

EASTERN CARIBBEAN SUPREME COURT

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO. BVIHCM2009/0430

BETWEEN:

BY WAY OF CLAIM:

- (1) **MARK BYERS**
- (2) **MATTHEW RICHARDSON**
(As Joint Liquidators of the third named Applicant)
- (3) **PIONEER FREIGHT FUTURES COMPANY LIMITED (IN LIQUIDATION)**

Applicants

and

CHEN NINGNING

Respondent

Appearances:

Mr. Tom Smith, KC with Mr. Ben Griffiths for the Applicants

Mr. Victor Joffe, KC for the Respondent

2023: July 4, 5;
2024: January 25,
February 10.

JUDGMENT

1. Introduction

[1] This is the judgment of the Court in relation to an application filed by the Applicants dated 17th March 2022 whereby the Applicants seek determination of all outstanding issues concerning quantum

pursuant to a direction of the Judicial Committee of the Privy Council (the 'Privy Council') dated 28th February 2022 ('the Application'). The Application was heard over two days in July 2023 and judgment was reserved.

- [2] In essence, the Privy Council had determined, on an appeal, that the Respondent, Miss Chen Ningning ('Miss Chen'), had breached fiduciary duties she owed to the Third Applicant ('PFF') as its sole *de jure* Director and had remitted issues of quantum back to this Court for determination.
- [3] The Board of the Privy Council consisted of Lord Kerr, Lord Briggs, Lady Arden, Lord Kitchin and Lord Leggatt. The Board's unanimous decision was delivered by Lord Kitchin. It was dated 22nd February 2021.
- [4] As the determination of such quantum issues are in essence a continuation of the decision-making process undertaken by the Privy Council, it is appropriate to cite the background as stated by the Privy Council, so far as it is presently relevant:¹

"The background

3. PFF was incorporated in the British Virgin Islands ("BVI") in 2006 for the purpose of trading in forward freight agreements ("FFAs"). FFAs are contracts for differences that allow shipowners and traders to manage their exposure to the volatility of freight rates. That volatility also provides an opportunity for companies such as PFF to enter into FFAs for speculative purposes. The FFAs entered into by PFF were written on standard terms and referenced to the Baltic Dry Index, an index of freight rates maintained and published by the Baltic Exchange. Until about September 2008, PFF was one of the largest FFA traders in Asia.

4. The respondent, Miss Chen, is the ultimate beneficial owner of a group of companies known as the Pioneer Group. The principal holding company of the group is another company incorporated in the BVI called Pioneer Iron and Steel Group Company Ltd ("PISG"). PFF is owned by PISG. Upon its incorporation, PFF had three directors, one of whom was Miss Chen. The other two directors resigned in the course of 2007, leaving Miss Chen as PFF's sole director. Miss Chen is based in the People's Republic of China and PFF's main business activities were conducted from offices occupied by PISG in Beijing.

5. In September 2008 there was a catastrophic collapse in the freight market and in consequence PFF began to experience severe financial difficulties. It ceased trading in FFAs

¹ Byers and others (Appellants) v Chen Ningning (Respondent) (British Virgin Islands) [2021] UKPC 4.

and concentrated on managing its FFA portfolio with a view to negotiating settlements with its creditors and minimising its losses.

6. On 15 May 2009 PFF entered into a loan agreement with Zenato Investments Ltd (“Zenato”), a company owned and controlled by Mr Song Dingding (“Mr Song”), a business acquaintance of Miss Chen. Under the terms of this agreement Zenato agreed to lend to PFF up to US\$ 13m for a term of two years at an interest rate of 9% per annum. Sums totalling US\$ 13m were duly advanced by Zenato to PFF in three tranches in the course of that month.

7. On 29 October 2009 PFF lost an action that had been brought against it in the High Court in London by an FFA counterparty, Marine Trade SA (“Marine Trade”) ([2009] EWHC 2656 (Comm); [2010] 1 Lloyd’s Rep 631). It had been conceded by PFF on 23 October 2009, the last day of the trial, that it was commercially insolvent and in the light of that concession the judge, Flaux J (as he then was), held that an event of default had occurred under the terms of their contract and that any liability of Marine Trade to PFF was suspended whilst PFF remained indebted to Marine Trade.

8. Shortly after the delivery of the Marine Trade judgment and as a result of an improvement in the market, PFF found itself with what the trial judge in these proceedings, Bannister J, described as an “excess margin on deposit” which meant that it could withdraw funds from its deposit account. PFF took that opportunity to repay its indebtedness to Zenato in three tranches on 3, 4 and 27 November 2009. Nevertheless, at the time these payments were made (and indeed at all times from, at the latest, 29 October 2009) PFF was insolvent and an insolvent liquidation or some other protective insolvency process was inevitable.

9. On 17 December 2009 PFF applied in the BVI for the immediate appointment of joint provisional liquidators on the ground of its insolvency and the need to protect its assets. The application was supported by an affidavit of Mr Eddie Chen (who is not a relative of Miss Chen and is also known as Mr Chen Yang) (“Mr Chen”) dated 16 December 2009. He described himself in that affidavit as the “Chief Operating Officer and Director of Risk Management” of PFF but made clear that although his title included the word “Director”, he had not in fact been appointed as a board director of PFF.

10. The court acceded to the application and appointed Mr Mark Byers, Mr Mark McDonald and Mr Andrew Hosking, each of Grant Thornton UK LLP, as joint provisional liquidators (“JPLs”). On 15 February 2010 the JPLs were appointed as PFF’s liquidators. Mr Hosking resigned on 24 October 2012. Mr Byers and Mr McDonald remain PFF’s liquidators (“the Liquidators”).

11. In the meantime, on 28 January 2010, using the statutory powers conferred on the JPLs, Mr Byers had examined Mr Chen. The meeting at which the examination took place was also attended by Mr Andrew Charters, a director of Grant Thornton, and by Ms Alex Welch, a colleague of Mr Charters. Ms Welch prepared a note (“the note”) of the meeting after its conclusion. The note records that Mr Chen told them that the Zenato loan was organised by PISG and that Miss Chen tried to pay back as much of it as possible because “she is reliant on her reputation”. The Liquidators have attached particular importance to the contents of

this note because the examination took place only shortly after their appointment as provisional liquidators and at a time when they were trying to gather as much information as possible about PFF's affairs. It was only about 12 weeks after instructions had been given for the payments to Zenato to be made.

12. On 17 May 2010 PISG submitted a claim in PFF's liquidation. That claim was later admitted by the Liquidators in the sum of about US\$ 90m. On 17 December 2010 the Liquidators announced their intention to pay to PFF's creditors an interim dividend of US\$ 0.06 in the dollar (that is to say, 6%) on admitted debts. This meant that the interim dividend payment in respect of PISG's debt would amount to about US\$ 5.4m.

13. On 2 January 2014 the liquidators of PISG, which was by this stage in liquidation itself, assigned to Miss Chen the right to that interim dividend and, indeed, all other dividends which might become due and payable to PISG in respect of its claim against PFF. Notice of this assignment was given to the Liquidators.

