**Michaelmas Term**
[2022] UKPC 41
**Privy Council Appeal No 0085 of 2020**

# JUDGMENT

# Sancus Financial Holdings Ltd and others (Appellants) *v* Holm and another (Respondents) (British Virgin Islands)

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

before

**Lord Briggs**
**Lord Kitchin**
**Lord Burrows**
**Lady Rose**
**Lord Lloyd-Jones**

**JUDGMENT GIVEN ON**
**10 November 2022**

**Heard on 29 June 2022**

*Appellants*
Paul Chaisty KC
Andrew Westwood KC
(Instructed by BDB Pitmans LLP)

*Respondents*
Hefin Rees KC
Oliver Clifton
(Instructed by Blake Morgan LLP)

**LORD BRIGGS AND LORD KITCHIN (with whom Lord Burrows, Lady Rose and Lord Lloyd-Jones agree):**

**Introduction**

1. This appeal provides an opportunity to affirm and to explain the reasons for and the consequences of the Board's practice not, save in exceptional cases, to undertake a review by way of second appeal against concurrent findings of fact by the courts below. As will appear, this appeal from the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands) consists of challenges to concurrent findings of fact. Although it is an appeal as of right, unless the requisite exceptionality can be established by the appellants, adherence to the Board's settled practice, described above, therefore means that it should not be entertained at all. This is despite the immense effort dedicated to litigating it by both sides, an effort that included two very long written cases, a bundle of documents running to over 7,000 pages, and a hotly contested application to adduce fresh evidence with an attendant bundle of its own running to more than 1,000 pages.

**Concurrent findings of fact and the practice of the Board**

2. The Board's practice not to engage with challenges to concurrent findings of fact by the courts below has existed for many years. In *Devi v Roy* [1946] AC 508 Lord Thankerton, giving the judgment of the Board in an appeal from India, conducted a review of the Board's practice as revealed by copious citations from reported cases going back to 1849. He concluded, at p 521:

> "From this review of the decisions of the Board, their Lordships are of opinion that the following propositions may be derived as to the present practice of the Board and the nature of the special circumstances which will justify a departure from the practice: -
>
> (1) That the practice applies in the case of all the various judicatures whose final tribunal is the Board.
>
> (2) That it applies to the concurrent findings of fact of two courts, and not to concurrent findings of the judges who compose such courts. Therefore, a dissent by a member of the appellate court does not obviate the practice.

(3) That a difference in the reasons which bring the judges to the same finding of fact will not obviate the practice.

(4) That, in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law.

(5) That the question of admissibility of evidence is a proposition of law, but it must be such as to affect materially the finding. The question of the value of evidence is not a sufficient reason for departure from the practice.

(6) That the practice is not a cast-iron one, and the foregoing statement as to reasons which will justify departure is illustrative only, and there may occur cases of such an unusual nature as will constrain the Board to depart from the practice.

(7) That the Board will always be reluctant to depart from the practice in cases which involve questions of manners, customs or sentiments peculiar to the country or locality from which the case comes, whose significance is specially within the knowledge of the courts of that country.

(8) That the practice relates to the findings of the courts below, which are generally stated in the order of the court, but may be stated as findings on the issues before the court in the judgments, provided that they are directly related to the final decision of the court."

3. This practice is, as Lord Thankerton said, applicable to all appeals to the Judicial Committee of the Privy Council. It is as applicable to appeals as of right as to appeals that require permission: see per Lord Mance in *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11, at para 6. Mr Chaisty KC for the appellants did not suggest the contrary. It has been re-affirmed in numerous cases in recent times: see eg *The Airport Authority v Western Air Ltd* [2020] UKPC 29, at para 26; *Al Sadik v Investcorp Bank BSC* [2018] UKPC 15, at paras 43-45; *Dass v Marchand* [2021] UKPC 2; [2021] 1 WLR 1788, at paras 15-17; and *Ma v Wong* [2022] UKPC 14, at paras 86-90.

