CORPORATE GOVERNANCE IN THE CONTEXT OF INSOLVENT COMPANIES

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Abstract: Corporate governance has been for many years an important aspect of company law attracting much academic interest. The extensive literature on corporate governance has not often dealt with insolvent companies. Yet governance remains critical for both financially distressed companies which have not yet entered into formal insolvency proceedings and insolvent companies which are subject to formal insolvency proceedings. This article looks at particular aspects of governance involving the board of directors in the former scenario and insolvency office-holders in the latter. It surveys the law and practice relating to distressed or insolvent companies, from the time before actual insolvency through to the time of insolvency proceedings. This is done through a review of Keay, Walton and Curl's *Corporate Governance and Insolvency: Accountability and Transparency*.

Keywords: *corporate governance; insolvency; directors' duties; liquidators' duties*

(A review of Andrew Keay, Peter Walton and Joseph Curl QC, *Corporate Governance and Insolvency: Accountability and Transparency* (Cheltenham: Edward Elgar, 2022))

I. Introduction

Corporate scandal and corporate failures have long been an unfortunate concomitant of commerce and enterprise. The first companies legislation[1] was enacted in England in the 1840s precisely to deal with fraud and the problems faced by investors in the market crash and widespread collapse of joint stock companies that occurred at the end of the 1830s.[2] Basic precepts of corporate governance, such as transparency and accountability, have been a goal of company law from these early times, such as through mandatory disclosure of company information in prospectuses and annual accounts and by treating directors as fiduciaries. Yet it was only in the latter half of the twentieth century that corporate governance became an established field of study. Since the 1970s much has been written on corporate governance, covering both theory on the importance of corporate governance and practice in connection with optimal systems and mechanisms for promoting good

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1 Joint Stock Companies Registration and Regulation Act 1844 (7 & 8 Vict, c 110).

2 Bishop C Hunt, *The Development of the Business Corporation in England 1800–1867* (Cambridge: Harvard University Press, 1936), 89–97.

governance. But problems in corporate governance persist, as illustrated by the Asian Financial Crisis of 1997, the major corporate collapses in the United States in the early 2000s (such as Enron) and the Global Financial Crisis of 2008.

Corporate governance remains topical and an imperative in economic life. Yet, although there is extensive literature on corporate governance, there has been relatively little written on corporate governance for insolvent companies or companies in financial distress. This aspect of corporate governance is the focus of a new book from Keay, Walton and Curl, entitled *Corporate Governance and Insolvency: Accountability and Transparency*.[3] This review article examines the importance of corporate governance in the context of insolvent companies with reference to Keay, Walton and Curl's book. Section II looks at the relevance of corporate governance to insolvent companies. Section III discusses governance issues for companies which are insolvent or otherwise in financial distress in the period before entering into formal insolvency proceedings such as liquidation. As the board of directors remains in control of the company in that period, there is a focus on the duties of directors, in particular the duty to take into account creditors' interests. Section IV then examines corporate governance in companies subject to formal insolvency proceedings, in particular in relation to the duties of insolvency office-holders.

II. Corporate Governance and Its Relevance to Insolvency

It is well recognised that poor corporate governance standards could often lead to insolvency. So it has been said that good corporate governance and corporate insolvency are "opposite sides of the same coin".[4] Scholars and policymakers dealing with corporate governance issues have traditionally focused on governance of solvent companies only and have not placed much emphasis on governance of companies in financial difficulty.[5] This perhaps is not surprising, because good governance ensures that corporations are managed responsibly and have a healthy growth, while insolvency law may be thought to be concerned not with continuation of the company but with liquidation and winding-up of an enterprise.

However, as various scholars have now emphasised, issues of governance remain critical for insolvent companies.[6] The connection between corporate governance and insolvency is the subject of Keay, Walton and Curl's book *Corporate Governance and Insolvency: Accountability and Transparency*.[7] The concept of

3 Andrew Keay, Peter Walton and Joseph Curl QC, *Corporate Governance and Insolvency: Accountability and Transparency* (Cheltenham: Edward Elgar, 2022).

4 Roman Tomasic, "Raising Corporate Standards in Response to Corporate Rescue and Insolvency" (2009) 1 *Corporate Rescue and Insolvency* 5.

5 David Milman, *Governance of Distressed Firms* (Cheltenham: Edward Elgar, 2013), 26.

6 Lynn M LoPucki and William C Whitford, "Corporate Governance in the Bankruptcy Reorganisation of Large, Publicly Held Companies" (1993) 141 *University of Pennsylvania Law Review* 669; and David A Skeel Jr, "Rediscovering Corporate Governance in Bankruptcy" (2015) 87 *Temple Law Review* 1015.

7 Andrew Keay, Peter Walton and Joseph Curl QC, *Corporate Governance and Insolvency* (n. 3).

"corporate governance" has been defined in different ways.[8] For the purposes of their book, Keay, Walton and Curl adopt the following definition: "the rules, relationships, systems and processes within and by which authority is exercised and controlled in companies for the benefit of pertinent stakeholders".[9] In the case of solvent companies, shareholders are often considered to be the primary stakeholders. At a minimum, they form one of the categories of stakeholders for whose benefit the business corporation is managed. Thus, in the context of solvent companies, the concept of corporate governance is said to "delineate the rights and responsibilities of each primary stakeholder and the design of institutions and mechanisms that induce or control board directors and management to serve best the interests of shareholders and other stakeholders of a company".[10]

Yet proper governance and stewardship of a company remains of the utmost importance for companies which slide into insolvency and even for those which enter into formal insolvency proceedings such as liquidation. Agency problems and conflicts still arise for both companies in financial distress and those under a formal insolvency regime. Questions as to who managers or controllers of the company should represent continue to be pertinent for insolvent companies[11] albeit that the framework and context are altered. When a company becomes insolvent, conflicts may arise between shareholders who seek to preserve their capital, creditors who seek repayment, employees and managers who wish to retain their positions, suppliers who attempt to maintain commercial links and customers who are concerned about pre-paid goods and services not yet delivered or the continued availability of warranties and other after-sale services.[12] As Keay, Walton and Curl point out, some of these conflicts also carry over when a company enters an insolvency regime, and further, the interests of the liquidator or other insolvency office-holder come into play as well, with their concerns for payment of their remuneration and expenses.[13]

The central concerns of corporate governance are accordingly still critical in the context of insolvent companies. In this context, it has been suggested that insolvency law involves "corporate governance under financial distress".[14] A notion of "insolvency governance" may be adopted, with such a notion being characterised

8 See, eg, Julian Roche, *Corporate Governance in Asia* (London: Routledge, 2005), 4–13.

9 Andrew Keay, Peter Walton and Joseph Curl QC, *Corporate Governance and Insolvency* (n. 3), 33.

10 Simon S M Ho, "Corporate Governance in Hong Kong: Key Problems and Prospects" (CUHK Centre for Accounting Disclosure and Corporate Governance Research Paper 1–59, 2003), 1, available at https://ssrn.com/abstract=440924

11 Lynn M LoPucki and William C Whitford, "Corporate Governance in Bankruptcy Reorganisation" (n. 6), 672.

12 Mike Ross, "Directors' Liability on Corporate Restructuring" in Charles Rickett (ed), *Essays on Corporate Restructuring and Insolvency* (Wellington: Brookers, 1996), 176.