14. On 7 March 2014 the Liquidators wrote to Miss Chen informing her that they would be withholding payment of the 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.

15. On 30 April 2014 Miss Chen made an application in the High Court of Justice of the BVI for an order that the Liquidators pay her, as assignee of PISG, the interim dividend to which she claimed to be entitled.

16. On 23 May 2014 the Liquidators began these proceedings against Miss Chen in the High Court of Justice of the BVI claiming the sum of US\$ 13m together with interest for breach by Miss Chen of her fiduciary duties as a de jure, de facto or shadow director of PFF, or as someone whose role in the affairs of PFF (including as sole authorised signatory on its bank accounts) justified the imposition of fiduciary duties, for causing and procuring the payments to Zenato in November 2009. They also sought an order against Miss Chen under section 249 of the 2003 Act for restoration of the funds paid to Zenato on the basis that the repayment of the loan constituted an unfair preference and so was a voidable transaction within the meaning of, respectively, sections 245 and 244 of that Act.

The decision of the trial judge

17. The action came on for trial before Bannister J on 3 March 2015 and lasted for four days. He clearly had a poor opinion of the merits of the Liquidators' claims, describing them in his concise judgment, which he delivered on 19 March 2015, as "remarkable" and as giving the impression of having been "cobbled together for the sole purpose of providing the [Liquidators] with grounds for refusing to pay Miss Chen's dividend" (para 14). He recorded as common ground that a director who realises that a company cannot avoid insolvent liquidation and yet uses company money to pay a particular creditor without any proper reason for doing so, misapplies company funds in breach of fiduciary duty. He also found that at all times after the Marine Trade judgment, PFF was unable to pay its debts as they fell due and insolvent liquidation or some other protective insolvency regime was inevitable. However, he then held that: (i) Miss Chen ceased to be a director of PFF at about the

beginning of August 2009 and she owed no fiduciary duties to PFF at the time of the Zenato payments in November 2009; (ii) Miss Chen probably knew of and did not object to the Zenato payments but she did not instruct Mr Chen to make them; nor did she cause or procure them to be made in any other way; and (iii) it followed that Miss Chen did not act in breach of fiduciary duty. Further, if Miss Chen was not liable for breach of fiduciary duty, sections 244, 245 and 249 of the 2003 Act were not capable of generating an obligation on their own.

The decision of the Court of Appeal

18. The Liquidators' appeal against Bannister J's judgment and consequential order was heard by the Court of Appeal on 11-12 January 2016. In its judgment, delivered on 12 June 2018, nearly two and a half years later, it dismissed the appeal on all grounds. In broad summary, the court held that: (i) the judge was entitled to find that Miss Chen owed no fiduciary duties to PFF at the time of the payments to Zenato whether as a *de jure*, *de facto* or shadow director or as a result of any role she may have had in the affairs of PFF; (ii) the judge's finding that Miss Chen did not cause or procure the payments to Zenato was one that was open to him on the evidence; and (iii) the payments to Zenato constituted an unfair preference within the meaning of section 245 of the 2003 Act, but the court would not exercise its discretion to make an order against Miss Chen because such an order was not required to restore PFF to the position it would have been in had it not made the payments because insolvent liquidation was inevitable in any event. Further, Miss Chen did not receive any benefit from the payments; and the fact that she knew about them but did not object to them was just one of the factors to be considered and by itself did not carry much weight.

The issues on this appeal

19. The Board can now outline the grounds of this further appeal and the rival contentions of the parties. The Liquidators submit that the judge ought to have found that Miss Chen was a *de jure* director of PFF at the time of the payments to Zenato and, indeed, remained a *de jure* director of PFF until its liquidation. They also contend that even if Miss Chen was not a *de jure* director of PFF at the time of these payments, she was a *de facto* or shadow director because she retained responsibility for important aspects of PFF's affairs and, in particular, its bank account and the payments it made. They submit that, irrespective of the precise nature of her directorship, she owed fiduciary duties to PFF and, once it became clear that PFF was insolvent, through PFF to its unsecured creditors. They contend that the Court of Appeal ought to have identified and corrected these failings by the judge and that it fell into error in failing to do so.

20. The Liquidators also argue that the judge was wrong not to find that Miss Chen acted in breach of these fiduciary duties. She permitted Zenato's loan to be repaid in full when she well knew that PFF was insolvent. The first payment was made a matter of days after the Marine Trade judgment and, within three weeks of the final payment, Miss Chen arranged for PFF to enter provisional liquidation. At the time of the loan repayment, Zenato was only entitled to prove *pari passu* with PFF's other unsecured creditors in its insolvency and by allowing PFF to repay its loan in full, Miss Chen acted in breach of her duty to the company to have proper regard to the interests of all of those other unsecured creditors. The

Liquidators contend that, once again, the Court of Appeal was wrong not to recognise and correct these errors.

21. The third limb of the Liquidators' case on this appeal is that the judge ought to have found that Miss Chen actually arranged or at least consented to the repayment of the Zenato loan. They maintain that, just as it is inconceivable that Miss Chen would not have known about the plan to repay the Zenato loan prematurely, it is also inconceivable that anybody involved in PFF's affairs would have made the loan repayments without seeking and obtaining her consent. Moreover, they argue, the evidence that Miss Chen was involved in the payments to Zenato and did give her permission for them to be made was overwhelming and ought to have been accepted. The Court of Appeal wrongly failed so to find.

22. The fourth and final limb of the Liquidators' case on this appeal concerns their claim under the 2003 Act. They contend that the judge was wrong to reject it as he did on the basis that if Miss Chen was not liable for breach of fiduciary duty then it followed that she was not liable under the provisions of the 2003 Act. They continue that the Court of Appeal was right to find that the repayment of the Zenato loan constituted an unfair preference within the meaning of section 245 and it ought also to have found that it was a voidable transaction within the meaning of section 244, and that section 249 conferred upon it a discretion to make an order against Miss Chen to restore PFF's position to what it would have been had the payments not been made. Further, the Liquidators continue, the Court of Appeal's decision not to make such an order was flawed and should be set aside. They invite the Board to exercise the discretion afresh and, in doing so, to order relief against Miss Chen on this ground too.

...

26. Miss Chen responds that the Liquidators' case constitutes a wholly inappropriate and unjustified attempt to challenge the findings of fact made by the judge and upheld by the Court of Appeal. There are, says Miss Chen, several key findings which are fatal to this further appeal: (i) she ceased to be a de jure director of PFF around the beginning of August 2009 when she withdrew from involvement in its affairs; (ii) after she ceased to be a de jure director of PFF, she did not become a de facto or shadow director of the company and did not owe fiduciary duties to it for any other reason; (iii) she did not cause or procure the repayment of the Zenato loan and Mr Chen was a credible witness on this issue. These findings are, Miss Chen continues, unimpeachable and the challenge made to them by the Liquidators was rightly rejected by the Court of Appeal.