4. This practice, which applies only to second (or further) appeals builds on, but is not to be confused with, the equally well-settled practice of all appellate courts in the common law world not lightly to override fact-finding by the trial judge. This is also re-affirmed by a wealth of recent authority, such as *Piglowska v Piglowski* [1999] 1 WLR 1360, *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, *Biogen Inc v Medeva plc* [1997] RPC 1, per Lord Hoffmann at p 45 and *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477. As Lord Burrows put it in *Dass v Marchand* at para 16, the practice with which the Board is here concerned is a "super-added constraint" over and beyond the reluctance of any appellate court to interfere with findings of primary fact by the trial judge.

5. There are several reasons for this practice. First, where the practice is applied, the reliability of the trial judge's findings will already have been subjected to careful review by a properly constituted and experienced court of appeal. In that way the aspect of access to justice constituted by the availability of an appeal will generally already have been satisfied. Secondly, as Lord Burrows explained in the *Dass* case, where two courts (one of them appellate) have agreed upon a finding of fact, it is inherently unlikely that a second appellate court will be well-placed to disagree with both of them with any degree of confidence. Thirdly, the parties are entitled to expect a reasonable degree of finality in litigation, at least where no contentious point of law of wider public importance is engaged. Fourthly, the minute examination of the detailed evidence underlying findings of fact is an expensive and time-consuming process likely to strain the Board's limited resources, if it has to be undertaken with any frequency. Finally (although of no particular relevance to the present case), fact finding will often benefit from the deeper understanding which the local courts are likely to have of custom and culture, by comparison with the Board: see *Dass v Marchand* at para 16.

6. The consequences of this settled practice call for emphasis. Where (as here) the entirety of the issues in the appeal concern concurrent findings of fact, the Board is likely to require the appellant to demonstrate, as a preliminary condition, that there exist exceptional circumstances which justify a departure from the practice, before the

Board will proceed with the appeal any further. The same may go for the review of concurrent findings of fact where they constitute only some of the issues on the appeal, but with the lesser consequence that only those issues will fall foul of the practice, rather than the whole appeal. This is the meaning of the dictum of the Board in the *Al Sadik* case, at para 44 that:

> "The Board's settled practice is not just to treat the scales as loaded against an appellant in the circumstances described above, but altogether to decline to interfere with concurrent findings of pure fact. This means … that an appellant seeking to mount such an appeal must first persuade the Board that the case comes within that very limited special category which justifies a departure from that practice."

7. Counsel may be tempted to submit that the relevant exceptionality will only be demonstrated when the case has been deployed in full. But that cannot be right. It would mean that, although the practice was not to interfere at all, the appeal would have to be heard, in full, in the usual way with all the concomitant time and expense even if, at the end of the day, the Board decided not to intervene. In this context it is worth bearing in mind the extent of the exceptionality contemplated in para 4 of Lord Thankerton's summary in *Devi v Roy*, namely that (leaving aside errors of law) there has been such a departure from the rules which permeate judicial procedure as to make what happened not fairly described as judicial procedure at all. Although Lord Thankerton was careful not to close the doors on categories of exceptionality, his only concrete example sets a sufficiently high hurdle that its presence ought to be capable of being demonstrated relatively summarily.

8. It follows that in a case which is all (or even in substantial part) aimed at disturbing concurrent findings of fact, the requisite exceptionality will need to be demonstrated in clear terms in the appellant's written case and, if the Board is not persuaded by pre-reading it, established at the outset of the hearing by concise oral submissions. It is not enough just to assert without giving specific reasons that the case is exceptional, or to describe the alleged miscarriage of justice as gross. Nor will it be enough to say, as did Mr Chaisty in the present case, that by raising as a separate ground of appeal a claim that there were serious departures from fair procedure, that will simply lie outside the reach of the practice, if the object of raising that ground is to sustain an attack on concurrent findings of fact. Of course, such a ground may go towards establishing a sufficiently exceptional basis for disapplying the practice, but not for treating it as simply inapplicable. Finally, it is just as much a challenge to concurrent findings of fact to ask for them to be re-tried as it is to ask for them to be reversed.

