

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0014

BETWEEN:

RAYLEY COMPANY LTD.

Appellant

and

KATHRYN MA WAI FONG

**(as Executrix of the Estate of the late Wong Kie Nai and Derivatively on behalf of
Rayley Company Limited)**

Respondent

BVIHCMAP2022/0015

BETWEEN:

[1] WONG KIE YIK

[2] WONG KIE CHIE

Appellants

and

KATHRYN MA WAI FONG

**(as Executrix of the Estate of the late Wong Kie Nai and Derivatively on behalf of
Rayley Company Limited)**

Respondent

BVIMAP2022/2016

BETWEEN:

[1] INCREDIBLE POWER LIMITED

[2] ESBEN FINANCE LIMITED

Appellants

and

KATHRYN MA WAI FONG

**(as Executrix of the Estate of the late Wong Kie Nai and Derivatively on behalf of
Rayley Company Limited)**

Respondent

Before:

The Hon. Mde. Margaret A. Price Findlay
The Hon. Mr. Trevor M. Ward
The Hon. Mr. Gerard St. C. Farara

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Andrew Westwood, KC with him Ms. Laure-Astrid Wigglesworth for the Appellant, Rayley Company Limited
Mr. David Alexander KC, with him Ms. Aisling Dwyer and Mr. Scott Tolliss for the Appellants, Wong Kie Yik and Wong Kie Chie
Mr. Stephen Atherton, KC with him Mr. Oliver Clifton and Ms. Colleen Farrington for the Appellants, Incredible Power Limited and Esben Finance Limited
Mr. Orlando Fraser, KC with him Mr. Hermann Boeddinghaus, KC, Ms. Eleanor Holland and Ms. Joni Khoo for the Respondent, Kathryn Ma Wai Fong

2024: May 21, 22, 23, 24;
2025: January 15.

Commercial appeal – Wholesale adoption of one party’s submissions - Whether the learned trial judge failed to have proper regard to the submissions of the appellant – Discharge of judicial duties - Whether the learned judge failed to discharge his judicial duties by adopting the submissions of the respondent - Apparent Bias - Natural justice - Whether the orders subject to appeal should be set aside on the grounds that there has been a breach of the duty to act fairly and/or a breach of the requirements of fairness and/or procedural unfairness and/or a breach of natural justice

This appeal arises from an action brought by the first respondent, Kathryn Ma Wai Fong (“Kathryn Ma”) in the Court below as the Executrix of the estate of her deceased husband and derivatively on behalf of the fourth respondent, Rayley Company Limited (“Rayley”). The claim involved three alleged misappropriations of funds belonging to Rayley whose monies disappeared to the detriment of Rayley. It was alleged that the monies taken from Rayley and paid to Esben Finance Limited and Incredible Power Limited were not done for any legitimate commercial purpose and as a result were not done in the best interest of Rayley. It was further asserted that the second and third respondents were de facto directors of Rayley at the relevant time and that they were responsible for the questioned transfers which were made and as a result of the alleged breaches of fiduciary duty by the second and third respondents, Rayley was entitled to damages in amounts equal to the sums transferred and any interest that would have been earned on those sums.

Kathryn Ma therefore sought an order that Esben and Incredible Power return the sums to Rayley, and that the second and third respondents account to Rayley as constructive trustees, and by way of equitable compensation and/or restitution. She also sought an order that she be indemnified out of the assets of Rayley for her costs of the suit.

The appellants in BVIHCMAP2022/0015 Wong Kie Yik (“WKY”) and Wong Kie Chie (“WKC”) and in BVIHCMAP2022/0016 Esben and Incredible Power denied all the claims made against them in the court below. The matter was heard over a period of 12 days in June and July 2020 and the learned trial judge issued an order dated 18th March 2021 in which he ordered, among other things, that judgment was to be entered against the appellants, save for the first respondent’s claim in conspiracy which he dismissed as she had abandoned that aspect of her claim before the end of the trial.

The appellants, Incredible Power and Esben, appealed against the full orders contained in the 18th March 2021 Order. The appellants WKY and WKC appealed against paragraph 4(e) of the said order. At a hearing on 4th May 2021, when the written judgment was delivered, a further hearing took place and on 11th November 2021 the learned trial judge further ordered with respect to the matter. Incredible Power and Esben both appeal the entirety of the order made on 11th November 2021 and WKY and WKC appeal from paragraphs 7(a), (b), (c) and paragraph 8 of the said order. WKY and WKC also appealed the further orders made by the learned trial judge on 19th January 2022, specifically paragraph 1(a) of the order. Rayley Company Limited appealed against the 19th January 2022 order, challenging the order that the first respondent be indemnified out of the assets of Rayley for her reasonable costs of proceedings, and any costs she has or may be ordered to pay to any other party in the proceedings.

