Michaelmas Term
[2022] UKSC 34
On appeal from: [2021] EWCA Civ 535

JUDGMENT

Stanford International Bank Ltd (In Liquidation) (Appellant) *v* HSBC Bank PLC (Respondent)

before

Lord Hodge, Deputy President
Lord Kitchin
Lord Sales
Lord Leggatt
Lady Rose

JUDGMENT GIVEN ON
21 December 2022

Heard on 19 January 2022

Appellant
Christopher Parker KC
James Knott
(Instructed by Stewarts Law LLP (London))

Respondent
Patricia Robertson KC
Louise Hutton KC
Christopher Langley
(Instructed by Eversheds Sutherland (International) LLP (London))

LADY ROSE (with whom Lord Hodge and Lord Kitchin agree):

1. Ponzi schemes continue to draw in large numbers of investors and so continue both to cause a great deal of misery and to generate complex litigation. This appeal arises out of one aspect of one of these schemes, operated by the claimant, Stanford International Bank Ltd ("SIB") a company incorporated in Antigua and Barbuda and now in liquidation. Until its collapse in February 2009, SIB was ultimately beneficially owned and controlled by Robert Allen Stanford who was also a director and the chairman of the board of directors of SIB. The bulk of SIB's business was the sale to international customers of Certificates of Deposit which were sold as investment products offering a good rate of return. Those who invested in the certificates were led to believe that the funds they deposited would be invested by SIB in a diversified low risk portfolio of assets and securities.

2. In fact, during the entire period relevant to this claim, that is from about 2003 until SIB's collapse in February 2009, Mr Stanford and some of his close associates dishonestly caused SIB to be run as a large Ponzi scheme. When customers requested withdrawals of money from SIB or when their product supposedly matured, the payment would be made from capital invested by other customers. In 2008 an increasing number of SIB's customers requested withdrawals and there was a run on the company. In February 2009, the US Securities and Exchange Commission charged Mr Stanford in relation to the fraud and a receiver was appointed in the USA over the Stanford Financial Group.

3. In April 2009 liquidators were appointed over SIB by the Antiguan court and that liquidation was subsequently recognised by the English High Court as foreign main proceedings under the Cross Border Insolvency Regulations 2006 (SI 2006/1030). At the time of SIB's collapse, SIB held only a fraction of the funds required to repay creditors in full and it is expected that the deficit between SIB's assets and its liabilities may be measured in billions of US dollars. Mr Stanford is now serving a federal prison sentence of 110 years.

4. The respondent, HSBC, provided correspondent banking services for SIB. There were four accounts, denominated in sterling, Euros, US Dollars and Swiss Francs. Those accounts were frozen by HSBC on 17 February 2009 following news that Mr Stanford had been charged by the SEC. SIB's case in these proceedings is that over the years when SIB had operated the bank accounts, there were many warning signs that put HSBC on notice that SIB's business was a fraud. SIB asserts in its Amended Particulars of Claim that by 1 August 2008 at the latest, HSBC was under a duty of care, known as the *Quincecare* duty, to refuse to accept Mr Stanford's instructions as to what to do with the balance standing in SIB's bank accounts. If

HSBC had complied with their *Quincecare* duty, payments from the accounts purportedly authorised by Mr Stanford would not have been made. The *Quincecare* duty takes its name from *Barclays Bank plc v Quincecare Ltd and another* [1992] 4 All ER 363. The application of the duty was recently considered by the Court of Appeal in *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2018] EWCA Civ 84; [2018] 1 WLR 2777. The precise scope and content of the *Quincecare* duty is not critical for this appeal, so for present purposes it is sufficient to say that the *Quincecare* duty is a duty on the bank to refuse to comply with a payment instruction given by the person mandated by the customer to give such an instruction when the bank is on notice that the instruction may be part of a fraud on the customer, unless and until the bank's inquiries satisfy it that the instruction is validly authorised by the customer. In its pleaded defence HSBC disputes the legal basis of the claim in its entirety. This appeal, however, focuses solely on the question of whether, even if HSBC did owe a relevant duty of care and was in breach of that duty, that breach has given rise to any recoverable loss on SIB's pleaded case. Nothing in this judgment therefore concerns the scope of the *Quincecare* duty or any other duty owed by a bank to its customer.

5. The payments made by HSBC which are identified in SIB's claim as made between 1 August 2008 (being the date on which it asserts HSBC should have frozen the bank accounts) and 17 February 2009 (being the date on which HSBC in fact froze the bank accounts) are claimed in three tranches. Expressed in sterling, the first is about £80m paid directly from SIB's accounts with HSBC to scheme customers in redemption payments and interest. The second is approximately £36m which was transferred to accounts held by SIB at the Toronto Dominion Bank and thereafter paid out by that bank to SIB's customers in redemption payments and interest. The third is about £2.4m paid from the HSBC account to the English and Welsh Cricket Board.

6. The £2.4m can be put to one side because the issues raised in this appeal do not apply to that payment. The appeal concerns the £116m paid to customers by monies in or derived from the HSBC bank accounts. There is no consequential loss claimed by SIB arising from the payment out of the money; the claim is simply for the loss of the payments made from the HSBC accounts.

7. It is accepted by SIB that those customers who initiated redemption requests and those SIB employees who processed the requests did so in ignorance of the fact that the whole investment scheme was a fraud. It was held in previous proceedings brought by the liquidators in Antigua and pursued on appeal to the Privy Council that there was no possibility of recovering the money from the customers who had been wise or lucky enough to redeem their investment and be paid out in full: see *In re Stanford International Bank Ltd* [2019] UKPC 45; [2020] 1 BCLC 446 ("the earlier

Stanford appeal"). Lord Briggs (with whom Lord Wilson and Sir Andrew Longmore agreed) quoted from the judgment of Lord Sumption giving the advice of the Board in *Fairfield Sentry Ltd (in liquidation) v Migani* [2014] UKPC 9; [2014] 1 CLC 611, para 3 where Lord Sumption said:

> "It is inherent in a Ponzi scheme that those who withdraw their funds before the scheme collapses escape without loss, and quite possibly with substantial fictitious profits. The loss falls entirely on those investors whose funds are still invested when the money runs out and the scheme fails."

8. In this judgment I shall refer to the customers who withdrew their funds in full and escaped without loss as the "early customers" and the investors who did not withdraw their funds before collapse and who now risk losing almost all their money as the "late customers".

9. Lord Briggs recognised at the outset of his judgment in the earlier *Stanford* appeal that this uneven distribution of loss among investors in the fraudulent scheme might be described as "capricious". Anxious consideration was needed as to whether the liquidators of SIB could achieve through the Antiguan insolvency regime a readjustment of that loss in a way which would accord with the liquidators' perception of fairness, justice and equity: para 2. The Board decided, broadly, that they could not. Antiguan insolvency law contained no statutory provision for the avoidance of fraudulent or wrongful preference. The common law doctrine of fraudulent preference applied but there was no prospect of such an allegation succeeding on the facts of the present case: para 23. The Board rejected the liquidators' attempt to rely instead on section 204 of the Antiguan International Business Corporations Act, concerning oppression and unfair prejudice, in order to fill what they perceived as an unsatisfactory gap in their armoury. Lord Briggs said, at para 40:

> "It is simply not the liquidator's job to seek to achieve some other outcome which he may perceive to be more equitable than that which is prescribed by the applicable insolvency scheme, still less to act as the standard bearer for creditors who have been the victims of oppression, in seeking to obtain for their benefit property, and in particular property clawed back from other creditors, which could never have been the company's property, save where

> the applicable insolvency code otherwise provides, as it may do in relation to preferences."

10. SIB's claim against HSBC in the English courts was served on 14 March 2019. SIB originally advanced two claims, one alleging breach of HSBC's *Quincecare* duty and one alleging dishonest or reckless assistance by HSBC in Mr Stanford's breaches of duty. On 9 April 2020, HSBC applied to strike out the claim, alternatively for summary judgment on both claims, on the grounds first that, as regards the *Quincecare* claims, SIB had suffered no loss either because the payments from the HSBC accounts had been made to other accounts held by SIB (that is as regards the £36m transferred to the Toronto Dominion bank) and/or because the payments made to the early customers discharged their debts and reduced pro-tanto the amount of SIB's liabilities. Secondly, as regards the dishonest assistance claim, HSBC asserted that there was no viable plea of dishonest assistance in circumstances where SIB accepted that it could not allege that any single individual in HSBC acted dishonestly to the necessary degree.

11. HSBC's strike out application was heard by Nugee J (as he then was): [2020] EWHC 2232 (Ch). He struck out the dishonest assistance claim but refused to strike out or grant summary judgment on SIB's *Quincecare* claim. Nugee J noted that SIB's claim was not a claim for misappropriation by a director nor an equitable claim nor a discretionary claim. It is a common law claim for breach of a contractual or tortious duty. Damages must therefore be compensatory and can only be awarded (save in exceptional circumstances which do not apply here) to compensate for loss: para 18. The judge recognised that in the case of a solvent person or company, if someone takes £100 of that person's money and uses it to discharge a debt owed by that person it is easy to see that the person is overall no worse off. They may not have the money that they had previously but equally they do not have the same liability that they had previously either and their net asset position is the same: para 24. But he considered that the position may be different in the case of an insolvent person or company. If the money had not been paid out by HSBC to the early customers, SIB would have had £80m more in cash, that is as an actual asset. It is true that it would have £80m more liabilities and a larger pool of creditors. But, since the company's liabilities vastly exceeded its assets it was a matter of indifference to the company whether it had £5 billion of liabilities or £6 billion of liabilities - it is just that the pool of creditors was a slightly different mix:

> "41. Had SIB had the £80m, it would have had that money available for the liquidators to pursue such claims as they thought they could usefully pursue and for distribution to its creditors. The assumed and alleged beaches by HSBC have deprived it of that opportunity and that seems to me

> to be a real loss. To describe the position as one in which it is in exactly the same financial position as it would have been in on 1 August 2008 does seem to me, … contrary to one's instinctive and common sense reaction to the facts."

12. He therefore dismissed HSBC's application in relation to the *Quincecare* duty but granted it in relation to the dishonest assistance claim.

13. Both parties appealed to the Court of Appeal which dismissed SIB's appeal in relation to the dishonest assistance claim but allowed HSBC's appeal in relation to the *Quincecare* duty claim: [2021] EWCA Civ 535; [2021] 1 WLR 3507. Sir Geoffrey Vos MR (with whom Moylan and Arnold LJJ agreed) noted that SIB did not assert that its net worth was less overall as at 17 February 2009 when the accounts were frozen than it was as at 1 August 2008. He rejected the argument that SIB's state of insolvency made all the difference. He emphasised that the *Quincecare* duty is owed by the bank to its customer the company, and not to the company's creditors:

> "37. Thus, for these purposes, the true distinction is between a company that is trading and a company in respect of which a winding up process has commenced, not between a solvent trading company and an insolvent trading company. In the judge's language, if the company is trading, even insolvently, then the £100 paid to a creditor reduces its assets, but is offset by a corresponding benefit to the company in reducing its liabilities. The fact that a company has slightly lower liabilities is a corresponding benefit to its net asset position even if the company is in a heavily insolvent position. Having more cash available upon the eventual inception of its insolvency 'for the liquidators to pursue such claims as they thought they could usefully pursue and for distribution to its creditors' is a benefit to creditors but not to the company whilst it is trading.
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> 38. As it seems to me, the result is not unjust to the creditors of SIB in this case, because it is brought about by the specific way that the claim was framed. SIB has disavowed claiming either (a) consequential loss, or (b) making the more general claim that, had HSBC complied with its *Quincecare* duty, SIB's winding up would have occurred sooner and/or SIB's overall net asset position

> would have been better at that earlier time or on the eventual winding up."

