IN THE PRIVY COUNCIL (BRITISH VIRGIN ISLANDS)
ON APPEAL FROM:
THE COURT OF APPEAL
EASTERN CARIBBEAN SUPREME COURT
BETWEEN:

CHEN NINGNING

APPELLANT

and

MARK BYERS AND MATTHEW RICHARDSON
(as joint liquidators of)
PIONEER FREIGHT FUTURES COMPANY LIMITED

RESPONDENTS

WRITTEN CASE OF THE APPELLANT

A. INTRODUCTION[1]

1 A director's fundamental duty is to act in the best interests of the company. When the company is insolvent or nearing insolvency "*the way in which the company's interests are understood, for the purposes of that duty, is extended so as to encompass the interests of the general body of creditors as well as the interests of the general body of shareholders*".[2] This appeal is concerned with the remedies available to a company for breach of that 'creditor duty'.

2 The Appellant was a director of the Respondent (the "**Company**"). The Board determined in its 2021 decision that at a time when the Company was insolvent the Appellant acted in breach of the creditor duty by failing to prevent preferential payments to one of the Company's creditors, "**Zenato**".[3] The Board remitted for determination "*All issues concerning what sums, if any*" the Appellant should pay in respect of or arising from the breaches.[4] The Board therefore left open the questions of whether any monetary remedy was available against the Appellant, the legal basis for it, and the amount and form of any such remedy. These questions are the subject of this appeal.

3 The Zenato payments reduced pro tanto a valid debt owed by the Company to Zenato. The effect of the payments was therefore balance-sheet neutral for the Company. The Court of Appeal nevertheless ordered the Appellant to pay to the Company the full amount of the Zenato payments (US$13 million), plus sixteen years' interest, as equitable compensation for her breach of fiduciary duty.[5] The remedy was expressly to compensate the Company for its putative loss; since the Appellant did not personally benefit from the Zenato payments there was no profit for which the Appellant could be required to account.[6]

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[1] The law governing the issues in this appeal is the law of the British Virgin Islands, being the law of the place of incorporation of the Respondent. There is no suggestion that the relevant principles of law differ from English law, and the Court of Appeal proceeded on the basis that the principles are the same in all relevant respects.

[2] ***BTI 2014 LLC v Sequana SA*** [2022] UKSC 25; [2024] AC 211, Lord Reed at [77]. [MB 765]

[3] ***Byers & Ors v Chen Ningning*** [2021] UKPC 4 ("**JCPC**"). [MB 866-886]

[4] JCPC 2022 Order, §2. [MB 239-240]

[5] CA, [113]. [MB 151]

[6] CA, [9], [109]. [MB 97, 150]

4 The Court of Appeal treated its order as an application of ***West Mercia***.[7] That was a very different case. In that case, Mr Dodd was ordered to repay £4,000 which, "*for his own purposes*" and "*for his own sole benefit*" and in a fraud on its creditors he had caused an insolvent company of which he was a director, to pay to its parent, thereby reducing his own liability under a personal guarantee. Dillon LJ described his order as "*a rough and ready way of achieving justice*".

5 The Court of Appeal understood ***West Mercia*** to mean that where the creditor duty is engaged, "*the fundamental principle of separate corporate personality is modified*" so that "*any loss to the general body of creditors must be equated with that of the company*".[8] But as Professor van Zwieten has noted, "*there is a fundamental difficulty with applying* ***West Mercia*** *in this way … from the perspective of the company, to which West Mercia affected duties are owed, there is no loss at all.*"[9]

6 The Appellant respectfully submits that the Court of Appeal's approach is contrary to the fundamental principles of company law and cannot be correct. As Lord Leggatt explained in ***Stanford***, the principle of separate corporate personality means that "*the rights and obligations, assets and liabilities, and consequently also the losses and gains, of a company are in law distinct from those of the persons who have economic interests in the fortunes of the company, be they shareholders or creditors*".[10] The Zenato payments may have prejudiced some of the Company's creditors (which include the Appellant), but they did not cause any loss to the Company.

7 In the absence of a loss suffered by the Company there is no basis on which the Appellant can be required to pay equitable compensation to the Company. This follows from ***Target Holdings*** and ***AIB***.[11] More recently, Lord Briggs confirmed in ***Stevens*** that the assessment of loss qualifying for equitable compensation must be conducted through a

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[7] ***Liquidator of West Mercia Safetywear Ltd v Dodd*** [1988] BCLC 250. [MB 3307-3312]

[8] CA [58], [84]. See also: [40], [44], [58], [90]. [MB 121, 137]

[9] Kristin van Zwieten, '*Director Liability in Insolvency and its Vicinity*' (2018) 38 OJLS 382, p. 400. [MB 3386]

[10] ***Stanford International Bank Ltd (in liquidation) v HSBC Bank plc*** [2022] UKSC 34; [2023] AC 761, [81]. [MB 3086]

[11] ***Target Holdings Ltd v Redferns*** [1996] AC 421; ***AIB Group (UK) plc v Mark Redler & Co Solicitors*** [2015] AC 1503. [MB 3104-3124] [MB 543-586]

but-for counterfactual: "*The loss is assessed by comparing that but-for position with the position in which the beneficiary finds himself as the result of the breach*".[12]

8 It follows that, if the remedy in ***West Mercia*** was rightly made, it cannot be understood as a compensatory remedy for loss. If it can be explained, it is best understood as a rough and ready means of requiring Mr Dodd to restore money he had misapplied for his personal benefit in a fraud on the company's creditors. It is a remedy with no relevance to this case, where the director derived no personal benefit and there is no suggestion of fraud.

9 The Appellant pursues three Grounds of Appeal.

(1) **Ground 1** concerns the Court of Appeal's approach to the company's loss. The Appellant's case is that the Court of Appeal erred in equating the Company's loss with the loss to the Company's creditors.

(2) **Ground 2** concerns the remedy available for breach of the creditor duty by reference to ***West Mercia***. Properly analysed, that decision supports a remedy (if at all) only when a director has benefitted personally from a preferential payment made in a fraud on creditors. Such a remedy has no relevance to this case.

(3) **Ground 3** arises if, contrary to the Appellant's case on Grounds 1 and 2, a sum is payable by the Appellant. The Court of Appeal awarded interest at 5% (which is the statutory rate for judgment debts in the BVI) from November 2009, without giving reasons. The Appellant submits that she should not be required to pay interest in the period during which the Respondents unreasonably delayed issuing proceedings, and a 3% rate better reflects a deposit rate, which is appropriate since the Company's insolvency means that it would not have been a borrower.

10 In the remainder of this Written Case, section B addresses the decision of the Court of Appeal, and section C, D and E, respectively, address the three Grounds of Appeal identified above. The factual and procedural background to this appeal is set out in the agreed Statement of Facts and Issues.

[12] ***Hotel Portfolio II UK Ltd v Stevens*** [2025] UKSC 28; [2025] 3 WLR 293, [43]. [MB 3419]

B. THE DECISION OF THE COURT OF APPEAL

11 As noted above, the Court of Appeal purported to apply ***West Mercia*** to justify its order requiring the Appellant to pay equitable compensation to the Company even in the absence of a balance-sheet loss. It is helpful briefly to address that decision before turning to the judgment below.

West Mercia [MB 3307-3312]

12 In ***West Mercia***, the defendant, Mr Dodd, was a director of both West Mercia Safetywear Ltd (the claimant) and Dodd Ltd (the claimant's parent company). The claimant owed Dodd Ltd £30,000. Dodd Ltd also had an overdraft with its bank which Mr Dodd had personally guaranteed. The claimant and the parent company became insolvent and engaged an accountant to liquidate both companies. The accountant took steps to commence formal liquidations and explained to the directors of the companies, including Mr Dodd, that they must not operate the companies' bank accounts in the meantime. Mr Dodd nevertheless procured a £4,000 payment from the claimant's account to its parent company's account in partial payment of its outstanding debt. This had the effect of discharging Dodd Ltd's overdraft with its bank and Mr Dodd's liability under the guarantee of that overdraft. Both companies entered insolvent liquidation shortly thereafter. The payment to Dodd Ltd therefore directly benefited the director by reducing pro tanto his liability under the guarantee.

13 The liquidators of the claimant brought an action for misfeasance under section 333 of the Companies Act 1948 (the predecessor to the summary procedure in section 212 of the Insolvency Act 1986). Rejecting the county court's decision below that the director had not engaged in misfeasance, Dillon LJ (with whom the other judges agreed) held (at p.32):[13]

> To my mind it is quite clear that there was a fraudulent preference of the Dodd company. It follows that there was a misfeasance on the part of Mr. Dodd as a director who owed a fiduciary duty to the West Mercia company in making that transfer by way of fraudulent preference: see the decision of the court in *Re Washington Diamond Mining Co* [1893] 3 Ch 95, and especially the judgment of Kay LJ a p115.

[13] The underlining of text in quotations has been added for emphasis throughout this Written Case.

14 His Lordship rejected the trial judge's view that there was no breach because the defendant had caused the company to pay a valid debt (at p.33):

> Mr. Dodd had, in fraud of the creditors of the company, made the transfer to the Dodd company's account for his own sole benefit in relieving his own personal liability under his guarantee. …
>
> Mr Dodd was guilty of breach of duty when, for his own purposes, he caused the £4,000 to be transferred in disregard of the interests of the general creditors of this insolvent company.

