THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2024/0022

BETWEEN:

INDIRA SALISBURY
(As executrix for the estate of David Toms)

Appellant

and

ASTRA HOLDINGS LIMITED

Respondent

Before:

The Hon. Mde. Margaret Price Findlay	Chief Justice [Ag.]
The Hon. Mde. P. Nicola Byer	Justice of Appeal
The Hon. Mde. V. Georgis Taylor-Alexander	Justice of Appeal [Ag.]

Appearances:

Mr. Leslie Thomas KC for the Appellant
Mr. Anthony Astaphan SC with him Mr. Kwame Simon and
Mrs. Carla Brookes-Harris for the Respondent

2026: April 30;
September 21.

Civil Appeal — Breach of fiduciary duty by director and beneficial owner — Shares held in trust — Whether the learned judge erred by mischaracterising evidence — Whether the learned judge erred in concluding that the witness was an untruthful witness without being cross examined about having seen corroborating bank statements — Supporting evidence — Whether the learned judge erred in drawing adverse inferences from the absence of bank statements evidencing transfers to the respondent, without properly considering whether there was any legal or practical obligation to retain such documents — Whether the learned judge conflated distinct issues — Whether the learned judge erred in finding that there was a breach of fiduciary duty by failing to properly consider that the former director honestly believed he was acting in the best interests of the company — Whether the learned judge erred in failing to assess the former director's subjective intentions and the evidence supporting his bona fide belief that his actions would benefit the company — Whether the learned judge erred by failing to properly consider the evidence — Whether the judge erred in stating that the meeting minutes were placed on the side table — Whether the learned judge erred in granting relief vesting shares in the respondent without properly considering the appellant's argument *that such relief would constitute an unjustified windfall — Whether the former director was the majority beneficial owner and controlling mind*

The appellant is the executrix of the late Mr. David Toms ("Mr. Toms"), who was the sole director and chairperson at the respondent's company. Acting as director of the respondent, Mr. Toms executed a loan facility with the Antigua Commercial Bank ("ACB") for the purpose of financing a real estate development. He further withdrew approximately EC $2.04 million from this facility and used the funds to acquire a 66.7% shareholding in Atlantic Properties Limited ("Atlantic"). The shares were purchased under two personal trusts for his benefit, with Executive Directors Limited and Executive Holdings Limited serving as trustees. Following his death, the appellant and her co-executrix were declared the owners of the 66.7% shareholding in Atlantic.

The respondent by claim filed on 7th June 2017 sought, among other things, a declaratory relief that it was the owner of 66.7% of the shares in Atlantic registered in or entitled to be registered in the name of the appellant and a declaration that until so registered those shares are held in trust for the respondent and an injunction restraining the appellant from disposing or dealing with the shares in Atlantic until determination of the claim.

The respondent alleged that although Mr. Toms was never formally appointed a director, he acted as a de facto or de jure director and therefore owed fiduciary duties. It was alleged that Mr. Toms breached his fiduciary duties by diverting approximately EC $2.04 million from the loan facility to purchase 66.7% of the shares in Atlantic in his own name, without disclosure or shareholder consent.

Further, it is alleged that the respondent and its shareholders were unaware that Mr. Toms had used company funds for his personal benefit until many years after the transactions and after his death. There is no evidence that he at the time of the withdrawal, informed the shareholders of the use of the funds, nor was any approval sought or obtained for the loan withdrawals.

The appellant contends that the use of the funds to purchase shares in Atlantic was disclosed at the respondent's annual general meeting on 28th March 2003, approximately six months after the acquisition of Atlantic.

The respondent further denied the existence of an alleged debt owed to Mr. Toms. The respondent submits that, notwithstanding a reference to "a debt" by Mr. Kingsley Thorogood in his Interim Financial Report, and in the accounts prepared by the accountants Pannel Kerr Forster, there is no document, record or resolution approving this alleged debt or its terms.

The learned judge found that no valid director's loan existed. She found that the appellant failed to produce any contemporaneous documentation such as agreements, bank statements, resolutions, or minutes, to substantiate the alleged indebtedness. Further, even if a loan had existed, the learned judge found that Mr. Toms breached his fiduciary duties as disclosure was inadequate.

Being dissatisfied, the appellant appealed against this decision. First, the appellant contended that the learned judge erred in her assessment of the evidence relating to the alleged director's loan, in particular by mischaracterising and unjustifiably discrediting the evidence of a witness. The respondent however submitted that there was no requirement to cross-examine the witness on the alleged paperwork he said he reviewed in England, because the central issue before the court was not what documents he may have seen privately, but the complete absence of any disclosure of such documents to the shareholders.

Second, the appellant argued that the learned judge erred in drawing adverse inferences from the absence of bank statements or other historic financial records, while the respondent submitted that the learned judge was entitled to treat the absence of documentary evidence as undermining the appellant's case because given the size of the loan, ordinary reasonable business and prudent practices and/or Mr. Toms fiduciary obligations required the keeping of supporting documents.

Third, the appellant contended that there is no authority that shareholder approval is required for directors to loan money to the company so the judge's finding that it was necessary to authenticate the loan was wrong. However, the respondent submitted that the learned judge was entitled to consider the broader question of whether the shareholders were properly informed of significant financial dealings undertaken by Mr. Toms for his benefit.

Fourth, the appellant contends that the learned judge failed to give proper regard to Mr. Toms' subjective good-faith belief that the Atlantic transaction, and the resulting repayment of the director's loan, were in the best interests of the respondent. The respondent however submitted that there was no contemporaneous or objective evidence capable of supporting any such belief.

Lastly, the appellant stated that to the extent that the judge wrongly thought that the 2002 AGM minutes were not sent to the shareholders in advance, but merely placed on the side table, this error constituted a misstatement or misunderstanding of the evidence before her. While the respondent stated that the learned judge was correct in finding that the mere placement of the 2003 and 2004 Interim Financial Report on a side table at an AGM did not meet standards of disclosure expected of a director to counter allegations of a breach of fiduciary duty.

The appellant raised 8 grounds of appeal, however the following issues could be distilled: whether the learned judge erred in concluding: that no director's loan was owed by the respondent to Mr. Toms; that Mr. Toms failed to make adequate disclosure to shareholders; that the relevant disclosure was not proactively circulated; that Mr. Toms breached his fiduciary duties to the respondent and that disclosure to shareholders was required in order to authenticate the alleged director's loan.

Held: Dismissing the appeal; granting the respondent's notice to uphold the decision of the learned judge; affirming the order below and awarding costs to the respondent to be agreed within twenty-eight days of the delivery of the judgment or otherwise assessed, that:

1. The appellant ultimately bears the burden of proof to produce the necessary documentation to substantiate its claims. As the existence of the loan itself was directly challenged, in the absence of any loan agreement, bank statements,

resolutions, or other supporting records disclosed either to the shareholders or to the court, the judge was entitled to find that the existence of a director's loan had not been proved. The absence of clear loan terms and supporting documentation undermined the legitimacy of the alleged loan. Although the learned judge's summary of the witness' evidence did not capture the full extent of his assertion that he had reviewed underlying documents, this omission was not material. The judge's conclusion did not rest on a rejection of his credibility, but on the appellant's failure to produce any contemporaneous documentation capable of evidencing the existence of a director's loan. As such, no error of principle or misdirection has been demonstrated.

2. In a commercial dispute of this nature, and particularly where the director stood to benefit personally, it was entirely reasonable to expect that such documents would have existed and been preserved, notwithstanding the passage of time. Viewed in that light, the absence of supporting documentation was a matter of legitimate and substantial weight, and the learned judge was plainly entitled to draw appropriate inferences from its unavailability.