14. The Court of Appeal therefore struck out both the *Quincecare* duty claim and the dishonest assistance claim. Neither Nugee J nor the Court of Appeal considered in any detail whether a distinction should be drawn between the early customers paid directly by HSBC and the early customers paid by the Toronto Dominion bank with the money transferred from HSBC to SIB's account there. The Master of Rolls said at para 30 "It might be thought to be obvious that SIB cannot have sustained a loss by paying itself £36m."

15. SIB appeals to this court only in respect of the *Quincecare* duty claim. As in the courts below, the appeal proceeds on the basis that there has been a breach by HSBC of the *Quincecare* duty here. Mr Parker KC, leading counsel for SIB, accepts that the facts of this case are different from the facts in *Singularis* where it was the circumstances of the instruction to transfer money that themselves should have flagged up to the bank that the transactions purportedly justifying the making of the payments were a sham: see para 25 of the Court of Appeal's judgment. For the purposes of this appeal, it is common ground that we must proceed on the assumption that the *Quincecare* duty may also be breached where there is nothing wrong with the transaction itself but where the bank is put on notice of some background fraudulent activity being carried on by the person purporting to authorise the payment from the customer's account.

16. SIB's case has evolved through three stages in the course of the proceedings. The simplest approach was to say that if HSBC had not wrongly paid out the £116m from SIB's bank account, then that money would still be in its bank account and SIB would therefore be better off by that amount. In the usual *Quincecare* case, that is indeed how one would approach loss because the money misappropriated does not go to relieve the company of any genuine liability it owes and so is in truth merely a depletion of the company's net assets in the amount paid away. SIB now, it appears, recognises that that is too simplistic because the £116m payments out did relieve it of £116m of debt that it owed under the contracts between it and the early customers. SIB therefore accepts that the net asset point which formed the basis of the Court of Appeal's decision is a good one.

17. SIB now puts its allegations as to loss on the basis that the damage it has suffered is the loss of a chance. The argument runs as follows. At the time the disputed payments were made, the company was hopelessly insolvent and it has since gone into liquidation. SIB argues that if HSBC had not made the payments, those debts would still be owed to the early customers. Those early customers would

now have to prove their debts in the liquidation and would be likely to receive a dividend of only a few pence in the pound. SIB's loss is, therefore, the loss of the chance of discharging those debts for a few pence in the pound. Mr Parker therefore seeks to establish his loss by relying on well-known cases such as *Chaplin v Hicks* [1911] 2 KB 786 and *Allied Maples Group Ltd v Simmons & Simmons* [1995] 1 WLR 1602.

18. SIB then addresses how the court should assess the value of the chance that was lost when HSBC made the payments. Mr Parker argues that the court can have regard to the fact that the chance of a liquidation as at 1 August 2008 has turned into an actual liquidation. He relies on *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha* [2007] UKHL 12; [2007] 2 AC 353 ("*The Golden Victory*") for this next step in his submissions. That case decided that a court can take account of the fact that an event that was contingent as at the date of breach of contract has since arisen. That means that the chance that SIB lost when the payments were made is valued by taking the likelihood of the liquidation happening as 100%.

19. The loss caused to Stanford is therefore said to be the difference between the payment wrongly made by HSBC to the early customers (either directly or indirectly through the Toronto Dominion Bank) of 100 pence in the pound, and the dividend that the early customers would have received if they had had to prove in the liquidation. Mr Parker accepts that there are many issues to be resolved and perhaps many years to pass before one can establish the precise quantum of loss. SIB also accepts that it must give credit for the value of the dividend that the early customers would have been paid if they had not been paid in full before the liquidation. But such problems could be mitigated in practice by the making of interim payments and the courts are often called upon to make assessments of damages in circumstances of uncertainty.

20. Ms Robertson KC leading for HSBC points to a number of flaws in this case. First, she submits that the loss of a chance approach is based on a false premise that the payment of the dividend to the early customers in the counterfactual world would discharge the whole debt owed to them in the same way that the actual payment made by HSBC in breach of its duty discharged it. Ms Robertson says that this is not so, citing *Wight v Eckhardt Marine GmbH* [2003] UKPC 37; [2004] 1 AC 147. In that case, an issue arose whether a proof of claim was wrongly rejected by liquidators on the ground that the debts had been assumed by a new bank under a scheme under which certain debts of the insolvent company were discharged. Lord Hoffmann said that central to the question before the Board was the proposition that the right of a creditor to share in the liquidation was a new right that came into existence in substitution for the previous debt, rather in the way that obtaining a

judgment merges the cause of action in the judgment and creates a new form of obligation governed by its own rules of enforceability. He rejected that proposition:

> “27 The winding up leaves the debts of the creditors untouched. It only affects the way in which they can be enforced. When the order is made, ordinary proceedings against the company are stayed … The creditors are confined to a collective enforcement procedure that results in pari passu distribution of the company’s assets. The winding up does not either create new substantive rights in the creditors or destroy the old ones. Their debts, if they are owing, remain debts throughout. They are discharged by the winding up only to the extent that they are paid out of dividends. But when the process of distribution is complete, there are no further assets against which they can be enforced. There is no equivalent of the discharge of a personal bankrupt which extinguishes his debts. When the company is dissolved, there is no longer an entity which the creditor can sue. But even then, discovery of an asset can result in the company being restored for the process to continue.”

21. Undaunted, Mr Parker countered that the effect of the liquidation is that the debt is unenforceable for all practical purposes against the company save to the extent that it gives rise to the dividend. Although according to *Wight v Eckhardt* the remainder of the debt may remain outstanding even after the receipt of the dividend, that remainder will ultimately be extinguished once the company is dissolved, for which proposition he relied on *Russian and English Bank v Baring Brothers & Co Ltd* [1936] AC 405.

22. Ms Robertson raised other flaws in SIB’s argument, such that the principles in the “loss of chance” cases do not apply here because they are limited to contingencies that turn on the future conduct of third parties who are outside the claimant’s control. She also drew the court’s attention to the fact that SIB has not pleaded that the £116m would still have been intact and standing to SIB’s credit in the bank accounts at the date of the liquidation.

23. I put all those arguments to one side for the moment to concentrate on the nature of the chance that SIB has lost here. If HSBC had complied with its *Quincecare* duty and disobeyed Mr Stanford’s instruction to pay out SIB’s money, the counterfactual world is one where SIB has an extra £116m to its credit. It has not,

prior to going into liquidation, discharged any of the payments due to the early customers. In that situation, there is no longer any distinction between early and late customers - everyone becomes a late customer who has tried to redeem their investment but been refused because the scheme has collapsed and the monies have all been frozen. There would then be only one pool comprising all the customers who, at the moment of liquidation, were owed money and had not at that point received money to which they were entitled.

24. Lord Briggs recognised this in the earlier *Stanford* appeal when he said at para 52:

> "Even if the relief which the liquidators seek permission to pursue by way of claw-back and readjustment were to be wholly successful, that would simply swell the class of creditors entitled to prove in the liquidation. By way of a simple example, if a fully paid creditor is required to disgorge his payment, he becomes an unpaid creditor entitled to prove in the liquidation."

25. Assuming that all those customers then share pari passu in the liquidation, they will all have those debts 'discharged' for the same dividend as part of the same winding up procedure. In the counterfactual world where there is an extra £116m for the liquidators to distribute, one might assume that all customers will get a higher dividend, say 12 pence in the pound rather than the five pence in the pound that the late customers will ultimately receive in the real world. That would mean that a higher percentage of the debt that was originally owed to each customer will be 'discharged' when the company is dissolved. But the "chance" of being able to discharge a debt owed to an early customer by paying them 12 pence instead of the 100 they were in fact paid, is matched by the "risk" of having to pay the late customers 12 instead of five to "discharge" the debt owed to them on dissolution. The chance must, in the circumstances, be quantified as exactly the same amount as that risk. No additional customer indebtedness is paid off; exactly the same amount of indebtedness is in effect extinguished "for free" on the company's dissolution. The chance that is lost to SIB as a result of HSBC's breach is not, therefore, a chance either to pay more money overall to the pool of indistinguishable customers or a chance to "discharge" more of their indebtedness for free.

26. Mr Parker argues that the chance lost is, putting it broadly, a chance for SIB to act more fairly as between customers by making sure that the early customers do not, by happenstance, benefit by receiving 100 at the expense of the late customers who only get five - everyone should just get 12. Putting aside questions as to

whether such a loss is within the scope of the *Quincecare* duty, it is clearly not a pecuniary loss suffered by SIB. The fairness or otherwise of any particular early or late customer having been paid or not paid, is not a matter that the court can investigate or assess.

27. Mr Parker submits that one can consider the money that would have been saved by discharging the early customer's debt of 100 by paying them only 12 separately from the extra money that would have to be spent by paying the late customers 12 rather than five. The fact that the saved money would have been spent to benefit the late customers is simply how SIB would have used the money if it had not been wrongfully paid away. Mr Parker argues that the fact that, when the bank account holder vindicates its rights against the bank, it is only the creditors who will benefit rather than the account holder itself is irrelevant to whether the account holder has such a right: see *Singularis* at para 87. In my judgment, that argument fails because it ignores the fact that in the counterfactual world where the money had not been paid away there are no early or late customers, only customers.

28. This approach is also supported by the decision of Lightman J in *National Employers' Mutual General Insurance Association Ltd (in liquidation) v AGF Holdings (UK) Ltd* [1997] 2 BCLC 191 ("*NEMGIA*"). In that case a subsidiary, NEMIC, of the mutual insurance company NEMGIA, agreed once it became clear that NEMGIA was insolvent to make direct payments to NEMGIA's UK policyholders in full in respect of their claims. Those were claims for which NEMIC had agreed to indemnify NEMGIA under reinsurance policies. On agreeing to pay the UK policyholders' claims directly, NEMIC was no longer obliged to make any payments under its reinsurance contracts with NEMGIA. On its liquidation, NEMGIA sued NEMIC arguing that it would have been better off if the direct payment arrangement had not been implemented and it had still received instead the reinsurance monies. In that situation they could have decided what to do with the reinsurance funds they received in respect of the claims, rather than in effect applying them exclusively in payment of UK policyholders. After liquidation the liquidators could have paid all policyholders rateably not just the UK policyholders in full and the other creditors would have received a substantially larger dividend.

29. Lightman J held that NEMGIA had not suffered a loss but had, rather, been relieved of claims by UK policyholders. Relief from a liability could not, he held, be a loss. He rejected an argument that NEMGIA had suffered loss as a result of not being able to apply the reinsurance funds it would have received from NEMIC to satisfy the claims absent the arrangement for its own purposes by leaving the UK policyholders unpaid. Lightman J said at pp 201-202:

> "To leave the UK policyholders unpaid after NEMGIA had accepted liability to them (leave aside after having taken advantage of that liability to extract payment from NEMIC) would have been a breach of contract. In short Mr Burton's case is that NEMGIA suffered loss because it was prevented from profiting from this wrong by withholding payment when placed in funds by NEMIC and so enabled to do so. I do not think that the loss of this opportunity constitutes damage or loss. The entitlement on the part of NEMGIA to the receipt of the reinsurance proceeds is entirely balanced by the immediate liability to the UK policyholders and both must be netted-off one against the other.
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> …
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> The reality is that the only persons who have suffered loss and can have been intended to have suffered loss are the creditors of NEMGIA other than the UK policyholders, the foremost of which must be the Australian policyholders. It is to meet situations of this character that legislation (now encapsulated in the 1986 Act) has provided means for adjusting the rights of creditors inter se and setting aside and granting other relief when transactions infringe rules laid down to ensure pari passu distribution in a liquidation of an insolvent company's assets to its creditors."

30. The same applies here. It would have been a breach of contract for SIB to refuse to pay the early customers when they requested redemption of their supposed investment. The fact that remedial powers to adjust the rights of creditors as the liquidators wish are available here but not in Antigua (according to the earlier *Stanford* appeal) does not affect the outcome.

