Privy Council appeals: concurrent findings of fact – tips and tactics

A. Introduction

1. Whilst a practice of longstanding, the Board has become somewhat more interested in it in recent years/ months. The practice is summarised by Lord Burrows in *Dass v Marchand* [2021] 1 WLR 1788:

> "[15] [I]n accordance with the Board's normal practice, we do not think it appropriate to go behind the concurrent findings of fact of the two lower courts (ie the facts which Rampersad J found proven and on which his findings were upheld by the Court of Appeal) …
>
> [16] Although there can be rare exceptions to this practice (in particular, where there has been an error of law in relation to the findings of fact), this case falls far short of coming within such an exception. It is worth here clarifying that the practice of the Board (in not going behind the concurrent findings of fact of two lower courts) imposes a super-added constraint on this appellate court. That is, it goes beyond the standard constraints on an appeal court and adds an additional hurdle for an appellant to overcome when appealing to the Privy Council. This is for two main reasons. First, the trial judge, given his or her opportunity to see and hear witnesses at first hand, is likely to be in the best position to make findings of fact. Where those findings of fact have been upheld by one appeal court, there is no reason to think that a second appeal court - the third court looking at the facts - is more likely to be correct about the facts than the two courts below. Secondly,

the Privy Council wishes to respect factual circumstances peculiar to the country from which the case comes (especially, for example, local customs, attitudes, and conditions) and the first instance and appeal court judges in those countries are very likely to be in a better position to assess such factual circumstances than is the Board."

2. I will explain its basis (broadly); update you on the Board's current approach to the issue, including giving appellants 30 minutes on their feet to get passed the doctrine, or you are out! And provide some hopefully useful tips and tactics on how to avoid or exclude one's case from the practice (or if you are responding, to ensure the case stays within its clutches).

B. The author

3. Here is some blurb about me together with a hopeless out-of-date photo that I lack the heart to replace: (for more see https://www.3harecourt.com/barrister/rowan-pennington-benton/)

Rowan has a busy commercial, chancery, and insolvency practice. He regularly appears in the High Court, as well as advising and appearing in offshore and other overseas jurisdictions.

As part of his international work, he has developed specialist expertise in appeals to the Privy Council, having appeared in over 35 Supreme Court/Privy Council appeals (many as sole counsel).

4. I am always happy to be contacted by email to discuss cases, queries, or just to pass the time of day:

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C. Recent developments

5. The Board has, in recent months, adopted a practice of identifying appeals that concern concurrent findings of fact and requiring – at the hearing of the appeal – counsel for the appellant to explain, in no more than 30 minutes, why the Board should hear the appeal at all.

6. Bear in mind: there is usually no warning in advance, and the 30-minute limit is imposed irrespective of the fact the appeal may have been listed for a day or even 2 days and the timetable agreed between the parties. Of course, counsel may push back but most do not – the requirement is to explain why an exception applies to the usual practice that the Board will not consider the facts for a third time.

7. Alternatively, the author has also seen the Board write to the parties prior to the appeal – possibly at the notice of appeal stage or the SFI stage – saying that the Board has identified that the grounds of appeal may challenge concurrent findings of fact and inviting the appellant to explain why the Board should hear the appeal or that ground of appeal. Again, the pressure is on to explain why the doctrine does not apply or an exception applies.

8. Even if the Board does not raise the point, I probably will! (Or whoever your opponent is, particularly if they know their way around the board, will do so). So best to carefully review the appeal, either to identify a way around the doctrine or to argue it applies (if you are a Respondent).

9. Beware too: the Board's eagerness to find the existence of concurrent findings of fact shows new bounds. The Board seems to think the doctrine applies not only to questions of fact (let alone pure fact), but questions of contextual interpretation of land conveyances on the basis that the process includes considering factual features of the land: *Carriacou Devcor Ltd v Corion* [2023] UKPC 1. It is even said to apply in criminal cases, at least where the judge sits without a jury, e.g. *R v Cox (Malik)* [2023] UKPC 4.

10. Out of 56 judgments issued by the Board in 2022 (I take these figures from Westlaw), the Board referred to its practice in respect of "concurrent findings of fact" in 9 of those judgments. There was reference or reliance in 7 judgments in 2021, and 4 judgments so far in 2023. The issue arises, as indicated, in applications for permission to appeal and in argument (written and oral) even if not making its way into the final judgment.

