Article

# BVI Directors' Duties And Insolvency: The Impact of the *Sequana* Case

**Authors:**
**Matthew Brown**, Counsel, Litigation | **Marie Stewart,** Associate, Litigation
**Anton Goldstein,** Partner, Corporate | **Nicholas Kuria,** Counsel, Corporate

**On 5 October 2022 the UK Supreme Court (UKSC) handed down its "momentous" decision in *BTI 2014 LLC v Sequana SA and others*[1]. The case addresses issues of *"considerable practical importance to the management of companies"*, in particular directors' duties during insolvency or the onset of insolvency.**

**Although the UKSC decision is not binding in the BVI (and most of the decision was *obiter*), it is already widely regarded (including by the UKSC itself) as a seminal decision in the field of company law. As a result, in the absence of any local authority to the contrary, the BVI Courts are likely to follow the views expressed by the majority in the Sequana case (at least on most of the issues) if the same issues arise for determination in a future BVI case.**

**In the circumstances, it is important that directors of BVI companies are aware of the effect of the Sequana decision.**

**We have therefore set out below a summary of the key takeaway points for directors of BVI companies, along with some practical steps that those directors should consider taking to reduce the risk of inadvertently breaching their duties.**

## Key Takeaway Points from the Sequana Decision

Among other things, the UKSC has now confirmed:

- The directors' duty to act in the best interests of the company does, in certain circumstances, include the interests of the company's creditors.
- The "interests of the company's creditors" means the interests of its creditors as a general body, not the interests of particular creditors.
- Although colloquially referred to as the 'creditor duty', the duty is not in fact a free standing duty owed by directors directly to the creditors, but is instead a duty that the directors owe to the company.
- The creditor duty *only* arises when the company is insolvent (i.e. cash flow or balance sheet insolvent), on the brink of insolvency, or where an insolvent liquidation is probable. It is not sufficient that there is simply a real risk that the company may in the future become insolvent.

  The different formulations of the test used by different members of the Court included "*bordering on insolvency*", "*at or near the onset of insolvency*", where insolvency was "*imminent*" i.e. "*just around the corner and going to happen*" or when the company was "*insolvent…bordering on insolvency or…insolvent liquidation…is probable" or "at or near the onset of insolvency*". One of

[1] [2022] UKSC 25 On appeal from: [2019] EWCA Civ 112

the Justices also suggested that the duty ought to arise when a planned transaction would place the company into one of those situations.

- According to the majority (at least), the duty also only arises when the directors know, or ought to know, that the company is insolvent, bordering on insolvency or that an insolvent liquidation is probable.
- In terms of the content of the creditor duty, it is not merely a duty to take account of the interests of creditors to the extent only of securing the success of the company for the benefit of its members (which is the extent of the duty to consider creditors' interests when the company is solvent). Instead, there is a sliding scale, such that once the duty is engaged, the more parlous the state of the company, the more the interests of the creditors will predominate and the greater the weight that should be given to their interests as against those of the shareholders.
- It is only once insolvent liquidation is inevitable that creditors' interests become paramount and the shareholders cease to retain any valuable interest in the company.
- A breach of the creditor duty cannot be authorised or ratified by shareholders.

## Practical Tips for Directors of BVI Companies

Although directors should always consider taking legal advice in respect of the nature, extent and performance of their duties – particularly where a company is in financial difficulties – there are some simple steps that directors of BVI companies should consider taking to reduce the risk of breaching the creditor duty:

- Directors should be mindful of creditors' interests and ensure there is a clear plan to discharge the company's debts as they fall due.
- Directors should remain apprised of the company's financial situation at all times, including, if appropriate, by obtaining reports from the CFO, accountants or other financial experts, particularly in relation to companies with complex cash flow or balance sheet issues.
- Directors should ensure they remain aware of who the company's creditors are, the nature and extent of those liabilities and the company's plans to ensure sufficient liquidity as debts fall due.
- To the extent repayment of creditors depends on achievement of a business plan or financial projections, directors should continuously re-asses the business plan and projections to ensure they remain valid and substantiate plans to repay creditors.
- To the extent existing indebtedness will need to be refinanced with new debt or equity, directors should regularly assess the viability of refinancing plans and ensure the necessary processes for refinancing are started and progressed on a timely basis. This is particularly important in an environment where interest rates are rising.
- Directors should properly and accurately record their decision making, including the reasons why they are taking decisions. When the company is insolvent or nearly so, those records should explain what considerations and weight they gave to the creditors' interests (as opposed to the interests of others) and the reason why they believe that the relevant decision is in the interests of the creditors as a whole.

For more information on any of the above, and the impact of the Sequana decision on your BVI Company, please connect with your usual Conyers contact or one of the team members listed below.

---

## Contacts:

**Anton Goldstein**
**Partner**
anton.goldstein@conyers.com
+1 284 852 1119

**Nicholas Kuria**
**Counsel**
nicholas.kuria@conyers.com
+1 284 852 1129

**Matthew Brown**
**Counsel**
matthew.brown@conyers.com
+1 284 852 1121

**Marie Stewart**
**Associate**
marie.stewart@conyers.com
+1 284 852 1124



**For further information please contact: media@conyers.com**