THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV2012/0319

BETWEEN:

STANFORD INTERNATIONAL BANK LIMITED (IN LIQUIDATION)

(Acting by and through its Joint Liquidators MARCUS A. WIDE AND HUGH DICKSON)

Claimant

and

(1) FRANCIS PETRUS VINGERHOEDT

(2) ROBERT ALLEN STANFORD

Defendants

Appearances:

Mr Malcolm Arthurs, Ms Nicolette Doherty for the Claimant

No appearance for the Defendants

2015: November 16, 17; 2016: December 23

JUDGMENT

[1] **Wallbank J [Ag]:** This is a judgment upon assessment of damages and for granting other relief against the Second Defendant in default of his having acknowledged service of the claim or filed a defence. Claims were not pursued against the First Defendant following a settlement, which was sanctioned by this Court on 24 July 2015.

[2] The trial for assessment of damages and other relief proceeded in the absence of the Second Defendant. The court was satisfied that he had had sufficient opportunity to be heard but that he chose not to avail himself of it.

[3] The Claimant ("SIB") relied at the trial on a First Witness Statement of Marcus A. Wide filed on 14 March 2014 and a Second Witness Statement of the same witness filed on 22 October 2015. Mr Wide's witness evidence was not opposed. The Claimant also put in evidence a considerable volume of documentary evidence. The Claimant filed written submissions.

The Nature of the Hearing

[4] The issue of the Second Defendant's liability was determined by the entry of a judgment in default on 22 October 2013. The remaining issue for the Court is how much, if any, compensatory damages is due to the Claimant based upon the evidence adduced by it. All questions going to quantification, including the question of causation in relation to particular heads of loss claimed, remained open for determination.

[5] Notwithstanding that the Second Defendant chose not to participate in the hearing, the Court is still required to "*critically carry out the assessment … on the evidence adduced, with the overriding objective of minimizing the costs of the assessment, ensuring that it is dealt with expeditiously and that the judicial time and resources of the court are not disproportionately allotted in assessing the quantum of damages on the claim*"[1].

Matters of Liability Deemed Admitted

[6] The following allegations made in the Statement of Claim are not open to challenge:

i. SIB was part of an international group of affiliated companies directly or indirectly owned and controlled by the Second Defendant known as the Stanford Financial Group;

ii. At all material times the Second Defendant was the Chairman of the Board of SIB, a director thereof, and the ultimate sole beneficial owner of its share capital;

[1] *Michael Laudat & The Attorney General of the Commonwealth of Dominica v Danny Ambo* (Commonwealth of Dominica High Court Civil Appeal No. 16 of 2010, delivered 15 December 2010) at paragraph 31.

iii. As a director of SIB, the Second Defendant was required by section 95(1) of the *International Business Corporations Act* ("**the IBC Act**") to:

(a) act honestly and in good faith with a view to the best interests of SIB; and
(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances;

iv. Further, the Second Defendant owed common law fiduciary duties to SIB:

(a) to use his director's powers only for purposes which benefited SIB;
(b) not to act for any purpose collateral to the purposes set out in SIB's articles;
(c) to act in the best interests of SIB; to avoid any conflict between his personal interests and those of SIB;
(d) to act honestly and fairly and with due regard to SIB's interests;
(e) to act in good faith;
(f) not to act for his own benefit, or the benefit of his immediate family, or the benefit of his associates or any other corporation in which he is interested in preference to the interests of SIB;
(g) not to part with the assets of SIB other than for full valuable consideration;
(h) to preserve the assets of SIB;
(i) to account to SIB for the full value of its assets under his control; and
(j) to account to SIB for the full value of any profits made by him when in a position of conflict with the interests of SIB;

v. Stanford Financial Group Company ("**SFGC**") and Stanford Financial Group Global Management LLC ("**SFGGM**") were both companies which were wholly owned, directly or indirectly, and controlled by the Second Defendant.

Directors as Trustees of Company Funds

[7] It is well established that, in consequence of the fiduciary character of their duties, directors are treated as if they were trustees of those funds of the company which are in their hands or under their control, and if they misapply them they commit a breach of trust[2].

