Hilary Term
[2021] UKPC 4
Privy Council Appeal No 0082 of 2019

JUDGMENT

Byers and others (Appellants) *v* Chen Ningning (Respondent) (British Virgin Islands)

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

before

Lord Kerr
Lord Briggs
Lady Arden
Lord Kitchin
Lord Leggatt

JUDGMENT GIVEN ON

22 February 2021

Heard on 4 June 2020

Appellants
Stephen Smith QC
Ben Griffiths
(Instructed by Holman
Fenwick Willan LLP
(London))

Respondent
Victor Joffe QC
Ifan Chan
(Instructed by Harney
Westwood & Riegels LLP
(London))

LORD KITCHIN:

1. This appeal concerns a claim by the joint liquidators of Pioneer Freight Futures Ltd ("PFF") which is based upon the alleged misfeasance of one of PFF's former directors, Miss Chen Ningning ("Miss Chen").

2. The appeal gives rise to issues concerning the adequacy of the judgment of the trial judge; the relevance of delay by the Court of Appeal in delivering its judgment; the permissibility of challenges on an appeal to the Board of findings of fact made by the trial judge and upheld by the Court of Appeal; the changing nature of the duties of a director once the insolvent administration of a company becomes inevitable; and the scope and nature of the jurisdiction conferred on the court by the Insolvency Act 2003 ("the 2003 Act") where a company has entered into a voidable transaction. The Board will identify the issues more precisely in a moment but first we must explain the background.

The background

3. PFF was incorporated in the British Virgin Islands ("BVI") in 2006 for the purpose of trading in forward freight agreements ("FFAs"). FFAs are contracts for differences that allow shipowners and traders to manage their exposure to the volatility of freight rates. That volatility also provides an opportunity for companies such as PFF to enter into FFAs for speculative purposes. The FFAs entered into by PFF were written on standard terms and referenced to the Baltic Dry Index, an index of freight rates maintained and published by the Baltic Exchange. Until about September 2008, PFF was one of the largest FFA traders in Asia.

4. The respondent, Miss Chen, is the ultimate beneficial owner of a group of companies known as the Pioneer Group. The principal holding company of the group is another company incorporated in the BVI called Pioneer Iron and Steel Group Company Ltd ("PISG"). PFF is owned by PISG. Upon its incorporation, PFF had three directors, one of whom was Miss Chen. The other two directors resigned in the course of 2007, leaving Miss Chen as PFF's sole director. Miss Chen is based in the People's Republic of China and PFF's main business activities were conducted from offices occupied by PISG in Beijing.

5. In September 2008 there was a catastrophic collapse in the freight market and in consequence PFF began to experience severe financial difficulties. It ceased trading in

FFAs and concentrated on managing its FFA portfolio with a view to negotiating settlements with its creditors and minimising its losses.

6. On 15 May 2009 PFF entered into a loan agreement with Zenato Investments Ltd ("Zenato"), a company owned and controlled by Mr Song Dingding ("Mr Song"), a business acquaintance of Miss Chen. Under the terms of this agreement Zenato agreed to lend to PFF up to US$ 13m for a term of two years at an interest rate of 9% per annum. Sums totalling US$ 13m were duly advanced by Zenato to PFF in three tranches in the course of that month.

7. On 29 October 2009 PFF lost an action that had been brought against it in the High Court in London by an FFA counterparty, Marine Trade SA ("Marine Trade") ([2009] EWHC 2656 (Comm); [2010] 1 Lloyd's Rep 631). It had been conceded by PFF on 23 October 2009, the last day of the trial, that it was commercially insolvent and in the light of that concession the judge, Flaux J (as he then was), held that an event of default had occurred under the terms of their contract and that any liability of Marine Trade to PFF was suspended whilst PFF remained indebted to Marine Trade.

8. Shortly after the delivery of the Marine Trade judgment and as a result of an improvement in the market, PFF found itself with what the trial judge in these proceedings, Bannister J, described as an "excess margin on deposit" which meant that it could withdraw funds from its deposit account. PFF took that opportunity to repay its indebtedness to Zenato in three tranches on 3, 4 and 27 November 2009. Nevertheless, at the time these payments were made (and indeed at all times from, at the latest, 29 October 2009) PFF was insolvent and an insolvent liquidation or some other protective insolvency process was inevitable.

9. On 17 December 2009 PFF 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 application was supported by an affidavit of Mr Eddie Chen (who is not a relative of Miss Chen and is also known as Mr Chen Yang) ("Mr Chen") dated 16 December 2009. He described himself in that affidavit as the "Chief Operating Officer and Director of Risk Management" of PFF but made clear that although his title included the word "Director", he had not in fact been appointed as a board director of PFF.

10. The court acceded to the application and appointed Mr Mark Byers, Mr Mark McDonald and Mr Andrew Hosking, each of Grant Thornton UK LLP, as joint provisional liquidators ("JPLs"). On 15 February 2010 the JPLs were appointed as PFF's liquidators. Mr Hosking resigned on 24 October 2012. Mr Byers and Mr McDonald remain PFF's liquidators ("the Liquidators").

11. In the meantime, on 28 January 2010, using the statutory powers conferred on the JPLs, Mr Byers had examined Mr Chen. The meeting at which the examination took place was also attended by Mr Andrew Charters, a director of Grant Thornton, and by Ms Alex Welch, a colleague of Mr Charters. Ms Welch prepared a note ("the note") of the meeting after its conclusion. The note records that Mr Chen told them that the Zenato loan was organised by PISG and that Miss Chen tried to pay back as much of it as possible because "she is reliant on her reputation". The Liquidators have attached particular importance to the contents of this note because the examination took place only shortly after their appointment as provisional liquidators and at a time when they were trying to gather as much information as possible about PFF's affairs. It was only about 12 weeks after instructions had been given for the payments to Zenato to be made.

12. On 17 May 2010 PISG submitted a claim in PFF's liquidation. That claim was later admitted by the Liquidators in the sum of about US$ 90m. On 17 December 2010 the Liquidators announced their intention to pay to PFF's creditors an interim dividend of US$ 0.06 in the dollar (that is to say, 6%) on admitted debts. This meant that the interim dividend payment in respect of PISG's debt would amount to about US$ 5.4m.

13. On 2 January 2014 the liquidators of PISG, which was by this stage in liquidation itself, assigned to Miss Chen the right to that interim dividend and, indeed, all other dividends which might become due and payable to PISG in respect of its claim against PFF. Notice of this assignment was given to the Liquidators.

14. On 7 March 2014 the Liquidators wrote to Miss Chen informing her that they would be withholding payment of the interim dividend to her on the grounds that they might have a cause of action against her. A letter before action followed on 31 March 2014.

15. On 30 April 2014 Miss Chen made an application in the High Court of Justice of the BVI for an order that the Liquidators pay her, as assignee of PISG, the interim dividend to which she claimed to be entitled.