   Efobi v Royal Mail Group Ltd [2021] UKSC 33 distinguished; **Win Business (Caofeidan) Limited formerly Win Business (Africa) Ltd v Anadarko China Holdings Company and Anadarko Petroleum Corporation** BVIHCMAP2022/0044 (delivered 5th July 2023, unreported) considered.

3. While a director's good faith belief remains relevant in determining whether a fiduciary duty was breached, honesty cannot be determined purely subjectively. Rather, the court may examine the objective circumstances in assessing whether such a duty was breached. The case before the learned judge was one of alleged breach of fiduciary duty arising from nondisclosure, not a case turning on the director's subjective commercial judgment or his asserted belief in the merits of the transaction. Her focus on whether there existed a credible director's loan, whether the withdrawals from the company's account were ever disclosed to the shareholders, and whether any such disclosure was capable of amounting to informed consent or ratification, was entirely consistent with the fiduciary principles engaged.

   Regentcrest plc v Cohen [2001] 2 BCLC 80 distinguished; **Extrasure Travel Insurances Ltd v Scattergood** [2003] 1 BCLC 598 distinguished; **Re Spring Media Investments Ltd; Saxon Woods Investment v Costa** [2025] Bus LR 2443 applied.

4. Appellate courts are slow to interfere with findings which turn on the trial judge's appreciation of the evidence as a whole. Unless there is a material error of law or a conclusion that is plainly wrong or outside the bounds of reasonable disagreement, the appellate court must defer to the trial judge's evaluation. No such error has been demonstrated in this case. Having reviewed the record and the reasoning of the learned judge, her conclusions were firmly anchored in the evidence and the applicable fiduciary principles. The appellant has not met the high threshold required to overturn findings of fact or evaluative judgments.

Adolphus John Sitney v Benedict Noel GDAHCVAP2022/0018 (delivered 25th March 2026, unreported) applied; **Maso Capital Investments Ltd and another v Trina Solar Ltd** [2026] Bus LR 373 applied.

JUDGMENT

[1] **TAYLOR-ALEXANDER JA [AG.]**: This is an appeal against the order of the learned judge dated 21st June 2024, entering judgment for the respondent, declaring the respondent the owner of 66.7% shares in Atlantic Properties Limited; that the 66.7% shares are held on trust by the appellant for the respondent until registered in the name of the respondent and awarding prescribed costs and interest to the respondent. The appellant asks that the order of the learned judge is set aside; that the claim is remitted to the High Court for a trial *de novo* before a different judge and that the respondent pay the appellant's costs of the appeal.

Factual Background

[2] The appellant is the former partner and executrix of the late Mr. David Toms, (Mr. Toms), a British citizen who died on 7th April 2005. The respondent is a company incorporated in Antigua and Barbuda. During his lifetime, Mr. Toms served as the respondent's sole director and chairperson.

[3] The respondent is a land-holding company and the holder of a non-citizen's land-holding licence. At its incorporation in 1987, the respondent had four shareholders: Arpels Investments Ltd (an Isle of Man company), the Government of Antigua and Barbuda, Clare Roberts, and Alistair Porter. The respondent contends that Mr. Toms managed the company pursuant to a six-month, limited, and revocable power of attorney issued by its majority shareholder, Arpels Investments Ltd. The appellant, however, maintains that Mr. Toms was the ultimate beneficial owner and controlling mind of Arpels, an assertion the respondent disputes. It is undisputed that Clare Roberts and Alistair Porter held their shares on trust for Arpels. Mr. Porter, who acted as Mr. Toms' English solicitor, died in the 1990s, and his shareholding is understood to have been transferred to Mr. H. Asquith Fearon.

[4] On 6th February 2002, acting as director of the respondent, Mr. Toms executed a loan facility with the Antigua Commercial Bank ("ACB") for the purpose of financing a real estate development at Laurie's Bay, St. Philip's North. In or about June 2002, he withdrew approximately EC $2.04 million from this facility and used the funds to acquire a 66.7% shareholding in Atlantic Properties Limited ("Atlantic"). The shares were purchased under two personal trusts for his benefit, with Executive Directors Limited and Executive Holdings Limited serving as trustees. Following his death, the appellant and her co-executrix were declared the owners of the 66.7% shareholding in Atlantic. The acquisition was funded by ACB cheques drawn on the respondent's loan facility.

[5] At the time of the acquisition, Atlantic owned approximately 48 acres of land near the St. James Club in Antigua and Barbuda (the "Savannah land"). Subsequently, roughly 20 acres of this land were sold to third parties, but the proceeds of sale were not deposited into the respondent's bank accounts.

[6] The appellant asserts that the withdrawals from the respondent's ACB loan account constituted repayment of director's loans allegedly owed by the respondent to Mr. Toms, and that these transactions were recorded as such in the respondent's accounts prepared by Kingsley Thorogood and audited by Pannell Kerr Forster. Mr. Thorogood, who was involved in the respondent's management from 2000 until Mr. Toms' death, held the title of Finance Director Designate. He was never formally appointed as a director due to licensing requirements but worked closely with Mr. Toms and prepared the respondent's financial statements and related documents.

[7] The respondent and its shareholders were unaware that Mr. Toms had used company funds for his personal benefit until many years after the transactions and after his death. There is no evidence that he at the time of the withdrawal, informed the shareholders of the use of the funds, nor was any approval sought or obtained for the loan withdrawals. The appellant contends that the use of the funds to purchase shares in Atlantic was disclosed at the respondent's annual

general meeting on 28th March 2003, approximately six (6) months after the acquisition of Atlantic.

[8] The respondent denies the existence of an alleged debt owed to Mr. Toms. The respondent submits that, notwithstanding a reference to "a debt" by Mr. Kingsley Thorogood in his Interim Financial Report, and in the accounts prepared by the accountants Pannel Kerr Forster, that there is no document, record or resolution approving this alleged debt or its terms.

[9] The Laurie Bay development was never completed. The appellant maintains that Mr. Toms' use of the loan facility did not cause the respondent's failure to develop the land. She states that preparatory work had commenced, including architectural plans for the first 20 acres, envisioned to contain 40 villas, prepared by an architect from Montserrat. A detailed Environmental Impact Assessment was also undertaken by a Trinidad-based firm, and discussions were held with relevant government departments regarding planning permission.

The Proceedings in the Court Below

[10] By claim form and amended statement of claim filed on the 7th June 2017, the respondent/claimant sought declaratory relief that it was the owner of 66.7% of the shares in Atlantic registered in or entitled to be registered in the name of the appellant/defendant and a declaration that until so registered those shares are held in trust for the respondent/claimant; an injunction restraining the appellant/defendant from disposing or dealing with the shares in Atlantic until determination of the claim and an order directing the Registrar of Companies to withhold any filings made by the appellant/defendant in respect of Atlantic pending determination of the claim, save and except as these relate to compliance with the court order made on 26th September 2016 in High Court claim ANUHCV2010/0319, other relief as the court sees just; damages and costs.

[11] In its claim form the respondent/claimant alleged that although Mr. Toms was never formally appointed a director, he acted as a de facto or de jure director and therefore owed fiduciary duties. The claimant relied on documentary

records showing Mr. Toms listed as director in annual returns and signing loan documents as chairman, including the 2002 ACB loan facility, which was expressly for developing the Laurie Bay lands. The respondent/claimant alleged that Mr. Toms breached his fiduciary duties by diverting approximately EC $2.04 million from the ACB loan facility in June 2002 to purchase 66.7% of the shares in Atlantic in his own name, without disclosure or shareholder consent. The respondent/claimant further submits that the purchase was executed using cheques drawn on the respondent/claimant's loan account and that Mr. Toms later became the registered owner of the shares.

