

Directors duties and insolvency – what’s the deal?



If you work in insolvency you will most likely be aware of [BTI 2014 LLC v Sequana SA \[2019\] EWCA Civ 112](#) (“Sequana”), which saw the Court of Appeal determine, amongst other things, when and in what circumstances the duty of directors under section 172 of the Companies Act 2006 (the “Act”) to promote the success of the company for the benefit of its members becomes one that must have regard to the interests of creditors (“the creditors’ interests duty”) rather than shareholders. Sequana relates to a decision by a company to pay substantial dividends to shareholders at a time when it had an unquantifiable contingent liability.

It is well-established that the creditors’ interests duty arises when a company is insolvent, however, there were two competing arguments before the Court of Appeal as to when a company’s insolvency arises for the purposes of determining when the creditors’ interests duty arises:

1. The duty was owed when there was a “real as opposed to remote risk of insolvency”; or
2. When a company was “insolvent, or very close to insolvency”.

The Court of Appeal determined that it would not be appropriate for the test of “real as opposed to remote risk of insolvency” to apply having taken into account the Government policy considerations behind the Act and the other provisions of the Act.

It was determined that that the duty arises when the directors know or should know that the company is or is likely to become insolvent. In this context, “likely” means probable.



So, what's the problem?

Sequana is infamous due to the potential impact a change in the law could have for directors (and insolvency practitioners pursuing directors). Whilst the Court of Appeal took a conservative approach in determining when the creditors interest duty arises, BTI has appealed that decision and the industry eagerly awaits the Supreme Court's Judgment on the issue. It is anticipated that the Judgment will be available before the end of the year – so watch this space.

How can we help

It is imperative that a company's directors seek legal advice when faced with possible insolvency, especially in the context of making decisions to pay connected parties, particular creditors and/or shareholders dividends. Likewise, an insolvency practitioner looking to pursue a director for payments will need to take steps to evidence when the company became insolvent.

If you are a director or insolvency practitioner in need of advice please get in touch with us or contact [Hannah Proctor](mailto:Hannah.proctor@cripps.co.uk) on Hannah.proctor@cripps.co.uk.

Written by



[Joanna Ford](#)

Partner and Head of Commercial Disputes