27. As for whether the Court of Appeal was wrong to hold that no order for relief should be made against her under section 249 of the 2003 Act, Miss Chen accepts the Court of Appeal's finding that PFF's repayment of the loan to Zenato constituted an unfair preference within the meaning of section 245 of the 2003 Act. She also accepts that section 249 confers on the court a discretionary power to make orders against third parties. However, she continues, such powers are not unfettered and must be exercised for the restitutionary purpose of restoring the pre-transaction position. The power can only be exercised against a third party who has benefitted from the transaction and so has something to restore. Here there is no finding that she derived any personal benefit from the repayment of the Zenato loan; indeed, there is a finding that she did not."

- [5] At paragraph [72] of the Privy Council's judgment, it ruled that:
- “The Board therefore concludes that Bannister J was entitled to find that Miss Chen continued to be a *de jure* director of PFF after 29 May 2009. Miss Chen was right not to challenge this finding before the Court of Appeal and we reject her attempt to do so on this further appeal.”
- [6] At paragraph [84] of the Privy Council's judgment, it found that Ms Chen had continued to be a *de jure* director of PFF after the beginning of August 2009:
- “...The key question is whether there was any evidence that she ceased to be a *de jure* director at about this time [i.e., after the beginning of August 2009]. There was no such evidence. Accordingly, the judge erred in law in making the finding that he did. So too, the Court of Appeal erred in failing to identify and correct the judge's error.”
- [7] At paragraph [86] of the Privy Council's judgment, it found that:
- “... Miss Chen continued to owe fiduciary duties to PFF after the beginning of August 2009 because she remained a *de jure* director.”
- [8] The Privy Council, at paragraph [93], found Ms. Chen in breach of fiduciary duty (NB: reference here to 'Mr. Chen' is reference to someone other than Ms. Chen, who also worked for PFF):
- “93. The judge found that Mr Chen was responsible for repaying the Zenato loan and that by this time he was in charge of PFF's affairs as sole *de facto* director. He also found that banking transactions were in practice conducted electronically by PFF's staff without Miss Chen having to sign anything, and that the payments to Zenato were made in this way. However, Miss Chen was, on the judge's findings, aware of these payments. What is more, Miss Chen had a fiduciary duty to PFF to take all reasonable steps to intervene to prevent a payment being made from a trading account of which she was sole signatory for an improper purpose. The repayment of the whole of the Zenato loan was undoubtedly improper. It was made at a time when PFF was insolvent and without any proper reason. Yet Miss Chen took no steps to prevent it. Moreover, given Miss Chen's position in relation to PFF as *de jure* director and sole beneficial owner and given further that she was the sole signatory on the account, there can be no doubt that, had she intervened, the payments would not have been made. She was, as the judge described, “ultimately the boss”. In these circumstances the Board is satisfied that her inaction amounted to a breach of her fiduciary duty to PFF.”
- [9] At paragraph [96], the Privy Council considered how it should proceed, in light of its findings:

“The claim under the Insolvency Act 2003

96. Nor is it necessary for the Board to consider this additional limb of the Liquidators’ claim. Both the judge and the Court of Appeal rejected it, but for very different reasons. In the Board’s view, our conclusion that Miss Chen is liable to account for breach of fiduciary duty makes any investigation of the question whether the Liquidators have, in addition, a remedy under sections 244 and 245 of the Insolvency Act 2003 simply unnecessary. Miss Chen’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. The Liquidators have not submitted to the contrary, at least before the Board. Nor do we need to address the question whether, as the Liquidators have contended, Miss Chen derived a reputational benefit from the making of the payments.”

[10] The reference here to sections 244 and 245 of the Insolvency Act 2003 are to statutory provisions dealing with transactions undertaken by a company during the onset of insolvency (as defined) or during the ‘vulnerability period’ (also defined), and specifically with reference to section 245, to unfair preferences.

[11] It is important to be aware what it is that the Privy Council is here referring to, because, in my reading of the Privy Council’s Judgment, **the Board was excluding the application of such statutory relief here.**

[12] Transactions covered by sections 244 and 245 of the Insolvency Act 2003, if they come within certain parameters laid down by these sections, are classed as ‘voidable transactions’ and attract a broad range of specified statutory remedies expressed in section 249. These include, but are not limited to:

“249. (1) Subject to section 250, where it is satisfied that a transaction entered into by a company is a voidable transaction the Court, on the application of the office holder— (a) may make an order setting aside the transaction in whole or in part; (b) in respect of an unfair preference ..., may make such order as it considers fit for restoring the position to what it would have been if the company had not entered into that transaction; and

...

(2) Without prejudice to the generality of subsection (1)(b), an order under that paragraph may—

(a) require any assets transferred as part of the transaction to be vested in the company;

- (b) require any assets to be vested in the company if it represents in any person's hands the application either of the proceeds of sale of assets transferred or of money transferred, in either case as part of the transaction;
- (c) release or discharge, in whole or in part, any security interest given by the company or the liability of the company under any contract;
- (d) require any person to pay, in respect of benefits received by him or her from the company, such sums to the office holder as the Court may direct; (Amended by Act 11 of 2004)
- (e) provide for any surety or guarantor whose obligations to any person were released or discharged, in whole or in part, under the transaction, to be under such new or revived obligations to that person as the Court considers appropriate;
- (f) provide for security to be provided for the discharge of any obligation imposed by or arising under the order, for such an obligation to be charged on any assets and for the security interest or charge to have the same priority as a security interest or charge released or discharged, in whole or in part, under the transaction;
- (g) provide for a person affected by an order made under subsection (1) to submit a claim in the liquidation of the company in such amount as the Court considers fit; and (Amended by Act 11 of 2004)
- (h) require the company to make a payment or transfer assets to any person affected by an order made under subsection (1).

(3) Subject to section 250, in respect of an unfair preference ..., an order under subsection (1) may affect the assets of, or impose any obligation on, any person whether or not he or she is the person with whom the company in question entered into the transaction."

[13] Furthermore, in my reading of the Privy Council's Judgment, the Board **excluded the need to address the question whether Miss Chen derived a reputational benefit from the making of the Zenato Payments.**

[14] The Privy Council then invited further submissions as to the form of order that would follow. It made an Order on 28th February 2022 (i.e. after the Privy Council had rendered its reasoned written judgment) in the following material terms:

"...

IT IS DECLARED that (1) the Respondent owed fiduciary duties to PFF at the time of the payments by PFF to Zenato Investments Limited in November 2009 ("the Zenato Payments") and (2) the Respondent breached her fiduciary duties to PFF in relation to the Zenato Payments and

IT IS ORDERED THAT

1. The Order [of this Court] dated 19 March 2015, the Order of the Court of Appeal dated 12 June 2018 ...and the Order of the Court of Appeal dated 28 June 2018 ... be set aside.

2. All issues concerning what sums, if any, the Respondent must pay to the Appellants in respect of or arising from her breaches of fiduciary duty to PFF in relation to the Zenato Payments be remitted to the High Court for decision, in the first instance, by a Judge of that Court.
...