15 Having found that the director had breached his duties, his Lordship then turned to the question of remedy (at p. 33):

> Prima facie the relief to be granted where money of the company has been misapplied by a director for his own ends is an order that he repay that money with interest, as in *Re Washington Diamond Mining Co*. The section in question, however, sec. 333 of the Companies Act 1948, provides that the court may order the delinquent director to repay or restore the money, with interest at such rate as the court thinks fit, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication as the court thinks fit. The court has a discretion over the matter of relief and it is permissible for the delinquent director to submit that the wind should be tempered because, for instance, full repayment would produce a windfall to third parties, or, alternatively, because it would involve money going round in a circle or passing through the hands of someone else whose position is equally tainted.

16 After rejecting the director's evidence that the remaining assets of the company were sufficient to meet the dividends that would have been payable to the creditors, Dillon LJ held (at p.34):

> In my judgment the appropriate course of administration in the present case is to order Mr Dodd to repay £4,000 with interest and to direct that in the distribution of the assets of the West Mercia company to the unsecured creditors the debt due from the West Mercia company to the Dodd company is to be taken as notionally increased by £4,000 to what it would have been if there had not been a fraudulent preference, and then any dividend attributable to the extra £4,000 thus added back to the debt of the Dodd company is to be recouped to Mr Dodd rather than to be paid to the Dodd company. That, as I see it, is a rough and ready way of achieving justice on both sides.

17 The facts in ***West Mercia*** were on any view extreme. Mr Dodd intentionally misappropriated for his own personal benefit the company's funds at a time when he knew the company was entering liquidation and after having been warned by the

accountant not to make any payments from the company's accounts. The payments were made to a parent company of which Mr Dodd was also a director (and which was named after him), and the payments were made to an overdrawn account which was guaranteed by the delinquent director.

18 As is developed further under Ground 2 below, these facts were fundamental to the reasons given by Dillon LJ for his decision, as is made clear by his Lordship's repeated references to Mr Dodd's fraud and personal gain. These facts, however, bear little resemblance to the position in this case. The Appellant maintained that she was not a director of the Company at the time of the Zenato payments (albeit the Board concluded that her resignation was not effective because she had impliedly withdrawn her letter of resignation with the company's consent).[14] Although she knew about and failed to prevent the payments, the Appellant did not procure or authorise them.[15] The payments discharged an undisputed debt to a third party and the Appellant did not personally benefit from them.[16] There is no finding that the Appellant knew the Company was insolvent at the time of the payments or had been otherwise told that the Company should not make them.

The Court of Appeal in this case

19 In this case, Ventose JA gave the only reasoned judgment in the Court of Appeal. His Lordship began his analysis with an attempt to explain the remedy awarded in ***West Mercia***. His Lordship recognised that the preferential payment in ***West Mercia*** was balance-sheet neutral before continuing in the following terms:[17]

> … if a pecuniary remedy for a breach of the fiduciary duty is designed to compensate the company for a loss which it has suffered as a result of the breach, then it is argued that no such pecuniary remedy can be granted to the company in respect of preferential payments, since they do not cause the company (as distinct from the general body of creditors) to suffer any loss. In my view, the answer to this question depends on the nature of the "loss" that is occasioned and by whom. It is not disputed that any loss must be that of the company to whom the duty (as reflected in the rule in *West Mercia*) is owed. The question is whether the "loss"

[14] JCPC, [66]-[72]. The Board also concluded that the Appellant had not resigned as a director in August 2009 (at [73]-[85]). [MB 201-202] [MB 202-205]

[15] JCPC, [88], [93]. [MB 205, 207]

[16] CA, [9], [109]. [MB 97, 150]

[17] CA, [57]. [MB 121]

> suffered by the general body of creditors can be equated to "loss" suffered by the company for the purposes of the breach of the rule in West Mercia.

20 Ventose JA went on to hold that, in light of the purpose of the creditor duty, the loss of the company should be equated with the loss to its general body of creditors:[18]

> What purpose is therefore served by the rule in West Mercia? In my view, it is to ensure that the assets of company (whose interests the rule is designed to protect) are preserved for the general body of creditors during insolvency. In other words, the general body of creditors should not suffer any financial loss by the actions of directors when the company is insolvent, or insolvency is imminent. How is that loss to be measured when arguably the loss is essentially that of the general body of creditors and not the company as a separate legal personality? It must therefore mean that, for the purposes of determining the loss caused by a breach of the rule in West Mercia, any loss to the general body of creditors must be equated with that of the company. If this is not the appropriate basis for measuring the loss to the company, the rule in West Mercia would be a toothless dog, having no bite. Directors would act with impunity in breach of the rule in West Mercia comforted in the knowledge that once the transaction is balance sheet neutral, the company would suffer no loss and consequently the directors will not be liable at all for any such breach.

21 Ventose JA held that once one conceptualises the company's loss as the loss of the general body of creditors, the remedy in ***West Mercia*** can be reconciled with the principle that equitable compensation is awarded only to compensate a counterfactual loss (as set out in ***AIB***). [MB 543-586]

22 This approach to loss was also how Ventose JA distinguished ***Stanford***, in which the Supreme Court held that a payment by an insolvent company made by its bank in breach of the *Quincecare* duty that reduces pro tanto a valid debt causes no pecuniary loss to the company actionable at common law. His Lordship held that the majority's reasoning in ***Stanford*** was not applicable to this case because the Company's loss could be equated with the creditors' loss where the creditor duty was engaged.[19] [MB 3058-3103]

23 The Court of Appeal's treatment of loss was therefore fundamental to its decision. This approach to loss was, however, contrary to principle and in conflict with authority for the reasons developed under Ground 1 below.

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[18] CA, [58]. [MB 121]

[19] CA, [73]. [MB 128]

C. GROUND 1: THE ZENATO PAYMENTS CAUSED NO LOSS TO THE COMPANY

Introduction

24 Ground 1 raises the question of whether the loss to a company caused by preferential payments to a creditor is to be equated with the loss suffered by its general body of creditors, notwithstanding that the company's net asset position was unchanged. The Court of Appeal answered that question in the affirmative.[20] The Appellant respectfully submits, for four reasons, the answer is no:

(1) First, a payment by a company (whether solvent or insolvent) that discharges in equal amount a valid debt owed by the company does not cause the company any direct loss. That is what the Supreme Court decided in ***Stanford***. [MB 3058-3103]

(2) Second, there is no basis for treating the loss suffered by a company's creditors as the loss suffered by the company; a company's losses and creditors' losses are distinct, consistently with the basic principle of separate corporate personality.

(3) Third, the concept of what constitutes a "loss" to the general body of creditors is uncertain, and it does not necessarily correspond to the amount of a preferential payment.

(4) Fourth, there is no basis for treating a breach of the creditor duty as being an exception to the settled principles of law stated above.

A payment in discharge of a valid debt causes no direct loss

25 It is common sense that repaying a debt does not cause the paying party any loss if the payment extinguishes a liability pro tanto. The 'loss' caused by the depletion of assets in making the payment is matched by the 'gain' in the reduction of the liability. The necessary corollary is equally obvious: borrowing money and thereby incurring a debt does not enrich the borrower because the increase in assets is matched by the increase in liabilities. In ***Stanford***, the Supreme Court confirmed that this commonsense position applies irrespective of the solvency of the paying party. [MB 3058-3103]

[20] CA [58], [83], [90], [98] and [110]. [MB 121, 136, 139, 146, 150]

26 Stanford International Bank ("**SIB**") had been run as a Ponzi scheme and became insolvent. Prior to SIB's liquidation, HSBC, acting on SIB's instructions, paid about £116 million out of SIB's accounts to customers who had made redemption requests (referred to in the judgment as the "*early customers*"). SIB's liquidators alleged that HSBC had made the early-customer payments in breach of its *Quincecare* duty, and claimed the £116 million as its loss. HSBC applied to strike out the claim, including on the basis that SIB had suffered no actionable loss since the payments to customers had discharged SIB's liabilities to the customers pro tanto.

