Triggers, Content, and Enforcement: Directors' duties to creditors – where are we after *Sequana*?

Professor Peter Walton*

Abstract

Despite their codification by the Companies Act 2006, there remain several unresolved issues in relation to directors' duties, in particular, how those duties operate when a company becomes insolvent or where its insolvency is imminent. In 2022, the Supreme Court in BTI 2014 LLC v Sequana SA provided much needed clarity in this area but some questions remain unanswered. This article looks at the Supreme Court's decision in order to assess when the directors' duty owed to their company shifts from a duty to act in the best interests of the company's members to one where the interests of the company's creditors are paramount or at minimum must be considered alongside the interests of the members. The nature of this 'creditors' duty' will be considered, along with what triggers it and who, if anyone, can enforce it. Although limited to the duty under section172 of the Companies Act 2006, the Sequana case appears to open up the creditors' duty to all of the directors' codified duties. The Sequana decision also points out the similarities between the creditors' duty and the insolvency office-holder actions available under sections 214 and 239 of the Insolvency Act 1986. It is argued here that it may be time to consider opening up the opportunity for creditors to bring a derivative action on behalf of the company for breach of the creditors' duty.

Keywords

Director's duties; Duty to take account of creditors' interests; Ratification of breach; Enforcement of duty.

---

* Professor of Insolvency Law, University of Wolverhampton. This is a slightly fuller version of a paper presented at the Insolvency Lawyers' Association Annual Conference in April 2023. I am grateful to the comments and suggestions of the anonymous referees. I am also very grateful to Professor Andrew Keay who kindly provided some most helpful guidance. Any remaining errors or poor exposition are entirely my own responsibility. ORCID ID: 0000-0001-5970-3585.

I. INTRODUCTION

The Supreme Court's decision in *BTI 2014 LLC v Sequana SA*[1] brings some clarity to the nature and extent of a company director's duty to take account of the interests of the company's creditors. This article will begin by providing a simple outline of the law generally applicable to the enforcement of directors' duties and in particular the duty to promote the company's success found in s.172(1) of the Companies Act 2006 ("the Act") and how, when a company enters the realm of insolvency, its directors are required to consider or act in the interests of the company's creditors. The article will consider the facts and decision in *Sequana*. The main conclusions of the Supreme Court will be explained. Some points remain uncertain from the decision and these points will be further examined. The article will conclude by suggesting that the decision in *Sequana* may be the precursor to further developments whereby creditors may be permitted to take direct action against company directors for breach of duty to the company. The article will also look at whether it is time to consider a form of codification and consolidation which would allow for a clear statement of the duties and potential liabilities of directors who allow their companies to continue to trade in the realm of insolvency.

II. LEGAL LANDSCAPE

Prior to considering the Supreme Court's decision in *Sequana*, it may be useful to provide an explanation of the legal background to the decision so as to be able to assess its importance and wide-ranging significance. It is a fundamental principle of company law that a company is separate from its participators.[2] One consequence of its separate legal personality is that its directors owe duties to the company[3] and not to any individuals interested in the company such as its members (who are usually the company's shareholders). Courts of equity recognise duties owed by directors to their companies which are similar to those duties owed by trustees to beneficiaries.[4] Of course, not all duties owed by directors are fiduciary duties. Only those duties linked to the concept that directors owe a duty of utmost good faith are regarded as fiduciary. Other duties recognised by equity such as the duty to act with reasonable skill and care are equitable in nature but not fiduciary.[5]

The Act codified the duties owed by directors in equity. The general duties are contained within Ch.2 of Pt 10 of the Act (predominantly in sections 171 to 177).[6] They are stated in

---

[1] [2022] UKSC 25.
[2] *Salomon v Salomon & Co Ltd* [1897] AC 22.
[3] See Companies Act 2006, s.170(1).
[4] See generally, Len Sealy, 'The Director as Trustee' (1967) 25 CLJ 83. All directors who participate in a breach of duty are jointly and severally liable but have rights of contribution amongst themselves either in equity or under the Civil Liability (Contribution) Act 1978.
[5] See Millett LJ in *Bristol & West Building Society v Mothew* [1998] Ch 1 at 18.
[6] Section 171 provides that a director must: "(a) act in accordance with the company's constitution, and (b) only exercise powers for the purposes for which they are conferred." Section 172(1) requires a director to act in the way they consider: "in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole." Section 173 requires a director to exercise independent judgment. This duty is subject to two exceptions listed in s.173(2): (a) it will not apply where the director is acting in accordance with an agreement duly entered into by the company that restricts the future exercise of discretion by its directors; and (b) it will not apply if the director's behaviour is permitted by the company's constitution. Section 174 states that a director of a company must exercise reasonable care, skill and diligence. This is defined in section174(2) as the care, skill and diligence that would be exercised by a reasonably diligent person with both: "(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and (b) the general knowledge, skill and experience that the director has." Section 175 takes the form of a duty to avoid situations where

s.170(3) to be based on common law rules and equitable principles applicable to directors and to "have effect in place of those rules and principles." Section 170(4) clarifies that the codified duties are to "be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties." The wording used in s.170(4) is intended to retain the previous case law interpretations of directors' duties but also to allow a flexibility which permits equity to develop further those duties to deal with changing circumstances.[7] All of the duties in Ch.2 of Pt 10 are fiduciary in nature except s.174.[8]

Section 179 makes it clear that more than one duty may arise in any given case. The main consequence of this is that a director must comply with each duty not just some of them. A director may not claim a justifiable breach of one duty due to the requirements of satisfying another of the duties.

Whenever a director breaches their duties to a company, it will be the company which has standing to bring an action for breach. The company is the correct claimant. The power to sue is part of the management powers vested in the directors under the company's constitution.[9] Whilst the company is a solvent going concern, if the director controls the management of the company, the company, acting through its directors, is unlikely to resolve to sue the director in breach. It is possible for minority shareholders to bring a derivative action on behalf of the company.[10]

One further fundamental company law principle relevant to the current discussion is that breaches of directors' duty are capable of being ratified by the company (or authorised if the conduct has not yet occurred).

This may occur in two different ways. Firstly, it is possible for a solvent going concern company to ratify a breach of duty by a director if the ratification is fully informed and made by all of a company's members unanimously, even where the ratification is informal without a formal general meeting or written resolution. This is usually referred to as the *Duomatic* principle.[11]

Second, in cases where the members are not acting unanimously, ratification is possible but requires the company's members to pass formally a fully informed ordinary resolution (a

---

a director has a direct or indirect interest that conflicts, or possibly may conflict with the interests of the company. The duty is stated explicitly to apply "in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity)." Section 176 requires a director not to "accept a benefit from a third party conferred by reason of (a) his being a director, or (b) his doing (or not doing) anything as director." Section 177 requires a director, who is directly or indirectly interested in a proposed transaction or arrangement with the company, to declare the nature and extent of that interest to the other directors. For an in-depth consideration of the codified duties see Andrew Keay, *Directors' Duties* (4th ed, LexisNexis Butterworths, 2020).