13 Andrew Keay, Peter Walton and Joseph Curl QC, *Corporate Governance and Insolvency* (n. 3), 49.

14 Horst Eidenmüller, "Comparative Corporate Insolvency Law" (European Corporate Governance Institute—Law Working Paper 319/2016, Oxford Legal Studies Research Paper 30/2017 1–30, 2016), 2, available at https://ssrn.com/abstract=2799863

"as a special form (or case) of 'corporate governance'".[15] The nature of corporate governance changes with the onset of insolvency not only because of the different interests of stakeholders that may come into play but also because the goals and objectives in management and operation of companies will change. Development and growth of a business will no longer be the primary concern, with objectives shifting to asset preservation, restructuring and rescue of the business where possible or, if not, orderly administration of winding-up.

Transparency and accountability of corporate controllers remain of the utmost importance in management of the company's assets and in choosing the appropriate course of action upon insolvency. As Keay, Walton and Curl put it: "The issue of governance during a time of insolvency is concerned with the person(s) who are directing and influencing processes and who is able/permitted to make the critical decisions that affect the results of these processes."[16] The key players are the board prior to the advent of an insolvency regime and the insolvency office-holder after such a regime has commenced.[17] Until the powers of the board of directors are divested upon entering formal insolvency proceedings controlled by an external insolvency office-holder, there continues to be a need for directors to act properly in the interests of stakeholders. Where an insolvency officer-holder takes the reins, such as a liquidator in a winding-up of a company, the insolvency office-holder is intended to be independent and impartial; but there must still be mechanisms in place to ensure that they are accountable in their roles in mediating between the divergent economic interests and the conflicts that arise in the administration of the company and its assets in the formal insolvency process.

Increasing recognition of the importance of corporate governance in the context of insolvent companies is reflected in recent insolvency law reform proposals put forward by the UK government. In 2018, the Department for Business, Energy and Industrial Strategy (BEIS) issued a consultation paper entitled *Insolvency and Corporate Governance*,[18] examining proposals to improve the governance of companies when they are in or approaching insolvency. Following the public consultations, the UK government indicated that it would take forward specific proposals which include the following: strengthening the framework relating to dividend payments; ensuring greater accountability of directors of parent companies in the sale of insolvent subsidiary companies; enhancing recovery powers of insolvency office-holders in relation to transactions or schemes and conferring powers on the

15 *Ibid*.

16 Andrew Keay, Peter Walton and Joseph Curl QC, *Corporate Governance and Insolvency* (n. 3), 49.

17 *Ibid*.

18 BEIS, *Insolvency and Corporate Governance* (20 March 2018). This consultation followed earlier ones in 2016 and 2017 separately dealing with insolvency law reform and corporate governance reform: Insolvency Service, *A Review of the Corporate Insolvency Framework: A Consultation on Options for Reform* (May 2016); and BEIS, *Corporate Governance Reform: Government Response to the Green Paper Consultation* (August 2017).

Insolvency Service to investigate directors of companies which have been dissolved without undergoing an insolvency procedure.[19]

There have now also been some publications focusing on corporate governance in distressed companies in the UK.[20] Keay, Walton and Curl's new book[21] is a welcome addition to the literature in this area.

The major aspects of governance of insolvent companies are dealt with by Keay, Walton and Curl in their book, covering both situations: before an insolvent company enters into a formal insolvency regime and after a company becomes subject to an insolvency regime. Chapter 2 introduces corporate governance while Ch. 3 introduces insolvency law. Chapter 4 examines extensively governance by company directors where the company is insolvent or approaches insolvency. Chapter 5 looks at the options for a company in financial distress, namely formal and informal corporate rescue possibilities or liquidation. Chapter 6 returns to focus on the position of directors when the company is subject to formal insolvency procedures. Chapters 7 and 8 then examine in detail the role of insolvency office-holders, their duties and control and supervision of insolvency practitioners. Chapters 9 and 10 look at creditors and liquidation committees and special managers in insolvency regimes. Finally, Ch. 11 deals with the role of the Insolvency Service, the executive agency within BEIS which bears responsibility for the regulation of the insolvency profession and leading the government's insolvency law policy.

Keay, Walton and Curl mainly focus on the laws and legal and regulatory framework in administration of insolvent companies. The topic of corporate governance spans different academic disciplines and is not confined to law. However, the law plays a fundamental role in corporate governance as it sets out foundational rights and obligations which are crucial for good governance of companies. Thus, it is apt to conceive of corporate governance as being composed of a "legal core" that covers common law and legislation, operating together with a self-regulation "penumbra",[22] in providing for optimal standards of governance in companies. Keay, Walton and Curl's contribution to the literature on corporate governance lies in the important area of the legal core as applicable to companies in insolvency.

Even without specific reference to corporate governance concerns, much of the law as affecting insolvent companies is in substance aimed at ensuring accountability and good governance in the administration of insolvent companies. Thus, many of the legal rules and principles discussed in Keay, Walton and Curl's book,

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19 BEIS, *Insolvency and Corporate Governance: Government Response* (26 August 2018). This response paper also set out the government's proposals in response to the 2016 review of the corporate insolvency framework. See n. 18. For preliminary implementation of some of the reforms, see the Corporate Insolvency and Governance Act 2020.

20 See for example David Milman, *Governance of Distressed Firms* (n. 5) and Marjan Marandi Parkinson, *Corporate Governance in Transition: Dealing with Financial Distress and Insolvency in UK Companies* (Cham: Springer International Publishing, 2018).

21 Andrew Keay, Peter Walton and Joseph Curl QC, *Corporate Governance and Insolvency* (n. 3).

22 John Farrar and Pamela Hanrahan, *Corporate Governance* (Australia: LexisNexis Butterworths, 2017), paras. 1.2, 1.7–1.8.

such as directors' duties, wrongful trading, fraudulent trading, liquidators' duties and control over liquidators by creditors and the court, are topics typically covered in standard texts on insolvency law and practice. A question may be asked as to whether explicit recognition of the relevance of corporate governance in insolvent companies is important as a matter of substance.

It is submitted that there is value in locating governance-related insolvency laws within the rubric of corporate governance. Classification and categorisation of legal concepts assist in providing clarity of understanding.[23] By drawing out and highlighting the aspects of insolvency law which are relevant to good governance, it is possible to understand, analyse and assess the relevant laws in light of corporate governance theories and precepts.

