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A Comparative Exploration of Directors' Duty to Creditors in Company Operations

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Abstract

Directors are statutorily enabled to enter transactions on behalf of the company, including contracting with creditors. The contracts executed by the directors are generally binding on the company and not on the directors as such, even as the directors who are the custodians of the company's assets and powers are by law mandated to preserve the sanctity of such contracts. The creditors, who are mostly investors, rely on the business skills and integrity of the directors to realise the expected returns on their investment. The reliance of creditors on directors, whose business decisions they are unable to influence, highlights the vulnerability of creditors' interests. The quest to protect creditors' interests galvanises the need to impose enforceable duties on directors to consider creditors' interests while conducting the company's affairs. But such duties are not generally expressed in the same light as the duties owed by the directors to the company. This article, through a doctrinal comparative analysis focusing on South Africa, Lesotho, and the United Kingdom, explores when the law considers the directors' obligation to protect the interests of creditors as an integral part of the directors' responsibility to promote the interests of the company in the ordinary course of discharging their managerial responsibilities.

Keywords: *Company interests, Creditor interests, Creditor Protection, Director duty, Shareholder interests.*

1. Introduction

The traditional view is that directors primarily owe their duties to the company to act in the best interests of the company. The company's best interests are judicially described as synonymous with the collective interests of all the company's shareholders.[1] A distinction is usually drawn by the courts between shareholders and creditors when defining the

[1] See *BTI 2014 LLC v Sequana SA & Ors* [2022] UKSC 25 (05 October 2022) paras 21-22 where Lord Reed summerised the extant common law jurisprudence on that concept stating that "[e]ven after the implications of the separate existence of the company became more clearly established, the courts were slow to treat the company as a distinct entity with interests of its own, and to develop rules for ascertaining those interests, as the logic of the company's separate personality might have indicated. Notwithstanding that the company was recognised as owning its own property (Macaura v Northern Assurance Co Ltd [1925] AC 619) and as carrying on its own business (Gramophone and Typewriter Ltd v Stanley [1908] 2 KB 89), its interests continued to be equiparated with those of its shareholders. For example, in Greenhalgh v Arderne Cinemas Ltd [1951] Ch 286, 291, Lord Evershed MR, with whose judgment the other members of the Court of Appeal agreed, said that the phrase 'the company as a whole' did not mean the company as a commercial entity, but meant the corporators as a general body. Although the case was not concerned with the director's duty to act in the interests of the company, Lord Evershed's dictum was nevertheless treated as applicable in that context. To this effect, in Parke v Daily News Ltd [1962] Ch 927, 963, it was said that the words "benefit of the company' meant the benefit of the shareholders as a general body. That approach has continued to have its adherents. For example, Sir George Jessel MR's dictum in In re Wincham Shipbuilding, Boiler and Salt Co, quoted in para 20 above, was cited with approval by the Privy Council in Kuwait Asia Bank EC v National Mutual Life Nominees Ltd [1991] 1 AC 187, 218. A different approach, which has been influential in the modern case law, was adopted in Gaiman v National Association for Mental Health [1971] Ch 317, where Megarry J said at p 330 that '[t]he [company] is, of course, an artificial legal entity, and it is not very easy to determine what is in the best interests of the [company] without paying due regard to the members of the [company]'. His Lordship went on to say that he 'would accept the interests of both present and future members of the [company], as a whole, as being a helpful expression of a human equivalent'."

company's interests. Although some judicial pronouncements recognise that directors could owe a duty to creditors, that does not arise as regularly as the duty owed to the shareholders as a whole. The rationale stems from the traditional view, as buttressed by Lord Reed in *BTI 2014 LLC v Sequana SA & Ors,*[2] that creditors entering a contractual relationship with a company must be the guardians of their own interests. Commercial lenders and suppliers can protect themselves against the risk of the company's insolvency by insisting on guarantees or security for their debt, or by seeking to account for the risk in the terms of their contract with the company, which may include providing for interest at a rate that reflects the risk involved. They can also avail themselves of the weapon of a statutory demand for payment, carrying the threat of an application for winding up and consequent damage to the company's reputation. "Given the need for creditors to be the guardians of their own interests vis-à-vis the company, with which they are in a contractual relationship, it would be paradoxical if there were widely drawn circumstances in which they had the benefit of unlimited liability as regards the company's directors, with whom they have no direct legal relationship."[3]

