Michaelmas Term
[2022] UKPC 52
Privy Council Appeal No 0010 of 2020

JUDGMENT

Kwok Kin Kwok (Respondent) *v* Yao Juan (Appellant) (British Virgin Islands)

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

before

Lord Briggs
Lord Kitchin
Lady Rose
Lord Richards
Dame Geraldine Andrews

JUDGMENT GIVEN ON
15 December 2022

Heard on 18 October 2022

Appellant
Alain Choo-Choy KC
Claire Goldstein
Romane Duncan
(Instructed by Blake Morgan LLP (Oxford))

Respondent
Paul Chaisty KC
Richard Evans
(Instructed by Sinclair Gibson LLP)

DAME GERALDINE ANDREWS (with whom Lord Briggs, Lord Kitchin, Lady Rose and Lord Richards agree):

Introduction

1. This appeal concerns a petition for unfair prejudice brought under section 184I of the BVI Business Companies Act 2004 ("the 2004 Act") by the appellant ("Madam Yao"). She claimed that the conduct of the business affairs of a BVI international business company, Crown Treasure Group Ltd ("Crown Treasure") and its subsidiaries by its sole director, the respondent ("Madam Kwok"), was oppressive, unfairly discriminatory and/or unfairly prejudicial to her in her capacity as a shareholder in Crown Treasure. Madam Yao and Madam Kwok each own 50% of the shares in that company, and neither can transfer her shares without the consent of the other.

2. The dispute concerned an oral agreement made between the parties in 2005 ("the Agreement") to engage in a commercial venture to build and operate a 5-star luxury hotel in Xiamen in the People's Republic of China ("the Project"). They decided to use Crown Treasure as the vehicle through which they would hold their respective interests in the Project. Strong Nation Investments Ltd ("Strong Nation"), another BVI company, was adopted as an intermediate holding company and became a wholly owned subsidiary of Crown Treasure. Madam Kwok is and was at all material times the sole director of both companies.

3. Xiamen Royal Victoria Hotel Ltd ("Xiamen RVH") was incorporated in the PRC to hold the land and develop and operate the hotel. Strong Nation became the beneficial owner of all the shares in Xiamen RVH. It was the registered owner of 56% of those shares; the remaining shares were registered in the name of Xiamen Yuqian Industrial Investment Co Ltd ("Shanghai Yuqian"), a company controlled by Madam Kwok, which held them as nominee for Strong Nation.

4. Although it was common ground that the parties agreed that they would each have a 50% shareholding in Crown Treasure, there was substantial disagreement as to the remaining terms of the Agreement.

5. Madam Yao contended that there was an agreement (or mutual understanding) that:

(i) The start-up capital was to be provided by Madam Yao and, if insufficient, by finance raised from banks and, if still insufficient, by Madam Yao and Madam Kwok equally (whether in the form of loans or otherwise); and

(ii) Madam Kwok was to notify and consult Madam Yao about any major decisions, transactions or dealings, especially those which would or may have a material adverse effect on Madam Yao's investment, ownership and control of the Project, and she was not to make any major decision or enter into any major transaction without Madam Yao's consent.

6. Madam Kwok contended that it was agreed (or mutually understood) that:

(i) Madam Kwok and Madam Yao were to be responsible for all necessary capital required for the Project in equal shares up to a total sum of RMB 550m (the estimated construction cost) exclusive of the cost of the land. The working capital could be raised through bank financing if available on reasonable terms; and

(ii) Madam Kwok was to have complete autonomy in running the Project, and Madam Yao was merely a "passive investor".

7. Madam Yao complained that without notifying or consulting her, let alone obtaining her consent, Madam Kwok entered into certain transactions that (i) locked in her capital investment for 40 years and (ii) led to the dilution of Madam Yao's indirect interest in Xiamen RVH and the alienation of shares in Xiamen RVH to a third party. Whilst on Madam Yao's case the parties did not define what would constitute a "major transaction or decision," there was no dispute that the decisions and transactions complained of by Madam Yao would meet that description. Madam Yao also complained that, although funding for the Project was provided by both parties, the amount of Madam Yao's funding was not matched by Madam Kwok, as they had agreed, and this led to further unfair prejudice to her position as a shareholder in Crown Treasure.

8. Madam Kwok denied that she was obliged to notify and consult Madam Yao about, or to obtain her consent to, any major transaction or decision. She alleged that she was given a completely free hand in the implementation and running of the Project and the raising of any necessary additional finance for it.

9. The terms of the Agreement were undocumented, and there was no contemporaneous correspondence or other written record which might assist in determining what they were. As the trial judge, Adderley J ("the Judge") stated at para 35 of his judgment:

> "It therefore fell to the court to evaluate the evidence of the witnesses at the trial and to make a determination as to whether such an agreement was made and what were its terms."

The resolution of the factual dispute about what was orally agreed or mutually understood at the inception of the Project necessarily depended on the Judge's assessment of the credibility of the witnesses, the inherent probabilities, and the commercial sense of their differing accounts.

10. The hearing of the Petition occupied 24 days. This was only partly due to the fact that all four witnesses, Madam Yao and her husband Mr Wei, and Madam Kwok and her husband Mr Tung, gave their evidence through interpreters. Some of the originally pleaded allegations (such as the alleged entitlement of Madam Yao to participate in the management of Crown Treasure, and various allegations of bad faith made against Madam Kwok) were not pursued, as the Judge recorded in paras 17 and 92 of his judgment. Even so, there were many contentious issues for him to resolve.

11. The Judge delivered judgment on 13 March 2018, only five weeks after counsel's closing speeches. He resolved the dispute as to the terms of the oral agreement in favour of Madam Yao. He found that Madam Kwok had breached those terms and acted in a manner that was unfairly prejudicial to her as a 50% shareholder in three specific respects (summarised in para 37 of this judgment). He also found that she had procured Madam Yao's consent to a loan transaction (which ultimately led to a further dilution of her interest in Xiamen RVH) by misrepresentation. Whilst he did not expressly characterise this as a further act causing unfair prejudice, he was entitled to take it into account when determining the appropriate remedy.

12. The Judge refused Madam Yao's primary claim for an order that she should buy out Madam Kwok's shares in Crown Treasure, on the basis that this would be disproportionate. Perhaps surprisingly, neither party sought nor supported the making of an order that Madam Kwok should buy out Madam Yao's shares in Crown Treasure. The Judge considered the idea of making an order that Madam Kwok should in future notify and consult Madam Yao about major decisions and

transactions, but rejected it on the basis that this would not cure the prejudice already caused, and that "policing such an order would be a formidable task, likely inviting further litigation down the road." In those circumstances, the Judge accepted Madam Yao's alternative submission that a liquidator should be appointed over Crown Treasure under section 159(1)(a) of the Insolvency Act 2003, on just and equitable grounds.

13. Madam Kwok appealed to the Eastern Caribbean Court of Appeal on five overlapping grounds, summarised as follows in para 4 of its judgment:

> "In essence, Madam Kwok's argument is that the learned judge erred in law when he appointed a liquidator of Crown Treasure because his decision (i) was an unreasonable and unjustified exercise of any discretion; (ii) was unsupported by any evidence; (iii) was contrary to the evidence and failed to take proper account of same; (iv) took account of issues not pleaded and (v) failed to provide any adequate reasons or explanation."

The appeal occupied one day of oral argument on 13 July 2018.