The Remedy Sought

[8] One issue raised by the Court at the trial was that a claim for an account generally involves at least two steps: (1) a judgment given at the end of a trial that the defendant do account; and (2) later, after more evidence, a calculation to establish the deficit in the trust fund. However, as stated in *Lewin on Trusts*[3]:

"*Where … the evidence at trial has established the amount of any deficit, no account may be needed and the claimant may instead ask for an award of the appropriate amount of compensation.*"

[9] Although SIB made claims for both an account and for equitable compensation in its Claim Form, it no longer pursued an account at trial. Instead SIB seeks an immediate award of compensation.

The Measure of Equitable Compensation

[10] The principles on which compensation for breach of trust is awarded as set out by Lord Browne-Wilkinson of the House of Lords in **Target Holdings Ltd v Redferns**[4], affirmed by the United Kingdom Supreme Court in **AIB Group (UK) plc v Mark Redler & Co Solicitors**[5].

[11] The Supreme Court confirmed the following principles[6]:

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[2] *Belmont Finance Corporation v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 at 405.
[3] 19th Ed. (2015), paragraph 39-006 at pages 1860 to 1861.
[4] [1996] AC 421
[5] [2014] 3 WLR 1367
[6] The conclusions of Lord Toulson can be found at pages 1384 to 1386, and those of Lord Reed at pages 1400 to 1402.

i. The basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law. Where there is a breach of the basic right the purpose of any remedy is to require the trustee to restore the trust fund to the position it would have been in if the trustee had performed his obligation;

ii. Absent fraud, which might give rise to other public policy considerations, there is no penal element to any monetary award;

iii. Equitable compensation is assessed at a different time from compensation in tort or contract. Equitable compensation is assessed at the point of judgment with the benefit of hindsight. The Supreme Court adopted as the relevant principle the statement of Millet NPJ in **Libertarian Investments Ltd v Hall**[7] that "*the amount of the award is measured by the objective value of the property lost, determined at the date when the account is taken and with the benefit of hindsight*";

iv. Liability is not unlimited. Causation is required. A claim for equitable compensation is limited to loss resulting from the trustee's acts in relation to the interest which he is bound to protect; and

v. The claimant is not required to mitigate loss but losses resulting from clearly unreasonable behaviour on the part of the claimant will be adjudged to flow from that behaviour and not from the breach (i.e. such behaviour will break the chain of causation).

[12] Although **AIB Group** was argued and decided in the context of a claim for breach of trust, I accept that the reasoning is applicable to breaches of fiduciary duty more generally.

[7] [2014] 1 HKC 368

The Alleged Breaches in Summary

[13] SIB had identified the following breaches of fiduciary duty and/or trust by the Second Defendant:

i. By the end of 2008 the Second Defendant had caused or allowed or directed approximately US$2,034,065,000 belonging to SIB to be paid to SFGC and SFGGM, being companies owned and/or controlled by the Second Defendant. The actual amount paid is, in all probability, likely to have been higher, as SIB's record keeping of such payments developed only in the later years of SIB's activities. That money was then paid on to the Second Defendant, or his companies or connected parties. It was never returned to SIB; and

ii. Between 23 June 2000 and 12 September 2008 the Second Defendant caused or allowed or directed payments totaling in excess of $262 million from funds belonging to SIB to be made to a bank account held in the name of Stanford Financial Group Limited ("**SFGL**") held with Société Générale de Paris, Switzerland (account number 108731) ("**the SocGen Account**"). The SocGen Account, also referred to in the documentary evidence by some of those involved in SIB as a "slush fund", was not recorded in the books and records of SIB or any companies within the Stanford Financial Group. Payments made to the SocGen Account were not made for any legitimate commercial or other purpose of SIB's business or interests. Save for a total sum of just over US$4.5 million, payments out of the SocGen account did not go back to SIB, but were again diverted to or at the Second Defendant's direction.

Breach (1): Evidence of Payments Made to SFGC/SFGGM

[14] Marcus A. Wide, one of SIB's joint liquidators, has explained SIB's basis for believing that the total sum of US$2,034.065,453 was transferred from SIB to SFGC and SFGGM by the end of 2008, at paragraphs 39 to 52 of his first witness statement dated and filed on 14 March 2014.