Held: allowing the appeal, setting aside the judgment and the consequential orders of the learned trial judge, remitting the matter to the Commercial Court for retrial before another judge and ordering costs to the appellants to be assessed by a judge in the Commercial Division within 21 days hereof if not agreed, that:

1. A judge has a duty to make sure that he or she has given due consideration to the arguments of all parties involved in proceedings in arriving at a reasoned decision in the matter. It is expected that a judge having heard the various arguments would consider and address the salient points raised by the parties in arriving at a decision. Judicial decisions have the benefit of the presumption of integrity and impartiality and a party who seeks to set aside the decision of a judge due to the incorporation of the material of others has the burden of rebutting that presumption.

Cojocaru v British Columbia Women’s Hospital and Health Center (2013) 2 SCR 357 followed.

2. It has generally been accepted that the wholesale adoption of counsel’s submissions by a judge is not offensive. Where a judicial officer adopts wholesale or substantially wholesale in the judgment passages of one side’s submissions, the issue which falls to be determined, is whether the judicial officer has properly discharged his duty. Where there is extensive copying of submissions by a judge however, it creates a substantive risk of the suspicion of bias on the part of the judge. There is nothing wrong with a judge making extensive use of submissions of one party provided that there is proper acknowledgement, whether in setting out the factual matrix or when analysing the issues and applicable legal principles or even in the actual dispositive reasoning. Where this occurs however, the judge should be

careful to make it clear on the face of the judgment that he has considered the contrary submissions and has brought his own reasoning to bear on the decision of the court.

Ng Min Hong v Soemarli Lie and Another BVIHCMAP2022/0068 (delivered 28th July 2023, unreported) followed.

3. It is accepted that in producing a judgment, a judge will favour one side's argument over another, however, it is the judicial function to arrive at a clear decision. No set formula has been laid down as to whether a judge has demonstrated sufficient consideration and deliberation in coming to a given conclusion. It is a matter for the appellate court upon careful consideration of the judgment to decide whether the learned trial judge has fallen short of what is to be expected having observed the substantial similarities between one party's submissions and the judgment itself.
4. When comparing the submissions of the respondent in the court below and the judgment of the learned trial judge, it is clear that the judgment adopts approximately ninety percent plus of the respondent's submissions. In adopting the respondent's submissions almost wholesale, it is not apparent that the learned trial judge addressed his mind to the submissions of the appellant. This may lead to the impression that the learned trial judge has abdicated his main judicial responsibility, that is, to exercise independent thought on the relevant issues and arrive at a conclusion. A judge must give some explanation as to why he has arrived at a particular decision. Justice will not be achieved if it is not apparent to the parties why one party has succeeded and the other has not.

Crinion v IG Markets Ltd 2013 EWCA Civ 587 followed; **Amaca Pty Ltd v Werfel** [2020] SASCFC 125 followed; **Ramnarine v Ramnarine** [2013] UKPC 27 applied; **Newton v Public Prosecutor** 2024 2 LRC 151 considered.

5. When copying on a large scale, to such a degree and in the manner seen in this case, serious questions arise about whether the judge has abdicated his judicial function or, at the very least, whether his or her conduct is such that justice has not been seen to be done by an independent tribunal. In such cases, it is the role of the appellate court to review and analyse the questioned judgment and determine whether it ought to stand. Having reviewed the judgment of the learned trial judge this Court finds that the extensive copying of the respondent's submissions, even with the minor additions made by the learned trial judge, when viewed as a whole, would lead a reasonable observer to be satisfied that the learned trial judge failed to impartially and independently examine all of the evidence and submissions and arrive at his own conclusions.
6. It therefore cannot be said that on a reading of the judgment of the trial judge that this Court is in a position to conclude that the learned trial judge properly brought to bear independent judicial reasoning to all the issues canvassed before him by both parties.

JUDGMENT

- [1] **PRICE FINDLAY JA:** This appeal arises from an action brought by the first respondent, Kathryn Ma Wai Fong in the Court below as the Executrix of the estate of her deceased husband and derivatively on behalf of the fourth respondent, Rayley Company Limited.
- [2] The claim involved three alleged misappropriations of funds belonging to Rayley Company Limited, ("Rayley") whose monies disappeared without a trace to the detriment of Rayley.
- [3] There were allegations that the monies taken from Rayley and paid over to Esben Finance Limited and Incredible Power Limited were not done for any legitimate commercial purpose and as a result were not done in the best interest of Rayley.
- [4] It was alleged that the second and third respondents were de facto directors of Rayley at the relevant time and that they were responsible for the questioned transfers which were made.
- [5] The allegation was further that as a result of the alleged breaches of fiduciary duty by the second and third respondents that Rayley was entitled to damages in amounts equal to the sums transferred and any interest that would have been earned on those sums.
- [6] It was further alleged that the companies, Esben and Incredible Power held the sums on constructive trust for Rayley as these companies had either constructive or actual knowledge, that the sums and the benefit of those sums were assets of Rayley.