**The central issues**

9. The central issues between the parties are and have always been whether, at a meeting on 26 September 2015, an oral agreement was made between, on the one hand, the first respondent, Mr Chad Holm ("Mr Holm"), and on the other, the second appellant, Mr Carson Wen ("Mr Wen") (acting on his own behalf and on behalf of his wife, the third appellant, Ms Julia Fung ("Ms Fung"), and the first appellant, Sancus Financial Holdings Limited ("Sancus Financial")); and, if there was such an agreement, whether the appellants have acted in breach of its terms.

**The essential factual background**

10. Mr Holm is a financial services executive and at all relevant times was the sole shareholder and director of the second respondent, FH Investment (BVI) Limited ("FHI"). By the time of the events giving rise to these proceedings, Mr Holm had acquired a good deal of professional experience in the financial and banking sectors having held positions as a Managing Director at Bank of America Merrill Lynch and, before that, as a Managing Director in Citigroup's Financial Institutions practice in New York.

11. Mr Wen is a corporate lawyer and investor with ties to the territory of the British Virgin Islands ("the BVI"). Mr Wen and Ms Fung are Hong Kong nationals. Sancus Financial was incorporated in the BVI in July 2015. It originally had one allotted share ("the founder share") and this was held by Ms Fung upon its transfer from the company formation agents on 1 August 2015. Mr Wen and Ms Fung have at all times been the only two directors of Sancus Financial.

12. In 2014 Mr Wen had the idea of a new corporate enterprise which would have, at its core, a bank to be called the Bank of Asia and incorporated as Bank of Asia (BVI) Limited (the "Bank of Asia"). The enterprise was designed to address the difficulties which it was understood that some BVI companies established and owned by foreign, particularly Chinese and Asian, shareholders were having in opening bank accounts and securing banking services in the BVI. But the concept went further and included asset management and investment banking advisory services. In the first part of 2015 Mr Wen engaged Deloitte (China) to prepare a draft business plan and, with Mr Wen's involvement, the original Deloitte plan (the "Deloitte Business Plan" or "the Plan") was completed in about July 2015. The breadth of the concept is apparent from the Plan, as the Court of Appeal recognised.

13. In August 2015, Mr Wen was introduced to Mr Holm by email, and a few days later Mr Wen emailed Mr Holm to say that he was keen to get his advice on the project, now identified generally as the "Bank of Asia Project" or "the Project", and shortly afterwards sent him a copy of the Deloitte Business Plan. On 29 August 2015 Mr Wen and Mr Holm met for the first time and discussed the Project. On 8 September 2015, Mr Holm sent to Mr Wen a 17 page critique of the Plan and a related financial model. Mr Wen and Mr Holm also met again on further occasions before the critical meeting on 26 September 2015.

14. It was Mr Holm's case that his meeting with Mr Wen on 26 September 2015 lasted for about four hours; that they had before them a series of diagrams illustrating the important elements of the Bank of Asia Project, the details of which were now familiar to both of them; and that Mr Wen reiterated that, in addition to the Bank of Asia, the Project envisaged the provision of a range of financial services and products. Mr Holm saw it as a bold and expansive undertaking involving far more than an offshore bank in the BVI, and he thought that it was at least in part the scope of the Project and the breadth and depth of his own experience that led Mr Wen to approach him as he did.

