Neutral Citation Number: [2023] EWHC 1784 (Ch)

Case No: CH-2022-000104

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN ENGLAND AND WALES
CHANCERY APPEALS (ChD)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 17 July 2023

Before :

MR JUSTICE ZACAROLI

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Between :

STEPHEN JOHN HUNT	**Applicant/ Appellant**
- and –	
JAGTAR SINGH	**Respondent**

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- -

Ms Lexa Hilliard (instructed by **Wedlake Bell LLP**) for the **Appellant**
The Respondent was not present or represented

Hearing dates: 14 and 16 June 2023

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JUDGMENT

Mr Justice Zacaroli:

1. This is an appeal against the order of ICC Judge Prentis dated 6 April 2022, dismissing the claim of the appellant, Stephen Hunt ("Mr Hunt"), the liquidator of Marylebone Warwick Balfour Management Limited ("the Company") against the respondent, Mr Jagtar Singh ("Mr Singh").

2. The principal question raised by the appeal is when, following the decision of the Supreme Court in *BTI 2014 LLC v Sequana SA* ("*Sequana*"), does a director's duty to take into account the interests of creditors arise, in circumstances where the company is at the relevant time insolvent, but its insolvency is due to a tax liability which the directors (wrongly, as it later turned out) believed at the relevant time had been avoided by a valid tax avoidance scheme entered into by the company. I will refer to this duty as the "creditor duty", recognising that it is nevertheless a duty owed to the company.

3. The background facts are set out at some length in the judge's judgment, but so far as relevant to the principal question on this appeal, they can be summarised as follows.

4. The Company was incorporated in 1994 to provide management services to Marylebone Warwick Balfour Group PLC ("PLC") and other companies within the group of companies owned by PLC. In 2002, as a result of a downturn in the fortunes of the group, PLC announced that it would take on no new business, but would embark on a four-year realisation plan, targeting returns to shareholders of 200p per share. In the event, the realisation plan took much longer.

5. The Company provided the services of head office staff tasked with implementing the business plan. At about the same time, the Company was introduced to BDO Stoy Hayward (later BDO LLP) ("BDO"), who recommended a "conditional share scheme" designed to enable the head office staff to receive payments – structured as non-contractual gratuitous bonuses – without the Company incurring liabilities to HMRC by way of PAYE or NIC contributions.

6. The Company entered into such a scheme (the "Scheme") in 2002 and operated it until 2010. It initially operated as follows:

   (1) The Company set up an employee benefit trust ("EBT") for the benefit of employees of the group;

   (2) A shell BVI company, Moorston Holdings Limited ("Moorston") was incorporated, with Mr Singh and another of the directors of the Company as directors;

   (3) The Company made payments in excess of £3 million to the EBT trustee, and the directors of Moorston resolved to allot two ordinary shares of £1 to the EBT trustee;

   (4) The EBT trustee subscribed for £3,143,169 1p preference shares in Moorston at a premium of 99p per share;

(5) The EBT trustee issued Moorston shares to the head office staff members, according to the Company's wishes to award them, as employees of the Company, non-contractual gratuitous bonuses;

(6) Moorston then declared and paid dividends on those shares to the head office staff members.

7. From 2003 onwards, the scheme was modified slightly, in that the Company subscribed for a 1p D redeemable share in Moorston at a substantial premium (constituting the amount the Company had resolved to pay out in gratuitous bouses), and the Company then resolved to award shares in Moorston to the head office staff, pursuant to "incentive arrangements" for senior executives and employees.

8. This process was then repeated at regular intervals over the following eight years, resulting in 34 subscriptions and declarations of dividends in favour of the directors of the Company (and certain other recipients) in a sum totalling over £54 million over the eight years during which the Scheme operated.

9. BDO continued to advise the Company that the Scheme was "robust" throughout the period relevant to this appeal, notwithstanding the actions of HMRC and the tribunal decisions to which I refer below.

10. The Scheme was notified to HMRC in May 2003. On 4 June 2004 HMRC notified an enquiry into the Company's return to 30 June 2002. On 20 July 2004, HMRC made further enquiries, and set out their position that if the payments under the Scheme were in reality earnings, then NIC and PAYE would be payable together with interest.