14. In a judgment handed down on 14 March 2019, the Court of Appeal (Michel JA, Gonsalves JA (Ag) and Courtney JA (Ag)) allowed Madam Kwok's appeal in part. The Court of Appeal found it unnecessary to deal with the allegation that the Judge had failed to provide adequate reasons or explanation for his findings. It held that the Judge had erred in finding that the Agreement required Madam Kwok to notify, consult and/or obtain Madam Yao's consent to any major decisions, transactions or dealings, especially those which would or might have a material adverse effect on Madam Yao's investments, ownership and control of the Project, on the basis that there was "no or no sufficient evidence to support a stand-alone and general duty to notify and consult".

15. However, the Court of Appeal held that there *was* evidence which supported a finding that (i) Madam Kwok could not introduce a new investor without Madam Yao's consent, and (ii) Madam Kwok needed to obtain Madam Yao's consent in relation to non-bank financing. Those obligations necessarily engaged a related or consequential duty to notify and consult Madam Yao in relation to those matters and to provide her with information about them. That duty had been breached in 2009 in circumstances which led to unfair prejudice to Madam Yao, essentially because the introduction of a new investor without her consent led to the dilution of her indirect interest in Xiamen RVH.

16. The Court of Appeal also reversed the Judge's finding that the duty on Madam Kwok to match the funding provided by, or on behalf of, Madam Yao, included the obligation to match funding provided by Madam Yao by way of shareholder loans.

17. The Court of Appeal refused an application by Madam Yao to admit fresh evidence pertaining to Madam Kwok's behaviour after the trial, which was alleged to be relevant because it demonstrated further acts by Madam Kwok of a similar nature which supported the correctness of the Judge's decision that liquidation was the appropriate remedy. It described the application as "misconceived" because it was not open to the respondent to an appeal to seek to introduce fresh evidence to support the judgment of the court below on grounds that were previously unavailable. This would undermine the principle of finality. Alternatively, if this approach was wrong, and even if all three requirements of *Ladd v Marshall* [1954] 1 WLR 1489 were met, the Court of Appeal said it would not exercise its discretion to admit the evidence. It would be preferable to leave Madam Yao to pursue a fresh claim for unfair prejudice.

18. Having determined that there was only one proven act of unfair prejudice, the Court of Appeal concluded that the decision to appoint a liquidator was a disproportionate remedy, and that the Judge had erred in the exercise of his discretion because he was "seeking to provide a remedy for what he considered to have been a greater infraction than what had truly occurred" and "the breakdown in trust and confidence that he identified was … necessarily exaggerated as it was premised on perceived breaches of a duty that was itself not well founded".

19. The Court of Appeal exercised its own discretion by substituting an order requiring Madam Kwok, in future, to notify and consult with Madam Yao in advance on all matters relating to the introduction of a new investor in the Project (whether in Crown Treasure or any of its subsidiaries) including any non-bank financing, and to obtain Madam Yao's consent prior to making or implementing any action that would result in or have the possibility of resulting in the introduction of such a new investor, subject to a proviso that such consent "must not be unreasonably withheld". That remedy (absent the proviso) had been considered and rejected by the Judge.

20. Madam Yao now appeals to the Board.

The issues

21. The principal issue that arises on this appeal is whether the Court of Appeal was entitled to overturn the Judge's fact-findings as to the terms of the Agreement and to substitute its own findings as to the nature and scope of the Agreement and of the unfairly prejudicial behaviour of Madam Kwok.

22. The second issue is whether the Court of Appeal erred in refusing the application to adduce fresh evidence. Madam Kwok contends that it is not open to Madam Yao to raise this point, because the grant of permission to appeal by the Court of Appeal does not encompass it, the application was interlocutory in nature, and there is no justification for the Board to exercise its own discretion to grant special leave.

23. The third issue is whether the Court of Appeal was wrong to set aside the Judge's order for the appointment of a liquidator. That issue arises even if the first issue is resolved in favour of Madam Yao, because Madam Kwok contends that the winding-up of Crown Treasure was outside the reasonable range of remedies open to the Judge even on his findings of unfair prejudice.

Background

24. In December 2005, Strong Nation and Shanghai Yuqian successfully bid at auction to acquire a 40-year interest in the land on which the hotel was to be developed for a price of RMB 248m (plus certain taxes). Mr Wei provided an interest-free demand loan of RMB 128m to Strong Nation, which was used to pay the auction deposit of RMB 18m and the first instalment of the purchase price (comprising 50% of the price less the auction deposit). The land was acquired, ultimately by Xiamen RVH, pursuant to a contract dated 19 December 2005.

25. Early in 2006, two payments totalling HK$160m were made directly to Strong Nation by Mr Wei's brother. The Judge found that this sum represented initial capital contributions of HK$80m each on behalf of Madam Yao and Madam Kwok (the latter's share being contributed in part-satisfaction of a debt owed by Mr Wei to Mr Tung in respect of an earlier business deal).

26. Without any prior notification of or consultation with Madam Yao, Madam Kwok caused Crown Treasure and Strong Nation to enter into a loan agreement dated 25 December 2005 ("the Loan Agreement to 2045") by which the HK$160m

was treated as an interest-free loan from Crown Treasure to Strong Nation, which would be injected by Strong Nation into Xiamen RVH as registered capital. The agreement provided that the loan was to be repaid by Strong Nation only from the dividends, if any, declared by Xiamen RVH to Strong Nation, and that any sums which had not been repaid to Crown Treasure by 19 December 2045 would be converted into capital in Strong Nation. This meant that there was no realistic prospect of Madam Yao seeing any benefit from her HK$80m contribution for at least 40 years, if at all.

27. The HK$160m was used by Strong Nation to capitalise Xiamen RVH in accordance with the requirements of the Chinese authorities. Most of the funds received by Xiamen RVH were then used by it to pay the balance of the purchase price for the land.

28. In October 2008, Xiamen RVH obtained a loan facility from a Chinese bank, ICBC, of up to RMB 200m, to finance the construction of the hotel ("the ICBC loan"). The ICBC loan could only be drawn down by reference to the progress in construction. Construction began in or around 2007-2008, and the hotel opened for business in August 2011. Madam Kwok exercised day to day management of and operational control over the Project. Madam Yao had no experience in the management or operation of five star hotels. She had virtually no involvement in the hotel prior to its opening.

29. In July 2009, without prior notification of or consultation with Madam Yao, Madam Kwok caused Strong Nation to enter into a "Co-Operation Agreement" and various related agreements with a Hong Kong company named Cheer Fancy Ltd ("Cheer Fancy") which was owned and controlled by a Mr Edward Eng, a friend of her husband. Strong Nation agreed to transfer a 40% shareholding in Xiamen RVH to a subsidiary of Cheer Fancy, Cheer Fancy Xiamen (whose legal representative was Madam Kwok). The Co-Operation Agreement provided that Strong Nation and Cheer Fancy would invest a total of RMB 500m in the Project, of which Cheer Fancy would contribute RMB 220m. Strong Nation had the option to redeem the transferred shareholding within 3 years, by repaying Cheer Fancy's investment with compound interest at the rate of 10% per annum.

30. These arrangements were implemented by the transfer by Shanghai Yuqian of its entire 44% interest in Xiamen RVH to Cheer Fancy Xiamen, on terms that Cheer Fancy Xiamen would hold a 4% interest in Xiamen RVH on behalf of Strong Nation. In consequence, Madam Yao's indirect interest in Xiamen RVH and the Project was diluted from 50% to 30% ("the First Dilution").