However, this traditional view has undergone some level of relaxation in the contemporary company's relationship with creditors. A variant of the suggestion that a positive directors' duty to creditors arises when the company is insolvent is that the company need not be insolvent for a duty to arise, and that it is sufficient that the company is engaged in a transaction that affects the creditor's interests. Moreover, the judicial classification of insolvency into factual and commercial insolvency erodes a definitive statement on when such a duty should arise, whether it should be when the company is unable to pay its debts as they fall due or when the company's liability exceeds its assets.[4]

The companies legislation in both South Africa and Lesotho restates the familiar common law position that directors owe their duty to the company and are mandated to discharge such duty in the best interests of the company.[5] However, the UK Companies Act of 2006 goes a notch further by providing in section 172(3) that "The duty imposed by this section has effect subject to any enactment or rule of law requiring

[2] [2022] UKSC 25 (05 October 2022) para 27.

[3] Ibid, para 28.

[4] See Mandhlaenkosi Sibanda and Anthony O. Nwafor, "Solvency and liquidity test as a creditor protective mechanism under South African company law" (2023) 17 (1) *Insolvency and Restructuring International* (IRI) 44-50.

[5] See s 76(3) South African Companies Act 2008, and s 63(1) Lesotho Companies Act 2011.

directors, *in certain circumstances*, to consider or act in the interests of creditors of the company."[6] The 'circumstances' under which such a duty arises are left for judicial determination. In the context of the Lesotho Companies Act, it is considered that such a duty would naturally arise where a breach would result in a loss to a creditor.[7]

A salient inference from all these pieces of legislation is that the directors' duty to creditors in contemporary corporate engagements can no longer be restricted to corporate insolvency. The rationale is that the economic viability of a company, rather than its capital structure and capital accounts, is just as much a concern to creditors as it is to the company and its shareholders. Thus, the question of how best to guarantee the company's economic viability, while maintaining a balance between the interests of shareholders and creditors, should be an ongoing concern of the company's directors. It is in this context that this article explores the extant statutory instruments in South Africa, Lesotho, and the United Kingdom with a view to arriving at a firm statement on when the directors could be held accountable for failure to consider the creditors' interests while conducting the company's affairs.

2. The concept of the best interests of the company

The consideration of whether directors owe company creditors a duty in discharging their obligations to the company has continued to recur in various judicial and academic discourses. The main thrust in this issue is that directors have a primary duty to secure the company`s best interests. The definition of what constitutes the best interests of the company is subject to each jurisdiction's peculiar efforts to develop its common law. The traditional approach is that the company`s best interests refer not to the legal entity itself, but rather to the interests of the collective body of present and future shareholders while the company is a going concern.[8] That traditional position, as demonstrated by common law, is not static. The company's best interests may vary depending on its financial status. In *Kinsela v Russell Kinsela Pty Ltd,*[9] Street CJ buttressed the shifting nature of the company's interests, which determines the direction of the director's duty as follows:

In a solvent company, the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when

[6] Emphasis added.
[7] See s 63(3) of the Lesotho Companies Act.
[8] See note 1 above.
[9] (1986) 4 NSWLR 722 at 730.

questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done. But where a company is insolvent, the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets.

This shifting trend in defining a company's interests is not reflected in the South African Companies Act or in the Lesotho Companies Act. Although the preamble to the South African Companies Act emphasises the need for appropriate legal redress to third parties and investors in companies.[10] The position remains uncertain, as it still maintains a shareholder-centric view, given that the Act has not specifically or clearly articulated the inclusion of creditors in the company's best interests.[11] There are, however, provisions in the South African Companies Act and other company directives that suggest a more expansive definition of the company's interests.

