[2017] UKPC 27
Privy Council Appeal No 0072 of 2016

JUDGMENT

Chen (Appellant) *v* Ng (Respondent) (British Virgin Islands)

From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

before

Lord Neuberger
Lord Mance
Lord Clarke
Lord Sumption
Lord Hodge

JUDGMENT GIVEN ON

17 August 2017

Heard on 22 and 23 May 2017

Appellant
John McDonnell QC
Raymond Davern
(Instructed by Mayer Brown International LLP)

Respondent
Christopher Parker QC
Victoria Ann Lord
(Instructed by Gibson Dunn & Crutcher LLP)

LORD NEUBERGER AND LORD MANCE:

The background facts

1. This appeal concerns the ownership of 40,000 of the 50,000 issued shares in Peckson Ltd ("Peckson"), a company incorporated in the British Virgin Islands. Since 1996, Peckson has owned the shares in Empresa Hoteleira de Macau Limitada ("Empresa"), a Macau-registered company, whose sole asset is the New Century Hotel in Macau ("the Hotel").

2. Around the time that Peckson acquired Empresa, 40,000 Peckson shares ("the Shares") were registered in the name of Ng Man-Sun ("Mr Ng"), and the remaining 10,000 shares were held by Sociedade de Turismo e Diversões de Macau SARL.

3. At all material times, the two directors of Peckson were Mr Ng and Chen Mei Huan ("Madam Chen"), who were living together in the Hotel, with two children. On 4 October 2011, Mr Ng and Madam Chen executed the following documents: (i) a formal Note ("the Note") recording a sale of the Shares by Mr Ng to Madam Chen for US$40,000, (ii) an Instrument of Transfer ("the Transfer") recording the transfer of the Shares by Mr Ng to Madam Chen for US$40,000 "paid to [Mr Ng] by [Madam Chen]", (iii) a written resolution of the directors of Peckson approving the transfer of the Shares, and (iv) a share certificate in the name of Madam Chen in respect of the Shares. It is common ground that the US$40,000 never changed hands. On or shortly after 4 October 2011, Peckson's register of members was altered by replacing Mr Ng's name with that of Madam Chen as the owner of the Shares.

4. On 21 November 2011, Mr Ng signed Peckson Board Minutes, which were written in Chinese and stated (according to the certified translation) that the Shares had "belonged to him personally", and that "after the transfer, all the [Shares] were vested under [Madam Chen's] name and [Mr Ng] did not retain any right or interest". The following day, he signed a declaration in Chinese confirming (again according to the certified translation) that he did "not keep any right" in the Shares.

5. On 24 August 2012, Mr Ng began proceedings against Peckson in the High Court of the British Virgin Islands claiming, inter alia, a declaration that the Transfer was void and of no effect, and an order that Peckson's register of members be rectified to replace Madam Chen's name with his name as the owner of the Shares.

6. On 26 October 2012, Madam Chen applied to be added as a defendant to the proceedings on the ground that "this is a dispute as to the ownership of the Shares between [Mr Ng] and [Madam Chen]" and that "as this matter is in truth a personal dispute between [Mr Ng] and [Madam Chen], it is not in the best interests of [Peckson] for its resources to be expended in legal costs defending this action". That application was unopposed, and Madam Chen was added as a defendant the following month. In March 2013, Madam Chen filed her Defence and Counterclaim seeking declarations that as from 4 October 2011 Mr Ng ceased to have any interest or right of any kind in the Shares, and that since that date she had been the only true legal and beneficial owner of them.

7. Thereafter the case proceeded as a contest between Mr Ng and Madam Chen as to which of them was the beneficial owner of the Shares, with Peckson playing no part other than that of a nominal defendant.

8. In his Statement of Claim and supporting written evidence, Mr Ng alleged, in very summary terms, that, as the legal and beneficial owner of the Shares, he had transferred them to Madam Chen in October 2011 on the express understanding that she would transfer them back to him some six months later. The reason which he gave for this alleged arrangement was based on the fact that he wished to obtain government approval for the development of a new hotel and casino on the Cotai Strip in Macau, a project which he intended to carry out through a company called Chong Gold International Ltd ("Chong Gold"), of which he was the major shareholder, CEO, and President. He said that Madam Chen had suggested to him that, as he had been the victim of bad publicity he or any company seen to be associated with him would not be looked on favourably by the Beijing or Macau authorities, whereas she had good contacts in Macau and Beijing, and so she should apply to the authorities for the necessary permissions. However, he said, she pointed out that if she was the applicant for the permissions, that would require her to establish that she had significant assets in her name, and for that reason she suggested that the Shares be transferred to her, but only on a temporary basis.

9. Madam Chen denied this. Her case, as revealed by her Defence and written evidence, was that she had been the beneficial owner of the Shares from the outset and that Mr Ng transferred the Shares to her pursuant to a pre-existing obligation.

10. The case came on before Bannister QC J(Ag) on 22 October 2013, and the hearing lasted six days. In his skeleton argument on behalf of Madam Chen, Mr McDonnell QC mentioned a "potential argument" that the BVI court did not have jurisdiction to hear the case. However, he added, as this would involve contending that a decision of the Eastern Caribbean Court of Appeal was wrong, he confined himself "to reserving the right to make [the argument] to a higher court".

11. During the ensuing trial, Mr Ng and Madam Chen were each subjected to a full cross-examination, limited by the Judge to one-and-a-half days in each case. It was put to Mr Ng, who gave evidence through an interpreter, that at least one of his reasons for transferring the Shares to Madam Chen was to conceal them from his creditors. He was also asked about the proposed development, and in the course of those questions reference was made to a feasibility report in respect of the project, but the report was not opened let alone read. More broadly, Mr Ng was challenged as to his probity which he warmly defended. Madam Chen was also cross-examined fully.

