This is a repository copy of *United Kingdom: company law - directors' duties towards shareholders and creditors in a corporate insolvency*.

White Rose Research Online URL for this paper:
https://eprints.whiterose.ac.uk/203632/

Version: Accepted Version

Article:

Akintola, K. orcid.org/0000-0003-4475-1941 and Samanta, N. (2023) United Kingdom: company law - directors' duties towards shareholders and creditors in a corporate insolvency. International Company and Commercial Law Review, 34 (5). N43-N45. ISSN 0958-5214

This is a pre-copyedited, author-produced version of an article accepted for publication in International Company and Commercial Law Review following peer review. The definitive published version Akintola, K. and Samanta, N. (2023) United Kingdom: company law - directors' duties towards shareholders and creditors in a corporate insolvency. International Company and Commercial Law Review, 34 (5). N43-N45. is available online on Westlaw UK or from Thomson Reuters DocDel service

Reuse

This article is distributed under the terms of the Creative Commons Attribution-NonCommercial (CC BY-NC) licence. This licence allows you to remix, tweak, and build upon this work non-commercially, and any new works must also acknowledge the authors and be non-commercial. You don't have to license any derivative works on the same terms. More information and the full terms of the licence here: https://creativecommons.org/licenses/

Takedown

If you consider content in White Rose Research Online to be in breach of UK law, please notify us by emailing eprints@whiterose.ac.uk including the URL of the record and the reason for the withdrawal request.

eprints@whiterose.ac.uk
https://eprints.whiterose.ac.uk/

Journal	ICCLR
Author	Kayode Akintola (Assistant Professor in Corporate Insolvency Law, University of Sheffield) and Navajyoti Samanta (Associate Professor in Corporate and Commercial Law, University of Leicester)
Heading	United Kingdom: Company Law – directors' duties towards shareholders and creditors in a corporate insolvency
Abstract	Codification of some of directors' duties – Rationale - Companies Act 2006 ("CA 2006") – Consideration of other stakeholders – Duty under s. 172 CA 2006 – Supreme Court decision in *BTI 2014 LLV v Sequana* **[2022] UKSC 25** – Shareholders' interests and creditors' interests – Trigger point for consideration of creditors' interests – legal and practical implications
Parties/ News event	***BTI 2014 LLC v Sequana SA and others*** **[2022] UKSC 25**
Court details	***UK Supreme Court***
Date	***2022***
Judge	***Lords Reed, Hodge, Briggs, Kitchin and Lady Arden***
Reference	

Legal and Practical Implications of the UK Supreme Court's decision in *BTI 2014 LLV v Sequana*

The Companies Act 2006 ("CA 2006") has codified some of the directors' duties under common law and equity in the form of general duties of directors. The primary aim was to assist directors in understanding their duties clearly and to find the law governing their duties easily.

The duty of the directors under section 172 CA 2006 is to act in good faith and promote the success of the company for the benefit of its shareholders as a whole while keeping in mind other stakeholders. S172(3) specifically addresses creditors and requires directors to consider their interests under certain circumstances.

The duty to act for the benefit of the company and to act in good faith has been a long standing common law duty. Section 172, codifies this duty and also enshrines the principle of 'enlightened shareholder value' in the Act. However, although s172 provides a philosophical foundation for the Companies Act its practical utility is debatable.

The Decision

The UK Supreme Court's decision in *BTI 2014 LLV v Sequana*[1] has altered the landmark of directors' duties with regards to shareholders and creditors' interests in certain circumstances. In this regard, consideration is given to the UK Supreme Court's position on the following: the existence of a common law duty to creditors; the nature of this duty; and the trigger for this duty when faced also with a duty to the shareholders.

In relation to the existence of the duty to have regard to creditors' interests, the Court, affirming *Liquidator of West Mercia Safetywear Ltd v Dodd* (1988) 4 BCC 30, held that this was not a new or free-standing duty. Rather, the duty was inherent in directors' duty to act in good faith and in a company's best interests since those interests would in certain circumstances include the interests of company creditors who hold an economic interest in the company in its solvent and insolvent state for the purpose of recovering debts owed to them (see paras 11 – 12). Such economic interest is plainly more acute when a company is bordering on insolvency, which necessitates a fiduciary duty to the company to properly consider the interests of its creditors (see para 246).

This leads to the nature of this duty. Procedurally, consideration of creditors' interests when a company is bordering on insolvency would involve giving them appropriate weight, balancing them against shareholder's interests where both sets of interests are in conflict (given that shareholders also hold an economic interest in the company's affairs) and, in appropriate circumstances, subordinating shareholders' interests to those of creditors; the latter would typically occur the more parlous a company's financial position appears to be (see paras 81and 176). Substantively, and in Lady Arden's judgment, consideration of creditors' interests in this context does not oblige directors to positively seek ways to benefit creditors; rather, the precise nature of the duty is to refrain from exercising their powers of management so as to harm creditors' interests. Thus, the duty precludes directors from taking a step that would prejudice creditors or omitting to take a step which would prevent or reduce such prejudice (see para 288).

Finally, at what point is this duty triggered? To put it differently, when does the duty of directors (to the company) to consider the interests of its shareholders shift to those of its creditors? The insolvency of a company is a self-evident trigger. The more obscure issue is

[1] ***BTI 2014 LLC v Sequana SA and others* [2022] UKSC 25**

whether the duty could be triggered pre-insolvency. Avid scholars of company and insolvency law should be all too familiar with the fabled notions of the *twilight zone* or *zone of insolvency* in this regard. The court held that a *real and not remote risk of insolvency* was not a sufficient trigger of this duty. In a series of *obiter dicta* their Lordships and her Ladyship went on to express their views that the duty is engaged when the company is insolvent or bordering on insolvency. These views turn on the precise point that creditors' interests potentially diverge from those of shareholders so as to justify their discrete consideration by directors. A sense of *imminent* or *irreversible* insolvency was therefore required as it is not sufficient that the company is likely to become insolvent at some point in future. Probability of an insolvent liquidation or administration would also suffice to trigger this duty (see paras 83, 203 and 250).

The Future

The case provides a timely reminder that a company is a network of interests. This is a construct with practical implications for company directors; for the relative primacy of those interests and associated duty to consider them would oscillate with the pecuniary position of the company. Some substantive questions linger, however. The point in a company's lifespan when the creditor duty is engaged is not settled. While the case provides authority that a real risk of insolvency is not a sufficient trigger, the Court's views on the point also suggest that merely being in the twilight zone or zone of insolvency should not be a sufficient trigger either– nor should it be. Determination of any pre-insolvency trigger of this duty should be fact specific and depend on whether or not insolvency is inevitable. The commercial realities of modern businesses and their dependency on credit variants for corporate capital will mean that, more often than not, many businesses will be balance sheet or cash flow (when one considers all debts falling due in future) insolvent. Thus, the prescient guidance by the Supreme Court in *BNY Corporate Trustee Services Ltd v Eurosail -UK 2007-3BL plc* [2013] 1 WLR 1408 that commercial realties should prevail over speculation in relation to determining a company's solvency is also critical. Indeed, the views expressed by the Court in the *Sequana* case on this point also portend further consistency in the commercial approach the courts typically take to these "fuzzy" issues; weight will be given to practical and nascent commercial difficulties directors encounter as the courts continue to develop the jurisprudence in this area.

A further pithy point of reflection is the verity that technical compliance with company law rules or the legality of the transaction complained of will not of itself absolve directors from the duty to consider creditor interests. As the court held, the duty could apply to the payment of a lawful dividend. The key to finding culpability in this regard could be whether the common law rule is preserved by the legislative provisions complied with.

Finally, uncertainty remains amongst the justices as to whether directors must know or ought to know that the company is insolvent or bordering on insolvency for the duty to be engaged. There is a strong case to be made that the duty to consider and not prejudice creditors' interests should not turn on directors' knowledge (although some notion of constructive knowledge should mitigate the dangers of subjectivity here).[2]

[2] See K Akintola, Creditor Treatment in Corporate Insolvency Law (Edward Elgar 2020), 3.14 – 3.15.