In this regard, Keay, Walton and Curl focus on the elements of transparency and accountability, which are two critical features of corporate governance in general.[24] Transparency involves openness and timely disclosure of accurate and relevant information,[25] while accountability involves being held to account and being responsible for one's conduct.[26] Transparency and accountability are crucial to corporate governance in ensuring corporate responsiveness to stakeholder interests and in providing checks on the power and control wielded by corporate controllers.[27] In the insolvency context, legal rules relevant to issues of governance, such as directors' duties on insolvency, statutory provisions for invalidating particular pre-liquidation transactions and status and duties of insolvency office-holders, ought to be analysed and assessed against the objectives of transparency and accountability. As Keay, Walton and Curl argue, directors and insolvency office-holders must be given authority "to get things done" but there must be appropriate checks on their authority.[28] Understanding the role of specific legal rules in company and insolvency law in upholding transparency, accountability and good governance ensures that the law operates at an optimal level for achieving the end-goals in the administration of insolvent companies. An important contribution that Keay, Walton and Curl make is to emphasise and develop these points.

III. Governance before Entering Formal Insolvency Proceedings

Keay, Walton and Curl also make a valuable contribution by providing practical guidance to directors. As a company encounters financial difficulties, it is critical

23 John C P Goldberg, "Introduction: Pragmatism and Private Law" (2012) 125 *Harvard Law Review* 1640, 1652–1655.

24 Andrew Keay, Peter Walton and Joseph Curl QC, *Corporate Governance and Insolvency* (n. 3), 38–48.

25 *Ibid.*, 43.

26 *Ibid.*, 45.

27 *Ibid.*, 39.

28 *Ibid.*, 48.

for directors to be aware of the specific legal duties that arise in the insolvency context and of the legal options for addressing the company's circumstances. In this respect, Ch. 4 of the book is helpful for directors in practice as it discusses major considerations for corporate decision-makers when the company enters the "twilight zone" prior to entering an insolvency regime. For example, directors need to be aware of their legal duty to take into account creditors' interests and to be aware of their potential personal liabilities for wrongful trading or fraudulent trading under the Insolvency Act 1986.[29] These aspects, and others, are discussed in Ch. 4. Due to the focus of the book on an array of corporate governance issues in insolvency, the discussion in Ch. 4 on each of these areas of law may not be of the depth that is covered in specialist insolvency law works. But it provides a sufficient discussion to guide directors.

The fiduciary duty of directors to take into account creditors' interests when a company is insolvent or near insolvency has become prominent in recent times. The duty is aimed at ensuring accountability of directors to creditors, but the scope of the legal duty is still being worked out by the courts. Keay, Walton and Curl discuss the main aspects of this duty in paragraphs 4.043 to 4.112 of their book. Following publication of their work, the UK Supreme Court in October 2022 handed down its decision dealing with the duty to take into account creditors' interests in the landmark case of *BTI 2014 LLC v Sequana SA* (*BTI v Sequana*).[30] It is well established now that the duty to take into account creditors' interests is a duty owed to the company and not directly to creditors.[31] However, it is convenient to refer to the duty as the "creditor duty".[32]

The importance of the creditor duty is reflected in Keay, Walton and Curl's observation that the duty "effectively incorporates and leads to one of the greatest, if not the greatest, consideration of corporate governance issues".[33] In recent decades, courts in various common law jurisdictions, including the UK,[34] Australia,[35] New Zealand[36] and Hong Kong,[37] have held that the duty of directors to act in good faith in the interests of the company requires directors to take into account the interests of the general body of creditors where the company is insolvent or nearing insolvency. In the UK, with the codification of the main common law duties of

29 Insolvency Act 1986 s. 213 (fraudulent trading) and s. 214 (wrongful trading).

30 [2022] UKSC 25, [2022] 3 WLR 709 (SC).

31 See *Yukong Line Ltd of Korea v Rendsburg Investments Corp of Liberia (No. 2)* [1998] 1 WLR 294; and *BTI v Sequana* (n. 30), [112].

32 *BTI v Sequana* (n. 30), [112], [205] (Lord Briggs, with whom Lord Kitchin agreed).

33 Andrew Keay, Peter Walton and Joseph Curl QC, *Corporate Governance and Insolvency* (n. 3), 116.

34 *West Mercia Safetywear Ltd v Dodd* [1988] BCLC 250 (CA); *Re HLC Environmental Projects Ltd* [2014] BCC 337; and *Bilta (UK) Ltd v Nazir (No.2)* [2015] 2 WLR 1168 (SC), [123]–[126].

35 *Walker v Wimborne* (1976) 137 CLR 1(HC); *Kinsela v Russell Kinsela Pty Ltd* (1986) 4 NSWLR 722 (CA); and *Westpac Banking Corp v Bell Group Ltd (No.3)* (2012) 89 ACSR 1 (CA).

36 *Nicholson v Permakraft (NZ)* [1985] 1 NZLR 242 (CA).

37 *Tradepower (Holdings) Ltd v Tradepower (Hong Kong) Ltd* (2009) 12 HKCFAR 417 (CFA); *Moulin Global Eyecare Holdings Ltd v Olivia Lee Sin Mei* [2013] 1 HKLRD 744; and *Cyberworks Audio Video Technology Ltd v Mei Ah (HK) Co Ltd* [2020] HKCFI 398.

directors in the Companies Act 2006, the common law duty to act in the interests of the company was replaced with the statutory duty to promote the success of the company under s. 172(1).

Although the existence of the creditor duty has been widely recognised both in the UK and other common law jurisdictions,[38] the issue had not been dealt with squarely by the apex court of the UK until the decision in *BTI v Sequana*. That case involved a company (AWA) which distributed dividends of €135 million to its parent company and sole shareholder (Sequana). This dividend payment extinguished most of a debt Sequana owed to AWA. The dividend payment was made out of distributable profits of the company and therefore complied with Pt. 23 of the Companies Act 2006 and with the common law rules on maintenance of capital. At the time of the payment of the dividends, AWA was solvent but had some long-term contingent liabilities in respect of environmental clean-up operations in the United States, the extent of which was uncertain, and which gave rise to a real risk, although not a probability, that it might become insolvent at an uncertain but not imminent date in the future. As it turned out, the environmental liabilities were much greater than originally estimated and AWA entered into insolvent administration in 2018. The appellant, BTI 2014 LLC, sought, as assignee of AWA's claims, to recover from AWA's directors the amount of the dividends paid out on the basis that their decision for the distribution of the dividends was in breach of the creditor duty.[39]

The Supreme Court unanimously affirmed the existence of a common law "creditor duty" as part of the duty of directors to act in good faith in the company's best interests. The Supreme Court also held that the creditor duty is now statutorily recognised by s. 172(3) of the Companies Act 2006 (which provides that the duty to promote the success of the company for the benefit of the members as a whole has effect subject to any rule of law requiring directors, in certain circumstances, to consider or act in the interests of the company's creditors).[40]

The creditor duty has been understood for some time as part of the duty to act in good faith in the interests of the company. Ordinarily, the interests of the company mean the interests of the shareholders as a whole, but where the company is insolvent or close to insolvency the interests of the company are in reality the interests

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38 Andrew Keay, Peter Walton and Joseph Curl QC, *Corporate Governance and Insolvency* (n. 3), 117.