The judgments below

12. Bannister J handed down a characteristically clearly expressed and promptly produced judgment on 14 November 2013. After summarising the facts, he turned to Madam Chen's case that she had been the beneficial owner of the Shares from the inception, and rejected it for a number of reasons which are not germane for present purposes.

13. The Judge then turned to Mr Ng's explanation of the circumstances in which the Transfer was executed, which was substantially as set out in para 8 above, and said that he could not accept that evidence either. He explained that "[t]he reason stems from the fact that the … proposed development on the Cotai Strip [was to be] by … Chong Gold". The Judge then referred to two extracts from the feasibility report which emphasised the importance of Mr Ng's involvement and the difficulty of replacing him. The Judge then mentioned that those two "passages were not put to Mr Ng in cross-examination or relied upon specifically at trial by [Mr McDonnell]". However, said the Judge, "they illustrate the submission which Mr McDonnell made", namely that "it was irrational to suppose that [the Transfer] could assist [Madam Chen] to promote, in Beijing, a project that was on its face a project of Mr Ng's". Mr Ng's explanation for the Transfer of the Shares was thus said the Judge one "which he, as a highly experienced businessman, must have known could bring him no advantage, because it was self-evidently futile". This was not a point that had been put to Mr Ng in cross-examination.

14. The Judge added that, in any event, he considered that, if his story was true, Mr Ng would not have transferred the Shares to Madam Chen without ensuring that Madam Chen gave him a blank transfer which he could use to retransfer the Shares at the end of the six month period. That was a point which had not been put to Mr Ng in cross-examination, but he had dealt with it in his witness statement, where he said that it had not occurred to him to ensure that he had a blank transfer of the Shares from Madam Chen, and he had not been advised to take such a course.

15. The Judge then went on to reject a submission on behalf of Mr Ng that the Transfer was gratuitous which he described as "proceed[ing] on a false basis", given

the reference in the Transfer and also in the Note to the consideration of US$40,000, even though it had not actually been paid.

16. The Judge then reached his conclusions. Having rejected Mr Ng's case on the facts, he said that Mr Ng had failed to discharge "the legal and evidential burden" of establishing "why the documents which he executed should not have carried into effect the agreement which they evidence on their face - a sale and purchase [of the Shares] completed by Madam Chen's entry in Peckson's register of members". The Judge added that "Mr Ng cannot show that the Transfer was gratuitous because his own documents contradict him".

17. The Judge therefore concluded and determined that the Shares were beneficially as well as legally owned by Madam Chen, and Mr Ng had no interest in, or rights over, them.

18. Mr Ng appealed to the Eastern Caribbean Court of Appeal (Baptiste and Michel JJA and Kentish-Egan QC JA(Ag)), who, for reasons set out in a clear and careful judgment given by Kentish-Egan JA, allowed his appeal. First, they held that it had not been open to the Judge to hold that Madam Chen had acquired the legal and the beneficial ownership of the Shares as a result of the October 2011 Transfer. That was because, with the exception of a possible contention to that effect in his closing submission to Bannister J, counsel for Madam Chen had not pleaded or argued that she had acquired the Shares beneficially as a result of the October 2011 Transfer. The Court of Appeal went on to hold that Mr Ng's appeal should also succeed on the ground that the Transfer of the Shares had been for no consideration (because the US$40,000 was in fact never paid), and the presumption of resulting trust accordingly applied and meant that Madam Chen held the Shares on trust for Mr Ng. The Court of Appeal further said that it had not been open to the Judge to reject Mr Ng's evidence on the basis of two grounds mentioned in paras 13 and 14 above, in the absence of any cross-examination in relation to those grounds.

19. Accordingly, the Court of Appeal allowed Mr Ng's appeal and declared that Madam Chen held the Shares on trust for Mr Ng and ordered her to execute a transfer in favour of Mr Ng, and further ordered that the register of members of Peckson be rectified accordingly. Madam Chen now appeals to the Board.

The issues on this appeal

20. Mr McDonnell, on behalf of Madam Chen, contends that the Court of Appeal were wrong on all three points on which they reversed the Judge. First, he says that they were wrong to hold that the Transfer was effected for no consideration (which established a basis for their later finding that the Shares were held on resulting trust for

Mr Ng). Secondly, he argues that the Court of Appeal was mistaken in holding that, in the light of the parties' respective cases, the Judge was precluded from holding that Madam Chen was the beneficial proprietor of the Shares. Thirdly, he contends that the Court of Appeal erred in holding that the Judge was not entitled to reject Mr Ng's evidence for the reasons which he gave, leading to the Court of Appeal's positive conclusion that the Shares were held on a resulting trust for Mr Ng. The Board will take these three arguments in turn. However, before dealing with those arguments, it is logical to deal with a point on jurisdiction which has been raised.

The jurisdiction issue

21. As mentioned in para 10 above, a jurisdiction issue was raised, but not pursued, on behalf of Madam Chen at the trial before Bannister J. That jurisdiction issue is now raised before the Board. Madam Chen's argument is that the BVI courts had no jurisdiction to determine the issue raised by Mr Ng against Peckson. That is because Mr Ng's claim for relief against Peckson was for rectification of its register of members, and the Board has now held that under the relevant BVI legislation, "proceedings for rectification can only be brought where the applicant has a right to registration by virtue of a valid transfer of legal title, and not merely a prospective claim against the company dependant on the conversion of an equitable right to a legal title by an order for specific performance of a contract" - see *Nilon Ltd v Royal Westminster Investments SA* [2015] UKPC 2, para 51.

22. At the time of the hearing in these proceedings both before Bannister J and the Court of Appeal, *Nilon* had not been decided by the Privy Council, but it had been heard in, and decided by, the Court of Appeal, who had determined the issue in the opposite sense to the Privy Council. Those acting for Madam Chen therefore decided that, while they should raise the point, they should simply reserve their position on it, as described in para 10 above. However, now that the point has been decided by the Privy Council (reinstating the original decision of Bannister J), Mr McDonnell has seen fit to raise it in this court.