16. On 23 May 2014 the Liquidators began these proceedings against Miss Chen in the High Court of Justice of the BVI claiming the sum of US$ 13m together with interest for breach by Miss Chen of her fiduciary duties as a *de jure*, *de facto* or shadow director of PFF, or as someone whose role in the affairs of PFF (including as sole authorised signatory on its bank accounts) justified the imposition of fiduciary duties, for causing and procuring the payments to Zenato in November 2009. They also sought an order against Miss Chen under section 249 of the 2003 Act for restoration of the funds paid to Zenato on the basis that the repayment of the loan constituted an unfair preference and so was a voidable transaction within the meaning of, respectively, sections 245 and 244 of that Act.

The decision of the trial judge

17. The action came on for trial before Bannister J on 3 March 2015 and lasted for four days. He clearly had a poor opinion of the merits of the Liquidators' claims, describing them in his concise judgment, which he delivered on 19 March 2015, as "remarkable" and as giving the impression of having been "cobbled together for the sole purpose of providing the [Liquidators] with grounds for refusing to pay Miss Chen's dividend" (para 14). He recorded as common ground that a director who realises that a company 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. He also found that at all times after the Marine Trade judgment, PFF was unable to pay its debts as they fell due and insolvent liquidation or some other protective insolvency regime was inevitable. However, he then held that:

> (i) Miss Chen ceased to be a director of PFF at about the beginning of August 2009 and she owed no fiduciary duties to PFF at the time of the Zenato payments in November 2009;
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> (ii) Miss Chen probably knew of and did not object to the Zenato payments but she did not instruct Mr Chen to make them; nor did she cause or procure them to be made in any other way; and
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> (iii) it followed that Miss Chen did not act in breach of fiduciary duty. Further, if Miss Chen was not liable for breach of fiduciary duty, sections 244, 245 and 249 of the 2003 Act were not capable of generating an obligation on their own.

The decision of the Court of Appeal

18. The Liquidators' appeal against Bannister J's judgment and consequential order was heard by the Court of Appeal on 11-12 January 2016. In its judgment, delivered on 12 June 2018, nearly two and a half years later, it dismissed the appeal on all grounds. In broad summary, the court held that:

> (i) the judge was entitled to find that Miss Chen owed no fiduciary duties to PFF at the time of the payments to Zenato whether as a *de jure*, *de facto* or shadow director or as a result of any role she may have had in the affairs of PFF;
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> (ii) the judge's finding that Miss Chen did not cause or procure the payments to Zenato was one that was open to him on the evidence; and

(iii) the payments to Zenato constituted an unfair preference within the meaning of section 245 of the 2003 Act, but the court would not exercise its discretion to make an order against Miss Chen because such an order was not required to restore PFF to the position it would have been in had it not made the payments because insolvent liquidation was inevitable in any event. Further, Miss Chen did not receive any benefit from the payments; and the fact that she knew about them but did not object to them was just one of the factors to be considered and by itself did not carry much weight.

The issues on this appeal

19. The Board can now outline the grounds of this further appeal and the rival contentions of the parties. The Liquidators submit that the judge ought to have found that Miss Chen was a *de jure* director of PFF at the time of the payments to Zenato and, indeed, remained a *de jure* director of PFF until its liquidation. They also contend that even if Miss Chen was not a *de jure* director of PFF at the time of these payments, she was a *de facto* or shadow director because she retained responsibility for important aspects of PFF's affairs and, in particular, its bank account and the payments it made. They submit that, irrespective of the precise nature of her directorship, she owed fiduciary duties to PFF and, once it became clear that PFF was insolvent, through PFF to its unsecured creditors. They contend that the Court of Appeal ought to have identified and corrected these failings by the judge and that it fell into error in failing to do so.

20. The Liquidators also argue that the judge was wrong not to find that Miss Chen acted in breach of these fiduciary duties. She permitted Zenato's loan to be repaid in full when she well knew that PFF was insolvent. The first payment was made a matter of days after the Marine Trade judgment and, within three weeks of the final payment, Miss Chen arranged for PFF to enter provisional liquidation. At the time of the loan repayment, Zenato was only entitled to prove pari passu with PFF's other unsecured creditors in its insolvency and by allowing PFF to repay its loan in full, Miss Chen acted in breach of her duty to the company to have proper regard to the interests of all of those other unsecured creditors. The Liquidators contend that, once again, the Court of Appeal was wrong not to recognise and correct these errors.

21. The third limb of the Liquidators' case on this appeal is that the judge ought to have found that Miss Chen actually arranged or at least consented to the repayment of the Zenato loan. They maintain that, just as it is inconceivable that Miss Chen would not have known about the plan to repay the Zenato loan prematurely, it is also inconceivable that anybody involved in PFF's affairs would have made the loan repayments without seeking and obtaining her consent. Moreover, they argue, the evidence that Miss Chen was involved in the payments to Zenato and did give her

permission for them to be made was overwhelming and ought to have been accepted. The Court of Appeal wrongly failed so to find.

22. The fourth and final limb of the Liquidators' case on this appeal concerns their claim under the 2003 Act. They contend that the judge was wrong to reject it as he did on the basis that if Miss Chen was not liable for breach of fiduciary duty then it followed that she was not liable under the provisions of the 2003 Act. They continue that the Court of Appeal was right to find that the repayment of the Zenato loan constituted an unfair preference within the meaning of section 245 and it ought also to have found that it was a voidable transaction within the meaning of section 244, and that section 249 conferred upon it a discretion to make an order against Miss Chen to restore PFF's position to what it would have been had the payments not been made. Further, the Liquidators continue, the Court of Appeal's decision not to make such an order was flawed and should be set aside. They invite the Board to exercise the discretion afresh and, in doing so, to order relief against Miss Chen on this ground too.

23. The Liquidators recognise that their case before the Board involves challenges to findings of fact made by the judge and upheld by the Court of Appeal. They also acknowledge that there are significant constraints on the ability of the Board to overturn such findings. However, they continue, the central findings which they challenge on this appeal are plainly wrong. The judge ignored relevant evidence and his findings are neither internally consistent nor adequately supported by reasons. These errors were not identified or acted upon by the Court of Appeal and justify the Board interfering in the decisions to which the judge and the Court of Appeal came.

24. There are two further matters upon which the Liquidators rely. They point, first, to what they describe as the great hostility of the judge to their case, a hostility which, they say, he displayed during the interlocutory stages of the proceedings, at the trial and on handing down his judgment. Moreover, they continue, this is not a case where the judge gave a full and detailed judgment. To the contrary, the judgment is only ten pages long and it was delivered within 14 days. Given the length of the trial (four days) and the complexity of the issues it raised, the concision of the judgment and the speed with which it was delivered reflect a failure by the judge properly to consider and address all the evidence before him and the submissions he heard.

25. The Liquidators refer, secondly, to the delay of two and a half years by the Court of Appeal in giving its judgment. This, they say, was exceptional and amounts to a real injustice to the parties. Further, when coupled with the errors in the judgment itself, this delay justifies the intervention of the Board.