31. By a supplementary agreement between Strong Nation and Cheer Fancy, dated 19 October 2009, Cheer Fancy's investment in Xiamen RVH was reduced to RMB 110m and its shareholding reduced to 20%. It was agreed that this would be achieved by Mr Eng transferring a 54.55% interest in Cheer Fancy to Strong Nation (representing a 24% indirect interest in Xiamen RVH through Cheer Fancy Xiamen). In the event that Strong Nation repaid the RMB 110m, and exercised its right to redeem the shares, the balance of the shares in Cheer Fancy would be transferred to it. In consequence of these revised arrangements, the dilution of the value of Madam Yao's shareholding was partly ameliorated, as her indirect interest was increased to 40%.

32. Approximately 40.5m RMB of the 110m advanced by Cheer Fancy was used to repay unsecured loans made by Madam Kwok to Strong Nation.

33. Madam Yao's pleaded case was that in breach of the terms of the Agreement, Madam Kwok had failed to fully match her funding comprising the initial loan of RMB 128m and the subsequent capital contribution of HK$ 160m made via her brother-in-law. Had she done so, there may have been no need to enter into these arrangements with Cheer Fancy. The Judge rejected Madam Yao's case that the entire HK$160m was a contribution from her, and therefore decided that the shortfall in Madam Kwok's contribution was less than Madam Yao had pleaded. However, he noted that Madam Kwok did not challenge Madam Yao's analysis that if Madam Kwok had matched Madam Yao's contributions before the end of 2008, there may not have been any need to borrow from Cheer Fancy.

34. On 7 January 2010, at Madam Kwok's request, Madam Yao signed a written resolution of the shareholders of Crown Treasure agreeing that Strong Nation would borrow HK$100m from Mr Eng against a pledge of a 40% shareholding in Strong Nation. Those arrangements were implemented by a Secured Loan Contract between Strong Nation and Mr Eng dated 10 January 2010. Madam Kwok procured Madam Yao's consent to the loan by misrepresenting to her that additional funds were urgently required for the construction of the hotel. As of 31 December 2009, only a small fraction of the ICBC loan facility – RMB 5m - had been drawn down. In fact, unbeknown to Madam Yao, Mr Eng and Strong Nation entered into a side agreement that this new loan would be used to repay the loan of RMB 128m which had been used to fund the initial tranche of the purchase price of the land. That is in fact how it was used.

35. The Secured Loan Contract was subsequently transferred by Mr Eng to a company named Sino Ventures, pursuant to an agreement dated 3 November 2010. Despite this, it was Mr Eng who demanded repayment of the loan on 30 December

2011. Madam Kwok asked Madam Yao to pay HK$56m (50% of the outstanding amount of principal and interest) by 10 January 2012. Madam Yao stated that she was willing to make the payment on proof that Mr Eng had in fact provided the HK$100m, but Madam Kwok did not respond, and Strong Nation defaulted.

36. It was subsequently agreed between Strong Nation and Mr Eng that, although in consequence of the default Mr Eng was entitled to receive a 40% shareholding in Strong Nation, Strong Nation would instead transfer its 54.55% interest in Cheer Fancy to Mr Eng, such that Mr Eng would hold a 44% indirect interest in Xiamen RVH. This resulted in the dilution of Madam Yao's indirect interest in Xiamen RVH from 40% to 28% ("the Second Dilution").

37. The Judge concluded that Madam Yao had suffered unfairly prejudicial conduct as a result of Madam Kwok:

(i) Failing to match the funding (including by way of shareholder loan) that Madam Yao had contributed towards the Project;

(ii) Failing to notify and consult Madam Yao in relation to the proposed conclusion of the Loan Agreement to 2045; and

(iii) Failing to notify and consult Madam Yao in relation to the Co-operation Agreement and failing to seek her consent to the First Dilution of her indirect interest in Xiamen RVH as a result of the grant of an equity interest by way of security in favour of Cheer Fancy.

The Judge made no findings as to whether Madam Yao would or would not have consented to these transactions, as he held that the mischief lay in the fact that she was given no opportunity to consider them.

38. The Court of Appeal reversed the Judge's findings of unfair prejudice on grounds (i) and (ii) above, but upheld his finding of unfair prejudice in respect of the First Dilution (albeit on its own, narrower version of the duty to notify and consult and the duty to obtain consent). It also upheld his finding that Madam Kwok had procured Madam Yao's consent to the Secured Loan Agreement (which ultimately led to the Second Dilution) by misrepresentation.

Issue 1 – Was the Court of Appeal entitled to overturn the Judge's findings of fact?

39. The circumstances in which an appellate court is entitled to interfere with findings of fact made by a trial judge based on the oral evidence of witnesses are severely circumscribed. The guiding principles are well established and were not disputed. They have been reiterated in numerous decisions of the Judicial Committee and the UK Supreme Court, including *Henderson v Foxworth Investments Ltd* [2014] UKSC 41; [2014] 1 WLR 2600, paras 58 – 68; *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd* [2014] UKPC 21, [2014] 4 All ER 419, paras 11 – 17; and *Pleshakov v Sky Stream Corpn* [2021] UKPC 15, para 32.

40. An appellate court should not interfere with a judge's findings of primary fact unless they are "plainly wrong", which in this context connotes that either there was no evidence to support the finding, or the finding was based on a misunderstanding of the evidence, or the finding was one that no reasonable judge could have reached (or, as it is sometimes put, "outside the bounds within which reasonable disagreement is possible").

41. The appellate court will be rarely justified in overturning a finding of fact which turns on the credibility of the witnesses. It should not do so unless it is satisfied that any advantage enjoyed by the trial judge by having seen and heard the witnesses could not be sufficient to explain or justify his conclusions.

42. The inhibition on interfering with the trial judge's findings of fact extends to his evaluation of the facts and any inferences to be drawn from them: see e.g. *Beacon Insurance* at para 17.

43. The reasons for such appellate restraint are not limited to the advantage enjoyed by the trial judge of having seen and heard the witnesses. They include the recognition that the judge who presides over the trial is immersed in the evidence in a way that an appeal court cannot replicate. The judge will be totally familiar with the evidence at trial, and is likely to gain a far deeper insight from living with the case over several days than the appeal court, whose view of the case will be circumscribed by the issues raised on appeal.

44. Moreover, not every detail of the relevant evidence need be or can be captured in the reasons given by the judge for his findings. As Lord Hoffmann said in *Piglowska v Pigolwski* [1999] 1 WLR 1360, 1372, citing from his own judgment in *Biogen Inc v Medeva plc* [1997] RPC 1, 45 :

> "[The judge's] expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualifications 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".

45. It was submitted by Mr Choo-Choy KC on behalf of Madam Yao that the Court of Appeal failed to have any or any sufficient regard to those principles.

A. The finding of the duty to notify and consult on major decisions and transactions

46. It is of some significance that the Judge delivered his judgment at a time when he enjoyed the considerable advantage of having seen and heard the witnesses only a few weeks earlier. The wealth of evidence that he heard, and the parties' submissions about it, would have been relatively fresh in his mind.

47. The key finding of the existence of the positive duty to notify and consult appears in the final sentence of para 41 of the Judge's judgment. The finding that the Agreement also included the concomitant negative duty alleged by Madam Yao (i.e. an obligation not to enter into major decisions and transactions without Madam Yao's consent) was not made by the Judge until para 77, and then he did so in terms which did not include the words "without Madam Yao's consent." However, in context, they are necessarily implicit.

48. The Court of Appeal accepted (at para 31) that the Judge's conclusion about the duty to notify and consult was based on the evidence of Madam Yao and her husband, and that on the facts (as found by the Judge) the Project was a venture between Madam Kwok and Madam Yao in which they undertook to fund the Project in equal shares. However, it then characterised the Judge's finding of the duty to notify and consult as an "inference that the trial judge would have drawn from … primary facts and [which] would have had very little to do with the credibility of the witness".