[12] The respondent/claimant further asserted that the Laurie Bay development never proceeded because funds were diverted, and that Mr. Toms placed himself in a conflict of interest by using company assets for personal gain. It also alleged that 20 acres of Atlantic's Savannah land were later sold, but the proceeds were never deposited into the respondent/claimant's accounts.

[13] In its amended defence, the appellant/defendant fundamentally disputes the respondent/claimant's case that Mr. Toms misused company funds and breached fiduciary duties. She asserts that Mr. Toms was at all material times a director, chairman, and the majority beneficial owner and controlling mind of both Astra Holdings Ltd and Arpels Investments Ltd, contrary to the respondent/claimant's allegation that he acted only under a limited power of attorney.

[14] She accepts that Mr. Toms obtained the 2002 ACB loan on behalf of Astra. She maintained that the funds used to acquire the 66.7% shareholding in Atlantic were not misappropriated but rather constituted a lawful repayment of a director's loan owed by Astra to Mr. Toms. She relies on audited accounts prepared by Pannell Kerr Forster, which recorded a substantial director's loan as a current liability.

[15] The appellant/defendant denied any breach of fiduciary duty, asserting that full disclosure was made to shareholders, particularly through the 2002 and 2003 AGM financial reports prepared by Finance Director Designate Kingsley

Thorogood. She states that shareholders, including the government's representative, Mr. Justin Simon QC, the Attorney General at the time, were informed of the use of EC $1.6 million from the director's loan account and raised no objection. The appellant/defendant argues that this amounted to shareholder ratification or acquiescence.

[16] The appellant/defendant disputed the respondent/claimant's characterisation of the ACB loan as an "asset" and denies any obligation to segregate loan funds. She also denies that the respondent/claimant ever had a beneficial interest in Atlantic, which were held by two trust companies for Mr. Toms.

[17] The appellant/defendant argued that the respondent/claimant's inability to locate documents proving the director's loan does not shift the burden of proof, and that the respondent/claimant's own audited accounts confirm the indebtedness. The appellant/defendant also raised defences of limitation and laches, asserting that the claim, brought some 15 years after the events, should be barred due to delay, prejudice, and the death of Mr. Toms, who can no longer give evidence.

[18] After written and oral evidence at a trial, the learned judge found that no valid director's loan existed. She found that the appellant/defendant failed to produce any contemporaneous documentation such as agreements, bank statements, resolutions, or minutes, to substantiate the alleged indebtedness. The financial statements alone were insufficient, particularly given the absence of source documents and the inability to test the auditor's report through cross-examination. The court concluded that the supposed loan was not proven and that any repayment was therefore improper.

[19] Even if a loan had existed, the learned judge found that Mr. Toms breached his fiduciary duties. Disclosure at AGMs or through financial statements was inadequate: documents were merely placed on a side table rather than proactively circulated, and no meaningful details of the loan or the intended use of company funds were provided. Full and timely disclosure to shareholders, required to resolve conflicts of interest, was not made, nor were the conditions

or purpose of the loan ever properly explained. The learned judge held that Mr. Toms failed to disclose both the alleged loan and his intention to use company funds to acquire the Atlantic shares, amounting to a breach of fiduciary duty.

[20] On limitation and laches, the court rejected the appellant/defendant's arguments. The respondent/claimant could not reasonably have discovered the breach earlier because key documents were in the possession of Mr. Toms and the Office of National Drug and Money Laundering Control Policy ("ONDCP"). The respondent/claimant only became aware of the relevant facts in 2015, and the action filed in 2017 was not an unreasonable delay. The appellant/defendant suffered no additional prejudice from the timing, as Mr. Toms' death in 2005 would have posed the same evidential difficulty regardless.

The Appeal

[21] By notice of appeal filed on the 30th of June 2024 the appellant challenges several findings of fact, of the learned judge, namely: the learned judge's conclusion that Mr. Toms ceased to be the respondent's controlling mind in February 2005; the determination that no director's loan was owed by the respondent to Mr. Toms; the findings that Mr. Toms failed to make adequate disclosure to shareholders; and the specific finding that relevant disclosure was not proactively circulated. The appellant also disputes the learned judge's findings of law, in particular the conclusions that Mr. Toms breached his fiduciary duties to the respondent and that disclosure to shareholders was required in order to authenticate the alleged director's loan.

[22] The appellant advances the following grounds of appeal:

(a) That the learned judge erred by mischaracterising Kingsley Thorogood's evidence as merely accepting Mr. David Toms' assertion that he had invested monies into the respondent.

(b) That the learned judge erred in concluding that Mr. Thorogood was an untruthful witness regarding the existence of the director's loan, without Mr. Thorogood being cross examined about having seen corroborating bank statements.

(c) That the learned judge erred in drawing adverse inferences from the absence of bank statements evidencing transfers from Mr. Toms to the respondent, without properly considering whether there was any legal or practical obligation to retain such documents, particularly given the passage of more than 20 years and, despite the presence of audited financial statements recording the loan and the lack of evidence that the appellant had access to all of Mr. Toms' papers.

(d) The learned judge conflated two distinct issues: (i) whether the shareholders were informed of the respondent/claimant loan debt to Mr. Tom's and (ii) whether the shareholders were informed that Mr. Toms had drawn on the director's loan account to purchase the Atlantic Properties shares.

(e) That the learned judge erred in finding that there was a breach of fiduciary duty by failing to properly consider the appellant's submissions that Mr. Toms honestly believed he was acting in the best interests of Astra. Whether the learned judge erred in failing to assess Mr. Toms' subjective intentions and the evidence supporting his bona fide belief that the Atlantic transaction and associated loan repayment would benefit Astra.

(f) Whether the learned judge erred by failing to properly consider the clear reference in the 2002 AGM minutes which were sent to all shareholders, in advance of the 2003/4 AGM and whether the judge erred in stating that the 2002 AGM minutes were placed on the side table.

(g) The learned judge erred in granting relief vesting the Atlantic Properties shares in the respondent without properly considering the appellant's argument that such relief would constitute an unjustified windfall.

(h) Whether the learned judge erred by failing to address the appellant's contention, supported by undisputed documents, that Mr. Toms was the majority beneficial owner and controlling mind of Arpels Investments Limited.

[23] At the outset of the hearing, ground (h) was abandoned, and ground (g) was advanced only on the footing that this Court accepted the premise underlying grounds (a)–(d), namely that the learned judge erred in law in finding that no director's loan existed. I propose to deal grounds (a) and (b) together and thereafter the other grounds of appeal in turn.

Whether the learned judge erred in her assessment of the evidence relating to the alleged director's loan, by mischaracterising and unjustifiably discrediting the evidence of Mr. Kingsley Thorogood (ground (a) and (b)).

Appellant's Submissions

[24] The appellant contends that the learned judge erred in her assessment of the evidence relating to the alleged director's loan, in particular by mischaracterising and unjustifiably discrediting the evidence of Mr. Kingsley Thorogood. She submits that the learned judge's finding at paragraph [143] of her judgment, that Mr. Thorogood merely accepted Mr. Toms' assertion that he had invested monies into the company, does not reflect his actual evidence. The appellant points to Mr. Thorogood's second supplementary witness statement, in which he stated that he prepared the accounts at Mr. Toms' family home in Dorset, where he spent considerable time collating paperwork, including bank statements and invoices, which substantiated the investments said to have been made.

[25] The appellant argues that the learned judge's conclusion that Mr. Thorogood was an untruthful witness was procedurally unfair. While he accepted in cross-examination that there was no written loan agreement or shareholder

resolution, it was never put to him that his evidence about reviewing supporting documentation was false. The appellant relies on the principle, affirmed in **Griffiths v TUI (UK) Ltd,**[1] and summarised in *Phipson on Evidence*,[2] that if a party intends to invite the court to reject a witness's evidence on a material point, fairness requires that the witness be challenged on that point in cross-examination. The appellant also cites **Abdi v Entry Clearance Officer,**[3] where the Court of Appeal of England reiterated that fairness to the witness and to the parties requires that any intended adverse credibility finding be put squarely to the witness. The appellant submits that, in the absence of such a challenge, the judge was not entitled to reject Mr. Thorogood's evidence on this critical issue.

