Case ID: JCPC/2026/0017

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL FROM THE COURT OF APPEAL OF THE EASTERN CARIBBEAN SUPREME COURT (BRITISH VIRGIN ISLANDS)

B E T W E E N:

CHEN NINGNING

Appellant

-and-

(1) MARK BYERS

(2) MATTHEW RICHARDSON

(in their capacity as joint liquidators of Pioneer Freight Futures Company Limited)

(3) PIONEER FREIGHT FUTURES COMPANY LIMITED (in liquidation)

Respondents

RESPONDENTS' WRITTEN CASE

(A) INTRODUCTION AND OVERVIEW

1. The central issue in this appeal is whether a director who has acted in breach of the creditor interest duty in causing or allowing a preferential payment to a creditor at a time of insolvency ought to be liable in equity in respect of his or her breach.

2. The Appellant's written case concludes (paragraph 120) as follows:

> "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…".

3. This is, one might think, an unpromising starting point for the Appellant's argument that, in fact, there ought to be no remedy at all (unless the director has personally benefitted from the preferential payment).

4. The Court of Appeal agreed with the Respondents that a remedy ought to be available in such a case. It held that a director should be liable for the amount that was wrongly paid away – but with the director being subrogated into the position of the creditor so as to restore the position (as far as possible) to what it would have been absent the breach.

5. The Respondents' case is that the Court of Appeal was plainly right to hold that a director is liable in such a case. The law would be incoherent if there was no available remedy. That is reflected in the Latin phrase *ubi jus, ibi remedium* (where there is a right, there is a remedy). Equity is sufficiently flexible to allow a carefully sculpted remedy of the sort identified by the English Court of Appeal in West Mercia Safetywear Ltd v Dodd [1988] BCLC 250 and followed in various other jurisdictions. To the extent it is necessary to go further, the law conceptualises loss and compensation by reference to the nature and scope of the underlying duty or obligation; and such a remedy restores the company to the position it would have been in but for the preferential payment that was made in breach of duty. On the facts of this case, the Appellant owed duties to act in the interests of the creditors. The Company previously had an additional US$13m to pay to creditors on a *pari passu* basis. It now has US$13m less as a result of the Appellant's breach of duty. [MB 3307-3312]

6. The Board is invited to dismiss the appeal.

(B) BACKGROUND

7. The background is set out in detail in the Statement of Facts and Issues. For the purposes of this appeal, the following summary is sufficient:

   7.1. On 3, 4 and 27 November 2009, Pioneer Freight Futures Company Limited ("**the Company**") paid approximately US$13m to a creditor called Zenato Investments Ltd ("**Zenato**") in order to repay a loan. Shortly thereafter, on 17 December 2019, the Company entered into provisional liquidation.

7.2. As the Privy Council previously held in Byers v Chen [2021] UKPC 4; [2021] BCC 462 ("**Privy Council 1**") at [8], "*at the time these payments were made (and indeed at all times from, at the latest, 29 October 2009) [the Company] was insolvent and an insolvent liquidation or some other protective insolvency process was inevitable*". [MB 215]

7.3. At the time of the payments, the Appellant "*had a fiduciary duty to act honestly and in good faith in what she believed to be the best interests of [the Company] and, through [the Company], as an insolvent company, in the best interests of its creditors. Similarly, she had a duty to exercise her powers as a director for proper purposes, that is to say, once [the Company] became insolvent, for purposes which would further the interests of [the Company's] creditors*": Privy Council 1 at [91]. [MB 236]

7.4. The payments were "*undoubtedly improper*" as they were "*made at a time when [the Company] was insolvent and without any proper reason*". As the Appellant took no steps to prevent the payments, "*her inaction amounted to a breach of her fiduciary duty*": Privy Council 1 at [93]. [MB 237]

8. The effect of the payments was that Zenato was repaid in full at a time when insolvent liquidation was inevitable. But for the payments, Zenato would have had to prove in the liquidation and would have been paid no more than its *pro rata* share of the assets available for distribution. Absent any relief, the other creditors will receive significantly less than what they would have received if the payments had not been made.

9. It is also relevant to note that the payments in this case did meet the statutory criteria for unlawful preferences under section 245 of the BVI Insolvency Act 2003: see the judgment of the Court of Appeal delivered on 12 June 2018 at [105] and Privy Council 1 at [18(iii)]. Lord Leggatt's concerns (expressed in Stanford International Bank Ltd v HSBC Bank PLC [2022] UKSC 34; [2023] AC 761) that a director should not be liable for a preferential payment if the payment is not caught by the statutory insolvency regime do not therefore arise in this case. In [MB 541-542] [MB 2017-218] [MB 3058-3103]

Privy Council 1 it was determined that it was not necessary to decide whether a remedy would lie against the Appellant under the BVI Insolvency Act 2003 because the remedy for breach of the creditor interest duty was sufficient: "*[the Appellant's] liability to account will be a sufficient remedy for the Liquidators, and a parallel remedy under the Act, although discretionary as to its precise extent, could not provide for them anything of greater value than they will obtain from the Board's conclusion that she was in breach of fiduciary duty by failing to prevent the Zenato payments*" (at [96]). [MB 238]

(C) GROUNDS ONE AND TWO: SUBMISSIONS

(C.1) The nature of the creditor interest duty

10. It is common ground that in the BVI, as in England and Wales, "*in certain circumstances the interests of the company, for the purpose of the directors' duty to act in good faith in its interests, are to be understood as including the interests of its creditors as a whole*": Court of Appeal judgment below at [33]. The Court of Appeal referred to this as "*the rule in West Mercia*". This written case uses the label "the creditor interest duty" but it means the same thing as "*the rule in West Mercia*". [MB288]

11. As explained by the Supreme Court in BTI 2014 LLC v Sequana SA [2022] UKSC 25; [2024] AC 211 (which the parties agree reflects the law of the BVI): [MB 731-865]

    11.1. A director owes a fiduciary duty to act in good faith in the interests of the company. Ordinarily, whilst a company remains solvent, the interests of the company are to be equated with the interests of the members as a whole.

    11.2. Where the company's financial position is such that the directors know or ought to know that the company is insolvent or that insolvency is imminent, the interests of the company are not the interests of its members but the interests of its creditors.

    11.3. This is the creditor interest duty. The duty is owed to the company, and not to the creditors directly. It is the same core fiduciary duty of good faith as exists if the company is solvent. It is the content of the duty that is modified

when the company is insolvent – with the focus moving from the interests of the members to the interests of the creditors.

12. The rationale for the creditor interest duty is that, where it arises, the company's creditors have the economic interest in the company, based on their entitlement to be paid the debts owed to them, ultimately enforceable against the proceeds of realisation of the company's assets: Sequana at [1], [11]-[12], [56], [59], [147], [207] and [246]-[247]. When the creditor interest duty is engaged, the interests of creditors displace those of shareholders. The classic statement in this regard is that of Street CJ in Kinsela v Russell Kinsela Pty Ltd (1986) 4 NSWLR 722: [MB 745, 747-748, 760, 761, 785] [MB 1738]

> "In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders' assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency, or the imposition of some alternative administration."