23. It is not necessary for present purposes to go into the details of the reasoning of the Board in *Nilon*; nor is it necessary to decide whether Mr McDonnell is right in contending that the nature of the lack of jurisdiction identified in that case is such that it could not have been waived by Peckson. The argument that the BVI courts had no jurisdiction in the instant case falls to be rejected on a ground which is, in effect, encapsulated in Madam Chen's successful application to be joined in the instant proceedings. Madam Chen voluntarily and unconditionally applied to be joined in the instant proceedings, and she did so on the basis that the real issue was not between Mr Ng and Peckson as to the register of members, but was between her and Mr Ng as to the beneficial ownership of the Shares. The correctness of that contention is borne out by the reasoning in *Nilon*. It is also borne out by the course of these proceedings.

24. Since Madam Chen was added as a party, this case has been argued and adjudicated on the basis that it is a dispute between Mr Ng and Madam Chen as to which of them is the beneficial owner of the Shares, and that is indeed what this case is all about. The fact that it started out as a claim to rectify Peckson's register is neither here nor there. Even if she could have objected on behalf of Peckson to the BVI courts adjudicating that rectification claim, Madam Chen plainly accepted that the BVI courts could determine the issue which she rightly identified in her application as the real issue, namely the ownership of the Shares, which was a matter between her and Mr Ng. As to the resolution of that issue, she not merely submitted to the jurisdiction of the BVI courts: she effectively invoked it by applying to be joined to these proceedings so that the issue could be determined between her and Mr Ng.

25. In *Pattni v Ali* [2007] 2 AC 85, para 39, the Board considered a similar point, namely "whether the Kenyan court had jurisdiction to make … an *in personam* judgment and order" in proceedings between parties to a contract. The Board said that "[t]he answer is straightforward. Mr Ali and Dinky submitted on the merits to the jurisdiction of the court in the Kenyan proceedings and are bound by the final and conclusive judgment and order which resulted, subject only to certain defences such as fraud, failure to comply with natural justice, public policy and inconsistency with any other prior judgment in the Isle of Man: cf the discussion in *Briggs & Rees, Civil Jurisdiction and Judgments* (4th ed) (2005) paras 7.46 et seq."

26. Quite apart from this, if Madam Chen could successfully raise a jurisdiction issue now, it would be offensive to any reasonable person's sense of fairness. She and Mr Ng have fought out the issue of beneficial ownership of the Shares, and if she were to succeed in her argument that there was no jurisdiction to determine the issue, it would mean that she would have effectively had a one-way option on the outcome of these proceedings. That is not the position. Madam Chen voluntarily acceded to, indeed she effectively invoked, the jurisdiction of the BVI High Court to determine the question of the beneficial ownership of the Shares as between her and Mr Ng, and there is now no conceivable basis on which she can challenge that jurisdiction.

Could Mr Ng allege a resulting trust based on absence of consideration?

27. One of the points on which Mr Ng succeeded in the Court of Appeal was in his argument that the Shares were held by Madam Chen on resulting trust for him because the Transfer was effected for no consideration. This argument is based on the proposition that (save in circumstances which it is unnecessary to identify in this judgment), where an asset or money is transferred for no consideration, there is a rebuttable presumption that the transferee holds the asset or money on trust for the transferor, and as Madam Chen's evidence was rejected by the Judge, there is no basis for rebutting the presumption in this case.

28. This argument was rejected by Bannister J but accepted by the Court of Appeal. Before the Board, Mr McDonnell sought to explain and support Bannister J's conclusion on the issue of consideration by reference to the recent decision of the Board in *Prime Sight Ltd v Lavarello* [2013] UKPC 22; [2014] 1 AC 436, handed down on 9 July 2013, but not referred to before Bannister J. In that case, an assignor had by deed assigned a lease to an assignee "[in] consideration of the sum of £499,950 now paid by the Assignee to the Assignor (receipt and payment of which the Assignor hereby acknowledges)", and, as the Board explained, it was "common ground that no payment was in fact made" by the assignee to the assignor. The assignor's trustee in bankruptcy petitioned to wind up the assignee on the ground that the £499,950 was an outstanding debt, but his petition failed. Lord Toulson explained on behalf of the Board in paras 47 and 53, that "contractual estoppels are subject to the same limits as other contractual provisions, but there is nothing inherently contrary to public policy in parties agreeing to contract on the basis that certain facts are to be treated as established for the purposes of their transaction, although they know the facts to be otherwise", and that "[t]o treat the deed as creating a valid contract but delete the acknowledgement of payment would be to alter significantly the nature of the transaction agreed between the parties".

29. *Prime Sight* has been criticised extra-judicially for ignoring an old rule that recitals as to payment in a deed were not binding in equity: Handley, *Reinventing Estoppel in the Privy Council* (2014) 130 LQR 370, 371 and Handley, *Estoppel by Conduct and Representation* (2nd ed) (2016), para 5-021, pointing out that the Board only cited Lord Maugham's statement in *Greer v Kettle* [1938] AC 156 that a recital as to payment in a deed gave rise to an estoppel at law, but omitted his further statement (p 171) that:

> "The position in equity is and was always different … The well-known rule of the Chancery Courts in regard to a receipt clause in a deed not effecting an estoppel if the money has not in fact been paid is a good illustration of the equity view."