27 The Supreme Court, by a majority, held that SIB had not suffered a loss of any pecuniary value. There was therefore nothing recoverable on its pleaded claim, which therefore fell to be struck out. Lady Rose gave the lead judgment for the majority. Her Ladyship first explained at [16] why SIB could not simply claim the £116 million as a loss:

> The simplest approach was to say that if HSBC had not wrongly paid out the £116m from SIB's bank account, then that money would still be in its bank account and SIB would therefore be better off by that amount. In the usual Quincecare case, that is indeed how one would approach loss because the money misappropriated does not go to relieve the company of any genuine liability it owes and so is in truth merely a depletion of the company's net assets in the amount paid away. SIB now, it appears, recognises that that is too simplistic because the £116m payments out did relieve it of £116m of debt that it owed under the contracts between it and the early customers. [MB 3070]

28 Lady Rose went on to reject the case that SIB developed in the Supreme Court, namely that SIB's loss comprised the loss of a chance to discharge the early customers' debts at a discount in SIB's liquidation (rather than in full, as it had by reason of the disputed payments). Any positive value of a chance to repay the early customers' debt at a discount was matched by the negative value of the risk of having to discharge other customers' debts at a lesser discount.[21] In other words, as Lord Legatt put it, "*the amount that SIB "lost" by paying the fortunate investors in full was offset by the equal amount that SIB "gained" by paying the unfortunate investors less than they would otherwise have received.*" The loss of a chance to "*act more fairly as between customers*" in the distribution of SIB's assets in the liquidation was "*clearly not a pecuniary loss suffered by SIB*".[22]

[21] ***Stanford***, [25]. [MB 3072]
[22] ***Stanford***, [26]. [MB 3072]

29 Lord Leggatt, concurring, explained that SIB's approach was inconsistent with the compensatory principle, which "*requires a comparison to be made between the claimant's net asset position following the disputed payments and what its net asset position would have been if the payments had not been made*".[23] This was the "*basic rule*" that applied in awarding damages for breach of contract or in tort: "*losses and gains arising from the breach must be netted off against each other and only any net loss awarded*".[24] There were therefore "*no reasonable grounds for the claim that SIB suffered loss by making payments for which it received full value*".[25]

30 Importantly, although the payments had not caused any loss to SIB, the payments plainly did cause a loss to the other creditors of the company as they reduced the assets available to distribute in the liquidation. The creditors' loss was not actionable because HSBC owed a duty only to SIB and not to its creditors.

31 Had the Court of Appeal applied the approach in ***Stanford*** to the facts of this case, it would inevitably have concluded that the Zenato payments caused no loss to the Company. If the Appellant had performed her duty by preventing the Zenato payments, the Company would have had US$13 million more in assets and US$13 million more in liabilities. Its net assets would be unchanged, and its net loss is therefore zero.

32 Ventose JA held that the majority's conclusion in ***Stanford*** could be distinguished because of the different types of duty involved in each case.[26] It is of course correct that ***Stanford*** was concerned with loss for the purposes of a breach of the ***Quincecare*** duty rather than breach of a director's duty to a company. However, this distinction makes no difference to the analysis. In each case, the relevant duty is owed only to the company, and so the question of loss in each case is the same, namely whether the company has suffered a loss that it would not have suffered but for the breach of duty. This is addressed below after consideration of the dissenting judgment of Lord Sales in ***Stanford***.

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[23] ***Stanford***, [78]. [MB 3086]
[24] ***Stanford***, [55]. [MB 3079-3080]
[25] ***Stanford***, [85]. [MB 3087]
[26] CA, [73]. [MB 128]

Lord Sales' dissent in *Stanford*

33 Lord Sales would have allowed the appeal in ***Stanford***. His Lordship agreed with the majority that the relevant question was whether SIB "*can be said to have suffered loss on a basic "but for" analysis, comparing its position in the real world as events unfolded with its position in the counterfactual world as it would have been had the respondent bank (HSBC) complied with the Quincecare duty to which it was subject*".[27] Lord Sales concluded that SIB did suffer such a loss. Lord Sales' approach can be distilled into three steps.

(1) First, Lord Sales adopted a functional view of corporate personality:[28]

> … it emerges that a company has representative responsibilities of its own in relation to certain persons who are affected by the management of its affairs and that the concept of "the company", and the corporate personality which corresponds with that concept, serve the function of ensuring that those responsibilities are fulfilled".

(2) Second, his Lordship reasoned that when a company is on the verge of, or enters, insolvency, there is a change to the function or purpose of its separate corporate personality:[29]

> In those circumstances the purpose of the company, and the function to be served by its having corporate personality as the vehicle by means of which it holds assets so that they can be used for fulfilling that purpose, is to protect the interests of the creditors.

(3) Third, his Lordship concluded that SIB had been prevented from fulfilling the function of creditor protection by the depletion of assets, and that this was a form of loss:[30]

> Where a company is deprived of assets and thereby disabled from fulfilling its proper function in relation to those who have the relevant economic stakes in it and whose interests it exists to promote, is that a loss to the company? In my opinion it is. Impairment of the company's proper function harms the company and constitutes a loss which it suffers.

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[27] ***Stanford***, [87]. [MB 3088]
[28] ***Stanford***, [107]. [MB 3094-3095]
[29] ***Stanford***, [128]. [MB 3100-3101]
[30] ***Stanford***, [113]. [MB 3096]

34 Lord Sales' judgment is fundamentally inconsistent with the majority's conclusions, both in terms of reasoning and ultimate disposal. Lady Rose expressly considered and dismissed the suggestion that a company suffers a loss when it is prohibited from fairly applying its assets among its creditors.[31] Lord Leggatt, concurring, held that it was "*contrary to first principles*" and unsupported by any authority to posit that corporate personality is a context-dependent concept that can change in an insolvency in the manner suggested by Lord Sales.[32]

35 Lord Sales' approach is similar to the approach of the Court of Appeal in this case, and indeed Ventose JA expressly relied on Lord Sales' judgment to support his conclusions.[33] It is therefore, respectfully, unsurprising that Lord Sales' approach suffers from the same fundamental difficulties, which are addressed in detail below. In short, his Lordship's analysis conflates (1) the content of the duty owed by a director to a company (which can require regard to creditors' interests) and (2) the person to whom the duty is owed and whose loss can be claimed for breach of that duty (which is only ever the company itself).

A company's losses are distinct from its creditors' losses

36 In this case, the Court of Appeal rightly accepted that the remedy of equitable compensation it awarded to the Respondents required a counterfactual loss suffered by the Company.[34] This is now well-established following ***Target Holdings***, ***AIB***, and ***Stevens***. In ***AIB***, Lord Toulson noted that the aim of equitable compensation is to put the beneficiary in the same position as they would have been in had the breach not occurred.[35] This involves comparing the 'post-breach' world, with the counterfactual 'no-breach' world (the difference in the claimant's position between those two worlds reflecting the extent of the 'loss' that must be compensated).[36]

37 As noted above, Ventose JA felt able to order the Appellant to pay equitable compensation precisely because he concluded that the Company did in fact suffer a

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[31] ***Stanford***, [29]. [MB 3073]
[32] ***Stanford***, [81]-[83]. [MB 3086-3087]
[33] CA, [92]-[100]. [MB 140-147]
[34] CA, [57]-[58]. [MB 121]
[35] ***AIB***, [64]. [MB 567]
[36] ***Hotel Portfolio***, Lord Briggs at [43]; Kramer and Dyson, 'There is no "breach-date rule": mitigation, difference in value and date of assessment' (2014) 130 LQR 259. [MB 3419] [MB 3345-3367]

counterfactual loss by reason of the Zenato payments (and this is the same basis on which Lord Sales would have allowed the appeal in ***Stanford***). This was explained by his Lordship as follows (emphasis added):[37]

> The UKSC in *Sequana* was able to provide clear guidance as to the circumstances in which the rule in *West Mercia* would apply. […] Once the rule in *West Mercia* is engaged, the foundational principle of separate legal personality shifts, and the interests of creditors become paramount such that any loss that they suffer by reason of a breach by directors of that duty owed to the company becomes a loss suffered by the company. There is no principled basis to reject this approach. I respectfully disagree with Lord Leggatt's statement at para [83] [of ***Stanford***] that, as well as being contrary to legal principle, such an approach, if adopted, would introduce considerable uncertainty into an area of law where clear rules are essential. If any uncertainty exists, it resides in the existence of the rule in *West Mercia* itself, which the UKSC was at pains in *Sequana* to ensure that the necessary clarity and certainty was provided".

38 There are at least three problems with this analysis:

(1) First, the approach is contrary to the basic principle of separate corporate personality which holds that a company's assets and liabilities are its own and thus distinct from the assets and liabilities of its members and creditors.

(2) Second, nothing in ***Sequana*** supports any change or weakening of a company's status as separate legal personality with separate assets and liabilities.

(3) Third, the approach unjustifiably elides the separate concepts of a company's interests on the one hand, with the company's loss on the other hand.

39 Turning to the first point, the Court of Appeal reasoned that once the interests of a company's creditors become "*paramount*", the creditors' loss is to be equated with the company's loss.

40 The same reasoning suggests that when it is the interests of shareholders that are paramount — the position when a company is solvent and the creditor duty is not engaged — a loss to the general body of shareholders would be reflected in the company's loss. But this is not the law, which suggests something has gone wrong in the Court of Appeal's approach.

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[37] CA, [90]. [MB 139]

41 In ***Swynson***,[38] the defendant had provided negligent advice to a company in respect of a loan on which a third-party borrower defaulted. The company's controlling shareholder gave the borrower a loan to refinance its operations on the condition that the borrower would repay the company. The defendants argued that because the borrower had repaid the loan to the company, the company had not suffered any loss as a result of the defendant's negligence. The Supreme Court accepted that submission and held that loss suffered by the shareholder was irrelevant in circumstances where the relevant duty was owed only to the company (at [17]). Lord Sumption (for the majority) noted that the company's argument conflicted with the principles of separate legal personality (at [1]):

> The distinct legal personality of companies has been a fundamental feature of English commercial law for a century and a half, but that has never stopped businessmen from treating their companies as indistinguishable from themselves. [The shareholder] is not the first businessman to make that mistake, and doubtless he will not be the last.