26. Miss Chen responds that the Liquidators' case constitutes a wholly inappropriate and unjustified attempt to challenge the findings of fact made by the judge and upheld

by the Court of Appeal. There are, says Miss Chen, several key findings which are fatal to this further appeal: (i) she ceased to be a *de jure* director of PFF around the beginning of August 2009 when she withdrew from involvement in its affairs; (ii) after she ceased to be a *de jure* director of PFF, she did not become a *de facto* or shadow director of the company and did not owe fiduciary duties to it for any other reason; (iii) she did not cause or procure the repayment of the Zenato loan and Mr Chen was a credible witness on this issue. These findings are, Miss Chen continues, unimpeachable and the challenge made to them by the Liquidators was rightly rejected by the Court of Appeal.

27. As for whether the Court of Appeal was wrong to hold that no order for relief should be made against her under section 249 of the 2003 Act, Miss Chen accepts the Court of Appeal's finding that PFF's repayment of the loan to Zenato constituted an unfair preference within the meaning of section 245 of the 2003 Act. She also accepts that section 249 confers on the court a discretionary power to make orders against third parties. However, she continues, such powers are not unfettered and must be exercised for the restitutionary purpose of restoring the pre-transaction position. The power can only be exercised against a third party who has benefitted from the transaction and so has something to restore. Here there is no finding that she derived any personal benefit from the repayment of the Zenato loan; indeed, there is a finding that she did not.

28. Miss Chen also rejects the criticisms of the judge's attitude to the claim and the concision of his judgment. These matters were, she says, raised by the Liquidators before the Court of Appeal and rightly dismissed. As for the delay by the Court of Appeal in giving judgment, Miss Chen submits that the critical question is whether there is some error in the Court of Appeal's approach which is attributable to the delay and here there is not.

The approach to be adopted

29. It is well established that, where a trial judge has reached a conclusion on an issue of fact, it will only be on rare occasions that an appellate court will intervene. Lord Reed summarised the position in *Henderson v Foxworth Investments Ltd* [2014] 1 WLR 2600, para 67:

> "in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

30. Further, as a matter of settled practice, the Board will decline to interfere with concurrent findings of fact of two lower tribunals. This practice will only be departed from in cases of a most unusual nature. In *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11; [2016] 1 BCLC 26, para 4, the Board made clear that the position remains as stated in *Devi v Roy* [1946] AC 508, pp 508-509, where it said:

> "(4) That, in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law.
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> (5) That the question of admissibility of evidence is a proposition of law, but it must be such as to affect materially the finding. The question of the value of evidence is not a sufficient reason for departure from the practice.
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> (6) That the practice is not a cast-iron one, and the foregoing statement as to reasons which will justify departure is illustrative only, and there may occur cases of such an unusual nature as will constrain the Board to depart from the practice."

31. The need for caution is yet further heightened where an appellate court is asked to reverse a finding by a trial judge exonerating a party of a lack of probity: see *Conticorp*, para 7.

Hostility of the judge and speed of delivery and concision of his judgment

32. The Board has referred in para 17 above to the judge's observations in his judgment about the merits of this claim from which, the Liquidators say, it is clear that, from the outset, he considered that a director could not be liable for breach of fiduciary duty for causing or permitting an insolvent company to pay an unsecured creditor; and in consequence he did not consider all of the relevant evidence led at trial or all of the material submissions made to him before he reached his overall conclusions.

33. The Liquidators also rely upon the following matters: first, the judge made hostile remarks about the merits of the claim at a case management conference on 25 November 2014. Secondly, the judge observed during the course of closing submissions that certain authorities relied on by the Liquidators were "highly sanctimonious" and "wholly inequitable"; that certain "general principles about applying trust law to companies" were, though agreed by counsel, "inherently unsound"; and that a number of English authorities upon which the Liquidators relied were "hysterically overreacting". Thirdly, the judge made comments on handing his judgment down to the effect that the claim was "misguided", "wholly misconceived" and had been brought "to spite Miss Chen and for no proper legal reason".

34. These remarks were, the Liquidators submit, wholly misconceived and are all the more remarkable in light of the fact that the claims were brought by them in their capacity as liquidators and officers of the court, and with the sanction of the creditors' committee. The Liquidators also point out that the judge did not accept Miss Chen's evidence in important respects: he found that she continued to be a *de jure* director of PFF until August 2009, contrary to her evidence that she had resigned as a director on 29 May 2009; and he also found that she knew about the Zenato payments before they were made, and in so doing again rejected her evidence.

35. These submissions were also made to the Court of Appeal which rejected them, wrongly say the Liquidators. The Court of Appeal held, at para 115:

> "… the appellants' complaint is not made out. Bannister J made remarks at the beginning and in the course of the hearing which indicated his views on the difficulties the appellant may face upon one or more of the points in issue. There is nothing wrong with that, provided that he does not show a closed mind. Bannister J did not show a closed mind neither did he fail to apply his mind to the task before him. It cannot be said that a fair minded and informed observer, having considered the facts would conclude that there was a real possibility that Bannister J had predetermined the case against the appellants. This ground accordingly fails."

36. It is of course a fundamental principle of civil justice that everyone is entitled to a fair trial before an independent and impartial tribunal. The Board has reviewed with care the judgment of Bannister J and those parts of the transcripts which record the remarks about which complaint is made and reveal the circumstances in which they were uttered. The Board also has in mind that these are proceedings of a commercial nature and that the parties were represented by experienced leading counsel, both before the judge and on appeal. There can be no doubt that the judge's remarks at the case management conference and during the trial were forthright and robust and it would have been better had he expressed himself in a more moderate manner. But they must

be considered in context. Some of them were made in the course of interchanges with counsel in which the judge was seeking to make clear the aspects of the claim which, as a matter of principle, he found difficulty accepting; others were made so that counsel understood his preliminary views on particular issues. The remarks he made when handing down his judgment reflected the decision he had reached. It is also apparent from the transcript that all of these remarks were of a kind with which the counsel before him, both of whom were highly experienced, were well equipped to deal. The Board is satisfied that, having regard to the nature of these proceedings, the parties to them and the skill and experience of those representing them, a fair minded observer, who heard these remarks in the context in which they were made, would not conclude that the judge had set his mind against the Liquidators or had predetermined the case against them. Indeed, the judge's evaluation of Miss Chen's evidence, accepting some parts but rejecting others indicates that he applied a critical mind to the case. The decision of the Court of Appeal on this issue was correct.

37. In reaching this conclusion the Board has also given careful consideration to the submission that the judgment itself is so concise and that it was produced with such speed that it may be inferred that the judge did not consider all of the relevant evidence before him or the submissions he heard. The Board has no hesitation in rejecting this contention. As a general matter, the expeditious production and delivery of a judgment is to be applauded, not criticised; and concision in a judgment is a quality, not a defect. That is not to say that expedition and concision are a justification for a failure by a judge to address material submissions; for making errors of law or findings of fact which cannot be supported or which are plainly wrong; or for failing adequately to explain the reasons for his or her decision. Of course, they are not. The Board will address the Liquidators' specific criticisms of this kind later in this judgment.