13. This appeal is concerned only with the creditor interest duty. It is not concerned with, for example, a contractual or tortious duty owed by a third party to the company as was the case in Stanford. By contrast with the creditor interest duty, the content of a contractual or tortious duty owed by such a third party is not modified in any way by the company's insolvency. [MB 3058-3103]

14. There is, and can be, no serious argument about either the existence of the creditor interest duty, or about the clear policy reasons as to why the duty is imposed on directors, namely, the protection of the interests of creditors.[1] Nor can there be any serious debate that, as a matter of policy, the law *should* provide for a remedy in the paradigm circumstances in which the creditor interest duty is intended to

[1] The Appellant accepts that "*the justification of the creditor duty involves the protection of creditors when the company is insolvent, or insolvency is imminent*" (at paragraph 59 of her written case), albeit she seeks to qualify that by saying that these policy reasons only apply "*in an abstract sense*". [MB 32]

operate (i.e. where a director of an insolvent company acts to prejudice creditors by causing a preferential payment to be paid to one or more creditors). The only question is whether, as the Appellant contends, the courts are hamstrung and unable to grant a remedy because of the application of principles relating to the calculation of loss for breaches of contractual and tortious duties to the equitable creditor interest duty.

(C.2) When there is a right there ought to be a remedy

15. A director who, like the Appellant, causes or allows a preferential payment to an individual creditor where the insolvent liquidation of the company is inevitable and where there is no proper reason for making the payment will likely breach the creditor interest duty. Indeed, this is the paradigm case in which the creditor interest duty will be engaged (because other acts of misfeasance such as gratuitous transactions, transactions at an undervalue and the direct misappropriation of company funds will be susceptible to challenge irrespective of whether the creditor interest duty is owed). The act of the director in enabling the preferential payment prejudices the creditors because it reduces the assets which would otherwise be available for rateable distribution between them. The question for the Board is simply: in the paradigm case in which the creditor interest duty is engaged, does the company, acting by its subsequently appointed officeholders, have any remedy against the directors in respect of such a breach?

16. If the Appellant is right that the answer is "no", then the creditor interest duty would be stripped of any real substance in the paradigm case in which it is required.

17. The maxim *ubi jus, ibi remedium* is the "*fundamental principle that, whenever a man has a right, the law should give a remedy*": Hill v CA Parsons & Co [1972] Ch. 305 at 316 per Lord Denning MR. The principle has been described by the Supreme Court as "*one of the maxims of equity*": Lehtimäki v Cooper [2020] UKSC 33; [2022] AC 155 at [144]. In The General Medical Council v Meadow [2006] EWCA Civ 1390; [2007] QB 462, Sir Anthony Clarke MR said that the "*most fundamental feature of our system of law [is] that breach of it should be remediable through the courts*": at [108]. [MB 1712] [MB 1790] [MB 3164]

18. In Secretary of State for Environment, Food, and Rural Affairs v Meier [2009] UKSC 11; [2009] 1 WLR 2780, Lady Hale said the following at [25]: [MB 2959]

> "The underlying principle is ubi ius, ibi remedium: where there is a right, there should be a remedy to fit the right. The fact that "this has never been done before" is no deterrent to the principled development of the remedy to fit the right, provided that there is proper procedural protection for those against whom the remedy may be granted…"

19. In Sidaway v Board of Governors [1985] AC 871, Lord Scarman said the following at page 884:

> "Unless statute has intervened to restrict the range of judge-made law, the common law enables the judges, when faced with a situation where a right recognised by law is not adequately protected, either to extend existing principles to cover the situation or to apply an existing remedy to redress the injustice. There is here no novelty; but merely the application of the principle ubi jus ibi remedium." [MB 2992]

20. The authors of Snell's Equity (35th edition) describe the first maxim of equity as being "*Equity Will Not Suffer a Wrong to be Without a Remedy*": at [5-002]-[5-005]. [MB 3396-3397]

21. A company has a right to enforce performance of a director's duties and a right to bring a claim against a director for breach of duty. In this case, the Company had a right to require the Appellant to comply with the creditor interest duty and not cause or allow the preferential payments that were made. Indeed, as the Appellant notes in paragraph 67 of her written case, the Company could, in theory (though not in practice given that the Appellant had effective control of the Company), have prospectively sought an injunction against the Appellant preventing her from allowing the preferential payments.[2] The Appellant interfered with the Company's rights and breached the creditor interest duty that she owed. It would, it is submitted, be a very surprising and wholly unsatisfactory result if there was no remedy available in such circumstances. As the Court of Appeal said in the

[2] If damages had been awarded in substitution for an injunction, the only conceivable measure would be the value of the preferential payments.

judgment below at [58], otherwise "*the rule in West Mercia would be a toothless dog, having no bite*". [MB 302]

22. In paragraphs 64-69 of her written case, the Appellant seeks to justify the "no remedy" outcome for five reasons. None of those reasons are in any way good ones: [MB 33-35]

22.1. The Appellant's first reason is that some breaches of the creditor interest duty might result in a balance sheet loss. That is true but beside the point. As discussed above, the making of a preferential payment is the paradigm case in which the creditor interest duty will be engaged. Most if not all of the examples given in paragraph 65 of the Appellant's written case (gratuitous transactions, transactions at an undervalue, the direct misappropriation of company funds) would be breaches of duty even if the creditor interest duty were not owed. The issue in the present case is whether there is a remedy in the paradigm case of breach of the creditor interest duty itself.

22.2. The Appellant's second reason is that there are other examples of breaches of duty where the law does not impose a remedy.[3] That is, of course, correct – the classic example is nominal damages for breach of contract where the innocent party suffers no loss. However, this simply begs the question of the circumstances in which the law should impose a remedy. The Appellant cannot suggest any coherent reason why the law should not impose a remedy in a case such as the present.

22.3. The Appellant's third reason is that the creditor interest duty can be enforced prospectively by injunction. In theory, that may be so but this is a practically worthless remedy in circumstances where a company will, in most cases, be under the control of the very director whose conduct the company would otherwise wish to injunct. It also raises the question, not

[3] In fact, contrary to what is suggested in paragraph 66 of the Appellant's written case, compensation was payable in both AIB Group (UK) plc v Mark Redler & Co Solicitors [2014] UKSC 58; [2015] AC 1503 and Morris-Garner v One Step (Support) Ltd [2018] UKSC 20; [2019] AC 649. [MB 543-586] [MB 2130-2192]

answered by the Appellant, as to why the law would prohibit compensation being payable in respect of a preferential payment that the company could have (if under the control of independent directors) sought to prevent by injunction.

22.4. The Appellant's fourth reason is that the creditor interest duty should complement the statutory scheme. It is unclear what the Appellant means by this in circumstances where her own case before Privy Council 1 was that a company has no remedy against a defaulting director under the statutory scheme, unless the director has received the benefit of the preference. In any event, as explained above, the payments in this case did meet the statutory criteria for unlawful preferences under section 245 of the BVI Insolvency Act 2003 so there can be no possible inconsistency.

22.5. The Appellant's fifth reason is that "*the Court of Appeal's order imposes liability on the wrong party*". In circumstances where: (i) the Appellant owed fiduciary duties; (ii) the payments were "*undoubtedly improper*"; and (iii) the Appellant's "*inaction amounted to a breach of her fiduciary duty*" (Privy Council 1 at [93]), it is unclear why the Appellant is said to be the "*wrong party*". Further: [MB 237]

22.5.1. There are often very good commercial reasons why a liquidator will not wish to pursue a creditor that has been preferred (particularly if the creditor is impecunious or enforcement would be difficult in the relevant jurisdiction) and this is no reason at all for a misfeasant director to be excused from their wrongdoing.