- [7] The second and third respondents it was alleged were also directors of Esben and de facto directors Incredible Power, and that as a result, knowledge that the sums were assets of Rayley was to be imputed to Esben and Incredible Power.
- [8] Kathryn Ma further alleged that Esben and Incredible Power were unjustly enriched by the receipt of those sums and were liable to compensate Rayley for its loss and damage.
- [9] The first respondent also sought the court below to order that Esben and Incredible Power return the sums to Rayley, and against the second and third respondents to account to Rayley as constructive trustees, and by way of equitable compensation and/or restitution.
- [10] The first respondent also sought an order that she be indemnified out of the assets of Rayley for her costs of the suit.
- [11] The appellants in appeal number BVIHCP2022/0015 Wong Kie Yik (“WKY”) and Wong Kie Chie (“WKC”) and in appeal number BVIHCP2022/0016, Esben and Incredible Power denied all the claims made against them in the Court below.
- [12] The matter was heard over a period of twelve days, between June 2020 and July 2020 and the learned trial judge issued an order dated 18th March 2021 in which he ordered among other things that judgment was to be entered against the appellants, save for the first respondent’s claim in conspiracy which he dismissed as she had abandoned this aspect of her claim before the end of the trial. The formal written judgment was delivered by the learned trial judge on 4th May 2021.
- [13] The appellants, Incredible Power & Esben appealed against the full orders contained in the 18th March 2021 Order (which is the order which pre-dated the judgment but contained the orders found in the written judgment of 4th May 2021).

The notice of appeal of Incredible Power and Esben set out the Orders appealed relative to the March 2021 Order as follows:

“By paragraph 1 of the March 2021 Order, the Judge ordered, among other things, that judgment be entered against Incredible Power and Esben in favour of the Claimant, Kathryn Ma Wai Fong (as executrix of the estate of the late Wong Kie Nai, derivatively on behalf of Rayley Company Limited) (the “Claimant”), save for the claimant’s claim in conspiracy, which stands dismissed (having been abandoned by the Claimant before the end of the trial).

By paragraphs 4(a) and (b) of the March 2021 Order, the Judge:

- (a) Declared that Incredible Power holds the sum of AU\$6,617,783 (the “Outstanding Sum”) and all benefits generated therefrom as a trustee or constructive trustee for the Fourth Defendant, Rayley Company Limited (“Rayley”); and
- (b) Ordered that Incredible Power pay to Rayley forthwith the Outstanding Sum.

By paragraphs 4(c) and (d) of the March 2021 Order, the Judge:

- (a) Declared that Esben holds the sums of US\$331,565.55 and SG\$917513.32 (together, the “Credit Balance Sums”) and all benefits generated therefrom as constructive trustee for Rayley; and
- (b) Ordered that Esben pay to Rayley forthwith the Credit Balance Sums.”

[14] The appellants WKY and WKC appealed against paragraph 4(e) of the said order:

“As against the Fifth Defendant, it is ordered that each of them accounts to the Fourth Defendant as constructive trustee for the Outstanding Sum and the Credit Balance Sums, and that consequently it is further ordered (i) that if the Fourth Defendant requires them to pay these sums, they should do so, and (ii) that they are not allowed to dissipate their assets such that they cannot pay.”

[15] At a hearing on 4th May 2021, the same day the written judgment was delivered, a further hearing took place, and, on 11th November 2021 the learned trial judge made further orders with respect to the matter.

[16] Incredible Power and Esben both appeal the entirety of the order made on 11th November 2021 and WKY and WKC appeal against paragraphs 7(a), (b), (c) and paragraph 8 of the said order, which state as follows:

“the Second and Third Defendants each of them do further account to the Company as constructive trustees for (1) the Outstanding sum and (2) the Credit balance sums in the following manner:

“Incredible Power pay to Rayley pre-judgment equitable interest on the Outstanding Sum for the period commencing 25th July 2013 and ending on 18 March 2021 at the rate of 6% *per annum*, compounded with quarterly rests, which amounts to a total sum of AU\$3,817,436.06; and

(a) Interest shall continue to accrue on the judgment debt (the Outstanding Sum plus pre-judgment interest) at 5% *per annum* pursuant to section 7 of the Judgments Act 1907.”

[17] By paragraph 2 of the November 2021 Order, the judge ordered that the Claimant: (i) be provided with an account from Incredible Power as to what benefits have been generated from the Outstanding Sum since its payment to Incredible Power on or around 25th July 2013, together with all necessary documents to enable Rayley to identify, trace and recover the Outstanding Sum and all benefits generated therefrom; and (ii) was entitled to an inquiry as to the sums due to Rayley from Incredible Power upon the taking of the account.