[7] Explanatory Notes to CA 2006 paras 298 – 322. In addition, s.178(1) states: "The consequences of breach (or threatened breach) of sections 171 to 177 are the same as would apply if the corresponding common law rule or equitable principle applied."

[8] Companies Act 2006, s.178(2).

[9] See for example Companies (Model Articles) Regulations 2008 (SI 2008/3229) Sch 1 art 3 and Sch 3 art 3.

[10] The ability at common law to bring a derivative action on behalf of the company was largely codified and replaced by the statutory derivative action available under Part 11 CA 2006. For an in-depth consideration of the statutory derivative action see generally Andrew Keay and Joan Loughrey, 'Derivative Proceedings in a Brave New World for Company Management and Shareholders' [2010] JBL 151 and Andrew Keay, 'Applications to continue derivative proceedings on behalf of companies and the hypothetical director test' (2015) 34 CJQ 346.

[11] Named after the case *Re Duomatic Ltd* [1969] 2 Ch 365. See the explanation of Lady Arden in *Sequana* at [314] of the different origins and therefore the different operation of the *Duomatic* principle and the general power in a company's members to ratify a breach of director's duty. Those differences are beyond the scope of the present discussion, but readers are directed to Ross Grantham, 'The Unanimous Consent Rule in Company Law' [1993] Cambridge Law Journal 245.

simple majority in value) to ratify the breach.[12] If the ratification is effective the breach of duty is no longer actionable. It is wiped from the slate.[13]

Whether the *Duomatic* principle is relied upon or a formal ordinary resolution of the members is used to ratify a breach, case law has recognised that some breaches of duty are capable of being ratified by the company, but some are not.[14] The case law draws a line between two categories cases: in the first, the courts have judged some breaches of duty to be capable of effective ratification (in which case the breach is no longer actionable) whilst in the second, where the conduct is recognised as more serious, the breach is not capable of being effectively ratified.[15] The Act has not clarified where the line is to be drawn between the two categories of cases but has confirmed the law remains unchanged in this respect.[16]

The Act did alter the requirements for members' ratification. It is no longer possible for a director who has breached their duty, to use their votes as a member (or indeed those of any party connected to the director) to ratify their breach.[17] It is possible that this change in the requirements for ratification now means that any breach of duty is capable of ratification as long as the decision is made by members unconnected to the directors in breach of duty.[18]

In addition to the members being empowered to ratify some breaches of duty in this way, it is also possible for the disinterested members of the board to authorise a director to act where their interest conflicts with their duty to the company and which, without such authorisation would be a breach of the duty under s.175 to avoid conflicts of interest.[19]

A director who has breached their duty to their company will be open to a member bringing a derivative action on behalf of the company whilst the company remains a going concern and if no action against a miscreant director is sanctioned by the board.[20] Should the company enter an insolvency procedure such as liquidation, any action being brought on behalf of the company will be brought by the liquidator.[21]

When a liquidator has investigated possible causes of action against a director, it is not unusual for the liquidator to sue the directors relying upon more than one cause of action. For example, the liquidator may bring a composite action, based on the same fact pattern, for wrongful trading (under s.214 Insolvency Act 1986) and/or a preference (under s.239

---

[12] Where a derivative action has been brought by a minority shareholder on behalf of the company alleging a breach of director's duty, the court may adjourn its hearing to allow a general meeting to be held so that the alleged breach may be considered by the company's shareholders and ratified by them if that is their decision (see *e.g. Hogg v Cramphorn* [1967] Ch 254).

[13] See *e.g. Kent v Jackson* (1851) 14 Beav 367 affirmed (1852) 2 De G M & G 49.

[14] See *e.g. Re Finch (UK) plc* [2015] EWHC 2430 (Ch) at [28] where the court observed that a breach of duty was not ratifiable in accordance with the *Duomatic* principle (even where the company was not insolvent).

[15] See generally Kenneth Wedderburn, 'Shareholders' Rights and the Rule in Foss v Harbottle' [1957] CLJ 194, [1958] CLJ 93; Kenneth Wedderburn, 'Derivative Actions and *Foss v Harbottle*' [1981] MLR 202 and Roger Gregory, 'What is the Rule in Foss v Harbottle?' (1982) 45 MLR 584. See also *e.g. Franbar Holdings Ltd v Patel* [2008] EWHC 1534 (Ch) at [47].

[16] Section 239(7) CA 2006 expressly refers to the requirements of s.239 having no effect on "any rule of law as to acts that are incapable of being ratified by the company." It is difficult to see what the legislature meant by this provision unless there are some acts which are not capable of being ratified by the company's members.

[17] Section 239(3) and (4) CA 2006. Nothing in s.239 affects the validity of a decision taken by unanimous consent of the members of the company (s.239(6)(a)). This provision therefore preserves the *Duomatic* rule even where all the members are connected to those acting in breach of duty.

[18] See dicta supporting this idea in *e.g. Prudential Assurance Co Ltd v Newman (No2)* [1981] Ch 257, *Taylor v National Union of Mineworkers (Derbyshire Area)* [1985] BCLC 237 and *Smith v Croft (No2)* [1998] Ch 114.

[19] Prior to the 2006 Act, the self-dealing rule required the members in general meeting to ratify any conflict. This equitable requirement was often modified by the articles (*e.g.* art 85 of the 1985 Table A under the Companies (Tables A to F) Regulations 1985 SI 1985/805) which provided that a director could be interested in a contract with the company provided they disclosed the interest (see *e.g.* Vinelott J's judgment in *Movitex v Bulfield* (1986) 2 BCC 99403). Section 175 effectively introduces statutory adoption of the earlier practice and converts what was an equitable restriction into a positive duty. See, Andrew Keay, 'The Authorising of Directors' Conflicts of Interests: Getting a Balance?' (2012) 12 Journal of Corporate Law Studies 129.

[20] For the procedure for a member to bring a statutory derivative action see Part 11 CA 2006.

[21] See s.212 Insolvency Act 1986. If the company has entered administrator, the administrator has a similar power under para 5 Sch 1 Insolvency Act 1986.