31. I therefore agree with the conclusion of the Court of Appeal that the *Quincecare* claim must be struck out. SIB has not suffered the loss of a chance that has any pecuniary value to it and hence there is nothing recoverable on its pleaded case.

32. My conclusion on that point means that I do not need to consider how *The Golden Victory* would apply to the valuation of that chance. My conclusion also disposes of the appeal in respect of the money paid by HSBC to the Toronto Dominion Bank and thereafter paid to early customers. The issues raised as to

causation and proximity of loss in respect of the Toronto bank monies do not need to be resolved since the payments out to early customers from SIB's Toronto bank accounts cannot cause any greater loss to SIB than the payments made directly from the HSBC accounts.

33. Finally, Mr Parker made a submission, which Ms Robertson described as being made in terrorem, about the effect of the Court of Appeal's conclusion on the liability of directors for breach of their fiduciary duties. Mr Parker referred to *Liquidator of West Mercia Safetywear Ltd v Dodd* (1988) 4 BCC 30 ("*West Mercia*"). 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.

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*.

35. I would therefore dismiss the appeal.

LORD LEGGATT (concurring):

Introduction

36. Stanford International Bank Ltd ("SIB"), represented in this action by its liquidators, is claiming damages from HSBC Bank Plc ("HSBC"). The damages are claimed as compensation for payments made from bank accounts held by SIB with HSBC between 1 August 2008 and 17 February 2009 (when the accounts were frozen). We are concerned on this appeal with payments to a total value of around £116m, which I will call "the disputed payments". The disputed payments were made - either directly or via accounts held by SIB at Toronto Dominion Bank - to investors to whom SIB owed the sums paid.

37. The disputed payments were made by HSBC on SIB's instructions. It is not intuitively obvious why a bank should be liable for carrying out its customer's instructions. But, as Lady Rose has explained, it has been held that a bank owes a duty of care to its customer to refuse to execute its customer's payment instructions if the bank has reasonable grounds for believing that the payments are an attempt to defraud the customer of money. The leading case is *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363. SIB claims that HSBC was in breach of this "*Quincecare*" duty on the basis that, when the disputed payments were made, HSBC allegedly had reasonable grounds for believing that SIB was being used as a vehicle to perpetrate a dishonest Ponzi scheme (that is, a scheme under which returns are paid to investors not from any actual profits earned but from the sums invested by them or by later investors.)

38. HSBC has applied to strike out this claim. Its short point is that, even if SIB were to succeed at a trial in establishing that HSBC owed such a duty to SIB of which HSBC was in breach, SIB cannot show that the breach caused SIB to suffer any loss. It is agreed that, although SIB did not enter into liquidation until 15 April 2009, at the time when the disputed payments were made the company was heavily insolvent on a balance sheet basis, as its liabilities vastly exceeded its assets. But the payments did not increase SIB's liabilities any further and thereby make its net asset position any worse. This is because SIB owed the money paid to the investors who received it. The payments of £116m out of SIB's accounts therefore reduced SIB's liabilities by an equal amount and left its net asset position unchanged.

39. As the Court of Appeal pointed out, it is plausible to imagine that making the disputed payments might have caused consequential loss to SIB: for example, if HSBC had frozen the accounts on 1 August 2008 rather than on 17 February 2009, this might conceivably have caused SIB to go into liquidation at an earlier date than it in fact did and so avoid incurring further liabilities. But SIB has disavowed such a claim: see [2021] EWCA Civ 535; [2021] 1 WLR 3507, paras 29-30. Thus, SIB has not alleged that, if the money had been retained in its bank accounts with HSBC, SIB would have entered into liquidation sooner or that its overall net asset position would have been better on going into liquidation or at any earlier time. Nor does SIB allege that it has suffered any other consequential loss from making the disputed payments. It follows, so HSBC submits, that SIB's claim for damages must fail.

40. Were it not for the fact that Lord Sales takes a different view, I would have regarded the logic of this argument as unassailable. His judgment discusses questions that will be of interest to insolvency lawyers about the nature of the fiduciary duty owed by a director to a company on the verge of going into insolvent liquidation. I recognise that these are thorny questions, but I have not been persuaded that they bear on the issue raised on this appeal. In my view, the Court of Appeal was right to reverse the decision of Nugee J and to strike out the claim for the reasons given by the Master of the Rolls and by Lady Rose in her judgment on this appeal. There is no way of escaping the simple truth that paying a valid debt does not reduce the payer's wealth.

41. The way in which counsel for SIB on this appeal has sought to escape this conclusion is by arguing that, if the £116m paid to investors had been retained in SIB's bank accounts with HSBC, the sums paid to those investors in the liquidation would have been limited to a dividend of a few cents for each dollar invested. SIB's case is that in these circumstances the company suffered a loss measured as the difference between the amounts actually paid and the amounts that would have been paid to the relevant investors in the liquidation process.

The 'breach date rule'

42. As Lady Rose has noted (at para 17 above), counsel for SIB framed this argument in terms of loss of a chance. They submitted that, by repaying the relevant investors when it did, SIB lost the chance of having to pay those investors only a small dividend in the liquidation. The argument appears to have been put this way in response to a submission made by HSBC that, as a matter of law, loss caused by breach of a duty owed under a contract or in tort is generally to be assessed as at the date of breach. The loss of a chance argument accepts this premise, but then takes account of the subsequent fact that SIB went into liquidation to evaluate the chance

as at the date of breach that this would happen as a certainty, relying on the authority of *Golden Strait Corpn v Nippon Yusen Kubishika Kaisha* [2007] UKHL 12; [2007] 2 AC 353 ("*The Golden Victory*") for the use of hindsight. I think that this is all unnecessarily complicated and involves a misunderstanding of the relevant legal principles.

43. The error lies in the premise that loss caused by a breach of duty is generally to be assessed as at the date of the breach. There is no such rule of law. Losses caused by breach of a contractual or common law duty routinely occur after the date of the breach and are generally to be assessed at whichever is the earlier of the date when the loss occurred and the date when damages are awarded. Sometimes - for example, in many personal injury cases - this requires the court to quantify losses which have not yet occurred but are likely to occur in future. The reason why in some types of case - for example, cases involving loss of or damage to goods - it is often appropriate to take a valuation date at or near to the date of breach is the effect of a rule which I will call the market mitigation rule. This rule is that, where there is an available market in which an adequate substitute can be obtained for goods or services of which the defendant's breach of duty deprived the claimant, damages are to be assessed as if the claimant entered the market and obtained such a substitute at the earliest reasonable opportunity whether or not the claimant in fact did so. So where, for example, a seller wrongfully fails to deliver goods, the market mitigation rule generally means that the measure of damages is the difference between the contract price and the market price of the goods at (or shortly after) the date when the goods should have been delivered: hence the prima facie measure of damages stated in section 51 of the Sale of Goods Act 1979. But where the market mitigation rule does not yield this result - as, for example, where the claimant is not aware of the defendant's breach until some time later or where there is no available market in which an adequate substitute for the lost performance can be obtained - the relevant loss will occur, and the damages will therefore be measured, at a different date. All of this, along with the ratio of *The Golden Victory*, is clearly explained by Lord Sumption and Lord Toulson in *Bunge SA v Nidera BV (formerly Nidera Handelscompagnie BV)* [2015] UKSC 43; [2015] Bus LR 987, paras 15-23 and 64-86; and see also A Dyson and A Kramer, "There is No 'Breach Date Rule'" (2014) 130 LQR 259.

44. The issue in *The Golden Victory* was how the market mitigation rule should be applied in a case where charterers had wrongly repudiated a time charter which had nearly four years left to run. The charter contained a war clause entitling either party to cancel it if war broke out between certain countries. Some 15 months after the charter had been brought to a premature end as a result of the charterers' repudiation, such a war did break out. Had the charter still been continuing, the outbreak of war would have entitled the charterers to cancel it. The question on

appeal to the House of Lords was whether the arbitrator was right to decide that the owners could not recover any damages relating to the period after the outbreak of war. The appellate committee (by a majority of three to two) held that he was. The essential reasoning of the majority was that: (i) the market mitigation rule required damages to be assessed on the assumption that the owners had entered into a substitute charter on equivalent terms to the original and therefore including a similar war clause; (ii) it was clear that the outbreak of war would have resulted in the cancellation of the substitute charter; and (iii) the performance lost as a result of the charterers' wrongful repudiation was therefore limited to the period up to the outbreak of war.

45. As Lord Sumption pointed out in *Bunge* at para 21, the real difference between the majority and the minority in *The Golden Victory* was that the minority treated the charter as a marketable asset which should be valued at the date when it was lost to the owners as a result of its premature termination. At that date the prospect of war would have been seen merely as a possibility which did not affect the value of the charter. The difficulty with this approach is that the owners were never intending to sell the charter as an asset (assuming that this would even have been possible). What they lost was not the opportunity for such a sale but a future income stream which would have ended with the outbreak of war both under the original charter and under a replacement charter entered into to mitigate their loss.

46. No similar issue to that which divided the House of Lords in *The Golden Victory* arises in the present case. This is not a case in which the market mitigation rule is relevant. There is no reason to complicate the argument by referring to loss of a chance. And in determining whether SIB has suffered a loss there is no possible reason to disregard the fact that SIB went into liquidation after the disputed payments had been made.

Consequences of SIB's entry into liquidation

47. The date when an insolvent company enters into liquidation is a critical cut-off date. In general, obligations of the company to its creditors which have not yet been performed cannot thereafter be enforced without the consent of the liquidator, but payments already made by the company are undisturbed. This reflects the general rule that only those assets which belong to the company when it enters into liquidation are available to meet the claims of creditors when the company is wound up.

48. It is necessary in the interests of orderly administration and commercial certainty that there should be such a cut-off date but, to protect creditors, insolvency

laws typically enable some transactions entered into before the commencement of winding up which have reduced the assets available to distribute in the liquidation to be reversed. Such provisions are of two broad kinds. One kind is aimed at transactions which have reduced the company's net assets during a specified period prior to the commencement of winding up - for example, by giving away an asset or selling it for significantly less than it was worth. The other kind of provision is aimed at wrongful preferences: that is, transactions which, although they have not affected the company's net asset position, have unjustly enriched a particular creditor by putting that creditor in a better position than it would have been in if the company had already gone into liquidation. In English insolvency law, section 238 of the Insolvency Act 1986 makes provision for the reversal of transactions of the first type (transactions at an undervalue) and section 239 for the reversal of transactions of the second type (unlawful preferences).

49. The disputed payments made out of SIB's accounts with HSBC were not transactions at an undervalue, as they reduced the company's liabilities by an equal amount and therefore had no effect on its net asset position. Any attempt by the liquidators to reverse the transactions under insolvency law had therefore to be based on a contention that the payments were unlawful preferences.

50. It is inherent in a company going into insolvent liquidation that every unsecured creditor whose debt was paid before the commencement of winding up is better off than those unsecured creditors to whom the company owed money at that time. Whether or in what circumstances this is regarded as sufficiently unfair to justify disturbing prior transactions is a policy choice. Such a choice is embodied in the legal rules which determine when an otherwise valid transaction is characterised as a wrongful preference which is capable of being reversed. The need for clear rules inevitably has apparently arbitrary results. For example, under section 240 of the Insolvency Act 1986 a payment made to a person who is not connected with the company can only be impugned as a wrongful preference if it was made during the period of 6 months ending with the commencement of winding up. Whether a transaction is liable to be re-opened may therefore depend on an accident of timing.

51. SIB is being wound up in Antigua, where the company was incorporated. The liquidators applied to the court in Antigua for orders permitting them to pursue claims to claw back money from investors who received payments in the period prior to SIB's entry into liquidation or, alternatively, to adjust claims within the liquidation to disallow any further claims by those investors. The liquidators faced the difficulty that, under the applicable statutory insolvency regime in Antigua, there is no provision for the avoidance of wrongful preferences and the criteria for such a claim at common law were not met. In those circumstances the liquidators sought to rely

on a more general provision of the Antiguan International Business Corporations Act under which relief can be granted for oppressive or unfairly prejudicial conduct.