42 In ***Marex***,[39] the claimant was a judgment creditor in respect of two companies owned and controlled by the defendant. The claimant had brought claims in tort against the director for causing the company to transfer sums out of its bank accounts to frustrate the enforcement of the judgment debts. However, the defendant argued that the creditor's losses fell within the ambit of the 'reflective loss' principle, such that only the company could properly bring a claim.

43 Lord Reed (for the majority) noted that while there may be circumstances in which a diminution in the value of the shareholder's shares coincides with the company's loss, the two losses are not the same:[40]

> Since the value of a company's shares is commonly calculated on the basis of anticipated future distributions, it is possible that a loss may result in a fall in the value of the shares. That is, however, far from being an inevitable consequence: companies vary greatly, and the value of their shares can fluctuate upwards or downwards in response to a wide variety of factors.

44 His Lordship clarified that despite the distinctions in shareholders' losses and the company's losses, the true basis for restricting shareholders from claiming losses in

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[38] ***Swynson v Lowick Rose*** [2018] AC 313. [MB 1887-1928]

[39] ***Marex Financial Ltd v Sevilleja*** [2021] AC 39. [MB 1929-2011]

[40] ***Marex***, [32]-[34]. [MB 1951-1952]

excess of those suffered by the company was the rule in Foss v Harbottle (at [37]). His Lordship then went on to consider the position of creditors (at [85]):

> Where a company suffers a loss, it is possible that its shareholders may also suffer a consequential loss in respect of the value of their shares, but its creditors will not suffer any loss so long as the company remains solvent. Even where a loss causes the company to become insolvent, or occurs while it is insolvent, its shareholders and its creditors are not affected in the same way, either temporally or causally. In an insolvency, the shareholders will recover only a pro rata share of the company's surplus assets, if any. The value of their shares will reflect the value of that interest. The extent to which the company's loss may affect a creditor's recovery of his debt, on the other hand, will depend not only on the company's assets but also on the value of any security possessed by the creditor, on the rules governing the priority of debts, and on the manner in which the liquidation is conducted (for example, whether proceedings are brought by the liquidator against persons from whom funds might be ingathered, and whether such proceedings are successful). Most importantly, even where the company's loss results in the creditor also suffering a loss, he does not suffer the loss in the capacity of a shareholder, and his pursuit of a claim in respect of that loss cannot therefore give rise to any conflict with the rule in *Foss v Harbottle*.

45 Lord Reed's conclusions in ***Marex*** turn on the notion that shareholders' and creditors' losses are distinct from the losses of a company: this was also the manner in which Lord Leggatt read the judgment in ***Marex*** in ***Stanford*** at [81]. While the losses may be connected and may even coincide, they are not one and the same.

46 As for the second point, the Court of Appeal advanced an unsustainable interpretation of ***Sequana***, when that decision in fact affirmed rather than undermined the sanctity of separate corporate personality. The Supreme Court rejected any suggestion that there is a creditor duty distinct from the duty of a director to a company.[41]

47 Indeed, as Ventose JA accepted in the passage set out above, Lord Leggatt in ***Stanford*** expressly rejected the proposition that ***Sequana*** modified the doctrine of separate personality:[42]

> It would be contrary to first principles to posit that, at some (imprecise) point on a path that leads to a company going into insolvent liquidation, the nature of its legal personality changes, such that, from then on, any disposition of the company's assets is treated as a loss to the company even if it discharges a liability and so leaves the company's net asset position unchanged. There is nothing in the judgments in the *Sequana* case which supports such a view, and I know of no

[41] See, for example, Lord Reed at [11]-[12] and Lord Briggs at [139]-[151]. [MB 747-748, 783-788]

[42] ***Stanford***, [83]. [MB 3087]

> authority which supports it. I am also concerned that, as well as being contrary to legal principle, such an approach, if adopted, would introduce considerable uncertainty into an area of law where clear rules are essential.

48 The Appellant respectfully agrees.

49 As for the third point, Ventose JA overextended the concept of a company's interests, reasoning from the premise that when a company is insolvent the "*interests of creditors become paramount*" to the proposition that "*any loss that they suffer by reason of a breach by directors of that duty owed to the company becomes a loss suffered by the company*". But the proposition does not follow from that premise. This is in substance the same reasoning adopted by Lord Sales in his dissenting judgment in ***Stanford***.

50 It is true that in ***Sequana*** the Supreme Court accepted that the interests of the company may include the interests of the creditors where the company is insolvent (or bordering on insolvency). However, the concept of the 'interests of a company' has no role in determining a company's loss.

51 Lord Leggatt emphasised the importance of this distinction in ***Stanford***: [43]

> … part of what the *Sequana* case decides is that, whereas in ordinary circumstances the interests of a company are equated with the interests of its present and future members, when a company enters insolvent liquidation it is the interests of its creditors which become paramount. This point is critical in determining what the director's fiduciary duty to act in the interests of the company requires at a given time. It has no bearing, however, on whether a payment which a director causes to be made out of the company's assets in breach of this fiduciary duty gives rise to a loss to the company.

52 That the interests a director must take into account in performance of the duty to a company do not define the persons whose loss is to be counted as the loss of the Company is obvious when one considers the position of a solvent company where the creditor duty is not engaged:

(1) As noted above, in a solvent company, it is the interests of the shareholders as a whole that are paramount, yet a loss suffered by the general body of shareholders is not a 'loss' suffered by the company, let alone one that can be recovered by the company. If it were otherwise, a company could claim as a loss a diminution in the

[43] ***Stanford***, [81]. [MB 3086-3087]

market value of its own shares even if a breach of duty caused no difference to the company's profitability, assets or liabilities. This is the point referred to above made by Lord Reed in ***Marex***.

(2) Similarly, a director's statutory duty to promote the success of the company (which "*corresponds*" to the common-law duty)[44] requires regard to be had to, among other interests, the interests of the company's employees and the impact of the company's operations on the community and the environment. It does not follow that a loss to the company's employees, or to the community, or to the environment can become a loss suffered by the company.[45]

Uncertainty as to the 'loss' to the general body of creditors

53 The Court of Appeal's approach (and the approach of Lord Sales in ***Stanford***) also encounters a fundamental problem of identification and quantification of the alleged loss in question. Even if a detriment suffered by the general body of creditors or (to use Lord Sales' terminology) an interference with the function of protecting the general body of creditors could in principle be treated as a loss suffered by the Company, there is no principled way to identify the nature or amount of that alleged loss. Ventose JA simply treated the amount of the Zenato payments as the amount that the Appellant should pay by way of compensation. That conclusion does not follow.

54 The Zenato payments reduced the cash available in the liquidation by US$13 million, but they also discharged Zenato's debt against the Company by the same amount. The effect on each other creditor's prospective dividend depends, or may depend, upon other matters. This point was made by Lord Reed in the passage from ***Marex*** set out above:[46] the extent to which changes in the company's assets may affect a creditor's recovery of his debt will depend not only on the company's assets but also on the value of any security possessed by the creditor, on the rules governing the priority of debts, and on the manner in which the liquidation is conducted. It cannot simply be assumed that the aggregate loss suffered by the other creditors corresponds to the amount paid to Zenato.

[44] ***Sequana***, Lord Briggs at [64].
[45] UK Companies Act 2006, s. 172(1).
[46] ***Marex***, [85].

[MB 762]
[MB 3447-3449]
[MB 1966]

55 Indeed, the fact that the amount of a preferential payment is not an analogue to the loss suffered by the general body of creditors is implicit in the proviso Dillon LJ attached to the relief in ***West Mercia***. Although Mr Dodd was ordered to repay £4,000 to West Mercia, Dillon LJ directed that the debt which had been discharged by the preferential payment be treated as notionally restored for the purpose of distribution, with the dividend attributable to that restored debt recouped to Mr Dodd. The Court of Appeal in the present case attached an equivalent proviso to its order.[47] That direction recognises that the relevant economic prejudice, if any, is a matter of distributional consequence, not an automatic loss equal to the gross amount of the payment.

56 This difficulty demonstrates a further reason why creditor prejudice cannot be equated with company loss. The amount of a creditor's shortfall is the product of the statutory distribution regime and the particular facts of the liquidation. It may be less than, equal to, or affected in a more complex way than the amount of a payment made to one creditor. In contrast, the loss of the Company itself is determined by comparing its net asset position in the actual and counterfactual worlds, as explained in ***Stanford***.

There is no basis for an exception for breach of the creditor duty

57 In the Court of Appeal, Ventose JA took the view that equating the Company's loss with its creditors' loss was justified in the special circumstances of a breach of the creditor duty, having regard to the purpose of that duty. His Lordship reasoned in two steps: [48]

(1) First, that the "*purpose*" of the creditor duty was to protect the general body of creditors from "*suffering any financial loss by the actions of directors when the company is insolvent, or insolvency is imminent*".

(2) Second, that to achieve this purpose, "*any loss to the general body of creditors must be equated with that of the company*" because otherwise "*the rule in West Mercia would be a toothless dog, having no bite*".

