

Breach of fiduciary duties: Privy Council intervenes in findings of fact of lower courts

UPDATE

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A recent decision of the Judicial Committee of the Privy Council reaffirms its position that only in rare cases will it be appropriate to interfere with concurrent findings of fact of two lower tribunals.¹ The Privy Council found *Byers and others v Chen Ningning* to be one such case on the basis that an error in findings of fact as to the Respondent's status as a director had been made by the first instance trial judge and upheld by the Court of Appeal.

Introduction

It is settled law that only in rare cases will an appellate court intervene on an issue of fact. The Judicial Committee of the Privy Council (the **Board**) has a well-established practice that it does not intervene where there are concurrent findings of fact of two lower tribunals and will only do so in '*cases of a most unusual nature*'.²

Exceptions to that practice can arise in instances where there is '*...some miscarriage of justice or violation of some principle of law or procedure...that if...corrected the finding cannot stand*'.³

In *Byers and others v Chen Ningning*, the facts in dispute centred on when the Respondent ceased being a *de jure* director of a company in order to determine whether she had breached her fiduciary duties owed to that company.

The Board overturned the decisions of both lower courts, finding that there was no evidence that the Respondent ceased to be a *de jure* director and that she had acted in breach of her fiduciary duties as a director. The Board held the erroneous factual findings made by the lower courts was of fundamental importance such that it was appropriate for the Board to intervene.

Background to *Byers and others v Chen Ningning*

The case concerned an appeal by the liquidators of a BVI company, Pioneer Freight Futures Company Limited (**PFF**), against the decisions of the BVI High Court and the Eastern Caribbean Court of Appeal (the **ECCA**) that PFF's former sole director and shareholder did not breach her fiduciary duties, among other things, in relation to the repayment of a loan to a single creditor at a time when PFF was insolvent and an insolvency process was imminent (the **Loan Repayment**).

¹ *Byers and others v Chen Ningning* [2021] UKPC 4 (*Byers*).

² *Byers* para 30.

³ *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11; *Devi v Roy* [1946] AC 508-509.

The Appellants contended that – (i) the trial judge did not appropriately consider relevant evidence and that the findings he made were not consistent nor properly supported by reasons; and (ii) the ECCA did not identify or act on those errors.

It was undisputed that the Respondent was the sole *de jure* director of PFF at the start of May 2009. However, the Appellants asserted that her fiduciary duties existed, in some capacity, at the time of the Loan Repayment in November 2009. The Respondent contended that once she resigned at the end of May 2009, she did not resume any role in the management of PFF's business, nor was she involved in the Loan Repayment.

A Case for the Board's Interference

A Fundamental Error

The Board found that there was no evidence that the Respondent ceased to be a *de jure* director and there was in fact evidence to the contrary that she remained a *de jure* director of PFF until after the Loan Repayment had been made:

1. Email correspondence demonstrated that the Respondent was actively engaged in determining the form and place of PFF's insolvency proceedings;
2. The Respondent continued to act as PFF's key decision maker;
3. The Respondent continued to have sole signing rights on PFF's bank account;
4. It was not clear if anyone was appointed as a director of PFF in place of the Respondent, providing some support that she continued in her director role.

On a review of the matters that came before the trial judge the Board concluded that he had erred in law in finding that the Respondent ceased to be a director of PFF at the relevant time; there was no evidence on which to base his conclusion. The ECCA erred in failing to identify and correct the trial judge's error.

The Board held that the Respondent continued to owe fiduciary duties to PFF to act honestly and in good faith in what she believed to be the best interests of PFF, and as PFF was insolvent, in the best interests of PFF's creditors. The Respondent also had a duty to exercise her powers as a director for proper purposes, specifically at the time of the Loan Repayment.

The Board found that the Respondent's inaction in failing to prevent the Loan Repayment constituted a breach of her fiduciary duties to PFF, that the Loan Repayment was an unfair preference and the Respondent as a '*director cannot knowingly stand by idly and allow a company's assets to be depleted improperly*'.⁴ The Appeal was allowed.

Conclusion

This case serves as a timely reminder to directors to be cognisant of the fiduciary duties they owe, to whom they are owed, particularly when the company to which they are appointed is in financial distress or when insolvency proceedings are likely, and that resignations should be clear and unequivocal.

⁴ *Byers* para 92.

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