49. On the basis of that characterisation, the Court of Appeal considered that it was in just as good a position as the Judge to draw these types of inferences. It said that the Judge found "an almost unrestricted duty to notify and consult when this inference was not supported by the evidence on which he sought to rely," and found that there was "no or no sufficient evidence to support a stand-alone and general duty to notify and consult". It then went on to criticise the Judge for appearing to have either conflated a duty to provide information with a duty to obtain consent

"without a distinction as to the circumstances", or to have extrapolated a wider duty to notify and consult from evidence that only supported a finding of a narrower duty to obtain consent in relation to proposed new investors. The latter point was based on the Judge's analysis of two passages in the cross-examination of Madam Kwok concerning the topic of permitted investors and the introduction of further funding by someone other than a bank, quoted in para 19 of his judgment.

Discussion

50. Contrary to the Court of Appeal's analysis, the finding of the duty to notify and consult was not an inference drawn by the Judge from primary facts, let alone an inference from undisputed primary facts of the type which an appellate court is equally well-placed to make. It was itself a finding of primary fact about the terms of the initial Agreement, based on the resolution of a conflict of evidence.

51. At the start of para 41 of his judgment, the Judge stated that the requirement to give information is not circumscribed solely by the articles of association of the company (contrary to the position being taken by Madam Kwok, which the Judge had described as "formalistic" in para 34.) He said that there were other factors to be considered, such as the initial arrangements between the parties. Whether in any case the information ought to have been given, and/or the claimant ought to have been consulted would depend on the nature of the action proposed and the terms of the arrangements to be made.

52. By the "initial arrangements" the Judge was plainly referring to the Agreement reached during the initial discussions in 2005. His reference to the "nature of the action proposed and the terms of the arrangements to be made" reflects Madam Yao's pleaded case (referred to in para 16(2) of the judgment) that only major transactions and decisions had to be consulted upon. The Judge was therefore addressing his mind to what the terms of the initial arrangements were, and Madam Yao's contentions about them, which he had previously set out, when he concluded in the final sentence of that paragraph that "on the facts of this case there was a duty both to notify and consult."

53. Although when read in isolation that sentence could give rise to some uncertainty, it is plain from reading the judgment in its entirety that the Judge was not finding any wider duty than that which was alleged and pleaded by Madam Yao, namely, a duty to notify and consult *with respect to major decisions or transactions*. He described the duty in those terms elsewhere in his judgment, for example in the heading to section C, and when referring in para 77 to the concomitant obligation not to proceed with major decisions or transactions without obtaining Madam Yao's

consent. Throughout section C of the judgment, when making his findings of breaches of the duty to notify and consult, the Judge was treating it as a duty to notify and consult with respect to important transactions and matters *in line with the parties' agreement* – see for example paras 66 and 67. The Court of Appeal was wrong, therefore, to characterise this as a finding of an "almost unrestricted duty to notify and consult" or a "stand-alone general duty".

54. There was also no basis for the suggestion in para 33 of the Court of Appeal's judgment that the Judge had confused the allegation of a duty to notify and consult upon (and a duty to obtain consent to) major transactions and decisions, with the entirely separate claim that Madam Kwok had refused to provide information to Madam Yao in relation to the business and finance of Crown Treasure and its subsidiaries.

55. It is unfortunate that, having found that there was a duty to notify and consult Madam Yao, the Judge did not go on to explain in more detail why it was that he had reached that conclusion, but instead moved on immediately to deal with the allegations of breach of a different contractual duty – the obligation to match funding – in Section B of the judgment. However, it is apparent from reading his judgment as a whole that his finding of the duty to notify and consult Madam Yao on major transactions and decisions was based, among other matters, upon his assessment of the conflicting evidence given by the protagonists about what they had agreed, and his findings about their credibility in paras 31 to 33. It was not based solely upon the passage he had quoted from the cross-examination of Madam Kwok on the specific topic of whether she could introduce new investors to the Project without first obtaining Madam Yao's consent.

56. In para 36 of his judgment the Judge said this:

> "I shall in each case briefly set out the areas of complaint and the views of the parties as disclosed in their pleadings witness statements submissions and oral evidence, and close with brief findings of fact. *My findings of fact also took into account the latter matters as well as what I gleaned from the demeanour of the witnesses*." [Emphasis added.]

57. Despite expressly acknowledging that the Judge's conclusion was based on the evidence of Madam Yao and her husband, the Court of Appeal made no reference to the relevant passages in their witness statements or the transcripts of that evidence. Had it done so, it could not have concluded that there was no, or no

sufficient evidence to support the Judge's finding. The witness statements of Madam Yao and her husband Mr Wei on this matter (which, as the Judge said, were in materially identical terms) reflected what was pleaded in para 14 of the Re-Amended Statement of Claim and Madam Yao's case as to the terms of the Agreement which was set out by the Judge in para 16 (2) of his judgment. The pleadings and the witness statements were signed with Statements of Truth.

58. In para 25 of her consolidated witness statement Madam Yao explained that most of the discussions relating to the Project took place between Mr Wei and Mr Tung, and that she left it to her husband to discuss the basis of the co-operation between herself and Madam Kwok and report back to her, which he did. She assumed that Mr Tung was similarly reporting back to Madam Kwok. She then said that she would set out in the following paragraphs of her statement what was discussed, and the understanding and agreement reached between her husband and Mr Tung at the numerous discussions from early 2005, based on what her husband told her at that time.

59. In para 34 Madam Yao said:

> ".. since our side would have invested very substantial sums into the Project and Madam Kwok would be entrusted with the management, operations, accounts, finance and affairs of the Project and the hotel during [the] initial period, Madam Kwok would have to take care of my interests in the hotel project and business and protect the interests of the BVI holding company and the PRC operating subsidiary company (or indeed any other subsidiary company of the BVI holding company used in the corporate structure) which would be subject to my scrutiny and control. In particular Madam Kwok would have to: -
>
> ...
>
> (2) promptly notify me of and discuss with me any major decision, transaction, dealing and/or matter relating to the hotel project and business and the relevant companies, especially those which would or might have material adverse effect on my investments, interests, ownership and control in the hotel project and business and the relevant companies; and

> (3) not to make any major decision or enter into any major transaction and/or dealing relating to the hotel project and business and the relevant companies, especially those which will or may have material adverse effect on my investments, interests, ownership and control in the hotel project and business and the relevant companies, without my consent."

60. She went on to refute Madam Kwok's allegation that she was simply a "passive investor" and gave reasons why that was not the case, before stating at para 36:

> "Tung Fai and Wei Dong *having reached agreement and/or understanding on the aforesaid matters*, Tung Fai and Madam Kwok proceeded to have the documents in relation to the BVI holding company prepared." (Emphasis added).

61. When Madam Yao was cross-examined about her witness statement, it was put to her that it contained points that she was merely prepared to adopt because she thought it was in her interests to do so. Madam Yao denied this. She said she told her lawyer, and after he listened to her descriptions, he wrote them down. When she was specifically questioned about what she said in para 34, it was put to her that she had deliberately used the words "Madam Kwok would have to" rather than "we discussed and she agreed to do these things," because there had been no such agreement. The witness refuted that suggestion, indicating that she thought she had made the position perfectly clear in her statement. She said that paras 32, 33 and 34 were the contents of the discussions between her husband and Mr Tung and set out what they agreed.