Insolvency Act 1986) (both of which are usually labelled as 'office-holder' actions as only an office-holder such as a liquidator may bring such actions) as well as a breach of director's duty (which is usually referred to as a 'company' action as the company is the claimant whether or not acting through the agency of an office-holder).[22]

The purpose of this background section is to highlight that directors' actions may be the subject of attack by different parties at different stages of a company's life. Whilst the company is still a going concern and under the control of the directors, a breach of duty by the directors may be ratified by the company's members. The ratification may or may not be effective to release the directors from liability. Some breaches of duty are too serious to be capable of ratification. If not successfully ratified, the members of the company may bring a derivative action on behalf of the company for breach of the directors' duty. If the company enters a formal insolvency proceeding such as liquidation, the liquidator may bring an action on behalf of the company for breach of directors' duty. In addition to such an action, a liquidator will also have available various 'office-holder' actions under the Insolvency Act 1986.

The *Sequana* case primarily analyses how the codified duty to promote the success of the company applies in circumstances where the company has not yet entered a formal insolvency proceeding (and so no office-holder has been appointed) but is nevertheless insolvent or close to insolvent.

III. SECTION 172 – THE DUTY TO PROMOTE SUCCESS OF THE COMPANY

Section 172(1) of the Act contains a duty to promote the success of the company. This statutory duty codified the fiduciary duty requiring a director to act *bona fide* in what they believe to be the best interests of the company. Section 172(1) requires a director to act in the way they consider: "in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole." In doing so, the director must have regard to (amongst other matters[23]) "the need to act fairly as between members of the company."[24]

One point confirmed by the courts after codification is that the test for whether s.172 has been breached is predominantly a subjective test.[25]

---

[22] One important difference between office-holder actions and company actions is that the proceeds of a successful company action, such as breach of directors' duty, will be covered by any floating charge and so the secured creditor will be paid out of those proceeds in priority to the unsecured creditors. A floating charge does not attach to the proceeds of office-holder actions (see s.176ZB Insolvency Act 1986 and also *e.g. Re Produce Marketing Consortium Ltd* (1989) 5 BCC 569, 598).

[23] Other matters listed in s.172 are "(a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct."

[24] Section 172(1)(f). As the courts have regarded s.172 as not altering the previous fiduciary duty, the courts have so far not looked beyond the previous case law for guidance (where the factors listed above did not play much of a part, if any) as to how to interpret the codified duty. The formulation of s.172 is, in terms, quite different to the simpler formulation of the previous fiduciary duty. Throughout the consultation and Parliamentary debates leading to the 2006 codification of this duty, there was much talk of "enlightened shareholder value." The idea is that directors are more likely to achieve long term sustainable success of the company, which by definition will benefit the shareholders, if the directors pay attention to the factors listed in the section. Although this concept was controversial in that it suggested a marked change of approach, the courts have yet to opine on their significance, or how, if at all, it has altered the previous fiduciary duty. See generally Andrew Keay, 'Enlightened Shareholder Value, the Reform of the Duties of Company Directors and the Corporate Objective' [2006] LMCLQ 335, Andrew Keay, 'Section 172(1) of the Companies Act 2006: an Interpretation and Assessment' (2007) 28 Company Lawyer 106 and Andrew Keay, 'Good Faith and Directors' Duty to Promote the Success of their Company' (2011) 32 Company Lawyer 138.

[25] The following *dicta* of Jonathan Parker J in a pre-2006 Act case (*Regentcrest plc v Cohen* [2001] BCC 494 at [120]) have been approved as a statement of the law as it applies post-2006 (e.g. *Richmond Pharmacology Ltd v Chester Overseas Ltd* [2014] EWHC 2692 (Ch); [2014] Bus LR 1110 at [66] and *Re HLC Environmental Projects Ltd* [2014] BCC 337 at [91]): "The duty imposed on directors to act bona fide in the interests of the company is a subjective one. The question is not whether, viewed objectively by the court,

IV. SECTION 172(3) – THE CREDITOR DUTY

The main focus of the *Sequana* case, is the meaning and application of s.172(3) which explicitly recognises and preserves the position under the previous fiduciary duty (and the corresponding case law) and which requires "directors, in certain circumstances, to consider or act in the interests of creditors of the company." This subsection specifically retains, under the codified duty, the requirement for directors to take account of the interests of creditors, in addition to or in place of the interests of members, in circumstances where the company is in financial distress. The justification for this duty is that once a company is, for example, in insolvent liquidation,[26] it is the creditors who have the main economic stake in the liquidation not the members who can expect no return from their shareholding.

The members of the Supreme Court used different labels when discussing the duty to take account of the interests of creditors under s.172(3). Lord Briggs (with whom Lord Kitchin agreed) and Lord Hodge used the term "creditor duty" whilst Lord Reed and Lady Arden preferred to describe the modifying rule under s.172(3) as "the rule in West Mercia" after the leading case.[27] Regardless of the label used it is important to remember that the duty owed by directors under s.172(3) is owed to the company, and not directly to the creditors. The term 'creditor duty' will be used in this article for convenience.

V. THE FACTS OF *SEQUANA*

AWA was a wholly owned subsidiary of Sequana. Sequana owed AWA a large debt. The directors of AWA caused AWA to declare a dividend to Sequana which virtually extinguished the debt owed by Sequana to AWA. A dividend becomes a debt payable when it is declared. The dividend complied with the statutory requirements of the Act and with the common law rules on maintenance of share capital. At the time of the dividend being declared, AWA was solvent on both a cash flow and balance sheet basis (under s.123 Insolvency Act 1986). However, AWA did have significant long-term contingent liabilities and there was a real risk that AWA might become insolvent in the future even though insolvency was not imminent or even probable at the time of the dividend.

Ten years later, AWA entered insolvent administration. BTI, as assignee of AWA, sought to recover the amount of the dividend from the company directors on the basis that the dividend was recommended in breach of the creditor duty as the directors had not considered nor acted

the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test." This subjective test only applies where there is evidence that the director actually did consider the best interests of the company when acting. If no such evidence is available (or the evidence provided by the director of honest belief is not accepted by the court), the test becomes objective—whether an intelligent and honest person in the position of the director could, in the circumstances, have reasonably believed that the transaction was for the benefit of the company.

[26] A company may enter liquidation voluntarily under s.84 Insolvency Act 1986, that is without any involvement of the court, by its members passing what is usually a special resolution (a 75% majority). This type of liquidation is called a voluntary liquidation. A company may instead enter liquidation by court order under s.122 Insolvency Act 1986 (usually based upon a petition by a creditor). Such liquidations are usually referred to as compulsory liquidations. If a company is unable to pay its debts as they fall due or if its assets are worth less than its liabilities (as defined by s.123 Insolvency Act 1986), the liquidation, whether voluntary or compulsory, will be an insolvent liquidation.