22.5.2. The Appellant has never sought to bring a contribution claim (or a claim in unjust enrichment) against Zenato. As to a potential contribution claim, the position in the BVI is the same as it was in England and Wales prior to the enactment of the Law Reform (Married Women and Tortfeasors) Act 1935 and the Civil Liability (Contribution) Act 1978. Depending on the facts, contribution claims may be available both in equity and at common law. As

explained in Goff & Jones on Unjust Enrichment (10th edition) at [19-15], "*[t]he categories of claimant by whom contribution can be claimed at common law or in equity are not closed*". It is simply not possible at this stage in the litigation, the point having been raised very late, to determine the precise scope of the Appellant's potential contribution rights in equity or at common law; or the strength of any claim in unjust enrichment that the Appellant might have. [MB 3340]

22.5.3. Further, the Appellant had other potential remedies if she wished to challenge the Respondents' decision not to pursue Zenato. As a contingent creditor, if she considered the Respondents' decision to be one that no reasonable liquidator could have reached, she would have had standing to seek an order requiring the Respondent to bring a preference claim. The Appellant did not do so.

22.5.4. In any event, the availability of the West Mercia remedy cannot vary depending on whether the jurisdiction in question has a statutory contribution scheme. This would lead to the surprising result that, on precisely the same facts, a remedy would be available in England but not in the BVI.

(C.3) The West Mercia remedy

23. The remedy ordered by the Court of Appeal in this case reflected the remedy ordered by the English Court of Appeal in West Mercia itself. The "West Mercia remedy" (in the absence of a better label) is: (i) an order that the director be liable in equity to pay the amount of the preferential payment; and (ii) an order that the director be treated, essentially by way of subrogation, as standing in the shoes of the creditor who has been preferred. As Lord Reed said in Sequana at [104]: "*[t]he overall effect [is] 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]

24. The Appellant's primary case on this appeal is that West Mercia was *rightly* decided: see paragraph 84 of her written case. The Appellant contends that the West Mercia remedy is based on the "no profit" principle (paragraphs 97-98) and/or should be regarded as analogous to an account of profits and/or "*is best understood as a rough and ready means of requiring Mr Dodd to restore money he had misapplied for his personal benefit*" (paragraph 8). [MB 39] [MB 44-45] [MB 16]

25. The fundamental problem with the Appellant's after-the-event rationalisation of West Mercia is that, as the Appellant accepts in paragraph 99 of her written case, "*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*". The same point was made by the Court of Appeal at [52] of the judgment below when it said that "*the remedy granted by Dillon LJ in West Mercia was based on the breach of the rule in West Mercia…it cannot be said that when properly read in context that [the director's personal benefit] was the sole basis or an important factor that informed his reasoning in respect of the remedy granted*". [MB 45] [MB 118]

26. Once one disregards the Appellant's after-the-event rationalisation of West Mercia there are, as a matter of analysis, two possible explanations for the West Mercia remedy:

    26.1. First, that in respect of a preferential payment made in breach of the creditor interest duty it is not necessary for the company to have suffered loss or at least "*not necessary for the company to have suffered a loss in the conventional, balance sheet, sense*": Sequana at [105] per Lord Reed. [MB 773-774]

    26.2. Second, and alternatively, as the Court of Appeal held in this case, that although loss is a necessary component of the cause of action, the company's loss is conceptualised by reference to the interests of the general body of creditors. This is because of the nature of the creditor interest duty and the fact that the creditors are the persons with the economic interest in the company.

27. In the result, there is no difference between these two different ways of analysing the West Mercia remedy. The Respondents' case on this appeal is that the second way of analysing the remedy is to be preferred, albeit it makes no difference to the outcome. Both approaches are based on two important points: (i) the flexibility of equity to mould appropriate relief in light of what is fair and just; and (ii) the fact that "loss" is a protean concept and the law conceptualises loss not in some abstract way but by reference to the specific obligation or duty that has been breached. The Respondents now deal with these points in turn.

(C.4) The flexibility of equity to mould appropriate relief

28. Equitable remedies are "*elastic*": Nocton v Lord Ashburton [1914] AC 932, 952. [MB 2051] As the majority of the Supreme Court of Canada said in Canson Enterprises Ltd v Boughton & Co [1991] 3 SCR 534 at 588, equitable compensation "*must continue to be moulded to meet the requirements of fairness and justice in specific situations*". [MB 962]

29. As the Supreme Court of South Australia said in Duke Group v Pilmer [1999] SASC 97; (1999) 73 SASR 64 at [834]: "*[e]quitable compensation itself has been shown to be a flexible remedy. It must be fashioned to meet the needs of a particular case*". [MB 1226]

30. In Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd [2011] EWCA Civ 347; [2012] Ch 453, Lord Neuberger MR said the following at [47]: [MB 3033]

> "[47]…However, although it is subject to limiting principles, equitable compensation is a more flexible concept than common law damages. Kirby J in the High Court of Australia put it this way in Maguire v Makaronis (1997) 188 CLR 449, 496:
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> > "[Equitable] remedies will be fashioned according to the exigencies of the particular case so as to do what is 'practically just' as between the parties. The fiduciary must not be 'robbed'; nor must the beneficiary be unjustly enriched.""

31. In both Sequana and Stanford, it was the flexibility of equity that led various members of the Supreme Court to voice (albeit *obiter*) their support for the West Mercia remedy:

31.1. In Sequana at [402], Lady Arden said that "*[c]ourts of equity granting relief on claims for misfeasance can mould remedies in an appropriate way to meet the circumstances of the case*". [MB 853]

31.2. In Sequana at [105], Lord Reed said that in West Mercia "*[t]he 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*". [MB 773]

31.3. In Stanford at [34], Lady Rose said that there exists "*the ability of the court of equity to identify a case of misfeasance and fashion an appropriate remedy*". [MB 3074-3075]

32. If the first explanation of the West Mercia remedy (see paragraph 26.1 above) is right, it may be sufficient to stop there in the analysis. Equity is capable of "*mould[ing] remedies in an appropriate way to meet the circumstances of the case*" and it is "*not necessary for the company to have suffered a loss in the conventional, balance sheet, sense*". [MB 853] [MB 773]

(C.5) The conceptualisation of loss by reference to the obligation or duty owed

33. As explained above, the Respondents' case is that (assuming loss is a necessary component of the cause of action) the Court of Appeal was right in the way it approached the question of loss. That is because, whether at equity or at common law, the law conceptualises loss not in some abstract way but by reference to the specific obligation or duty that has been breached.

34. At common law, for example, there is a different approach to damages in contract and tort "*reflecting the different nature of the obligation breached by the wrongdoer in each case*": Morris-Garner at [31]. [MB 2152-2153]

35. One particular example discussed in Morris-Garner is "*user damages*", which compensate a property owner for the theoretical use that the property could have been put to if the owner's rights had not been interfered with – even if the owner

would not have in fact used the property.[4] As explained in Morris-Garner at [30], user damages are "*compensation for loss, albeit not loss of a conventional kind*". The fact that damages can be awarded even if the owner would not have used the property shows that "*loss*" is a protean concept. There is not a single "*conventional*" type of loss that applies in each and every case. The law's conceptualisation of loss depends on the nature and scope of the obligation that has been breached by the wrongdoer. [MB 2152]

36. The position is the same in equity. In fact, there is even greater scope for loss to be conceptualised by reference to the nature and scope of the underlying obligation because of equity's "*elastic*" and "*flexible*" nature and the need for remedies to be "*fashioned to meet the needs of a particular case*" (see previous section).

