One step on from Sequana – what more have we learned after Hunt v Singh [2023] EWHC 1784 (Ch)?

The Supreme Court's decision in *Sequana* left unresolved the question whether, in a case where a company was at the relevant time actually insolvent, that was sufficient to trigger the creditor duty irrespective of the directors' state of knowledge of the insolvency.

In *Sequana* there was no doubt that the company was solvent at the time the relevant dividends were paid and it was therefore necessary to consider whether the company's directors ought to have realised that the company was likely to become insolvent.

In *Hunt v Singh*, however, there was no doubt that the company was insolvent during the relevant period. The fact that the company disputed a liability due to HMRC did not change this. A disputed liability does not make it a contingent one. As it is now known, there *was* an actual liability.

The appeal has provided helpful guidance on how and when the creditor duty is triggered in circumstances where directors are aware of a claim which, if recognised in the company's books, renders the company insolvent. The appropriate test in such circumstances depends on "knowledge of a real risk that the company's challenge to the claim may fail".

Key takeaways

Although the decision in Hunt v Singh has not moved the debate on by much, the Supreme Court judges did set out various principles that are useful in understanding when the duty arises.

- The duty does not arise simply because there is a real and not remote risk of insolvency.
- Rather, the **duty arises when insolvency is probable or imminent.**
- The Supreme Court identified four situations where the duty is likely to arise. These are where a company is insolvent; where a company is bordering on insolvency; where an insolvent liquidation or administration is probable; and where a transaction would place the company in one of those situations.

The directors do not need to realise that insolvency is imminent. The duty arises if a "reasonably diligent and competent director" would know that there is no reasonable prospect of avoiding insolvency proceedings. In other words, an "objective test" applies.

How we can help

If you would like further advice or information on this topic, contact our **restructuring and insolvency team**.

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