Delay by the Court of Appeal in delivering judgment

38. The Liquidators point to the delay of two and a half years by the Court of Appeal in giving judgment and submit that this too amounts to a miscarriage of justice. They also say that there are errors in the judgment which are probably attributable to this delay and which render it unsafe. They argue that these further factors justify the intervention of the Board.

39. The Board has been provided with no explanation for the delay of two and a half years by the Court of Appeal in giving judgment in this appeal and we have no doubt that delay was excessive. It is well known that in 2017 the BVI were struck by two category five hurricanes, Hurricane Irma and Hurricane Maria, which caused widespread destruction and disruption and it is possible that the failure to deliver judgment in a timely way was attributable at least in part to these natural disasters. But the Board has been provided with no information which would allow it to determine whether that is so or not.

40. Excessive delay by a court in giving judgment is a serious matter. As Peter Gibson LJ explained in *Goose v Wilson Sandford and Co* [1998] TLR 85, paras 112-113, in the context of a complaint of undue delay in the delivery of a judgment after a trial, such delay denies justice to the winning party, undermines the loser's confidence in the correctness of the decision and weakens confidence in the judicial process. What is more, in resolving issues of contested fact, the judge has the benefit of having seen and heard the witnesses give their evidence. The passage of time may weaken this advantage.

41. In this appeal the Board is not concerned with a complaint of excessive delay by a trial judge in the delivery of his judgment. We must address a complaint of excessive delay by the Court of Appeal. We would accept that the outcome of an appeal will not normally depend upon matters such as the evaluation of the honesty of particular witnesses or an assessment of the probative value of the evidence they gave, the reliability of which may be affected by the passing of time. If, as is commonly the case, the appeal is limited to a review of the decision of the lower court, it will usually involve instead an assessment of whether that decision is wrong or whether it is unjust because of some serious procedural or other irregularity. The correctness of decisions by appellate courts may therefore be less sensitive to delay in their delivery. Nonetheless, excessive delay again amounts to a denial of justice to the winning party, undermines the loser's confidence in the correctness of the decision and weakens confidence in the judicial process. What is more, the Board has no doubt that excessive delay by an appellate court in delivering its judgment does increase the risk of it being unreliable and this may justify its careful scrutiny on a further appeal: see, for example, *Al Sadik v Investcorp Bank BSC* [2018] UKPC 15, para 47.

42. Nevertheless, delay in the delivery of a judgment by a trial judge or by an appellate court, however excessive, does not of itself justify the intervention of an appellate court. In *Cobham v Frett* [2001] 1 WLR 1775, 1784, the Board explained that if excessive delay is to be relied upon as a ground of appeal against a judgment at first instance, a fair case must be shown for believing that the judgment contains errors that are probably or even possibly attributable to that delay. The appellate court must also be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant. We are satisfied that we should adopt the same approach on this second appeal.

43. As we have foreshadowed, the Liquidators argue that the delay of two and a half years in delivery by the Court of Appeal of its judgment in these proceedings was so excessive as to amount to a miscarriage of justice and to render it generally unreliable. They also say that where, as here, the decision of the appellate court is to the effect that the judge was entitled to reach the conclusion he did, it is permissible to question whether the appellate court has simply taken the line of least resistance because it can no longer recall the intricacies of the arguments presented to it.

44. These are powerful arguments. On the other hand, we must also take into account that the Court of Appeal had the benefit of extensive written submissions, the Justices took detailed notes during the hearing and a transcript of the hearing was available. Moreover, the judgment of the Court of Appeal is long and detailed and it addresses in a systematic way all of the grounds of appeal. It contains no errors which can be attributed to delay. Weighing all these matters, the Board is not persuaded that the correctness of the judgment of the Court of Appeal can be impugned merely on the ground of excessive delay. Nor is the Board persuaded that the miscarriage of justice inherent in a delay of this duration of itself justifies setting that judgment aside and so depriving Miss Chen of the decision in her favour. However, the Board is satisfied that 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. It is to that exercise that the Board now turns.

Did Miss Chen owe fiduciary duties to PFF in November 2009?

45. This is a major issue between the parties and it is convenient to consider it in four parts: (i) the parties' cases and the decisions of Bannister J and the Court of Appeal; (ii) whether Miss Chen resigned as a *de jure* director of PFF on or about 29 May 2009; (iii) whether Miss Chen ceased to be a *de jure* director of PFF at or around the beginning of August 2009; and if necessary (iv) whether Miss Chen owed PFF fiduciary duties after the beginning of August 2009 for any other reason.

(i) The parties' cases and the decisions below

46. There has never been any dispute that Miss Chen was the only *de jure* director of PFF at the beginning of May 2009. It was the Liquidators' case at trial that she remained a *de jure* director of PFF until the appointment of the JPLs or at least until November 2009, and was a *de jure* director of the company at the time the payments were made to Zenato. The Liquidators also contended at trial that if Miss Chen resigned as a *de jure* director before the autumn of 2009, she was reappointed in October 2009. A yet further limb of the Liquidators' case was that Miss Chen was at least a *de facto* or shadow director of PFF in November 2009 or that her relationship with PFF was such that she owed it fiduciary duties at that time.

47. Miss Chen, on the other hand, maintained at trial that she resigned from her position as *de jure* director of PFF on 29 May 2009 and was not at any time reappointed as a director of the company, and did not owe it any fiduciary duties for any other reason. In this connection she relied upon her letter of resignation dated 29 May 2009 and addressed to "the Board of Directors" of PFF in which she said that she: "would like to tender my resignation as a director" of PFF with effect from that day. This was one of a series of three documents bearing that date. The second purported to be a

resolution in writing of "the sole director" of PFF and made pursuant to its articles of association resolving, as of that day, to appoint Mr Gan Shaoqui ("Mr Gan") as a director of PFF and to accept Miss Chen's resignation. The third purported to be a letter from Mr Gan to the Board of Directors of PFF consenting to his appointment as a director of PFF, again, as of that day.