[27] *West Mercia Safetywear Ltd v Dodd* (1988) 4 BCC 30.

in the interests of AWA's creditors. Both the High Court and Court of Appeal rejected BTI's claim. The argument was over whether the trigger for the creditor duty was that there was a real, as opposed to a remote, risk of insolvency.[28] BTI appealed to the Supreme Court.

The Supreme Court unanimously dismissed BTI's appeal although the judgments contain some differences of opinion.

VI. WHAT IS THE CREDITOR DUTY AND WHEN IS IT TRIGGERED?

The majority of the Supreme Court[29] held that the creditor duty is engaged when the directors know (or ought to know)[30] that the company is insolvent or bordering on insolvency or that an insolvent liquidation or administration is probable. It is clear that the company must be presently insolvent, or the company's insolvency must be reasonably imminent in order for the creditor duty to arise. A probability of insolvency at some point in the future is not sufficient.

In relying upon the specific wording of s.172(3),[31] the Supreme Court distinguished between, on the one hand, cases where insolvent liquidation or administration is inevitable and on the other hand, cases where the company is insolvent or bordering on insolvency but is not currently faced with an inevitable insolvent liquidation or administration. The extent to which the directors must take account of the interests of creditors may be viewed as a sliding scale.[32] The Supreme Court recognised that many companies may be bordering on insolvency or indeed become insolvent (as defined by s.123 of the Insolvency Act 1986) but that such situation may be temporary. There may be light at the end of the tunnel and so there may be good reason to be optimistic about future profitable trading.[33] In such cases (where a company is insolvent or bordering insolvency or where insolvency is imminent or where an insolvent liquidation or administration is probable but not inevitable) the directors must consider the interests of creditors and will need to balance those interests with the interests of members where the two conflict. The sliding scale image suggests that the greater and more imminent the company's

[28] For a consideration of the Court of Appeal judgment see, *e.g.*, Peter Walton, 'Directors' duty to act in the interests of creditors under section 172 of the Companies Act 2006 – Aussie Rules Gone Walkabout' (2019) 2 Wolverhampton Law Journal 47.

[29] Lord Briggs (with whom Lord Kitchin agreed without delivering a separate judgment) gave the principal judgment with which Lord Hodge agreed. Although there are some differences of opinion in the judgments of Lord Reed and Lady Arden, there is a consensus on many points. For the purposes of this article the views of the majority are relied upon unless stated.

[30] Lord Briggs at [203] and Lord Hodge at [231] and [238]. See also Lord Reed at [90] and Lady Arden at [281] neither of whom express a final view as to whether it is essential that the directors know or ought to have known. In the subsequent case of *Hunt v Singh* [2023] EWHC 1784 (Ch) the issue did need to be resolved by the court and Zacaroli J at [51] concluded: "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." The result therefore appears to be that directors must either know the company is insolvent or ought to know that there is a real prospect of insolvency. The meaning of knowledge of a "real prospect" or "real risk" in this context (at [54]) "equates to knowledge that it is the creditors that are potentially currently being affected by the directors' actions and decisions."

[31] Lord Briggs at [153] and Lord Hodge at [224] considered it a straightforward exercise in interpreting the natural meaning of the words used without the need to consider the law reform background to the codification of directors' duties. Lady Arden at [249] was of the view that considering the relevant law reform activities, of which she herself was significantly involved, should be considered by the Court (the relevant law reform reports are primarily Company Directors: Regulating Conflicts of Interests and Formulating a Statement of Duties The Law Commission (Law Com No 261) and The Scottish Law Commission (Scot Law Com No 173) (September 1999) and the final report of the Company Law Review Steering Group "Modern Company Law for a Competitive Economy" 26 July, 2001).

[32] Lady Arden adopts this imagery at [303].

[33] Lord Briggs at [173] provided the following examples: "Why should the directors of a start-up company which is paying its debts as they fall due but is balance sheet insolvent by a small margin abandon the pursuit of the success of the company for the benefit of its shareholders? And why should the directors, faced with what they believe to be a temporary cash-flow shortage as the result of an unexpected event, like the present pandemic, give up the pursuit of the long-term success of a fundamentally viable, balance sheet solvent, business for the continuing benefit of shareholders?"

financial difficulties, the more the scale is tipped towards prioritising the interests of creditors. The creditors have an economic interest in the company's assets where it is insolvent or nearing insolvency. At this point, the directors should manage the company's affairs in a way which takes their economic interests into account and avoids prejudicing the creditors' interests.[34]

The other end of the sliding scale is where insolvent liquidation or administration is inevitable. At that point, the members' interests fall away, and the interests of the creditors become paramount.[35] For companies which have become permanently or hopelessly insolvent the interests of the creditors become more important than other concerns and so the factors in s.172(1) also drop away to be replaced with the pre-eminence of the interests of creditors.

In the terms of the wording of s.172(3), the directors must "consider" the interests of creditors (along with members' interests) where a company is insolvent or bordering insolvency but must "act in the interests of creditors" once insolvent liquidation or administration becomes inevitable. When the latter circumstances exist, the interests of the creditors are paramount, and the interests of the members fall away and are no longer taken into account.

If triggered by the company's financial distress, the duty to act in the interests of the company's creditors would appear usually to require the directors to act to limit further losses to the creditors as a general body[36] and to treat creditors consistently with their priorities in any subsequent formal insolvency.[37] It seems that directors need only take account of those creditors who are 'in the money.' If creditors, such as unsecured creditors, will receive no payment whatever the directors decide to do, their interests may be overlooked.[38] Once fully engaged, the duty requires directors to act in good faith in what they believe to be the best interests of the creditors. They must consider subjectively the interests of the creditors. If the directors fail to consider the interests of the creditors (or the court is not convinced that the directors *bona fide* did consider their interests), the court will then look objectively at the conduct of the directors. The court will look to see if the directors' conduct was consistent with what an intelligent and honest person in the position of the directors could, in all the circumstances, have reasonably believed was for the benefit of the creditors.[39]

VII. RATIFICATION BY MEMBERS OF BREACH OF THE CREDITOR DUTY?

According to the Supreme Court the power in the members to ratify a breach of directors' duties is lost in circumstances where the creditor duty arises. When the directors are under a duty to act in the interests of the creditors, the members (shareholders) can no longer authorise a