Meagher, Gummow and Lehane's *Equity: Doctrines and Remedies* (5th ed) (2015) also submit, at para 17-015, that *Prime Sight* was wrong on this score, and the Board in *Prime Sight* was not referred to the quite recent English Court of Appeal decision in *Close Asset Finance Ltd v Taylor* [2006] EWCA Civ 788. The authorities and the position generally are now discussed in Spencer Bower's *Reliance-based estoppel* (5th ed) (2017), paras 8.77-8.78. The Board has not on the present appeal heard any argument on this point, and would not wish to be thought to be commenting on the existence, scope or application of any such equitable rule or therefore to be questioning *Prime Sight*. The point is mentioned merely for completeness.

30. The key to *Prime Sight* is, on any view, that the estoppel there recognised arose and could be given effect within the context of a deed, which was and was expressly

referred to by the Board in a number of places as a binding contract: see eg paras 41 and 52-54. A deed gives rise to a binding contractual commitment, irrespective of the existence of consideration, and estoppel by deed is an ancient principle, which can preclude the parties from going back on a recital, see eg Meagher, Gummow and Lehane's *Equity: Doctrines and Remedies* (5th ed) (2015) para 3-165; Wilken & Villiers, *Waiver, Variation and Estoppel* (3rd ed) (2012), chapter 12 on *Estoppel by Deed*; Handley, *Estoppel by Conduct and Representation* (2nd ed) (2016), chapter 7 on *Estoppel by Deed*; and Spencer Bower, *Reliance-based estoppel* (5th ed) (2017), paras 8.78-8.81. But, as the Board pointed out in *Prime Sight*, contractual or conventional estoppel may also arise in the context of other forms of contract. Whether the context is a deed or some other contract, the description contractual or conventional estoppel may in reality be a confusing misnomer, in circumstances where the parties can (even if there is also reliance on the truth of the agreed proposition) simply be regarded as having committed themselves by contractual term to a particular proposition: see Kelry CF Loi, *Contractual estoppel and non-reliance clauses* [2015] LMCLQ 346; Spencer Bower's *Reliance-based estoppel* (5th ed) (2017), paras 1.29 and 8.67-8.71, citing *Prime Sight*. But in other circumstances, eg where the proposition does not constitute a term or a variation of a contract, an estoppel may arise during a contractual relationship, as a result of a representation by words or other conduct by one party relied on by the other in circumstances making it inequitable for the first party to resile from the representation: see eg Spencer Bower, above, para 1.27.

31. The Board itself was careful in *Prime Sight* to point out that the position is different if there is no contract within the context of which a contractual or conventional estoppel could arise: "consideration remains a fundamental principle of the law of contract and is not to be reduced out of existence by the law of estoppel", whereas a "particular characteristic of a deed is that consideration is not ordinarily required for it to be effective as between the parties" (para 30). The Board also referred here to what Lord Goff had said in *Johnson v Gore Wood & Co* [2002] 2 AC 1, 39-40. The same theme, that the doctrine of consideration is not undermined by the law of estoppel is evident in the extensive discussion in Spencer Bower, above, paras 1.25, 1.47 et seq, esp 1.49. Examining the potential scope of contractual estoppel, at para 8.71, Spencer Bower also notes that mere agreement upon a convention as governing the parties' relationship cannot establish consideration, if it was "known at the time that the convention benefits one party alone".

32. The Board notes in passing another academic commentary on *Prime Sight*: Trukhtanov, *Receipt Clauses: From estoppel by deed to contractual estoppel* [2014] LQR 3, where at p 7 the writer suggests

> "A putative contract which fails for absence of purported consideration will not fare better if framed as a deed: consideration imported by the seal is displaced by the express consideration, and

> when that fails none at all is left: *Triggs v Staines Urban District Council* [1969] 1 Ch 10, 19."

Not only is this suggestion inconsistent with the ratio of *Prime Sight*, it appears to the Board to misinterpret *Triggs v Staines Urban District Council*. In *Triggs*, the parties entered into the deed on a common mistake that the consideration provided was valid in law. In fact, it was unenforceable, as fettering the Council's future exercise of its official powers in various respects. Not surprisingly, the Council could not in these circumstances enforce Triggs's obligations when its own obligations were unenforceable. To allow it to do so would have been to give effect to the opposite of what both parties had intended. The deed therefore failed. That has nothing to do with *Prime Sight*, where, by entering into a deed, and reciting as paid a consideration which had not been paid, both parties intended to be bound by precisely what they stated and the courts would be giving effect to, not contradicting, the intention of the deed.

33. While the Board did not hear full argument in this area, it readily accepts that there can be cases where an estoppel enlarges the effect of an agreement, by binding parties to an interpretation which would not otherwise be correct: see eg *De Tchihatchef v Salerni Coupling Ltd* [1932] 1 Ch 330; per Robert Goff J in *Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd* [1982] 1 QB 84, p 106A and Spencer Bower, above, para 1.48. But these cases operate in the context of an existing contract.

34. The judgment of Isaacs J in the Australian case of *Ferrier v Stewart* (1912) 15 CLR 32, cited in *Prime Sight*, para 43, might be taken to reflect a different approach. Isaacs J in that case took a minority route to the same conclusion as the other two members of the court. He (alone) thought that there might be merit in Agnes Ferrier's technical objection to the application of section 57 of the Instruments Act 1890 (the equivalent of section 56 of the English Bills of Exchange Act 1882). He relied on an estoppel as to the order of signature of documents which were signed. But such an estoppel is not the same as an estoppel circumventing the doctrine of consideration. All members of the court emphasised that it had been agreed that Agnes Ferrier should incur liability on the notes, which were only issued and signed by all concerned on that basis, in discharge of her liability under previous notes: see per Griffith CJ at p 36 lines 5-11, Barton J at p 39 last five lines to p 40 lines 1-1 and Isaacs J at p 44 lines 1-6. Isaacs J's analysis of the case in terms of estoppel must be seen against the background of that underlying agreement.

