THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

THE TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2019/0002

BETWEEN: -

[1] SANCUS FINANCIAL HOLDINGS LIMITED
[2] CARSON WEN
[3] JULIA YUET SHAN FUNG

Appellants

and

[1] CHAD HOLM
[2] FH INVESTMENT (BVI) LIMITED

Respondents

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mde. Rose-Marie Belle Antoine	Justice of Appeal [Ag.]

Appearances:

Mr. Paul Chaisty, QC for the Appellants
Mr. Hefin Rees, QC for the Respondents

2019: December 4;
2020: March 30.

Commercial Appeal — Oral contract — Breach of oral contract — Certainty of oral contract — Challenge to trial judge's findings of fact — Threshold for overturning trial judge's finding of fact — Whether trial judge erred in concluding that oral contract existed and was breached — Whether trial judge erred in finding that terms of oral contract were certain — Weight to be given to oral testimony — Whether trial judge incorrectly treated documentary evidence and made inferences and findings of fact unsupported by the documentary evidence — Duty of fidelity — Duty to give reasons for decision —Whether trial judge gave sufficient reasons for decision — Estoppel and implied terms defences —

Whether trial judge sufficiently dealt with defences raised — Judicial management of case — Whether trial judge's case management caused serious procedural irregularities — Costs — Whether trial judge erred in making costs award in favour of party without any finding on that party's claim

On 26th September 2015 a business meeting was held between Mr. Carson Wen, ("the second appellant") and Mr. Chad Holm, ("the first respondent"), with a view to establishing a corporate enterprise which would be known as the Bank of Asia Project. Mr. Holm alleged that arising from that meeting, an oral contract was formed between himself on one part and (1) Mr. Wen, (2) Ms. Julia Fung, and (3) Sancus Financial Holdings Limited ("the appellants") on the other part. The parties, it is alleged, agreed that Mr. Holm, an experienced banker and financial advisor, would provide his strategic corporate services and banking acumen to implement the project. In exchange, Mr. Holm contended that the appellants had agreed to vest to him 22% equity of the founding shares of the Bank of Asia Project as he would come on board as a partner to the enterprise. These shares, it is alleged, were to be held *pari passu* to the remainder 78% shares. At the time, the founding shares were solely held by Ms. Julia Fung, ("the third appellant"), by virtue of her sole shareholding in Sancus Financial Holdings Limited, which was at the time at the head of the corporate structure of the Bank of Asia Project. Mr. Holm accordingly commenced working on implementing the Bank of Asia Project pursuant to an Executive Service Agreement between Mr. Holm and Financial Holdings (BVI) Ltd, a subsidiary company of Sancus Financial Holdings Limited.

The 22% equity shares were never vested to Mr. Holm but were held in several special purpose vehicle companies which formed part of the shifting corporate structure of the Bank of Asia Project.

The relationship between the parties disintegrated and the Executive Service Agreement was terminated. Subsequently, Mr. Holm claimed entitlement to the 22% equity in the founding shares of the Bank of Asia Project. Mr. Wen, Ms. Fung, and Sancus Financial Holdings Limited rejected the claim, indicating that Mr. Holm was merely an employee, and upon the termination of the Executive Service Agreement, the benefit to the 22% equity in the shares was similarly terminated. Mr. Holm, sued.

The learned trial judge agreed with Mr. Holm, finding that an oral contract between the parties existed and as such Mr. Holm was due 22% equity in the founding shares of whichever company in the Bank of Asia Project was at the top of the corporate structure of the project as Mr. Holm was promised that his shares would be held *pari passu* the other 78% equity in the founding shares. The learned judge also found that Mr. Holm was entitled to the 22% equity immediately upon signing the Executive Service Agreement.

Mr. Wen, Ms. Julia Fung, and Sancus Financial Holdings Limited appealed. The thrust of the appellants' appeal is that the learned trial judge made incorrect findings of fact. The appellants contend that the trial judge made these incorrect findings by placing excessive weight on the oral evidence and insufficiently considering the documentary evidence. They also contend that the trial judge did not sufficiently regard the defences of fidelity and

estoppel, improperly managed the case, did not give sufficient reasons for his decision and improperly awarded cost to the second respondent.

Held: The appeal is dismissed save in relation to the costs that were awarded in the court below to FHI, the second respondent; costs in the appeal awarded to the first respondent and if not agreed within 21 days to be assessed by a judge of court below at the rate of two-thirds of the amount awarded to the first respondent; and costs to the appellants of the issue relating to costs awarded to FHI, such to be assessed if not agreed within 21 days; that**:**

1. The threshold for a Court of Appeal to overturn findings of fact is exceedingly high and it cannot be said, based on the oral and documentary evidence adduced at trial, that the findings of the trial judge were so plainly wrong as to meet this threshold. The trial judge had the benefit of seeing and hearing the witnesses first-hand, which allowed him to assess their credibility. Further, the contemporaneous documentary evidence which accompanied the oral testimony supported the oral evidence which was adduced and the conclusion that an oral contract existed. The trial judge was well within his remit to analyse the documentary evidence in light of their substance and not necessarily their form in determining whether a contract existed and to determine whether there was sufficient certainty in the contract. There was therefore sufficient evidence to find that a contract existed. In the circumstances, the conclusions drawn by the trial judge cannot be said to be ones where he misunderstood the evidence and was plainly wrong.

   Skynet Ltd. et al v Global Skynet International Ltd. et al AXAHCVAP2018/0012 (delivered 3rd October 2019, unreported) applied; **Bahamasair Holdings Ltd v Messier Dowty Inc** [2018] UKPC 25 (Bahamas) applied; **Chaggar v Chaggar** [2018] EWCH 1203 (QB) at 187 applied; **Blue v Ashley** [2017] EWHC 1928 (Comm) applied.

2. A trial judge, especially in a trial of complex commercial disputes with several thousand pages of documents, is not expected to comment in his written judgment on each and every submission made by counsel. The trial judge provided clear and sufficient analysis of the evidential basis upon which he made his decision and, as such, it cannot be said that the trial judge failed to provide cogent reasons for his decision.

   English v Emery Reimbold & Strick Ltd [2002] 1 WLR 2409 applied.

3. Given that the evidence accepted by the judge was that the first respondent was entitled to a vesting of his shares as a matter of law on January 2016, the defences of breach of duty of fidelity and of estoppel were correctly viewed as immaterial given that the actions complained of occurred after the date on which the shares were to vest.

4. Pleadings do not necessarily need to use discrete terms when referring to entities. What is important is that the case is adequately and fairly put to the other party,

that they understood it and had the opportunity to defend it. The findings of the judge that the requirement of specificity in the terminology used to refer to the entities in the often-changing corporate structure of the Bank of Asia Project was not material [and?] is therefore unimpeachable.

Southern Developers Limited v Attorney General of Antigua and Barbuda HCVAP 2006/020A (delivered 7th April 2008, unreported) applied.