For instance, section 72(4) of the Act requires that every listed company and every state-owned company appoint a social and ethics committee that monitors the company`s activities concerning good corporate social responsibility. There can be little argument that a company cannot be socially responsible if it does not consider the interests of its stakeholders in its operations. The apparent weakness in that provision lies in the failure to create an enforceable obligation that stakeholders can latch onto to seek relief against the company. Similarly, the King's Code of Corporate Governance (King IV) 2016 recognises that, even as a company is an economic institution, it remains a corporate citizen. It therefore has to balance economic, social, and environmental value in its operations. The inference from these provisions is that the directors cannot narrow their focus solely on maximising profits for the members while disregarding the interests of other stakeholders. Directors who adopt a stakeholder-centric approach in discharging their duty to the company cannot be faulted for a breach of duty.

In Lesotho, the Companies Act provides in section 63(3) that "[t]he directors, including former directors, shall be severally and individually liable to the company, its shareholders and any other person for any loss suffered by the company, its shareholders or any person as a result of the directors' failure to perform their duties stated in subsections (1) and (2)." The reference to "any other person" in that provision is all encompassing.

[10] See the preamble of the Companies Act of 2008.

Section 7 s 76(3)(b) of the Act requires directors to act in the company`s best interests and does not explain further what such interests entail.

It certainly includes the company's creditors. Thus, the primary director's duty in subsections (1) and (2) to act in the company's best interests extends to the creditor's interests to the extent that a breach of that duty could attract personal liability to the directors for any loss suffered by a creditor. However, the Act stops short of explicitly providing when a duty to the creditors should arise to incorporate that aspect into the 'best interests of the company' requirement in subsection (1).

An interesting statutory exposition of the balanced approach, inclusive of creditors and other non-member stakeholders, is section 172(1) of the UK Companies Act,[12] which deals with the directors' duty to promote the success of the company for the benefit of its members as a whole. The section provides the following:

A director of a company must act in a way that he considers, in good faith, would be most likely to promote the success of the company for the benefit of the members as a whole, and in doing so have regard (amongst other matters) to, the likely consequences of any decision in the long term, the interests of the company's employees, the need to foster the company's business relationships with suppliers, customers and others, the impact of the company's operations on the community and the environment, the desirability of the company maintaining a reputation for high standards of business conduct, and the need to act fairly between members of the company.

Section 172(1) constitutes a legislative endeavour to broaden the narrow confines of the common law in defining what constitutes the interests of the company. Even as that provision envisions the shareholders' interests as the primary consideration, it further requires that directors subjectively consider other stakeholders whose interests may be promoted, provided that the end result benefits the company and its members as a whole. Those requirements are contextualised in the Canadian Supreme Court decision in *BEC Inc v 1979 Debentureholders,*[13] where the court held that the fiduciary duty of directors to the corporation is a broad, contextual concept. It is not confined to short-term profits or share value, and as such, the corporation as a going concern must look to its long-term interests. A company that takes long-term projections to secure its interests will invariably consider the interests of its stakeholders, who are essential to the overall long-term success of the company as a going concern.

3. Directors' Duty to Creditors

[12] UK`s Companies Act of 2006.

[13] 2008 SCC 69 (CanLII), [2008] 3 SCR 560.