[15] The Applicants, being the Joint Liquidators of PFF, and PFF under their control, applied on 17th March 2022 for an order that Miss Chen should pay to them:

- (1) sums of US\$5 million, US\$3,407,774.28 and a US Dollar equivalent sum equivalent to Euros 3,718,147.34 as at 4th November 2009, reflecting the three sums wrongfully paid away from PFF's account in breach of Miss Chen's fiduciary duty;
- (2) Interest on such sums at a rate of 5% per annum, compounded annually, from 27th November 2009 (the date of the last payment); and
- (3) Costs of the Application.

[16] The Applicants submitted the following basis for their quantum claim:

"The position as regards Miss Chen's liability to pay the amounts of the Zenato Payments to PFF is straightforward. Had Miss Chen complied with her fiduciary duties and intervened at the time of the Zenato Payments, they would not have been made and PFF would have had an additional sum equivalent to the amount of the Zenato Payments in its estate in the insolvent liquidation. ...

Accordingly, Miss Chen's breaches of fiduciary duty have given rise to loss to PFF. She is liable to account to PFF and/or compensate PFF for those breaches of duty: **West Mercia Safetywear v Dodd** (1988) 4 BCC 30 (See also **Re HLC Environmental Projects** [2013] EWHC 2876 (Ch), [2014] BCC 337; **BTI 2014 LLC v Sequana** [2022] UKSC 25, [2022] 3 WLR 709 at [237] per Lady Arden. ...)"

[17] The Applicants submitted a fall-back position:

"Alternatively, if and to the extent necessary, the Liquidators say that Miss Chen is additionally liable to repay the Zenato Payments by virtue of the fact that she caused PFF's property to be misapplied for her own benefit. Whilst the question whether Miss Chen personally benefitted from the Zenato Payments was in issue before the Privy Council, that was not ultimately a matter which the Privy Council considered it necessary to determine (as set out above). Nonetheless, the Liquidators are entitled to – and do – rely on the fact that the evidence indicates that Miss Chen derived a reputational benefit from the Zenato Payments if and to the extent that they do not recover on their primary case above."

[18] They submitted furthermore that Miss Chen is liable to repay the amounts of the Zenato Payments to PFF by virtue of having caused PFF's property to be misapplied.

[19] The Applicants submitted that the Privy Council clearly contemplated that Miss Chen should pay a substantive amount of money to PFF, when the Board said at paragraph 96 of its judgment:

“Miss Chen’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.”

2. Miss Chen’s position on quantum

[20] Miss Chen fundamentally disagrees with the Applicants’ positions.

[21] First, as her learned Counsel, Mr. Joffe, KC, pointed out, the Privy Council’s Order referred at clause 2 to ‘what sums, **if any**, the Respondent must pay to the Applicants’ (emphasis added), indicating that the Privy Council was alive to the possibility that this Court might find that no sums are payable.

[22] This part of the Order was made (urged Mr. Joffe, KC,) after the Joint Liquidators had asked the Privy Council in submissions filed on 24th March 2021 to order Miss Chen to pay ‘compensation’ for breach of fiduciary duty in an amount of US\$13 million, being the aggregate sum which Miss Chen had been found to have wrongly caused or procured PFF to pay to Zenato, together with interest thereon. Mr. Joffe, KC, urged that the Privy Council declined to make that order, but crafted the Order it eventually made in the particular terms already quoted.

[23] Mr. Joffe, KC, further observed that the Privy Council did not find that:

- (1) Miss Chen had benefitted personally in any way from the Zenato Payments; and
- (2) PFF suffered any loss as a result of Miss Chen’s breach, be it in terms of PFF’s net asset position or in terms of any reduced liquidity caused by the Zenato Payments.

[24] He further pointed out that it is significant that the Privy Council framed its Order with reference to Miss Chen’s breaches of fiduciary duty to PFF. The distinction he sought to make was between Miss Chen’s duties owed to the company PFF, not to PFF’s creditors. He submitted that ‘[t]he loss this

Court is concerned about is the loss suffered by PFF, not the loss suffered by PFF's individual creditors'. Such a distinction is crucial when examining whether PFF itself in fact suffered any loss. He drew support for this submission from the United Kingdom Supreme Court decision in **Stanford International Bank Ltd v HSBC Bank PLC**² where it was stated that 'loss suffered by the company and loss suffered by its creditors are different losses and, if the law is to be coherent, it is important not to blur the distinction between them.'

[25] Mr. Joffe, KC, argued that the financial remedy that would be applied to Miss Chen is one of equitable compensation and that this is a loss-based remedy. Thus, if PFF has not suffered any loss as a result of the Zenato Payments, Miss Chen should not be required to pay PFF any money by way of equitable compensation.

[26] Mr. Joffe, KC, reached this conclusion as follows.

- (1) The legal position concerning equitable compensation has been clarified by the House of Lords in **Target Holdings Ltd v Redfern (a firm)**³ and by the United Kingdom Supreme Court case of **AIB Group (UK) plc v Mark Redler & Co Solicitors**⁴ and as summarised in the English High Court (Chancery Division) case of **Mitchell v Al Jaber**:⁵ Thus:
- (2) Equitable compensation is the personal remedy available against trustees, or others in a fiduciary position, whose acts or omissions amount to a breach of trust or fiduciary duty.
- (3) In broad terms, breaches of duty have been analysed as falling within one of three main categories: first, transactions involving the unauthorised payment or disposal of or damage to trust assets, causing loss to the trust; second, breaches of duties of loyalty, involving trustees in making profits at the expense of the trust or by the use of information or opportunities available to the trustee in that capacity; third breaches of duties of care and skill.
- (4) In all claims for equitable compensation, the beneficiary is entitled to have the trust property properly administered, so he is entitled to have made good any loss suffered by reason of a breach of duty.

² [2022] UKSC 34 at paragraph [81] (Leggatt LJ).

³ [1996] AC 421.

⁴ [2015] AC 1503.

⁵ [2023] EWHC 364 (Ch) at paragraph 549 (Dame Justice Joanna Smith, DBE).

- (5) Equitable compensation is apt to include both substitutive performance claims and reparative claims, i.e. payment made to restore the value of assets removed without authority as well as reparation for losses suffered.
- (6) The purpose of a substitutive order is to replace a loss to the trust fund which the trustee has brought about. The basic rule is that a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss. To require the trustees to restore the assets or their monetary value is 'the real loss which is being made good'. The loss must be caused by the breach of trust in the sense that it must flow directly from it. The amount of the award is measured by the objective value of the property lost normally determined at the date when the account is taken.
- (7) By contrast, where a reparative claim is made, the amount recoverable is measured by reference to the actual loss sustained by the beneficiary and 'in this case the payment of 'equitable compensation' is akin to the payment of damages as compensation for loss'. This form of equitable compensation is therefore different in kind from equitable compensation arising in connection with a substitutive claim, where the primary concern is to make good a deficit in the fund.
- (8) Thus, it is now settled that the object of an equitable monetary remedy for breach of trust or fiduciary duty is ultimately concerned with 'mak[ing] good any loss suffered by reason of a breach of duty'.⁶

[27] Mr. Joffe, KC, observed that the decision in **AIB Group** clarified that equitable compensation is fundamentally loss based. He referred to *dicta* of Lord Leggatt in **Stanford International Bank Ltd** as explaining the position, thus:

"The AIB case

68. By the time *HLC Environmental Projects* was decided, this traditional view of the liability of a defaulting fiduciary had, however, been undermined by the decision of the House of Lords in *Target Holdings Ltd v Redferns* [1996] AC 421, albeit that the effect of that decision was the subject of vigorous academic debate. Shortly

⁶ AIB Group (UK) plc at paragraph 66 and Target Holdings at paragraph 439.

afterwards, in *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58; [2015] AC 1503, the Supreme Court expressly held that there is, or is no longer, a separate equitable account remedy which is not based on a principle of compensation.