5. There is no factual basis upon which to find that the learned judge inappropriately changed his draft judgment, nor is there any factual basis to find that there was a procedural irregularity in the prevention of a re-examination of Mr. Wen.

6. The second respondent, having pleaded its claim in the alternative, and the learned judge having not made any findings on the alternative pleading, the award of cost to the second respondent is set aside.

JUDGMENT

Introduction

[1] **ANTOINE JA [AG.]**: This is an appeal against the decision of the learned trial judge by which he upheld a claim against the appellants Sancus Financial Holdings Limited ("Sancus"), Carson Wen ("Mr. Wen") and Julia Yuet Shan Fung ("Ms. Fung"), for breach of an oral contract. The contract was for 22% founder equity shares in a far-reaching, multi-layered corporate scheme labelled 'the Bank of Asia Project' ("the Project") to be granted to the first respondent, Chad Holm ("Mr. Holm"). FH Investment (BVI) Limited ("FHI") is the second respondent. The appellants seek a reversal of the judgment and, in the alternative, a retrial by a different judge.

Background /Summary

[2] The first respondent, Mr. Holm, is an experienced banker, strategic financial advisor and the sole shareholder and director of FHI. The second appellant, Mr. Wen, is a corporate lawyer and financial investor with close ties to the Territory of the Virgin Islands ("the BVI"). Ms. Fung, the third appellant, is his wife. Mr. Holm claimed that an oral contract had been made between himself and Mr. Wen, on behalf of Ms. Fung, at a business meeting on 26th September 2015.

This meeting was the culmination of several weeks of discussion and business interaction between Mr. Wen and Mr. Holm. Mr. Wen was desirous of establishing a potentially lucrative corporate enterprise which involved, at its core, the establishment of an offshore bank, the Bank of Asia (or "the Bank") in the BVI. The scheme was designed to fill a perceived gap in the BVI for offshore companies which had difficulty obtaining banking services.

[3] The concept for the Bank was linked to other commercial endeavours and entities with a global reach. As such, this corporate scheme was more than just the Bank, but a dynamic, complex, multi-layered, financial investment project. The Project was the subject matter of the alleged oral contract, the terms of which included a grant of 22% of vested shares in its founder equity to the first respondent, Mr. Holm, to be held *pari passu* with the appellants' 78% share. At the time of the alleged contract Financial Holdings (BVI) Ltd ("FHL") held the Bank of Asia shares. The first appellant, Sancus, owned FHL. Sancus was therefore the beneficial owner of the founder shares and the highest entity in the corporate structure. Ms. Fung was the beneficial owner of the shares in Sancus.

[4] At the time of the meeting on 26th September 2015, a business plan detailing the Project had been drawn up by the firm Deloitte, ("the Deloitte Business Plan"), but little progress had been made. Only four million dollars of the necessary capital of one hundred and fifty million dollars had been raised and no licence had been obtained as yet for the Bank. Mr. Holm had previously submitted a critique of the Deloitte Business Plan which outlined strategies to operationalise the Project successfully. It led to Mr. Wen offering to engage him, whereupon Mr. Holm began work on the Project. This included serving as the Chief Executive Officer in FHL under an Executive Service Agreement dated 25th January 2016, in a corporate structure that involved several special purpose vehicles ("SPVs") being built in and repeated restructuring of the enterprise. The Executive Service Agreement provided for Mr. Holm to hold shares in FHL.

[5] After the restructuring exercises, the founder shares were in fact transferred to different and new corporate entities and were not transferred to Mr. Holm. Ms. Fung retained full ownership of Sancus, at Mr. Wen's direction, and the founder equity was transferred to new companies, including FHI. In May 2016, Mr. Wen made a further restructuring of the corporate scheme. He advised that the shares should be held separately and asked Mr. Holm to accept shares in another company instead of the company through which the appellants held their 78% shares. This was ostensibly on the basis that there would be financial complications due to the 'concert parties' principle if they continued to hold their shares together. Mr. Holm agreed. However, no transfer of the founder shares to Mr. Holm was made. The Executive Service Agreement was also terminated in June 2016 due to conflict caused by a disputed allegation that Mr. Holm was attempting to establish a competitor bank. After Mr. Holm's contract was terminated, further restructuring occurred. Mr. Wen removed FHL from the corporate structure, which resulted in Mr. Holm's shares being essentially worthless while Sancus/Ms. Fung remained the owner of the Bank. There were also separate proceedings in another jurisdiction for issues related to the employment contract.

The trial in the lower court

[6] Mr. Holm brought proceedings in the High Court claiming the existence of the oral contract of 26th September 2015 and its breach. There were also alternative claims of inducement of breach of contract, or breach of a statutory duty by FHI.

[7] The precise terms of Mr. Holm's engagement in the corporate scheme were in issue at the trial. Mr. Holm claimed that at the meeting on 26th September 2015, he had been offered and accepted engagement as a partner, under an oral contract. This was on the basis of an incentive, the grant of 22% vested shares in the founder equity of the entire commercial enterprise, the Project. The remaining 78% was to be held by the owner of the shares, Ms. Fung. While at that time, the founder equity was held in Sancus, Mr. Holm contended that it was understood

that the shares could, in future, be held in other corporate vehicles of similar highest rank as the Project evolved and that he would hold these founder shares *pari passu* with the appellants subject to dilution. This was termed the 'BVI Contract'.

[8] Mr. Holm asserted that his Executive Service Agreement with FHL was simply a mechanism and guarantee to effect the contract which was really intended for his founder equity shares. This occurred because, under the structure of the corporate scheme at that time, only FHL had a bank account. The stated intention gleaned from the documents for the 22% founder share to be transferred to Mr. Holm was delayed and eventually never materialised. The fact that FHL was the only entity with a bank account was not contested and was supported by the documentation.

[9] The appellants contended that there was no such oral contract. They argued that Mr. Holm was a mere employee and that the only contract was for 22% of employee shares in FHL, which were not free standing, but part of Mr. Holm's Executive Service Agreement. These employee shares, they argued, were no longer due given that the employment contract had been terminated.

[10] The appellants also put forward a defence that even if there had been an oral contract, this would have been defeated due to the first respondent's breach of the implied terms of loyalty in relation to his employment contract in seeking to establish a competitor bank. They further raised the defence of estoppel on the ground that Mr. Holm had accepted the transfer of his shares to FHI.

Judgment in the lower court

[11] The trial judge found in favour of Mr. Holm. He held that an oral contract had been made on 26th September 2015 which entitled Mr. Holm to 22% of the founding equity shares of the Project, irrespective of its changing corporate structure and the changing SPVs used. He found that this contract had been breached.

Further, he held that these equity shares should have been transferred to and vested in Mr. Holm in January 2016 – the time of the signing of the Executive Service Agreement with FHL which gave effect to the oral contract.