52. The case reached the Judicial Committee of the Privy Council on an appeal (which, like Lady Rose, I will call "the earlier *Stanford* appeal"): see *In re Stanford International Bank Ltd* [2019] UKPC 45; [2020] 1 BCLC 446. The Privy Council held (by a majority) that relief under the statutory provision invoked by the liquidators is not available once a company has crossed the threshold of entry into insolvent liquidation. From that point on, the powers of the liquidators to set aside prior transactions and to distribute assets are exclusively regulated by the insolvency regime. The Privy Council further held (unanimously) that, even if the power to grant relief were available, it would be wrong to exercise it when the investors to whom payments were made in the period before SIB entered into liquidation had received no more and no less than their contractual entitlement and were bona fide purchasers for value without notice. The attempt by the liquidators to claw back or reverse the effect of those payments accordingly failed.

53. As a result of this decision, SIB's liquidators do not maintain in this action that the disputed payments were unlawful preferences or otherwise invalid or susceptible to being re-opened or reversed. It is not in dispute that under the applicable insolvency regime the £116m is not money which ought to be available to pay expenses or distribute to creditors in the liquidation of SIB but is money which the payees were legally entitled to receive and are legally entitled to keep.

SIB's loss argument

54. SIB's argument that the disputed payments nevertheless caused the company to suffer loss depends on treating the sums paid to those whom I will call the fortunate investors as "overpayments" - not in comparison with the liabilities which the payments discharged, but compared with the sums that would have been payable to those same investors on the distribution of SIB's assets in the liquidation. Treating this difference as a loss, however, depends on looking at only one side of the equation and ignoring the other: namely, the corresponding "underpayments" made to all the other creditors. If the £116m paid out of SIB's accounts with HSBC had been retained, SIB would have been required to pay dividends in the liquidation which were higher by this total amount. In other words, the amount that SIB "lost" by paying the fortunate investors in full was offset by the equal amount that SIB "gained" by paying the unfortunate investors less than they would otherwise have received.

55. SIB's argument is thus flawed because it disregards the net loss rule. This is the basic rule that applies in awarding damages for breach of contract or in tort that losses and gains arising from the breach must be netted off against each other and only any net loss awarded as damages. The leading authority for the rule as it applies to claims for breach of contract is *British Westinghouse Electric & Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673, where the House of Lords held that savings made by the claimant from installing more efficient turbines to replace turbines supplied by the defendant which did not comply with the contract had to be taken into account in computing damages. Viscount Haldane LC said, at p 691, that "the principle which applies here is that which makes it right … to look at what actually happened, and to balance loss and gain." Among many authorities for the net loss rule as it applies to claims based on negligence in tort, a good example is *Hodgson v Trapp* [1989] AC 807, 819, where Lord Bridge said:

> "My Lords, it cannot be emphasised too often when considering the assessment of damages for negligence that they are intended to be purely compensatory. Where the damages claimed are essentially financial in character, … the basic rule is that it is the net consequential loss and expense which the court must measure. If, in consequence of the injuries sustained, the plaintiff has enjoyed receipts to which he would not otherwise have been entitled, prima facie, those receipts are to be set against the aggregate of the plaintiff's losses and expenses in arriving at the measure of his damages. All this is elementary and has been said over and over again."

Applying this basic rule leads to the inexorable conclusion that SIB in this case has suffered no net loss.

56. The response of leading counsel for SIB, Mr Christopher Parker KC, to this flaw in SIB's argument was to say that paying lower dividends in the liquidation cannot be regarded as a benefit to the company because it was simply a consequence of the company having less money and having less money is not a benefit. By contrast, the payments made to the fortunate investors gave rise to a loss because the liabilities which those payments discharged would have been discharged anyway for less money through the liquidation process and subsequent dissolution of the company.

57. I do not accept that such a distinction can be drawn. Either the consequences of the liquidation process are to be taken into account in determining whether SIB has suffered loss or they are not. If they are not taken into account, then the

disputed payments made to the fortunate investors did not cause any loss because the reduction in assets resulting from the payments was matched by an equal reduction in liabilities. The disputed payments can only be said to have caused a loss if the consequences of the liquidation process are taken into account so as to say that, but for the disputed payments, the relevant debts would have been discharged for a lesser sum. Having less money to distribute to creditors is of course not itself a benefit, but if discharging a debt through the liquidation process by paying only a fraction of the amount due is regarded as a saving to the company, then by the same token paying more to discharge a debt through the liquidation process than would otherwise be the case must be regarded as a cost. Contrary to counsel's submission, the liquidators cannot have their cake and eat it on this point. However one looks at the matter, the disputed payments did not cause SIB any net loss.

The remedy granted in the *West Mercia* case

58. Counsel for SIB submitted that the decision of the Court of Appeal in *Liquidator of West Mercia Safetywear Ltd v Dodd* (1988) 4 BCC 30 shows that a payment can cause loss to an insolvent company even though it discharges a debt owed by the company. They then sought to extrapolate from this to the conclusion that the disputed payments (somehow) caused loss to SIB. Had such a step formed part of its reasoning, the Court of Appeal in *West Mercia* would in my view have been in error. But I think it clear from the judgment in that case that the Court of Appeal made no such error.

59. The facts were that a director of an insolvent company, Mr Dodd, caused the company to repay a debt of £4,000 owed to its parent company, which was also insolvent. The money was used to reduce the parent company's bank overdraft which Mr Dodd had personally guaranteed. The liquidator of the subsidiary company sought to recover the sum of £4,000 from Mr Dodd personally. The Court of Appeal upheld the claim. Dillon LJ (with whom the other members of the court agreed) had no doubt that the payment was a fraudulent preference (as an unlawful preference was then called) and that, in causing the company to make it, Mr Dodd was acting in breach of his fiduciary duty owed to the company as a director.

60. Dillon LJ then turned to the question of remedy. He said (at p33):

> "Prima facie the relief to be granted where money of the company has been misapplied by a director for his own ends is an order that he repay that money with interest, as in *In re Washington Diamond Mining Co*."

Dillon LJ noted that, on a misfeasance summons under section 333 of the Companies Act 1948 (now section 212 of the Insolvency Act 1986), the court nevertheless has a discretion in shaping the appropriate relief. The order made was to require Mr Dodd to repay the £4,000 with interest but also to direct that, in the liquidation, the debt owed to the parent company should be treated as notionally increased by this amount and any dividend attributable to this extra sum should be paid to Mr Dodd personally instead of to the parent company. The need for this direction, which has become known as the "*West Mercia* proviso", demonstrates that the aim of the remedy was to achieve a just distribution of the company's assets and not to compensate the company for a loss which it had suffered. The proviso was needed, not to compensate a loss suffered by the company but because, in the absence of the proviso, the relief granted would have made the company better off by £4,000 than if the misapplication had not occurred.

61. It is long established that the statutory provision which is now section 212 of the Insolvency Act 1986 is procedural only and does not create any new right or liability: see eg *In re Canadian Land Reclaiming and Colonising Co, Coventry and Dixon's Case* (1880) 14 Ch D 660, 670; In *In re City Equitable Fire Insurance Co Ltd* [1925] Ch 407; *Cohen v Selby* [2001] 1 BCLC 176, para 20; *Stone & Rolls Ltd (in liquidation) v Moore Stephens* [2009] UKHL 39; [2009] AC 1391, para 110 (Lord Scott). As is clear from the statement of Dillon LJ quoted above, the underlying basis of liability in the *West Mercia* case was the time-honoured doctrine that, as explained by Lindley LJ in *In re Lands Allotment Co* [1894] 1 Ch 616, 631:

> "Although directors are not properly speaking trustees, yet they have always been considered and treated as trustees of money which comes to their hands or which is actually under their control; and ever since joint stock companies were invented directors have been liable to make good moneys which they have misapplied upon the same footing as if they were trustees ..."

62. *In re Washington Diamond Mining Co* [1893] 3 Ch 95, cited by Dillon LJ, was an earlier case in which this principle had been applied to payments held to be unlawful preferences. In that case two directors jointly caused a company at a time when it was insolvent to pay sums of £70 due to each of them. Having held that the payments were unlawful preferences, the Court of Appeal ordered the directors jointly and severally to repay both sums (see pp 112 and 115). Thus, not only was each director liable to restore the benefit he had personally received but he was also liable to restore the sum wrongly paid to the other director.

63. In the *West Mercia* case counsel for Mr Dodd advanced an argument that, as summarised by Dillon LJ at p 33, the payment of the £4,000 "has not caused any loss either to the company or, through the company and its liquidator, to any of the creditors of the company". This was not an argument that no loss had been caused because the payment discharged a valid debt. While the fact that the payment discharged a valid debt meant that the payment had not caused any loss to the company, or to its creditors collectively, it plainly did not mean that the payment had not caused loss to any of the creditors of the company. On the contrary, if the company lacked sufficient assets to pay all its debts, the payment made was clearly capable of making creditors other than the parent company worse off, as it reduced the amount available to distribute in the liquidation. The argument made on Mr Dodd's behalf was a different one. What counsel for Mr Dodd sought to show was that, on the particular facts of the case, the payment of £4,000 made to the parent company would not affect the sums distributed in the liquidation. Counsel relied on an estimated statement of affairs to argue that, on the basis that the £4,000 ought to be included in the assets available for distribution as its transfer was a fraudulent preference, the amount payable to the parent company as a dividend would exceed £4,000. The £4,000 could therefore be recouped by deducting it from the dividend ultimately paid to the parent company, and none of the creditors would suffer any loss. So there was no need to require Mr Dodd to replace this sum.

64. Dillon LJ did not accept that this contention had been made out on the evidence, principally because the estimated statement of affairs did not take account of the costs of the winding up (including the irrecoverable element of the costs of suing Mr Dodd). However, the proviso to the order made by the Court of Appeal ensured that, to the extent that the company had assets which could be used to pay its unsecured creditors, Mr Dodds would not be disadvantaged as he would in that event get back a pro rata share of the £4,000 that he was ordered to restore.

Re HLC Environmental Projects

65. The *West Mercia* case has been followed, or distinguished, in a number of later cases. An argument based on the proposition that payment of a debt is not a loss was made in *In re HLC Environmental Projects Ltd* [2013] EWHC 2876 (Ch); [2014 BCC 337, paras 136-144. In that case a director had caused a company to make payments which, as in the *West Mercia* case, discharged debts of the company at a time when it was insolvent. Unlike in the *West Mercia* case the payments were not unlawful preferences, but the director was found to have acted in breach of his fiduciary duties to act bona fide in the best interests of the company and to exercise his powers for proper purposes. It was argued that the remedies against a defaulting director for breach of such a duty are limited to ordering the director to pay equitable compensation for any loss which the breach has caused the company or

ordering an account of profits made by the director from the breach of duty. As the payments in question had neither caused the company to suffer any loss nor enriched the director, he was not liable to restore the money.

66. Mr John Randall QC, sitting as a deputy High Court judge, rejected this argument. He applied the same principle as was applied in the *Washington Diamond Mining Co* and *West Mercia* cases that "[t]he 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" (para 142). It was until recently the orthodox view that this liability is not based on compensation for loss (or disgorgement of profit). A court of equity could order the taking of an account in which a trustee was required to justify any disbursement from the trust fund and, if a disbursement was not justified, to restore the money paid out. On this view, the equitable remedy of taking an account is analogous to a claim for debt: it involves the enforcement of a primary obligation and is not a remedy for breach of an obligation nor aimed at compensating loss.