11. A number of similar schemes had been marketed and set up in the early 2000s. In December 2004, the Paymaster General announced in Parliament a crackdown on schemes avoiding PAYE and NIC, and stated that HMRC would be challenging such schemes in the courts where it was appropriate to do so.

12. In September 2005 HMRC offered a market-wide offer to participants in such schemes, including the Company. This was relayed to the Company in a letter from BDO dated 23 November 2005. The letter notified the Company that HMRC were minded to take a test case to the Special Commissioners for a formal ruling, but had decided to make an offer to all companies which, in essence, required the employing company to pay NIC contributions together with interest, with certain corporation tax relief being available. Attached to BDO's letter to the Company was a schedule which identified that the amount of NIC contributions for which the Company was liable (if HMRC's challenge to the Scheme succeeded) up to that point, together with interest, was in excess of £3.65 million.

13. The Company rejected that offer. In the early part of 2006 HMRC indicated that it would resolve the issue through litigation and indicated an intention to issue formal determinations (in respect of PAYE) and decisions (in respect of NIC) shortly. In fact, it was not until July 2008 that assessments were issued for the period 6 April 2002 to 5 April 2006, in the sum of £11,376,566 (for PAYE) and £4,776,592 (for NIC), each exclusive of interest. HMRC also commenced proceedings against the Company in relation to the NIC liability, in order to preserve its rights while it

pursued litigation, including in respect of the issues that arose as between the Company and HMRC, against others, as I describe further below.

14. On 7 April 2008, HMRC wrote to the Company indicating that there were now a number of cases progressing towards litigation covering different variations of the generic arrangements of which the Scheme formed part. It had been hoped that at least one of those cases would be resolved in 2007, but that had not happened. HMRC again invited the Company to settle, this time by paying the full PAYE and NIC contributions plus interest for late payments. HMRC also offered the Company the opportunity to stop interest running by paying the amount that was due, but on the basis that it would be returned in the event that it turned out that the tax was not due.

15. On 7 May 2009, the tax chamber of the first-tier tribunal ("FTT") released its decision in an appeal against HMRC's assessments in relation to a scheme for PA Holdings Ltd that was materially similar to the Scheme: [2009] UKFTT 95 (TC). It concluded that HMRC was entitled to payment of the NIC contributions, but not the PAYE claimed.

16. That decision was upheld on appeal to the Upper Tribunal, Tax and Chancery Chamber, in a decision released on 7 July 2010: [2010] UKUT 251 (TCC).

17. On a further appeal, the Court of Appeal, in a judgment handed down on 30 November 2011, dismissed the appeal of PA Holdings and allowed the appeal of HMRC: [2011] EWCA Civ 1414. The result was that the Scheme failed both in respect of the PAYE and NIC contributions.

18. As I have already noted, the Company continued to operate the Scheme until August 2010. In light of the decision of the Court of Appeal in the *PA Holdings* case, the Company's liability to HMRC in respect of PAYE and NIC contributions throughout the period that it operated the Scheme, including interest, was in excess of £36 million.

19. Leaving aside the tax liability, the Company's financial statements disclosed net assets or net liabilities, as at the year end (30 June) for each of the following years: 2002: +£45,000; 2003: -£5,945; 2004: -£2.5m; 2005: +£146,214; 2006: -£381,465; 2007: £+158,400; 2008: +£147,003; 2009: -£91,567; and 2011: +£192,478.

20. Once account is taken of the debt to HMRC, however, the Company was clearly substantially insolvent. The Company's liability for NIC and interest alone, by September 2005 (when HMRC made its market-wide offer of settlement), would have produced a net deficit (on the basis of the figures contained in the financial statements for 30 June 2005) of more than £3.5 million.

21. Following the Court of Appeal's judgment in *PA Holdings*, the Company was advised by Counsel that its position was not distinguishable, at least in respect of NIC, and that it "seems overwhelmingly likely that the Company's defence of HMRC's proceedings claiming NIC amounts will fail." The Company was then placed into creditors' voluntary liquidation on 14 May 2013. The then liquidator's final report was filed on 3 March 2016, and the Company was dissolved on 3 June 2016. It was, however, restored into voluntary liquidation on 3 June 2017 and Mr Hunt was

appointed liquidator. There are no material creditors in the liquidation apart from HMRC, whose proof was admitted in the sum of £38,701,750.