There is no argument that a company's creditors are stakeholders in the company's operation. The question is always whether the directors should consider the interests of creditors in conducting the company's business. Or more specifically, whether the directors owe a duty to the creditors while the company is a going concern. The recent UK Supreme Court decision in *BTI 2014 LLC v Sequana SA and others*[14] has shed some light on this issue. The UK Supreme Court had the opportunity to address a crucial aspect of corporate law relevant to creditor protection in company affairs. It had to closely scrutinise legal provisions to elucidate whether the directors owe a duty to creditors or whether "company interests" include those of creditors. For a more thorough analysis, a brief outline of the facts in the *Sequana SA* case is provided below. In May 2009, AWA's directors, who are the second and third respondents, caused it to pay a dividend of €135 million to the shareholder, the first respondent Sequana SA, which extinguished, by way of set-off, almost the entire of a slightly larger debt that Sequana owed to AWA. It was common ground between the parties that the dividend was lawful, as it complied with the statutory scheme regulating the payment of dividends in Part 23 of the UK Companies Act 2006 and with the common law rules governing the maintenance of capital.

Furthermore, the dividend was distributed when AWA was solvent on both a balance sheet and a commercial (or cash flow) basis. Its assets exceeded its liabilities, and it could pay its debts as they fell due. However, it had long-term pollution-related contingent liabilities of an uncertain amount, which, together with uncertainty regarding the value of one class of its assets (an insurance portfolio), gave rise to a real risk. There was a probability that AWA might become insolvent at an uncertain but not imminent date. In the event, AWA went into insolvent administration almost ten years later. The appellant sought, as an assignee of AWA's claims, to recover an amount equivalent to the dividend from AWA's directors, arguing that the distribution of the dividend constituted a breach of duty to the creditor. Additionally, AWA's main creditor applied to the court to set aside the dividend as a transaction at an undervalue intended to prejudice creditors under section 423 of the UK's Insolvency Act 1986.[15]

[14] [2022] UKSC 25 (05 October 2022).

[15] Section 423 of the UK`s Insolvency Act of 1986 gives *locus standi* to a victim of a transaction *mala fide* or prejudicial to apply to the court for an order avoiding such transaction or protecting the interests of victims of such transaction(s).

The two claims were heard together in the High Court before Rose J, who held that the distribution of the dividend contravened section 423 of the UK's Insolvency Act 1986. However, the claim against the directors for a breach of duty to the creditors was dismissed. This was because, although they had not considered the interests of AWA's creditors, other than for the non-qualifying purpose of deliberately causing prejudice to them, the creditor duty had not become engaged as of the time the dividend was paid. AWA had not then become insolvent, nor was a future insolvency either imminent or probable, in the sense of being more likely than not, even though there was a real risk of it. In rationalising the judgment, Lord Briggs shed some light on when the directors' duty to creditors is triggered as follows:

In the judgment of the Court of Appeal, the creditor duty did not arise until a company was either actually insolvent, on the brink of insolvency, or probably headed for insolvency. A risk of insolvency in the future, however real, was insufficient unless it amounted to a probability. Although the dividend was lawful, this did not of itself prevent its payment amounting to a breach of the creditor duty, had it arisen by May 2009.[16]

There are two pertinent lessons from Lord Briggs' pronouncement on directors' duty to creditors. The first is that the directors' duty to creditors is not automatic nor continuous. According to section 172 (3) of the UK Companies Act, the duty owed to creditors is not a continuous one, it only materialises upon the occurrence of a trigger or a specific event or situation related to the company in question. The trigger situations mainly relate to a company`s financial or economic circumstances. Secondly, the main trigger is actual insolvency, the brink of it, or its future probability. In precis the duty owed by directors to creditors arises only when the company is insolvent or is on the brink of insolvency, or when the future risk culminates in a reasonable probability of the company becoming insolvent. Lord Toulson and Lord Hodge were explicit on that fact in *Bilta (UK) Ltd v Nazir (No 2)*,[17] where they emphasised that:

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

It is apparent from the decision in the *Sequana SA* case that the duty of directors to creditors is secondary and not a primary responsibility of

[16] *Sequana SA case* para 116.
[17] [2015] UKSC 23 para 123.