67. Adopting this traditional approach, in *HLC Environmental Projects* the deputy judge held that it did not matter that, because the payments made had reduced the company's debts by an equal amount, the director's breach of fiduciary duty had not caused the company to suffer loss (nor enriched the director). This did not affect the director's duty to restore the money wrongly paid out.

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 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.

69. In the *AIB* case solicitors holding £3.3m on trust for a mortgage lender were instructed not to release the balance to the borrower until they had paid off a first charge over the property for around £1.5m in favour of another bank (Barclays). In breach of trust, the solicitors released the remaining funds to the borrower when only £1.2m had been paid to Barclays, who therefore continued to hold a first charge over the property for (in round numbers) £300,000. The borrower later defaulted on the loan and the property was sold for only some £800,000. Of this, £300,000 had to

be paid to Barclays because of their first charge. The solicitors argued that their liability was limited to compensating the lender for the loss caused by their breach of trust. That loss was the amount of £300,000 which had to be paid to Barclays out of the proceeds of sale of the property because Barclays' first charge had not been fully paid off before the balance of the loan was released to the borrower as it should have been. If the full amount covered by Barclays' first charge had been paid off, the lender's charge would have covered all the sale proceeds. But the rest of the money owing to the lender would have been lost anyway even if the solicitors had performed their duty to administer the trust fund correctly.

70. The lender, however, sought to recover from the solicitors the entire amount of the trust fund of £3.3m (less the proceeds of sale) on the basis that the solicitors were liable to reconstitute the trust fund by restoring all the money which they had wrongly paid out without having removed Barclays' first charge over the property.

71. The lender's claim for the higher amount failed. The Supreme Court unanimously accepted the solicitors' argument and expressly rejected the view that the accounting remedy can operate differently from the remedy of equitable compensation. In the words of Lord Toulson (with whose judgment as well as that of Lord Reed the other Justices agreed), "it would not … be right to impose or maintain a rule that gives redress to a beneficiary for loss which would have been suffered if the trustee had properly performed its duties": para 62.

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.

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.

No relevance to common law damages

76. It is unnecessary to form any concluded view on this point, however, in order to decide this appeal. This is for the straightforward reason that the claim against HSBC in 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. This is not a case in which any fiduciary duty is alleged. It is a claim at common law for damages for breach of a duty of care allegedly owed in contract and tort. Equitable remedies of accounting or equitable compensation are not available and have not been claimed by SIB. It is therefore unnecessary to decide whether the remedy granted in the *West Mercia* case was justified in the light of this court's subsequent decision in the *AIB* case and whether, if so, the justification is limited to cases such as *West Mercia* where the transaction was an unlawful preference.

77. Even if there are circumstances in which a defaulting fiduciary who has misapplied trust money can properly be ordered to replace the money when no loss has been caused to the trust estate (and no gain made by the fiduciary), there is no justification for importing such an approach into a claim for damages for breach of contract or in the tort of negligence. The recent direction of travel has been in the opposite direction and has brought the principles governing the award of equitable compensation into closer alignment with the common law rules. No court or commentator, so far as I am aware, has sought to extrapolate from the law about equitable remedies for breach of fiduciary duty to suggest any dilution of the basic compensatory principle which underpins the award of damages for breach of contract and in tort.

78. 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.

The *Sequana* case

79. In the *West Mercia* case the director, Mr Dodd, was in breach of his fiduciary duty to exercise his powers as a director in the interests of the company and not in his own self-interest. The payment which he caused to be made was plainly not in the company's interest and was made "for his own sole benefit in relieving his own personal liability under his guarantee" (see 33). The *West Mercia* case has, however, been viewed as authority for the existence of a more specific fiduciary duty owed by directors of a company which is insolvent to have regard to the interests of its creditors. The existence of this "creditor duty" has been affirmed by this court in *BTI 2014 LLC v Sequana SA* [2022] UKSC 25; [2022] 3 WLR 709, decided since the hearing of the present appeal.

80. As explained by Lord Briggs, who gave the principal judgment in the *Sequana* case with which Lord Kitchin and Lord Hodge agreed, the duty derives from the entitlement of creditors, in the liquidation of a company, to have its assets distributed to them in accordance with the statutory scheme. Although Lord Briggs used the term "creditor duty" as a convenient shorthand, he made it clear that the duty, when engaged, is owed to the company, and not to its creditors directly (see para 112), and that it is not a freestanding duty but is in truth simply an aspect of the director's fiduciary duty to act in good faith in the interests of the company (see para 205). That basic duty is modified when the entitlement of creditors to share in distributions in a liquidation is in prospect such that the directors must take the interests of creditors into account.

81. As Lord Sales explains in his judgment, the abstract nature of a company as a separate legal person does not mean that a company is regarded as having interests which are independent of the interests of those who have actual or prospective entitlements to its assets. This does not detract, however, from the fundamental principle of separate corporate personality whereby the rights and obligations, assets and liabilities, and consequently also the losses and gains, of a company are in law distinct from those of the persons who have economic interests in the fortunes of the company, be they shareholders or creditors. While a company is solvent, there is likely to be a correlation between loss suffered by the company and loss suffered by its shareholders. But they are not the *same* loss: see eg *Marex Financial Ltd v Sevilleja* [2020] UKSC 31; [2021] AC 39. Similarly, when a company is insolvent, loss suffered by the company may result in future loss to creditors of the company by affecting the amount that they will be entitled to receive in a subsequent liquidation. But 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.

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

83. It would be contrary to first principles to posit that, at some (imprecise) point on a path that leads to a company going into insolvent liquidation, the nature of its legal personality changes, such that, from then on, any disposition of the company's assets is treated as a loss to the company even if it discharges a liability and so leaves the company's net asset position unchanged. There is nothing in the judgments in the *Sequana* case which supports such a view, and I know of no authority which supports it. I am also concerned that, as well as being contrary to legal principle, such an approach, if adopted, would introduce considerable uncertainty into an area of law where clear rules are essential. Statutory insolvency regimes invariably specify a precise period of time before a company goes into insolvent liquidation within which preferences are liable to be re-opened. There is good reason for this approach in the interests of legal certainty. I do not think that English (or Antiguan) law would be well served by creating a parallel common law regime in which, as from a date about which there would be ample scope for argument, the discharge of a debt is treated as a loss to the company.

84. If this were a case about whether, in authorising or failing to prevent the disputed payments, SIB's directors were in breach of their fiduciary duties, then (assuming that the law of Antigua is the same as English law in this respect) the *Sequana* case would be in point. But I cannot see that the questions addressed in that case are relevant to whether - as a matter of factual, 'but for' causation - the alleged negligence of an external party (HSBC) caused SIB to suffer loss.

Conclusion

85. The short of the matter is that there are in my opinion no reasonable grounds for the claim that SIB suffered loss by making payments for which it received full value. For that reason its claim to recover (more than nominal) damages from HSBC must fail. In agreement with Lady Rose, therefore, I would dismiss the appeal.

LORD SALES (dissenting):

86. Unfortunately, I find myself in disagreement with my colleagues. I think that Nugee J (as he then was) was correct.

87. The question on this appeal is very narrow. It is whether the appellant company (SIB), now in liquidation, can be said to have suffered loss on a basic "but for" analysis, comparing its position in the real world as events unfolded with its position in the counterfactual world as it would have been had the respondent bank (HSBC) complied with the *Quincecare* duty to which it was subject (see *Barclays Bank plc v Quincecare Ltd* [1992] 4 All ER 363). This question arises on a strike out application, with it being assumed that HSBC was indeed subject to a *Quincecare* duty of care which it breached by acting on the payment instructions from SIB to pay certain creditors of SIB. We are concerned only with what has been called "the basic measure" of a claimant's loss: *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (formerly Edward Erdman (an unlimited company) (No 2)* [1997] 1 WLR 1627, 1631, per Lord Nicholls of Birkenhead.

88. It should be emphasised that any issue regarding whether such loss as may be found to have been suffered by SIB on a "but for" analysis fell within the scope of the duty owed by HSBC (see *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20; [2022] AC 783) would be a matter for trial. Since a bank's duty under *Quincecare* is directed to ensuring that it should only act on a payment instruction which has been properly authorised by its customer rather than to protecting the customer from becoming insolvent or the effects of insolvency, it is an open question whether the loss which I consider SIB has suffered from breach by HSBC of the *Quincecare* duty in this case would fall within the scope of that duty. We have not heard argument on that point and nothing I say in this judgment is intended to indicate a view one way or the other on that question.

89. The issue for decision on this appeal can be identified very shortly. Debts which SIB owed certain of its customers fell due at a time when SIB was in fact hopelessly insolvent, which fact had however, it seems, been concealed by Mr Stanford from the directors and other organs with responsibility for managing the affairs of the company. Therefore, on the assumption that SIB was solvent and was carrying on, and was capable of carrying on, its business in the usual way, officers of SIB gave instructions to HSBC to effect payment to these customers, either itself or by remitting the relevant funds to its correspondent bank, Toronto Dominion Bank, for onward payment to them. Like Lady Rose, I will call these customers "the early customers". HSBC paid the relevant funds out of SIB's accounts to the early customers, directly or indirectly, and they gave good consideration for those

payments since they discharged the debts owed to them. Accordingly, the moneys cannot be recovered from the early customers: *In re Stanford International Bank Ltd* [2019] UKPC 45; [2020] 1 BCLC 446 ("*Stanford International Bank (PC)*"). As explained in the majority judgment delivered by Lord Briggs in that case, the law of Antigua and Barbuda has no unlawful preference provision which would allow such an outcome to be reversed. Such equitable rights as SIB asserted in relation to the money after it was paid to the early customers had to be treated as eliminated because, by the discharge of the debts owed to them in circumstances where they had no awareness of SIB's insolvency, nor of the Ponzi scheme, and hence no notice of facts giving rise to the equitable claim they asserted based on unfairly prejudicial conduct, they were equity's darlings (ie bona fide purchasers for value without notice): paras 69-71.

90. SIB's case - which has to be assumed to be correct for the purposes of this appeal - is that at the time of the payment instructions from SIB there were significant indications, of which HSBC was aware, that the instructions were directed to making payments for the purposes of the carrying on of a Ponzi scheme or a money-laundering operation rather than for the purposes of any lawful and proper business being carried on by SIB. Those indications were sufficient to put HSBC on notice that the payment instructions it had received were not instructions properly authorised to be made on behalf of its customer, SIB. Accordingly, HSBC became subject to a *Quincecare* duty of care not to make payment until checks had been carried out to verify that the instructions had been given for a proper corporate purpose and were validly authorised. It is common ground for the purposes of this appeal that it must be assumed that if HSBC had complied with the *Quincecare* duty which is alleged against it the relevant funds would have remained in SIB's accounts until it was put into liquidation in April 2009. (SIB says that those checks, and inquiries within SIB prompted by them, might themselves have exposed the true state of affairs, namely that SIB, as directed by Mr Stanford, was carrying on a Ponzi scheme and that it was hopelessly insolvent, with the result that SIB would have gone into liquidation at an earlier time, but for present purposes nothing turns on this).

91. The consequence would have been that the sums in fact paid out of SIB's accounts with HSBC would have been retained in the accounts and placed under the control of the liquidators to swell the assets available in the liquidation. SIB would not have paid the early customers the full face value of the debts apparently due to them, which were in fact – by reason of SIB's insolvency - not liable to be paid in full by the company and which, had the truth been known to it (acting by relevant and honest office-holders), it would have chosen not to pay. In the liquidation, the early customers would have been treated in the same way as SIB's other customers ("the late customers") who were owed money by it. They would all have received only a small proportion of the debt due to them, but at a higher dividend than will in fact be

paid to the late customers. Also, as Nugee J pointed out at para 41 of his judgment, the liquidators of SIB would have had a larger fund of assets available to them in the liquidation to pursue possible claims against third parties with a view to increasing the dividend which might be payable. In these circumstances, can it be said that the company has suffered a loss? I think it has.