22. The claim was originally advanced against a number of former directors of the Company, but the Company settled with all but three of them prior to trial. The Liquidator advanced claims under s.423 of the Companies Act 1986, under s.317 of the Companies Act 1985 (later s.177 of the Companies Act 2006), and under s.212 for breach of fiduciary duty, specifically breach of the creditor duty. Pursuant to the latter claims, the Liquidator sought equitable compensation, and also sought against each director the amount that he received as a result of the breach of duty.

23. The judge dismissed all of the claims. The Liquidator appeals as against Mr Singh (with permission granted by me on 18 July 2022) and only in respect of the claim to recover the amount received by him as a result of the breach of the creditor duty (the Liquidator does not appeal the judge's decision that the claim for equitable compensation is time-barred). The appeal is also limited to breach of duty committed in the period from September 2005 to 2010. So far as the two other respondents against whom the claim was pursued at trial, one (Mr Aspland Robinson) was only a director for a short period in 2003, which falls outside the period covered by the appeal, and the other (Mr Michael Bibring) has reached a settlement with the Liquidator.

24. Mr Singh was appointed a director on incorporation of the Company in 1994 and resigned on 23 September 2005. The judge found, however, that he remained a *de facto* director throughout the remainder of the period up to the Company's liquidation, and there is no appeal against that finding. Shortly after permission to appeal was granted, Mr Singh was made bankrupt on his own petition. He has played no part in the appeal. Shortly before the hearing of the appeal he contacted the Court to say that he was unable to attend court for a number of reasons, including that his wife was unwell and may need to go into hospital. He said, however, that he was content for the appeal to proceed in his absence.

The judgment

25. I need refer only to those aspects of the judgment that dealt with the claim for breach of the creditor duty. At §25, the judge noted that the parties agreed that, based on the decision of the Court of Appeal in *Sequana* ([2019] EWCA Civ 112), a duty to consider the interests of creditors will arise "when the directors know or should know that the company is or is likely to become insolvent … In this context 'likely' means probable."

26. Having referred in detail to the operation of the Scheme between 2002 and 2010, and considered the roles of the respondents, the judge turned (at §252) to consider the Company's financial state. He concluded at §258, on the basis of the annual financial statements (see above at §19) that "leaving aside the potential liability to HMRC, the Company was wavering in and out of a solvent position on its accounts." He noted that the respondents accepted that they knew that, if there was a liability to HMRC, the Company would be insolvent, and said: "the question then becomes whether they ought to have realised that the Company was probably likely to be or become insolvent."

27. At §259, he noted that the Liquidator had not "looked down through the Company's own subsidiaries and the Group as a whole to see what could have been paid up or across at any point" but was "content to rely on the Group's ultimate insolvency". He continued:

> "That means that this investigation becomes directed, as with the alleged breaches themselves, at the credibility of BDO's advice and, here, BSG Valentine's [the Company's auditors]. Without more, their advice and their treatment of the Company's position was that no further disclosures needed to be made, and no other treatment made of HMRC's claim. On that basis I consider that in this case, where there was ongoing oversight both (at least annually) by the auditor, and over frequent periods by BDO, the insolvency test is not met over the relevant period. Whether that basis can be shifted can be seen from the findings below."

28. By the "insolvency test" not being met, I infer that the judge meant that it had not been established that the directors "knew or ought to have realised that the Company was probably likely to be or become insolvent" (as he formulated the test in §258).