---

[34] Lord Reed at [45]. The interests of creditors are those of the body of creditors generally. Directors are not required to consider the interests of individual creditors: Lord Briggs at [112], [135], [139-142] and 165. Lord Reed at [11], [48], [50], [77] and [80-81].
[35] Lord Reed at [11] and Lord Briggs at [165]. This is the same moment in time when s.214 of the Insolvency Act 1986 (wrongful trading) is engaged (Lord Briggs at [176]).
[36] In the words of Lady Arden at [288] not "to harm creditors' interests."
[37] In *Liquidator of West Mercia Safetywear Ltd v Dodd* (1988) 4 BCC 30 the court recognised a breach of duty where directors paid some creditors in priority to other creditors (in circumstances where a preference action under s.239 Insolvency Act 1986 might not be available). The actions of the directors in such cases could constitute a breach of duty even where the company had suffered no overall loss in balance sheet terms as the decrease in assets was offset by the decrease in liabilities. The aspect of the creditor duty was further considered in *Stanford International Bank Ltd v HSBC Bank plc* [2022] UKSC 34 where the majority of the Supreme Court held that there were no reasonable grounds for claiming a company had suffered loss by making payments for which it received full value (but see the strong dissenting judgment of Lord Sales). Overall loss suffered by the company is not a requisite for the creditor duty to apply.
[38] *Wessely v White* [2018] EWHC 1499 (Ch) at [40].
[39] *Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd* [2002] EWHC 2748 (Ch) applying *Charterbridge Corp v Lloyds Bank Ltd* [1970] Ch. 62.

breach of duty.[40] The specific moment when the power in the members to ratify a breach is lost was variously described by the Supreme Court. Members may not ratify a breach of duty made when the company is already insolvent[41] or where the implementation of the ratification would render the company insolvent. To similar effect, the members cannot authorise or ratify a breach of duty which would jeopardise the company's solvency or cause loss to creditors.[42] The ratification principle does not apply where the company is or would be rendered insolvent.

Put slightly differently, "where the directors are under a duty to act in good faith in the interests of the creditors, the shareholders cannot authorise or ratify a transaction which is in breach of that duty."[43] Lord Briggs cites with approval a dictum of Templeman LJ in *Re Horsley & Weight Ltd*[44] which involved the effective ratification in the context of a solvent company of what would otherwise have been a breach of the duty now found in s.171:

> "If the company had been doubtfully solvent at the date of the grant to the knowledge of the directors, the grant would have been both a misfeasance and a fraud on the creditors for which the directors would remain liable."[45]

If one attempts to lay the ratification principle over the test for when the creditor duty arises, there is the potential for some inconsistency or uncertainty. The members' power to ratify is clearly lost at the far end of the scale, that is, when insolvent liquidation or administration is inevitable. At this point the directors must act in the best interests of the creditors and so the members' interests, rights and powers fall away.

At the near end of the scale, where the duty to consider the interests of the creditors is triggered, the matter may not be quite so clear cut. The duty to consider the creditors' interests along with the members' interests kicks in where the company is insolvent or bordering insolvency or where insolvency is imminent or where an insolvent liquidation or administration is probable but not inevitable. The sliding scale imagery adopted to explain the degree to which the creditors' interests must be considered is less convincing when considering whether or not a breach of duty may be ratified. Whether a breach is ratifiable is a binary decision. A breach is either capable of ratification or it is not. Although it will not be ratifiable where the company is insolvent or where the actions being ratified would cause insolvency, it would seem that ratification by the members remains a possibility where the breach was committed at other times where the creditor duty still applies. If the company is bordering on insolvency, where insolvency is imminent or where insolvent liquidation or administration is probable but not inevitable, it seems that although the creditor duty applies, it will still be possible for members to ratify the breach. It is conceded that this analysis may be playing with words. However, if the Supreme Court was of the view that whenever the creditor duty applied, the members lost their power to ratify a breach, it would have been quite simple for them to have stated this. Indeed, Lady Arden observed "the limits on ratification and the [creditor duty] do not always dovetail."[46]

[40] Lord Reed at [91]. The *Duomatic* principle may not be used to ratify a breach once the company is insolvent (see *Byers v Chen* [2021] UKPC 4 at [91]).
[41] Lord Briggs at [149].
[42] Lord Reed at [40].
[43] Lord Reed at [91].
[44] [1982] Ch 442 at 455.
[45] At [149].
[46] At [313].

It seems the better view is that once the duty to consider the interests of the creditors is triggered, the members ought to lose their power to ratify any breach. Otherwise, the effect is that the party whose interests ought to be considered (the creditors) have no say in ratifying or forgiving any breach of that duty. This would be contrary to equitable principle that only those to whom a duty is owed have the power to ratify any breach of that duty.

VIII. EFFECT OF CREDITOR DUTY ON OTHER CODIFIED DUTIES

Lord Hodge (with whom Lord Briggs and Lord Kitchen agreed[47]) discusses the extent of the creditor duty affecting the codified duties other than the s.172 duty to promote the interests of the company. It is reasonably clear that the Supreme Court's view is that the creditor duty will apply to ss.171 and 173-177 as well as s.172.

The Supreme Court observed that, in most cases, s.172(3) (the creditor duty) will be irrelevant to, for example, the duty not to abuse a director's powers under s.171.[48] It was recognised that it will be unusual or unlikely for the creditor duty to conflict or otherwise fail to co-exist with the other codified duties.[49] However, it is clear that once the creditor duty applies, its application goes beyond s.172 and "prevents any implication of the primacy of the interests of shareholders into the statement of the other general rules…".[50]

Section 170(4) provides:

> "The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties."

In discussing the proper purpose duty under section 171 Lord Hodge observed:

> "[t]his injunction to adopt common law techniques in interpreting and applying the duties suggests to me that s 171(b) should be read alongside and consistently with section 172 as a whole because it is the role of the courts to reconcile and make coherent the rules of the common law and equitable principles."[51]

Lord Hodge further commented that:

> "Section 172(1) is a modern formulation of the well-established duty of directors to act bona fide in what they consider is in the interests of the company … it is that reformulation in section 172(1) that is now relevant to the proper purpose duty in section 171(b) in place of the prior judge-made formulation and it is that reformulation which is made subject to section 172(3)."[52]

---

[47] Lord Briggs at [156].
[48] Lord Briggs at [155-156] and Lord Hodge at [225].
[49] See also Lady Arden at [294].
[50] Lord Hodge at [225].
[51] At [225].
[52] At [226].

As mentioned above in the previous section Lord Briggs quoted Templeman LJ in *Re Horsley & Weight Ltd*[53] in the context of a discussion on ratification by members only being possible where a company is solvent.[54] Although not referred to directly by the Supreme Court, Buckley LJ[55] in *Re Horsley & Weight Ltd* recognised what would have been a breach of the duty to act within the directors' powers.[56] Cumming-Bruce LJ[57] referred to a possible negligence claim[58] on the facts of the case. The point here is that the decision in *Re Horsley & Weight Ltd* identifies an inability to ratify a breach of duty due to the company's insolvent state where there is a breach of the duty under s.171((a) (to act within their powers) or under s.174 (to act with reasonable care). The inability of the members to ratify breaches of duty is not therefore limited to s.172 itself.