15. Mr Holm also contended that at the 26 September 2015 meeting, Mr Wen, acting on his own account and on behalf of Ms Fung and Sancus Financial, agreed with him that he would become a partner in the Project with Mr Wen and Ms Fung and that they would transfer to him 22% of the vested shares in whichever corporate entity owned the Project, whether directly or indirectly, to be held pari passu with the balance of 78% of the shares in that entity which Ms Fung and Mr Wen would retain. At that time Financial Holdings (BVI) Limited ("FHL") was effectively the owner of the Project and Sancus Financial owned the issue shares in FHL. Sancus Financial was in that way the indirect owner of the founder shares and was the highest entity in the corporate structure and, as we have mentioned, Ms Fung was the owner of its founder share. Mr Holm contended that it was also agreed that in the event of a reorganisation of this corporate structure he, on the one hand, and Mr Wen and Ms Fung, on the other, would hold their respective 22% and 78% shares, as agreed, in the highest ranking company in any new or developed corporate structure. In that way they would continue to share in those proportions the available equity and value in the Project in accordance with their agreed partnership, and would do so through whichever corporate vehicles and structures were used to carry it into effect, subject to any dilution caused by the raising of any necessary third party finance and provided always that this dilution would only have an impact on the size and value of their shares in accordance with the agreed proportions. The Board will refer to this agreement, as the courts below have done, as "the BVI Contract".

16. There was a further aspect of the relationship between the parties which has assumed a particular significance in the course of these proceedings and on which the appellants have placed considerable reliance. After the meeting on 26 September 2015, Mr Holm took steps to prepare the terms of a written service agreement and instructed lawyers in Hong Kong, Bird & Bird, to assist him. The agreement (the "Executive Service Agreement") was entered into between Mr Holm and FHL on 25 January 2016. Clause 5 provided:

> "Upon or prior to execution of this Agreement, the Company [FHL] shall, directly or indirectly, grant to the Executive [Mr Holm] 22% of the initial issued share capital in the Company ('Equity Grant').The initial share capital for the purposes of the Equity Grant shall be determined prior to the issuance of shares to any party other than the Group CEO [Mr Wen], implying that the Group CEO owns 78% of the initial issued share capital, directly or indirectly, at the point of the Equity Grant."

17. Mr Holm contended that the Executive Service Agreement, which was in similar terms to an agreement between Mr Wen and FHL, simply reflected and was evidence of when the transfer of the shares under the BVI Contract was to take effect. He maintained that he thereupon began working on the implementation of the Project pursuant to the agreement and continued to do so until its repudiation by Mr Wen and Ms Fung in the manner the Board will relate a little later in this judgment.

18. The appellants, on the other hand, maintained that no agreement was ever made in the terms of the BVI Contract. They argued that it was inherently improbable that Mr Wen would have made any such agreement and that its existence was undermined by the contemporaneous documentary record, including the Executive Service Agreement. It was and remains the appellants' case that Mr Holm's only entitlement to shares in relation to the Bank of Asia Project arose under the Executive Service Agreement and as an entitlement only to shares in FHL, prepared as it was with professional assistance from Mr Holm's lawyers, Bird & Bird.

19. The appellants also argued that the Executive Service Agreement was of central importance for it made express provision for a 78:22% split of the share capital of FHL, and nothing more, and specified the date by which the share split must take place.

20. Mr Wen rejected any suggestion that he had entered into any contractual obligation with Mr Holm on his own account or that he had done so on behalf of his

wife, Ms Fung, or that he ever purported to or did in fact enter into any contractual obligation with Mr Holm on behalf of Sancus Financial. He maintained that he only ever represented FHL in the discussions he had with Mr Holm and, as the Board has explained in para 18 above, that any contractual rights which Mr Holm may have had arose only under the terms of the Executive Service Agreement and had no other basis.

21. As for the Executive Service Agreement, the appellants contended that Mr Holm gave the outward appearance of continuing to act within the structure of FHL over the months that followed, but that Mr Wen discovered in June 2016 that Mr Holm, with others, had been working secretly to set up a bank in competition with Bank of Asia; and that this amounted to wrongdoing and a breach of the Executive Service Agreement. The appellants also argued that on 29 June 2016 FHL dismissed Mr Holm as it was in these circumstances entitled to do; and that FHL then began proceedings in Hong Kong against Mr Holm and others in respect of Mr Holm's wrongdoing and breach. The appellants continued that any entitlement to shares that Mr Holm may have had under the terms of the Executive Service Agreement was subject to Mr Holm's compliance with its terms and these had been broken. It followed that Mr Holm was not entitled to shares in FHL or indeed any other entity involved in the Bank of Asia Project.