...

72. It is open to question whether the remedial approach adopted in the *West Mercia* line of cases can be reconciled with this decision, as pointed out in a helpful article: K van Zwieten, “Director Liability in Insolvency and its Vicinity” (2018) 38(2) OJLS 382, 403. It is true that in the *West Mercia* line of cases the potential objection to granting equitable relief is not that loss would have been suffered anyway but that the misapplication of funds did not cause any loss to the company in the first place. But it is hard to see why generally this distinction should make a difference given that, **if the value of the trust fund has not been diminished, no payment is required to restore its value. Generally speaking, there is no justification in terms of legal policy for ordering a defaulting trustee or other fiduciary to pay money to the trust fund which reflects neither any loss caused to the trust fund nor any gain made by the trustee. To do so, as Lord Toulson observed in *AIB* at para 64, would be penal.**” [Emphasis added.]

[28] I pause here to note that the United Kingdom Supreme Court in *Stanford International Bank Ltd v HSBC* did not exclude the application of a different type of remedy where a preference payment is balance sheet neutral with the company suffering no loss:

- “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.

75. This rationale would not apply, however, in a case such as *HLC Environmental Projects* where the payment made in breach of the director's duty was not an unlawful preference. **Whether a payment made in the period before a company goes into insolvent liquidation which advantages one creditor at the expense of others ought to be reversed is a question of policy answered by the rules of the applicable insolvency regime.** It is the function of those rules to determine which assets, including assets disposed of before the commencement of winding up, should be available to be allocated through the liquidation process and which should not. As noted earlier, this point was central to the reasoning of the Privy Council in the earlier *Stanford* appeal. It is hard to see how, in the absence of loss to the company or gain to the director, a director who causes a payment to be made to a particular creditor which does not meet the criteria for an unlawful preference and which the creditor is entitled to keep could properly be held liable to repay the money. Requiring the director to repay the money in such a case would cut across the distribution of assets provided for by the insolvency regime. It would also impose on the director a liability for which he or she (despite not having personally received a benefit) would not even in principle be entitled to an indemnity from the person who received the money. That would not be just." [Emphasis added.]

[29] I pause further to note that the need to look at the company's net asset position (as opposed to availability or reduction of available cash) for the purposes of ascertaining whether a transaction has caused the company loss, is supported by the highest authority. At paragraph 78 of **Stanford International Bank Ltd v HSBC** Lord Leggatt stated:

"That compensatory principle 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. The aim of an award of damages is to compensate the claimant (subject to limiting principles of remoteness etc) for any net loss represented by the difference between these amounts. Considerations of reversing unjust enrichment or reconstituting a trust fund play no part in the assessment."

[30] Mr. Joffe, KC, argued that Miss Chen's liability in this case is to be determined exclusively under principles of general law without reference to any statutory remedies under the Insolvency Act 2003 or their underlying policy objectives. The Privy Council expressly declined to order any statutory remedies. Consequently, Miss Chen's liability is only to compensate for any proven losses suffered by PFF as a result of her breach. There were no such losses, he urged, because the Zenato Payments were balance sheet neutral.

[31] Moreover, said Mr. Joffe, KC, there is no finding that the Zenato Payments conferred any personal benefit on or enrichment of Miss Chen. That means (said Mr. Joffe, KC) that any order of compensation against Miss Chen cannot be based on principles of unjust enrichment. The only basis for a monetary remedy is based on the principles of equitable compensation, which require loss by PFF to be shown, which it cannot do and has not done.

3. The Joint Liquidators' response

[32] The Joint Liquidators sought to distinguish the decision in **Stanford International Bank Ltd v HSBC**. They observed that that case concerned a claim in tort by the company against its bank (HSBC) for breach of the bank's **Quincecare** duty of care to the company. The Joint Liquidators argued that 'that has no bearing on the present case'.

[33] The Joint Liquidators placed particular emphasis on *dicta* of Lady Rose in **Stanford International Bank Ltd v HSBC** at paragraph 34, in which Lady Rose considered that a payment order could be made against a director even where the director caused a balance-sheet neutral transaction to be effected:

"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*.”

[34] Lady Rose summarised **West Mercia** thus, at paragraph 33 of the judgment:

“That case concerned a claim by the liquidators of a company against a director who, knowing the company was insolvent, caused it to pay £4,000 to its parent company in part payment of a debt owed by the company to that parent, thereby reducing the parent company’s bank overdraft which he had personally guaranteed. It was argued by the director that although he had acted improperly he had not misapplied the company’s assets because he had merely used those assets to pay part of a debt owed by the company to its parent. The director submitted that he had not therefore been in breach of any duty of care, or any fiduciary or other duty in relation to the company. Dillon LJ (with whom Croom-Johnson LJ and Caulfield J agreed) rejected that proposition and held that the director had been guilty of a 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. He ordered Mr Dodd to repay the £4,000 with interest and directed that the extra money be distributed among the unsecured creditors but giving Mr Dodd personally the credit for the dividend that would, on that basis, be paid to the parent company on its resuscitated debt of £4,000. That was, Dillon LJ said, “a rough and ready way of achieving justice on both sides”: p 35 of the report.”

4. DISCUSSION

[35] My initial reaction to the Joint Liquidators’ Application was that Miss Chen should be ordered to restore the funds she had permitted to be paid out as a wrongful preference to Zenato. My initial view had been based upon the **West Mercia** line of authorities that the Joint Liquidators relied upon. It was moreover coloured by an initial reaction on my part that it is all very well for the Zenato Payments to be treated for accounting purposes as a balance sheet neutral transaction but that ignored the fact that the company’s cash had been depleted by the Zenato Payments: expressing the thought in the vernacular, the company cannot pay for goods and services with a balance sheet; it needs cash or credit for that. On somewhat more profound reflection, I am persuaded that my initial views were wrong. I am satisfied that Miss Chen should not be required to pay PFF any money representing the Zenato Payments at all. I will now explain why.

[36] This Court’s starting point for its consideration of the Application must be the Privy Council’s Judgment and Order, taken together.