D. Scope of the practice

11. The practice can cause problems, particularly if the doctrine is over-extended beyond its proper ambit. It is okay insofar as it goes to identify cases in which both courts below have carefully considered the facts, and to say that as the Apex court the Board will not generally do it again for a third time. But the breadth of the doctrine is stated in such extreme terms, its effect is potentially more chilling than that. Often cited are dicta of the Board in *Devi v Roy* [1946] AC 508:

> "[I]n order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or

procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law."

12. In circumstances where there exists an appeal not limited to a point of law, it seems odd that an appeal court can constrain its powers to this degree. In reality, the scope of the appeal has been limited to points of law (rationality, procedural irregularity). The extent to which the Board has, in later cases, adopted this strict approach varies. In the past, a largely pragmatic approach can be seen whereby the Board would reference the doctrine but then decide whether – in substance – the appellant's arguments and the parties' evidence was fully and fairly considered below. If it was, the doctrine would be applied; if not then often not. More recently, however, a stricter approach is evident.

13. The difficulties are multiplied when one considers the approach of the English courts (very often adopted overseas) even to first appeals. In respect of trials on oral evidence of questions of primary fact, the traditional approach is not particularly controversial – per Lord Thankerton in *Thomas v Thomas* [1947] AC 484, at 487:

> "(1) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; (2) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; (3) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his

having seen and heard the witnesses, and the matter will then become at large for the appellate court."

14. Again, as applied to primary findings of fact based on hearing and seeing the witnesses, one can see the point. But the modern approach is pretty extreme – see the recent decision of the Court of Appeal in *Volpi v Volpi* [2022] 4 WLR 48, concerning a question of whether in fact a sum of CHF4m was paid for the purchase of an apartment. Lewison LJ summed up the position as follows:

> "i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
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> iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
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> iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

15. In short: so long as the judge considers the evidence and comes to a decision that is not perverse, the appeal court will not intervene. In deciding whether the decision was rational (including, in this context, whether the judge took into account all material considerations), there is an assumption that the judge looked at and considered all the evidence even if they failed to refer to it. With respect, it is difficult to understand how this standard allows for anything other than an appeal on a point of law (and even then, a somewhat ungenerous one). If a judge's findings are perverse, that is a legal challenge (there is no practical difference, nowadays anyway, between the grounds of judicial review and appeals on points of law). So what has happened to the right of appeal on the facts?

16. The practice of the English court is very often applied in the courts within the jurisdiction of the Board. The author has seen many decisions from various Courts of Appeal that adopt this essentially hands-off approach to factual appeals, and not just questions of pure fact decided on oral evidence (though these are the most stark).

17. So, when an appellant embarks upon their first-tier appeal, they are told the judge's assessment of the facts stands unless, essentially, the judge has gone mad and reached a decision that cannot be justified on the evidence. It is no good pointing to the fact

that half of the evidence appears to have been ignored, the judge is assumed to have considered it all and done a good job. The first appeal is dismissed.

18. If the appellant wants to take the matter any further, they are told they face the hurdle of concurrent findings of fact; a practice the Board does not depart from unless there has been a "miscarriage of justice" viz "a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all". But there have been no "concurrent findings of fact" in any meaningful sense. There has been a single set of findings by a trial judge that no other court has ever called into question or tested against the documents or witness statements (other than to satisfy themselves that the findings were not totally balmy).

19. The doctrine's origins lie, I believe, in the early appeals to the Board from India. Many of those appeals turned on nuanced and complex questions of fact relating to local customs, religions and traditions. *Naragunty Lutchmeedavamah v Vengama Naido* (1861) (1861) IX Moore, Indian Appeals 66; 19 ER 66, was an appeal concerning succession to a Polliam, an ancestral estate in the nature of a Raj. It is held by a member of a family, the Polligar. The report notes that the "native Courts" in respect of evidence did not "proceed according to the strict technical rules adopted in England". Oral and documentary evidence was admitted including genealogical tables. Locally, principles of ancestral property succession were considered from "The Hindoo Law books", and other similar sources. Lord Kingsdown said:

> "It is not the habit of their Lordships, unless in very extraordinary cases, to advise the reversal of a decision of the Courts of India merely on the effect of evidence or the credit due to witnesses. The Judges there have usually better means of determining questions of this description than we can have, and when they have all concurred in opinion it must be shown very clearly that they were in error in order to induce us to alter their judgment; but in this case

we think that the Courts could have come properly to no other conclusion than that at which they arrived."