92. It is also common ground for the purposes of the appeal that Mr Stanford, as a director of SIB with knowledge at the relevant time of the Ponzi scheme and of SIB's insolvency, was subject to a duty to preserve SIB's remaining assets for the benefit of SIB's general creditors and to place SIB into liquidation. The duty referred to was a duty owed by Mr Stanford to the company itself, not the creditors. The reason Mr Stanford was under a duty to preserve SIB's assets (that is, to refuse to pay the debts of the early customers at the time they were paid) was in order to ensure that the assets remaining in SIB's hands at that time, including all the funds in its accounts with HSBC, would continue to be held by it and then would be applied in the liquidation for the benefit of SIB's general creditors as a class. The reason Mr Stanford was under a duty to place SIB into liquidation was to ensure that the usual moratorium in a liquidation on payment of debts in the ordinary course of business would apply, so that the early customers and others owed money by SIB could not sue for recovery of their debts and to ensure that they would not be paid out of the assets then in SIB's hands, including the relevant funds in its accounts with HSBC. There is nothing special about Mr Stanford's position as such. An equivalent duty, owed to the company itself, would have applied to any other director or manager of the company's affairs who had notice of the true situation.

93. In my view, these circumstances which existed when the early customers were paid show that at that time the corporate personality of the company was, in law, a vehicle for the protection of the general creditors as a class. At the material times, since SIB was hopelessly insolvent, SIB's own interests as a legal person were fully aligned with, and the same as, those of its general creditors as a class. To harm SIB's general creditors as a class was to harm SIB. On the facts, as a result of the alleged breach of the *Quincecare* duty by HSBC there has been a diversion of the relevant funds in the HSBC accounts from the general creditors as a class into the hands of the early customers at a time when the company's own interest in the proper administration of its affairs was that the funds should have been retained in order that they could be paid to the general creditors. In my opinion, this diversion of funds to an improper destination represents a loss to the company itself.

94. Nor is this some quirk of company law. If someone such as my spouse has access to my money (sitting in my bank account or in a tin on the mantelpiece) and, trying to be helpful, unbeknown to me spends it in a way I would not have chosen, using it to discharge debts which I did not need to pay at face value (say, because

those creditors would have been willing to accept less) and would not have chosen to pay at that value, leaving me with less to spend on other things, I consider that I will have suffered a loss as compared to the situation where that had not happened. Of course, my spouse may well not owe me a legal duty to safeguard me against suffering such a loss, but that is a separate question. So here, SIB's staff, thinking they were acting in its interests in carrying on its business in the ordinary way, having control of its accounts, arranged to pay creditors in full who would not have been so paid if SIB had itself been aware of its true position as a hopelessly insolvent company, and not been deceived by Mr Stanford.

The nature of corporate personality

95. At the heart of this appeal is the question of the function served by treating a company as having a separate corporate personality of its own: *Salomon v Salomon & Co Ltd* [1897] AC 22. This is discussed in the judgments in this court in *BTI 2014 LLC v Sequana SA* [2022] UKSC 25; [2022] 3 WLR 709 ("*Sequana*"). I refer in particular to the judgment of Lord Briggs (with whom Lord Kitchin and Lord Hodge agreed) at paras 139 and following, and the judgment of Lord Reed, at paras 11, 48, 50, 77 and 80. Corporate personality means that a company transacts on its own behalf and has an existence which transcends that of its shareholders, whose identity may change during the company's life. At the same time, those dealing with a company or managing its affairs owe duties to the company itself. So, for example, directors owe duties to the company, not its individual shareholders nor its creditors, as does a liquidator appointed to manage a company's affairs when it is in liquidation, and as did HSBC as SIB's bank.

96. However, it is also the case that corporate personality serves a representative function. A company is not purely an abstraction, but stands for the interests which corporate personality is there to represent and protect. The company has its own responsibilities separate from those of its shareholders (*Sequana*, para 151, per Lord Briggs). This makes no difference to external parties dealing with a company, who in ordinary circumstances just deal with it as a separate person. But it does affect those managing the company's affairs, by delineating the content of their duty to act in the interests of the company.

97. For directors, the usual position is that their duty to the company as a person means that they have to act in the interests of the shareholders as a general body (ie without showing undue favouritism to one group or another within that body, but trying to balance their interests in good faith). As Lord Briggs put it in *Stanford International Bank (PC)*, para 54, "[t]hose responsible for the control of the company's affairs are expected to act fairly vis a vis a company's stakeholders, that

is, not oppressively or unfairly prejudicially, or in a way which unfairly disregards their interests". In certain circumstances, when it becomes clear that the company is hopelessly insolvent with no light at the end of the tunnel, so that it is inevitable that it will have to go into liquidation, the directors' duty to the company means that they have to act in the interests of the company's creditors as a general body (ie without undue favouritism for one group or other within that body): *Sequana*, paras 112, 135, 139-142 and 165 per Lord Briggs, and paras 11, 48, 50, 77 and 80-81 per Lord Reed.

98. As Lord Briggs observes (*Sequana*, para 165), once insolvent liquidation becomes inevitable, the creditors' interests are paramount. Lord Reed makes the same point (*Sequana*, para 11): "[w]here insolvent liquidation or administration is inevitable, the interests of the members cease to bear any weight, and the rule [recognised in *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250] consequently requires the company's interests to be treated as equivalent to the interests of its creditors as a whole" so far as the behaviour of the company is concerned. Lord Reed emphasises (para 48) that consideration then has to be given to the interests of the company's creditors "as a class rather than as a fixed group of individuals", or as he also puts it (para 77) "the interests of the general body of creditors".

99. The stage of inevitability of insolvent liquidation is not postponed by the dishonest concealment of the company's true financial position, as in this case, which has prevented the company, through its honest decision-making organs, from being able properly to appreciate its true financial position and act in the light of that. In this case, it is common ground that SIB was hopelessly insolvent at the material times. At those times, its decision-making organs, if honest and properly conversant with its true financial position, would have had no choice but to put it into insolvent liquidation for the benefit of its creditors as a class, and in particular – to the extent that any assets remained after the realisation of security – for its unsecured creditors as a class. "As a class" is important. On a proper understanding of the true financial position, the company, acting by its relevant organs, was not entitled to pay some creditors in full to the detriment of the creditors as a class. In these circumstances, where on a true view of SIB's affairs insolvent liquidation was unavoidable, then in Lord Reed's words (*Sequana*, para 77) "the interests of the shareholders drop out of the picture, and the company's interests can be treated as equivalent to those of the creditors alone", meaning the general body of creditors.

100. At the time of the payments to the early creditors, SIB's own interest was fully aligned with that of the general body of creditors. The payments meant that SIB lost assets which in its own interest it would have wished to retain in its hands in order to be able to spend them as it would have chosen and indeed would have been obliged to do (ie by distribution in the proper way to its general body of creditors).

101. In his judgment in *Sequana*, paras 168-177, Lord Briggs explains that the duty owed to a company in respect of the interests of its creditors is nuanced and may vary according to the degree of insolvency experienced by the company. "[P]rior to the time when liquidation becomes inevitable and section 214 becomes engaged [ie when there is "no reasonable prospect that the company would avoid going into insolvent liquidation": section 214 of the Insolvency Act 1986, on wrongful trading]", the directors' duty owed to the company includes "a duty to consider creditors' interests, to give them appropriate weight, and to balance them against shareholders' interests where they may conflict": para 176. See also *Sequana*, paras 50-51, 56-59 and 76-77 per Lord Reed. As Lord Briggs points out, para 177, there is no particular difficulty about conceptualising the directors' duty in this way as it is often a feature of a fiduciary duty that the fiduciary has to balance competing claims by those interested in their decision (such as, here, shareholders and, at certain points, creditors) in a fair manner. As appears from Lord Briggs' judgment, particularly para 176, the duty to act in the interests of the creditors as a general body reaches a crescendo and becomes paramount when the company's insolvency is hopeless (ie there is no "light at the end of the tunnel" to suggest it could continue trading and emerge back into solvency). At that point, it is only the creditors who have "skin in the game". See also *Sequana*, paras 11, 50, 77 and 80-81 per Lord Reed.

102. There are also times when, in voting upon certain resolutions in general meeting, a shareholder has a duty to act bona fide for the benefit of the company as a whole rather than in their own personal interest. As Lord Briggs observed in *Stanford International Bank (PC)*, para 54, there are occasions when a company's affairs are entrusted to the shareholders in general meeting, as distinct from being entrusted to the directors or its officers, in such a way as to engage a duty similar to that owed to the company by the directors. In such cases, as explained by Lord Evershed MR in *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch. 286, 291:

> "… 'bona fide for the benefit of the company as a whole' means … that the shareholder must proceed upon what, in his honest opinion, is for the benefit of the company as a whole. … [T]he phrase, 'the company as a whole', does not (at any rate in such a case as the present) mean the company as a commercial entity, distinct from the corporators: it means the 'corporators as a general body'. That is to say, the case may be taken of an individual hypothetical member and it may be asked whether what is proposed is, in the honest opinion of those who voted in its favour, for that person's benefit."

Thus, where the context requires, the concept of the company is taken to be informed by the underlying interests represented by it, rather than as something abstracted from those interests. In ordinary circumstances, those interests are the interests of the corporators as a general body, as it was put in *Greenhalgh*.

103. In *Sequana* Lord Reed calls attention (para 22) to the different formulation by Megarry J in *Gaiman v National Association for Mental Health* [1971] Ch 317, where he said (p 330) that "[t]he [company] is, of course, an artificial legal entity, and it is not very easy to determine what is in the best interests of the [company] without paying due regard to the members of the [company]", and treated the "interests of both present and future members of the [company], as a whole, as being a helpful expression of a human equivalent". The relevant point for present purposes is the same. The company, as an artificial legal entity, represents underlying economic interests and its interests are taken to be informed by those interests: see also *Sequana* paras 46-47 per Lord Reed. In ordinary circumstances, the interests are those of the present and future members of the company. As Lord Reed explains (para 26), "the company's interests were traditionally equiparated with those of its shareholders, not its creditors."

104. However, as Lord Reed and Lord Briggs explain in *Sequana*, the law has moved on from that traditional position in relation to a company which is hopelessly insolvent. Entry into insolvent liquidation "is a watershed event for [a company like SIB], as it is for any other company" (*Stanford International Bank (PC)*, para 54, per Lord Briggs). As Lord Briggs then explained (para 55):

> "… following entry into insolvent liquidation, the affairs and property are taken out of the hands of the company's directors, officers and shareholders and entrusted to a court-appointed office-holder, the liquidator, whose duties are laid down by statute and whose conduct may be regulated and directed by the court as part of the liquidation process. The getting in of the company's property and its distribution to stakeholders are governed by an insolvency scheme (in Antigua partly statutory and partly judge-made) which defines the priorities as between different classes of stakeholders and requires that, within each class, stakeholders' claims are to be met by a pari passu distribution from the available resources. Those resources are limited to those assets, rights and claims which the company enjoyed as at the cut-off date, subject to augmentation by the use by the liquidators of specific powers to re-open prior transactions. …"

105. The company's corporate personality continues during the liquidation process and serves a new function, to protect the interests of the creditors entitled to protection under the statutory scheme. One may debate the extent to which a liquidator's duties are owed to the company itself or to those entitled to benefit under the statutory scheme. What is important for present purposes, however, is that there is no significant difference between these options. "The liquidator is not a trustee for individual creditors but rather an agent for the company in much the same position as a director and with statutory duties which may be enforced by application to the court. His duty is owed to the company and to the creditors as a class, but he does not in general owe any duty to an individual creditor" (*Goode on Principles of Corporate Insolvency* Law, 5th ed (2018), para 5-03, p 181, omitting footnotes). Once the company enters into insolvent liquidation and the directors are replaced by a liquidator as the manager of the company's affairs and assets, the liquidator has a duty to the company and to those whose interests the company exists to promote, the practical content of which is that he has to act in the interests of the company's creditors as a general body (ie, again, fairly and without undue favouritism): *In re Longmeade Ltd (in liquidation)* [2016] EWHC 356 (Ch); [2016] Bus LR 506. As Snowden J (as he then was) pointed out in that case, at para 52, "[l]iquidation is a class remedy to be conducted in the best interests of the general body of creditors as a whole"; and, at para 66, this means that when taking a decision, for example, to commence proceedings in the name of the company "the liquidators should act in what they believe to be the best interests of the insolvent company and all those who have an interest in its estate", which is to say the unsecured creditors and (if there is a surplus) the contributories.