29. As to whether "that basis" could be shifted, the findings the judge made in the following section of the judgment did not lead him to alter his conclusion that the "insolvency test" was not met. The following is a summary of the matters he relied on:

(1) The Scheme was put in place, and subsequently operated, for genuine commercial reasons;

(2) That purpose included incentivising, not just rewarding, employees which it was desirable to keep together as a team to operate the business wind-down;

(3) There was no evidence that BDO – in setting up and advising on the Scheme – were acting in bad faith, or that the directors were acting in bad faith in relying on BDO's advice;

(4) Although the Scheme resulted in above-market rewards for the directors, they genuinely believed (as would an objective director) that this was in the Company's best interests;

(5) It was not controversial that the effect of the Scheme's operation, known to at least Mr Singh, was that all the Company's profits were paid out, leaving nothing at any stage for HMRC, if PAYE and NIC were payable. It did not follow from that, however, that "the Scheme was always likely to cause loss to and be challenged by HMRC (or, more accurately, that the Respondents perceived or should have perceived that as the situation)", and nor was it the respondents' *purpose* to benefit themselves at the expense of HMRC;

(6) BDO were engaged on an ongoing basis to give advice. Notwithstanding HMRC initiating enquiries in 2004, the HMRC market-wide settlement offer in September 2005, the correspondence with HMRC leading to assessments, or

subsequently, "BDO's advice was the same, and definitive: the Scheme was robust";

(7) Although BDO's advice differed in degree in 2008, it did not change then, nor after the FTT's decision was handed down in the *PA Holdings* case. They continued to advise that the Scheme was "robust" and that "no further action was needed by the Company", save for making a note in the Company's accounts;

(8) The respondents took, and were entitled to take, BDO's advice at face value;

(9) At §287, the judge said:

> "In the context of that advice, there was nothing wrong with the Respondents adopting a "sit and wait" policy, or trying to ensure that the Company's issues were at the bottom of the HMRC pile. Neither was there a need to make provision for accruing liabilities of principal, interest or penalties; nor to cease the Scheme. Those were matter for commercial judgments, which were being exercised, informed by the advice which the Respondents had consistently sought and obtained. While the word "robust" was a BDO favourite, that does not undermine its being relied on: the review of relevant documents at trial has a more repetitious effect than would have been apparent at the time. Further, if the word were inapt in its conveying of a sizeable degree of strength and resilience to attack, there was a dictionary of alternatives carrying their different meanings."

30. At §289 he considered the position if he was wrong in his conclusion as to the applicability of the *Sequana* test, and said: "it would make no difference because in operating the Scheme there was repeated assessment of HMRC's status."

31. In light of the judge's conclusion that there had been no breach of fiduciary duty, it was unnecessary for him to consider the possibility that any such breach had been ratified, but he said: "for what it is worth, I would have considered that (at least while the Company was solvent) it was open to [the shareholder] … to ratify the breach of duty". The judge also did not need to deal with the respondents' contention that they should be relieved of liability under s.1157 of the Companies Act 2006.

The grounds of appeal

32. There are numerous grounds of appeal, spanning 17 paragraphs. Ms Hilliard KC, who appeared for the Liquidator, however, agreed that there was essentially one principal question raised by the appeal, namely whether the judge was wrong to conclude that the creditor duty had not arisen. If the appeal on that ground succeeds, then the Liquidator also contends that the judge was wrong to conclude (at §289, quoted above) that had the creditor duty arisen it would have made no difference.

When does the creditor duty arise?

33. As I have noted, the test applied by the judge was that set out by the Court of Appeal in *Sequana* (per David Richards LJ, as he then was, at §220). The Court of Appeal's

decision on that issue must now be read in light of the decision of the Supreme Court in the same case.

34. The Supreme Court confirmed the existence of a rule that in certain circumstances when a company is financially distressed the directors' fiduciary duty to the company to act in its interests is modified to include a duty to have regard to the interests of creditors as a whole.

35. That left two questions: at what time prior to the company's actual insolvency did the duty arise, and what was its content?

36. On the first of these questions, the ratio of the Court's decision was limited to the conclusion that the creditor duty does *not* arise whenever there was merely a real and not remote risk of insolvency: see Lord Reed at §83; Lord Briggs, with whom Lord Kitchin agreed, at §191; Lord Hodge, at §207, agreeing that the appeal should be dismissed for the reasons given by Lord Briggs; and Lady Arden at §250.

37. Each of the Justices gave consideration – albeit *obiter* – to the point in time at which the creditor duty arises.

38. Lord Briggs rejected the Court of Appeal's test and preferred (at §203) "a formulation in which either imminent insolvency (i.e. an insolvency which directors know or ought to know is just around the corner and going to happen) or the probability of an insolvent liquidation (or administration) about which the directors know or ought to know, are sufficient triggers for the engagement of the creditor duty."