the directors. The duty arises only when certain trigger events are met.[18] This understanding is strengthened by section 172(1) of the UK`s Companies Act, which requires a director of a company to act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to the need to foster the company's business relationships with suppliers, customers, and others.[19] Thus, the primary duty imposed on directors by section 172(1) is expressed as being to promote "the success of the company for the benefit of its members as a whole." Accordingly, the duty is no longer described by reference to the interests of the company, and the previous problem of identifying the interests of an artificial person no longer arises.[20] Since the duty under section 172(1) is focused on promoting the company's success "for the benefit of its members as a whole," it is clear that, although the duty is owed to the company, the shareholders are the intended beneficiaries of that duty.[21] The interests of the company and those of the shareholders are synchronised under the statutory dispensation. Thus, it is arguable that the common law approach of shareholder primacy in the exercise of directors' duties is now entrenched in the Companies Act 2006.

In carrying out their primary duty under section 172(1), the directors are also under a secondary obligation to have regard "amongst other matters" to the considerations listed in paragraphs (a) to (f). In analysing section 172(1), Lord Reed in *Sequana SA* case elucidated the secondary duty of directors towards creditors and other stakeholders as follows:

This reflects a recognition that the promotion of the company's success requires that consideration be given to such matters as the interests of its employees and the need to foster its business relationships with suppliers and customers. The considerations listed in paragraphs (a) to (f) are capable of including the treatment of certain creditors of the company. Creditors are liable to include employees, suppliers, customers, and others

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[18] See the New Zealand court decision in *Nicholson v Permakraft (NZ) Ltd* [1985] 1 NZLR 242 at 249 where Cooke J opined that directors might owe a duty to the company to consider the interests of creditors "if the company is insolvent, or near-insolvent, or of doubtful solvency, or if a contemplated payment or other course of action would jeopardise its solvency". He considered that such a duty might apply in respect of the interests of "current and likely continuing trade creditors", which could be justified on the basis that "[i]n a situation of marginal commercial solvency such creditors may fairly be seen as beneficially interested in the company or contingently so".

[19] Section 172 (1)(c) of the UK Companies Act of 2006.

[20] Lord Reed in the *Sequana SA* case para 65.

[21] ibid.

with whom the company has business relationships; and their treatment may well affect the company's reputation and its creditworthiness, and have consequences for it in the long term. However, the primary duty imposed by section 172(1) remains focused on promoting the success of the company for the benefit of its members.[22]

The inference from the above pronouncement is that even as the statute has not elevated the consideration of the interests of the creditors to a primary statutory obligation of the directors while the company is a going concern, it is safe for the directors to integrate the consideration of the creditors' interests in the directors' primary duty to promote healthy business operations of the company. The unincentivized employees, as a company's creditors, cannot, in all probability, exert their best effort to enhance the company's business. Therefore, a company's best interests cannot be promoted in isolation from the director's secondary duties to creditors.

Both the Lesotho and South African Companies Act provisions on directors' fiduciary duty are not as expansive as their UK counterparts. The latter, for instance, merely provides in section 76(3) that the directors must exercise the powers and perform the functions of director- (a) in good faith and for a proper purpose; (b) in the best interests of the company; and (c) with the degree of care, skill and diligence that may reasonably be expected of a person- (i) carrying out the same functions in relation to the company as those carried out by that director; and (ii) having the general knowledge, skill and experience of that director. Section 76(4) which lays down the standard for determining the extent of a directors compliance, indicates that a particular director of a company- (a) will have satisfied the obligations of subsection (3)(b) and (c) if- (i) the director has taken reasonably diligent steps to become informed about the matter; (ii) either- (aa) the director had no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a personal financial interest in the matter; or (bb) the director complied with the requirements of section 75 with respect to any interest contemplated in subparagraph (aa); and (iii) the director made a decision, or supported the decision of a committee or the board, concerning that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company.[23]

[22] ibid, para 66.

[23] The Lesotho Companies Act provision is less detailed, see s 63, and by extension, ss 65 and 66 of the Act on disclosure of interests.