[18] There were further orders made by the learned trial judge on 19th January 2022, from which WKY and WKC have appealed.

[19] They specifically appealed against the order at paragraph 1(a) where it was ordered that WKY and WKC make a payment on account of the costs ordered to be paid pursuant to paragraph 8 of the 11th March 2021 order to the first respondent in the amount of US\$900,000 within twenty-one days of the sealing of the said order.

[20] Rayley also filed an appeal against the order of the learned trial judge dated 19th January 2022. They challenged the order of the learned trial judge that the first respondent be indemnified out of the assets of Rayley for her reasonable costs of

the proceedings, and any costs she has or may be ordered to pay to any other party in the proceedings.

The Appeals

- [21] Both Incredible Power and Esben and WKY and WKC filed several grounds of appeal with respect to the written judgment of 4th May 2021 and the order of the learned trial judge dated 11th November 2021, the first of which was similar in content.

Summary of Appellants' submissions

- [22] The appellants submitted that the learned trial judge in producing the judgment had adopted almost verbatim the written closing submissions of the first respondent, including that document's structure, order, headings, sub-headings, assessment of each witness and unjustifiably tendentious and critical comments relating to lead counsel for Esben and Incredible Power as to the conduct of their case.
- [23] WKY and WKC posited in their submissions that the judgment was formulated by the learned trial judge slavishly adopting more or less word for word, some eighty percent or more of the first respondent's written closing submissions including most of the structure, order, cross headings and views in relation to the witnesses such that the judgment was derived to an overwhelming extent from those submissions.
- [24] In essence both appellants submitted that the learned trial judge in adopting and relying almost wholesale on the first respondent's closing submissions in formulating the judgment abdicated the core elements of his judicial function and has failed to render a judgment after a true and fair evaluation of the evidence, facts and law.
- [25] The appellants submitted that by relying so heavily on the submissions of the first respondent, the learned judge failed to properly assess or analyse any of the submissions of the appellants and failed to consider any of their submissions such

that would lead the independent observer to conclude that he had viewed the material before him even handedly and had exercised independent judicial thought to the judgment. In other words, the learned trial judge failed to do justice between the parties.

[26] They further submitted that the learned trial judge failed to adequately state, summarise or take into account, address or deal with a large amount of the arguments put forward by the appellants, failing to address their arguments in relation to the relevant case law and procedure. They posited that the learned trial judge singularly failed to state why he rejected the appellants' arguments and failed to mention any submissions made by the appellants in their closing submissions either written or oral.

[27] They also submitted that the learned trial judge produced a judgment riddled with errors because he failed to exercise his independent thought and merely copied the submissions of the first respondent thus leading himself into error.

[28] They further complained that the order of 11th November 2021 suffers from the same defects that the learned trial judge merely copied almost wholesale the first respondent's submissions in his Order.

[29] They submitted that the orders and the judgment should be set aside on account of the apparent bias on the part of the learned trial judge. They further submitted that there was a breach of duty on the part of the learned trial judge to act fairly due to the wholesale or almost wholesale copying of the first respondent's submissions.

Summary of Respondent's submissions

[30] The respondent on the other hand submitted that the judgment of 4th May 2021 showed that the trial judge considered the arguments of all the parties in an independent, impartial and even-handed manner. The trial judge did not slavishly

adopt their submissions but rather derived extensive assistance from them and he openly acknowledged this.

- [31] They further submitted that this was clear from a reading of the judgment and the transcripts of the trial. The judge was alive to the various issues which were before the court and he applied his independent judgment to them.
- [32] The respondent submitted that the learned trial judge acted professionally at all times and conducted the hearing in a fair and impartial manner. They further submitted that the learned trial judge fully appreciated the issues which were to be determined between the parties. They posited that the learned trial judge played an active role in the proceedings, asking questions of the various witnesses.
- [33] The respondent further submitted that the judge's conduct was careful and engaged and that the appellants have taken the judgment out of context. The learned trial judge was an experienced judicial officer who was entitled to the presumption of integrity, and that on a proper reading of the judgment the learned trial judge identified all the key issues and did bring his independent thought to the judgment.
- [34] The respondent submitted that the Court must examine the judgment in its entirety in order to arrive at the conclusion that the judgment was fair and unbiased and the product of the learned trial judge's careful analysis of the issues and not merely a reproduction of the respondent's submissions.
- [35] They posited that the first eighty-nine paragraphs of the judgment were authored solely by the learned trial judge and set out his views on the credibility of the appellants' witnesses as well as the circumstances of the claim and his findings of what transpired. The learned trial judge adopted the respondent's submissions for good reason, and there are references in the judgment from the witness statements of the appellants as well as to the material arguments of the appellants.