Respondent's Submissions

[26] The respondent submits that there was no requirement to cross-examine Mr. Thorogood on the alleged paperwork he said he reviewed in England, because the central issue before the court was not what documents he may have seen privately, but the complete absence of any disclosure of such documents to the shareholders. The respondent argues that the burden rested squarely on Mr. Toms, and subsequently on the appellant, to produce the necessary information and documentation if they wished to rely on a director's loan and to obtain the informed consent of the company and its shareholders. That burden, it is said, was never discharged. In those circumstances, the respondent contends that the learned judge was entitled to assess the credibility and weight of Mr. Thorogood's evidence in light of the undisputed fact that no supporting documentation was ever produced to the company, regardless of what he may have reviewed privately.

Analysis of the Judge's Findings on the Alleged Director's Loan

[27] Paragraph 20 of Mr. Thorogood's second supplemental affidavit records his evidence that, upon being asked to bring the company's accounts up to date,

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[1] [2023] UKSC 48.
[2] Hodge M Malek (ed), Phipson on Evidence (20th edn, Sweet & Maxwell 2022).
[3] [2023] EWCA Civ 1455.

he worked primarily at Mr. Toms' family home in Dorset, where he collated paperwork including bank statements and invoices, and provided his "full working papers" to the auditors, Pannell Kerr Forster. He stated that the records forming the basis of the annual accounts established that Mr. Toms had injected substantial personal funds into the company by way of a director's loan. On its face, this evidence goes beyond merely accepting Mr. Toms' assertion that he had invested monies into the company, and the learned judge's summary did not fully reflect that aspect of his account. However, his evidence remained notably unspecific as to the content of the bank statements, invoices, or other documents he reviewed, or which of them, if any, evidenced the existence of a director's loan.

[28] The learned judge's reasoning did not turn on whether she accepted that Mr. Thorogood had privately reviewed documents, but on the undisputed fact that none of those documents were ever produced to the company, to its shareholders, or to the court. She emphasised the complete absence of contemporaneous records, loan agreements, bank statements, resolutions, promissory notes, or minutes supporting the alleged indebtedness. In that context, she concluded that the evidence of a director's loan lacked credibility and that neither Mr. Thorogood's testimony nor the financial statements prepared by Pannell Kerr Forster discharged the burden on the appellant to prove the existence of the loan.

[29] The learned judge undertook a detailed assessment of the evidence before her at paragraphs [141] – [149] of her judgment. She noted the respondent's position that a thorough review of its records revealed no documentary evidence of any director's loan and accepted that the mere appearance of a loan entry in the financial statements for 2000 and 2001 was not determinative. She highlighted the absence of basic loan terms, interest, repayment arrangements, or the date of the loan and emphasised that proper corporate governance requires significant financial transactions to be documented and approved. She found that the duty of transparency owed by a director extends beyond recording a figure in the financial statements.

[30] At paragraph [143], she noted that Mr. Thorogood accepted in cross-examination that there was no loan agreement and that no bank statements, resolutions, promissory notes, internal memoranda, or board minutes were produced to substantiate the alleged investments. She observed that, as sole director, Mr. Toms could easily have ensured that any substantial financial contributions were properly recorded. She considered it inherently unlikely that a businessman of his experience would have failed to document a loan of this magnitude and viewed this inconsistency as supporting the inference that the alleged loan was fabricated.

[31] The learned judge also discounted the evidential value of the auditor's report, noting that it was hearsay, as the auditor was not called to give evidence and the report was not exhibited through any competent witness. Without the ability to test the methodology or underlying documents, the report could not prove the existence of the loan. This concern was reinforced by the appellant's own evidence that many of the source documents an auditor would ordinarily rely upon were missing.

[32] Ultimately, the learned judge's conclusion turned on the appellant's inability to substantiate the existence of a director's loan with documentary proof provided to the company, the shareholders or to the court. As she stated at paragraphs [144] and [148], the absence of clear loan terms and supporting documentation undermined the legitimacy of the alleged loan, and the appellant, who bore the burden of proof, failed to meet the requisite standard.

[33] In the result, although the learned judge's summary of Mr. Thorogood's evidence did not capture the full extent of his assertion that he had reviewed underlying documents, this omission was not material. The judge's conclusion did not rest on a rejection of his credibility, but on the appellant's failure to produce any contemporaneous documentation capable of evidencing the existence of a director's loan.

[34] The authorities relied upon by the appellant, including **Griffiths v TUI (UK) Ltd** and **Abdi v Entry Clearance Officer**, do not materially assist. In this case, the

existence of the loan itself was directly challenged, and the burden rested squarely on Mr. Toms, and subsequently the appellant, to produce the necessary documentation to substantiate it. That burden was never met and in the absence of any loan agreement, bank statements, resolutions, or other supporting records disclosed either to the shareholders or to the court, the judge was entitled to find that the existence of a director's loan had not been proved. No error of principle or misdirection has been demonstrated, and this ground of appeal accordingly fails.

Did the learned judge improperly draw adverse inferences from the absence of historic bank statements without considering the age of the documents, any obligation to retain them, or the appellant's limited access to Mr. Toms' records

[35] On this ground the appellant frames the issue as one of evidential fairness and the limits of permissible inference drawing. The respondent, by contrast, treats it as a question of fiduciary duty and permissible inferences.

[36] The appellant's case is that the learned judge erred in drawing adverse inferences from the absence of bank statements or other historic financial records. Relying on **Efobi v Royal Mail Group Ltd,**[4] the appellant submits that a court may only draw such inferences where, as a matter of "ordinary rationality," it is reasonable to expect the missing evidence to be available. She argues that, given the age of the events, there was no statutory or practical obligation to retain bank statements from decades earlier, and that the judge's assumption that a "shrewd businessman" would have kept such documents failed to take account of the statutory framework and the realities of long-term document retention. The appellant further contends that there was no evidence that she possessed all of Mr. Toms' papers, and that no allegation was put to her at trial that she ought to have produced such records. On this basis, the appellant submits that the absence of bank statements should not have been

[4] [2021] UKSC 33 at [41].

held against her, particularly in light of the audited financial statements recording the alleged loan.

[37] The respondent argues that the learned judge was entitled to treat the absence of documentary evidence as undermining the appellant's case because given the size of the loan, ordinary reasonable business and prudent practices and/or Mr. Toms fiduciary obligations required the keeping of supporting documents, which allegedly shows the existence and terms of the loan and therefore the relevant documentation ought to have been retained, notwithstanding the statutory minimum retention period. The respondent submits that the burden lay squarely on Mr. Toms, and subsequently on the appellant, to produce documents necessary to obtain the informed consent of the shareholders. That burden was never discharged, despite repeated requests. The learned judge was therefore entitled to draw inferences from their failure so to do.

[38] The respondent distinguishes **Efobi,** noting that it concerned the absence of a witness, not the absence of critical financial documents in a commercial case involving an alleged EC $1.6 million loan. The respondent contends that the mere recording of a loan in accounts prepared by Mr. Thorogood cannot substitute for the underlying documentation required to establish the loan's existence. Finally, the respondent submits that the appellant's suggestion that documents may have been seized by the ONDCP is speculative and irrelevant, as no such evidence was before the learned judge. In any event, had proper disclosure been made at the time, the respondent and its shareholders would have had copies of the relevant documents.