[12] The learned judge held also that given the finding of (an existence of) an oral contract in September 2015, for which founder shares should already have been transferred to Mr. Holm by January 2016, the alleged employee misconduct of Mr. Holm after this date was irrelevant to the issue. Accordingly, the appellants' defence based on implied terms failed. He awarded damages to Mr. Holm and costs to Mr. Holm and FHI.

Condensed issues on appeal

[13] Having perused the 17 grounds of appeal, I am of the view that several overlap. Accordingly, I have condensed them into the following main issues:

(a) whether the learned judge erred in his findings of fact that led to the conclusions that:

(i) an oral contract existed and had been breached;

(ii) the terms of the oral contract were sufficiently certain and clear; and

(iii) liability could be attached to the first and third appellants;

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

(c) whether the learned judge erred in failing to address defences raised by the appellants, namely breach of implied terms and estoppel;

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

(e) whether the judgment was flawed in its award of costs to the second respondent, FHI.

Analysis
Issue 1 – Assessment of the findings of fact

[14] The correctness of various findings of fact made by the learned judge is instrumental to the substantive issues of this appeal. The challenge to the judge's findings of fact is wide. The appellants argue that the evidence does not support the judge's findings of fact or do they support his conclusions that; an oral contract existed, was breached by the appellants, and was a contract that was sufficiently certain to be enforced. Further, the appellants' challenge asserts deficiencies in (a) the weight attached to oral testimony at trial and; (b) the treatment of contemporaneous documentation, and (c) raises questions of improbability.

[15] The challenge to the judge's findings of fact also permeates several other grounds of appeal, considered separately. It undergirded the ground alleging a failure to give reasons or inadequate reasoning. In addition, the grounds involving defences put forward were also contingent on these findings of fact.

[16] The evidence interrogated various issues important to the findings of fact which the judge had to evaluate. These included the meaning of documents referencing Mr. Holm as a "partner"; the significance of Sancus as the company initially holding the founder equity; the specific mention of Sancus in documents describing Mr. Holm's shares; the descriptions of the corporate scheme by third parties such as the law firm Conyers Dill & Pearman and the Financial Services Commission; the rationale and meaning of the various restructuring exercises; and, the conduct of Ms. Fung in relation to the commercial arrangements.

[17] The appellants claimed that the trial judge gave disproportionate weight to oral testimony on the supposed credibility of Mr. Holm as a witness, as opposed to the contemporaneous documentation which, they argued, supported their case. At least, they said, the judge failed to explain why certain evidence from the

appellants supporting the contention that the contract was only for employee shares in FHL should be disregarded.

Law on findings of fact

[18] It is trite law that findings of fact and the inferences to be drawn from them are the preserve of the court of first instance and the threshold is exceedingly high for a Court of Appeal to overturn findings of fact. The relevant guiding principles were recently restated by this Court in the case of **Skynet Ltd. et al v Global Skynet International Ltd. et al**[1] by Blenman JA:

> "...an appellate court reviewing a trial judge's findings of fact should not substitute its own views for those of the court below, unless it can be shown that the trial judge's findings were clearly wrong. The principles were first propounded in **Watt (or Thomas) v Thomas** [fn. 7: [1947] AC 484.] and have been restated by the Privy Council in **Beacon Insurance Company Limited v Maharaj Bookstore Limited**. [fn. 8: 2014 [UKPC] 21.]"

[19] The rationale for this approach lies in the advantage that a trial judge has from seeing and hearing the witnesses first-hand, which allows him or her to assess their credibility from the expertise that comes with experience.

[20] In **Bahamasair Holdings Ltd v Messier Dowty Inc.**[2] it was emphasised that:

> "…[A]ny appeal court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the judge's findings and position, and in particular the extent to which, he or she had, as the trial judge, an advantage over any appellate court."

[21] Notwithstanding these well-established first principles of appellate courts, this judicial restraint may be lifted where, as was stated in **Yates Associates Construction Company Ltd. v Blue Sand Investments Limited**:

---

[1] AXAHCVAP2018/0012 (delivered 3rd October 2019, unreported).
[2] [2018] UKPC 25.

> "...either because the reasons given by the trial judge are unsatisfactory, or because it clearly appears so from the evidence, an appellate court may be satisfied that the trial judge has not taken proper advantage of his having seen and heard the witnesses... The critical question before an appellate court is whether there was evidence before the trial judge from which the judge could properly have reached the conclusions that he or she did or whether, on the evidence, the reliability of which it was for the judge to assess, that the judge was plainly wrong."[3]

[22] As explained further in the dictum of Lord Mance in **Central Bank of Ecuador and others v Conticorp SA and others**,[4] there is room to differ in relation to fact finding in the judge's task of evaluating the facts since it:

> "is often a matter of degree upon which different judges can legitimately differ: see *Assicurazioni Generali SpA v Arab Insurance Group* (Practice Note) [2003] 1 WLR 577, paras 15-17, per Clarke LD cited with approval in *Datec Electornics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23, [2007] 1 WLR 1325, para 46."

Findings of fact may not be overturned simply because the Court of Appeal would have 'found them differently'. It must be shown that the judge misunderstood the evidence.[5]

[23] Accepting this dicta, the question for this Court therefore, is whether the conclusions of fact made by the learned judge from his evaluation of the evidence and which supported his reasoning were plainly wrong and did not take sufficient advantage of him having heard and seen the witnesses. Given the overarching submission by the appellants that the learned judge's findings are not supported by the evidence and that he did not treat with the evidence in coming to his conclusions, I will lay out in some detail the parts of the judgment which reference the evidence in order to fairly assess this complaint. I also examine the oral testimony, contemporaneous documentation and claim of improbability separately given the emphases made by the appellants.

---

[3] BVIHCVAP2012/0028 (delivered 20th April 2016, unreported) at paragraphs 1 and 3.
[4] [2015] UKPC 11; [2016] 1 BCLC 26, at paragraph 5.
[5] See Volcafe Ltd. v CSAV [2018] UKSC 61.

(i) Whether evidence supported the oral contract and its breach
Evidence from oral testimony

[24] Having listened to the examination and cross-examination of the witnesses, it is apparent that the trial judge concluded that Mr. Holm's evidence was to be preferred over that of Mr. Wen and Ms. Fung. He formed the impression that Mr. Holm was a credible and even "impressive" witness not only because of the demeanour of Mr. Holm, but also because of the inconsistencies in the testimonies of Mr. Wen and Ms. Fung. Mr. Holm's evidence, unlike that of Mr. Wen, was also 'entirely consistent with his... witness statements and email trail', as the judge noted at paragraph 87 of the judgment below.

[25] Of particular importance to the trial judge, as evident from paragraphs 50 to 52, was the admission by Mr. Wen, after insistent inquiries from the learned judge himself, that at the date of the alleged oral contract, it was in fact, the company Sancus that was the subject of the agreement for Ms. Fung, Mr. Wen and Mr. Holm to hold the shares and not FHL.