39 For the facts of the case, see *BTI v Sequana* (n. 30), [115], [350]; and see also the outline of the facts in the English Court of Appeal decision in *BTI 2014 LLC v Sequana SA* [2019] EWCA Civ 112, [2019] Bus LR 2178 (CA), [7]–[20].

40 *BTI v Sequana* (n. 30), [11] and [69] (Lord Reed), [138] and [153] (Lord Briggs, with whom Lord Kitchin agreed), [207]–[209] (Lord Hodge), [250], [276], [344] (Lady Arden). Although the court was unanimous in agreeing that the creditor duty is preserved by s. 172(3), there was a technical difference in view amongst the judges as to how s. 172(3) achieves that. Lord Briggs (with whom Lord Kitchin agreed) (at [153]–[154]) and Lord Hodge (at [209], [224]) considered that Parliament had specifically intended to adopt the creditor duty under the common law and did so via s. 172(3), whereas Lord Reed (at [72]) and Lady Arden (at [344], [404], [445]) took the view that s. 172(3) was neutral, with Parliament intending to leave it to the courts to determine whether the creditor duty exists under the common law.

of the creditors.[41] This is because it is now the creditors' money which is at stake. In an insolvent winding-up, shareholders rank after creditors and may go empty handed. In contrast, actions of the directors, which lead to the financially distressed company losing further funds or other assets, will prejudice creditors since further depletion of assets will mean that creditors will receive less in a winding-up. In *BTI v Sequana*, the Supreme Court agreed with this conception of the creditor duty. The court emphasised that the respective economic interests of shareholders and creditors are critical in determining where the company's interests lie.[42] Although creditors always have an economic interest in the company, their interests are adequately protected so long as the company remains solvent and is able to pay its debts. When a company is amply solvent, the shareholders have the greater financial stake: "It is the shareholders whose interests are affected by fluctuations in [the company's] profits and reserves, as they are the persons entitled to share in its distributions and its surplus assets."[43] But when the company veers towards insolvency, the relative importance of the creditors' economic interest as against the economic interest of the shareholders increases and it is this which gives rise to the directors' duty to give separate and proper consideration to the interests of the creditors.[44]

Notwithstanding general endorsement of the creditor duty in case law, there has been some academic critique of the duty.[45] For example, it has been argued that creditors always bear the risk of the debtor not being able to pay its debts, as underscored by the limited liability doctrine.[46] In these circumstances, creditors can adequately protect themselves through carefully negotiated contractual provisions.[47] If there are abuses by directors to the detriment of creditors, insolvency law protections (such as fraudulent trading or unfair preferences) together with the capital maintenance rules and conventional duties of directors would be sufficient to protect creditors.[48] Some of this critique was noted in *BTI v Sequana*. Without venturing into the deeper policy

41 *Kinsela v Russell Kinsela Pty Ltd* (n. 35); *Brady v Brady* [1987] BCC 535 (CA), 537; and *Colin Gwyer and Associates Ltd v London Wharf (Limehouse) Ltd* [2003] 2 BCLC 153, [74].

42 (n. 30), [56]–[59] (Lord Reed), [147] (Lord Briggs), [245] (Lord Hodge), [256]–[258] (Lady Arden).

43 *Ibid*., [47] (Lord Reed).

44 *Ibid*., [246] (Lord Hodge).

45 See, eg, L S Sealy, "Directors' Duties: An Unnecessary Gloss" (1988) 47 *Cambridge Law Journal* 175; Sarah Worthington, "Directors; Duties, Creditors' Rights and Shareholder Intervention" (1991) 18 *Melbourne University Law Review* 121; Stephen M Bainbridge, "Much Ado About Little? Directors' Fiduciary Duties in the Vicinity of Insolvency" (UCLA Law & Economics Research Paper Series, Research Paper No. 05–26, 2005), available at http://ssrn.com/abstract=832504; Hon Justice K M Hayne AC, "Directors' Duties and a Company's Creditors" (2014) 38:2 *Melbourne University Law Review* 795; and Peter Watts, "Why as a Matter of English-law Principle Directors Do Not Owe a Duty of Loyalty to Creditors Upon Insolvency" [2021] *Journal of Business Law* 103.

46 K M Hayne, "Directors' Duties and a Company's Creditors" (n. 45), 813.

47 *Ibid*., 814.

48 *Ibid*., 815; L S Sealy, "Directors' Duties: An Unnecessary Gloss" (n. 45), 175, 177; Peter Watts, "Why As a Matter of English-law Principle Directors Do Not Owe a Duty of Loyalty to Creditors Upon Insolvency" (n. 45), 120–121.

or theoretical debate,[49] the judges in the case considered that the existence of the creditor duty is sufficiently established in the case law and sufficiently well founded on principle for it to be affirmed by the Supreme Court.[50]

It is submitted that the court was correct in affirming the existence of the duty. The contract between the company and a creditor is important in providing *ex ante* compensation to the creditor for risks of default. However, such contracts are formed against the backdrop of insolvency law, the objectives of which include maximisation of the return to creditors and the provision of a fair and equitable system for distribution of assets among creditors.[51] Also, liquidators in a winding-up have duties to act in the interests of those who have economic interests in the company's assets, namely the creditors in the case of insolvent companies.[52] Accordingly, it seems that creditors can legitimately expect that directors ought not to unreasonably run down the company's assets when the company is insolvent. The expectation of the parties must be that an insolvent company that cannot be rehabilitated would be put into liquidation, with due legal protection afforded to creditors under insolvency law. Excessive risk-taking or other conduct that unreasonably depletes a company's assets following insolvency would give rise to uncompensated risks for creditors. It is arguable that the creditor duty can, in the vein of fiduciary duties in general,[53] provide an efficient legal rule for minimisation of agency costs for companies in insolvency.

There is, of course, a range of other legal remedies that address problems in the misapplication of company assets by directors, including when a company is insolvent. However, Lord Hodge was right in *BTI v Sequana* to assert that there would be a lacuna in the law in the absence of the creditor duty.[54] For instance, capital maintenance rules restricting the return of capital to shareholders, including the rules on distributions and dividends, would not prevent distributions to shareholders where financial statements show distributable profits even though the company has since fallen into insolvency or the distribution would cause the company to become insolvent. It is because of the potential inadequacy of the capital maintenance doctrine to protect creditors in such circumstances that the Supreme Court held in *BTI v Sequana* that the creditor duty can apply to a decision of directors to pay a dividend which is otherwise lawful.[55] Also, a critical importance of the creditor duty is that a

49 In *BTI v Sequena* (n. 30), [56]. Lord Reed observed: "This is not the place to explore that debate, let alone to attempt to resolve it."