20. The practice was confirmed in *Mussumat Jariut-oll-butool v Mussumat Hoseinee Begum* (1867) XI Moore Indian Appeals 194; 20 ER 75. The issue in the case was whether, according to Mahomedan (Islamic) law or otherwise, one or other of two woman was legitimately married to and therefore entitled to an interest in the estate of the deceased. The rule in *Naragunty Lutchmeedavamah* was cited, followed by:

> "Their Lordships, after a very careful attention to the evidence, and to the arguments addressed to them on the part of the Appellants, are of opinion, that there is wanting in this case that clear indication of error in finding against the marriage and the Will which would be necessary to take this appeal out of the operation of the above salutary rule.
>
> The Sudder Court thought the evidence as to the marriage of the Appellant insufficient. The same Court concurred with the Court below in thinking the evidence in support of the Will untrustworthy. They say, "We concur with the Judge in discrediting the evidence in support of the Will. We consider the attendant circumstances as altogether improbable and unworthy of belief.
>
> Is error clearly manifest in these conclusions? Is the evidence clearly sufficient to prove either issue?"

21. The answer to the question there posed was, in short, 'no'. But the reader will note some key aspects of these decisions: both courts below did make findings of fact, or at the very least both reviewed the evidence and decided upon the correctness of the findings at first instance. The Board declined to intervene but, to quote the last case, not without their Lordships "very careful attention to the evidence, and to the

arguments addressed to them". In other words, the doctrine appears to have been focused on the threshold to be met (an "error clearly manifest") rather than any suggestion that the facts and evidence would not be reviewed. Less still that the threshold even to look at the thing required "a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all" (*Devi v Roy*).

22. See, too, the approach adopted in *Tareeny Churn Bonnerjee v William Maitland* (1867) 11 Moo. Ind. App. 317; 20 ER 121:

> "Now, the learned Judges in the Courts below,—the two Judges in the primary Court and the three Judges in the Court of appeal,—have all arrived, without hesitation, at the conclusion that that debt of Rs. 43,674 was not a *bona fide* debt due from Obhoychurn; and it would be far from consistent with the rules which their Lordships have always laid down in dealing with cases of this kind for them to reverse a decision upon a question of fact thus unanimously arrived at by five Judges, unless the very clearest proof were adduced to their Lordships that that decision was erroneous.
>
> It is true that only the two primary Judges had before them the witnesses, or the witness, who were or was examined; but the three Judges of the Court of appeal, conversant with testimony of the kind which has to be dealt with in this case, were of opinion that the two Judges of the Court below had arrived at a just conclusion upon evidence that was never adduced.
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> But passing from the great respect which, upon a question of this kind, would be shown to the determination of the Judges below upon a question of fact, their Lordships have examined with care the whole of the evidence which was before those learned Judges, and they are of opinion, that there is no

ground whatever to be dissatisfied with the conclusion at which the learned Judges arrived."

23. Again, this is some way from the approach suggested in *Devi v Roy*. The path from those cases to *Devi v Roy* and the cases that have followed is a subject too long (and somewhat off-piste) to detail here. But see *Allen v Quebec Warehouse Co* (1886) 12 App. Cas. 101, 104 per Lord Herschell:

> "Their Lordships having arrived at the conclusion that there has been no error in point of law, the sole question that remains for determination is whether the judgment of the court below ought to be reversed on the ground that the judges have taken an erroneous view of the facts. Now, it has always been the view taken by this Committee in advising Her Majesty, when the question for determination has been whether the concurrent judgment of the judges who have been unanimous below should be supported or reversed, that unless it be shewn with absolute clearness that some blunder or error is apparent in the way in which the learned judges below have dealt with the facts, this Committee would not advise Her Majesty that the judgment should be reversed. That principal has been laid down in many cases."