It is therefore tolerably clear that once the conditions for the creditor duty are satisfied, all the other codified duties must be carried out so as to consider the interests of creditors or to act in the creditors' best interests (depending upon how far advanced down the insolvency scale the company has reached).[59] The shareholders' power to ratify breaches of those other codified duties is similarly restricted as discussed above under s.172. This would include duties where a breach can only be ratified by a members' resolution. It is not immediately clear how the creditor duty co-exists with the statutory power for the board to approve a conflict of interest under s.175. It would seem that if a case involves a s.175 board ratification (made at a time when the company is insolvent or any of the other creditor duty's triggers have occurred), a court should consider whether the directors have acted consistently with their duty under s.172 in reaching their decision to ratify. It is perhaps this type of case which Lord Briggs had in mind when commenting that the other codified duties will usually "co-exist with the performance of a creditor duty."[60]

IX. CREDITOR ACTIONS FOR BREACH OF THE CREDITOR DUTY?

Once the creditor duty is engaged, *Sequana* recognises that the economic interest in the company shifts from the company's shareholders to its creditors. Prior to this shift, the shareholders have standing to bring a derivative action on behalf of the company against the directors for breach of duty.[61] As soon as the creditor duty is engaged, there appears to be no reasonable impediment to the creditors bringing a derivative action on behalf of the company.[62] The creditors may, for example, want to obtain an injunction preventing director actions being carried out in breach of the creditor duty. Creditors are permitted to bring misfeasance actions against directors on behalf of the company once it has entered liquidation under s.212 of the Insolvency Act 1986. There seems no logical reason why they should not be able to do so prior to the winding up.[63]

---

53 [1982] Ch 442.
54 At [149].
55 [1982] Ch 442 at 454.
56 The codified duty is now found in s.171.
57 [1982] Ch 442 at 455.
58 The codified duty is now found in s.174.
59 See also *Byers v Chen* [2021] UKPC 4 at [91] where the Privy Council apply the creditor duty to both the duty act in the best interests of the company and the duty to exercise powers for proper purposes only.
60 Lord Briggs at [156].
61 Under Part 11 of the Companies Act 2006.
62 It is recognised that Lady Arden's view at [267] is strongly against this suggestion. There is also admittedly the obvious limitation in the current version of the statutory derivative action under s.260 of the Act which limits such actions to members.
63 Even if a company has not entered a formal insolvency process, creditors (as victims) have standing to bring an action under s.423 Insolvency Act 1986 alleging a transaction defrauding creditors. To take matters further, the Supreme Court in *Sevilleja v*

X. OVERLAP OF CREDITOR DUTY ACTION WITH OFFICE-HOLDER ACTIONS?

The Supreme Court identified two situations where liability for breach of the creditor duty may arise and where the facts of the case may also provide grounds for separate office-holder actions.[64]

The first is where the directors have failed to consider the interests of creditors in cases where the company's insolvent liquidation is inevitable. The actions of the directors may have led to further loss to the company and so have a knock-on effect of there being fewer assets available in general to satisfy the claims of creditors in the subsequent winding-up. In such cases the directors may also be potentially liable under s.214 Insolvency Act 1986.

The second is where the directors have caused the company to pay one (or more) creditor in priority to other creditors. This type of case may also fit within s.239 Insolvency Act 1986 where the liquidator has power to attack a voidable preference.

a. Section 214 Insolvency Act 1986 and the Creditor Duty

Liability for breach of the creditor duty, following *Sequana*, arguably looks very similar to wrongful trading under s.214 of the Insolvency Act 1986. Directors of financially distressed companies who are considering a restructuring or other rescue plan must be mindful of the interests of the creditors under s.172(3) as well as be advised on other statutory provisions such as s.214. As long as the directors can point to clear evidence that they *bona fide* considered the interests of the creditors whilst formulating a rescue plan, they will have satisfied their duty under s.172(3) even if ultimately the plan fails. If this is the case, the directors will most likely also be able to rely upon the defence for a wrongful trading action found in s.214(3) by claiming that they "took every step with a view to minimising the potential loss to the company's creditors."

There may remain cases which would not fit within the requirements of s.214 but which would still support an action for breach of s.172. Lord Reed in *Sequana* helpfully explained a number of differences between s.172 and a s.214 action. His Lordship explained that the creditor duty was a modification of a director's fiduciary duty to the company and that there was no conflict between s.172 and s.214:

> "First, the points in time at which the relevant duties arise differ considerably. The fiduciary duty applies at all times, but if it is modified by the rule in *West Mercia* [the

---

Marex Financial Ltd [2020] UKSC 31 explained that the rule against reflective loss, which prevents individual shareholders from bringing actions on their individual behalf against a company's directors for breach of duty where loss is caused to the company, does not apply to creditors. Although the action in *Marex* was based in tort, the decision in *Sequana* appears to open up the possibility of an action by an individual creditor, on their own behalf, alleging individual loss has been caused by a breach of the creditor duty by a company's directors.

[64] In *Re Brothers Produce Ltd* [2022] EWHC 291 (Ch) the duty under s.172(3) was engaged in circumstances where the directors knew that a substantial judgment had been entered against the company, a winding up petition had been presented and that liquidation was imminent. The disposition of company assets after the date of the petition by the directors at an undervalue was both a void disposition under s.127 of the Insolvency Act 1986 and a breach of duty by the directors under s.172. In addition to potential office-holder actions, a director of an insolvent company may become subject to a disqualification order primarily under s.6 of the Company Directors Disqualification Act 1986 ("CDDA"). Under s.15A CDDA, where the unfit conduct of such a director has led to disqualification, it is possible for the court to order the director to compensate the creditors generally or individually for the loss caused by such unfit conduct. It is likely that there would be a high degree of overlap between the liability for breach of the creditor duty and compensation ordered under s.15A.

creditor rule] from the point when the company is bordering on insolvency or an insolvent liquidation or administration is probable, as I have suggested, it therefore applies in that modified way before the time when section 214 might become relevant, i e when a reasonably diligent and competent director would know that there was no reasonable prospect of avoiding insolvency proceedings.