[26] Mr. Wen also conceded in oral testimony on 8th November 2018, that he and Mr. Holm had agreed at the time, 26th September, 2015, that they would 'hold their shares with Sancus or whichever company ended up being at the top of the organisational structure'. Mr. Wen further conceded in cross-examination that the shares (from Sancus) should have been registered in Mr. Holm's name at that time, but he had not had time to do it. This was also the explanation given for why the transfer documents had not been signed.

[27] Given that Sancus was the original holder of the founder equity, it was therefore eminently reasonable and entirely consistent with the evidence for the judge to infer that an oral contract had been made for Mr. Holm to have a 22% share in the founder equity. The appellants' continued insistence that these shares were being held in Sancus for transferral to FHL was not plausible. Further, it was not borne out by the contemporaneous documentation. I am of the view that the trial judge

did not stray from the evidence in his acceptance that FHL was merely a mechanism to hold Mr. Holm's shares. His finding that FHL was to 'directly or indirectly' grant Mr. Holm 22% of the initial share capital was not inconsistent with the evidence.

[28] The learned judge also scrutinised carefully the evidence surrounding a conflict that arose in May between Mr. Wen and Mr. Holm when the latter demanded payment of his deferred salary, (by now worth over US $750,000.00) given that he had received only one month's compensation. The learned judge placed great emphasis on Mr. Wen's testimony, observing from Mr. Wen's demeanour that this conduct 'bothered him greatly'. He inferred that Mr. Wen regarded this as unbecoming conduct from one who was an 'equity partner', as opposed to an employee. This was in fact corroborated by emails from Mr. Wen to Mr. Holm, which were produced and accepted by the trial judge as important evidence as to probability. This strengthened the inference he had drawn from other testimony and documentation that the inherent probability was that Mr. Holm was more than a mere employee, but was viewed, up until that point at least, as an equity partner, who was, unlike an employee, expected to accept risk.

[29] The conclusions that the trial judge came to in relation to the oral testimony were not therefore plainly wrong. Accordingly, there is no merit in the appellants' claim that he misjudged the evidence from the oral testimony and gave it undue weight. There is therefore no basis to deviate from the established reticence of appellate courts to deviate from such findings of fact.

Evidence from contemporaneous documentation

[30] The appellants argued that the learned judge ignored key contemporaneous documents which showed that Mr. Holm's only contract was with FHL under the Executive Service Agreement and not with the Project and Sancus. They placed emphasis on the fact that the share ratio 78% to 22%, which was claimed for the oral contract, was instead specifically prescribed in the Executive Service

Agreement that Mr. Holm, as Chief Executive Officer, had with FHL. The appellants asserted that there was a total and complete absence of any documentation to support the oral contract as pleaded.

[31] In my view, the findings of fact and inferences made by the trial judge were not, contrary to the appellants' assertions, made on the basis of oral testimony only. Central to his conclusions were the several pieces of important contemporaneous documentation. I rely on the observations of Leggart J in **Blue v Ashley**,[6] in that such documentation is of vital importance in oral contracts, given that 'memories tend to fade'. As stated in **Blue v Ashley** at paragraphs 49 to 64:

> "the absence of a contemporaneous written record by those with business experience may count heavily against the existence of an oral contract, because in the twenty-first century the prevalence of emails, text messages and other forms of electronic communication is such that most agreements and discussions which are of legal significance, even if not embodied in writing, leave some form of electronic footprint. Moreover, where parties contemplate that they will instruct lawyers to draft detailed written agreements between them, there is a presumption that they intend the terms of their bargain to be those reflected in such carefully drafted agreements, not those in any prior or contemporaneous oral conversation...".

[32] The contemporaneous documentation revealed by the respondents comprised a strong 'electronic footprint', with several emails, excerpts from key documents, including documents drafted by the appellants' lawyers, Conyers Dill & Pearman, diagrams illustrating the placement of Mr. Holm at the top of the corporate structure and even the draft letter to the Financial Services Commission. These all clearly referenced Mr. Holm as being more in the nature of a business partner holding founder equity shares and not a mere employee holding shares as the appellants submitted. These documents also specifically mentioned Sancus, the original holder of the founder share and not FHL, with which the Executive Service Agreement was associated. Further, when restructuring took place, these contemporaneous documents described the transfer of these founder shares to

[6] [2017] EWHC 1928 (Comm).

other named entities. These were all produced at the trial and appeal proceedings and were not adequately explained away, or even rejected by the appellants. Moreover, the judgment made explicit reference to these contemporaneous documents in explaining the conclusions that the learned judge made.

[33] Contrary to the appellants' submission, the trial judge did not ignore key contemporaneous documents such as the Executive Service Agreement. Rather, he considered these in the face of more persuasive contemporaneous documents that contradicted, or importantly, contextualised them. While the appellants claimed that the trial judge failed to take documents supporting their argument into account, it is instructive that in presenting the case to this Court, they omitted the key documentation referencing the emphasis on partnership and founder equity shares in favour of Mr. Holm. They also failed to explain how these were to be reconciled with their preferred documents, which spoke mainly to the employee contract, which, as the trial judge accepted, was merely a mechanism to effect the agreed founder shares.

[34] In evaluating the contemporaneous documentation and other evidence, the learned judge also relied, appropriately, on dicta from **Chaggar v Chaggar**,[7] which placed importance on giving effect to the 'ascertainable and determinate intention to contract, to give effect to that intention looking at substance and not mere form. It will not be deterred by merely difficulties of interpretation.' In giving effect to this principle of substance, the trial judge looked through the layers of complex financial arrangements, to evaluate the evidence and support his calibration of the judgment. I am of the view that his evaluation was eminently reasonable and not plainly wrong, or improbable.

[35] It is not necessary to outline all of the references to relevant contemporaneous documents which the learned judge referenced explicitly and were demonstrably

[7] [2018] EWCH 1203 (QB) at 187.

instrumental to his findings. Rather, I will now highlight some significant examples of these, before treating with the sub-issues of certainty and liability.

[36] The Executive Service Agreement itself was important. At clause 5.1, it referenced the proportion of shares (78% to 22%) as ‘Equity Grant’ which was to be “determined prior to the issuance of the shares to any party”. This gave credence to the evidence that it was simply a mechanism to effect the transfer of founder equity shares to Mr. Holm as a practical measure because of the bank account issue and as a ‘guarantee’. This, plus the fact that share capital ownership was to be effected ‘directly or indirectly’ were considered by the learned judge to be key indicators of the true status of Mr. Holm in the corporate scheme. The term sheet of the Executive Service Agreement described tellingly, the ‘Upfront Equity Grant’ and referred explicitly to Mr. Holm as a ‘Partner’. The learned judge reproduced and analysed the clause at paragraphs 22 to 25 of his judgment, and appropriately found it to be important evidence.