[36] They posited that the learned trial judge was not required nor was it good practice to mention every argument put before the Court.

[37] They suggested that the appellants had not met the high threshold required to rebut the presumption of judicial impartiality and integrity.

The Law

[38] The substantial copying of the respondent's submissions in the court below as alleged by the appellants raises the question of whether the trial judge carried out any independent analysis of the facts and the law, and whether he considered any of the issues raised by the appellants at the trial. In considering these issues, it is to be presumed that a judicial officer has discharged the duty and carried out the exercise which he or she is sworn to do.

[39] It is not an uncommon occurrence that some parts of counsel's submissions will end up in a judge's ruling and this is not usually a problem. A judge has a duty to make sure that he or she has given due consideration to the arguments of all parties involved in proceedings in arriving at a reasoned decision in a matter.

[40] In **Thong Ah Fat v Public Prosecutor**,¹ the Singapore Court of Appeal set out the reasons for the judicial officers to give reasoned decisions. They opined as follows:

- “(a) First, the recognition of a duty to give reasons encourages judges to make well-founded decisions: judges are reminded that they are accountable for their decisions, which should lead to increased care dealing with submissions and analyses of evidence.
- (b) Second, the duty ensures that the parties are made aware of why they won or lost. This also enables practitioners, legislators and members of the public to ascertain the basis upon which like cases will be decided in the future.
- (c) Third, it ensures that the appellate court has the proper material to understand why the first instance decision was made in a particular

¹ [2012] 1 SLR 676 pages 20-25.

way, and preserves and facilitates any right of appeal a party may have.

- (d) Fourth, the duty to articulate reasons curbs arbitrariness.
- (e) Fifth, it allows justice to be seen to be done and increases the transparency of the judicial system.”

[41] It has been said that the primary role of a judgment is to convey to the parties and to the public as a whole the reasons why the court arrived at a particular decision. This is particularly so for the losing party who must be the beneficiary of knowing clearly how and why the court found against them. This approach to justice is fundamental to our system of justice and at the core of the judicial function. As a result, it is expected that a judge having heard the various arguments would consider and address the salient points raised by the parties in arriving at a decision. It is not necessary for the court to engage each and every submission raised but the court must give the parties some satisfaction that their individual arguments were at least considered even if discarded or not accepted in arriving at the decision.

[42] The judgment when produced, ought as to content and reasoning, give the litigants the clear perception and understanding that the judge considered the salient issues and arguments and reached a truly independent decision.

[43] In **Ng Min Hong v Soemarli Lie**² this Court of Appeal opined that it has generally been accepted that the wholesale adoption of counsel’s submissions by a judge is not offensive. The Court further stated that the adoption of one party’s submissions by a judge is one method of providing adequate reasons, and while this may not be the approach adopted by every judge it was impossible to say that it necessarily fell short of the judicial duty to provide reasons.

[44] Where a judicial officer adopts wholesale or substantially wholesale in the judgment passages of one side’s submissions, what falls to be determined is whether that

² BVIHCMAP2022/0068 (delivered 28th July 2023, unreported).

judicial officer has properly discharged his duty. Where there is extensive copying of submissions by a judge it creates a real and substantive risk of the suspicion of bias on the part of the judge.

[45] In **Cojocaru v British Columbia Women's Hospital and Health Center**,³ the Supreme Court of Canada stated:

“As a general rule it is good judicial practice for a judge to set out the contending positions of the parties on the facts and the law, and explain in his or her own words her conclusions on the facts and the law. However, including materials of others is not prohibited. Judicial copying is a long standing and accepted practice, although if carried to excess may raise problems. If the incorporation of the materials of others is evidence that will lead a reasonable person to conclude taking into account all relevant circumstances, the decision making process was fundamentally unfair, in the sense that the judge did not put his or her mind to the facts, the arguments and the issues, and decide them impartially and independently, the judgment can be set aside.”

[46] As stated in **Cojocaru**, judicial decisions have the benefit of the presumption of integrity and impartiality – a presumption that a judge has done what the judge is sworn to do, and a party seeking to set aside a decision of a judge because the judgment incorporated the material of others has the burden of showing that the presumption is rebutted. That threshold is high and requires cogent evidence.

Analysis and Conclusion

[47] The question that the Court must resolve is whether the evidence presented by the party challenging the judgment convinces the appellate court that a reasonable person would conclude that the judge failed to perform his/her duty to review and consider the evidence which was placed before him or her, and to do so with an open mind.

[48] The appellants submitted that in this matter the learned trial judge adopted hundreds of paragraphs of the first respondent's submissions in the court below.