35. The Board also adds that Australian caselaw may have developed differently from English law in this area: see the discussion in *Baird Textiles Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274; [2002] 1 All ER (Comm) 737. But, quite apart from that, an estoppel resulting from reliance on an agreement which is unenforceable for a technical reason such as want of a particular order of signature or want of a

memorandum in writing is, on any view, a different matter which does not "undermine the necessity of consideration": see *Baird Textiles*, para 98, per Mance LJ, discussing another Australian case, *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, where the unenforceability (apart from estoppel) of an agreement to pay for a landowner's demolition works on his own land arose from want of a memorandum.

36. In the present case, the agreed statement that consideration had been paid was clearly gratuitous, and for the benefit of one side only. Both parties knew that it had not been paid, and neither can have relied on the statement that it had been paid. Their intention to be bound, or any reliance they placed on their agreement to be bound, without consideration cannot suffice; otherwise gratuitous promises could readily be made binding. In these circumstances, two alternative analyses exist of the apparent agreement recorded in the documents mentioned in para 3 above:

> (A) the parties' recital in the Transfer that consideration had been paid was simply inaccurate and the consideration of US$40,000 recorded in the Note was and, presumably, remains payable, or

> (B) the parties' real agreement, when executing the Note and the Transfer with its recital that the stated consideration of US$40,000 had been paid, was that no such consideration should ever be paid.

In case (B), the Board considers that no contract for sale of the Shares can have come into existence. This lays the ground for Mr Ng's case, on which he succeeded in the Court of Appeal, that

> (Bi) the Transfer gives rise to a resulting trust (at least as a matter of presumption, which the Court of Appeal concluded that Madam Chen had not rebutted).

But the Board considers that an alternative, in the light of all the circumstances, including the later documents mentioned in para 4 above and the rejection of Mr Ng's evidence (if the judge's rather than the Court of Appeal's assessment of it were to stand) is that

> (Bii) there was a gift of the Shares to Madam Chen.

37. The difficulty which this case presents is that none of these possibilities was fully explored in the evidence at trial. Both parties occupied themselves with efforts to establish their respective cases. Having rejected both parties' cases, the judge was left

with the mere fact of the documents and the transfer of the Shares on 4 October 2011 by Mr Ng to Madam Chen. Neither party's positive case was accepted. There was no plea by Mr Ng that the documents were a "sham", which seems to the Board a not unfair categorisation of the position if the parties were really in agreement that the stated consideration of US$40,000 would never be paid. But, on the other side, there was no plea by Madam Chen that the Note and Transfer were by way of sale or, if that was not the case, that they were by way of a gift, although it was put to Mr Ng in cross-examination that the Shares may have been transferred to her to keep them out of the way of Mr Ng's creditors (and, as will appear, one of the grounds on which Madam Chen now seeks to adduce fresh evidence is to fortify a conclusion that that may be the explanation of what happened on 4 October 2011).

38. In these circumstances, Bannister J held that he could and should take the documents at face value. He concluded that there was consideration, stating (and this may perhaps be seen as a precursor of the argument based on *Prime Sight*, which Mr McDonnell has now raised and the Board has been unable to accept) that "Mr Ng cannot show that the transfer was gratuitous, because his own documents contradict him" (para 39). The Court of Appeal on the other hand derived - from Madam Chen's pleading that what occurred in October 2011 was simply Mr Ng giving full effect to a pre-existing obligation to hold the Shares for her and that "as such, no new consideration changed, or needed to change hands" - a conclusion that the transaction was voluntary, ie without consideration, and therefore had no contractual effect (paras 62-63, 76 and 83). On that basis, the Court of Appeal concluded that there was a presumption of a resulting trust, which Madam Chen had done nothing to rebut.

Did the parties' respective cases preclude the Judge's conclusion?

39. The Court of Appeal laid much weight on the fact that both Madam Chen and Mr Ng agreed, as part of their respective cases albeit for very different reasons, that the Transfer of the Shares in October 2011 did not affect the ownership of the beneficial interest in the Shares, and held therefore that it was not open to the Judge to find that it did. Madam Chen contended that the Transfer did not convey the beneficial interest in the Shares to her because she already owned it, and Mr Ng contended that he retained the beneficial interest in the Shares throughout or at least that Madam Chen was only to hold the Shares for six months after which he was to recover them - although it is notable that he did not seek to do so, and continued to maintain to third parties that he had nothing to do with the Hotel, until August 2012. The Court of Appeal's reasoning is based on the proposition that, as a matter of principle, it is not open to a judge to reach a conclusion for which there is no support in either party's case. As Dyson LJ said in *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 1041, para 21, the consequence of a party to litigation choosing to run a case in a particular way may be that "the judge is compelled to reject a claim on the basis on which it is advanced, although he or she is of the opinion that it would have succeeded if it had been advanced on a different basis".

40. Although this line of reasoning was accepted by the Court of Appeal and was clearly and attractively developed on Mr Ng's behalf by Mr Parker QC (who did not appear before Bannister J), the Board cannot accept it. The simple answer to it is that, in the light of the incontrovertible fact that the Shares were registered in the name of Madam Chen, the onus was firmly on Mr Ng to establish a right over or in respect of the Shares. He was contending that he had the right to have the Shares transferred back to him, and it was for him to persuade the Judge that he had such a right or any other right over the Shares, in particular either by giving a credible account of the Note and Transfer involving the existence of such a right or by bringing the circumstances within possibility (Bi) (a resulting trust) mentioned in para 36 above, rather than possibility (A) (sale) or (Bii) (gift).

41. Analogies can be dangerous, but this conclusion derives support from two cases involving real property. First, there is the principle re-asserted by Scarman LJ in *Portland Managements Ltd v Harte* [1977] QB 306, 314, that where the freehold proprietor of premises seeks possession of land, "it is not enough for the defendant merely to assert or give evidence that he is in possession: he has got to show that he is there on the basis of some title which is consistent with the ownership of the premises being vested in the [proprietor]". Secondly, in her speech in *Stack v Dowden* [2007] 2 AC 432, where the freehold of the property concerned was registered in the joint names of the appellant and the respondent, Lady Hale said at para 56:

> "Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest."

