held (1) the Trial Judge was entitled to find that the Appellant owed no fiduciary duties to the

Company; (2) the Trial Judge was entitled to find that the Appellant did not cause or procure the Zenato Payments; and (3) although the payments were unlawful preferences under section 245 of the BVI Insolvency Act 2003, the Court of Appeal would not exercise its discretion to award a remedy against the Appellant.

8. On 22 February 2021, the Judicial Committee allowed the Respondents' appeal on the claim for breach of fiduciary duty (the "**JCPC Liability Judgment**").[1] The Judicial Committee held, in summary, that the Appellant was a *de jure* director of the Company when the Zenato Payments were made, owed fiduciary duties to the Company, and breached those duties by failing to intervene to prevent the payments. The Board found it unnecessary to determine the statutory preference claim under of the BVI Insolvency Act 2003.

9. By order dated 28 February 2022, the Judicial Committee remitted to the BVI High Court all issues concerning the sums, if any, to be payable by the Appellant in respect of or arising from her breaches of fiduciary duty in relation to the Zenato Payments.

The quantum proceedings

10. On 17 March 2022, the Respondents applied to the BVI High Court for an order that the Appellant pay the Company US$13 million, i.e. the approximate total amount of the Zenato Payments, plus interest at 5% per annum from 29 November 2009 and costs.

11. The Respondents' application was heard by Wallbank J in July 2023. In a judgment dated 10 February 2024 the Judge dismissed that application (the "**Trial Judgment**").[2] The Judge held that the Zenato Payments discharged a valid debt to Zenato in the same amount as the payment so that the Zenato Payments were balance-sheet neutral and the Company had therefore suffered no net loss. The Judge further held that in those circumstances there was no basis for ordering the Appellant to pay compensation to the Company nor was there any other basis for ordering payment since Ms Chen derived no financial benefit from the Zenato Payments. The Judge declined to determine the Respondents' contention that the Appellant derived a reputational benefit from the Zenato Payments.

[1] Byers & Ors v Chen Ningning [2021] UKPC 4 [MB 866-886]
[2] Byers & Ors v Chen Ningning [2024] BVIHCM2009/0430 [MB 241-269]

12. In a judgment dated 20 June 2025 the Court of Appeal allowed the Respondents' appeal (the "**CA Judgment**").[3] The Court of Appeal concluded that the Company's loss arising from the Appellant's breach of fiduciary duty was to be equated with the loss caused to its general body of creditors. Applying this approach, the Court of Appeal held that the Company suffered a loss in the amount of the Zenato Payments.

13. The Court of Appeal ordered the Appellant to pay US$13,000,000 together with interest at 5% p.a. from November 2009, and costs, and included a so-called "*West Mercia proviso*" under which any dividend attributable to a notional increase in the Company's debt in the amount of the Zenato Payments would be recouped by the Appellant.

The issues in the appeal

14. The issues to be determined in this appeal are as follows:

    14.1. The approach to the conceptualisation of loss in a case like this and whether the remedy awarded by the Court of Appeal in this case is the appropriate one in a case such as this where, in breach of the creditor duty, a director causes or allows a preferential payment that discharges a valid debt?

    14.2. Whether the Court of Appeal erred in holding that for the purpose of determining the loss caused by a breach of the creditor duty, loss suffered by the general body of creditors from a preferential payment may be treated as loss suffered by the Company;

    14.3. Whether the Court of Appeal erred in holding that the remedy for breach of the creditor duty is available otherwise than to require disgorgement of profits obtained by a director in breach of fiduciary duty; and

    14.4. Whether the Court of Appeal erred in awarding pre-judgment interest at 5% per annum from 29 November 2009.

[3] Byers & Ors v Chen Ningning [2025] BVIHCAP2024/0009 [MB 90-152]

Annex

Chronology

1. **May 2009**: Zenato advances approximately US$ 13m to the Company as a loan;

2. **29 October 2009**: Latest date on which the Company became insolvent;

3. **3, 4 and 27 November 2009**: Dates of the tranches comprising the Zenato Payments;

4. **17 December 2009**: The Company applies for the immediate appointment of provisional liquidators;

5. **28 January 2010**: Mr Byers, in his capacity as a joint provisional liquidator, examined the Company's Chief Operating Officer, who informed Mr Byers of the Zenato Payments.

