COLLAS CRILL

Fiduciary duties owed by the "Ultimate Boss" in de jure directorship roles

MARCH 2021

Byers and others (Appellants) v Chen Ningning (Respondent) (British Virgin Islands) [2021] UKPC 4 Privy Council Appeal No 0082 of 2019

The Privy Council has found that a sole director who resigned from her position and sought to appoint a replacement shortly before her company went into liquidation continued to owe fiduciary duties to her company.

Ms Chen was the sole director of a BVI incorporated company called Pioneer Freight Futures Ltd ("PFF"). PFF traded in forward freight agreements ("FFAs") that allow ship owners and traders to manage their exposure to the volatility of freight rates. Until September 2008, PFF was considered one of the largest FFA traders in Asia until it began suffering financial issues following the catastrophic collapse of the freight market in 2008. PFF eventually ceased trading FFAs and commenced negotiations with its creditors to minimise its losses.

In May 2009, PFF entered into a USD$13 million loan agreement with Zenato Investments Ltd ("Zenato"), which was operated by one of Ms Chen's acquaintances in the People's Republic of China. Ms Chen then resigned as a director on 29 May 2009. Although there was insufficient evidence to show that a replacement had been appointed simultaneously, another director did eventually assume the role.

PFF conceded in October 2009 that it was commercially insolvent, and shortly thereafter approximately USD$13 million was transferred from PFF's deposit account to Zenato. Although Ms Chen did not make the payments herself, it was significant that she remained the sole signatory of PFF's accounts following her resignation.

Breach of fiduciary duties

Joint provisional liquidators were appointed in February 2010 and proceedings were brought against Ms Chen in the High Court of the British Virgin Islands for causing and procuring the payments to Zenato in November 2009.

The liquidator claimed the sum of USD$13 million plus interest for Ms Chen's breach of:

"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"

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

In particular, the liquidators alleged that Miss Chen was a *de jure* director of PFF both at the time the payments were contemplated and when they were made, regardless of the fact that Ms Chen had resigned.

The Privy Council looked at what was in contemplation before Ms Chen resigned. On the facts, the Privy Council held that Ms Chen's resignation letter did not change how she, as a sole director, perceived her activities and so remained a *de jure* director.

The "Ultimate Boss"

Ms Chen's status as a *de jure* director was supported by the fact that there was no evidence to suggest that Ms Chen had in fact resigned as a *de jure* director. For example, Ms Chen was actively involved in PFF's insolvency proceedings and continued to have sole signing rights on PFF's bank accounts after she had submitted her resignation letter.

The Privy Council held that although Ms Chen was not involved in the actual making of the payments to Zenato (which were made subsequent to her resignation), the fact that she remained a *de jure* director meant that she was under a duty to take reasonable steps to prevent a fellow director from misapplying PFF's assets.

Ultimately, it was Ms Chen's inaction, as the sole signatory of PFF's deposit account, that was considered to be a key breach of her duties. The Privy Council considered that Ms Chen had failed to prevent the payments from being made to Zenato at a time when it was inevitable that PFF would face some form of insolvency process.

The pink perspective

This case is a good lesson for directors who are contemplating a retirement from their positions.

Fiduciary duties may survive a director's resignation and practical steps ought to be taken to ensure that no trace of their responsibility for the business subsists. This includes ensuring that their names are removed from any company accounts and ensuring that staff understand that their involvement in making decisions for the business has ceased entirely.

If you would like to discuss any of the issues raised in this case further, please get in touch with David Harby, Michael Adkins or Nia Statham.

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

COLLAS CRILL

For more information please contact:



Michael Adkins

Partner (Advocate) | Guernsey

t: +44 (0) 1481 734 231 | **e:** michael.adkins@collascrill.com

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.