48. Bannister J addressed this issue in paras 18-27 of his judgment. He began, in para 18, by referring to Miss Chen's letter of resignation. He said that he had no doubt that this letter was not contrived and continued:

> "… I am satisfied that [Miss Chen] originally intended it to have effect as from 29 May 2009. Shortly before that time, she had been held incommunicado for some six weeks by law enforcement agencies of the People's Republic of China in connection, as I understood it, with an investigation, subsequently abandoned, into economic fraud. Although she was, perhaps understandably, sparing with details of this event, I accept her evidence that it traumatized her and that it lay behind her resignation as director, not only of PFF, but also of PML [another Pioneer group company]. The unpleaded allegation that the resignation was backdated is not made out and in any event is irrelevant given the fact that it is common ground that she had effectively resigned as a *de jure* director long before the repayments to Zenato were in contemplation. In any case, she signed a similar resignation letter, with the same timeline, in respect of PML. The [Liquidators] have not suggested that that resignation was similarly backdated nor have they put forward any reason why it might have been." [A footnote is omitted]

49. Several points emerge from this paragraph. First, the judge found that Miss Chen *originally* intended the letter to have effect as from 29 May 2009. This was an important qualification and the reason for it follows a little later in the judgment, as will become clear in a moment. Secondly, the judge gave a substantive reason for believing that Miss Chen originally had that intention, namely that she had recently been held by the enforcement agencies of the People's Republic of China. That particular finding is not challenged by the Liquidators. Thirdly, the judge believed it to be common ground that Miss Chen resigned as a *de jure* director of PFF long before the payments to Zenato were in contemplation. This was not correct. It is not and has never been common ground that Miss Chen resigned as a *de jure* director of PFF before the repayment of the Zenato loan was in contemplation. A part of the Liquidators' case was and remains that Miss Chen was a *de jure* director of PFF both at the time the payments were contemplated and when they were in fact made.

50. The judge considered next who, if anyone, succeeded Miss Chen as a director of PFF. This was not an incidental matter. Under section 109(4) of the BVI Companies Act 2004 ("the 2004 Act") and subject to an exception which is irrelevant for the purposes of this appeal, a company is required to have at least one director. If it does not, then, by section 109(6), any person who manages or who directs or supervises the management of the business or affairs of the company is deemed to be a director of the company for the purposes of the Act.

51. The judge addressed this question at para 19 of his judgment. He found that there was hopeless confusion about who, if anyone, succeeded Miss Chen as PFF's sole *de jure* director. He continued that, for a brief while, it may have been intended that Mr Song should become a director but there was no evidence that he was ever validly appointed. He also observed that there was a "suggestion" that Mr Gan was "latterly a *de jure* director of PFF" and "appears to have signed some documents" on behalf of PFF but found that there was no evidence that he was ever validly appointed, and thought that the issue whether he ever became a director was "immaterial".

52. The Board has no difficulty understanding why the judge thought there was no satisfactory evidence that Mr Gan was ever appointed as a *de jure* director of PFF. The signature on the document purporting to be the resolution appointing him as a director of PFF is remarkably similar to that on his own letter to PFF consenting to act as such a director, and he could hardly have resolved to appoint himself. However, the Board cannot accept so readily that whether Mr Gan became a director of PFF was immaterial. PFF was required to have at least one director and this was a particularly critical time for the company. If there was no satisfactory evidence that Mr Gan (or anyone else) became a *de jure* director on 29 May 2009, it provides at least some support for the view that Miss Chen did not in fact resign on that day.

53. Moreover, there was ample evidence before the judge that Miss Chen continued to act as a *de jure* director of PFF after 29 May 2009. She was directly involved with the management and direction of PFF's business and the instruction of Holman Fenwick Willan LLP ("HFW"), the solicitors acting for PFF. In this connection the judge explained at para 20 of his judgment:

> "There is, however, clear evidence that PFF staff continued to behave as if Miss Chen remained as a *de jure* director of PFF until well after 29 May 2009. In particular, in July 2009 they sought her signature to board resolutions of PFF authorizing Mr Chen to execute settlement agreements with FFA creditors. On 14 July 2009 Miss Chen gave advice as to the form of a letter to one of PFF's FFA debtors and HFW copied Miss Chen into draft letters on the point. An email from Mr Chen to HFW dated 20 July 2009, states that Miss Chen had instructed him to call defaults on two of

> PFF's FFA debtors. On 29 July 2009 Miss Fiona Li, the Pioneer Group's Chief Legal Officer, told HFW that she was going to do a note to HFW and Miss Chen to approve the execution of a settlement agreement and of two consent orders."

54. Miss Chen did not challenge these findings before the Court of Appeal. Nor did she challenge on appeal the further finding made by the judge, at para 25 of his judgment, that she in fact remained a *de jure* director of PFF, capable of signing board resolutions, after 29 May and until the beginning of August 2009.

55. Since the hearing of this appeal the Board has had the benefit of further submissions in writing from the parties which they have filed in response to directions which we gave on 10 June 2020. In essence, the Board sought and has received further assistance on the status of Miss Chen as a director of PFF and whether and, if so, how her directorship continued after 29 May 2009. It is now clear that Miss Chen does indeed challenge the judge's finding that she continued to be a *de jure* director after 29 May 2009 and this is a matter to which we must return.

56. The judge turned his attention next to the position after the beginning of August 2009. He found there to be a "distinct and complete gap", so far as disclosed by the documents in evidence, in Miss Chen's involvement in the affairs of PFF in the period from the beginning of August 2009 until November 2009. The Liquidators pointed to the absence on Mr Chen's laptop, which he handed over to the JPLs after PFF had gone into liquidation, of any emails. But Mr Chen explained and the judge accepted that he operated a system whereby all emails self-deleted after a few days, leaving only draft agreements and similar documents. Nor was the judge impressed by the fact that Miss Chen had sole signing rights on PFF's bank accounts. Here the judge accepted what he described as uncontradicted evidence that all PFF's banking transactions were carried out electronically from its offices by its accounts staff and so he thought the point "went nowhere".

57. The judge was similarly dismissive of the note of Mr Chen's interview in January 2010, observing that it contained only a summary and was "demonstrably inaccurate" in that it did not set out all the questions Mr Chen was asked and to which his statements were supposed to be responsive. Moreover, the judge continued, Mr Chen had never been given an opportunity to review or comment upon the content of the note despite requests by him. So the note was, in the judge's opinion, of no probative value.

58. The judge did accept, however, that once it became clear that PFF would have to enter into some kind of insolvency process, Miss Chen was kept abreast of discussions. In this regard he held, at para 24, that she expressed her concerns about the process and:

> "She expressed her preferences as to process and venue, down to the budget for lawyers' fees. She agreed to underwrite the appointment of Grant Thornton as administrators/liquidators up to a limit of US$ 2m. Despite there being a considerable quantity of traffic with or involving Miss Chen between then and the appointment of the JPL's, none of it concerns the day to day conduct of PFF's business, let alone the Zenato loan or its repayment. It is confined exclusively to the question of insolvent administration of PFF."

59. The judge's conclusions follow at para 25:

> "My conclusions from this material are that, for whatever reason, Miss Chen did in fact remain a *de jure* director of PFF, capable of signing board resolutions, until around the beginning of August 2009. There is no evidence that she was involved in the affairs of PFF at any level or at all between then and the time when it came to put PFF into an insolvency procedure in November/December 2009, and then only in relation to the insolvency process itself. That she was involved in those processes is most naturally explained by the fact that she was PFF's ultimate owner. The evidence is clear that Miss Chen withdrew from any involvement in the affairs of PFF after, at the latest, early August 2009, leaving Mr Chen in charge of its affairs as its sole *de facto* director. There is no material capable of supporting a suggestion that, after she ceased to be a *de jure* director she somehow continued as a director *de facto*."