All these provisions simply require a level of objectivity in the performance of a director's duty. Once the element of personal interest is eliminated, a director is safely assumed to have acted in the best interests of the company. The only other qualification is that the director's exercise of power must be for a proper purpose. At common law, the courts have always recognised that a director's fiduciary power must be exercised for the purpose for which the power is given and not for a collateral purpose.[24] Therefore, a director could be found to have breached their fiduciary duty even when they have acted in what they subjectively consider to be in the best interests of the company, but the real reason for the exercise of such power does not reflect the purpose for which such power is given. The power to issue shares to raise funds for the company cannot be used simply to increase the voting powers of the minority shareholders in order to dilute the voting strength of a takeover bidder, or to frustrate the appointment of an additional director to the board.[25] It is arguable that the 'proper purpose' mechanism as enshrined in the South African Companies Act, being a general purpose compass to guide the directors in the right direction in the exercise of their duties, serves the same functions as the material considerations enumerated under the UK Companies Act. However, the danger remains that in the absence of the clarity espoused by the UK Companies Act provision, a director in South Africa and Lesotho may still struggle to justify the exercise of a duty that promotes the interests of the creditors within the broad scope of pursuing the company's interests unless the relevant triggers of the protection of creditors' interests are established.

That triggering factor, as demonstrated by the cases considered earlier, is the prospect of the company being insolvent. Insolvency is a significant factor that can prompt company directors to shift their primary duty to act in the company's best interests and to prioritise the interests of the creditors. This explains why creditors, by law, are empowered to enter into certain arrangements with the company as it approaches insolvency. The creditors may apply for liquidation, business rescue, or restructuring. These processes affect directors' duties and the exercise of their powers, as in such instances, an intervenor is appointed to ensure that creditor interests are secured to the greatest extent possible and to potentially salvage the company. Thus, in the absence of the prospect of insolvency, creditor interests, even when considered, would remain subjugated to the interests of the company and its members. That position was expressed

[24] *Hogg v Cramphorn Ltd* [1967] Ch 254.

[25] *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 (PC), *Punt v Symons & Co Ltd* [1903] 2 Ch 506, *Piercy v Mills* [1920] 1 Ch 77.

by Nourse LJ in *Brady v Brady,*[26] who stated that creditor interests are significant only when a company is financially ailing, and insignificant when a company's assets are substantial, and its debts are minimal. In the *Sequana SA case,* Lord Reed, although agreeing that the company's interests could encompass those of the creditors, declined to accept that there is a "creditor duty" distinct from the directors' fiduciary duty to act in the company's best interests. In an elaborate demonstration of what he considered the true state of the law, Lord Reed emphasised as follows:

In summary, I reject the contention, raised in some of the authorities, that there is a "creditor duty" distinct from the directors' fiduciary duty to act in the interests of the company; but I have come to the conclusion that there are circumstances in which the interests of the company, for the purposes of the latter duty, should be understood as including the interests of its creditors as a whole. As it seems to me, there is a risk of confusion if this is described as a creditor duty, as the parties described it, as there is not a duty owed to creditors, or any duty separate from the directors' fiduciary duty to the company. Rather, there is a rule which modifies the ordinary rule whereby, for the purposes of the director's fiduciary duty to act in good faith in the interests of the company, the company's interests are taken to be equivalent to the interests of its members as a whole. I understand all the members of the court to be in agreement on that point. Where the modifying rule applies – a rule which I shall describe as the rule in *West Mercia*, after the leading case of *West Mercia Safetywear Ltd (in liq) v Dodd*[27]- the company's interests are taken to include the interests of its creditors as a whole. The duty remains the director's duty to act in good faith in the interests of the company. The effect of the rule is to require the directors to consider the interests of creditors along with those of members. The weight to be given to their interests, insofar as they may conflict with those of the members, will increase as the company's financial problems become increasingly serious. Where insolvent liquidation or administration is inevitable, the interests of the members cease to bear any weight, and the rule consequently requires the company's interests to be treated as equivalent to the interests of its creditors as a whole.[28]

Lord Reed could not find any justification for creating a distinct 'creditor duty' outside the director's fiduciary duty to act in the company's best interests, even though such a duty could be triggered by company

[26] [1988] BCLC 20, 40.