37. In AIB Group, Lord Toulson said at [70] that "*the scope and purpose of the trust may vary, and this may have a bearing on the appropriate relief in the event of a breach*". Lord Reed said that "*different rules apply to the breach of different obligations*" (at [92]) and that the "*measure of compensation for breach of trust…reflects the nature of the obligation breached and the relationship between the parties…compensation can be seen more clearly to reflect an analysis of the characteristics of the particular obligation breached*" (at [137]-[138]). [MB 568-569] [MB 574] [MB 585]

38. The reason why the claim failed in Stanford was not because there was no loss in an abstract sense. It was because there was no loss by reference to the nature of the underlying "Quincecare" duty[5] (a duty that, unlike the creditor interest duty, does not shift to take account of the creditors' interests when the company is insolvent). This was the point made by Lady Rose in Stanford at [34] when she said that "*[t]he nature of the duty owed by a director to the company when it becomes insolvent is very different from the Quincecare duty owed in tort by the bank to its customer and the range of remedies available to the court is very different as well*". In other [MB 3074-3075]

[4] By analogy with the user damages cases, in this case, the Company would have used its property (US$13m) to pay its creditors *pari passu*, The Appellant's breach of the creditor interest duty has prevented it from putting its property to such use.

[5] Following the Supreme Court's decision in Philipp v Barclays [2023] UKSC 25; [2024] AC 346, it is now known that a "Quincecare" claim is based on general principles of agency law and the fact that payment instructions (or indeed other actions taken by an agent) do not bind the principal if the agent did not have actual or apparent authority to give the instructions or act as they did. [MB 2267-2309]

words, the conceptualisation of loss depends on the nature of the obligation or duty that has been breached.

39. The present case concerns a breach of the creditor interest duty. When the creditor interest duty is owed, the interests of creditors will have displaced those of shareholders. The existence of the creditor interest duty reflects the fact that it is the creditors that now have the economic interest in the company. The fiduciary (unlike the bank in Stanford) owes a duty to take account of the interests of the creditors. Where a company is solvent and a director does not owe the creditor interest duty (or where, as in Stanford, the content of the duty is not directed towards the creditors at all) it is understandable why the company's loss in analysed in a conventional balance sheet sense. But there is no reason to analyse loss in this way when considering a breach of the creditor interest duty. As the Supreme Court explained in Sequana at [77], "*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*". It would be, as the Court of Appeal held, incoherent to measure loss in the present context without having regard to, or conceptualising loss by reference to, the purpose of the duty and the interests of the general body of creditors. [MB 765]

40. Applying those principles to the present case, the Appellant was required to have regard to the interests of creditors (and treat them as paramount when, as in this case, insolvent liquidation was inevitable). Prior to the preferential payments being made, the Company had US$13m that would have been distributed *pari passu* among the creditors. As a result of the preferential payments, it does not have US$13m to be distributed *pari passu* among the creditors. That is a US$13m loss by reference to the nature and scope of the fiduciary duty owed by the Appellant.

41. This is what the Court of Appeal said at [58] of the judgment below and the Respondents endorse that analysis: [MB 121-122]

> "[58] The issue as I see it is two sides of the same coin. On one side, for the purposes of the rule of West Mercia, the interests of the company must

include the interests of the general body of creditors. Company directors must ensure that they act in the best interests of the company and this requires them, when the company is insolvent or insolvency is imminent, to consider the interests of the general body of creditors. 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."

42. This approach is not, as the Appellant suggests, contrary to the principle of separate corporate personality. The West Mercia remedy is simply an example of equity responding flexibly to a specific breach of duty and conceptualising loss in the context of that breach of duty.

43. In paragraphs 40-52 of her written case, the Appellant argues that because the loss of the shareholders is not, so it is said, always reflected in the loss of the company when the company is solvent, so the loss of the creditors cannot be, so it is said, reflected in the loss of the company when the company is insolvent. As to this: [MB 26-30]

43.1. In the first instance, it is not clear to the Respondents what point the Appellant is trying to make. There is no dispute about the way in which the law conceptualises loss in the context of a solvent company. The only issue on this appeal is how the law should conceptualise loss in the context of a breach of the creditor interest duty.

43.2. When the Court of Appeal said that "*loss to the general body of creditors must be equated with that of the company*", this meant that the loss to the company should be measured by reference to the value of the preferential [MB 92]

payment that would otherwise have been available for *pari passu* distribution to the general body of creditors. The precise $/£ value of a particular creditor's loss may not entirely correspond with their *pari passu* share of the preferential payment. For example, a creditor might have used their *pari passu* share of the preferential payment to invest in a highly profitable business generating a near-immediate 100% return. But the company's loss is not the same as that individual creditor's loss; and that is not the way in which the law conceptualises the company's loss in a case like the present one. In this sense, the West Mercia remedy is consistent with the point made by the Appellant that the loss of a shareholder or creditor may not be precisely the same as the company's loss.

43.3. In any event, contrary to the Appellant's assertion, there are a great number of cases in which the law regards a company's loss and a shareholder's loss as being the same thing. Indeed, this is precisely the circumstances in which the principle against recovery of "reflective loss" may be engaged. The principle is engaged where "*a diminution in the value of a shareholding or in distributions to shareholders, which is merely the result of a loss suffered by the company in consequence of a wrong done to it by the defendant, is not in the eyes of the law damage which is separate and distinct from the damage suffered by the company, and is therefore not recoverable*": Sevilleja v Marex Financial Ltd [2020] UKSC 31; [2021] AC 39 at [39]. Thus, the whole point of the principle against the recovery of reflective loss is that it applies where the loss of the shareholder is in substance the same as that suffered by the company. [MB 1954]

43.4. Lowick Rose LLP v Swynson Ltd [2017] UKSC 32; [2018] AC 313 also does not assist the Appellant. A company (Swynson) lent money to another company (EMSL) on the basis of negligent advice provided by the defendant. Swynson's beneficial owner (Mr Hunt) subsequently lent money to EMSL in order to enable it to repay the loan to Swynson. As the loan which Swynson had made was repaid, Swynson did not suffer any loss. Lowick Rose LLP v Swynson Ltd is simply an example of a company not being able to recover damages for making a loan based on negligent [MB 1897-1928]

advice when the loan was in fact repaid; and is of no relevance whatsoever to the present case.

44. The Appellant also contends (see paragraphs 53-56) of her written case that the West Mercia remedy causes some sort of difficulty in quantifying the amount that the defaulting director ought to pay. There is no such difficulty. The starting point is that the defaulting director will be ordered to pay the amount of the preferential payment (with the director subrogated to the position of the creditor in respect of the same). If the director wishes to advance a defence based on the hypothetical counterfactual (for example, that the money used to make the preferential payment would have been lost in some other way), then the director can advance that defence and the court can determine it in the usual way. In any event, even if quantification were difficult (which it is not), "*[d]ifficulty of assessment is no reason for awarding no damages*": CCC v Sheffield Teaching Hospitals NHS Foundation Trust [2026] UKSC 5; [2026] 2 WLR 385 at [56]. [MB 30-31] [MB 988]

(C.6) Additional reasons why the Court of Appeal was right

45. There are three additional reasons why the Court of Appeal was right to make the order it did:

45.1. First, the West Mercia remedy is consistent with the general policy of *pari passu* distribution.

45.2. Second, if the Appellant is right, it would lead to some unusual and undesirable outcomes in analogous cases. [MB 3307-3312] [MB 3058-3103]

45.3. Third, contrary to the Appellant's submissions, the West Mercia remedy is consistent with the Supreme Court cases of Stanford, Target Holdings Ltd v Redferns [1996] AC 421 and AIB Group [MB 3104-3124] [MB 543-586]