Secondly, section 214 applies only where the directors know or ought to know that there is no reasonable prospect of avoiding insolvent liquidation or administration. The directors do not require such knowledge in order for the rule in *West Mercia* to be engaged.[65]

Thirdly, the contents of the duties are very different. In the much more restricted circumstances where it applies, section 214 imposes a much more onerous duty. The contrast, put shortly, is between a duty to act in good faith in the interests of the company, usually judged subjectively … and a duty to take reasonable care to minimise the potential loss to the company's creditors, judged objectively: *In re Produce Marketing Consortium Ltd* [1989] 1 WLR 745, 750.[66]

Fourthly, the remedies for a breach of the duty are different: on the one hand, the wide range of remedies available in equity for the breach of a fiduciary duty; on the other hand, a liability to make a contribution to the company's assets, at the discretion of the court.

Fifthly, proceedings can only be brought under section 214 in the event that the company is wound up, whereas there is no such restriction on the bringing of proceedings for breach of fiduciary duty.

Sixthly, the range of persons who can bring proceedings for a breach of the fiduciary duty extends beyond the liquidator, who is the only person who can bring proceedings under section 214.[67] Breach of the fiduciary duty, understood in accordance with the rule in *West Mercia*, may give rise to a remedy at the instance of the company itself, or its assignee, or a shareholder suing derivatively, or a creditor or contributory making an application under section 212 of the 1986 Act, or a liquidator or administrator.[68] That is not a technical or academic difference: the present proceedings, for example, were brought by the company's assignee, long before the commencement of insolvency proceedings in relation to the company.

Seventhly, the range of persons against whom a remedy may be sought is also wider in respect of a breach of fiduciary duty than under section 214. The latter provision only enables a remedy to be sought against a director or former director. Remedies for a breach of fiduciary duty are potentially available against a wider range of persons, including knowing recipients of payments made in breach of the duty."[69]

[65] This is not the view of the majority of the Supreme Court in *Sequana* (see Lord Briggs at [203] and Lord Hodge at [231]).
[66] Although there is clearly an objective element to s.214 and the creditor duty is mainly subjective, there can be an objective element to the creditor duty where the director did not consider creditor interests (*Colin Gwyer & Assocs Ltd v London Wharf (Limehouse) Ltd* [2002] EWHC 2748 (Ch) at [87] adopting comments made in the context of a solvent company in *Charterbridge Corporation Ltd v Lloyds Bank Ltd* [1970] Ch 62).
[67] An administrator also has the power to bring an action for wrongful trading in an administration under s.246ZB of the Insolvency Act 1986.
[68] There is no suggestion here that creditors are able to bring a derivative action on behalf of the company, but it is suggested that it would be a reasonable extension of the creditor duty to allow such an action.
[69] At [94].

Although these observations are clearly reasonable, they recognise the possibility that liability for breach of the creditor duty and for wrongful trading may arise and coincide at the same time. For example, once a company's insolvent liquidation is inevitable, continued trading at a loss would seem to lead to directors' liability both under the creditor duty and s.214. Although the way in which liability will be quantified may differ depending upon whether it is based upon the creditor duty or s.214, the likelihood is that any financial payment ordered by the court would be very similar. Although the Supreme Court have identified these differences, it might be observed that the differences are not likely to be significant in the majority of cases. In most cases, it would seem that the same facts are likely to give rise to potential liability under both causes of action.

This rather blurred picture of potential dual heads of liability may be contrasted with the clearer vision of liability identified by Vinelott J in *Re Purpoint Ltd*[70] where his Lordship found liability for losses attributable to breach of duty up to the date when insolvent liquidation was inevitable, and liability for wrongful trading for the increase in liabilities after that date. If wrongful trading was seen as an effective provision, there might be less need for the judicial extension of potential liability for directors' duties to the period after insolvent liquidation becomes inevitable. If *Purpoint* were decided today, the court would have to consider how it would avoid double counting, for breach of the creditor duty and for wrongful trading, in relation to the losses caused by the continued trading after the date when insolvent liquidation had become inevitable. This would be particularly significant in a case where the company's assets are subject to a floating charge. Under s.176ZB of the Insolvency Act 1986, the proceeds of office-holder actions (such as those brought under s.214 or s.239 of the Insolvency Act 1986) are excluded from the reach of the floating charge whilst the proceeds of an action based upon the creditor duty are available to the floating charge holder.

b. Section 239 Insolvency Act 1986 and the Creditor Duty[71]

Prior to *Sequana* the leading case on the creditor duty was *Liquidator of West Mercia Safetywear Ltd v Dodd*[72] which is factually very similar to a typical preference action under s.239 of the Insolvency Act 1986.

Lord Reed in *Sequana* identified several differences between the creditor duty and s.239:[73]

> "It follows that section 239 differs from the director's fiduciary duty to the company, applied in accordance with the rule in *West Mercia*, in important respects. First, the transaction in question must have occurred within a specified period before the commencement of insolvency proceedings. The directors' fiduciary duty, applied in accordance with the rule in *West Mercia*, is not subject to such a limitation.

[70] [1991] BCC 121.
[71] See Andrew Keay, 'Financially distressed companies, preferential payments and the director's duty to take account of creditors' interests' (2020) 136 Law Quarterly Review 52.
[72] (1988) 4 BCC 30.
[73] In addition to those identified by Lord Reed, one other difference between ss.214 and 239 on the one hand and the creditor duty on the other is that any award for a breach of the creditor duty will go to pay any secured creditor first whereas an award under either s.214 or s.239 will be distributed rateably amongst the unsecured creditors and not be available to a floating charge holder (see s.176ZB of the Insolvency Act 1986).

> Secondly, the company must have been insolvent at the time of the transaction or in consequence of it. The circumstances in which the directors' fiduciary duty applies in accordance with the rule in *West Mercia* are somewhat broader, as explained earlier.
>
> Thirdly, the company must have been influenced in giving the preference by an intention to prefer the recipient. The directors' fiduciary duty, applied in accordance with the rule in *West Mercia*, is potentially broader in scope: the directors must have exercised their powers without believing in good faith that the transaction in question was in the interests of the company, understood in accordance with the rule in *West Mercia*. The fact that one creditor is paid in preference to others, at a time when the company is insolvent or bordering on insolvency, will not be a breach of fiduciary duty if the directors believe in good faith that they are acting in the interests of the company, understood in accordance with the rule in *West Mercia*: for example, because they have decided on that basis that it is in the company's interests to continue trading, and therefore need to pay particular creditors: see, for example, *In re Sarflax Ltd*[1979] Ch 592, 602, and *Westpac* 270 FLR 1, at paras 2635–2636.
>
> Fourthly, the remedy under section 239 is designed to restore the company's position to what it would have been if the preference had not been given. The relief available for a breach of fiduciary duty is liable to differ ….
>
> Fifthly, section 239 can provide a remedy only if there are insolvency proceedings. No such limitation applies to the directors' fiduciary duty, applied in accordance with the rule in *West Mercia*.
>
> Sixthly, proceedings under section 239 can be brought only by a liquidator or administrator. Proceedings for breach of fiduciary duty can be brought by a wider range of claimants, as explained at para 94(6) above[74].
>
> Seventhly, proceedings under section 239 are normally brought against the recipient of the preference, although section 241(2) enables orders to be made against other persons, and such an order has been made where the person had received a benefit from the preference: *In re Sonatacus Ltd* [2007] 2 BCLC 627. Proceedings for breach of fiduciary duty are brought primarily against the directors responsible, although a third party might also be liable in some circumstances, such as a case of knowing receipt."[75]