[39] The questions for consideration on this ground of appeal are whether it was reasonable for the learned judge to expect that documentary evidence of the alleged loan should have existed and been produced over twenty years after the alleged loan was created and whether the absence of such evidence could properly be treated as undermining the appellant's case.

Discussion and Analysis

[40] The central issue at trial was whether a director's loan existed. The learned judge acknowledged that the burden of establishing its existence rested squarely on Mr. Toms, and thereafter on the appellant, who relied on the alleged indebtedness to justify the impugned payment. At paragraphs [144] and [145] of her judgment, she articulated those concerns in terms that bear repeating:

> "[144] Of further concern is the fact that no clear terms of the alleged director's loan including the term, interest and repayment which ordinarily would lend some legitimacy to it was identified. The duty of complete transparency required of a director extends far beyond simply reporting an alleged loan amount in the financial statements. It is imperative to provide a comprehensive and precise account of all details related to the loan's date and conditions. Good corporate governance requires that significant financial transactions be properly documented and approved to ensure transparency and accountability.
>
> [145] Additionally, the fact that the director's loan was recorded several years after the alleged investment is highly unusual. The long delay in documenting such a significant transaction coupled with the lack of proper historical documentation undermines the credibility of the claim."

[41] The learned judge's analysis centred on the failure to make timely and transparent disclosure of the alleged director's loan to the company. Her focus was firmly rooted in Mr. Toms' fiduciary duty as director to ensure full transparency in any transaction from which he stood to benefit, and on the burden resting on him, and thereafter on the appellant, to prove the loan's existence. The absence of clear loan terms, the absence of supporting documentation, and the significant delay in recording the alleged loan were all matters the learned judge had regard to as undermining the credibility of the claim. Her consideration of the missing bank statements was not confined to the appellant's failure to produce them at trial; rather, it formed part of her broader assessment of Mr. Toms' fiduciary obligations. In her view, these deficiencies were not mere evidential gaps but indicators of a failure to act with the diligence required of a director dealing with company funds for his own benefit. At paragraph [153] of her judgment, she said this:

> "[153] The fiduciary duty of a director demands a high level of responsibility, especially regarding financial matters or personal profit-making. Consequently, it was the deceased director's obligation to maintain accurate and prompt financial records. Such records would verify the legitimacy of the loan and dispel any suspicions among shareholders or other stakeholders about improper conduct, ensuring

that the transaction was conducted fairly and transparently. Unfortunately, this was not the case. The evidence before the court is that the director's loan was made by the deceased at the point of incorporation and that he lent other sums of money to the Claimant as the years passed. There is no evidence which demonstrates that this loan was approved by the shareholders or that they knew of its existence at the time it was made. The eventual revelation of a director's loan, lacking substantial corroborative details long after its supposed inception, did not meet the stringent standards expected of a director's duties."

[42] This case concerned an alleged million-dollar director's loan and the accounting for missing company assets. In those circumstances, it was proper for the court to examine what a prudent sole director, who was also the controlling mind of the company and a personal beneficiary of the transactions, ought to have done, and to measure Mr. Toms' conduct, and the appellant's position as his executor, against that standard. The appellant treated her burden too narrowly, as if the only question was what documents she could realistically produce or was statutorily required to produce at trial to prove a loan from Mr. Toms to the company. The real inquiry was a broader one: namely what duties of disclosure, transparency, and proper documentation a sole director owed to the company and its shareholders when entering a transaction from which he stood to benefit personally.

[43] The principle in **Efobi,** a case relied on by the appellant, is that the drawing of adverse inferences is not governed by rigid legal rules but is a matter of ordinary rationality, informed by the practical realities. At paragraph [41] of **Efobi** the Court explained that tribunals should be free to draw, or decline to draw, inferences using their common sense, having regard to what evidence it was reasonable to expect, the circumstances in which it was absent, and the significance of the missing material in the context of the case as a whole. The Court said:

"[41]. The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in Wisniewski v Central Manchester Health Authority [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality.

> So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."

[44] Applied to the present case, **Efobi** offers no assistance to the appellant. The missing evidence here is not the absence of a witness, as in **Efobi**, but the absence of core financial records, bank statements, loan terms, resolutions, and contemporaneous documentation, said to evidence a million-dollar director's loan that was never brought to the attention of the company's shareholders. In a commercial dispute of this nature, and particularly where the director stood to benefit personally, it was entirely reasonable to expect that such documents would have existed and been preserved, notwithstanding the passage of time. Viewed in that light, the absence of supporting documentation was a matter of legitimate and substantial weight, and the learned judge was plainly entitled to draw appropriate inferences from its unavailability. The learned judge's analysis was a straightforward application of ordinary rationality to the evidential record before her.

[45] The appellant's argument about statutory retention periods is equally unconvincing. The learned judge's reasoning did not turn on any statutory duty to keep records, but on the practical expectation that a person asserting a substantial loan would preserve and produce the documents needed to prove it.

[46] Further and to the extent that the appellant suggests that even if Mr. Toms had retained bank statements, it could not be assumed that they would still be in her possession because certain papers were seized by the ONDCP, that submission does not assist her. The appellant does not assert, as a matter of

fact, that any documents substantiating the alleged loan were ever in Mr. Toms' possession, in her possession, or seized by the ONDCP. What is offered is, at its highest, speculation about the whereabouts of possible documents. Moreover, the appellant properly acknowledges that this contention was not advanced before the court below and is raised for the first time on appeal. In **Win Business (Caofeidan) Limited formerly Win Business (Africa) Ltd v Anadarko China Holdings Company and Anadarko Petroleum Corporation,**[5] this Court restated the principles governing the raising of new points on appeal:

> "Parties should argue all their points at first instance and a trial is not the dress rehearsal for the appeal. When a party seeks to raise a new point on appeal, the party should seek the Appellate Court's permission to so do, and a cogent explanation should be given as to why the point was not raised below. A case need not be exceptional before a new point may be argued on appeal, however, whether or not an Appellate Court will permit a new point depends on where such new point lies on the spectrum between pure points of law that can be argued on the findings of the judge below, and those which, had they been raised below, might have changed the course of the evidence given at trial. Where a new point would require further evidence or, had the new point been argued below it would have resulted in different evidence being filed, an Appellate Court should err on the side of caution in allowing such new points to be raised. This caution is even greater where the other party has not had adequate time to deal with the new point."

[47] The submission that there were documents that may have been seized by the ONDCP is an insubstantial point, and allowing the appellant to rely on it at this stage would also plainly prejudice the respondent. Considering all these points, I find no basis to impugn the learned judge's findings on the absence of contemporaneous financial records as weakening the claim that a director's loan ever existed. Her conclusion rested on established fiduciary principles and a practical assessment of what a responsible director would have documented and disclosed. Nothing in the appellant's submissions demonstrates any error of law or unfairness in that approach. This ground of appeal therefore, fails.

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[5] BVIHCMAP2022/0044 (delivered 5th July 2023, unreported).