39. Lord Hodge, at §207, was "satisfied that the directors of a company which is insolvent or bordering on insolvency owe a duty to the company to have proper regard to the interests of its creditors and prospective creditors", citing Lord Toulson in *Bilta (UK) Ltd v Nazir (No.2)* [2016] AC 1, at §123:

> "It is well established that the fiduciary duties of directors of a company which is insolvent or bordering on insolvency differ from the duties of a director of a company which is able to meet its liabilities, because in the case of the former the directors' duty towards the company requires him to have proper regard for the interests of its creditors and prospective creditors."

40. Lord Reed also rejected the Court of Appeal's test: see §89. He said, at §88, that he was "inclined to agree" with the view expressed by Lord Toulson and Lord Hodge in *Bilta* that it is sufficient for the creditor duty to arise that the company "is insolvent or bordering on insolvency", and was also inclined to agree with Lord Briggs and Lord Hodge that the probability of an insolvent liquidation or administration was also sufficient for the creditors' interests potentially to diverge from those of the shareholders and therefore to require separate consideration."

41. He said, however, at §90, that he was "less certain than Lord Briggs JSC and Lord Hodge DPSC … that it is essential that the directors "know or ought to know" that the company is insolvent or bordering on insolvency".

42. Lady Arden agreed with Lord Reed's test, and also agreed that the question of knowledge should be left open for full submissions.

43. As to the content of the duty, the comments in *Sequana* are again *obiter*, as the point did not arise for determination, but there was a broad consensus among the majority that a nuanced approach is required: the fact that the company is bordering on insolvency, or even that it is actually insolvent, does not mean that the directors necessarily owe a duty to treat the creditors' interests as paramount. Lord Briggs explained the position as follows, at §176:

> "In my view, prior to the time when liquidation becomes inevitable and section 214 becomes engaged, the creditor duty is a duty to consider creditors' interests, to give them appropriate weight, and to balance them against shareholders' interests where they may conflict. Circumstances may require the directors to treat shareholders' interests as subordinate to those of the creditors. This is implicit both in the recognition in section 172(3) that the general duty in section 172(1) is "subject to" the creditor duty, and in the recognition that, in some circumstances, the directors must "act in the interests of creditors". This is likely to be a fact sensitive question. Much will depend upon the brightness or otherwise of the light at the end of the tunnel; i.e. upon what the directors reasonably regard as the degree of likelihood that a proposed course of action will lead the company away from threatened insolvency, or back out of actual insolvency. It may well depend upon a realistic appreciation of who, as between creditors and shareholders, then have the most skin in the game: i.e. who risks the greatest damage if the proposed course of action does not succeed."

44. In considering the comments made in *Sequana* as to the point in time at which the creditor duty arises, it is important to bear in mind an important distinction between the facts of that case and this. In *Sequana*, there was no doubt that at the time the relevant dividends were paid the company was solvent. As Lord Briggs put it at §115:

> "the May dividend was distributed at a time when AWA was solvent, on both a balance sheet and a commercial (or cash flow) basis. Its assets exceeded its liabilities and it was able to pay its debts as they fell due. But it had long-term pollution contingent liabilities of a very uncertain amount which, together with uncertainty as to the value of one class of its assets (an insurance portfolio), gave rise to a real risk, although not a probability, that AWA might become insolvent at an uncertain but not imminent date in the future."

45. The focus of the Supreme Court in *Sequana* was therefore on the time *before* the company was actually insolvent when the creditor duty arose.

46. In contrast, in this case there is now no doubt that the Company was in fact insolvent (indeed substantially insolvent) throughout the relevant period. Having regard to the liabilities for NIC alone, it is established that by September 2005 (the start of the relevant period) the Company owed in excess of £3.65 million but had either no or negligible net assets from which it could pay that sum. Thereafter, the position got

steadily and substantially worse as the amounts due to HMRC increased each year, but no assets were retained to cover the liability.