46. Starting with the first of these three points (consistency with general policy), as was said by Lord Bingham in Fairchild v Glenhaven Funeral Services [2002] UKHL 22; [2003] 1 AC 32 at [32], "*[t]he law must be developed coherently, in accordance with principle, so as to serve, even-handedly, the ends of justice*". One [MB 1595]

of the principles by reference to which the law is developed in insolvency cases is the general policy that: (i) creditors are paid before shareholders when a company is insolvent; and (ii) as between themselves, unsecured creditors are paid on a *pari passu* basis. Indeed, the *pari passu* principle has been rightly described as the "*most fundamental principle of insolvency law*": Goode on Principles of Corporate Insolvency Law (5th edition) at [8-02]. When considering the appropriate remedy for breach of the creditor interest duty in a case like this, equity should strive to be consistent with these more general policy principles. The West Mercia remedy is consistent with the *pari passu* principle; no remedy would be inconsistent with that principle. [MB 3342-3343]

47. Relatedly, the second point (undesirable outcomes in analogous cases) concerns the knock-on effect that acceptance of the Appellant's arguments would have in analogous cases. The most obvious example is in relation to an insolvency officeholder who incorrectly distributes the assets in the estate. An insolvency officeholder owes a duty to act in the interests of the creditors but the officeholder owes that duty to the company itself – see Oldham v Kyrris [2003] EWCA Civ 1506; [2004] BCC 111 at [146]:

> "[146] Given the nature and scope of an administrator's powers and duties, I can for my part see no basis for concluding that an administrator owes a duty of care to creditors in circumstances where a director would not owe such a duty to shareholders. In each case the relevant duties are, absent special circumstances, owed exclusively to the company." [MB 2126]

48. If an insolvency officeholder were (for example) to act contrary to their duties and pay all, or an excess amount of, the assets to a single creditor, rather than distribute them to the creditors generally on a *pari passu* basis, it could not seriously be suggested that there was no remedy available because the company had suffered no loss. A similar issue arose in the Scottish case of Lord Advocate v Liquidators of Purvis Industries Ltd 1958 SC 338. The facts are described at page 340 of the report:

> "The petitioner alleges that, in failing to make any payment on account of the preferable and ordinary claims of the Commissioners of Inland Revenue, and in making payments to other creditors without paying or setting aside from free assets sums sufficient to pay or provide for an equal [MB 1884]

> ranking of all preferential claims, the liquidators have misapplied money or property of the company in terms of section 333 of the Companies Act. The petitioner asks for an inquiry into the conduct of the liquidators and for the liquidators to be ordered to repay or restore the money themselves and to contribute to the assets of the company by way of compensation for such misapplication such sum as may be found necessary to secure payment of a dividend of 2s. in the £ on the ordinary claim made by the Inland Revenue or such other dividend as to the Court shall seem just."

49. The liquidators accepted that they had wrongly paid other creditors at the expense of the Inland Revenue. It was (correctly) not argued by the liquidators that there was no loss arising out of this. The liquidators did wish the court to exercise its discretion to order some lesser amount by way of compensation but this was rejected by Lord Guest at page 343 of the report:

> "…As I have indicated, the main facts are the subject of admission, and the only defence put forward by the respondents is that they did not appreciate that the Inland Revenue would institute the present proceedings. This, of course, is no defence at all. The petitioner contends that, in the circumstances of this case, misapplication being admitted, there is no room for further inquiry, and that the prayer of the petition quoad the preferable claims should be granted de plano. The respondents suggest that there should be an inquiry into the facts and that after the inquiry it would be open to the Court to make such order for repayment as the Court thought just. They seem to envisage that a plea in mitigation could be made by the liquidators in the hope of securing more lenient treatment from the Court than an order to repay the whole of the preferential claims… [MB 1886]
>
> I can see no necessity for an inquiry into the facts which are all substantially admitted. In the exercise of its discretion the Court is entitled to order repayment of the whole amount of the preferential claims, which is the extent of the respondents' misapplication and the measure of the loss of the Inland Revenue. I shall therefore grant the prayer of the petition to the extent of ordering the respondents to repay the amount of the preferential claims made by the Commissioners of Inland Revenue."

50. As can be seen, the Inland Revenue's loss was (correctly) regarded as representing the company's loss. It must however be the Appellant's case that Re Purvis Industries was wrongly decided. The Appellant's case necessarily must be that in cases where an officeholder wrongly pays one creditor an excess amount at the expense of the creditors generally the company suffers no loss and there is no therefore remedy against the misfeasant officeholder. This, it is submitted, cannot be right. The decision in Re Purvis Industries was plainly the correct one. The true

position is that the misfeasant officeholder would be liable in equity for the sums wrongly paid out because of: (i) the flexibility of equitable remedies; and (ii) the law's conceptualisation of loss responding to the nature and scope of the duty or obligation that has been breached. As an insolvency officeholder owes a duty to act in the interests of creditors, the loss is the amount wrongly paid away; or, put another way, the creditors' loss is the insolvent company's loss.

51. A similar point arises in relation to a payment made to a creditor which was a void disposition under section 127 of the English Insolvency Act 1986 because it was made after presentation of a winding up petition and the company was subsequently the subject of a winding up order. The act of causing such a payment to be made would likely be a breach of the creditor interest duty by the director(s) concerned. That was the case in Wilson v Masters International Ltd [2009] EWHC 1753 (Ch); [2010] BCC 834 where a director was found to have breached his fiduciary duties in paying £115,000 to a creditor after presentation of the petition. But, on the Appellant's case, no remedy would lie against a director in such a case, and Wilson v Masters was wrongly decided. This illustrates the unreality of the Appellant's contentions – in circumstances where a company is insolvent what matters is the preservation of assets so that they may be distributed in accordance with the statutory scheme, and that indeed is the whole reason why section 127 voids dispositions of property made after presentation of a winding up petition where a winding up order is then made. The Appellant would contend that there is no remedy available against a director who causes an insolvent company to pay all its assets to a family member (who is a creditor) the day before the hearing of the winding up petition. That would be deeply unsatisfactory if that was the law. [MB 3313-3338]

52. The third point is consistency with Stanford, Target Holdings Ltd and AIB Group. As to this: [MB 3058-3103] [MB 3104-3124] [MB 543-586]

52.1. The Appellant's reliance on Stanford is misplaced. The present case has nothing to do with a tortious or contractual duty owed by an outsider – a duty that does not shift to take account of the creditors' interests when the company is insolvent. The present case: (i) is about the fiduciary creditor interest duty described above; and (ii) is about equitable remedies, not

common law damages. The law is capable of developing different remedies, and conceptualising loss in different ways, depending on the nature and scope of the duty in question.

52.2. Indeed, Lord Leggatt made that clear at [76] of Stanford when he said that no findings regarding the West Mercia remedy were necessary because "*this case is not a claim against a director for breach of a trustee-like fiduciary duty owed to the company in managing its assets… It is a claim at common law for damages for breach of a duty of care allegedly owed in contract and tort*". [MB 3085]

52.3. Target Holdings and AIB Group are cases involving equitable remedies against defaulting fiduciaries. The central point that emerges from those authorities is that the court applies a "but for" test when quantifying equitable compensation.[6] In the present case, the application of the "but for" test is straightforward. If the preferential payments had not been made then: (i) the Company would have an additional US$13m to be distributed *pari passu* among the creditors; and (ii) the Company would owe an additional $13m to Zenato as creditor. As a result of the Court of Appeal's order: (i) the Company will have an additional US$13m to be distributed *pari passu* among the creditors; and (ii) the Company will owe an additional $13m to the Appellant as creditor. The Court of Appeal's order satisfies the "but for" test.

52.4. As Lord Reed said at [105] of AIB Group, "*the basic obligation of a defaulting trustee is to restore the trust fund to the position it would have been in but for the default*" and "*the 'loss' is what the beneficiary has been deprived of as a result of the breach*". The Court of Appeal's order is consistent with that. The Company has been deprived of an additional US$13m that would have been distributed *pari passu* among the creditors. [MB 577-578]

[6] Whether the West Mercia remedy is properly described as "equitable compensation" or simply as an equitable remedy responding to the specific breach of duty is not, it is submitted, material.