24. "Blunder or error" in "the way" the courts below dealt with the facts has the flavour of the approach later adopted (i.e. whether the courts below took proper advantage of their position as triers of fact, applied the correct processes and so on). But even in *Allen* the focus remained on the threshold question: "whether it has been established that the judgments of the Courts below were clearly wrong" (p. 105).

25. Even in *Devi v Roy* itself, reference was made to the older Indian cases and confirmation that concurrent findings of fact in no way relieved the Board of its obligation to review

the evidence. *Mudhoo Soodun Sundial v. Suroop Chunder Sirkar Chowdry* (1849) 4 Moo. 1. A. 431:

> "Both the courts below have decided against the validity of the instrument; a fact which, considering the advantages the judges in India generally possess, of forming a correct opinion of the probability of the transaction, and in some cases of the credit due to the witnesses, affords a strong presumption in favour of the correctness of their decisions, but does not, and ought not, to relieve this, the court of last resort, from the duty of examining the whole evidence, and forming for itself an opinion upon the whole case."

26. *Devi v Roy* went further (at least in respect of "pure" questions of fact):

> "The appellant is at once faced with the concurrent judgments of two courts on a pure question of fact, and the practice of this Board to decline to review the evidence for a third time, unless there are some special circumstances which would justify a departure from the practice."

27. Pausing there, quaere whether there then existed a practice of the Board "declin[ing] to review the evidence". I suppose the point of distinction is between a "fresh examination of the facts" (*Umrao Begam v Husain* (1894) LR 21 IA 163), and careful review of the evidence before the courts below, and consideration of how they dealt with it, to satisfy the Apex court that the judges below properly reviewed the same and arrived at justified conclusions.

28. The stage post decision appears to be the judgment of the Board in *Robins v National Trust Company* [1927] A. C. 515, another appeal from Canada. The Board confirmed not only that the practice applied across all of the jurisdictions appealing to the Board (not just Indian appeals), but that the focus had shifted to a "miscarriage of justice" in the courts below.

29. The position was summarised in *Devi v Roy* as follows:

> "From this review of the decisions of the Board, their Lordships are of opinion that the following propositions may be derived as to the present practice of the Board and the nature of the special circumstances which will justify a departure from the practice:-
>
> (1.) That the practice applies in the case of all the various judicatures whose final tribunal is the Board.
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> (2.) That it applies to the concurrent findings of fact of two courts, and not to concurrent findings of the judges who compose such courts. Therefore a dissent by a member of the appellate court does not obviate the practice.
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> (3.) That a difference in the reasons which bring the judges to the same finding of fact will not obviate the practice.
>
> (4.) That, in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law.

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

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

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

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

30. As indicated, the extent to which the Board has – since – followed the approach suggested in point (5.) varies. This might comprise implicit recognition that point (5.) goes rather too far. Or it might simply reflect point (6.).

31. The problem is that, with both levels of appeal court seeking to limit their function vis-à-vis factual complaints (see the *Volpi* decision above), arguably there is an erosion of any meaningful appeal on the facts.

32. Indeed, in some cases the Board has openly said that it will not interfere with concurrent findings of fact absent an error of law. For example, para 17 in Central *Broadcasting Services Ltd v Attorney General of Trinidad and Tobago* [2018] UKPC 6:

> "While the judge's evaluation of the likely profitability of CBSL if it had been trading between 2002 and 2006 is not a finding of primary fact, the Board considers that the concurrent findings can be undermined only if an error of law is demonstrated".

33. Appeals are almost always governed by statute. Where thought appropriate, rights of appeal may be limited to points of law. But in all other cases it is difficult to see on what basis the practice of the courts, effectively emptying a right of appeal on the facts of any real content, can be justified. This, at least, is one view.

34. Another view, no doubt perfectly valid, is that the Board is entitled not to be inundated with appeals seeking to have it act as a second civil court of appeal. It is the Apex court. It is busy. It sits, usually, with 5 Justices of Appeal members of the judiciary at the top of their game. Why should their time be taken up trying to muddle through whatever factual and procedural mess the parties (and often, frankly, the courts too) got themselves into below? As someone who has dealt with very many appeals to the Board, I always say by far the most time-consuming part of the process is seeking to unpick and understand precisely what happened below – who was making what arguments, when, to what effect and so on. The arguments tend to develop and refine over time, including on and through the appeal process.