60. For like reasons, the judge rejected the Liquidators' alternative case that, after her resignation took effect, Miss Chen acted as a shadow director of PFF. The judge's final conclusion on this issue necessarily followed. He found that Miss Chen owed PFF no fiduciary duties after about the beginning of August 2009.

61. On appeal, the Court of Appeal dismissed the Liquidators' challenges to these findings, holding, in substance, that they were open to the judge on the evidence before him.

(ii) Did Miss Chen resign as a de jure director of PFF on or about 29 May 2009?

62. As we have said, Miss Chen maintains in the further submissions that she filed after the hearing that she did indeed resign as a *de jure* director of PFF on 29 May 2009.

In outline, she submits that she has concurrent findings in her favour that her letter containing the notice of her resignation was genuine. As for the date that notice took effect, Miss Chen points to section 115(1) of the 2004 Act which reads:

> "A director of a company may resign his office by giving written notice of his resignation to the company and that resignation has effect from the date the notice is received by the company or from such later date as may be specified in the notice."

63. This section was implemented in the articles of association of PFF which provided, in article 9.8:

> "A director may resign his office by giving written notice of his intention to the Company and the resignation has effect from the date the notice is received by the Company at the office of its registered agent or from such later date as may be specified in the notice. …"

64. Miss Chen contends that, as the sole director of PFF, she received the letter on behalf of the company as soon as she had written it. As for article 9.8, Miss Chen recognises there was no evidence of when PFF's registered agent, Tricor Services (BVI) Ltd, received the notice but maintains that, by application of the principle established in *In re Duomatic Ltd* [1969] 2 Ch 365, this is neither here nor there. The sole shareholder of PFF was PISG and Miss Chen was the sole shareholder of PISG. So, Miss Chen continues, under the *Duomatic* principle, any actions taken by her on PISG's behalf were necessarily approved and valid. Further, notwithstanding the terms of article 9.8, PISG, acting by her, was in a position informally to accept delivery of the letter as sufficient notice of her resignation; alternatively, PISG accepted the resignation on behalf of PFF. In so doing, to the effect necessary, PISG, acting through her, informally consented to the necessary alteration of PFF's articles of association.

65. The history, content and scope of the *Duomatic* principle were recently considered by the Board in some detail in *Ciban Management Corpn v Citco (BVI) Ltd* [2020] UKPC 21; [2020] 3 WLR 705, paras 31 to 47. On this appeal, there is no dispute or issue as to the content of the principle and so, at this stage, we need only recite Buckley J's encapsulation of it in *In re Duomatic* at p 373:

> "where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be."

66. Nevertheless, the Board has no doubt that application of this principle does not produce the outcome for which Miss Chen contends. The fallacy in the submissions Miss Chen advances is that they assume what they seek to establish, namely that her state of mind remained as it was when she wrote her letter of resignation. But the judge did not make any such finding. To the contrary, he found that Miss Chen *originally* intended it to have effect as from 29 May 2009 but that *in fact* she *remained* a *de jure* director well after that date and until the beginning of August.

67. The finding that Miss Chen remained a *de jure* director well after the 29 May was a perfectly proper one for the judge to make as a matter of fact and law. Miss Chen may have had second thoughts straight away or changed her mind after a day or two, or perhaps a little longer. At all events, Miss Chen continued to act in relation to the business and affairs of PFF after 29 May 2009 in just the same way as she had before that date and, in making the finding he did, the judge must have been satisfied that, contrary to her evidence and despite her letter of resignation, she decided to continue to be a *de jure* director after all, and that she did so with the consent of PFF.

68. It has long been established that a director who has given the company proper notice of his or her resignation is not entitled to withdraw that notice, save with the consent of the company: *Glossop v Glossop* [1907] 2 Ch 370. Here, as we have seen, the sole shareholder of PFF was PISG, and Miss Chen was the sole shareholder of PISG. Miss Chen gave evidence at the trial and there is no reason to doubt that she was also a director of PISG. Miss Chen could therefore, upon application of the *Duomatic* principle and on behalf of PISG, as the sole shareholder in PFF, consent to the withdrawal of her notice of resignation, and that consent would be binding on PFF.

69. The Liquidators also contend that Miss Chen could consent to the withdrawal of her notice of resignation in her capacity as the sole ultimate beneficial owner of PFF. In this regard, the Liquidators have properly drawn the attention of the Board to a number of authorities on the question whether the consent of a beneficial owner will suffice for the purposes of the *Duomatic* principle. It is not necessary to refer to them here, however, because the question has now been considered by the Board in the *Ciban Management* case at para 47:

> "A further possible qualification of the *Duomatic* principle is that, in some cases, doubts have been expressed as to whether the principle applies where it is the beneficial owners, rather than the registered shareholders, who consent. See, eg, *Palmer's Company Law*, looseleaf ed, vol 2, para 7.439. But the correct view is that, at least as here where the ultimate beneficial owner and not the registered shareholder is taking all the decisions in the relevant transactions, the *Duomatic* principle applies as regards the consent of (and authority given by) the ultimate beneficial owner. This is

> supported, as a matter of principle, by Mann J's judgment in *Shahar v Tsitsekkos* [2004] EWHC 2659 (Ch), para 67; and by Newey LJ's judgment in *Dickinson v NAL Realisations (Staffordshire) Ltd* [2020] 1 WLR 1122, para 20, in which, while not deciding the point, he stated that he was willing to assume (in the same way as he had done as Newey J in *In re Tulsesense Ltd; Rolfe v Rolfe* [2010] Bus LR D99; [2010] 2 BCLC 525, para 42) that 'the assent of the beneficial owners of a share can meet *Duomatic* requirements'. Certainly the claimant in this case did not seek to argue that, in relation to the *Duomatic* principle, any distinction should be drawn between Mr Byington, as ultimate beneficial owner, and Mr Stollman, his lawyer, who held the bearer shares."

70. In the circumstances of this case, where the sole shareholder of PFF was PISG, Miss Chen was the sole shareholder of PISG and the relevant decision making was that of Miss Chen, the Board is satisfied that the consent of Miss Chen as the beneficial owner of PFF is sufficient for the *Duomatic* principle to apply.

71. Further, there is no reason why the *Duomatic* principle should not be applied in the manner the Board has described. There can be no suggestion that it would involve an activity outside the powers of PFF. Nor would it cause loss to PFF's creditors or otherwise impact adversely on its already precarious financial position. It concerns only the appointment and status of Miss Chen as a director. As the Liquidators say and we accept, it would have been open to PISG as the sole shareholder in PFF, acting formally, to have agreed to the withdrawal of Miss Chen's resignation and it could do so informally under the *Duomatic* principle.