42. Although *Portland* and *Stack* were concerned with real property rather than with shares, the observations quoted from both cases are in point. A major virtue of a register of ownership of assets, whether real or personal, whether corporeal or incorporeal, is that it incontrovertibly identifies the person who is, at least prima facie, the owner of an asset, and, subject to any qualifications on the register, throws the onus onto any third party who claims an interest in or right over the asset. This proposition was well established in the cases relied on in *Portland* where the third party raised a common law right, and the observations in *Stack* confirm that the position is the same where the third party's claim is equitable. It is unnecessary to decide the point, but, at least as at present advised, the Board is inclined to accept that Mr Ng's case involved claiming a right which was both contractual and equitable: he was contending for a contractual right to have the Shares transferred to him, which, if established, would have given him an equitable interest in the Shares.

43. It is true that at trial Madam Chen put forward a different case which, like that of Mr Ng, failed. However, given that she was the registered proprietor of the Shares, that did not undermine the fundamental point identified in para 40 above. As Bannister J pithily put it, "[i]n order to succeed in these proceedings Mr Ng needed to prove that he is entitled to call for a retransfer of the Shares. Madam Chen needed to prove nothing". It is also true that no alternative case was put forward by Madam Chen to the effect that she should succeed on the point identified in para 40 above. However, it does not appear to the Board to be unfair on Mr Ng that the point should be taken. It is a pure point of law which Mr Ng could not have produced any evidence to rebut, and it was a point which Mr Ng's legal advisers had the opportunity to deal with.

44. It may well be that Madam Chen could have advanced a case on a slightly different basis, namely that it was open to the Judge to find that the unchallenged transfer of the legal ownership of the Shares to Madam Chen in October 2011 inevitably led to the conclusion, at least in the absence of any contradictory evidence accepted by the Judge, that the beneficial, as well as the legal ownership of the Shares was vested in Madam Chen. Given that that transaction was completed by registration of Madam Chen as proprietor of the Shares, that seems to the Board to be a very similar, if somewhat more roundabout, basis for arriving at the same result.

Was the Court of Appeal right to find positively that there was no valid consideration?

45. The Court of Appeal, overturning the judge on this point, found effectively that the case fell within possibility (Bi) identified in para 36 above. In other words, the references to consideration were never intended to be effective or to bind, and for that reason alone there can have been no sale of the Shares: see para 38 above and paras 62-63, 76 and 83 of the Court of Appeal's judgment. Mr McDonnell submits that US$40,000 may, in the context of a property valued in 2012 at around US$480m, be regarded as "nominal". He relies on Lord Wilberforce's reference in *Midland Bank Trust Co Ltd v Green* [1981] AC 513, 532D to nominal consideration as a term of art, referring to consideration which can be mentioned as consideration, but is not necessarily paid. Lord Wilberforce's scepticism in the same case about whether £500 could be regarded as nominal in the context of a sale of a property worth £40,000 does not lend much encouragement to this submission, although that is not to say that it may not be argued further at a later stage in this litigation. More importantly, the Board does not consider that the Court of Appeal was necessarily right to derive, from pleaded statements made by Madam Chen in the context of a case (which the judge rejected) to the effect that she was the long-standing beneficial owner of the Shares, a conclusion that the Transfer of 4 October 2011 fell necessarily within possibility (Bi) (resulting trust), rather than (A) (sale) or (Bii) (gift), identified in para 36 above. Even if the right conclusion on the facts was that no consideration was ever really intended, agreed or payable, it does not follow that the Transfer did not operate by way of gift.

46. Mr Ng was, as the Board has in para 11 indicated, asked about the possibility that he was, by the Transfer aiming to evade his creditors. Bearing in mind his long-standing family relationship with Madam Chen, such an aim might well be achieved, indeed could only truly be achieved as a matter of law, by transfer of the whole interest in the Shares, whether for a comparatively small consideration or by way of gift. It is true that Madam Chen advanced no positive case on either point at the trial. But the specificity and number of ways in which Mr Ng averred that only Madam Chen had any interest in the Hotel from and after 4 October 2011 could be thought to militate against the existence of a resulting trust and/or to support a conclusion that some form of outright transfer of any and all interest occurred on that date. Madam Chen was also entitled to test the credibility of Mr Ng's case that he had or retained a beneficial interest after 4 October 2011, and did so by reference to the possibility that his indebtedness to creditors might provide a motive for the Transfer. It is also in this connection that Mr McDonnell applies to introduce fresh evidence, only available since the trial, in the form of a defence put in on behalf of Mr Ng in Macau legal proceedings, positively explaining the Transfer as designed to avoid the risk of seizure of Mr Ng's assets by creditors. The Court of Appeal refused to admit that fresh evidence, on the ground that it would not affect their decision. The Board considers that the evidence would potentially have had a real relevance in cross-examination, and that, if the matter goes back for re-hearing, there would on the face of it (and without limiting the judge's discretion) appear to the Board to be a strong case for permitting its use in this context. Those advising Madam Chen would have also of course to consider whether any application should be made then to advance a positive case in this area.

Other arguments in relation to the above

47. A number of other arguments in relation to the above issues appear to have been raised before the Court of Appeal, and indeed were raised before the Board, on behalf of Mr Ng, but there is no benefit in considering them.

Was the Judge entitled to disbelieve Mr Ng for the reasons he gave?