35. The reality is that appeals arrive at the door of the Board not always in the condition that appeals might arrive at having been hard fought in the Rolls Building and on appeal to the Court of Appeal in the RCJ. There are various well-known reasons for this, not least jurisdictions of varying size with varying degrees of access to legal resources and support services. Many of the jurisdictions that appeal to the Board are small island states. They have often thriving and hard working legal services sectors, and excellent and hard working judges; but it is not uncommon nonetheless for the cases to require some significant intervention at the Privy Council level.

36. I love the Privy Council work, and really enjoy the puzzle that is unraveling what went on below, trying to repackage and present the case (for the appellant or respondent) to the Board. I don't think it is any secret to say that the appetite for engagement in this process amongst the Justices varies. I think Lady Hale would forgive me for repeating her oft-cited statement that hearing appeals from the Board was "grounding". Some appeals of course raise terrifically interesting and exciting questions of law. Justices have a rare opportunity (not enjoyed in the Court of Appeal in England and Wales) to sit as constitutional judges; wielding no less the power to strike down primary legislation. Other cases are just hard work.

37. Anyway, whilst seeing the basic logic in the doctrine, it seems important to apply it sensitive to these realities. In practice, the Board always listens carefully to any arguments about the doctrine and why it is said it should not apply in a particular case. It is essential, however, that such points are made (where there is a proper basis to make the arguments). In other words, it is important that appellants when facing this issue give serious and proper consideration to the doctrine: whether it really applies to the facts of the case, whether any exception might be shown. It think it is right to say that the Justices are always up for listening to a decent argument well made, even if in the end it does not succeed. But please don't simply ignore the elephant in the room. *Lares v Lares* [2020] UKPC 19 at para 10:

> "Although leading counsel for the appellant confirmed that he is aware of this settled practice, no attempt was made in the appellant's written case nor in oral submissions to argue that there are any special circumstances in the present case which could justify departure from it. That, of itself, is fatal to this appeal."

E. Tips and tactics

38. I move to tips and tactics when faced with an appeal said to comprise a challenge to concurrent findings of fact. My preceding consideration of the origins of the doctrine (however brief and incomplete) is not, however, entirely irrelevant. Arguments seeking to avoid or limit application of the doctrine might be assisted by focusing minds on the origins of the doctrine and cases to which it most aptly applies. On any view, these are appeals concerning questions of "pure fact" (not easy to define, but paradigmatically questions concerning whether some event did or did not happen, as opposed to whether a statutory or other legal test is met); where that question of fact turned largely or wholly on oral evidence and the trial judge's assessment of it; and appeals where the first tier appeal court did itself engage in a proper and full review of the evidence and the trial judge's consideration of it. (To put it another way: an appellant stands a better of chance of persuading the Board to get its hands dirty by considering the facts where the question was one of mixed law and fact, decided primarily on the basis of the documents, and where the Court of Appeal gave only peremptory consideration of the point).[1]

39. In summary, the following are some of the core arguments to avoid application of the practice or to exclude an appeal from its clutches:

    (1) First and most obviously, the practice does not apply to appeals on points of law. Whilst it has sometimes been said that attacking findings of fact on the basis of legal error presents an exception to the rule, it seems to me the rule in *Devi v Roy* is one that only ever applies at all to appeals on points of fact. If it can be shown that the judges below failed to consider some obviously material evidence this can I think be advanced as a legal challenge (rationality). Failure to consider the evidence must be shown; not a failure to accord it the weight an appellant thinks it

[1] (Assuming of course that, on the documents, the answer to the factual questions wasn't simply obvious; there must be a proper basis for arguing that the finding was wrong).

ought to have attracted. The former is a legal challenge, the latter is just a disagreement with the facts.

(2) Perverse findings. Again, the practice has nothing to do with (or in my opinion should have nothing to do with) legal challenges. If the judge's factual conclusions cannot (and I mean cannot) be justified on the evidence, the practice has no application to the challenge which is one of law.

(3) Failing to weigh oral testimony against the documents and the inherent probabilities of the case, tested against a proper understanding of the issues in the case. There are actually at least two elements to this (which might be taken independently of each other): testing the oral evidence against the documents and inherent probabilities; and secondly, correctly understanding the core issues and thereby also focusing on the most significant parts of the evidence.