22. There is no dispute that in the meantime, on or about 3 March 2016, two new companies had been incorporated: Tortola Investment Holdings Limited ("Tortola") and the second respondent, FHI. Mr Holm, Mr Wen and Ms Fung were the original directors of both of these companies. This arrangement formed part of a proposed restructuring under which the FHL founder share would be converted into Class A and Class B shares. FHI would be the Class B shareholder of FHL and, in turn, Tortola would be the holding company for the shares in FHI. It was proposed that Ms Fung would then own 78% of the shares in Tortola through Sancus Financial and Mr Holm would own the remaining 22% of the shares in Tortola. It was suggested that this restructuring would have a number of benefits. First, it would provide a way to divide the parties' interest in the founder share. Secondly, it would create a vehicle for the raising of funds from third party investors and provide a means for those investors and for employees to participate in the Project. Thirdly, it would ensure that Ms Fung and Mr Holm held their respective shares in the founder equity through different companies.

23. In March 2016, Bank of Asia was granted a conditional, albeit restricted, banking licence by the BVI authorities, and Mr Holm travelled to Europe to meet with potential clients, investors and corporate service providers. In April 2016 Oasis Sun Investments Limited ("Oasis Sun") executed a subscription agreement to invest in the Class A shares

in FHL although it is a matter of dispute as to whether Oasis Sun or FHI ever became shareholders in FHL.

24. Be that as it may, and despite further steps being taken in April to develop the Project, it became clear in May 2016 that Mr Wen did not want Tortola or FHI to play any part in the Project corporate structure. In June 2016 Ms Fung and Mr Wen ceased to be directors of FHI. Then, later that month, Mr Wen met Mr Holm in Thailand and at that meeting alleged that Mr Holm and others were attempting to set up a competing bank. By this point the relationship between the parties had irretrievably broken down and claims and counterclaims followed. Mr Holm's Executive Service Agreement was terminated. FHL was removed from the corporate structure with the result that it became worthless. Meanwhile Sancus Financial and Ms Fung remained the effective owners of the Bank of Asia.

**The trial of the action**

25. The action came on for trial before Adderley J in November 2018. It took six days and was concerned with liability only. The judge gave judgment on 19 December 2018. The parties having adopted very different positions as to what had been agreed in the course of the meeting on 26 September 2015, the credibility of the principal witnesses became a matter of considerable importance. Here the judge made clear and unequivocal findings. He held that Mr Holm was a thoroughly believable and knowledgeable witness, and that his evidence was entirely consistent with the relevant contemporary documents. By contrast, the judge found inconsistencies in the evidence of Mr Wen and Ms Fung, and although it is fair to say that he found them to be reliable witnesses generally, it is clear, and the Court of Appeal recognised, that he preferred Mr Holm's evidence over that of Mr Wen and Ms Fung so far as there was any significant conflict between their respective accounts.

26. In broad terms the judge found that Ms Fung and Mr Wen had indeed reached an agreement with Mr Holm in the terms of the BVI Contract; that Mr Wen had agreed on his own behalf and on behalf of Ms Fung that they would be business partners with Mr Holm and that they, that is to say Mr Wen and Ms Fung, on the one hand, and Mr Holm, on the other, would have, respectively, a 78% and 22% interest in the founder equity in the Project; and that this agreement would be reflected initially in a sharing in these proportions of the equity in Sancus Financial. Importantly, they also agreed that they would continue to share the equity and value in the Project in these proportions despite any changes that might be adopted to the corporate structure, but subject to any dilution arising from the raising of funds from third party investors.