50 *Ibid*., [138] (Lord Briggs). See also [56] (Lord Reed).

51 Kristen van Zwieten, *Goode on Principles of Corporate Insolvency Law* (London: Sweet & Maxwell, 5th ed., 2018), para. 2–01.

52 *Chinese Strategic Holdings Ltd v James Wardell & Lui Chau Yuet* [2019] HKCFI 1236, [24]; Andrew Keay, Peter Walton and Joseph Curl QC, *Corporate Governance and Insolvency* (n. 3), 236.

53 See, eg, Robert Cooter and Bradley J Freedman, "The Fiduciary Relationship: Its Economic Character and Legal Consequences" (1991) 66 *New York University Law Review* 1045.

54 [2022] UKSC 25, [2022] 3 WLR 709, [238].

55 *Ibid*., [110], [160]–[162], [247], [342].

breach of the duty cannot be ratified by shareholders.[56] In cases for example where directors of an insolvent company take excessive risks (which may be in the interests of shareholders but not of creditors), it is likely that there could be breach of the duty of directors to act with due care, skill and diligence.[57] But if shareholders are able to ratify the breach of the duty of care, then there might not be any remedy available against the directors in the absence of the creditor duty.

In any event, as Lady Arden argued in *BTI v Sequana*, the fact that there is a range of other remedies available in insolvency law "underscores the need to have a range of sanctions to ensure directors act properly while there is an asymmetry in the governance of the company".[58] Accordingly, her Ladyship opined, the existence of a panoply of insolvency remedies "is an argument for having more, not less, of such remedies".[59] The creditor duty is advantageous in that it "provides a more transparent and more direct protection for creditors" and, further, "the proposition that on insolvency directors should consider creditors' interests must surely represent the basis of good practice".[60] Lady Arden's comments emphasise the importance of the creditor duty from the governance perspective. This is in line with Keay, Walton and Curl's observation that the duty deals with one of the greatest issues, "if not the greatest" issue, of corporate governance for insolvent companies.[61]

In *BTI v Sequana*, the Supreme Court affirmed the lower courts' decisions that there was no breach of the creditor duty by the directors on the facts of the case. This conclusion turned on the issue of the time as to when the duty is triggered. As Keay, Walton and Curl note, the point at which directors are required to consider creditors' interests "is, arguably, the most contentious and vague issue that is related to the duty".[62] In earlier cases, the courts held that the creditor duty applies where the company is already insolvent but also accepted that the duty applies even before actual insolvency. Different formulations have been expressed, such as where the company is doubtfully solvent or near insolvency,[63] on the verge of insolvency[64] or where there is a real risk of insolvency.[65]

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56 *Nicholson v Permakraft (NZ)* (n. 36), 254; *Tradepower (Holdings) Ltd v Tradepower (Hong Kong) Ltd* (n. 37); and *BTI v Sequana* [2022] UKSC 25, [2022] 3 WLR 709, [91], [149], [312].

57 Companies Act 2006 s. 174. In *BTI v Sequana* [2022] UKSC 25, [2022] 3 WLR 709, [330] Lady Arden considered that such situations involving a very risky transaction as a last throw of the dice would involve a breach of the duty of care; Lord Briggs disagreed: [238], [244].

58 *BTI v Sequana* [2022] UKSC 25, [2022] 3 WLR 709, [336].

59 *Ibid*., [336].

60 *Ibid*.

61 Andrew Keay, Peter Walton and Joseph Curl QC, *Corporate Governance and Insolvency* (n. 3), 116.

62 *Ibid*., 122.

63 *Nicholson v Permakraft (NZ) Ltd* [1985] 1 NZLR 242 (CA), 249; *Colin Gwyer and Associates Ltd v London Wharf (Limehouse) Ltd* [2003] 2 BCLC 153, [74]; *Tradepower (Holdings) Ltd v Tradepower (Hong Kong) Ltd* (n. 37), [130].

64 *Re New World Alliance Pty Ltd* (1994) 51 FCR 425 (FC), 444; *Colin Gwyer and Associates Ltd v London Wharf (Limehouse) Ltd* (n. 63).

65 *Grove v Flavel* (1986) 43 SASR 410 (SC).

When the matter in *BTI v Sequana* was before the Court of Appeal, the court took the view that references to "near insolvency" or "on the verge of insolvency" suggest a temporal test involving the notion that actual insolvency would occur within a very short time.[66] The court considered that such a test sets the bar too high and might not cover the situation where although the company may be able to pay its debts as they fall due for some time—for perhaps a considerable time to come—insolvency is nonetheless likely to occur and decisions taken now may prejudice creditors when the likely insolvency occurs.[67] The court also rejected the "real risk of insolvency test". In the court's view, this test looks at whether there is a real as opposed to a remote risk of insolvency and sets a threshold that is lower than the other formulations.[68] Instead, the court held that the correct test is whether the directors know or should know that the company is or is likely to become insolvent, and in this context, "likely" means "probable".[69]

The Supreme Court agreed with the Court of Appeal's view that the creditor duty is not engaged at a time where there is only a real risk of insolvency.[70] Similar to the Court of Appeal, the Supreme Court regarded this formulation as denoting a point in time where insolvency is not yet probable or likely even though there is a real risk of insolvency at some future time.[71] The court considered that the predominant economic interest would normally still be held by the shareholders at this point and that it is unnecessary for separate consideration of the creditors' interests yet.[72] In the present case, AWA was not actually or imminently insolvent at the time of the payment of the dividends, nor was insolvency probable. There was a real risk of insolvency in the medium-term to long-term future because of the large uncertainties affecting the value of its contingent liabilities and of an important class of its unrealised assets (the insurance portfolio).[73] The court unanimously held that that was insufficient to engage the creditor duty.[74]

Although not strictly necessary to decide for the purposes of the case, the Supreme Court set out its views on the appropriate test in order to provide guidance for directors on when the creditor duty is triggered. The court unanimously held that the duty applies when the company is insolvent or bordering on insolvency, or when an insolvent liquidation or administration is probable or where the transaction in question would place the company in one of those situations.[75] The majority considered that the duty would only be engaged if the directors knew or ought to have known of the company's insolvency or probability of going into insolvent

66 *BTI 2014 LLC v Sequana SA* [2019] BCC 631 (CA).
67 *Ibid*., [219].
68 *Ibid*., [214]–[215].
69 *Ibid*., [220].
70 *BTI v Sequana* (n. 30), [83], [199], [247], [250].
71 *Ibid*., [178], [193].
72 *Ibid*., [83], [191].
73 *Ibid*., [178].
74 *Ibid*., [111], [199], [247], [349].
75 *Ibid*., [12], [88], [203], [231], [279].