Readers will recognise this as a classic first appeal ground, but it can also work against concurrent findings. *Central Bank of Ecuador v Conticorp SA* [2015] UKPC 11 is a good example of this. Lord Mance, who was hugely interested in Privy Council work, overturned not only concurrent findings of fact but findings of want of probity. He found, contrary to both judgments below, that directors had dishonestly and in breach of fiduciary duty transferred company assets out for no consideration. In a 64-page judgment, his Lordship reviewed the evidence and the approach of the courts below in significant detail. Setting out the general principles applicable to factual appeals, his Lordship went on to affirm the following (para 8):

> "…these principles do not mean that an appellate court is never justified, indeed required, to intervene. They only concern appeals on fact, not issues of law. But they also assume that the judge has taken proper advantage of having heard and seen the witnesses, and has in that connection tested their evidence by reference to a correct understanding of the issues against the background of the material available and the

inherent probabilities. In this connection, a valuable coda to the above statements of principle is found in a passage from the judgment of Robert Goff LJ in *Armagas Ltd v Mundogas SA (The "Ocean Frost")* [1985] 1 Lloyd's Rep 1, 56 and 57. Robert Goff LJ noted that Lord Thankerton had said in *Thomas v Thomas* that:

> 'It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, according to the individual case in question.'

Robert Goff LJ then added this important practical note:

> 'Furthermore it is implicit in the statement of Lord MacMillan in Powell v Streatham Manor Nursing Home at p 256 that the probabilities and possibilities of the case may be such as to impel an appellate court to depart from the opinion of the trial judge formed upon his assessment of witnesses whom he has seen and heard in the witness box. Speaking from my own experience I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth.'

(4) Much fertile ground here for appellant lawyers before the Board: did the judge "take… proper advantage of having heard and seen the witnesses, and has in that connection tested their evidence by reference to a correct understanding of the issues against the background of the material available and the inherent probabilities"? Examples:

(a) *Conticorp* itself: the courts below, it was said, "erred as a matter of process in failing properly to address the factors and issues which were really significant" (para 164). This is important: the Board must have first reviewed the evidence and background to the claim to distill what it considered to be the "central issues in the case". It considered that the courts below had not correctly focused their minds on these issues, including failing to appreciate the fact that the impugned transactions "in economic substance" saw a reduction in capital of the group, and several "extraordinary features" of the transactions including use of out-of-date figures in an information memorandum which "must have been known to be out of date" (para 163). There is not space here to descend into more detail, but the focus of enquiry is to identify core issues or central parts of the evidence or factual matrix that the courts below appeared not to appreciate in their analysis and which may or would have made a real difference had they done so.

(b) *Cleare v The Attorney General* [2017] UKPC 38 (addressed in more detail, below): failing properly to test oral evidence against the objective materials (in that case, oral testimony about being beaten up by the police against the medical evidence).

(c) *Ramsook v Crossley* [2018] UKPC 9 (obiter) the practice of the Board might "only apply in a weak form" where the Court of Appeal "barely

addressed" the judge's factual findings, and where there were "certainly points which can be made both on the judge's reasoning and above all on the overall probabilities, which do not seem to have received much attention at any stage" (para 31).

(5) Perhaps part of the preceding two points, but worth a mention on its own: lack of, or plainly inadequate, reasons. Per Lord Thankerton in *Thomas v Thomas* [1947] AC 484, 487 (cited with approval by the UK Supreme Court in *McGraddie v McGraddie* [2013] UKSC 58):

> "The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court…"

One must be careful here, as sometimes an appeal court will seek to revert to the position whereby – even in the absence of satisfactory reasons – it says that the factual findings cannot be disturbed if the evidence was "capable" of rationally supporting the findings. Fight hard on this point: unless the evidence was capable of only one reading, a litigant is entitled to a reasoned decision as to why their interpretation of the evidence was rejected in favour of the other side's. Otherwise, in my view, there is no basis for saying that the judge took full and proper advantage of their position as trier of the facts. If the Court of Appeal failed, below, to pick up on the point and do its part then it falls to the Board (i.e. point (v.) in *Volpi* – see above – cannot cure lack of adequate reasons; point (v.) only applies to a straight challenge to the judge's interpretation of the evidence where they *have* provided proper reasons for that interpretation).