27. In reaching this conclusion the judge also gave careful consideration to the Executive Service Agreement and reasoned that, in context, this supported rather than undermined Mr Holm's case. It specified the date upon which Mr Holm became entitled to 22% of the equity in the Project, that is to say the equity in whichever company was at the top of the corporate structure; and so too it provided the date on which the transfer of the shares under the BVI Contract was to take effect.

28. The judge also held that Mr Holm's interest in the Project should have been transferred to him and ought to have vested in him on 25 January 2016, the date he signed the Executive Service Agreement. It followed, in his view, that Mr Holm's alleged misconduct after that date, and his dismissal and the reasons for it were irrelevant to the determination of his right to damages for breach of the BVI Contract.

**The appeal to the Court of Appeal**

29. The appellants appealed to the Eastern Caribbean Court of Appeal and a two day hearing of that appeal took place in December 2019 before Blenman, Webster and Antoine JJA. The Court of Appeal gave judgment on 30 March 2020 and dismissed the appeal, save that a costs order made by the judge in favour of FHI was reversed.

30. There were no fewer than 17 grounds of appeal. The Court of Appeal distilled them into five groups, the first of which was by some margin the most important:

(i) whether the judge erred in his findings of fact that led to the conclusions that an oral contract existed and had been breached; that the terms of the oral contract were sufficiently certain and clear; and that liability could be attached to the first and third appellants, that is to say, Sancus Financial and Ms Fung;

(ii) whether the judge erred in failing to give reasons to support his evaluation of the evidence and conclusions;

(iii) whether the judge erred in failing to address defences, namely breach of implied terms and estoppel;

(iv) whether the judge erred in his management of the case which led to serious procedural irregularities; and

(v) whether the judge fell into error in awarding costs to the second respondent, FHI.

31. The Court of Appeal addressed them in turn. As for the first, the Court of Appeal recognised and accepted that the judge's findings of fact were fundamental to the final conclusions he reached. The appellants argued that the evidence did not support those findings, and that it did not support the judge's conclusion that an oral contract had ever been made. They also submitted that the judge erred in attaching the weight he did to aspects of the oral evidence, in failing properly to assess the contemporaneous documents and in failing to appreciate the inherent improbability of the parties ever having reached an oral agreement of the kind for which Mr Holm contended.

32. In assessing these submissions, the Court of Appeal directed itself properly as to the law and recognised that although the appeal was by way of rehearing, a trial judge's findings of fact should not be overturned simply because an appeal court might have been disposed to make different findings. It had to be shown the judge was wrong or had misunderstood the issue or the evidence, or that he failed to take material evidence into account, or that he arrived at a conclusion that the evidence could not support.

33. The Court of Appeal then proceeded to assess whether the evidence provided a proper basis for the judge's findings. Here careful consideration was given to the credibility of the evidence the judge had heard and the judge's assessment of the principal witnesses, the admissions and concessions Mr Wen had made, the evidence surrounding the conflicts that arose in May 2016 and the contemporaneous email correspondence. Far from showing the conclusions reached by the judge were plainly wrong, this analysis showed that the judge's findings were eminently reasonable. The court also assessed with care the other contemporaneous documents such as the Executive Service Agreement upon which the appellants placed particular reliance. The court recognised the judge had not ignored these but had considered them together with other documents and evidence that set them in context. Overall, the views reached by the judge were again, in the view of the court and for reasons elaborated by Antoine JA, entirely supportable.

34. The Court of Appeal also addressed the appellants' submission that such an oral contract was inherently improbable. The court found this submission unpersuasive and expressed the view that such arrangements were typical in corporate schemes of this kind. It was true that Mr Wen and Mr Holm both had service agreements with FHL, but this was no surprise because at the time it was the only company with a bank account. In these circumstances the court was satisfied that the employee arrangement did not

preclude the judge from finding that Mr Wen and Mr Holm were also partners and that Mr Holm was not merely an employee. What mattered in this multi-layered and rather fluid financial investment structure was the agreement the appellants had reached with Mr Holm that he would have 22% of the founder equity and that his shares were to be held pari passu with those of the appellants. This was an ambitious commercial venture which required not only legal expertise but financial experience and acumen; and these last two qualities were something Mr Holm could bring to the partnership.