[37] Emails also revealed the meaning to be ascribed to the share arrangement in the Executive Service Agreement. In an email dated 3rd January 2016 from Mr. Wen to Mr. Holm, Mr. Wen described Mr. Holm and himself as the ‘major shareholders’, stating that it would be ‘disingenuous’ for Mr. Holm to call FHL his ‘mere employer’. He underlined that ‘…the equity I gave you will generate millions of dollars, if not more, of wealth for you…’. He specifically alluded to the shareholding in Sancus along the same terms, *pari passu*, as his own vested share interest and asked that the Service Agreement be corrected to reflect this, saying:

> “For your employment contract, one more revision that is needed is in the 22% that you are be given as Sign-on Equity Grant under Clause 5.1 . . . **As such the equity grant [Mr. Holm’s] should not be 22% of the company [FHL] but of Sancus Financial holdings Limited** [emphasis added], which is the intended structure anyway. I think the clause was drafted as such only because counsel was unaware of the share structure…”. (Emphasis Supplied)

The email dated 14th December 2015 from Mr. Wen to Mr. Holm also stated: 'your shares and mine… would be held through Sancus… which currently holds the one issued founder share.'

[38] Documentation from the appellants' lawyers, Conyers Dill & Pearman, were also key to the learned judge's conclusion that Mr. Holm and the appellants were to hold their shares *pari passu* as founder equity, through Sancus initially. Conyers's email of 23rd February 2016, upon instructions from Wen's earlier email outlined the new SPVs that would hold the Bank of Asia shares instead of Sancus at proposed restructuring. The email specifically stated that the new company '"will be the vehicle for Julia/Sancus and Chad to structure their affairs'' and it illustrated the new structure in a diagram. This new structure was implemented thereafter. The draft letter to the Financial Services Commission prepared by the appellants' lawyers outlining the new structure also referenced Mr. Holm as holding founder shares. Mr. Wen initially approved this proposal, but later changed the structure months later.

[39] Of the several clear references to the word 'partner' in the many contemporaneous documents, the appellants' only counter-argument was that the word 'partner' was used in a general, or 'loose' sense. I agree with the learned judge in his specific rejection of this meaning. In the light of the evidence, this is not a plausible, or probable inference to be drawn. Rather, as the learned judge found, the word 'partner' used in these documents is to be interpreted in the legal sense to mean a financial partner.

[40] These documents were adequately evaluated by the learned judge, for example, at paragraphs 46 to 47. I am in agreement with the learned judge that they provide cogent evidence to support his finding of the existence of an oral contract with Mr. Holm as an equity partner.

[41] In my view, there is also sufficient and clear evidence to validate the learned judge's finding that the company that was to be the holder of Mr. Holm's shares was Sancus and not FHL, as a first-tier company holding founder equity shares and owning FHL.[8] The documentation showed that the intention was to retain Mr. Holm's share of the founder equity even when, for commercial reasons of form, the corporate scheme was restructured. The documentation illustrated that the restructuring continued, always with the expectation that the founder share would remain with Mr. Holm on *pari passu* terms. This was vital to the issue of the oral contract and enabled the judge to look through the various iterations of the corporate scheme. The judge was entitled to rely on such evidence and did so. This is evident, in particular, from paragraphs 75 to 76 of the judgment:

> "It was pleaded and proved by the documents that the structure put forward by Conyers and agreed by both parties, that the FHL founder share would be converted to Class A and Class 8 Shares. Sancus as sole shareholder of the founder share would transfer 49 million class 8 shares to FHI... Mr Wen would indirectly own 38.22 million class B shares in FHL through his 78% shareholding in Tortola, and as a result Mr Holm would indirectly own 10.78 million Class B shares in FHL through his 22% shareholding in Tortola... In pursuance of this structure Newco 2 was incorporated as Tortola and Newco 1 was incorporated as FHI… and a draft letter was prepared by Conyers to be sent to the FSC to inform them of the new structure and obtain their sanction. On 6 April 2016, Mr Wen approved the draft letter."

That plan was, however, never implemented.

[42] The judge's inferences are in my view supported by Mr. Wen's email dated 18th February 2016 informing Mr. Holm that he sought to restructure, to keep Sancus solely for Ms. Fung. Yet, he assured Mr. Holm that another company will be formed in which Mr. Holm would be a shareholder (in lieu of Sancus) and Sancus would 'transfer its share in Financial Holdings Limited [the founder share] to the new entity.' It is accepted too that the subsidiary company, FHL, could not, as a

---

[8] See paragraph 18 of the judgment below.

matter of law, compel a parent company, Sancus Financial, which then held the founding shares, to perform or import an obligation upon it.

[43] The appellants made much of the fact that in May 2016, Mr. Holm had agreed to the restructuring proposal to hold his shares in FHI, arguing that as a consequence, he lost any rights from the oral contract. The trial judge did not feel the need to agree with learned counsel for the respondent, Mr. Rees's assertion that this was a ruse to deny Mr. Holm his agreed founder share. However, he held that even accepting on face value Mr. Wen's explanation that there was a pragmatic financial reason to restructure, to avoid the 'concert parties problem', there was an obligation to find an appropriate vehicle to hold Mr. Holm's founder share. In other words, it was not necessary for the judge to reject outright this particular evidence of the appellants in order to reasonably evaluate the wealth of evidence on the existence of a core obligation to a 22% portion of the founder shares. The judge's concern here, consistent with his acceptance of the dicta in **Chaggar**, was to give effect to the substance of the agreement, which was a 22% share in the Project, whichever format the restructured companies took.

Evidence on Probability

[44] The appellants claimed that such an oral contract was inherently improbable. However, from the evidence, the finding that such an oral contract was made is not easily faulted for improbability or being "outrageous''. This is accentuated by an understanding of the context of such financial investment portfolios. The trial judge based his conclusion, not only on the persuasive contemporaneous documents and oral evidence, but also on his obvious understanding of this corporate context, prioritising substance over form. The financial investment model in issue is acknowledged to be characterised by multi-layered, dynamic and complex corporate structures, using several corporate vehicles, such as SPVs and even shell companies. This kind of arrangement is often designed to prioritise

commercial objectives, including confidentiality, or tax planning.[9] Instructively, both in the documentation and oral testimonies, such objectives were highlighted, even by Mr. Wen himself. For example, the term sheet to the Executive Service Agreement which spoke to the 'Upfront Equity Grant', specified that the terms and conditions would be 'without any vesting restrictions, which would have detrimentally negative tax consequences to the Partner'.

[45] Similarly, in cross-examination on 8th November 2018, Mr. Wen said, in a response to the meaning of the corporate structure: '...this is the business of the BVI. You have a lot of investment holding, what we call SPVs that are just there to hold shares. This is the very essence of the BVI as an offshore jurisdiction. No?' Further, in an email dated 6th April 2016 to Holm, commenting on a letter to be sent to the Financial Services Commission, Mr. Wen gave the reason for the several corporate vehicles as confidentiality, saying: '[s]o neither you nor I will be named in the Shareholders' Agreement, and instead Sancus Financial Holdings should'. The appellants' lawyers repeated this rationale in their restructuring proposal to involve new companies in an email to Mr. Holm, saying: '[t]he purpose of Newco is to hide yours and Carson's relative interest in Sancus as well as to allow both of you to structure your affairs on a confidential basis.'

