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Case: Stanford International Bank Ltd v HSBC Bank PLC [2022] UKSC 34; Lord Hodge, Lord Kitchin, Lord Sales, Lord Leggatt and Lady Rose, 21 December 2022

Synopsis: The claim against HSBC was for paying away money which, in accordance with its Quincecare duty (as established in Barclays Bank plc v Quincecare Ltd [1992] 4 All ER 363), it should not have paid. Two important issues arise for insolvency lawyers. The first concerns whether a company suffers loss in circumstances where paying monies away validly discharges a debt owed by the company to its creditors. The second concerns the interplay of this decision with BTI 2014 LLC v Sequana SA [2022] UKSC 25.

Topics covered: **Directors' duties; Common law duties of directors; s172 (3) IA 1986; Net loss; West Mercia Safetywear v Dodd; BTI 2014 LLC v Sequana**

Comment

This case is of relevance to insolvency lawyers as a result of the decision on the main issue that, even if there was a breach of the *Quincecare* duty, the appellant, Stanford International Bank Limited (SIB), suffered no net loss as a result of the payments given they validly discharged debts owed by it to its creditors. It was considered in Technical Bulletin 943 on the decision of the Court of Appeal. Its impact arises because it was submitted that such a decision would affect the liability of directors for breach of their fiduciary duties and would call into question the decision in Liquidator of *West Mercia Safetywear Ltd v Dodd* (1988) 4 BCC 30. 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 the director had personally guaranteed. It was there 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. While successful at first instance, upon appeal 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 body of creditors. He ordered the director to repay the £4,000 with interest and directed that the extra money be distributed among the unsecured creditors, but giving the director credit for the dividend that would, on that basis, be paid to the parent company on its resuscitated debt of £4,000 (known to readers as the *West Mercia* proviso).

In the present case Lady Rose, with whom Lord Hodge and Lord Kitchin agreed, accepted 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

illustrated one such situation where the director as guarantor benefited personally from the purported payment of the debt. That did not mean 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 explained in the **Facts** below which is owed in contract or tort by HSBC to SIB. Putting the point the other way round, a decision that no recoverable loss is suffered by SIB in the present case does not undermine the ability of the court of equity to identify a case of misfeasance and fashion an appropriate remedy, as in *West Mercia*.

On the subject of *West Mercia* Lord Sales, who dissented in relation to the result, had the following to say [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. Having identified such a duty, Dillon LJ, giving the sole substantive judgment, said that the defendant was guilty of breach of it "when, for his own purposes, he caused the £4,000 to be transferred [to the parent creditor] in disregard of the interests of the interests of the general creditors of this insolvent company [ie the subsidiary]". Having regard to the available evidence about the assets available in the liquidation of the subsidiary, Dillon LJ rejected the submission for the [director] that his action had "not caused any loss either to the company or, through the company and its liquidator, to any of the creditors of the company", because (the [director] said) all its general creditors would be paid in full out of such assets, regardless of whether the £4,000 was repaid by the defendant or not".* Lord Sales added "*It is implicit in Dillon LJ's discussion of this point that the subsidiary company, which at this stage represented the interests of its general creditors, had suffered loss, even though the defendant had succeeded in repaying one of its creditors and hence in reducing its liabilities by an equivalent amount.*" In his dissenting judgement, Lord Sales sought to consider the nature of corporate personality and the functions it serves, in doing so, recognising that companies are not mere abstractions. Applying his reasoning to the facts, he concluded that SIB had been deprived of assets by virtue of the payments made by HSBC. As such, its ability to perform its proper representative function (e.g. its ability to act in the interests of the general body of its creditors) had as a result been impaired, thereby causing the company to incur harm and accordingly suffer a loss.

Lord Leggatt's views in relation to *West Mercia* differed somewhat. He thought that it was open to question whether the remedial approach adopted in the *West Mercia* line of cases could be reconciled with *AIB Group (UK) plc v Mark Redler & Co Solicitors* [2014] UKSC 58. In this regard *West Mercia* is the subject of a helpful article: K van Zwieten, ''Director Liability in Insolvency and its Vicinity'' (2018) 38(2) OJLS 382. In line with the doubt in such article Lord Leggatt thought 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. Lord Leggatt considered that, 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. Having said that Lord Leggatt did go on to say that the position might be different where a transfer of company assets made by a director is an unlawful preference. This meant that, if such distinction be correct, it would mean that the rationale in a case such as *HLC*

Environmental Projects [2013] EWHC 2876 (Ch) was incorrect where the payment made in breach of the director's duty was not an unlawful preference.

To sum up and with the exception of Lord Leggatt the decision in *West Mercia* remains substantially unscathed as a result of the present decision. This is consistent with what was said in *Sequana* about *West Mercia* (which is cited positively by both Lord Leggatt and Lord Sales) although *Sequana* did not have to address the net loss argument considered in the present case.

By way of further observation on *Sequana* it should be noted that it did not involve an unlawful preference claim but the correctness of the possible distinction identified by Lord Leggatt may not sit easily with *Sequana* e.g.in para.327 of the judgment of Lady Arden she includes the following "*Section 239 invalidates transactions entered into within a certain time prior to liquidation. It has few similarities with the Rule in West Mercia. I do not therefore see any possibility of overlap between these remedies*." This was not however part of the ratio.

Facts

Stanford International Bank Limited is a company incorporated in Antigua and Barbuda that went into liquidation in 2009. SIB was ultimately owned and controlled by Robert Allen Stanford. Most of SIB's business was selling investment products to international customers. However, during 2003 to 2009, SIB was being run as a large Ponzi scheme by Mr Stanford and some of his associates. Customer withdrawals and payments when investment products supposedly matured were being made from capital invested by other customers rather than investment proceeds. In 2008, many customers requested withdrawals from SIB fearing that it may become insolvent.

SIB had four bank accounts with HSBC. These accounts were frozen by HSBC on 17 February 2009 following Mr Stanford being charged by the US Securities and Exchange Commission. Prior to the accounts being frozen, from August 2008, Mr Stanford purportedly authorised various payments from the accounts. This appeal concerns payments from the accounts totalling £116 million which were used to pay SIB's customers, some directly and some after money was transferred by HSBC to SIB's account with a different bank in Toronto ("the disputed payments").

SIB's claim is that HSBC was on notice that the instructions to make the disputed payments may have been part of a fraud. Accordingly, it is alleged that HSBC was under a duty of care, known as the Quincecare duty, to refuse to accept Mr Stanford's instructions to pay out money from the accounts (the "Quincecare claim"). HSBC's application for summary judgment to strike out SIB's Quincecare claim was refused by the High Court. However, on appeal HSBC was successful. SIB appeals to the Supreme Court. Separate claims and strike-out orders were sought from the High Court and Court of Appeal in relation to a dishonest assistance claim brought by SIB, however, the striking out of that claim was not appealed to the Supreme Court.

Decision

By a majority the Supreme Court dismissed the appeal. Lady Rose gives the lead judgment with which Lord Hodge and Lord Kitchin who were part of the panel in *Sequana* agreed. Lord Leggatt gave a concurring judgment. Lord Sales gave a dissenting judgment.

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