72. The Board therefore concludes that Bannister J was entitled to find that Miss Chen continued to be a *de jure* director of PFF after 29 May 2009. Miss Chen was right not to challenge this finding before the Court of Appeal and we reject her attempt to do so on this further appeal. The next question is whether the judge fell into error in finding that Miss Chen ceased to be a *de jure* director in early August 2009.

(iii) Did Miss Chen cease to be a de jure director of PFF in early August 2009?

73. It did not form any part of Miss Chen's case at trial that she decided to or did in fact resign as a *de jure* director of PFF at or around the beginning of August 2009; nor did she or any witness called by her give evidence to this effect. Her case, which the judge rejected, was that she resigned as a *de jure* director of PFF on or about 29 May 2009 and was replaced by Mr Gan. Further, her letter of resignation, dated 29 May 2009,

made clear that she was tendering her resignation as of that day. Miss Chen cannot point to any other document which might be said to constitute a notice by her to PFF of her intention to resign as a *de jure* director of PFF as from any date in early August 2009 or, indeed, at any time other than 29 May 2009.

74. Similarly, it formed no part of the Liquidators' case at trial that Miss Chen ceased to be a *de jure* director of PFF in early August or at any time before the Zenato loan had been repaid. They too called no evidence which might provide a basis for such a finding. Their case was that Miss Chen remained a *de jure* director of PFF until its liquidation.

75. How, then, did the judge come to the conclusion that Miss Chen resigned as a *de jure* director in early August 2009? It appears to have been based upon two matters. First, the judge thought it was common ground that Miss Chen resigned as a *de jure* director before the payments to Zenato were in contemplation. This was wrong. It was also a highly material error. It meant that the judge was proceeding under the false impression that the date on which Miss Chen resigned as a *de jure* director did not bear on the question whether she owed PFF fiduciary obligations at the time the payments to Zenato were actually made, it being common ground, so the judge thought, that she was not a *de jure* director at that time.

76. Secondly, the judge attached considerable importance to what he perceived to be a gap in the disclosure. Here he drew a sharp distinction between the disclosure up to the beginning of August 2009 and the disclosure after that time. He was satisfied that the disclosure up to the beginning of August 2009 showed Miss Chen's involvement in the affairs of PFF. However, he continued, after that time, there was a considerable quantity of email traffic with or involving Miss Chen, but none of it concerned the day to day conduct of PFF's business and it was confined exclusively to the question of the company's insolvent administration. He concluded that Mr Chen was left in charge of the affairs of PFF as its sole *de facto* director.

77. The Board does not find this reasoning persuasive. A lack of involvement by Miss Chen in the day to day management of PFF's business after the beginning of August 2009 could provide little evidential support for the conclusion that she had resigned as a *de jure* director. Had it been common ground that she resigned as a *de jure* director at some point before the payments to Zenato were made, the position might have been otherwise. But it was not.

78. What is more, the judge was in any event wrong to characterise the email traffic after the beginning of August 2009 and to dismiss its relevance in the way that he did. Whilst we accept the judge's finding that Miss Chen was not involved in the day to day running of PFF's business, these emails reveal that her instructions were sought both in relation to the forthcoming insolvency proceedings and PFF's ongoing business

concerns. In this connection our attention has been drawn, in particular, to an email from Miss Chen to HFW and Mr Chen dated 10 December 2009 responding to a request for her instructions in relation to the anticipated insolvency proceedings and whether a hearing in ongoing litigation involving PFF and one of its FFA counterparties, referred to as "Klaveness", should be adjourned. All of this email correspondence was consistent with the Liquidators' case that Miss Chen was still a *de jure* director of PFF in the autumn of 2009.

79. Not only was there no evidence that Miss Chen ceased to be a *de jure* director of PFF at or around the beginning of August 2009, there was at least some evidence that she did not. First, there was the email correspondence to which we have referred, the contents of which were not only consistent with but supportive of the Liquidators' case that Miss Chen remained a director of the company after that time. Once it became apparent that PFF was insolvent, it was the duty of the directors to have regard to the interests of the creditors of the company because the creditors had the primary interest in the assets of the company. The fact that Miss Chen was actively involved in the decisions as to the form and place of the insolvency proceedings is an indication that she was still a director.

80. Secondly, Mr Perrott, the partner in HFW who was responsible for dealing with the instructions from PFF, gave evidence in an affidavit dated 27 January 2015, in compliance with an order of the High Court of the BVI dated 13 January 2015, that he believed or assumed that all his instructions were fully authorised by Miss Chen, and that he considered that Miss Chen was the key decision maker in relation to PFF. However, it is also right to record that Mr Perrot made it clear that he had no contemporaneous knowledge of the payments to Zenato and so could not comment on whether Miss Chen was involved in the decision to make them.

81. The judge did not deal with Mr Perrott's evidence at all. The Court of Appeal considered that it was of no assistance in the light of his acceptance that he had no contemporaneous knowledge of the Zenato payments. But as the Liquidators correctly point out, this misses the point. The point is not whether Mr Perrot had direct knowledge of whether Miss Chen specifically authorised the Zenato payments but whether she was a *de jure* director of PFF after the beginning of August 2009 and this is at least some evidence that she was.

82. Thirdly, Miss Chen accepts that she continued to have sole signing rights on PFF's bank accounts. There is no challenge to the judge's finding that PFF's banking transactions were carried out electronically from its offices by PFF accounts staff. But they could only do so with Miss Chen's authorisation. This too was suggestive that she continued to direct and was responsible for the business affairs of PFF after the beginning of August.

83. Fourthly, the judge thought that the question whether Mr Gan was ever appointed as a director of PFF was immaterial. The Board cannot agree. This was relevant because it was Miss Chen's case that she was *replaced* as a *de jure* director of PFF by Mr Gan. If she was not, it casts further doubt on her case that she had ceased to be a *de jure* director of PFF by the time the payments were made to Zenato. Moreover, as we have mentioned, BVI companies are required by section 109(4) of the 2004 Act to have at least one director. If Mr Gan was not appointed, it gives further support to the conclusion that Miss Chen did not resign.

84. Ultimately, in the circumstances of this case, the question whether there was positive evidence that Miss Chen continued to be a *de jure* director after the beginning of August 2009 is not critical, however. The key question is whether there was any evidence that she ceased to be a *de jure* director at about this time. There was no such evidence. Accordingly, the judge erred in law in making the finding that he did. So too, the Court of Appeal erred in failing to identify and correct the judge's error.

85. The Board has no doubt that this was an error of fundamental importance to the outcome of this appeal. This is therefore one of those rare cases in which, on the established practice of the Board, it is appropriate to intervene.

(iv) Did Miss Chen owe fiduciary duties to PFF after the beginning of August 2009?

86. We can now deal with this question very shortly. Miss Chen continued to owe fiduciary duties to PFF after the beginning of August 2009 because she remained a *de jure* director. There is no need to consider whether, had that directorship come to an end, she would have owed fiduciary duties to the company for any other reason.

Did Miss Chen act in breach of her fiduciary duties?