[46] Consequently, learned counsel, Mr. Chaisty, QC, repeated indignant questions as to the supposed implausibility and improbability of such convoluted corporate arrangements instead of a simple written contract to give Mr. Holm the 22% in a finite company holding the founder shares, were unpersuasive. Such arrangements were indeed probable and even typical in such corporate schemes. The arrangement, which included importantly, both Mr. Wen and Mr. Holm as employees of FHL, which company at the time of the contract held the bank account, was plausible in this context. Consequently, this employee arrangement did not preclude the trial judge from concluding, as he did, that Mr. Holm was a

[9] See Rosewood Trust Ltd v Schmidt[2003] UKPC 26 (Isle of Man) (27 March 2003) (2003) 5 ITELR 715 (PC) (Isle of Man).

partner and not a mere employee. That the compensation accruals to Mr. Wen and Mr. Holm under the Executive Service Agreement were backdated to 1st October 2015, before the start date, was further good evidence of the probability of the alleged contract.

[47] Moreover, the judge was cognisant of the fact that in this multi-layered financial investment structure, different SPVs and other corporate entities held the founder shares at different times in what was a fluid arrangement. He understood correctly, therefore, that the names of the SPVs and companies were not crucial in understanding the substance of the corporate scheme. What was important was that the appellants had agreed with Mr. Holm to give him 22% of the founder equity shares which were to be held in the most hierarchical company and which were to be *pari passu* with the shares of the appellants. Regardless of the form of the commercial enterprise and what the company was called at that point in time in this dynamic and fluid corporate structure, the core entitlement remained. This deep understanding of the factual evidence and their implications is evident when he reasoned at paragraph 71:

> "Whether it was done through Sancus, FHL, or FHI does not matter. As Mr. Wen… stated, they were all just SPVs… in a structure to achieve the objective… that Mr Holm was to receive directly or indirectly his 22% in the founding shares… whichever structure or SPVs was used."

[48] Similarly, the questions raised by the appellants as to why Mr. Wen, a successful corporate attorney, would enter such an arrangement to gift 22% of the founder equity and incur personal liabilities, were appropriately placed in context. This was an ambitious commercial endeavour which required, not only legal expertise, but finance and banking acumen. The evidence showed that Mr. Wen accepted that Mr. Holm had the necessary acumen and he did not. At the time Mr. Wen had not only been unable to raise the necessary capital, which continued for several months and was the impetus for the conflict between himself and Mr. Holm, but his initial application for a banking licence had been rejected by the FSC because of shortcomings in its strategy outline. Mr. Holm was able to fill in these gaps.

[49] The documentation showed that Mr. Wen in an email to Mr. Holm on 9th September 2015 had invited further deliberations and described Mr. Holm's critique and revision of the Deloitte Business Plan in glowing terms, saying it was a 'brilliant analysis', that he Mr. Wen was '... not a trained banker and [Deloitte] are primarily accountants, and your analysis showed the shortfalls due to lack of professional training and experience'. This was referenced by the learned judge at paragraph 15 of the judgment and formed part of the basis for his reasoning as to the probability of the terms of the oral contract. While Mr. Wen tried to downplay this in oral testimony, the judge accepted the importance of this input from Mr. Holm as important evidence as to why Mr. Wen would have wanted him to be part of the Project and was willing to offer him an incentive of 22% founder equity shares as a partner, especially since his salary was deferred.

[50] The learned judge also recognised as a matter of law and relying on the objective facts from the contemporary documents, that only Mr. Wen, in his personal capacity, and not FHL, could have committed Ms. Fung's shares on behalf of himself and Ms. Fung. Further, the personal liability at stake was simply the transfer of share capital. These all added to the probability of the oral contract.

(ii) Evidence on certainty of the oral contract

[51] The appellants argued that from the evidence there could be no oral contract given that its terms could not be clearly identified or applied. They contended that the Project was itself too nebulous a concept and its worth was unquantifiable. This criticism filtered to the judge's award of damages which centred on the Project.

[52] It is trite law that a contract, even an oral contract, must be certain and not vague. However, the courts are reluctant to conclude that what the parties intended to be a legally binding agreement is too uncertain to be of contractual effect and such a conclusion is very much a last resort. As Toulson LJ observed in **Durham Tees Valley Airport v BMIbaby**,[10] at paragraph 88:

[10] [2010] EWCA Civ 485, [2011] 1 Lloyd's Rep 68.

> "Where parties intend to create a contractual obligation, the court will try to give it legal effect. The court will only hold that the contract, or some part of it, is void for uncertainty if it is legally or practically impossible to give to the agreement (or that part of it) any sensible content."

[53] In complex commercial contracts, the peculiarities of that sphere and the need for a margin of appreciation in determining what is practically possible or sensible, is need for further caution.

[54] The appellants' insistence on being able to quantify the scope and financial worth of the Project as evidence of lack of certainty is, therefore, misplaced. The evidence showed that the content of the oral contract was not a quantifiable quantity, but a discernible stake, or percentage. What was agreed was that there would be a 78% to 22% proportionate split in the potential earnings of the investment that was the Project.

[55] Certainty in outcome is not to be confused with certainty in the subject matter of the contract itself. The parties to the oral contract were not clear as to how much profit they would make in the future, but they were certain how any such profits were to be split. Similarly, parties could agree to purchase a lottery ticket and if they win, split the winnings 50/50. While the outcome of a win is uncertain, this would not be an unenforceable contract because of uncertainty. The terms of the contract that were required to be certain were the percentages that were to be attached to each party, that is, the 78% to 22% portions. These were identifiable and certain and this ratio was not in fact, denied by the appellants. Rather, they contended that the ratio was to be applied to the shares in FHL, from the Service Contract, which, incidentally, would have been just as uncertain, if the appellants' line of reasoning is followed.

[56] Notwithstanding the above, the testimony of Mr. Wen showed that a financial quantity could be and had already been ascribed to the Project. In addition, in both the oral testimony of Mr. Wen and in the documents – Mr. Wen's own written

witness statement, the Deloitte Business Plan and the Conyers's lawyers' letters, the concept of the Project was described, ventilated and understood. It could not therefore be seen to be too vague to be the subject of the contract, or an award for damages. Mr. Wen also referenced the Project in his oral testimony.

[57] The 78% shares of Ms. Fung were similarly placed and there was no contention that they could not be quantified vis-à-vis the Project. Further, as seen from paragraphs 70 to 72, 84, 91 and 95, the learned judge did clearly appreciate the scope and nature of this project and was well within his ambit to prescribe liability in relation to it. Should the 22% of the founder equity of the Project be viewed as vague or uncertain, then the 78% share held by the appellants would equally be so. This would be an unreasonable conclusion.