62. In the light of the contents of para 25, which made it clear that the following paragraphs in that section of Madam Yao's witness statement (including para 34) set out the terms of the agreement or understanding reached in the course of the discussions between Mr Wei and Mr Tung, as reported by Mr Wei to Madam Yao at the time, and the express confirmation of this in para 36, the subtle linguistic point being made by counsel was misconceived. In any event, the witness did not accept it. On any sensible interpretation of para 34, considered in the context of the surrounding paragraphs, Madam Yao's references to what Madam Kwok "would have to" do were references to her contractual obligations as agreed between their respective husbands.

63. Madam Kwok, in her witness statement, essentially repeated her defence that Madam Yao was a mere investor; at that stage she did not accept that there was a duty to notify or consult her at all - even in respect of the introduction of new investors or the sources of additional finance for the Project. In cross-examination, when it was put to Madam Kwok in terms that it was agreed that she would promptly notify Madam Yao and discuss with her any major decision, transaction, dealing or other matter relating to the Project, especially any that might have a material adverse effect on the investments, interests, ownership and control of Madam Yao in the Project, the business or the companies, she simply answered: "disagree." Likewise, when it was put to her that it was also agreed that she would not make any such major decisions or enter into any such major transactions or dealings without Madam Yao's consent, she replied: "disagree." The matter was not explored further by Madam Yao's then counsel, no doubt reflecting the fact that this was but one of many matters in issue at the trial.

64. It was not suggested to the Board that there was anything in the evidence of Mr Wei or Mr Tung which took matters any further, despite the fact that they were the persons who directly engaged in most of the relevant discussions.

65. Thus, there was a clear conflict of evidence about what was agreed. The Judge resolved that conflict in favour of Madam Yao and Mr Wei. Whilst he did not state in terms that he preferred the evidence of Madam Yao and Mr Wei on this issue to that of Madam Kwok, it is plain that he did.

66. The Judge specifically addressed the credibility of the witnesses at paras 29 to 35. He stated that he had to weigh their evidence against the objective facts and surrounding circumstances as they came out in the evidence. He noted that Madam Yao and Mr Wei's witness statements were almost identical, but that in their oral evidence they told the story in their different ways. He considered that they were "basically honest witnesses". He described the passion with which they gave their evidence, and found that this led them to unreasonably disagree with some questions put to them in cross-examination. However, he formed a clear impression that they felt that they had been "gravely wronged" and "used" and that this led to a deep mistrust of anything that was being advanced on behalf of Madam Kwok.

67. Although the Judge did not spell this out, it could be inferred that the reason for their genuine sense of grievance was that Madam Kwok had reneged on what had been agreed. This emerges more clearly from the passage towards the end of his judgment, at paras 97 and 98, in which the Judge described the "palpable" passion of Madam Yao and her husband which he had observed in the courtroom:

> "Where is justice, they seemed to ask?
>
> Well, justice reposes right here in these courts."

68. The Judge described Madam Kwok as well-informed, charming, and a good witness who, by contrast with Madam Yao and her husband, was dispassionate and persuasive in giving the reasons for her conduct. He found that she too was basically an honest witness, but said he had formed the view that any changes in her position were deliberate and that "the objective of proving her case could easily compete with telling the complete truth". He gave two examples of aspects of her evidence that he felt illustrated this weakness.

69. Elsewhere in his judgment, in para 93, after referring to the fact that all allegations of bad faith and impropriety had been abandoned by Madam Yao, the Judge made this observation relating to the dealings involving Cheer Fancy:

> "Within that context, though, it does beg the question why was Madam Kwok so secretive with the information if it was not for the reason that she knew that she should consult in accordance with their arrangement, but if she had done so Madam Yao might not have agreed with the terms."

70. Besides the passage quoted in para 19 of the Judge's judgment, from which the Court of Appeal held the Judge was entitled to find that there was a duty to notify and consult Madam Yao in respect of the introduction of new investors, Mr Choo-Choy identified other passages in Madam Kwok's cross-examination in which she made concessions that Madam Yao had the right to be informed about other major issues, such as funding shortages and the sale of the hotel. As he submitted, all these passages individually or collectively could well have provided further support for the Judge's finding as to the terms of the Agreement. So, indeed, could the Judge's finding that Madam Yao's consent to the borrowing from Mr Eng was procured by misrepresentation, which could have had an adverse effect on her credibility.

71. However, even in the absence of any concessions by Madam Kwok, there was a sufficient evidential basis for the Judge's finding that the duty was as claimed by Madam Yao and Mr Wei. Given that the duty arose from an express agreement between the parties, it is not at odds with the Judge's finding that management decisions were matters for Madam Kwok, as the Court of Appeal suggested in paras

55 and 56. The reasoning in that passage of the Court of Appeal's judgment cannot be supported.

72. The assessment of the witnesses' credibility was quintessentially a matter for the Judge. He did not accept everything that Madam Yao and Mr Wei said – for example he preferred Madam Kwok's and Mr Tung's evidence that the HK$160m represented equal capital contributions by Madam Yao and Madam Kwok. He was also alive to the fact that many of the allegations they initially made had been dropped in the course of the case or after trial. He said as much in para 17, and there is no reason to assume that he failed to take this into account in his assessment of their evidence just because he did not specifically refer to it again in the context of his findings on demeanour and credibility. In any event, Madam Kwok did not appeal on the basis that the Judge failed to take account of the allegations that were no longer pursued when he came to assess the credibility of Madam Yao and Mr Wei.

73. The Court of Appeal fell into error by focusing on a very small part of the evidence before the Judge, assuming (contrary to what the Judge himself had said) that this was the only evidence on which he relied in support of his finding of the duty to notify and consult, and failing to appreciate that Madam Kwok had been specifically asked about *that* duty in a different passage of her cross-examination. It was wrong to say that the matter did not turn, at least in part, on the credibility of the witnesses.

74. The Court of Appeal was in no position to overturn the Judge's findings on the terms of an oral agreement, which was based on all the matters he identified in para 35 of his judgment, including the demeanour of the witnesses. Moreover, its criticism of the Judge for extrapolating a wider duty from evidence on which it accepted he would have been justified in finding a narrower one, was misplaced. It was not the Judge but the Court of Appeal who misunderstood the evidence. This was not a case in which the high hurdle for overturning the trial judge's fact findings was surmounted.

75. Although the Judge did not say so, his finding also accorded with commercial sense (and with the plausible reasons given by Madam Yao at the start of para 34 of her witness statement for the requirement that Madam Kwok should notify and consult her about major decisions and transactions, and obtain her consent to them). Madam Yao and her husband were investing a great deal of money in the Project, but entrusting it to Madam Kwok to manage, at least in the initial stages; naturally they would wish to be kept informed about any proposed course of action that might put their investment at risk or affect their chances of obtaining a return from it, and given the opportunity to say no or to suggest an alternative course of action. It would

have been a reasonable request to which there could have been no sensible objection. By contrast, Madam Kwok's version of the agreement would require Madam Yao to be not so much a passive investor, as a comatose one, something to which she was unlikely to have agreed. Thus the Judge's finding of the duty was not one which no reasonable Judge could have made.

76. Mr Chaisty KC, on behalf of Madam Kwok, sought to complain about the absence of reasoning given for the Judge's conclusion that there was a duty to notify and consult. However, that was not the basis on which the Court of Appeal justified its interference with the Judge's findings. Indeed, it expressly refused to address that criticism or make any findings about it. In any event, although it would undoubtedly have been preferable if the Judge had expressed his reasoning more fully, he said enough in the course of his judgment to explain why he had reached the conclusions that he did.