58 The Appellant respectfully submits that both stages of this reasoning are unsustainable.

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[47] CA, [113]. [MB 151]

[48] CA, [58]. [MB 121]

The creditor duty is owed to the company and protects only the company's assets

59 It is right that, in an abstract sense, the justification of the creditor duty involves the protection of creditors when the company is insolvent, or insolvency is imminent, but the duty is owed to the company and not to the creditors, and the purpose is to preserve the company's assets and not the creditors' assets. The error made by Ventose JA in considering the purpose of the creditor duty is again to conflate the content of the duty owed to the company with the identity of the person to whom that duty is owed and whose assets the duty protects. The former depends on context: it may require regard to shareholders' interests, creditors' interests, or both. The latter remains consistent, irrespective of context: the duty is only ever owed to the company, and it is only ever the company's assets that are protected by it.

60 Professor van Zwieten has made the same point:

> Although some aspects of the rule [in ***West Mercia***] are ambiguous, it is at least clear that it operates by altering the duties that directors owe to the company, rather than by supplying any new duty owed to creditors. Once this is accepted, the case for awarding any compensatory remedy appears doubtful. From the perspective of the insolvent company's unpaid creditors, the payment of one creditor produces a loss: they are forced to share pro rata in the remaining assets, while the payee recovers in full. But from the perspective of the company, to which West Mercia affected duties are owed, there is no loss at all. Keay has contended otherwise, noting that some of the West Mercia cases appear to equate the company with the creditors when describing the rule's effect, and arguing that this suggests that the relevant loss is the creditors'. But this cannot be right: it is well established that West Mercia affects only duties owed to the company, and that a breach of West Mercia affected duty is actionable only by, or in right of, the company. The only relevant loss can be that of the company itself.

[MB 3386-3387]

61 This same point was also made by Park J in ***Continental Assurance***.[49] In that case, Park J had found that the payments made to two creditors did not amount to an unlawful preference (at [420]), and that the payments were also not in breach of the creditor duty (at [421] - [422]). However, Park J also noted that:[50]

> This misfeasance claim by the liquidators is a claim for breach of the common law duty which directors owe to the company, not a claim for breach of any duty which they owe directly to the creditors of the company, still less of any duty owed to some creditors but not to others. Because the duty is owed to the company, any

[49] ***Re Continental Assurance Co of London Plc*** [2007] 2 BCLC 287 [MB 2462-2629]

[50] ***Continental Assurance***, [419]. [MB 2623]

> loss, if it is going to be recoverable by way of an action for misfeasance, must be loss suffered by the company. However, the payment by [the company] of its liabilities to [the two creditors] did not cause any loss to [the company]. It may have caused loss to the creditors other than [the two creditors], but it did not cause any loss to the company.

62 The same point was also made by Newey J in ***GHLM Trading***:[51]

> To my mind, questions of breach and remedy need to be distinguished. A director of a company has a duty to act "in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole" (see section 172 of the Companies Act 2006). Where creditors' interests are relevant, it will similarly, in my view, be a director's duty to have regard to the interests of the creditors as a class. If a director acts to advance the interests of a particular creditor, without believing the action to be in the interests of creditors as a class, it seems to me that he will commit a breach of duty….
>
> On the other hand, the applicability of section 239 of the 1986 Act may have a bearing on what, if any, remedy is available in respect of a breach of duty. As Hart J said in *Knight v Frost*, the *West Mercia* and *Washington Diamond* cases "are not authority for the proposition that a director who for his own purposes causes the company to prefer one of its creditors over another outside [the relevant] statutory period is liable to replace the money at the suit of the company". It seems to me that a company seeking redress in respect of a "preference" to which section 239 does not apply is likely to need to show (a) that it has suffered loss, (b) that the director has profited (so that the "no profit" rule operates) or (c) that the transaction in question is not binding on the company. In a typical case, the first of these may be impossible: if the "preference" involved the discharge of a debt, the company's balance sheet position is likely to be unaffected.

63 As Professor van Zwieten explains, and Park J and Newey J held, once it is understood that the creditor duty is owed only to the company, there is no basis for equating the company's loss with a loss suffered only by its creditors.

The Court of Appeal's approach is not necessary to make the creditor duty effective

64 As noted above, Ventose JA justified his approach on the proposition that the creditor duty would be rendered "*toothless*" if the Company's losses were not equated with those of its general body of creditors.[52] This is an unsound basis for the Court of Appeal's approach for five reasons.

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[51] ***GHLM Trading Limited v Maroo*** [2012] EWHC 61, [168]-[169]. [MB 1688]

[52] CA, [58], [86]-[87], [91]. [MB 121, 137, 140]

65 First, the proposition is based on the false premise that a breach of the creditor duty will always be balance-sheet neutral. This is not the case. There is a range of circumstances in which a breach of the creditor duty could cause a balance-sheet loss to the company. ***Sequana*** supplies one such example: the Supreme Court held that the payment of a dividend could breach the creditor duty, and any such payment would plainly reduce the net assets of the Company.[53] Other such circumstances include gratuitous transactions or transactions at an undervalue, instances of wrongful trading and the direct misappropriation of company funds. In each of these scenarios, a director would cause a balance-sheet loss to the company which could therefore form the basis of a claim for equitable compensation.

66 Second, the proposition is based on a further false premise that the law must provide an effective pecuniary remedy whenever it imposes a duty. It is not uncommon that a breach of a primary obligation does not generate a secondary obligation to pay compensation (for example, the breach of restrictive covenants in ***Morris-Garner v One Step Ltd*** [2019] AC 649, or the breach of trust in ***AIB***). [MB 2130-2192]

67 Third, the creditor duty may be enforced prospectively by injunction, even if (perhaps especially when) the company would not have a claim for a monetary remedy.

68 Fourth, any remedy for breach of the creditor duty complements the statutory scheme in respect of preferential payments. The Insolvency Act 2003 (BVI), like the Insolvency Act 1986 (UK), provides a detailed scheme specifying the persons liable to restore a preference (namely, the recipient), the qualifying period within which the transaction must have occurred, the conditions which must be satisfied for an order, the defences available and the orders which may be made.[54] Though the Appellant does not dispute that the creditor duty can co-exist with this statutory scheme, which was a point decided in ***Sequana***, the Board should approach with caution the suggestion that a further remedy "*must*" be available in addition to a statutory remedy or where the legislature has chosen not to apply the statutory remedy.

69 Fifth, the Court of Appeal's order imposes liability on the wrong party. If the Appellant is required to pay the US$13 million to the Company, the Respondents have no incentive

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[53] ***Sequana***, Lord Briggs at [158]-[162]. [MB 788-789]

[54] Insolvency Act 2003 (BVI), ss 244 ff; cf Insolvency Act 1986, ss 239–241. [MB 3443-3446] [MB 3450-3455]

to pursue Zenato, which is the only party that actually benefitted from the relevant payments. Nor does the Appellant have any obvious cause of action against Zenato, the BVI not having any equivalent to the Civil Liability (Contributions) Act 1978.

Lord Reed's provisional view in Sequana

70 The Court of Appeal found "*support*" for its approach in the "*provisional view*" expressed by Lord Reed in ***Sequana***.[55] Having considered (at [104]) the remedy awarded in ***West Mercia***, Lord Reed went on to state:[56]

> My provisional view is that the court was correct in taking that approach to the question of relief. In order to obtain a pecuniary remedy, it was not necessary for the company to have suffered a loss in the conventional, balance sheet, sense. The funds available to the company to meet the claims of the general body of creditors were depleted as a result of the director's breach of his fiduciary duty.

71 The Court of Appeal was wrong to find support for its approach in what Lord Reed said in ***Sequana***. Lord Reed's provisional view was that the remedy awarded in ***West Mercia*** was justified notwithstanding the absence of a loss to the claimant company in that case.[57] Lord Reed instead analysed ***West Mercia*** as providing an equitable remedy "*based on the restoration of the misapplied monies to the company so as to reconstitute its assets*" and "*treating the debt as subsisting for the benefit of the director*". Lord Reed's analysis of West Mercia is considered further under Ground 2 below. For present purposes, the key point is there is nothing in Lord Reed's judgment that supports equating a company's loss with the loss of its creditors (per Ventose JA in this case) or treating an interference with the *pari passu* distribution amongst the general body of creditors as giving rise to a compensable loss to a company (per Lord Sales, dissenting in ***Stanford***).

72 In any case, to the extent Lord Reed's provisional view that "*the funds available to the company to meet the claims of the general body of creditors were depleted as a result of the director's breach of his fiduciary duty*" is a conception of compensable loss, it is one that was comprehensively later rejected by the majority in ***Stanford***, where the issue was central to the appeal. Since the depletion of funds is matched by a decrease in liabilities,

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[55] CA [59], [88]. Lady Arden (at [327]) expressed agreement with Lord Reed's provisional view without further elaboration. [MB 122, 138] [MB 831]

[56] ***Sequana***, [105]. [MB 773]

[57] ***Sequana***, [103]-[105]. [MB 773]

the company suffers no loss, whether conceptualised on a balance-sheet basis or as a loss of an opportunity. Had the payments been prevented, the company would have retained the funds but remained liable for the debt. But the better view, as noted above, is that Lord Reed was not discussing compensable loss at all. This is apparent from Lord Reed's emphasis on the need for the proviso to the remedy awarded in ***West Mercia***, where his Lordship makes the above point about the absence of loss:[58]

> The relief given against the director was not simply an order that he repay the amount of the preference, since such an order would have left the company better off than if no breach of duty had occurred. That was because, if there had been no breach of duty, while the company's assets would have included the amount of the payment, its liabilities would also have included the amount of the debt due to the recipient of the payment.