[27] [1988] BCLC 250. The *West Mercia* case is seemingly considered as the leading case concerning the inclusion of creditor interests as a whole in company interests.

[28] *Sequana SA case* para 11.

insolvency, being an exception ('modifying rule approach') to the general rule. The acceptance by the court that insolvency triggers 'creditor duty' even without an explicit statutory provision, as in the general fiduciary duty, seeks to alert the directors to the expectations on them at different stages of the company's operations. This expectation is implicit in the observation of Maugham J in *Re William C Leitch Brothers Ltd*[29] that "if a company continues to carry on business and to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors ever receiving payment of those debts, it is, in general, a proper inference that the company is carrying on business with intent to defraud." The conduct of the company's business in such circumstances could expose the directors to personal liability.[30] It is in that context that decisions such as *Walker v Wimborne*[31] where Mason J observed that "the directors of a company in discharging their duty to the company must take account of the interests of its shareholders and its creditors", and that "[a]ny failure by the directors to take into account the interests of creditors will have adverse consequences for the company as well as for them," and Lord Diplock's pronouncement in *Lonrho Ltd v Shell Petroleum Co Ltd (No 1)*[32] that the best interests of the company "are not exclusively those of its shareholders but may include those of its creditors", should be understood. Those decisions do not necessarily conflate both sides of the director's duty; one precedes the other and is triggered in different circumstances.

4. Conclusion

The directors owe their fiduciary duty to the company to protect the company's interests. The interests of the company are aligned with those of the shareholders as a whole, both current and future. The law does not impose 'creditor duty' on the directors while the company is a going concern. However, in pursuing company interests, the extent to which creditor interests are considered is determined by the company's financial position. Where insolvent liquidation or administration is inevitable, the members' interests in the company are attenuated; consequently, the rule

29 [1932] 2 Ch 71 at 77.

30 For detailed discussion on fraudulent trading and protection of creditors, see Anthony O. Nwafor, "Fraudulent Trading and the Protection of Company Creditors: the Current Trend in Company Legislation and Judicial Attitude" (2013) 42(4) *Common Law World Review* 297-323.

31 (1976) 137 CLR 1 at 7.

32 [1980] 1 WLR 627, 634.

requires the company's interests to be treated as equivalent to the interests of its creditors as a whole.[33] This similarly applies to situations where a company is financially distressed and has to undergo either creditor compromises, restructuring, or rescue proceedings; in all these circumstances, creditor interests are aligned with the company`s interests and trump the shareholders' interests. The rationale is that the company's creditors have an economic interest in the company, based upon their entitlement to be paid the debts owed to them. The creditors can enforce that debt obligation against the proceeds of the realisation of the company's assets, and their claims on those assets, are, by law, prioritised over the interests of the shareholders.

The UK Companies Act is explicit in outlining that directors, in carrying out their primary duty of promoting the interests of the company under section 172(1), should also have regard to those other interests listed in paragraphs (a) to (f). Such matters ensure that the company maintains good relationships with creditors and other stakeholders. Section 172(3) further requires a company to consider the interests of the company as the interests of its creditors when the company is in financial distress. In those premises, creditors' interests and those of members should be considered by directors while exercising their duty to the company. However, the mere requirement to consider creditors' interests may morph into a duty once the company is financially distressed. Neither the Lesotho nor the South African Companies Act is as explicit and expansive on the need to consider the creditors' interests as their UK counterpart. It is, however, accepted that sections 63 and 76(3) respectively are only partial codifications of the common law. Thus, it is expected that the courts in those jurisdictions will continue to rely on the common law precepts to find the existence of 'creditor duty' in individual cases.

[33] *BTI 2014 LLC v Sequana SA & Ors* [2022] UKSC 25 (05 October 2022) paras 11-12.