[15] The principal documentary evidence relied upon by SIB for their contention that the total sum of US$2,034.065,453 was transferred from SIB to SFGC and SFGGM by the end of 2008 is:

i. A chart created by a Mr Henry Amadio, an accountant employed by SFGC, in February 2008 which illustrated the flow of funds from SIB to SFGGM "[o]*n Behalf of the Shareholder*" (i.e. the Second Defendant);

ii. A series of promissory notes signed by the Second Defendant on various dates between 31 December 1999 and 31 December 2003, by which he promised to repay to SIB outstanding principal and interest on 'loans' made to him. By the terms of the last promissory note dated 31 December 2003, the Second Defendant promised to repay to SIB the total sum of US$346,500,000 on 31 December 2004; and

iii. So-called "Shareholder Funding Reports" prepared by Mr Amadio. The Final Report for the year ended 31 December 2007 records that a total sum of US$1,634,633,044 had been distributed to companies within the Stanford Financial Group. In the Preliminary Report for the year ended 31 December 2008, that sum had increased to US$2,034,065,453; and

[16] Mr James Davis, SIB's Chief Financial Officer, confirmed at the Second Defendant's criminal trial that:

i. no security was provided for the 'loans' made to the Second Defendant; and

ii. none of the loans were ever repaid.

Breach (2): Payments Made to the SocGen Account

[17] SocGen Account credit advices and statements confirm that the account holder was SFGL. Mr Wide's evidence was that SFGL, another company incorporated under the IBC Act, was wholly owned by Mr Stanford who was also its President/Chairman.

[18] SIB had identified two repayments that were made from the SocGen Account to SIB: US$4,000,035 on 2 May 2001; and US$500,026.01 on 30 January 2009, a total of US$4,500,061.01.

Conclusions on the Evidence

[19] SIB's case is straightforward. The transfers from SIB of: (a) US$2,034.065,453 to SFGC and SFGGM; and (b) US$262,106,566 to SFGL, represented simple misappropriations of company funds by the Second Defendant in breach of fiduciary duties owed by him to SIB. The recipient companies were wholly owned by the Second Defendant. SIB received no security or consideration for the payments, and no ownership interest in any of the recipient companies. But for the Second Defendant's misappropriations, SIB would have continued to have the funds at its disposal. Breach of duty by the Second Defendant to the Claimant, loss, damage, and causation are thus duly established.

[20] At a minimum the Second Defendant is therefore liable to pay equitable compensation to SIB in the sums of US$2,034,065,453 and US$257,606,504.99 (which takes into account the two repayments made to SIB from the SocGen Account).

Pre-Judgment Interest Generally

[21] A defendant who commits a breach of trust or fiduciary duty will be required by equity to pay compensation to ensure that any loss occasioned by his breach of fiduciary duty is remedied. A court, when awarding such compensation, will be required to determine what would have happened but for the breach of fiduciary duty. Given this principle equitable compensation can include an award of equitable interest whether on a simple or compounded basis. The Courts of Antigua & Barbuda have an inherent power to award interest in equity.

[22] SIB argued, and I accept, that SIB is entitled to interest on the sums misappropriated compounded at annual rests, on the basis set out below (dealing with the breaches in reverse order).

Breach (2): Pre-Judgment Interest on Payments Made to the SocGen Account

[23] Mr Wide has, in his second witness statement, given evidence in relation to various rates of interest that could have been obtained had SIB's funds been invested in United States of America Treasury Securities, which he says are a good example of a low-risk liquid investment of the nature marketed to depositors. I accept this is an appropriate comparison.

[24] SIB calculates the total sum payable (including interest) in respect of this breach in relation to payments made to the SocGen Account to be US$306,308,820.21 as at the hearing on 17 November 2015. I accept this figure. SIB's evidence is that their calculations assume an annualized rate of interest of 0.10% for 2015. That is lower than any of the other rates applying from 2000. In that year (2000) a highest rate of 6.11% obtained. From 2000 to 2014 a median rate of 2.08% obtained. The court does not have evidence of the rate applicable to 2016. In the context of an overall median rate of 2.08% it is unlikely that a substantial injustice to the Second Defendant or the Claimant will caused if I adopt a continuing rate of 0.10% from 17 November 2015 and I will therefore do so. Thus to 17 November 2016 a further US$306,308.82 is to be added to US$306,308,820.21, making a total of US$306,615,129.03.

Breach (1): Pre-judgment Interest Payable on Payments Made to SFGC/SFGGM

[25] SIB has been unable to clarify the dates on which the US$2,034,065,453 was misappropriated from SIB, although it is likely that the misappropriations occurred on a daily basis over a period of some years. Therefore, on the basis that the last Shareholder Funding Report was current to 31 December 2008, SIB seeks interest from 1 January 2009 to the date of this judgment.

