Eastern Caribbean Court of Appeal delivers key ruling concerning directors' duties and creditor protection in the British Virgin Islands

Briefing Summary: In the recent decision of *Byers & Richardson v Chen Ningning (BVIHCMAP2024/0009)* ("**Byers**"), the Eastern Caribbean Court of Appeal ("**COA**") considered the scope of the director's duty to creditors when a company is insolvent or on the verge of insolvency (the "**Creditor Duty**"). In a landmark decision defining BVI company and insolvency law, the COA made the significant finding that a director can be liable to compensate the company for loss suffered by the general body of creditors as a result of a breach of the Creditor Duty, even where the transaction in question is balance sheet neutral from the perspective of the company and did not result in a personal gain to the misfeasant director.

Service Area: Dispute Resolution and Litigation, Restructuring and Insolvency

Location: British Virgin Islands

Content Authors: Richard Brown, Tyrone Bailey

Created Date: 14 July 2025

Analysis

In reaching its decision, the COA revisited the rule established in *West Mercia Safetywear Ltd (in liquidation) v Dodd [1988] BCLC 250*, in which it was held that, upon a company's insolvency or imminent insolvency, directors must consider the interests of the company's creditors and may be held liable for resulting losses to creditors resulting from a breach of that duty. The rule in *West Mercia* had recently been further reviewed by the UK Supreme Court in two decisions: *BTI 2014 LLC v Sequana [2024] AC 211* and *Stanford International Bank Ltd (in liquidation) v HSBC Bank plc* [2023] AC 761, and the COA critically analysed those decisions (amongst others) in reaching its decision in *Byers*.

In *Byers*, the director, Ms Chen, had authorised the preferential repayment of a US$13 million loan to the company of which she had acted as director, at a time when the company was insolvent. While the trial judge found that the director had breached her fiduciary duties, he declined to award compensation to the company, holding that the transaction had left the company balance sheet neutral and had not resulted in a net loss, based on an interpretation of the rule in *West Mercia* that the breach of duty needed to cause loss occasioned by the company itself. He also found that the director had not benefitted from the repayment of the loan.

Key Contacts

Richard Brown
PARTNER,
BRITISH VIRGIN ISLANDS
+ 1 284 394 4034
EMAIL RICHARD

Tim Haynes
PARTNER,
HONG KONG SAR
+852 3628 9035
EMAIL TIM

James Noble
PARTNER, SINGAPORE
+65 6911 8322
EMAIL JAMES

Helen Wang
PARTNER, SINGAPORE
+65 6911 8083
EMAIL HELEN

The COA disagreed with the trial judge's interpretation of the rule in *West Mercia*. It held that the rule in *West Mercia* exists as a broad common law remedy, alongside the more restrictive statutory regime for voidable transactions, to protect the general body of creditors by preserving company assets once insolvency looms. In that context, the company's interests must be understood through the lens of creditor protection. The COA made clear that it is not necessary for the company to suffer a conventional balance sheet loss in order to establish compensable damage. Rather, any reduction in the pool of assets available to creditors must be treated as a loss to the company. Otherwise, the rule in *West Mercia* would be "a toothless dog, having no bite," and directors could act with impunity so long as transactions superficially appear balance sheet neutral.

The COA rejected the suggestion that only a loss to the company, which was a separate legal entity to the body of creditors, would trigger compensation. It emphasised that when the rule in *West Mercia* was breached, equitable remedies may be granted to restore the company's asset position and enforce the director's fiduciary duty – including treating a repaid loan as subsisting for the benefit of the company. The COA further held that the question of whether or not the director received a benefit as a result of the transaction was "*not a material consideration in determining whether the rule in West Mercia applied*". It also rejected any notion (alluded to by Lord Leggatt in *Sanford*) that it would be unjust to order a director to pay compensation in circumstances where the director had no right of indemnity from the person who had received the money.

Notably, in reaching the decision, the COA distinguished the decision in *Stanford* and departed from parts of Lord Leggatt's reasoning in that case. In particular, the COA rejected Lord Leggatt's suggestion that a company could not be said to have suffered a loss by making payments for which it received full value. The COA concluded that: "*The liability of a director who breaches the rule in West Mercia to compensate for any loss suffered by the company cannot be disputed. In the context of the rule in West Mercia, any loss to the general body of creditors following that breach is a loss to the company.*"

This robust decision emphasises the care that needs to be taken by directors of BVI companies in times of financial uncertainty. It clarifies that the rule in *West Mercia* is a broad common law remedy, and certainly expands the scope for misfeasance claims to be brought by liquidators of insolvent BVI companies against directors.

Key takeaways

The key takeaways from *Byers* are as follows:

1. Creditors' interests form part of the company's interests once it is insolvent or nearing insolvency. Directors must act with these interests in mind and will need to consider the analysis of the Supreme Court in *Sequana* when considering when the creditor duty arises.

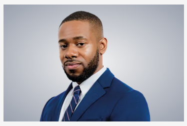
Key Contacts

Matthew Watson

PARTNER,
HONG KONG SAR

+852 3628 9034

EMAIL MATTHEW



Tyrone Bailey

ASSOCIATE,
BRITISH VIRGIN ISLANDS

+1 284 394 4053

EMAIL TYRONE

2. A loss to the general body of creditors may be treated as a loss to the company for the purposes of assessing whether there is a loss for which the misfeasant director may be ordered to make compensation.
3. The fact that the director did not gain personally from a transaction in breach of the Creditor Duty is not determinative as to whether a compensable loss has occurred.
4. The common law rule in ***West Mercia*** coexists with the BVI statutory insolvency regime and reinforces and enhances directors' duties to prevent losses to creditors when insolvency is likely.
5. Liquidators of insolvent BVI companies are likely to focus more keenly on misfeasance claims, following the COA's confirmation that there are fewer defences available than would be the case under the voidable transaction provisions in the BVI's Insolvency Act 2003.

Whether you are a director navigating financial uncertainty, a creditor concerned about recoveries, or a stakeholder of a distressed company, it is crucial to understand how the principles in ***Byers*** may affect your rights and responsibilities.

Please do not hesitate to contact us at Carey Olsen for strategic and practical legal advice tailored to your situation.