106. In *Sequana*, this court accepted that the fiduciary duty owed by directors to the company itself would become a duty to protect the interests of the creditors of the company at the point when the company entered into liquidation or was on the verge of doing so: see paras 112, 135, 138, 142, 165, 176, 192 and 202, per Lord Briggs, and paras 11, 50, 77 and 80-81 per Lord Reed. As Lord Briggs explains (para 142), "consideration of the interests of creditors is a responsibility of the company which is, or is on the verge of being, insolvent" (in the sense of being due to enter into insolvent liquidation). Following the reasoning in *West Mercia Safetywear Ltd (in liquidation) v Dodd* [1988] BCLC 250 ("*West Mercia*") and *Kinsela v Russell Kinsela Pty Ltd (in liquidation)* (1986) 4 NSWLR 712 ("*Kinsela*"), Lord Briggs explains (para 165) that it is the onset of liquidation which "converts the creditors into the main economic stakeholders in the company". The assets of the company are then to be managed for their benefit. At para 192 Lord Briggs says:

> "The true principle … is that creditors (or at least unsecured creditors) are not the main stakeholders in the company at any earlier date than when it goes into insolvent

> liquidation, at which point they acquire statutory priority in an entitlement to share pari passu in any distributions which that process may generate. It is that prospective entitlement which entitles them to have their interests considered, although not necessarily given paramountcy, when the onset of insolvency makes that prospect both much more likely and one which may be beyond the ability of the company to control, in the sense that insolvency immediately exposes a company to being wound up at the behest of any unpaid creditor."

It is only for companies which are permanently or hopelessly insolvent where their creditors "have become entitled (actually or inevitably) to share in the proceeds of their winding-up or administration": para 194.

107. Therefore, in my view, it emerges that a company has representative responsibilities of its own in relation to certain persons who are affected by the management of its affairs and that the concept of "the company", and the corporate personality which corresponds with that concept, serve the function of ensuring that those responsibilities are fulfilled. So far as that is concerned, as Lord Briggs emphasised in both *Stanford International Bank (PC)* and *Sequana* and Lord Reed emphasised in *Sequana*, a fundamental change occurs as regards those responsibilities when a company is on the verge of, or enters, insolvent liquidation.

The function served by corporate personality in this case

108. In my opinion this analysis shows that SIB, the company, did suffer a loss in the circumstances of this case. On the actual facts, at a time when SIB was hopelessly insolvent, SIB's funds held in its accounts with HSBC (to the tune of £116m, as identified by Lady Rose) were used to pay the debts due to the early customers at a time when SIB also had very substantial liabilities owed to other creditors (the late customers). Therefore, at the time when the moneys were paid away, the company's own interests were equated with those of its creditors as a general body. In the counterfactual world, if HSBC had complied with its *Quincecare* duty, SIB would still have had that fund of £116m in its accounts with HSBC, SIB would have been liable to be placed into insolvent liquidation immediately, and it would in fact have entered liquidation with that fund in its hands. If SIB's own interests at the relevant time had been protected as they should have been, the fund could not have been used to pay the early customers in full but would have had to be retained to pay the early customers and the late customers together a dividend equivalent in each case to

only a small fraction of the face value of the debts due to them, but at a higher rate than the late customers will in fact receive.

109. In *Sequana*, para 167, Lord Briggs cites the statement by Nourse LJ in *Brady v Brady* (1987) [1988] BCLC 20, 40 where he said "[t]he interests of a company, an artificial person, cannot be distinguished from the interests of the persons who are interested in it … Where a company is both going and solvent, first and foremost come the shareholders, present and no doubt future as well … Conversely, where the company is insolvent … the interests of the company are in reality the interests of existing creditors alone". The case went to the House of Lords, where the decision of the Court of Appeal was reversed ([1989] AC 755), but no comment was made on this part of Nourse LJ's reasoning: the company in that case had been solvent and the relevant transaction was in the interests of the company, its shareholders and its employees (pp 776-777). Andrew Keay, "Financially distressed companies, preferential payments and the director's duty to take account of creditors' interests" (2020) 136 LQR 52, 74-75, points out the connection between Nourse LJ's statement and the approach of Street CJ in *Kinsela*, discussed below, and their significance for the question whether a company has suffered a loss when its debts are paid at a time when it is a breach of the directors' duty to pay them, due to the company's hopeless insolvency. In *Sequana*, Lord Reed referred to *Brady v Brady* and made it clear (paras 50 and 80) that it is only when a company is hopelessly insolvent that the interests of shareholders drop out of the picture.

110. If one treats the company as a pure abstraction whose interests are the same whether it is trading and solvent or whether it is in insolvent liquidation, it may be said that, in a certain sense, it has suffered no loss. By the payments it made to the early customers it reduced the liabilities on its balance sheet and therefore had correspondingly lower liabilities as it entered into liquidation.

111. However, in my respectful opinion, that is not the right way to analyse the position. It leaves out two critical factors. First, SIB paid the early customers more to discharge the debts due to them than they were truly worth at the time, thereby depleting its assets without full value in return and reducing what was available to it to spend in other ways it would have chosen had it appreciated what its true responsibilities were. Second, and related to the first, corporate personality is not a pure abstraction, but has substantive content by reference to the interests which it exists to represent, serve and protect. According to the company's true position when the payments to the early customers were made, it was hopelessly insolvent and such assets as it had (including the fund of £116m held with HSBC) should have been retained for the benefit of the company, which at that time meant for the benefit of the creditors as a general body. Any director who, like Mr Stanford, appreciated that this was the true position owed a duty to the company to retain the

fund of £116m so that it could be used to maximise the payments to be made to the general body of creditors (ie treating them all equally): see *Sequana*. The duty owed reflects the interests of the company itself and the knowledge of the directors is only relevant to trigger their personal fiduciary obligation to take steps in recognition of what are the true interests of the company in such circumstances. Similarly, if SIB had been put into insolvent liquidation as a result of the investigations which should have been made pursuant to the *Quincecare* duty, the liquidators would have been under an equivalent duty owed to the company to act for the benefit of the creditors as a general body. Again, the duty owed reflects the interests of the company itself.

112. In my view, the depletion of SIB's assets by payment to the early customers at a time when they should not have been used for that, had the true import of the function to be served by SIB's corporate personality been appreciated at the time, represented a loss to the company. In the counterfactual world, the early customers would only have been paid a small proportion of the value of the debts owed to them as a dividend in the liquidation and the company would have retained the fund of £116m to pay its general body of creditors a higher dividend in the liquidation and possibly to seek to realise greater value from other assets of the company.

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

114. This was the way in which, as I read his judgment, Nugee J analysed the matter at first instance. In my opinion, he was right. On this analysis, no distinction is to be drawn in terms of "but for" causation between payments made to early customers directly and those made indirectly via Toronto Dominion Bank. In both cases, had HSBC complied with the *Quincecare* duty alleged against it, the instructions to make payments out of SIB's accounts would not have been complied with and the moneys would have remained in those accounts and available for use in the liquidation, which was at all material times the proper way in which they should have been used.

115. I respectfully think that the Court of Appeal, by treating the company purely as an abstract entity as though for accounting purposes only, failed to have regard to the true nature of the company's interests which its corporate personality existed to protect. I also think that it failed to give proper weight to the difference between the company's interests as they appeared to be as events in fact played out (in a world in which it was not appreciated, other than by Mr Stanford and those in league with

him, that SIB was hopelessly insolvent) and its interests as they were in fact at the time that the payments were made, which were equated with those of its creditors as a general body. The period in which the payments in breach of the *Quincecare* duty occurred was therefore a period when such payments could not properly have been made because the company's function was to represent its creditors as a general body, its interests being the same as their interests. In the counterfactual world, as is common ground (see para 90 above), SIB would not have made the payments to the early customers and would have entered into liquidation with the relevant funds still in its hands. As a result of HSBC's breach, therefore, SIB was disabled from performing its proper function to serve and protect the interests of its creditors as a general body, for whom it should have safeguarded the £116 million so that it could be paid out to them. In my view, losing that fund which ought to have been retained by it for that purpose was a loss to the company.

116. I do not find it helpful to analyse the case at this stage in terms of the loss of a chance. In my view loss, according to a "but for" assessment, is established by simple comparison of the actual position in the real world and the position in the counterfactual world and consideration of the interests of the company at the relevant time. I agree with paras 42-46 of Lord Leggatt's judgment, which explains this point with admirable clarity.

117. Like Nugee J, I do not consider that the judgment of Lightman J in *National Employers' Mutual General Insurance Association Ltd (in liquidation) v AGF Holdings (UK) Ltd* [1997] 2 BCLC 191 has any bearing on the analysis above. As Nugee J observed (para 39), this was a case where what the claimant company was complaining of was "that it had lost the opportunity to get in money because it had been deprived of the opportunity to expose itself to a liability to the policyholders. It is not a case where the money was already an asset of [the claimant] and someone had paid it away." In the counterfactual world in our case, whilst it would have been a breach of contract for SIB to refuse to pay the early customers when the debts due to them fell due, it is clear that in fact they would not have been paid and should not have been paid because the company was hopelessly insolvent and the relevant funds should have been retained for the benefit of all its creditors as a general class. The interest of the company to retain the funds for the benefit of its general creditors was reflected in the directors' duty to put the company into liquidation and hence to activate the moratorium to stop payment of debts outside the liquidation process. This is all that SIB needs to show to make out loss on a "but for" analysis.

West Mercia*, the principle of reparation and the principle of compensation*

118. The analysis which I would apply also provides a ready explanation for the outcome in *West Mercia*. I do not think that this case can be brushed aside so easily as Ms Patricia Robertson KC, for HSBC, invited us to do.

119. In *West Mercia* the defendant, a director of one company (the subsidiary), was the guarantor of the overdraft of its parent company, of which he was also a director. The overdraft was also secured by a charge on the book debts of the parent, which included a substantial debt due from the subsidiary. Both companies were in financial difficulties and the parent had a substantial overdraft. The directors realised that the companies were insolvent and accordingly would have to be put into liquidation, but shortly before that was done the defendant obtained the transfer of £4,000 from the subsidiary's bank account to the overdrawn account of the parent. After the companies went into liquidation, the bank refused to repay the £4,000 which had been applied in diminution of the parent's overdraft and the parent had no assets to repay it. The liquidator of the subsidiary applied to court for a declaration that the defendant was guilty of misfeasance and breach of duty in relation to the subsidiary in transferring the £4,000 to the parent and sought an order that the defendant repay that sum. The judge at first instance held that although the defendant had acted improperly, he had not misapplied the subsidiary's assets by using them to pay a debt which it owed to the parent, and so not been in breach of any duty of care, fiduciary or otherwise, to the company. The Court of Appeal allowed the liquidator's appeal, finding that there had been misfeasance on the part of the defendant by arranging a fraudulent preference in favour of the parent, which was in breach of the fiduciary duty which the defendant owed the subsidiary. It ordered the director to repay an equivalent sum to the subsidiary, with an adjustment to take account of the reduction in the dividend which the general creditors would have received in the liquidation of the subsidiary if the debt owed by the subsidiary to its parent had not been discharged by the payment of the £4,000. The effect of this order was to shift the benefit of the £4,000 which should not have been removed from the subsidiary's bank account, when it was on the verge of liquidation, from being wholly for one of its creditors (in this case, the parent, which also benefited the bank and the defendant) to being for the general body of creditors, on a pari passu basis.