[26] In terms of the interest rate to be applied, SIB submitted that it is appropriate to have regard to the rates of interest found in the promissory notes signed by the Second Defendant. Such annual rates of interest ranged from 5% to 10%. These are rates of interest which the Second Defendant agreed to pay (although SIB recognized that the promissory notes do not cover the entirety of the

US$2,034,065,453). Given that the misappropriation was in all probability greater than this sum, and that 5% was a rate on the low side that the Second Defendant professed himself in agreement to pay, adopting a 5% rate of annual simple interest would seem to me a conservative figure and not inequitable to hold the Second Defendant to in respect of the full amount of US$2,034,065,453.

[27] SIB calculates the total sum payable (including interest) in respect of this breach to be US$2,845,331,221.49 as at the hearing on 17 November 2015. I accept this figure. It is appropriate also to apply the same rate pro rata to interest accruing in respect of this breach to the date of this judgment. To 17 November 2016 a figure of US$142,266,561.07 needs to be added to US$2,845,331,221.49, giving a total of US$2,987,597,782.56.

Post-Judgment Interest

[28] In accordance with section 7 of the Judgments Act (Cap.227), interest accrues on the judgment from the date of entry to the date of satisfaction at the rate of 5% per annum.

Prescribed Costs

[29] SIB calculates the prescribed costs to which it is entitled in accordance with CPR 65.5 and Appendices B and C to Part 65 in an amount of US$9,530,670.13. This is 60% of US$15,884,450.21, calculated upon a total judgment sum of US$3,151,640,041.70 as at 17 November 2015.

[30] As the currency of the jurisdiction is the Eastern Caribbean Dollar, the prescribed costs are to be calculated in that currency. The operative exchange rate is US$1 to EC$2.7. Calculating the costs in the "home currency" makes a difference. This can be illustrated by taking the first percentage band of 15% which is applicable to $(sic)15,000. If the dollar figure is taken to be United States Dollars, this would mean that the first 15% applies to the first EC$40,500 (equivalent to US$15,000). However if the dollar figure is taken to be EC$15,000 (US$5,555.56), then the 15% only applies to that amount and the next tier of 12.5% starts sooner, and so forth. If the next tiers start sooner, because the percentages decrease, the result is a lower figure.

US$3,151,640,041.70 is equivalent to EC$8,509,428,112.59. Applying the relevant prescribed costs percentages, this gives a total costs figure of EC$42,673,390.56, as follows

Column 1	Column 2	Column 3	Cumulative Costs
(1)	First $100,000	15%	$15,000
(2)	Next $150,000	12.5%	$18,750
(3)	Next $250,000	10%	$25,000
(4)	Next $500,000	7%	$35,000
(5)	Next $1,500,000	3%	$45,000
(6)	From $2,500,000 to $8,509,428,112.59 (Next $8,506,928,112.59)	0.5%	$42,534,640.56
Total			$42,673,390.56

[31] In accordance with Appendix C, SIB is entitled to 60% of this figure up to default judgment and including the assessment of damages. That is, a sum of EC$25,604,034.34. This is equivalent to US$9,482,975.68.

Orders upon judgment

[32] Accordingly the Court makes the following orders:

1. The Second Defendant is liable to, and shall forthwith, pay the Claimant the sum of US$3,294,212,911.59 (being US$306,615,129.03 plus US$2,987,597,782.56) by way of principle and pre-judgment interest to 17 November 2016;

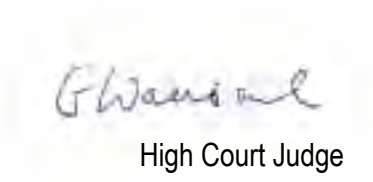
2. Pre-judgment interest at an annual rate of 0.10% from 17 November 2016 until the date of this judgment shall accrue on the amount of principle and interest of US$306,615,129.03;

3. Pre-judgment interest at an annual rate of 5% from 17 November 2016 until the date of this judgment shall accrue on the amount of principle and interest of US$2,987,597,782.56;

4. The Second Defendant shall forthwith pay to the Claimant the sum of US$9,482,975.68 by way of prescribed costs.

5. The Second Defendant shall pay the Claimant post-judgment interest at the statutory rate pursuant to the Judgments Act (Cap.227).

[33] I thank learned counsel for their assistance and apologize for the length of time taken to render this judgment.



High Court Judge

23 December 2016