B. The finding of the duty to match funding made by way of shareholder loans

77. It was common ground that an agreement had been reached between the parties requiring them to make equal financial contributions to the Project. The dispute at trial concerned precisely what types of financial contribution the parties had agreed to match, and specifically whether the agreement included any contribution made by way of shareholder loans.

78. As the Judge recognised in para 16(i) of his judgment, Madam Yao's case was that Madam Kwok's failure to match the funding she had provided by way of shareholder loans was contrary to what *on Madam Kwok's own case* was agreed between the parties in this regard. In her re-Amended Defence, Madam Kwok had treated loans as forming part of the "capital" contributions made by the parties. This point appears to have been overlooked by the Court of Appeal.

79. The Judge found in paragraph 54 that the arrangement was that Madam Kwok would equally match the financial contribution of Madam Yao, and that whilst Madam Yao made available the RMB 128m from December 2005 until the loan was repaid in January 2010 using the money borrowed from Mr Eng, Madam Kwok did not match that contribution.

Discussion

80. The Court of Appeal reversed the Judge's fact-finding that the agreement extended to funding provided by way of loans, again without having proper regard to the underlying evidence, notwithstanding that the Judge made it clear in the judgment that he had reached his conclusion "having regard to all the evidence" including the fact that the parties had used the word "capital" to refer to any form of funding for the Project. As with the obligation to notify and consult, it mischaracterised the Judge's finding as a matter of inference to be drawn from primary facts, and from "the simple workability or lack thereof of what was claimed by Madam Yao". The Judge's finding was a finding of primary fact about the terms of the parties' undocumented oral agreement, based upon his assessment of the evidence he had read and heard, including his views of the witnesses. Therefore the Court of Appeal should have been more circumspect in its consideration of whether it was entitled to interfere.

81. Although in their witness statements the parties had referred to "capital," the evidence of Mr Wei and Madam Yao was that additional capital could be contributed by a shareholder as loan capital. There were also passages in Madam Kwok's witness statements in which she accepted that the principle of equal capital contribution applied to *both* the land cost and the hotel construction cost, and in which she treated the initial RMB 128m loan (which was applied to the land cost) as part of Madam Yao's working capital contribution to the Project, in exactly the same way as Madam Yao's share of the HK$160m which was transferred by Mr Wei's brother to Strong Nation. The Judge referred to these passages in paras 43 and 44 of his judgment. Madam Kwok maintained this position in cross-examination. In another passage of her cross-examination, she expressly confirmed that the parties' intention was that funds would be injected as capital or by way of loans.

82. In paras 45 to 54 of his judgment, the Judge considered the evidence that showed that the funding of the Project took various forms which could be classified as "working capital", including, significantly, short-term loans from Madam Kwok herself. He found at para 46 that: "*on the evidence which I accept* the agreement between the parties was that start-up capital in the way I have described it could be by way of capital or loans." (Emphasis added).

83. As the Judge recorded in para 53 of his judgment, Madam Kwok's denial that she had an obligation to match funding other than the capital contributed under the injection of HK$160m was first made in answer to the point made by Madam Yao that if she had matched the funding, there may have been no need to approach Cheer Fancy for finance in 2009. He concluded at para 54 that "having regard to all

the evidence" the agreement was that Madam Kwok would equally match the financial contribution of Madam Yao, taking into account the RMB 128m. In so doing, he expressly rejected Madam Kwok's oral evidence to the contrary, which, as he recognised, was given only after she appreciated the implications of adhering to her original position.

84. Accordingly, there was ample evidence to support the Judge's findings, and they were not based on any misunderstanding of that evidence. The Court of Appeal did not find (nor was there any basis for it to have found) that this conclusion as to the terms of the Agreement was one that no reasonable judge could have reached. In principle, therefore, there was no justification for interfering with it.

85. Whilst the workability of the alleged agreement was undoubtedly a factor to be taken into account, the Court of Appeal's view that the arrangement was unworkable provided no justification by itself for concluding that the Judge was "plainly wrong". In any event, the Court of Appeal's reasoning for finding the arrangement "unworkable" was flawed. The fact that a loan was expressed to be a "demand loan" did not mean that the shareholder would exercise the right to demand repayment in a capricious manner without regard to the funding needs of the Project. The RMB 128m loan to Crown Treasure was a demand loan, but it effectively became part of the capital of Xiamen RVH and was used by Xiamen RVH to fund the acquisition of the land. In the circumstances of this case the Judge was fully justified in finding, as he did at para 44, that the arrangements between the parties would have been commercially unworkable if the agreement to match funding did *not* extend to the shareholder loans which were used as working capital.

86. For these reasons, the Court of Appeal was not entitled to reverse the Judge's fact-findings in respect of the duty to match funding.

Conclusion on Issue 1

87. The Court of Appeal was not justified in reversing the Judge's findings about what the parties had agreed, nor in substituting its own more restricted version of Madam Kwok's contractual duties.

88. The Court of Appeal's decision that the duty to notify and consult was much narrower than that found by the Judge formed part of the reasoning it gave for overturning the Judge's conclusion that entering into the Loan Agreement to 2045 amounted to conduct on the part of Madam Kwok that was unfairly prejudicial to Madam Yao. However at para 56, the Court of Appeal gave two further reasons for

reversing the Judge's finding that that Agreement was not unfairly prejudicial. Neither of those reasons justified interfering with the Judge's conclusion.

89. The Court of Appeal held that the Loan Agreement to 2045 was not unfair because the Judge had found that the capitalisation of the land holding company was a requirement of the Chinese authorities. However, it is clear from the Judge's reasoning at para 67 of his judgment that the prejudice to Madam Yao lay in not having the opportunity to be heard on the intended terms, given the very onerous nature of the conditions of the Loan and the effect of those terms on her shareholding.

90. The Court of Appeal also criticised the Judge for referring to matters such as the salary and perquisites that Madam Kwok enjoyed as manager of the hotel, noting that Madam Yao had not complained about those matters in her pleaded case. The Board considers that the Court of Appeal misunderstood the point that the Judge was making. The reference to the other substantial benefits that Madam Kwok received from the Project was not intended as a separate criticism of those benefits. The Judge was dismissing the argument put forward by Madam Kwok that since the likelihood of her earning a return from her shareholding was also postponed by the Loan Agreement to 2045 to the same extent as Madam Yao, it was not unfairly prejudicial. That argument was wrong because Madam Kwok would benefit from the Project through those other payments and so, unlike Madam Yao, she was not entirely reliant on the receipt of dividends as the possible return on her investment.

91. The Board therefore concludes that the Court of Appeal was not entitled to interfere with the Judge's findings of breaches of the contractual obligations that it wrongly found to be non-existent, nor with the Judge's evaluation that those breaches were unfairly prejudicial to Madam Yao. All those findings were open to him on the evidence, and the Court of Appeal could not interfere with them on the basis that it disagreed with those findings or would have decided the case differently.

92. Consequently issue 1 must be decided in favour of Madam Yao. Both the Judge's reversed findings, and his consequential findings of breach of duty and unfair prejudice to Madam Yao, must be restored.

Issue 2 – Was the Court of Appeal wrong to refuse to admit the fresh evidence of Madam Kwok's post-trial behaviour?

93. As a general rule, a decision made by a trial judge (particularly when exercising judicial discretion) will fall to be assessed by an appeal court only on the

basis of the evidence that was placed before the judge at trial. An appeal is not an opportunity to re-litigate the issues afresh, but a review of the decision of the lower court.

94. A discretion can only be exercised on the basis of the material that is available to the decision-maker at the time of the decision – therefore, as a general rule it cannot be impugned on the basis of something which occurred after the decision was taken, which might have had a material bearing on the exercise of the discretion. However, an appeal court which is minded to set aside the trial judge's decision and re-exercise the discretion afresh is not artificially constrained to consider the situation as it was at trial, ignoring any further relevant developments. This was such a case.