liquidation or administration,[76] but the minority preferred to leave open the question of whether this is essential.[77]

The earliest trigger point for application of the creditor duty suggested by the Supreme Court is different to that set out by the Court of Appeal. Under the Supreme Court's test, it is not sufficient that the company is likely to become insolvent at some point in the future.[78] Lord Reed considered that such a likelihood may objectively exist before the interests of shareholders and creditors are in practice likely to diverge and, further, that such a test, applied with the benefit of hindsight, might impose an impracticable burden upon directors.[79] The reason why the interests of shareholders and creditors might not yet diverge is that, as suggested by Lord Briggs, insolvency (whether balance sheet insolvency or cash-flow insolvency) at a particular time is not necessarily permanent or fatal to the success of the company.[80] For example, start-ups are often balance-sheet insolvent before their invention or business product is sufficiently developed to be brought to market so as to generate revenue or goodwill value. Or companies may experience short-term cash-flow insolvency due to temporary illiquidity at a time when particular debts mature. In both situations, there could well be reasonable prospects for the company to trade out of insolvency.[81] What is critical in affecting the economic interests of creditors is the prospect of the creditors having to share in distributions in an insolvent liquidation. Creditors are not the main stakeholders in the company before the time of insolvent liquidation, but insolvency itself creates the very real risk of insolvent liquidation.[82] For these reasons, the court considered that the appropriate trigger for the creditor duty is when the company is insolvent (or imminently insolvent) or where insolvent liquidation or administration is itself probable but not any earlier time.

As regards the content of the creditor duty, namely what the directors should do when the duty applies, Keay, Walton and Curl, writing before the Supreme Court decision in *BTI v Sequana*, expressed the view that under the UK case authorities, directors must regard creditors' interests as paramount when the company is insolvent, in the sense that the interests of creditors must have priority over other interests (though it does not mean that this necessarily excludes consideration of other interests).[83] The Supreme Court has now held differently. In *BTI v Sequana*, the court considered that where the company is insolvent, or bordering on

76 *Ibid*., [203] (Lord Briggs, with whom Lord Kitchin agreed), [231] (Lord Hodge).

77 *Ibid*., [90] (Lord Reed), [281] (Lady Arden).

78 *Ibid*., [89], [202].

79 *Ibid*., [90].

80 *Ibid*., [120]. A company is insolvent under the balance sheet test of insolvency if the value of the company's assets is exceeded by the company's liabilities. A company is insolvent under the cash-flow or commercial test of insolvency if the company is unable to pay its debts as they fall due.

81 *Ibid*., [120].

82 *Ibid*., [192]–[193].

83 Andrew Keay, Peter Walton and Joseph Curl QC, *Corporate Governance and Insolvency* (n. 3), 125–126.

insolvency, but is not faced with an inevitable insolvent liquidation or administration, the directors should consider the interests of creditors, balancing them against the interests of shareholders where they may conflict. At this point, shareholders still have economic interests in the company since insolvent liquidation or administration is not inevitable. Hence creditors' interests are not yet to be regarded as paramount in necessarily overriding the interests of shareholders. But the greater the company's financial difficulties, the more the directors should prioritise the interests of creditors.[84] Where an insolvent liquidation or administration is inevitable, the creditors' interests do then become paramount as the shareholders cease to retain any valuable interest in the company, with the creditors now converted into the main economic stakeholders in the company.[85]

In practical terms, Keay, Walton and Curl state that giving pre-eminence to creditors' interests means that directors ought to act for the advantage of creditors or at least not to act in ways which are disadvantageous to creditors.[86] Directors need to consider the impact of decisions on the ability of the creditors to recover the sums due to them in the company. Others have observed that directors would need to refrain from excessive risk-taking, from entering into transactions for which full value is not received and from improper diversion of assets (particularly to directors or members).[87] What needs to be done depends on the circumstances. In some cases, it could be reducing expenditure or not commencing a project unless it was adequately funded. There could be situations where it is appropriate to seek refinancing or restructuring to enable a return to profitable trading. In other situations, it may be necessary to put the company in administration or liquidation.[88]

There is a suggestion that, in various respects, the law has diverged between different common law jurisdictions regarding the creditor duty. In relation to the trigger for the duty, Langford and Ramsay have noted that the "real and not remote risk of insolvency" test is favoured in Australia, with such a point in time capable of arising even before there is likelihood, on the balance of probabilities, of the company becoming insolvent.[89] In Hong Kong, the Court of First Instance[90] had expressed agreement with the "likelihood of insolvency" test from the English Court of Appeal decision in *BTI v Sequana* before the Supreme Court decision was handed down. As for the contents of the duty, there are Australian case authorities which support the view that the duty only requires directors to treat the position of creditors with due deference but does not demand that the interests of creditors

84 *BTI v Sequana* (n. 30), [81]–[82], [164], [176]–[177], [303].

85 *Ibid*., [81], [165], [176]–[177], [247], [291], [306].

86 Andrew Keay, Peter Walton and Joseph Curl QC, *Corporate Governance and Insolvency* (n. 3), 128.

87 Rosemary Teele Langford and Ian Ramsay, "The Contour and Content of the 'Creditors' Interests Duty'" (2021) 21 *Journal of Corporate Law Studies* 85, 106.

88 Andrew Keay, Peter Walton and Joseph Curl QC, *Corporate Governance and Insolvency* (n. 3), 128–129.

89 Rosemary Teele Langford and Ian Ramsay, "The Contour and Content of the 'Creditors' Interests Duty'" (n. 87), 91–94, citing, eg *Termite Resources NL (in liq) v Meadows (No.2)* (2019) 135 ACSR 45 (FC).