Conclusion on Ground 1

73 The Zenato payments discharged a valid debt of US$13 million and left the Company's net asset position unchanged. The Company therefore suffered no loss capable of founding an award of equitable compensation. The rule in ***West Mercia***, properly understood in light of ***Sequana***, modifies the content of the directors' fiduciary duty to the Company by requiring appropriate regard to creditors' interests; it neither changes the identity of the person to whom that duty is owed nor converts a loss suffered by creditors into a loss suffered by the Company.

74 The Appellant accordingly respectfully invites the Board to allow Ground 1, set aside the order for payment, and restore the dismissal of the Quantum Application.

D. GROUND 2: THE REMEDY IN WEST MERCIA HAS NO APPLICATION ABSENT PERSONAL BENEFIT

Introduction

75 Ground 2 considers alternative justifications for the remedy awarded in ***West Mercia***, assuming (contrary to the approach of the Court of Appeal and of Lord Sales in ***Stanford***) that it cannot be explained as providing compensation for loss suffered by the company.

[58] ***Sequana***, [104]. [MB 773]

76 The Appellant respectfully submits that to the extent the remedy in ***West Mercia*** was correctly awarded in the absence of a loss to the company, it supports the proposition that where a director, for their own benefit, misapplies an insolvent (or near-insolvent) company's funds to pay one creditor in preference to the general body of creditors, equity may require the director to restore the misapplied sum on terms that the director takes the preferred creditor's dividend. ***West Mercia***, properly analysed, has no application to the present case because the Appellant derived no benefit from the Zenato payments. ***West Mercia*** therefore cannot justify the Court of Appeal's order.

The significance of Mr Dodd's benefit

77 As noted above, Mr Dodd was a director of both the claimant (West Mercia) and its parent. He had personally guaranteed the parent's overdraft. Despite instructions that the companies' bank accounts were not to be operated, he transferred £4,000 from West Mercia to the parent's overdrawn account. The transfer reduced West Mercia's debt to the parent, the parent's overdraft and Mr Dodd's exposure under his personal guarantee. Both companies entered liquidation shortly afterwards.[59]

78 Dillon LJ identified the transfer as having been made for Mr Dodd's sole benefit in relieving his guarantee liability.[60] When turning to remedy, his Lordship stated the relevant question as follows:

> The question then remains: what financial relief ought to be granted against him? Prima facie the relief to be granted where money of the company has been misapplied by a director for his own ends is an order that he repay that money with interest, as in *Re Washington Diamond Mining Co*.

79 ***Re Washington Diamond Mining Co*** was itself a case involving the misapplication of company funds for the personal benefit of the directors. In that case two directors jointly caused a company to pay sums of £70 due to each of them at a time when it was insolvent. [MB 2930-2950]

[59] ***West Mercia***, pp. 32-33. [MB 3307-3312]

[60] ***West Mercia***, p. 33. [MB 3307-3312]

80 Mr Dodd's personal benefit was therefore part of the stated premise of the remedy awarded in ***West Mercia***, not merely incidental background. Indeed, Ventose JA accepted as much in his judgment below:[61]

> Throughout the judgment of Dillon LJ, the fact that Mr. Dodd benefited indirectly from the payment of the £4,000.00 looms large …
>
> It seems clear that in framing the relief to be granted, Dillon LJ had in mind the misapplication by a director of the money of the company "for his own ends" and that the relief to be granted was that the director is to repay the company that money with interest.

81 However, having correctly recognised that the issue of Mr Dodd's personal benefit looms large in Dillon LJ's judgment, Ventose JA went on without explanation to dismiss its relevance:

> Although the action of the director in making the payment for his own benefit which amounted to what was called a "blatant misfeasance" loomed large in the decision of Dillon LJ, it cannot be said that when properly read in context that that feature was the sole basis or an important factor that informed his reasoning in respect of the remedy granted.

82 Putting the views of Ventose JA to one side, it is undoubtedly an available interpretation of ***West Mercia*** that Dillon LJ's approach to relief was predicated on the personal benefit of Mr Dodd. This is, for example, how Lady Rose understood the decision when she distinguished ***West Mercia*** in ***Stanford***:

> I accept that there may well be situations, similar to *West Mercia*, where a director is properly regarded as misfeasant and required to repay sums to the insolvent company even though those sums have been used to extinguish an existing liability. The West Mercia case illustrates one such situation where the director as guarantor benefited personally from the purported payment of the debt. I do not, however, accept that one can read across from that liability on the part of the fiduciary director a principle that a tortfeasor can be liable for a breach of duty which results in no pecuniary loss being suffered by the claimant. [MB 3074]

[61] CA, [46]-[48]. [MB 116]

83 For the reasons developed below, it is respectfully submitted that it is also the only coherent explanation for the remedy awarded in that case.

The remedy in *West Mercia* as conditional on a director's gain

84 The Board may take the view that the remedy in ***West Mercia*** is unsound or ought otherwise to be confined to the facts of that case. This might well be the outcome that is most consistent with the principles of equitable compensation, loss and corporate personality canvassed under Ground 1. This is not, however, a necessary step for the Board to take. There is a principled explanation for the remedy in ***West Mercia***, namely that it responds to the director's gain, rather than compensating the company for a loss.

85 As noted above, Lord Reed analysed the remedy in ***West Mercia*** when giving the leading judgment in ***Sequana***. It may be helpful to set out the relevant passage at some length:

> 104. […] *West Mercia* was itself concerned with proceedings brought by a liquidator against a director who had authorised a preferential payment, in circumstances where a claim against the recipient of the payment under the predecessor of section 239 would not have been worthwhile. The relief given against the director was not simply an order that he repay the amount of the preference, since such an order would have left the company better off than if no breach of duty had occurred. That was because, if there had been no breach of duty, while the company's assets would have included the amount of the payment, its liabilities would also have included the amount of the debt due to the recipient of the payment. Accordingly, while the director was ordered to repay the amount which he had misapplied, with interest, the Court of Appeal also ordered that the debt which had been discharged by the payment should be included in the amount of the company's liabilities for the purpose of calculating the distribution in the company's winding up, with any dividend attributable to that debt being paid to the director. The overall effect was to produce a similar result for the unsecured creditors as would have obtained if the preferential payment had not been made or if it had been set aside as a preference, with the director being treated in the same way as if he had personally paid the debt and been subrogated to the creditor's right against the company. [MB 773-774]
>
> 105. My provisional view is that the court was correct in taking that approach to the question of relief. In order to obtain a pecuniary remedy, it was not necessary for the company to have suffered a loss in the conventional, balance sheet, sense. The funds available to the company to meet the claims of the general body of creditors were depleted as a result of the director's breach of his fiduciary duty. The court granted an equitable remedy, based on the restoration of the misapplied monies to the company so as to reconstitute its assets as they ought to have been. By doing so, and treating the debt as subsisting for the benefit of the director, the court achieved the equivalent, as nearly as possible, of the director's performance of his fiduciary duty to the company.

> […]
>
> 107. Attention has turned instead in the more recent cases to the question of the remedy available, and in particular to the question whether pecuniary relief is available against the directors who authorised the payment. The basis of such relief has been regarded by some judges as problematical, notwithstanding the decision in *West Mercia*, unless the director has profited (eg if the debt was owed to himself, and he would not have been repaid if he had performed his fiduciary duty), in which case disgorgement can be ordered. In the absence of a profit to be disgorged, it has been suggested that no pecuniary relief can be given, since the preferential payment does not occasion the company any loss, in the sense that its balance sheet position is unlikely to be affected: see, for example, *GHLM Trading Ltd v Maroo*, para 169. A different approach was adopted in *In re HLC Environmental Projects Ltd [2014] BCC 337, paras 141–142*, where an analogy was drawn between a director who breaches his fiduciary duty by authorising a preferential payment and a trustee who has misapplied trust assets: just as the trustee can be ordered to restore the misapplied assets so as to reconstitute the trust fund, it was considered that the director could be ordered to restore the amount of the payment to the company. An order was made on that basis in the same form as in *West Mercia*. More recently still, in *Northampton Borough Council v Cardoza [2017] EWHC 504 (Ch) at [25]–[32]*, it was suggested, in the light of these authorities, that the remedies that should be granted where a director has acted in breach of duty by causing the company to prefer a particular creditor may be affected by a range of factors.
>
> 108. […] The central question therefore appears to me to concern the remedies which may be available where a preferential payment is made in breach of the directors' fiduciary duty. This is not the appropriate occasion on which to attempt a definitive resolution of that issue, although I have indicated a provisional view in relation to the relief granted in *West Mercia*. It does not directly arise for decision in this appeal, and it has not been the subject of full argument.

86 The following key points emerge from Lord Reed's careful analysis:

(1) First, the remedy awarded in ***West Mercia*** was not simply to compensate the company for a loss in the amount of the misappropriated funds, nor was it simply to restore those funds to the company. The proviso was an integral part of the remedy, without which creditors would get a "*windfall*".

(2) Second, the remedy in ***West Mercia*** creates what is in substance a legal fiction, "*with director being treated in the same way as if he had personally paid the debt and been subrogated to the creditor's right against the company*".