³ (2013) 2 SCR 357.

- [49] They posited that after paragraph eighty-nine of the judgment, a judgment of four hundred and seven paragraphs, the learned trial judge authored only one percent to two percent of the remainder of the judgment. They further submit that of the numerous paragraphs he adopted, the learned trial judge made only cosmetic changes to those paragraphs leaving them mostly untouched. In those remaining paragraphs the learned trial judge did not refer to any submissions of the appellants neither did he discuss any of the arguments which the appellants proffered in their closing written or oral submissions.
- [50] In analysing the judgment, the learned trial judge at paragraph 90(5) added that he was of the view that the appellants sought to hide evidence by resisting attempts to have them disclose documents which would have assisted the court with respect to the outgoing payments to Faedah Mulla. This was the only addition made to the respondent's submissions under the heading "The Trial."
- [51] The learned trial judge did make additions to the respondent's submissions when dealing with the factual witnesses. With respect to the evidence of Madam Ma he gave his opinion as to whether or not she could be described as a serial litigator, and found that she was a candid witness in the face of aggressive cross examination. Even the acceptance of Madam Ma's evidence was copied from the respondent's submissions.
- [52] The assessment of WKC's evidence was again mostly from the respondent's submissions, but the learned trial judge did add that WKC did not come across as an untruthful witness. The same approach was applied to the evidence of WKY. There was one paragraph added to the respondent's submissions on the evidence of Janice Ting where the learned trial judge found that she was also not a witness of truth, describing her as "manipulative and shallow." That apart, the learned trial judge adopted wholesale the submissions of the respondent.

[53] There was further wholesale adoption of the respondent's submissions with respect to the evidence of Richard Tiang.

[54] On the issue of the corresponding payments, the learned trial judge adopted wholesale the arguments placed before the court by Madam Ma, but inserted a section in paragraph 173 where he set out what the approach to the assessment of evidence by a trial judge ought to be. He stated that 'the judicial officer is to look for the best evidence, assess that evidence and determine the facts on a balance of probabilities'. Apart from these comments everything else relative to this issue comes from the submissions of the respondent.

[55] At paragraph 176 the judge opined that it was the appellant's evidence with respect to the corresponding payments issue which self-destructed when looked at in light of the bank statements which the appellant's 'reluctantly disclosed'.

[56] The conclusion arrived at with respect to this aspect of the claim was also copied from the submissions of the respondent.

Other evidence as regard alleged intercompany debts

[57] This entire section of the judgment was copied wholesale from the respondent's submissions.

Defendant's reliance on destroyed intercompany ledgers

[58] Under this heading, the learned trial judge added two sentences paraphrasing some of the evidence of Mr. Tiang but otherwise adopted all of the respondent's submissions.

The disputed board resolution

[59] There is a wholesale adoption of all of the respondent's submissions with no additions from the learned trial judge.

Mr. Atherton's new case

- [60] Under this heading, apart from describing the new case as a desperate and speculative attempt to find support for the already discredited outstanding payments theory 'and finding it' 'wholly incompatible with the case advanced by the defendants', it is a reproduction of the respondent's submissions.

Defendant's disclosure/de facto directorships

- [61] There was further wholesale adoption of the respondent's submissions with only cosmetic changes made under these two headings.
- [62] The learned trial judge treated with the other issues raised in the proceedings in similar vein. Regarding the transfers from Rayley to Esben and the evidence with respect to those transfers, the conclusions drawn by the learned trial judge from that evidence were all the submissions of the respondent without change or amendment.
- [63] With respect to the issues of the standard of proof, the director duties, the powers to be exercised for a proper purpose; unjust enrichment; knowing receipt the payments from Rayley to Incredible Power, all were copied almost verbatim from the respondent's submissions.
- [64] In reality, from paragraphs 185 through to paragraph 347 of the judgment the learned trial judge made only cosmetic changes to the submissions of the respondent and copied those submissions into his judgment without more.
- [65] Through to the conclusion of the judgment the trial judge adopted the same approach.
- [66] In **Cojocaru**, the Supreme Court of Canada further opined:
"The fact that a judge attributes copied material to the author tells us nothing about whether she put her mind to the issues addressed in that copying. Nor is lack of originality alone a flaw in judgment writing, on the contrary, it is part and parcel of the judicial process. To set aside a judgment for failure to attribute sources or for lack of originality alone would be to misunderstand

the nature of the judge's task and the time-honoured traditions of judgment writing. The concern about copying in the judicial context is not that the judge is taking credit for someone else's prose, but rather that it may be evidence that the reasons for the judgment do not reflect the judge's thinking."