(6) Cumulative process concerns/ delay. *Byers v Chen* [2021] UKPC 4; [2021] BCC 462 concerned (again – see *Conticorp*) a successful appeal against a finding that a director was not in breach of her fiduciary duties in respect of payments out said to be unfair preferences (i.e. preferring some creditors over other or the general body of creditors). The trial judge had made several "forthright" and "robust" comments where he should have expressed himself more moderately. There followed a delay of 2 ½ years for the judgment from the Court of Appeal for which there was "no explanation" and which other things being equal did increase the risk of it being unreliable. In the premises (para 44):

> "[T]he Board is satisfied that the delay demands a careful consideration of the merits of the substantive grounds of appeal to see if this is one of those cases in which, on the settled practice of the Board, it is appropriate to intervene."

(Whilst the delay was the focus, I infer the judge's approach at first instance was relevant too).

(7) Non-concurrent findings of fact. Perhaps to state the obvious, it is not uncommon for the first-tier appeal court to make findings additional to those made below or to add new and different reasons. Certainly in the former and possibly also in the latter (because those new and different reasons have not been tested), the appeal to the Board from those points may not be caught by the practice applicable to concurrent findings of fact. The test even on first appeals is not easy, however the Board recognises this as an exception to the practice: see *Low v Lezama* [2022] UKPC 15, paras 53ff (a case concerning findings of negligence against a specialist obstetrician); and *Harvey v Brette* [2021] UKPC 23, in which the Court of Appeal made its own factual findings as to the cause of a road traffic accident. At para 40:

> "The only factual conclusions were those made by the Court of Appeal. Accordingly, there have been no concurrent findings of fact reached in the courts below so that this case does not fall within the Board's normal practice…
>
> The factual findings by the Court of Appeal were made after consideration of the documents all of which are available to the Board. There was no oral evidence before the Court of Appeal and there is none before the Board. On one view the Board is in the same position as the Court of Appeal but there is still resonance in the vivid expression in *Anderson v City of Bessemer* (1985) 470 US 564*,* 574–575 that the fact finding trial, which in this case was in the Court of Appeal, should be seen as the "main event" rather than a "tryout on the road", see *DB v Chief Constable of Police Service of Northern Ireland* [2017] UKSC 7*, para 80* . The Board will exercise considerable reticence before overturning any factual finding made by the Court of Appeal."

"Considerable reticence" I think we can all live with. Better than the *Devi v Roy* line of thought.

40. I should say, of course, that the reasons the Board provides for intervening in a particular case may be more, or less, revealing and inclusive. To put the point another way, the Board will intervene if an appellant can persuade the Justices that "something" went wrong below, but it is not always possible to identify with precision the error or "miscarriage of justice" said to have occurred. The Justices are human. Things don't always go the way they ought in the courts below. They get it. They recognise that an appellant might have cause to doubt the factual finding made below for several cumulative reasons – even if one or other of those reasons alone might not make the grade. The focus, then, is on persuading the Board that for one reason or

another the appellant's factual case just wasn't given the attention it ought to have been.

41. *Cleare v The Attorney General* [2017] UKPC 38 is a good example. The appellant claimed damages for personal injury he said was sustained as a result of abuse by the police. He said officers forced plastic bags tightly over his head, depriving him of oxygen, as well as beating him. The judge rejected the claim holding that the injuries were self-inflicted. He just didn't believe the appellant. The Court of Appeal upheld those findings.

42. Acting for the Appellant, we argued that the judge had rejected the appellant's account without testing that account against the documentary evidence, in particular the medical evidence. The argument arose from the structure of the judgment in which the judge had, first, dealt with the appellant's oral evidence which he rejected, before, secondly and separately, dealing with the medical evidence. Quaere whether in reality the judge had failed to consider one in light of the other, as opposed to simply structuring his judgment in that way. On the face of it however this was the point that justified reviewing the facts for a third time: "The judge was wrong to conclude that the claims of assault should be dismissed prior to considering the medical evidence adduced in support of them" (para 7).

