

公报文章

Directors' duties on the precipice of insolvency: a brief overview of *BTI 2014 LLC v Sequana SA*

董事于濒临无力偿债时的责任：*BTI 2014 LLC 诉 Sequana SA* 一案概要

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Introduction

The United Kingdom Supreme Court (the "UKSC") recently delivered its eagerly anticipated judgment in *BTI 2014 LLC v Sequana SA and others* [2022 UKSC 25] ("*Sequana*"). The reasoning in *Sequana* will be highly persuasive in the Cayman Islands, as well as other common law jurisdictions.

Sequana is a helpful decision for at least the following reasons:

- It confirms the conventional view that the fiduciary duty of directors to act in good faith and in the best interests of the Company applies not only to shareholders but also, where the company is insolvent, is bordering on insolvency or an insolvent liquidation or administration is probable, to act in or consider the interests of creditors (the "creditors' interest duty").
- *Sequana* is the first time the UKSC has adjudicated on the circumstances in which directors must consider the interests of the company's creditors, whether such an obligation can be triggered before the company is insolvent and whether the shareholders can ratify a potential breach of the creditors' interest duty.

Background

Arjo Wiggins Appleton Limited ("*AWA*") paid dividends in December 2008 (the "December dividends") and May 2009 (the "May dividends") of approximately €578 million to its parent company *Sequana SA* by way of a set-off against debts owed to *Sequana SA*. At the time of the respective payments, *AWA* was solvent, had ceased trading and had one significant contingent indemnity liability for clean-up costs and damages due to the pollution of the Lower Fox River in the United States.

引言

英国终审法院最近就 *BTI 2014 LLC 诉 Sequana SA 及其他* [2022 UKSC 25] 一案（“*Sequana* 案”）颁布一份万众期待的判决。*Sequana* 案的法理将于开曼群岛以至其他普通法司法管辖区成为极具说服力的法律根据。

Sequana 案是一项有用的判决，原因如下：

- 该案不但确认董事对股东负有受信责任而须真诚以公司最佳利益行事的传统观点，同时指出董事于公司无力偿债或濒临无力偿债或可能进行无力偿债清盘或管理时，须考虑债权人利益或以其行事（“债权人利益责任”）。
- *Sequana* 为英国终审法院审理的首宗案件裁定董事于哪些情况下必须考虑公司债权人利益，不论债权人利益责任可否于公司无力偿债前触发，以及股东可否认可对债权人利益责任的潜在违反。

背景

Arjo Wiggins Appleton Limited（“*AWA*”）分别于 2008 年 12 月及 2009 年 5 月以抵销拖欠其母公司 *Sequana SA* 债务的方式，向 *Sequana SA* 派付约 5.78 亿欧元股息（“12 月股息”及“5 月股息”）。派付股息时，*AWA* 有偿债能力。*AWA* 当时已停止交易，并有一项重大或然弥偿负债，为污染美国福克斯河下游的清洁成本及损害赔偿所致。

Prior to the dividend payments, AWA's debts included an investment contract and insurance policies collectively worth approximately US\$350 million. AWA also had an outstanding debt of €585 million to Sequana SA.

The payment of the dividends was challenged on the grounds that (i) they were paid in violation of part 23 of the UK Companies Act 2006 (the "Companies Act"); (ii) the directors of AWA had breached their duty to have regard to the interest of creditors at the time payments were made; and (iii) the payment of the dividend fell within section 423 of the Companies Act.

AWA initially filed the claim against Sequana SA, but BTI 2014 LLC ("BTI") was substituted as Claimant as AWA had assigned the claims to BTI. BAT Industries plc ("BAT"), the company formed by BTI filed a separate claim, in its capacity as a potential creditor of AWA, under section 423 of the Companies Act. Section 423 of the Companies Act contains provisions to protect creditors (actual or potential) from debtors that execute transactions with the aim of putting assets beyond the creditors' reach or otherwise prejudicing the creditors' interest.

First Instance decision

Rose J dismissed the December dividends claim, which was not appealed. The learned judge also dismissed the May dividend claim but gave judgment against Sequana SA in relation to the section 423 claim. The learned judge ordered Sequana SA to pay the sum of US\$138.4million. Sequana SA filed an appeal in the Court of Appeal. It challenged the findings in relation to the section 423 claim and the dismissal of the claim against the directors that they had breached their duty to consider the interest of the company's creditors.

The Court of Appeal's ("COA") decision

The COA dismissed each of the appeals, except for Sequana SA's cross-appeal on the issue of the interest rate in the section 423 claim. The COA held that, in relation to section 423 of the Companies Act, a dividend is a transaction and the transaction was prejudicial to the creditors. In relation to the creditors' interest duty, the COA affirmed the lower court's decision to reject BTI's claim that the creditors' interest duty is triggered by a "real as opposed to a remote, risk of insolvency." The COA, however, accepted that, in a different case, the said duty may be triggered by circumstances falling short of insolvency.

The UKSC decision

BTI argued in the UKSC that the creditors' interest duty exists where the company is solvent, but there is "a real but not remote risk of its becoming insolvent at some point in the future." BTI submitted that the common law had recognised this duty on directors and that the position was codified by section 172(3) of the Companies Act. The UKSC dismissed BTI's appeal and concluded that the creditors' interest duty is not engaged merely because the company faces "a real and not remote risk of

派付股息前，AWA 的债务包括一份投资合约及保单（合共价值约 3.5 亿美元）。AWA 亦未向 Sequana SA 偿还 5.85 亿欧元债务。

股息派付受到挑战的理据包括：(i) 有关派付违反英国 2006 年公司法（“公司法”）第 23 部分；(ii) AWA 董事于派付股息时违反考虑债权人利益的责任；及 (iii) 有关股息派付属公司法第 423 条的范围。

AWA 最初针对 Sequana SA 提诉。然而，鉴于 AWA 将申索转予 BTI 2014 LLC（“BTI”），故 BTI 取代 AWA 成为申索人。BAT Industries plc（“BAT”），为 BTI 组成的公司，根据公司法第 423 条，以 AWA 潜在债权人的身分另行提出申索。公司法第 423 条规定，债务人不得执行旨在令资产超出债权人触及范围或损害债权人利益的交易，以保障实际或潜在债权人。

原审法院判决

Rose 法官驳回 12 月股息的申索（亦无被上诉）。该法官同时驳回 5 月股息的申索，但就第 423 条申索作出 Sequana SA 败诉的判决，命令 Sequana SA 支付 1.384 亿美元款项。Sequana SA 向上诉法院上诉，对第 423 条申索的裁决以及针对董事违反考虑公司债权人利益责任的申索被驳回提出异议。

上诉法院判决

除 Sequana SA 就第 423 条申索利率提出的交叉上诉外，上诉法院驳回其他上诉部分。上诉法院判定，就公司法第 423 条而言，派付股息属于交易，而有关交易损害债权人利益。就债权人利益责任而言，上诉法院维持下级法院原判，拒绝 BTI 的声请，即债权人利益责任因“确切而非渺茫的无力偿债风险”而触发。然而，上诉法院接纳，上述责任可在未至於无力偿债的情况下触发。

英国终审法院判决

BTI 于英国终审法院声称，即使公司有偿债能力，如“于未来某个时间有确切而非渺茫的无力偿债风险”，也负有债权人利益责任。BTI 指出，普通法承认此董事责任，而公司法第 172(3) 条也确立有关观点。英国终审法院驳回 BTI 上诉，总结债权人利益责任并非仅因公司面临“确切而非渺茫的未来无力偿债风险”而产生，并接纳其可于公司“无力偿债或濒临无力偿债”时触发。

insolvency.” The UKSC accepted that it could be engaged where the company is “insolvent or bordering on insolvency.”

AWA was solvent, and therefore could not be said to be “insolvent or bordering on insolvency,” at the time the dividends were paid. In fact, AWA only became insolvent ten years later. Consequently, the directors were not obliged to consider the interests of AWA’s creditors at the material time.

Takeaways

Some key points from the judgment, which are relevant to directors of Cayman Islands companies, are:

- It is now firmly established, at the highest level in the UK, that directors have a duty to have regard to and/or act in accordance with the interests of creditors.
- The general rule is that directors owe fiduciary duties to the company to act in good faith in the interests of the company, which for practical purposes is tantamount to the interests of the shareholders. However, the general rule is modified where “the directors know or ought to know that the company is bordering on insolvency or an insolvent liquidation or administration is probable.” This is the point at which the duty to consider the interest of creditors arises.
- Consequently, the creditors’ interest duty is subsumed in the fiduciary duties owed by the directors to the company and therefore is not a free-standing duty owed directly to the creditors.
- Directors, in fulfilling their fiduciary duties, are required to engage in a balancing exercise of the shareholders’ interest versus the creditors’ interest based on the financial position of the company. Therefore, directors should ensure that they are properly informed about the company’s financial affairs at all times.
- The creditors’ interest duty is justified on the premise that their financial and other interests become paramount as the company enters the zone of insolvency.
- Even if the directors lawfully pay dividends, they are not precluded from liability to the company for breach of the creditors’ interest duty and the shareholders cannot ratify the breach of duty.

The decision is highly relevant to the Cayman Islands, particularly in light of recent macro-economic trends and activity. Directors should continue to take care to ensure they comply with their fiduciary duties in all circumstances. This decision reinforces that, where a company’s fortunes are descending towards insolvency, directors must ensure that they take into account the interests of the company’s creditors and should be encouraged to take independent advice at an early stage.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

AWA 于派付股息时有偿债能力，而并非“无力偿债或濒临无力偿债”。事实上，AWA 于十年后无力偿债。是故，董事于关键时间并无责任考虑 AWA 债权人的利益。

重点

以下为判决中与开曼群岛公司董事有关的部分重点：

- 英国的最高法院机关现确认，董事有责任考虑债权人利益并据其行事。
- 一般情况下，董事对公司负有真诚以公司利益行事的受信责任（即实际上等同股东利益）。然而，如“董事知悉或应知悉公司濒临无力偿债或可能进行无力偿债清盘或管理”，此通则则有所不同。考虑债权人利益的责任将在此情况下产生。
- 因此，董事对公司所负受信责任纳入了债权人利益责任。债权人利益责任不再为直接对债权人负有的独立责任。
- 董事履行其受信责任时，须基于公司财务状况平衡股东及债权人的利益，故董事应确保其一直获妥为通知公司的财务状况。
- 债权人利益责任的存在依据为，债权人的财务及其他利益于公司无力偿债时变得至关重要。
- 即使董事合法派付股息，他们并无就违反债权人利益责任排除对公司所负责任，股东亦不得认可有关责任的违反。

此判决与开曼群岛有密切关系，在最近的宏观经济趋势及活动方面尤甚。董事应继续确保在所有情况下遵守其受信责任。此判决进一步证实，如公司因财富减少步向无力偿债，董事必须确保其顾及公司债权人的利益，并建议董事于早期征求独立建议。

本文不应被视为法律建议或法律意见，其内容并非详尽无遗，仅可作为概览及一般参考资料。感谢您的垂阅。

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