52.5. In contrast, it is the Appellant's case that is inconsistent with the "but for" analysis that emerges from Target Holdings and AIB Group. The Appellant submits that the correct order is no remedy at all. But that would leave the Company and its creditors in a materially worse position than they would have been in but for the Appellant's breach of duty. It is the Appellant's proposed solution (no remedy) that therefore is inconsistent with the "but for" approach to loss.

(C.7) The English authorities

53. The Respondents' case on this appeal is also consistent with a long line of English authorities.

54. In Re Washington Diamond Mining Co [1893] 3 Ch 95, preferential payments were made to two directors. The English Court of Appeal held that "*all the directors who concurred in making the payments were guilty of a misfeasance, and that the order should direct them jointly and severally to repay the amounts*": at page 115. Each director was therefore liable for the sums received by their co-director. There was no suggestion that the company suffered no loss or that no remedy was available in respect of preferential payments made where the director did not derive a personal benefit. [MB 2930-2950] [MB 2950]

55. West Mercia is discussed above. As explained above, although the Appellant now wishes to rationalise the result on a different basis, the West Mercia remedy was not based on the fact that the defaulting director had made a gain. The English Court of Appeal proceeded on the basis that the £4,000 preferential payment in that case had caused loss of £4,000 to the company; and did not in fact seek to quantify any benefit that the director might have obtained.

56. In Re Cityspan Ltd [2007] EWHC 751 (Ch); [2008] BCC 60, a liquidator brought a claim against a director (NC) in respect of: (i) payments made to NC himself (which were challenged as preferences); but also (ii) payments made to a co-director which were said to have been made in breach of the duties owed by NC. The judge (Philip Sales QC, sitting as a Deputy High Court Judge) found that NC could not "*properly have arranged for the payment of the three transfers to Mr* [MB 2455-2461]

Dean and himself" (at [31]) and had therefore acted in breach of duty. Although there was no discussion of the "no loss" issue, the judge ordered the director to pay compensation in the amount of the preferential payments, including those which did not personally benefit him. [MB 2461]

57. Re HLC Environmental Projects Ltd [2013] EWHC 2876; [2014] BCC 337 concerned various preferential payments that a director had caused or allowed. The judge, John Randall QC (sitting as a Deputy High Court Judge) held that the payments were made in breach of the creditor interest duty. They had been made "*without giving any consideration to the best interests of the company's creditors as a whole*" and the director been "*choosing which creditors to pay, and which to leave exposed to a real risk of being left unpaid*": at [106]. The director was ordered to repay the sums wrongly paid away but with the benefit of the same right of quasi-subrogation as had been ordered in West Mercia. [MB 2872-2910] [MB 2901]

58. The judge expressly rejected a "no loss" defence and said that claims against directors in such circumstances are not limited to those where the director has, directly or indirectly, been the recipient of the preference – "*I am not persuaded that the judgments of the Court of Appeal in the West Mercia case were intended to be limited to cases where the recipient of the payment was the director in question*": at [139]. He went on to say at [142] that "*the liability of a defaulting fiduciary who has, by his or her default, allowed the trust fund to become denuded is, or includes, a liability to restore the fund to what it should have been*". [MB 2909]

59. Re Micra Contracts Ltd (in liquidation) [2016] BCC 153 concerned a company that, shortly before liquidation, paid a debt owing to a sub-contractor. Registrar Barber held that the process bore "*all the hallmarks of a process of 'shutting up shop'*" and had been "*the first step in a rapid, informal liquidation*" conducted by the directors: at [76]. Registrar Barber also held that the payment was in fact a preference: at [109]. The directors were ordered to repay the sums subject to the West Mercia right of quasi-subrogation. [MB 2911-2929] [MB 2924] [MB 2928]

60. In Sequana, the *obiter* comments of various Supreme Court Justices also indicated firm support for the West Mercia remedy. At [105], Lord Reed said the following:

> "[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." [MB 773-774]

61. At [402], Lady Arden said the following:

> "[402] Dillon LJ went on to order relief against Mr Dodd on the basis that he was liable for breach of duty and that he would be liable only for the loss to the transferring company. Accordingly he ordered Mr Dodd to compensate the company for the £4,000 but that dividends to creditors should be calculated on the basis that, for the purposes of the proof of debts, the debt owed by the subsidiary company to its parent company was not reduced by the amount which Mr Dodd had to repay and that any amount that would be distributable by way of dividend to unsecured creditors in respect of that part of the debt due to the parent company should be paid instead to Mr Dodd. In my judgment, there is nothing novel in this. Courts of equity granting relief on claims for misfeasance can mould remedies in an appropriate way to meet the circumstances of the case: see, for example, In re VGM Holdings Ltd [1942] 1 Ch 235. The transfer did not benefit his company and there was no good corporate reason for making it. In those circumstances, the transfer was in breach of his duty to use his powers for a proper purpose. Mr Dodd would be liable to compensate the company and restore it to its previous position (see AIB Group (UK) plc v Mark Redler & Co [2015] AC 1503)." [MB 853]

62. The same point was made by ICC Judge Mullen in Re Fastfit Station Ltd [2023] EWHC 496 (Ch); [2023] BCC 663 at [75]: [MB 2846-2871]

> "[75] While the balance sheet position of the Company might not be altered to the extent that the Company's debts were discharged, and it is thus no worse off, it seems to me that Mr Barker is liable to account and must reconstitute the fund that he, as a fiduciary, caused to be misapplied without regard for the interests of creditors, so that those monies are returned to the Company and dealt with as part of the liquidation. Given that I intend to direct pursuant to section 238(3) IA 1986 that Fastfit MK repay the monies received and stand subrogated to the rights of creditors that it discharged, it seems to me that Mr Barker's liability to reconstitute the fund should be secondary to that of Fastfit MK, so that he should be liable to do so only to the extent that Fastfit MK does not within a [MB 2870]

reasonable period and similarly be subrogated to the discharged creditors' claims."

63. The Appellant relies heavily on Stanford and, in particular, on the *obiter* remarks of Lord Leggatt in his concurring judgment. As set out above, Stanford does not assist the Appellant because it had nothing to do with the equitable remedy for a breach of the creditor interest duty.

64. The Appellant relies in particular on Lord Leggatt's observation at [72] that "*[i]t is open to question whether the remedial approach adopted in the West Mercia line of cases can be reconciled*" with Target Holdings and AIB. The Respondents respectfully disagree with Lord Leggatt on that point for the reasons set out above. The West Mercia remedy is consistent with the "but for" analysis in those cases. [MB 3084]

65. However, it is also important to note what was said by Lord Leggatt at [73]-[74]: [MB 3084-3085]

> "[73] It might, however, be said that the position is different where a transfer of company assets made by a director is an unlawful preference. In such a case it is arguably not sufficient to say that no remedy is required because the value of the fund has not been diminished. The policy of English law, embodied in section 239 of the Insolvency Act 1986, is that where a company has given a preference falling within the scope of that provision the position of the company ought to be restored to what it would have been if the company had not given that preference. As discussed earlier, it is no answer to say that nothing needs to be done to achieve this aim as the transaction has not diminished the company's assets. The point of this element of the insolvency legislation is not to provide a means by which the company can recover compensation for loss; it is to enable a liquidator to reverse transactions which, even though they caused no loss to the company, have in eye of the law unjustly enriched the preferred creditor at the expense of the other creditors by depleting the pool of assets which ought to be available to distribute equally in the winding up.
>
> [74] It is consistent with this policy of redistribution to require a director who, in breach of fiduciary duty, has caused the company to give an unlawful preference to restore the company's position to what it would have been if the transaction had not taken place. That is what was done in the West Mercia case itself. The unlawful preference could not have been reversed in that case by ordering the parent company to return the money, as it was itself insolvent and had no assets available to repay the £4,000: see (1988) 4 BCC 30, 32. But Mr Dodd was ordered to repay the money himself and stand in place of the parent company as a creditor of the subsidiary. It could be said that this fulfilled the basic remedial aim of

> putting the company into the position it would have been in if the breach of fiduciary duty had not occurred. More generally, it seems just to put the risk that the transfer cannot or will not be restored by the recipient on the person whose breach of fiduciary duty caused the unlawful preference to be given."