35. The Court of Appeal found the appellants' submissions on lack of certainty no more persuasive and in this regard distinguished between certainty of outcome of the Project and certainty as to the subject matter of the contract. The Court of Appeal recognised the reluctance of the courts to find that what commercial parties themselves intend to be a legally binding agreement is too uncertain to be of contractual effect, and that such a conclusion is very much a last resort. The court concluded that this was not such a case.

36. Overall, the Court of Appeal was satisfied that the judge had examined and considered the relevant contemporaneous documents and that, in light of this material and the oral evidence he had heard, he had arrived at a conclusion that was properly open to him and had not been shown to be wrong.

37. The Court of Appeal also addressed the contention that the judge had no basis for finding that liability should attach to Ms Fung or Sancus Financial. The court considered that these arguments had no substance. The judge had ample evidence that Ms Fung and Mr Wen acted as one; that Mr Wen had authority to enter into agreements on Ms Fung's behalf and did so in this case; and that Ms Fung had ratified his actions. In the Court of Appeal's view, it was also appropriate for Sancus Financial, an entity owned and controlled by Mr Wen and Ms Fung, and the highest entity in the corporate structure, to have been joined as a party to the proceedings and made the subject of the judge's order.

38. The other grounds of appeal were also dealt with by the Court of Appeal. The judge had explained the conclusions that he had reached on the evidence and why he had made them; and given that the case turned largely on the facts, these conclusions were in large measure determinative of the issue as to whether there was an oral agreement as Mr Holm had contended, and if so, whether the appellants had acted in breach of its terms. Similarly, the judge had addressed the defences of implied terms of loyalty and fidelity and estoppel entirely properly. Nor was there anything in the submission that the judge had committed procedural irregularities in his management of the case. The one area where the judge had fallen into error was in awarding FHI its costs. He had no basis for making such an order and it would be set aside.

39. The concluding remarks of the Court of Appeal are also of some importance. It was recognised that the grounds of appeal were, in the main, centred on attempts to impugn the judge's findings of fact based upon his evaluation of the evidence and the inferences drawn. Nevertheless, the Court of Appeal had revisited the evidence, both oral and documentary, and found that it supported the findings the judge had made. The terms of the agreement were neither vague nor uncertain and were clearly identified and understood by the parties.

**The appeal to the Board**

40. The primary ground of appeal to the Board is that the Court of Appeal was wrong not to overturn the judge's finding that on 26 September 2015 Mr Holm and Mr Wen entered into an agreement in the terms of the BVI Contract, and that it ought to have allowed the appeal, set aside the judge's order and dismissed the claims. Mr Chaisty, for the appellants, submits that the Court of Appeal should have concluded that the findings of the judge were not and could not be justified on a proper consideration of the totality of the evidence or on the basis of Mr Holm's pleaded case. He argues that the judge and the Court of Appeal misunderstood key documents, failed to take into account other important contemporaneous documents and failed to pay sufficient regard to the totality of the evidence and the inherent improbability that the parties would have entered into an oral agreement of the kind and scope for which Mr Holm contended.

41. The appellants' second ground of appeal is that, even if the Court of Appeal was justified in reaching the view that it could not overturn the judge's decision and dismiss the claims, it ought to have ordered a retrial. There were, so Mr Chaisty's submission continues, fundamental deficiencies in the judgment and substantial procedural irregularities in the way the trial was conducted.