The Learned Judge conflated two distinct issues: (i) whether the shareholders were informed of the respondent/claimant's loan debt to Mr. Toms and (ii) whether the shareholders were informed that Mr. Toms had drawn on the director's loan account to purchase the Atlantic Properties shares

[48] The appellant on this ground submits that there is no authority that shareholder approval is required for directors to loan money to the company. Therefore, the judge's finding at [156] that full disclosure to shareholders was necessary to "authenticate the loan" was wrong in law. To the extent that the judge thought that Mr. Toms could not validly have loaned money to the company without the consent of the shareholders, that was a clear misdirection of law, which the appellant submits appears also to have vitiated the learned Judge's finding that there was no director's loan:

[49] This Company was incorporated in 1987, and under the legal framework that was replaced by the **Companies Act of Antigua and Barbuda**[6] in 1995. Neither the Articles of Association nor the Memorandum of Association provide for any restrictions on director loans to the company, and to that extent, I agree with the submission of the appellant that there is no authority that speaks to shareholder approval being required for directors to loan money to a company and in this case the respondent. Nevertheless, the learned judge's finding with which the appellant takes issue must be read in its context. The learned judge said from paragraph [155]-[157]:

> "[155] The Defendant's rationale for the director's failure to disclose the loan and the intended use of the Claimant's capital is unpersuasive. Directors are obliged to keep shareholders adequately informed about matters of importance. Merely stating that such information was available, yet ignored by shareholders, does not fulfil this obligation. Good governance mandates that this information be provided a reasonable time prior to the annual general meeting, ensuring individuals have sufficient time to peruse, comprehend, and highlight any issues they may need further explanation. This process is crucial for the matters to be addressed with due diligence at the AGM. The Defendant's suggestion that the minutes were merely placed on a side table implies that they were not proactively distributed, indicating a failure to meet the necessary standards of disclosure expected of a director to counter allegations of a breach of fiduciary duty.

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[6] Act No 18 of 1995.

> [156] Additionally, I dismiss the idea that the loan's disclosure in the financial statements at the annual general meeting would suffice in meeting the director's obligation to disclose. More substantial proof was required to authenticate the loan and to thoroughly inform the shareholders about the company's debt to the deceased. It was essential to share the loan's conditions and details before its arrangement to properly execute this responsibility. Similarly, the director needed to reveal his plans to use the Claimant's funds to purchase shares of Atlantic.
>
> [157] In the circumstances I find that the director's duty to disclose details of the loan along with the intended use of the Claimant's funds was not properly discharged and that this constituted a breach of Mr. Toms' fiduciary obligations to the Claimant."

[50] The judge's remarks at paragraph [156] were not directed to the legal validity of a director making a loan to a company. Rather, the remarks were made in the context of the director's fiduciary duty of disclosure and transparency to shareholders.

[51] It seems to me that when the learned judge stated that "more substantial proof was required to authenticate the loan," she could only be addressing the evidential and governance deficiencies surrounding the alleged loan transaction. The issue before the court was not simply whether a director could lend money to the company, but whether the director had properly disclosed, documented, and explained the transaction to shareholders in circumstances where the director stood in a position of conflict or potential self-interest; company funds were allegedly being used for a significant purpose; and the supposed disclosure consisted merely of references buried in financial statements. Thus, "authenticate the loan" in context means substantiate, verify, or properly evidence the existence and terms of the loan so as to satisfy the director's fiduciary obligations and demonstrate that the transaction was genuine, transparent, and properly disclosed.

[52] The respondent submits that the appellant's case at trial was that the existence of a director's loan in favour of Mr. Toms and the subsequent use of Astra funds to acquire the Atlantic shares in the name of Mr. Toms, were both matters known to Astra's shareholders and therefore incapable of resulting in a breach of

fiduciary duty or misapplication of funds. In considering these allegations the respondent submits that the learned judge was entitled to consider the broader question of whether Astra's shareholders were properly informed of significant financial dealings undertaken by Mr. Toms for his benefit.

[53] The respondent also submits further, that Mr. Toms was subject to the terms and conditions of a power of attorney, issued to him by Arpels the majority shareholder of the respondent that required him to report to the principals and keep them informed of decisions made by him.

[54] Consequently, the respondent submits that even if shareholder approval was not strictly required for a director to lend money to a company, the presence or absence of disclosure on the use of the funds was relevant to the credibility of the appellant's narrative. If shareholders were never told of the supposed EC $1.6 million director's loan, that strongly undermined the likelihood of its existence. I agree.

[55] The absence of clear disclosure and supporting evidence was therefore relevant, not to the legal capacity of Mr. Toms to lend money to the company, but to the credibility and authenticity of the appellant's narrative and to the assessment of whether Mr. Toms had discharged his fiduciary obligations. The learned judge was therefore entitled to conclude that the failures of disclosure and transparency constituted a breach of fiduciary duty. Consequently, this ground is also dismissed.

Did the learned judge wrongly conclude that Mr. Toms breached his fiduciary duties by giving insufficient regard to his subjective intentions and to evidence that he acted in the honest belief that the Atlantic transaction and related loan repayment were in the best interests of the respondent?

[56] On this ground, the appellant contends that the learned judge failed to give proper regard to Mr. Toms' subjective good-faith belief that the Atlantic transaction, and the resulting repayment of the director's loan, were in the best interests of the respondent. The appellant submits that while the judge was

entitled to scrutinise the objective reasonableness of Mr. Toms' conduct, she was required to consider his subjective intentions and the evidence said to support them. The finding of breach of fiduciary duty, cannot stand without an assessment of whether Mr. Toms honestly believed he was acting in the respondent's interests, even if that belief was ultimately mistaken. The appellant contends that this aspect of their case was not adequately addressed.

[57] The appellant submits that the judge did not have regard to the well-established principle that courts should not lightly interfere with the commercial judgment of directors acting in good faith, as articulated in **Regentcrest plc v Cohen,**[7] **Extrasure Travel Insurances Ltd v Scattergood,**[8] and **Hirsche v Sims**.[9] Those authorities the appellant argues establish that a director is not in fiduciary breach merely because he also personally benefits; the critical question is whether he honestly believed that his actions promoted the company's interests.

[58] The appellant submits that the proper test to be applied in assessing a director's honest belief is that affirmed in **Charterbridge Corporation Ltd v Lloyds Bank Ltd,**[10] whether an intelligent and honest director could reasonably have believed the transaction was for the company's benefit. The appellant says that the learned judge failed to apply this test and instead focused solely on the objective deficiencies in the transaction.

[59] The appellant maintains that there was substantial evidence supporting Mr. Toms' bona fide belief that the Atlantic transaction would benefit the respondent. Reliance is placed on the evidence of Mr. Thorogood, who stated that Mr. Toms intended the transaction to generate significant financial advantages for the company, and on contemporaneous documents, including correspondence with the ACB, corporate strategy plans, and financial statements, which, the appellant says, reflected a genuine expectation of future income streams and strategic opportunities for the respondent.

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[7] [2001] 2 BCLC 80 at 105.
[8] [2003] 1 BCLC 598 at [90]-[92].
[9] [1894] AC 654 at 660-661.
[10] [1970] Ch 62 at [74].

[60] The respondent counters the appellant's submissions by arguing that the contention that the learned judge failed to have regard to Mr. Toms' alleged subjective belief is misconceived. It submits that there was no contemporaneous or objective evidence capable of supporting any such belief, and that the appellant's case rested almost entirely on Mr. Thorogood's uncorroborated assertions. In the respondent's view, the authorities relied upon by the appellant, **Regentcrest, Extrasure, Hirsche, and Charterbridge** do not shield a director who acted in circumstances of serious and undisclosed conflict of interest, without shareholder consent, and without any documented process evidencing good-faith decision-making.

[61] The respondent further submits that the transaction was structured to benefit Mr. Toms personally, and that the alleged advantages to the company were speculative, unsupported by independent evidence, and based largely on internally generated documents whose reliability was in issue. Relying on **Re Spring Media Investments Ltd; Saxon Woods Investment v Costa**,[11] the respondent submits that an objective test of honesty applies to the actions of Mr. Toms, further, he was required to give full disclosure to the shareholders of all material facts, something wholly absent in this case.

[62] The respondent contends that the appellant cannot invoke subjective belief to justify conduct that was self-serving and structured to advantage the director personally; which was unsupported by contemporaneous, objective evidence of good faith decision making; and which was without informed consent and/or ratification of the shareholders.