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 (p 33) 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 (pp 33-34) rejected the submission for the defendant 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 defendant 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. 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.

121. 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. Ms Robertson, on the other hand, sought to explain the outcome in the case on a different basis. She said that on a proper view, consistent with the submission of HSBC in the present appeal, the subsidiary company had not suffered a loss on a "but for" analysis because the payment of the £4,000 had discharged a liability it had to its parent, as a creditor. Instead, in *West Mercia* the liability of the defendant to pay the liquidator a sum equivalent to the £4,000 should be grounded in an obligation he owed as a fiduciary to reconstitute the fund from which he had diverted money for his own benefit, even though the beneficiary in relation to his fiduciary duty (the subsidiary) had suffered no loss.

122. I do not find this explanation persuasive or attractive. It does not accord with the reasoning of Dillon LJ. Having held that the defendant was guilty of a breach of duty by diverting the £4000 for his own purposes and in disregard of the interests of the general creditors, Dillon LJ said (p 33) that, prima facie, the remedy was that he should be ordered to repay that money with interest, ie to make good that loss. 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 Redferns* [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. I would not wish the sensible and justified approach in *West Mercia* to be left to depend on the resolution of such issues. It is not obvious to me why the defendant in that case should have been ordered to pay any money if in fact (and contrary to my view) he had caused no loss to the company which was the person to whom he owed the relevant duty.

123. In any event, I find it difficult to see why the outcome in the present case should depend on such a refined juristic debate. The obligation of a fiduciary to make good the trust fund from which he has diverted money is to make good a loss in the fund which has been created by the diversion of money from the proper use to which it should have been put. To the extent that there is a difference between this principle of reparation and the principle of compensation where a loss is caused by a breach of duty, it appears to me to reflect a difference in how widely one looks at the context in which the assessment of loss is to be made. The former principle focuses on the immediate impact on the trust fund, the latter looks at matters more widely to determine whether there has been a loss overall which ought to be made good. However, in the present case, in my opinion, both principles lead to the same conclusion, namely that the relevant trust fund (the £116m in the hands of the company) has been depleted by being used for improper purposes and a loss has been suffered by the company, representing for these purposes its creditors as a general body.

124. Moreover, not all of a director's duties are fiduciary in nature. The duty to exercise reasonable care in the management of the company's affairs, owed to the company, is not: *Bristol and West Building Society v Mothew* [1998] Ch 1, 16-17. One could imagine a case in which an office manager who has lent money to the company and knowing of its impending insolvent liquidation arranges the repayment of his loan in circumstances where, if the directors had exercised reasonable care in the management of the company's affairs in accordance with their duty, they would have prevented him from doing so. Or suppose certain managers of SIB had been using it as a vehicle to carry on a Ponzi scheme and the directors, in breach of their duty to exercise reasonable care in managing SIB, failed to detect this and hence failed to prevent payments out of SIB's funds at a time when it was hopelessly insolvent. In both cases the directors, by their breach of duty, would have failed to protect the very interests which it was the object of their duty to protect (ie those of the company, meaning in these circumstances the company's general body of creditors). In my view it would be clear that the company had suffered loss in such a case, on a "but for" basis, and would have a cause of action against the directors. On the simple question of whether the company has suffered loss on a "but for" basis, I do not think that the present case could be distinguished from these.

125. Lord Leggatt cites at para 61 the well-known explanation given by Lindley LJ in *In re Lands Allotment Co* [1894] 1 Ch 616, 631, to the effect that directors are treated as if they were trustees of money under their control, so that they are liable to make good moneys misapplied in the same way as a trustee. This reflects the way in which company law grew out of trusts law in the nineteenth century. But it remains to consider how the analogy with trusteeship applies in the case of a company.

126. Directors do not hold a company's assets at all, let alone hold them on trust for the company. The company's assets are held by the company in its own name, but the directors have control of the company and, through it, control of the company's assets. So when money is under their control in this way, who are the notional beneficiaries for the purposes of the trust analogy? They are the body of persons whose interests are represented by the company.

127. As it was put by Street CJ in *Kinsela*, p 730, in a passage cited with approval by Dillon LJ in *West Mercia*, p 253, and by Lord Briggs and Lord Reed in *Sequana* (see paras 130 and 147-148, and paras 31-35 and 45-49):

> "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. … 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."

Where the company is hopelessly insolvent, in the sense set out above, in a practical sense its assets are held for the benefit of the creditors as a general body. They are the beneficiaries for the purposes of the trust analogy. This is the force of the reasoning in *Kinsela*, endorsed in *West Mercia* and in *Sequana*.

128. In my view, this reflects the point that in the eyes of the law the interests of a company which is hopelessly insolvent are fully aligned with those of its creditors as a general body. In those circumstances the purpose of the company, and the function to be served by its having corporate personality as the vehicle by means of which it holds assets so that they can be used for fulfilling that purpose, is to protect the interests of the creditors as a general body, ie according to the pari passu principle applicable in an insolvent liquidation, subject to any security rights particular creditors might have. The interests of the creditors as a general body, and hence the interests of the company, are prejudiced and damage is suffered if in those circumstances money under the control of the directors (because in the hands of the company) is paid out to satisfy in full the debts of some creditors out of that general body, ie in a way which disregards the principle of equality which applies

within that body. When that occurs, the trust fund has become "denuded" (to use the language employed in *In re HLC Environmental Projects Ltd* [2013] EWHC 2876 (Ch); [2014] BCC 337, para 142), because it has been misapplied for the wrong purposes and the proper beneficiaries have been made worse off as a result.

129. If the directors have caused that to happen by breach of their fiduciary duty, they will have a liability to restore the fund to what it should have been, as stated in that case and in *In re Lands Allotment Co*. See also *In re Washington Mining Co* [1893] 3 Ch 95, cited by Dillon LJ in *West Mercia*. Similarly, if the directors have caused that to happen by breach of their common law duty of care (para 123 above), they will have a liability to pay damages equal to the loss suffered. And if a third party, like HSBC, has caused that to happen by breach of its common law duty of care, as SIB has alleged has occurred in this case, it too will have a liability to pay damages equal to the loss suffered (provided that the loss falls within the scope of the relevant duty, which is not an issue before us on this appeal and will require to be debated on another occasion: para 88 above).

130. It was a significant part of the reasoning of the Board in *Stanford International Bank (PC)* in treating the early customers as equity's darlings, at paras 69-71 (the Board being unanimous on this point), that they were unaware of and had no notice of the circumstances regarding SIB's insolvency at the time the payments were made to them. It is implicit in this that the position might well have been different had they been on notice that SIB was hopelessly insolvent at the time their debts were paid in full so as to prejudice the interests of the creditors as a general body. In my opinion, the early customers would then have received SIB's money knowing that it was impressed with a trust or similar equitable interest in favour of the general creditors, as represented by the company itself. Knowing the true position, they would not have been entitled to keep the money for themselves. They would have had to repay it to the liquidator and share in a distribution alongside the other general creditors. To make the point again, this reflects the fact that at the time the payments were made the interests of the company were equated with the interests of the general creditors.

131. 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). I do not consider that the absence of such provisions from the law of Antigua tells one anything about whether SIB, the company, suffered loss when the relevant payments were made to the early customers. It just means that the ability of the liquidator to seek relief from such third parties dealing with SIB is more constrained than it would be in the United Kingdom.

Coherence of the law and the limits of the Quincecare *duty*

132. The *Quincecare* duty should be kept within narrow bounds, lest it interfere unduly with the conduct of commerce. In ordinary circumstances a bank should be able to act upon the payment instructions given to it by its customer promptly and without fear. However, the very existence of the *Quincecare* duty qualifies that position and, in my respectful opinion, the solution to keeping its effect within proper bounds lies in analysis of the duty itself, not in distorting (as I see it) the question whether the company has suffered loss. The impact of the *Quincecare* duty should be kept within bounds by a strict approach governing when it applies according to the standard of care under it and by careful analysis of the scope of the duty (see, for recent commentary, Peter Watts QC, "Playing the Quincecare Card" (2022) 138 LQR 530). But this does not affect the issue before us, which is whether SIB suffered loss on a simple "but for" analysis.

133. As Steyn J explained in *Quincecare* (p 376), when a bank receives what appears to be a valid and proper order to pay, the question is what state of knowledge on the part of the bank "will oblige the bank to make inquiries as to the legitimacy of the order?". As he put it, a banker must refrain from executing an order if and for so long as he "is 'put on inquiry' [according to the standard of the ordinary prudent banker] … that the order is an attempt to misappropriate the funds of the company". It seems to me that this formulation covers the situation where the order is an attempt to misappropriate the funds of a company by using them to make full payments which ought not to be made to creditors in a situation of hopeless insolvency just as much as any other kind of misappropriation. The company suffers a loss in both situations because its own funds are misappropriated.

134. To my mind it does not make sense to say that where a director or other company officer in a hopeless insolvency situation would indeed be misappropriating the funds of the company by using them to pay full value to some creditors, the bank which has knowledge of this or is on notice of it according to the requisite standard is nonetheless to treat the instruction given as a legitimate one. If it has this knowledge (or has the requisite notice) it is aware that it cannot be a legitimate instruction. But since the test of hopeless insolvency is such a stringent one (ie no light at the end of the tunnel), it will only be in a rare case that a bank will be found to have knowledge

of this or to be on notice of it to the requisite standard. Banks are not expected to police the solvency of their customers as an ordinary incident of the service they provide.

135. In my respectful opinion Lord Leggatt's points in para 83 are misplaced for a number of reasons. Statutory insolvency regimes may specify a precise period of time before a company goes into insolvent liquidation within which preferences are liable to be re-opened, but that does not assist a person dealing with the company to know where they stand at the time they so deal, precisely because they will not know then whether the company *will* go into insolvent liquidation at some later date. The statutory provisions to allow liquidators to unwind preferences expose such persons to greater risk than ordinary equitable principles would do, since they may be liable to repay money even though not on notice when they took it that the company was in difficulty: see the discussion of this in *Stanford International Bank (PC)* and paras 130-131 above.

136. Further, the duties of directors and other officers of a company are uncertain to the extent that they depend upon knowledge or notice that the company is hopelessly insolvent, but this has not been an impediment to finding that such duties exist. Since a bank dealing with directors and officers of a company will typically have far less knowledge of the company's affairs than they do, the extent to which the bank will face any real uncertainty in knowing how to react to their instructions will be correspondingly less.

137. In *Quincecare* Steyn J reasoned (pp 375-376) that when the bank acted on an order to transfer money from the company's account it was acting as the company's agent and therefore owed fiduciary duties to it; as an agent for reward it was also bound to exercise reasonable care and skill in carrying out the instructions of its principal; and there was "no logical or sensible reason for holding that bankers are immune from such an elementary obligation". Thus, it seems to me that there is no significant distinction between the duties of directors and officers of a company and the *Quincecare* duty owed by a bank. As pointed out at para 124 above, in a similar way directors of a company owe both fiduciary duties and a duty to exercise reasonable skill and care in the conduct of its affairs. I do not think that the nature of the company's own interests which they are bound to protect is different depending on whether one looks at the former or the latter type of duty. Nor do I consider that any principled distinction can be drawn between any of these cases so far as concerns analysis of whether the company has suffered a loss according to the "basic measure" when the duties I have referred to are breached.

138. It is inherent in the *Quincecare* duty that *some* element of uncertainty is introduced into the relationship between a bank and a corporate customer. It was by stating the standard of care as he did (see para 133 above) that Steyn J considered that an appropriate "fair balance between competing considerations" was struck in terms of weighing commercial certainty for the bank against the need for some reassurance that the payment instruction was legitimate (p 376).