- [67] It is accepted that in producing a judgment, a judge will favour one side's argument over another, however it is the judicial function to arrive at a clear decision. No set formula has been laid down as to whether a judge has demonstrated sufficient consideration and deliberation in coming to a given conclusion. It is a matter for the appellate court upon a careful consideration of the judgment to decide whether the learned trial judge fell short of what is to be expected having observed the substantial similarities between the respondent's closing submissions and the judgment itself.
- [68] In the instant case, the learned trial judge authored the first eighty-nine paragraphs under the heading "Introduction" for paragraphs 1-11, and "Background" from paragraphs 12-89. In those paragraphs the learned trial judge set out the chronology of the facts and events which were the subject matter of the claim. The learned trial judge mentions the particulars of the claim and the defences filed in the matter.
- [69] From paragraphs ninety to four hundred and seven of the judgment the learned trial judge made little substantive changes to the general structure of the respondent's submissions and made a few cosmetic changes to give persons their proper titles and to give the companies involved their full names.
- [70] From paragraph ninety to paragraph four hundred and seven of the judgment, four paragraphs were written solely by the learned trial judge and another fifteen were added to, amended or qualified by the learned trial judge. There were no changes made to the respondent's submissions except that the learned trial judge left out certain paragraphs or sentences relative to Mr. Richard Tiang who filed a witness statement but did not give evidence due to illness.

- [71] When one compares the submissions of the respondent in the court below and the judgment of the learned trial judge, it is clear that the judgment adopted approximately ninety percent plus of the respondent's submissions at the court below.
- [72] The learned trial judge did add two paragraphs in which he addressed the credibility of the witnesses WKY, WKC and Ms. Ting, finding them to be untruthful and unreliable.
- [73] In adopting the respondent's submissions almost wholesale, it is not apparent that the learned trial judge addressed his mind to much of the submissions of the appellants, this may lead the reader to develop the impression that the learned trial judge abdicated his main judicial responsibility, that is, to exercise independent thought on the relevant issues and arrive at a conclusion. Justice must not only be done, it must be seen to be done.
- [74] Where copying on this large a scale occurs, to such a degree and in such a manner that serious questions arise as to whether the judge has abdicated his judicial function or at least as to whether his conduct is such that justice has not been seen to be done by an independent tribunal, then it is for the appellate court to analyse the questioned judgment and determine whether it ought to stand.
- [75] As stated in **Crinion v IG Markets Ltd**⁴:
"A litigant who sees the other party's submissions adopted in the wholesale way which occurred here will justifiably not believe that his own side of the case has received any attention."
- [76] A judge must give some explanation as to why he has arrived at a particular decision. Justice will not be achieved if it is not apparent to the parties why one party has succeeded and the other has not.

⁴ 2013 EWCA Civ 587.

- [77] Where a judge has failed to give adequate reasons as to why he arrived at a decision to prefer one party's evidence over the other that failure amounts to a breach of the trial judge's duty to give reasons. This duty to give reasons is a function of due process and is necessary to ensure justice.
- [78] Various arguments were advanced by the appellant on critical issues in this matter, however, the learned trial judge failed to treat with these submissions in any substantial way. Any reference to the appellant's case was at best perfunctory and in summary.
- [79] The parts of the judgment headed "trial" and factual witnesses are almost wholesale reproductions of the respondent's written submissions. While it is true that a judgment need not mention every fact or argument placed by the court, the review court and the parties must be able to discern that the judge took on board the arguments and submissions of both sides and arrived at a conclusion having exercised independent judicial thought.
- [80] In **Cojocar**, by Machlin CJ:
"In a case such as this, the essence of the complaint is not that the reasons are functionally insufficient -...but rather that the judge's wholesale incorporation of the material of others show that he did not put his mind to the issues and decide them impartially. It is a complaint, not about sufficiency but about process...whether the presumption of judicial impartiality has been rebutted."
- [81] The issue for decision is: whether the wholesale adoption of the submissions of one party would lead a reasonable person, who is aware of the relevant facts, to come to the conclusion that the judge failed to address his mind to the issues and arrive at an independent conclusion based on the law and the evidence led at the trial.
- [82] Where a judge adopts the submissions of one party only, it is not difficult to see why the other side will view the decision with some trepidation especially where the

judgment largely follows much of the other side's submissions. This is more so when the other side's submissions are largely ignored and do not seem to feature in any way in the decision-making process.

[83] It all depends on what has been copied and whether in the face of that copying it can be said that the judicial officer has engaged with the case presented by each party, and has come to conclusions on matters of evidence, on matters regarding the legal principles and whether those principles have been properly applied to the evidence.