48. As explained in paras 13 and 14 above, the Judge based his rejection of Mr Ng's evidence (summarised in para 8 above) as to the circumstances in which he transferred the Shares to Madam Chen, and in particular his evidence that the Shares would be transferred back to him after six months, on two grounds. The first was that the explanation which Mr Ng gave for this arrangement was unconvincing, as it would have been "self-evidently futile" to expect the Macau and Beijing authorities to believe that Mr Ng had no involvement in the proposed development. The second ground, which appears to the Board to be, and to have been regarded by the Judge as being, of less weight, was that, if Mr Ng's explanation had been true, the Judge considered that he would have obtained a transfer in blank executed by Madam Chen, so that he could have ensured that the Shares were transferred back to him.

49. These two grounds are not inherently objectionable as reasons for disbelieving Mr Ng. Recent guidance has been given by the UK Supreme Court in *McGraddie v McGraddie* [2013] 1 WLR 2477 and *Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600 and by the Board itself in *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11 as to the proper approach of an appellate court when deciding whether to interfere with a judge's conclusion on a disputed issue of fact on which the judge has heard oral evidence. In *McGraddie* the Supreme Court and in *Central Bank of Ecuador* the Board set out a well-known passage from Lord Thankerton's speech in *Thomas v Thomas* [1947] AC 484, 487-488, which encapsulates the principles relevant on this appeal. It is to this effect:

> "(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'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."

50. In *Henderson* at paras 62 and 66, the Supreme Court said, in shorthand, that an appellate court should only interfere with a judge's conclusion of fact if it was one which "no reasonable judge could have reached" or the judge's decision "cannot be reasonably explained or justified". In *Central Bank of Ecuador*, the Board, after reciting once again Lord Thankerton's famous passage (above) and examining other considerations bearing on the matter, pointed out that these principles do not mean that an appellate court should never intervene, that they "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" (para 8). In the present case, the Judge made findings of primary fact about Mr Ng's credibility and case, based on reading his lengthy written material and seeing him in the witness box for one and a half days in the context of the material before him as a whole. Ultimately, however he expressed only two reasons for rejecting Mr Ng's evidence, so that it is on them that the appeal in this area must focus. It is not suggested that the Judge's two grounds for rejecting Mr Ng's evidence were unreasonable or unjustified, and rightly so: his grounds were plainly reasonable in themselves. However, the attack on the

Judge's finding in this case is not based on the merits of his grounds for disbelieving Mr Ng: it is founded on an alleged procedural flaw in relation to each of those grounds.

51. Mr Parker's argument is, as it was before the Court of Appeal, that if the two grounds cited by the Judge were to be relied on as reasons for disbelieving Mr Ng, they ought to have been put to Mr Ng in cross-examination. As neither ground was raised with him, runs the argument, it was unfair for the Judge to have relied on either of them as reasons for disbelieving Mr Ng; accordingly, it would be wrong to let the decision of the Judge stand. The Court of Appeal accepted this argument, and, albeit with some hesitation, the Board considers that they were right to do so.

52. In a perfect world, any ground for doubting the evidence of a witness ought to be put to him, and a judge should only rely on a ground for disbelieving a witness which that witness has had an opportunity of explaining. However, the world is not perfect, and, while both points remain ideals which should always be in the minds of cross-examiners and trial judges, they cannot be absolute requirements in every case. Even in a very full trial, it may often be disproportionate and unrealistic to expect a cross-examiner to put every possible reason for disbelieving a witness to that witness, especially in a complex case, and it may be particularly difficult to do so in a case such as this, where the Judge sensibly rationed the time for cross-examination and the witness concerned needed an interpreter. Once it is accepted that not every point may be put, it is inevitable that there will be cases where a point which strikes the judge as a significant reason for disbelieving some evidence when he comes to give judgment, has not been put to the witness who gave it.

53. Mr Parker relies on a general rule, namely that "it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted", as Lord Herschell LC put it in *Browne v Dunn* (1893) 6 R 67, 71. In other words, where it is not made clear during (or before) a trial that the evidence, or a significant aspect of the evidence, of a witness (especially if he is a party in the proceedings) is challenged as inaccurate, it is not appropriate, at least in the absence of further relevant facts, for the evidence then to be challenged in closing speeches or in the subsequent judgment. A relatively recent example of the application of this rule by the English Court of Appeal can be found in *Markem Corpn v Zipher Ltd* [2005] RPC 31.

54. The Judge's rejection of Mr Ng's evidence, and his reasons for rejecting that evidence, do not infringe this general rule, because it was clear from the inception of the instant proceedings, and throughout the trial that Mr Ng's evidence as to the basis on which the Shares were transferred in October 2011 was rejected by Madam Chen. Indeed, Mr Ng was cross-examined on the basis that he was not telling the truth about this issue. The challenge is therefore more nuanced than if it was based on the general

rule: it is based on an objection to the grounds for rejecting Mr Ng's evidence, rather than an objection to the rejection itself. It appears to the Board that an appellate court's decision whether to uphold a trial judge's decision to reject a witness's evidence on grounds which were not put to the witness must depend on the facts of the particular case. Ultimately, it must turn on the question whether the trial, viewed overall, was fair bearing in mind that the relevant issue was decided on the basis that a witness was disbelieved on grounds which were not put to him.

55. At a relatively high level of generality, in such a case an appellate court should have in mind two conflicting principles: the need for finality and minimising costs in litigation, on the one hand, and the even more important requirement of a fair trial, on the other. Specific factors to be taken into account would include the importance of the relevant issue both absolutely and in the context of the case; the closeness of the grounds to the points which were put to the witness; the reasonableness of the grounds not having been put, including the amount of time available for cross-examination and the amount of material to be put to the witness; whether the ground had been raised or touched on in speeches to the court, witness statements or other relevant places; and, in some cases, the plausibility of the notion that the witness might have satisfactorily answered the grounds.

56. It is also worth an appellate court having in mind in this context what was said by Lord Hoffmann in *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372:

> "If I may quote what I said in *Biogen Inc v Medeva Plc* [1997] RPC 1, 45:
>
> > '... [S]pecific 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 … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'
>
> … The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed."