6. **15 February 2010**: The joint provisional liquidators are appointed as joint liquidators of the Company;

7. **7 March 2014**: Respondents write to the Appellant informing her that they would be withholding payment of an interim dividend to her on the grounds that they might have a cause of action against her;

8. **23 May 2014:** Respondents issue proceedings in the High Court of the BVI against the Appellant for breach of fiduciary duty and for relief under the BVI Insolvency Act;

9. **3 to 5 March 2015**: Trial of the Respondents' claim before Bannister J in the High Court of the BVI;

10. **19 March 2015**: First instance judgment of Bannister J dismissing the Respondents' claims;

11. **11 to 12 January 2016**: Hearing of the Respondents' appeal against Bannister J's judgment and consequential order;

12. **12 June 2018**: Court of Appeal's judgment dismissing the Respondents' appeal on all grounds;

13. **4 June 2020**: Hearing of the Respondents' appeal to the Judicial Committee;

14. **22 February 2021**: Judicial Committee's judgment allowing the Respondents' appeal on the claim for breach of fiduciary duty ([2021] UKPC 4);

15. **28 February 2022**: Date of the Judicial Committee' order remitting quantum issues to the High Court of the BVI;

16. **17 March 2022**: Date of the Respondents' quantum application;

17. **4 to 5 July 2023**: Trial of the Respondents' quantum application before Wallbank J;

18. **10 February 2024**: Judgment of Wallbank J dismissing the quantum application ([2024] BVIHCM2009/0430);

19. **29 October 2024**: Hearing of the Respondents' appeal in the Court of Appeal;

20. **20 June 2025**: Judgment of the Court of Appeal ([2025] BVIHCAP2024/0009);

21. **14 January 2026:** Final leave to appeal to the Judicial Committee is granted.

Precis

The Appellant was a director of Pioneer Freight Futures Company Limited (the "**Company**"). The respondents are the Company's joint liquidators. The Company borrowed US$13m from Zenato Investments Ltd in 2009 and repaid that debt in full in November 2009 (the "**Zenato Payments**"), by which time the Company was insolvent. The Respondents brought proceedings in 2014 alleging that the Appellant had breached the so-called 'creditor duty' in relation to the Zenato Payments.

The Respondents' claim for breach of the creditor duty was dismissed at first instance and that dismissal was upheld on appeal. The Judicial Committee allowed the Respondents' appeal, holding that the Appellant was a *de jure* director who had breached her duty to the Company by failing to prevent the Zenato Payments ([2021] UKPC 4). The Board remitted to the BVI High Court the question of the sums, if any, payable by the Appellant for breach of her duty.

The BVI High Court held that the Zenato Payments discharged a valid debt in equal amount such that the Company had suffered no net loss and that there was therefore no basis to require the Appellant to make payment to the Company.

The Court of Appeal allowed the Respondents' appeal. It held that for the purposes of breach of the creditor duty, loss suffered by the general body of creditors could be treated as loss suffered by the Company. The Court of Appeal ordered the Appellant to pay to the Company the principal amount of the Zenato Payments (US$13 million) plus interest at 5% per annum from 29 November 2009, subject to the proviso (in summary) that the Appellant would recover in the Company's insolvency any dividend notionally attributable to the debt that would have been owed to Zenato but for the Zenato Payments.

The following issues arise in this appeal:

1. Is the remedy awarded by the Court of Appeal in this case appropriate?
2. Does a company's loss from preferential payments made in breach of the creditor duty include the loss suffered by its general body of creditors?
3. Do the remedies for breach of the creditor duty extend beyond requiring a director to disgorge profits obtained in breach of duty? and
4. Did the Court of Appeal err in awarding pre-judgment interest at 5% per annum from 29 November 2009?