43. Plainly the Board was concerned that the medical evidence was in fact quite strong. In particular one of the doctors suggested seeing an hypoxic injury consistent with being suffocated, as well as an unusual mini mental status score and presenting difficulties also consistent with the appellant's account and "very unlikely to be able to fake". Another expert's evidence was "of substantial significance". Not only did the judge appear not to weigh the oral evidence against all of this, when the judge did consider the medical evidence "he did not do so satisfactorily. Satisfactory consideration of it, at the proper time, might have led him not to reject the appellant's claims of assault" (para 20).

44. This is a "something went wrong" case. The medical evidence, much of it unchallenged, pointed in the direction of injuries difficult or impossible to fake. The appellant was an unimpressive witness and faced several statements from the police refuting his account. Nonetheless however something in the case did not ring true. Had the judge really focused his mind on the objective material when considering the apparently unimpressive oral testimony of the appellant? The wrongful compartmentalization of the judgment was the hook to hang the Board's coat on, but the feeling of unease at the imbalance of evidence and the judge's apparent enthusiasm to reject the oral account of the appellant is what, I submit, drives the decision.

45. Lord Mance's judgment in the *Conticorp* case is, in my opinion, gold in this context. What his Lordship effectively said is that the Board's practice in the face of concurrent findings of fact was the starting position, but it is a practice to be applied carefully and after proper consideration of the evidence and the courts' approach to it below. It also depends on the sorts of factual findings in issue and how they were resolved. At para 5:

> "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. The greater that advantage, the more reluctant the appellate court should be to interfere. Some conclusions of fact are, however, not conclusions of primary fact, but involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ…"

46. Having cited with some fanfare the decision of Lord Mance in *Conticorp*, I should fess up that the Board plainly sees the danger here. In *Ma Wai Fong v Kie Yik* [2022] UKPC 14; [2022] B.C.C. 953 Lady Rose emphasised the decision of Lord Mance "should not

be regarded by prospective appellants as a watering down of the principles in *Devi v Roy* as confirmed in many later cases" (para 90). Maybe not, but the decision perhaps emphasises the approach in the old Indian cases – at least to the extent of requiring "very careful attention to the evidence" led and to how it was dealt with by the courts below (*Mussumat Jariut-oll-butool*). Characteristically insightful, Lady Rose deals with this point. It is a question of *focus*. At para 91:

> "Ms Ma's written case to the Board in this appeal is peppered with complaints that the judge and the Court of Appeal "failed to appreciate" or "failed properly to take into account" or "disregarded" or "failed properly to apply its mind to" or "failed properly to address" or "failed to give proper weight to" or "overlooked" very many aspects of the evidence or arguments presented to the judge at trial. There appears to have been no attempt to distinguish between on the one hand instances where the judge clearly has appreciated, taken into account, addressed and given weight to Ms Ma's evidence and submissions but decided to reject them for the reasons he has given and on the other hand in identifying any instances that show that the judge really has failed to perform his judicial task. This is not a helpful approach to adopt in an appeal of this kind to the Board."

47. That's the point: forget general disagreement with factual conclusions reached by the courts below which are (a) reasonable and (b) supported by reasons (even if you think those findings are wrong). Those points are a waste of time and will turn the Board against you. Where did the trial judge go wrong in their *approach* to the evidence? Identify (or at least try to identify) core issues that were missed; evidence inexplicably left out of the mix; witnesses not listened to; oral evidence not tested against the documents or inherent probabilities; unchallenged evidence inexplicably rejected; where to use Lady Rose' apt words where did "the judge… fail… to perform his judicial task"?

48. What the Board is looking for – I emphasise – is evidence that something went wrong below; I return to that admittedly vague proposition, but it encapsulates the nub of the point: did the appellant get a proper outing on their evidence below? Did they get fair and full consideration of the facts and arguments presented? That's what an Apex court is interested in. Not whether the findings of fact below might have been made differently or the case decided the other way. Almost every difficult case is like that. These are errors I have seen even the most brilliant lawyers make (many well above my pay grade). The Board is interested only to see that their local courts are doing their job properly. Judges make mistakes. We are all human. Identify the mistakes and focus on their potential impact on the evidence. Don't get lost in meanderings about some finding or other that the client doesn't like.

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