47. The fact that the Company disputed that anything was due to HMRC does not change the fact that it was insolvent. A disputed liability is not a contingent liability. At the time (i.e. throughout the relevant period) there either was an actual liability to HMRC or there was not: see, for example, *Integral Memory PLC v Haines Watts* [2012] EWHC 342 (Ch), per Richard Sheldon QC, sitting as a deputy High Court Judge, at §32. In fact, as is now know, there was an actual liability.

48. One of the unresolved questions following the Supreme Court's decision in *Sequana* is whether, in a case where the company was at the relevant time actually insolvent, that is sufficient to trigger the creditor duty irrespective of the directors' state of knowledge as to the company's insolvency. Ms Hilliard KC made it clear, however, that she did not contend that the duty arose simply because the company was in fact insolvent. I proceed on the assumption, therefore, that it is necessary to establish some form of knowledge of insolvency (actual or constructive) on the part of the directors for the creditor duty to arise, even where the company was at the relevant time actually insolvent.

49. Mr Hunt's case is that the creditor duty either had arisen by September 2005 or, if not, at one or other of the following times: (1) October 2005, when HMRC made it clear that in the absence of its settlement offer being accepted it would pursue litigation; (2) July 2008, when formal assessments were issued; (3) May 2009 when the FTT decision in *PA Holdings* was released; or (4) July 2010 when the Upper Tribunal decision was released.

50. The difference between those dates is one of degree: as HMRC's intention to litigate became clearer, and as it was vindicated in the first tier, then the upper tier, of the tribunal system, the likelihood of the Scheme being successfully challenged, so that the Company owed enormous amounts in tax that it could not pay, became greater. Mr Hilliard's essential contention was, however, that at the latest by September 2005 the risk that the Company was in fact insolvent was sufficiently great that the directors ought to have been having regard to the interests of creditors.

51. It is important to emphasise that I have heard no contrary argument at all so that my conclusions have been reached solely on the basis of the arguments advanced on behalf of Mr Hunt. For the reasons which follow, however, I consider that Ms Hilliard's contention is broadly correct. In my judgment, assuming some element of knowledge is required, where a company is faced with a claim to a current liability of such a size that its solvency is dependent on successfully challenging that claim, then the creditor duty arises if the directors know or ought to know that there is at least a real prospect of the challenge failing.

52. I recognise that the language of "real risk" of insolvency was specifically rejected by the Supreme Court in *Sequana*, but that was in the different context of the possibility that a company, that was undoubtedly solvent at the relevant time, might become insolvent at some point in the future.

53. There is an important difference between the two contexts, particularly in light of the rationale for the creditor duty in the first place: i.e. that there is a shift in economic

interest from shareholders to creditors (either alongside or to the exclusion of shareholders depending on the depth of the insolvency): see, for example, Lord Reed at §83 of *Sequana*. If it turns out that the company was in fact insolvent at the relevant time, then this shift in economic interest had already occurred, and had occurred irrespective of whether the directors appreciated it.

54. Accordingly, if at the relevant time the directors were wrong in their appreciation of the risk of the company *actually being* insolvent, then their actions and decisions were in fact impacting on the creditors at that time, either together with or to the exclusion of the shareholders. Knowledge of a real risk that the company's challenge to the claim may fail, therefore, equates to knowledge that it is the creditors that are potentially *currently* being affected by the directors' actions and decisions.

55. It is important to keep in mind that the fact that the creditor duty is *triggered* is only the starting point in a claim for breach of duty. The consequences of it being triggered vary enormously depending on the facts.

56. In particular, it does not mean that the creditors' interests necessarily become paramount, or that the directors would be in breach of duty if the actions they then take turn out to have damaged creditors' interests.

57. The factors to take into account in determining the content of the duty – and whether that duty was breached – will include, as Lord Briggs put it (see above), the brightness of the light at the end of the tunnel, for which might be substituted the strength of the company's resistance to the claim, and who has the most "skin in the game" so far as the actions the directors propose to take. The extent to which directors should act with a view to protecting creditors' interests is likely to vary significantly, for example, depending on what it is the directors are considering doing. For example, there is a world of difference between, on the one hand, (1) directors proposing to continue trading, notwithstanding the risks of making further losses and, on the other hand, (2) directors proposing to declare dividends of all available assets leaving nothing to pay the disputed liability in the event that it is a good one.