(3) Third, the basis for this legal fiction involves treating the debt repaid by the preferential payment "*as subsisting for the benefit of the director*".

(4) Fourth, Lord Reed identified a debate about whether a remedy can be granted against a director "*in the absence of a profit to be disgorged*" but expressly declined to offer even a provisional view about that. His Lordship's view, itself provisional, was limited to the correctness of the remedy in ***West Mercia***, where the director intentionally misapplied the company's money for his own benefit.

87 One can well understand why Lord Reed considered the approach in ***West Mercia*** to be justified on the facts of that case. The repayment of the West Mercia company's debt reduced pro tanto Mr Dodd's liability under his personal guarantee of an insolvent company's overdraft. In that case, the legal fiction of treating the repaid debt "*as subsisting for the benefit of the director*" merely reflects economic reality.

88 The position is quite different where the director neither benefited from the payment nor acted in a fraud on creditors. In such a case there is no basis for the fiction that the debt subsisted for the director's benefit or for placing the director in the position of the preferred creditor. Where that fiction is not justified, the only available remedy for breach of fiduciary duty is equitable compensation. To its credit, the Court of Appeal in this case correctly identified this as the only appropriate remedial approach. However, as explained under Ground 1 above, equitable compensation requires compensable loss and the Court of Appeal erred in finding such a loss in this case.

89 As Lord Reed noted, treating the remedy in ***West Mercia*** as confined to cases where the director benefits from a preferential payment is consistent with Newey J's analysis in ***GHLM Trading Ltd v Maroo***. In that case, Newey J recognised the situation where a director has profited from a preferential payment as an alternative basis for redress to showing that a company suffered loss.[62] The learned Judge reasoned that the "*no profit*" rule would operate where the director had profited from the preference. A similar view was also endorsed by Professor van Zwieten, albeit with the qualification that this characterisation "*will not be available where the director's gain would not be expected to perfectly correspond with the amount received by the creditor.*"[63] This qualification is no impediment in ***West Mercia***. The £4,000 transfer reduced pro tanto the overdraft of Dodd Ltd for which Mr Dodd was personally liable under his guarantee. The financial

[62] [2012] EWHC 61 (Ch); [2012] 2 BCLC 369, [169]. [MB 1688]

[63] *Zwieten*, p.408, fn. 169. [MB 3394]

benefit obtained by Mr Dodd therefore corresponded to the amount transferred from West Mercia.

90 The cases in which repayment relief has been awarded have commonly involved a payment to the director, the discharge of the director's own liability, or a direct financial benefit to the director or a closely connected person.

91 In ***Re Cityspan Ltd***, the relevant payments were repayments of loans made to the company by its directors and were paid into their personal accounts. In ***Re Micra Contracts Ltd,*** the payments were also made to the director. In ***Re Cosy Seal Insulation Ltd***, the impugned payments included repayments to the sole director and payments to a company controlled by his wife. In each of these cases the court found that the director and/or a connected person had gained financially as a result of the breaches of duty. [MB 2455-2461] [MB 2911-2929] [MB 2821-2845]

92 The exception is ***Re HLC Environmental Projects Ltd***, which Lord Reed referred to in the passage quoted above. In that case the director had caused an insolvent company to make payments discharging various debts of the company. Some of the debts were owed to the director while others were owed to a third party. John Randall QC, sitting as a Deputy High Court, made an order against the director for repayment to HLC of the money that he had himself received. As regards payments to the third party, which it was accepted discharged genuine liabilities of HLC, Mr Randall QC made an order against the director for "*payment to the company of the £1,557,907 which he wrongfully caused to be paid out of its funds*" but said that the order should be qualified by a ***West Mercia*** proviso. The Judge justified this order by analogy to the position of a trustee who has misapplied trust assets. [MB 2872-2910]

93 With respect to Mr Randall QC, drawing this analogy is problematic because of the material differences between the position of a director and a trustee in relation to assets, liabilities and creditors:

(1) A trustee is personally liable for debts incurred in administering the trust, and creditors may enforce those debts against the trustee's personal assets: ***Equity Trust (Jersey) Ltd v Halabi*** [2023] AC 877 at [53] and [58]–[59]. A company's debts, by contrast, are liabilities of the company itself. [MB 1497-1498, 1499-1500]

(2) Accordingly, applying trust assets to discharge a debt for which the trustee is personally liable releases the trustee from that liability. Payment of a company's debt confers no corresponding release on a director.

(3) It is also difficult to imagine a situation where a trustee wrongfully pays off a debt, which then has a balance-sheet-neutral effect on the trust fund. If the trustee applies trust assets towards the payment of a debt that is not 'trust debt', they have misappropriated trust funds. However, because the debt is not a trust debt, there is no matching reduction in the liabilities recorded in the trust accounts. Accordingly, the payment is not 'balance-sheet neutral' in the way a payment of a company's debt would be. The payment would always generate a 'net loss' to the trust fund. On the other hand, if the trust debt has been validly incurred, the trustee has a right to indemnity out of the trust assets. If they apply trust assets towards the payment of the debt, there is no breach of trust that could sustain a claim for compensation.

(4) It follows that the award of equitable compensation cannot be justified by analogy to a trustee's obligation to restore a depleted trust fund. In the trusts context, there is neither a creditor duty nor a foreseeable scenario where a balance-sheet-neutral transaction generates an obligation to pay compensation that could support the analogy proposed in ***HLC Environmental***.

94 In any case, the analogy to the position of a trustee begs the question of when a trustee can be ordered to restore a trust fund. In the absence of personal profit, the only available remedy is equitable compensation, which the Supreme Court has now three times confirmed requires counterfactual loss: **Target Holdings**, **AIB**, **Stevens**. [MB 3104-3124] [MB 543-586] [MB 3398-3442]

95 These authorities therefore do not establish that the ***West Mercia*** remedy is available in respect of a balance-sheet-neutral payment to an unrelated creditor. At most, they show that relief may be available where the director has personally benefited from, or caused a benefit to be conferred through, the impugned transaction.

96 Treating the remedy in ***West Mercia*** as conditional on a director's gain also resolves a number of difficulties with the loss-based approach addressed in Ground 1 above:

(1) There is no need to create an unprincipled and unclear exception to the basic principle that a company's assets, liabilities, profits and losses are its own and distinct from those of its shareholders and creditors;

(2) There is no need to create a further unprincipled and unclear exception to the principle that equitable compensation may be awarded only to compensate for counterfactual loss;

(3) There is no need to grapple with how to quantify a company's loss by reference to the prejudice suffered by the general body of creditors; the quantum of the relief is instead tailored to match the director's profit; and

(4) It provides a coherent basis for the proviso adopted in ***West Mercia***. Since Mr Dodd's own guaranteed liability had been reduced by the payment, he could be treated as having funded the restoration of the company's assets and could receive the dividend attributable to the notionally restored debt. No comparable basis exists in this case: the Appellant neither received the Zenato payments nor obtained a corresponding financial benefit from the discharge of PFF's debt.

97 This understanding of the remedy in ***West Mercia*** draws support from the principles that govern an account of profits, which were recently restated in the Supreme Court in ***Rukhadze***.[64] Lord Briggs, delivering the majority judgment, explained the basis of an account of profits in the following terms (at [16]):

> The essential purpose of the rule that a fiduciary must not without his principal's consent keep for himself a profit from his position as such, and the related rule that a fiduciary must avoid placing himself in a position where his interest and his duty may conflict (usually called the conflict rule), is to protect or deter those who have undertaken an obligation of single-minded loyalty to someone else from being tempted by human frailty to fall short of that obligation.

98 This supports the proposition that the 'profits' for which a fiduciary may be liable to account are not confined to monies received directly by a fiduciary. If the purpose of the "no profit" rule is to deter a fiduciary from straying from the duty of single-minded

[64] ***Rukhadze v Recovery Partners*** [2025] UKSC 10; [2025] 2 WLR 529. [MB 2349-2454]

loyalty, that purpose applies equally where a fiduciary benefits from a reduction in liability just as much as when a fiduciary benefits from a monetary gain.

99 The Appellant accepts that Dillon LJ did not characterise the order made in ***West Mercia*** as conditional on a director's gain or an application of the 'no profit' rule. But Mr Dodd's self-interest was plainly central to Dillon LJ's judgment and it is respectfully submitted that this is the best and only coherent justification for the remedy his Lordship awarded.

Conclusion on Ground 2

100 The remedy adopted by the Court of Appeal cannot be justified by ***West Mercia***. Properly understood, ***West Mercia*** does not support the imposition of a liability to repay the amount of a preferential payment on a director who neither received that payment nor obtained a personal benefit from it. The Appellant derived no such benefit from the Zenato payments.

101 The Appellant respectfully invites the Board to allow Ground 2 and restore the learned Judge's order dismissing the Quantum Application.

E. GROUND 3: INTEREST

Introduction

102 Ground 3 arises only if the Board holds that the Appellant is liable to pay compensation to the Company, and it arises on whatever basis that liability is upheld.

103 The Court of Appeal ordered the Appellant to pay interest on the US$13 million it awarded to the Company as equitable compensation for the period from 29 November 2009 until payment at a rate of 5% per annum.[65] No reasons were given justifying either the period of interest or the rate of interest so ordered. The sums involved are substantial: accrued interest on this basis will exceed US$11 million by the time of the hearing of this appeal.

104 The Appellant respectfully submits that the award of interest was unjust both in relation to the period of interest and the rate of interest.

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[65] CA, [113]. [MB 151]

105 The Appellant's position is that interest should be awarded at a rate not exceeding 3% for the period from 12 June 2014, being the date on which the Respondents issued the claim form against the Appellant, alternatively at a reduced rate until then.

106 The Appellant's submissions may be summarised as follows:

(1) Pre-judgment interest is intended to compensate the claimant for being "kept out" of the money which ought to have been paid to them. It is assessed by reference to the position of a claimant sharing the general attributes of the actual claimant.

(2) The period for which interest is awarded and the rate of interest may be reduced where the claimant delayed unreasonably in prosecuting the proceedings.

(3) The Respondents knew of the Zenato payments from 28 January 2010 at the latest but did not intimate any claim against the Appellant until over 4 years later and only issued proceedings on 12 June 2014. The Respondents have provided no proper explanation for this delay, which should be treated as unreasonable in the circumstances.

(4) The Company has been in an insolvent liquidation for substantially the entire period over which interest was awarded. In that period, the Company would not have been a borrower, and it is therefore appropriate to peg the rate of interest at a deposit rate, which in the ordinary course is likely to be lower than a borrowing rate.

The principles governing pre-judgment interest

107 The principles by which the appropriate rate is determined were summarised by Hamblen LJ in ***Carrasco v Johnson***:[66]

> (1) Interest is awarded to compensate claimants for being kept out of money which ought to have been paid to them rather than as compensation for damage done or to deprive defendants of profit they may have made from the use of the money.
>
> (2) This is a question to be approached broadly. The court will consider the position of persons with the claimants' general attributes, but will not have regard to claimants' particular attributes or any special position in which they may have been.

[66] [2018] EWCA Civ 87, [17] (Hamblen LJ, with whom Kitchin LJ agreed). [MB 969-970]

> (3) In relation to commercial claimants the general presumption will be that they would have borrowed less and so the court will have regard to the rate at which persons with the general attributes of the claimant could have borrowed. This is likely to be a percentage over base rate and may be higher for small businesses than for first class borrowers.
>
> […]
>
> (5) Many claimants will not fall clearly into a category of those who would have borrowed or those who would have put money on deposit and a fair rate for them may often fall somewhere between those two rates.

108 Interest on a judgment debt in a foreign currency is assessed by reference to rates relevant to that currency. Where, as in the present case, the judgment debt is in US Dollars, the English Commercial Court has granted interest at US Prime.[67] This rate of interest applies even where the claimant does not have any operations in the USA.

109 The relevance of delay was summarised by Jackson J in ***Claymore Services Ltd***.[68]

> (1) Where a claimant has delayed unreasonably in commencing or prosecuting proceedings, the court may exercise its discretion either to disallow interest for a period or to reduce the rate of interest.
>
> (2) In exercising that discretion the court must take a realistic view of delay. In the case of business disputes, litigation is for all parties an unwelcome distraction from their proper business. It is not reasonable to expect any party to take every litigious step at the first possible moment, or to concentrate on litigation to the exclusion of all else. Delay should only be characterised as unreasonable for present purposes when, after making due allowance for the circumstances, it can be seen that the claimant has neglected or declined to pursue his claim for a significant period.
>
> (3) When determining what disallowance or reduction of interest should be made to mark a period of unreasonable delay, the court should bear in mind that the defendant has had the use of the money during that period of delay.

The period of interest

110 The relevant chronology is set out in the Board's judgment in the liability proceedings:[69]

(1) The Zenato payments were made in November 2009 and provisional liquidators were appointed shortly thereafter.

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[67] ***Lonestar Communications Corporation LLC v Kaye*** [2023] EWHC 732 at [14]. [MB 1875-1876]

[68] ***Claymore Services Ltd v Nautilus Properties Ltd*** [2007] EWHC 805 (TCC), [55]. [MB 1058-1059]

[69] JCPC, [10]-[16]. [MB 185-186]

(2) On 28 January 2010, one of the Respondents, Mr Byers, examined a Mr Chen, who was the person at the Company "*responsible for repaying the Zenato loan" and "was in charge of PFF's affairs as sole de facto director*".[70] Mr Chen told Mr Byers about the repayments of the Zenato loan at that examination.[71]

(3) On 7 March 2014 the Liquidators wrote to the Appellant informing her that they would be withholding payment of an interim dividend to her on the grounds that they might have a cause of action against her. A letter before action followed on 31 March 2014.[72]

(4) On 12 June 2014 the Liquidators issued the claim form in these proceedings.

111 The Respondents were therefore aware of the Zenato payments within weeks of their appointment as provisional liquidators. Yet no claim was intimated for more than four years thereafter. The first indication the Respondents might pursue a claim against the Appellant was their letter of 7 March 2014. A letter before action followed three weeks later. The Liquidators have offered no explanation for the interval between January 2010 and March 2014.

112 The delay in this case is precisely the kind which Jackson J referred to in ***Claymore***. The Respondents, on any view, "*neglected or declined to pursue [their] claim for a significant period*", which period cannot be explained by ignorance of the relevant facts.

113 Further, since the Appellant never received the US$13 million (which was paid by the Company to Zenato), and had no reason to suppose that she ought to make payment of this sum to the Company as compensation, it is in this case artificial to treat her as having use of money that she ought earlier to have paid to the Company, at least in the period prior to the commencement of proceedings in 2014.

114 The Appellant accordingly submits that interest, if any is payable, should run from 12 June 2014 when proceedings were issued, alternatively, that interest until that date should be allowed only at a substantially reduced rate.

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[70] JCPC [11], [93]; and see PC [88] for Mr Chen's evidence at trial as to the circumstances of the repayment. [MB 185, 207]

[71] JCPC, [11]. [MB 185]

[72] JCPC [14]. [MB 186]

The rate of interest

115 The starting point for assessing the appropriate rate of interest is to consider the general attributes of the claimant. The only pertinent attribute is that the Company has been in an insolvent liquidation since February 2010, neither trading nor capable of borrowing. The Respondents will hold any sums realised in the liquidation on deposit pending distribution to creditors. The only loss the Company is likely to have suffered from being kept out of any sums payable by the Appellant is the deposit interest the Respondents would have earned in the meantime. It follows that the rate of interest should reflect deposit rates in the appropriate currency, being US Dollars in this case.

116 As noted above, the English Commercial Court has used US Prime as a representative borrowing rate for determining the rate of pre-judgment interest on US Dollar awards. In the period since the Zenato payments, US Prime was 3.25% in the six years until December 2015, and thereafter ranged between 3.25% and 5.5% until September 2022, after which it increased, peaking at 8.5% in July 2023 before settling back to 6.75% since November 2025.[73] The time-weighted average of the US Prime rate in the period since the Zenato payments is 4.64%.[74]

117 The 5% rate awarded by the Court of Appeal therefore exceeds the average US Prime rate for the relevant period. Since deposit rates will typically be lower than borrowing rates – and deposit rates were notoriously close to zero in the period following the global financial crisis, it is safe to assume that the deposit rates the Company would have earned on any sums payable to the Company would be materially lower.

118 For these reasons the Appellant respectfully submits that the rate of pre-judgment interest should not exceed 3% per annum.

Conclusion on Ground 3

119 If, contrary to Grounds 1 and 2, any sum is payable, the Appellant respectfully submits that the Court of Appeal's order for interest should be set aside and that the Board should

[73] https://www.jpmorganchase.com/legal/historical-prime-rate

[74] Average $= \frac{\Sigma(\text{rate} \times \text{days applicable})}{6{,}149 \text{ days}} = \frac{28{,}549}{6{,}149} = \boxed{4.6429\%}$

substitute an order for simple interest at a rate not exceeding 3% per annum from 12 June 2014 until payment.

F. CONCLUSION

120 There is no dispute that a director's duty to a company that is insolvent or verging on insolvency requires regard to the interests of the company's creditors. Nor is there any dispute that a company may in principle obtain a remedy against a director for allowing a preferential payment in breach of that duty. The Appellant's case is rather that any such remedy must fit the nature of the breach and have a principled basis.

121 Where a director profits from a preferential payment, the appropriate remedy may be to require the director to disgorge that profit. This was the position in ***West Mercia***, in which the director was treated as if he received the preferential payment and was required to restore the payment to the company and stand in the position of the preferred creditor. Where a breach causes a loss to the company, for example, a gratuitous disposition, an under-value transaction, wrongful trading or the direct misappropriation of assets, the company has its claim in equitable compensation on established legal principles.

122 There is, however, no principled basis on which any such remedy can be awarded against the Appellant because she did not profit and the Company suffered no loss. Nor is there any warrant for rewriting the fundamental principles of corporate personality to provide compensation to a company that has suffered no loss.

123 The Appellant accordingly respectfully requests that the appeal be allowed, that the orders of the Court of Appeal be set aside, and that the dismissal of the Quantum Application be restored, with the alternative relief on interest sought under Ground 3 if, and only if, any sum is held to be payable.

28 September 2026

Laurence Rabinowitz KC

Tim Goldfarb

Ifan Chan