

BRITISH VIRGIN ISLANDS

COURT OF APPEAL

Mark Byers and Mark McDonald -v- Pioneer Freight Futures Company Limited (June 2018)

LIQUIDATION – CLAIMS FOR UNFAIR PREFERENCE
AND BREACH OF FIDUCIARY DUTY

In this case, the appellants, Mark Byers and Mark McDonald, joint liquidators of Pioneer Freight Futures Company Limited ("PFF") brought a claim against the sole beneficial owner of PFF, Ms. Chen Ninging ("Ms. Chen") for the repayment of an unsecured loan from Zenato, a BVI company, on the grounds of it being an unfair preference. The appellants also claimed a breach of fiduciary duty by Ms. Chen. Their primary case being that Ms. Chen remained a *de jure* director or, alternatively, a *de facto* or shadow director from incorporation until liquidation.

The Trial Judge dismissed the claim holding that Ms. Chen remained a *de jure* director of PFF only until the beginning of August 2009 and there was no evidence of her being involved in the affairs of PFF between August 2009 and the time the company was put into liquidation in November/December 2009. Therefore, Ms. Chen owed no fiduciary duties when the repayment of the loan to Zenato was made, thus no claim based on unfair preference could succeed. The appellants appealed.

On dismissing the appeal, it was held that while there was an unfair preference to Zenato, the Court could not exercise its discretion against Ms. Chen as such an act was not required as a part of the process of restoring the position of the company to what it would have been had the preference not occurred. Further, the decision that Ms. Chen was not a director and had no fiduciary duties was upheld on the basis that there was no evidence that Ms. Chen had actively assumed duties to act during the relevant period. The Learned Judge found that the credibility of the witness's evidence was one for the Trial Judge to decide and could not be interfered with by the Appellate Court.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.