95. The circumstances in which a party will be allowed to adduce evidence on appeal that was not considered by the trial judge are limited to those in which it would clearly be in the interests of justice to do so. The question whether the appeal court will exercise its discretion to admit such evidence will necessarily turn on the specific facts and circumstances of the individual case. The Court of Appeal correctly addressed the question by reference to the three conditions laid down by Lord Denning in *Ladd v Marshall*, [1954] 1 WLR 1489, 1491, namely, that the evidence could not have been obtained with reasonable diligence for use at the trial, that if admitted it would probably have an important (though not necessarily decisive) influence on the result of the case, and that it must be apparently credible, though not incontrovertible.

The fresh evidence in this case

96. Oral closing submissions at trial were heard on 4 and 5 February 2018, and judgment was reserved. The fresh evidence on which Madam Yao sought to rely showed that:

(i) on 28 February 2018, Strong Nation, Madam Kwok and Xiamen RVH entered into a Debt Assignment and Offset Agreement, which provided that:

(a) Strong Nation owed Madam Kwok the equivalent of

US$10,170,000;

(b) Sums of US$9,339,976 and HK$ 53,500,000 were immediately payable by Xiamen RVH to Strong Nation; and

(c) Strong Nation assigned to Madam Kwok the debt of US$9,339,976 in partial settlement of the debt of US$10,170,000.

(ii) On 5 March 2018, Xiamen RVH resolved to increase its registered share capital from US$36,000,000 to US$46,170,000, with the additional share capital of US$10,170,000 being issued to Madam Kwok; and

(iii) Also on 5 March 2018, Xiamen RVH and Madam Kwok entered into a "Debt-for-Equity Swap Agreement" by which Madam Kwok would not be required to pay US$9,339,976 of the US$10,170,000 to be subscribed in new capital and Xiamen RVH would not have to pay Madam Kwok the assigned debt of US$9,339,976 previously due to Strong Nation.

97. The effect of these arrangements was that:

(i) Madam Kwok converted unsecured loans of approximately US$9.34 million made by her to Strong Nation into a 22.03% direct personal shareholding in Xiamen RVH;

(ii) Strong Nation's shareholding (and therefore Crown Treasure's indirect interest) in Xiamen RVH was diluted from 56% to 43.32% and therefore from a majority to a minority interest; and

(iii) Madam Yao's indirect interest in the Project through Xiamen RVH was now diluted to 21.66% ("the Third Dilution").

Once again, Madam Yao was neither notified nor consulted about these agreements, and her approval was neither sought nor obtained.

98. Significantly, none of these facts is in dispute.

99. The primary reason given by the Court of Appeal for rejecting the application, at para 92 of its judgment, was that it was not open to a respondent to an appeal to make an application to adduce fresh evidence which might reinforce the conclusions reached by the trial judge. Alternatively, it said that it would refuse the application as a matter of discretion. The two reasons it gave in paragraph 93 were, first, that the reversal of the Judge's finding of a broad duty to notify and consult "threw into question the basis of the application and the relevance of the fresh evidence". Secondly, it considered that the effect of the evidence could not be assessed without remitting the matter to the lower court. Mr Choo-Choy submitted that in all these respects the Court of Appeal fell into error.

100. Madam Kwok raised a preliminary objection to this issue being determined by the Board, on the basis that the application to adduce the evidence was not part of the decision of the Court of Appeal for which permission to appeal was granted. Mr Choo-Choy took issue with this characterisation, pointing out that the judgment of the Court of Appeal dealt with this issue, and it was not made the subject of a separate order. He also relied on the fact that permission to appeal had been sought from the Court of Appeal on this issue without any objection being raised by Madam Kwok at the time.

101. It is unnecessary for the Board to resolve this dispute, because even if this were correctly characterised as an interlocutory matter, and not as part of the decision, the manner in which the Court of Appeal disposed of the application raises a short arguable point of law of general public importance which ought to be considered by the Board at this time, namely: whether it is open to a respondent to an appeal to seek to adduce fresh evidence? Therefore, if there were a need for the grant of special leave under Practice Direction 3.3.3(a), the Board should exercise its discretion to grant it.

Can a Respondent to an appeal seek to adduce fresh evidence?

102. The Court of Appeal's primary reason for rejecting the application was that it was "misconceived" because it was made by a respondent. It recorded that Madam Yao was unable to provide any authority for the proposition that a respondent could properly make an application to adduce fresh evidence to enable him or her to support the judgment of the court below on grounds that were unavailable until the new evidence became available. However, it is the Court of Appeal's objection that is misconceived. No authority was or should have been required to establish the respondent's entitlement to make an application to adduce fresh evidence.

103. Whilst the circumstances in which a respondent might wish to introduce fresh evidence on appeal are likely to arise less frequently than those in which the appellant wishes to do so, the Board was not shown anything in case law, or in the Rules or Practice Directions applicable in the BVI Courts, that supported a prohibition on respondents from making such an application. There is nothing as a matter of principle which would justify imposing such a restriction. It certainly is not justified by the principle of finality, as the Court of Appeal suggested, because the discretion to allow fresh evidence is a well-established inroad into that principle.

104. If an appellant is permitted to adduce fresh evidence, it would be unfair to refuse to permit the respondent to adduce fresh evidence to rebut it; and it would be equally unfair to refuse to permit a respondent to adduce fresh evidence in support of a counter-notice simply because he is a respondent and not an appellant. As Mr Choo-Choy submitted, the Court of Appeal's asymmetric approach to the ability of parties to an appeal to rely on fresh evidence is illogical, unjust and unfairly puts a party who has been successful at first instance in a worse position than the party who has lost.

105. If the *Ladd v Marshall* conditions are met, and it is in the interests of justice to admit the evidence, it should not matter which of the parties makes the application to adduce it. On this point, therefore, the Court of Appeal was plainly wrong to find that the application fell at the first hurdle.

Did the Court of Appeal err in the exercise of its contingent discretion by refusing to admit the fresh evidence?

106. The Court of Appeal was right to the extent that any review it carried out of the exercise by the Judge of his discretion had to be conducted solely by reference to the material that was before the Judge at the time when he exercised that discretion, i.e. at the time of the trial. However, if it set aside the Judge's decision and had to consider how it should exercise its own discretion, the fresh evidence was clearly both relevant and admissible. This was a case in which, for those purposes, all the *Ladd v Marshall* criteria, including the second, were met. The question whether winding-up was an appropriate remedy for such acts of unfair prejudice as the Court of Appeal decided the Judge was entitled to find, required consideration of all the relevant circumstances. Irrespective of any commercial justification for the Third Dilution, it was plainly a matter of potential importance to the Court of Appeal's evaluation of the appropriate remedy for it to take into account the fact that Madam Kwok had recently engaged in strikingly similar behaviour to that complained of in the Petition, which had led to a further dilution of Madam Yao's shareholding.

107. As a matter of principle, when granting discretionary relief afresh, an appeal court should take account of matters as they stand at the time of its decision. As Lord Briggs JSC observed in *Ming Siu Hung v JF Ming Inc* [2021] UKPC 1; [2021] 1 BCLC 341, para 14 :

> "at the remedy stage, the court is entitled to have regard to any aspect of the facts as found about the history of the company and the relationship between its shareholders inter se, and between them and the directors, including those occurring after the issue of the claim and those which may fairly be found by the court even though not necessarily pleaded. In short, nothing is off-limits, subject only to the twin tests of relevance and weight, in relation to the choices to be made in the exercise of the discretion."