Again, there is no disputing the differences identified by Lord Reed, but his Lordship's observations are perhaps an indictment of the drafting of s.239 and its flaws. If s.239 was seen as an effective remedy for instances where directors have permitted differential treatment in favour of some creditors over others, there would be no need for the creditor duty to be developed in the way it has. The judicial creation of an alternative to s.239 in the form of the creditor duty may suggest that it may be time for Parliament to reconsider the effectiveness of s.239 and the mischief it is aimed at remedying.

[74] The sixth point listed at [94] when Lord Reed was comparing wrongful trading with the creditor duty.
[75] At [101].

XI. CONCLUSION

The Supreme Court's judgment in *Sequana* has brought some welcome clarification of the creditor duty. It is now clear when the creditor duty is triggered and what its content is. Directors must 'consider' the interests of creditors (along with members' interests) where a company is insolvent or bordering insolvency but must 'act in the interests of creditors,' to the exclusion of the members' interests, once insolvent liquidation or administration becomes inevitable.

Although helpful, *Sequana* does raise some further questions. The sliding scale by which directors have to consider increasingly the interests of creditors is a helpful image. When a company is insolvent or bordering on insolvent but where things are not yet clearly irretrievable, the directors should consider the interests of creditors as well as shareholders. Where things get worse and the company reaches the point where insolvent liquidation (or administration) is inevitable, at this point on the sliding scale, the shareholders lose any economic interest in the company and the directors must thereafter act only in the interests of the creditors.[76]

So far, so clear. A few further observations may be made. Despite the Act's codification of directors' duties only referring explicitly to the creditor duty in s.172, it now appears that the creditor duty is applicable to all the codified duties. This in itself may not cause too much confusion but does open the door to the possibility of creditors bringing derivative actions on behalf of the company. Take for example a case where a company's directors are about to act in breach of s.171 by exercising their powers for an improper purpose. If the company's financial position is that insolvent liquidation is inevitable, is there now the possibility of a creditor bringing an action for an injunction to prevent such a breach? The shareholders would no longer have any economic interest in the company and so would not have any interest to protect. It seems entirely reasonable that the court should allow a creditors' derivative action.

The Supreme Court has highlighted the similarities between the creditor duty and certain office-holder actions available under the Insolvency Act 1986. It is common for office-holders (and their assignees) to bring hybrid actions based on the same facts for both office-holder actions and breach of the creditor duty. There is an obvious inefficiency in permitting different causes of action based upon the same facts, leading to similar consequences if successful.[77]

Now is a good time to reconsider the creditor duty and its codification. There may be a good reason for its existence, or it may be that the available office-holder actions in insolvency can be amended to cover the same territory without any need for duplication. If the codification of directors' duties were to be revisited by policy makers, it may be possible to introduce some clarity around which types of breach of duty are ratifiable and which are not. Similarly, some policy consideration may be given to the introduction of a creditors' derivative action if the creditor duty is to survive. Without such a right in the creditors to enforce the creditor duty the

---

[76] In cases considering restructuring plans under Part 26A of the Companies Act 2006, the courts have recognised that often the only creditors of an insolvent company who are likely to receive any payment in a formal insolvency proceeding are the secured creditors who are seen as the economic owners of the company with the value of the equity shareholding in the company being valued at nil (see *e.g. Re Virgin Active Holdings Ltd* [2021] EWHC 814 (Ch) at [242], [249] and [266]-[267] and *Re Prezzo Investco Ltd* [2023] EWHC 1679 (Ch) at [35-37].

[77] There are also procedural and fee inconsistencies with the commencement of such hybrid actions. See *Manolete Partners plc v Hayward and Barrett Holdings Ltd* [2021] EWHC 1481 (Ch) where Chief ICCJ Briggs commented at [60]: "I reach these conclusions with regret. The criticisms of the procedure are well made by Mr Curl. They do not promote a convenient or sensible or economical use of court resource. In modern parlance the result fails to ensure that claims of this nature are dealt with expeditiously, allotting an appropriate share of the court's resources. An office-holder and assignee of claims will be forced to issue claims arising from an insolvency using different procedures, in different lists within the Business and Property Courts, with a risk that without a transfer they will be case managed, at least, by different judges although the claims arise out of the same facts."

law appears to have created a duty of imperfect obligation with no-one (prior to an office-holder being appointed) being able to enforce the creditor duty in the twilight period immediately prior to an insolvent liquidation or administration.

There is not much new in this whole debate. In 1895 the Davey Committee[78] considered recommending a provision which would hold directors liable for losses to creditors in certain circumstances. The Davey Committee looked back at various earlier attempts to legislate on the issue which had occurred at various times in the late nineteenth century. The Davey Committee recommended the adoption of provisions not dissimilar to our modern-day sections 214 and 239. In a precursor to similar comments by the Supreme Court in *Sequana*,[79] the Davey Committee recognised that the interests of creditors and members, whilst diverse, were not necessarily adverse or in conflict.[80] Significantly, the clause in the draft Bill annexed to the Davey Committee report referred to situations where directors incurred debts which they had no reasonable or probable expectation that the company would be able to pay.[81] In such cases the Davey Committee recommended the directors be personally liable "to pay or discharge" those debts. The language used, in terms of a liability to discharge such debts, suggests a direct liability to the creditors in question. Over a century later, the law in this area has developed but, it is argued here, remains unsatisfactory. It is perhaps time to reconsider such direct liability to creditors.

---

[78] Report of the Departmental Committee appointed by the Board of Trade to inquire what amendments are necessary in the Acts relating to joint stock companies incorporated with limited liability under the Companies Acts 1862 to 1890 (1895, C 7779) ("Davey Committee").

[79] See *e.g.* Lord Briggs at [155-156], Lord Hodge at [225] and Lady Arden at [294].

[80] Davey Committee at [7].

[81] Clause 11 of the draft bill found in the Appendix to the Davey Committee report.