87. The Liquidators alleged in their amended statement of claim that until the appointment of the JPLs, Miss Chen, as the sole authorised signatory on PFF's main trading account, was responsible for "authorising and causing or procuring all payments" made from that account on behalf of PFF in the relevant period, including the payments made to Zenato.

88. Bannister J rejected this allegation. He considered that Mr Chen gave credible evidence for repaying the Zenato loan when he did, namely that agents of Mr Song were "threatening staff and besieging PFF's offices in search of repayment". He also accepted Mr Chen's denial that Miss Chen had instructed him to repay the Zenato loan. However, he did not accept Miss Chen's evidence that she had no idea about that repayment until

the commencement of these proceedings. He thought it probable that Miss Chen did know of and did not object to the repayment. But he continued at para 29:

> "That, of course, is not the same as causing or procuring the repayment, which is the charge levelled against Miss Chen. There is no evidence at all that she did that."

89. The Court of Appeal upheld this finding. It considered that the judge was entitled to find that Miss Chen did not instruct Mr Chen to repay the Zenato loan or arrange the repayment; and that the judge was also entitled to find that it had not been established that Miss Chen "specifically caused and or procured the repayments". The Court of Appeal also observed that, in so far as it was contended that Miss Chen acted in breach of her fiduciary duties to PFF by not objecting to the Zenato payments, the judge, in the passage of his judgment cited immediately above, was "making reference to a pleading point, in essence stating that the pleaded case was not supported by the evidence". By this we understand the Court of Appeal to have agreed with the judge that the Liquidators had never alleged that Miss Chen had acted in breach of her fiduciary duties to PFF by failing to object to the Zenato payments.

90. For reasons to which we will come, we do not accept the judge's characterisation of the Liquidators' pleaded case. But first, we must say something about the duties a director owes to a company in his or her capacity as a director. The general duties owed by a director are well known and are codified in sections 120 to 125 of the 2004 Act. They include the duty to act honestly and in good faith and in what the director considers to be the best interests of the company, and a duty to exercise his or her powers for a proper purpose: see, respectively, sections 120(1) and 121 of the 2004 Act.

91. The next question is whether, by failing to intervene to prevent the Zenato payments, Miss Chen acted in breach of her fiduciary duties to PFF. As we have said, Miss Chen was a *de jure* director of PFF and she was the sole authorised signatory on the account from which the Zenato payments were made. At all times after the Marine Trade judgment, PFF's insolvent liquidation or some other protective insolvency regime was inevitable and, as the judge found, this was under active discussion between Miss Chen and others on behalf of PFF, on the one hand, and HFW, on the other, "a matter of days" afterwards. It is not necessary for the purposes of this appeal to explore the boundaries of the fiduciary duty owed by a director of an insolvent company for the Board has no doubt that, in the circumstances we have described, when making or authorising payments from PFF's account, Miss Chen had a fiduciary duty to act honestly and in good faith in what she believed to be the best interests of PFF and, through PFF, as an insolvent company, in the best interests of its creditors. Similarly, she had a duty to exercise her powers as a director for proper purposes, that is to say, once PFF became insolvent, for purposes which would further the interests of PFF's

creditors. Further, in light of PFF's insolvency, the normal principle that Miss Chen, as the ultimate owner of PFF, could waive or ratify any such breach of duty was displaced.

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

93. The judge found that Mr Chen was responsible for repaying the Zenato loan and that by this time he was in charge of PFF's affairs as sole *de facto* director. He also found that banking transactions were in practice conducted electronically by PFF's staff without Miss Chen having to sign anything, and that the payments to Zenato were made in this way. However, Miss Chen was, on the judge's findings, aware of these payments. What is more, Miss Chen had a fiduciary duty to PFF to take all reasonable steps to intervene to prevent a payment being made from a trading account of which she was sole signatory for an improper purpose. The repayment of the whole of the Zenato loan was undoubtedly improper. It was made at a time when PFF was insolvent and without any proper reason. Yet Miss Chen took no steps to prevent it. Moreover, given Miss Chen's position in relation to PFF as *de jure* director and sole beneficial owner and given further that she was the sole signatory on the account, there can be no doubt that, had she intervened, the payments would not have been made. She was, as the judge described, "ultimately the boss". In these circumstances the Board is satisfied that her inaction amounted to a breach of her fiduciary duty to PFF.

94. Was it an answer to this claim that it fell outside the scope of any pleaded issue? The pleaded allegation was that, as the sole authorised signatory on the relevant trading account, Miss Chen authorised, caused or procured all payments made from the account during the relevant period, including the Zenato payments. In the Board's opinion that allegation did encompass the culpable inactivity of Miss Chen that we have described. By delegating to Mr Chen the ability to make payments from the account and by failing to take any action to prevent the improper payments to Zenato, Miss Chen did authorise those payments to Zenato and she relevantly caused them to be made.

Ought the judge and the Court of Appeal to have found that Miss Chen arranged the repayment of the Zenato loan?

95. In these circumstances there is no need to consider whether, as the Liquidators submit, Bannister J also fell into error in failing to find that Miss Chen actually arranged the Zenato payments and whether the Court of Appeal was wrong not to correct this error. It is sufficient to say that the Board has not been persuaded that there is a proper basis for interfering with the concurrent findings of the courts below on this question.

The claim under the Insolvency Act 2003

96. Nor is it necessary for the Board to consider this additional limb of the Liquidators' claim. Both the judge and the Court of Appeal rejected it, but for very different reasons. In the Board's view, our conclusion that Miss Chen is liable to account for breach of fiduciary duty makes any investigation of the question whether the Liquidators have, in addition, a remedy under sections 244 and 245 of the Insolvency Act 2003 simply unnecessary. Miss Chen's liability to account will be a sufficient remedy for the Liquidators, and a parallel remedy under the Act, although discretionary as to its precise extent, could not provide for them anything of greater value than they will obtain from the Board's conclusion that she was in breach of fiduciary duty by failing to prevent the Zenato payments. The Liquidators have not submitted to the contrary, at least before the Board. Nor do we need to address the question whether, as the Liquidators have contended, Miss Chen derived a reputational benefit from the making of the payments.

Conclusion

97. The Board was originally constituted for this appeal as Lord Kerr, Lord Briggs, Lady Arden, Lord Kitchin and Lord Leggatt and was heard by that panel of five. Lord Kitchin had prepared a draft of this judgment, upon the main conclusions of which all five of us were agreed, by the end of October 2020. Lord Kerr had by then retired, at the beginning of October, but had as is usual continued thereafter to participate in the process of perfecting the judgment. Very sadly Lord Kerr died on 1 December after a short illness. It is for that reason that the Board now delivers this judgment as a panel of four rather than the original five.

98. For the reasons given, the Board will humbly advise Her Majesty that this appeal should be allowed. Miss Chen owed fiduciary duties to PFF at the time of the repayment of the Zenato loan and her failure to intervene to prevent that repayment amounted to a breach of those duties. The Board will invite submissions as to the appropriate form of order in the light of this judgment.