66. In short, Lord Leggatt was suggesting that, even if it is right that a company suffers no loss from a preferential payment made in breach of the creditor interest duty, if the relevant payments were/are unlawful preferences under the relevant insolvency regime then equity is capable of fashioning a remedy in order to "*[fulfil] the basic remedial aim of putting the company into the position it would have been in if the breach of fiduciary duty had not occurred*". As explained above, the payments in this case were unlawful preferences under section 245 of the BVI Insolvency Act 2003. Lord Leggatt's comments do not therefore assist the Appellant – they assist the Respondents. [MB 3085] [MB 541-542]

67. It is also important to note what the majority (Lady Rose, with whom Lord Hodge and Lord Kitchin agreed) said about the West Mercia remedy at [34]:

> "[34] 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. The nature of the duty owed by a director to the company when it becomes insolvent is very different from the Quincecare duty owed in tort by the bank to its customer and the range of remedies available to the court is very different as well. Putting the point the other way round, I do not accept that a decision that no recoverable loss is suffered by SIB in this case undermines the ability of the court of equity to identify a case of misfeasance and fashion an appropriate remedy, as the Court of Appeal did in West Mercia." [MB 3074-3075]

68. Save for Lord Leggatt in Stanford (whose *obiter* remarks do not in fact assist the Appellant because the payments in this case were unlawful preferences under section 245 of the BVI Insolvency Act 2003) and Park J in Re Continental Assurance [2007] 2 BCLC 287 (see paragraph 61 of the Appellant's written case) the English authorities are consistent on the point. When a director breaches the [MB 2462-2629] [MB 32-33]

creditor interest duty and causes or allows a preferential payment, the director is liable to the company for the amount that has been wrongly paid away.[7]

(C.8) The authorities in other jurisdictions

69. The approach of the courts in Singapore is consistent with the Respondents' case – see the Singapore Court of Appeal in BIT Baltic Investment v Wee See Boon [2023] SGCA 17; [2023] 1 SLR 1648 at [54]: [MB 587-625]

> "[54] We deal first with the fiduciary duties. We have described at some length at [31]–[33] above, what a director's fiduciary duties consist of. It is well established in case law that when a company is insolvent, the directors' fiduciary duty to act in the best interests of the company extends to ensuring that the company's assets are not misapplied to the prejudice of the interests of the creditors as a whole. Generally, a director who procures an undue preference payment acts in breach of that duty and is liable (subject to relief under relevant statutory provisions being granted) to reimburse the company with the amount of the payment (see for example Living the Link Pte Ltd (in creditors' voluntary liquidation) and others v Tan Lay Tin Tina and others [2016] 3 SLR 621 at [78], [82]–[90], [97] and Liquidators of Progen Engineering Pte v Progen Holdings Ltd[2010] 4 SLR 1089) ("Progen"). In Progen at [48], the court observed that the fiduciary duties of a director of an insolvent company required the director to ensure that the company's assets were not dissipated to the prejudice of the company's creditors." (emphasis added) [MB 611-612]

70. Indeed, the Singapore courts have expressly rejected the "no loss" argument and adopted the West Mercia remedy: Living the Link v Tan Lay Tin Tina [2016] SGHC 67; [2016] 3 SLR 621 at [83] and [87]: [MB 1811-1871]

> "[83] The liquidators seek an order that Tina Tan be required to pay a sum equal in value to the undue preference transactions to Living. They rely on the English Court of Appeal's decision in Liquidator of West Mercia Safetywear Ltd v Dodd and another (1988) BCC 30 ("West Mercia") which is the authority most often cited for the proposition that a director may be made personally liable for procuring an undue preference (see Goode at para 14-14; A Walters, "Preferences" in J Armour and H Bennett, Vulnerable Transactions in Corporate Insolvency (Hart Publishing, 2003) ch 4 ("Walters") at para 4.104). [MB 1863-1864]
> …
> [Description of the West Mercia and Re HLC Environmental decisions]
> …

[7] See also the discussion of the authorities in A Keay, '*Financially distressed companies, preferential payments and the director's duty to take account of creditors' interests*' (2020) 136 Law Quarterly Review 52.

> [87] I find the reasoning adopted by the English courts in West Mercia and Hellard compelling. Holding a director who procures an undue preference directly responsible for restoring the company to the position it would otherwise have been in is not only just, but also in line with the clear direction of the Singapore Court of Appeal in Progen that a director has a fiduciary duty to take into account the interests of the company's creditors when a company is insolvent, or near insolvency, and that the purpose of this duty mirrors that of the statutory avoidance provisions. Finding otherwise would empty this duty of substance." (emphasis added)

[MB 1866]

71. The Respondents respectfully agree that any other finding would "*empty this duty of substance*".

72. See also Parakou Shipping v Liu Cheng Chan [2017] SGHC 15 at [124]: [MB 2193-2266]

> "[124] The PIH Repayments and the PSSA Repayment extinguished the respective debts owed by Parakou to PIH and PSSA. As succinctly explained in Living the Link (at [84]–[86]), the fact that Parakou's liabilities to PIH and PSSA were reduced does not absolve the directors concerned from liability for breach of fiduciary duties. However, to the extent that the directors concerned are ordered to repay the value of the undue preferences, Parakou (and consequently, its creditors) would be in a better position since it no longer has to pay PIH or PSSA. To address this and ensure that unsecured creditors of Parakou will not receive a larger dividend than they would have otherwise obtained, the dividends attributable to such repayments are to be recouped to the directors who made the repayments (see Living the Link at [84], [85] and [90])."

[MB 2239]

73. The Malaysian courts have also referred to the West Mercia remedy with approval – see CIMB Bank Berhad v Jaring Communications Sdn Bhd [2016] MLJU 920 at [72] and [79]: [MB 1022-1043]

> "[72] Another important aspect of the facts of this instant application is that the Company was already insolvent (prior to the presentation of winding up petition and the making of a winding up order against the Company) when virtually all the payments were made. A significant consequence of this state of affairs would be that the interest of the creditors of the Company displaces that of its members. In insolvency, the interests of the creditors are paramount. I agree that the case of West Mercia Safetywear Ltd (in Liquidation) v Dodd [1988] BCLC 250 referred to by the Liquidators is of relevance, where it was ruled that upon the insolvency of a company, the interests of the creditors would override those of the shareholders since from that point, the company's assets belonged, in a practical sense, to the creditors. In that case, since West Mercia was known by the director in question to be insolvent when he procured some £4,000

[MB 1036]

> to be transferred from its account to a third party, the transfer was held to be a fraudulent preference which had been undertaken purely to relieve the said director of personal liability under his guarantee, in total disregard for the interest of the general body of the creditors of West Mercia. Accordingly, the Court granted the declaration sought by the liquidator that the director was guilty of misfeasance and breach of trust and that further he be ordered to repay the £4,000 transferred to the third party.
> …
> [79] As such, given the overwhelming preponderance of affidavit evidence which establishes breaches of duty on the part of Dato' Norhisam, in pursuance of Section 305, the Liquidators are therefore fully entitled to the recovery to all the monies belonging to the Company which have been unlawfully and wrongfully granted and misapplied by virtue of none other than Dato' Norhisam's own breach of fiduciary and statutory duty, and misfeasance."