42. It appeared to the Board on reading the parties' written cases that the appellants were, in substance, inviting the Board to undertake a review of concurrent findings by the judge and the Court of Appeal. The Board also reached the preliminary view that the appellants' written case did not disclose an exceptional case which would justify the Board taking this course. Accordingly, at the outset of the oral hearing, the Board indicated to the parties that it had reached this preliminary view but that it would give the appellants an opportunity, in concise oral argument, to persuade the Board that it was or might be wrong and further, that this was indeed an exceptional case which would justify the Board hearing a second appeal.

43. Mr Chaisty thereupon made admirably focused submissions. He argued that this was indeed an exceptional case, first, because the judge misunderstood the case presented to him and so his judgment did not properly or fairly address the issues he had to decide. Here Mr Chaisty began with the original statement of claim in which it was alleged that on 26 September 2015 it was agreed that Mr Holm would be given a 22% interest in Bank of Asia BVI Limited, a specific company. This evolved, however, and in the amended statement of claim became an allegation that Mr Holm would own, directly or indirectly, an interest of 22% in the Bank of Asia Project. This, continued Mr Chaisty, was totally unclear and ill-defined. What is more, it was not reflected in the case put to Mr Wen or Ms Fung in cross-examination; nor was it consistent with or supported by the evidence of Mr Holm given in the course of his cross-examination, which was to the effect that he was entitled to 22% of the issued shares in Sancus Financial rather than the Project or some aspect or variation of it.

44. Mr Chaisty also argued that the lack of clarity as to the nature of the case being advanced by Mr Holm was in due course reflected in Adderley J's judgment. This, said Mr Chaisty, is unclear and confused as to the subject matter of the alleged agreement and, in particular, whether it was 22% of the Bank of Asia BVI Limited or some more generalised concept and, if the latter, what it was, and how it came to be the subject of any agreement between the parties.

45. That brought Mr Chaisty to the appellants' second ground of appeal which he emphasised was self-standing though entirely consistent with the first. He submitted that the judge had failed to provide any adequate reasons to support his conclusions. The judge's reasoning was, he submitted, cursory and confused; the analysis of the documents was limited and selective, and no sufficient justification was given for rejecting the evidence of Mr Wen. In these circumstances, Mr Chaisty continued, justice and fairness made a retrial necessary.

46. Concisely and attractively though these submissions were developed, the Board was not persuaded by them. This is not one of those cases which merits a full reconsideration by way of second appeal; nor was it appropriate to allow the appellants to develop their arguments that the appeal should be allowed and that there be a retrial for any other reason, and after a relatively short adjournment to consider Mr Chaisty's oral submissions, the Board so indicated to the parties. It also meant that an application by Mr Holm to adduce further evidence fell away, as Mr Rees KC, who appeared on his behalf, accepted.

47. It became increasingly clear during Mr Chaisty's submissions that there was nothing at all exceptional about the challenge the appellants were seeking to make to the concurrent findings of fact made in these proceedings. To the contrary, the

appellants would be inviting the Board to revisit the issues considered at length by the judge and the Court of Appeal, and to do so in the hope of persuading the Board that those courts had failed properly to evaluate the oral evidence in light of the documentary record. That is not an appropriate course to take on a second appeal to the Board. Nor was there anything confusing about the nature of the case that Mr Holm was advancing. This had at its heart the propositions, accepted by the judge, that Mr Holm was a founder partner in the enterprise and was well qualified to bring particular expertise to bear in developing the Project. Secondly, Mr Holm worked for some nine months without drawing a salary; and he was prepared to do so because he knew he had a 22% share in the Project. Thirdly, it would have made no sense for Mr Holm to hold his share in the Project through FHL because any value in such a share could have been removed at any time by Mr Wen. Hence the parties' agreement, as alleged in the amended statement of claim and as well understood by the appellants, that Mr Holm would own his 22% interest in the form of shares in whichever company in the Project was at the top of the relevant corporate structure, and that these shares would rank pari passu with the 78% of the shares held by or for Ms Fung and Mr Wen.

48. It follows that the Board will humbly advise His Majesty that this appeal should be dismissed.