[84] In **Amaca Pty Ltd v Werfel**⁵, the Court stated:

“it is necessary for the judge to engage with the case presented and to expose his or her reasoning on points critical to the contest between the parties, whether as to evidence or as to argument. The reasons must deal with the substantial points which have been raised, including findings on material questions of fact. Where a party has relied on evidence or material which the judge has rejected, the judge should refer to that evidence or material and in giving reasons which deal with substantial points that have been raised, explain why that evidence or material has been rejected.”

[85] This approach was further endorsed in **Ramnarine v Ramnarine**⁶ which approved the dicta in **Crinion**, the Privy Council stated:

“13. Certainly the incorporation into the judgment of the successful party's argument was, in the present case much less extensive than the recent English case of *Crinion v IG Markets Ltd*, in which notwithstanding that almost all of his judgment had been taken word for word from Counsel's closing submissions, the Court of Appeal eventually, if hesitantly concluded that the judge had conducted a proper judicial evaluation. It is not of itself bad practice for a judge who has considered the rival contentions on a discrete issue such as credibility, to decide that the contentions he preferred have been expressed by Counsel in terms upon which he cannot improve and which he should therefore incorporate into his judgment. But the Board endorses the recommendations of Longmore LJ in the *Crinion* case that their incorporation should be expressly acknowledged and accompanied by a recital of the other party's contentions and an explanation of their rejection.”

⁵ [2020] SASFC 125.

⁶ [2013] UKPC 27.

- [86] This type of wholesale copying has been rightly described as “thoroughly bad practice”, and for good reason.
- [87] Appearances do matter, and for a trial judge to rely so heavily on one side’s submissions risks giving the impression that he had not performed the critical task of considering the cases put forward by both sides independently and even handedly. There is nothing wrong with a judge making extensive use of submissions of one party with the proper acknowledgement whether in setting out the factual matrix or when analysing the issues and applicable legal principles or even in the actual dispositive reasoning.
- [88] Where this occurs however, the judge should be careful to make it clear on the face of the judgment that he has considered the contrary submissions and has brought his own reasoning to bear on the decision of the Court. In other words, has the trial judge conducted a fair and balanced evaluation of the issues placed before him and arrived at a conclusion based on the evidence and submissions.
- [89] The Court has to carefully examine the judgment in the context of the evidence and the submissions of the parties in order to satisfy itself that the trial judge performed his judicial function. If upon such an examination it can be discerned that the trial judge did in fact carry out a proper judicial evaluation of the essential issues and did not surrender this vital function and his responsibility to Counsel, then in those circumstances the judgment should stand.
- [90] In **Newton v Public Prosecutor**⁷ the Singapore High Court stated:
- “The wholesale copying of one side’s submissions is bound to raise doubts in the mind of the other side as to whether the judge had brought an independent mind to his judicial function and whether the points made on that other party’s behalf have been adequately considered. Though there is nothing wrong with a judge accepting submissions where he agrees with them, extensive judicial copying may raise serious questions as to whether

⁷ 2024 2 LRC 151, paragraph 38.

the judge has abdicated his judicial function or at least as to whether justice has been seen to be done by an independent judicial tribunal. This is especially so because judicial opinions are a tangible sign to litigants that the judge has actively wrestled with their claims and arguments and made an independent decision grounded in reason and logic.”

[91] This Court having reviewed the judgment of the learned trial judge finds that the extensive copying of the respondent’s submissions, even with the minor additions made by the learned trial judge, when viewed as a whole, would lead a reasonable observer to be satisfied that the learned trial judge failed to impartially and independently examine all of the evidence and submissions and arrive at his own conclusions.

[92] It cannot be said that on a reading of the judgment this Court is in a position to conclude that the learned trial judge properly brought to bear independent judicial reasoning to all the issues canvassed before him by both parties and came to a balanced decision based on the evidence and the law.

[93] In **Bright v Westmoreland County**⁸ Judge Richard Nygaard for the US Court of Appeal, Third Circuit, stated:

“Judicial opinions are the core work product of judges. They are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reasoning and logic. When a Court adopts a party’s proposed opinion as its own the Court vitiates the vital purposes served by judicial opinions.”

[94] This Court can do no better than to repeat the words of Longmore LJ in **Crinion**, where he opined:

“We trust that no judge in any future case will lift so much of a claimant’s submissions into his own judgment as this judge has done and that if substantial portions are to be lifted, it will be with proper acknowledgement and with a recitation of the defendant’s case together with a reasoned rejection of it.”

⁸ 380 F 3d 279 (3rd Circuit, 2004, pp 731-732.

- [95] In the circumstances, the appeal is allowed on this ground, and the judgment and the consequential orders of the learned trial judge are set aside, and the matter is remitted to the Commercial Court for retrial before another judge.
- [96] The appellants are entitled to their costs on the appeal to be assessed by a judge in the Commercial Division within 21 days hereof if not agreed.

I concur.
Trevor M. Ward
Justice of Appeal

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar