

Dispute Resolution
Case Law Update
Rosling King LLP



BTI 2014 LLC (Appellant) v Sequana SA and others (Respondents) [2022] UKSC 25

On 5 October 2022, the Supreme Court handed down their momentous and eagerly anticipated decision in *BTI 2014 LLC v Sequana SA [2022] UKSC 25*. In a unanimous decision, the Court dismissed BTI's appeal finding that the directors of a company, Arjo Wiggins Appleton Limited ("**AWA**"), were not under a duty to have regard to the interests of creditors when approving a payment of a dividend to AWA's parent company, Sequana SA ("**Sequana**"). The decision is the first time that the Supreme Court has considered whether there are circumstances in which directors must act in, or at least consider, the interests of the company's creditors when the company is in, is approaching or is at real risk of insolvency (the "**Creditor Duty**"). It is also the first case within the jurisdiction where such a question arises in respect of a company that was solvent at the relevant time.

Background

In May 2009, the directors of AWA approved a distribution of €135 million (the "**Dividend**") to its only shareholder, Sequana. By way of set-off, the payment of the Dividend extinguished almost the entirety of another larger debt which Sequana owed to AWA. The Dividend complied with Part 23 of the Companies Act 2006 ("**the Act**") and with the common law rules on capital maintenance. When the Dividend was paid out to Sequana, AWA was solvent on both a balance sheet and a cash flow basis but it had some contingent liabilities of an uncertain amount and an insurance portfolio of an uncertain value. There was a real risk that AWA might become insolvent in the future, though insolvency was not imminent, or even probable.

In October 2018, AWA went into insolvent administration. The appellant, BTI 2014 LLC ("**BTI**"), the assignee of AWA's claims, sought to recover the amount of the Dividend from AWA's directors as they argued that the directors had failed to consider or act in the interests of AWA's creditors when making the decision to distribute the Dividend which was in breach of the Creditor Duty. Both the High Court and the Court of Appeal rejected the Creditor Duty claim. BTI appealed the decision of the Court of Appeal to the Supreme Court.

The Appeal

The Supreme Court dismissed BTI's appeal and affirmed the High Court and Court of Appeal's decisions. There were 4 substantive issues that the Supreme Court had to consider:

1. Is there a common law creditor duty at all?
2. Can the creditor duty apply to a decision by directors to pay an otherwise lawful dividend?
3. What is the content of the creditor duty?
4. When is the creditor duty engaged? Was it engaged on the facts of this case?

The Supreme Court reached the following important conclusions:

- In certain circumstances, a director's duty to act in good faith in the interests of the company (as required by Section 172(1) of the Act), is modified by the common law rule such that the company's interests are taken to include the interests of the company's creditors as a whole; the Creditor Duty. All members of the Court agreed

that the Creditor Duty should be affirmed on the basis that it is supported by a considerable amount of case law, the duty is affirmed or preserved by virtue of 172(3) of the Act and has a coherent and principled justification.

- Creditors always have an economic interest in the company’s assets, but such interest becomes heightened where the company is insolvent or nearing insolvency. When this is the case, directors should manage the affairs of the company in a manner that takes creditors’ interests into consideration and avoids prejudicing them.
- Fundamentally, directors owe their duties to the company, and not directly to its shareholders or to creditors. As such, the Creditor Duty is not a free-standing duty that is owed to creditors.
- The Creditor Duty can apply to a decision by directors to pay a dividend which is otherwise lawful. Part 23 of the Act is subject to any rule of law to the contrary and as the Creditor Duty is part of the common law and is recognised by section 172(3) of the Act, it is not excluded by Part 23. Also, a decision to pay a dividend that is lawful under Part 23 may still be taken in breach of duty.
- Where a company is insolvent, or bordering on insolvency, but is not faced with an inevitable insolvent liquidation or administration, the directors of the company should consider the interests of its creditors, however this should also be balanced against the interests of shareholders where there is a possibility for a conflict.
- The more considerable the financial difficulties faced by the company, the more emphasis the directors should place on prioritising the interests of creditors. That said, the Court clarified that the interests of creditors are the interests of the company’s creditors as a whole but the directors are not obliged to take into consideration each individual creditor’s special circumstances.
- The ultimate conclusion reached by all of the members of the Supreme Court was that the Creditor Duty was not engaged on the facts of this case. The key factor was that at the time the Dividend was made, AWA was not actually or imminently insolvent, nor was insolvency even probable. It is not sufficient that there is a real and not remote risk of insolvency. The Creditor Duty is engaged when the directors know, or ought to know, that the company is insolvent or bordering on insolvency, or that an insolvent liquidation or administration is probable.

Implications of the Judgment

Whilst the Supreme Court confirmed that the Creditor Duty is engaged when the directors know, or ought to know, that the company is insolvent or bordering on insolvency, or that an insolvent liquidation or administration is probable, they did not provide total clarity as to the precise timing or trigger point for the engagement of that duty. They have also left open the question of whether it is essential that the directors know or ought to know that the company was on the precipice of such circumstances.



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That said this key decision provides us with clear confirmation of the existence of the Creditor Duty and should act as an important reminder for all company directors that there is a trigger point when directors need to have particular regard to the interests of the whole of the company's creditors, as well as the shareholders, when making decisions, including, as in this case, any decision to authorise dividend payments.

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