

Privy Council Decision on Directors' Duties and Concurrent Findings of Fact

The Judicial Committee of the Privy Council has handed down last week its judgment in *Kathryn Ma Wai Fong v Wong Kie Yik and Ors*, which resulted from litigation first commenced in the British Virgin Islands ("BVI") in May 2015. By its judgment, the Board provides welcome clarity on the law concerning directors' duties and on appeals against concurrent findings of fact by the courts below.

Maples and Calder, the Maples Group's law firm, acted for the successful respondents, Wong Kie Yik and Wong Kie Chie (each "WKY" and "WKC"), and the legal team was led by Partners Aisling Dwyer and Adrian Francis, and Associates Scott Tolliss and Aline Mooney.

Background

The appeal arose from a shareholder dispute between the appellant, Ms Ma, and WKY and WKC, concerning their respective beneficial ownership of a 1/3 interest in the Third Respondent, a BVI company called Successful Trend Investments Corporation ("STIC"). Ms Ma is the personal representative, executrix and trustee of the estate of her late husband, Wong Kie Nai ("WKN"), who was the brother of WKY and WKC. She holds her 1/3 interest in STIC in her capacity as executrix of WKN's estate.

STIC is incorporated in the BVI but is part of a larger corporate group established in Malaysia, referred to as the WTK Group. STIC held 55

million non-voting convertible preference shares (the "CPS") in WTK Realty, another company within the wider WTK Group.

Shortly after WKN died in March 2013, STIC (at the suggestion of WKY and WKC) elected to convert the CPS into ordinary shares in WTK Realty (the "Conversion"), which thereupon comprised 14.4% of WTK Realty's ordinary share capital. As WKY and WKC had voting control over STIC, following the Conversion they acquired voting control of WTK Realty.

The reason given by WKY and WKC for the Conversion was, among other things, that it was required for financing purposes. Ms Ma claimed that the primary purpose of the Conversion was to dilute the rights of WKN's estate which, she said, was an improper purpose contrary to BVI company law.

Ms Ma sought, among other things: (i) a winding up order against STIC; (ii) an order setting aside the Conversion; and / or (iii) further or other relief, alleging that the affairs of STIC were conducted in a manner that was unfairly prejudicial, unfairly discriminatory, and / or oppressive to her in her capacity as a member.

The judge at first instance held that there had been no unfair prejudice and dismissed the claim, but made an order requiring WKY and WKC to acquire Ms Ma's shares in STIC on the basis, among other things, that they could not be

expected to work together going forward. The Court of Appeal dismissed Ms Ma's appeal, and she subsequently availed herself of her final right of appeal to the Privy Council, after being granted final leave to do so in December 2019.

The Judgment

Among Ms Ma's grounds of appeal were challenges to: (a) the lower court's concurrent findings of fact, including the first instance judge's assessment of the witnesses; and (b) the lower court's findings that WKY and WKC were not in breach of their fiduciary duties as de facto directors of STIC to act in its best interests.

Dealing first with the legal principles arising on an appeal against concurrent findings of fact, the Board held:

- The position is well-established by decisions such as *Devi v Roy* ("Devi") in that the practice of the Board is not to interfere with concurrent findings of pure fact unless there has been some miscarriage of justice or violation of some principle of law or procedure;
 - Per Lord Thankerton's decision in *Devi*, the Board will "*decline to review the evidence for a third time, unless there are some special circumstances which would justify a departure from the practice*";
 - The requirement of "*special circumstances*" is a high hurdle for an appellant to overcome;
 - It must be "*shown with absolute clearness that some blunder or error is apparent in the way in which the learned judges below have dealt with the facts*";
 - Ms Ma's suggestion that the recent decision of the Board in *Central Bank of Ecuador v Conticorp SA (Bahamas)* ("Bank of Ecuador") has materially changed the test in *Devi* was not the correct analysis;
 - The decision in *Bank of Ecuador* is merely an example of the exceptional type of case envisaged by *Devi*, and should not be regarded by prospective appellants as a watering down of the principles in *Devi*;
 - Ms Ma's submissions did not establish that this case is one where the judge below failed to take advantage of his ability to see and assess the witnesses, nor that he ignored crucial evidence relied upon by Ms Ma;
 - To the contrary, the Board found that the judge made a careful assessment of the evidence, and his factual findings, including as to the primary purpose for the Conversion, should stand.
- The Board then addressed the law on directors' duties and, in doing so, it found:
- The test to be applied where directors have failed to turn their minds to whether a proposed transaction is in the best interests of the company was considered by the Eastern Caribbean Court of Appeal in *Antow Holdings Ltd v Best Nation Investments and Ors* ("Antow");
 - The core fiduciary duty of a director to act honestly and in good faith, as encapsulated in section 120 of the Business Companies Act 2004, is largely, though by no means entirely, a subjective test and the courts have adopted a non-interventionist attitude when reviewing business decisions;
 - Where, however, there has been a failure by a director to consider the separate interests of the company, the test will then become an objective one;
 - Citing *Charterbridge Corp Ltd v Lloyds Bank Ltd* ("Charterbridge"), the Eastern Caribbean Court of Appeal described the test as whether an intelligent and honest man in the position of a director of the company concerned could, in the whole of the existing circumstances, have reasonably believed

that the transaction was for the benefit of the company;

- The facts in each of *Antow* and *Charterbridge* were similar to those pertaining to STIC and WTK Realty, in that the directors had looked to the benefit of the group as a whole without giving separate consideration to the benefit of the particular company within that group;
- The test set out in *Antow* and *Charterbridge* is therefore the correct test to apply to the present appeal;
- On application of the test, the judge below was entitled to find that STIC genuinely required financing and the Conversion was the best way to achieve it;
- The value of STIC's shareholding in WTK Realty was maintained and preserved by the Conversion and, if WKY and WKC had turned their minds to the best interests of STIC, as they should have done, they would reasonably have decided to convert the CPS, and there was therefore no breach of their fiduciary duties to STIC.

The Board ultimately dismissed the appeal, and reaffirmed the orders of the below courts, including the buy-out order.

Commentary

The judgment stands as a useful and welcome clarification of the principles relating to appeals against concurrent factual findings and the law on directors' duties. Specifically, it highlights the reluctance of the BVI's highest appellate court to go behind the assessment of a judge who has had the benefit of live evidence at trial, and who has presided over a matter for an extended period of time. Appellants going forward will be wise to consider the learning, recited by the Board in its judgment, as to when a truly exceptional circumstance, such as that in *Bank of Ecuador*, might be said to have arisen such that

the Board will consider the evidence afresh (at the point of a final appeal, for the third time).

These proceedings saw the Maples Group's BVI and Hong Kong offices work collaboratively for the successful respondents, and the Maples Group can offer the same cross-office cooperation and support on all litigation matters where appropriate.

For further information, please reach out to your usual Maples Group contact or any of the persons listed below.

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