[MB 1037-1038]

74. In Moulin Global Eyecare Holdings Ltd v Olivia Lee Sin Mei [2014] HKCFA 63; [2014] 6 HKC 220, the Hong Kong Court of Final Appeal (Mr Justice Gummow with whom Chief Justice Ma, Mr Justice Ribeiro, Mr Justice Tang and Mr Justice Bokhary agreed) allowed an appeal against an order striking out a claim seeking the West Mercia remedy. Without deciding the point, the court held at [58] that the claim was "*reasonably arguable, should not be struck out and should be allowed to go to trial*". One principle on which the liquidators had relied was that "*[e]quitable remedies are discretionary. The court has power to mould relief depending on the nature and facts and circumstances of the individual case*": at [57(7)].

[MB 2012-2030]

[MB 2028]

[MB 2027-2028]

(C.9) Conclusion on issues one and two

75. The Court of Appeal was correct to hold that the West Mercia remedy is the proper response to breaches of duty such as the one which occurred in the present case:

75.1. The remedy reflects the principle that where there is a right there should be a remedy.

75.2. The remedy reflects the flexibility of equity to mould appropriate relief.

75.3. The remedy reflects the fact that the law conceptualises loss by reference to the underlying duty or obligation that has been breached.

75.4. The remedy is consistent with the general policy of *pari passu* distribution and the leading Supreme Court cases on equitable relief; and avoids unusual and undesirable outcomes in analogous cases.

75.5. The remedy is consistent with the approach that has been taken by courts in other common law jurisdictions.

76. In contrast, the Appellant's case is unprincipled. It would denude the creditor interest duty of any substance in the paradigm case in which it is engaged because, if a director has not derived a benefit from the preferential payment, the director will not be liable at all.

77. Further and in any event, the Appellant did in fact derive a benefit from the payments in this case. Eddie Chen, recorded as having been the Chief Operating Officer of the Company, told the liquidators (in response to questions about the preferential payments) that the Appellant was reliant on her reputation; and the obvious inference was that the Appellant had allowed the payments to be made in order to obtain a reputational benefit. To the extent the point is relevant, further details are set out in paragraphs 77-81 and 101-102 of the Respondents' written case for Privy Council 1.[8] [MB 483-484] [MB 490-491]

(D) GROUND THREE

78. It is submitted that ground three (interest) has no merit.

79. As a starting point, an award of interest is discretionary: Watts v Morrow [1991] 1 WLR 1421 at 1446. An appellate court will not generally interfere with a lower court's exercise of discretion "*unless it has been demonstrated that that discretion has plainly been wrongly exercised or has been exercised on some erroneous principle of law*": Prescott v Potamianos [2019] EWCA Civ 932; [2019] BCC 1031 at [89]. It is not clear to the Respondents whether the Appellant's case is that the [MB 3208-3233] [MB 2333-2334]

[8] The courts below refused to consider the point on the basis that it was not relevant: see judgment below at [103]. The point only becomes relevant if the Appellant is correct that a personal benefit is necessary. For the reasons set out in this written case, the Respondents submit that the Appellant is not correct. [MB 147-148]

Court of Appeal's decision was plainly wrong or whether it is said to have made a mistake of law.

80. Turning to the substance of ground three, the Appellant first complains about interest running from 29 November 2009. However, the principle is that "*interest will generally run from the date of accrual of the cause of action*": BP Exploration Co (Libya) Ltd v Hunt (No.2) [1979] 1 WLR 783 at 846. In this case, the cause of action was complete on the date of each preferential payment: 3, 4 and 27 November 2009. The selection of 29 November 2009 as a starting date was therefore favourable to the Appellant. [MB 726]

81. The Appellant next complains about the time it took the Respondents to issue a claim. The liquidators were appointed on 15 February 2010. The claim was issued on 23 May 2014 (not 12 June 2014 as per the Appellant's written case). This does not come close to unreasonable delay. The liquidators were entitled (in fact, required to) carefully investigate the Company's affairs, consider the viability of any claim and explore funding options in the context of a company whose cash assets had been transferred away pursuant to the preferential payments that form the basis of this case. These difficulties are explained in the witness statement of Richard Anthony Brown dated 24 March 2021. The claim was issued well within any limitation period. Further, the modern approach to litigation is that parties should not precipitously commence litigation but explore all avenues to avoid litigation. There was, in fact, no unreasonable delay at all. This must have been accepted by the Court of Appeal and that factual or evaluative finding cannot be challenged by the Appellant. In fact, the delay in obtaining a final judgment is entirely due to the fact that the Appellant has wrongly contested these proceedings for 12 years.

82. The Appellant then complains about the rate of interest. Simple interest was awarded against the Appellant. The Appellant might consider herself fortunate not to be liable for compound interest. As Foxton J (as he then was) said in Hotel Portfolio II UK Ltd & Anor v Ruhan [2022] EWHC 1695 (Comm); [2022] Costs LR 1285 at [37]: [MB 1722-1731]

> "Courts of equity have jurisdiction to award compound interest where money has been obtained and retained by fraud (and, even in the absence of fraud, where a trustee or fiduciary defendant has withheld or misapplied trust money and/or improperly profited from the trust): Westdeutsche v Islington LBC [1996] AC 669; Black v Davies [2005] EWCA Civ 531."

83. For the avoidance of doubt, the Respondents do not seek compound interest by way of a cross-appeal.

84. The Appellant's complaint is aimed at the 5% p/a (simple) interest rate, which is said to have been ordered "*by reference to the statutory judgment debts rate*". This [MB 539-540] is incorrect; or at least not fully correct. Section 215(4) of the BVI Insolvency Act 2003 provides that the interest payable to creditors in a liquidation is the greater of: (i) the "*court rate*"; and (ii) the rate that would have been applicable but for the liquidation. The "*court rate means the rate of interest specified in section 7 of the Judgments Act*": section 2. The 5% p/a (simple) interest rate is therefore referable to the (minimum) amount of statutory interest payable on provable debts.

85. The Respondents agree with the Appellant that, broadly speaking and applying a broad brush approach, "*[p]re-judgment interest is intended to compensate the claimant for being "kept out" of the money which ought to have been paid to them*": paragraph 106(1) of the Appellant's written case. That is what the Court of Appeal did. The whole point of the claim is that, absent the breach of duty, an additional US$13m would have been available to pay the creditors on a *pari passu* basis. As a result of the Appellant's breach of duty, the US$13m has not been available and (at least) 5% interest has accrued on creditors' claims. The Court of Appeal's interest order was therefore the proper rate of compensation. [MB 46]

86. Further, given that the Appellant will be entitled to be treated as a creditor in respect of the US$13m debt previously owed to Zenato, she will presumably also seek at least 5% p/a simple interest on that debt (in fact, the relevant contractual interest rate for the Zenato debt was 9% p/a) if there are sufficient assets in the estate. It would be illogical if the Appellant were entitled to claim at least 5% p/a simple interest on that debt without having to compensate the Respondents for keeping the creditors out of the same money for so many years.

(E) CONCLUSION

87. For the reasons set out above, the Board is invited to dismiss the appeal.

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