(iii) Evidence on findings on liability of third and first appellants

[58] Learned counsel Mr. Chaisty, QC contended that there was no basis for the judge's finding that Ms. Fung, the acknowledged beneficial owner of the founder shares, was liable. He submitted that she had not been party to the alleged oral contract and was not aware of any such contract or related arrangements, nor had she authorised them. In my view, the learned judge correctly rejected this claim given the weight of the evidence, both oral testimony and contemporaneous documentation from Ms. Fung herself that she 'worked as one' with Mr. Wen and they acted 'as one'.[11] This was corroborated by Mr. Wen. The judge made specific references to the 'pride' with which Mr. Wen described this relationship with Mr. Wen saying: 'myself and Julia are conceptually the same'. There was ample evidence too that Ms. Fung had signed documents held to be pertinent to the oral contract and was directly involved in business matters surrounding the contract. This included attempting to persuade Mr. Holm to participate in the Project and to agree to defer his salary.

[11] See paragraphs 58 to 62.

[59] Given the testimony of Ms. Fung, herself, and Mr. Wen, as well as the contemporaneous documentation, it was open as a matter of law for the judge to come to the conclusion that he did at paragraph 68 of the judgment that 'Mr. Wen had implied authority to enter agreements on Ms. Fung's behalf and did so in this case. She then proceeded to ratify his actions'. It follows that once the oral contract was identified, Ms. Fung must be held to be part of that contract and liable for its breach.

[60] The judge's appreciation of the first appellant, Sancus, being solely owned and controlled by Ms. Fung and Mr. Wen, also adequately locates its liability in this matter.

Conclusion on the findings of fact

[61] I am of the view that the learned judge examined all the relevant contemporaneous documentation, including that of the Executive Service Agreement, which reproduced the 78% to 22% ratio prescribed for the oral contract. This, added to his evaluation of the witnesses and understanding of the commercial context, brought him to certain conclusions of facts and inferences. These cannot be demonstrated as improbable, inconsistent with the evidence, or inappropriately weighed as the appellants' claim. In his judgment there was a clear thread of evidence that adequately supported his conclusions and reasoning. The legal requirement that a judge must give weight to contemporaneous documents to support the claim of an oral contract was easily met.

[62] Ultimately, the appellants provided no new evidence of compelling contemporaneous documentation that supported their case and which the learned judge ignored. Indeed, particularly as it relates to the participation by Ms. Fung and the shares being held in Sancus, the submission by Mr. Rees, QC that:

> '[t]he appellants' skeleton argument conveniently ignores the actual evidence given at trial by Mr. Wen and Ms. Fung; reverting instead to an untenable position that is not even supported by Mr. Wen's own evidence during cross-examination'

is understandable.

[63] In sum, in all of the various issues that relate to the judge's treatment of the evidence, it is apparent that he examined the relevant evidence and made reasonable inferences. Consequently, I am of the view that his findings of fact and conclusions were adequately supported by the evidence and not improbable. The learned judge was not plainly wrong.

Issue 2 – The duty to give reasons

[64] The appellants' contention that the learned judge failed to give reasons for his decision is intimately linked to their main complaint on the judge's treatment of the evidence. In essence, the appellants complained that the judge did not explain his evaluation of the evidence and, particularly, his reasons for rejecting the appellants' evidence and submissions. Accordingly, his judgment was not well reasoned. During the appellate proceedings, learned counsel Mr. Chaisty, QC also said that the judge simply stated that the witnesses were credible and did not specifically state that Ms. Fung and Mr. Wen were not credible. Yet, they say, he nevertheless appeared to reject their evidence, without giving reasons.

[65] It is well established that a trial judge has a duty to give reasons as a function of due process and fairness. In **English v Emery Reimbold & Strick Ltd**[12] however, it was stated that:

> "The extent of the duty . . . depends on the subject matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt summarized the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other."[13]

[12] [2002] EWCA Civ 605 at paragraphs 6 and 15 to 25.

[13] See also Yates Associates Construction Company Ltd. v Blue Sand Investments Limited BVIHCVAP2012/0028 (delivered 20th April 2016, unreported).

[66] In this case, although it turned mainly on the resolution of facts, the learned judge did more than simply state that he believed 'X or Y'. Rather, he linked the evidence to the issues at hand and provided a clear trail to identify his reasoning. The several examples were outlined in the discussion of how he treated with the evidence, above. Learned counsel Mr. Chaisty, QC drew the Court's attention to the recently decided case of **Simetra Global Assets v Ikon Finance Ltd**.[14] With respect, it added nothing to the current discourse since it is not disputed that the failure to give reasons can, of itself, be a ground of appeal. However, Mr. Chaisty's rationale for invoking this ground and this case is linked to the submission that the judge failed to take account of compelling contemporaneous documentary evidence, an issue that has already been dispensed with, above, and found to be of no merit.

[67] While at paragraph 87, the judge did describe the witnesses to be 'credible' in general, nonetheless, he did not accept all of the testimony of Ms. Fung and Mr. Wen as accurate and said so. This is permissible given the dicta on oral contracts which speak to lapses of memory that do not necessarily impugn a witness's credibility entirely. This indeed, is the rationale for placing more weight on contemporaneous documents.[15]

[68] Further, it is accepted that a trial judge, especially in a trial of complex commercial disputes with several thousand pages of documents, is not expected to comment in his written judgment on each and every submission made by Counsel.[16] Having outlined the cogent evidence that the judge considered and his evaluation of such evidence in coming to his conclusions, the judge made clear and definite statements about the probability and weight of the evidence from the respondents. He found this evidence to be compelling and it logically subjugated the contrary testimony and selective documentation submitted by the appellant.

---

[14] [2019] EWCA Civ 1413.

[15] See Gestmin SGPS S.A. v. Credit Suisse (UK) Limited & Anor [2013] EWHC 3560 (Comm), paras. 19-23.

[16] See English v Emery Reimbold & Strick Ltd [2000] 1 WLR 377.

[69] I therefore reject the assertion that the judge did not provide a sufficient evidential basis to ground his conclusions of fact and reasoning, or that he failed to provide cogent reasons for his decision. His judgment clearly outlined the conclusions that he had reached about the evidence and why they had been made. Given that this case turned essentially on factual evidence, the judge's positive evaluation of the evidence in favour of the respondents was enough to base his conclusion that there was an oral contract and he said so clearly. His reasons for his judgment were discernible and well-founded. I hold that the claim that the judge provided no reasons for his decision, or that the judgment was not reasoned, is without merit.

Issue 3 - Whether the defences were adequately addressed

[70] The appellants put forward two defences to the claim of the oral contract – breach of the implied term of loyalty or fidelity; and estoppel.