- [37] They must be taken together because the Order was an order upon the Judgment. The Judgment had been handed down before the Order was made. That is conceptually important, because all concerned knew what the Privy Council's analysis was before the Order was settled. That is to be contrasted with a case where a court announces a result with reasons to follow later, with an order on judgment being settled before the reasoning has been given.
- [38] It is here also practically important, because the Joint Liquidators contend that the Privy Council's Order gives this Court a broad remit to determine '[a]ll issues concerning what sums, ... the Respondent must pay to the Appellants'. The Joint Liquidators contend that it is therefore open to this Court to order Miss Chen to pay PFF money on the basis that she obtained a reputational benefit from permitting the Zenato Payments to be made.
- [39] Whilst it is correct that the Privy Council's Order did not in terms provide that this Court could or should not do so, the Order should not be read in isolation from the written Judgment delivered by the Board earlier. They must be read together. That written Judgment must be taken as setting out the parameters of this Court's review of the matters remitted to it.
- [40] The Privy Council considered whether or not:
- (1) statutory remedies under the Insolvency Act 2003 should be applied; and
 - (2) Miss Chen obtained a reputational benefit from permitting the Zenato Payments.
- [41] As we have seen, the Privy Council opined at paragraph 96 of its Judgment that:
- In the Board's view, "...our conclusion that Miss Chen is liable to account for breach of fiduciary duty makes any investigation of the question whether the Liquidators have, in addition, a remedy under sections 244 and 245 of the Insolvency Act 2003 simply unnecessary."
- [42] It should be noted that the Privy Council did not, here, restrict the question whether it was necessary for just the Privy Council to consider the application of Insolvency Act remedies (implicitly leaving it open to this Court to do so). The passage, read sensibly (in my respectful judgment), means that it is 'simply unnecessary' for either the Privy Council or this Court to consider the application of such remedies.

[43] It should be noted that the Privy Council was not leaving the question open, for eventual later determination. Nor was it the case that the Privy Council did not get around to dealing with the question, such that this Court could or should fill the omission. The Privy Council considered the question and ruled that it is not necessary for the application of those statutory remedies to be considered. That lack of necessity applied to the Privy Council, and, in my respectful interpretation of the Privy Council Judgment, it applies to this Court now.

[44] In respect of whether any benefit, including reputational benefit, accrued to Miss Chen, the Privy Council held in the same paragraph, 96, that:

“Nor do we need to address the question whether, as the Liquidators have contended, Miss Chen derived a reputational benefit from the making of the payments.”

[45] I read that in the same way. I do not read it as saying that the **Privy Council** need not address that question, but that this Court can and should do so. If the Board had that in mind it could and probably would have said so.

[46] I thus read the Privy Council Judgment as excluding those two questions from consideration when it comes to determining what sums, if any, Miss Chen should pay PFF.

[47] It warrants observing at this juncture that the Joint Liquidators urged that the Privy Council must have had in mind that Miss Chen should be ordered to pay a substantial sum to PFF, by virtue of the following sentence in paragraph 96:

“Miss Chen’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.”

[48] I respectfully disagree. The Joint Liquidators, in their learned Counsel’s skeleton argument for the hearing of the Application, omitted reference to the words ‘if any’ that the Privy Council had deployed in clause 2 of its Order.

- [49] Again, I do not read the Privy Council's Judgment as suggesting that the Privy Council thought Miss Chen should make a substantial, nor indeed any, payment to PFF. If it did, it surely would not have used the words 'if any' in its Order.
- [50] The Privy Council might have thought that Miss Chen could or should be ordered to pay a substantial sum, but it left the issue to this Court whether that would be so. The Privy Council did not leave that issue at large. By ruling that issues of application of Insolvency Act remedies and any reputational benefit to Miss Chen were unnecessary to be investigated, the Privy Council funnelled this Court's consideration onto a sole issue, namely, what sum, if any, Miss Chen should pay PFF as a matter of law and fact upon an account being taken in respect of Miss Chen's breach of fiduciary duty. By using the words, 'if any', the Privy Council was leaving it completely open to this Court to decide how much, if at all, Miss Chen should be ordered to pay PFF, within the limits of the parameters thus set by the Privy Council. The Privy Council itself may not have taken a view on what the applicable legal principles were - **Stanford International Bank Ltd v HSBC** would not be heard until 19th January 2022, around a year after the Privy Council's Judgment in this matter dated 22nd February 2021. In effect, the Privy Council was doing no more than what an objective and impartial court of law should do in remitting part of a matter to a lower court, namely, to require and expect that court to follow the law where-ever it might take the court and to apply it to the facts in order to produce a just and equitable result. I am satisfied that the Privy Council had no preferred outcome in mind. Neither should this Court.
- [51] Now, the Privy Council might have assumed (rightly or wrongly) that Miss Chen would be required to make a substantial payment, and it might be somewhat surprised if this Court were to find that no sums should be payable by Miss Chen to PFF. It however is not part of this Court's remit to proceed from such a supposition, nor to try to divine the Privy Council's unexpressed intentions and expectations in this regard. Nor is it open to this Court to broaden the parameters set for it by the Privy Council in order to reach a different result from that which the law dictates.
- [52] In terms of the law, after the Privy Council gave judgment in this matter, the United Kingdom Supreme Court gave judgment in **Stanford International Bank Ltd v HSBC**. The latter is a decision of the highest authority in English law. It is of course not binding upon this non-English Court. That said,

the courts of the BVI generally follow and apply English common law unless the BVI context or BVI statute requires otherwise. Decisions of the United Kingdom Supreme Court, and the House of Lords before it, are treated by our courts as highly persuasive.

[53] For our present purposes it is apt to observe that **Stanford International Bank Ltd v HSBC** is an important decision. That is because it contains pronouncements, albeit *obiter* and not directly binding upon this Court, made at the highest authoritative level, on the bases for granting remedial relief in cases (such as this) where a company was caused or permitted by a director to make a preferential payment when already insolvent (or approaching insolvency). It is moreover apt to observe that the structure of that decision is not straightforward, in the sense that generally one can say that the views expressed, even *obiter*, are expressed unanimously or by a majority. In **Stanford International Bank Ltd v HSBC**, four of the five Justices of the Supreme Court (Lady Rose, Lord Hodge, Lord Kitchin and Lord Leggatt) concurred that the appeal there should be dismissed. Lord Sales dissented. That appeal concerned Stanford International Bank Ltd's alleged **Quincecare** claim in tort against HSBC. On the presently pertinent issues, which are different from those which formed the *ratio decidendi* in relation to the tort claim, Lady Rose, Lord Hodge and Lord Kitchin agreed on a point that was *obiter*, namely that they would not disturb nor doubt **West Mercia**, although they did not in terms say so. Lady Rose, who gave the decision with which Lords Hodge and Kitchin agreed, explained (or interpreted) the decision in **West Mercia** without criticism or doubting or disagreeing with it. They did not disagree, or expressly agree, with Lord Leggatt's opinion of the current state of the law on remedying wrongful preferences and his views on **West Mercia**. Lord Sales' position was to treat **West Mercia** as the leading authority on that issue. He stated at paragraph 120:

"*West Mercia* is well known as being one of the principal authorities in English law for the duty which directors owe to a company to protect its creditors as a general body when the company is on the verge of insolvent liquidation, which has been affirmed by this court in *Sequana*."

He developed that at paragraph 121 by saying:

"In my view, Dillon LJ's reasoning regarding the loss suffered by the subsidiary company, and accordingly suffered by its general creditors through the company itself, is supported in a straightforward way by the analysis set out above."