90 *Cyberworks Audio Video Technology Ltd v Mei Ah (HK) Co Ltd* (n. 37).

be paramount or determinative.[91] However, the plainer it is that it is the creditors' money that is at risk, the lower may be the risk to which the directors can justifiably expose the company.[92]

One factor that may lead to some divergence in the common law creditor duty in different common law jurisdictions is the different legislative policies as regards insolvent trading. In the UK, the "wrongful trading" provision in s. 214 of the Insolvency Act 1986 applies. Under that provision, a director may be personally liable to make contributions to the company's assets in an insolvent liquidation where, at some time before commencement of winding-up, the director knew or ought to have known that there was no reasonable prospect that the company would avoid going into insolvent liquidation, unless the director had taken every step with a view to minimising the potential loss to the company's creditors as the director ought to have taken. This section does not mean that there can be liability merely where a company continues to trade or incur debts while insolvent.[93]

The policy underpinning s. 214 was taken into account by the Supreme Court in *BTI v Sequana* in determining the scope of the creditor duty. Lord Briggs observed that the statutory scheme in the Insolvency Act 1986 (of which s. 214 is a central plank) is the dominant element in the UK's framework of insolvency law and judge-made rules must be accommodated within the statutory scheme.[94] His Lordship considered that focusing on the risk of insolvency rather than risk of inevitable liquidation would run contrary to s. 214 and the statutory insolvency scheme and would make s. 214 largely redundant.[95] Creditors' interests should not be regarded as paramount merely upon the company entering insolvency but only where there is inevitable liquidation or administration.[96]

Australia has a statutory provision on insolvent trading instead of wrongful trading. Section 588G of the Corporations Act 2001 (Commonwealth of Australia) provides that a director may be liable for insolvent trading where the company incurs a debt at a time when the company is insolvent or where the company's incurring of a debt renders the company insolvent, and at the time the debt was incurred, there are reasonable grounds for suspecting that the company is insolvent or would so become insolvent. Thus, the Australian legislative policy is to focus on the time of insolvency, with directors encouraged to put the company into a formal insolvency regime as soon as the company is insolvent rather than a potentially later time when insolvent liquidation is inevitable. If the legislative insolvency regime is taken into account in determining the scope of the common law creditor duty, then there is justification for Australian courts to adopt a stricter approach in

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91 *Bell Group Ltd v Westpac Banking Corp (No.9)* (2008) 70 ACSR 1 (CA), [4438]–[4439]; *Westpac Banking Corp v Bell Group Ltd (No.3)* (n. 35), [2049].

92 *Kinsela v Russell Kinsela Pty Ltd* (n. 35), 733.

93 *Re Sherborne Associates Ltd* [1995] BCC 40; Andrew Keay, Peter Walton and Joseph Curl QC, *Corporate Governance and Insolvency* (n. 7), 139.

94 *BTI v Sequana* (n. 30), [123].

95 *Ibid*., [172].

96 *Ibid*., [172], [174].

giving greater protection to creditors. This can well mean that it would be appropriate under Australian law for an earlier trigger point for the duty (namely a real risk of insolvency) and for paramountcy to be given to creditors' interests at least when the company becomes insolvent (if not earlier).[97]

IV. Governance during Formal Insolvency Proceedings

Where a company enters into a formal insolvency procedure, it is also crucial for directors to know what their position and responsibilities are. Chapter 6 of Keay, Walton and Curl's book usefully outlines directors' powers and obligations in the different types of procedures. As noted by Keay, Walton and Curl, directors remain in office in the cases of "debtor-in-possession" procedures (moratorium, company voluntary arrangement and schemes of arrangement) and also where an external insolvency office-holder takes control in administration or voluntary liquidation.[98] The scope of the powers and duties of directors differ depending on the procedure involved but even where they no longer have management powers (as in the case of administration or liquidation, unless the relevant authority allows otherwise[99]), directors have a duty to provide information and to co-operate in the insolvency proceedings.[100]

In the case of compulsory liquidation, directors engaged as employees (namely executive directors) would have their employment automatically terminated from the date of publication of the winding-up order, as is the case of employees of the company generally.[101] The case of *Measures Brothers Ltd v Measures*[102] is often cited for the principle that directors also automatically vacate office as director when the company enters compulsory liquidation. Keay, Walton and Curl appear to accept this position.[103] It is debatable though whether *Measures Brothers* authoritatively sets out this principle. The majority of the Court of Appeal affirmed the first instance decision of Joyce J that a restraint of trade covenant could not be enforced against a director following the company's entry into compulsory liquidation. In their judgments, Buckley LJ and Kennedy LJ stated that directors are displaced from office upon winding-up,[104] but Buckley LJ's judgment was a dissenting one. The other judge in the majority, Cozens-Hardy MR, did not address this point. As noted by Joyce J at first instance, whether the director actually ceased office was

97 Cf. Rosemary Teele Langford and Ian Ramsay, "The Contour and Content of the 'Creditors' Interests Duty'" (n. 87), 107.

98 Andrew Keay, Peter Walton and Joseph Curl QC, *Corporate Governance and Insolvency* (n. 3), 195–198.

99 Insolvency Act 1986 ss. 91(2) and 103 (voluntary liquidation); Sch. B1, para. 64 (administration).

100 *Ibid.*, 193.

101 *Re General Rolling Stock Co* (1866) LR 1 Eq 346; *Re Beeton & Co Ltd* [1913] 2 Ch 279.

102 [1910] 2 Ch 248.

103 Andrew Keay, Peter Walton and Joseph Curl QC, *Corporate Governance and Insolvency* (n. 3), 198.

104 [1910] 2 Ch 248, 256 (Buckley LJ), 261–262 (Kennedy LJ).

not in issue.[105] It appears that the *ratio* of the majority in the Court of Appeal decision was simply that the company would be denied equitable relief because it was unable to perform its side of the bargain by continuing the employment of the director.[106] In the earlier English decision of *Madrid Bank Ltd v Bayley*,[107] Blackburn J (with whom Shee J agreed) had held that compulsory liquidation leads to cessation of the powers of directors but not automatic vacation of office. Australian courts have held likewise.[108] One advantage of this approach is that it militates against the unnecessary inconvenience of having to reappoint the directors should the liquidation be stayed or terminated.[109]

In any event, the insolvency office-holder (administrator or liquidator, as the case may be) takes over the management powers of directors of companies in all forms of external administration. With the insolvency office-holder taking over the reins, it is imperative for the office-holder to be accountable for their conduct in the administration or liquidation of the company. Chapters 7 and 8 of Keay, Walton and Curl's book provide valuable discussion of the duties of insolvency office-holders and the controls on their decision-making by creditors and the court.

Private insolvency practitioners who are appointed as insolvency office-holders in an administration or liquidation are typically accounting or legal professionals with requisite insolvency expertise. In the UK, Pt. XIII of the Insolvency Act 1986 sets out qualifications of insolvency practitioners and provides for their regulation and oversight. As mentioned by Keay, Walton and Curl in the section on recent reform initiatives at the end of Ch. 8,[110] the UK Insolvency Service in 2019 sought views from the public for the purpose of their review of the current regulatory landscape.[111] The Insolvency Service has since put forward for consultation particular proposals for reform, including the following: introduction of a single independent government regulator of insolvency practitioners (to replace the current model of self-regulation by four Recognised Professional Bodies with the Insolvency Service as only an oversight regulator), strengthening of the regulatory regime through the introduction of a regime for authorisation and regulation of firms that offer insolvency services (as opposed to simply regulating individual insolvency practitioners as at present), introduction of a public register of insolvency practitioners and firms and a formal process for compensation by errant practitioners or firms where errors or omissions lead to financial loss for parties involved in the

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105 *Measures Bros v Measures* [1910] 1 Ch 336, 345.

106 [1910] 1 Ch 336, 254, 262.