The Decision of the Learned Judge

[63] At paragraph [14], the learned judge set out, with commendable clarity, the essence of the respondents' case and the nature of the allegation levelled against Mr. Toms in his capacity as director:

[11] [2025] Bus LR 2443.

> "[14] In light of the foregoing, the Claimant asserts that the deceased, as director of the Claimant, breached his fiduciary duty by placing himself in a position of conflict of interest and by utilising the assets of the Claimant without the fullest disclosure and without shareholders' approval. The Claimant further denies the existence of any director's loan made by the deceased to the Claimant, contending that he could not lawfully appropriate its funds on the basis of some purported set-off and/or to purchase shares in Atlantic Properties Limited in his own name without full disclosure, knowledge, and the informed consent or authorisation of the Claimant and its shareholders."

And at paragraph [21], she continued:

> "[21] Further, the Claimant states that the use of its loan funds by the deceased to purchase the shares in Atlantic Properties Limited was without proper authority and constituted a breach of his fiduciary duties to it."

[64] At paragraph [26], she recorded the position of the appellant, namely that no breach of fiduciary duty had occurred. The appellant maintained that Mr. Toms had made full disclosure to the members and shareholders of the respondent at the Arpels Investment annual general meeting held on 28th March 2003, and that he had explained that the funds utilised were monies owed to him by way of a director's loan.

[65] The learned judge's summary of the pleadings reflects that the breach of fiduciary duty allegation was grounded in the deceased director's failure to disclose to the board and to the shareholders the withdrawals made from the company's accounts and the use to which those funds were put.

[66] At paragraph [140], the learned judge distilled the issues requiring determination:

> "[140] The primary question for the court to determine is whether the Claimant has successfully demonstrated a breach of fiduciary duty. Additionally, to reach a conclusion on this matter, several related issues will need to be addressed, specifically:
>
> (i) Whether there was a director's loan;
>
> (ii) Whether the deceased director's disclosure in the financial statements or at the AGM sufficiently resolved the inherent conflict and countered the allegation of breach of fiduciary duty;

(iii) Whether this claim is subject to laches or is time-barred."

Discussion

[67] It is evident that, in directing her mind to the pleaded case of breach of fiduciary duty, the learned judge was required to focus on whether Astra's shareholders were ever properly apprised of the significant financial dealings undertaken by Mr. Toms. Central to that inquiry was the credibility of the alleged director's loan said to justify the withdrawal of funds from the respondent's account, and whether any disclosure in the financial statements or at the AGM could amount to the level of disclosure required of a fiduciary.

[68] The learned judge's task was to determine whether the shareholders had been sufficiently informed to provide informed consent, or whether they had expressly or impliedly ratified Mr. Toms' use of the respondent's funds to acquire shares in Atlantic Properties Limited in his own name. The issue was not whether Mr. Toms acted in good faith in purchasing the shares, but whether full disclosure and proper authorisation had been obtained. The allegation of breach of fiduciary duty was therefore assessed through that lens.

[69] The appellant's case rests on the proposition that the judge was required to focus on Mr. Toms' subjective state of mind, and to determine whether he honestly believed that the transaction benefited the company. But, as framed, this was not the pleaded case of either party. The learned judge cannot, therefore, be faulted for declining to embark upon an inquiry that the pleadings did not require her to undertake.

[70] In **Regentcrest** the High Court of England considered whether a director breached his fiduciary duty by supporting the waiver of a contractual clawback claim worth £1.5 million in favour of vendors, some of whom sat on the board. The waiver was approved during the company's financial difficulties in exchange for the vendors' continued assistance. After the company entered liquidation, the liquidators alleged that the director acted to protect the vendors rather than the company. The court rejected the claim, holding that the relevant test was

subjective: whether the director honestly believed the decision was in the company's best interests, not whether it was objectively wise.

[71] However, in 2025, the English Court of Appeal in **Re Springs Media** departed from the **Regentcrest** approach. The Court held that the duty under section 172 of the Companies Act 2006 is not assessed on a wholly subjective basis. While a director's good faith belief remains relevant, honesty cannot be determined purely subjectively, and the court may examine the objective circumstances in assessing whether the duty was breached. The Court of Appeal said: -

> "In our judgment, section 172 requires a director, in all he does, to act in good faith towards the company, in the way he considers would be most likely to promote the success of the company for the benefit of its members as a whole; and the requirement that the director acts in good faith includes, as a core fiduciary duty, a requirement that the director acts honestly towards the company."

[72] In the present case, the learned judge found that Mr. Toms was the sole director, the controlling mind of the company, and the personal beneficiary of the impugned transaction. In those circumstances, the law imposed on him a stringent duty of full and frank disclosure to the company and its shareholders. The judge found that this duty was not met. There were no contemporaneous loan terms, no resolutions, no supporting financial records, and no evidence that the shareholders were ever informed of, or consented to, the alleged benefits said to flow from the Atlantic transaction. These findings were open to the learned judge on the evidence.

[73] In the end, the learned judge approached the matter on the basis required by the pleadings and the evidence. The case before her was one of alleged breach of fiduciary duty arising from nondisclosure, not a case turning on the director's subjective commercial judgment or his asserted belief in the merits of the Atlantic transaction. Her focus on whether there existed a credible director's loan, whether the withdrawals from the company's account were ever disclosed to the shareholders, and whether any such disclosure was capable of amounting to informed consent or ratification, was entirely consistent with the fiduciary principles engaged. The authorities relied upon by the appellant, including **Regentcrest** and **Extrasure**, do not assist him, for they presuppose

transparency and the absence of undisclosed conflict, features the judge found to be wholly lacking here. Her further conclusion that Mr. Toms, as sole director and personal beneficiary of the impugned transaction, bore a stringent duty of full and frank disclosure, and that this duty was not met, was plainly open to her on the record. In these circumstances, no error of principle has been demonstrated, and the judge's finding of breach cannot be impugned. This ground of appeal therefore fails.

The learned judge's analysis at [153]-[157] failed to take into account the clear reference in the 2002 AGM minutes to "the Return of the Director's Loan Account of circa XCD$1.6m used temporarily to secure a contract completion" as evidence of disclosure. That the 2002 AGM minutes were circulated to all shareholders in advance and not merely placed on a side table at the AGM and in this regard, there was proactive disclosure of the director's loan and the Atlantic transaction

[74] The appellant states that to the extent that the judge wrongly thought that the 2002 AGM minutes were not sent to the shareholders in advance, but merely placed on the side table, this error constituted a misstatement or misunderstanding of the evidence before her. There was no evidential basis on which she could properly have made such a finding, and in reliance on **Miftari v Secretary of State for the Home Department**[12] submits that this is an appealable legal error that went to the core question of how much disclosure Mr. Toms and Mr. Thorogood had made to the shareholders about the Atlantic transaction.

[75] The appellant submits that there was clear reference in the 2002 AGM minutes to "the Return of the Director's Loan Account of circa EC $1.6 million used temporarily to secure a contract completion". These minutes were sent to the minority shareholders, in advance of the 2003/4 AGM. Contrary to the judge's statement at [155], it was the Interim Financial Statements, not the minutes, that were placed on the side table. The 2002 AGM minutes proactively disclosed the key information about the director's loan to shareholders.

[12] [2005] EWCA Civ 481 at [15]

[76] The respondent states that the learned judge was correct in finding that the mere placement of the 2003 and 2004 Interim Financial Report on a side table at an AGM did not meet standards of disclosure expected of a director to counter allegations of a breach of fiduciary duty. Further, the learned judge would have considered the 2002 AGM minutes which made no reference to the use of the respondent's facilities at ACB for the purchase of Atlantic shares by Mr. Toms or any informed consent and/or ratification of the share purchase or the alleged director's loan by the shareholders.