57. In the instant case, the Board is of the view that it would not be fair to let the rejection of Mr Ng's evidence stand, given that the two grounds upon which the Judge reached his decision were not put to Mr Ng. The ultimate factual dispute between the parties in the litigation was the basis upon which, and circumstances in which, the

Transfer of the Shares took place, and therefore the issue on which Mr Ng was disbelieved was central to the proceedings.

58. The two grounds on which the Judge relied were not by any means obscure. The first, that it would have been futile to try and hide Mr Ng's involvement in the development, was primarily based on the contents of the feasibility study, which was actually put as a document to Mr Ng (albeit not opened, let alone read), and one only has to look at the first few pages to see the significance of Mr Ng to the development. The second ground, that Mr Ng would have taken a transfer back in blank, was a pretty obvious point, not least because he had referred to it in his witness statement, and he had also mentioned taking just such a course in relation to another transaction four years earlier. Both grounds could have been put very easily in the course of a 90-minute cross-examination, even allowing for the other points which Mr McDonnell raised with him and the fact that Mr Ng needed an interpreter - and also allowing for wisdom of hindsight. Put bluntly, these two grounds were simple, self-contained reasons for disbelieving Mr Ng, whereas the bulk of the cross-examination was directed to more peripheral and complicated issues such as whether, at the time of the Transfer, he had criminal connections, he had been in financial difficulties, and he had fallen out with a proposed partner.

59. It is said that the first ground was raised in Mr McDonnell's closing submissions, but that was on the basis that Mr Ng's explanation for the Transfer of the Shares and the alleged agreement to transfer back in six months would have been pointless because the development project had been abandoned. Quite apart from the fact that it was never put to Mr Ng that the project had been abandoned, that was not the basis upon which the Judge rested his ground, which was that Mr Ng's involvement in the development project would have been apparent to the authorities; indeed, the notion that the project had been abandoned (as Madam Chen said) is in some ways inconsistent with that ground. The second ground was, as mentioned above, specifically addressed in Mr Ng's witness statement, which is of some assistance to Madam Chen's case, but was not touched on at any point at the hearing, and it was a secondary reason for disbelieving Mr Ng.

60. It is not hard to conceive of answers which might have been available to Mr Ng to answer the first ground, and which might have satisfied or at least mitigated the Judge's concern. Mr Ng had dealt with the second point in his witness statement, but it is not impossible that he might have had more to say about it if it had been raised in cross-examination. Of course, the Judge may very well have had strong reservations about Mr Ng's evidence for other reasons, but he gave only two specific grounds for disbelieving him, and there is no other material in his judgment which justifies a conclusion that he would have reached the same decision without these two grounds.

61. In summary, then, (i) the issue concerned was central to the whole proceedings, (ii) neither ground which the Judge gave for disbelieving Mr Ng on that issue was put to Mr Ng, (iii) neither ground was referred to at the hearing at any time, save that the second (less significant) ground had been addressed in Mr Ng's witness statement, (iv) neither ground was obscure or difficult and so each could reasonably be expected to have been raised in cross-examination, (v) it is quite possible that Mr Ng would have given believable evidence which weakened or undermined those grounds, and (vi) there is nothing in the judgment which can reasonably be invoked to say that it is reasonably clear that the judge would have reached the same conclusion without those grounds.

Conclusions

62. The Judge's reasoning for concluding that the Transfer constituted a sale for consideration and his decision to reject Mr Ng's case therefore cannot stand. The issue as to which of the possibilities identified in para 36 above may apply, whether the Transfer of 4 October 2011 gave rise to a resulting trust, and as to the credibility of Mr Ng's evidence and case all require further consideration in the light of evidence. It is self-evidently not possible for the Board to reach a conclusion on the issue of Mr Ng's credibility. The only possible outcome is therefore that this case must be sent back for full re-hearing. Subject to any order which the BVI High Court may give, it would be both unfair and impractical for it to go back on any basis other than that (i) the parties are both free to conduct their respective cases at the re-hearing as if it was the first trial, but (ii) their respective cases should be based on their existing pleadings and witness statements, subject to such amendments and further evidence as the court at first instance may permit, in particular with regard to the new material deriving from the Macau legal proceedings (para 46 above) and (iii) they will be entitled to rely on the transcript of the hearing before Bannister J as cross-examination material.

63. It is right to mention that Madam Chen applied to adduce further evidence and argument on another issue. This consisted of material from Macau proceedings relating to the Cotai strip project, by reference to which Mr Ng had sought (unsuccessfully) to explain the Transfer (see para 8 above). It is unnecessary for the Board to rule on this application, in the light of the decision we have reached, and again the Board will leave it to the court at first instance to hear and determine any such application.

64. Accordingly, the Board concludes that (i) the BVI courts had jurisdiction to hear these proceedings, (ii) Madam Chen's appeal should be allowed to the extent of setting aside the order that the Shares are beneficially owned by Mr Ng, but that, rather than restoring the order of Bannister J, (iii) it should be ordered that there be a new trial before a different judge. The Board will humbly advise Her Majesty accordingly.

65. It is obviously regrettable that there must be a new trial. The fact that the Board considers that the re-trial should be before a different judge implies no criticism of Bannister J, who the Board understands has now in any event retired from the Bench. So far as the trial was concerned, the transcript suggests that he was faced with an unnecessarily elaborate set of factual and legal arguments on both sides; so far as any re-trial is concerned, justice may not be seen to have been done if it takes place before a judge who has already reached a conclusion on the facts.

66. The parties should try and agree an appropriate order to give effect to the above conclusions and for costs, within 14 days of the handing down of this judgment, failing which they should make submissions in writing to the Board on those matters they cannot agree within 28 days thereafter.