At paragraph 122 Lord Sales followed Dillon LJ's analysis in **West Mercia** and applied that to the **Stanford International Bank Ltd v HSBC** situation. Lord Sales' approach might thus give the

impression that he disagreed with Lord Leggatt on the state of English law as it pertains to wrongful preferences. But, upon closer examination of Lord Sales' judgment, that is not so. At paragraph 131, Lord Sales summarised the law in a similar way as Lord Leggatt saw it:

"In some jurisdictions, notably in the United Kingdom, legislation has extended the circumstances in which transactions with third parties can be reversed and relief can be sought against them on a wider basis than under the common law. Lord Leggatt refers (paras 48-53 and 73-75) to provisions aimed at reversing transactions at an undervalue and at wrongful preferences. The significance of such provisions is that they extend the protection for a company's creditors beyond what might be available pursuant to basic equitable principles, by giving a liquidator wider rights to pursue persons other than the directors of the company (whose own asset position might mean they are not worth pursuing or are unlikely to be able to make good the loss suffered by the creditors)."

Lord Sales stopped short of expressing a view that the application of equitable remedies was essentially compensatory. Lord Sales considered that the court had not heard full argument on such points. At paragraph 122 he stated:

"The relationship between the compensatory principle in relation to breach of duty and possible alternative bases for ordering monetary relief against a fiduciary such as a director is one which raises issues of considerable juristic complexity and controversy: see, eg, *Target Holdings Ltd v Redfern* [1996] AC 421 and *AIB Group (UK) Plc v Mark Redler & Co Solicitors* [2014] UKSC 58; [2015] AC 1503. We are not in a position to resolve these points on the arguments we have heard on this appeal."

[54] Pertinently, Lord Sales did not here doubt, nor criticise the United Kingdom Supreme Court's earlier recent decision in **AIB Group**, which Lord Leggatt summarised⁷ as holding that in that case 'the Supreme Court expressly held that there is, or is no longer, a separate equitable account remedy which is not based on a principle of compensation.'

[55] It would be misguided to regard **Stanford International Bank Ltd v HSBC** as somehow the only word on these issues. It would also be misguided to lose sight of the fact that **AIB Group**⁸ was also a recent (2014) United Kingdom Supreme Court decision, and thus also one of the highest authority, which would be highly persuasive in this jurisdiction. In that case, the Supreme Court (Lord Neuberger, Lady Hale, Lord Wilson, Lord Reed and Lord Toulson) had received some 900 pages of

⁷ At paragraph 68 in *Stanford International Bank Ltd v HSBC*.

⁸ [2014] UKSC 58.

academic writing as part of the arguments submitted.⁹ The Supreme Court's decision was unanimous. Lord Toulson and Lord Reed each pronounced a judgment, both of which the other members of the panel concurred. Unlike in **Stanford International Bank Ltd v HSBC**, the Supreme Court's pronouncements on matters of present pertinence were part of its *ratio decidendi*: they were not *obiter*. The recapitulating point of Lord Toulson's judgment was expressed at paragraph 73:

"The basic equitable principle applicable to breach of trust, as Lord Browne-Wilkinson stated [in **Target Holdings Ltd v Redfern**¹⁰], is that the beneficiary is entitled to be compensated for any loss he would not have suffered but for the breach."

[56] Lord Toulson differentiated compensatory remedies from penal orders:

- "64. All agree that the basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law. Where there has been a breach of that duty, the basic purpose of any remedy will be either to put the beneficiary in the same position as if the breach had not occurred or to vest in the beneficiary any profit which the trustee may have made by reason of the breach (and which ought therefore properly to be held on behalf of the beneficiary). Placing the beneficiary in the same position as he would have been in but for the breach may involve restoring the value of something lost by the breach or making good financial damage caused by the breach. But a monetary award which reflected neither loss caused nor profit gained by the wrongdoer would be penal.
65. The purpose of a restitutionary order is to replace a loss to the trust fund which the trustee has brought about. To say that there has been a loss to the trust fund in the present case of £2.5m by reason of the solicitors' conduct, when most of that sum would have been lost if the solicitors had applied the trust fund in the way that the bank had instructed them to do, is to adopt an artificial and unrealistic view of the facts."

[57] Lord Reed agreed with the result but considered 'the relationship between equitable compensation and common law damages on a somewhat broader basis'.¹¹ After a review of authorities from numerous Common Law jurisdictions, Lord Reed reached a conclusion which can best be seen in the following paragraphs:

"136. It follows that the liability of a trustee for breach of trust, even where the trust arises in the context of a commercial transaction which is otherwise regulated by contract, is not

⁹ See paragraph 47.

¹⁰ [1996] AC 421.

¹¹ At paragraph 78.

generally the same as a liability in damages for tort or breach of contract. **Of course, the aim of equitable compensation is to compensate: that is to say, to provide a monetary equivalent of what has been lost as a result of a breach of duty.** At that level of generality, it has the same aim as most awards of damages for tort or breach of contract. Equally, since the concept of loss necessarily involves the concept of causation, and that concept in turn inevitably involves a consideration of the necessary connection between the breach of duty and a postulated consequence (and therefore of such questions as whether a consequence flows "directly" from the breach of duty, and whether loss should be attributed to the conduct of third parties, or to the conduct of the person to whom the duty was owed), there are some structural similarities between the assessment of equitable compensation and the assessment of common law damages.

137. Those structural similarities do not however entail that the relevant rules are identical: as in mathematics, isomorphism is not the same as equality. **As courts around the world have accepted, a trust imposes different obligations from a contractual or tortious relationship, in the setting of a different kind of relationship. The law responds to those differences by allowing a measure of compensation for breach of trust causing loss to the trust fund which reflects the nature of the obligation breached and the relationship between the parties.** In particular, as Lord Toulson explains at para 71, where a trust is part of the machinery for the performance of a contract, that fact will be relevant in considering what loss has been suffered by reason of a breach of the trust." (Emphasis added.)

- [58] It is fair to observe that **AIB Group** did not concern the making of a wrongful preference of the type we are presently concerned with. Nor did the United Kingdom Supreme Court in terms address the **West Mercia** line of authorities. Nonetheless, the general principles enunciated there are instructive.
- [59] Where this leaves us is that this Court could apply those general principles to this case. They would, in my respectful opinion, yield the same result. If this Court were to restrict itself to the principles enunciated in **Stanford International Bank Ltd v HSBC**, it would be fair to observe that Lord Leggatt and Lord Sales appear to have been *ad idem* that there are two fundamental bases for relief in wrongful preference cases: compensation for loss suffered by a company and wider statutory relief reflecting equitable principles. The other three Lords Justices of the Supreme Court in **Stanford International Bank Ltd v HSBC** were silent on these points. Such silence cannot be taken as disagreement, nor as agreement, merely that they did not consider them relevant in that case.
- [60] It is thus apt, in my respectful judgment, to follow and apply here those fundamental bases. I will return to this.