58. In principle, it seems to me that whether directors are liable for beach of duty to take into account the interests of creditors should depend upon consideration of factors such as these. It is only, however, if the creditor duty is determined to arise notwithstanding that the liability is still reasonably disputed, that these matters can be taken into consideration.

59. Any different conclusion would lead to significant difficulties, and inherent uncertainties, in determining when the creditor duty arises. Taking this case as an example, the question whether the Company was subject to existing tax liabilities to HMRC was a binary one: it either was, or it was not. It is a binary question, however, on which reasonable directors, advisors and tribunals, may reasonably differ. Identifying where, on the sliding scale between high probability of success and high probability of failure, the duty to consider the interests of creditors cuts in is inherently difficult. A conclusion that the duty to *have regard* to creditors' interests is triggered by actual or constructive knowledge of a real risk that the liability may exist, with questions of degree of probability of success or failure being factored into the content of the duty and whether it was breached in the particular case, is more

consistent in my view with the approach suggested, for example, by Lord Reed in *Sequana*. At §82 he advocated an approach which is:

> "…sufficiently fact-specific to take account of differences, according to particular circumstances, in what it may be reasonable and responsible for directors to do when they find that the company is in a sufficiently weak financial situation that a conflict of interest between its creditors and its shareholders appears to arise."

60. In my judgment, therefore, the judge – in deciding that the creditor duty was not engaged, essentially because the directors acted reasonably in taking and acting upon advice as to the merits of HMRC's claim and as to what provision, if any, should be made in the Company's accounts – applied the wrong test for determining whether the creditor duty arose. Had he applied the right test, then I consider that he should have held that the creditor duty had arisen at the latest in September 2005, and continued thereafter throughout the relevant period.

61. The second limb of Mr Hunt's appeal relates to the judge's conclusion that, had the creditor duty arisen, it would have made no difference. I can deal with this shortly. The judge, of course, did not have the benefit of the deliberations of the Supreme Court in *Sequana* on the content of the creditor duty. Albeit *obiter*, I consider that the nuanced approach there suggested ought to be followed. That requires consideration of a range of factors. In this case, the economic effect of the directors continuing the Scheme was materially the same as if salaries had been paid which gave rise to an arguable tax liability, but all remaining assets were routinely distributed by way of dividend to the shareholders, leaving nothing to pay that liability in the event that it was later established to exist. It is not sufficient, in my judgment, to conclude that there was no breach of duty on the basis simply that "there was repeated assessment of HMRC's status", which is the only reason given by the judge. The issue needs therefore to be re-assessed in accordance with the *Sequana* test.

62. Ms Hilliard urged me to go on and consider whether Mr Singh was in breach of the creditor duty, in light of the findings of fact made in the judgment. I do not think, however, that it is appropriate to do so. In the first place, I think it likely that approaching the test with the guidance of the Supreme Court in mind might require findings to be made on additional matters. Second, it would in any event be necessary to consider the possibility of a defence under s.1157, which it was unnecessary for the judge to deal with, and which may also require findings to be made on different points. I also bear in mind that any conclusions I might make on these further points would be made in the absence of Mr Singh or anyone representing his interests, or those of his trustee in bankruptcy.

63. I will, therefore, remit the case to be reconsidered. Given Mr Singh's bankruptcy, I acknowledge that there is a real possibility that the matter will not be further pursued. I was initially minded to direct that, if it is, then it should be transferred to be dealt with by a High Court Judge. There is not a clear dividing line between those cases that are appropriate to be tried by an Insolvency and Companies Court Judge and those that are better tried before a High Court Judge. In light of the importance of the legal issues raised in this developing area of the law, I consider that in principle this is the type of case which ought to be tried at first instance by a High Court Judge. There

are, however, complicating factors, including the current lack of any active opponent, the potential impact of Mr Singh's bankruptcy, and the costs consequences of a determination before a different judge. These are matters which the judge is better placed to evaluate. I will therefore remit the matter to the judge to give directions for the further disposal of the case, including consideration of the question whether it should be transferred to a High Court Judge.