[77] The respondent submits that the learned judge did not make a finding unsupported by evidence nor did she misunderstand the nature or purpose of the AGM minutes. The respondent contends that the appellant's argument amounts to no more than disagreement with the learned judge's assessment of the 2002 AGM minutes, rather than any demonstration of legal or factual error. The appellant simply failed to establish disclosure of the alleged director's loan and informed consent of the shareholders to pursue the Atlantic share purchase.

The Learned Judge's Findings

[78] In her analysis at paragraphs [150] –[157], the learned judge addressed whether any disclosure made by Mr. Toms, whether through the financial statements or at the annual general meetings, could resolve the inherent conflict of interest and satisfy the stringent standards imposed by his fiduciary office.

[79] The learned judge found that the subsequent appearance in the company's records of an alleged loan, unsupported by contemporaneous documentation, fell significantly short of the standard required. She held that it was essential for the loan's terms and conditions to be disclosed to shareholders prior to its arrangement to properly discharge the director's fiduciary responsibility. Likewise, the director was obliged to reveal his intention to use the claimant's funds to purchase shares in Atlantic Properties.

[80] At paragraph [153] she said:

> "The fiduciary duty of a director demands a high level of responsibility, especially regarding financial matters or personal profit-making. Consequently, it was the deceased director's obligation to maintain accurate and prompt financial records. Such records would verify the legitimacy of the loan and dispel any suspicions among shareholders or other stakeholders about improper conduct, ensuring that the transaction was conducted fairly and transparently. Unfortunately, this was not the case. The evidence before the court is that the director's loan was made by the deceased at the point of incorporation and that he lent other sums of money to the Claimant as the years passed. There is no evidence which demonstrates that this loan was approved by the shareholders or that they knew of its existence at the time it was made. The eventual revelation of a director's loan, lacking substantial corroborative details long after its supposed inception, did not meet the stringent standards expected of a director's duties."

[81] The learned judge reasoned that a director's obligation is not discharged by passive availability of information. Proper governance required that material financial information be proactively provided to shareholders in sufficient time to allow for meaningful scrutiny. The judge found that this did not occur. While I accept that the learned judge mischaracterised the defendant's submission by suggesting that the minutes were merely placed on a side table, thereby implying they were not proactively distributed, that observation was no more than a passing remark. It did not amount to a fundamental misunderstanding of the evidence, nor was it a finding on which her conclusion turned.

[82] In the end, the question for this court is not whether another judge might have attached greater weight to the reference in the 2002 AGM minutes, but whether the learned judge misdirected herself in a manner amounting to appealable error. On a fair reading of her reasons, no such error is disclosed. The appellant's complaint amounts to no more than disagreement with the judge's evaluation of the adequacy of the disclosure, an evaluative judgment plainly open to the learned judge on the evidence.

[83] Appellate courts are slow to interfere with such findings, particularly where they turn on the trial judge's appreciation of the evidence as a whole. Unless there is a material error of law or a conclusion that is plainly wrong or outside the bounds of reasonable disagreement, the appellate court must defer to the trial judge's

evaluation. No such error has been demonstrated here. In the recent case of **Adolphus John Sitney v Benedict Noel**[13] this Court said:

> "… A trial judge is responsible for hearing and evaluating the evidence presented by both sides in a civil dispute. In doing so, trial judges are often called upon to make assessments of the credibility of witnesses and the weight to be attached to any evidence presented by the parties in an impartial manner. They determine the issues that need to be resolved and make their decisions based on the evidence presented at trial and the appliable law. Where the parties' evidence consists mainly of oral testimony the trial judge must assess their character, the honesty and candour of their evidence, and the quality of their recollection. It is through the rigors of cross-examination at trial that oral evidence is tested. It is principally for this reason that successful challenges to findings of fact by a trial judge are rare."

[84] In **Maso Capital Investments Ltd and another v Trina Solar Ltd**[14] the Privy Council summarized the applicable principles by appellate courts to findings of fact and evaluative assessments as follows:

> "19. The parties were largely agreed as to the principles to be applied by an appellate court to findings of fact or evaluative assessments of a lower court, which are well established. In the absence of some identifiable error such as a material error of law, an appellate court will not interfere with such findings unless the judge's decision is plainly wrong, in the sense that it was one which no reasonable judge could have reached, or (which is the same) lies outside the bounds within which reasonable disagreement is possible; if the decision does not come within that category it is irrelevant that the appellate court would have reached a different decision. See Assicurazioni Generali SpA v Arab Insurance Group (Practice Note) [2002] EWCA Civ 1642; [2003] 1 WLR 577, at para 16; FAGE UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5; [2014] FSR 29, at para 114; Henderson v Foxworth Investments Ltd [2014] UKSC 41; [2014] 1 WLR 2600, at paras 58-68; Volcafe Ltd v Cia Sud Americana de Vapores SA [2018] UKSC 61; [2019] AC 358, at para 41; JSC BTA Bank v Ablyazov [2018] EWCA Civ 1176; [2019] BCC 96, at paras 40-41; Perry v Raleys Solicitors [2019] UKSC 5; [2020] AC 352, at paras 49-52; Volpi v Volpi [2022] EWCA Civ 464; [2022] 4 WLR 48, at paras 24. 20.
>
> Four of the reasons for that restrictive approach are of relevance to the current appeal. First, where the trial court has heard evidence given orally by witnesses, tested by cross examination, it is in a much better position to evaluate that evidence than an appeal court which does not have that advantage; a transcript of the evidence does not capture the atmosphere of the courtroom or the subtleties of the way the evidence

[13] GDAHCVAP2022/0018 (delivered 25th March 2026, unreported) at [28].
[14] [2026] Bus LR 373.

> was given. That applies as much to expert witnesses as it does to witnesses of fact (save sometimes in the special case of experts on foreign law). Secondly, as Lord Hoffmann said in Piglowska v Piglowski [1999] UKHL 27; [1999] 1 WLR 1360, 1372: "[The judge's] expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance … of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation." Thirdly, the trial judge has sat through the entire case, and their ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for days or weeks will be far deeper than that of the appellate court whose view of the case is much more limited: McGraddie v McGraddie [2013] UKSC 58; [2013] 1 WLR 2477, at para 4. In the memorable and oft quoted metaphor ascribed to this consideration by Lewison LJ in FAGE v Chobani, "[i]n making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping." Fourthly, especially in long and complicated cases, duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court and will seldom lead to a different outcome in an individual case. Again, to quote the memorable language of Lewison LJ in FAGE v Chobani: "[t]he trial is not a dress rehearsal. It is the first and last night of the show."

[85] Having reviewed the record and the reasoning of the learned judge, I am satisfied that her conclusions were firmly anchored in the evidence and the applicable fiduciary principles. The appellant has not met the high threshold required to overturn findings of fact or evaluative judgments. The appeal on this ground therefore fails.

[86] The appellant had submitted that ground (g) would arise only if this court accepted that the learned judge erred in law in finding that no director's loan existed. As this court has affirmed the learned judge's findings on that issue, the contingency on which ground (g) depended has not materialised, and the ground accordingly falls away, and the appeal is dismissed. The judgment below stands.

Disposition

[87] Based on the foregoing, I make the following orders:

(1) The appeal is dismissed.

(2) The respondent's notice to uphold the decision of the Learned Judge in order dated the 21st June 2024 is granted.

(3) The orders of the learned trial judge in order dated the 21st June 2024 are affirmed.

(4) The respondent is awarded its costs on appeal to be agreed within twenty-eight (28) days of the delivery of the judgment or otherwise assessed.

I concur.
Margaret Price Findlay
Chief Justice [Ag.]

I concur.
P. Nicola Byer
Justice of Appeal

By the Court

Deputy Chief Registrar