Whilst those observations were made in the specific context of matters arising between the date of the petition and the trial, they apply with equal force to a situation in which the discretion as to the appropriate remedy is being re-exercised by an appellate court.

108. The Court of Appeal was right to be cautious about the prospect of the fresh evidence being used as a vehicle for the parties to ventilate their disputes further, and to introduce new allegations and counter-allegations which would necessitate the matter being sent back for a further hearing. However, in this case the critical facts were undisputed – perhaps most significantly, the further dilution of Madam Yao's indirect interest in the Project – and any commercial justification for the transactions which led to that result would have no bearing on the appropriate remedy. The Court of Appeal was wrong to say that the matter should be left to a fresh petition. There was therefore a great deal of force in the criticisms made by Mr Choo-Choy.

109. That said, it is unnecessary for the Board to decide whether the Court of Appeal fell into error in the exercise of its contingent discretion, because Madam Yao has succeeded on issue 1. The Board does not need to consider the fresh evidence for the purposes of evaluating the Judge's exercise of his discretion on the basis of the findings that he made. Suffice it to say that, where there is material updating to be done, and the Court of Appeal is being asked to exercise its own discretion in substitution for that of the trial judge, an application to adduce fresh evidence which provides it with the updated position should not be resisted (or refused) unless there is a good reason, for example, that a further fact-finding hearing would be required.

In those circumstances the court may well refuse to admit the fresh evidence, and, if necessary, remit the matter to the first instance court.

Issue 3 – Was the winding-up order an appropriate remedy open to the Judge?

110. In the light of the decision on issue 1, the basis upon which the Court of Appeal interfered with the Judge's exercise of his discretion and substituted its own order falls away. However, Mr Chaisty submitted that even on the Judge's findings, the order he made was outside the reasonable range of remedies open to him, and that for that reason, the Board should not interfere with the remedy substituted by the Court of Appeal.

111. Once unfair prejudice is established, the court has a wide discretion as to the relief which should be granted. It is not constrained by the relief which the claimant has sought in the petition. It must take into account all the relevant circumstances and decide what is an appropriate remedy *at that time* to put right, and cure for the future, the unfair prejudice which the petitioner has suffered at the hands of the other shareholder(s) of the company. The appropriate remedy is not limited to reversing or putting right the conduct which has justified the making of the order. In determining what is appropriate, the court is entitled to look at the reality and practicalities of the overall situation, past, present and future. See generally, *Ming Siu Hung* (above).

112. The Judge decided the case on the basis that, regardless of whether there was a commercial justification for it, there had been a repeated pattern of Madam Kwok ignoring her contractual duty to notify and consult Madam Yao, and then denying that it existed.

113. The Judge was obliged to consider all remedies that it was reasonable for the claimant to pursue before considering a just and equitable winding-up, as this is a remedy of last resort. In this case, he did so. However, he was not assisted by the fact that Madam Kwok's position (which she maintained on appeal) was that neither of the remedies sought by Madam Yao in the Petition was appropriate, and that because of this, she should be granted no relief even if unfair prejudice was found to have occurred. The Judge adverted to this at para 99 of the judgment. That position was fundamentally misconceived, and the submission was rejected by the Court of Appeal, which explained in paras 61-65 of its judgment that relief, being equitable, was at large and not constrained by the pleadings.

114. Although an order that Madam Kwok purchase Madam Yao's shares might seem an obvious remedy, it was made clear to the Judge in her counsel's written closing submissions that Madam Kwok would "vigorously oppose" any application to amend the Petition to seek such an order. During the oral closing submissions, when the Judge sought counsel's assistance on the question whether he should make an order that was different from the remedies sought, Mr Chaisty said this:

> "I therefore repeat again, and make the point as strongly as, with respect, I reasonably can, that it would be totally wrong at this stage to even be contemplating making an order that my client buy out Madam Yao if you were of the view that there was any unfair prejudice which [would] otherwise justify such an order."

Shortly afterwards Mr Chaisty submitted that:

> "in circumstances where neither party asks for an order that we be required to buy out the Claimant it would be an extraordinary position for the Court to impose an order that neither side are asking for."

115. Despite this vigorous protest, at the hearing of this appeal Mr Chaisty complained to the Board that the Judge did *not* make such an order, which he suggested would have been preferable to the winding-up order. This volte face was just as unattractive as the stance that was initially taken by Madam Kwok. The Judge was entitled to expect greater assistance than he got on the question of alternative remedies. The position adopted by Madam Kwok is to be deprecated; it is incompatible with the modern duty on parties to assist the court. Since that assistance was not forthcoming, the Judge cannot be criticised for failing to make an order that Madam Kwok repeatedly indicated through her counsel, in the strongest of terms, she did not wish him to make. Madam Kwok only has herself to blame for the fact that her tactics misfired.

116. As for the Judge's rejection of the remedy which the Court of Appeal substituted, his reasons for doing so are compelling. As he said, the damage had already been done, and having regard to the history, policing such an order would be a formidable task (and risked further litigation). The holding companies were both in the BVI, whereas the day to day operation and management of the business was going on in the PRC. It would be well-nigh impossible for Madam Yao to find out if Madam Kwok was taking major decisions behind her back before it was too late to

undo them. In any event the Judge rightly considered that the relationship of trust and confidence had broken down completely and was beyond repair.

117. No doubt the Judge's decision that an order of that nature would not meet the justice of the case would have been reinforced had the Judge been made aware of the steps Madam Kwok was taking whilst he was considering his judgment. The order made by the Court of Appeal would not have prevented her from taking those steps and diluting Madam Yao's interest still further, whilst giving herself a direct interest in Xiamen RVH. Certainly it cannot be said that the Judge erred in principle or strayed outside the boundaries of reasonable decision-making in rejecting that type of order as unsuitable, for the reasons that he gave.

118. Mr Chaisty was unable to point to any errors in the way in which the Judge exercised his discretion. The Judge took all relevant matters into account. He recognised that winding-up is a remedy of last resort. He carefully set out in his judgment the relevant and competing considerations before concluding, for clear and cogent reasons set out at para 104, that the appropriate order was for the winding-up of Crown Treasure.

119. It is important to bear in mind that Crown Treasure was the ultimate parent company within the group. The appointment of a liquidator of that company would not interfere with the day to day operations of Xiamen RVH. The order that the Judge made gave both parties an equal opportunity to purchase Crown Treasure from the liquidator, and, as he said, if a third party purchaser acquired the company they would participate equally in any surplus over and above their capital contributions.

120. Far from being outside the bounds of reasonable remedies, the order made by the Judge was fair and sensible. It was also the only option which would go some way towards remediating the serious prejudice that he found Madam Yao had suffered. In commercial terms, there was little difference between the order the Judge made, and the buy-out order that would have been a more common remedy in a case such as this, but which Madam Kwok so vigorously resisted. In this case liquidation had certain advantages, including expedition. It avoided the expense of experts valuing the shares for the purposes of a buy-out by Madam Kwok, and the spectre of further litigation concerning the appropriate figure (particularly bearing in mind the complexities caused by the serial dilutions of Madam Yao's interest in the Project).

121. In short, issue 3 must be determined in favour of Madam Yao. There was an ample basis for the Judge's decision that in the circumstances of this case, the appropriate order was an order for the winding-up of Crown Treasure.

Conclusion

122. In the light of the above reasoning, the Board will humbly advise His Majesty to allow the appeal and to reinstate the Judge's order for the appointment of a liquidator over Crown Treasure.