107 (1866) LR 2 QB 37.

108 *Austral Brick Co Pty Ltd v Falgat Constructions Pty Ltd* (1990) 8 ACLC 1011; *Lord Corp Pty Ltd v Green* (1991) 22 NSWLR 532, 541–543; *McAusland v Deputy Commissioner of Taxation* (1994) 12 ACSR 432.

109 *McAusland v Deputy Commissioner of Taxation* (n. 108), 449.

110 Andrew Keay, Peter Walton and Joseph Curl QC, *Corporate Governance and Insolvency* (n. 3), 346.

111 Insolvency Service, *Call for Evidence – Regulation of Insolvency Practitioners: Review of Current Regulatory Landscape* (July 2019).

insolvency proceedings.[112] At the time of writing, the UK government is analysing public feedback on the proposals.

Problems of conflict of interest often arise on the part of insolvency office-holders, as discussed by Keay, Walton and Curl.[113] Difficulties in this area are of course not unique to administrations or liquidations in the UK. A recent decision from Hong Kong, *Re GTI Holdings Ltd*,[114] illustrates potential problems of conflict and questionable conduct on the part of liquidators. The case concerned a company incorporated in the Cayman Islands which had its principal place of business in Hong Kong and which was listed on the Stock Exchange of Hong Kong. The company was "grossly insolvent"[115] and a petition was presented in Hong Kong for compulsory winding-up of the company. There were multiple adjournments of the petition for 20 months to enable restructuring, but the Hong Kong court (Chan J) finally ordered the company to be wound up in Hong Kong after it was unable to put forward a viable scheme of arrangement that had the support of creditors. At the time, the company had also been in provisional liquidation in the Cayman Islands and, following the Hong Kong winding-order being made, the Cayman provisional liquidators obtained a winding-up order in the Cayman court (with the provisional liquidators then appointed as joint official liquidators (JOLs)), as well as a letter of request issued from the Cayman court to the Hong Kong court for the purpose of recognition of the JOLs in Hong Kong.

In the past decade, the Court of First Instance of the High Court in Hong Kong (in particular, in the judgments of Harris J) has applied and developed the principles in *Singularis Holdings Ltd v PricewaterhouseCoopers*[116] to grant recognition and assistance to foreign insolvency office-holders under the common law. Assistance has been given for foreign office-holders to exercise certain powers in Hong Kong to facilitate the foreign liquidation or provisional liquidation, including for the purpose of corporate rescue.[117] In the present case, the JOLs applied *ex parte* before Harris J outside of the pre-existing winding-up proceedings in Hong Kong for recognition and assistance to re-pursue a debt restructuring plan.

The matter was subsequently transferred to Chan J, who was the presiding judge in the winding-up proceedings. The JOLs then abruptly abandoned the application. However, Chan J directed the hearing to proceed for the purpose of determining the propriety of the JOLs' application and costs. Her Ladyship was scathing about the JOLs. She considered that the JOLs engaged in misconduct in seeking to undermine the Hong Kong winding-up order and in re-opening the issues on

112 Insolvency Service, *The Future of Insolvency Regulation* (21 December 2021).

113 Andrew Keay, Peter Walton and Joseph Curl QC, *Corporate Governance and Insolvency* (n. 3), 322–330.

114 [2022] 4 HKLRD 339.

115 *Ibid.*, [2].

116 [2015] AC 1675, [2014] UKPC 36 (PC).

117 See, eg, *Re BJB Career Education Co Ltd* [2017] 1 HKLRD 113; *Re Agritrade Resources Ltd* [2020] 4 HKLRD 616; and *Re FDG Electric Vehicle Ltd* [2020] 5 HKLRD 701.

the viability of the restructuring scheme "through the backdoor".[118] Chan J was of the view that the JOLs committed serious and deliberate breaches of their duties, with their conduct falling far short of the standard expected of liquidators who are officers of the court.[119] The JOLs' application to Harris J had been unusual as there was no precedent case for a Hong Kong court to grant assistance to a foreign liquidator to act independently of the Hong Kong provisional liquidators or liquidators for restructuring purposes where a winding-up order had already been made against the company in Hong Kong.[120] Against this background, Chan J considered that the JOLs had acted improperly because of the following:

(i) misrepresentations made to the Cayman court to procure orders for their appointment as JOLs and issue of the letter of request (including in relation to the viability of the restructuring scheme which the Hong Kong court had already rejected and to the likelihood of the Hong Kong court now granting assistance to enable their pursuit of the restructuring);[121]

(ii) an element of "forum shopping" in that the JOLs elected not to make their recognition application before the judge (Chan J) presiding over the winding-up proceedings but only before Harris J, with the subsequent abandonment of the application when the proceedings were transferred to Chan J;[122]

(iii) misrepresentations and non-disclosure of material matters in the initial *ex parte* application to Harris J (including representations inconsistent with the determinations of the Hong Kong court in making the winding-up order).[123]

Chan J made costs orders against the JOLs and also directed that the JOLs not be entitled to recover costs and remuneration from the assets of the company.[124] Although the court did not make express findings on the point, it seems that the court may well have had serious misgivings as to whether the JOLs were acting in the interests of the company and the creditors as a whole or whether they were acting only in the interests of the party (a proposed investor) who was funding them. The case is a stark illustration of the potential conflicts of interests which may occur on the part of insolvency office-holders in formal insolvency proceedings.

V. Conclusion

Keay, Walton and Curl's book is an important contribution to the literature on corporate governance from a theoretical and practical perspective. The book is right

118 *Re GTI Holdings Ltd* (n. 114), [3].
119 *Ibid*., [30], [63], [66].
120 *Ibid*., [45], [62].
121 *Ibid*., [36]–[52].
122 *Ibid*., [53]–[56].
123 *Ibid*., [57]–[63].
124 *Ibid*., [64]–[66].

to analyse administration of insolvent companies within the framework of corporate governance. Although the objectives or goals in the operation of an insolvent company may differ from those of solvent firms, governance, including requirements for accountability and transparency, remains critical in the administration of insolvent companies both before and after entry into formal insolvency proceedings. Keay, Walton and Curl also provide useful practical guidance for directors and insolvency office-holders in discussing and analysing the "legal core" in governance issues for insolvent companies. This legal core includes, importantly, the duties of directors and insolvency office-holders. There have been some significant developments in these areas since the publication of Keay, Walton and Curl's book, as highlighted earlier. These include the landmark decision of *BTI v Sequana*, with the UK Supreme Court affirming the existence of the directors' duty to take into account creditors' interests and providing some elaboration on the nature and scope of the duty. Although the decision has provided valuable clarification of the law in various respects, there are still unresolved aspects of the duty which need to be worked out by the courts in future. For both judge-made law and statute law, future developments are expected for enhancement of governance of insolvent companies before and after entry into formal insolvency regimes.