[61] It is of course also correct to say that in relation to directors' fiduciary duties **Stanford International Bank Ltd v HSBC** is strictly *obiter*. But the United Kingdom Supreme Court's lengthy and profoundly considered analysis of the current state of English law (by Lord Leggatt and to a lesser extent the other Lords Justices) cannot be lightly disregarded. The whole point about its pronouncements was to provide guidance – and guidance from the highest judicial level – so that other courts that apply English Common Law and equity, including this Court, can be steered thereby.

[62] I am unaware of any factors (and I do not recall that the Joint Liquidators urged the existence of any) which suggest that the BVI legal or commercial context should render the observations made in **Stanford International Bank Ltd v HSBC** inapplicable in this jurisdiction. If anything, quite the opposite. One of the features of that decision was to leave in place the **West Mercia** line of authorities. The reason for doing so was that (as Lady Rose recognised) there might be circumstances where equity should step in to avoid an unfair or perverse result, even though there might be no question in issue as to whether a company had suffered a loss as a result of a wrongful preferential payment. Although I cannot speak for the position under English law and the English statutory insolvency regime, the statutory remedies supplied by the BVI Insolvency Act 2023 at section 249 are extremely broad and would obviate the need to have recourse to general principles of equity in almost all cases. Nonetheless, I recognise, as I must, that such an eventual recourse continues to exist under BVI law.

[63] What then, is the effect of the decision in **Stanford International Bank Ltd v HSBC** for our present purposes? In a nutshell, it can be stated thus: there are two main bases upon which financial payment orders can be made to remedy wrongful preferences:

- (1) The first is to compensate the company for net loss it has suffered as a result;¹² and
- (2) The second basis is statutory, applying policy of English law as perceived by the legislature.¹³

[64] The first requires there to be loss to the company caused by the wrongful preference payment. That is because this basis is compensatory. The second does not. That is because it is not necessarily

¹² See *Stanford International Bank Ltd v HSBC* paragraphs 68, 71, 72, 78 (Leggatt LJ).

¹³ See *Stanford International Bank Ltd v HSBC* paragraph 73 (Leggatt LJ).

compensatory, but encompasses perceptions of fairness, or rather remedying unfairness, in allowing the recipient of such a preference payment to keep the benefit of a payment it should not have had.

[65] There is also a third basis, which is the Court's power to craft equitable remedies where it might still be required, as was done in the **West Mercia** case. However, with the availability of statutory remedies pursuant to statutory insolvency regimes, this now appears to be a residual basis that would rarely be necessary to apply.

[66] In the present case, when the Privy Council ruled that it was not necessary to apply statutory remedies, in my respectful judgment this means that this Court need not (and should not) apply such statutory remedies either. That leaves only the first basis, and, eventually, the exceptional **West Mercia** equitable remedy basis.

[67] In respect of the first basis, it is clear to me that PFF suffered no loss. I noted from paragraph 78 of **Stanford International Bank Ltd v HSBC** that as a matter of law what the court must look for is a 'net loss', not, or not just, a depletion of available cash. Thus, the fact that the Zenato Payments were balance sheet neutral means that PFF did not suffer a net loss. There is thus nothing for which PFF needs to be compensated by a payment from Miss Chen.

[68] Indeed, I am satisfied that requiring Miss Chen to make a payment would be penal. It forms no part of the Joint Liquidators' case that Miss Chen obtained a financial benefit from the Zenato Payments. It was Zenato, and indirectly, those behind Zenato, that benefitted from them. There is no claim against them, merely against Miss Chen. Zenato and/or those behind Zenato would keep the benefit they received, but it would be Miss Chen who would have to restore the cash to PFF, although she (*ipso facto*) does not have those monies and PFF suffered no net loss.

[69] I must therefore ask myself whether an equitable remedy, along the lines of that crafted in the **West Mercia** case, should be applied. I am persuaded that the answer is 'no'. In **West Mercia**, the wrongdoing director, Mr. Dodd, obtained a personal benefit which was capable of being ascertained financially, even though the preference payment there made was balance sheet neutral as between the paying company and the receiving company. The personal benefit was that Mr. Dodd had

personally guaranteed the receiving company's overdraft facility, and the payment reduced that overdraft. The wrongful preference payment reduced his personal exposure under that personal guarantee. The court thus crafted an equitable remedy, particular to the factual circumstances of that case, to undo the effect of the wrongful preference and to re-establish fairness all-round. The point there was that Mr. Dodd had benefited, albeit indirectly, from the improper preference payment.

[70] In the present case Miss Chen did not, at least in any tangible or readily ascertainable sense. The Joint Liquidators advanced an argument that she had obtained a reputational benefit from making the Zenato Payments. The Privy Council ruled that it was not necessary to determine that issue. This Court will likewise therefore not do so.

[71] In any case, that allegation is problematic at several levels. First, as recorded at paragraph 11 of the Privy Council's Judgment, the notion that Miss Chen had permitted the Zenato Payments derived from a note of an interview conducted by a representative of the Joint Liquidators with Mr. Chen - not Miss Chen herself - thus the evidence is hearsay. How much weight should be accorded to this evidence is not clear.

[72] Secondly, there would appear to be an issue as to how doing something wrong or improper should be treated as enhancing the perpetrator's 'good' reputation. I can understand how those behind Zenato might have thought, superficially, that Miss Chen would be cheating them if she were to have taken the legally correct line that she could not permit Zenato to be repaid when PFF was insolvent. It could be said, rather, that Miss Chen's reputation would have been enhanced by refusing to permit the payments to be made then, as she would be seen to be acting in accordance with her fiduciary duties.

[73] Thirdly, how any such 'reputational benefit' should be valued is also not clear. It would be facile to say that its value equates to the amount of the payments. But that need not be the case at all.

[74] In making these three points, I make no findings of law, nor fact whatsoever. I simply identify some potential issues.

[75] Such issues are by no means straightforward. I am grateful to the Privy Council for its ruling that it is not necessary to determine them.

[76] The Joint Liquidators contend for no other basis than the alleged derivation of a reputational benefit to engage equitable relief along the lines of **West Mercia**.

[77] Any other relief outside the ambit of compensation, or where the wrongdoing director does not derive a personal benefit, would ordinarily be supplied by the application of statutory relief under our Insolvency Act 2003, but the Privy Council excluded the application of such remedies as unnecessary.

DISPOSITION

[78] In conclusion, where this takes the matter is that the only eventual basis for making a payment order is that PFF needs to be compensated for a net loss incurred as a result of the Zenato Payments. As there was no such net loss to PFF, no compensation falls due.

[79] If no compensation falls due, no interest falls due either.

[80] The Joint Liquidators' application must thus fail in its entirety.

[81] Since the general rule is that costs follow the event, Miss Chen will have her costs of and occasioned by the Application.

[82] I take this opportunity to thank both sides' learned Counsel for their assistance. It behoves me to apologise for the delay in rendering judgment in this matter. The primary reason is that an earlier

judgment after a lengthy trial proved to be unusually long, both as a document to write and in its content, whilst at the same time hearing and determining a full list of other matters.

Gerhard Wallbank
High Court Judge

By the Court

Registrar