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Directors and officers update

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Creditor duty

In **BTI 2014 LLC v Sequana SA** the Supreme Court considered the issue of the so-called 'creditor duty'.

The case concerned a company called AWA. In May 2009 AWA's directors caused it to distribute a dividend of €135m to its only shareholder, Sequana SA. The dividend was distributed at a time when AWA was solvent; however, it had long-term pollution-related liabilities which gave rise to a real risk that AWA might become insolvent at some time in the future. AWA went into insolvent administration in October 2018. BT1 2014 LLC (pursuant to an assignment by AWA), brought a claim alleging the directors' decision to distribute the dividend was in breach of its duty to consider the creditors' interests as there had been a real risk of the company becoming insolvent in the future.

The Supreme Court confirmed the existence of a Creditor Duty noting that a director's duty to act in good faith in the company's interests did mean, in certain circumstances, that the company's interests are taken to include the interests of its creditors as a whole. However, it stressed that this was only a 'modifying rule' which meant that the duty was owed by the director to the company, not its creditors. The duty to act in the interests of the company must reflect that both shareholders and creditors have an interest, and those interests may not always align. When the duty will be triggered will depend on the facts, though 'imminent insolvency' would be sufficient.

As always, directors must act cautiously when considering whether the creditor duty has been complied with as the court will take into consideration what directors knew, or ought to have known, about the financial affairs of the company at the time a decision was taken.

A copy of our article on the case can be found [here](#) and a full copy of the decision (in which several separate judgments were delivered) can be found [here](#).

ClientEarth v Shell

D&O insurers should keep a close eye on the claim that has recently been filed by environmental law charity ClientEarth against Shell.

ClientEarth, in its capacity as a shareholder, has filed a claim against Shell's board of directors alleging that the board are mismanaging climate risk and failing to implement an energy transition strategy that aligns with the 2015 Paris Agreement. In a first, the directors are being sued personally for failing to properly manage the risks associated with climate change.

If successful, this could have significant implications on how companies and their directors are implementing plans to cut emissions. The claim has significant financial backing and is considered to be the first case in the world seeking to hold board directors directly liable.

Shell do not accept the allegations and are expected to defend the claim.

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