[71] In the first defence, the appellants submitted that even if an oral contract had been entered into, Mr. Holm could not rely on it because of his alleged misconduct of attempting to establish a competitor bank (not conceded by the respondents) since this violated the implied duty of fidelity under his employment contract. The alleged misconduct was the subject of another proceeding in another court and had come to light sometime between May and June 2016.

[72] The appellants claimed that the judge erred in not addressing this defence in his conclusion that it was 'irrelevant' to the issue. Instructively, the appellants appeared to deviate from their original line of defence submitted at the trial in the High Court and in their grounds of appeal (at paragraph 34 of their skeleton arguments). Both of these had tied the alleged breach of implied terms because of disloyalty and infidelity to the employee contract only, but at the proceedings in the Court of Appeal, they suggested that this infidelity arose in relation to the oral contract itself.

[73] Regardless of which version of infidelity is addressed, it is evident that not only did the learned judge analyse this defence, but that, in rejecting it, his reasoning is faultless. He found that an oral contract was entered into on 26th September 2015, which was given effect in January 2016, at which time the founder shares should have already been vested in Mr. Holm as an equity partner to the entire Project. He therefore reasoned, correctly in my view, at paragraph 86 of his judgment, that any conduct by Mr. Holm after this failure on the part of the appellants to vest the shares was not material.

[74] On the question of an estoppel, the appellants argued that in a later restructuring, when Mr. Holm was asked by Mr. Wen and accepted to use yet another new company, FHI, to hold his shares, this estopped him from alleged rights under the oral contract, which initially, were for shares held in Sancus. The trial judge referenced this defence at paragraph 42, admittedly scantily. However, his rejection of this defence is to be gleaned from other findings in the judgment. Given that he reasoned from the evidence that an oral contract existed as at 26th September 2015 and that the founder shares should have been transferred to Mr. Holm by January 2016, the defence of estoppel for a transaction that occurred several months after could not stand and needed little further elaboration.

[75] Importantly, the learned judge's appreciation of the evidence that the core contractual term was for shares in founder equity regardless of which SPV, or other corporate vehicle held them, made the claim of estoppel moot. Further, given that this restructuring resulted in Mr. Holm ending up with worthless shares after the restructuring of the Project unilaterally by Mr. Wen, it is improbable that he would have agreed to this knowing that it was to be a revocation of the agreement for him to hold 22% of the founder shares. In fact, Mr. Holm's evidence was that he understood this to be yet another iteration of the corporate structure which would leave his founder share, though held in another entity, intact. The judge clearly accepted this as credible evidence.

Issue 4 – The judge's management of the case

[76] The appellants contended that the trial judge had committed procedural irregularities in his management of the case in 3 ways, which I will discuss in turn.

Pleadings

[77] The appellants asserted that the case was argued outside of the boundaries of its pleading, in particular, the failure to specify Sancus and in using discrete terms such as Bank of Asia, Bank of Asia Project and Sancus interchangeably. This issue is easily disposed of. The response of the respondents that these names were specified and explained in their reply, and that the reply under the court's rules is part of the pleadings, is accepted. What matters is that the case was adequately and fairly put to the appellants; that they understood it and had the opportunity to defend it, not to reproduce every detail.[17] Moreover, the judge adequately spoke to this issue at paras 88-89 and in his finding that the terminology in this dynamic corporate structure was not material. What was important was the substance of the Agreement and not the form.

Draft judgment

[78] The appellants contended that the learned judge was persuaded by the respondents to change his draft judgment inappropriately. On reviewing the documentation, I hold that this contention has no basis in fact. Learned counsel for both the appellants and the respondents made changes to the draft upon invitation, but the changes suggested by the respondents were not substantial or detrimental.

Cross Examination

[79] The appellants submitted that preventing Mr. Wen from being re-examined on a point to do with the meeting of 26th September 2015, which ground had already been exhaustively covered in the trial, constituted a procedural irregularity. The

[17] See Southern Developers Limited v Attorney General of Antigua and Barbuda HCVAP 2006/020A (delivered 7th April 2008, unreported).

transcripts illustrate that the appellants' case was thoroughly brought, and they had ample time to give evidence and cross examine witnesses. Accordingly, there is no merit to the claim.

Issue 5 - No justification for costs for FHI

[80] While I agree with the learned judge's determination of the matter of the oral contract, I am not in accord with his treatment of the costs awarded to the Second Respondent, FHI. FHI's case was made in the alternative, on the ground of a breach in statutory duty. The learned judge did not make a finding in relation to this matter. However, he ordered costs for "the Claimants" which could only mean both FHI and Mr. Holm. In the circumstances, however, there is no justification for costs to be awarded to FHI. I would therefore allow the appeal on this issue and set aside the costs order in relation to FHI.

Conclusion

[81] The grounds of this appeal were, in the main, centred on attempts to impugn the trial judge's findings of fact based on his evaluation of the evidence and inferences drawn. A revisiting of the evidence reveals that the evidence, both oral and from contemporaneous documents, supports the findings of fact of the judge. Further, from the evidence, the terms of the oral contract were neither vague nor uncertain and were clearly identified and understood by the parties. In my view, the learned judge was not plainly wrong. Accordingly, there is no merit to this submission since the high legal threshold established for appellate courts to overturn judicial findings of fact has not been met in this case. The conclusion of the learned judge that an oral contract had been made and was breached by the appellants is unimpeachable.

[82] The reasoning of the judge and the reasons for his judgment were closely aligned to the findings of fact that the judge made and are clearly discernible in the judgment. As such, the judgment is not lacking for a failure to give reasons, or lack of reasoning.

[83] In his evaluation of the evidence, the learned judge demonstrably considered the defences raised by the appellants of disloyalty as an implied term and estoppel. He found no merit in them because of his main finding that an oral contract had been entered into on 26th September 2015. This contract contemplated changes to the corporate structure to be carried out in good faith, which changes were accepted by Mr. Holm on this understanding. Further, the alleged misconduct after that date could not constitute a breach the contract.

[84] The procedural irregularities alleged in the management of the trial were not proved and further did not violate any principles of law.

[85] For the reasons set out above, I would make the following orders:

1. The appeal in relation to the following grounds of appeal is dismissed:

   (i) the learned judge's findings of fact that led to the conclusions that:

   - an oral contract existed and had been breached;
   - the terms of the oral contract were sufficiently certain and clear; and
   - liability could be attached to the first and third appellants;

   (ii) the giving of reasons by the learned judge;

   (iii) the defences of implied terms and estoppel; and

   (iv) the learned judge's management of the case.

2. The appeal in relation to FHI's costs is allowed and the order of costs is set aside.

3. Costs in the appeal relating to (2) above are awarded to the first respondent, Chad Holm, and if not agreed within 21 days to be assessed by a judge of court below at the rate of two-thirds of the amount awarded to the first respondent.

4. Costs to the appellants of the issue relating to the setting aside of the award of costs to FHI, such costs to be assessed if not agreed within 21 days.

[86] I am grateful for the assistance of learned counsel.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar