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A CRITICAL ANALYSIS OF THE EFFECTIVENESS OF THE CORPORATE RESCUE PROVISIONS UNDER SCH B1 OF INSOLVENCY ACT 1986

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Abstract

In 1982, the *Insolvency Law and Practice: Report of the Review Committee* (“the Cork Committee”) recommended the preservation of viable commercial enterprises,¹ as an alternative to company winding up, in appropriate circumstances.² Although the primary purpose of administration, which was subsequently enacted to foster a “rescue culture”, is to rescue a company as a going concern,³ under the third statutory purpose, an administrator may realise the company’s assets to make a distribution to one or more secured or preferential creditors.⁴ Thereafter, the administration may be converted to a liquidation⁵ or move directly to dissolution where all the assets have been liquidated during administration.⁶ The three purposes of administration are listed in order of primacy which means the third purpose can only be adopted if the administrator thinks that it is not reasonably practicable to either achieve company rescue⁷ or a better result for the company’s creditors as a whole than would be likely in an immediate winding up.⁸ The administrator’s function of making distributions and the ability to move the administration into winding up or dissolution cannot be reconciled with the theory of corporate rescue which was envisaged by the Cork Committee. In light of the fundamental principles and purposes of insolvency law and empirical evidence, this thesis argues that the administration regime, under Schedule B1 of Insolvency Act 1986, is not fit for purpose and is frequently used by insolvent companies as ‘quasi-liquidation’ and dissolution of the company. In short, the rescue approach adopted under the administration framework is inconsistent and obscures

¹ Cmnd 8558 (1982), para 198(j).

² Cork Committee, Ch 9.

³ Insolvency Act 1986, Sch B1 para 3(1)(a).

⁴ *Ibid*, para 3(1)(c).

⁵ *Ibid*, para 83.

⁶ *Ibid*, para 84.

⁷ *Ibid*, para 3(1)(a).

⁸ *Ibid*, para 3(1)(b).

the distinction between the concepts of creditor enforcement, corporate rescue and winding up.

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Part I

It has been suggested that:

“Modern corporate rescue and reorganisation seeks to take advantage of the reality that in many cases an enterprise not only has substantial value as a going concern, but its going concern value exceeds its liquidation value. Through judicial bankruptcy procedures, reorganisation seeks to maximise, preserve and possibly even enhance the value of a debtor’s business enterprise, in order to maximise payment to the creditors of the distressed debtor”.⁹

I. Introduction

The starting point is to recognise that there is no universal protocol for corporate rescue. But, the rationale of reorganisation (or restructuring/reconstruction), as opposed to liquidation, is that if either the company or underlying business is rescued the connected jobs are preserved and both the returns to creditors and the economy are improved. It, thus, logically follows that the objectives of an effective corporate rescue framework should be either to preserve the corporate entity or going concern value of the business where it is reasonably practicable. In the United Kingdom (UK), the original administration¹⁰ (“the old regime”) was recommended by the *Insolvency Law and Practice: Report of the Review Committee*¹¹ (hereinafter referred to as “the Cork Committee”), along with company voluntary arrangements (CVAs), to foster a corporate “rescue culture”,¹² as an alternative to company winding up. Yet, in addition

⁹ A. J. Smits, ‘Corporate Administration: A Proposed Model’ (1999) 32 *De Jure* 80, at 83.

¹⁰ Insolvency Act 1986, Part II (“IA 1986”).

¹¹ Cmnd 8558 (1982).

¹² The Cork Committee proposed that, as a fundamental principle, a modern corporate insolvency framework should provide a way of preserving viable commercial enterprises capable of making a useful contribution to the economy. Cork Committee, para 198(j).

to promoting company rescue,¹³ or “achieving a better result for the company’s creditors than would be likely if the company were wound up” (without first being in administration),¹⁴ the existing administration provisions (“the new regime”) may also be adopted to realise the company’s property in order to pay one or more secured or preferential creditors¹⁵ which generally precipitates a winding up or dissolution.

The apparent protection of the pre-insolvency rights of secured creditors, *prima facie*, suggests that the policymakers regrettably imported traces of receivership¹⁶ into administration.¹⁷ This thesis argues that the administration framework adopted in England and Wales, under Schedule B1 provisions,¹⁸ is not fit for purpose and is largely used as a substitute for liquidation (‘quasi-liquidation’)¹⁹ and subsequent dissolution of the company. The introduction of administration, in 1986, was anticipated to herald a shift from non-collective proceedings, under administrative receiverships,²⁰ to a more collective and inclusive insolvency regime.²¹ Receivership was essentially contractual in nature.²² For better or worse, there are striking

¹³ IA 1986, Sch B1 para 3(1)(a).

¹⁴ *Ibid*, para 3(1)(b). The majority of administrators attempt to achieve a better result for the creditors either through a pre-packaged administration or going concern sale of the company’s business. A preliminary *Study of Administration Cases* (2006) for the Insolvency Service by A. Katz and M. Mumford observed that administrators adopted the primary statutory purpose in less than 10% of administrations. See 3.2.

¹⁵ IA 1986, Sch B1 para 3(1)(c).

¹⁶ The old-style receivership (the power to appoint a receiver of income) has been used as a method of enforcing security by a secured creditor and is not a collective insolvency procedure. R. Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, London 1990), p 11.

¹⁷ The primacy of receivership is preserved with administration under both the court and out-of-court procedures: under para 39 of Sch B1 the court must dismiss an application where an administrative receiver is in office and para 17 of Sch B1 prevents the appointment of an administrator where an administrative receiver is in office.

¹⁸ IA 1986, Sch B1.

¹⁹ See, for example, *Re Kaupthing Singer & Friedlander Ltd* (No 2) [2010] EWCA Civ 518, [2011] 1 BCLC.

²⁰ The absence of a legal duty to the general body of creditors makes an administrative receiver inadequately accountable. *Davey v Money & Anor* [2018] EWHC 776 (Ch) at para 254 per Snowden J.

²¹ The administrator is under a duty to act in the interests of the company’s creditors as a whole. IA 1986, Sch B1 para 3(2).

²² See, for example, *Cripps (Pharmaceuticals) Ltd v Wickenden* [1973] 1 WLR 944; *Bank of Baroda v Panessar* [1987] Ch 335.

similarities between the management functions of an administrator²³ and a receiver and manager (an administrative receiver in the modern context).²⁴ In practice, both the operation and outcomes of administration²⁵ are synonymous with receivership and critically obscure the distinction between corporate rescue (a non-terminal procedure) and winding up (a terminal procedure).²⁶

Since its inception the nature of administration has changed a great deal in terms of how it is administered and its *bona fide* resolve of filling a gap in corporate insolvency law²⁷ as originally espoused by the Cork Committee.²⁸ Although an administration period is intended to provide some breathing space to revive a struggling business enterprise,²⁹ the extensive powers bestowed upon an administrator³⁰ are more affiliated with those of a liquidator.³¹ Under the old regime, an administrator did not generally distribute the company's assets even to preferential creditors without a court order. Yet, under the new regime, an administrator is empowered to make a distribution to one or more secured or preferential creditors without first obtaining leave of the court.³² It is argued that the administrator's function of making distributions and

²³ A person appointed to manage the company's affairs, business and property. IA 1986, Sch B1 para 1(1).

²⁴ A receiver or manager of the whole (or substantially the whole) of a company's property appointed by or on behalf of the holders of any debentures of the company secured by a charge which, as created, was a floating charge, or by such a charge and one or more other securities. IA 1986, s. 29(2)(a).

²⁵ IA 1986, Sch B1.

²⁶ The reformation of the old regime has produced a hybrid species of administration (a combination of the old regime and receivership) and not the projected abolition of administrative receivership. G. McCormack, 'Control and Corporate Rescue – An Anglo-American Evaluation' (2007) *International & Comparative Law Quarterly* 515.

²⁷ See A. Keay and P. Walton, *Insolvency Law: Corporate and Personal* (4th edn Jordan Lexis Nexis, Bristol 2017), p 78; R Goode, *Principles of Corporate Insolvency Law* (4th edn Sweet & Maxwell, London 2011), p 380.

²⁸ Cork Committee, para 495.

²⁹ IA 1986, Sch B1 para 43.

³⁰ For instance, the administrator may do anything necessary or expedient for the management of the affairs, business and property of the company. IA 1986, Sch B1 para 59(1). See also the wide-ranging powers contained under Sch 1 of IA 1986.

³¹ T. Robinson and P. Walton (ed.), *Kerr and Hunter on Receivers and Administrators* (20th edn Sweet & Maxwell, London 2018).

³² IA 1986, Sch B1 para 65. A distribution to unsecured creditors requires leave of the court under para 65(3).

ability to convert an administration into a winding up³³ or move directly to dissolution³⁴ is not consistent with the original theory of corporate rescue and, potentially, undermines the prospect of achieving corporate rescue in practice.

A significant consequence of the Enterprise Act 2002 (“EA 2002”) reforms has been the increase in the number of pre-packaged administrations (“pre-packs”).³⁵ Although the administration framework³⁶ does not expressly provide for pre-packs, the contentious practice is now established and accepted by the courts.³⁷ Unlike under the old regime, most administrators are now appointed out-of-court by either the holder of a qualifying floating charge³⁸ or the company’s director(s).³⁹ In further contrast to the old regime, the administration order is no longer based on a list of statutory aims⁴⁰ but on one of the three purposes which the administrator thinks is reasonably practicable to achieve.⁴¹ It is worth noting that during the debates preceding the EA 2002 Lord Hoffmann suggested that the amendments render the courts powerless by virtue of leaving everything to the subjective opinion of the administrator.⁴²

The financial implications of the failure of a corporate debtor and the significance of business reorganisation have increasingly become prominent subjects in Europe⁴³

³³ IA 1986, Sch B1 para 83.

³⁴ *Ibid*, para 84.

³⁵ A pre-pack deal occurs where an arrangement to sell the business of the company is agreed prior to the company entering into administration and immediately executed on the day the administrator is appointed or soon afterwards. See, for instance, P. Walton, ‘Pre-packaged administrations – trick or treat?’ (2006) 19(8) *Insolvency Intelligence*, 113-122.

³⁶ IA 1986, Sch B1.

³⁷ See *DKLL Solicitors v HMRC* [2008] 1 BCLC 112, *Re Kayley Vending Limited* [2009] BCC 578, *Re Johnson and Machine Tool Co Ltd* [2010] BCC 382 and *Re Hellas Telecommunications (Luxembourg) II SCA* [2009] EWHC 3199 (Ch).

³⁸ IA 1986, Sch B1 para 14.

³⁹ *Ibid*, para 22.

⁴⁰ *Ibid*, s. 8.

⁴¹ *Ibid*, para 3.

⁴² *Hansard*, House of Lords, vol. 639, 21 Oct 2002 col. 1103.

⁴³ See, e.g., European Law Institute (ELI) Instrument: ‘Rescue of Business in Insolvency Law’ available at:

https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Instrument_INSOLVEN_CY.pdf Contractualised Distress Resolution (CoDiRe) in the Shadow of the Law: ‘Effective Judicial

and beyond.⁴⁴ The primary focus has been to assist financially distressed businesses to be restored to profitability through the provision of effective rescue instruments. International institutions and organisations such as the World Bank,⁴⁵ the United Nations Commission on International Trade Law (UNCITRAL)⁴⁶ and the European Union (EU)⁴⁷ have been articulating the socio-economic benefits of business reorganisation.⁴⁸ Preventive solutions are the developing trend in insolvency law. Nevertheless, as a result of Brexit, the (recast) EU Insolvency Regulation⁴⁹ on insolvency proceedings and articles of the Directive on preventive restructuring frameworks⁵⁰ no longer apply in the UK.⁵¹ This means that the law of the UK and the relevant domestic laws of each individual member states apply.⁵² Even though only four EU member states have implemented the UNCITRAL Model Law,⁵³ EU

Review and Oversight of Insolvency and Pre-Insolvency Proceedings' project which published its Final Report in 2018 available at: <https://www.codire.eu/publications/> and the JCOERE (Judicial Co-Operation supporting Economic Recovery in Europe) project due to complete in December 2020 available at: <https://www.ucc.ie/en/jcoere/>.

⁴⁴ Since 2006 more than 40 economies around the world have adopted reforms implementing or strengthening reorganisation procedures to resolve insolvency. *Doing Business 2020 Report* available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf>. In 2021, World Bank Group took the decision to discontinue the *Doing Business* report. See the discussion at 3.10.

⁴⁵ World Bank available at: <http://documents.worldbank.org/curated/en/936851468152703005/The-World-Bank-principles-and-guidelines-for-effective-insolvency-and-creditor-rights-systems> [Accessed 08/10/19]

⁴⁶ UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006) available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration [Accessed 22/08/19].

⁴⁷ Directive (EU) 2019/1023 of the European Parliament and of the Council on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).

⁴⁸ These institutions now regard the provision of reorganisation procedures as an alternative to liquidation as a benchmark of international respectability.

⁴⁹ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

⁵⁰ Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132, art 4 ("Preventive Restructuring Directive").

⁵¹ Under the Withdrawal Agreement with the EU the UK had two years to negotiate a divorce bill from the date (29 March 2019) of triggering Article 50 of the Lisbon Treaty but left on 31 December 2020 without agreeing a trade deal at the end of the transitional period.

⁵² See the discussion at 3.11.

⁵³ The four EU member states which have implemented the UNCITRAL Model Law are Romania, Slovenia, Poland and Greece.

insolvency proceedings (similar to non-EU proceedings) may seek recognition and enforcement under the Cross Border Insolvency Regulations⁵⁴ which implemented the UNCITRAL Model Law in the UK.⁵⁵

In recent years, there has been a noticeable increase in international trade and cultural exchange between people (and companies alike) due to advances in transportation and communication: globalisation.⁵⁶ We now live in a global economy where an occurrence that transpires in one remote corner can have a knock-on effect in other parts of the world. The devastating impact of the coronavirus (COVID-19) on the livelihoods of many people and economies around the world can only be instructive.

Since the implementation of administration in the UK there has been no comprehensive review of the operation and outcomes of the corporate rescue provisions save for *ad hoc* piecemeal academic inquiries mainly focused on, *inter alia*, the provisions that deal with the appointment and duties of the administrator and the process and effect of administration.⁵⁷ The rehabilitation of financially distressed businesses is a key element of an efficient insolvency regime; if stakeholders have

⁵⁴ SI 2006/1030. See 3.11.

⁵⁵ See the Guidance published by The Insolvency Service on Cross Border Insolvencies: Recognition and Enforcement in EU Member States available at: <https://www.gov.uk/government/publications/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states> [Last accessed 18/10/2021].

⁵⁶ The BBC available at: http://www.bbc.co.uk/schools/gcsebitesize/geography/globalisation/globalisation_rev1.shtml [Last accessed 13/06/18].

⁵⁷ See, for example, I. Fletcher, 'UK Corporate Rescue: recent developments – changes to administrative receivership, administration, and company voluntary arrangements – the Insolvency Act 2000, the White Paper 2001 and The Enterprise Act 2002' *European Business Law Review* (2004) 5(1), at 119-151; S. Phipps and H. Hoskins, 'Administrators and distributions to members' *Butterworths Journal of International Banking & Financial Law* (2017) 32(11), at 733-734; Clifford Chance, 'Administrator's functions: statutory objective' *PLC Magazine* (2020) 31(8), at 78.

confidence in the rescue provisions that confidence supports lending which in turn promotes economic growth.⁵⁸

In light of the aforementioned, this research is intended to provide a timely wholesale review of the administration provisions⁵⁹ and, more importantly, to suggest appropriate and desirable changes aimed at both improving the corporate rescue provisions and reinforcing the respect for the UK's corporate insolvency framework post Brexit.⁶⁰

II. Research Objectives

The primary objective of this research project is to evaluate the effectiveness of the administration provisions⁶¹ to promote company rescue in practice. The study intends to examine the operation and outcomes of the Schedule B1 provisions⁶² and to critically analyse the impact of the EA 2002 reforms that were intended to reinvigorate the corporate rescue environment through fostering collective execution, achieving a better return for creditors and a generally fairer system of distribution.⁶³ In addition to the principal inquiry, the research also endeavours to investigate whether adopting the second statutory purpose of administration⁶⁴ achieves a better result for the company's creditors as a whole where the administrator thinks company rescue is not reasonably practicable.

⁵⁸ Graham Review into Pre-pack Administration (2014) available at: <https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration#:~:text=The%20report%20was%20carried%20out,Government%20response%20to%20the%20Review> [Last accessed 12/09/21].

⁵⁹ IA 1986, Sch B1.

⁶⁰ Brexit is an abbreviation of two English words: 'Britain' and 'exit' and refers to the withdrawal process of the United Kingdom (UK) from the European Union (EU).

⁶¹ IA 1986 Sch B1.

⁶² Ibid.

⁶³ See, for instance, *A Review of Company Rescue and Business Reconstruction Mechanisms*, The Insolvency Service (London: HMSO, 1999); *A Review of Company Rescue and Business Reconstruction Mechanisms: Report by the Review Group*, The Insolvency Service (London: HMSO, 2000); *Productivity and Enterprise: Insolvency – A Second Chance*, The Insolvency Service, Cmnd 5234 (London: HMSO, 2001).

⁶⁴ IA 1986, Sch B1 para 3(1)(b).

Although administration was specifically recommended to promote corporate rescue (as opposed to liquidation) in appropriate circumstances, under the third statutory purpose, the company's assets may be realised "in order to make a distribution to one or more secured or preferential creditors"⁶⁵ which frequently precipitates a winding up or dissolution. It is argued that this provision is not consistent with the theory of corporate rescue which was originally envisioned by the Cork Committee.⁶⁶ Hence, this research also intends to examine its effect on the prospect of achieving corporate rescue and impact on the fundamental principle of collective execution (equitable distribution of a debtor's assets among the creditors). In resonating with the main theme of the thesis, the study intends to compare the corporate rescue approach which was promoted under the original administration (IA 1986, Part II) with the new streamlined regime (Sch B1 provisions of IA 1986) and to conclude by suggesting sensible recommendations primarily aimed at informing the deliberations of practitioners and future policy considerations.

III. Methodology

In a mixed methods approach, the research primarily adopts the doctrinal approach along with other research methods and techniques i.e., historical analysis, theoretical discussion, empirical research and comparative analysis. The literature review under Part I - which is comprised of three chapters: Chapter 1 (historical background), Chapter 2 (theory of corporate rescue) and Chapter 3 (impact of EA 2002 reforms) - makes use of the expository "black-letter law" and historical analysis. As background to the research, the first chapter will analyse the evolution of English insolvency legislation from mid-16th century until late 20th century along with the law of private

⁶⁵ IA 1986, Sch B1 para 3(1)(c).

⁶⁶ Cork Committee, para 204.

arrangements with creditors and the reconstruction and amalgamation of joint stock companies. In doing so, the chapter will shed critical light on the fundamental principles and purposes of insolvency law and scope of the early private arrangements that were adopted by insolvent traders and their creditors. The literature review will also consider the theoretical basis of English insolvency law and the main insolvency theories in order to determine a theoretical model which is compatible with the concept of corporate rescue. The discussion critically evaluates the impact of the EA 2002 reforms on corporate rescue and provides a preliminary analysis of the existing administration regime.⁶⁷ It attempts to reconcile the intended legislative goals and ideals with the preliminary findings to depict a true picture of the law-in-action. Over the years, it has increasingly become necessary to ascertain the meaning of law for ordinary people in everyday life. As such, the literature review will also endeavour to compare the corporate rescue strategy adopted in the UK with other common law jurisdictions, for example, Australia, South Africa, the United States of America (USA) and the corporate rescue approach promoted in the EU where it is deemed to be either necessary or appropriate.

Aside from the technical interpretation of case law and statutes, the research is intended and designed to produce new knowledge in accordance with the recognised standards of academia by studying how the law works in practice (socio-legal study). Inevitably, policymakers are influenced by their social background and ideologies which form the basis of economic or political theory and policy.⁶⁸ It is through examining the policy behind certain legal rules that potential biases of the law may be

⁶⁷ IA 1986, Sch B1.

⁶⁸ S. Qureshi, 'Research Methodology in Law and its Application to Women's Human Rights Law' (2015) *Journal of Political Studies* 22(2), at 629-643.

exposed in a particular context.⁶⁹ Therefore, in order to make sound recommendations, it is important to initially identify and address the discrepancies between the law as it is stated on paper and how it actually works in practice and its social impact. To deliver results that are definitive and final about the law, the research incorporates an empirical study, under Part II, based on a dataset of 300 cases of ‘traditional’ administrations, pre-packaged administrations (pre-packs) and creditors’ voluntary liquidations (CVLs) subject to the first exception⁷⁰ to the restriction on re-use of company names.⁷¹ These are used to perform statistical tests comparing key characteristics and corporate rescue outcomes under the three selected insolvency procedures. The quantitative study will thus provide a measure of the effectiveness of the administration provisions⁷² by comparing the operation and respective outcomes (observed over a period of 30 months)⁷³ of the three selected procedures through a corporate rescue lens. The preliminary findings (under Part I) and the statistical analysis and summary of the observations (under Part II) will form the basis of the conclusions and frame the recommendations under Part III.

IV. Overview of Chapters

Chapter 1 – Evolution of English Insolvency Law, Private Arrangements with Creditors and Reconstructions

In a novel way, the first chapter will set the backdrop of the research by expounding on the evolution of English insolvency law while having regard to the interests of the

⁶⁹ M. Salter and J. Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson Education Limited, London 2007).

⁷⁰ IR 2016, r 22.4.

⁷¹ IA 1986, s. 216.

⁷² *Ibid*, Sch B1.

⁷³ The original envisaged 36 months observational period was slightly adjusted to terminate 6 months early on 1 January 2020 in order to avoid the economic impact of the coronavirus (COVID-19) global pandemic and lockdown measures implemented across the UK in March 2020.

trading community and creditors and the role played by the legislator. The chapter also explores how larger bankruptcies (the equivalent of businesses) were administered under the bankruptcy system⁷⁴ alongside the reconstruction and amalgamation of joint stock companies. The historical survey will, among other things, consider the rationale behind the introduction of bankruptcy, in 1543, and effect of the subsequent major legislative developments until the Cork Committee was appointed to conduct an extensive review of the law of insolvency and practice in 1977. Of particular interest will be the early administration of larger bankruptcies prior to the advent of commercial companies and the contemporary schemes of arrangements that were used by debtors and their creditors as an alternative to bankruptcy (and later company winding up), including a brief operation of the system of imprisonment for debt. The chapter also considers how the interests of creditors may have not only influenced the role that was furnished by the legislator but, ultimately, the nature and structure of insolvency law. It is envisaged that an understanding of the motivation behind the early schemes of arrangements and why they were preferred by debtors and their creditors, as opposed to filing for a bankruptcy commission, will provide a useful model to comparatively assess the potential efficacy of the contemporary formal (and less formal) insolvency procedures and critically inform the overall inquiry and recommendations.

⁷⁴ It was often necessary to continue the operation of a bankrupt's business until it could be sold profitably or liquidated. V. M. Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-up in Nineteenth Century England* (Oxford University Press, Oxford 1995), p 4.

Chapter 2 – Theory of Corporate Rescue in the UK – Trying to Find a Needle in a Haystack?

In order to fully explore the theory of corporate rescue in the UK, the discussion in this chapter will initially investigate the elusive theory which underpins English insolvency law and critically examine the leading insolvency theories from a corporate rescue standpoint. The second chapter will, thus, examine the corporate insolvency provisions adopted in UK to determine whether (or not) the principles and purposes promoted under the existing framework may be reconciled with the original theory of corporate rescue which was articulated by the Report of the Cork Committee. It is projected that a reconciliation of the existing corporate insolvency provisions with the original theory of corporate rescue will either expose any inconsistencies in the law or potential flaws. In the end, the discussion in this chapter will adopt the historical findings gleaned in Chapter 1 and recommend an effective theoretical framework to support the Sch B1 provisions⁷⁵ in order to mitigate and/or avert policy failure.

Chapter 3 – Impact of EA 2002 Reforms: Is the Money Where the Mouth Is?

The changes that were inserted by the EA 2002 were aimed at improving the overall performance of the original administration provisions constituted under Part II of IA 1986. This chapter will critically analyse the impact of the modifications on the prospect of achieving corporate rescue in practice. The Cork Committee recognised the extensive powers of a receiver and manager appointed by a secured creditor to manage and continue the business of an insolvent company as key to facilitating corporate rescue.⁷⁶ In fact, the Cork Committee hailed the power to appoint a receiver and manager of the whole property and undertaking of the company, under a floating

⁷⁵ IA 1986, Sch B1.

⁷⁶ Cork Committee, para 495.

charge, as an outstanding benefit to the general public and society.⁷⁷ Nevertheless, due to the realisation of the potential abuse of the power, the Cork Committee recommended that the power to appoint an administrator should be vested in the court.⁷⁸ To the contrary, the amendments introduced by EA 2002 allow the holder of a qualifying floating charge⁷⁹ and the director(s) or the company⁸⁰ to appoint an administrator out-of-court. This chapter will critically examine the effect of allowing out-of-court appointments of administrators and the extensive powers bestowed upon an administrator⁸¹ on the prospect of achieving corporate rescue.

Chapter 4 – Administration Empirical Research: Corporate Rescue Outcome Analysis

The empirical study under this chapter builds on the findings of early research and the preliminary findings gleaned in Chapter 3. Significantly, the empirical research, along with the comparative analysis of the outcomes of the three procedures under review, is anticipated to generate new knowledge. The fresh understanding will, thus, reinforce and progress existing wisdom. Besides revealing the actual numbers of companies that are successfully rescued during administration⁸² this chapter will also critically examine the operation of the first exception⁸³ to the restriction on the re-use of company names⁸⁴ - where the business of the insolvent company is acquired from the liquidator during a CVL - against a background of the historical legal context of the restriction. On the one hand, the restriction was intended to curb the phoenix

⁷⁷ Cork Committee, para 495.

⁷⁸ *Ibid*, para 500.

⁷⁹ IA 1986, Sch B1 para 14.

⁸⁰ *Ibid*, para 22.

⁸¹ *Ibid*, Sch 1.

⁸² IA 1986, Sch B1.

⁸³ IR 2016, r 22.4.

⁸⁴ IA 1986, s. 216.

syndrome and, on the other, the Insolvency Service suggests that the main exception⁸⁵ to the restriction on re-use of company names⁸⁶ is intended to promote legitimate enterprise.⁸⁷ The research will collect key information of 300 companies divided into three equal samples of 'traditional' administrations, pre-packs and CVLs (subject to the exception to re-use company names)⁸⁸ commenced post the Insolvency (England and Wales) Rules 2016 coming into force.⁸⁹ The study will closely follow the companies over a period of 30 months and observe the outcomes. In addition to providing a summary of the statistics, the chapter will also analyse and compare the outcomes of the three procedures through a corporate rescue lens in order to provide a measure of the effectiveness of the administration regime⁹⁰ to promote company rescue in practice.

Chapter 5: Conclusion and Recommendations

In addition to recapping and summarising the findings of the research project, the last chapter will tie all the component parts together and concludes the thesis as well as suggesting appropriate and desirable changes for future consideration. Specifically, the last chapter endeavours to directly answer the principal research question of whether the existing administration regime⁹¹ is fit for purpose and the related research questions in light of the preliminary findings and empirical evidence. Thus, the conclusion will primarily derive from the literature review and preliminary analysis in Chapter 3 and empirical findings under Chapter 4. Nevertheless, it will also draw from

⁸⁵ IR 2016, r 22.4.

⁸⁶ IA 1986, s. 216.

⁸⁷ See the Guidance on phoenix companies and the role of the Insolvency Service available at: <https://www.gov.uk/government/publications/phoenix-companies-and-the-role-of-the-insolvency-service/phoenix-companies-and-the-role-of-the-insolvency-service> [Accessed 06/03/2022].

⁸⁸ IR 2016, r 22.4.

⁸⁹ SI 2016/1024. The Rules came into force on 6 April 2017 (see rule 1).

⁹⁰ IA 1986, Sch B1.

⁹¹ *Ibid.*

the historical findings of early research. Crucially, the recommendations will be closely guided by the empirical evidence, and, for clarity, each perceived problem will be linked with a specific proposal.

Chapter 1

Evolution of English Insolvency Law, Private Arrangements with Creditors and Reconstructions

1.1 Introduction

This chapter sets the background of the research by examining the evolution of insolvency law while paying special attention to the role played by the legislature and the interests of the trading community, in particular the creditors' interests. Inevitably, any inquiry into the evolution of English insolvency law will, for the most part, entail a study of the provisions primarily designed to regulate personal insolvency (bankruptcy).¹ Corporate insolvency law² was later carved out of bankruptcy law.³

This research also intends to break with convention by having some regard, in addition to corporate insolvency itself, to how insolvent businesses were administered under the bankruptcy system prior to the advent of modern commercial companies⁴ and the contemporary forms of schemes of arrangements. In a similar vein, the research aims to investigate the rationale behind the reconstruction and amalgamation of joint-stock companies between 1800 – 1926. In larger bankruptcies, it was often necessary for the assignees (or trustees) to continue the operation of a bankrupt's business until it

¹ I. F. Fletcher, *The Law of Insolvency* (2nd edn Sweet & Maxwell, London 1996) ("Fletcher, Law of Insolvency"); R. Goode, *Principles of Corporate Insolvency Law* (4th edn Sweet & Maxwell, London 2011), p 6 ("Goode, Principles"); A. Keay and P. Walton, *Insolvency Law: Corporate and Personal* (LexisNexis, Bristol 2017), p 7 ("Keay and Walton, Insolvency Law").

² See 1.11 for the commencement and development of corporate insolvency.

³ V. M. Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt, and Company Winding-up in Nineteenth Century England* (Oxford University Press, Oxford 1995), p 1 ("Lester, Victorian Insolvency").

⁴ Royal Charter created the first companies, for instance, the East India Company in 1600 or by means of special Acts of Parliament e.g., the New River Company in 1605 (3 Jac. 1. c. 18). The Joint Stock Companies Act 1844 (7 & 8 Vict. c. 110) laid the foundation of modern company law. The Act introduced the procedure for the creation of joint stock companies by registration. Corporate insolvency was administered separately under the Joint Stock Companies Winding Up Act 1844 (7 & 8 Vict. c. 111). See the discussion at 1.11.

could be profitably sold or otherwise liquidated.⁵ An analysis of the early administration of larger bankruptcies and scope of private arrangements that were adopted by insolvent traders and their creditors is provided at 1.4.

Corporate insolvency is primarily concerned with the orderly collection, realisation and distribution of the debtor's security free assets among the company's creditors on a *pro rata* basis.⁶ The concept of insolvency is based on a debtor's inability to pay debts⁷ as they fall due⁸ - a situation which naturally arises as a result of credit.⁹ As consequence of secured credit, security interests¹⁰ reduce the pool of assets available for the general body of creditors when a company becomes insolvent.¹¹ The automatic reduction in the assets, or realising the company's property to make a distribution to one or more secured or preferential creditors, as promoted under the third statutory purpose of administration,¹² is conceivably detrimental to the prospect of achieving corporate rescue.¹³ The impact of secured credit on corporate insolvency has increasingly become more prevalent *mutatis mutandis*.¹⁴ A brief discussion of the

⁵ Lester, Victorian Insolvency, p 4.

⁶ *Insolvency Law and Practice: Report of the Review Committee*, Cmnd 8558 (1982), para 17 (hereinafter "the Cork Committee"); Goode, Principles, p 8.

⁷ Insolvency Act 1986, s. 122(f) ("IA 1986").

⁸ IA1986, ss. 123(1) and 123(2) contain the cash flow test and balance sheet test, respectively. The cash flow test under s.123(1)(e) includes debts payable in the future: *BNY Corporate Trustee Service Ltd v Eurosail-UK 2007-3BL plc* [2013] UKSC 28, [2013] 1 WLR 1408.

⁹ Goode, Principles, p 2.

¹⁰ A creditor who holds security or other right over an asset may proceed to realise that right in priority to all other low-ranking creditors. Fletcher, Law of Insolvency, p 633.

¹¹ Goode, Principles, pp 6-7.

¹² IA 1986. Sch B1 para 3(1)(c).

¹³ Where a secured creditor enforces their security pending voluntary arrangements the chances of successfully implementing one and rescue become almost negligible. Keay and Walton, Insolvency Law, p 139.

¹⁴ In addition to the traditional methods of security (fixed and floating charges) businesses are increasingly being financed by receivables financiers who take assignment of the company's book debts which is often the only significant asset of a company available to the general body of creditors when it becomes insolvent. See P. Walton, 'Assignment of Book Debts – outright transfers of rights or unregistered securities?' (2018) *Wolverhampton Law Journal* 1(1).

historical development of the general law of credit and security and its impact on corporate rescue is provided at 1.12.¹⁵

In order that an effective assessment of the administration provisions¹⁶ may be achieved it is imperative to have some regard to how insolvency law has developed over the last four centuries: 1542 – 1977. The extensive historical survey is intended to illuminate, among other things, the theory and fundamental principles and purposes of insolvency law and, in doing so, to lay down a solid foundation as background for the research project.

1.2 Establishment of the Substantive Principles and Scope of Bankruptcy

Bankruptcy¹⁷ was originally confined to the institution of the Law Merchant¹⁸ which derived upon the customs and practices that became established among the merchants in their dealings.¹⁹ The individual insolvency procedures therein being based on principles of the mercantile law of Italy which was itself a product of the adaptation of the Roman law procedures known as *cessio bonorum* (assignment of property for the benefit of creditors), *distractio bonorum* (forced liquidation of assets), and *remissio* and *dilatatio* (compositions with creditors).²⁰ From the 14th century onwards, the jurisdiction of common law courts increasingly gained supremacy over

¹⁵ See also the discussion at 2.4

¹⁶ IA 1986, Sch B1.

¹⁷ The word bankrupt is said to derive from the Latin words “*bancus*” the table or counter of a tradesman and “*ruptus*” broken. The practice of breaking the table of a defaulting tradesman (“*banca rupta*”) was prevalent in Italian cities during the medieval period. E. T. Baldwin, *A Concise Treatise upon the Law of Bankruptcy* (Stevens & Haynes, London 1879), p 1 (“Baldwin, A Concise Treatise”).

¹⁸ A distinct body of law developed by a network of medieval courts across Europe. Fletcher, *Law of Insolvency*, p 7.

¹⁹ Fletcher, *Law of Insolvency*, p 6.

²⁰ Special remedies for fraudulent alienations of property by debtors (*actio pauliana*) were also available. Fletcher, *Law of Insolvency*, p 6.

local Courts Merchant which led to parts of the Law Merchant being adopted into common law on the basis that they were “part of the lawes [*sic*] of this realm”.²¹

Before 1543, at common law, or in any of the ordinary processes of the Law Merchant courts,²² there is no evidence of the existence of an organised bankruptcy system.²³

A creditor could either seize the body or effects of a debtor: “the rule being first come, first served”.²⁴ This situation was both ineffective and extremely unsatisfactory for creditors attempting to collect their debts.²⁵ It is, therefore, not surprising that the trading community was demanding reform and the purpose of the first English bankruptcy statute²⁶ was to facilitate execution against absconding debtors.²⁷

1.2.1 Official Collective System and Equality of Treatment

Bankruptcy in the contemporary understanding of an official collective procedure was originally presented in 1542. The self-announcing legislation²⁸ targeted the fraudulent debtor and repeatedly referred to absconding debtors as offenders.²⁹ The terminology adopted by the statute shows a close identification between bankruptcy and criminality.³⁰ From this standpoint, it is easy to see why the prominent legal historian Sir William Holdsworth considered the Act in terms of frauds prevention only.³¹ During

²¹ Co. Litt. 182(a): “...and this *is per legem mercatoriam* which (as hath been said) is part of the lawes [*sic*] of the realm, for the advancement and continuance of commerce and trade, which is *pro bono publico*”. Ibid.

²² Lester, *Victorian Insolvency*, p 13.

²³ Goode, *Principles*, p 382.

²⁴ Cork Committee, para 31.

²⁵ Lester, *Victorian Insolvency*, p 13. The level of disquiet expressed over the subject by previous generations also indicates a general dissatisfaction with the bankruptcy system. Victorian England manifestly stands alone in this respect based on the volume of bankruptcy legislation that was enacted during that era. Cork Committee, para 27.

²⁶ “An Act against such persons as do make bankrupts”. 34 & 35 Hen. VIII. c. 4 (1542).

²⁷ Cork Committee, para 35.

²⁸ As stated in the preamble: aimed at those “who craftily obtaining into their hands great substance of other mens [*sic*] goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or return to any their own creditors, their debts and duties, but at their own wills and pleasures and delicate living, against all reason, equity and good conscience...”.

²⁹ 34 & 35 Hen. VIII. c. 4 (1542).

³⁰ Fletcher, *Insolvency Law*, p 6.

³¹ Sir W. Holdsworth, *A History of English Law* (London, 1956).

this time bankruptcy was regarded as quasi-criminal or even criminal.³² However, as a remedy to the rigours and inadequacies under the common law, the Bankruptcy Act 1542 established an organised system of bankruptcy. Upon being summoned, if the bankrupt failed to show up for three months the assets were disposed for the benefit of creditors.³³

England accepted into its centuries-old legal system the substantive principle of bankruptcy law which provides for the rateable³⁴ distribution of a debtor's assets among the creditors.³⁵ The fundamental principle of insolvency law, which is still central to the existing corporate insolvency framework,³⁶ epitomises the earliest credible notion of a bankruptcy system.³⁷

1.2.2 Limited Scope of Bankruptcy

It was not long before the bankruptcy system required some revision, albeit with far-reaching implications in the distinction to be observed between traders³⁸ and non-traders.³⁹ By amending the Act of 1570⁴⁰ bankruptcy was limited to traders who had committed certain "acts of bankruptcy".⁴¹ In a similar vein to its predecessor, the Act

³² In *Fowler v Paget* (1798) 7 Term Rep 509 Lord Kenyon said that: "Bankruptcy is considered as a crime and a bankrupt in the old laws is called an offender".

³³ 34 & 35 Hen. VIII. c. 4, s. 5.

³⁴ "To every one of the said creditors, a portion rate and rate-like according to the quantity of their debts". 34 & 35 Hen. VIII. c. 4, s. 1.

³⁵ The adoption of the principles of equality and collective execution was seen a continental phenomenon of the time. During the Middle Ages Italian city-states adopted the bankruptcy procedure of Roman law (*vendito bonorum*) whereby the proceeds from a debtor's assets were equally divided among the creditors.

³⁶ However, in most cases reviewed by the Cork Committee only the preferential creditors and floating charge holders received any distributions. Cork Committee, para 233. In practice, the notion of equality of treatment among creditors has been modified by judicial and legislative interventions (see Chapter 3). Fletcher, *Insolvency Law*, p 2.

³⁷ Lester, *Victorian Insolvency*, p 15.

³⁸ "Any merchant or other person, using or exercising the trade of merchandise by way of bargaining, exchange, rechange, bartry, chevisance, or otherwise, in gross or by retail...or seeking his or her trade or living by buying and selling". 13 Eliz. I. c. 7 (1570), s. 1(2) and (3).

³⁹ Cork Committee, para 32.

⁴⁰ 13 Eliz. I. c. 7 (1570).

⁴¹ Three divisions adopted by Baldwin have been followed: acts which relate to the person (absconding, fleeing, absenting oneself, to keep house or suffering outlawry), acts related to dispositions of the

of 1570 clearly took aim at the fleeing, absconding and fraudulent debtor.⁴² It was strongly suggested that the impetus behind the statute was to amend the law even though economic and financial difficulties were also being experienced at the time.⁴³ It is clear that the early bankruptcy statutes were designed to protect the interests of creditors by making provision for them to attach the property of a debtor,⁴⁴ albeit the legislation may have been triggered by economic problems and the need to mitigate inequitable aspects of the law.⁴⁵

The restricted scope of bankruptcy created a distinct two-tier system of dealing with insolvents: bankruptcy and insolvency.⁴⁶ A non-trader could be imprisoned under the punitive rules of insolvency: imprisonment for debt,⁴⁷ a part of English law since the 13th century.⁴⁸ Hence, in a slight detour, the following discussion (section 1.3) briefly summarises the operation of the system of imprisonment for debt, how bankruptcy reform shaped the practice and vice versa, and the motivation behind the demise of the practice.

debtor's property (conveyance or assignment for the benefit of creditors or fraudulent conveyance, gift, delivery or transfer) and acts related to the debtor's circumstances (filing a declaration admitting an inability to pay debts, and in the event of goods belonging to a trader being attached for a debt of more than £50 or failing to satisfy in full a judgment order within seven days if a trader or 21 days if not). Baldwin, *A Concise Treatise*, pp 22-33.

⁴² Lester, *Victorian Insolvency*, p 15.

⁴³ W. J. Jones, 'The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period' (1979) *Transactions of the American Philosophical Society* 69/3.

⁴⁴ A. Keay, 'Balancing Interests in Bankruptcy Law' (2001) 30 *Common Law World Review* 206, at 9.

⁴⁵ Cork Committee, para 27.

⁴⁶ *Ibid*, para 39.

⁴⁷ The harsh treatment of debtors was described as the English equivalent of slave trade in the 18th century. Cork Committee, para 40.

⁴⁸ J. Cohen, 'The Imprisonment for Debt and Its Relation to the Development of Discharge in Bankruptcy' (1982) 3 *Journal of Legal History* at 153-171.

1.3 Operation of the System of Imprisonment for Debt

A non-trader was liable to be imprisoned on the suit of a creditor.⁴⁹ Thus, the old-fashioned debt collection system continued alongside bankruptcy.⁵⁰ The logic for the distinction was that traders were naturally exposed to the risks and volatility of financial markets, whereas the losses incurred by non-traders were a direct attribute of their own overindulgence or terrible judgements.⁵¹ Debtors who either fell outside of the definition of a trader⁵² or failed to seek protection conferred by bankruptcy law were subject to imprisonment for debt.⁵³ The alternative was that a debtor could be discharged with the permission of the creditors who could sanction imprisonment until the debt was settled.⁵⁴

To ensure the debtor would be present at trial the system relied on arrest on *mesne* (arrest before trial) through the common law courts.⁵⁵ The court retained power to imprison a debtor after trial if he (or she) still refused to pay according to the ruling (arrest on final process).⁵⁶ Over time, it became easier for a creditor to have a debtor arrested than to attach the property.⁵⁷ McCulloch commented that: “While the law of England gives the creditor an unnecessary degree of power over the debtor’s person; it does not give him sufficient power over his property”.⁵⁸ In an extraordinary case, the corpse of a debtor dying in prison could be detained until the debt was honoured.⁵⁹

⁴⁹ A creditor would initiate the proceedings of arrest on *mesne* by swearing an affidavit of bankruptcy before a judge or a commissioner. Lester, *Victorian Insolvency*, p 89.

⁵⁰ *Ibid*, p 88.

⁵¹ *Ibid*. See also W. Blackstone, *Commentaries on the Laws of England (1765-1769)* vol. 2, p 473.

⁵² See n. 38 above for the statutory definition of a trader.

⁵³ Lester, *Victorian Insolvency*, p 88.

⁵⁴ *Ibid*, pp 88-89.

⁵⁵ *Ibid*, p 89.

⁵⁶ *Ibid*.

⁵⁷ *Ibid*.

⁵⁸ J. R. McCulloch, *A Dictionary, Practical, Theoretical, and Historical, of Commerce and Commercial Navigation* (London, 1832), p 106.

⁵⁹ *R v Fox* (1841) 2 QB 246.

The difficulty in collecting debts through the seizure of a debtor's property emanated from the emergence of modern forms of wealth such as bank accounts, negotiable instruments and other related *choses in action*.⁶⁰

From the 18th century imprisonment for debt started to fall out-of-step with society in general.⁶¹ Holdsworth summarised the growing disenchantment:

“On the one hand imprisonment is not always effectual to force payment from an obstinate and fraudulent debtor; while, on the other hand, he whose insolvency may have arisen only from accident and misfortune, may still be detained in prison by a rigorous creditor, though he has nothing left wherewith to satisfy the debt”.⁶²

The loss occasioned to creditors due to imprisonment for debt is difficult to ascertain⁶³ because some creditors either wrote off their debts or compounded the debt with their debtors.⁶⁴ In fact, many insolvencies were being administered through the use of letters of licence, deeds of inspectorship, or compositions.⁶⁵ An analysis of the contemporary schemes of arrangements is provided below at 1.4.

The system of imprisonment for debt seemed to work for creditors: the cost of administering the system was quite modest⁶⁶ and the returns outweighed the costs.⁶⁷ Reformers attempted to free honest debtors prior to embarking on a sustained campaign aimed at diminishing the circumstances which prompted imprisonment, in

⁶⁰ W. R. Cornish and G. de N. Clark, *Law and Society in England 1750-1950* (London, 1989), p 228.

⁶¹ Cork Committee, para 40; Lester, *Victorian Insolvency*, pp 89-90.

⁶² Sir W. Holdsworth, *A History of English Law - The Centuries of Settlement and Reform 1701-1875* (Sweet & Maxwell, London 1952), p 265.

⁶³ *The Times* estimated that the economic loss represented by imprisonment for debt totalled £5 million in 1860. 'Insolvents' *The Times* (29 June 1860).

⁶⁴ Lester, *Victorian Insolvency*, p 99.

⁶⁵ J. Hoppit, *Risk and Failure in English Bankruptcy Business 1700-1800* (Cambridge, 1987), pp 29-30.

⁶⁶ It cost £8,000 in 1821 and just over £13,000 in the 1830s and 1840s: *Estimates and Accounts* (June 1831); *Estimates and Accounts* (June 1831); *Estimates* (Apr. 1841).

⁶⁷ Lester, *Victorian Insolvency*, pp 99-100.

particular the arrest on *mesne* process.⁶⁸ But opposition to the abolition of the practice meant it was never “tackled as a whole”.⁶⁹ Creditors argued that without security of arrest they would not be eager to extend credit because many debtors did not have property to secure their debts.⁷⁰ According to Paley, imprisonment for debt broadened the catchment area for credit which was a massive advantage for creditors.⁷¹ Creditors opposed any attempts to reform the system because they regarded it as added security: actual imprisonment or the threat of imprisonment.⁷² But even those who supported imprisonment for debt soon accepted an injustice embedded in the practice: “in the case of insolvency, punishment ought to be applied to him, and him [*sic*] alone, on whose part there has been blame”.⁷³

1.3.1 Establishment of the Court for the Relief of Insolvent Debtors

The provisions under the Act of 1813⁷⁴ allowed a debtor imprisoned for three or more months to petition the Court for the Relief of Insolvent Debtors for release. The system that was introduced by the Act of 1813 fundamentally resembled the bankruptcy system:⁷⁵ an assignee administered the assets and distributed any realisations among the creditors on a *pro rata* basis.

The trading community protested the watering-down of the creditors’ discretion and assumed that those who were in desperate need of credit would be affected most.⁷⁶

The 1816 select committee reported that fraudulent debtors were also being released

⁶⁸ Lester, *Victorian Insolvency*, p 90.

⁶⁹ J. Brooke, *The House of Commons, 1754-1790: An Introductory Survey* (Oxford, 1968), p 267.

⁷⁰ Lester, *Victorian Insolvency*, pp 99-100.

⁷¹ W. Paley, *The Principles of Moral and Political Philosophy* (10th edn, Boston 1821), pp 121-122.

⁷² Lester, *Victorian Insolvency*, p 101.

⁷³ J. Bentham, *The Works of Jeremy Bentham*, ed. J. Browning (Edinburgh, 1843).

⁷⁴ 53 Geo. III. c. 102 (1813).

⁷⁵ Although, in contrast to bankruptcy, judgement for any unpaid debt remained in force against the debtor’s future assets. Lester, *Victorian Insolvency*, p 107.

⁷⁶ *Ibid*, p 108.

and some Members of Parliament (MPs) referred to the system as “nothing short of [a] legalised system of fraud”.⁷⁷ In line with the operation of the provision of a discharge,⁷⁸ the Act of 1813 was amended to allow for the examination of the affairs of a debtor before release⁷⁹ and preferences and conveyances by debtors were subsequently invalidated.⁸⁰

Most commissioners recommended restricting imprisonment for debt to cases involving some impropriety on the part of the debtor.⁸¹ In order to garner the support of creditors, the reformers proposed to allow a judgment to be a charge on the debtor’s property. Parliament subsequently stopped arrest on *mesne* process where the debt was under £20⁸² and extended the writ of *elegit* to encompass all the property of a debtor.⁸³ The campaign against imprisonment for debt continued throughout the 1840s.⁸⁴ A bill that was introduced in 1842⁸⁵ made it possible for traders and non-traders to petition the Bankruptcy Court for examination and possible discharge.⁸⁶ An abolition of imprisonment for debts under £20⁸⁷ followed and it was reported that the provision had an immediate impact on the numbers of inmates.⁸⁸

1.3.2 Summary of the System of Imprisonment for Debt

The cruelty of imprisonment for debt was referred to as the English version of slave trade.⁸⁹ Nevertheless, the establishment of the Court of Relief for Insolvent Debtors,

⁷⁷ *Hansard*, 2nd ser. (1823), viii. 541

⁷⁸ See 1.6.

⁷⁹ 1 Geo. IV. c. 119 (1820).

⁸⁰ 7 Geo. IV. c. 121 (1826).

⁸¹ *PP* (6 Mar. 1832), 8.

⁸² 1 & 2 Vict. c. 102 (1838).

⁸³ 1 & 2 Vict. c. 110 (1838).

⁸⁴ Lester, *Victorian Insolvency*, pp 114-115.

⁸⁵ See 1.7.3.

⁸⁶ *Hansard*, 1st ser. (1842), lxxv. 489.

⁸⁷ 7 & 8 Vict. c. 96 (1844).

⁸⁸ The number of debtor-prisoners at Whitecross Prison fell from 300 to 130. *The Times* (23 Aug. 1844).

⁸⁹ Cork Committee, para 40.

the abolition of arrest on *mesne*⁹⁰ and extension of the writ of *elegit*⁹¹ mitigated the brutality. After the establishment of the Court of Relief for Insolvent Debtors the operation of the system of imprisonment for debt effectively mirrored the bankruptcy system. Parliament finally abolished imprisonment for debt on *mesne* or final process in 1869.⁹² However, on the insistence of creditors, the legislation reserved the courts a “saving power of committal for small debts”⁹³ provided it was proven that the debtor had the means to pay. It was argued that the provision practically maintained imprisonment for debt “as if the Legislature had never abolished the same”.⁹⁴ Imprisonment for debt possibly continued beyond 1869 for the poorer members of society.⁹⁵ It was not until 1970 that Parliament abolished all forms of imprisonment for debt.⁹⁶

As indicated above, between 1700 – 1800, many insolvent debtors and their creditors preferred to enter private arrangements instead of petitioning the court. The following analysis explores the rationale and popularity for using private arrangements, the extent of their success in rehabilitating insolvent traders and the major weaknesses from a corporate rescue perspective.

1.4 Private Arrangements with Creditors

Although part payment of a debt does not satisfy the whole,⁹⁷ it may be applied in satisfaction if a creditor by deed acknowledges to be satisfied, or releases the debt, he (or she) will be estopped from making any further claim.⁹⁸ Deeds for creating private

⁹⁰ 1 & 2 Vict. c. 110 (1838).

⁹¹ 1 & 2 Vict. c. 102 (1838).

⁹² 32 & 33 Vict. c. 62 (1869): “An Act for the Abolition of Imprisonment for Debt”.

⁹³ *Ibid*, s. 5.

⁹⁴ L. Levi, ‘On the Abolition of Imprisonment for Debt’ *Law Magazine and Review* 3 (1874), at 599.

⁹⁵ *SP* 20 June 1893: ‘Report from the Select of the House of Lords on the Debtors Act...’.

⁹⁶ Administration of Justice Act 1970.

⁹⁷ *Pinnell’s Case* (1602), 5 Co. Rep. 117.

⁹⁸ *Knight v Cox*, Bull N.P 153.

arrangements between insolvent debtors and their creditors have been in use for a long time.⁹⁹ Thus, a debtor has always been able to propose arrangements for the settlement of his (or her) debts independent of the court.¹⁰⁰ Subject to the circumstances of the debtor, the arrangements can take a variety of forms.¹⁰¹ They are usually either a composition (i.e. an agreement to accept part of debt in satisfaction of the whole) with creditors or an assignment of the debtor's property for the benefit of creditors.¹⁰² Nevertheless, voluntary arrangements have always been plagued with difficulties. For instance, an assignment of the whole (or substantially the whole) of the debtor's property for the benefit of his (or her) creditors was deemed to be an "act of bankruptcy".¹⁰³ Furthermore, an arrangement only bound the creditors who consented; it could be vitiated by the actions of a dissenting creditor instituting proceedings against the debtor.¹⁰⁴ The arrangements usually contemplated that the debtor gave up all his (or her) assets to an assignee (or a trustee) for benefit of the creditors in exchange for a release from their claim.¹⁰⁵

Private arrangements (between debtors and creditors) have been a fixture of English law from the earliest periods.¹⁰⁶ The origins of compositions can be traced back to early continental systems of law whose foundations were laid down during the Roman period.¹⁰⁷ During the 18th and 19th centuries creditors preferred to enter into private

⁹⁹ R.G. Young, *A treatise on the law of private arrangements with creditors: with an appendix containing the Deeds of Arrangement Act, 1887, the Bills of Sale Acts 1878 & 1882, and the Bankruptcy (Discharge and Closure) Act, 1887: with the rules under the above acts* (W. Clowes and Sons, London 1888).

¹⁰⁰ Cork Committee, para 58.

¹⁰¹ Ibid.

¹⁰² Ibid, para 88.

¹⁰³ Ibid, para 60.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid, para 58.

¹⁰⁶ J. P. Tribe, 'Company voluntary arrangements and rescue: a new hope and a Tudor orthodoxy' (2009) *Journal of Business Law* vol. 5, pp 454-487 ("Tribe, CVAs and Rescue").

¹⁰⁷ I. Treiman, 'Majority Control in Compositions: Its Historical Origins and Development' (1937-1938) *Virginia Law Review* 507 ("Treiman, Majority Control"). See 1.2.

arrangements with their debtors than to file for bankruptcy; formal bankruptcy was least favoured because of the cost and delay involved.¹⁰⁸ Statistics support the extensive use of private arrangements.¹⁰⁹ Comparable to corporate rescue, some of the arrangements allowed the debtor to continue the operation of their business under certain restrictions imposed by the creditors through a deed of arrangement,¹¹⁰ a letter of licence¹¹¹ or deed of inspectorship.¹¹² Although company voluntary arrangements (CVAs), see 1.4.4.1 below, when adopted either as a standalone procedure¹¹³ or under administration,¹¹⁴ may be applied to the same effect, the chronic lack of rescue finance massively restricts their use as a corporate rescue tool in practice.¹¹⁵

1.4.1 Compositions

Under Roman law, as evidence of the corporate theory which underpinned the principle, the majority decision to accept a composition was collectively made at a formal meeting of all the creditors.¹¹⁶ The principle of a majority controlled composition probably marked the starting point of the creditors' domination and influence in corporate insolvency.¹¹⁷ On the petition of a debtor, a moratorium (or respite) could be granted by an elected civil magistrate (*praetor*) and later by the Emperor acting through his "privy council".¹¹⁸ In the event of an impasse the side in support of the

¹⁰⁸ Lester, *Victorian Insolvency*, p 78.

¹⁰⁹ In 1859, *The Times* stated that the number of compositions, assignments and informal arrangements were between 10 000-12000 every year. *The Times* (Feb. 1859).

¹¹⁰ See 1.9.

¹¹¹ Cork Committee, para 58.

¹¹² *The Times* (28 Feb. 1859).

¹¹³ IA 1986, ss 1-7B.

¹¹⁴ See Chapter 3 for a preliminary analysis of the administration provisions (IA 1986, Sch B1).

¹¹⁵ See Chapter 4.

¹¹⁶ I. Treiman, *Majority Control*, at 508.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*, at 509.

respite prevailed.¹¹⁹ In stark contrast, respites under the later developed Italian Law Merchant¹²⁰ were creditor-granted.¹²¹

Similar petitions were being directed to the Privy Council from late 15th century until early 16th century.¹²² The practice of granting respites was not immune to abuse and it was stopped during the reign of Emperors Gratian, Valentinian and Theodosius apart from exceptional cases.¹²³ A decree issued during the reign of Emperor Justinian that required creditors to either accept a *cessio bonorum* (voluntary assignment of assets)¹²⁴ or to assent to a five-year respite¹²⁵ restored the practice.

The collapse of the Roman Empire was shadowed by a period of anarchy during which the law of private seizure and self-help replaced the official system.¹²⁶ The majority controlled composition somehow survived the chaos and re-emerged as a part of the Italian Law Merchant developed in the mercantile city-states of northern Italy.¹²⁷ To make it attractive for debtors the Italian creditors offered a “safe-conduct” and the practice eventually gave rise to a scheme comparable to the Roman moratoria.¹²⁸ By the 13th century the practice had permeated the civil law jurisdictions of France and Germany.¹²⁹ Even though the early English bankruptcy statutes did not make provision for compositions it was observed that merchants had long been using related

¹¹⁹ I. Treiman, Majority Control, at 509.

¹²⁰ See 1.2.

¹²¹ I. Treiman, Majority Control, at 509.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ L E Levinthal ‘The Early History of English Bankruptcy Law’ [1918] *University of Pennsylvania Law Review* 223.

¹²⁵ I. Treiman, Majority Control, at 509.

¹²⁶ Ibid.

¹²⁷ See 1.2.

¹²⁸ I Treiman, Majority Control, at 510.

¹²⁹ Ibid.

mechanisms.¹³⁰ Notwithstanding their limitations, it was considered more expedient to enter into private arrangements than to file for bankruptcy.¹³¹

1.4.2 The Role played by the Privy Council

In England, it was the Privy Council and the Court of Chancery that initially recognised compositions and not the legislature.¹³² Interestingly, the Privy Council did not take the principle of majority control into account.¹³³ The Privy Council would first attempt to persuade creditors to compound with the debtor on their own terms but creditors who continually disagreed risked being committed to prison.¹³⁴ In one case, the Privy Council wrote a letter to a dissenting creditor pleading for their lenience toward the debtor as a “good and charytable deed” but with a warning that “their Lordships should be constrained to take that course against him as otherwise they would be loath to do”.¹³⁵

A few debtors fraudulently petitioned the Privy Council for protection to the detriment of its prior hard work.¹³⁶ The rules or any guidance on which the Privy Council formulated its jurisdiction are not clear.¹³⁷ The basis on which the Privy Council calculated the majority seems to have been predicated on numbers and not in value as first espoused by the Romans.¹³⁸ Based on the Privy Council’s success in bringing creditors to a composition with their debtors, Professor Holdsworth asserted that “it

¹³⁰ I. Treiman, Majority Control, at 511.

¹³¹ See 1.4 above.

¹³² The duration of compositions varied from case to case sometimes it was for only a brief stay of proceedings and at other times it was for a definite period ranging from six months to five years. I. Treiman, Majority Control, at 512.

¹³³ Ibid, at 513.

¹³⁴ Ibid, at 514.

¹³⁵ Ibid. It was observed that Lord Verulam also threatened dissentient creditors with imprisonment. J. Tribe and D. Graham, *Bacon in Debt – The Insolvency Judgements of Francis, Lord Verulam* [2006] *Insolvency Law & Practice* vol. 22(1).

¹³⁶ I. Treiman, Majority Control, at 515.

¹³⁷ Ibid, at 512.

¹³⁸ Ibid.

was this branch of English law which was the most injuriously affected by the abolition of the jurisdiction of the Council".¹³⁹

1.4.3 Practice in the Court of Chancery

During the 13th century the Chancellor entertained petitions for and against the granting of "bills of protection".¹⁴⁰ However, the records do not clearly show any precedent on the concept of majority control.¹⁴¹ By the second half of the 15th century petitions for respite were generally submitted to the Privy Council.¹⁴² But, through the exercise of the writ of subpoena and the power of injunction the Court of Chancery remained relevant.¹⁴³ During the reign of Queen Elizabeth I, for the purpose of barring proceedings being brought against them, debtors with royal protections filed them in the Court of Chancery.¹⁴⁴

Creditors frequently initiated proceedings to prevent a minority from exercising their individual rights where protection had been granted.¹⁴⁵ In 1596, creditors were allowed to bring formal suits which compelled a minority to abide by the terms of a composition with a debtor without royal protection.¹⁴⁶ At first sight, it seems "bills of conformity" were initiated by creditors on behalf of the debtor.¹⁴⁷ During the reign of James I (1603 – 1625), the practice was transformed by allowing debtors to file for "bills of conformity" in the Chancery.¹⁴⁸

¹³⁹ Sir W. Holdsworth, *A History of English Law* (London, 1956).

¹⁴⁰ I. Treiman, *Majority Control*, at 516.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Ibid.*, at 517.

¹⁴⁴ For instance, in 1575, a royal protection and defence for three years for the "well beloved subject" Robert Christmas was filed in the Court of Chancery. *Ibid.*

¹⁴⁵ *Ibid.*, at 518.

¹⁴⁶ *Ibid.*, at 522.

¹⁴⁷ *Ibid.*, at 520.

¹⁴⁸ *Ibid.*

Deceitful debtors caused the practice to fall into disrepute as the procedure was still largely undefined at this stage.¹⁴⁹ In light of the abuses, Francis Bacon published orders concerning “bills of conformity” for the guidance of the Court of Chancery.¹⁵⁰ The orders required concurring creditors to represent “three parts in four” of the value of the debt and examination.¹⁵¹ Similarly, the decision of three-fourths of creditors in value and number is binding on the minority in a CVA.¹⁵² Regrettably, a royal proclamation abolished the practice of granting “bills of conformity”.¹⁵³ The majority controlled composition did not have any supporting mechanisms and so remained ever susceptible to the actions of a dissenting creditor.¹⁵⁴

1.4.4 Formalising Informal Arrangements

Parliament’s reluctance¹⁵⁵ to legislate in favour of a majority-controlled composition first showed signs of receding through a bill intended “to prevent the smaller number of the creditors of a bankrupt from obstructing a composition of the greater number”.¹⁵⁶ Despite receiving considerable support the bill was eventually dropped.¹⁵⁷ In 1693, the House of Commons proposed another bill which the House of Lords rejected.¹⁵⁸

The earliest statutory provision for a composition under English law was enacted in 1697: “An act for the relief of creditors, by making compositions with their debtors in case two thirds in number and value do agree”.¹⁵⁹ The provision essentially ratified a

¹⁴⁹ I. Treiman, *Majority Control*, at 520.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² IR 2016, r 15.34. See the discussion at 1.4.4.1.

¹⁵³ I. Treiman, *Majority Control*, at 520.

¹⁵⁴ *Ibid.*

¹⁵⁵ In 1623, the legislature made it an “act of bankruptcy” for a debtor to present any petition or bill against his or her creditors. 21 James I. c. 19 (1623), s. 2.

¹⁵⁶ I. Treiman, *Majority Control*, at 521.

¹⁵⁷ *Ibid.*, at 521-2.

¹⁵⁸ *Ibid.*, at 522.

¹⁵⁹ 8 & 9 Wm. III. c. 18 (1697).

common practice among the trading community.¹⁶⁰ Nonetheless, it guaranteed creditors a partial satisfaction of debts while ensuring the debtor was not permanently incapacitated.¹⁶¹ For the first time, the legislature attempted to effect a balance between the interests of creditors and rehabilitating insolvent but yet viable traders. Regrettably, the Act of 1697 was repealed the following year based on alleged abuse by debtors.¹⁶²

After the initial failure, the legislature did not concern itself again until 1825. The attitude of the legislature and the courts throughout the 18th century was that “adjustment between an insolvent trader and the creditors, otherwise than under a commission (of bankruptcy) was an attempt to evade the law”.¹⁶³ The motivation for this stance emanated from fear that prolonged private arrangements encouraged secrecy and fraudulent dealings by debtors or controlling creditors.¹⁶⁴ Although the duration of administration is relatively quick,¹⁶⁵ the pre-appointment consultations between the principal secured creditor, the prospective administrator and the management are, likewise, conducted behind closed doors.¹⁶⁶

In 1818, a parliamentary select committee reported that compositions were highly regarded by public opinion.¹⁶⁷ In 1825, a minority of one-tenth of creditors in number and value was prevented from frustrating a composition preferred by nine-tenths.¹⁶⁸ The majority was subsequently lowered to three-fifths in number and value prior to

¹⁶⁰ See 1.4.

¹⁶¹ I. Treiman, *Majority Control*, at 522.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ The administration of a company automatically ends after 12 months unless the creditors or court agree to an extension. IA 1986, Sch B1 para 76.

¹⁶⁶ See 3.6.

¹⁶⁷ *PP* (8 May 1818), 8.

¹⁶⁸ 6 Geo. IV. c. 16 (1825), s. 133.

the adjudication of bankruptcy.¹⁶⁹ Deeds of arrangement required six-sevenths in number and value of creditors.¹⁷⁰ The modern system of compositions was laid down by the Bankruptcy Act 1861¹⁷¹ which provided that a majority in number and three-fourths in value of creditors would suffice to bind the minority.¹⁷² The framework was amended and re-enacted through the Bankruptcy Act 1869¹⁷³ before the provisions of both Acts were repealed by the Bankruptcy Act 1883.¹⁷⁴

The CVA procedure is a modern scheme¹⁷⁵ but its origins can be traced back to the early compositions and schemes of arrangements which were frequently adopted by debtors with their creditors to either avoid imprisonment or as an alternative to bankruptcy or company winding up. The following section (1.4.4.1) briefly explores the evolution of CVAs and the perceived strengths and weaknesses of the voluntary procedure as a corporate rescue mechanism.

1.4.4.1 Company Voluntary Arrangements (CVAs)

The origin of CVAs can be delineated from the Deeds of Arrangement Act 1914¹⁷⁶ through successive Companies Acts which contained the scheme of arrangement provisions.¹⁷⁷ The effect of formalising compositions was to make them binding without necessarily making provision for a moratorium.¹⁷⁸ CVAs were introduced under IA 1986 based on the recommendation of the Cork Committee which sought to add voluntary arrangements to complement the complex schemes of arrangements under

¹⁶⁹ 12 & 13 Vict. c. 106 (1849). The approval of nine-tenths of the creditors in number and value was still required for compositions arranged after the adjudication of bankruptcy.

¹⁷⁰ *Ibid.*

¹⁷¹ 24 & 25 Vict. c. 134 (1861).

¹⁷² See 1.8.2.

¹⁷³ 32 & 33 Vict. c. 71 (1869). See 1.8.4.

¹⁷⁴ See the discussion at 1.9.

¹⁷⁵ The procedure was first recommended in 1982 by the Report of the Cork Committee at para 428.

¹⁷⁶ See the discussion at 1.10.

¹⁷⁷ Companies Acts of 1929, 1948, 1967, 1985 and 2006. Tribe, CVAs and Rescue.

¹⁷⁸ Tribe, CVAs and Rescue, at 454.

the Companies Acts.¹⁷⁹ A company either required the approval of all the creditors to make an agreement binding or otherwise settling for one of the binding schemes under sections 206, 287 and 306 of the Companies Act 1948.¹⁸⁰

The Cork Committee focused on the schemes under s.206 which required a three-fourths majority vote by contributories and creditors to be binding.¹⁸¹ The Cork Committee critically observed that the combination of a lack of a moratorium and the burdensome formalities were impeding potential corporate rescue.¹⁸² In order to “facilitate the effecting of fair and reasonable schemes”¹⁸³ the Cork Committee proposed two possibilities. Firstly, it was envisaged that administration would alleviate the crisis.¹⁸⁴ The second avenue involved two schemes of CVAs i.e., voluntary arrangements following the appointment of an administrator and voluntary arrangements without a court order but with the possibility of extending the binding formalities.¹⁸⁵

1.4.5 Summary of Private Arrangements

In spite of their shortcomings, private arrangements have been used by insolvent debtors and their creditors since the early days. Historically, informal arrangements were mainly favoured because of the private nature of the proceedings, low cost and less delay involved.¹⁸⁶ It was anticipated that formally adopting compositions would deter the “debilitating effects of errant debtor behaviour” responsible for bad debt.¹⁸⁷ CVAs were specifically enacted to facilitate the ethos of corporate rescue when used

¹⁷⁹ Tribe, CVAs and Rescue, at 454.

¹⁸⁰ Ibid, at 460.

¹⁸¹ Ibid, at 464.

¹⁸² Cork Committee, para 409.

¹⁸³ Ibid, para 422.

¹⁸⁴ Tribe, CVAs and Rescue, at 477.

¹⁸⁵ Cork Committee, para 428.

¹⁸⁶ See 1.4.

¹⁸⁷ Tribe, CVAs and Rescue, at 480.

either as a standalone procedure or in conjunction with other procedures.¹⁸⁸ Voluntary arrangements were seen as an instrument that could be used when administration was not appropriate and also to allow small companies to participate cost effectively in such arrangements.¹⁸⁹ Neuberger LJ opined that "...the CVA regime is intended to be an additional, and particularly flexible, option in the case of corporate insolvency, in addition to liquidation, administration and administrative receivership".¹⁹⁰ From a corporate rescue standpoint, a standalone CVA is, similar to the early private arrangements, vulnerable to the action of a dissenting creditor.

1.5 Reconstruction and Amalgamation of Joint Stock Companies (1800 – 1926)

Where it was desired to extend or amend the objects or powers of a company incorporated under the Companies Act 1862 or the Companies Consolidation Act 1908 it was common practice to transfer its undertaking and liabilities to another (new or already existing) company with sufficiently wide objects and powers.¹⁹¹ The shareholders of the transferring company received shares in the other company in exchange for their interests in the transferring company and such a transfer (depending on the circumstances of each case) either constituted a reconstruction or amalgamation.¹⁹²

However, both terms (reconstruction and amalgamation) are not technical terms and have not yet acquired precise meanings. According to Lord Lindley, reconstruction differs from amalgamation in that, as a rule, there is only one transferring company and the company to which the property is transferred is practically the same

¹⁸⁸ Tribe, *CVAs and Rescue*, at 487.

¹⁸⁹ Cork Committee, para 430.

¹⁹⁰ *Commissioners of Inland Revenue v The Wimbledon Football Club Ltd and others* [2004] EWCA Civ 655 at 53.

¹⁹¹ P. F. Simonson, *The Law Relating to the Reconstruction and Amalgamation of Joint Stock Companies: together with forms and precedents* (Sweet & Maxwell, London 1919), p 1.

¹⁹² *Ibid*, p 2.

company, albeit with some alteration in its constitution.¹⁹³ Similarly, in his book,¹⁹⁴ Lord Wrenbury stated that the essential part of a reconstruction would seem to be the formation of a new company to take over the assets of an old one.¹⁹⁵ Whereas, the word amalgamation is generally understood to express or imply a transfer of assets and liabilities by one or more companies either to a new company or to an already existing company in consideration of shares which are given or offered to members of the transferring company.¹⁹⁶

Reconstruction was frequently resorted to where the powers of a company were sufficiently wide, but it was desirable that the undertaking should be vested in another company and where there was a need to extend or modify the company's objects. In comparison, amalgamation was often used where the expenses of carrying on a large business were relatively less than those incidental to running a smaller business and it was in the best interest of a number of small businesses to be amalgamated into one large business.¹⁹⁷ Amalgamation was also conducive where there was intense competition between numerous companies.¹⁹⁸

In 1662, it was necessary to amend the law so that shareholders in joint-stock companies were not declared bankrupt based on their membership.¹⁹⁹ Prior to 1844, a company could be incorporated by a Royal Charter or by means of a special Act of

¹⁹³ P. F. Simonson, *The Law Relating to the Reconstruction and Amalgamation of Joint Stock Companies: together with forms and precedents* (Sweet & Maxwell, London 1919), p 7.

¹⁹⁴ Buckley, 9th edn, p 43.

¹⁹⁵ P. F. Simonson, *The Law Relating to the Reconstruction and Amalgamation of Joint Stock Companies: together with forms and precedents* (Sweet & Maxwell, London 1919), p 7.

¹⁹⁶ *Ibid*, p 10.

¹⁹⁷ *Ibid*, p 13.

¹⁹⁸ *Ibid*.

¹⁹⁹ 13 & 14 Car. II. c. 24 (1662).

Parliament:²⁰⁰ limited liability²⁰¹ was not guaranteed.²⁰² Bankruptcy legislation in the 17th century was enacted on the same premise as the first bankruptcy statute and was pro-creditor:²⁰³ the thrust was to ensure the debtor gave up all the assets and punishment was imposed for any fraud.²⁰⁴ However, during early 18th century, the legislature started to appreciate that bankrupts were not always delinquent and that people who became insolvent because of circumstances outside of their control deserved sympathy and relief.²⁰⁵

1.6 The Provision of a Discharge

In 1705 it became possible for a bankrupt to be discharged from present and future liabilities without the approval of creditors.²⁰⁶ Discharge was granted by the court provided the bankrupt acted *bona fide* towards the creditors.²⁰⁷ The onus of determining the prudence of a bankrupt was at the discretion of the court: co-operation with creditors and compliance with the provisions rendered a discharge.²⁰⁸ Nevertheless, the death penalty could still be imposed on debtors who were convicted of concealing assets, resisting examination or fraud.²⁰⁹ A position which makes Defoe's suggestion that reimbursement of creditors underlay the provision of discharge very persuasive.²¹⁰ Moreover, the Act itself made it clear that the provision

²⁰⁰ See n. 4 above.

²⁰¹ The doctrine of limited liability and its implications are considered at 1.11.1.

²⁰² For charter companies, under private Acts of Parliament, liability was limited to the amount of unpaid shares. The development of company law was disturbed between 1720 and 1825 by the "South Sea Bubble" scandal (see 1.11). A. Dignam and J. Lowry, *Company Law* (9th edn Oxford University Press, Oxford 2016), p 16; Goode, *Principles*, p 11.

²⁰³ A. Keay, 'Balancing Interests in Bankruptcy Law' *Common World Law Review* (2001) 30 (2), p 9.

²⁰⁴ Cork Committee, para 37.

²⁰⁵ Sir W. Holdsworth, *A History of English Law* (2nd edn 1937).

²⁰⁶ "An act to prevent frauds frequently committed by bankrupts". 4 Anne. c. 17 (1705).

²⁰⁷ 4 Anne. c. 17, s. 7.

²⁰⁸ The Act made provision for creditors to oppose the granting of a certificate of discharge. 4 Anne. c. 17, s. 1.

²⁰⁹ 4 Anne. c. 17, ss 8 and 9.

²¹⁰ D. Defoe, *A Review of the State of the English Nation* (1706).

of a discharge would encourage bankrupts to be honest for the benefit of creditors.²¹¹ The provision of a discharge, it is submitted, represented a “pivotal transitional phase” in the development of bankruptcy law.²¹² It signified an attempt to balance the interests of stakeholders in bankruptcy, albeit the system was still very much creditor oriented.²¹³

The provision of discharge did not produce the desired results and Parliament concluded that insolvents “hath not answered the good intent” of the previous Act “but to the contrary, many notorious frauds and abuses have been committed”.²¹⁴ As a consequence, discharge required approval by four-fifths of the creditors in number and value.²¹⁵ The power that was originally bestowed upon the courts²¹⁶ was immediately reassigned to creditors.

More bankruptcy legislation ensued²¹⁷ and, in 1732, Parliament consolidated all bankruptcy laws.²¹⁸ Besides unifying the law the Bankruptcy Act 1732 refined the original system of assignees.²¹⁹ Upon being selected, commissioners could immediately appoint an assignee to govern the affairs of the estate.²²⁰ The collection and distribution of assets was originally delegated to commissioners who were nominated by the Lord Chancellor from a pool of candidates selected by creditors.²²¹

²¹¹ 4 Anne. c. 17, s. 17.

²¹² R. Weisberg, ‘Commercial Morality, the Merchant Character, and the History of Voidable Preference’ (1986) 39 *Stanford Law Review* 1.

²¹³ For instance, it was not until passage of the Bankruptcy Act 1825 (6 Geo. IV. c. 16.) that provision was made for a debtor to file for his or her own bankruptcy. See 1.6.

²¹⁴ 5 Anne c. 22 (1706).

²¹⁵ *Ibid*, s. 2.

²¹⁶ 4 Anne c. 17 (1705).

²¹⁷ 10 Anne c. 15 (1711) (discharge of a bankrupt not considered a discharge of partners); 5 Geo. I. c. 24, (1718) (Lord Chancellor allowed to dismiss unsuitable assignees); 6 Geo. I. c. 22 (1719) (imprisoned bankrupts allowed to be released after receipt of certificate discharge); 7 Geo. I. c. 31 (1720) (creditors holding bills, bonds, notes, or other securities of the bankrupt and not due on the date of bankruptcy permitted to make a claim against the debtor’s assets).

²¹⁸ 5 Geo. II. c. 30 (1732).

²¹⁹ Lester, *Victorian Insolvency*, p 18.

²²⁰ 5 Geo. II. c. 30, s. 31.

²²¹ 13 Eliz. c. 7 (1570).

This system was completely dislodged in London in favour of a list of specific commissioners.²²² The traditional selection of commissioners by creditors sustained in the county courts until 1830.²²³ The bankruptcy regime that prevailed for the rest of the 18th century would, to a great extent, endure principled on the Act of 1732.²²⁴

Lord Mansfield contributed to the development of bankruptcy when he ascertained that a person's status as a trader was a question of law based upon fact.²²⁵ His Lordship's interpretation served on two fronts. Firstly, it was argued that the precedent fortified the position of a creditor.²²⁶ Secondly, the exposition meant that the contentious business of defining a trader was kept away from the jury.²²⁷ The intervention, nonetheless, demonstrates both the judiciary's pragmatic approach to bankruptcy problems and the infrequency of such contributions to the growth of the bankruptcy jurisprudence.²²⁸

The second half of the 18th century was characterised by epidemic levels of bankruptcies.²²⁹ The number of which grew at a rate of 3.55 per cent between 1760 and 1780.²³⁰ During this period the economy and indeed many aspects of social life in the UK were under the spell of the Industrial Revolution.²³¹ The increase in the number

²²² Lester, *Victorian Insolvency*, p 18.

²²³ C. P. Cooper, *A Brief Account of Some of the Most Important Proceedings in Parliament, Relative to the Defects in Administration of Justice in the Court of Chancery, the House of Lords and the Court of the Commissioners of Bankrupt...* (London, 1828), pp 261-262.

²²⁴ Lester, *Victorian Insolvency*, p 18.

²²⁵ *Ibid.*, p 19.

²²⁶ C. H. S. Fifoot, *Lord Mansfield* (Oxford, 1936), pp 109-10.

²²⁷ Lester, *Victorian Insolvency*, p 19.

²²⁸ *Ibid.*

²²⁹ According to Hoppit, between 1700 and 1800 approximately 33 000 businesses became insolvent in England and Wales: J. Hoppit, *Risk and Failure in English Bankruptcy Business 1700-1800* (Cambridge, 1987), p 42.

²³⁰ *Ibid.* p 49.

²³¹ Fletcher, *Law of Insolvency*, pp 9-10.

of bankruptcies²³² over-burdened the bankruptcy system and nearly brought the institution into disrepute.²³³

1.7 The Age of Reform (1800-1883): Evolution of the Administrative Machinery

By 1800 the substantive principles of bankruptcy law²³⁴ were laid down and reformers shifted their attention to the administrative aspects.²³⁵ It is important that 19th century bankruptcy reform be contextualised within the slightly bigger picture to reform almost all aspects of the English legal system.²³⁶ The reform to the legal system being a constituent part of an overall national reform agenda fittingly termed: “the age of reform”.²³⁷ Bankruptcy reform during early 19th century was justified on abuse and fraud.²³⁸ The Lord Chancellor, Lord Eldon, described the bankruptcy system as “a disgrace to the country and that it would be better at once to repeal all the statutes than suffer them to be applied to such purposes”.²³⁹ His Lordship’s comments were particularly motivated by a classic case of abuse of the process.²⁴⁰

In fact, the Lord Chancellor himself presided over the case on appeal and dismissed the bankruptcy lawsuits therein. *Ex parte Story*²⁴¹ is an extraordinary case regarding

²³² Under s. 23 of the Act of 1732 bankruptcy only concerned traders owing at least £100 to one creditor or partners, £150 to two individual creditors, or £200 to three or more.

²³³ I. P. H. Duffy, ‘Bankruptcy and Insolvency in London in the Late Eighteenth and Early Nineteenth Centuries’ (University of Oxford, Doctor of Philosophy Thesis, 1973), p 15.

²³⁴ According to Lester all modern definitions of English bankruptcy law encompass two substantive principles: rateable distribution of the bankrupt’s assets among the creditors and the discharge of a *bona fide* debtor. Lester, *Victorian Insolvency*, p 24. See 1.2 and 1.5, respectively.

²³⁵ Lester, *Victorian Insolvency*, p 38.

²³⁶ *Ibid*, p 21.

²³⁷ E. L. Woodward, *The Age of Reform 1815 – 1870* (Oxford, 1939).

²³⁸ Lester, *Victorian Insolvency*, p 26.

²³⁹ *Regulations in Bankruptcy*, VI Vesey 1 (1801). Some of the perceived problems were not limited to abuse and fraud but were part and parcel of the law itself: bankruptcy was limited to traders and the exercise of construing a trader caused a lot of controversy; neither was it easy to determine “acts of bankruptcy” necessary to declare an individual bankrupt; the fees of handling bankruptcy cases were high and there were delays in the process; commissioners were not paid appropriately and as a result did not perform their duties to a satisfactory level and the expiration of some of the legislation regulating bankruptcy and insolvency created uncertainty.

²⁴⁰ The case was also cited as an example of abuse by the 1817 parliamentary select committee.

²⁴¹ *Ex parte Story*, 1 Bucks’s Reports 70 (1817).

the abuse of the bankruptcy apparatus. A partner in a boat building firm of four principals, who was a solicitor, initiated a bankruptcy commission against a debtor company. He later served as the commissioner's counsel in that case while another partner served as one of the commissioners who declared the debtor bankrupt. In separate proceedings, albeit under a related contract, a third partner also benefited from the expertise of the solicitor partner and the services of another partner acting in the capacity of a commissioner against the same debtor. In disgust, Lord Eldon dismissed both commissions on appeal as he felt justly obliged to condemn a situation where "one partner is the petitioning creditor, another [*sic*] an acting commissioner, another [*sic*] the solicitor to the commission, and the remaining one the sole assignee".²⁴²

For the period between 1815 – 1830, Boyd attributes the prevalent policies to a pragmatic response of "officially minded" Government ministers to everyday problems.²⁴³ In 1825, the legislature made it possible for debtor to trigger their own bankruptcy by a simple act of publicly declaring insolvency.²⁴⁴ The subsequent filing of the record of such a declaration qualified as an "act of bankruptcy".²⁴⁵ Prior to 1825, there was no statutory provision for schemes of arrangements.²⁴⁶ Compositions first appeared towards the end of the 17th century but their statutory adoption was rather short lived.²⁴⁷ As previously highlighted, deeds of arrangement were rarely used because of the high threshold required.²⁴⁸ The Act of 1825 re-enacted compositions

²⁴² *Ex parte Story*, 1 Bucks's Reports 70 (1817).

²⁴³ B. Hilton, *Age of Atonement: The Influence of Evangelicalism on Social and Economic Thought 1795-1865* (Oxford University Press, Oxford 1988).

²⁴⁴ 6 Geo. IV. c. 16, ss. 6-7.

²⁴⁵ *Ibid.*

²⁴⁶ Lester, *Victorian Insolvency*, p 36.

²⁴⁷ For a discussion of the early development of compositions see 1.4. The first statutory provision for compositions was enacted in 1697 but repealed the following year because of alleged abuse by fraudulent debtors.

²⁴⁸ Baldwin, *A Concise Treatise*, p 2. See 1.4.4.

into English law.²⁴⁹ Thus, a bankruptcy commission could be set aside provided a new contract to recompense a certain amount in the pound was sanctioned by nine-tenths of the creditors in number and value and the debtor had passed examination.²⁵⁰ Significantly, the arrangement was not regarded as an “act of bankruptcy”: the debtor was free to continue trading subject to the terms of the new composition.²⁵¹

The focus on the administrative aspects of bankruptcy inevitably led to the argument of who could best administer bankrupt estates between creditors and Government officials.²⁵² While staunch reformers, like Lord Brougham, believed that certain situations justified official intervention²⁵³ for others since the property of a debtor effectively belonged to creditors, they were entitled to administer the estate.²⁵⁴

1.7.1 Introduction of the Official Assignee

It was asserted that sometimes it is necessary for the state to step in and do for the people “that which they cannot do for themselves”.²⁵⁵ Traditionally, the administration of insolvent estates was essentially the business of creditors.²⁵⁶ The position was changed by the introduction of the official assignee. The Act 1831²⁵⁷ introduced a court appointed assignee as a replacement of the creditors’ assignee.²⁵⁸ It should, however,

²⁴⁹ 6 Geo. IV. c. 16, ss. 133-4.

²⁵⁰ Ibid, s. 4. See also 1.5.3.

²⁵¹ Lester, *Victorian Insolvency*, p 36.

²⁵² Ibid.

²⁵³ R. L. Crouch, ‘Laissez-Fare in Nineteenth Century Britain: Myth or Reality?’ (1967) *Manchester School of Economics and Social Studies* 35, at 210.

²⁵⁴ Lester, *Victorian Insolvency*, p 55.

²⁵⁵ D. Ricardo, *The works and Correspondence of David Ricardo* ed. Piero Sraffa and M. H. Dobb, 10 vols. (Cambridge, 1951-5).

²⁵⁶ Cork Committee, para 46.

²⁵⁷ “An Act to Establish a Court in Bankruptcy”. 1 & 2 Wm. 4. c. 56 (1831).

²⁵⁸ Lester, *Victorian Insolvency*, p 40.

be borne in mind that since the introduction of the first bankruptcy statute Government has retained limited supervision over the administration of insolvent estates.²⁵⁹

The Act of 1831²⁶⁰ abolished the jurisdiction of the Chancery Court and established a Bankruptcy Court presided over by a chief judge and three appellate judges.²⁶¹ The official assignees²⁶² would be appointed by the Lord Chancellor and it was envisaged that their appointment would mitigate the lack of interest on part of the creditors²⁶³ on which it seems intervention was justified in the first place.²⁶⁴

The new official system would initially apply to London and its surrounding areas²⁶⁵ but since most bankruptcy cases were heard in London courts the Act of 1831 was monumental.²⁶⁶ The prospect of maintaining the creditors' assignee with some residual powers, *prima facie*, created a conflict between the two assignees. However, it was observed that practice increasingly diminished the role of the creditors' assignee to lesser importance.²⁶⁷

1.7.2 Opponents of State Intervention

Prior to 1831, no sitting Lord Chancellor had attempted "to strike the whole system".²⁶⁸

Opponents argued that state intervention was against tradition and would only benefit

²⁵⁹ At first, the Lord Chancellor administered bankrupt estates through bankruptcy commissioners and then officials from the Board of Trade - later known as the Department of Trade and Industry (DTI) - supervised the administration of insolvent estates. Currently, the Insolvency Service (IS), an executive agency of the Department for Business, Energy and Industrial Strategy (BEIS), oversees the administration of insolvent estates.

²⁶⁰ 1 & 2 Wm. 4. c. 56.

²⁶¹ Lester, *Victorian Insolvency*, p 45.

²⁶² The official assignees were not to exceed thirty in number and had to be "merchants, Brokers, or Accountants or Persons who have been engaged in Trade in the Cities of *London and Westminster*". *SP* (15 July 1831), 442.

²⁶³ Lester, *Victorian Insolvency*, p 45.

²⁶⁴ The need for state intervention in the administration of insolvent estates was justified on maladministration on the part of creditors. *Ibid*, p 44.

²⁶⁵ The counties would continue with the part time commissioner system. *Ibid*, p 45.

²⁶⁶ *Ibid*.

²⁶⁷ *Ibid*.

²⁶⁸ *Ibid*, p 53.

a few.²⁶⁹ The low-key participation of the trading community in the opposition was attributed to a lack of proper organisation.²⁷⁰ Petitions from London bankers, merchants, solicitors and wholesale and retail traders in favour of the reform were recorded in the House of Lords.²⁷¹

Uncertainty and delay were identified as the Achilles heels of the bankruptcy system²⁷² and the abolition of the jurisdiction of the Chancery Court was probably a response to the needs of a highly influential business community.²⁷³ The introduction of the official assignee was not supported by some business groups because it effectively side-lined creditors in bankruptcy proceedings.²⁷⁴ It was argued that since the assets of a debtor were effectively the private property charged to creditors Government involvement in the administration of such was unjustified.²⁷⁵ Some bankers, merchants, solicitors and wholesale and retail traders in London petitioned Parliament in favour of a bankruptcy court but did not oppose the introduction of an official assignee.²⁷⁶

The Act of 1831 undoubtedly increased the role of Government in bankruptcy. Although Government, as enunciated above, had always been involved in the supervision of the courts,²⁷⁷ in 1831, its role was transformed to the administration of private estates.²⁷⁸ On the other hand, the Act of 1831 confirmed the power and

²⁶⁹ Those against change also tried to rely on the fact t there were only a handful of petitions seeking reform that had been lodged. *Hansard*, 3rd ser. (1831), vii. 501.

²⁷⁰ Lester, *Victorian Insolvency*, p 54.

²⁷¹ *JHL*, lxiii. 226 (15 Feb. 1831); lxiii. 246 (21 Feb. 1831).

²⁷² Lester, *Victorian Insolvency*, p 54-5.

²⁷³ *Ibid.*

²⁷⁴ Lester, *Victorian Insolvency*, p 54-5.

²⁷⁵ *Ibid*, p 55.

²⁷⁶ *JHL*, lxiii (15 Feb. 1831), 229.

²⁷⁷ See 1.6.1.

²⁷⁸ Lester, *Victorian Insolvency*, p 58.

growing influence of an increasingly organised business community on bankruptcy reform.²⁷⁹

1.7.3 Re-examination of the Official System

In addition to assuming overall control the Government intended to extend its jurisdiction to the income generated by the assets owned by creditors.²⁸⁰ Notwithstanding the implications, Parliament enacted the provision²⁸¹ with relative ease.²⁸² As a measure of success of the official system, a bill which was introduced in 1838 proposed to abolish some bankruptcy offices and to reduce the number of official assignees.²⁸³ Petitioners outside London complained about the general administration of bankrupt estates.²⁸⁴ In mitigation, the bills that were introduced in 1836²⁸⁵ and 1837²⁸⁶ specifically sought to remedy the limitation of the jurisdiction of the Bankruptcy Court by empowering the Lord Chancellor to appoint district commissioners and official assignees in the country. During the late 1830s, a sentiment of despair started to feed off the view that much reform had been undone in a noticeably short interim.²⁸⁷

A royal commission that was appointed to inquire into bankruptcy and insolvency did not challenge the official system but suggested ideas to improve the scheme.²⁸⁸ It recommended merging bankruptcy and insolvency and extending the scope of bankruptcy to “all persons engaged in trade, [*sic*] or business requiring capital and

²⁷⁹ Lester, *Victorian Insolvency*, p 59.

²⁸⁰ G. K. Fry, *The Growth of Government: The Development of Ideas about the Role of the State and the Machinery and Function of Government in Britain since 1780* (London, 1979), p 14.

²⁸¹ Parliament enacted into law a measure to invest the funds recovered from bankrupt estates with provision to direct the interest to pay for the salaries of bankruptcy officials. Report from the Select Committee on Bankrupts' Estates Bill... (June 1834).

²⁸² Lester, *Victorian Insolvency*, p 60.

²⁸³ A Bill to Diminish the Number of Commissioners and Deputy Registrars of the Court of Bankruptcy.

²⁸⁴ Lester, *Victorian Insolvency*, p 60.

²⁸⁵ A Bill to Amend the Law Relating to Bankrupts (July 1836).

²⁸⁶ A Bill to Amend the Law Relating to Bankrupts (May 1837).

²⁸⁷ C. Fane, *Bankruptcy Reform: In a Series of Letters Addressed to Sir Robert Peel, Bart.* (London, 1838).

²⁸⁸ Report of the Commissioners for Inquiring into Bankruptcy and Insolvency (July 1840).

credit”.²⁸⁹ It also proposed allowing traders to file for their own bankruptcy with the consent of one or more creditors even where they had not committed “an act of bankruptcy”.²⁹⁰ It considered the provision which required discharge to be approved by creditors as “mischievous in its consequences” and recommended discharge to be administered by the court.²⁹¹ On one hand, the royal commission expressed overall satisfaction with the law while, on the other, it sensed a lack of severity in the penal provisions.²⁹²

The bill that was introduced in 1842 lowered the minimum amount of debt required to file a bankruptcy petition, abolished creditor approved discharge, permitted voluntary bankruptcy, and increased penalties for obstinate debtors.²⁹³ The bill also extended the scope of bankruptcy by adding to the list of traders²⁹⁴ but it did not address the bankruptcy and insolvency merger.²⁹⁵ The full-time commissioner system was extended to the country²⁹⁶ after the Attorney-General had articulated how the collection of debts under the official system was operating at over 70% compared to 38% under the old system operating in the country.²⁹⁷

After the bill was enacted into law the House of Commons was petitioned by twenty-nine cities regarding bankruptcy reform.²⁹⁸ The sudden increase in the number of petitions after the bill became law can be sharply contrasted with the lack of debate

²⁸⁹ Report of the Commissioners for Inquiring into Bankruptcy and Insolvency (July 1840).

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ A Bill Intituled [*sic*] an Act for the Amendment of the Law of Bankruptcy (Mar. 1842).

²⁹⁴ Ibid.

²⁹⁵ Lester, *Victorian Insolvency*, p 62.

²⁹⁶ Ibid.

²⁹⁷ *Hansard*, 3rd ser. (1842), lxxv.1129.

²⁹⁸ *JHC*, xcvi. (1843), 93-442.

during passage in Parliament.²⁹⁹ In large measure, the fierce lobbying by the business community encapsulated its disapproval of the Act of 1842.³⁰⁰

1.7.3.1 Bankruptcy Consolidation Act 1849

According to Lord Brougham (a former Lord Chancellor), the principle underlying the revisions was that: “*Prima facie* the creditor was in the right, [*sic*] and the debtor in the wrong”.³⁰¹ Hence, the bill was clearly in favour of the creditors: failure to comply with summons amounted to an “act of bankruptcy”.³⁰² It also established a system of ranking certificates of discharge:³⁰³ the “virtuous” debtor (unavoidable losses and misfortune), the “unfortunate” debtor (whose conduct was generally satisfactory) and the “spend-thrift, speculating or fraudulent” debtor.³⁰⁴ The Victorians firmly believed that financial failure was connected with dishonesty and weakness of character.³⁰⁵

The Bankruptcy Act 1849 provided the apparatus through which the courts would be able to distinguish between decent and dishonest debtors based on their moral culpability.³⁰⁶ Parliament, nonetheless, redrafted the bill and removed the provisions intended to reinforce the examination of debtors and the sections relating to fraudulent conveyances.³⁰⁷ The bill became law in 1849.³⁰⁸

²⁹⁹ Lester, *Victorian Insolvency*, p 64.

³⁰⁰ *Ibid.*

³⁰¹ *Hansard*, 3rd ser. (1849), cv. 1142.

³⁰² Lester, *Victorian Insolvency*, p 67.

³⁰³ Minutes of Evidence Taken before the Select Committee of the House of Lords Appointed to Consider the Bankruptcy Bill (June 1853).

³⁰⁴ W. A. Steel, ‘An Outline of Bankruptcy Legislation in England During the Present Century, Together with That of Some of the Principal Commercial Countries of the World; With a Comparison of the Objects Sought for and the Results Obtained’ *Journal of the Institute of Bankers* 2 (1881).

³⁰⁵ R. Bellamy (ed.), *Victorian Liberalism: Nineteenth Century Political Thought and Practice* (London, 1990), p 7.

³⁰⁶ Lester, *Victorian Insolvency*, p 68. Similarly, an honest and conforming bankrupt is discharged after 12 months (IA 1986, s. 279) but a bankruptcy restriction order (BRO) for a period of between two and fifteen years can be imposed on a blameworthy bankrupt. IA 1986, s. 281A.

³⁰⁷ Lester, *Victorian Insolvency*, p 70.

³⁰⁸ 12 & 13 Vict. c. 106 (1849).

The provisions of the Act of 1849 for facilitating private arrangements with creditors contemplated two kinds of arrangements: arrangements under the control of the court and private arrangements by deed.³⁰⁹ Arrangements under the control of the court required to be sanctioned by three-fifths of the creditors in number and value. The debtor was required to fully disclose his (or her) affairs to the creditors and upon approval by the requisite majority the debtor's property was vested in the official assignee for realisation and distribution. Arrangements by deed required the approval of six-sevenths of the creditors³¹⁰ by way of assignment or composition but were held not binding on dissenting creditors unless accompanied by a *cessio bonorum* of the whole of the debtor's property for the benefit of the creditors.³¹¹ On the application of creditors, the Court of Bankruptcy retained jurisdiction to interfere if the administration of the debtor's property was not properly conducted under the deed.

1.7.3.2 Ancillary Modifications to the Bankruptcy System

After the Act of 1849 was brought into force the bankruptcy system appeared to run smoothly.³¹² A bill which was introduced in 1853 proposed a fee schedule for official assignees, abolition of the classification of discharge and to allow creditors to petition where a debtor was deceased.³¹³ The bill became law in a revised arrangement in 1854.³¹⁴

³⁰⁹ Ibid, ss 211 and 228.

³¹⁰ 12 & 13 Vict. c. 106 (1849), ss 224-229.

³¹¹ *Drew v Collins*, 6 Exch. 670.

³¹² Lester, *Victorian Insolvency*, p 70. In 1853, the chairman of the London Committee declared that: "I believe I am speaking the unanimous opinion of our committee when I say that the amount of insolvency is now much less, and the dividends, as a whole, are much larger than previously to 1849; and that the grossly fraudulent cases are principally confined to a lower class of tradesmen, who in fact have not a great amount of business". *PP* (24 June 1853), 8

³¹³ A Bill Intituled [*sic*] an Act further to Amend the Laws Relating to Bankrupts, to Extend the Jurisdiction of the Court of Bankruptcy, and to Make Such Court Auxiliary to the Court of Chancery (Feb 1853).

³¹⁴ 17 & 18 Vict. c. 119 (1854).

By late 1850s, the bankruptcy court system was running short of funds because of declining court fees.³¹⁵ The Government appointed a commission to “inquire into the fees, funds and establishments of the court of bankruptcy”.³¹⁶ The Birmingham Law Society concluded that since the likelihood of receiving a dividend was remote, except in larger bankruptcies, creditors were steering the estates away from the court.³¹⁷ Contrariwise, the Royal Commission thought that the reduction in court fees was directly related to the “general prosperity of trade and commerce which has recently prevailed” and “a better and more prudent system of trading among the smaller traders”.³¹⁸

The Manchester Association for the Protection of Trade campaigned for a “general want of confidence in the law”.³¹⁹ The association alleged that the penal provisions were not being utilised effectively.³²⁰ The Bradford chambers suggested that in order to improve the quality of official assignees it was necessary to confer the power to appoint them upon the chambers in each district.³²¹ While the position of the merchants and traders from London was that “any mode of liquidation which shall be approved of a proper majority of creditors, whether by trust, composition, inspection, or otherwise, shall be binding of the rest”.³²² In short, creditor dissatisfaction with the official system was starting to gather momentum.³²³

³¹⁵ Lester, *Victorian Insolvency*, p 71.

³¹⁶ The report was issued in 1854. Copy of the Report of Her Majesty’s Commissioners Appointed to Inquire into Fees, Funds, and Establishments of the Court of Bankruptcy, and the Operation of the Bankruptcy Consolidation Act, 1849... (Apr. 1854).

³¹⁷ Birmingham Law Society Papers, Book A, p 557 (Jan 1854).

³¹⁸ *PP* (10 Apr. 1854), 11.

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

³²¹ *Ibid.*

³²² *Ibid.*

³²³ Lester, *Victorian Insolvency*, p 73.

1.8 Withdrawal from the Official System

During the 1860s, the emphasis of bankruptcy reform shifted from increasing official involvement to swelling creditor control.³²⁴ Both major legislative reforms of the period, the Bankruptcy Act of 1861³²⁵ and the Bankruptcy Act of 1869,³²⁶ enhanced creditor control at the expense of court involvement.³²⁷ The shift in the balance of power was arguably driven by the business community's relentless lobbying of Parliament through local chambers of commerce and new organisations such as the National Association for the Promotion of Social Science ("NAPSS") and the Associated Chambers of Commerce of the United Kingdom ("the ACC").³²⁸ It was generally accepted that the Act of 1869 "was framed upon the request and very nearly upon the lines laid down by the Chambers of Commerce".³²⁹ The earlier contributions of the legal profession were completely reversed by a more influential business community.³³⁰

NAPSS³³¹ was founded to "aid legislation, by preparing measures, by explaining them, by recommending them to the community, or, as it may be, by stimulating the legislature to adopt them".³³² In 1958, the chair of the jurisprudence committee of NAPSS introduced a bill.³³³ The bill proposed to remove the trader and non-trader distinction, combine the insolvency and bankruptcy courts, maintain the district

³²⁴ Lester, *Victorian Insolvency*, p 123.

³²⁵ 24 & 25 Vict. c. 134 (1861).

³²⁶ 32 & 33 Vict. c. 62 (1869).

³²⁷ Lester, *Victorian Insolvency*, p 123.

³²⁸ *Ibid.*

³²⁹ Sheffield CC Papers, LD 1986/1, council report at annual meeting, p 361: chamber meeting, 29 Jan. 1875.

³³⁰ Lester, *Victorian Insolvency*, p 124.

³³¹ NAPSS was a large organisation whose influential membership drew from the business community, the medical profession, and the legal profession and government officials. Lester, *Victorian Insolvency*, p 126.

³³² NAPSS, *Transactions 1857* (London, 1858), 23, cited in Goldman, 'Social Science Association', p 97.

³³³ A Bill to Amend and Consolidate the Laws Relating to Bankrupts and Insolvents (June 1958).

bankruptcy court, and extend bankruptcy jurisdiction to the county courts.³³⁴ It was hoped that “bankruptcy discharge would be energetically opposed by Creditors in a Court in their own neighbourhood”.³³⁵ The primary goal of the legislation was to quash officialism and sanction creditor control.³³⁶ It was said that the purpose of the legislation was “to secure to the creditors the means of controlling and dividing without delay their own property in the hands of bankrupts, and to make the creditors, who are the injured persons, paramount”.³³⁷

The measure also abolished the classification of discharge and left it to the court to discharge a debtor.³³⁸ It made provision for deeds of arrangement approved by a majority in number and four-fifths in value. In response, the Government introduced a bill that embraced most of the provisions proposed by NAPSS.³³⁹ However, the Government’s bill did not provide for the retirement fees of bankruptcy officials to be paid out of the consolidated fund, as anticipated by NAPSS, but maintained the practice of charging such fees to the accounts of bankrupt estates.³⁴⁰ The bill diluted the power of official assignees by requiring them to seek “assistance and counsel”³⁴¹ of the creditors’ assignee. Local chambers continued to lobby Government and eventually supporters³⁴² of the bill secured an interview with Lord Palmerston who was

³³⁴ Leeds CC Papers, minute book, ii. 335: meeting, 25 Feb. 1858.

³³⁵ A. J. Jones, *A Letter to the Right Hon. Lord Brougham and Vaux on the Expediency of Transferring the Country Jurisdiction in Bankruptcy to the County Courts...* (London, 1853).

³³⁶ Lester, *Victorian Insolvency*, p 129.

³³⁷ Manchester CC Papers, M8/2/5, P. 609: annual report, 1 Feb. 1858.

³³⁸ Lester, *Victorian Insolvency*, p 129.

³³⁹ A Bill Intituled [*sic*] an Act to Amend the Law of Debtor and Creditor and Insolvency and Bankruptcy, and to Enable and Facilitate the Liquidation of a Debtor’s Estate, and the Administration of Estates of Insolvent Traders Deceased (July 1858).

³⁴⁰ Lester, *Victorian Insolvency*, p 130.

³⁴¹ A Bill Intituled [*sic*] an Act to Amend the Law of Debtor and Creditor and Insolvency and Bankruptcy, and to Enable and Facilitate the Liquidation of a Debtor’s Estate, and the Administration of Estates of Insolvent Traders Deceased (July 1858).

³⁴² Among the delegates that met the Prime Minister, and the Attorney-General in November 1859 were fifteen MPs and representatives from more than ten chambers of commerce. Lester, *Victorian Insolvency*, p 131.

the head of Government.³⁴³ According to a report of the meeting, the Prime Minister pledged sincere consideration of the issues and bequeathed the responsibility of preparing a bill to the Attorney-General.³⁴⁴

1.8.1 Formation of the Associated Chambers of Commerce of the United Kingdom (ACC)

The number of local chambers of commerce gradually increased from late 18th century, albeit without a collective reform agenda.³⁴⁵ The problem was recognised as an obstruction to reform: “the commercial class in this commercial country has no recognised organ...of communication with the legislature”.³⁴⁶ The idea of a federation of chambers first came about in the 1850s and there is evidence of considerations for a national body from meetings held in local chambers.³⁴⁷ The need for the representatives of local chambers to meet annually, at an annual meeting of NAPSS, set the idea in motion.³⁴⁸

The chambers’ representatives to the drafting committee of NAPSS resolved to summon an organisational meeting for a national association.³⁴⁹ In 1860, representatives from sixteen local chambers assembled in London and formed the ACC which the delegates assumed would become “a most useful medium of communication between the commercial, manufacturing and trading classes and

³⁴³ Lester, *Victorian Insolvency*, p 131.

³⁴⁴ *Ibid.*

³⁴⁵ Lester, *Victorian Insolvency*, p 132.

³⁴⁶ ‘Consolidation of Bankrupt Laws’ *Jurist* 1 (1827), p 55.

³⁴⁷ Professor Leon Levi urged the formation of a federation of chambers with a London office and secretary. Bristol CC Papers, 38605/M/2, pp. 58-9: chamber meeting, 18 Nov. 1859; M. W. Beresford, *The Leeds Chamber of Commerce* (Leeds, 1951), p 39.

³⁴⁸ Lester, *Victorian Insolvency*, p 132.

³⁴⁹ *Ibid.*

Government”.³⁵⁰ Bankruptcy was the only topic debated at the association’s first meeting and formed the subject of its first resolution.³⁵¹

1.8.2 Bankruptcy Act 1861

In 1860, it was suggested that any reform would automatically improve the lamentable *status quo*.³⁵² The Attorney-General thought that the law prior to the 19th century reforms was superior.³⁵³ The huge draw-back under the existing system was the costs which were estimated to average a third of the assets of a bankrupt estate.³⁵⁴ Reformers attributed the costs to the burdensome bureaucracy, and some argued that it was “high time to amend the amendments and reform the reforms”.³⁵⁵

The Attorney-General drafted a bill which essentially represented a new bankruptcy code.³⁵⁶ It was reported that provisions of the bill had been presented to a delegation from the chambers and that it was likely the association would not reintroduce its bill.³⁵⁷ Lord Russell abstained from reintroducing the bill which was prepared by NAPSS and joined forces with the Attorney-General as a co-sponsor.³⁵⁸ Contrary to the measure proposed by NAPSS, the Attorney-General’s bill relegated the official assignee to collecting small debts and accounting as opposed to ending his (or her) duties upon the appointment of the creditors’ assignee.³⁵⁹ The bill also created a single chief judge to sit in London and assist in the synchronisation of the bankruptcy system.³⁶⁰

³⁵⁰ ACC Papers,14,474: meeting 2 Feb. 1860, first annual meeting 6-7 Feb. 1861 (reporting on formation of the association).

³⁵¹ Ibid.

³⁵² ‘The New Bankruptcy Bill’ *Economist* (Mar. 1860), p 337.

³⁵³ *Hansard*, 3rd ser. (1860), clvii. 650.

³⁵⁴ *Solicitors’ Journal and Reporter* (Mar. 1860), p 357.

³⁵⁵ ‘The New Bankruptcy Bill’, *Economist* (Mar. 1860), p 337.

³⁵⁶ NAPSS, *Transactions 1868*, pp 294-5.

³⁵⁷ *Solicitors’ Journal and Reporter* (Feb. 1860), p 251.

³⁵⁸ Lester, *Victorian Insolvency*, p 134.

³⁵⁹ Ibid, p 135.

³⁶⁰ Ibid.

The bill received support in many quarters; the business community presented a petition signed by 1,000 London merchants, traders, and bankers citing important advantages.³⁶¹ A minority observed deep-seated domineering business interests in the bill at the expense of the needs of smaller bankruptcy estates.³⁶² The business community actively engaged in the debate that ensued in Parliament.³⁶³ The law amendment committee of NAPSS sent out a circular letter to chambers outlining minor desirable amendments.³⁶⁴

The debate in Parliament focused on the merger of bankruptcy and insolvency and devolution of the bankruptcy jurisdiction to county courts.³⁶⁵ The merger was perceived as unfeasible because many viewed bankruptcy as a privileged safeguard for the trading community.³⁶⁶ The Lancashire and Preston Trade Protection Society was of the opinion that the abolition of insolvency courts would make it costly for those attempting to collect small debts.³⁶⁷ MPs suspected that the universal application of bankruptcy law would lead to some non-trader upper class landowners losing their land as a result of lawsuits initiated by fraudulent moneylenders.³⁶⁸

The provision of transferring the district bankruptcy jurisdiction to county courts was supported by many business groups³⁶⁹ but it had been opposed earlier because of the

³⁶¹ *Hansard*, 3rd ser. (1860), clviii. 1565.

³⁶² Nash, *Westbury*, i. 301.

³⁶³ Local chambers held meetings and constantly exchanged communications on the subject. Leeds CC Papers, minute book, ii. 414, 420: chamber meeting, 28 Mar. 1860; Bristol CC Papers, 38605/M/2, p 127: chamber meeting, 6 June 1860 (discussion of communication from the Wolverhampton CC on the bill).

³⁶⁴ Bristol CC Papers, 38605/M/2, p 125: general meeting, 21 May 1860.

³⁶⁵ Lester, *Victorian Insolvency*, p 136.

³⁶⁶ *Ibid.*

³⁶⁷ *Solicitors' Journal and Reporter* (17 July 1858), p 770.

³⁶⁸ Sir Fitzroy Kelly expressed fears on behalf of the non-trader upper classes. *Hansard*, 3rd ser. (1860), clvii. 674.

³⁶⁹ The provision emanated from the Benthamite concept of making courts locally accessible and not concentrated in London. E. Halevy, *The Growth of Philosophic Radicalism* (London, 1928), p 395.

divergent nature of the county courts.³⁷⁰ The Leeds chamber asserted that county courts did not have the requisite capacity and competence to administer bankruptcy.³⁷¹ The Liverpool Law Society petitioned Parliament arguing that bankruptcy was best administered by a single court.³⁷² Lawyers working in district bankruptcy courts opposed decentralisation of the bankruptcy jurisdiction.³⁷³

Local chambers petitioned local MPs in support of the bill.³⁷⁴ However, near the end of the parliamentary session only 100 of more than 600 sections had been reviewed and the bill was withdrawn.³⁷⁵ Local chambers became more determined and started preparations to ensure the bill would be passed during the next session.³⁷⁶ Unbeknown to the chambers, the Attorney-General was discouraged by the spirit of Parliament and devised a different plan.³⁷⁷ The Attorney-General felt that Parliament had become “jealous and suspicious” of bankruptcy reform because of the historic failures and therefore despised any public sponsored reform.³⁷⁸ For that reason, the bill that was introduced in 1861 was significantly shorter than its predecessor.³⁷⁹

The bill proposed to combine bankruptcy and insolvency and to extend the bankruptcy jurisdiction to county courts.³⁸⁰ Eighteen local chambers petitioned the House of Lords encouraging it to pass the bill.³⁸¹ Their Lordships referred the bill to a select committee

³⁷⁰ Lester, *Victorian Insolvency*, p 137.

³⁷¹ *Hansard*, 3rd ser. (1860), clvii. 1582.

³⁷² Lester, *Victorian Insolvency*, p 137.

³⁷³ ‘Bankruptcy in the County Courts’ *County Court Chronicles* (1 Feb. 1860), p 33.

³⁷⁴ Leicester and County CC, *Leicester and County Chamber of Commerce, 1860-1960* (Leicester, 1860), p 23.

³⁷⁵ Lester, *Victorian Insolvency*, p 138.

³⁷⁶ Acting in collaboration with the Leeds Chamber of Commerce, the Liverpool Chamber of Commerce forwarded a request to government seeking an early introduction of the bankruptcy bill in the next session. Liverpool CC Papers, 380 Com 1/1. p 26: council meeting, 1 Oct. 1860.

³⁷⁷ Lester, *Victorian Insolvency*, p 139.

³⁷⁸ *Hansard*, 3rd ser. (1861), clxi. 388.

³⁷⁹ Lester, *Victorian Insolvency*, p 139.

³⁸⁰ *Ibid.*

³⁸¹ *JHL*, xciii. (26 Apr. 1861), 239.

in a move that was objected by the Lord Chancellor and a large number of merchants and banking firms in London.³⁸² It is worth noting that the business community was divided: the Manchester chamber supported the referral although there are no reasons on record.³⁸³

In both houses of Parliament the greatest opposition was incited by the proposal to increase the power of creditors and the introduction of a chief judge.³⁸⁴ The House of Lords removed the provisions relating to the transfer of power to the creditors' assignee and a chief judge in bankruptcy.³⁸⁵ The standing committee of the ACC, including local chambers, strongly disapproved as they felt this "would deprive the bill of its principal value in the estimation of the mercantile community".³⁸⁶ The Attorney-General attempted to strike a balance by proposing to remove court officials from administrative roles and replacing them with creditors subject to a strict accounting and auditing regime.³⁸⁷ In the end, the creditors' assignee was bestowed with "the right of receiving, applying, and administering the estate" while the official assignee was reserved power to be "an efficient auditor, active inspector, and vigilant superintended over the creditor's assignee".³⁸⁸

New provisions were introduced into the Act of 1861 to mitigate the burdensome requirements of implementing a composition under the provisions of the Act of 1849. The provisions gave the debtor a limited period to obtain the consent of the creditors to the proposed arrangement without the risk of bankruptcy (moratorium) and did not

³⁸² Lester, *Victorian Insolvency*, p 140.

³⁸³ Leeds CC Papers, minute book, ii. 467: chamber meeting, 24 Apr. 1861. Other chambers also supported the referral, but it was Leeds who appeared alongside the Manchester chambers on the list of those in support.

³⁸⁴ Lester, *Victorian Insolvency*, p 140.

³⁸⁵ *Ibid*, p 142.

³⁸⁶ *The Times* (22 June 1861), p 5.

³⁸⁷ *Hansard*, 3rd ser. (1861), clxi. 286.

³⁸⁸ 24 & 25 Vict. c. 134 (1861), ss. 119 (creditors' assignee to audit the accounts of the official assignee) and 127 (creditors' assignee to manage...realize and recover the bankrupt's estate).

require a *cessio bonorum* to make an arrangement binding on dissenting creditors. A majority in number and three-fourths in value of the creditors was empowered to bind the minority provided the deed was registered in the Bankruptcy Court within 28 days after the execution thereof and available for inspection.³⁸⁹

The creditor-controlled bankruptcy system resonated with the business community.³⁹⁰ Support from the chambers of commerce was not in short supply either.³⁹¹ According to the *Economist*, the court could never make a good money collector because it was not inherently in its nature as there ought to be a “want of motive power”.³⁹² Some opponents argued that there was an element of superfluous duplication between the duties of the creditors’ assignee and the official receiver.³⁹³

The support for establishing a chief judge in bankruptcy was not universal: the Attorney-General declared the bill “unworkable” without the provision while some provincial chambers strongly opposed the idea.³⁹⁴ The Leeds chamber claimed it was an “expensive and unnecessary appointment”.³⁹⁵ But many chambers and the standing committee of the ACC made no objections to the exclusion of the provision.³⁹⁶ Parliament removed permission to transfer insolvent estates from the Chancery Court to the Bankruptcy Court at the insistence of the Lords.³⁹⁷

³⁸⁹ Bankruptcy Act 1861, ss 192-200. The mercantile community immensely appreciated the requirement according to a Member of Parliament: *Hansard*, 3rd ser. (1861), clxii. 26061.

³⁹⁰ Lester, *Victorian Insolvency*, p 141.

³⁹¹ Chambers that supported the provision during debate in Parliament include Belfast, Birmingham, Bradford, Coventry, Gloucester, Hull, Leeds, London, Sheffield, Southampton, Wolverhampton, York and Sunderland. *Hansard*, 3rd ser. (1861), clxiv. 1303,1305,1307. See also, Wolverhampton CC Papers, minute book, i: chamber meeting, 18 Apr. 1861.

³⁹² ‘The Essential Element in Bankruptcy Reform’ *Economist* (16 Feb. 1861), p 170.

³⁹³ Lester, *Victorian Insolvency*, p 142.

³⁹⁴ *Hansard*, 3rd ser. (1861), clxiv. 1103.

³⁹⁵ Leeds CC Papers, minute book, ii. 458: special meeting, 19 Feb. 1861; *Hansard*, 3rd ser. (1861), clxiv. 1104.

³⁹⁶ *Hansard*, 3rd ser. (1861), clxiv. 1104-5 (Belfast, Birmingham, Bristol, Glasgow, Leeds, Hull, Sheffield, Wolverhampton and Coventry).

³⁹⁷ This also happened to be one of the main goals listed by NAPSS as part of its resolution passed in 1857. Lester, *Victorian Insolvency*, p 146.

Hazlitt concluded that the legislature gave up the chief judge provision “in order that the power of the creditors to regulate and control the administration of the debtor’s property - an object so popular with the commercial classes - should be secured”.³⁹⁸ Lawyers hoped for a possible revision by the Lords³⁹⁹ and the business community was in support of a review.⁴⁰⁰

1.8.3 Parliamentary Select Committee: 1864 – 65

The legal profession and the business community agreed that the Act of 1861 was unsatisfactory.⁴⁰¹ The Birmingham chamber raised the issue at the annual meeting of the ACC.⁴⁰² The number of insolvencies had significantly increased and the amount of assets collected sharply declined.⁴⁰³ In 1860, a total of 1,430 bankruptcy petitions were filed and assignees collected £1.25 million worth of assets.⁴⁰⁴ In comparison, there were 9,663 adjudications for bankruptcy in 1862 and under £650,000 was realised.⁴⁰⁵ During the mid-1860s it was estimated that while the annual income of the country was £400 million the loss incidental to insolvency amounted to £50 million.⁴⁰⁶

The Attorney-General accepted the defects of the regime and a select committee was appointed to review the law.⁴⁰⁷ Testifying before the select committee, a Birmingham banker and chairman of the ACC, Sampson Lloyd said that bankruptcy was more a legal problem and not a commercial difficulty: “It is more difficult for a commercial man to state the wisest remedies for a legal difficulty than to state where the shoe

³⁹⁸ Hazlitt and Roche, *Bankruptcy Act*, p iv.

³⁹⁹ Lester, *Victorian Insolvency*, p 146.

⁴⁰⁰ See, for example, the resolution of the Manchester chamber: *The Times* (11 Jan. 1861).

⁴⁰¹ Lester, *Victorian Insolvency*, p 146.

⁴⁰² Birmingham CC Papers, council minute book, 13 Jan. 1863.

⁴⁰³ *Law Times* (3 Sept. 1864), p 479.

⁴⁰⁴ Lester, *Victorian Insolvency*, p 147.

⁴⁰⁵ General Returns by the Chief Registrar of the Court of Bankruptcy (Feb. 1864).

⁴⁰⁶ Meeting held on 5 Oct. 1865 and reported in the *Law Times* (14 Oct. 1865), p 607.

⁴⁰⁷ *Hansard*, 3rd ser. (1864), clxxiv. 686, 688.

pinches".⁴⁰⁸ It was highlighted that the administrative costs had increased tremendously so much that many debtors were using the threat of bankruptcy as a negotiation strategy.⁴⁰⁹ The ACC believed that "questions affecting the person or the character of the bankrupt, or abstract questions of law, belong exclusively to the court, but the duty of realising and distributing the estate belongs exclusively to the creditors".⁴¹⁰

A comparison of the English bankruptcy system with the Scottish system in terms of creditor approval and costs swayed the business community and the Attorney-General towards a creditor-controlled system.⁴¹¹ On the other hand, the Lord Chancellor and others⁴¹² were opposed to a system overseen by creditors and sought to restore the powers of the official assignee.⁴¹³ The Government introduced a bill⁴¹⁴ but a change of Government meant the bill would be withdrawn.⁴¹⁵

The Bankruptcy Amendment Act 1868 was subsequently enacted to put to an end the abuses committed under the provisions of the Act of 1861 which enabled the debtor to impose a composition on their creditors.⁴¹⁶ In many cases, the approval of the composition was obtained by a secret agreement between the debtor and some favoured or friendly creditors and sometimes by the creation of fictitious debts.⁴¹⁷ A bill

⁴⁰⁸ *PP* (22 July 1864), 166-7.

⁴⁰⁹ *Hansard*, 3rd ser. (1865), clxxix. 421-2.

⁴¹⁰ *PP* (11 Feb. 1864), 292.

⁴¹¹ Report from the Committee on the Bankruptcy Act (Mar. 1865).

⁴¹² Edward Holroyd, a commissioner who advocated for the return of the official assignee, told the select committee that it was an "exceptional case" where a creditors' assignee devoted time to the administration of the estate. *PP* (11 Feb. 1864), 79.

⁴¹³ Bodleian Library, University of Oxford, MS Don C. 150, FOS. 79-80: letter from Lord Westbury to Mansfield Parkyns (n.d.).

⁴¹⁴ A Bill to Amend and Consolidate the Law Relating to Bankruptcy in England, and to Abolish Imprisonment for Debt in Final Process (Apr. 1866).

⁴¹⁵ Lester, *Victorian Insolvency*, p 153.

⁴¹⁶ R.G. Young, *A treatise on the law of private arrangements with creditors: with an appendix containing the Deeds of Arrangement Act, 1887, the Bills of Sale Acts 1878 & 1882, and the Bankruptcy (Discharge and Closure) Act, 1887: with the rules under the above acts* (W. Clowes and Sons, London 1888), p 4.

⁴¹⁷ *Ibid.*

which was introduced to restrict false creditors in deeds of arrangement by requiring a debtor to file a list of his (or her) debts, names of all creditors, and a statement of affairs⁴¹⁸ became law in 1868.⁴¹⁹ It was reported that during the final three days before the legislation came into force 509 deeds were registered and “thus escaping the test of honesty which the Act imposes upon all compounding debtors”.⁴²⁰ The deeds would have been consented to by one or more creditors⁴²¹ and, therefore, creditors were complicit in the act. The business community maintained divergent thoughts and attitude towards reform.⁴²²

1.8.4 Bankruptcy Act 1869

In 1869, the Government introduced a bill which proposed to terminate the offices of commissioners and official assignee.⁴²³ A debtor could no longer voluntarily file for bankruptcy if a petition was filed by a creditor but agreeing to pay 10s. in the pound with the majority in number and three-quarters in value would secure a discharge.⁴²⁴ The bill also intended to extinguish the remnants of imprisonment for debt.⁴²⁵ The House of Lords was inundated with petitions from local chambers and merchants supporting the measure.⁴²⁶ The reason for the overtly warm reception was due to the

⁴¹⁸ A Bill to Amend the Bankruptcy Act 1861 (May 1868).

⁴¹⁹ 31 & 32 Vict. c. 104 (1868).

⁴²⁰ *Law Times* (17 Oct. 1868), p 433. During the first three months the number of private deeds decreased from 2,010 to 804 at a time when the number of bankruptcies were increasing (2,245 to 2,361). *Law Times* (Feb. 1869), p 6.

⁴²¹ See 1.9.

⁴²² The Mercantile Law Amendment Society disliked the measure on the basis that it caused unnecessary inconvenience for creditors. *The Times* (13 July 1868), p 6. In contrast, Leeds and Sheffield Chambers of Commerce supported the measure and the secretary of ACC expressed support in letters to MPs. Leeds CC Papers, minute book, ii (unnumbered pages): chamber meeting, 24 June 1868; Sheffield CC Papers, LD 1986/1, p 120: council meeting, 18 June 1868; *Hansard*, 3rd ser. (1868), cxciii. 1159, 1161.

⁴²³ Lester, *Victorian Insolvency*, p 155.

⁴²⁴ *Ibid.*

⁴²⁵ *Ibid.*

⁴²⁶ Between April and July, the House received more than twenty individual petitions. *JHL*, ci. 52, 434, 494-543.

return to a creditor managed system even though divisions among the business community were still visible.⁴²⁷

At the behest of the business community, the Government amended the bill to make the liquidation of partnerships with more than seven partners fall under bankruptcy.⁴²⁸

The legal profession thought the bill “had evidently been drawn by gentleman unacquainted with the practical working of Bankruptcy Law”.⁴²⁹ Put differently, “the patient is not the best person to prescribe the remedy” and, moreover, the defects in the existing law were a result of the “adoption of the views of the mercantile world”.⁴³⁰

The Metropolitan and Provincial Law Association argued that creditor inspectors were not fit for purpose and that trustees should be supervised by the court.⁴³¹ The *Banker's Magazine* also questioned the removal of judicial supervision.⁴³² Others suggested that accountants and traders simply feared the “researches of an official eye” and “we all know that their charges are double those of the solicitor, and five times the expense of an official assignee”.⁴³³

The influence of a more determined business community and prominent organisations, such as NAPSS, on the development of bankruptcy law cannot be doubted.⁴³⁴ Nonetheless, the business community was split on more than one topic.⁴³⁵ A rift existed between the creditors' of small estates and those involved in larger

⁴²⁷ For example, there was no consensus on the minimum amount of indebtedness required before a bankruptcy petition could be filed. *Hansard*, 3rd ser. (1869), cxcvi. 1213, 1406.

⁴²⁸ *Hansard*, 3rd ser. (1869), cxcvi. 1212-1213.

⁴²⁹ Law Society of the UK, *Annual Report of the Council of the Law Society of the United Kingdom, 16 July 1869* (London, 1896), p 16.

⁴³⁰ *Law Times* (25 Apr. 1869), p 23

⁴³¹ *Solicitors' Journal and Reporter* (28 Mar. 1868), pp 439-40.

⁴³² 'The Attorney-General's Bankruptcy Bill' *Bankers' Magazine and Journal of the Money Market* (Apr. 1861).

⁴³³ *County Courts Chronicle* (Apr. 1869), p 98.

⁴³⁴ For example, see 1.8.

⁴³⁵ See, for example, n. 517.

bankruptcies.⁴³⁶ The creditors in larger bankruptcies led the way in calling for the removal of the official assignee⁴³⁷ while creditors involved in small bankruptcies relied on the official assignee to collect the property of the debtor.⁴³⁸ Another difference between the two groups was geographical: London creditors and creditors from the country.⁴³⁹ Parliament was dominated by a more organised business community:⁴⁴⁰ groups like NAPSS and the ACC consistently maintained pressure for reform through successive parliamentary sessions.⁴⁴¹

1.8.5 Failure of the Act of 1869

The *Economist* reported that “merchants and lawyers are agreed that the Act of 1869...has completely broken down and that it has fostered and stimulated the very evils it intended to prevent”.⁴⁴² The creditor managed system failed to solve the fundamental problems in the administration of insolvent estates.⁴⁴³ The Birmingham chambers had suggested that the Act would “be a large improvement on any previous Bankruptcy legislation” and that it would minimise bankruptcies, lower the costs and result in larger dividends.⁴⁴⁴

The ACC resolved that the provision which allowed fully secured creditors to vote on approval of deeds of composition was unsatisfactory.⁴⁴⁵ The Bristol chamber proposed better notice for creditors and procedures for scheduling assets.⁴⁴⁶ The executive council of the ACC advocated for the appointment of a full-time committee

⁴³⁶ Lester, *Victorian Insolvency*, p 158.

⁴³⁷ *Ibid.*

⁴³⁸ *Ibid.*

⁴³⁹ Lester, *Victorian Insolvency*, p 158.

⁴⁴⁰ *Ibid.*, p 162.

⁴⁴¹ *Ibid.*, p 158.

⁴⁴² *Economist* (23 Dec. 1882), p 1583.

⁴⁴³ Lester, *Victorian Insolvency*, p 171.

⁴⁴⁴ Birmingham CC Papers: council report, 29 July 1869.

⁴⁴⁵ ACC Papers, 14,746 (2), minute book: annual meeting, 22-4 Feb. 1870.

⁴⁴⁶ Bristol CC Papers, 38605/M/4, minute book, p 30: meeting, 12 Oct. 1870.

to review the Act of 1869.⁴⁴⁷ Six towns petitioned the House of Lords demanding reforms.⁴⁴⁸

Three major problems were identified with the creditor managed system: creditors' general lack of interest in the administration of small bankruptcies, improper use of liquidations and proxies by debtors and creditors and ineffective provisions for proper investigation of the bankrupt's affairs.⁴⁴⁹ A prominent business leader and MP, Samuel Morley, thought creditors had "absolutely neglected their duty".⁴⁵⁰ The problem of neglect was mainly encountered in smaller bankruptcies where the assets were scarce⁴⁵¹ and this meant some creditors would possibly get a free ride through the efforts of others.⁴⁵²

Although some business groups accepted that there were serious flaws, the trading community was unanimous in defending a creditor-controlled system.⁴⁵³ This support was not limited to the business ranks only: several provincial law societies challenged the Government's plan to reinstate the official system.⁴⁵⁴ For the legal profession the official system represented a threat of losing some work to Government officials.⁴⁵⁵

A select committee established that "the principal defect in the working of the Act of 1869 is found in the facilities for fraud which result from the practice of Liquidation and

⁴⁴⁷ ACC Papers, 14,746 (2), minute book: special meeting of the executive council, 24 Nov. 1870

⁴⁴⁸ Leeds, Norwich, Bristol, Southampton, Birmingham and Ipswich. *JHL*, civ. (16 July 1872), 574.

⁴⁴⁹ Lester, *Victorian Insolvency*, p 172.

⁴⁵⁰ London Chamber of Commerce (Incorporated), *First Annual Report of the Council to the Members of the Chamber* (London, 1883), p 80; *Dod's Parliamentary Companion* (London, 1883).

⁴⁵¹ 'The Bankruptcy Bill' *The Times* (3 July 1876), p 7 (quoting *Economist*).

⁴⁵² Lester, *Victorian Insolvency*, p 174.

⁴⁵³ The ACC reaffirmed its belief in 1881 and so did the business press. The president of the Institute of Bankers suggested that creditor control had still not been tried to its fullest. ACC Papers, 14,476 (3), minute book: annual meeting, 2 Feb 1881; *The Times* (22 Mar. 1883), p 4; 'Bankruptcy Law Amendment', *Bankers Magazine and J. Market* (Dec. 1880), p 975; *Economist* (23 Dec. 1882), p 1583.

⁴⁵⁴ Law Society, *Bankruptcy Bill: Suggestions and Observations of the Provincial Law Societies* (London, 1883), 2-3 (Bradford Law Society and Hull Law Society).

⁴⁵⁵ Lester, *Victorian Insolvency*, p 176.

Composition by Resolution”.⁴⁵⁶ A circular disseminated by the ACC revealed an increased tendency in the use of liquidation and assignment provisions by debtors “owing to the facilities afforded these latter methods to the insolvent, to conceal his past transactions”.⁴⁵⁷ The Act of 1869 made provision for effecting a liquidation by arrangement and the acceptance of a composition by the creditors without actual bankruptcy.⁴⁵⁸ A composition, similar to a liquidation by arrangement, could be accepted by a resolution of the majority of creditors in number and three-fourths in value.⁴⁵⁹ In practice, the provisions did not produce the intended results due to the abuses linked with the use of proxies, creditors not looking after their own interests and, in cases of liquidation by arrangement, the exemption of trustees from the control of the court. The president of the Law Society suggested that liquidation had become a “process of whitewashing”.⁴⁶⁰ The popularity of liquidations by arrangement and compositions is demonstrated by the statistics: in 1872, there were around 7,000 liquidations by arrangement and by 1879 the figure had more than doubled to 14,574.⁴⁶¹

Liquidation is undoubtedly the most commonly used insolvency procedure. Where the procedure is commenced by a voluntary resolution of the members there needs to be checks and balance to curb the potential abuse of the process by a few controlling stakeholders. Alongside the principal inquiry, this research intends to examine the operation of the exception to re-use company names during creditors’ voluntary liquidations (CVLs) - where the business of the insolvent company is acquired from

⁴⁵⁶ Special Report from the Select Committee on the Bankruptcy Amendment Bill (Aug. 1880).

⁴⁵⁷ ACC Papers 14,476 (2), minute book: annual meeting, 2 Mar. 1871.

⁴⁵⁸ Bankruptcy Act 1869, s. 125.

⁴⁵⁹ *Ibid*, s. 126.

⁴⁶⁰ Law Society, *Proceedings and Resolutions of the Annual Meeting of the Law Society of the United Kingdom* (London, 1877), p 14.

⁴⁶¹ General Report by the Comptroller in Bankruptcy (June 1873; General Report by the Comptroller in Bankruptcy (July 1880); General Report by the Comptroller in Bankruptcy (July 1883).

the liquidator⁴⁶² and continued using the same or a similar name - through a corporate rescue lens.⁴⁶³

The abuse of the liquidation provisions led to the accusation that dishonest debtors were using bankruptcy to discharge debts without proper scrutiny.⁴⁶⁴ It was observed that a lot of debtors were going through the system unchecked especially in smaller bankruptcies where creditors were less interested.⁴⁶⁵ The London merchants believed that the investigation of the affairs of a bankrupt should be conducted by a court and argued “that reliance on Creditors to perform these onerous and costly functions is entirely futile”.⁴⁶⁶

Others were so discouraged with bankruptcy reform and preferred abolition of the system.⁴⁶⁷ According to some bankruptcy merely encouraged “reckless trading and speculation, a readiness amounting to an eagerness to give, as well as to take credit”.⁴⁶⁸ The Bristol chambers circulated information of the abolition of the bankruptcy code in the USA.⁴⁶⁹ Others suggested that since imprisonment for debt was no longer in force it meant that debt could be efficiently collected under common law.⁴⁷⁰ The Government subsequently introduced a bill that was intended to preserve the principle behind the Bankruptcy Act of 1869 while sanctioning elements of official administration.⁴⁷¹

⁴⁶² IR 2016, r 22.4.

⁴⁶³ See Chapter 4.

⁴⁶⁴ Lester, *Victorian Insolvency*, p 182.

⁴⁶⁵ *Ibid.*

⁴⁶⁶ HLRO, document no. 54.

⁴⁶⁷ Lester, *Victorian Insolvency*, p 183.

⁴⁶⁸ *Hansard*, 3rd ser. (1879), ccxlviii. 571, 574.

⁴⁶⁹ Bristol CC Papers, 38605/M/5, minute book: pp. 284-5: general meeting, 26 Nov. 1879.

⁴⁷⁰ Lord Sherbrooke, ‘What shall we do with our bankruptcy?’ *Nineteenth Century* (Aug. 1881).

⁴⁷¹ Lester, *Victorian Insolvency*, p 184.

1.9 Bankruptcy Act 1883: Return to Officialism?

The Government's bill required creditors to select a permanent committee of inspection that would appoint a trustee to manage the estate.⁴⁷² All accounts of trustees would be audited and liquidation arrangements approved by the court.⁴⁷³ In addition to the usual monitoring of bankruptcy bills by the ACC, the Association of English Country Bankers and the Institute of Chartered Accountants established similar bankruptcy committees.⁴⁷⁴ The ACC introduced a bill which required discharge to be approved by at least three-fourths of creditors in value.⁴⁷⁵

When Joseph Chamberlain was appointed as president of the Board of Trade the cabinet gave him responsibility for bankruptcy reform.⁴⁷⁶ It was envisioned that a bill would be prepared for the business community by an astute businessman⁴⁷⁷ and not by lawyers who "were not qualified to judge or know the wants and necessities of the commercial community".⁴⁷⁸ The drafting of the bill was undertaken by members of staff of the Board of Trade.⁴⁷⁹ Farrer, the permanent secretary of the board at the time, was instrumental in the development of the revised official system.⁴⁸⁰ Farrer and others were beginning to see the impact of bankruptcy on the national economy and not just in terms of injury caused to creditors.⁴⁸¹ According to Farrer state intervention was

⁴⁷² A Bill Intituled [sic] an Act to Consolidate and Amend the Law of Bankruptcy and for Other Purposes (June 1876).

⁴⁷³ A Bill Intituled [sic] an Act to Consolidate and Amend the Law of Bankruptcy and for Other Purposes (June 1876), ss. 8-15.

⁴⁷⁴ ICA Papers, minutes of general meeting, book A, P. 112: meeting 23 Apr. 1879, Country Bankers, Assoc. Papers 4517: 'Report for the Year Ending May 1878'.

⁴⁷⁵ A Bill to Amend the Bankruptcy Act, 1869 (Jan. 1878).

⁴⁷⁶ Gladstone Papers, 44,642, fo. 11: Gladstone's notes of cabinet meeting 14 May 1880.

⁴⁷⁷ Winston Churchill held Chamberlain in high esteem: he reflected that although others were leaders, crucially "Joe" was the one who made the weather. W S. Churchill, *Great Contemporaries* (London, 1937), p 2.

⁴⁷⁸ *Hansard*, 3rd ser. (1879), cclxxvii. 571, 846.

⁴⁷⁹ Address by M. D. Chambers, staff member of the Board of Trade, to the Inst. Of Bankers reported in *Journal of the Institute of Bankers* (Dec. 1883).

⁴⁸⁰ H. Paris, *Constitutional Bureaucracy: The Development of British Central Administration since the Eighteenth Century* (London, 1969), p 159.

⁴⁸¹ Sir T. H. Farrer, *What Do We Pay With? OR, Gold Credit and Prices* (London, 1889), p 56.

justified because of the dual existence of public and private characters in bankruptcy.⁴⁸² The state would assume the role of a coroner's inquest and, therefore, a return to some sort of official supervision was necessary.⁴⁸³

The Board of Trade welcomed contributions from different stakeholders: MPs, local judges, the Incorporated Law Society and the Institute of Bankers.⁴⁸⁴ The Bill⁴⁸⁵ paid homage to creditor control but qualified such control with requisite official supervision.⁴⁸⁶ It summoned for "some independent examination into the conduct of the debtor and circumstances attending to his or her insolvency, and some proper provision for the punishment of fraud and negligence, and rash and unjustifiable speculation and extravagance".⁴⁸⁷ All bankruptcy proceedings were to be initiated by a petition presented by either a creditor or debtor and no liquidation arrangement or composition would be binding without approval of the court.⁴⁸⁸

Upon filing a petition, a "receiving order" would authorise an official receiver (OR) over the debtor's property.⁴⁸⁹ The bill provided that the OR would be a member of staff of the Board of Trade.⁴⁹⁰ The OR would administer the estate prior to the appointment of a trustee.⁴⁹¹ The OR "would in some way be a public investigator, and to a slight extent also a public prosecutor".⁴⁹² The OR would summon a meeting of the creditors within 14 days of the "receiving order" and any proof of claim and proxies had to be filed

⁴⁸² W. H. G. Armitage in his biography of A. J. Mundella: *A. J. Mundella: The Liberal Background to the Labour Movement* (London 1951), p 251. W. C. Lubenow, *The Politics of Government Growth* (Newton Abbot, 1971), p 135.

⁴⁸³ Lester, *Victorian Insolvency*, p 191.

⁴⁸⁴ *Hansard*, 3rd ser. (1881), cclx. 1057.

⁴⁸⁵ A Bill to Amend the Law of Bankruptcy (Apr. 1881).

⁴⁸⁶ *Hansard*, 3rd ser. (1881), cclx. 1067.

⁴⁸⁷ *Hansard*, 3rd ser. (1883), cclxxvii. 817.

⁴⁸⁸ Lester, *Victorian Insolvency*, p 195.

⁴⁸⁹ *Ibid.*

⁴⁹⁰ Speech by M. D Chambers, an official of the Board of Trade involved in drafting the Bankruptcy Act of 1883, to the Institute of Bankers. *Journal of the Institute of Bankers* (Dec. 1883).

⁴⁹¹ Lester, *Victorian Insolvency*, p 195.

⁴⁹² *Hansard*, 3rd ser. (1883), cclxxvii. 822.

within 24 hours of the first meeting. The scope and operation of the framework is comparable to the compulsory winding up regime constituted under IA 1986.

At the meeting, creditors could either approve a composition or scheme of arrangement or resolve in favour of adjudication for bankruptcy.⁴⁹³ A composition or scheme of arrangement required approval of a majority in number and three-fourths in value and a confirming resolution of the majority.⁴⁹⁴ Such a vote would only transpire after a proper examination of the affairs of the debtor.⁴⁹⁵ The court would approve the proposal based on the report of the OR and the proposal had to be sensible in the circumstances, calculated to benefit the general body of creditors and void of any misconduct on part of the debtor.⁴⁹⁶

If creditors failed to reach a consensus the court would adjudicate for bankruptcy.⁴⁹⁷ The trustee selected by creditors could be removed by the Board of Trade if it suspected any irregularity in the election process, or that the trustee was unfit to act, or that he or she was not likely to act in the interests of creditors.⁴⁹⁸ Creditors could appoint the OR as the trustee but if they did not agree the Board of Trade was authorised to make such an appointment.⁴⁹⁹ An audit of all accounts of trustees had to be conducted at least twice each year and no trustee could be released before the board was satisfied with his or her accounts.⁵⁰⁰

The requirement of a public inquiry enjoyed support from the business community, particularly from the London merchants,⁵⁰¹ and other organisations such as the

⁴⁹³ Lester, *Victorian Insolvency*, p 195.

⁴⁹⁴ *Ibid.*

⁴⁹⁵ *Ibid.*

⁴⁹⁶ *Ibid.*

⁴⁹⁷ *Ibid.*

⁴⁹⁸ *Ibid.*

⁴⁹⁹ *Ibid.*

⁵⁰⁰ *Ibid.*

⁵⁰¹ HLRO, document no. 54.

Institute of Chartered Accountants and the Incorporated Law Society.⁵⁰² The court would set a date for a discharge hearing after a public examination and consider the report of the OR in regards to the debtor's conduct and affairs at the hearing.⁵⁰³ The court would adjudicate for bankruptcy if there was evidence of misconduct and could either refuse or qualify discharge.⁵⁰⁴ Although many arrangements were successfully and advantageously carried out for the creditors, unlike under the previous Acts, creditors were sometimes compelled to a deed of arrangement without being afforded sufficient opportunity to scrutinise the debtor's affairs and without any notice of the deed.⁵⁰⁵

The bill provided that trustees had to invest all money in excess of £50 into the Bank of England so that it could be used to subsidise the new system like under the old system.⁵⁰⁶ In small bankruptcies, where assets of the debtor were expected to be under £300, the OR would act as the trustee unless creditors objected.⁵⁰⁷ An administration order could be made where the debt was under £50, and the debt paid in instalments.⁵⁰⁸

The bill proposed a new system in which bankrupt estates would be supervised by the Board of Trade instead of the courts.⁵⁰⁹ Creditors would "administer the estate by having control over the election of the trustee".⁵¹⁰ For a philosophical underpinning,

⁵⁰² *Hansard*, 3rd ser. (1883), cclxxvii. 819.

⁵⁰³ Lester, *Victorian Insolvency*, p 197.

⁵⁰⁴ *Ibid.*

⁵⁰⁵ R.G. Young, *A treatise on the law of private arrangements with creditors: with an appendix containing the Deeds of Arrangement Act, 1887, the Bills of Sale Acts 1878 & 1882, and the Bankruptcy (Discharge and Closure) Act, 1887: with the rules under the above acts* (W. Clowes and Sons, London 1888), p 8.

⁵⁰⁶ 5 & 6 Wm. IV. c. 29 (1835). An official from the Board of Trade advanced that the provision borrowed from the French system. *Journal of the Institute of Bankers* (Dec. 1883), p 564.

⁵⁰⁷ NAPSS, *Transactions 1868*, 283.

⁵⁰⁸ Lester, *Victorian Insolvency*, p 198.

⁵⁰⁹ *Ibid.*

⁵¹⁰ *Ibid.*

Chamberlain relied on Farrer and his communitarian approach: the community as a whole could potentially be affected by the perils of business failure and “Parliament had to endeavour...to protect the salvage, and also to diminish the number of wrecks”.⁵¹¹ The bill was received with mixed emotions by the business community.⁵¹² Bankers were clearly in support: “Officialism, so called, affords some safeguard against dishonesty and extravagance, and it is this much needed safeguard which Mr Chamberlain seeks to supply”.⁵¹³ After five months of protracted debate the bill became law in 1883.⁵¹⁴

1.10 Deeds of Arrangement Acts

The Deeds of Arrangement Act 1887 precipitated from the Bankruptcy Act of 1883 and was designed to publicise private arrangements to safeguard the interests of creditors.⁵¹⁵ The Muir Mackenzie Committee declared the scheme ineffective because it was possible for a debtor to assign assets to an unfit trustee provided one or more creditors consented to the deed.⁵¹⁶ In addition, there was no provision for the proper examination of the affairs of a bankrupt.⁵¹⁷ The Muir Mackenzie Committee’s proposals led to the enactment of Deeds of Arrangement Act 1914.⁵¹⁸ Although the Act established official supervision of deeds of arrangement,⁵¹⁹ it did not extinguish the historic problems connected with private arrangements.⁵²⁰ The Blagden

⁵¹¹ *Hansard*, 3rd ser. (1883), cclxxvii. 817.

⁵¹² The Bristol chamber attacked the measure for attempting to reinstate officialism, but the Manchester chamber suggested implementation at once. Bristol CC Papers, LD 1989/4/201, letter book: Thomas Browning, secretary of Manchester CC, 1 June 1881; *Accountant* (25 June 1881), 3-4; Sheffield CC Papers, LD 1989/4/201, letter book: Thomas Browning, secretary of the Manchester CC, 1 June 1881.

⁵¹³ ‘The New Bankruptcy Bill’ *Bankers Magazine and Journal of the Money Market* (June 1881), 447.

⁵¹⁴ 46 & 47 Vict. c. 52 (1883).

⁵¹⁵ Cork Committee, para 61.

⁵¹⁶ Report of the Committee appointed by the Board of Trade to enquire into Bankruptcy Law and its Administration, Cmnd 4068 (1906).

⁵¹⁷ *Ibid*, para 63.

⁵¹⁸ Cork Committee, para 65.

⁵¹⁹ Deeds of arrangement were required to be registered with the Board of Trade. *Ibid*, para 66.

⁵²⁰ *Ibid*, para 65.

Committee examined the law and concluded that creditors were not generally looking after their own interests because they were under the impression that it was the duty of the Board of Trade.⁵²¹ The Blagden Committee made recommendations relating to provision of discharge which were enacted under Insolvency Act 1976.⁵²²

1.11 Company Winding Up: Evolution of Corporate Insolvency

Bankruptcy law did not apply to companies *per se*.⁵²³ The Joint Stock Companies Winding-Up Act 1844 made provision for a registered company to be declared insolvent “[I]n like manner as against any other bankrupts”.⁵²⁴ Prior to the enactment of the Winding-Up Act Parliament had passed a statute which made provision for the incorporation of joint stock companies, albeit without limiting the liability of members.⁵²⁵ The provisions of the Winding-Up Act 1844 established the concept of corporate insolvency for registered companies.⁵²⁶

The modern company has its origins in the 17th century.⁵²⁷ The scandal and financial crisis during early 18th century (“the South Sea Bubble”)⁵²⁸ prompted official disapproval of joint stock companies and resulted in the Bubble Act of 1720.⁵²⁹ At common law, the legal position of unincorporated joint stock companies remained unpredictable⁵³⁰ even after the Bubble Act was repealed.⁵³¹ During the 1830s, the

⁵²¹ Report of the Committee on Bankruptcy and Deeds of Arrangement Law Amendment, Cmnd 221 (1955).

⁵²² *Ibid.* See 1.12.

⁵²³ Goode, Principle, p 11.

⁵²⁴ Joint Stock Companies Winding-Up Act 7 & 8 Vict. c. 111 (1844), s. 1.

⁵²⁵ Joint Stock Companies Act 1844 7 & 8 Vict. c. 110 (1844).

⁵²⁶ Joint Stock Companies Winding-Up Act 7 & 8 Vict. c. 111.

⁵²⁷ A. J. Boyle and J. Birds, *Boyle & Bird's Company Law* (Jordans Ltd, Bristol 2007), p 1 (“Boyle & Bird's Company Law”). See also n. 4.

⁵²⁸ The South Sea Company was formed in 1711 and became heavily involved in the speculative market of trading shares. A. Dignam and J. Lowry, *Company Law* (9th edn Oxford University Press, Oxford 2016), p 15.

⁵²⁹ 6 Geo. I. c. 18 (1720).

⁵³⁰ If shares in the company were not freely transferable the company was not liable for prosecution under the Bubble Act.

⁵³¹ 6 Geo. IV. c. 91 (1825).

thriving economy significantly increased the amount of unincorporated joint stock companies.⁵³² A new form of insolvency⁵³³ connected with companies developed and regulation thereof inevitably followed.⁵³⁴

Incorporation by Royal Charter was deemed incompatible with contemporary commerce and the cost of incorporating a statutory company was prohibitive.⁵³⁵ The report of the select committee which was chaired by Gladstone, the president of the Board of Trade at the time, formed the basis of modern company law: Joint Stock Companies Act 1844.⁵³⁶ However, the principles of partnership and trust law developed by the courts of equity should not be overlooked in this regard.⁵³⁷ The Joint Stock Companies Act 1844 repealed the practice of obtaining letters patent from the Crown in favour of a supervised⁵³⁸ registration system.⁵³⁹ The provisions applied to joint stock companies of more than 25 contributors or which permitted shares to be transferred without the approval of all membership.⁵⁴⁰ The bankruptcy court would investigate the affairs of a debtor and determine any abuse and creditors could obtain leave of the Court of Chancery to proceed against shareholders.⁵⁴¹

The Joint Stock Companies Winding-Up Act of 1848 permitted a contributory to petition the Lord Chancellor or the Master of Rolls where, for instance, the company committed an “act of bankruptcy”.⁵⁴² Where such a petition had been filed a creditors’

⁵³² See the discussion at 1.7.

⁵³³ The winding-up of companies and partnerships. Lester, *Victorian Insolvency*, p 222.

⁵³⁴ Boyle & Bird’s *Company Law*, p 2.

⁵³⁵ *Ibid*, p 3.

⁵³⁶ 7 & 8 Vict. c. 110 (1844). Prior to 1844, both the Trading Companies Act 1834 and the Chartered Company Act 1837 attempted to solve some of the inherent legal problems without making provision for incorporation. *Ibid*.

⁵³⁷ *Ibid*.

⁵³⁸ The Act established the Registrar of Companies to supervise registration and to keep records of each company’s constitution, directors and annual return. *Ibid*.

⁵³⁹ *Ibid*.

⁵⁴⁰ 7 & 8 Vict. c. 110 (1844).

⁵⁴¹ Sir W. S. Holdsworth, *A History of English Law* (London, 1903-66).

⁵⁴² 11 & 12 Vict. c. 45 (1848), s. 5.

assignee could present a petition to the court and an official assignee would be immediately appointed.⁵⁴³

1.11.1 The Doctrine of Limited Liability

The jurisdictional conflict between bankruptcy courts and the Chancery Court that was created by the Acts of 1844 and 1848, together with the Act of 1849,⁵⁴⁴ was resolved by the Joint Stock Companies Act 1856.⁵⁴⁵ Aside from establishing limited liability⁵⁴⁶ the legislation made provision for the Chancery Court to refer winding-up orders to the appropriate bankruptcy court.⁵⁴⁷ In like manner to the bankruptcy system, the court would appoint an official liquidator after the presentation of a winding-up petition.⁵⁴⁸ The Joint Stock Companies Act 1856 permitted voluntary winding-up outside court supervision.⁵⁴⁹ According to Hilton, the doctrine of limited liability immensely gained in currency after the abolition of arrest on *mesne*.⁵⁵⁰ It was observed that creditors were increasingly shifting their security interests to the property of a company and its future assets.⁵⁵¹ As a *quid pro quo*, when the arrest on *mesne* process was finally ceased, the writ of *elegit* was extended to cover all the property of a debtor.⁵⁵²

The Joint Stock Companies Winding-Up (Amendment) Act 1857 granted exclusive winding-up jurisdiction to the Chancery Court and, in so doing, effectively separated

⁵⁴³ It was hoped that contributors would act quickly to lessen their losses and that the official assignee would swiftly collect and dispose the assets of the debtor and thereby effecting an expedient liquidation. Lester, *Victorian Insolvency*, p 223.

⁵⁴⁴ 12 & 13 Vict. c. 108 (1849).

⁵⁴⁵ 19 & 20 Vict. c. 47 (1856).

⁵⁴⁶ The liability of shareholders was limited to the amount of unpaid shares.

⁵⁴⁷ The Act repealed all prior Company Acts and winding-up Acts. Lester, *Victorian Insolvency*, p 222.

⁵⁴⁸ *Ibid*, p 224.

⁵⁴⁹ *Ibid*.

⁵⁵⁰ Imprisonment for debt or using threats of imprisonment was not going to return as many funds as before to creditors. Hilton, *The Age of Atonement* (Oxford, 1988), p 264. See 1.3.1.

⁵⁵¹ Lester, *Victorian Insolvency*, p 225.

⁵⁵² See the analysis at 1.3.2.

bankruptcy and winding-up.⁵⁵³ The Companies Act 1862⁵⁵⁴ consolidated winding-up provisions and prescribed three procedures that would endure until the 20th century:⁵⁵⁵ compulsory winding-up, voluntary winding-up and voluntary winding-up under court supervision.⁵⁵⁶ The legislation also provided for a binding private arrangement between a company and its creditors provided it was favoured by three-fourths in number and value.⁵⁵⁷ It seems likely that this provision originated from the bankruptcy composition: the Bankruptcy Act of 1861 extended protection to a debtor pending negotiations for an arrangement, removed the need for a *cessio bonorum* in a deed in order to bind dissenting creditors and lessened the proportion of assenting creditors necessary to bind the minority.⁵⁵⁸

Provisions of the Judicature Act 1875 specifically sought to align winding-up rules with bankruptcy “as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively”.⁵⁵⁹ The interpretation of the provision occasioned controversy and at one point the Court of Appeal was compelled to reiterate that priority bankruptcy rules were adopted into company winding-up.⁵⁶⁰

⁵⁵³ L.C.B. Gower, *Principles of Modern Company Law* (6th edn Sweet & Maxwell, London 1997), Chapter 2.

⁵⁵⁴ 25 & 26 Vict. c. 90 (1862).

⁵⁵⁵ 8 Edw. VII. c. 69 (1908).

⁵⁵⁶ Lester, *Victorian Insolvency*, p 227.

⁵⁵⁷ 25 & 26 Vict. c. 90 (1862).

⁵⁵⁸ 24 & 25 Vict. c. 134 (1861).

⁵⁵⁹ Judicature Act 1875, s. 10.

⁵⁶⁰ *Re Whitaker, Whitaker v Palmer* [1901] 1 Ch D 9. The case was about a deceased person’s insolvent estate, but the provision was held to apply to the winding-up of a company. To the contrary, the provisions of the Bankruptcy Act 1883 relegating the Crown’s preference were ruled inapplicable to a company winding up (*Re Oriental Bank Corp* (1884) 28 Ch D 643). See also A. Keay and P. Walton, ‘The Preferential Debts Regime in Liquidation Law: In the Public Interest?’ (1999) 3 *Company Financial and Insolvency Law Review* 84.

In addition to the doctrines of *ultra vires*⁵⁶¹ and maintenance of capital,⁵⁶² creditors sought new ways of protecting their interests against the possibility of default.⁵⁶³ What follows is a brief historical background of the general law of credit and security and its function and impact on corporate insolvency and prospect of corporate rescue.

1.12 Secured Credit: Fixed and Floating Charges

The creation of credit involves undertaking financial obligations which are not immediately discharged and the possibility of default.⁵⁶⁴ In the UK, and in most industrialised economies, credit is the cornerstone of commerce and trade.⁵⁶⁵ In 1982, the Cork Committee observed that the opportunities of procuring credit, and the risk of insolvency,⁵⁶⁶ were significantly increased⁵⁶⁷ and it seems little has changed in this regard.

A mortgagee traditionally retained power to appoint a receiver to manage the income generated from a mortgaged property.⁵⁶⁸ Historically, the old-style receivership (the power to appoint a receiver of income) has been used as a method of enforcing security by a secured creditor.⁵⁶⁹ In *Graham v Chapman*,⁵⁷⁰ the court ruled that mortgages over changing assets paralysed businesses and that the execution of the deed was an “act of bankruptcy”. The ensuing conflict between the judicial precedent (common law) and early equitable rules that were facilitated by the “ingenuity of

⁵⁶¹ *Ashbury Railway Carriage Co Ltd v Riche* (1875) LR 7 HL 653.

⁵⁶² *Re Exchange Banking Co* (1882) LR 21 Ch D 519; *Trevor v Whitworth* (1887) 12 App Cas 409.

⁵⁶³ J. Armour, ‘The Chequered History of the Floating Charge’ (2004) *Griffiths Law Review* 13(1) (“Armour, Chequered History”).

⁵⁶⁴ Cork Committee, para 5.

⁵⁶⁵ *Ibid*, para 10.

⁵⁶⁶ *Ibid*, para 23

⁵⁶⁷ *Ibid*, para 16.

⁵⁶⁸ Armour, Chequered History, p 29; See, for example, *Re Morritt* (1868) 18 QBD 222.

⁵⁶⁹ R. Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, London 1990), p 11.

⁵⁷⁰ (1852) 12 CB 85.

draftsmen”⁵⁷¹ in the Chancery Court⁵⁷² was settled in favour of equity⁵⁷³ and culminated in the statutory adoption of the floating charge⁵⁷⁴ contrary to the commonly accepted 19th century “paralysis” theory of its creation.⁵⁷⁵

By mid-1860s, the practice of granting a debenture holder security over the “entire undertaking and sums arising therefrom” by limited liability companies was common practice.⁵⁷⁶ The potential drawback of the security was its limitation on the chargor to deal with the charged assets without consent of the chargee.⁵⁷⁷ The judiciary purposefully interpreted undertaking as implying that a company could conduct business as usual without interference from the debenture holder until default caused the charge to crystallise into a fixed charge.⁵⁷⁸ During the early stages it was common to expressly state that the company was free to conduct business until some future event but the clause became obsolete as courts became familiar with the charging instrument and its implications.⁵⁷⁹ The term floating charge⁵⁸⁰ became synonymous with such transactional agreements⁵⁸¹ and the practice of appointing a receiver out of court as an agent of the company developed.⁵⁸² Sanctity of contract allowed a

⁵⁷¹ I. F. Fletcher, ‘UK Corporate Rescue: Recent Developments – Changes to Administrative Receivership, Administration and Company Voluntary Arrangement – The Insolvency Act 2000, The White Paper 2001 and the Enterprise Act 2002’ (2004) 5 *European Business Organisation Law Review*, at 122.

⁵⁷² The early beginnings of the use of conditional bills of sale and assignments of debt to finance trade were noted from late 14th century into the 15th century. R. Gregory and P. Walton, ‘Fixed and floating charges – a revelation’ (2001) *Lloyds Maritime and Commercial Law Quarterly* 1, at 125.

⁵⁷³ *Holroyd v Marshall* (1862) 10 HLC 191.

⁵⁷⁴ Bills of Sale Act (1878) Amendment Act 1882.

⁵⁷⁵ R. Gregory and P. Walton, ‘Fixed and floating charges – a revelation’ (2001) *Lloyds Maritime and Commercial Law Quarterly* 1.

⁵⁷⁶ Armour, *Chequered History*.

⁵⁷⁷ *Ibid.*

⁵⁷⁸ *Re Panama, New Zealand and Australia Royal Mail Co* (1870) LR 5 Ch App 318, per Sir George Giffard LJ at 322.

⁵⁷⁹ *Re Florence Land Co* (1878) 10 Ch D 530.

⁵⁸⁰ The term “floating charge” first appeared in *Re Colonial Trusts Corporation* (1879) 15 Ch D 465.

⁵⁸¹ Armour, *Chequered History*, at 28.

⁵⁸² To avoid liability the chargee did not go into possession: *Gaskel v Gosling* (1896) 1 QB 669. Another reason was to avoid becoming liable to third party-creditors for the debts of the business: *Gaskel v Gosling* (1897) AC 575.

debenture-holder to appoint a receiver even where a company was being wound up.⁵⁸³

Where the security covered all the property the receiver could continue to trade the business and exercise power to sale over the charged assets.⁵⁸⁴

A floating charge confers proprietary rights which means the holder enjoys priority over unsecured creditors in a winding up.⁵⁸⁵ The judiciary's initial approach was to place the onus of finding out whether or not assets were subject to security on unsecured creditors.⁵⁸⁶ However, in *Salomon v A. Salomon & Co Ltd*,⁵⁸⁷ Lord Mcnaghten slightly redressed the balance in favour of unsecured creditors.⁵⁸⁸ The Preferential Payments in Bankruptcy Amendment Act prioritised the statutory scheme of preferential debts over floating charges⁵⁸⁹ and the Companies Act 1900 made provision for floating charges and other charges to be registered else they were rendered void.⁵⁹⁰ Nonetheless, the Cork Committee acknowledged the importance of the floating charge to corporate finance and subsequently recommended the appointment of an administrator in a bid to cover the gap where no floating charge holder existed based on the positive rescue outcomes observed during a few receiverships.⁵⁹¹

After the success of the regime, under the Bankruptcy Act of 1883,⁵⁹² the Government introduced a bill which was designed to apply bankruptcy law to company winding-up.⁵⁹³ On presentation of a winding-up petition, a provisional liquidator (comparable to

⁵⁸³ *Re Henry Pound* (1889) 42 Ch D 402.

⁵⁸⁴ *Gaskel v Gosling* (1896) 1 QB 669 at 700.

⁵⁸⁵ Armour, *Chequered History*, at 31-32.

⁵⁸⁶ *Re General South America Co* (1876) 2 Ch D 337.

⁵⁸⁷ [1897] AC 22 at 53.

⁵⁸⁸ Mr Salomon took security (a debenture) over all the assets of a limited company he controlled and when the business became insolvent no dividend was paid to unsecured creditors.

⁵⁸⁹ Preferential Payments in Bankruptcy Amendment Act 1897, s. 2.

⁵⁹⁰ Companies Act 1900, s. 14.

⁵⁹¹ Cork Committee, Ch 9.

⁵⁹² In 1908, the Muir Mackenzie Committee reported that the commercial community was satisfied with the law constituted under the Act of 1883. Cork Committee, para 54. See also 1.10.

⁵⁹³ Companies (Winding-up) Bill (1890).

the OR in bankruptcy) would be appointed.⁵⁹⁴ The creditors had the opportunity to either retain the provisional liquidator or to select their own.⁵⁹⁵ The legislature has been criticised for some of the flaws in corporate insolvency law because of this direct importation of bankruptcy provisions into company winding-up.⁵⁹⁶ However, the review and reform of bankruptcy⁵⁹⁷ and company law⁵⁹⁸ maintained separate avenues. The scheme of arrangements provisions constituted under the Companies (Winding-up) Act of 1890⁵⁹⁹ were adopted from section 18 of Bankruptcy Act 1883 which allowed creditors to agree to a composition or scheme of arrangement before the actual adjudication for bankruptcy.

1.13 The Need for Reform

The Bankruptcy Act 1914, following a report by the Muir Mackenzie Committee, did not materially impact the bankruptcy system established by the Act of 1883.⁶⁰⁰ The recommendations of the Hansell Committee were given effect by the Bankruptcy (Amendment) Act of 1926. When the Blagden Committee was appointed, its task was to review the Acts of 1914 and 1926 and the Deeds of Arrangement Act 1914.⁶⁰¹ Similar to its predecessor, the Blagden Committee expressed a general satisfaction with the bankruptcy framework under the Act of 1883.⁶⁰²

⁵⁹⁴ 53 & 54 Vict. c. 63 (1890).

⁵⁹⁵ Ibid.

⁵⁹⁶ *Re Berkeley Securities* [1980] 3 All ER 513 per Vinelott J at 526-529.

⁵⁹⁷ Committees appointed to review bankruptcy: Muir Mackenzie Committee, 1906 Cmnd 4068; Hansell Committee, 1925 Cmnd 2326; and the Blagden Committee, 1957 Cmnd 221. I. F. Fletcher, *The Law of Insolvency* (2nd edn Sweet & Maxwell, London 1996), p 13.

⁵⁹⁸ Committees which inquired into company law include: Loreburn Committee, 1906 Cmnd 3052; the Greene Committee, 1926 Cmnd 2657; the Cohen Committee, 1945 Cmnd 6659; and the Jenkins Committee, 1959 Cmnd 6659. Fletcher, *The Law of Insolvency*, p 13.

⁵⁹⁹ 53 & 54 Vict. c. 63 (1890).

⁶⁰⁰ Cork Committee, para 54.

⁶⁰¹ Ibid, para 56.

⁶⁰² The Committee was appointed after the Muir Mackenzie Committee had reported positively about the bankruptcy system established in 1883. See 1.10.

On 1 January 1973 the UK joined the European Economic Community (EEC).⁶⁰³ The report of the Cork Advisory Committee⁶⁰⁴ on the proposed Draft EEC Bankruptcy Convention⁶⁰⁵ bolstered the arguments in favour of a wholesale review of insolvency law.⁶⁰⁶ A report by “Justice”⁶⁰⁷ *inter alia* supported the passage of Insolvency Act 1976.⁶⁰⁸ In response, the Government announced its intention of setting up a review committee of insolvency law and practice.⁶⁰⁹ The question of whether (or not) the administration framework (under Schedule B1 of IA 1986), which was subsequently enacted following the Report of the Cork Committee to foster a corporate “rescue culture”, is fit for purpose forms the subject matter of this research project and pervades the discussion in the next chapters.

1.14 Conclusion of the Historical Development of English Insolvency Law

In the beginning, bankruptcy was exclusive to traders based on the principles⁶¹⁰ of the Law Merchant.⁶¹¹ At common law, a creditor could either seize the body or effects of a debtor⁶¹² but it was relatively easy to seize the body of a debtor than to attach the property.⁶¹³ Creditor dissatisfaction with the situation arguably underlay the introduction of bankruptcy into English law⁶¹⁴ and indeed the growth of its

⁶⁰³ European Communities Act 1972 (repealed).

⁶⁰⁴ Cmnd 6602 (1976).

⁶⁰⁵ The original six member states (Germany, France, Belgium, Luxembourg, Italy and the Netherlands) had prepared a preliminary draft Convention on Bankruptcy, Winding-Up, Arrangements, Compositions and Similar Proceedings. Cork Committee, para 57.

⁶⁰⁶ I. F. Fletcher, *The Law of Insolvency* (2nd edn Sweet & Maxwell, London 1996), p 15.

⁶⁰⁷ The British section of the International Commission of Jurists.

⁶⁰⁸ The Act allowed public examination of a debtor to be excluded from deserving cases and modified discharge by making it automatic in certain circumstances or subject to review by the court. Cork Committee, para 57.

⁶⁰⁹ *Hansard*, vol. 918, Oct. 1976.

⁶¹⁰ The principles were derived from the mercantile law of Italy which was itself a product of the adaptation of Roman law procedures known as *cessio bonorum*. See 1.2.

⁶¹¹ See 1.2

⁶¹² See 1.3.

⁶¹³ See 1.3.1.

⁶¹⁴ See 1.2.

administration.⁶¹⁵ Similar to common law, the founding bankruptcy statute⁶¹⁶ targeted the person of the debtor or their property. Nevertheless, as a remedy for the inadequacies under common law, the Bankruptcy Act 1542 laid down the fundamental principle of bankruptcy law i.e., the rateable distribution of a debtor's assets among creditors (the *pari passu* principle).⁶¹⁷ Nevertheless, in practice, the fundamental principle is subject to secured interests⁶¹⁸ and the statutory scheme⁶¹⁹ of preferential debts.⁶²⁰

The restriction of bankruptcy law to traders⁶²¹ simply prolonged imprisonment for debt under which a creditor yielded real power over the person.⁶²² Inevitably, the practice became repugnant over time and the legislature subsequently made it possible for a debtor prisoner to petition the Court for the Relief of Insolvent Debtors for release.⁶²³ After the establishment of the Court for the Relief of Insolvent Debtors, the system of imprisonment for debt essentially resembled the bankruptcy system.⁶²⁴ Imprisonment for debt was very profitable for creditors⁶²⁵ who regarded the system as added security. Hence, the abolition of arrest on *mesne* shifted the creditors' interests from the person to their property.⁶²⁶ Parliament finally succumbed to the pressure of the reformers and made it possible for both traders and non-traders to petition the court for discharge prior to the abolition of the practice in 1869.⁶²⁷

⁶¹⁵ See 1.8.

⁶¹⁶ 34 & 35 Henry VIII. c. 4 (1542).

⁶¹⁷ See 1.2.

⁶¹⁸ The realisation of secured assets occurs outside collective execution. Cork Committee, para 17.

⁶¹⁹ IA 1986, s. 175.

⁶²⁰ Ibid, Sch 6.

⁶²¹ 13 Eliz. I. c. 7 (1570).

⁶²² See the discussion at 1.3.

⁶²³ 53 Geo. III. c. 102 (1813).

⁶²⁴ See 1.3.1.

⁶²⁵ Ibid.

⁶²⁶ Ibid.

⁶²⁷ See 1.4.2.

During the 18th and 19th centuries, many insolvent debtors and their creditors preferred to resolve insolvency by entering private arrangements,⁶²⁸ albeit most of the early respites lasted for longer periods. The principle of majority control in compositions arguably marked the starting point of creditors' dominance in corporate insolvency⁶²⁹ which is still extant under the existing corporate insolvency framework. At first, it was a debtor who petitioned for a respite but later respites were creditor granted.⁶³⁰ Although compositions were not officially adopted early under English law, there is evidence that merchants had been using similar arrangements from early 13th century.⁶³¹ Parliament's reluctance to formalise informal arrangements was partly influenced by bad press⁶³² and a presumption that private arrangements were fraudulent activities by debtors or controlling creditors.⁶³³ Similarly, this thesis contends that the principal secured creditor dominates the proceedings and can influence the outcome of most (out-of-court) administrations or a voluntary winding up where such a creditor exists.⁶³⁴

The early bankruptcy statutes were clearly not intended to provide any relief for debtors, but to enable a creditor to attach the assets of a debtor.⁶³⁵ Although the provision of a discharge, which represented a significant development, it seems reimbursement of creditors underlay the provision.⁶³⁶ Shortly after the provision was enacted creditors assumed the power to grant a discharge.⁶³⁷ The intensive lobbying

⁶²⁸ See 1.4.

⁶²⁹ See 1.4.1.

⁶³⁰ Ibid.

⁶³¹ See 1.4.2 and 1.4.3.

⁶³² See 1.4.3.

⁶³³ Ibid.

⁶³⁴ See the empirical study of administration and comparative analysis in Chapter 4.

⁶³⁵ See 1.2.

⁶³⁶ The law still treated bankrupts as criminals: the death penalty could be imposed in cases involving fraud. See 1.6.

⁶³⁷ 5 Anne c. 22, s. 2 (1706).

of Parliament, during the 18th century, shows a vested interest of the business community in the development of bankruptcy law.⁶³⁸ Nonetheless, the greatest catalyst to the evolution of bankruptcy law during the Victorian era was the Industrial Revolution.⁶³⁹ The response of the legislature was pragmatism not based on any policy.⁶⁴⁰ In a novel approach, while drafting the Bankruptcy Act 1883, civil servants employed by the Board of Trade considered the wider impact of insolvency, in particular on the economy and community. As a result, the Act of 1883 combined creditor control with official supervision. By making it possible for a business to continue trading through a formal composition, the Act of 1825 signalled the earliest attempt to rehabilitate insolvent businesses prior to the advent of modern companies. The spectacular failure of the creditor-controlled bankruptcy system during late 19th century justified state intervention.⁶⁴¹ The temporary abolition of the centuries-old jurisdiction of the Court of Chancery validated the growing influence of creditors⁶⁴² while the introduction of the official assignee significantly increased the Government's role in the administration of insolvent estates.⁶⁴³ The abolition of arrest on *mesne* shifted the creditors' interests towards the property of a debtor, for instance, a composition was binding if it was supported by an assignment of property for the benefit of creditors.⁶⁴⁴ Influential organisations which were primarily formed to promote the interests of creditors persistently lobbied Parliament.⁶⁴⁵ After a rather limited and naive comparison of the English and Scottish systems, the legislature and the business community were convinced that a creditor-controlled system was

⁶³⁸ Lester, *Victorian Insolvency*, p 19.

⁶³⁹ Fletcher, *Law of Insolvency*, pp 9-10.

⁶⁴⁰ See, for example, the comments at 1.9.

⁶⁴¹ See 1.7.1.

⁶⁴² See 1.8.

⁶⁴³ *Ibid.*

⁶⁴⁴ 12 & 13 Vict. c. 106 (1849).

⁶⁴⁵ See 1.8.

desirable.⁶⁴⁶ The official assignee was replaced by a creditors' assignee,⁶⁴⁷ but creditors dismally failed to protect their interests which prompted the legislature to make a U-turn⁶⁴⁸ and return to a revised official system.⁶⁴⁹

The Joint Stock Companies Winding Up Act 1844⁶⁵⁰ heralded the commencement of corporate insolvency.⁶⁵¹ The increase in commercial activity during the 19th century boosted the number of joint-stock companies and led to the introduction of the doctrine of limited liability.⁶⁵² Creditors became determined to find new ways of protecting their interests.⁶⁵³ The common law courts reluctantly accepted the creation of an equitable charge over the company's present and future assets⁶⁵⁴ and the practice of granting a floating charge over the undertaking of the company developed.⁶⁵⁵ The potential limitation of the security was neutralised⁶⁵⁶ by interpreting undertaking as implying that the chargor could deal with charged assets until 'crystallisation' of the floating charge.⁶⁵⁷ Over time, the practice of appointing receivers as agents of the company out-of-court as a way of avoiding liability by creditors developed.⁶⁵⁸ Where the security covered all the property the agent was empowered to trade the business and to sell the business as a going concern.⁶⁵⁹ It is this characteristic of the floating charge that was observed as key to facilitating corporate rescue by the Cork Committee.⁶⁶⁰ In

⁶⁴⁶ 1.8.3.

⁶⁴⁷ 32 & 33 Vict. c. 71 (1869).

⁶⁴⁸ See 1.9.

⁶⁴⁹ Ibid.

⁶⁵⁰ 7 & 8 Vict. c. 111.

⁶⁵¹ See 1.11.

⁶⁵² See 1.12.

⁶⁵³ See 1.11.1.

⁶⁵⁴ See 1.12.

⁶⁵⁵ Ibid.

⁶⁵⁶ *Re Panama, New Zealand and Australia Royal Mail Co* (1870) LR 5 Ch App 318 per Sir George Giffard LJ at 322. See 1.12.

⁶⁵⁷ See 1.14.

⁶⁵⁸ *Gaskell v Gosling* (1896) 1 QB 669; *Gaskell v Gosling* (1897) AC 575.

⁶⁵⁹ *Gaskell v Gosling* (1896) 1 QB 669.

⁶⁶⁰ Cork Committee, para 495. See 2.2.

1986, Parliament subsequently enacted administration based on the recommendation of the Cork Committee of filling a gap in corporate insolvency law where no floating charge holder existed.⁶⁶¹

The evolution of bankruptcy law went back and forth between official involvement and creditor control in the administration of insolvent estates until Joseph Chamberlain and some senior civil servants, who were inspired by a communitarian vision, considered the wider impact of bankruptcy on the economy and certain groups in society. To protect the minority and improve transparency, the Bankruptcy Act of 1883 qualified creditor control with official supervision. The Government was encouraged by the success of the Act of 1883⁶⁶² to align company winding up with bankruptcy. It was concluded that the failure to comprehend the critical difference between the two concepts by the legislature is the root cause of many flaws that plague corporate insolvency.⁶⁶³ Statutes enacted during the 19th century laid the edifice of corporate insolvency framework as it appears in the 21st century.⁶⁶⁴ For the most part, the evolution of bankruptcy depicts a legislature subjugated by a controlling and resolute business community with an insatiable appetite for reform.⁶⁶⁵ Rehabilitation was never a major concern in bankruptcy amendment and, therefore, when corporate law followed bankruptcy there was little in the way of effective rescue mechanisms. In terms of rescue, receivership was the only real option which developed in the corporate sphere and indirectly led to the introduction of administration.

⁶⁶¹ See 3.1.

⁶⁶² Statistics showed that 75% of bankruptcies each year between 1883-1913 had assets of less than £200. Lester, *Victorian Insolvency*, p 190.

⁶⁶³ *Re Berkeley Securities* [1980] 3 All ER 513 per Vinelott J at 526-529.

⁶⁶⁴ The principle of a three-fourths majority in number and value in schemes of arrangements was established in 1883 and carried through successive Company Acts before being adopted into CVAs. See 1.4.4.1.

⁶⁶⁵ See 1.8. The spectacular failure of the creditor-controlled system significantly diminished the desire for reform. See, for example, 1.8.4.

The development of English insolvency law did not involve any theoretical consideration. For that reason, the next chapter will investigate the theory of corporate rescue promoted in the UK by critically analysing the existing corporate insolvency framework and the principles and purposes of corporate rescue, promoted under Schedule B1 provisions,⁶⁶⁶ in light of the theory of corporate that was espoused by the Cork Committee and main insolvency theories.

⁶⁶⁶ IA 1986, Sch B1.

Chapter 2

Theory of Corporate Rescue in the UK: Trying to Find a Needle in a Haystack?

2.1 Introduction

The theory which underpins English insolvency law has never been clearly articulated,¹ let alone the theory which supports corporate rescue, notwithstanding the principles of a modern insolvency law provided by the *Insolvency Law and Practice: Report of the Review Committee*² (hereinafter “the Cork Committee”). Yet, it is essential for the development of insolvency law to endure with a clear defined purpose.³ For instance, it is important to determine the theoretical framework on which the law is predicated so that the fundamental principles and purposes may be reconciled⁴ to avoid inconsistencies and policy failure.⁵ In order that an effective assessment of the administration provisions⁶ may be achieved,⁷ it is particularly enlightening to initially visualise the theory of corporate rescue that was envisaged by the Cork Committee.⁸ As previously observed in Chapter 1, the evolution of English insolvency law was not predicated on any theory,⁹ except in 1883¹⁰ when the Board of Trade adopted a wider approach - which was underpinned by a communitarian philosophy - and nearly a century later, in 1982,¹¹ when the Cork Committee

¹ R. Goode, *Principles of Corporate Insolvency Law* (4th edn Sweet & Maxwell, London 2011), p 59 (“Goode, Principles”).

² Cmnd 8558 (1982), para 198.

³ V. Finch ‘The Measures of Insolvency’ (1997) 17 *Oxford Journal of Legal Studies* 227, at 227 (“Finch, Measures”).

⁴ A. Keay and P. Walton, *Insolvency Law: Corporate and Personal* (4th edn LexisNexis, Bristol 2017), p 21 (“Keay and Walton, Insolvency Law”).

⁵ Finch, Measures, at 227.

⁶ IA 1986, Sch B1.

⁷ See Chapter 3 for a preliminary analysis of the Schedule B1 (administration) provisions.

⁸ Cork Committee, Chapter 9.

⁹ See Chapter 1.

¹⁰ See 1.8.

¹¹ See 2.2.

recommended administration.¹² Similarly, the Cork Committee's recommendation was based on the realisation of the wider impact of corporate insolvency and a concern for the other interests of society (or other groups) including the community interest.¹³

In a three-way close relationship, the purposes of insolvency law are influenced by the underlying theory¹⁴ and the theory is inseparable from the principles.¹⁵ Due to what has been termed as a pragmatic approach¹⁶ by the previous generations,¹⁷ regrettably, there has been little progress in framing a coherent theory which supports English insolvency law. The discussion in this chapter initially explores the theory of corporate rescue that was originally proposed by the Cork Committee and critically examines the corporate insolvency framework adopted in the UK,¹⁸ and the leading insolvency theories, through a corporate rescue lens.

2.2 Genesis and Theory of Corporate Rescue in the UK

In 1982, the Cork Committee recognised the social consequences and financial implications of the failure of a corporate debtor.¹⁹ Similar to the wider approach that was adopted in 1883,²⁰ it was observed that the failure of a company is not limited to the participants but that other interests, for example, suppliers in chain and the economy also take a financial hit.²¹ Thus, a legitimate concern for the interests of stakeholders and other interests in society, in particular the likely impact of corporate

¹² Cork Committee, Ch 9.

¹³ *Ibid*, paras 203 and 204.

¹⁴ Key and Walton, *Insolvency Law*, p 22.

¹⁵ *Ibid*, p 21.

¹⁶ Finch, *Measures*, at 227.

¹⁷ See Chapter 1 for the evolution of English insolvency law between 1542 and 1977.

¹⁸ The analysis is focused on administration and restructuring provisions, company voluntary arrangements (CVAs), company winding up and provisions that regulate malpractice. Nonetheless, as background to administration, the research also examines the scope and operation of receivership.

¹⁹ Cork Committee, para 200.

²⁰ See 1.8.

²¹ Cork Committee, para 203.

failure on the community, motivated the Cork Committee to recommend a wider and more inclusive approach to corporate insolvency.²² The Cork Committee proposed that, as a fundamental principle, a modern corporate insolvency framework should provide a way of preserving viable commercial enterprises capable of making a useful contribution to the economy.²³ It is worth noting that the policy was to preserve viable enterprises²⁴ and not necessarily the company itself as later enacted by the legislature.²⁵ The Cork Committee's carefully considered policy of rescuing viable enterprises²⁶ was transmuted to survival of the company during the legislative passage of the Insolvency Bill.²⁷

2.2.1 Contemporary Rescue Procedures

Scholars in North America, in contrast to those in the UK, have devoted more time to policy issues and normative theory in bankruptcy.²⁸ It must, however, be borne in mind that the theories proposed by the American scholars relate to a federal bankruptcy system which is different to the English insolvency jurisdiction. It is, nevertheless, arguable that the corporate rescue framework²⁹ adopted in the UK and Chapter 11 of the US Bankruptcy Code embrace the same fundamental goals,³⁰ albeit the restructuring tools differ in their approach.³¹ The primary purpose of administration is

²² Cork Committee, para 204.

²³ *Ibid*, para 198(j).

²⁴ *Ibid*.

²⁵ IA 1986, Part II.

²⁶ Cork Committee, para 198(j).

²⁷ For an exposition of some of the legislative meddling by vested power interests see J. Tribe, "Policy Subversion" in *Corporate Insolvency: Political Science, Marxism and the Role of Power Interests During the Passage of Insolvency Legislation* (2019) 32 *Insolvency Intelligence*, at 59.

²⁸ Bankruptcy in this context includes the liquidation of companies. Goode, *Principles*, p 70.

²⁹ IA 1986, Sch B1.

³⁰ Both procedures aim to preserve going concern values before the onset of liquidation. P. Carrington, 'Reconciling UK administration and US Chapter 11 after Maxwell' 11 *International Financial Law Review* 20 (1992), at 22 ("Carrington, Reconciling UK and US").

³¹ For instance, the appointment of an administrator displaces the directors (Board) from management of the company whereas the pre-existing management remains in office, as debtor in possession (DIP), even after an examiner is nominated under Chapter 11 of the US Bankruptcy Code. Carrington, *Reconciling UK and US*, at 22.

to rescue a company as a going concern.³² This implies that a company must remain intact and retain the whole or a part of its business after an administration.³³ So, despite preserving the going concern value of the business,³⁴ a pre-packaged administration (“pre-pack”) does not constitute corporate rescue for the purposes of the law.³⁵ The Cork Committee recommended administration with a view to business rescue³⁶ contrary to the statutory company rescue.³⁷

Under Chapter 11 of the US Bankruptcy Code, it is more common for a reorganisation that provides for the survival of the business to be arranged between the pre-existing management (DIP) and the creditors.³⁸ It is in such light that Chapter 11 of the US Bankruptcy Code is often professed to be a debtor relief mechanism as opposed to being a remedy for creditors.³⁹ Administration is regarded as a precursor to liquidation by observers here in the UK,⁴⁰ and likewise in the US,⁴¹ whereas Chapter 11 of the US Bankruptcy Code is widely considered to be an effective financial management

³² IA 1986, Sch B1 para 3(1)(a).

³³ In *Davey v Money & Anor* [2018] EWHC 766 (Ch), Snowden J decided that a decision not to pursue the primary purpose could only be attacked where it was made in bad faith or was clearly perverse in the sense that no reasonable administrator would have thought that it was not reasonably practicable to rescue the company as a going concern.

³⁴ It has been noted that value is an imprecise term which can lead to more than one interpretation but for creditors it is certainly measurable in monetary terms. S. Frisby, *A preliminary analysis of pre-packaged administrations* (2007): Report to The Association of Business Recovery Professionals, at 8.

³⁵ Key and Walton, *Insolvency Law*, p 82.

³⁶ See 2.2.

³⁷ IA 1986, Sch B1 para 3(1)(a).

³⁸ Carrington, *Reconciling UK and US*, at 22.

³⁹ *Ibid*, at 23.

⁴⁰ Under paragraph 65 an administrator is empowered to make distributions to creditors and if the court's permission to make distributions to (non-preferential) unsecured creditors is obtained the administration may thereafter be converted to a CVL or dissolution where all the assets have been distributed. Key and Walton, *Insolvency Law*, p 132. See, for example, *Re GHE Realisations Ltd* [2006] 1 All ER 357.

⁴¹ The administration regime can only be adopted when a company is, or is likely to become, insolvent which is considered to be too late for effective business rescue in the US. Carrington, *Reconciling UK and US*, at 23.

procedure and flexible business survival technique⁴² that does not require any test or condition to be satisfied prior to filing for a voluntary reorganisation.⁴³

The corporate rescue approach adopted in the UK, under administration,⁴⁴ is comparable to the “judicial management”⁴⁵ under the company law⁴⁶ of South Africa since 1926 and the Australian “official management”⁴⁷ introduced in 1961.⁴⁸ In contrast, the preventive restructuring approach adopted in the EU is focused on preventing insolvency and ensuring the viability of businesses⁴⁹ where there is a likelihood of insolvency.⁵⁰ For the purposes of this research, corporate rescue is taken to be either rescue of a company as a going concern or the whole or part of the business and the connected jobs.⁵¹

2.3 Leading Insolvency Theories

In recent times, academics and practitioners have started to identify the need to research the normative English theories of insolvency law.⁵² The current discussion is

⁴² Carrington, Reconciling UK and US, at 20.

⁴³ Ibid, at 23.

⁴⁴ IA 1986, Sch B1.

⁴⁵ An order could only be made with a view to the financial rehabilitation of the company, see for example, *Tenowitz v Tenny Investments* 1979 (2) SA 680.

⁴⁶ However, the regime has since been replaced by the business rescue proceedings under the Companies Act No. 71 of 1978.

⁴⁷ The procedure was rarely used in practice and was superseded by the voluntary administration procedure which was introduced in 1993 by the Corporate Law Reform Act 1992.

⁴⁸ For a more detailed discussion of the procedures see L. S. Sealy and D. Milman, *Annotated Guide to the Insolvency Legislation* (4th edn CCH Edition Limited, Oxfordshire 1994), p 40.

⁴⁹ The internationally recognized corporate rescue approach promotes reorganisation of viable businesses through formal or informal procedures. The World Bank available at: <https://www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights> [Last accessed 13/12/2021].

⁵⁰ Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132, art 4 (“Preventive Restructuring Directive”).

⁵¹ See 3.2 for a flavour of the different shades of corporate rescue adopted in other common law jurisdictions and in the EU.

⁵² See, for example, R. J Mokal, *Corporate Insolvency Law: Theory and Application* (Oxford University Press, Oxford 2005) and V. Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn Cambridge University Press, Cambridge 2009).

not intended to be exhaustive but focused on the main views on insolvency theory: the creditors' bargain theory, the communitarian vision and the multiple values theory. Like the creditors' bargain theory, the corporate insolvency framework adopted in the UK protects the pre-insolvency rights of secured creditors.⁵³ On the other hand, the provisions foster a communitarian approach,⁵⁴ distinguishes distributional values⁵⁵ and provides discharge for bankrupts.⁵⁶ Suffice it to say, the corporate insolvency framework adopted in the UK embodies divergent principles promoted by the main insolvency theories.

The following analysis explores the main insolvency theories from a corporate rescue standpoint, albeit the other theories are briefly considered at 2.3.4. The assessment considers whether corporate insolvency law should be purely concerned with creditor rights⁵⁷ or if other values, in particular corporate rescue, ought to be equally considered. The inquiry also seeks to identify how a balance of stakeholder interests may be achieved and a reasonably practicable approach to corporate rescue.

2.3.1 Creditors' Bargain Theory (Creditors' Wealth Maximisation)

The economic analysis theory of bankruptcy has arguably been dominant in the past thirty years.⁵⁸ Professor Jackson and his co-author Professor Baird, both from the

⁵³ See 2.1.

⁵⁴ It is debatable whether the Cork Committee recommended administration based on a communitarian theory but the approach which was adopted by the Government in the winding up of Carillion plc ("Carillion") and British Steel Ltd ("British Steel"), discussed at 2.5.1.6, is more inclined to a communitarian approach.

⁵⁵ The reintroduction of the Crown preference on 1 December 2020 (Finance Act 2020), after the announcement in the October 2018 Budget by the Chancellor of the Exchequer, is clear attempt of reordering distributional values. HMRC, Budget 2018: Protecting your taxes in insolvency (October 2018) available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752136/Insolvency_web.pdf [Accessed 10/05/19].

⁵⁶ IA 1986, s. 279. See 1.5.

⁵⁷ The principal beneficiary of insolvency proceedings is the general body of creditors. Cork Committee, para 232.

⁵⁸ Keay and Walton, *Insolvency Law*, p 25.

United States of America and inspired by the economics and law school of thought,⁵⁹ argue that the sole aim of bankruptcy is to maximise the collective dividend of creditors simply because debt collection lies at its core.⁶⁰ Jackson adopts the view that bankruptcy involves a creditors' bargain i.e., bankruptcy should reflect the agreement creditors would have agreed among themselves based on anticipated changes (*ex-ante* position).⁶¹ Because the bargain never occurred it is a hypothetical bargain. The prospect of basing legal theory on imaginary behaviour, devoid of a historical foundation,⁶² is not only problematic⁶³ but highly unlikely.⁶⁴

The hypothetical model contemplates an *ex-ante* agreement between two creditors to act collectively after one of them (the "risk-averse") secures a judicial lien over the assets of the debtor.⁶⁵ How the unsecured creditor would voluntarily agree a bargain which, in the event of insolvency, protects the secured interests of their counterpart is highly objectionable.⁶⁶ In this instance, the Rawlsian "veil of ignorance" assumed by Jackson⁶⁷ is a nonsense because the respective parties are fully aware of their rankings in default.⁶⁸ Nevertheless, the collective execution promoted by the theory is attractive because it reduces the costs associated with a litigation race,⁶⁹ increases the pool of assets (certainty) and is administratively more efficient.⁷⁰ The alternative

⁵⁹ . Keay 'Balancing Interests in Bankruptcy Law' [2001] *Common Law World Review* 206, at 2 ("Keay, Balancing Interests").

⁶⁰ Keay and Walton, *Insolvency Law*, p 25.

⁶¹ T. H. Jackson, 'Bankruptcy, Non-Bankruptcy Entitlements and the Creditors' Bargain' (1982) 91 *Yale Law Journal* 857, at 860 ("Jackson, Creditors' Bargain").

⁶² D. G. Carlson, 'Philosophy in Bankruptcy' (1987) 85 *Michigan Law Review*, at 1342.

⁶³ Determining bankruptcy policy based on *ex-ante* decisions generates inflexibility as what is presumed may change when confronted with reality. K. Gross, 'Taking Community Interests into Account in Bankruptcy: An Essay' (1994) 72 *Washington University Law Quarterly* 1031, at 1044-5 ("Gross, Community Interests").

⁶⁴ Goode, *Principles*, p 76.

⁶⁵ Jackson, *Creditors' Bargain*, at 864-5.

⁶⁶ *Ibid*, at 860-1.

⁶⁷ T. H. Jackson, *The Logic and Limits of Bankruptcy* (Cambridge Massachusetts and London, England, *Harvard University Press*, 1986), p 17 ("Jackson, Logic Limits").

⁶⁸ Finch, *Measures*, at 232.

⁶⁹ See 1.3 for an insight of early remedies that were available to creditors.

⁷⁰ Jackson, *Creditors' Bargain*, at 861.

position manifestly produces an undesirable state of affairs which precipitated and, indeed, justified the introduction of bankruptcy.⁷¹

The creditors' bargain theory is not concerned with distributional objectives simply because distributions could be given effect outside of bankruptcy⁷² but safeguards pre-insolvency rights. Protection of security interests is a key hallmark of the creditors' wealth maximisation theory.⁷³ It is difficult to comprehend how distributional issues cannot, or should not, be treated as a bankruptcy issue as argued by Professor Baird.⁷⁴ To attempt to separate issues that arise in bankruptcy according to applicable non-bankruptcy law,⁷⁵ formulated without any regard to insolvency,⁷⁶ it is argued, defeats the logic of bankruptcy law *ab initio*.⁷⁷

The vision of bankruptcy policy championed by Jackson is creditor-oriented and clearly ignores the community interest⁷⁸ and other interests which might be affected by the insolvency of a debtor.⁷⁹ Jackson does not see a public interest in bankruptcy and adopts the view that all the other interests, except creditors interests, fall outside bankruptcy law.⁸⁰ Contrariwise, Professor Goode emphasises the importance of

⁷¹ See 1.3. Aside from increased costs a business can be terminated prematurely by the untimely removal of essential assets contrary to the advantages to be realised collectively as a group. Jackson, *Creditors' Bargain*, at 862-4. The same criticism has been levelled against pre-packs. T. H. Jackson and R. Scott, 'On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and The Creditors' Bargain' (1989) 75(2) *Virginia Law Review* 155, at 204.

⁷² A bankruptcy regime that governs loss distribution invites forum shopping. D. G. Baird, 'Loss Distribution, Forum Shopping and Bankruptcy: A Reply to Warren' (1987) 54 *University of Chicago Law Review* 815, at 819 ("Baird, A Reply to Warren").

⁷³ Keay and Walton, *Insolvency Law*, p 25.

⁷⁴ Baird, A Reply to Warren.

⁷⁵ The issue in question should be whether bankruptcy law is applicable to distribution and not how losses should be distributed. Baird, A Reply to Warren, at 816.

⁷⁶ Finch, *Measures*, at 237.

⁷⁷ It is not surprising that Baird challenges any bankruptcy scholar to justify the existence of bankruptcy law because he sees it as an unnecessary and costly avenue of enforcement. Baird, A Reply to Warren, at 825.

⁷⁸ Gross, *Community Interests*, at 1031.

⁷⁹ D. Korobkin 'Contractarianism and the Normative Foundations of Bankruptcy Law' (1993) 71 *Texas Law Review* 541, at 555; E. Warren, 'Bankruptcy Policy' (1987) 54 *University of Chicago Law Review* 775, at 787-8 ("Warren, Bankruptcy Policy").

⁸⁰ Keay and Walton, *Insolvency Law*, p 26.

protecting other interests besides the interests of creditors because insolvency induces the need for protection of such non-creditor interests.⁸¹ In *Re Cambridge Analytica (UK) Ltd*,⁸² Norris J reiterated that insolvency is a combined remedy whereby individual rights of creditors are replaced by rights to participate in a collective (insolvency) process designed to benefit the general body of creditors.⁸³ His Lordship said that the prime interests in the procedure are the interests as a creditor and not, for instance, the pursuit of breaches of data protection principles.⁸⁴ Nonetheless, his Lordship acceded to the public interest in the performance of statutory reporting duties by the office holder.⁸⁵ The incumbent office holder is an officer of the court and as such has a duty to co-operate with external regulators but neither administration nor liquidation (in the widest sense) “is a free-floating public enquiry into unlawful activity implicit in the business model of the insolvent company”.⁸⁶ For better or worse, the corporate insolvency framework adopted and promoted in the UK evidently personifies some elements of the creditors’ bargain theory.⁸⁷

The narrow scope adopted by the creditors’ wealth maximisation theory is not compatible with corporate rescue,⁸⁸ which is clearly not a priority⁸⁹ and presumed to be illegitimate,⁹⁰ unless it is either intended to maximise returns for creditors⁹¹ or

⁸¹ Goode, Principles, pp 77-78.

⁸² [2019] EWHC 954 (Ch), at 61.

⁸³ *Re Cambridge Analytica (UK) Ltd* [2019] EWHC 954 (Ch), at 60.

⁸⁴ *Ibid*, per Norris J at 61.

⁸⁵ Statutory reporting duties require administrators to investigate any potential breaches of the duties owed by directors to the company. *Ibid*, per Norris J at 85.

⁸⁶ *Ibid*.

⁸⁷ For example, the collective execution imposed under administration and liquidation personifies the collective process promoted by the creditors’ bargain theory and both the theory and the corporate insolvency policy of the UK protect pre-insolvency entitlements. For more details see Chapter 1.

⁸⁸ Gross, Community Interests, at 1035.

⁸⁹ Finch, Measures, at 231.

⁹⁰ Business rescue is only legitimate if it was included in the pre-bankruptcy bargain. Goode, Principles, p 71.

⁹¹ Preventing an insolvent business shutting a factory that it would have been entitled to close pre-bankruptcy is not legitimate. C. W. Mooney, ‘A Normative Theory of Bankruptcy Law: Bankruptcy As (Is) Civil Procedure’ (2004) 61 *Washington & Lee Law Review* 931, at 957-959.

negotiated *ex-ante*.⁹² The failure to recognise that insolvency is closely connected with business failure and the flagrant lack of support for business rescue has been broadly criticised.⁹³ Since the theory does not value informal business relationships this may result in the omission of the most vulnerable from consideration.⁹⁴ The theory has been further criticised for being founded on vastly debatable assumptions and inconsistencies.⁹⁵ The creditors' wealth maximisation approach is too simplistic in the sense that it treats all the creditors in the hypothetical bargain as homogeneous (one size fits all)⁹⁶ and the *ex-ante* bargain position is a nonsense for involuntary creditors who are either tort victims or employees.⁹⁷ It is practically impossible for tort victims and employees to predetermine contingent future events.

2.3.2 Communitarian theory: Enterprise philosophy?⁹⁸

Unlike the narrow approach adopted by the creditors' bargain theory, the communitarian counter vision embraces an inclusive approach in consideration of the various constituent stakeholder interests.⁹⁹ The interests of employees, suppliers, the Government, customers, neighbours and the local and wider community are taken into account together with the creditors' interests.¹⁰⁰ The community interest and other interests do not trump the interests of creditors.¹⁰¹ It has been suggested that taking the community interest into account does not represent less concern for the creditors

⁹² Jackson, *Creditors' Bargain*, at 865.

⁹³ Finch, *Measures*, at 231.

⁹⁴ D. Korobkin, 'Contractarianism and the Normative Foundations of Bankruptcy Law' 71 *Texas Law Review* 541, at 581.

⁹⁵ D. G Carlson, 'Philosophy in Bankruptcy' (1987) 85 *Michigan Law Review* 1341.

⁹⁶ For example, in real life creditors possess varying degrees of knowledge, skills and influence (Finch, *Measures*, at 233) and do not act collectively when extending credit. Goode, *Principles*, p 75.

⁹⁷ Key and Walton, *Insolvency Law*, p 26.

⁹⁸ Professor Axel Flessner adopted the phrase in reference to the same approach: 'Philosophies of Business Bankruptcy Law: An International Overview' in J. Ziegel (ed) *Current Developments in International and Comparative Corporate Insolvency Law* (Clarendon Press, 1994), p 24.

⁹⁹ Finch, *Measures*, at 236.

¹⁰⁰ Key and Walton, *Insolvency Law*, p 27.

¹⁰¹ Gross, *Community Interests*, at 1033.

but, in fact, a broader economic approach.¹⁰² Rather than focusing on private rights of individual creditors the communitarian theorists recognise the inter-reliance which sustains between individuals and deem it necessary for individuals to limit their rights sometimes and act in the best interests of their community's well-being.¹⁰³

In simple terms, creditors live in a society and as such are indebted to others.¹⁰⁴ It means that in practice the pre-insolvency rights of secured creditors would potentially be vitiated¹⁰⁵ in the event of insolvency¹⁰⁶ contrary to the *status quo*.¹⁰⁷ So, during the process of sharing the value of an insolvent business, if necessary, the interests of secured creditors may be relegated by other social interests including the community interest.¹⁰⁸ The communitarian vision is conceivably more compatible with the concept of corporate rescue. A business reorganisation under Chapter 11 of the US Bankruptcy Code similarly requires secured creditors to stay their collection rights to enable rescue of the company or revival of the business in appropriate circumstances.¹⁰⁹ A restructuring plan¹¹⁰ also promotes a more inclusive approach and, in true spirit of a Chapter 11 reorganisation, retains the management as debtor in possession (DIP), albeit under the supervision of a monitor.¹¹¹

¹⁰² Taking community interests into account in bankruptcy does not equate to a denial of all economic models of bankruptcy. *Ibid.*

¹⁰³ *Ibid.*, at 1036.

¹⁰⁴ Rights come with responsibilities: Gross, Community Interests, at 1040-1.

¹⁰⁵ In accordance with a new model which takes more values into account by adopting a different approach. *Ibid.*, at 1039.

¹⁰⁶ In an analogous way to a reorganisation, under Chapter 11 of US Bankruptcy Code, secured creditors would have to give up collection rights on pre-insolvency interests in certain circumstances for the good of the community. *Ibid.*, at 1036-7.

¹⁰⁷ The realisation of security in satisfaction of secured debts is given effect outside of insolvency proceedings. Cork Committee, para 17; See 1.1.

¹⁰⁸ Finch, Measures, at 236.

¹⁰⁹ Warren, Bankruptcy Policy, at 779.

¹¹⁰ Companies Act 2006, Part 26A.

¹¹¹ *Ibid.*

The Cork Committee recognised the potential (socio-economic) impact of a major insolvency on a city, or even a region, and recommended a policy which protects the interests of creditors, employees and other social interests including the community interest.¹¹² The compulsory liquidation of British Steel, after a consideration of administration, was significantly influenced by environmental safety issues.¹¹³ Likewise, the administration procedure is intended to promote company rescue¹¹⁴ and thereby protecting wider interests.¹¹⁵ However, research conducted by the University of Wolverhampton showed that approximately 750 businesses are pre-packaged¹¹⁶ every year through administration¹¹⁷ with 25.5% (29% for connected sales) of all the pre-packs failing after 36 months.¹¹⁸ The subsequent failure of new companies undermines the argument in favour of pre-packs of employment preservation¹¹⁹ and effectiveness of the practice.¹²⁰ A business sale to a phoenix¹²¹ company probably provides an unfair incentive and costs advantage to the debtor company over its debt free competitors which can lead to market distortion.¹²² It is rather unfortunate that a theory of business rescue was not either expressly recommended by the Report of the

¹¹² Business failure also affects the livelihood and well-being of others who may be depended on its continuation and whose plight should not be ignored. Cork Committee, paras 203 and 204.

¹¹³ *Re British Steel Ltd* [2019] EWHC 1304 (Ch), per Norris J at 11 and 12.

¹¹⁴ IA 1986, Sch B1 para 3(1)(a).

¹¹⁵ Cork Committee, para 495.

¹¹⁶ See *DKLL Solicitors v HMRC* [2008] 1 BCLC 112 for the first instance of judicial approval of pre-packs.

¹¹⁷ Where a pre-pack is given effect through administration, the legitimate collective rights of unsecured creditors to participate in the process are breached. S. Frisby, *A preliminary analysis of pre-packaged administrations* (2007): Report to The Association of Business Recovery Professionals, at 8.

¹¹⁸ P. Walton and C. Umfreville, 'Pre-pack Empirical Research: Characteristic and Outcome Analysis of Pre-pack Administration (2014) available at: <https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration> [Accessed 30/05/19].

¹¹⁹ Pursuant to the regulations which protect employment contracts of employees: Transfer of Undertakings (Protection of Employment) (TUPE) Regulations 2006.

¹²⁰ See the empirical study under Chapter 4 for a critical analysis of the operation and outcomes of pre-packs.

¹²¹ For more on phoenixing see the discussion at 2.1.5.7.

¹²² P. Walton, 'When is Pre-Packaged Administration Appropriate? – A Theoretical Consideration (2011) 20 *Nottingham Law Journal* 1, at 3 ("Walton, A Theoretical Consideration").

Cork Committee¹²³ or adopted in the subsequent White Paper.¹²⁴ In communitarian terms, insolvency law should benefit society by promoting the survival of viable businesses and, if not, their orderly liquidation.¹²⁵

Unlike the approach adopted by the creditors' bargain theorists, the communitarian theorists view the distributional rationale as central to insolvency,¹²⁶ albeit the variation of pre-insolvency rights invites the risk of increased borrowing costs.¹²⁷ In some way, the communitarian theory is a victim of its own success: there are no defined parameters in regards to the interests that could be taken into account¹²⁸ and some interests will invariably conflict each other.¹²⁹ According to Schermer, the community argument is limited in three respects: definition, application and the role of the decision maker.¹³⁰ The criticism in terms of conflict of interests is probably mitigated by the fact that courts are frequently involved in the exercise of balancing interests although it is quite challenging.¹³¹ While the creditors' bargain theory is accused of being crude,¹³² the communitarian theory is said to be too complex to be implemented effectively.¹³³ Even then, some might still argue that the complexity is a mere reflection of the

¹²³ Cork Committee, para 1980.

¹²⁴ White Paper, *A Revised Framework for Insolvency Law* (HMSO, 1984) Cmnd 9175.

¹²⁵ Finch, *Measures*, at 237.

¹²⁶ *Ibid*, at 236.

¹²⁷ *Ibid*, at 37.

¹²⁸ B. S. Schermer, 'Response to Professor Gross: Taking the Interests of the Community into Account in Bankruptcy' (1994) 72 *Washington University Law Quarterly* 1049, at 1051.

¹²⁹ Key and Walton, *Insolvency Law*, p 28.

¹³⁰ The number of the interests at stake is infinite with limitless boundaries. B. S. Schermer, 'Response to Professor Gross: Taking the Interests of the Community into Account in Bankruptcy' (1994) 72 *Washington University Law Quarterly* 1049, at 1051.

¹³¹ A. Key, 'Insolvency Law: A Matter of Public Interest?' (2000) 51 *Northern Ireland Legal Quarterly* 509, at 530-3.

¹³² See 2.3.

¹³³ Key and Walton, *Insolvency Law*, p 28.

reality.¹³⁴ In summary, insolvency inevitably involves balancing multiple and conflicting interests¹³⁵ and making hard choices.¹³⁶

2.3.3 Multiple values approach¹³⁷

Professor Elizabeth Warren argues that no single value dominates; there are other principles that matter above and beyond creditor wealth maximisation and the emphasis of insolvency theory should be premised on how the losses in bankruptcy must be distributed among stakeholders.¹³⁸ The theory overlaps in many ways with the communitarian vision, but is less coherent compared to the creditors' bargain theory.¹³⁹ Similar to the communitarian theory, the multiple values approach embraces the idea of a wider impact of business failure and takes a slightly broader approach to insolvency.¹⁴⁰

Both theories offer the opportunity for business continuation, rehabilitation and reorganisation, consideration of non-creditor interests (for example, employees, customers, neighbouring landlords and tax authorities), establishing priorities between creditors and protecting investors and the community.¹⁴¹ The Government recently adopted a similar approach in the compulsory liquidation of two large corporations which implies some official support for this theory.¹⁴² The Cork Committee's statement of the aims of a modern insolvency framework¹⁴³ is a classic example of a multiple

¹³⁴ Keay and Walton, *Insolvency Law*, p 28.

¹³⁵ See, for example, the aims of a modern insolvency law provided by the Cork Committee, para 198.

¹³⁶ Finch, *Measures*, at 250-1.

¹³⁷ The title adopted by Vanessa Finch in 'The Measures of Insolvency' (1997) 17 *Oxford Journal of Legal Studies* 227, at 240.

¹³⁸ Warren, *Bankruptcy Policy*, at 777.

¹³⁹ The approach produces multi-faceted questions but no conclusive answers. *Ibid*, at 777-8.

¹⁴⁰ Keay and Walton, *Insolvency Law*, p 28.

¹⁴¹ Finch, *Measures*, at 240.

¹⁴² Carillion entered compulsory liquidation on 15 January 2018 and British Steel on 22 May 2019 (*Re British Steel Ltd* [2019] EWHC 1304 Ch). See the discussion at 2.5.1.6.

¹⁴³ Cork Committee, para 198.

values approach.¹⁴⁴ In essence, the principles aim to establish equality between creditors, to foster the maintenance of commercial morality, to promote an approach to insolvency and business rescue, to discharge and protect deserving insolvents and to protect non-creditor interests which could potentially be affected by insolvency.¹⁴⁵

Finch argues that the broad approach adopted by the multiple values approach integrates the idea of representation of interests (the forum vision theory)¹⁴⁶ put forward by Korobkin.¹⁴⁷ Decision making would unavoidably involve the challenging task of balancing diverse values.¹⁴⁸ While, *prima facie*, the outcomes may be lacking in precise benchmarks, it is a more profitable model for corporate insolvency compared to a narrow approach.¹⁴⁹ Inevitably, bankruptcy preserves certain rights at the expense of others. For instance, prioritising distributions to employees effectively reorder competing interests.¹⁵⁰ The pre-insolvency rights of secured creditors would potentially be disturbed pursuant to a more equitable distribution of the costs of insolvency between stakeholders.¹⁵¹ Although the theory does not articulate specific answers, it illuminates, more vividly than the communitarian vision, the more relevant questions to be taken into consideration when formulating a more balanced insolvency framework.¹⁵²

The difficulty with the multiple values approach is that it does not provide any guidance or solutions to the uncertainty it generates¹⁵³ but, in fact, raises further puzzling

¹⁴⁴ Finch, Measures, at 240.

¹⁴⁵ Cork Committee, paras 191 and 198.

¹⁴⁶ Finch, Measures, at 240.

¹⁴⁷ D. Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91 *Columbia Law Review* 717, at 762.

¹⁴⁸ Finch, Measures, at 241.

¹⁴⁹ *Ibid.*

¹⁵⁰ Warren, Bankruptcy Policy, at 786.

¹⁵¹ *Ibid.*, at 790.

¹⁵² Warren, Bankruptcy Policy, at 796.

¹⁵³ Keay and Walton, Insolvency Law, p 29.

questions.¹⁵⁴ The approach lacks any practical guidance on decision-making which makes it difficult to articulate a clear insolvency framework¹⁵⁵ compared with the relatively less involving communitarian theory or the attractively packaged creditors' bargain theory. Professor Elizabeth Warren, the main champion of the multiple approach, conceded the indeterminacy:

“I have offered a dirty, complex, elastic, interconnected view of bankruptcy [insolvency] from which I can neither predict outcomes nor even necessarily fully articulate all the factors relevant to a policy decision”.¹⁵⁶

2.3.4 Other approaches

Other theorists have looked at bankruptcy from different perspectives. From an ethical viewpoint, it has been suggested that policymakers must consider other issues in addition to the legal concerns.¹⁵⁷ Moral issues are frequently overlooked due a lack of a sound philosophical underpinning.¹⁵⁸ The ethical vision, championed by Professor Shuchman, is focused on moral issues and based on utilitarian principles.¹⁵⁹ Professor Veryl Miles approaches bankruptcy policy from a social justice standpoint.¹⁶⁰ Her philosophy is influenced by Thomas Aquinas's¹⁶¹ idea of theological justice, derived from Aristotle, which promotes the principles of mercy, justice and charity.¹⁶² The

¹⁵⁴ Warren, *Bankruptcy Policy*, at 778.

¹⁵⁵ Finch, *Measures*, at 242.

¹⁵⁶ Warren, *Bankruptcy Policy*, at 811.

¹⁵⁷ J. Kilpi, *The Ethics of Bankruptcy* (Routledge, London 1998).

¹⁵⁸ Professor Shuchman argues that the circumstances of a debtor, the morality of the debt and the size, and position and intentions of the creditor must be considered. P. Shuchman 'An Attempt at Philosophy of Bankruptcy' (1973) 21 *University of California Los Angeles Law Review*, at 403.

¹⁵⁹ P. Shuchman 'An Attempt at Philosophy of Bankruptcy' (1973) 21 *University of California Los Angeles Law Review*.

¹⁶⁰ V. Miles, 'Assessing Modern Bankruptcy Law: An Example of Justice' (1996) 36 *Santa Clara Law Review* 1025.

¹⁶¹ Saint Thomas Aquinas (1225 – 1270) was an immensely influential philosopher, theologian and jurist from Italy. Pope Pius XI, *Studiorum Ducem* 11 (June 1923).

¹⁶² V. Miles, 'Assessing Modern Bankruptcy Law: An Example of Justice' (1996) 36 *Santa Clara Law Review* 25. See also *The Holy Bible*, Deuteronomy 15 verses 1-18.

provision of a discharge¹⁶³ is evidence of a policy inclined to the moralities of mercy and pardon.¹⁶⁴ David Korobkin's broad-based contractarianism includes other values, in addition to pre-insolvency entitlements,¹⁶⁵ into the hypothetical (*ex-ante*) bargain.¹⁶⁶ As indicated earlier, the forum vision conceptualises insolvency as being a procedural forum for stakeholders to assert their rights.¹⁶⁷ Apart from the creditors' bargain theory, all the other theories take wider interests into consideration.

2.4 Balancing Interests in Bankruptcy

Although many commentators have articulated the different interests involved in bankruptcy,¹⁶⁸ there is no consensus on the specific interests that should be considered as a matter of insolvency policy.¹⁶⁹ The balancing exercise mainly involves the enforcement of debts and how creditors are to be treated *inter se*.¹⁷⁰ It is possible that the plight of a debtor may be unfortunate, and often involuntary, hence it is necessary for regulation to be proportionate.¹⁷¹ In attempting to strike the right balance the request of a debtor (individual or corporate) is for compassion and pardon.¹⁷² If it were entirely up to the creditors they would probably have a debtor sanctioned or even worse¹⁷³ until settlement of the debt.¹⁷⁴ The provision of a discharge struck a reasonable balance between the two conflicting interests.¹⁷⁵

¹⁶³ IA 1986, s. 279.

¹⁶⁴ See 1.5.

¹⁶⁵ D. Korobkin, 'Contractarianism and the Normative Foundations of Bankruptcy Law' (1993) 71 *Texas Law Review* 541.

¹⁶⁶ See the discussion at 2.3.

¹⁶⁷ A. Flessner, 'Philosophies of Business Bankruptcy Law: An International Overview' in Ziegel (ed) *Current Developments in International and Comparative Corporate Insolvency Law* (1994).

¹⁶⁸ See 2.3.

¹⁶⁹ Keay, *Balancing Interests*, at 2.

¹⁷⁰ *Ibid.*

¹⁷¹ Cork Committee, para 51.

¹⁷² Keay, *Balancing Interests*, at 4-5.

¹⁷³ It was reported that the corpse of a dying debtor was left in prison until the debt in question was settled. See 1.5.

¹⁷⁴ Keay, *Balancing Interests*, at 4.

¹⁷⁵ 4 Anne. c. 17 (1705). See 1.5.

The family of a bankrupt may also be affected by his (or her) bankruptcy and attempting to balance the creditors' interests and the interests of spouses and families can be complicated.¹⁷⁶ In trying to balance the conflicts involved in selling the family home, the Cork Committee recommended a consideration of the welfare and circumstances of the dependants of a debtor.¹⁷⁷ Professor Keay similarly suggested that family members are equally affected, if not more, by the indebtedness of the bankrupt.¹⁷⁸ In *Re Citro*,¹⁷⁹ Hoffmann J suggested that the two conflicting interests could not be measured by the same standard except by way of involving some value judgement. Parliament enacted Insolvency Act 1985 ("IA 1985") on the premise that creditors' interests remained a priority and outweighed those of a bankrupt's family¹⁸⁰ despite contrary public opinion.¹⁸¹ The modernisation of the types of property which can be retained by a debtor has indirectly addressed the imbalance.¹⁸² By virtue of the introduction of s. 334, the interests of a bankrupt and any person below the age of 18 years who previously occupied the house and lived with the bankrupt at the time of insolvency are protected subject to the court's discretion.¹⁸³ The provision requires the court to pay due attention to the needs of children, the interests of creditors and the financial resources of the bankrupt.¹⁸⁴

¹⁷⁶ In *Re Citro* [1991] Ch 142, the Court of Appeal ruled that the interests of creditors will normally trump the rights of a spouse; there is a presumption in favour of the creditors to prevail after a year under s. 135A. The interests of a spouse will only prevail in exceptional circumstances: *Claughton v Charalamabous* [1998] BPIR 558. The rights acquired under s. 336 of IA 1986 by a spouse or civil partner are not entrenched rights, for example, see *Re Ruiz* [2012] BPIR 446.

¹⁷⁷ Cork Committee, paras 1118 and 1129.

¹⁷⁸ Keay, *Balancing Interests*, at 7.

¹⁷⁹ [1991] Ch 142.

¹⁸⁰ *Hansard*, H.C. vol. 83, col. 546.

¹⁸¹ A 1975 bankruptcy report by a committee of JUSTICE recommended that the court should give primary consideration to the dependants of the bankrupt especially safeguarding the educational needs of children.

¹⁸² Keay, *Balancing Interests*, at 7. See 1.3.

¹⁸³ IA 1986, s. 334.

¹⁸⁴ *Ibid*, s. 337(5).

While some creditors deserve sympathy the majority are fully aware of the risk associated with the extension of credit:¹⁸⁵ interest payments to loan creditors mitigate the risk of default.¹⁸⁶ But, unlike banks that lend money and can insure against possible default, some creditors (for example, small trade creditors) cannot mitigate the hazard otherwise they risk losing business.¹⁸⁷ The interests of such creditors should be considered so that more businesses can stay afloat for the benefit of all stakeholders.¹⁸⁸ It is quite possible that a corporate “rescue culture” could be fostered and stimulated where a genuine consideration is given to all creditors and the concomitant communal interest.¹⁸⁹ It is accepted that creditors who are owed are entitled to enforcement of the debts: creditors deserve justice.¹⁹⁰ Some creditors will inevitably receive little or nothing but undoubtedly most would be interested in a public examination of the insolvent and chastisement for impropriety.¹⁹¹ Because creditors mainly prioritise their claims above everything else they overlook the distinction between honest and fraudulent debtors and desire that both classes of debtor are sanctioned.¹⁹² A *bona fide* bankrupt can be automatically discharged after 12 months¹⁹³ and creditors view the provision as excessively lenient.¹⁹⁴

Creditors have interests which conflict with other creditors too.¹⁹⁵ This conflict is focused on how the losses are distributed equally and rateably:¹⁹⁶ secured creditors

¹⁸⁵ In the ordinary course of business, the creation of credit involves the possibility of unmanageable debt. Cork Committee, para 5.

¹⁸⁶ Warren, Bankruptcy Policy, at 780.

¹⁸⁷ Keay, Balancing Interests, at 3.

¹⁸⁸ Ibid.

¹⁸⁹ Gross, Community Interests.

¹⁹⁰ Keay, Balancing Interests, at 3.

¹⁹¹ Ibid.

¹⁹² Ibid.

¹⁹³ IA 1986, s. 279.

¹⁹⁴ Keay, Balancing Interests, at 3.

¹⁹⁵ Ibid.

¹⁹⁶ The *pari passu* principle was first espoused in 1542: “To every one of the said creditors, a portion rate and rate-like according to the quantity of their debts”: 34 & 35 Hen. VIII. c. 4, s. 1. See 1.2.1.

are significantly protected from the loss.¹⁹⁷ For instance, in *Re British Steel*¹⁹⁸ virtually all the assets fell outside the scope of the liquidation: the security effectively excluded the company's assets from the prescribed part deductions under s. 176A of IA 1986.¹⁹⁹ It is arguable that the widespread use of such asset based lending techniques adversely impacts potential corporate rescue.²⁰⁰ The collective nature of bankruptcy imposes a moratorium from which the debtor benefits and individual creditor competing interests are balanced.²⁰¹ Each creditor gives up the right to enforce their debt and depend on collective execution²⁰² thereby affording the debtor some breathing space.

Even though society may not be privy to the contract between a creditor and a debtor the balancing exercise would not be complete if the public interest was not considered because bankruptcy is not purely a private matter.²⁰³ The Cork Committee observed that the impact of insolvency is not limited to the loss suffered by creditors but that other interests could also be affected and should be protected.²⁰⁴ While the primary focus of the early bankruptcy statutes in England was protection of creditors' interests,²⁰⁵ Parliament was quite aware of the public interest in such matters.²⁰⁶ There is a public interest in the payment of debts in order that the foundation of economies

¹⁹⁷ Cork Committee, para 17. According to a report to the Insolvency Service (IS) unsecured creditors recovered nothing in 95% of cases compared to secured creditors recovering nothing in only 19% of cases (but recovered 100% in 20% of cases). S. Frisby, 'Interim Report to the Insolvency Service on Returns to Creditors from pre-and post-Enterprise Act Insolvency Procedures in Insolvency Service' (2007).

¹⁹⁸ [2019] EWHC 1304 (Ch).

¹⁹⁹ A. Keay and P. Walton, 'British Steel: is it a wind up?' (2019) 4 *Corporate Rescue and Insolvency* 125, at 6.

²⁰⁰ *Ibid.*

²⁰¹ Keay, *Balancing Interests*, at 4.

²⁰² Cork Committee, para 232. See also, T. H. Jackson, 'Avoiding Powers in Bankruptcy' (1984) 36 *Stanford Law Review* 725.

²⁰³ Cork Committee, para 1734. See 1.8.

²⁰⁴ *Ibid.*, para 204.

²⁰⁵ Keay, *Balancing Interests*, pp 8-9. See also Chapter 1.

²⁰⁶ See n. 351.

which are depended on credit, like the UK, is not undermined.²⁰⁷ There is a community interest in the provision of a fresh start to individual and corporate debtors where the debtor can be rehabilitated for the ultimate benefit of the national economy.²⁰⁸ In a modern society, it is in the public interest to have a bankruptcy system that is fit for purpose.²⁰⁹

The public interest favourably overlaps with the interests of a bankrupt as far as relief from creditor harassment and obtaining a fresh start are concerned. Yet, it is also in the public interest that a bankrupt fully complies with the directions of a bankruptcy trustee to ensure the effective administration of insolvent estates.²¹⁰ In the interests of society any illegality on part of the insolvent or associates is subject to public examination and may result in sanctions being imposed at the request of an Official Receiver (OR), a trustee in bankruptcy or private sector insolvency practitioner (IP).²¹¹ The public interest additionally seeks to eradicate dishonest debtors who abuse the bankruptcy process in an attempt to circumvent liabilities.²¹²

The universal rationale of bankruptcy manifestly demonstrate an attempt at balancing the conflicting interests of stakeholders involved: the debtor, creditors, society in general and, possibly, the debtor's family.²¹³ It is generally accepted that insolvency transcends the creditor-debtor problem and in reality also performs a social function.²¹⁴ The following analysis critically evaluates the provisions adopted under the existing

²⁰⁷ I. F. Fletcher, 'Juggling with the Norms: The Conflict between Collective and Individual Rights under Insolvency Law' in R. Cranston, *Making Commercial Law* (Clarendon Press, Oxford 1997), p 393.

²⁰⁸ Cork Committee, paras 192 and 193.

²⁰⁹ A. Keay, *Balancing Interests*, at 6.

²¹⁰ *Ibid.*

²¹¹ Cork Committee, para 50.

²¹² Keay, *Balancing Interests*, at 7.

²¹³ For example, bankruptcy law should provide benefits and safeguards for the community by not only restricting the financial activities of bankrupts but imposing other sanctions where warranted. Keay, *Balancing Interests*, at 2.

²¹⁴ *Ibid.*

corporate insolvency framework in light of the universal approach and the main insolvency theories.

2.5 English Philosophy of Corporate Insolvency

The policy which underpins English insolvency law has always been multifaceted and not meant to serve a single purpose of distributing the assets of an insolvent debtor among creditors.²¹⁵ Most notably, two other objectives have sufficed: insolvency laws have been traditionally invoked by the trading community as a last resort for the enforcement of financial obligations (as a debt recovery instrument)²¹⁶ and as a means of maintaining commercial morality.²¹⁷ Notwithstanding the principles of insolvency law provided by the Cork Committee,²¹⁸ the Report did not explicitly offer a theoretical model²¹⁹ and the theory underlying the subsequent legislation (Insolvency Acts of 1985 and 1986) was not clearly articulated.²²⁰ Nonetheless, the Cork Committee expressed support for an insolvency policy which takes the likely impact of business failure on the community into consideration.²²¹ When a company becomes insolvent the interests of various stakeholders can potentially be affected: creditors, directors, employees and shareholders,²²² the community and other groups in society.²²³ The failure can also impact companies in the supply chain of the business causing job losses in the local communities and where a major bank or a key industrial player²²⁴

²¹⁵ Cork Committee, para 235.

²¹⁶ See, for instance, 1.3 (Imprisonment for Debt).

²¹⁷ Cork Committee, paras 235(a) and (b). See also 1.6.

²¹⁸ Ibid, para 198.

²¹⁹ The statement of aims was criticised for being too broad and not precise as to the core and ancillary principles. *Insolvency Law: An Agenda for Reform* (Justice, London, 1994).

²²⁰ M. Stubbins, 'What Kind of World Are We Living In? Creditor Wealth Maximisation, Contractarianism or Multiple Values in the Post-Enterprise Act 2002 Insolvency Regime?' (2019) 32 *Insolvency Intelligence*, at 79.

²²¹ Cork Committee, para 204. See 2.4.

²²² Goode, *Principles*, p 68.

²²³ Cork Committee, paras 203-4.

²²⁴ Britain's second largest steel maker British Steel was placed into compulsory liquidation on 22 May 2019 putting the jobs and livelihoods of 5000 employees and 20 000 jobs in the supply chain in France,

is involved the ripple effect of the insolvency can also affect the national economy.²²⁵ It is against such a backdrop that consideration of whether the primary concern should be the protection of creditors' interests or if the other interests, including the community interest, should be considered as a matter of (corporate insolvency) policy.

A director has a duty to promote the success of the company for the benefit of its membership²²⁶ subject to the interests of creditors under prescribed circumstances.²²⁷ Despite the fact that administration was recommended as a fundamental principle of a modern insolvency law,²²⁸ directors who attempt corporate rescue early risk becoming liable for breach of the creditors' interest duty where the company is, or is likely to become, insolvent.²²⁹ In *BTI 2014 LLC v Sequana SA and others*,²³⁰ the Court of Appeal upheld that the creditors' interest duty is triggered when the directors know or ought to know that the company is, or is likely to become, insolvent. The welcome judgement specifically cleared the grey area of when the directors of a company ought to start acting in the best interests of the company's creditors, albeit the scope of the duty is still not clearly defined.²³¹

The collapse of big financial institutions, for example, Lloyds TSB Bank in 2009, and the likely domino effect of the insolvency have often been mitigated by the state²³² or with a merger or takeover on the basis that the business is "too big to fail".²³³ The latest

Netherlands, and various jurisdictions across the world at risk. BBC available at: <https://www.bbc.co.uk/news/business-48365241> [Accessed 28/05/19].

²²⁵ Goode, Principles, p 68. The collapse of Carillion in 2018 was a classic illustration of the domino effect that could be generated by the impact of a single bulk insolvency (see 2.5.1.6).

²²⁶ Companies Act 2006, s. 172(1) ("CA 2006").

²²⁷ Ibid, s. 172(3).

²²⁸ Cork Committee, para 198 (j). See 2.2.

²²⁹ CA 2006, s. 172(3). When a company becomes insolvent the assets are held for the benefit of the creditors not shareholders.

²³⁰ [2019] EWCA Civ 112.

²³¹ P. Walton, 'Directors' duty to act in the interests of creditors under section 172 of the Companies Act 2006 – Aussie Rules Gone Walkabout' (2019) 2 *Wolverhampton Law Journal* 1, p 53.

²³² See the discussion at 2.5.1.6.

²³³ Goode, Principles, p 68.

Government intervention was prompted when British Steel was placed into compulsory liquidation.²³⁴ The company continued to trade in liquidation with the taxpayer paying the wages bill while a buyer of the business as a going concern was being sought.²³⁵ It is clear that such an approach to corporate insolvency takes both the community and creditors' interests into account.

2.5.1 UK's Corporate Insolvency Lens

The Cork Committee envisioned a wider approach to corporate insolvency which would, *inter alia*, promote corporate rescue.²³⁶ But, as previously highlighted, a business rescue policy was not expressly adopted in the final Report²³⁷ and consequently omitted in both the White Paper²³⁸ and foundation laid down by the Act of 1986.²³⁹ The following discussion examines the leading insolvency theories through the lens of the UK's corporate insolvency framework. It is hoped that such an extensive analysis will yield a balanced approach to corporate rescue which is conducive to a corporate "rescue culture" and enlighten future policy considerations too.

2.5.1.1 Administration

The Enterprise Act 2002 ("EA 2002") massively restricted²⁴⁰ the non-collective receivership²⁴¹ and replaced it with a more collective administration regime.²⁴² A receiver owes a primary duty to the appointing debenture holder²⁴³ as opposed to an

²³⁴ British Steel was put in compulsory liquidation on the petition of the directors. See <https://www.bbc.co.uk/news/business-48365241> [Accessed 24/07/2019].

²³⁵ BBC available at: <https://www.bbc.co.uk/news/business-48365241> [Accessed 28/05/19].

²³⁶ Cork Committee, paras 198(j) and 204. See 2.2.

²³⁷ *Ibid*, para 1980.

²³⁸ White Paper, *A Revised Framework for Insolvency Law* (HMSO, 1984) Cmnd 9175.

²³⁹ IA 1986, c. 45.

²⁴⁰ See ss 72A-72GA (IA 1986, Ch IV) for the exceptions.

²⁴¹ EA 2002, s. 250.

²⁴² *Ibid*, s. 248.

²⁴³ See, for example, *Re Morritt* (1886) 18 QBD 222.

administrator who acts in the interests of all creditors,²⁴⁴ subject to realising property in order to make a distribution to one or more preferential or secured creditors.²⁴⁵ The administrator must perform his (or her) functions with the primary objective of rescuing the company as a going concern²⁴⁶ unless adopting the second statutory purpose would achieve a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration).²⁴⁷ In the event that the first two objectives are not reasonably practicable to achieve, the administrator may "realise the company's property to pay one or more secured or preferential creditors".²⁴⁸

Although the creditors' bargain theory resonates with the collective execution imposed during administration,²⁴⁹ the focus of the theory is to preserve the pre-insolvency rights of secured creditors²⁵⁰ and does not, in fact, value corporate rescue.²⁵¹ Moreover, since late 19th century English insolvency law has maintained an exception of prioritising the statutory scheme of preferential debts²⁵² over some pre-insolvency entitlements (floating charges).²⁵³ The administrator is empowered to do anything necessary or expedient for the management of the property, business and affairs of the company,²⁵⁴ or to dispose any property of the company subject to security as if it were not subject to such where the court is satisfied that the disposal would promote the purpose of administration.²⁵⁵ An administrator may also rely on provisions to avoid

²⁴⁴ IA 1986, Sch B1 para 3(2).

²⁴⁵ Ibid, para 3(1)(c).

²⁴⁶ Ibid, para 3(1)(a).

²⁴⁷ Ibid, para 3(1)(b).

²⁴⁸ Ibid, para 3(1)(c).

²⁴⁹ Ibid, para 43.

²⁵⁰ Walton, A Theoretical Consideration, at 5.

²⁵¹ Gross, Community Interests, at 1035.

²⁵² IA 1986, Sch 6. See 1.7.

²⁵³ Preferential Payments in Bankruptcy Amendment Act 1897, s. 2. See 1.13.

²⁵⁴ IA 1986, Sch B1 para 59(1).

²⁵⁵ Ibid, s. 15(2).

certain transactions²⁵⁶ to the extent of maximising the pool of assets and not as a remedy for secured creditors as predicted by the limited scope of the creditors' bargain theory.²⁵⁷ By virtue of their nature,²⁵⁸ pre-packs cannot be subjected to the same scrutiny and are, therefore, out of step with collective execution although when used in the right circumstances they can potentially maximise returns to creditors.²⁵⁹ The creditors bargain theory is clearly incompatible with the corporate rescue provisions²⁶⁰ and at odds with the long established treatment of preferential debts under English law.²⁶¹

In contrast to the position assumed by the creditors' wealth maximisation vision, the assets of a company in administration can only be realised as a last resort "in order to make a distribution to one or more secured or preferential creditors"²⁶² on condition that it is not reasonably practicable to achieve the first two rescue oriented objectives²⁶³ and provided that the interests of unsecured creditors are not necessarily compromised in the process.²⁶⁴ Interestingly, the contractarian theorists base the decision to either reorganise (business rescue) or liquidate a business upon the procedure which maximises financial returns to creditors²⁶⁵ without factoring-in any other considerations.²⁶⁶ The homogeneous treatment of hypothetical creditors,²⁶⁷ it is

²⁵⁶ IA 1986, ss 238 and 239 (transactions at an undervalue and preferences respectively).

²⁵⁷ See 2.2.

²⁵⁸ A pre-pack administration occurs where a deal to sell the company's business is agreed prior to the company entering administration. See, for example, P. Walton, 'Pre-packin' in the UK' (2009) *International Insolvency Review* 18(2).

²⁵⁹ Walton, A Theoretical Consideration.

²⁶⁰ IA 1986, Sch B1.

²⁶¹ Ibid, Sch 6.

²⁶² Ibid, Sch B1 para 3(1)(c).

²⁶³ Ibid, para 4(a).

²⁶⁴ IA 1986, Sch B1 para 4(b).

²⁶⁵ Jackson, *Logic Limits*, pp 212-3.

²⁶⁶ Reorganisations (and pre-packs) connected to the incumbent management are only acceptable if the assets will be more valuable to the connected party than to a third party. Ibid, p 214.

²⁶⁷ The creditors have no specified characteristics as to whether they are secured or unsecured, trade creditors (suppliers) or non-creditor claimants like employees or tort victims.

argued, imparts tremendous doubt as to whether a rateable and equitable distribution could be achieved among the diverse stakeholders.²⁶⁸ Furthermore, the theory's blatant disregard of distributional issues²⁶⁹ creates a conflict with the scope of administration which makes provision for redistribution.²⁷⁰

2.5.1.2 Restructuring Plans

A compromise or arrangement which is approved by a number representing 75% in value of the creditors or class of creditors (or members or class of members) and the court is binding, and the court can cram-down any dissenting creditors and impose the plan.²⁷¹ The flexible restructuring framework is, like administration, not compatible with the rigid scope of the creditors' wealth maximisation theory. The creditors' bargain theory's singular emphasis of protecting the pre-insolvency rights of secured creditors lacks consideration for any means of restructuring or preserving viable commercial enterprises.²⁷² The narrow scope of the creditors' bargain theory is irreconcilable with the cross-class cram-down procedure intended to promote effective corporate rescue.²⁷³

2.5.1.3 Communitarian Approach: A Model Theory for Corporate Rescue?

The communitarian approach considers other interests, in particular the community interest.²⁷⁴ The theory promotes corporate rescue where possible and, if not, the orderly winding up of insolvent companies for the benefit of society.²⁷⁵ The

²⁶⁸ See 2.3.2.

²⁶⁹ Warren, Bankruptcy Policy, at 787-8. See 2.3.1.

²⁷⁰ IA 1986, Sch B1 para 3(1)(c).

²⁷¹ Companies Act 2006, Part 26A ("CA 2006").

²⁷² Finch, Measures, at 231.

²⁷³ See <https://www.gov.uk/government/consultation/insolvency-and-corporate-governance> [Accessed 30/05/19].

²⁷⁴ Gross, Community Interests, at 1036. See the discussion at 2.3.2.

²⁷⁵ Walton, A Theoretical Consideration, at 7.

communitarian theory mirrors the corporate rescue policy which was recommended by the Cork Committee.²⁷⁶ It is, perhaps, contentious but at least not perverse to argue that the Cork Committee recommended a corporate “rescue culture” based on a communitarian theory - branded as the enterprise philosophy by Professor Flessner.²⁷⁷

A debtor’s failure may result in environmental clean-up costs which if not mitigated by some concern for the community - through corporate rescue where possible - would unduly burden the taxpayer.²⁷⁸ Snowden J arguably adopted a communitarian approach in further justifying the basis for the winding up order in the matter of British Steel.²⁷⁹ Aside from the trading difficulties, the learned judge alluded to the fact that there were significant potential environmental and safety hazards connected particularly to the steel making and processing facility in Scunthorpe.²⁸⁰ Besides the fundamental questions raised by the case²⁸¹ it is also worth probing whether it is acceptable for secured creditors to maximise their returns by dumping the environmental clean-up costs on the taxpayer.²⁸²

A restructuring plan²⁸³ is also compatible with the communitarian vision and the multiple values approach both of which promote corporate rescue.²⁸⁴ As previously noted, English insolvency law has traditionally assumed a multi-faceted approach to

²⁷⁶ Cork Committee, paras 203-4. See 2.2.

²⁷⁷ See 2.3.2.

²⁷⁸ K Heidt, ‘The Automatic Stay in Environmental Bankruptcies’ (1993) 67 *American Bankruptcy Law Journal* 69.

²⁷⁹ *Re British Steel Ltd* [2019] EWHC 1304 (Ch), per Norris J at 11.

²⁸⁰ In the absence of careful and continued supervision the risk of a gas explosion, flooding and the presence of hazardous materials on site would be high. *Ibid*, at 12.

²⁸¹ See 2.5.1.6.

²⁸² A. Keay and P. Walton, ‘British Steel: is it a wind up?’ (2019) 4 *Corporate Rescue and Insolvency* 125, at 6.

²⁸³ CA 2006, Part 26A.

²⁸⁴ See discussion at 2.2.1.

insolvency²⁸⁵ which, it is submitted, is well-suited with the concept of corporate rescue. The multiple values vision (as the label implies) combines the creditors' bargain ideology, communitarian values, other theories²⁸⁶ and the theory's own focus²⁸⁷ on how losses should be traded-off between the various stakeholders.²⁸⁸ Both the communitarian theory and multiple values approach recognise the impact of insolvency on the livelihoods of non-creditors who may be depended on the continuation of the business.²⁸⁹ Although not decisive,²⁹⁰ a consideration of wider interests sheds critical light on the decision-making process.²⁹¹

A multiple values approach involves asking fundamental questions about the business failure which comprise among others:²⁹² who may be hurt and how? An empirical understanding of the relative ability to bear costs of default might be useful in justifying reordering distributional priorities.²⁹³ Is failure avoidable and, if so, at what cost? It is only by posing such questions that timely business restructuring and effective corporate rescue starts to enter the picture. Who benefits from failure²⁹⁴ and who contributed to failure? This last line of enquiry is in sync with the existing public policy of maintaining commercial morality.²⁹⁵ The public examination of insolvents or the actions of directors is designed to unravel the reasons behind business failure with a view to investigating and redressing malpractice and wrongdoing prior to and during

²⁸⁵ See 2.3.

²⁸⁶ See 2.3.4.

²⁸⁷ However, it cannot be justification for the entirety of the bankruptcy system. E. Warren, 'Bankruptcy Policy' (1987) 54 *University of Chicago Law Review* 775.

²⁸⁸ Walton, A Theoretical Consideration, at 10.

²⁸⁹ For example, older employees, customers, suppliers, property owners and tax authorities: Walton, A Theoretical Consideration, at 10.

²⁹⁰ See, for instance, 2.3.3.

²⁹¹ Warren, Bankruptcy Policy, at 796. See also 2.3.3.

²⁹² Walton, A Theoretical Consideration, at 10.

²⁹³ E. Warren, 'Bankruptcy Policy' (1987) 54 *University of Chicago Law Review* 775, at 790-1.

²⁹⁴ The beneficiaries of a pre-pack business sale are often perceived to be the management, the administrator and the main secured creditor at the expense of unsecured creditors. A fair allocation of the costs might be necessary in those circumstances. Walton, A Theoretical Consideration, at 11.

²⁹⁵ See the Cork Committee, paras 193, 194 and 198(h).

insolvency and imposing appropriate penalties where warranted.²⁹⁶ In short, a communitarian approach to corporate rescue is capable of promoting more than one value, in particular promoting and facilitating corporate rescue, and protecting the interests of creditors.

2.5.1.4 Company Voluntary Arrangements (CVAs)

CVAs were introduced to improve the preservation of viable businesses which is one of the principles promoted by both the communitarian theory and multiple values approach.²⁹⁷ The CVA procedure was designed as a flexible alternative to supplement the complex schemes of arrangements.²⁹⁸ In addition to the long-drawn out formalities, the Cork Committee highlighted the lack of a provisional moratorium on creditor actions and the inability to bind all creditors as averting the efficacy of the schemes of arrangements under the Companies Act 1948²⁹⁹ (see the discussion below). Because creditors could freely enforce their rights between the initial stages of implementation and the absolute court order it meant that a large proportion of the arrangements were doomed to fail.³⁰⁰ As a remedy, a standalone CVA with the benefit of a moratorium for small companies³⁰¹ or a CVA³⁰² under administration for larger companies which is approved by a majority in number and 75% in value³⁰³ is binding³⁰⁴ subject to the rights of secured and preferential creditors.³⁰⁵ Although CVAs are intended to promote corporate rescue, the absence of a moratorium essentially means that collective

²⁹⁶ Under the existing law this is exemplified by the provisions under ss 213 (Fraudulent Trading), 214 (Wrongful Trading), 238 (Transactions at an undervalue) and 239 (Preferences) of IA 1986.

²⁹⁷ See 2.3.2 and 2.3.3.

²⁹⁸ See 1.4.4.1.

²⁹⁹ Cork Committee, paras 406 and 418.

³⁰⁰ Cork Committee, para 406.

³⁰¹ IA 1986, Sch A1 para 3.

³⁰² *Ibid*, ss 1-7B.

³⁰³ Insolvency (England and Wales) Rules 2016, r. 2.36 ("IR 2016"). See also 1.5.4.

³⁰⁴ IA 1986, s. 5(2).

³⁰⁵ *Ibid*, ss 4(3) and (4).

execution depends on the willingness of secured creditors to be bound by an arrangement. It is, therefore, not surprising that a significant number (65.2%) of CVAs fail to fulfil the set goals and terminate before the proposed end date.³⁰⁶ Nevertheless, the overall success or failure of CVAs is not so clear-cut: in most arrangements that were terminated early unsecured creditors still received a dividend equivalent or better to what they would have realised in a winding up or from pre-pack business sale.³⁰⁷

2.5.1.5 Schemes of Arrangements

The schemes of arrangements that may be given effect under Part 26 of CA 2006³⁰⁸ are not consistent with the collective execution promoted by the creditors' bargain theory.³⁰⁹ A compromise or arrangement that encroaches on the pre-insolvency rights of secured creditors³¹⁰ infringes the hypothetical bargain which is posited prior to insolvency. More pointedly, the uncertainty associated with schemes of arrangements is inconsistent with the extremely predictable *ex-ante* creditors' bargain.³¹¹ As noted above, schemes of arrangements, like CVAs, are a restructuring tool for both solvent and insolvent companies³¹² and not necessarily anticipated to maximise the dividend to secured creditors. A composition or scheme of arrangement between the company and its creditors³¹³ breaches the notion of a common pool which potentially undermines the likelihood of maximising creditors' wealth.³¹⁴

³⁰⁶ P. Walton., C. Umfreville and L. Jacobs, *Company Voluntary Arrangements: Evaluating Success and Failure* (2018): Report to the Association of Business Recovery Professionals.

³⁰⁷ Ibid.

³⁰⁸ CA 2006, s. 899(1).

³⁰⁹ See 2.3.1. The unpopularity of schemes of arrangements is far-reaching: the arrangements were, prior to Brexit, excluded from the scope of Annex A of the (recast) Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings.

³¹⁰ CA 2006, s. 897(3).

³¹¹ See 2.3.1.

³¹² Cork Committee, para 404.

³¹³ IA 1986, s. 1(1).

³¹⁴ See 2.3.1.

Comparable to a restructuring plan,³¹⁵ a compromise or arrangement (under Part 26 of CA 2006) binds all creditors or members or a class of each if approved by a majority of 75% in value (as the case maybe) and sanctioned by the court.³¹⁶ Therefore, collective schemes that are designed either to facilitate restructuring or to promote corporate rescue are generally consistent with communitarian ideals.³¹⁷ On the other hand, the success of non-collective schemes of arrangements is liable to the action of individual creditors which is defeats the notion of collective execution.³¹⁸ CVAs bind all unsecured creditors and secured creditors who agree to be bound if approved by a majority and thus make it possible for the creditors to act collectively.³¹⁹ A stay of action is possibly what is requested by the communitarian theorists from secured creditors as a way of recognising the interaction of their private rights and the public interest in preserving viable businesses and connected jobs for the greater good of the community.³²⁰

The broad approach adopted by the multiple values theory is compatible with the collective schemes of arrangements that are intended to promote restructuring or corporate rescue.³²¹ Although a scheme which is more favourable to a particular class of creditors appears to establish a ranking of creditors,³²² on the other hand, the arrangements are not necessarily intended to promote corporate rescue or conform to the idea of equitable distribution of loss among the stakeholders.³²³

³¹⁵ CA 2006, Part 26A.

³¹⁶ CA 2006, s. 899(1).

³¹⁷ See 2.3.2.

³¹⁸ See, for example, 2.3.1.

³¹⁹ See, for instance, 2.5.1.4.

³²⁰ See 2.3.2.

³²¹ See 2.3.3.

³²² CA 2006, s. 899(1).

³²³ See 2.3.3.

2.5.1.6 Liquidation (Winding up)

Liquidation is a terminal insolvency procedure for winding up the operations of a company by realising its assets and distributing the proceeds among the creditors and any remainder among the members according to their rights followed by dissolution.³²⁴

The Companies Act of 1862 consolidated the winding up provisions and established three methods that endured until the Act of 1929:³²⁵ voluntary winding up, voluntary winding under court supervision and compulsory winding up.³²⁶ It was not until then that the distinction between a members voluntary (solvent) liquidation³²⁷ (MVL) and a creditors' voluntary (insolvent) liquidation (CVL) was assimilated.³²⁸

Liquidation is by far the most prevalent insolvency procedure entered by insolvent companies³²⁹ and is inherently collective in its nature.³³⁰ A company in financial distress can either enter voluntary liquidation supervised by creditors (CVL) or may be forced into liquidation on the petition of a creditor (compulsory liquidation). Either way, each creditor forfeits their individual enforcement rights and relies on the outcome of the collective execution as similarly promoted by the main insolvency theories³³¹ and, indeed, the Cork Committee.³³² In addition to avoiding value extraction schemes, in

³²⁴ Cork Committee, para 74.

³²⁵ Ibid, para 76(a).

³²⁶ See 1.10.1.

³²⁷ A company may enter a MVL if the directors make a statutory declaration of solvency under s. 89(1) of IA 1986. The procedure is outside the scope of this research which is principally focused on corporate insolvency.

³²⁸ IA 1986, s. 90.

³²⁹ In 2019, there were 12, 058 CVLs, 3,001 compulsory liquidations (CLs), 1,814 administrations, 351 CVAs and 1 receivership out of a total of 17, 225 company insolvencies compared to 9,418 CVLs, 1,351 CLs, 1,526 administrations, 259 CVAs and 3 receiverships out of 12,557 company insolvencies in 2020 (a reduction of 27% compared to 2019). The reduction was likely due to the temporary restrictions introduced under CIGA 2020 on the use of statutory demands and winding up petitions in response to the coronavirus (COVID-19) global pandemic. The Insolvency Service available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/956872/Company_Insolvency_Statistics_October_to_December_2020.pdf [Accessed 03/01/2022].

³³⁰ Cork Committee, paras 224-7.

³³¹ T. H. Jackson, 'The Avoiding Powers in Bankruptcy' (1984) 36 *Stanford Law Review* 725, at 758. See also 2.2.

³³² Cork Committee, para 232.

like manner to an administrator,³³³ the liquidator possess investigative powers to enable the affairs of the company to be scrutinised.³³⁴ The corporate insolvency framework adopted in the UK is multi-faceted³³⁵ and prioritises restructuring³³⁶ or corporate rescue³³⁷ unless either is not reasonably practicable or where the court makes a compulsory winding up order. The company's assets are liquidated, and the proceeds distributed in accordance with pre-insolvency entitlements,³³⁸ subject to preferential payments.³³⁹

The scope of the creditors' bargain theory is more compatible with CVLs which are primarily designed for the benefit of creditors and supervised by a liquidation committee³⁴⁰ where one is appointed by the creditors.³⁴¹ Nevertheless, the liquidator adheres to the equitable rules of distribution and acts independently,³⁴² albeit creditors are empowered to appoint the liquidator³⁴³ and fix the remuneration³⁴⁴ and sanction his (or her) powers in a winding up.³⁴⁵ The compatibility of the creditors' bargain theory and CVLs only goes thus far: preferential debts are paid in priority to all debts during winding up.³⁴⁶ The liquidator has the authority to either compromise debt or to consent

³³³ See 2.4.1.

³³⁴ IA 1986, s. 212(1).

³³⁵ See 2.3.

³³⁶ CA 2006, Part 26A. CVAs and schemes of arrangements are applicable to both solvent and insolvent companies.

³³⁷ IA 1986, Sch B1.

³³⁸ Ibid, s. 107.

³³⁹ Ibid, Sch 6.

³⁴⁰ IA 1986, s. 141.

³⁴¹ Ibid, s. 101(1). Members may appoint up to five persons to act as members of a liquidation committee subject to the approval of creditors. Ibid, s. 101(2).

³⁴² *Re Contract Corp* (1827) 7 Ch App 207.

³⁴³ IA 1986, s. 100(1). In the event of there being two nominees the creditors' nominee prevails over the members' nominee. Ibid, s. 100(2).

³⁴⁴ IR 2016, r. 18.20.

³⁴⁵ IA 1986, s. 165.

³⁴⁶ Ibid, s. 175.

to some sort of arrangement with creditors in exercising his (or her) powers³⁴⁷ which in theory undermines the *ex- ante* creditors' bargain.

Both the communitarian theory and multiple values approach recognise distributional objectives and are compatible with the winding up provisions under IA 1986. Even though the communitarian theory places particular emphasis on business rescue,³⁴⁸ the approach also encourages the orderly liquidation of businesses which are beyond salvage for the benefit of society.³⁴⁹ The compulsory winding up regime provides the ideal framework, with the necessary checks and balances, for an orderly and equitable winding up. The focus of the multiple values approach on how losses should be distributed in insolvency is also consistent with the winding up provisions i.e., realising assets and effecting an equitable distribution among the stakeholders.³⁵⁰ The corporate insolvency framework adopted in the UK arguably provides some guidance that is lacking from both the communitarian theory and multiple values approach.³⁵¹ For example, the preferential treatment of employees and specific debts,³⁵² facilitating early restructuring³⁵³ and supervised winding up are intended to strike a balance between the rights of creditors, employees and shareholders according to their ability to bear the loss of insolvency and to mitigate the impact of insolvency on local communities, society and national economy.³⁵⁴

³⁴⁷ IA 1986, Sch 4 para 2.

³⁴⁸ Finch, Measures, at 237.

³⁴⁹ Ibid, at 236.

³⁵⁰ See 2.3.3.

³⁵¹ See 2.3.2 and 2.3.3.

³⁵² IA 1986, Sch 6.

³⁵³ CA 2006, Parts 26 and 26A.

³⁵⁴ The way in which the winding up of Carillion and British Steel were handled ostensibly supports this point although both liquidations involved large corporations traditionally regarded as being "too big to fail".

The liquidator is authorised to carry on the business of a company so far as may be necessary for its beneficial winding up.³⁵⁵ More lately, we have seen a tendency of extending this jurisdiction through the Government's approach to what was termed the "largest ever trading liquidation in the UK":³⁵⁶ the liquidation of the second largest construction company in the UK and government contractor, Carillion plc.³⁵⁷ The Government intervened in the compulsory winding up and, by doing so, it ensured the continuity of public services thereby minimising the impact of the insolvency.³⁵⁸ Secondly, the inducement of state resources guaranteed that British Steel continued to trade in liquidation while the liquidator and the special managers attempted to sale the company's business. The OR was quoted: "we are continuing to work with interested parties to explore how to preserve the business as a going concern".³⁵⁹

Liquidation by definition does not comprise business rescue or a CVA. The precedent set by the Government is quite unlike the conventional collective execution (winding up) that provides for an equitable and fair distribution of the assets of a debtor as prescribed under the provisions of IA 1986. In fact, the approach adopted in British Steel smacks of a concern for job losses and the wider impact of insolvency on the community and economy.³⁶⁰ The approach represents an extension of the style which was adopted in Carillion: the equitable distribution of loss among the stakeholders.

³⁵⁵ IA 1986, Sch 4 para 5.

³⁵⁶ The comment was made by the OR (Dave Chapman) while revealing that agreements to transfer the last contracts to new service providers had been successfully negotiated. Express & Star available at: <https://www.expressandstar.com/news/business/2018/08/06/last-carillion-contracts-transferred-as-liquidation-enters-final-phase/> [Accessed 21/06/19].

³⁵⁷ On 15 January 2018, the High Court appointed the OR as liquidator of Carillion and some of its subsidiaries on the petition of the company's directors.

³⁵⁸ Sky News available at: <https://news.sky.com/story/carillion-liquidation-to-cost-taxpayers-148m-investigation-11397089> [Accessed 21/06/19].

³⁵⁹ GOV.UK available at: <https://www.gov.uk/government/news/british-steel-limited-in-liquidation-information-for-customers-employees-and-creditors> [Accessed 20/06/19].

³⁶⁰ The total liabilities of Carillion were £7billion at an estimated cost of £148m to the public purse. Sky News available at: <https://news.sky.com/story/carillion-liquidation-to-cost-taxpayers-148m-investigation-11397089> [Accessed 21/06/19].

The approach which is often adopted by the Government indirectly supports the introduction of a single gateway system to corporate insolvency as proposed under this research.³⁶¹ A compulsory winding up order does not effectively pronounce the termination of a company anymore. In certain circumstances, the Government has shown that a company can continue to trade while the liquidator attempts business rescue.³⁶² It was previously professed that administration might be the new liquidation³⁶³ but after the winding up of British Steel it has been considered whether liquidation may be the new administration where there is a public interest.³⁶⁴

2.5.1.7 Re-use of Company Names and Phoenixing

Allied to liquidation is the notorious practice of carrying on the same business through a series of companies where each one becomes insolvent in turn.³⁶⁵ The business of the insolvent company (excluding debt) is transferred to a new connected company (phoenix) and the insolvent company is placed into liquidation and then dissolved.³⁶⁶ The purpose of section 216 is to restrict the re-use of a name, by which a liquidated company was previously known or a name so similar to suggest a link, by former directors for 5 years except with the permission of the court.³⁶⁷ An application to the court within 7 days of the liquidation allows use of the old name either up to six weeks

³⁶¹ See the proposals.

³⁶² A. Keay and P. Walton, 'British Steel: is it a wind up?' (2019) 4 *Corporate Rescue and Insolvency* 125, at 6.

³⁶³ A. Keay, 'The future for liquidation in light of the Enterprise Act reforms?' [2005] *Journal of Business Law* 143.

³⁶⁴ A. Keay and P. Walton, 'British Steel: is it a wind up?' (2019) 4 *Corporate Rescue and Insolvency* 125, at 5.

³⁶⁵ The Insolvency Service available at: <https://www.gov.uk/government/publications/phoenix-companies-and-the-role-of-the-insolvency-service/phoenix-companies-and-the-role-of-the-insolvency-service> [Accessed 18/06/19].

³⁶⁶ The Insolvency Service available at: <https://www.gov.uk/government/publications/phoenix-companies-and-the-role-of-the-insolvency-service/phoenix-companies-and-the-role-of-the-insolvency-service> [Accessed 18/06/19].

³⁶⁷ IA 1986, s. 216(2) and (3).

or up to when the court makes a decision.³⁶⁸ If after six weeks a decision is still pending, the restriction applies again but permission may still be sought up to 5 years after the date of liquidation and the old name may be used after permission is granted.³⁶⁹

The old name may also be used where the business of the insolvent company is acquired from the liquidator by a former director (or connected party) during a CVL and a legal notice is published in the *Gazette* within 28 days of completing the transaction.³⁷⁰ In addition, a company trading for at least 12 months before the liquidation with a similar or close to similar name (continuously used for 12 months prior to winding up) is not affected by the restriction.³⁷¹ Objectively, the exceptions³⁷² undermine the practical utility of the restriction on re-use of company names.³⁷³ This research proposes to examine the operation and outcomes of the main legislative exception³⁷⁴ to the restriction on re-use of company names³⁷⁵ from a corporate rescue perspective along with 'traditional' and pre-pack administrations.³⁷⁶

The liquidator is a fiduciary, trustee, agent and officer of the court³⁷⁷ and could be investigated by the court where there is evidence of misfeasance or breach of any fiduciary duty.³⁷⁸ However, a liquidator of a CVL is not an officer of the court.³⁷⁹ While the court may not necessarily be involved in a CVL the liquidator owes a duty to the

³⁶⁸ IR 2016, r 22.6.

³⁶⁹ See the Guidance available at: <https://www.gov.uk/government/publications/guide-to-liquidation-winding-up-for-directors/guide-to-liquidation-winding-up-for-directors#sec-seven> [Accessed 24/07/19].

³⁷⁰ Ibid, r 22.4(3)(b). A copy of the notice must be sent to all known creditors of the company or creditors who could be known by reasonable enquiry before the lapse of 28 days after completion of sale.

³⁷¹ Ibid, r 22.7.

³⁷² Ibid, rr 22.4, 22.5 and 22.7

³⁷³ IA 1986, s. 216.

³⁷⁴ IR 2016, r 22.4.

³⁷⁵ IA 1986, s. 216.

³⁷⁶ See the empirical study under Chapter 4.

³⁷⁷ A. Keay, *McPherson's Law of Company Liquidation* (2nd edn Sweet & Maxwell, London 2009), p 431.

³⁷⁸ IA 1986, s. 212(1).

³⁷⁹ *Re Hill's Waterfall Estate & Gold Mining Co* [1896] 1 Ch 947 at 954.

company and its creditors as a whole which means a creditor could enforce the duty following dissolution.³⁸⁰ A duty may also arise as a result of a contract or where the liquidator has been negligent towards a particular group of creditors.³⁸¹ The re-use of company names during CVLs critically lacks the requisite oversight and is largely unregulated which could potentially lead to abuse of privilege and power. The practice is notoriously synonymous with pre-packs,³⁸² non-collective schemes of arrangements,³⁸³ or receiverships,³⁸⁴ which favour a few stakeholders at the expense of the general body of creditors, notwithstanding that the three procedures are subject to some regulation. Phoenixing contradicts the fundamental principles of collective execution and equitable distribution, the spirit and letter of the law, and as such cannot be reconciled with the corporate insolvency policy promoted in the UK.

2.6 Conclusion

It is bewildering that the incidence of insolvency still presents a dilemma in contemporary society bearing in mind the extent to which trade and commerce is financed by credit.³⁸⁵ Conceivably, it is partly attributable to the *ad hoc* fashion (devoid of any policy consideration) which characterised the evolution of English insolvency law.³⁸⁶ At times, Parliament reacted to a problem³⁸⁷ and often followed-up with a harsh

³⁸⁰ *Pulsford v Devenish* [1903] 2 Ch 625; *James Smith & Sons (Norwood) Ltd v Goodman* [1936] Ch 216.

³⁸¹ *A & J Fabrications Ltd v Grant Thornton* [1999] BCC 807 per Jacob J at 811.

³⁸² The SIP 16 requires an administrator to provide information to the creditors explaining his (or her) involvement prior to appointment; the reasons why a pre-pack was used; whether or not the business sale was marketed and the details of the sale.

³⁸³ All schemes under Part 26 are sanctioned by the court: CA 2006, s. 899(1).

³⁸⁴ A receiver is an agent of the company and is answerable to the company (principal) for any excess assets and subject to any restrictions in like manner to directors. The company can also intervene if a breach of duty is established, see, for example, *Gaskell v Gosling* [1896] 1 QB 669 per Rigby LJ at 692-693.

³⁸⁵ Keay, *Balancing Interests*, at 1.

³⁸⁶ *Ibid*, at 11. See Chapter 1 for the historical evolution of English insolvency law.

³⁸⁷ R. Weisberg, 'Commercial Morality, the Merchant Character, and the History of the Voidable Preference' (1986) 39 *Stanford Law Review* 3. See 1.7.

provision in order to appease the creditors in the absence of an underlying policy.³⁸⁸ While it is imperative that the principles and purposes of insolvency law must be founded on theory (which is easier said than done)³⁸⁹ it was not manifestly the case of English insolvency law.³⁹⁰ Similarly, in the modern era the policy of preserving viable commercial enterprises that was recommended by the Cork Committee, in 1982, was subsequently transmuted to company rescue when administration was enacted into law by Parliament in 1986.³⁹¹ Fatefully, the administration regime³⁹² is not expressly supported by a theoretical framework and, it is argued, such a predicament significantly impedes the effective deployment of the rescue provisions.

Various aspects of the leading insolvency theories may be adopted to improve the corporate rescue strategy and inform future insolvency policy considerations. Although the prime concern of the creditors' bargain theory does not necessarily promote business rescue, the collective execution prescribed under the model is extremely desirable³⁹³ and, indeed, an essential ingredient of effective corporate rescue or equitable distribution. Ironically, the Cork Committee conceived the idea of corporate rescue from the collective execution which was achieved under (non-collective) receiverships.³⁹⁴

The scope of the communitarian theory is more compatible with the concept of corporate rescue based on a review of the prominent insolvency theories and the principles and purposes of corporate insolvency adopted in the UK. In like manner to

³⁸⁸ Legislation enacted in 1706 (5 Anne c. 22) is a good example of how the provision of a discharge (4 Anne c. 17) was quickly qualified with certain conditions at the request of creditors. Keay, *Balancing Interests*, p 11. See 1.5.

³⁸⁹ In order to maintain consistency insolvency law must progress with a defined sense of direction. Finch, *Measures*, at 251.

³⁹⁰ Keay and Walton, *Insolvency Law*, p 30. See Chapter 1.

³⁹¹ IA 1986, Sch B1.

³⁹² *Ibid.*

³⁹³ See 2.3.

³⁹⁴ Cork Committee, para 495.

the communitarian theory, the corporate insolvency framework adopted in the UK promotes corporate rescue³⁹⁵ where possible for the benefit of society and the economy.³⁹⁶ Although not expressly promoted, a communitarian approach to corporate rescue is more balanced and practical compared to the creditors' bargain theory. That all stakeholders in insolvency, except secured creditors, should factor in the losses of business failure could not be justified especially where there is a possibility of corporate rescue or where the environmental health of a community is at stake.³⁹⁷

The multiple values approach mirrors the complex, but flexible, nature of the UK's corporate insolvency framework.³⁹⁸ However, the adoption of competing and conflicting principles and purposes makes it incredibly challenging to identify the theory of corporate rescue. At the elastic end of the spectrum, the contemporary policy is loosely defined by the wider approach which was adopted in the winding up of Carillion and extension of the precedent in *British Steel*³⁹⁹ and, at the stiffer end, by the seemingly unyielding limits set out by Norris J in *Cambridge Analytica*.⁴⁰⁰ The theory of corporate rescue is left to be found in the plethora (of other values and interests) in between the two limits and elsewhere. In other words, the administration regime⁴⁰¹ is not substantiated or complemented by a theoretical framework. The theory of corporate rescue in the UK (of preserving viable businesses for the benefit of the creditors, community and national economy) is fatally obscured.

³⁹⁵ IA 1986, Sch B1.

³⁹⁶ Cork Committee, para 204.

³⁹⁷ See *Re British Steel Ltd* [2019] EWHC 1304 (Ch). A consideration of business rescue during winding up raised eyebrows and prompted some commentators to question whether liquidation is the new administration (see 2.6.3).

³⁹⁸ See 2.5.

³⁹⁹ See 2.5.1.6.

⁴⁰⁰ [2019] EWHC 954 (Ch). See 2.3.1.

⁴⁰¹ IA 1986, Sch B1.

On the one hand, the existing corporate insolvency framework represents a traditionalists' approach that endeavours to protect the interests of creditors by preventing a damaging race for the assets or unfair distribution while, on the other, ensuring a debtor is not disproportionately punished but allowed a fresh start after a public examination. The corporate insolvency framework adopted in the UK is, in varying degrees, a mixture of the three prominent insolvency theories with a hint of social justice. The balance of the mixture is heavily tipped in favour of maximising the wealth of secured creditors. In practice, it is confusing for the judiciary, and IPs alike, to frame their decisions and strategy based on any theoretical model (or clearly articulated principles) that is comprised of a stack of competing and divergent theories in the absence of some guidance. Therefore, it is prudent to support the corporate rescue provisions, under Sch B1 of IA 1986, with a communitarian theory so that the inconsistencies and policy failure which stem from the ambiguities and deficiencies in the law can be minimised.

Despite the evidence of traces of both the communitarian theory and multiple values approach inherently entrenched in the existing corporate insolvency framework and successive Government policies, there is no theoretical framework to promote either approach compared to how the rights of secured creditors are protected. The trade-offs that must be reached demonstrates the multifaceted and complex nature of corporate insolvency. A corporate insolvency policy that considers multiple values equally, it is argued, is not only progressive but far superior to the *status quo*. Insolvency is a complicated process which is integral to contract enforcement⁴⁰² and not just a straightforward debt collection procedure. Inevitably, tough decisions have to be made. The legislative meddling and subsequent deviations which were

⁴⁰² Warren, Bankruptcy Policy, at 778.

promulgated into law significantly subverted the insolvency reform policy.⁴⁰³ Suffice it to say that the corporate insolvency policy adopted in the UK primarily protects the interests of secured creditors along with a vague public interest because of the wider impact of insolvency.⁴⁰⁴

As a preliminary analysis prior to the empirical study in Chapter 4, the next chapter (Chapter 3) critically evaluates the effectiveness of the existing administration provisions⁴⁰⁵ against a background of the inconsistent evolution of insolvency law (Chapter 1), apparent theoretical constraints (Chapter 2) and principles promoted under the existing corporate insolvency framework.

⁴⁰³ Contrary to the statement of aims of insolvency law advanced by the Cork Committee, the White Paper only emphasised the interests of creditors: *A Revised Framework for Insolvency Law*, Cmnd 9175 (1984).

⁴⁰⁴ See, for example, *Re British Steel Ltd* [2019] EWHC 1304 (Ch) per Snowden J at 11 and 12. See also Finch, *Measures*, at 234.

⁴⁰⁵ IA 1986, Sch B1.

Chapter 3

Impact of Enterprise Act 2002 Reforms on Corporate Rescue: Is the Money Where the Mouth Is?*

3.1 Introduction

The original administration¹ (“the old regime”) was intended to fill a gap in corporate insolvency law by simulating the operation of receiverships where the business of an insolvent company was continued and preserved due to the extensive powers and absolute control of a receiver and manager.² However, unlike receivership, administration would be initiated where no floating charge existed and hence not focused on the interests of the main secured creditor.³ The purpose of this chapter is to assess the fitness for purpose of the existing administration provisions⁴ (“the new regime”) in light of the growing trend of preventive restructuring⁵ and international

* The preliminary analysis of the administration provisions and findings in this chapter were published as part of a collection of short papers by INSOL International in 2021: P. Chanakira, ‘The parable of corporate rescue in the UK – survival of the company, business rescue or quasi-liquidation?’.

¹ Insolvency Act 1986, Part II (“IA 1986”). However, under s. 249 of the Enterprise Act 2002, the old regime is still applicable to specific types of organisation namely water companies (under the Water Industry Act 1991), railway companies to which administration orders apply (under Railways Act 1993 and s. 19 of Channel Tunnel Rail Link Act 1996), air traffic control companies (under the Transport Act 2000), London Underground private public partnership companies (under the Greater London Authority Act 1999) and building societies (under Building Societies Act 1986).

² *Insolvency Law and Practice: Report of the Review Committee*, Cmnd 8558 (1982), para 495 (hereinafter “the Cork Committee”).

³ S. Frisby, ‘In Search of a Rescue Regime: The Enterprise Act 2002’ (2004) 67 *Modern Law Review* 247, at 252 (“Frisby, In Search of Rescue”).

⁴ IA 1986, Sch B1.

⁵ Directive (EU) 2019/1023 of the European Parliament and of the Council on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency) (“Preventive Restructuring Directive”).

principles⁶ and ease of doing business,⁷ bearing in mind both the historical development (Chapter 1) and conspicuous lack of a theoretical framework (Chapter 2) and recent legislative reforms.⁸ It is essential for the corporate rescue framework to be continually adapted to preserve a competitive edge and to keep up with the dynamic trends of international trade and credit markets.⁹

This chapter critically examines the rationale and implications of the transformation of receivership to administrative receivership on corporate insolvency, review the corporate rescue landscape pre-Enterprise Act 2002 (“EA 2002”) and the impetus for streamlining administration before appraising the impact of the EA 2002 reforms on the prospect of corporate rescue. The preliminary analysis primarily draws on five empirical reports: an early comparative study of administration and administrative receivership,¹⁰ a study of administration cases,¹¹ a report on the impact of the EA 2002,¹² a preliminary report on pre-packaged administrations¹³ and the report of the

⁶ UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006) available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration [Accessed 22/08/19] and the principles for effective insolvency frameworks promoted by the World Bank available at: <http://documents.worldbank.org/curated/en/936851468152703005/The-World-Bank-principles-and-guidelines-for-effective-insolvency-and-creditor-rights-systems> [Accessed 08/10/19] (“principles of the World Bank”).

⁷ World Bank Group *Doing Business* 2020 Report available at: <https://russian.doingbusiness.org/content/dam/doingBusiness/pdf/db2020/Doing-Business-2020.pdf> [Accessed 28/10/19].

⁸ Corporate Insolvency and Governance Act 2020 c. 12 (“CIGA 2020”).

⁹ The UK Government’s *Review of the Corporate Insolvency Framework* in 2016 was intended to consider the options for reform in the light of the principles developed by the World Bank and UNCITRAL and the emerging European trend of providing solvent restructuring frameworks. See https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/525523/A_Review_of_the_Corporate_Insolvency_Framework.pdf [Accessed 18/11/19].

¹⁰ A. Katz and M. J. Mumford, *Comparative study of administration and administrative receivership as corporate rescue vehicles* (2003): Report Prepared for the Institute of Chartered Accountants of England and Wales (ICAEW).

¹¹ A. Katz and M. Mumford, *Study of Administration Cases* (2006): Report Prepared for Insolvency Service.

¹² J. Armour, A. Hsu and A. Walters, *The Impact of the Enterprise Act 2002 on Realisations and Costs in Corporate Rescue Proceedings* (2006): A Report Prepared for the Insolvency Service.

¹³ S. Frisby, *A preliminary analysis of pre-packaged administrations* (2007): Report to the Association of Business Recovery Professionals (R3).

University of Wolverhampton¹⁴ to the Graham Review into Pre-Pack Administration.¹⁵

The empirical findings in the next chapter (Chapter 4) will progress the knowledge to be gleaned from these reports and also inform and update the preliminary findings in this chapter.

An administration period creates a moratorium on actions against the company¹⁶ while company rescue,¹⁷ for example, through a company voluntary arrangement (CVA)¹⁸ or scheme of arrangement,¹⁹ is attempted by the administrator.²⁰ If company rescue is not reasonably practicable the administrator may adopt the purpose “to achieve a better result for the company’s creditors as a whole than would likely if the company were wound up (without first being in administration)”²¹ and, if not feasible, “realising the company’s property to pay one or more secured or preferential creditors”.²² Receivership is a (non-collective) private contractual remedy²³ with no incentive to maximise economic value²⁴ and, hence, the power of a floating charge holder (created on or after 15 September 2003)²⁵ to appoint an administrative receiver²⁶ was largely

¹⁴ P. Walton and C. Umfreville, ‘Pre-pack Empirical Research: Characteristic and Outcome Analysis of Pre-pack Administration (2014) available at: <https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration> [Accessed 31/10/19].

¹⁵ Ibid.

¹⁶ IA 1986, Sch B1 para 43.

¹⁷ Ibid, para 3(1)(b).

¹⁸ CVAs have not lived up to expectations: research conducted in 2018 exposed a failure rate of over 65% and that in some cases CVAs are being used as a distribution scheme and not for corporate rescue purposes. P. Walton., C. Umfreville and L. Jacobs, *Company Voluntary Arrangements: Evaluating Success and Failure* (2018): Report to the Association of Business Recovery Professionals. See 2.5.1.4.

¹⁹ See 2.5.1.5.

²⁰ A person appointed to manage the company’s affairs, business and property. IA 1986, Sch B1 para 1.

²¹ IA 1986, Sch B1 para 3(1)(b).

²² Ibid, para 3(1)(c). Distribution to unsecured creditors requires the permission of the court under para 65(3)(b).

²³ A receiver does not owe a direct duty to the general body of creditors or employees: *Lathia v Dronsfield Bros.* [1987] BCLC 321, but owes a primary obligation to the appointing party, see *Re B Johnson & Co (Builders) Ltd* [1995] 1 Ch 634; *Downsview Nominees v First City Corporation* [1993] AC 295.

²⁴ White Paper, *Productivity and Enterprise: Insolvency – A Second Chance*, The Insolvency Service (London: HMSO, 2001) Cmnd 5234, para 2.2.

²⁵ IA 1986, s. 72A and SI 2003/2093.

²⁶ IA 1986, s. 29(2).

replaced with the power to appoint an administrator.²⁷ It may be helpful, at this stage, to define the concept of corporate rescue as a matter of English law and for the purposes of this research.

3.2 Different Shades of Corporate Rescue

The Schedule B1 provisions describe corporate rescue as rescue of a company as a going concern²⁸ or, alternatively, “achieving a better result for the company’s creditors as a whole than would be likely if the company were wound up (without first being in administration)”²⁹ which is frequently achieved by preserving the viable part(s) of the business and connected jobs through a rescue procedure.³⁰ Chapter 11 of the US Bankruptcy Code makes provision for a reorganisation procedure that prioritises business rescue.³¹ A pre-pack business sale (whether or not approved by the court)³² does not constitute corporate rescue for the purposes of the law.³³ The principal advantage of a business sale is that the proceeds usually settle a part of the unsecured debt,³⁴ whereas company rescue involves payment of some debt, for example, through a CVA. Pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended),³⁵ a business sale is generally covered³⁶ which means the terms and conditions of employment are protected either when a company survives as a going concern or the underlying business is rescued as a going

²⁷ EA 2002, s. 250. See 2.5.1.1.

²⁸ IA 1986, Sch B1 para 3(1)(a).

²⁹ *Ibid*, para 3(1)(b).

³⁰ J. Armour, A. Hsu and A. Walters, *The Impact of the Enterprise Act 2002 on Realisations and Costs in Corporate Rescue Proceedings* (2006): A Report Prepared for the Insolvency Service, at 2 (“Armour, Hsu and Walters, Impact of EA 2002”).

³¹ See 2.2.1.

³² See 2.3.1.

³³ See 2.2.1.

³⁴ P. Walton, ‘Pre-packaged administration – trick or treat?’ (2006) 19(8) *Insolvency Intelligence*, at 113.

³⁵ SI 2006/246.

³⁶ See, for example, *RCO Support Services v Unison* [2002] EWCA Civ 464 and *ECM v Cox* [1999] IRLR 559.

concern.³⁷ A relevant transfer under the Regulations comprises the transfer of an undertaking, business or part of an undertaking where there is a transfer of an economic entity which retains its identity.³⁸

In practice, most administrators adopt the purpose³⁹ to “achieve a better result for the company’s creditors as a whole than would be likely if the company were wound up (without first being in administration)”⁴⁰ either through a pre-packaged administration (“pre-pack”)⁴¹ or going concern sale of the company’s business.⁴² Consistently with the principles promoted by the World Bank and approach adopted in the USA and EU,⁴³ and theory of corporate rescue advocated by the Cork Committee⁴⁴ and other prominent commentators,⁴⁵ this research recognises business rescue as a going concern (along with company rescue)⁴⁶ as a legitimate corporate rescue outcome.

3.3 Background to Administration: Receiver of Income to Receiver and Manager

The old-style receivership (the power to appoint a receiver of income) has been used as a means of enforcing security by a secured creditor and not regarded as an

³⁷ The Regulations apply regardless of the size and sector (private or public) in which it the business operates and whether it is conducted for profit.

³⁸ Transfer of Undertakings (Protection of Employment) Regulations 2006, Reg 3(1)(a).

³⁹ A preliminary *Study of Administration Cases* in 2006 for the Insolvency Service by A. Katz and M. Mumford observed that administrators adopted the first statutory purpose in less than 10% of administrations.

⁴⁰ IA 1986, Sch B1 para 3(1)(b).

⁴¹ See the empirical study under Chapter 4 for the operation and effectiveness of pre-packs from a corporate rescue standpoint.

⁴² See, for example, R3, *Corporate Insolvency in the UK: A Decade of Change* available at: <http://www.r3.org.uk/publications> [Accessed 05/09/19]; Frisby, *In Search of Rescue*, at 266.

⁴³ See 2.2.1.

⁴⁴ See 2.2.

⁴⁵ R. Harmer, ‘Comparison of Trends in National Law: The Pacific Rim’ (1997) 23 *Brooklyn Journal of International Law* 139; J. Armour, ‘The Law and Economics of Corporate Insolvency: A Review’ in R. D. Vriesendorp, J. A. McCahery and F. M. J. Verstijlen (eds), *Comparative and International Perspectives on Bankruptcy Law Reform in the Netherlands* (The Hague: Boom Juridische uitgevers, 2001); S. Frisby, ‘In Search of a Rescue Regime: The Enterprise Act 2002’ (2004) 67 *Modern Law Review* 247.

⁴⁶ IA 1986, Sch B1 para 3(1)(c).

authentic insolvency procedure.⁴⁷ An increase in commercial activity and availability of credit, against a backdrop of the abolition of arrest of debtors on *mesne* process and introduction of the doctrine of limited liability,⁴⁸ probably motivated creditors to bolster the protection of their interests by reserving the right to appoint a receiver and manager of the business.⁴⁹ A combination of a fixed charge over fixed assets and a floating charge over the rest of the company's undertaking (a debenture)⁵⁰ formed the legal basis of appointing of a receiver and manager who could sell the company's assets either piecemeal (even though more could be attained)⁵¹ or as a going concern.⁵²

The floating charge allowed a receiver and manager to exercise significant control over the company's undertaking in addition to receiving income as an agent of a secured creditor.⁵³ At first, the court was not in favour of the imposition of a mortgage over the entire undertaking of a company.⁵⁴ The conflict between common law and equity was settled in favour of equity⁵⁵ and led to adoption of the floating charge⁵⁶ contrary to the paralysis theory⁵⁷ of its creation.⁵⁸

Where the business was viable and capable of being restored to profitability a receiver continued to trade with a view of securing a better return through selling the business

⁴⁷ R. Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, London 1990), p 11 ("Goode, Principles").

⁴⁸ See discussion at 1.10.1.

⁴⁹ Goode, Principles, p 77.

⁵⁰ In *Levy v Abercorris Slate and Slab Co* (1887) 37 Ch D 260 at 264, Chitty J held that: "a debenture means a document which either creates a debt or acknowledges it".

⁵¹ Goode, Principles of Corporate Insolvency Law (2nd edn Sweet & Maxwell, London 1997), pp 15-16.

⁵² See 1.11.

⁵³ *Ibid.*

⁵⁴ *Graham v Chapman* (1852) 12 CB 85.

⁵⁵ *Holroyd v Marshall* (1862) 10 HLC 191.

⁵⁶ Bills of Sale Act (1878) Amendment Act 1882.

⁵⁷ See 1.11 for a historical account of the development of the floating charge.

⁵⁸ R. Gregory and P. Walton, 'Fixed and floating charges – a revelation' (2001) *Lloyds Maritime and Commercial Law Quarterly* 1. See also 1.11.

as a going concern.⁵⁹ The Cork Committee similarly identified underlying viability as key to business rescue.⁶⁰ In the same spirit that initially made it possible for a mortgagor (the debtor) to appoint a receiver (and later the mortgagee) at the request of a mortgagee, the appointment by a debenture holder under the new-style receivership was considered convenient as opposed to making an application to the court.⁶¹ An application to the court would be time consuming and expensive and the receiver's powers would potentially be curtailed by the judicial framework compared to the extensive powers of a privately appointed receiver under a debenture.⁶² The wide-ranging powers are replicated under Schedule 1 (powers of administrator or administrative receiver).⁶³ A receiver owes a primary duty to the debenture holder and, hence, receivership is not regarded as a collective insolvency procedure,⁶⁴ although under modern practice the interests of other stakeholders are often promoted during receivership.⁶⁵

Because the security under a floating charge⁶⁶ covers all or almost all the property⁶⁶ it creates a moratorium when it "crystallises" which presents receivership as a collective insolvency procedure.⁶⁷ The appointment of a receiver triggers the floating charge to "crystallise" and in conjunction with s. 43⁶⁸ provides a safeguard mechanism that is

⁵⁹ Goode, Principles, p 10.

⁶⁰ Cork Committee, para 198.

⁶¹ Goode, Principles, p 77.

⁶² *Ibid*, p 78.

⁶³ IA 1986, Sch 1.

⁶⁴ Receivership and schemes of arrangements under Part 26 of CA 2006 were not recognised under Appendix A and therefore excluded from the scope of the (recast) EU Insolvency Regulation 2015/848 of the European Parliament and of the Council on insolvency proceedings.

⁶⁵ Goode, Principles, p 11.

⁶⁶ The debenture must relate to the whole or substantially the whole of the company's property. IA 1986, Sch B1 para 14(3).

⁶⁷ Goode, Principles, p 11; Frisby, *In Search of Rescue*, at 253.

⁶⁸ A court may sanction the disposal of assets subject to a senior floating charge if it is satisfied that such a disposal "would be likely to promote a more advantageous realisation of the company's assets than would otherwise be effected".

equivalent to the statutory moratorium against individual enforcement actions.⁶⁹ An equitable assignment where, for instance, a company executes a floating charge creates a trust in the form of an equitable charge which protects the assets from other creditors.⁷⁰ Although the chargor remains the legal owner of the asset, the chargee is the beneficiary in equity.⁷¹ To get ahead of other creditors, a judgement creditor should complete execution (an execution creditor should actually receive the money owed) before the appointment of a receiver otherwise the benefit is lost.⁷² Commercial Rent Arrears Recovery (CRAR)⁷³ allows landlords to recover rent arrears from tenants in commercial properties without going to court by taking control of the debtor's goods⁷⁴ and selling them⁷⁵ ahead of other unsecured claimants.⁷⁶ To preserve the benefits of collective execution,⁷⁷ the court is prepared to grant relief from forfeiture where a company in receivership is in possession of assets under a high purchase agreement,⁷⁸ or a chattel lease,⁷⁹ if the forfeiture unjustly enriches the landlord,⁸⁰ but property owners who are not paid can repossess their goods.⁸¹

Receivership is within the scope of IA 1986 for certain purposes: a receiver is deemed an insolvency Office Holder⁸² and owes a statutory duty to preferential creditors,⁸³

⁶⁹ Frisby, *In Search of Rescue*, at 253.

⁷⁰ See *Re Cosslett (Contractors) Ltd* (1998) Ch 495 per Millett LJ at 508.

⁷¹ P. Walton, 'Assignment of Book Debts – outright transfer of rights or unregistered securities?' (2018) 1 *Wolverhampton Law Journal* 1, at 8.

⁷² *Evans v Rival Granite Quarries* [1910] 2 KB 979.

⁷³ Tribunals, Courts and Enforcement Act 2007, s. 72.

⁷⁴ There is no requirement for the distrained goods to belong to the tenant in default: see, for example, *Salford Van Hire (Contracts) Ltd v Bocholt Developments Ltd* [1995] CLC 611.

⁷⁵ *Rhodes v Allied Dunbar Pension Services* [1989] 1 All ER 1161 per Nicholls LJ at 1163.

⁷⁶ Licensed enforcement agents will seize the goods in accordance with the provisions of the Act and notice must be served on the tenant prior to enforcement.

⁷⁷ Frisby, *In Search of Rescue*, at 254.

⁷⁸ *Transag Haulage Ltd v Leyland DAF Finance plc* [1994] BCC 356.

⁷⁹ *On Demand Information plc v Michael Gerson Finance plc* [2000] 4 All ER 734.

⁸⁰ See the House of Lords decision in *Billson v Residential Apartments Ltd* [1992] 1 AC 494.

⁸¹ *Re Atlantic Computer Systems plc* [1992] per Nicholls LJ at 524-5; *Brown v City of London Corporation* [1996] 1 WLR 1070.

⁸² IA 1986, ss 233(1), 238(1) and 246(1).

⁸³ An administrative receiver must observe the priority of preferential creditors over claims secured by a floating charge where the security free assets of a company are insufficient. *Ibid.*, s. 40(2) and (3).

must send a report to the registrar and to all creditors,⁸⁴ produce a statement of affairs,⁸⁵ invite creditors to form a creditors' committee,⁸⁶ file a summary of receipts and payments⁸⁷ and assume personal liability for adopting any contracts of employment.⁸⁸ A receiver may only be removed by order of the court.⁸⁹ Although receivership is not regarded as a true collective insolvency procedure it is characterised by various events of a typical collective procedure and, accordingly, treated as such for some purposes by the IA 1986 and practitioners.⁹⁰

3.3.1 Receivership as a Business Rescue Vehicle

An instinctive criticism of receivership may be misleading and, perhaps, ignores some benefits of the traditional practice.⁹¹ Contrary to the popular criticism that receivership is predisposed to a perverse incentive, in order to maximise value where a debenture holder was under-secured,⁹² a receiver could sell the business as a going concern and thereby also promoting the interests of unsecured creditors and employees.⁹³ The business sale rescued the enterprise from closure and preserved the connected jobs, although the company did not survive.⁹⁴

In 2014, the report of the University of Wolverhampton to the Graham Review into Pre-Pack Administration also demonstrated that business rescue was the most common

⁸⁴ IA 1986, ss 48 and 49.

⁸⁵ Insolvency (England and Wales) Rules 2016, r. 4.6 ("IR 2016").

⁸⁶ IR 2016, r 4.15.

⁸⁷ *Ibid*, r 4.17.

⁸⁸ IA 1986, s. 44(1) (b).

⁸⁹ *Ibid*, s. 45(1).

⁹⁰ Goode, Principles, p 11.

⁹¹ J. Armour and S. Frisby, 'Rethinking Receivership' (2001) 21 *Oxford Journal of Legal Studies* 73.

⁹² Frisby, *In Search of Rescue*, at 253.

⁹³ Secured creditors were thought to be under-secured in just below half of the insolvencies during the late 1990s. J. Armour and R. J. Mokal, 'Reforming the Governance of Corporate Rescue: the Enterprise Act 2002' (2005) *Lloyds' Maritime and Commercial Law Quarterly*, at 32-68.

⁹⁴ Armour, Hsu and Walters, *Impact of EA 2002*, at 3-4.

outcome observed under the new regime,⁹⁵ contrary to the primary objective of company rescue.⁹⁶ Data collected from IPs, regulators and bankers in 2006 suggested that successful company reorganisation or restructuring was usually conducted outside formal insolvency proceedings.⁹⁷ In their early empirical study of administration, Katz and Mumford observed that company rescue was attempted in only 10% of the cases.⁹⁸ The Cork Committee's recommendation of administration was founded on the unfettered discretion⁹⁹ of a receiver and manager appointed by a holder a floating charge.¹⁰⁰ The procedure was both quick and flexible: the lender was able to respond swiftly by appointing a receiver who could potentially revive the commercial enterprise¹⁰¹ or sell the business as a going concern.¹⁰² As alluded to above, administration was primarily intended to reproduce the corporate rescue outcomes,¹⁰³ as observed under a few receiverships, where a company had not granted a floating charge over its undertaking,¹⁰⁴ and not to replace receivership.¹⁰⁵

According to the findings of early comparative research, administration was less commonly used than receivership prior to enactment of the EA 2002.¹⁰⁶ In the year

⁹⁵ P. Walton and C. Umfreville, 'Pre-pack Empirical Research: Characteristic and Outcome Analysis of Pre-pack Administration (2014) available at: <https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration> [31/10/19].

⁹⁶ IA 1986, Sch B1 para 3(1)(c).

⁹⁷ One banker indicated that he had never witnessed a successful reorganisation during administration. Armour, Hsu and Walters, *Impact of EA 2002*, p 23.

⁹⁸ A. Katz and M. Mumford, *Study of Administration Cases* (2006): Report Prepared for Insolvency Service.

⁹⁹ The extensive powers granted to a receiver under a debenture to manage the company's business are replicated under IA 1986, Sch 1.

¹⁰⁰ Cork Committee, para 495.

¹⁰¹ *Ibid.*

¹⁰² Armour, Hsu and Walters, *Impact of EA 2002*, at 4.

¹⁰³ In the sense of being able to promptly appoint an office holder with absolute control over the company's assets at a minimal cost to rescue the company or its business. See 3.1.

¹⁰⁴ Cork Committee, Ch 9.

¹⁰⁵ A secured creditor entitled to appoint a receiver could veto the appointment of an administrator before the introduction of the EA 2002. Armour, Hsu and Walters, *Impact of EA 2002*, p 4.

¹⁰⁶ A. Katz and M. J. Mumford, *Comparative study of administration and administrative receivership as corporate rescue vehicles* (2003): Report to the Association of Business Recovery Professionals (R3), at 5 ("Katz and Mumford, Comparative Study").

2000, there were 429 administrations compared to 1113 receiverships (28% of the total cases).¹⁰⁷ 41% of responses from a sample of (180) administrations were in respect to cases where there was no floating charge holder which represents a significant achievement of the original objective of filling a gap thus far.¹⁰⁸ Nevertheless, the proportion of administrations gradually increased to a peak of 50% by mid-2003.¹⁰⁹ The study observed that in 69% of receiverships it was compelled by case control considerations and administration was not considered as an alternative in 52% of receiverships for mainly control reasons.¹¹⁰ Avoidance of delay where the assets were considered to be at risk influenced the selection of receivership in 33% of the total cases but, intriguingly, in half of those cases (representing almost 50% of the assets) respondents (IPs) indicated that had administration been the only option available it would have achieved the same net realisations.¹¹¹

So, contrary to the negative perception of receivership the appointment of a receiver occasionally resulted in a better return for all the stakeholders through company rescue or the preservation of the whole or a part of the business. In fact, the Cork Committee's recommendation of administration was motivated by the corporate rescue outcomes observed under a few receiverships.¹¹²

3.3.2 Preliminary Corporate Rescue Statistics in 2006

As expected, empirical research on the operation of the administration provisions¹¹³ showed that the new regime had fundamentally replaced receivership.¹¹⁴ Remarkably,

¹⁰⁷ Katz and Mumford, Comparative Study, at 6.

¹⁰⁸ Ibid, at 9.

¹⁰⁹ Ibid, at 5.

¹¹⁰ Ibid, at 6.

¹¹¹ However, it was anticipated that the new regime with similar speed of appointment as receivership would eliminate that risk. Ibid, at 6-7.

¹¹² Cork Committee, para 495.

¹¹³ IA 1986, Sch B1.

¹¹⁴ Armour, Hsu and Walters, Impact of EA 2002, at iii.

the study observed that 32.3% of 153 receiverships commenced prior to the EA 2002 reforms continued to trade in comparison to 24.7% of 195 administrations under the new regime.¹¹⁵ Receiverships achieved a total of 45.4% going concern sales compared to 41.7% business sales under the new regime.¹¹⁶ In addition, the frequency of piecemeal sales was slightly higher (58.3%) for the new regime than it was under the pre-EA 2002 receiverships (54.6%).¹¹⁷ Based on the empirical evidence, pre-EA 2002 receiverships produced slightly better corporate rescue outcomes compared with the new regime. Although the gross realisations in administration cases were larger, the costs connected with the new regime were also significantly higher.¹¹⁸

On average, 21% of all claims were recovered in both pre-EA 2002 receiverships and under the new regime: the increased costs (increased IP fees) under the new regime reduced the increased gross realisations which negatively impacted the net recoveries for creditors.¹¹⁹ The high costs (primarily the remuneration of IPs and legal fees) were attributed to the costs of a duty to act in the interests of all creditors.¹²⁰ *A fortiori*, it seems that creditors were not better off under either the pre-EA 2002 receiverships or new administration regime with the exception of the higher fees achieved by IPs.¹²¹

3.4 Downside of Receivership

The major criticism of receivership was that it concentrated control rights in the hands of a single secured creditor¹²² to the detriment of the preservation of viable businesses capable of making a useful contribution to the economy.¹²³ Where the value of the

¹¹⁵ Armour, Hsu and Walters, Impact of EA 2002, at 32.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Armour, Hsu and Walters, Impact of EA 2002, at 39.

¹¹⁹ Ibid, at 40.

¹²⁰ Armour, Hsu and Walters, Impact of EA 2002, at iv.

¹²¹ Ibid, at 40.

¹²² Ibid, at 5.

¹²³ Cork Committee, para 198(j).

assets was more than the secured credit (over-secured), it was often observed that a secured creditor would promptly seek repayment at the expense of preserving a viable business, which resulted in the wasteful closure of businesses,¹²⁴ on the basis that a piecemeal liquidation would be quicker.¹²⁵

As previously noted in Chapter 2, the sale of essential assets more often than not triggers insolvency regardless of whether the business is viable or not.¹²⁶ Furthermore, the absence of a legal duty to other stakeholders especially unsecured creditors¹²⁷ makes a receiver insufficiently accountable.¹²⁸ From an international perspective, receivership was viewed as being incompatible with the collective insolvency proceedings prescribed under the European Insolvency Regulation.¹²⁹ To mitigate the discrepancy and achieve international recognition, it was suggested that receivership would be substituted by administration.¹³⁰

In contrast, the Cork Committee was convinced that the floating charge possessed significant advantages to corporate finance and its abolition could not be contemplated, albeit it also accepted that receivership could be improved.¹³¹ The disapproval of receivership for being a self-interested procedure with no incentive to maximise returns for the company's creditors as a whole is not substantiated by the preliminary statistics of corporate rescue,¹³² bearing in mind that receivership is supposedly a private contractual remedy.

¹²⁴ See White Paper, *Productivity and Enterprise: Insolvency – A Second Chance*, The Insolvency Service (London: HMSO, 2001) Cmnd 5234.

¹²⁵ Armour, Hsu and Walters, *Impact of EA 2002*, at 5.

¹²⁶ See 2.3.1.

¹²⁷ See, for example, *Davey v Money & Anor* [2019] EWHC 997 (Ch), per Snowden J at 254.

¹²⁸ Armour, Hsu and Walters, *Impact of EA 2002*, p 6.

¹²⁹ Council Regulation (EC) 1346/2000 repealed by (recast) Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings.

¹³⁰ Armour, Hsu and Walters, *Impact of EA 2002*, p 6.

¹³¹ Cork Committee, para 110.

¹³² See 3.3.2.

3.5. Impetus for Streamlining Administration

The relative speed of appointment and comparatively low costs associated with receivership were perceived as a major procedural advantage.¹³³ The old regime was not only criticised for its lack of expedience but for being procedurally complex (the requirement of a court order).¹³⁴ The other professed weakness of the old regime was the cost of commissioning a business review (IR 1986, rule 2.2 report) on small and medium sized enterprises (SMEs) and creditors with limited resources in order to sway the court.¹³⁵ The new regime was intended to maintain the key procedural benefits of receivership with a view to encourage the use of administration to stimulate and promote corporate rescue.¹³⁶ In other words, the aspirations of the Cork Committee of promoting a corporate “rescue culture” were not being realised.¹³⁷

Traditionally, a debtor could always enter into private arrangements with creditors independent of any court proceedings, but the business of a debtor only continued to trade in exceptional circumstances.¹³⁸ Aside from improving the corporate rescue environment, the amendments were intended to achieve better returns for creditors and to foster a more collective execution.¹³⁹ The new regime was, thus, expected to promote a wider approach as indorsed by both the communitarian theory¹⁴⁰ and multiple values vision:¹⁴¹ all creditors would have a meaningful right to collectively

¹³³ Goode, Principles, p 316; Keay and Walton, Insolvency Law, p 89.

¹³⁴ *Hansard*, HL Vol. 637, 138-190 (2002) per Lord Sainsbury of Turville.

¹³⁵ L. S. Sealy and D. Milman, *Annotated Guide to the Insolvency Legislation* (4th edn CCH Editions Ltd, Oxford 1994), p 43. See, for example, *Re W F Fearman Ltd* (1998) 4 BCC 139 where the absence of a report proved to be fatal.

¹³⁶ Armour, Hsu and Walters, Impact of EA 2002, p 7.

¹³⁷ I. F. Fletcher, ‘UK Corporate Rescue: Recent Developments – Changes to Administrative Receivership, Administration and Company Voluntary Arrangement – The Insolvency Act 2000, The White Paper 2001 and the Enterprise Act 2002’ (2004) 5 *European Business Organisation Law Review*, at 122.

¹³⁸ See 1.4.

¹³⁹ Frisby, *In Search of Rescue*, at 247.

¹⁴⁰ See 2.3.2.

¹⁴¹ See 2.3.3.

participate in the administration process.¹⁴² Put differently, the provisions of the EA 2002 were intended to mitigate the control rights of secured creditors and thereby fostering collective execution.¹⁴³

To the contrary, the out-of-court appointments of administrators¹⁴⁴ and connected provisions,¹⁴⁵ intended to make the new regime flexible, similar to informal arrangements,¹⁴⁶ have precipitated controversial practice (discussed below) that is not only prejudicial to the interests of unsecured creditors but effectively undermines the ideal of collective execution (equality and inclusivity) which promotes effective corporate rescue.¹⁴⁷ According to McCormack, the reformation of the old regime has produced a hybrid species of administration (a combination of the old regime and receivership) and not the projected abolition of receivership.¹⁴⁸

3.5.1 Prominent Contemporary Issues

The absence of a court order and the extensive powers bestowed upon an administrator, under the new regime,¹⁴⁹ more affiliated with those of liquidators,¹⁵⁰ have led to the prevalent use of pre-packs¹⁵¹ and the new administration regime being used as 'quasi-liquidation'.¹⁵² These two issues are discussed in more detail below.

¹⁴² White Paper, *Productivity and Enterprise: Insolvency – A Second Chance*, The Insolvency Service (London: HMSO, 2001) Cmnd 5234, para 2.5.

¹⁴³ Armour, Hsu and Walters, *Impact of EA 2002*, at 7.

¹⁴⁴ IA 1986, Sch B1 paras 14 and 22.

¹⁴⁵ *Ibid*, paras 65 and 84.

¹⁴⁶ Cork Committee, paras 59-63. See 1.4.

¹⁴⁷ White Paper, *Productivity and Enterprise: Insolvency – A Second Chance*, The Insolvency Service (London: HMSO, 2001) Cmnd 5234, at paras 2.5 and 2.6.

¹⁴⁸ G. McCormack, 'Control and Corporate Rescue – An Anglo-American Evaluation' (2007) *International & Comparative Law Quarterly* 515.

¹⁴⁹ IA 1986, Sch 1.

¹⁵⁰ T. Robinson and P. Walton (eds), *Kerr and Hunter on Receivers and Administrators* (20th edn Sweet & Maxwell, London 2018), para 16-63.

¹⁵¹ A preliminary review of pre-packs between 2001 and 2004 indicated that there were 40 pre-packs (33.9%) pre-EA 2002 and 78 (66.1%) post EA 2002 from a sample of 118 administration pre-packs.

¹⁵² Goode, *Principles*, p 35; A. Keay and P. Walton, *Insolvency Law*, p 91; J. Armour, A. Hsu and A. Walters, *The Impact of the Enterprise Act 2002 on Realisations and Costs in Corporate Rescue Proceedings* (2006): A Report Prepared for the Insolvency Service.

The influence of a qualifying floating charge holder has arguably been heightened by the EA 2002 reforms to the detriment of the intended policy shift to a more collective execution which promotes and facilitates corporate rescue.¹⁵³ Since the introduction of the Schedule B1 regime¹⁵⁴ there has been a significant increase of pre-packs¹⁵⁵ and the incidences of the new regime being used as 'quasi-liquidation' as opposed to more successful reorganisations or company rescue as intended.¹⁵⁶ Although the concept of corporate rescue has various interpretations,¹⁵⁷ the theory of corporate rescue which was envisioned by the Cork Committee embraced the preservation of viable businesses.¹⁵⁸

The prevalence and popularity of pre-packs indirectly supports a policy that expressly describes the preservation of viable businesses as legitimate corporate rescue and not necessarily the company itself.¹⁵⁹ The policy is not only attractive but potentially a more practicable corporate rescue strategy for future policy considerations. Whether or not business rescue is perceived as a legitimate corporate rescue outcome is debatable, but it is unequivocal that it is the most prevalent outcome observed under the new regime.¹⁶⁰ The annual surveys conducted by the Association of Business Recovery Specialists (R3) for more than a decade identified three types of corporate rescue: two sale types (complete and partial going concern sales) were frequently encountered, but company rescue was relatively low.¹⁶¹

¹⁵³ Cork Committee, Ch 9.

¹⁵⁴ IA 1986, Sch B1.

¹⁵⁵ A. Keay and P. Walton, *Insolvency Law*, p 88.

¹⁵⁶ Goode, *Principles*, p 32.

¹⁵⁷ Frisby, *In Search of Rescue*, at 248.

¹⁵⁸ Cork Committee, para 198(j).

¹⁵⁹ See 2.2.

¹⁶⁰ Frisby, *In Search of Rescue*, at 249.

¹⁶¹ See R3, *Corporate Insolvency in the UK: A Decade of Change* available at: <http://www.r3.org.uk/publications> [Accessed 05/09/19].

In the aftermath of the EA 2002 reforms, administration¹⁶² has emerged as the preferred insolvency procedure for a debenture holder.¹⁶³ The fact that the prevalent outcome under administration is business rescue should provide an incentive for reviewing the policy transmutation from business to company rescue during the legislative process.¹⁶⁴ Data collected in 2014 on 500 pre-packs indicated that over 70% of the appointments were made out-of-court by directors,¹⁶⁵ albeit with the consent of the floating charge holder or after the five working days' notice. Liquidation is also being used to perform corporate rescue where, for example, there is a public interest.¹⁶⁶

In order that a more critical exposition of the administration framework be accomplished it is imperative to examine the scope and operation of both the old¹⁶⁷ and the new regime¹⁶⁸ in the light of preventive restructuring¹⁶⁹ and domestic¹⁷⁰ and international developments.¹⁷¹

3.6 Court Administered Administration: The Old Regime

The relevant corporate insolvency provisions of the EA 2002 replaced Part II of IA 1986 with the new regime (Schedule B1 provisions).¹⁷² For the most part,¹⁷³ the two

¹⁶² IA 1986, Sch B1.

¹⁶³ A. Keay and P. Walton, *Insolvency Law*, p 88.

¹⁶⁴ For an exposition of some of the legislative meddling by vested power interests see J. Tribe, "Policy Subversion" in *Corporate Insolvency: Political Science, Marxism and the Role of Power Interests During the Passage of Insolvency Legislation* (2019) 32 *Insolvency Intelligence*, at 59. See 2.2.

¹⁶⁵ IA 1986, Sch B1 para 22.

¹⁶⁶ See 2.6.1.5.

¹⁶⁷ IA 1986, Part II.

¹⁶⁸ *Ibid*, Sch B1.

¹⁶⁹ Preventive Restructuring Directive.

¹⁷⁰ CIGA 2020.

¹⁷¹ See, for instance, *Doing Business 2020 Report* available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf> [Accessed 14/11/19].

¹⁷² EA 2002, s. 248.

¹⁷³ For example, the court application process is exactly the same and so are the effects of an order and the duties of the administrator under both regimes.

regimes are identical and so the analysis is focused on the amendments as far as they promote corporate rescue or otherwise. When administration was enacted into English law in 1986 there were only two similar procedures elsewhere: the appointment of a “judicial manager” under the company law of the Republic of South Africa and the Australian “official management”.¹⁷⁴ Ominously, just a few companies were successfully rehabilitated in those jurisdictions over several years.¹⁷⁵ However, the purposes for which an administration order can be made in the UK are relatively wider¹⁷⁶ compared with the requirement of making out a clear case of rehabilitation under South African legislation.¹⁷⁷ The business reorganisation prescribed under Chapter 11 of the US Bankruptcy Code is more comparable with the operation of CVAs and restructuring plans¹⁷⁸ than administration.¹⁷⁹

Under the old regime, administration could only be commenced by a court order.¹⁸⁰ The administrator was appointed by the administration order¹⁸¹ on the grounds that the company was, or was likely to become, insolvent¹⁸² and that administration was likely to achieve rescue of the company (with the whole or part of its undertaking), or the approval of a CVA, or the sanctioning of a scheme, or a more profitable realisation of the company’s assets than would be effected on winding up.¹⁸³ In *Re Consumer and Industrial Press Ltd*,¹⁸⁴ Gibson J interpreted “likely to be achieved” as meaning

¹⁷⁴ See 2.2.1.

¹⁷⁵ L. S. Sealy and D. Milman, *Annotated Guide to the Insolvency Legislation* (4th edn CCH Editions Ltd, Oxford 1994), p 41.

¹⁷⁶ For example, an order can be sought to implement the proposals of a CVA or to secure a more advantageous realisation. L. S. Sealy and D. Milman, *Annotated Guide to the Insolvency Legislation* (4th edn CCH Editions Ltd, Oxford 1994), p 40.

¹⁷⁷ See, for example, *Tenowitz v Tenny Investments* 1979 (2) SA 680.

¹⁷⁸ CA 2006, Part 26A.

¹⁷⁹ See 2.3.1.

¹⁸⁰ IA 1986, s. 8.

¹⁸¹ *Ibid*, s.13(1).

¹⁸² *Ibid*, s. 8(1)(a).

¹⁸³ *Ibid*, s. 8(3).

¹⁸⁴ (1988) 4 BCC 68.

“likely (more probably than not), on balance of probabilities, to be achieved”. But, in *Re Harris Simons Construction Ltd*,¹⁸⁵ Hoffmann J held that the requirements of s. 8(3) would be satisfied where there was “a real prospect” of achieving the purpose(s) of administration. The issue was subsequently resolved in favour of the latter view in *Re SCL Building Services Ltd*¹⁸⁶ and *Re Rowbotham Baxter Ltd*¹⁸⁷ respectively. The decision of the court was primarily based on the evidence of the affidavit in support of the petition¹⁸⁸ and the report (rule 2.2)¹⁸⁹ of an independent IP prepared to assist the court. Although not obligatory its absence required explanation.¹⁹⁰

In essence, under the old regime, administration was commenced and presided over by the court and the administrator was appointed to achieve a specific (statutory) purpose.¹⁹¹ This requirement probably restricted the powers of an administrator and ensured he (or she) acted consistently with the stated objective,¹⁹² albeit the order could be amended on application to the court by the administrator.¹⁹³ So, the function of an administrator of implementing the corporate rescue strategy or otherwise was effectively controlled and directed by the court in black and white. Although the four purposes of administration, under the old regime, did not include a purpose to realise the company’s assets in order to make a distribution, a floating charge holder could either exercise his (or her) power to appoint a receiver and effectively veto administration¹⁹⁴ or refuse to give consent to the making of the order where there was

¹⁸⁵ [1989] 1 WLR 368.

¹⁸⁶ (1989) 5 BCC 746.

¹⁸⁷ [1990] BCC 113.

¹⁸⁸ Insolvency Rules 1986, r 2.3 (“IR 1986”).

¹⁸⁹ IR 1986, r 2.2.

¹⁹⁰ *Ibid*, r 2(3) and (6).

¹⁹¹ IA 1986, s. 8.

¹⁹² L. S. Sealy and D. Milman, *Annotated Guide to the Insolvency Legislation* (4th edn CCH Editions Ltd, Oxford 1994), p 44.

¹⁹³ IA 1986, s. 18(1).

¹⁹⁴ *Ibid*, s. 10(2)(b).

a receiver of the company in office.¹⁹⁵ In this sense, the old regime ostensibly protected the interests of secured creditors at the expense of collective execution and promoting corporate rescue.

3.7 Out-of-Court Appointments: The New Regime

Under the new regime, the administrator has a duty to act “as quickly and efficiently as is reasonably practicable”.¹⁹⁶ However, at times, the need for expedience has occasioned a pre-pack business sale being agreed prior to the company entering administration.¹⁹⁷ As previously highlighted, pre-packs have generated considerable creditor disenfranchisement.¹⁹⁸ The holder of a qualifying floating charge¹⁹⁹ can appoint an administrator out-of-court²⁰⁰ but such an administrator is still an officer of the court even though not appointed by a court order.²⁰¹ In contrast, under the old regime an administrator could only be appointed by a court order on the basis of achieving a specified purpose.²⁰² Although the court is still empowered to make an appointment,²⁰³ the grounds of making the administration order are considerably wider compared with the more precise approach promoted under the old regime.²⁰⁴

Under the old regime, it was not sufficient to show that the company was, or likely to become, insolvent but also that the administration order was reasonably likely to

¹⁹⁵ Ibid, s. 9(3).

¹⁹⁶ Ibid, Sch B1 para 4.

¹⁹⁷ See 3.5.1.

¹⁹⁸ See, for example, P. Walton, ‘Pre-packaged administrations – trick or treat?’ (2006) 19(8) *Insolvency Intelligence*, at 113-122 and A. Keay and P. Walton, *Insolvency Law*, p 130.

¹⁹⁹ The debenture must expressly refer to the application of paragraph 14 or empower the holder to either appoint an administrator or administrative receiver under para 14(2) and relate to the whole or substantially the whole of the company’s property as a single debenture under para 143(a) or more than one under para 14(3)(b)) or by a combination of charges and other forms of security under para 14(3)(c).

²⁰⁰ IA 1986, Sch B1 para 14(1).

²⁰¹ Ibid, para 5.

²⁰² See 3.6 above.

²⁰³ IA 1986, Sch B1 para 10.

²⁰⁴ Ibid, s. 8(3).

achieve the purpose of the administration.²⁰⁵ The purposes²⁰⁶ of making an administration order under the new regime,²⁰⁷ it is argued, have drifted away from the objective and selective approach which promoted a “real prospect of success” under the old regime.²⁰⁸ The administration order, under the new regime, is no longer premised on a clear prospect of corporate rescue or a better realisation for the company’s creditors, but on the reasonable likelihood of achieving company rescue²⁰⁹ or a better result for company’s creditors compared to an immediate winding up²¹⁰ or, if both are not reasonably practicable, “realising the company’s property to make a distribution to one or more secured or preferential creditors”²¹¹ based on the subjective thinking of the administrator.²¹² In *Unidare plc v Cohen*, Lewis J acknowledged that “the process of thinking involves a rational thought process, and in that sense must be reasonable”.²¹³ Surprisingly, his Lordship did not accept that the same standard is applicable to an administrator.²¹⁴ Lord Hoffmann noted that the approach adopted under the new regime effectively render the courts to be powerless by virtue of leaving everything in the hands of the administrator.²¹⁵

For instance, in *Davey v Money & Anor*,²¹⁶ allegations of breach of duty and misfeasance (pursuant to paragraph 75)²¹⁷ brought against the joint administrators for obstructing potential company rescue by advancing the interests of a manipulative and coercive secured creditor were dismissed by the court. Snowden J suggested that the

²⁰⁵ IA 1986, Sch B1 para 11(b).

²⁰⁶ See, for instance, IA 1986, Sch B1 para 3(1)(c).

²⁰⁷ Ibid, Sch B1.

²⁰⁸ Ibid, Part II.

²⁰⁹ Ibid, Sch B1 para 3(1)(a).

²¹⁰ IA 1986, Sch B1 para 3(1)(b).

²¹¹ Ibid, para 3(1)(c).

²¹² Ibid, para 3(3).

²¹³ [2006] 2 BCLC 140 at 71.

²¹⁴ Ibid.

²¹⁵ *Hansard*, vol. 639, 21 Oct 2002 col. 1103.

²¹⁶ [2019] EWHC 997 (Ch).

²¹⁷ IA 1986, Sch B1 para 75.

use of the expression that the administrator thinks “is a clear indication that Parliament intended a degree of latitude to be given to an administrator in deciding on the objective to be pursued, and that he is not lightly to be second guessed by the court with benefit of hindsight”.²¹⁸ In regards to the allegations of breach of statutory duty to pursue the proposed strategy, under paragraph 3 of Schedule B1,²¹⁹ the court held that a defective statement of proposals under para 49(2)(b)²²⁰ does not amount to a breach of duty as long as the administration is conducted in good faith and in a rational manner.²²¹ As a matter of practice, it is quite difficult to prove that the administrator did not satisfy the conditions under paragraph 3.²²²

The purposes of administration have been redrafted to include distribution to secured or preferential creditors.²²³ Yet, as previously explained,²²⁴ administration was intended to be a collective procedure primarily designed to promote corporate rescue²²⁵ as an alternative to wasteful company winding up.²²⁶ While there is a duty to act in the interests of all creditors²²⁷ the administrator may, nonetheless, derogate from the duty pursuant to the objective of making a distribution.²²⁸ Increasingly, administration is being used as a substitute for liquidation (‘quasi-liquidation’) post the EA 2002 reforms. The House of Lords decision in *Re Leyland DAF Ltd (Buchler v Talbot)*,²²⁹ although later reversed by statute,²³⁰ was initially cited as a significant

²¹⁸ *Davey v Money & Anor* [2019] EWHC 997 (Ch), per Snowden J at 255.

²¹⁹ IA 1986, Sch B1 para 3.

²²⁰ *Ibid*, para 49(2)(b).

²²¹ *Davey v Money & Anor* [2019] EWHC 997 (Ch), at 325.

²²² Armour, Hsu and Walters, Impact of EA 2002, at 12.

²²³ IA 1986, Sch B1 para 3(1)(c).

²²⁴ See 2.6.1.

²²⁵ See 3.1.

²²⁶ See the terms of reference of the Cork Committee and recommendations at paragraph 1980.

²²⁷ IA 1986, Sch B1 para 3(2).

²²⁸ *Ibid*, para 3(4).

²²⁹ [2004] 2 AC 298.

²³⁰ CA 2006, s. 1282: expenses of winding up where the assets are insufficient have priority over floating charge holders and are payable out of the assets secured by the floating charge.

contributing factor for the predicament because of the reduced priority of expenses under liquidation.²³¹ Research conducted in 2006 showed a desire for administration on the part of some IPs to save the costs of a CVL or contemplation that a quick sale (piecemeal liquidation) was the optimal way of realising the assets.²³² Based on the IPs own interests, an administration appointment is more secure than in a CVL: in a CVL the initial advisory capacity appointment could be potentially replaced by the nominee of a creditors' committee as liquidator. In contrast, an administrator has eight weeks to formulate and circulate proposals²³³ and can be certain that the expenses (including his or her remuneration) are recoverable from the assets secured by a floating charge.²³⁴

The paragraph 10 procedure used to apply for an administration order resembles the old regime in the sense that it similarly requires an application to the court and preserves the primacy of receivership²³⁵ unless the debenture holder agrees to the appointment of an administrator or, alternatively, if the security is vulnerable under the provisions of IA 1986.²³⁶ Paragraph 15 requires a 2 days' notice to be given to a holder of a prior floating charge²³⁷ or obtaining their consent²³⁸ and paragraph 17 prevents an appointment where a provisional liquidator has been appointed²³⁹ or where an administrative receiver is in office.²⁴⁰ This means an administrative receiver cannot be appointed after the appointment of an administrator but takes precedence if

²³¹ The decision upheld that the general expenses of liquidation are not payable out of floating charge assets but from the company's security free assets.

²³² Armour, Hsu and Walters, *Impact of EA 2002*, at 18.

²³³ IA 1986, Schedule B1 paras 49(5) and 51(2).

²³⁴ *Ibid*, para 99.

²³⁵ The court must dismiss an application where an administrative receiver is in office: *Ibid*, para 39.

²³⁶ Under s. 238 (transactions at an undervalue), s. 239 (preference) or s. 245 (avoidance of certain floating charges).

²³⁷ IA 1986, Sch B1 para 15(1)(a).

²³⁸ *Ibid*, para 15(1)(b).

²³⁹ *Ibid*, para 17(a).

²⁴⁰ *Ibid*, para 17(b).

appointed before the administrator. The power of a floating charge holder is preserved,²⁴¹ albeit the two out-of-court appointment methods under paragraphs 14 and 22 are flexible, quicker and more expedient.²⁴²

Instead of making an application to the court,²⁴³ a qualifying floating charge holder may alternatively appoint an administrator and file a notice of the appointment with the court.²⁴⁴ Compared to the operation of the old regime, the notice of appointment is conceivably a *fait accompli*: the court is not able to adjudicate on the grounds of achieving the purpose(s) of the administration as the appointment has in fact transpired. This critical function of the court has been replaced by a statement setting out the proposals provided by the administrator stating that the purpose of administration is likely to be achieved²⁴⁵ or otherwise.²⁴⁶ Where appropriate the administrator must explain why the objectives in paragraph 3(1)(a) or (b) cannot be achieved.²⁴⁷

Interestingly, it was observed that the majority of out-of-court appointments were often preceded by consultation between the principal secured creditor, insolvency practitioner (IP) and management.²⁴⁸ In 2003, a comparative study of administration and receivership demonstrated that floating charge holders relied on their power of veto of administration in only 2% of the receivership appointments.²⁴⁹ Therefore, the strategy that is frequently adopted may well have been predetermined during the

²⁴¹ Frisby, *In Search of Rescue*, at 259.

²⁴² IA 1986, Sch B1 paras 14 and 22.

²⁴³ *Ibid*, s. 9.

²⁴⁴ IA 1986, Sch B1 para 18(1).

²⁴⁵ *Ibid*, para 18(3)(b).

²⁴⁶ *Ibid*, para 2(b).

²⁴⁷ *Ibid*, para 49(2)(b). In *Davey v Money & Anor* [2019] EWHC 997 (Ch), the court accepted that the omission of an explanation under the paragraph by the administrators made the statement of proposals defective as it did not fulfil the intended goal of reporting and transparency.

²⁴⁸ S. Frisby, *A preliminary analysis of pre-packaged administrations* (2007): Report to the Business Recovery Professionals, at 28.

²⁴⁹ Katz and Mumford, *Comparative Study*, at 8.

course of the pre-appointment consultations²⁵⁰ and subsequently attached to the appointment.²⁵¹ The secured creditors' power of veto of administration has since been replaced with veto rights over the administrator²⁵² and, in so doing, preserving considerable secured creditor influence and dominion. The pre-appointment consultations behind closed doors, it is argued, compromise the objectivity of an IP as the future administrator and potential liquidator as required by the professional and ethical obligations²⁵³ and the equitable rules that govern a fiduciary.²⁵⁴

In further contrast to the old regime, the administrator may realise the company's assets to make a distribution to one or more preferential or secured creditors²⁵⁵ and to an unsecured creditor if it is likely to promote achieving the purpose of administration.²⁵⁶ The purpose of realising assets to make a distribution to a few protected stakeholders is not consistent with the fundamental collective execution which was recommended by the Cork Committee to promote a corporate "rescue culture".²⁵⁷ The function of an administrator of making distributions is essentially a throwback and more reminiscent of the (non-collective) traditional receivership.²⁵⁸

If after the payment of secured and preferential creditors (or some of them) the administrator is satisfied that there are no assets left to make further distributions to

²⁵⁰ Katz and Mumford, *Comparative Study*, at 8.

²⁵¹ Armour, Hsu and Walters, *Impact of EA 2002*, at 10.

²⁵² IA 1986, Sch B1 para 26(1).

²⁵³ The conduct of IPs is governed by five fundamental principles: integrity, objectivity, professional competence and due care, confidentiality and professional behaviour. Insolvency Code of Ethics available at: <https://www.gov.uk/government/publications/insolvency-practitioner-code-of-ethics> [Accessed 13/11/19].

²⁵⁴ The same IP might have carried out material professional work for the client prior to being appointed as administrator which creates the possibility of conflict of interest and duty or duty and duty. See, for example, P. Walton, 'Pre-packaged administrations – trick or treat?' (2006) 19(8) *Insolvency Intelligence* 113, at 118.

²⁵⁵ IA 1986, Sch B1 para 65(3).

²⁵⁶ *Ibid*, para 66.

²⁵⁷ Cork Committee, Ch 9.

²⁵⁸ See 3.3.1.

unsecured creditors it is possible to move from administration to dissolution by simply notifying the Registrar of companies to that effect.²⁵⁹ Once the notice has been recorded, the appointment of the administrator ceases to have effect²⁶⁰ and after three months the company is dissolved.²⁶¹ CVAs are being similarly used for an advantageous winding up.²⁶² The instances where administration is used as ‘quasi-liquidation’ and subsequent dissolution of the company are on the increase. The original theory of corporate rescue is not consistent with winding up or dissolving companies, albeit it is in the public interest that companies which are inefficient, and not economically sustainable, are orderly liquidated and dissolved.²⁶³

Administration (a non-terminal procedure) was intended to be an alternative to winding up and it is a travesty that hopelessly insolvent companies whose viability is questionable wound up in administration. The nature of the original administration²⁶⁴ has indeed changed.²⁶⁵ Under the new regime, there is an inherent element of a predetermined outcome, which is a going concern or pre-pack business rescue in best light and liquidation in worst, mainly due to the extensive powers (like those of a liquidator) bestowed upon the administrator and the inconsistent approach to corporate rescue adopted under the regime. Contrary to the non-collective nature of pre-pack administrations and schemes of arrangements (under Part 26 of the CA 2006),²⁶⁶ the World Bank is not only in favour of collective regimes that are inclusive

²⁵⁹ IA 1986, Sch B1 para 84(1).

²⁶⁰ Ibid, para 84(4).

²⁶¹ Ibid, para 84(6).

²⁶² P. Walton., C. Umfreville and L. Jacobs, *Company Voluntary Arrangements: Evaluating Success and Failure* (2018): Report to the Association of Business Recovery Professionals, at 7.1.

²⁶³ *A Review of Company Rescue and Business Reconstruction Mechanisms*, the Insolvency Service (London: HMSO, 1999); A. Keay, ‘Insolvency Law: A Matter of Public Interest?’ (2000) 51 *Northern Ireland Legal Quarterly* 509. See also 2.3.2.

²⁶⁴ IA 1986, Part II.

²⁶⁵ See, for example, P. Walton, ‘Pre-packaged administrations – trick or treat?’ (2006) 19 *Insolvency Intelligence*, at 115 and A. Keay and P. Walton, *Insolvency Law: Corporate and Personal* (3rd edn Jordan Publishing Ltd, Bristol 2012), p 90.

²⁶⁶ See 2.5.1.5.

and transparent but in fact regard the provision of a preventive restructuring framework (as an alternative to winding up) as a benchmark of international recognition.²⁶⁷ The schemes under Part 26 of CA 2006 were not recognised as collective insolvency proceedings under Annex A of the (recast) EU Regulation on insolvency proceedings.²⁶⁸

3.8 Impact of EA 2002 Reforms on Corporate Rescue

Satisfying the conditions of entering administration is probably easy to deal with out-of-court: the order is no longer founded on a clear possibility but on the reasonable likelihood of achieving corporate rescue.²⁶⁹ Additionally, the wording of sub-paragraph 3(3) explicitly makes it clear that the purpose of administration that is adopted is a matter involving the professional and commercial judgement and subjective thinking of the IP who acts in the capacity of administrator.²⁷⁰ As alluded to above, most IPs are inevitably involved in pre-appointment consultations with the main secured creditor and management of the company prior to their appointment which arguably undermines the integrity of their future decisions as administrators.²⁷¹ Perhaps, as a way of reducing costs, there is no requirement to prepare a rule 2.2 report which, albeit not mandatory, was consistently submitted with the petition under the old regime.²⁷²

The primacy of receivership is preserved with administration under both the court²⁷³ and out-of-court procedures.²⁷⁴ Although the appointment of an administrator by a debenture holder under the new regime is flexible and quick,²⁷⁵ the domination of

²⁶⁷ Armour, Hsu and Walters, Impact of EA 2002, p 5.

²⁶⁸ Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings.

²⁶⁹ See 3.6.

²⁷⁰ IA 1986, Sch B1 para 3(3).

²⁷¹ See 3.7.

²⁷² IR 1986, r 2.2.

²⁷³ IA 1986, Sch B1 para 39.

²⁷⁴ Ibid, para 17(a) and (b).

²⁷⁵ IA 1986, Sch B1 para 14(1).

secured creditors is equally maintained.²⁷⁶ This position is not consistent with the intended collective execution (equality of treatment)²⁷⁷ which was integral to the corporate rescue outcomes which were observed during a few receiverships by the Cork Committee.²⁷⁸ The floating charge holder still retains considerable influence in terms of the appointment and identity of the administrator,²⁷⁹ and through tendering assignments,²⁸⁰ hence the increased likelihood of pre-pack business sales. The predicament highlights the inconsistent approach to corporate rescue adopted under the administration framework:²⁸¹ the provisions prioritise the interests of secured creditors along with an ambiguous public interest.²⁸² The EA 2002 regime essentially maintained the traditional approach of protecting the rights of secured and preferential creditors.²⁸³ Although the new regime is indeed flexible and fast, the special treatment of secured creditors means that the provisions are not entirely collective nor inclusive to genuinely foster a corporate “rescue culture” in practice.

In other words, the EA 2002 reforms have inadvertently recast the administrator to act in the capacity of a receiver in certain circumstances, with no incentive to maximise value,²⁸⁴ contrary to the collective execution which facilitated corporate rescue and led to the adoption of the old regime in the first place.²⁸⁵ The early preference of receivership over administration was primarily motivated by the need for control and certainty more than by the financial realisations, albeit speed and flexibility also

²⁷⁶ For more detail see 3.7.

²⁷⁷ See 1.3.1.

²⁷⁸ See the discussion at 3.3.1.

²⁷⁹ IA 1986, Sch B1 paras 14(1) and 26(1) respectively.

²⁸⁰ Armour, Hsu and Walters, *Impact of EA 2002*, at 24.

²⁸¹ IA 1986, Sch B1.

²⁸² See 2.7.

²⁸³ I. F. Fletcher, ‘UK Corporate Rescue: Recent Developments – Changes to Administrative Receivership, Administration and Company Voluntary Arrangement – The Insolvency Act 2000, The White Paper 2001 and the Enterprise Act 2002’ (2004) 5 *European Business Organisation Law Review*, at 131.

²⁸⁴ See the discussion at 3.2.

²⁸⁵ *Ibid.*

influenced the choice of the procedure.²⁸⁶ As a result of the significant control and influence that can be exerted by a secured creditor, under the new regime,²⁸⁷ the incidences of the regime being used as a substitute for liquidation ('quasi-liquidation') and subsequent dissolution of the corporate entity have increased.²⁸⁸ The provisions allow an administrator to realise the company's assets to make a distribution to secured and preferential creditors²⁸⁹ and thereafter to either liquidate²⁹⁰ or dissolve²⁹¹ the company. A study by Katz and Mumford suggested that a considerable number of administrations under the new regime end up in liquidation as opposed to successful corporate rescue.²⁹²

Early research on the operation of the new regime suggested that there were higher gross realisations in administrations than in pre-EA 2002 receiverships especially where the debenture holder was over-secured at the commencement of the procedure.²⁹³ Nonetheless, the research also found that the new regime was associated with high costs because of the increased accountability and costs related to the new procedural requirements²⁹⁴ which in turn effectively diminished the additional realisations and reduced the creditors' net recoveries.²⁹⁵ Where the secured creditor was under-secured it would be in their best interest to monitor costs but, perhaps, less determined when over-secured.²⁹⁶ Remarkably, the early statistics

²⁸⁶ See 3.3.1

²⁸⁷ See 3.6.

²⁸⁸ Ibid.

²⁸⁹ IA 1986, Sch B1 paras 3(1)(c) and 65.

²⁹⁰ Ibid, para 83.

²⁹¹ Ibid, para 84(1).

²⁹² A. Katz and M. Mumford, *Study of Administration Cases* (2006): Report Prepared for Insolvency Service.

²⁹³ Armour, Hsu and Walters, *Impact of EA 2002*, at 64.

²⁹⁴ Ibid, at iii. These are typically cases in which the duty to act in the interests of all creditors would be more pronounced and IP costs and fees negotiated and approved by numerous and dispersed unsecured creditors.

²⁹⁵ Armour, Hsu and Walters, *Impact of EA 2002*, at 64.

²⁹⁶ Ibid, at 65.

showed that the new regime did not necessarily result in either more companies continuing to trade in administration or corporate rescue outcomes than under the pre-EA 2002 receiverships. Thus, the new regime was neither superior in terms of preserving employment nor at maximising returns for creditors.²⁹⁷ The empirical findings in the next chapter (Chapter 4) will progress the preliminary findings and statistics explored so far. The following discussion examines the effectiveness of the new regime in the light of preventive restructuring adopted in the EU and international principles of best practice.

3.9 Principles of Preventive Restructuring: Directive (EU) 2019/1023

In recent years, here in the UK, and increasingly in Europe and elsewhere, the focus has been to facilitate the preservation of viable and yet financially distressed businesses by providing the necessary corporate rescue tools. The articles of the EU Directive on preventive restructuring and insolvency seek to promote business restructuring at an early stage where there is a likelihood of insolvency and thereby preventing insolvency and achieving continuity.²⁹⁸ Preventive solutions are the developing trend in insolvency law. To the contrary, a company may enter administration when it is, or is likely to become, insolvent.²⁹⁹ There is significant difference between the timing of corporate rescue promoted in the UK and in the EU. The EU Directive on preventive restructuring and insolvency lays down the rules and promotes certain minimum principles of effectiveness restructuring that should be adopted and adjusted into national law to facilitate cross-border recognition of preventive restructuring procedures and enforcements of judgements.³⁰⁰

²⁹⁷ Ibid, at 64-65.

²⁹⁸ Preventive Restructuring Directive, art. 1.

²⁹⁹ See 3.8.

³⁰⁰ Preventive Restructuring Directive and Explanatory Notes at para 13.

As a marker of good insolvency practice, member states should ensure the availability of early warning tools³⁰¹ and access to information.³⁰² Where there is a likelihood of insolvency debtors should have access to preventive restructuring so that they can reorganise and avoid insolvency thereby preserving jobs and maintaining commercial activity.³⁰³ Even though the schemes under Part 26 of CA 2006 and CVAs³⁰⁴ may similarly be adopted for solvent restructuring the absence of a moratorium on creditor actions under the schemes of arrangements and the inability to bind secured creditors (without their consent) in CVAs are both detrimental to the collective execution required for effective restructuring.³⁰⁵ It is for that reason that the schemes of arrangements were not recognised under Annex A of the recast EU Regulation³⁰⁶ on insolvency proceedings.³⁰⁷ Nonetheless, the pre-insolvency moratorium³⁰⁸ and restructuring plans³⁰⁹ are, similar to the preventive restructuring frameworks, intended to promote early reorganisation.

A viability test, as identified by the Cork Committee,³¹⁰ is necessary to exclude debtors that lack the prospect of viability.³¹¹ Where out-of-court procedures are provided,³¹² analogous to the appointments under paragraphs 14 and 22 of Schedule B1,³¹³ member states should ensure that the rights of all stakeholders are protected in a

³⁰¹ For instance, members may make use of information technology (IT) for notification of alerts and communication when a debtor fails to make certain types of payments. Preventive Restructuring Directive, art. 3(2).

³⁰² Preventive Restructuring Directive, art. 3.

³⁰³ Preventive Restructuring Directive, art. 4(1).

³⁰⁴ IA 1986, Sch A1 para 3.

³⁰⁵ See 2.6.2.

³⁰⁶ Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings.

³⁰⁷ See 3.8.

³⁰⁸ CIGA 2020, s. 1.

³⁰⁹ Ibid, Sch 9.

³¹⁰ See 3.2.

³¹¹ Preventive Restructuring Directive, art. 4(3).

³¹² Ibid, art. 4(5).

³¹³ See 3.8.

balanced manner.³¹⁴ As previously observed, the new administration regime does not provide satisfactory protection when the third purpose of realising the company's assets is adopted in order to make a distribution to secured or preferential creditors.³¹⁵ It is difficult to see how an administrator can act in the interests of all creditors³¹⁶ when there is no duty to act in the interests of unsecured creditors when making a distribution to secured or preferential creditors.³¹⁷ Similar to the approach adopted under a pre-insolvency moratorium and restructuring plan,³¹⁸ Article 5 provides that a debtor should remain in control of the company's assets and daily operations of the business (as a debtor in possession) to encourage early restructuring, similar to Chapter 11 of the US Bankruptcy Code,³¹⁹ and that an IP should only be appointed where warranted.³²⁰

In order to support successful restructuring, debtors must benefit from a stay of individual enforcement actions comparable to the moratorium imposed during administration³²¹ and under the standalone restructuring moratorium.³²² The stay of actions must encompass all types of claims including secured and preferential claims³²³ with the exception of workers claims.³²⁴ Where it can be justified, for example, if enforcement is not likely to jeopardise restructuring, member states may exclude certain types of claims.³²⁵ In order to balance the rights of debtors and creditors, the initial duration of the stay must be limited³²⁶ and the total duration

³¹⁴ Preventive Restructuring Directive, art. 4(6).

³¹⁵ See the analysis at 3.8.

³¹⁶ IA 1886, Sch B1 para 4(b).

³¹⁷ IA 1986, Sch B1 para 3(4).

³¹⁸ See 2.2.

³¹⁹ Ibid.

³²⁰ Preventive Restructuring Directive, art. 5(1) and (2).

³²¹ IA 1986, Sch B1 para 43.

³²² CIGA 2020, s. 1.

³²³ Preventive Restructuring Directive, art. 6(2).

³²⁴ Ibid, art. 6(5).

³²⁵ Ibid, art. 6(4).

³²⁶ Ibid, art. 6(6).

including extensions and renewals must not exceed 12 months.³²⁷ This provision is generally in harmony with the provisions of a paragraph 43 moratorium³²⁸ and the pre-insolvency moratorium.³²⁹

Article 17 ensures that any rescue finance is adequately protected in case the debtor subsequently becomes insolvent.³³⁰ This is similar to the “super priority” proposal (ranking ahead of other expenses) which was intended to shield any debt finance secured during the 12-month restructuring period but eventually not implemented by the legislature under CIGA 2020.³³¹ Similarly, transactions that are reasonable and necessary to a restructuring plan should not be declared void or unenforceable.³³² Where there is a likelihood of insolvency directors must have regard to the interests of creditors and other stakeholders, act in order to avoid insolvency, and show responsible corporate behaviour by abstaining from negligent conduct.³³³ The directors’ duty to act in the interests of creditors under the UK’s corporate insolvency framework is triggered when the directors know or ought to know that the company is, or expected to become, insolvent.³³⁴ In addition, the judiciary and IPs involved with preventive restructuring should receive suitable training and appropriate oversight and regulation should be provided to ensure that IPs act impartially and independently.³³⁵

³²⁷ Preventive Restructuring Directive, art. 6(8).

³²⁸ IA 1986, Sch B1 para 43.

³²⁹ CIGA 2020, s. 1.

³³⁰ Preventive Restructuring Directive, art. 17.

³³¹ See A Review of the Corporate Insolvency Framework available at: <https://www.gov.uk/government/consultations/a-review-of-the-corporate-insolvency-framework> [Accessed 20/12/2021]. However, a sum payable in respect of a debt or liability arising out of a contract entered into by an administrator who vacates office before cessation shall be payable in priority to any charge. IA 1986, Sch B1 para 99.

³³² Preventive Restructuring Directive, art. 18(1).

³³³ Ibid, art.19.

³³⁴ See the decision of the Court Appeal in *BTI 2014 LLC v Sequana SA and others* [2019] EWCA Civ 112 at 2.5.

³³⁵ Preventive Restructuring Directive, art. 27(1).

The new regime was intended to be more collective and inclusive,³³⁶ but to the contrary the regime has replaced the old-style receivership.³³⁷ The changes which were introduced by the EA 2002 do not necessarily make the new regime incompatible with the collective regimes prescribed, for example, under Annex A of the (recast) EU Regulation on insolvency proceedings. But, bearing in mind the history of what transpired when creditors were in charge of the administration of insolvent estates³³⁸ and the rationale behind the transformation of a receiver of income to a receiver and manager,³³⁹ the new regime is not immune to be manipulated. However, the restructuring provisions, under CIGA 2020, and the Preventive Restructuring Directive do not only use the same terminology and identical provisions,³⁴⁰ but precisely adopt the same approach of promoting restructuring prior to the onset of insolvency.³⁴¹ That should incentivise the incumbent Government to stay aligned with the EU common market for easy movement of capital and investment post Brexit. Either way, preventive (business) restructuring is increasingly gaining traction to be ignored.

3.10 Principles of the World Bank and *Doing Business* Report 2020

In wake of the financial crisis of the late 1990s, and with the mandate of the international community, the World Bank developed the Principles of Effective Insolvency and Creditor/Debtor Regimes in 2001 (“the Principles”) and at the time constituted the universally acknowledged standards.³⁴² Increasingly, businesses have evolved to become international in nature which means that insolvencies now have

³³⁶ See 3.1.

³³⁷ See 3.2.

³³⁸ See, for a classical example, 1.9.1 (Failure of the Act of 1869).

³³⁹ See 3.2.

³⁴⁰ The phrase “cross class cram down” is also adopted in the Preventive Restructuring Directive.

³⁴¹ See 2.3.1.

³⁴² The World Bank available at: <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/936851468152703005/the-world-bank-principles-and-guidelines-for-effective-insolvency-and-creditor-rights-systems> [Accessed 23/05/22].

global implications.³⁴³ The Principles of the World Bank sets out the benchmark for assessing the effectiveness of domestic insolvency regimes³⁴⁴ based on best practice. The Principles promoted by the World Bank have been revised to reflect evolving best practice based on real-world experience and further consultation: the latest review was conducted in 2015.³⁴⁵ Nonetheless, in 2021, World Bank Group took the decision to discontinue the *Doing Business* Report and has since embarked on formulating a new approach for assessing the business and investment climate in economies worldwide through a new project called Business Enabling Environment (BEE).

3.10.1 Key Elements of the Principles

According to the Principles, an effective insolvency system should treat similarly situated creditors in like manner (as prescribed by the *pari passu* principle)³⁴⁶ and aim to reorganise viable businesses and to strike a balance between liquidation and reorganisation.³⁴⁷ As previously observed, under the new regime, the distinction between administration and liquidation is becoming increasingly blurred.³⁴⁸ The Principles of the World Bank promote a quick and easy access to formal or informal reorganisation of viable businesses: there should be a collective and equally protective environment which allows negotiations to take place and for the decision of the majority to bind all creditors including dissenting minorities.³⁴⁹ The corporate rescue framework adopted in England and Wales, under administration, similarly provides an

³⁴³ The World Bank available at: <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/936851468152703005/the-world-bank-principles-and-guidelines-for-effective-insolvency-and-creditor-rights-systems> [Accessed 23/05/22].

³⁴⁴ Ibid.

³⁴⁵ Ibid.

³⁴⁶ See 1.2.

³⁴⁷ Ibid.

³⁴⁸ See 3.8.

³⁴⁹ The World Bank available at: <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/936851468152703005/the-world-bank-principles-and-guidelines-for-effective-insolvency-and-creditor-rights-systems> [Accessed 23/05/22].

equivalent mechanism to promote company rescue where possible, albeit, subject to “realising the company’s property in order to pay a preferential or secured creditor.”³⁵⁰

A key principle (enforcement of unsecured rights) promoted by the World Bank encourages insolvency regimes that impose a moratorium, akin to the frameworks adopted in the EU and the UK, to protect the assets of a debtor for the benefit of all stakeholders.³⁵¹ A paragraph 43 moratorium, under the new regime,³⁵² and the standalone moratorium for companies experiencing financial difficulties³⁵³ generally achieve the goal set out by this Principle. However, distributions under the new regime are in favour of secured and preferential creditors³⁵⁴ which means that the new regime is not entirely collective in practice.³⁵⁵ The Principles of the World Bank prioritises the rights of secured creditors in the same manner as discussed earlier with respect to their consent to be bound, for example, in a CVA.³⁵⁶

Even though insolvency law is not dogmatic³⁵⁷ the Principles recognise the importance of designing a system to achieve specific objectives because of the diverse commercial expectations which exist in a dynamic market.³⁵⁸ In the UK context, since the most commonly achieved corporate rescue outcome is business rescue it is worth reconsidering the efficacy of the existing company rescue policy. Although the existing corporate insolvency policy is consistent with the international principles of best

³⁵⁰ See 3.8.

³⁵¹ World Bank, *The World Bank principles and guidelines for effective insolvency and creditor rights systems* (2001) Washington DC: World Bank, at 18.

³⁵² IA 1986, Sch B1 para 43.

³⁵³ CIGA 2020, s. 1.

³⁵⁴ IA 1986, Sch B1 para 3(1)(c).

³⁵⁵ See the analysis at 3.8.

³⁵⁶ See 2.6.2.

³⁵⁷ Cork Committee, para 196.

³⁵⁸ The World Bank available at: <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/936851468152703005/the-world-bank-principles-and-guidelines-for-effective-insolvency-and-creditor-rights-systems> [Accessed 23/05/22].

practice, the preferential treatment of a few creditors, which is not conducive to effective corporate rescue, undermines the effectiveness of the administration regime. According to the World Bank *Doing Business* Report 2020, since 2006 more than 40 economies around the world have adopted reforms implementing or strengthening reorganisation procedures to Resolve Insolvency.³⁵⁹ The UK's ease of Doing Business score increased from 82.22 from the survey in 2018 to the 2020 figure of 83.5 based on 12 areas of business regulation that comprise Starting a Business through to Resolving Insolvency.³⁶⁰ The ambition of the Government of being in the top five in the world was not attained (and with the discontinuance of the World Bank rankings, never will be).³⁶¹ The UK actually slipped in the overall rankings from 7th to 8th according to the last *Doing Business* Report in 2020.³⁶² The provision of restructuring procedures that ensure the survival of viable businesses has been one of the most common regulatory changes in the past 17 years: fourteen of the top 20 performing economies allow a viable business to continue operating as a going concern despite becoming insolvent.³⁶³

The failure rates of SMEs are drastically reduced and the liquidation of insolvent but viable businesses avoided where reorganisation procedures have been adopted into national insolvency frameworks.³⁶⁴ International principles of best practice require a

³⁵⁹ *Doing Business* 2020 Report available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf> [Accessed 14/11/19].

³⁶⁰ The indicators for resolving insolvency include time, cost, outcome and recovery rate for a commercial insolvency and the strength of the legal framework for insolvency.

³⁶¹ The 2015 Conservative Party election manifesto referred to the business regulatory regime advocated by the *Doing Business* 2020 Report.

³⁶² The full report is available at: <https://www.worldbank.org/en/news/feature/2019/10/24/doing-business-2020-sustaining-the-pace-of-reforms> [Accessed 20/11/19].

³⁶³ *Doing Business* 2020 Report available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf> [Accessed 14/11/19].

³⁶⁴ Ibid.

reorganisation plan to propose debt restructuring among other standard procedures such as providing a stay of actions and collective execution of a debtor's property.³⁶⁵ After the financial crisis at the end of the 20th century it became necessary to identify underlying viability in order to resolve insolvency³⁶⁶ as similarly identified in the UK by the Cork Committee.³⁶⁷ A reorganisation provides the minimum principles that enable financially distressed companies to restore their viability with better tools to successfully negotiate debt and maximise returns for creditors.³⁶⁸ The availability of restructuring provisions is associated with higher lending to the private sector and investment growth as a percentage of the Gross Domestic Product (GDP): the *Doing Business* Report 2020 observed that lending is particularly driven by the protection of creditor rights for moveable property through efficient monitoring (collateral registries) and enforcement (possibly out-of-court enforcement).³⁶⁹

3.11 UNCITRAL Model Law

The United Nations Commission on International Trade Law (UNCITRAL) developed, with the assistance of the International Association of Insolvency Practitioners (INSOL) and Committee J (Insolvency) of the section on Business Law of the International Bar Association, a Model Law which it adopted on 30 May 1997.³⁷⁰ To aid its implementation, UNCITRAL issued a 'Guide to Enactment of the Model Law on Cross-

³⁶⁵ *Doing Business* 2020 Report available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf> [Accessed 14/11/19].

³⁶⁶ Ibid.

³⁶⁷ See 3.3.1.

³⁶⁸ Reorganisation procedures increase the overall recovery rate from 27 to 72 cents on the \$1 based on a standardised methodology which measures domestic limited liability companies only. The highest recovery rates were recorded in economies where reorganisation is a common proceeding.

³⁶⁹ *Doing Business* 2020 Report available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf> [Accessed 14/11/19].

³⁷⁰ Accessible at: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf> [Accessed 10/03/2022].

Border Insolvency³⁷¹ and Legislative Guide which delivers a broad statement of the key objectives and principles that should be represented in national insolvency law.³⁷²

The Model Law is intended to inform and assist insolvency reform by providing a reference tool for national authorities and legislative bodies in addressing cross-border insolvency proceedings.³⁷³ In a bid to promote universalism, the Model Law focuses on four key elements: access, recognition, relief (assistance) and cooperation.³⁷⁴

Nevertheless, the UNCITRAL Model law, unlike EU law, is not binding and countries around the world are free to decide whether to adopt it with (or without) modifications. It is, however, hoped that countries will adopt the Model Law with a few modifications so that uniformity is maintained.³⁷⁵ There is no restriction on the jurisdiction to which recognition and assistance may be given, unlike under s. 426 of IA 1986 which is only applicable to a limited number of designated jurisdictions.³⁷⁶ The Model Law is procedural in effect rather than attempting the unification of substantive insolvency law. Its articles are given effect under English law by the Cross-Border Insolvency Regulations 2006 (“Regulations”).³⁷⁷ Crucially, the articles of the Model Law, like the recast EU Insolvency Regulation,³⁷⁸ only apply to collective insolvency proceedings. While the number of nations which have adopted the Model Law continues to grow,

³⁷¹ See UNCITRAL available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration [Accessed 23/05/22].

³⁷² Ibid.

³⁷³ Ibid.

³⁷⁴ Ibid.

³⁷⁵ Article 8 states that: “In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith”.

³⁷⁶ “The courts having jurisdiction in relation to insolvency law in any part of the UK shall assist the courts having corresponding jurisdiction in any part of the UK or any relevant country or territory”. IA 1986, s. 426(4). Relevant country or territory means any of the Channel Islands or the Isle of Man or any country or territory designated for the purposes of this section by the Secretary of State by order made by statutory instrument. IA 1986, s. 426(11).

³⁷⁷ SI 2006/1030.

³⁷⁸ Regulation (EU)2015/848 of the European Parliament and of the Council on insolvency proceedings.

besides the UK, only four Member States (Poland, Greece, Romania, and Slovenia) of the EU have implemented the Model Law.

The UK's withdrawal from the EU means that the automatic recognition of insolvency proceedings across the region is no longer available.³⁷⁹ The relationship between the UK and the EU is now regulated by the EU-UK Trade and Cooperation Agreement (24 December 2020) which was implemented by the European Union (Future Relationship) Act 2020. Post Brexit, foreign representatives or creditors or other interested persons (who have an interest in requesting the commencement of or participating in an insolvency proceeding under UK law) may seek recognition and assistance from the UK courts by applying under Schedule 1 of the Regulations which implemented the Model Law in the UK. There is no requirement for reciprocity and so a representative from a foreign country that has not adopted the Model Law may also seek recognition and assistance in connection with foreign proceedings under the Regulations. Alternatively, foreign practitioners may seek recognition of foreign proceedings by relying on the principles of common law. Common law judicial assistance does not require reciprocity and it is also available to countries that do not fall within the scope of s. 426 of IA 1986. Conversely, officeholders from the UK may seek assistance from a court in foreign state that has adopted the Model Law for recognition.³⁸⁰ But, since most EU member states have not adopted the Model Law it means that, in the absence of alternative bilateral arrangements, the domestic private international law rules of each member state will apply.

³⁷⁹ British voters opted to withdraw from the EU on 23 June 2016. However, the withdrawal was only given effect at the end of the transition/implementation period by the European Union (Withdrawal Agreement) Act 2020 on 31 December 2020 at 23:00 hours UK time.

³⁸⁰ Regulations, Sch 1.

The latest part of the Model Law was established in 2013 and focuses on the obligation of managing insolvent enterprises.³⁸¹ Under the articles of the Model Law, directors have a duty to act early when insolvency is imminent or unavoidable through restructuring to avoid insolvency or commencing winding up in order to minimise potential losses to creditors and the company (including its shareholders).³⁸² This early approach promoted under the articles of the Model Law is similar to the approach adopted in the EU under the articles of the Preventive Restructuring Directive.³⁸³

3.11.1 The Future for Corporate Rescue

The growing new trend in corporate insolvency is to prevent insolvency, for example, by making provision for flexible preventive restructuring tools that encourage directors to engage early, contrary to the old school approach of attempting to salvage the wreck.³⁸⁴ Under the existing corporate insolvency framework, there are comparative restructuring mechanisms, albeit the restructuring provisions, under both Parts 26 and 26A of CA 2006, are not necessarily designed for collective execution and, in fact, the former were not recognised under Annex A of the recast EU Insolvency Regulation³⁸⁵ for that very reason. On the other hand, administration may only be triggered by the advent of insolvency or a high likelihood of becoming unable to pay debts as they fall due.³⁸⁶ Perhaps, as mitigation to the “hard Brexit” on corporate insolvency and restructuring,³⁸⁷ by virtue of falling outside the jurisdiction of the recast EU Insolvency

³⁸¹ See UNCITRAL Legislative Guide on Insolvency Part four: Directors’ obligations in the period approaching insolvency available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-11273_part_4_ebook.pdf [Accessed 23/05/22].

³⁸² Ibid.

³⁸³ See 3.10.

³⁸⁴ See 1.8 for the approach that was adopted by the Board of Trade during drafting of the Act of 1883. *Hansard*, 3rd ser. (1883), cclxxvii. 817.

³⁸⁵ Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings.

³⁸⁶ IA 1986, s. 123(1)(e).

³⁸⁷ K. Stephenson, ‘Addressing Post-Brexit of Cross-Border Limitations of Restructurings and Insolvency Proceedings in Europe (2021) 18(1) Int. C.R.I.

Regulation³⁸⁸ and preventive restructuring frameworks,³⁸⁹ both the articles of the Model Law and restructuring plans, under Schedule 9 of CIGA 2020, critically promote collective execution and early preventive restructuring respectively.

3.12 Conclusion

The early transformation of receivership to administrative receivership allied with the creation of a floating charge over the undertaking of a company cemented the notion of secured creditor control in English corporate insolvency proceedings,³⁹⁰ notwithstanding the traditional power of a mortgagee to appoint a receiver of income.³⁹¹ A receiver and manager appointed by a floating charge holder over the undertaking (present and future assets) of a company was empowered to continue trading and to sell the company's business as a going concern in the absence of a duty to the company and other stakeholders to seek an optimum outcome.³⁹² Ironically, the Cork Committee's recommendation of the appointment of an administrator was inspired by the possibility of extending the unfettered control exercised by a receiver and manager to promote a corporate "rescue culture".³⁹³ But, unlike a receiver and manager, an administrator would primarily attempt company rescue or achieving a better result by acting in the interests of all creditors.³⁹⁴ The EA 2002 reforms, in particular the third purpose of making a distribution to preferential or secured creditors,³⁹⁵ have arguably revived the domination of secured creditors,³⁹⁶

³⁸⁸ Regulation (EU) 2015/848 on insolvency proceedings.

³⁸⁹ Directive (EU) 2019/1023 of the European Parliament and of the Council on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).

³⁹⁰ See 3.3.

³⁹¹ See 1.11.

³⁹² See 3.4.2.

³⁹³ Cork Committee, para 495.

³⁹⁴ IA 1986, Sch B1 para 3(2).

³⁹⁵ *Ibid*, para 3(1)(c).

³⁹⁶ See 3.8.

despite the abolition of receivership,³⁹⁷ contrary to promoting and facilitating a corporate “rescue culture” as intended.³⁹⁸

Despite the fact that a receiver and manager was not obliged to act in the interests of the general body of creditors or to consider reorganisation³⁹⁹ sometimes viable businesses and employment were preserved during receivership and thereby promoting the interests of all stakeholders.⁴⁰⁰ On the other hand, the old regime never realised its full potential as a corporate rescue vehicle because of the time and cost involved in obtaining a court order.⁴⁰¹ The EA 2002 amendments were therefore aimed at streamlining the regime in order to improve the corporate rescue landscape or achieving better outcomes for the creditors.⁴⁰² Contrariwise, the out-of-court appointments have resuscitated the dominance of secured creditors, previously mitigated by the court,⁴⁰³ in addition to making the administration procedure more expedient.⁴⁰⁴ The court is no longer involved in approving the administrator’s proposals and it is submitted that the corporate rescue outcomes under the new regime essentially depict the outcomes observed under receivership.⁴⁰⁵

It is arguable that the scope of the power given to an administrator to decide on the strategy to be adopted may be too wide.⁴⁰⁶ Since an administrator can be influenced by a dominant secured creditor, and bearing in mind the historical outcomes of private

³⁹⁷ See 3.4.2.

³⁹⁸ White Paper, *Productivity and Enterprise: Insolvency – A Second Chance*, The Insolvency Service (London: HMSO, 2001) Cmnd 5234, para 2.5. See also Explanatory Notes of the EA 2002, para 642.

³⁹⁹ See 3.1.

⁴⁰⁰ The preliminary statistics collected in 2006 highlighted receiverships performed better than the new regime in terms of the corporate rescue outcomes. See 3.4.1.

⁴⁰¹ P. Walton, ‘Pre-packin’ in the UK’ (2009) 18(2) *International Insolvency Review*, at 88.

⁴⁰² See 3.5.

⁴⁰³ See 3.6.

⁴⁰⁴ See 3.8.

⁴⁰⁵ See 3.4.1.

⁴⁰⁶ For example, Bloom and Harris acknowledged that administrators enjoy exceptional powers in the administration of insolvent companies. A. Bloom and S. Harris, ‘Pre-packaged administrations – what should be done given the current disquiet?’ (2006) 19 *Insolvency Intelligence*, at 123.

arrangements where a dominant creditor exercised significant control over the assignee or trustee,⁴⁰⁷ the odds of achieving company rescue under the new regime are very slim.⁴⁰⁸ When the Cork Committee recommended administration it was encouraged by the outcomes of receiverships where the commercial enterprise or part of the business was preserved.⁴⁰⁹ The positive corporate rescue outcome under the new regime is business rescue,⁴¹⁰ but many administrations are either converted to a CVL⁴¹¹ or moved to dissolution following a distribution to one or more secured or preferential creditors.⁴¹²

The appointment of a receiver and manager with extensive powers over the company's assets facilitated corporate rescue even though receivership was not a collective insolvency procedure. It was imagined that an IP who would act in the interests of all creditors (as an administrator) with the primary objective of rescuing the company as a going concern made perfect sense. In an attempt to make the administration provisions more rescue-oriented the reforms, under the EA 2002, have re-established traditional receivership – the very mischief administration was intended to initially complement and later on replace.

It is concluded that the EA 2002 reforms did not improve the corporate rescue environment as intended. To the contrary, the streamlined regime has bolstered the position of secured creditors. The new regime is clearly not fit for purpose in practice. Far more companies are either liquidated or dissolved during administration compared

⁴⁰⁷ The earliest statutory provision for a composition in 1697 was repealed the following year on grounds of abuse and a second attempt had to wait until 1825 because Parliament and the courts adopted the view that any arrangements other than under a bankruptcy commission were fraudulent. See 1.5.3.

⁴⁰⁸ Corporate rescue also proved to be an elusive concept in jurisdictions where similar schemes were attempted prior to the introduction of administration in England and Wales. See 3.7.

⁴⁰⁹ See 3.1.

⁴¹⁰ See 3.8.

⁴¹¹ IA 1986, Sch B1 para 83.

⁴¹² *Ibid*, para 3(1)(c).

with the statistics of successful company rescue. The Schedule B1 framework is not entirely collective or inclusive compared with the operation of a restructuring plan designed to cram down dissenting creditors to promote effective corporate rescue. The corporate rescue approach adopted in the UK is based on a test of insolvency which is contrary to the solvent restructuring promoted under the Preventive Restructuring Directive, Chapter 11 of the US Bankruptcy Code and principles of the World Bank and indicators of resolving insolvency. Nonetheless, the collective execution which can be achieved under a restructuring plan⁴¹³ is more compatible with the early restructuring and collective regimes adopted elsewhere and in line with the developments of financial markets.⁴¹⁴ It is highly desirable for Parliament to put the money where its mouth is rather than going round in circles reinventing the same wheel. In the meantime, the UK is slipping in the pecking order of the best places to do business in the world. Hence, it is imperative to review and reform the administration provisions⁴¹⁵ to maintain a competitive edge and stay abreast of international (corporate rescue) trends.

The quantitative study in the next chapter (Chapter 4) is intended to generate new knowledge by studying the operation and outcomes of the administration provisions⁴¹⁶ in practice. Thus, the empirical findings will either validate or disprove the preliminary findings in this chapter. In addition to conducting a comprehensive literature review, it is also essential to appreciate how the administration framework operates in practice and, if any, the social and economic impact of the provisions based on the empirical

⁴¹³ CA 2006, Part 26A. See also 2.5.1.2.

⁴¹⁴ See 3.9 and 3.10.

⁴¹⁵ IA 1986, Sch B1.

⁴¹⁶ Ibid.

evidence prior to making any meaningful conclusions and desirable recommendations.

Part II

Chapter 4

4. Administration Empirical Research: Corporate Rescue Outcome Analysis

4.1 Introduction

The empirical research in this chapter primarily seeks to investigate the outcomes of the corporate rescue provisions under Schedule B1 (“the new regime”) of Insolvency Act 1986 (“IA 1986”). Contrary to company rescue, the prevalent outcome observed in Chapter 3 was business rescue in best light, and liquidation in worst,¹ reminiscent of the outcomes under traditional receiverships.² As previously noted in Chapter 2, empirical research on the success and failure of company voluntary arrangements (CVAs) highlighted that more than 65% arrangements were prematurely terminated.³ Hence, this research intends to break new ground by examining an ostensibly unlikely corporate rescue procedure namely creditors’ voluntary liquidations (CVLs)⁴ subject to the first exception⁵ to the restriction on re-use company names.⁶

Voluntary liquidations often see the assets of an insolvent company (“oldco”) acquired by a connected party⁷ and the business continued using the same name or a similar

¹ Under Sch B1 para 3(1)(c), an administrator may realise the company’s assets to make a distribution to one or more secured or preferential creditors and, thereafter, either liquidate the company (IA 1986, Sch B1 para 83) or dissolve it where there are no assets left to make a distribution thereby effectively acting as a liquidator. IA 1986, Sch B1 para 84.

² See 3.4.

³ P. Walton., C. Umfreville and L. Jacobs, *Company Voluntary Arrangements: Evaluating Success and Failure* (2018): Report to the Association of Business Recovery Professionals. See 2.6.2.

⁴ In 2019 there were a total of 17, 225 company insolvencies consisting of 12, 058 creditors’ voluntary liquidations (CVLs) compared to 3,001 compulsory liquidations (CLs), 1, 814 administrations, 351 CVAs and one administrative receivership. Company Insolvency Statistics available at: <https://www.gov.uk/government/collections/company-insolvency-statistics-releases> [Accessed 09/01/21].

⁵ Insolvency (England and Wales) Rules 2016, r 22.4 (“IR 2016”).

⁶ IA 1986, s. 216.

⁷ In this context, a connected party includes the debtor, or a party connected to the debtor or company as defined under ss 249 and 435 (as an associate) of IA 1986 in accordance with the definition provided by the Statement of Insolvency Practice 13 (SIP 13), para 11.

name (“newco”) - essentially depicting a similar phoenix company.⁸ This is permissible under the first legislative exception⁹ to the restriction on re-use of company names.¹⁰ Therefore, in addition to the evaluative research of ‘traditional’ and pre-packaged administrations (“pre-packs”),¹¹ the operation and outcomes of CVLs - where the business of oldco was acquired from the liquidator and continued using the same or a similar name¹² - will be examined through a corporate rescue lens. The purpose of the empirical study is to assess the effectiveness of the administration provisions¹³ to promote corporate rescue in practice or, alternatively, the other two procedures under review, bearing in mind the effectiveness of CVAs,¹⁴ reform of the corporate insolvency framework,¹⁵ developments in the EU¹⁶ and contemporary restructuring trends.¹⁷

⁸ Between 2017 and 2019 an average of 786 CVLs were subject to the first exception (IR 2016, r 22.4) to the restriction on re-use company names (s. 216 of IA 1986) in each year. See the *Gazette* available at: <https://www.thegazette.co.uk/insolvency/notice> [Accessed 27/04/21]. See 2.6.3 for a definition of phoenixing provided by the Insolvency Service (IS) and a more detailed discussion.

⁹ IR 2016, r 22.4. The other two exceptions are where the concerned director obtains the permission of the court (IR 2016, r 22.6) to re-use a prohibited name within 7 days of entering insolvency and where the same or similar name has been used by another company continuously for 12 months before the liquidation of oldco: IR 2016, r 22.7.

¹⁰ IA 1986, s. 216.

¹¹ See *DKLL Solicitors v HMRC* [2008] 1 BCLC 112 for the first instance of judicial approval of pre-packs. The latest empirical work on pre-packs was prepared in 2014 by P. Walton and C. Umfreville, ‘Pre-pack Empirical Research: Characteristic and Outcome Analysis of Pre-pack Administration (2014)’ available at: <https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration> [31/10/19].

¹² IR 2016, r 22.4.

¹³ IA 1986, Sch B1.

¹⁴ P. Walton., C. Umfreville and L. Jacobs, *Company Voluntary Arrangements: Evaluating Success and Failure* (2018): Report to the Association of Business Recovery Professionals.

¹⁵ Corporate Insolvency and Governance Act 2020 c. 12 (“CIGA 2020”).

¹⁶ Directive (EU) 2019/1023 of the European Parliament and of the Council on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency). See 3.10.

¹⁷ World Bank *Doing Business 2020* Report available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf> [Accessed 10/03/20]. See 3.11.1.

In recent times, it has been suggested that administration is the new liquidation¹⁸ and vice versa.¹⁹ It also transpires that CVAs are being frequently adopted as a distributional scheme rather than as a corporate rescue tool.²⁰ Hence, by adopting a wide scope, this research is designed to either confirm or dispel the notion of a convergence of the principal corporate insolvency procedures in England and Wales.²¹ It is envisioned that the findings of the extensive research will provide a solid foundation for the recommendations intended to inform practice and future policy considerations in the next chapter.

Voluntary liquidation is a terminal procedure and yet the preservation of the business of oldco while leaving a trail of unpaid debts is similar to administration where the business is sold as a going concern ahead of a liquidation²² or dissolution.²³ As will be demonstrated below, key features associated with the practice of re-using company names²⁴ are notoriously identical with the set-up and operation of pre-packaged administrations.²⁵ In the light of the findings of the research on CVAs²⁶ the outcome comparative analysis of 'traditional' administrations and pre-packs will not include

¹⁸ A. Keay, 'The future for liquidation in light of the Enterprise Act reforms?' [2005] *Journal of Business Law* 143. See 2.6.3.

¹⁹ A. Keay and P. Walton, 'British Steel: is it a wind up?' (2019) 4 *Corporate Rescue and Insolvency* 125. See 2.6.3.

²⁰ P. Walton., C. Umfreville and L. Jacobs, *Company Voluntary Arrangements: Evaluating Success and Failure* (2018): Report to the Association of Business Recovery Professionals, at 12.

²¹ A receiver is empowered to continue and sell the business of an insolvent company which often leads to a winding up. It is widely accepted that administration is frequently used as quasi-liquidation and that some CVAs are similarly being adopted as a distribution mechanism rather than as a corporate rescue tool. The main corporate insolvency procedures in the UK translate into a sale of the company's business to a connected party through a pre-pack followed by a liquidation or dissolution at the expense of the general body of creditors.

²² IA 1986, Sch B1 para 83.

²³ *Ibid*, para 84.

²⁴ IR 2016, r 22.4.

²⁵ Besides the common aspect of a business sale to a connected party there is an inherent element of a pre-determined outcome under both procedures. See, for instance, 3.8.

²⁶ P. Walton., C. Umfreville and L. Jacobs, *Company Voluntary Arrangements: Evaluating Success and Failure* (2018): Report to the Association of Business Recovery Professionals. See the discussion at 2.6.2.

CVAs but comprise CVLs subject to the first exception²⁷ to the restriction on re-use company names.²⁸ Nonetheless, reference to the CVA research findings will be made where it is either deemed to be necessary or appropriate.

It is highly likely that business rescue, which is the most common outcome achieved under the new regime,²⁹ is a result of the administration being adopted to “achieve a better result for the company’s creditors as a whole than would likely if the company were wound up” (without first being in administration).³⁰ The third objective of realising the company’s assets to pay one or more secured or preferential creditors³¹ is potentially a pre-cursor to winding up or dissolution³² as demonstrated by the primary analysis in Chapter 3.³³ In addition to the empirical study, this chapter intends to shed more light on administrations adopted to achieve the primary statutory purpose of company rescue.³⁴ The empirical research in this chapter builds on knowledge gleaned from the early empirical reports in the previous chapter.³⁵ Since the most recent empirical work in those reports was conducted by the University of Wolverhampton in 2014, the findings in this chapter will thus generate new knowledge to reinforce and progress the preliminary findings.³⁶

4.2 Methodology

For simplicity, the empirical research is divided into three main parts. Part A (subdivided into traditional administrations and pre-packs) and Part B (CVLs subject to the

²⁷ IR 2016, r 22.4.

²⁸ IA 1986, s. 216.

²⁹ *Ibid*, Sch B1. See the preliminary analysis at 3.4.

³⁰ *Ibid*, para 3(1)(b).

³¹ *Ibid*, para 3(1)(c).

³² See, for instance, 2.2.

³³ See 3.4.

³⁴ IA 1986, Sch B1 para 3(1)(a).

³⁵ See 3.1.

³⁶ See the analysis at 3.4.1.

exception to re-use company names)³⁷ comprise the quantitative data collection, break-down and analysis for each procedure. The pre-packaged administrations and CVLs data set will provide counterfactual data for an outcome comparative analysis with 'traditional' administrations under Part C. The comparative analysis entails deducing the data findings under Part A and Part B into a statistical summary and comparing the respective outcomes through a corporate rescue lens. The comparison is intended to provide an evaluation of the fitness for purpose of the administration regime to promote company rescue³⁸ in practice or, alternatively, pre-packs or the use of the main exception³⁹ to restriction on re-use company names⁴⁰ during CVLs.

The data gathering and analysis in Part A are focused on two samples of 100 'traditional' administrations and the same number of pre-packs⁴¹ commenced after 6 April 2017.⁴² The selection of the date particularly allows for a sneak preview into the operation of the new Insolvency Rules in England and Wales⁴³ and is simultaneously conducive for a regression analysis (of at least 30 months)⁴⁴ in relation to the outcomes. Moreover, a review of the operation of the selected procedures under the new rules (IR 2016) is intended to provide some comparison with the operation under the old rules (Insolvency Rules 1986).⁴⁵

³⁷ IR 2016, r 22.4.

³⁸ IA 1986, Sch B1 para 3(1)(a).

³⁹ IR 2016, r 22.4.

⁴⁰ *Ibid.*

⁴¹ This data was purchased using funds kindly provided by the University of Wolverhampton Law Research Centre from Geoff Swire who produces different schedules of insolvency information for insolvency professionals in the UK and collaborated with company records on Companies House database. Companies House available at: <https://www.gov.uk/government/organisations/companies-house> [Accessed 26/11/20].

⁴² The Insolvency (England and Wales) Rules 2016 (SI 2016/1024) came into force on 6 April 2017 (see rule 1).

⁴³ IR 2016.

⁴⁴ To avoid any distortions caused by the impact of lockdown measures announced on 23 March 2020 in response to the coronavirus (COVID-19) global pandemic the original observational period of 36 months was slightly adjusted to terminate 6 months early on 1 January 2020.

⁴⁵ Insolvency Rules 1986 (SI 1986/1925).

A sample size of 100 companies for each selected procedure was considered as more or less representative of the entire population and, therefore, a dependable model. Information on several variables was entered onto a database and the following data variables were recorded for companies which entered administration:

1. The name of the company, registered number, and sector
2. The size and location of the company
3. The date of commencement
4. Nature of appointment
5. The type of security: fixed, floating (or a combination), or asset-based lending.
6. Insolvency Practitioner (IP) information: identity of IP and their firm and any prior involvement
7. The amount of unsecured debt
8. The level of unsecured returns
9. Corporate rescue outcome

The information on pre-packs was retrieved from Statement of Insolvency Practice 16 (SIP 16) reports and verified with the records held by the Companies Registrar.⁴⁶ This data virtually resembles the information collected for traditional administrations, albeit additional information on valuation of assets, marketing and price of business sales were gathered from SIP 16 reports. Since traditional administrations do not involve a pre-arranged business sale, the price of post appointment going concern sales will be compared with the price of pre-pack business sales and business and/or asset sales in CVLs.

⁴⁶ See Companies House available at: <https://www.gov.uk/government/organisations/companies-house> [Accessed 13/04/2020].

Part B examines the nature, operation and outcomes of 100 CVLs - where a legal notice to re-use a company name was published by a director or connected party in the *Gazette*⁴⁷ - through a corporate rescue lens. The research identified newcos using the information provided by the concerned directors in the legal notices required under the secondary legislation⁴⁸ which authorise the re-use of company names by directors of failed companies. The commercial footprints of each phoenix company were followed, and the outcomes observed after a period of 30 months. The following data were collected from legal notices published in the *Gazette* (post IR 2016 coming into force)⁴⁹ and from progress reports and final accounts filed by IPs at Companies House:

1. Company name, registered number, and sector
2. The size of the company
3. The name and location of the concerned director
4. Date of commencement of insolvency
5. The prohibited name(s)
6. Date of notice to re-use prohibited name
7. The composition of debt and amount of unsecured debt
8. IP information
9. Whether an independent valuation and marketing were conducted prior to the sale of assets
10. Business/assets sale price
11. Declaration of unsecured dividend

⁴⁷ In 2018, 807 legal notices to re-use a company name were published in the *Gazette* available at: <https://www.thegazette.co.uk/> [Accessed 20/02/20].

⁴⁸ IR 2016, r 22.4(2).

⁴⁹ The new rules came into force on 6 of April 2017 and the administration and pre-pack samples were, accordingly, selected from the same period.

12. Outcome/Newco survival

Part A

4.3 Survival of the Company under Schedule B1 Provisions

The Report of the *Insolvency Law and Practice: Review Committee*⁵⁰ (hereinafter “the Cork Committee”) recommended the preservation of viable enterprises,⁵¹ but the primary purpose of administration is to rescue a company as a going concern.⁵² A study of administration commissioned by the Insolvency Service (IS) in 2006 observed that successful company rescue was rare in practice and usually achieved outside formal insolvency proceedings.⁵³ The findings of preliminary research also highlighted a significant increase in the use of pre-packs and administration being used as a substitute for liquidation (quasi-liquidation)⁵⁴ post EA 2002 reforms.⁵⁵

Pre-packs are typically used to “achieve a better result for the company’s creditors as a whole than would be likely if the company were wound up (without first being in administration)”.⁵⁶ The controversial practice is frequently used to pre-arrange for the business of an insolvent company to be sold to the incumbent management.⁵⁷ As previously explained, the third purpose of administration⁵⁸ usually precipitates a winding up or dissolution.⁵⁹ Hence, this study intends to investigate the numbers of

⁵⁰ Cmnd 8558 (1982).

⁵¹ Cork Committee, para 198(j). See 2.2.

⁵² IA 1986, Sch B1 para 3(1)(a).

⁵³ J. Armour, A. Hsu and A. Walters, *The Impact of the Enterprise Act 2002 on Realisations and Costs in Corporate Rescue Proceedings* (2006): A Report Prepared for the Insolvency Service.

⁵⁴ See 3.4.

⁵⁵ See, for instance, A. Katz and M. Mumford, *Study of Administration Cases* (2006): Report Prepared for Insolvency Service.

⁵⁶ IA 1986, Sch B1 para 3(1)(b).

⁵⁷ See, for instance, 3.8.

⁵⁸ IA 1986, Sch B1 para 3(1)(c).

⁵⁹ See the discussion at 3.8.

administrations which are specifically adopted to rescue the company⁶⁰ and the outcomes.

The quantitative research randomly identified 100 'traditional' administrations commenced post the IR 2016 coming into force. The purpose of each administration was noted from the information provided by the administrators in their proposals to the company's creditors.⁶¹ The conduct of each administration procedure was followed through the subsequent reports filed by administrators and the outcomes observed after a period of 30 months. The following sections critically analyses key characteristics of the administrations which were examined under the empirical study.

4.3.1 Method of Appointment

An administrator was appointed out of court by directors (67%)⁶² or a qualifying floating charge holder (28%)⁶³ in 97 administrations, with only three appointments being made by the court⁶⁴ (see Figure 1 below). One of the applications to court was made by a floating charge holder as an unsecured creditor (under paragraph 12) because of concerns over the validity of the security. In a unique scenario, an administrator was appointed by a company in its legal capacity as a trustee of an insolvent charitable business and in another exceptional case by the designated members of a limited liability partnership (LLP). In both cases, the administrators were appointed out of court (under para 22).

⁶⁰ IA 1986, Sch B1 para 3(1)(a).

⁶¹ Ibid, para 49.

⁶² Ibid, para 22.

⁶³ Ibid, para 14.

⁶⁴ Ibid, para 10.

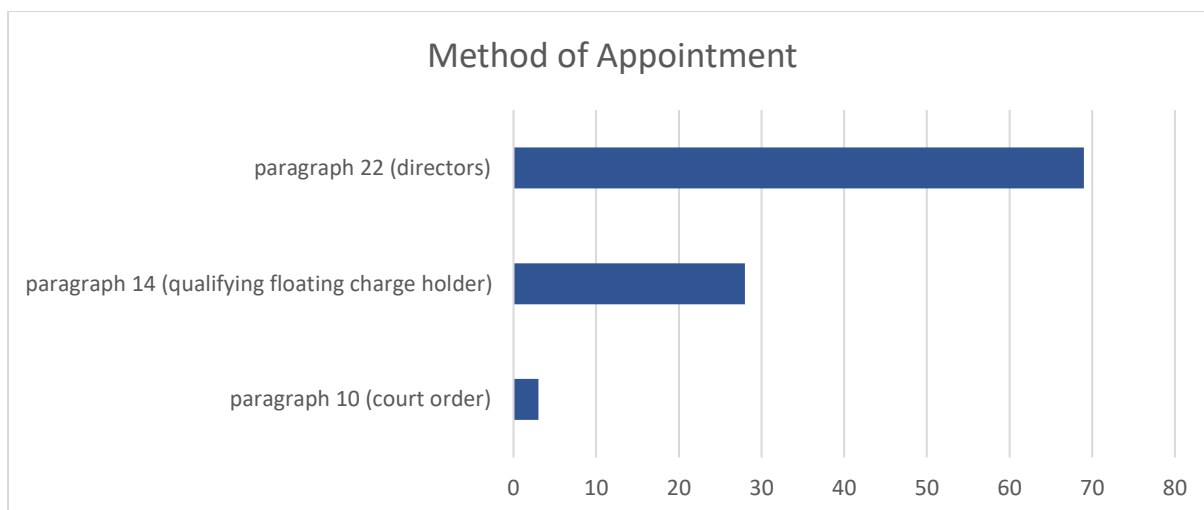


Figure 1

4.3.2 Purpose of Administration

The second statutory purpose of “achieving a better result for the company’s creditors as a whole than would be likely if the company were wound up (without first being in administration)”⁶⁵ was adopted in 58% of the administrations (see Figure 2 below). The second most adopted statutory purpose (38%) was “realising the company’s property in order to make a distribution to one or more secured or preferential creditors”.⁶⁶ Remarkably, the primary statutory purpose of rescuing a company as a going concern⁶⁷ was adopted in only four administrations. Most administrators alluded to a general lack of interest in the shares of an insolvent company, the prominent levels of indebtedness or lack of funding (rescue finance) as the main reasons for not attempting company rescue. In the four administrations where the administrators proposed to rescue the company as a going concern it was achieved in two cases. In one of the successful cases of corporate rescue the asset realisations achieved a value which was more than the unsecured debt and the other situation involved a

⁶⁵ IA 1986, Sch B1 para 3(1)(b).

⁶⁶ *Ibid*, para 3(1)(c).

⁶⁷ *Ibid*, para 3(1)(a).

group of (gold and platinum) mining companies with substantial assets in more than one jurisdiction (see the discussion below at 4.9.1.3).

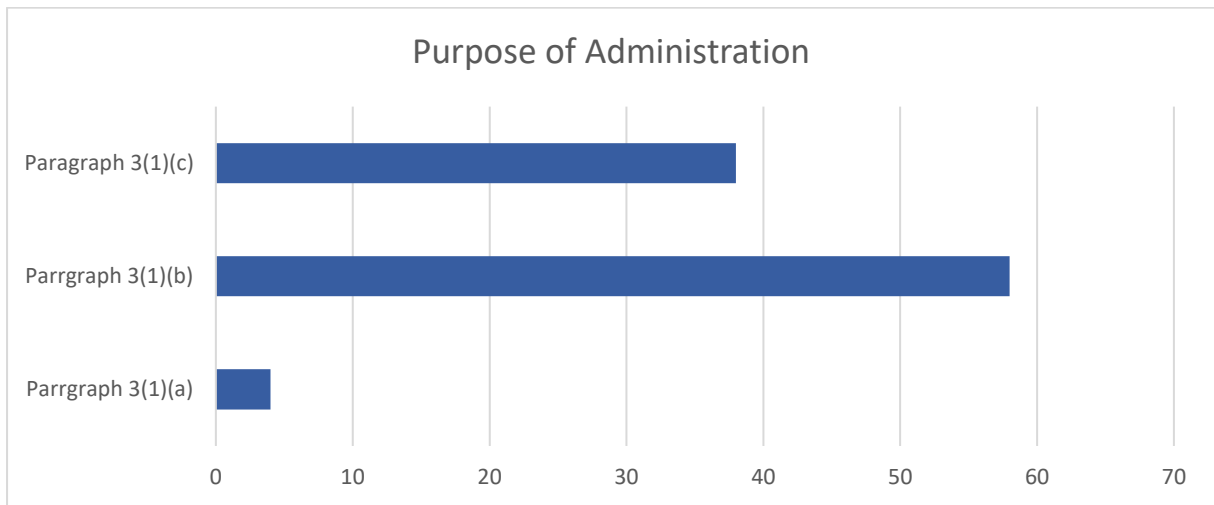


Figure 2

4.3.3 Age of Company

A quarter of the companies (23%) which were observed were less than 5 years old. Nevertheless, the combined total of the older companies that were aged over 10 years, including thirteen companies aged over 31 years, was significantly higher (59%). The average age of the companies at the time of entering administration was 27.68 years.

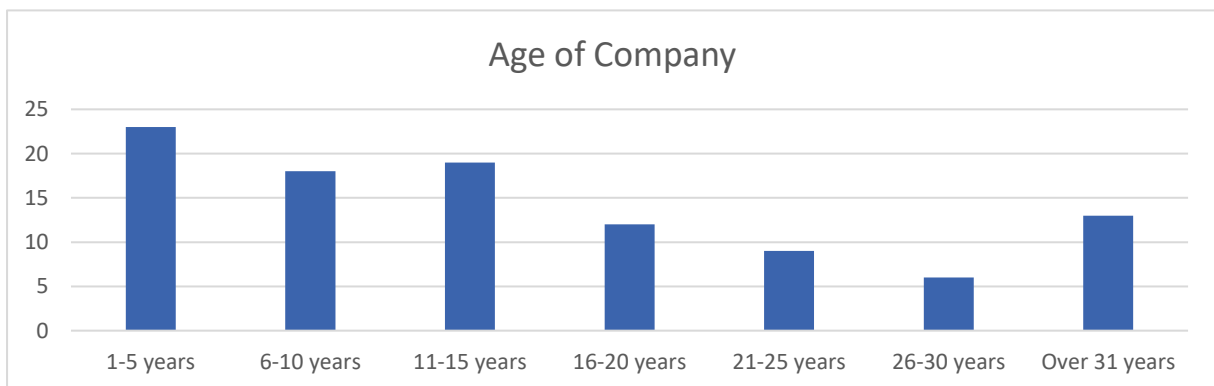


Figure 3

4.3.4 Level of Unsecured Debt

The amounts of unsecured debt documented were greater than £1 million in almost half (45%) of the administrations (see Figure 4 below). In four cases the company owed unsecured creditors a debt over £10 million and the highest debt observed was just over £77 million. Nonetheless, the level of unsecured debt was less than 500K in at least 35 administrations.

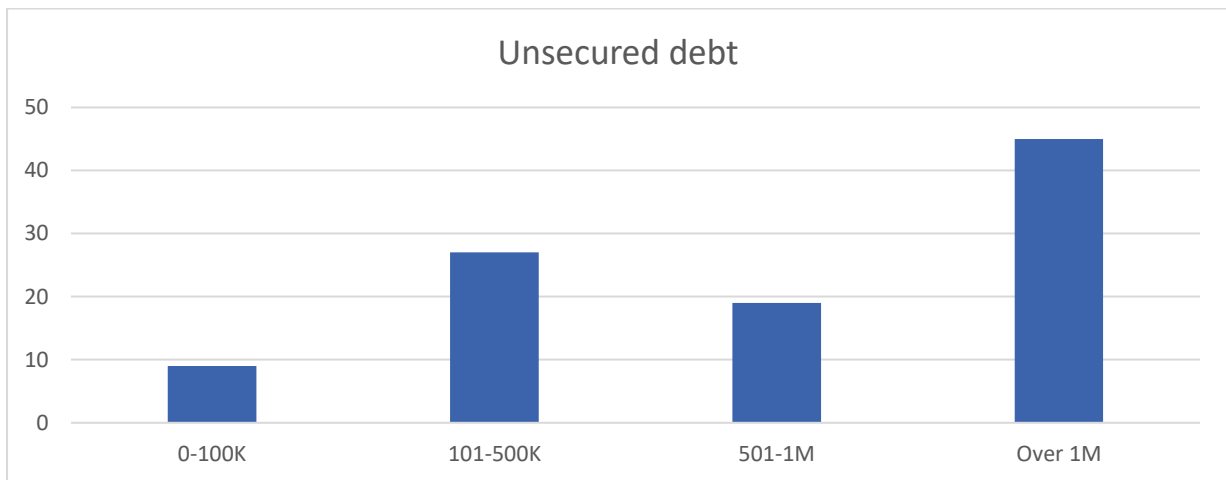


Figure 4

4.3.5 Asset Realisations

Most of the companies observed owned tangible assets, a *chose in action* or intellectual property. The administrators were able to realise the company's assets in 97% of the administrations, with only three instances where no tangible assets were declared (see Figure 5 below). Notably, the bulk of the asset realisations (67%) achieved a sum below £250K, including eight proceedings in which less than £10K was generated. However, 10% of the asset realisations raised between £251K – 500K, six achieved between £501K – 1 million and 14% of the realisations generated over £1 million.

The company's business and assets were sold as a going concern in 26 administrations. The going concern sale price was 30K or less in ten proceedings (38% of the total). A total of six going concern sales achieved between £60K - £80K and a further nine sales realised between 120K - £895K. The highest going concern sale price of £4,150,000 was in relation to the sale of the business of two connected companies.

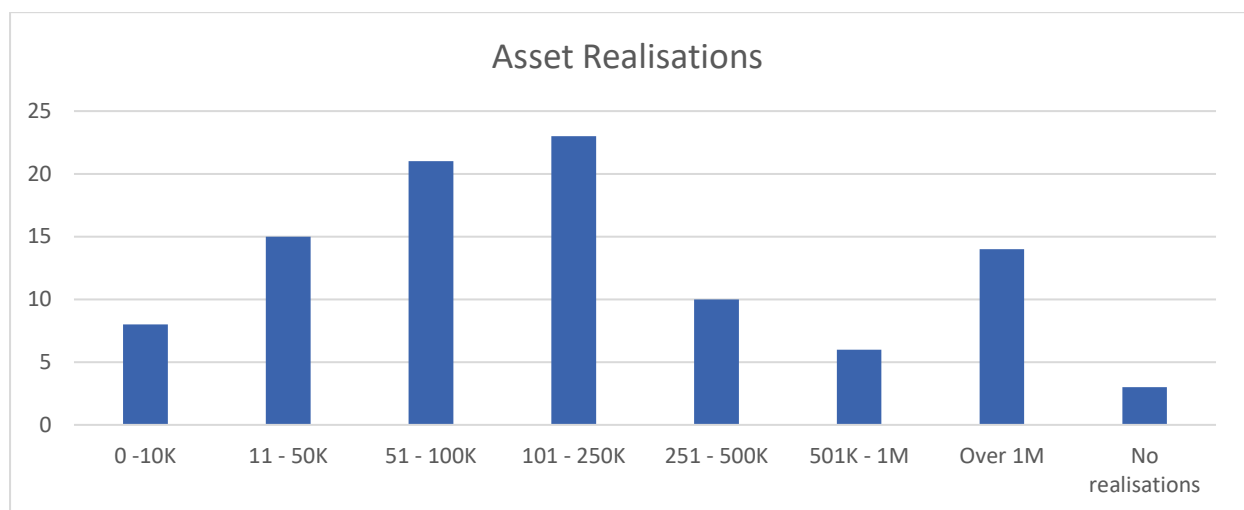


Figure 5

4.3.6 Unsecured Dividend

Unsecured creditors did not receive a dividend in 47 administrations of which 43 proceedings moved straight to a dissolution, two were converted to CVLs and no dividend was declared in two compulsory liquidations. A dividend was anticipated where either the administration or a subsequent CVL (a total of 30 proceedings) was still ongoing after 30 months. A non-preferential dividend was declared in 23 administrations. However, almost half of the dividends were less than 5p in £ (see Figure 6 below). A dividend of 100p in the £ was declared in three of the four administrations where a dividend of over 50p in £ was declared.

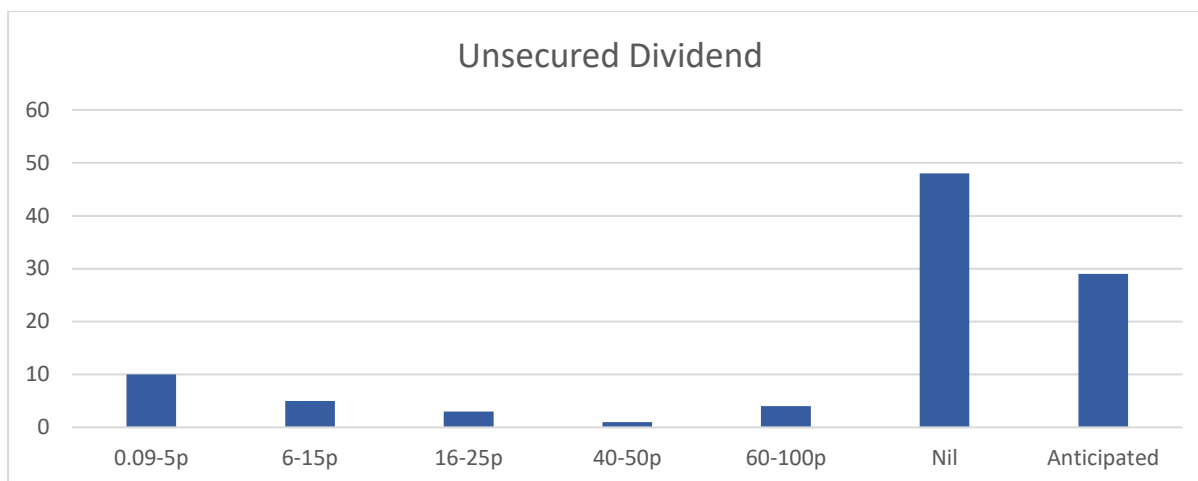


Figure 6

4.3.7 Insolvency Practitioner (IP) Firm Appointments

The success and outcome of an insolvency procedure is largely dependent on the expertise and professional and ethical attributes of an insolvency practitioner (IP).⁶⁸ In the exercise of their duties, it is imperative for IPs (as fiduciaries)⁶⁹ to maintain high professional and ethical standards so that the confidence of stakeholders and the public is not extinguished.⁷⁰ A total of 48 IP firms - including two of the “Big Four”⁷¹ accounting firms - were engaged in the 100 ‘traditional’ administrations which were reviewed. Prior to accepting an insolvency appointment, an IP is required to determine whether acceptance would create any threats to compliance with the fundamental principles.⁷² Of particular importance are threats to the fundamental principle of

⁶⁸ L. Jacobs, *Corporate insolvency practitioners, ethics and remuneration: Not a case of moral bankruptcy?* (2020): Special Report to INSOL International.

⁶⁹ IPs owe fiduciary duties to the creditors of the company and should also consider the interests of other stakeholders during rescue proceedings. *Ibid.*

⁷⁰ For a more detailed discussion of the code of conduct and ethics of IPs see L. Jacobs, *Corporate insolvency practitioners, ethics and remuneration: Not a case of moral bankruptcy?* (2020): Special Report to INSOL International.

⁷¹ The “Big Four” is the nickname used to refer to the four largest multi-national professional services networks consisting of Deloitte, Ernst & Young, KPMG and PricewaterhouseCoopers. In May 2022, KPMG sold its UK Restructuring practice, known as Interpath Advisory, to HIG Europe, the European affiliate of HIG Capital, LLC.

⁷² To protect and promote the public interest insolvency practitioners are required to comply with five fundamental principles of ethics: integrity, objectivity, professional competence and due care, confidentiality and professional behaviour. See the Insolvency practitioner code of ethics available at:

objectivity created by conflicts of interest. Although most of the IP firms (30) were engaged in a single appointment, a total of 18 IP firms conducted multiple appointments. However, half of the IP firms which took multiple appointments (eight) were only involved in a maximum of two administrations. The highest number of multiple appointments conducted by a single IP firm was nine.

4.3.8 Duration of Administration

A total of 32 administrations ended after the stipulated 12 months duration.⁷³ However, almost a quarter of the proceedings (23) endured for less than 12 months. On the other hand, an application to extend the period of administration⁷⁴ was filed in 45 proceedings (see Figure 7 below). The reasons for making the applications varied. The realisation of assets was not completed on time in most large administrations involving subsidiary companies and, occasionally, there were ongoing legal actions either to recover book debts or payments from parties with previous dealings with the companies. A few administrators requested to extend the administration to finalise outstanding complex and time-consuming issues. For example, it was deemed necessary to extend the administration of a law firm to enable the director to complete criminal aid work which improved the value of the company's assets. The shortest administration was conducted in 5 months prior to being converted to a CVL. A total of 11 administrations were still ongoing after 30 months.

<https://www.gov.uk/government/publications/insolvency-practitioner-code-of-ethics>
04/05/21].

⁷³ IA 1986, Sch B1 para 76(1).

⁷⁴ Ibid, para 76(2).

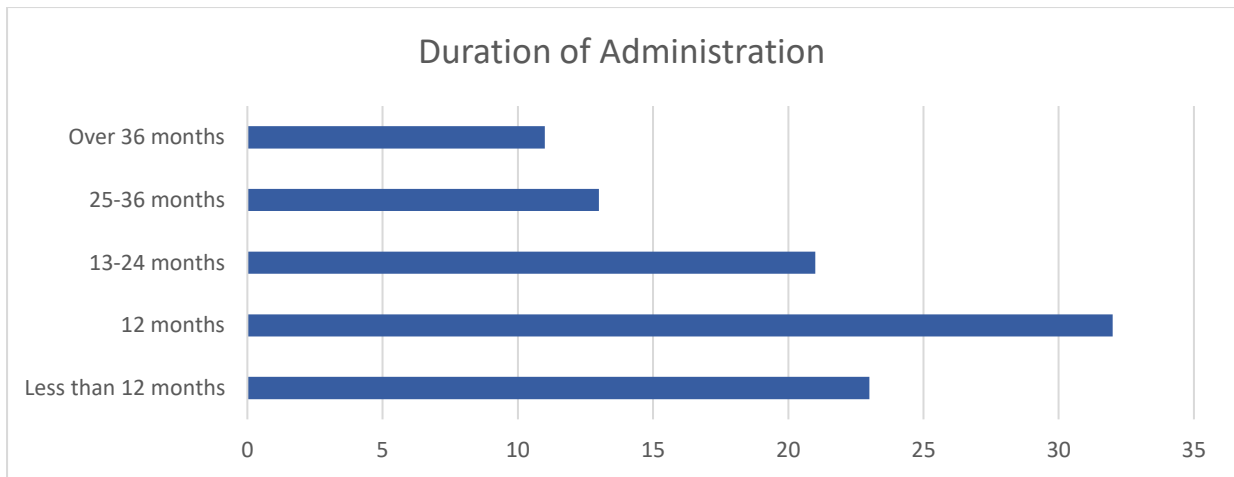


Figure 7

4.3.9 Company Rescue Outcomes

Out of the 100 traditional administrations observed only two companies were successfully rescued. In both instances, the administration lasted for at least 36 months. Nevertheless, in almost half of the administrations (47%) the companies were subsequently dissolved and in a further 37 administrations the companies were liquidated (see Figure 8 below). The court made an order for the compulsory liquidation of two companies and a total of 11 companies were still in administration after 30 months. It is noteworthy that a CVA was only proposed as part of a rescue strategy in one administration, but it was not adopted in any administration. CVAs are most popularly adopted by small companies. This observation is consistent with the findings of the research that was conducted on CVAs in 2018.⁷⁵

⁷⁵ The research observed that 93% of companies that used a CVA were small or micro companies of which only 1.4% first entered administration. P. Walton., C. Umfreville and L. Jacobs, *Company Voluntary Arrangements: Evaluating Success and Failure* (2018): Report to the Association of Business Recovery Professionals.

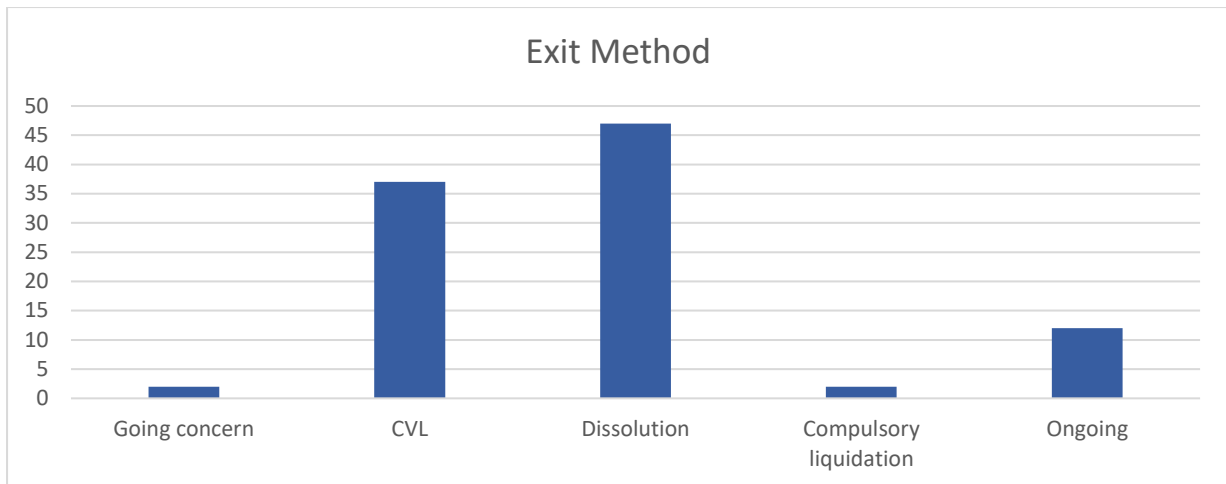


Figure 8

4.3.9.1 Business Rescue

The company's assets were either realised to achieve a better result for the company's creditors as a whole⁷⁶ or to pay one or more secured or preferential creditors.⁷⁷ The realisations were conducted on a piecemeal basis in two thirds of the administrations (66) whereas the whole or a part of the company's business and assets were sold as a going concern in 29 proceedings. The company's business and assets were sold to a connected party in a total of 5 going concern sales. Apart from the two going concern sales where the administrators did not provide the details of the purchasers, the company names of the purchasers and whether they were a connected party were clearly stated in 27 sales. The overwhelming majority of administrators followed the guidance provided by Statement of Insolvency Practice 13 (SIP 13) concerning disposal of assets to connected parties in an insolvency process.

A total of 22 out of 27 known purchasers, including four connected companies, were actively trading after the observational period of 30 months. Nevertheless, one

⁷⁶ IA 1986, Sch B1 para 3(1)(b).

⁷⁷ *Ibid*, para 3(1)(c).

purchaser was subsequently placed in administration after trading for over 24 months and two companies entered creditors' voluntary liquidation during the same period. In addition, one company was dissolved after 24 months and there was an active proposal to strike off one dormant company on 1 January 2020.

4.4 Pre-packaged Administrations (Pre-packs)

A pre-pack administration occurs where a deal to sell all or part of the company's business or assets is agreed prior to the appointment of an administrator.⁷⁸ The arrangement usually preserves the business and at least some connected jobs,⁷⁹ notwithstanding that the company does not survive after its business is sold. The statutory framework of administration, under IA 1986, does not make provision for pre-packs. Even so, the practice was approved by the court in *DKLL Solicitors v HMRC*.⁸⁰ Pre-packs can be an important restructuring tool; in certain circumstances the speed and secrecy involved may represent the only viable option of extracting value for creditors.⁸¹ Unlike the business sales under traditional administrations, which must generally be approved by creditors as part of the administrator's proposals,⁸² the general body of creditors is deprived of the opportunity to review a pre-pack business sale.⁸³ In a bid to improve transparency, the Joint Insolvency Committee (JIC) introduced the Statement of Insolvency Practice 16 (SIP 16).⁸⁴ However, the

⁷⁸ See, for example, P. Walton, 'Pre-packaged administrations – trick or treat?' (2006) 19 *Insolvency Intelligence*, at 113.

⁷⁹ The Transfer of Undertakings (Protection of Employment) Regulations (SI 2006/246) apply to pre-packaged business sales. See the discussion above at 3.2.

⁸⁰ [2008] 1 BCLC 112. See the discussion at 3.2.

⁸¹ S. Frisby, 'A preliminary analysis of pre-packaged administrations' (2007): Report to The Association of Business Recovery Professionals, at 6.

⁸² IA 1986, Sch B1 para 49.

⁸³ See *Re Kayley Vending Limited* [2009] BCC 578 per Cooke HHJ at 583.

⁸⁴ SIP 16 requires the administrator to disclose the full details of his prior involvement with the company, an explanation of the marketing of the business conducted, alternative options considered before the decision to pre-pack was reached, whether the main creditors were consulted and full details of the sale including the price.

disclosure required by SIP 16 is provided to creditors after the execution of a pre-pack deal and conceivably a *fait accompli*⁸⁵ hence the disquiet surrounding pre-packs still lingers.⁸⁶

The purpose of analysing pre-packs under this study is to evaluate the effectiveness of the controversial practice from a corporate rescue standpoint based on the numbers of successful business rescues. The research initially identified administrations commenced in April 2017 and selected pre-packs based on the information contained in the administrators' proposals and SIP 16 reports. The research also gathered data on the number of employees who were transferred to the purchasers and whether the Pre-Pack Pool was approached for its opinion by connected parties. Where this information was available the purchasers' progress was tracked, and the corporate rescue outcomes observed after a period of 30 months. The following discussion examines key characteristics and outcomes of 100 pre-pack arrangements.

4.4.1 Method of Appointment and Purpose of Pre-pack

An administrator was appointed by a holder of a qualifying floating charge in 17 pre-packs and by directors in 83 pre-packs. Where the directors made an appointment the qualifying floating charge holder either consented to, or did not oppose, the appointment. The courts were not involved in the appointment of any administrator who sold the company's business in a pre-pack arrangement.

The purpose of a pre-pack was to "achieve a better result for the company's creditors as a whole than would be likely if the company were immediately wound up (without

⁸⁵ See *Re Kayley Vending Limited* [2009] BCC 578.

⁸⁶ The sunset clause on potential pre-pack regulation under para 60A of Sch B1 (which expired in May 2020) was extended to June 2021 by s. 8 of CIGA 2020.

first being in administration)⁸⁷ in 78% of the proceedings while 22% of the pre-packs were executed as part of the strategy of realising property to pay one or more preferential or secured creditors.⁸⁸ In almost all of the pre-packs, the administrators fully explained the rationale behind adopting a pre-pack and demonstrated how the pre-arranged deal represented a better return for the company's creditors as a whole compared with the other available options.⁸⁹

4.4.2 Age of company

More than half (57) of the companies whose business was sold in a pre-pack business sale were less than 10 years old. Nonetheless, a quarter of the companies were aged between 11 - 20 years (see Figure 9 below) and a further 14% between 21 - 40 years. Only four companies had been trading for more than 41 years before the business was sold in a pre-pack arrangement. The average age of the companies which used a pre-pack administration was 13.30 years.

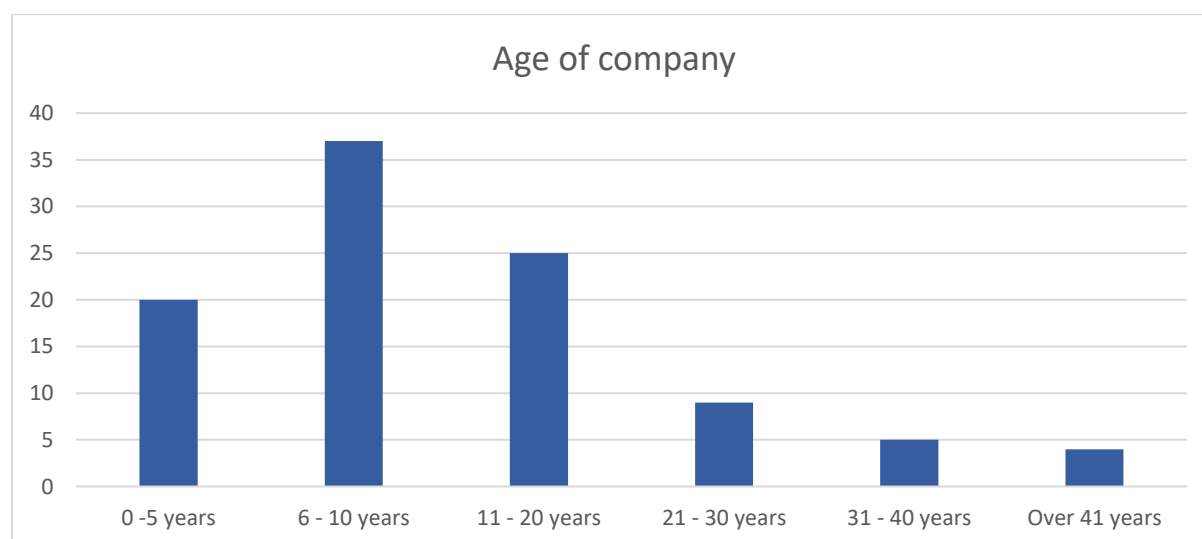


Figure 9

⁸⁷ IA 1986, Sch B1 para 3(1)(b).

⁸⁸ *Ibid*, para 3(1)(c).

⁸⁹ This is in line with the requirements of SIP 16. See the discussion above at 4.4.

4.4.3 Unsecured Debt

In a substantial proportion of administrations (45) where a pre-pack deal was adopted the companies owed unsecured creditors between £101K - £500K (see Figure 10 below). Only four companies declared unsecured debt below £100K. In 25 pre-packs the companies declared unsecured debts between £501K - £1 million and in a further 25 arrangements unsecured creditors were owed over £1 million. The highest unsecured debt observed for the sample was more than £36 million.

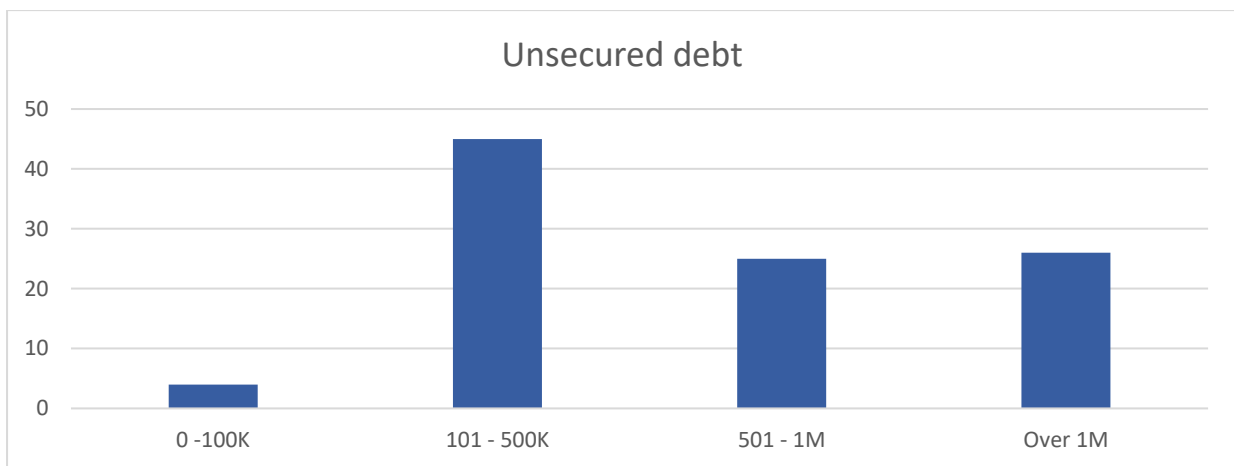


Figure 10

4.4.4 Pre-pack Sale Price

In the most common category observed, the company's business and assets were sold in a pre-pack deal for a price of between £31K - £50K. The pre-pack sale price was £50K or less in 58 sales, including 20 pre-packs where the consideration was £20K or less (see Figure 11 below). However, a substantial number (16) of pre-packs fetched between £101K - £500K, six realised between £500K and £1 million and a further six pre-packs were sold for over £1 million. Interestingly, the highest sale price of £21 million was achieved in the case where the highest amount of unsecured debt

(£36 million) was also observed (see 4.4.3 above). Almost half of the pre-pack sales (48%) included an element of deferred consideration.



Figure 11

4.4.5 Unsecured Dividend

No dividend was declared to unsecured creditors in 54% of the pre-packaged administrations (compared to 47% traditional administrations). A dividend of between 0 - 10p in £ was paid to non-preferential creditors in 16 pre-packs and three administrators announced a dividend between 11 - 20p (see Figure 12 below). Unsecured creditors received a dividend in the range of between 21 - 40p in seven pre-packs and between 41 - 70p in only two pre-packs. Nevertheless, a dividend of 100p in £ was paid to unsecured creditors in two pre-packs. In three pre-packs where either the administration or a subsequent CVL was still ongoing after 30 months the office holder was uncertain as to whether a dividend would be available to unsecured creditors. A dividend was anticipated in thirteen proceedings (comprising one administration and twelve CVLs) which were still in progress after 1 January 2020. Of the six large pre-packs - where the pre-pack price was over £1 million - a dividend was declared to unsecured creditors in only two proceedings. However, a dividend of 3p in

£ was anticipated in another large pre-pack which was still in administration after 30 months.

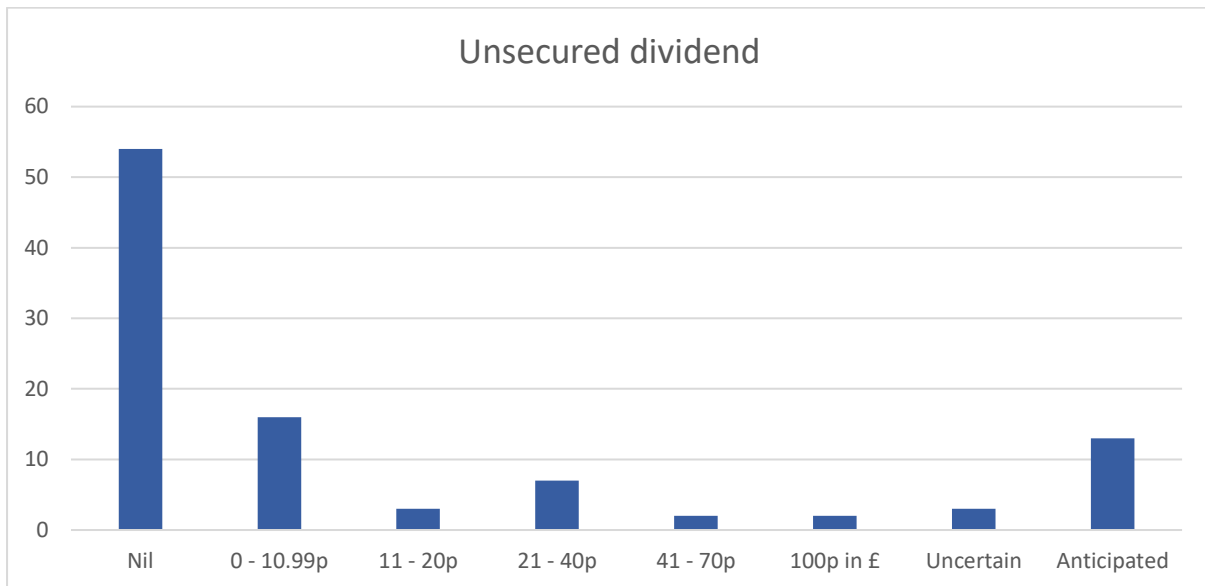


Figure 12

4.4.6 IP Firm Appointments

Pre-packs can potentially cause an administrator to act in breach of statutory⁹⁰ and fiduciaries duties⁹¹ or a conflict interest and duty or duty and duty.⁹² Although an administrator is required to submit proposals for achieving the purpose of administration,⁹³ and to send a copy of the statement to every creditor,⁹⁴ the courts have ruled that an administrator can sell the assets of a company prior to a creditors'

⁹⁰ Since a deal to sell the business of the company in a pre-pack is agreed prior to the company entering into administration the administrator cannot claim to have carried out the duty to initially consider company rescue when he (or she) is appointed. P. Walton, 'Pre-packaged administrations – trick or treat?' (2006) 19(8) *Insolvency Intelligence* 113, at 116.

⁹¹ By selling the business of the company before considering company rescue it is arguable that the administrator would have effectively fettered his or her discretion as a fiduciary. *Ibid.*

⁹² Where an administrator gives advice to the company, secured creditor and/or the directors in their personal capacity before appointment there is a risk that when subsequently acting as administrator, he (or she) may be acting where there is a conflict of duties. *Ibid.*

⁹³ IA 1986, Sch B1 para 49(1).

⁹⁴ *Ibid.*, para 49(4).

meeting approving the decision without leave of the court.⁹⁵ In fact, the administrator is empowered to “do anything necessary or expedient for the management of the affairs, business and property of the company”.⁹⁶ Under para 60 of Sch B1, an administrator is given all the powers contained in Sch 1 of IA 1986, including the power to sell company assets without first holding a creditors’ meeting or applying to the court for directions.⁹⁷

A total of 40 IP firms - including three of the “Big Four” - were appointed to conduct the (100) pre-pack arrangements that were observed under the study. Although many IP firms (23) were only involved in a single appointment, a total of seventeen IP firms conducted more than one pre-pack and together between them formed a combined total of 77% of the multiple appointments. One IP firm was involved in 13% of the pre-packs and another two firms were appointed in ten and nine pre-packs, respectively.

4.4.7 Duration of Pre-packaged Administration

A considerable 38% of the pre-packaged administrations were extended and endured for over 36 months. However, 28% of the pre-packs lasted between 7 – 12 months (see Figure 13 below) and another 18 pre-packs were completed in between 13 – 24 months. The most rapid pre-pack arrangement was finalised in 6 months while a total of 15 pre-packs were concluded in between 25 – 36 months. All the proceedings which were still ongoing after 30 months had been converted into liquidations. A high proportion of pre-packs that lasted for over 20 months terminated in a CVL. The shorter pre-packs were concluded with a dissolution; 29 pre-packs which were moved to a

⁹⁵ See *Re T & D Industries plc* [2000] 1 All English Reports 333; *Re Transbus International Ltd* [2004] 2 All ER 911.

⁹⁶ IA 1986, Sch B1 para 59(1).

⁹⁷ In *Re T & D Industries plc*, Neuberger J opined that administrators may be required to make urgent and important decisions and that a court cannot be used as a “sort of bomb shelter”.

dissolution (53% of the total which led to dissolution) were concluded within 12 months. There is an apparent link between the longer pre-packs and a declaration of a dividend to unsecured creditors. A dividend was declared to unsecured creditors, under the prescribed part,⁹⁸ in twelve dissolutions (21% of the total ending in dissolutions) compared to 18 incidences in CVLs (46% of the total leading to CVLs). The system seems to be working as intended as a dissolution is designed for cases where there is nothing left to distribute to unsecured creditors.

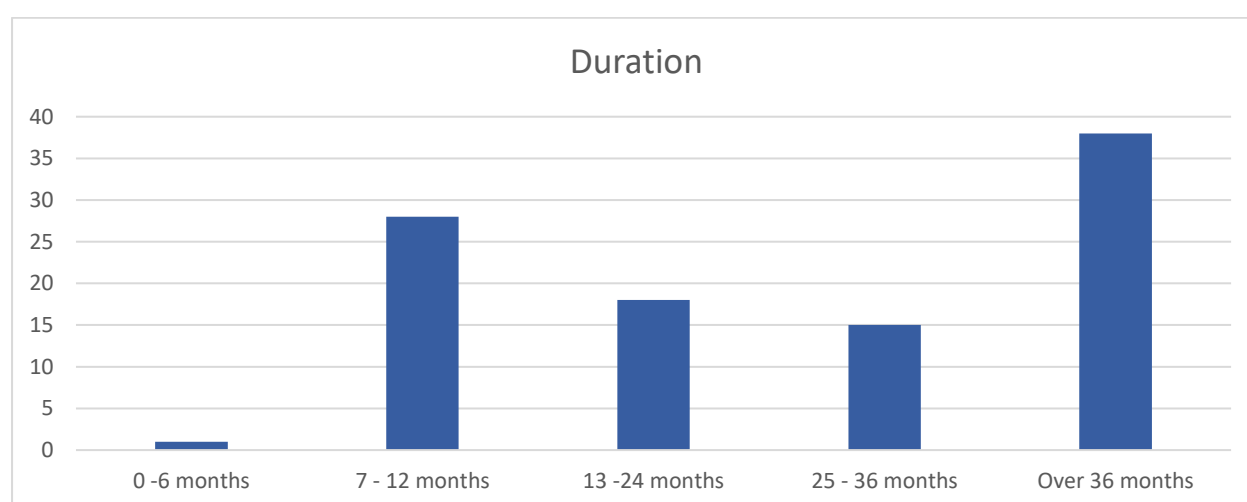


Figure 13

4.4.8 Exit Method

In more than 90% of the proceedings, the pre-pack administration was either converted to a liquidation or moved to dissolution. The court made an order for compulsory winding up in only two proceedings and four pre-pack arrangements were still in administration after 30 months (see Figure 12 below). No dividend was declared to unsecured creditors in most (43) of the dissolutions. Nonetheless, a dividend was declared in 12 dissolutions including one instance where a return of 100p in £ was

⁹⁸ IA 1986, s. 176A.

achieved.⁹⁹ Although a dividend was declared to unsecured creditors in 18 CVLs, seven liquidations did not generate any dividend. A dividend was anticipated in 11 ongoing liquidations, albeit the liquidators were doubtful about the prospects of a dividend being declared in three CVLs.

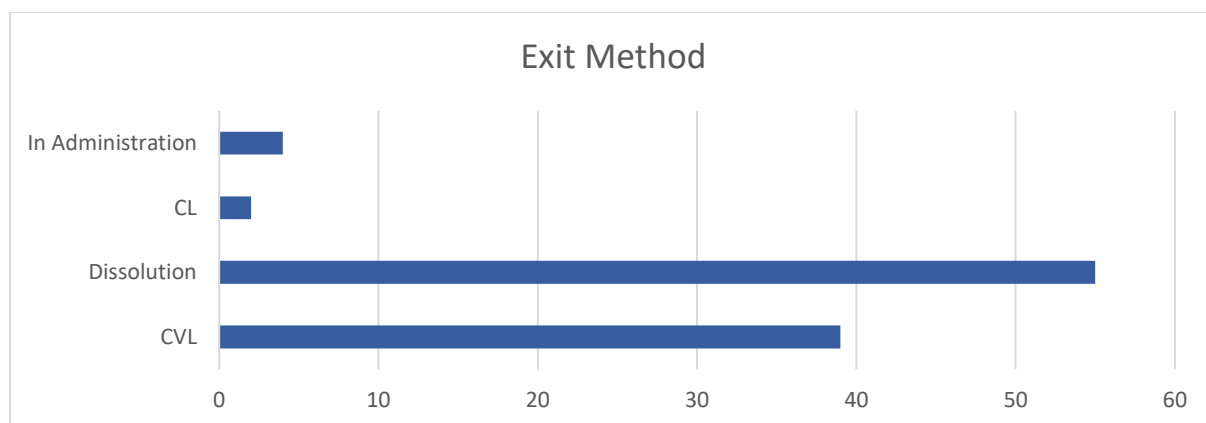


Figure 14

4.4.9 Business Rescue Outcome

Administrators sold the company's business in a pre-pack to a connected party in 66% of the arrangements. However, only two connected parties (3% of the total) approached the Pre-Pack Pool for its opinion as set out by the SIP 16 guidance. In both instances the members of the Pool opined that a pre-pack deal was reasonable in the prevailing circumstances. Most connected purchasers did not give any reason for deciding not to approach the Pre-Pack Pool. A few connected parties believed that since the marketing activities had failed to attract any third-party interest there was no logic in approaching the Pool. In three connected sales the cost of approaching the Pool (£800 + VAT) was cited as prohibitive.

⁹⁹ A total of eleven distributions were made under the prescribed part (IA 1986, s. 176A) and in the case where a dividend of 100p in the £ was declared the unsecured liabilities were novated to the purchaser and settled.

The identity of the purchasers was not clearly stated in only two pre-packs where the rescue outcomes could not be ascertained. In one of the pre-pack arrangements the purchaser was only identified as a former employee and in the other transaction it was a foreign (Dubai) based entity. At the beginning of January 2020, a total of 62% of the businesses that were sold in a pre-pack deal to either a connected party or an independent third party were actively trading (see Figure 14 below).

Out of the 28 failures, a total of 16 businesses (57%) were acquired using deferred consideration. A total of 11 purchasers, consisting of ten connected companies, subsequently entered a CVL procedure. Another twelve purchasers, comprising six connected businesses, were placed in administration. There are two active proposals to strike off two connected buyers and another 14 purchasers, including ten connected companies, have been dissolved. The failure rate for connected sales was 42%.

The employees of the failed companies were transferred to the purchasers – pursuant to the TUPE Regulations 2006¹⁰⁰ - as part of the pre-pack sale arrangements except where they were made redundant either prior to the company entering administration or immediately after the execution of a pre-pack deal. Administrators did not consistently state the number of employees which were transferred but where employees were transferred there was no preferential debt left behind.

¹⁰⁰ SI 2006/246.

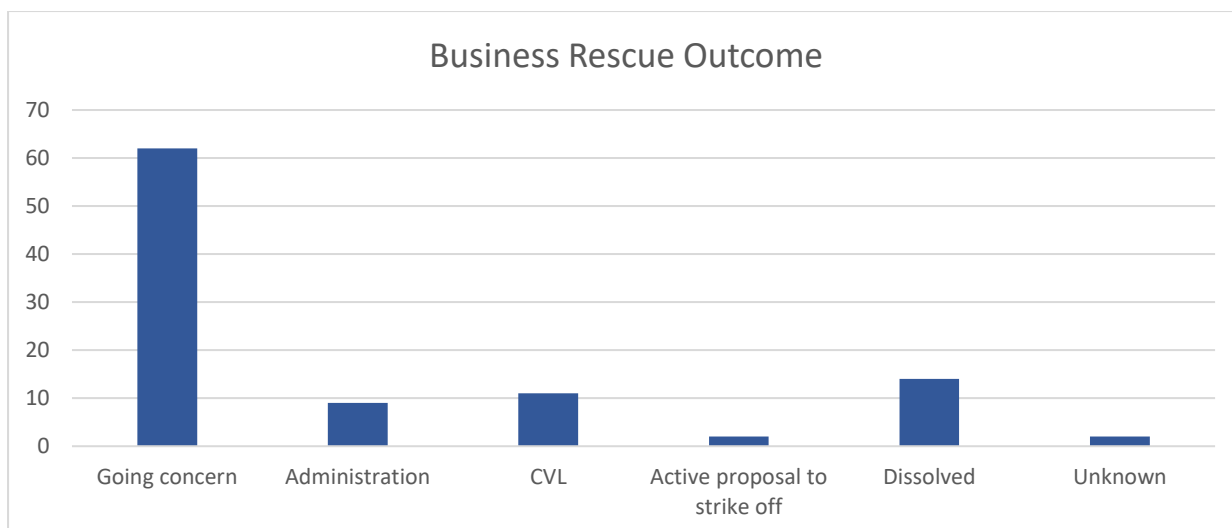


Figure 15

Part B

4.5 Voluntary Liquidations*

It was against a background of failures displaying “certain unsatisfactory features”¹⁰¹ that the Greene Committee was appointed.¹⁰² In mitigation, the Greene Committee recommended a system which was intended to give creditors effective control in voluntary liquidations.¹⁰³ The system became the procedure known as the creditors’ voluntary winding up¹⁰⁴ that was introduced by the Companies Act 1929.¹⁰⁵

* The empirical findings of the operation and outcomes of the main legislative exception (IR 2016, r 22.4) to the restriction on re-use of company names (s. 216 of IA 1986), under this part, were published as a journal article: P. Chanakira, ‘Re-use of company names in the UK – phoenixing or premeditated business rescue?’ (2021) *Insolvency Intelligence* 34(2), at 29-36.

¹⁰¹ Cork Committee, para 88.

¹⁰² The Greene Committee, *Report of Company Law Amendment Committee* Cmnd 2657 (1925).

¹⁰³ Cork Committee, para 89.

¹⁰⁴ IA 1986, CH IV.

¹⁰⁵ Cork Committee, para 89.

In 2019, a total of 740 CVLs¹⁰⁶ were subject to the first exception¹⁰⁷ to the restriction on re-use of company names¹⁰⁸ and the rules¹⁰⁹ of publishing a legal notice in the *Gazette*.¹¹⁰ The purpose of the restriction on re-use of company names,¹¹¹ in combination with the provisions that temporarily limit the powers of directors and liquidators,¹¹² is to curb the abuse of privilege and power before and during voluntary liquidation.¹¹³ The regime is thus intended to preserve a debtors' assets for the benefit of the general body of creditors.

The following analysis briefly explores the historical legal context of the restriction on re-use of company names.¹¹⁴ The analysis endeavours to evaluate the efficacy of the restriction in light of the first exception¹¹⁵ which allows a director of a failed company to re-use a company name where the business is acquired from a liquidator during a CVL.

4.5.1. Background to Restriction on Re-use of Company Names

Despite the recommendations advanced by the Cork Committee in regards to delinquent directors or officers of a failed company,¹¹⁶ bizarrely the restriction on re-use of company names¹¹⁷ and the associated strict liability provisions under s. 217¹¹⁸

¹⁰⁶ In comparison to 1,289 administrations and 292 CVAs in the same year. See Company Insolvency Statistics available at: <https://www.gov.uk/government/collections/company-insolvency-statistics-releases> [Accessed 14/04/20].

¹⁰⁷ IR 2016, r 22.4.

¹⁰⁸ IA 1986, s. 216.

¹⁰⁹ IR 2016, rules 22.4 (3)(b) and 22.5.

¹¹⁰ See *The Gazette* available at: <https://www.thegazette.co.uk/> [Accessed 29/04/20].

¹¹¹ IA 1986, s. 216.

¹¹² *Ibid*, ss 114 and 166.

¹¹³ See Cork Committee, para 1813.

¹¹⁴ IA 1986, s. 216.

¹¹⁵ IR 2016, r 22.4.

¹¹⁶ Cork Committee, para 1827.

¹¹⁷ IA 1986, s. 216.

¹¹⁸ *Ibid*, s. 217.

were only introduced into the Insolvency Bill as a last minute bolt-on amendment.¹¹⁹ The provisions (operating in conjunction with ss 114 and 166)¹²⁰ were enacted to tackle the abuse of the privilege of limited liability habitually associated with winding up: the phoenix syndrome.¹²¹

The Cork Committee observed that the doctrine of limited liability made it possible for a director of a failed company to continue the business of oldco by incorporating a newco (using the same name or a name so similar to the previous name) free from the burden of debts incurred by oldco at the expense of creditors.¹²² In contrast, the Greene Committee were of the opinion that the abuse of limited liability by a minority was far outweighed by the benefits of the system to trade (mobilising capital for business purposes) and industry and the overall economic performance of the nation.¹²³ In short, the Greene Committee accepted the abuse of limited liability as part of the price which the community should pay in exchange for the innumerable benefits of the doctrine.

Despite the fact that directors remained in control, it was observed that the assets of insolvent companies were not adequately protected in voluntary liquidations during the intervening period between the realisation of actual (or imminent) insolvency and convening the necessary meeting to pass a resolution to wind up.¹²⁴ Hence, in a CVL

¹¹⁹ It is also questionable as to why the three exceptions to the restriction on re-use of company names were relegated to secondary legislation (Insolvency Rules 1986). D. Milman, 'Curbing the phoenix syndrome' [1997] *Journal of Business Law*, at 225.

¹²⁰ IA 1986, ss 114 and 166.

¹²¹ Cork Committee, paras 1813 and 1816; The Insolvency Service available at: <https://www.gov.uk/government/publications/re-use-of-company-names/re-use-of-company-names> [Accessed 11/12/20]; L. S. Sealy and D. Milman, *Annotated Guide to the Insolvency Legislation* (4th edn CCH Editions Ltd, Oxford 1994), p 259. For a more detailed discussion on phoenixing see 2.6.3.

¹²² Cork Committee, para 1813. Alternatively, the Company Law Review Steering Group 2000 (CLRSG) considered circumstances whereby the controllers of a company transferred its assets to a newco under their control prior to the liquidation of oldco on favourable terms. CLRSG, 'Modern Company Law for a Competitive Economy: Completing the Structure' DTI November 2000, para 13.102.

¹²³ Cork Committee, para 88.

¹²⁴ *Ibid*, para 667.

where no liquidator has been appointed or nominated, s. 114 limits the powers of directors to the disposal of perishable goods and preservation of company assets¹²⁵ until the appointment or nomination of a liquidator of the company.¹²⁶

The ruling in *Re Centrebind Ltd*¹²⁷ probably encouraged the practice of “Centrebinding”: holding a members’ meeting to pass a resolution to wind up at short notice and intentionally depriving creditors the right to participate in the voluntary liquidation to allow the controllers to acquire the business at an undervalue.¹²⁸ Hence, s. 166 restricts the powers of a liquidator nominated by the company in a CVL to the collection and preservation of assets and disposal of perishable goods¹²⁹ pending the creditors’ nomination of a liquidator¹³⁰ in accordance with the rules under s. 100(1A).¹³¹

The desired effect of ss 114 and 166 provisions¹³² is to disable the powers of directors or a liquidator appointed by the company thereby diminishing the “Centrebinding” mischief and preserving the company’s assets. In other words the temporary limitations are intended to either prompt the early appointment or nomination of a liquidator by the company or to encourage a liquidator appointed by the company to obtain a decision of the creditors at the earliest.¹³³ However, the summoning of a creditors’ meeting in a CVL is no longer required¹³⁴ subject to the request of a

¹²⁵ IA 1986, s. 114(3).

¹²⁶ Ibid, s. 114(2).

¹²⁷ [1967] 1 WLR 377. Plowman J held that a liquidator appointed by the members was empowered to act before a creditors’ meeting was held.

¹²⁸ D. Milman, ‘Curbing the phoenix syndrome’ [1997] *Journal of Business Law*, at 226.

¹²⁹ IA 1986, s. 166(3).

¹³⁰ IA 1986, s. 166(2).

¹³¹ Ibid, s. 100(1A).

¹³² Ibid, ss 114 and 166.

¹³³ D. Milman, ‘Curbing the phoenix syndrome’ [1997] *Journal of Business Law*, at 226.

¹³⁴ Small Business, Enterprise and Employment Act 2015, s. 122 (SBEEA 2015).

minimum number of creditors.¹³⁵ A decision of the creditors can either be obtained through a qualifying decision procedure¹³⁶ or, where appropriate,¹³⁷ by deemed consent.¹³⁸

Based on observed practice, a liquidator appointed by a resolution of the members invariably becomes the liquidator. Most of the reports filed by the IPs referred to earlier reports which contained the prospective liquidator's initial proposals sent to creditors for consideration, but no further details were provided. It was, therefore, not clear whether the initial appointments were later confirmed by a decision of the creditors or if that decision was simply deemed. Under the rules a decision may be obtained by either qualifying decision procedure the provisional liquidator thinks fit¹³⁹ or by deemed consent where a set level of objections does not suffice.¹⁴⁰ Either way, the transformation to virtual decision making, notwithstanding the deterrent effect of the provisions which temporarily curtail the powers of directors and liquidators,¹⁴¹ creates opportunities for abuse of privilege and power by delinquent directors and office holders.

In a similar vein, the re-use of a company name of oldco by a former director (or shadow director) before waiting for a 5-year period to elapse except with the leave of court, or as may be prescribed by the law, is a criminal offence.¹⁴² In practice, the operation of the first legislative exception,¹⁴³ as set under the subordinate

¹³⁵ SBEEA 2015, s. 122(3). The minimum number of creditors required is 10% in value or 10% in number or 10 creditors.

¹³⁶ IA 1986, s. 246ZE (2).

¹³⁷ Ibid, s. 246ZF.

¹³⁸ Where the appropriate number of creditors that is required to object a proposed decision does not suffice, the creditors are considered to have confirmed the decision. Ibid, s. 246ZF (4).

¹³⁹ Ibid, s. 246ZE (2).

¹⁴⁰ IA 1986, s. 246ZF (4).

¹⁴¹ Ibid, ss 114 and 166.

¹⁴² Ibid, s. 216(3).

¹⁴³ IR 2016, r 22.4.

provisions,¹⁴⁴ essentially undermines the restriction on re-use of company names.¹⁴⁵ A director of a failed company can possibly use the exception¹⁴⁶ to buy the business at an undervalue in order to further exploit the goodwill for personal gain. This is contrary to the rationale¹⁴⁷ behind the restriction on re-use of company names¹⁴⁸ and prejudicial to the interests of the general body of creditors.

Because the purpose of the main exception¹⁴⁹ is not clearly articulated¹⁵⁰ in the legislation it is susceptible to different interpretations.¹⁵¹ For instance, in *Penrose v Secretary of State*¹⁵² Chadwick J failed to determine the purpose of the exception and had to resort to details of the delegated legislation for some guidance. What is clear is that the legislation was hastily introduced and consequently enacted without proper scrutiny. The result is a paradox: the mischief (phoenixing) which the restrictive provisions¹⁵³ are intended to eradicate is inextricably connected with the practice of re-using company names which is permissible under secondary legislation.¹⁵⁴

4.6 Characteristic and Outcome Analysis

The following sections critically examine key characteristics of companies that entered into a CVL where the first exception¹⁵⁵ to re-use a company name¹⁵⁶ was invoked and the outcomes as observed after 30 months. In an exceptional case, the business sale

¹⁴⁴ IR 2016, rr 22.4(3)(b) and 22.5.

¹⁴⁵ IA 1986, s. 216. Prior to re-using the same or similar name under a new corporate vehicle a director is required to publish a legal notice containing the details prescribed by rules 22.4(3)(b) and 22.5 in the *Gazette* no later than 28 days after completion of the arrangement to acquire the business of oldco from a liquidator.

¹⁴⁶ IR 2016, r 22.4.

¹⁴⁷ See, for example, Cork Committee at para 1813.

¹⁴⁸ IA 1986, s. 216.

¹⁴⁹ IR 2016, r 22.4.

¹⁵⁰ The Insolvency Service suggests that the exception promotes legitimate enterprise.

¹⁵¹ D. Milman, 'Curbing the phoenix syndrome' [1997] *Journal of Business Law*, at 225.

¹⁵² [1996] 1 WLR 482.

¹⁵³ IA 1986, s. 216.

¹⁵⁴ *Ibid*, r 22.4.

¹⁵⁵ *Ibid*.

¹⁵⁶ IA 1986, s. 216.

arrangement also transferred nine employees to the purchaser in typical corporate rescue style. However, this was not necessarily the case in the overwhelming majority: the companies were small (if not micro) and medium-sized enterprises (SMEs). The director and their spouse and/or close family members were often the only employees especially where no preferential debt was declared on the Statement of Affairs.¹⁵⁷

There were no fixed charges on the assets of oldco in 85% of the CVLs.¹⁵⁸ There are two explanations: secured creditors enforced their security prior to the declaration of insolvency, or the size (SMEs) and capital of the companies limited access to finance from lenders. Where the assets of oldco were secured by either a fixed or floating charge or by a combination of both (in 15% of the cases) the security was partially satisfied in three liquidations only. In a trade-off scenario, a secured loan in favour of a director was satisfied *in specie* through a sale of the business of oldco. The other outstanding charges were secured in favour of a director with control over two companies and a few commercial banks and financial lending institutions.

4.6.1 Age of Oldco

The age of oldco at the time of commencement of CVL - calculated as the value between the date of incorporation and the date of appointment of a liquidator - varied from companies incorporated for just over a year to companies trading for over 70 years. However, it is notable that most of the CVLs (78%) - where a legal notice to re-use a company name was published in the *Gazette* - were in connection to companies aged between 1 - 10 years. 19% of the companies fell in the middle range between 11 - 20 years. Only three companies had been incorporated for over 30 years prior to

¹⁵⁷ In some of those cases the directors were listed on the schedule of unsecured creditors for money loaned to the company during trading.

¹⁵⁸ It was observed that in some cases the charges which were either listed on the statements of affairs or appeared to be registered against the company had in fact been satisfied.

entering insolvency (see Figure 1 below). The average age of companies that were voluntarily wound up and used the first exception¹⁵⁹ to re-use a company name was 8.45 years.

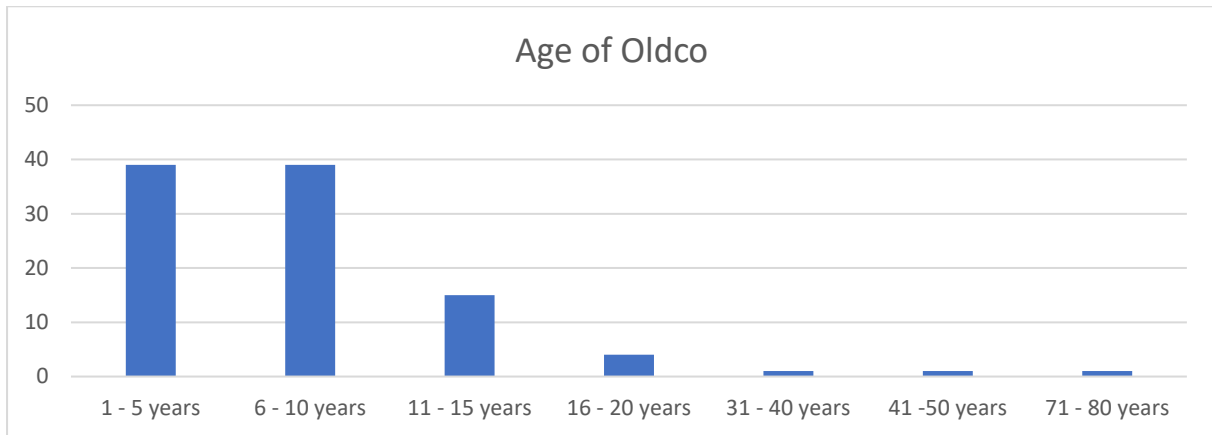


Figure 16

4.6.2 Amount of Unsecured Debt

A company in the construction sector and another in the accommodation and food service stand out in terms of the amounts of unsecured debt of over £1 million (see Figure 2 below). However, almost half (45) of the companies owed unsecured creditors between £101K - £250K. Just under a third of the companies were indebted to unsecured creditors to the tune of at least £100k. Nonetheless, only a few companies (9%) owed unsecured debt ranging from £500K to over £1 million. In total £20 million worth of debt was lost by unsecured creditors and more broadly to the national economy.

¹⁵⁹ IR 2016, r 22.4.

4.6.3 Industrial Sector and Location

Based on the data collected the companies that were involved in CVLs - where the first exception¹⁶⁰ to the restriction on re-use of company names¹⁶¹ was used - were evenly spread across all the industrial sectors. However, companies in the accommodation and food sector (accounting for 22% of the total) were ahead of the other prominent sectors such as construction (13%), manufacturing (6%) and administrative and support services (8%). The location of the registered offices and concerned directors was also spread across all the regions of the country, albeit slightly more CVLs (13) were conducted in London.

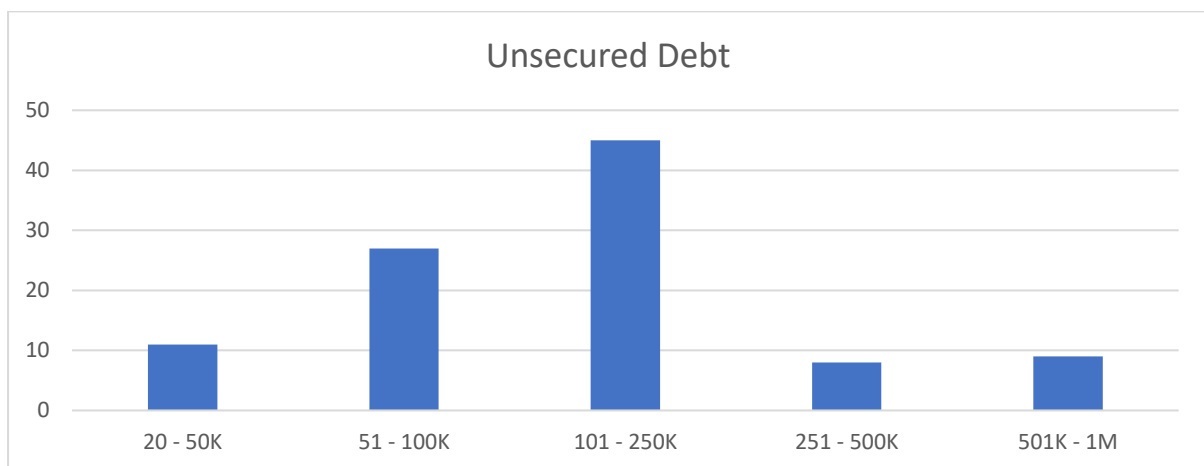


Figure 17

4.6.4 Business Sale Price

It is noteworthy that some directors declared that oldco had no realisable assets on the Statement of Affairs or it later transpired that previously declared assets were owned by a third party (in 13% of the cases). In an exceedingly small number of cases

¹⁶⁰ IR 2016, r 22.4.

¹⁶¹ IA 1986, s. 216.

the liquidators abandoned assets on the basis that the cost involved in setting up a sale far outweighed the value to be realised.

At the highest end of the spectrum the business and assets of an academy were sold for £42K to a former director. On the other hand, the goodwill of a restaurant was sold for only £250 to a connected party on the justification that earlier marketing attempts had failed to attract any third-party interest (see Figure 3 below). A further seventeen businesses were sold to a connected party for less than £1K and a significant two thirds (66%) were acquired for less than £10K. The average sale price of a business was £7,5K for the observed 87 sales. All sales achieved a combined total of £657,700.

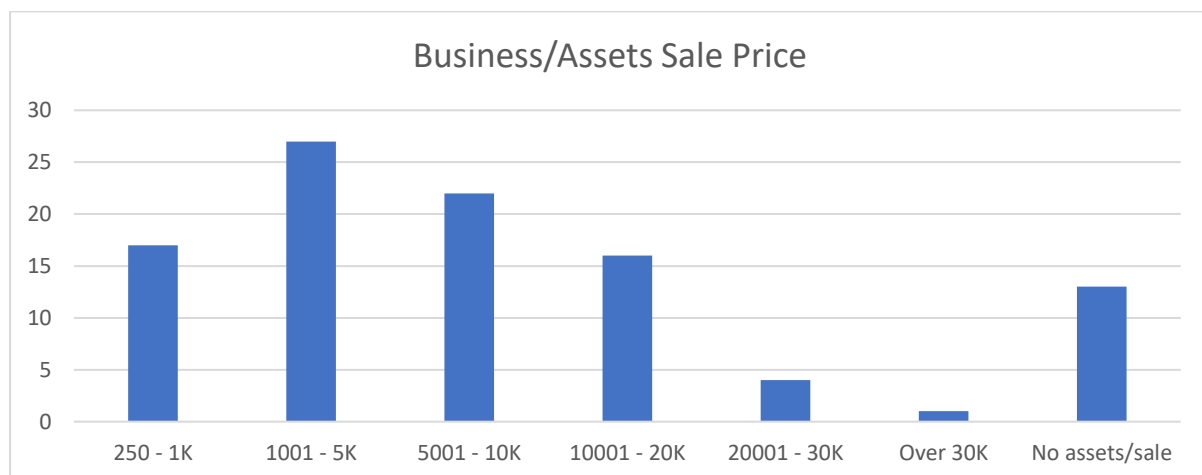


Figure 18

4.6.5 Unsecured Dividend

An economic analysis of the outcomes of CVL proceedings commenced post IR 2016 remarkably revealed that no dividend was declared to unsecured creditors in 97% of the voluntary liquidations.¹⁶² Nevertheless, a dividend was anticipated in a few cases

¹⁶² The financial outcomes for unsecured creditors under CVLs are largely mirrored by the levels of unsecured creditor returns (mean unsecured returns = £71, 405 and median = £0) observed for 2,174 cases comprising 585 pre-packs and 422 going concern administrations under the UK National Report available at: <https://www.codire.eu/publications/uk-national-report/> [Accessed 13/04/20]. The report was commissioned as part of a wider EU project conducted by a partnership of several universities in

where liquidation of oldco was still ongoing (six cases) based on the latest progress reports filed by IPs. In all the cases where preferential debt was declared (5%) it was duly paid in full.

Of the three instances where a dividend was declared, the highest return was 75.56p in the £ and all the distributions were made where oldco had been trading for at least 10 years prior to entering insolvent liquidation. In a rare occurrence, a dividend of 4p in the £ was declared after the liquidator called back an illegal dividend of £12K which had been declared by the company to a person with significant control in the proximity of insolvency. In another case an antecedent transfer of assets of oldco by a director to himself was avoided by the liquidator as a transaction at an undervalue. But no further investigations were conducted because the director agreed to an independent valuation and subsequently paid £18K for the assets. The purchase price under the avoided transaction was not disclosed and no dividend was declared.

The company's assets and goodwill were independently valued in most CVLs but not consistently marketed prior to sale to a connected party.¹⁶³ In like manner to the operation of pre-packs (see the discussion above at 4.4), the business sales to connected parties were promptly executed on the day of entering voluntary liquidation and appointment of a liquidator or immediately afterwards.

4.6.6 Newco Failure

Apart from the three cases where either no newco was incorporated using a prohibited name or the business was continued as a sole trader, a total of 22 newcos failed. The

2018: 'Contractualised Distress Resolution in the Shadow of the Law: Effective judicial review of insolvency and pre-insolvency proceedings' available at: www.codire.eu [Accessed 13/04/20].

¹⁶³ One IP reported that the value of the company's assets (later sold to a director for £4,751) did not justify incurring the expense of valuation agents.

newco failures can be divided into three categories: active proposal to strike-off, in liquidation (comprising one compulsory liquidation) and dissolved.

Four newco failures were conducted by an IP who had the highest number of appointments (see Figure 4 below). The same IP was connected to the IP firm with the highest number of multiple appointments.¹⁶⁴ Only one of the five IP firms that were involved in 54% of all the multiple appointments was not associated with newco failure. The other four firms were involved in appointments where newco did not survive beyond the observational period. Noticeably, most newco failures were in the accommodation and food service and retail sectors.

4.6.7 IP Firm Appointments

A total of 53 IP firms - excluding the “Big Four” accounting firms - were appointed across the sample of 100 CVLs. Even though most of the IP firms (32) were involved with a single appointment at least 21 firms conducted multiple appointments. Of the 21 firms which took multiple appointments 12 firms were appointed at least twice and one firm took three appointments. Three firms each took four appointments, two firms were engaged in five CVLs and another 2 firms were appointed six times. One IP firm was involved in seven multiple appointments. Five IP firms and one IP conducted noticeably, more than half of the multiple appointments (54%) was appointed in seven CVLs (33% of total).

4.6.8 Insolvency Practitioners’ (IPs) Fees

The remuneration of IPs often creates a conflict between the interests of the IP and those of creditors and, hence, the need for remuneration frameworks that encourage

¹⁶⁴ The phrase is used to refer to more than one (IP firm) appointment.

ethical behaviour and compliance with duties.¹⁶⁵ In all the 100 CVLs that were reviewed, the IPs' fees were consistently reported as a component of the expenses incurred during the winding up in the first annual progress reports and consequently paid in full. The IPs were paid a fixed fee (ranging between £5K - £20K) for preparing the Statements of Affairs, placing the company into liquidation and for arranging a decision procedure for creditors. Under the rules, expenses for preparing the Statement of Affairs (under s. 99)¹⁶⁶ and decisions sought from creditors can be paid out the company's assets by a liquidator nominated by the company¹⁶⁷ either before or after commencement of winding up¹⁶⁸ subject to the approval of the liquidation committee, the creditors or the court.¹⁶⁹ The operation of the provisions is consistent with the procedure prescribed for the payment of pre-appointment administration costs.¹⁷⁰

4.7 Business Rescue Outcomes

The survival rate of newco over a period of 30 months was a remarkable 78% (see Figure 5 below), including the four cases where the business of oldco was either continued as a sole trader or using a dissimilar name. Most of the statutory notices to re-use a company name were published in accordance with the rules¹⁷¹ i.e., after passing a resolution to wind up and appointment of a liquidator.¹⁷² Occasionally, a

¹⁶⁵ L. Jacobs, *Corporate insolvency practitioners, ethics and remuneration: Not a case of moral bankruptcy?* (2020): Special Report to INSOL International.

¹⁶⁶ IA 1986, s. 99.

¹⁶⁷ IR 2016, r 6.7(4). However, the liquidator appointed by the company must give a notice of five business days to the liquidation committee (where appointed) before making such a payment.

¹⁶⁸ IR 2016, r 6.7(1).

¹⁶⁹ Ibid, r 6.7(5).

¹⁷⁰ Ibid, r 3.52.

¹⁷¹ Ibid, rr 22.4(3)(b) and 22.5.

¹⁷² The guidance provided by the Insolvency Service (IS) states that where the business of the liquidated company is acquired a director may re-use a company name if the arrangements are made with the liquidator or another office holder. Re-use of company names guidance available at: <https://www.gov.uk/government/publications/re-use-of-company-names/re-use-of-company-names> [Accessed 15/04/20].

legal notice was published on the same day the liquidator was appointed or prior to the appointment which implies an element of premeditation and planning. The guidance provided by the Insolvency Service (IS) suggests that notice cannot be given where oldco is not in liquidation.¹⁷³

The Insolvency Rules strictly prohibit a director of an insolvent company from either directly or indirectly taking part in the promotion, formation or management of a company with a similar name before notice has been given to every creditor and published in the *Gazette*.¹⁷⁴ Therefore, the legal notices that were published before or on the same day the liquidator was appointed seem to suggest that the concerned directors were involved with newcos (using the same or a similar name to oldco)¹⁷⁵ before notice was given and published. Acting before giving and publishing a notice is potentially in contravention of the restriction imposed by section 216.¹⁷⁶

¹⁷³ The Insolvency Service Guidance on re-use of company names available at: <https://www.gov.uk/government/publications/re-use-of-company-names/re-use-of-company-names> [Accessed 03/06/20].

¹⁷⁴ IR 2016, r 22.4(2).

¹⁷⁵ According to the records, all the concerned directors were directly involved in the incorporation of newco using a prohibited name except in one case where the connected party was a son of a former director.

¹⁷⁶ IR 2016, r 22.4(2).

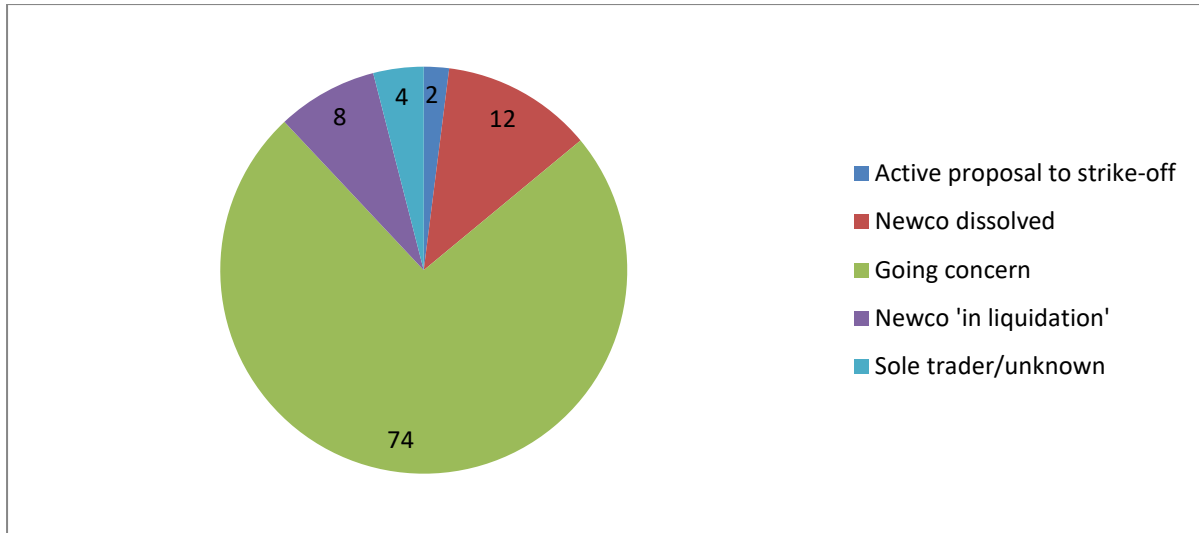


Figure 19

4.7.1 Newco Pre-incorporation

The majority of newcos (86%) were incorporated by the concerned directors at least four weeks in advance of publishing a legal notice to re-use a company name and commencement of voluntary liquidation (see Figure 6 below). Out of the 86% early incorporations, a total of 20 newcos were incorporated four weeks before oldco filed for insolvent liquidation and a further 21 newcos were incorporated over 48 weeks prior to the commencement of voluntary liquidation. Another 45 newcos were incorporated between 8 – 48 weeks before entering insolvency. On average, a newco was incorporated 12 weeks before oldco was placed in voluntary liquidation.

Nonetheless, in a few cases it was obvious that newco was autonomously incorporated (with a similar name to oldco) and had been trading as part of a group of companies prior to insolvency. A total of six newcos satisfied this category. Two newcos had been incorporated for over ten years, another two for more than five years and the other two companies had been in existence for three and four years,

respectively.¹⁷⁷ A total of six newcos were incorporated after the date of entering insolvent liquidation. An overall trend which implies a degree of some pre-insolvency planning prior to the acquisition of the company's business of oldco is unequivocal. The bulk of the decisions to acquire and continue the business of oldco were clearly contemplated before resolving to wind up (Figure 6 below).

A total of 86% of newcos were incorporated at least four weeks prior to filing for insolvency. On the other hand, a staggering 78% of the businesses which were acquired by a connected party during a CVL and continued using the same or similar name were actively trading as of 1 January 2020. The survival rate of newcos incorporated four or more weeks prior to insolvency is a phenomenal 92%. The corporate rescue statistics observed for CVLs subject to rule 22.4¹⁷⁸ transcend the previous corporate rescue statistics observed for administrations and CVAs, notwithstanding that most of the CVLs reviewed under this study involved SMEs and only preserved the jobs of a few employees.

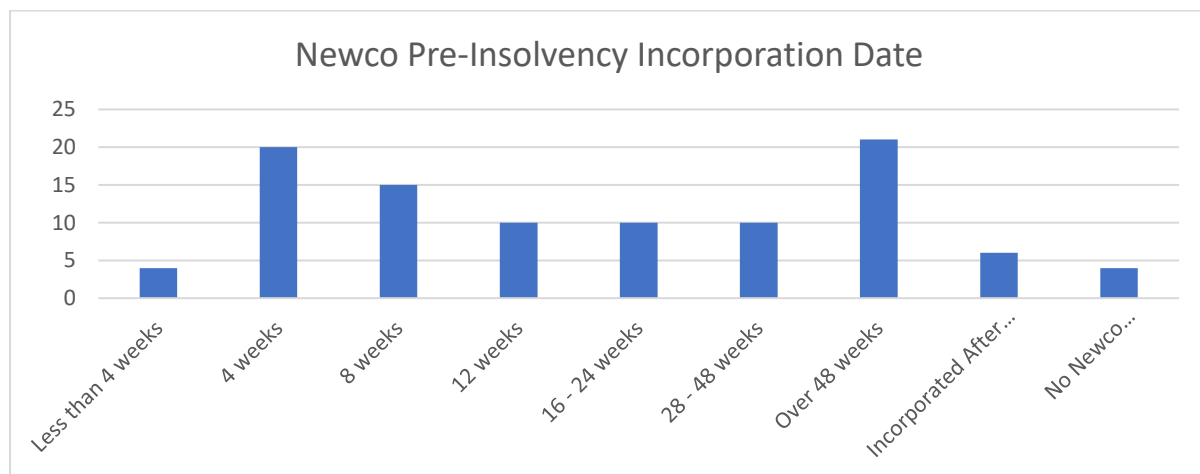


Figure 20

¹⁷⁷ The third exception (r 22.7) to the restriction on re-use of company names (s. 216) allow the re-use of a similar name where the name was already in use for 12 months continuously prior to entering voluntary liquidation.

¹⁷⁸ IR 2016, r 22.4.

4.8 Summary of Observations

A substantial number of companies that entered a CVL, which was subject to the main exception to re-use company names,¹⁷⁹ were less than 10 years old and SMEs with few employees and modest assets. This observation partly explains why unsecured creditors did not receive a dividend in 97% of the CVLs. The fact that most directors and their spouses and/or close family members were the shareholders made the decision to continue the business of oldco easy and appealing. Notwithstanding the other characteristics which were observed there were similar trends in the early pre-incorporation of newco (86%), a business sale price of less than £10K (66%) and survival of the business (78%).

The early timing of incorporation of newcos (86%) and a high survival rate (78%) of the business of oldco while leaving a trail of unpaid debts amounts to abuse of privilege of limited liability by directors of insolvent companies. In most cases newcos were contemplated several months prior to the advent of insolvency and appointment of a liquidator. It seems that the first exception¹⁸⁰ to the restriction on re-use of company names¹⁸¹ was used by directors of failed companies to facilitate pre-conceived business rescue at the expense of the general body of creditors. The operation of CVLs subject to the exception to re-use company names¹⁸² and the outcomes¹⁸³ are more consistent with premeditated business rescue or phoenixing. A predisposition of early incorporation of newco translating into survival of the business (corporate rescue) is inescapable.

¹⁷⁹ IR 2016, r 22.4.

¹⁸⁰ Ibid.

¹⁸¹ IA 1986, s. 216.

¹⁸² IR 2016, r 22.4.

¹⁸³ In terms of pure business rescue, CVLs subject to the first exception (r 22.4) to restriction on re-use of company names (s. 216) convincingly out-perform the corporate “rescue culture” provisions: IA 1986, ss 1-7B and Sch B1.

Under the existing legal framework, a decision of creditors to nominate a liquidator in a CVL may be obtained through a qualified decision procedure or by deemed consent.¹⁸⁴ The transformation to virtual decision making potentially makes it easy for a liquidator appointed by the company to be confirmed as liquidator.¹⁸⁵ In practice, delinquent directors and ‘friendly’ liquidators can possibly use the virtual decision-making mechanism to exclude the general body of creditors from participating in a CVL. The marginalisation of unsecured creditors in turn exposes the assets of an insolvent company to potential abuse.

The money realised from the sale of assets was consistently equal to the costs of winding up, including the IPs (pre-appointment) fees in two thirds (64) of the CVLs reviewed. Where this was not the case or where no assets were either declared or realised, the concerned director(s) made a monetary contribution towards the costs in 17 proceedings.¹⁸⁶ The contributions ensured that the IP’s fees and costs were settled in every case. Besides the information on pre-appointment fees no further details were provided on the remuneration of IPs.¹⁸⁷ The proceeds of the business sales were used to pay the IP’s fees and disbursements contrary to the notion of being exploited for the benefit of the debtor company’s creditors.

In a potential case of serial improper dealing, the IP who was engaged in the initial liquidation was re-appointed when newco became insolvent after 13 months and sold the business of newco to the same director for a second time. Although subsequent

¹⁸⁴ See 4.5.1.1.

¹⁸⁵ The liquidator was previously required to summon a creditors’ meeting within 14 days after the day on which the resolution to wind up was passed (s.98 of IA 1986) before the changes introduced by s. 122 of Small Business, Enterprise and Employment Act 2015 (SBEEA 2015) substituted the requirement with virtual decision making.

¹⁸⁶ In the remaining nineteen CVLs there was a noticeable difference between the value of receipts (income) and payments (expenses).

¹⁸⁷ In most cases, there were no assets to be realised after the sale of the business and goodwill to a connected party or any outstanding issues to be pursued. In theory, the liquidations were less involving and hence swiftly concluded to justify any further remuneration.

appointments should be given careful consideration,¹⁸⁸ the same IP was appointed again when the second newco became insolvent after 14 months only this time there were no realisable assets.¹⁸⁹ This is precisely the type of mischief a CVL procedure (where creditors have effective control) and s. 216¹⁹⁰ (without the ambiguity of the first exception)¹⁹¹ are intended to extinguish from voluntary liquidations.

Part C

4.9 Summary of Findings: 'Traditional' Administrations

4.9.1 Nature of Appointment and Purpose

Of the 100 'traditional' administrations that were reviewed, a remarkable 97 out-of-court appointments were made by either a qualifying floating charge holder or the company's directors with the agreement of the debenture holder where such secured creditor existed. It is clear that most of the administrations were commenced by the company's directors out of court. A company was placed into administration out of court by a director in 67 administrations. On the one hand, the observation seems to suggest that at least most directors took some action to mitigate financial distress while, on the other, the prominent levels of existing debts implies that the directors were probably aware of the impending financial difficulties at an early stage but were too slow to act.

¹⁸⁸ See L. Jacobs, *Corporate insolvency practitioners, ethics and remuneration: Not a case of moral bankruptcy?* (2020): Special Report to INSOL International.

¹⁸⁹ The conceptual framework for insolvency practitioners suggests that accepting sequential appointments is one of the circumstances that might create self-review threats for an insolvency practitioner. See the Insolvency practitioner code of ethics available at: <https://www.gov.uk/government/publications/insolvency-practitioner-code-of-ethics> [Accessed 04/05/21].

¹⁹⁰ IA 1986, s. 216.

¹⁹¹ IR 2016, r 22.4.

Intriguingly, the primary purpose of administration of rescuing a company as a going concern¹⁹² was adopted in only four administrations. The predominant reason for not pursuing company rescue was that the prominent levels of existing debts virtually made it impossible to sell the shares of the insolvent companies to potential buyers. The proposition would have required investors who were prepared to initially inject significant amounts of capital to make the companies financially stable before commencing to trade.

Instead of pursuing company rescue, the majority of administrators (58%) opted to achieve a better result for the company's creditors as a whole under the second statutory purpose.¹⁹³ A further 38 administrations were entered with the sole purpose of realising the company's assets to make a distribution to one or more preferential or secured creditors.¹⁹⁴ Based on the statistical evidence, administration¹⁹⁵ is not primarily adopted as a rescue procedure but more often as a way to achieve a better result for the company's creditors than would be likely in an immediate winding up.¹⁹⁶ This observation is consistent with the findings of preliminary research and the primary analysis of the provisions in the previous chapter.¹⁹⁷ However, both the frequency of declaration of a dividend to unsecured creditors (23 incidences) and the level of dividends (nearly 50% of the dividends were less than 5p in £) does not support convincingly the suggestion that administrators achieve a better result for the company's creditors as a whole, under the second statutory purpose,¹⁹⁸ in comparison to an immediate liquidation.

¹⁹² IA 1986, Sch B1 para 3(1)(a).

¹⁹³ IA 1986, Sch B1 para 3(1)(b).

¹⁹⁴ *Ibid*, para 3(1)(c).

¹⁹⁵ *Ibid*, Sch B1.

¹⁹⁶ *Ibid*, para 3(1)(b).

¹⁹⁷ See 3.8.

¹⁹⁸ IA 1986, Sch B1 para 3(1)(b).

4.9.2 Company Profile

A quarter of the administrations considered involved young companies (less than 5 years old). Nonetheless, a few companies were aged over 31 years which distorted the average age of the companies (27.68 years) at the time of entering administration. Half of the companies owed unsecured creditors more than £1 million and a few companies had incurred debt of over £10 million to unsecured creditors. The highest recorded unsecured debt in the sample was just over £77 million. Interestingly, the mining group plc which owed the debt was successfully rescued. Nonetheless, a debt of less than £500K was declared in 35 administrations. Although most of the companies were young, the prominent levels of debts seem to suggest otherwise or that some young companies accumulate huge debts within a few years of trading.

Although the bulk of the companies owned assets which were realised by administrators, it is noteworthy that more than two thirds of the realisations achieved less than £250K, including eight realisations which generated less than £10K. Nevertheless, 14% of the asset realisations raised over £1 million. On the other hand, no dividend was paid to unsecured creditors in half of the administrations. Nonetheless, a dividend was declared to unsecured creditors in a quarter of the administrations, albeit almost half of the dividends were less than 5p in the £. A dividend of over 50p in £ (including three dividends of 100p in £) was declared to unsecured creditors in four administrations. The company's assets did not necessarily translate into a dividend for unsecured creditors.

A sizeable proportion of the administrations were extended beyond the statutory 12 months¹⁹⁹ for several reasons. Large administrations are complex and time

¹⁹⁹ IA 1986, Sch B1 para 76(1).

consuming and often take long to be concluded. Nevertheless, one third of the administrations were terminated after 12 months and a substantial number (23) of administrations were finalised in less than 12 months. Just over a tenth of the administrations were still ongoing after the survey date. Based on these observations, the administration period varies depending on the size of a company and the complexity of the issues involved. The fact that half of the administrations were extended bears testimony to the volume of assets and the size of companies that enter administration, albeit this point is not entirely supported by both the incidence and level of distributions to unsecured creditors.

4.9.3 Corporate Rescue Outcomes

The empirical research identified only two companies which were successfully rescued and handed back to the directors (a 2% company rescue success rate). The corporate rescue outcomes clearly demonstrate that company rescue is almost impossible to achieve in practice. This fact is strongly supported by the appalling numbers of administrations adopted to rescue the company in the first place. The two cases of successful company rescue represent half of the administrations where the statutory primary purpose of company rescue was pursued.²⁰⁰ Interestingly, in both cases the administration period was extended more than once, and the proceedings endured for at least 36 months. One of the administrations involved a mining group plc and the other was in connection to company which specialised in the sale of motor vehicles. In the latter case the asset realisations achieved a figure which was more than the unsecured debt. Both companies were well established and had been trading for at least 18 years prior to entering administration.

²⁰⁰ IA 1986, Sch B1 para 3(1)(a).

Nevertheless, half of the administrations were subsequently moved to dissolution and a slightly lesser proportion were converted to a liquidation. This observation supports the findings of preliminary research which suggested that administration²⁰¹ is the new liquidation or being used as a 'quasi-liquidation'.²⁰² The administrators realised the company's assets on a piecemeal basis in two thirds of the administrations and sold the company's business and assets as a going concern in a third of the administrations (including five connected sales). A total of 22 out of 27 known purchasers (comprising four connected parties) were actively trading after 30 months which represents a remarkable business rescue success rate of 81%.

4.10 Pre-Packs

4.10.1 Nature of Appointment and Purpose

In a high proportion of the pre-packs that were reviewed the administrators were appointed by the directors²⁰³ compared to a few appointments that were made by a holder of a qualifying floating charge.²⁰⁴ It is interesting to observe that the courts were not involved in the appointment of any of the administrators bearing in mind that it was a court that initially approved the practice.²⁰⁵

More than three quarters of the pre-packs were executed to "achieve a better result for the company's creditors as whole than would likely if the company were wound up (without first being in administration)".²⁰⁶ This observation suggests that most of the administrators who were involved in pre-packs already knew that there was no prospect of achieving company rescue prior to accepting to be appointed. In *Re One*

²⁰¹ IA 1986, Sch B1.

²⁰² See 2.6.3.

²⁰³ IA 1986, Sch B1 para 22.

²⁰⁴ *Ibid*, para 14.

²⁰⁵ See the discussion at 4.4.

²⁰⁶ IA 1986, Sch B1 para 3(1)(b).

Blackfriars Ltd,²⁰⁷ it was held that the duty of an administrator to form a judgement as to which statutory duty he or she is going to pursue starts before appointment and continues afterwards. John Kimbell QC (sitting as a Deputy High Court Judge) accepted that in many administrations it will be palpable that the primary objective of company rescue is not reasonably practicable.²⁰⁸ The overwhelming majority of administrators clearly explained how in their view the pre-pack deal represented a better option for the company's creditors. In the other pre-pack deals, the administrators stated that the arrangements were adopted as part of the strategy of realising property to pay one or more preferential or secured creditor.²⁰⁹

4.10.2 Company Profile

Most of the companies that used a pre-pack business sale in the sample were less than 10 years old. Nonetheless, a quarter of companies were aged between 11 - 20 years and a tenth of the companies were aged between 21 - 40 years. The average age of the companies was 13.30 years. Half of the companies involved in the pre-packs owed unsecured creditors debt ranging from £501K to over £1 million, albeit a considerable proportion of the companies owed between £101K - £500K. The highest unsecured debt observed was over £36 million.

The company's business and/or assets were sold in a pre-pack for less than £50K in more than half of the arrangements, including a fifth of the sales which achieved less than 20K. Nonetheless, the sale price in six large pre-packs was over £1 million. The highest pre-pack sale price was attained in the case where the highest unsecured debt was also observed. Nevertheless, no dividend was declared to unsecured creditors in

²⁰⁷ [2021] EWHC 684 (Ch) at 200.

²⁰⁸ *Ibid*, at 202.

²⁰⁹ IA 1986, Sch B1 para 3(1)(c).

more than half of the proceedings. In a third of the pre-packs, the dividend declared to unsecured creditors was less than 40p in the £. A dividend over 40p in the £ was only declared in two pre-packs, albeit a dividend was anticipated in ongoing proceedings. Of the six large pre-packs, a dividend was declared in only two proceedings.

The initial administration period was not extended in most pre-packs, albeit it was deemed necessary to enter a subsequent CVL procedure in two fifths of the proceedings to facilitate a distribution to unsecured creditors. In a small number of cases, the duration of administration was extended to enable enquiries into the company's affairs to be continued or so that other assets - aside from those included in the pre-pack deal - could be realised. Two fifths of the proceedings continued beyond 36 months while 15 pre-pack administrations were conducted between 25 - 36 months. In almost a third of the pre-packs, the duration (7 - 12 months) fell within the stipulated 12 months. One pre-pack administration arrangement was quickly wrapped up in 6 months. There is a link between the shorter pre-packs terminating in a dissolution and the longer proceedings in a CVL. The likelihood of a dividend to unsecured creditors was, not surprisingly, higher in a CVL than in a dissolution.

4.10.3 Business Rescue Outcome

Out of the 100 pre-packs the company's business and/or assets were sold to a party connected to the company in two thirds of the arrangements. For a variety of reasons all the connected parties did not approach the Pre-Pack Pool for its opinion. Nevertheless, an impressive two thirds of the businesses that were pre-packaged were actively trading as of 1 January 2020. Often, the pre-packs did not preserve the jobs of employees. In a few cases the employees were either made redundant prior to, or immediately after, the execution of a pre-pack.

Most of the proceedings were either converted to a CVL or moved to dissolution. The court made an order for the compulsory winding up of two companies and four pre-packs were still in administration after 30 months. Of the 38 newco failures, a total of 28 companies were connected to oldco, which represents a 42% failure rate for connected sales.

4.11 Main Exception to Re-use Company Names (r 22.4)

4.11.1 Method of Appointment and Purpose

A liquidator who was appointed by a resolution of the members continued as the liquidator in all the CVLs which were examined. However, the information on the virtual decision-making procedures that were used by the liquidators to obtain the creditors' nomination of a liquidator was not disclosed in the reports filed by IPs. It was, therefore, not clear whether the initial appointments made by the company were confirmed by a decision of the creditors or if the decision was simply deemed.

The ban on re-use of company names²¹⁰ which is intended to tackle the phoenix syndrome does not apply where a director acquires the business of an insolvent company from a liquidator during a CVL and notice is given to every creditor and published in the *Gazette* no later than 28 days after the completion of the arrangements.²¹¹ The purpose of the exception is not articulated in the legislation. Nonetheless, the guidance on re-use of company names provided by the Insolvency Service (IS) suggests that the exception is intended to promote legitimate enterprise. In practice, most directors use the first exception²¹² to the restriction on re-use of

²¹⁰ IA 1986, s. 216.

²¹¹ IR 2016, r 22.4(2).

²¹² *Ibid*, r 22.4.

company names²¹³ to continue the business of an insolvent company at the expense of creditors.

4.11.2 Company Profile

Most of the companies which were voluntarily wound up and had their business and/or assets acquired by a director and continued using a similar name²¹⁴ were small (if not micro) and medium sized enterprises (SMEs). In most cases, the companies only employed a few members of staff. The fact that there was no security on the company's assets in more than four fifths of the CVLs speaks volumes of both the size of the companies and collateral value of the assets.

More than three quarters of the companies considered were less than 10 years old. Less than a handful of companies had been trading for more than 30 years prior to being voluntarily wound up. The average of the older companies slightly skewed the average age of the sample. However, almost half of the companies owed unsecured creditors less than £250K, with only a few companies owing unsecured creditors more than £1 million.

A significant two thirds of the businesses were acquired by a connected party for less than £10K and two fifths for less than £1K. The average sale price was 7.5K and remarkably all the observed business and/or asset sales achieved a combined total of just over half a million pounds. Nonetheless, there was no dividend declared to unsecured creditors in all the liquidations (97%). Of the instances where a dividend was declared, the highest distribution was more than 75p in the £ and oldco had been trading for at least a decade prior to the onset of insolvency.

²¹³ IA 1986, s. 216.

²¹⁴ IR 2016, r 22.4.

4.11.3 Business Rescue

More than three quarters of the businesses (78%) which were acquired by a director in a CVL and continued using a similar name were actively trading on 1 January 2020. Interestingly, a high proportion of newcos were incorporated several months before oldco entered a CVL and the publication of a legal notice in the *Gazette* to re-use a company name in contravention of the rules.²¹⁵ However, more than a tenth of newcos were later dissolved, less than a tenth subsequently entered liquidation and a few dormant newcos were struck off from the register.

4.12 Comparison of the Rescue Outcomes

The primary purpose of administration (company rescue) was achieved in only two proceedings under Schedule B1 provisions.²¹⁶ Half of the companies which entered administration were subsequently dissolved and an equal proportion of companies were liquidated. However, in attempting to achieve a better result for the company's creditors as a whole,²¹⁷ the administrators sold the company's business and assets as a going concern in almost one third of the administrations (26). Remarkably, a total of 22 businesses that were sold as a going concern - which represents 81% of going concern sales - were effectively rescued.

On the other hand, two thirds of the businesses (62%) that were sold in a pre-pack administration either to achieve a better return for the company's creditors or to pay one or more preferential or secured creditor²¹⁸ were successfully rescued for at least 30 months. Two thirds of the pre-pack sales observed were to a connected party of

²¹⁵ IR 2016, r 22.4(2).

²¹⁶ IA 1986, Sch B1 para 3(1)(a).

²¹⁷ *Ibid*, para 3(1)(b).

²¹⁸ *Ibid*, para 3(1)(c).

which half subsequently failed. A high proportion of the pre-packs (90%) were, like traditional administrations, either converted to a CVL or moved to dissolution. Nonetheless, the survival rate of the businesses which were acquired by a connected party during a CVL and continued using a similar name²¹⁹ was an impressive 78%. All the companies involved in the CVLs were SMEs with a few employees who were not transferred to the purchasers in most sales.

The business and/or assets of the company were sold as a going concern in a total of 226 proceedings across the sample of 300 companies. Of the 226 sales, a total 171 sales (75%) were to a connected party. In fact, most business rescues are achieved through the sale of the business to a connected party. Only two companies were successfully rescued by entering administration, albeit a staggering 81% of the 26 businesses that were sold as a going concern were effectively preserved. In comparison, a significant 62% of the businesses that were sold in a pre-pack deal survived and a remarkable 78% of the businesses that were acquired from a liquidator by a connected party and continued using a similar name²²⁰ were successfully rescued for at least 30 months.

4.12.1 Achieving a Better Result for the Company's Creditors

In the bulk of the traditional administrations (58%), the administrators stated that the purpose of the administration was to achieve a better result for the company's creditors as whole than would be likely if the company were wound up (without first being in administration).²²¹ Yet, a dividend was declared in only 23 administrations where the

²¹⁹ IR 2016, r 22.4.

²²⁰ Ibid.

²²¹ IA 1986, Sch B1 para 3(1)(b).

second statutory purpose was adopted²²² and significantly nearly half of the distributions were less than 5p in £.

Similarly, more than three quarters of the pre-packs (78%) considered were executed to achieve a better result for the company's creditors than would be likely in an immediate winding up.²²³ Nonetheless, no dividend was declared to unsecured creditors in 67% of the pre-pack administrations (including 16 proceedings where either the administration was still in progress or where a dividend was anticipated). A dividend of 40p in £ or less was declared in 26 pre-packs and unsecured creditors received a distribution above 40p in £ in only four proceedings.

An economic analysis of the CVLs (subject to exception to re-use company names)²²⁴ highlighted that the proceeds from the business and/or asset sales were used to pay the IPs pre-appointment fees and disbursements – contrary to the notion of being exploited to benefit the general body creditors. No dividend was declared to unsecured creditors in 97% of the CVLs and the total (business) sales observed (87) amounted to less than £1 million. Concisely a dividend was declared to unsecured creditors in 23 administrations, a total of 26 pre-pack arrangements and only three CVLs.

4.13 Conclusion

The corporate rescue outcomes under administration are similar to the outcomes observed under traditional receiverships. Only two companies were successfully rescued but a total of 29 businesses were sold as going concerns (of which 22 businesses (81%) were successfully rescued for at least 30 months). Although the

²²² IA 1986, Sch B1 para 3(1)(b).

²²³ Ibid.

²²⁴ IR 2016, r 22.4.

primary objective of administration is to rescue the company as a going concern,²²⁵ in practice most administrators attempt to achieve a better result for the company's creditors (under the second statutory purpose).²²⁶ The main reason submitted for not attempting to rescue the companies was the lack of any potential buyers of the shares of the insolvent companies due to the prominent level of existing debts. Neither the shareholders nor the secured creditors were prepared to inject rescue finance.

Adopting the second statutory purpose of administration does not necessarily result in a better result for the company's creditors.²²⁷ Both the number of times a dividend was declared to unsecured creditors and the level of the distributions show that the plight of unsecured creditors is not alleviated when the second statutory purpose is adopted. Similarly, most pre-packs are executed to achieve a better return for the company's creditors.²²⁸ The frequency of a declaration of a dividend to unsecured creditors and the level of the returns, however, suggests otherwise. Nevertheless, most of the businesses that are sold in pre-packs are rescued and the employees of the insolvent companies are transferred to the purchasers in most of the arrangements.

Where a business of an insolvent company is acquired by a director from a liquidator during a CVL and continued using a same or similar - under the first exception to the restriction on re-use of company names - there is a high likelihood that the business will survive. The survival rate of the businesses which were acquired by a connected party from the liquidator in a CVL was 78%. The companies which enter CVLs - where the exception to re-use a company name is elected - are SMEs. In most cases, the

²²⁵ IA 1986, Sch B1 para 3(1)(a).

²²⁶ Ibid, para 3(1)(b).

²²⁷ IA 1986, Sch B1 para 3(1)(b).

²²⁸ Ibid.

directors are the only employees and rarely do the business sales also transfer any employees to the purchasers.

In conclusion, administration does not result in any meaningful company rescue in practice nor does the adoption of the second statutory purpose achieve a better result for the company's creditors as a whole. To the contrary, the new administration regime is being used as 'quasi-liquidation' and subsequent dissolution of the company. However, most businesses that are sold in pre-packs - to achieve a better result for the company's creditors - are rescued although the practice does not always improve the returns for unsecured creditors or necessarily preserve the contacts of employment of personnel. Although the re-use of company names is an effective way to preserve viable businesses the operation of the first exception is synonymous with phoenixing or pre-meditated business rescue. There are no jobs preserved and no dividend is declared to unsecured creditors.

Part III

Chapter 5: Conclusion and Recommendations

5.1 Introduction

The primary aim of this research project was to evaluate the effectiveness of the administration provisions¹ adopted in England and Wales to promote company rescue.² To effectively achieve this goal it was, at first, necessary to investigate the theory and fundamental principles and purposes of insolvency law.³ The historical analysis was intended to expose the role played by the legislature and effect of the relentless lobbying of the legislature by organisations specifically formed to advance the interests of creditors on the development of the law. As part of the literature review, the study examined the early alternative arrangements to bankruptcy and company winding up and theory of corporate rescue which was originally envisaged by the *Insolvency Law and Practice: Report of the Review Committee*⁴ (hereinafter referred to as “the Cork Committee”). To assess the impact of the subsequent Enterprise Act 2002 (“EA 2002”) reforms on corporate rescue, the research critically compared the corporate rescue framework which was adopted under the original administration⁵ with the new streamlined regime.⁶

Both the findings of early research⁷ and preliminary analysis of the administration provisions,⁸ under Part I of the thesis, were substantiated by the findings of the

¹ Insolvency Act 1986, Sch B1 (“IA 1986”).

² The inquiry also encompassed other corporate rescue procedures adopted in the UK namely company voluntary arrangements (CVAs) under ss 1-7B of IA 1986 and schemes of arrangements and restructuring provisions under Parts 26 and 26A of Companies Act 2006 respectively (“CA 2006”).

³ See Chapter 1.

⁴ (1982) Cmnd 8558, Ch 9.

⁵ IA 1986, Part II.

⁶ *Ibid*, Sch B1.

⁷ See 3.3.

⁸ See 3.8.

empirical research, under Part II of the thesis. In short, the principal corporate insolvency procedures (both terminal and non-terminal) adopted in the UK converge into the same outcome of business rescue, albeit at the expense of the general body of creditors. Based on the numbers observed it is evident that the primary purpose of administration - rescuing a company as a going concern⁹ - is impossible to achieve.¹⁰ To the contrary, a total of 22 businesses that were sold as a going concern (81% of the total sales observed) during administration were rescued for at least 30 months. In practice, most administrators attempt to achieve a better result for the company's creditors as a whole,¹¹ either through a pre-packaged ("pre-pack") or going concern sale of the company's business, but the number of incidences of declaration of a dividend and level of distributions to unsecured creditors are not encouraging.¹²

A quantitative study of 100 pre-packs showed that contrary to the general positive perception of the practice in some arrangements the employees are made redundant either prior to or immediately after the execution of a pre-pack. In most pre-packs, only a few jobs are preserved and the frequency and level of returns to unsecured creditors are not significantly improved where a pre-pack is preferred.¹³ However, unlike a 'traditional' administration, a pre-pack does exactly what it says on the tin – rescue of part or the whole business through a pre-arranged deal. Nonetheless, similar to 'traditional' administrations, a high proportion (62%) of the businesses that were sold in a pre-pack deal were successfully preserved over a period of 30 months.¹⁴ Even so, the prospect of declaration of a dividend to unsecured creditors was bleak (no dividend

⁹ IA 1986, Sch B1 para 3(1)(a).

¹⁰Out of the 100 'traditional' administrations that were considered only two companies were successfully rescued. See 4.3.8.

¹¹ IA 1986, Sch B1 para 3(1)(b).

¹² See 4.9.1.

¹³ See 4.10.1.

¹⁴ See 4.4.9.

was declared in 54% of the pre-packs reviewed).¹⁵ Similarly, no dividend was declared to unsecured creditors in 47% of 'traditional' administrations.¹⁶

To provide counterfactual data, the permissible practice of re-using company names - where the business of an insolvent company was acquired by a connected party from the liquidator during a creditors' voluntary liquidation (CVL)¹⁷ - was examined through a corporate rescue lens. The critical analysis significantly highlighted that 78% of the businesses which were acquired by a connected party during a CVL were successfully rescued over 30 months.¹⁸ Remarkably, no dividend was declared to unsecured creditors in 97% of the CVLs.¹⁹ In essence, the operation and outcomes of the first exception²⁰ to the restriction on re-use of company names²¹ is more consistent with phoenixing or premeditated business rescue.²² Interestingly, a comparative analysis of the outcomes of the three procedures considered showed that more businesses were, in fact, rescued through the use of the exception²³ during CVLs than under either 'traditional' or pre-pack administrations.²⁴

Most companies that either entered into administration or used a pre-pack were subsequently liquidated²⁵ or dissolved²⁶ while the businesses which were acquired during both procedures were successfully rescued. In a similar vein, most businesses that were acquired by a connected party from the liquidator, during a CVL, and

¹⁵ See 4.4.5.

¹⁶ See 4.3.5.

¹⁷ Insolvency (England and Wales) Rules 2016, r 22.4 ("IR 2016").

¹⁸ See 4.7.

¹⁹ See 4.6.5.

²⁰ IR 2016, r 22.4.

²¹ IA 1986, s. 216.

²² See 4.8.

²³ IR 2016, r 22.4.

²⁴ See 4.10.1.

²⁵ IA 1986, Sch B1 para 83.

²⁶ *Ibid*, para 84.

continued using the same or a similar name²⁷ were effectively preserved. Hence, the main recommendation proposed in this chapter - of a single gateway system to corporate insolvency - is purely founded on the ostensible convergence of the principal corporate insolvency procedures in practice. Nevertheless, the other recommendations are intended to address specific prominent issues relating to the corporate insolvency framework adopted in England and Wales and key corporate rescue policy considerations. The following discussion identifies the key issues in relation to the existing corporate insolvency provisions and corporate rescue policy and makes recommendations aimed to improve both strategies.

5.2 The Nature of the Main Insolvency Proceedings in the UK

The introduction of an organised collective system for administering the assets of a debtor and rateable distribution of the proceeds among the creditors,²⁸ in 1542,²⁹ established the institution of bankruptcy.³⁰ Under the Roman procedures, known as *cessio bonorum*, *distractio bonorum* and *remissio* and *dilatio*,³¹ on which the fundamental principles of bankruptcy were derived, the assignment of the assets of a debtor was intended to benefit creditors.³² In contrast, the findings of the empirical research in Chapter 4 clearly demonstrated that unsecured creditors rarely benefit from asset realisations.³³ Although on paper it appears that the main insolvency procedures adopted in the UK are intended to be collective,³⁴ the provisions are not

²⁷ IR 2016, r 22.4.

²⁸ During the Middle Ages Italian city-states adopted the bankruptcy procedure of Roman law known as *vendito bonorum* whereby the proceeds from a debtor's assets were equally divided among the creditors. See 1.3.1.

²⁹ Statute of Bankrupts 34 & 35 Hen. VIII. c. 4 (1542).

³⁰ See 1.3.1.

³¹ See 1.2.

³² See the discussion at 1.1.

³³ See the summary of findings at 4.10.1.

³⁴ In this context, collectivity refers to the imposition of a mandatory moratorium on individual debt enforcement by creditors. See S. Frisby, 'In Search of a Rescue Regime: The Enterprise Act 2002' (2004) 67 *Modern Law Review* 247, at 249.

entirely inclusive in practice.³⁵ In the UK, a moratorium on creditor actions against the company exists in liquidation,³⁶ during administration³⁷ and under the pre-insolvency moratorium.³⁸ However, the early transformation of a receiver of income to a receiver and manager³⁹ i.e., the creation of the floating charge over the undertaking of a company⁴⁰ and subsequent escalation in commercial lending,⁴¹ it is argued, have eroded the fundamental collective principle and equal division of a debtor's assets among the creditors of a company.⁴²

In like manner to the operation of traditional receivership, a qualifying floating charge holder⁴³ can appoint an administrator out-of-court⁴⁴ who is empowered to either sell the company's business as a going concern or on a piece-meal basis.⁴⁵ Although administration is a collective procedure,⁴⁶ which imposes a moratorium on individual creditor actions,⁴⁷ the framework adopted under the existing regime⁴⁸ is essentially a throwback and more reminiscent of traditional receivership.⁴⁹ A secured creditor with security over the whole (or substantially the whole) of the company's assets arguably

³⁵ Whereas collectivity simply binds creditors inclusive proceedings afford all creditors participation rights (a pro-active role in the procedure) which means that they can look to the insolvency practitioner to represent their interests. S. Frisby, 'In Search of a Rescue Regime: The Enterprise Act 2002' (2004) 67 *Modern Law Review* 247, at 250.

³⁶ IA 1986, s.130.

³⁷ *Ibid*, Sch B1 para 43.

³⁸ Corporate Insolvency and Governance Act 2020, s. 1.

³⁹ See 3.3.

⁴⁰ See the first decision under English law to recognise a floating charge in *Re Panama, New Zealand, and Australian Royal Mail Co* (1870) 5 Ch App 318 and the discussion at 1.13.

⁴¹ See 1.1.

⁴² See 1.3.1.

⁴³ The security must relate to the whole or substantially the whole of the company's property. IA 1986, Sch B1 para 14(3).

⁴⁴ *Ibid*, para 14(1).

⁴⁵ See *Re T&D Industries plc* [2001] 1 WLR 646 for the power of an administrator to sell the assets of a company and *Re TransBus International Ltd* [2004] EWHC 932 (Ch) for the discretion of an administrator to trade with a company's assets.

⁴⁶ The administrator must perform his functions in the interests of the company's creditors as a whole. IA 1986, Sch B1 para 3(2).

⁴⁷ *Ibid*, para 43.

⁴⁸ *Ibid*, Sch B1.

⁴⁹ See 3.9.

yields the same amount of control and influence where either a receiver is appointed, or a company is placed into administration.⁵⁰ It is argued that the emphasis placed on the protection of the pre-insolvency rights of secured creditors⁵¹ effectively undermines both the fundamental collective nature of insolvency and equality of treatment (the *pari passu* principle).⁵²

It is not disputed that secured creditors, unlike unsecured creditors, have additional proprietary rights over the assets of a debtor. But, where there is a possibility of rescuing the company, salvaging the business, or achieving a better result for the company's creditors, prioritisation of pre-insolvency rights is not necessarily warranted. However, when it is in the best interests of all stakeholders to wind up a hopelessly insolvent company, prioritisation cannot be avoided. In other words, "not all lame ducks can, or should be rescued, and the appropriate procedure for the genuinely doomed is immediate liquidation".⁵³

The early pragmatic approach that was adopted by the legislature in response to the contemporary commercial needs⁵⁴ was, fatefully, not predicated on any theory.⁵⁵ Thus, a combination of the *ad hoc* approach and influence of organisations with vested interests, such as National Association for the Promotion of Social Science and Associated Chambers of Commerce of the UK,⁵⁶ resulted in a corporate insolvency framework which prioritises the rights of secured creditors over the interests of other stakeholders.⁵⁷ The existing corporate insolvency framework, it is submitted, primarily

⁵⁰ See, for example, S. Harris, "The Decision to Pre-Pack" Winter 2004 *Recovery* 26, at 27.

⁵¹ The realisation of secured assets and distribution of the proceeds is conducted outside the scope of any insolvency. Cork Committee, para 17.

⁵² See 1.3.

⁵³ S. Frisby, 'In Search of a Rescue Regime: The Enterprise Act 2002' (2004) 67 *Modern Law Review* 247, at 248.

⁵⁴ See Chapter 1.

⁵⁵ A. Keay, 'Balancing Interests in Bankruptcy Law' (2001) *Common Law World Review* 30(2), at 11.

⁵⁶ See 1.8.

⁵⁷ See the conclusion at 1.15.

protects the pre-insolvency rights of secured creditors at the expense of promoting collective execution which facilitates corporate rescue.⁵⁸ The scope of the provisions is not consistent the multi-faceted approach that was adopted during the evolution of English insolvency law.

The following section explains the rationale of the recommendation which is projected to strike a fair balance between competing stakeholder interests and to, some extent, mitigate the deleterious public perception of corporate insolvency in the UK.

5.3 Balancing Interests of Stakeholders

Although the corporate insolvency framework adopted in UK clearly distinguishes and makes provision for multiple stakeholder interests,⁵⁹ the thrust of the provisions, similar to the creditors' wealth maximisation theory,⁶⁰ is to protect the pre-insolvency rights of secured creditors.⁶¹ Debt is an essential source of finance for companies,⁶² but assets subject to a charge are not part of the "assets of the company".⁶³ In reality, the assets of the company are the "free assets" meaning the company's unencumbered assets.⁶⁴ Corporate insolvency law recognises the rights conferred by the general law and by contract.⁶⁵ The relationship between property law and insolvency law is such that secured creditors - who provide debt finance - are entitled to enforce their security⁶⁶ outside insolvency.⁶⁷ Nevertheless, the credit provided by

⁵⁸ See 2.2.

⁵⁹ See 2.1.

⁶⁰ See 2.3.2.

⁶¹ See 3.8

⁶² It has also been suggested that the discipline of having to meet contractual obligations and to abide by covenants acts as a corporate governance monitoring mechanism: Ellis Ferran, 'Creditors' interests and "core" company law' (1999) *Company Lawyer* 20(10), at 314-323.

⁶³ See J. Armour and A. Walters, 'Funding Liquidation: a functional view' (2006) *Law Quarterly Review* 122, at 297.

⁶⁴ *Ibid.*

⁶⁵ R. Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell Ltd, London 1990), p 17.

⁶⁶ *Re David Lloyd & Co* (1877) 6 Ch. D. 339.

⁶⁷ *Food Controller v Stoke* [1923] AC 647 per Lord Wrenbury at 670-671. See 1.8.

unsecured creditors is, similar to secured credit, advanced prior to a company becoming insolvent although it is not secured and generally less in value compared to secured credit. During its lifetime, a company crucially thrives on either or both forms of credit (secured and unsecured) and it is, therefore, proposed that the emphasis placed on the pre-insolvency rights of secured creditors should be revised with a view to promoting a more collective and inclusive corporate insolvency regime.

The provision of realising assets to make a distribution to secured or preferential creditors,⁶⁸ during an administration, effectively undermines the collective nature of the procedure: in practice more administrations are adopted to realise the company's property in order to make a distribution⁶⁹ compared to a very small number that is adopted to achieve the primary statutory purpose of company rescue.⁷⁰ It is, therefore, suggested that removing the purpose⁷¹ of making distributions to a minority would definitely promote a more collective and balanced approach to effective corporate rescue. An inequality of bargaining power exists between the different classes of creditors. A more balanced approach will improve the current position of unsecured creditors in comparison to secured and preferential creditors.⁷² In other words, a more inclusive regime fosters collective execution which in turn promotes the interests of all stakeholders.

5.4 The Meaning of Corporate Rescue

Although the concept of corporate rescue has various shades of meaning,⁷³ there is a clear distinction between rescuing the company and rescuing the business of the

⁶⁸ IA 1986, Sch B1 para 3(1)(c).

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, para 3(1)(a).

⁷¹ *Ibid.*, para 3(1)(c).

⁷² Preferential debts, for example, employee wages and holiday pay, are prioritised ahead of other unsecured creditors. IA 1986, Sch 6.

⁷³ See 2.1.

company.⁷⁴ The theory which supports English insolvency law has never been clearly articulated, let alone the theory behind corporate rescue.⁷⁵ The predicament makes it particularly difficult to illuminate and justify the concept of corporate rescue adopted in England and Wales.⁷⁶ Nevertheless, the Cork Committee articulated the theory behind the corporate “rescue culture” in its final report.⁷⁷ The Report observed that receivers who were privately appointed under carefully drafted instruments were able to successfully turn around the fortunes of a few insolvent companies or, more commonly, sold the whole or part of the business as a going concern.⁷⁸ The extensive powers bestowed upon a receiver and manager to continue the operation of a company and to either sell its business as a going concern (or on a piece-meal basis) effectively facilitated both types of rescues.⁷⁹

The corporate rescue outcomes observed during receiverships prompted the Cork Committee to recommend a similar (administration)⁸⁰ procedure to cover the gap where there was no debenture holder who was entitled to appoint a receiver and manager with a view to promoting a corporate “rescue culture”.⁸¹ The Cork Committee’s recommendation debatably envisaged a policy of promoting business rescue hence the pre-requisite of an underlying viable business.⁸²

To the contrary, the primary purpose of administration, similar to the restructuring moratorium,⁸³ is to rescue a company as a going concern.⁸⁴ If company rescue is not

⁷⁴ See, for example, S. Frisby, ‘In Search of a Rescue Regime: The Enterprise Act 2002’ (2004) 67 *Modern Law Review* 247, at 248.

⁷⁵ See 2.1.

⁷⁶ See Chapter 2.

⁷⁷ Cork Committee, Ch 9.

⁷⁸ *Ibid*, para 495.

⁷⁹ Cork Committee, para 495.

⁸⁰ IA 1986, Part II.

⁸¹ See 3.1.

⁸² Cork Committee, para 201.

⁸³ Corporate Insolvency and Governance Act 2020, s. 1 (“CIGA 2020”).

⁸⁴ IA 1986, Sch B1 para 3(1)(a).

reasonably practicable the administrator must attempt to “achieve a better result for the company’s creditors as a whole than would be likely if the company were wound up (without first being in administration)”.⁸⁵ It is noteworthy that the second purpose is by far the most adopted in practice⁸⁶ and a better result for the company’s creditors is usually attempted through a sale of the whole or part of the company’s business to a connected party. Although the provision does not specify how a better result may or should be achieved,⁸⁷ the common trend is a sale of the company’s business as a going concern. During the passage of the Insolvency Bill 1986, it was suggested that promoting business rescue (as opposed to company rescue) would discourage directors from entering the rescue procedure because of fear of losing their jobs to the new purchasers.⁸⁸ Similarly, during the passage of the Enterprise Act, Mr Douglas Alexander, Minister of E-Commerce and Competitiveness, reiterated the same approach:

“[t]he purpose 'to rescue the company' evidently means to rescue the company as a going concern, with the whole or much of its business intact. We are confident that the courts would interpret the purpose in exactly that way... If the objective of administration were to rescue the company's businesses rather than the company itself, frankly there would be little incentive for directors of the company to enter into administration, which is one of the intentions of the Bill.”⁸⁹

⁸⁵ IA 1986, Sch B1 para 3(1)(b).

⁸⁶ The second statutory purpose was adopted in 58% of the traditional administrations reviewed under this study. See 4.3.1.

⁸⁷ IA 1986, Sch B1 para 3(1)(b).

⁸⁸ See White Paper, *Productivity and Enterprise: Insolvency – A Second Chance*, The Insolvency Service (London: HMSO, 2001) Cmnd 5234.

⁸⁹ HC May 2002, House of Commons Standing Committee B at Columns 548-9.

To the contrary, the empirical research findings showed that a large number of businesses⁹⁰ are, in fact, sold to either a former director or a connected party during administration. If neither the survival of a company nor business rescue are feasible,⁹¹ the administrator may realise the company's property in order to pay one or more secured or preferential creditors.⁹² It seems that the traditional approach, under receivership, which gave the main secured creditor preferential treatment over other creditors was directly imported into administration. Although administration was purely motivated by the corporate rescue outcomes observed during a few receiverships, the existing regime can also be used to liquidate⁹³ or dissolve⁹⁴ the company. The odd connection between receivership and administration partly explains the convergence of the principal corporate insolvency procedures in practice and prevalence of business rescue as opposed to the survival of the company.

The following recommendations are intended to address the corporate rescue policy which is promoted in England and Wales and the inconsistent approach adopted under Schedule B1 provisions.⁹⁵

5.5 Corporate Rescue Outcome - Survival of the Company, Business Rescue or Quasi-Liquidation?

The empirical findings, under Part II of the thesis, do not support the argument which was advanced in favour of adopting a company rescue policy⁹⁶ as opposed to business rescue. In pre-pack administrations, most businesses are acquired by either

⁹⁰ The company's business and assets were sold to a connected party in 5 'traditional' administrations (17%) out of 29 observed going concern sales, albeit the details of the purchasers were not disclosed in two connected sales, and in 66% of all the pre-pack arrangements reviewed. See Chapter 4.

⁹¹ IA 1986, Sch B1 paras 3(1)(a) and (b).

⁹² *Ibid*, para 3(1)(c).

⁹³ *Ibid*, para 83.

⁹⁴ *Ibid*, para 84.

⁹⁵ *Ibid*, Sch B1. See 3.8.

⁹⁶ IA 1986, Sch B1 para 3(1)(a).

a former director or a connected party. In fact, in all the cases of successful business rescue observed across the three samples considered, the directors' jobs were preserved in the new companies ("newco") while the old companies ("oldco") were either liquidated or dissolved. Based on the statistics, it is evident that rescuing a company as a going concern is extremely difficult to achieve. Interestingly, in South Africa where a similar "judicial management"⁹⁷ procedure was initially adopted it was later replaced with a business rescue regime⁹⁸ and the analogous Australian "official management" was rarely used in practice and was consequently superseded by voluntary administration⁹⁹ under the Corporate Law Reform Act 1992. The corporate rescue policy promoted in England and Wales¹⁰⁰ has led some prominent commentators to question the wisdom of giving primacy to company rescue instead of aiming to preserve the underlying business.¹⁰¹

Based on practical evidence, it is suggested that the Cork Committee's original recommendation of preserving viable businesses is a more sensible corporate rescue policy to implement. Promoting the survival or reorganisation of the business is in line with both the contemporary preventive restructuring trends adopted in the EU¹⁰² and principles endorsed by the World Bank.¹⁰³ The findings of the empirical research in

⁹⁷ An order could only be made with a view to the financial rehabilitation of the company, see for example, *Tenowitz v Tenny Investments* 1979 (2) SA 680.

⁹⁸ Companies Act No. 71 of 1978.

⁹⁹ L. S. Sealy and D. Milman, *Annotated Guide to the Insolvency Legislation* (4th edn CCH Editions Limited, Oxfordshire 1994), p 41.

¹⁰⁰ IA 1986, Sch B1.

¹⁰¹ See, for instance, A. Keay and P. Walton, *Insolvency Law: Corporate and Personal* (4th edn LexisNexis, Bristol 2017), p 82.

¹⁰² Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency). See 3.10.

¹⁰³ The internationally recognized approach encourages reorganisation of viable businesses through formal or informal procedures. The World Bank available at: <https://www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights> [Accessed 16/06/2021]. See 3.11.

Chapter 4 evidently showed that most practitioners are inclined to sell the business of an insolvent company to a director or a connected party.¹⁰⁴ In practical terms, the meaningful corporate rescue outcome which is achievable during administration is business rescue and not the primary objective of company rescue.¹⁰⁵ Clearly, promoting the survival of viable businesses is not a new concept to practitioners. Nevertheless, the policy can potentially increase both the number of companies that enter administration and statistics of successful business rescues since for several reasons only a negligible percentage of administrators (4% under this study)¹⁰⁶ attempt to achieve company rescue¹⁰⁷ in the first place.

As previously proposed, the statutory purposes of administration¹⁰⁸ should be streamlined by excluding the third purpose¹⁰⁹ to make the procedure more rescue orientated. The increase in the use of the administration provisions¹¹⁰ as a substitute for liquidation ('quasi-liquidation')¹¹¹ in the aftermath of the EA 2002 reforms is inextricably connected to the third purpose.¹¹² It is difficult to reconcile the objective of realising the company's assets to make a distribution to one or more preferential or secured creditors¹¹³ with the theory of corporate rescue which was advocated by the Cork Committee.¹¹⁴ It is far easier and perhaps more appealing to sell the assets of an insolvent company and use the proceeds to pay a small class of protected creditors¹¹⁵ ahead of a liquidation or dissolution than to actually turn around the

¹⁰⁴ Out of the 188 businesses that were sold as a going concern across the three samples considered a total of 171 businesses were sold to a connected party (90% of the total). See 4.10.1.

¹⁰⁵ IA 1986, Sch B1 para 3(1)(a).

¹⁰⁶ See, for instance, 4.3.1.

¹⁰⁷ IA 1986, Sch B1 para 3(1)(a).

¹⁰⁸ *Ibid*, para 3.

¹⁰⁹ *Ibid*, para 3(1)(c).

¹¹⁰ IA 1986, Sch B1.

¹¹¹ See 2.2.

¹¹² IA 1986, Sch B1 para 3(1)(c).

¹¹³ *Ibid*.

¹¹⁴ See 2.2.

¹¹⁵ IA 1986, Sch B1 para 3(1)(c).

fortunes of an ailing company. Thus, the inconsistent approach adopted under the administration framework¹¹⁶ effectively render the regime to be unfit for its primary purpose.

5.6 A Single Gateway for Corporate Insolvency

Based on the findings of this research project, the administration framework¹¹⁷ is not fit for purpose. Both the primary objective of company rescue¹¹⁸ and the notion of maximising returns to creditors, under the second statutory purpose,¹¹⁹ are rarely achieved in practice.¹²⁰ Most companies that enter administration are subsequently liquidated¹²¹ or dissolved¹²² while the businesses that are sold during the process are preserved. Similarly, most businesses that are acquired by former directors from liquidators during CVLs and continued using a same or similar name¹²³ are successfully preserved. In similar fashion to traditional administrations, most pre-packs result in the survival of the business and either liquidation or dissolution of the company, albeit the practice occasionally preserves a few connected jobs. So, even though a CVL is a terminal procedure and administration is a corporate rescue procedure, there is an apparent link between the opposite procedures and a convergence of the outcomes in practice. The most common outcome observed under the three procedures that were examined under this research project was business rescue.¹²⁴

¹¹⁶ IA 1986, Sch B1.

¹¹⁷ Ibid.

¹¹⁸ Ibid, para 3(1)(a).

¹¹⁹ Ibid, para 3(1)(b).

¹²⁰ See, for instance, 4.10.1.

¹²¹ IA 1986, Sch B1 para 83.

¹²² Ibid, para 84.

¹²³ IR 2016, r 22.4.

¹²⁴ See the summary of outcomes at 4.10.1.

The insolvency practitioners (IPs) who were appointed under the three procedures which were reviewed regularly charged pre-appointment fees for work done prior to the official declaration of insolvency and their appointment. Consequently, the pre-appointment fees added to the remuneration of the IP and increased the cost of the procedures. In the rare cases where a dividend was declared to unsecured creditors, the remuneration paid to IPs was significantly more than the distributions. Aside from the IPs the other stakeholders who are guaranteed to receive a significant dividend are secured creditors. In fact, in practice the assignment of a debtor's assets which is intended to benefit all creditors only benefits the IPs and a small group of protected creditors.¹²⁵ To mitigate the discrepancy, where there are insufficient assets, it is proposed that 10% of the IPs' remuneration should be allocated to unsecured creditors so that they can also benefit from asset realisations.¹²⁶ On the same token, it is proposed that businesses which are rescued either through a pre-pack or going concern sale should pay a dividend (at least 10p in £) out of the trading profits to the creditors of oldco until either the debt is settled or newco ceases to trade (whichever happens first). This recommendation is very akin to the proposal previously made by Wellard and Walton in 2009.¹²⁷

It is envisaged that the introduction of a single gateway system will vastly improve the corporate insolvency landscape in the UK by removing the need for the pre-appointment of IPs and thereby eliminating pre-appointment fees and reducing the procedural costs. One way of ensuring that the proposed single gateway system is accessible to companies of all sizes, including small and medium-sized businesses

¹²⁵ See, for instance, IA 1986, Sch B1 paras 70-73.

¹²⁶ This proposal is in line with the prescribed part under s. 176A of IA 1986.

¹²⁷ M. Wellard and P. Walton, 'A comparative analysis of Anglo-Australian pre-packs: Can the means be made to justify the ends?' *International Insolvency Review* 21(3), at 143-181.

(SMEs), is to keep the cost at a minimal. To this end, the selection of a full-time Government employee (the OR), as one of the key players, is anticipated to significantly reduce the IPs' fees. The gatekeepers' combined experience and expertise is expected to provide the requisite oversight, which already exists during administration,¹²⁸ to mitigate the malpractices associated with most out-of-court proceedings especially the operation of the first exception¹²⁹ to the restriction on re-use company names¹³⁰ during CVLs.

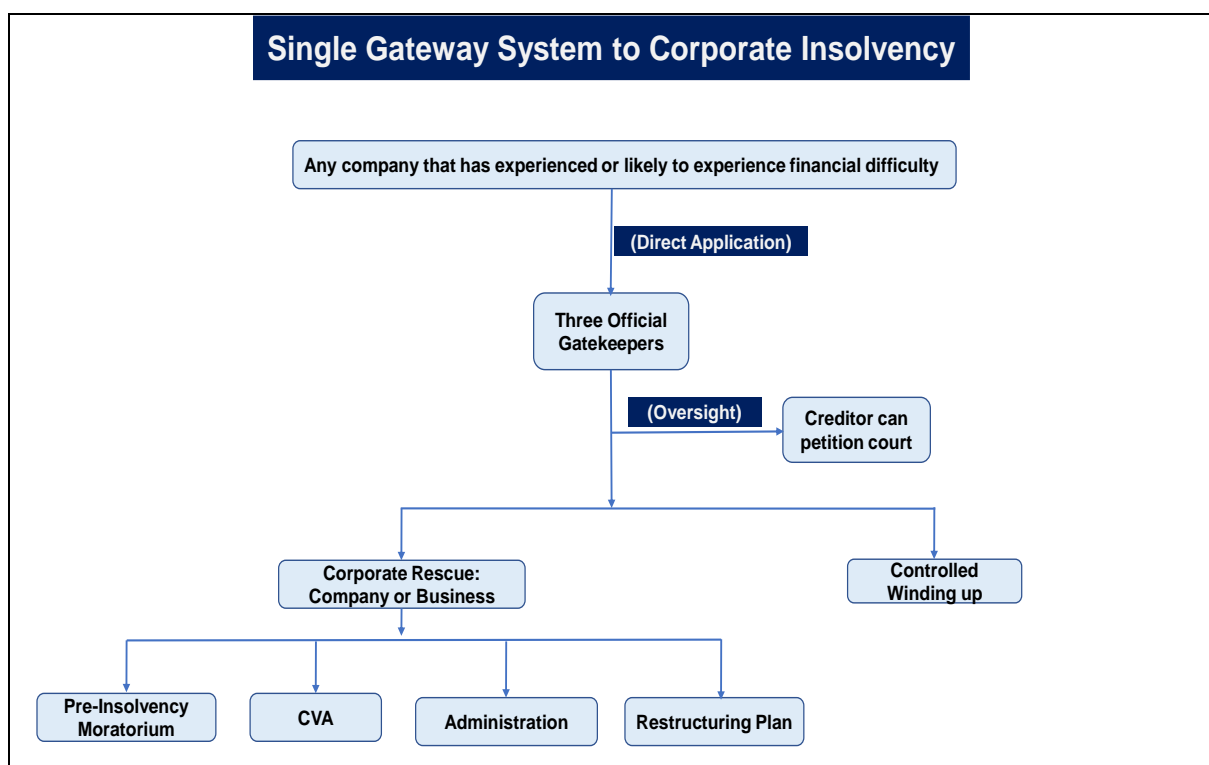


Figure 1

The following discussion is designed to address the most significant flaws in the existing corporate insolvency framework and to make desirable recommendations that

¹²⁸ An administrator is under a duty to perform his or her functions in the interests of the company's creditors as a whole. IA 1986, Sch B1 para 3(2). The purpose of Statement of Insolvency Practice 16 (SIP 16) is to ensure that creditors are informed as to the reasons why an IP decided to use a pre-pack.

¹²⁹ IR 2016, r 22.4.

¹³⁰ IA 1986, s. 216.

collectively constitute a single gateway system to corporate insolvency as illustrated in simple form above (see figure 1).

5.6.1 Application of the Provisions: Eligibility Criteria

One of the main reasons that was submitted by the majority of administrators for not attempting to perform the primary purpose of rescuing the company¹³¹ was the prominent levels of existing debts.¹³² This implies that most directors did not take decisive action until it was too late. Under the existing corporate insolvency framework there are provisions that are designed to penalise directors for continuing to trade when a company is deemed to be insolvent.¹³³ However, one of the conditions to enter administration is that a company is or is likely to become unable to pay its debts.¹³⁴ This requirement is probably a contributing factor to the crippling levels of debts observed and failure on the part of directors to act timely. The terminology does not particularly encourage directors to act early as it is drafted too wide and is imprecise.

The entry requirement under the proposed single gateway framework embraces similar wording as one of the conditions necessary for a restructuring plan.¹³⁵ In essence, the director(s), a creditor or member of a company that is experiencing financial difficulties¹³⁶ can make a direct application to the official gatekeepers for entry into the single gateway system. The transformation in the wording of the condition for entry is, unlike the test for insolvency under administration,¹³⁷ intended to promote early restructuring before the advent of insolvency. The findings of the empirical

¹³¹ IA 1986, Sch B1 para 3(1)(a).

¹³² See 4.3.1.

¹³³ IA 1986, s. 214.

¹³⁴ Ibid, Sch B1 para 11(a).

¹³⁵ CA 2006, Part 26A.

¹³⁶ In *Re Hurricane Energy Plc* [2021] EWHC 1759 (Ch), the court declined to sanction a restructuring plan, under Part 26A of CA 2006, because the company was likely to remain profitable for the next year and there was a realistic prospect that it would be able to pay its debts in the future.

¹³⁷ See footnote 121 above.

research on CVLs (subject to the exception to re-use company names)¹³⁸ vividly demonstrated a clear link between early restructuring and successful business rescue.¹³⁹

5.6.2 Request to Enter Single Gateway

The commencement of proceedings under the proposed single gateway system is quite analogous to the out-of-court appointment of an administrator by the directors¹⁴⁰ or holder of a qualifying floating charge,¹⁴¹ albeit the decision to either pursue a corporate rescue procedure or a controlled winding up is jointly undertaken by three professional (independent) gatekeepers instead of a single private insolvency practitioner (IP). The proposed gatekeepers will be an Official Receiver (OR), an experienced restructuring IP and a business consultant. The provision of a direct entry route is designed to reduce cost and delay and to eliminate the potential conflicts of interests surrounding the pre-appointments of IPs. To promote transparency, it is recommended that the OR must be appointed in all winding up proceedings so that an independent examination of the debtor and thorough investigation of the affairs in attendance can be conducted. Where the gatekeepers recommend, for example, business rescue, the experienced restructuring IP must immediately take charge thereby eliminating both the potential conflicts created during the pre-appointment consultations and connected fees. Crucially, a creditor or group of creditors can petition the court where they are of the opinion that the recommendations of the gatekeepers do not necessarily promote their interests.

¹³⁸ IR 2016, r 22.4.

¹³⁹ See 4.7.

¹⁴⁰ IA 1986, Sch B1 para 22.

¹⁴¹ *Ibid*, para 14.

For simplicity, the proposed single gateway system incorporates most of the corporate rescue procedures that are already in use in England and Wales: pre-insolvency moratorium,¹⁴² administration¹⁴³ (preferably an amended version as previously recommended), company voluntary arrangements (CVAs)¹⁴⁴ and restructuring plans.¹⁴⁵ Based on the merits of each case the gatekeepers will adjudicate on the most appropriate procedure that is likely to either achieve corporate rescue or a better result for the company's creditors as a whole than would be likely if the company were wound up. Alternatively, the gatekeepers can decide that the optimum procedure is a controlled winding up. In order that the system is not compromised or abused it is suggested that - similar to how the IP rota is used in the distribution of cases by the OR¹⁴⁶ - the gatekeepers' appointments should be temporary.¹⁴⁷ It means that the specialist restructuring IP and business consultant can be paid a modest commission for their services based on the value of the assets which should keep the expenses low and maximise returns to creditors.

A rota system also ensures that the gatekeepers (excluding the OR) can return to private practice at some point where they can potentially earn more. The out-of-court appointments and a rota system for making appointments requires the Insolvency Service (IS), the recognised professional bodies (RPBs)¹⁴⁸ and the Joint Insolvency

¹⁴² CIGA 2020, s 1.

¹⁴³ IA 1986, Sch B1.

¹⁴⁴ Ibid, ss 1-7B.

¹⁴⁵ CA 2006, Part 26A.

¹⁴⁶ See the guidance on the insolvency practitioner rota available at: <https://www.gov.uk/government/publications/insolvency-practitioner-rota> [Accessed 10/09/2021].

¹⁴⁷ This proposal is similar to the automated "rota" system of appointments of Pre-Pack Pool evaluators under the voluntary scheme which was introduced in 2014 following the recommendations of the Graham review into Pre-pack Administration available at: <https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration> [Accessed 12/09/2021]. From April 2021, a disposal of a substantial part of an insolvent company's assets to a connected party during the first 8 weeks of administration must be referred to an independent evaluator under the Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021.

¹⁴⁸ The four recognised professional bodies are the Institute of Chartered Accountants in England and Wales (ICAEW), the Institute of Chartered Accountants in Ireland (ICAI), the Institute of Chartered

Committee (JIC) to work closely with each other to develop and maintain an effective register of the potential gatekeepers.¹⁴⁹ Since it is already the responsibility of the IS to investigate the affairs of companies in liquidation and to report any misconduct to the Secretary of State and to act as trustee or liquidator where no private sector IP has been appointed, it is strongly recommended that the appointment of the gatekeepers should be administered by the same Government agency. The development and improvement and maintenance of insolvency standards across the profession should remain as a province of the JIC.

5.6.3 Petition to Court

Where one or more creditors petition the court, it is envisioned that the court will exercise its inherent jurisdiction to wind up hopelessly insolvent companies where it is of the opinion that it is just and equitable to do so¹⁵⁰ or make an order it thinks is fit. After filing a petition and adjudication, the court will appoint an OR over the debtor's assets where it is appropriate. The operation of the single gateway system is intended to be comparable to the revised official system, which was constituted under the Bankruptcy Act of 1883,¹⁵¹ albeit most of the duties which were performed by the court will be administered by the gatekeepers¹⁵² to reduce the procedural costs. The courts

Accountants in Scotland (ICAS) and the Insolvency Practitioners Association (IPA). See the guidance on recognised professional bodies available at: <https://www.gov.uk/government/publications/insolvency-practitioners-recognised-professional-bodies/recognised-professional-bodies> [Accessed 12/09/2021].

¹⁴⁹ The Government is currently conducting a consultation on changes to the way the insolvency profession is regulated and similarly some of the key changes proposed in the consultation are to establish a single independent regulator to replace the current system of using RPBs and to create a public register of all individuals and firms that offer insolvency services. See The future of insolvency regulation available at: <https://www.gov.uk/government/consultations/the-future-of-insolvency-regulation> [Accessed 14/03/2022].

¹⁵⁰ IA 1986, s. 122.

¹⁵¹ During preparation of the Bankruptcy Bill of 1883, it was acknowledged that bankruptcy, like many aspects of society, had a public as well as a private character. V.M Lester, *Victorian Insolvency* (Oxford University Press, Oxford 1995), p 191.

¹⁵² See, for instance, 1.10.

will retain a supervisory role through the office of the OR. The dual existence of a private and public character in insolvency requires that an OR must perform a coroner's inquest. Thus, the OR will perform the necessary investigations and penalise improper conduct. Aside from being appointed to administer liquidations, the OR will also be one of the three official gatekeepers in charge of deliberating on the applications to enter the single gateway. Where an investigation of the company's affairs is necessary it is recommended that the OR should be appointed and not a private sector IP. Whilst the provision of a direct entry route ensures that the system is streamlined and accessible to companies of all sizes, the provision to petition the court provides the requisite oversight which safeguards against potential abuse of privilege and power.

5.7 Summary of Recommendations

The three procedures which were examined under this study were mostly commenced out-of-court and achieved the same outcome of business rescue at the expense of the unsecured creditors. A single gateway system is highly desirable due to the perceived convergence of the principal (terminal and non-terminal) corporate insolvency procedures in practice. On one hand, the operation and outcomes of administration are synonymous with liquidation while, on the other, the permissible practice of re-using company names during CVLs result in successful rescue of businesses. However, there is no independent review of the operation of the first exception¹⁵³ to the restriction on re-use of company names¹⁵⁴ compared to the robust framework proposed under the single gateway system.

¹⁵³ IR 2016, r 22.4.

¹⁵⁴ IA 1986, s. 216.

Unlike the approach adopted under administration¹⁵⁵ and the restructuring frameworks,¹⁵⁶ there is no pre-condition to satisfy¹⁵⁷ in order to access the single gateway system. The prominent levels of debts that stifled company rescue during most administrations suggested that the directors involved failed to act early. Ironically, most directors who published a legal notice in the *Gazette* to re-use company names¹⁵⁸ during a CVL had actually started planning to continue the business of oldco by incorporating a newco with a similar name several months prior to filing for insolvent liquidation. It is weird that the effective (early) approach to corporate rescue and restructuring is in fact adopted during CVLs (subject to exception to re-use company names)¹⁵⁹ but never as part of any administration. To promote early restructuring and improve expediency the directors, a creditor or a member of the company can make a direct application to the gatekeepers so that a financially distressed company can enter into the single gateway system at the earliest. Based on the outcomes of the empirical research it is unequivocal that early restructuring promotes effective corporate rescue. Similarly, the preventive (business) restructuring adopted in the EU, business reorganisation under Chapter 11 of the US Bankruptcy Code and the principles endorsed by the World Bank promotes early restructuring.

A total of 171 businesses (90% of the total business sales) across the three samples considered were sold to a former director or a connected party. This statistic clearly shows that most directors do not lose their jobs to new purchasers as suggested during passage of the Insolvency Bill 1986 and Enterprise Act. Therefore, it is perfectly arguable that adopting and expressly promoting the preservation of viable businesses

¹⁵⁵ IA 1986, Sch B1.

¹⁵⁶ CIGA 2020, s. 1 and Sch 9.

¹⁵⁷ See s. 123 of IA 1986 for a definition of inability to pay debts.

¹⁵⁸ IR 2016, r 22.4(3).

¹⁵⁹ Ibid, r 22(4).

and streamlining the purposes of administration would not only make the corporate rescue strategy adopted in England and Wales more consistent but can potentially improve the corporate rescue statistics too. In addition, there needs to be a balanced way of protecting the interests of all stakeholders during rescue, for example, comparable to how security interests are stayed to facilitate business reorganisation under Chapter 11 of the US Bankruptcy Code.

5.8 Conclusion

Based on the findings of early research and preliminary findings and empirical evidence, it is safe to conclude that the principal corporate rescue procedure (administration) adopted in England and Wales to promote company rescue¹⁶⁰ is not fit for purpose. The administration regime is largely adopted either to try to achieve a better result for the company's creditors compared to an immediate liquidation¹⁶¹ or to realise the company's property to pay one or more secured or preferential creditors,¹⁶² prior to a winding up¹⁶³ or dissolution,¹⁶⁴ instead of being adopted to promote the primary statutory purpose of company rescue in the first place.¹⁶⁵ A quantitative study of 100 'traditional' administrations highlighted that where the second statutory purpose¹⁶⁶ was adopted the administrators did not convincingly achieve a better result for the unsecured creditors. A dividend was declared to unsecured creditors in less than a quarter of the proceedings, and almost half of the distributions were less than 5p in the £. The only positive outcome observed during both 'traditional' and pre-pack

¹⁶⁰ IA 1986, Sch B1 para 3(1)(a).

¹⁶¹ Ibid, para 3(1)(b).

¹⁶² Ibid, para 3(1)(c).

¹⁶³ Ibid, para 83.

¹⁶⁴ Ibid, para 84.

¹⁶⁵ Ibid, para 3(1)(a).

¹⁶⁶ Ibid, para 3(1)(b).

administrations was rescue of the whole or part of the business coupled with the preservation of a few jobs.

The apparent link between receivership and administration in terms of safeguarding the pre-insolvency rights of secured creditors is a significant contributing factor for the ineffective deployment of the Schedule B1 provisions.¹⁶⁷ The introduction of a collective regime, under administration,¹⁶⁸ was intended to represent a shift from the non-collective proceedings under receivership.¹⁶⁹ However, in practice, the operation of the existing administration provisions,¹⁷⁰ similar to traditional receivership, is neither collective nor entirely inclusive. Although administration, unlike receivership, imposes collective execution,¹⁷¹ the proceeds from the asset realisations are mostly used to pay secured creditors and to cover the costs. Hence, there is a need to improve the existing corporate insolvency framework in order to balance the protection of the rights of secured creditors with the interests of unsecured creditor and other stakeholders to facilitate corporate rescue. To this end, the decision on the most appropriate procedure to be adopted when a company is experiencing financial difficulties, under the single gateway framework, is based on the professional judgement of three experienced independent practitioners' contrary to what a private sector IP - who is often involved in pre-appointment negotiations with the main secured creditor and the management - thinks is fit.

The inconsistent approach to corporate rescue adopted under the administration framework¹⁷² partially reflects the early pragmatism of the legislature and impact of

¹⁶⁷ IA 1986, Sch B1.

¹⁶⁸ Ibid, Part II.

¹⁶⁹ See, for instance, P. Walton, 'Pre-packaged administrations – trick or treat?' (2006) 19(8) *Insolvency Intelligence*, at 113-122.

¹⁷⁰ IA 1986, Sch B1.

¹⁷¹ Ibid, para 43.

¹⁷² Ibid, Sch B1.

influential organisations with vested interests on the evolution of insolvency law. In particular, the creation of the floating charge established the supremacy of secured creditors in corporate insolvency proceedings. Debt finance is secured by a combination of fixed and floating charges which means that in a considerable proportion of administrations there are no “free assets” to be realised for the benefit of the general creditors. This position might be acceptable either when a secured creditor enforces their security on default or when it is necessary to wind up a hopelessly insolvent company. In contrast, the theory of corporate rescue that was espoused by the Cork Committee was founded on either rescuing a company or its viable business. Thus, the third purpose of administration, which allows an administrator to realise the company’s property in order to pay one or more secured or preferential creditors,¹⁷³ contradicts the original theory of corporate rescue.

There is a causal link between the third statutory purpose,¹⁷⁴ which preserves the supremacy of secured creditors, and the new administration regime being used as ‘quasi-liquidation’ and subsequent dissolution of the company. The empirical study in the previous chapter showed that most companies enter administration when the levels of debts are too excessive which means that company rescue is virtually impossible due to the chronic lack of rescue finance in practice. The suggested transformation in the wording of the condition to enter the single gateway system is anticipated to encourage early and effective restructuring. In addition, the purposes of administration should be limited to either corporate or business rescue or achieving a better result for the creditors as whole in order to avoid the prospect of hopelessly insolvent companies winding up in a rescue procedure. Ominously, there is no

¹⁷³ IA 1986, Sch B1 para 3(1)(c).

¹⁷⁴ *Ibid.*

evidence from either a similar common law jurisdiction or otherwise which supports maintaining the survival of the company as a going concern. Promoting a policy of preserving viable businesses is consistent with the theory of corporate rescue, which was originally envisaged by the Cork Committee, contemporary restructuring trends and, indeed, in harmony with modern practice.

It is abundantly clear that company rescue is extremely challenging to achieve in practice, but if a company is rescued it means that it can pay its creditors a healthy dividend. From this viewpoint, it is particularly important for the law to clearly define the alternative options to the primary objective of company rescue¹⁷⁵ and to provide a framework that ensures an equitable distribution of losses caused by insolvency among the stakeholders.¹⁷⁶ Accordingly, the provisions under the proposed single gateway framework (see figure 1) clearly defines the options that are available to companies once they start to experience financial difficulties and also makes provision for a prescribed part of the IPs remuneration to be ring fenced for unsecured creditors where there are insufficient assets.

A historical survey of English insolvency law suggests that debtors and creditors preferred to enter into private arrangements as an alternative to either formal bankruptcy or company winding up. For that reason, all the procedures under the proposed single gateway system are independent of the court, albeit the OR is an officer of the court and creditors may also petition the court. If neither company nor business rescue is reasonably practicable, as observed under most administrations, a swift but controlled winding up is desirable to ensure that at least the processes of

¹⁷⁵ The second purpose is not explained but simply stated as to “achieve a better result for the company’s creditors as a whole than would likely if the company were wound up (without first being in administration)”. IA 1986, Sch B1 para 3(1)(b).

¹⁷⁶ Under the third purpose, the administrator may realise the company’s property to pay one or more secured or preferential creditors. IA 1986, Sch B1 para 3(1)(c).

realisation of the company's assets and distribution of proceeds are administered in an honest and competent manner in order to maximise or preserve both the value of the estate and returns to the creditors.

Although there is no blueprint for a corporate rescue framework, it has been suggested that modern corporate rescue and reorganisation should primarily seek to preserve, maximise or even enhance the value of a corporate debtor's business for the benefit of the creditors. Even though the primary purpose of administration is to rescue a company as a going concern, the thrust of the provisions is to protect the pre-insolvency rights of secured creditors. It does not take a rocket scientist to recognise that the third statutory purpose of administration of realising the company's property to pay secured or preferential creditors¹⁷⁷ smacks of receivership and, effectively, undermines the objectives of an effective corporate rescue framework.

A comparative analysis of administration with similar provisions, adopted under common law jurisdictions, and in the EU, clearly demonstrates that the regime is lagging behind the developing trends in insolvency, notwithstanding the restructuring frameworks under CIGA 2020. The thrust of many corporate rescue frameworks in developed economies is preserving viable businesses through early restructuring where there is a likelihood of insolvency. The traditional English approach to corporate insolvency has always recognised and accommodated other values and interests alongside the interests of creditors. The most successful regime in the history of English insolvency was based on a wider approach to insolvency. Similarly, the Cork Committee's recommendation of administration was driven by a concern of the impact of corporate insolvency on the wider social interests, in particular the community

¹⁷⁷ IA 1986, Sch B1 para 3(1)(c).

interest. In light of Brexit and overall findings of this extensive research project, the legislature is strongly recommended to review the administration framework with a view to amend the corporate rescue provisions, in line with international developments and recommendations proposed by this research, in order to improve the lamentable *status quo* and bolster the UK's reputation of being the centre of restructuring in Europe and beyond.

Bibliography

Books

Baldwin, E. T, *A Concise Treatise upon the Law of Bankruptcy* (Stevens & Haynes, London 1879)

Bellamy, R (ed.), *Victorian Liberalism: Nineteenth Century Political Thought and Practice* (London, 1990)

Bentham, J, *The Works of Jeremy Bentham* (ed) Bowring, J (London, 1843)

Beresford, M. W, *The Leeds Chamber of Commerce* (Leeds, 1951)

Boyle, A. J, and Birds, J, *Boyle & Bird's Company Law* (Bristol, 2007)

Brooke, J, *The House of Commons, 1754-1790: An Introductory Survey* (Oxford, 1968)

Brougham, H, *Speeches of Henry Lord Brougham* (Edinburgh, 1838)

Burn, W. L, *The Age of Equipoise: A Study of the Mid-Victorian Generation* (London, 1946)

Campbell, R. H, 'A Critique of the Christian Businessman and his Paternalism' in Jeremy, D. H, *Business and Religion in Britain* (Aldershot, 1988)

Churchill, W. S, *Great Contemporaries* (London, 1937)

Cooper, C. P, *A Brief Account of Some of the Most Important Proceedings in Parliament, Relative to the Defects in Administration of Justice in the Court of Chancery, the House of Lords and the Court of the Commissioners of Bankrupt...* (London, 1828)

Cornish, W. R, and Clark, G. de N, *Law and Society in England 1750-1950* (London, 1989)

Davis, G, *The Early Stuarts 1603-1660* (2nd edn, Oxford 1970)

Defoe, D, *A Review of the State and of the English Nation* (1706)

Dignam, A and Lowry, J, *Company Law* (Oxford, 2016)

Eden, R. H, *Observations Upon the Bill Now Depending in Parliament for the Consolidation and Amendment of the Bankruptcy Laws* (London, 1824)

Fane, C, *Bankruptcy Reform: In a Series of Letters Addressed to Sir Robert Peel, Bart* (London, 1838)

Farrer, T. H, *What Do We Pay With? OR, Gold Credit and Prices* (London, 1889), p 56

Fifoot, C. H. S, *Lord Mansfield* (Oxford, 1936)

Finch, V, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn Cambridge University Press, Cambridge 2009)

Flessner, A, 'Philosophies of Business Bankruptcy Law: An International Overview' in J. Ziegel (ed) *Current Developments in International and Comparative Corporate Insolvency Law* (Clarendon Press, 1994)

Fletcher, I, F, 'Juggling with the Norms: The Conflict between Collective and Individual Rights under Insolvency Law' in Cranston, R, *Making Commercial Law* (Clarendon Press, Oxford 1997)

Fletcher, I. F, *The Law of Insolvency* (2nd edn Sweet & Maxwell, 1996)

Goode, R in Feldman, D and Meisel, F (eds), *Corporate and Commercial Law: Modern Developments* (London, 1996)

Goode, R, *Principles of Corporate Insolvency Law* (4th edn Sweet & Maxwell, London 2011)

Gower, L. C. B, *Principles of Modern Company Law* (6th edn Sweet & Maxwell, London 1997)

Grant, *Sketches in London* (London, 1838)

Haagen, P, 'Eighteenth-Century English Society and the Debt Law', in Cohen, S and Scull, A (eds.), *Social Control and the State: Historical and Comparative Essays* (Oxford, 1983)

Halevy, E, *The Growth of Philosophic Radicalism* (London, 1928)

Hilton, B, *The Age of Atonement: The Influence of Evangelicalism on Social and Economic Thought* (Oxford, 1998)

Holdsworth, W, *A History of English Law* (London, 1903-66)

Holdsworth, W, *A History of English Law* (London, 1956)

Holdsworth, W, *Some Makers of English Law* (Cambridge, 1938)

Hoppit, J, *Risk and Failure in English Bankruptcy Business 1700 -1800* (Cambridge, 1987)

Ilersic, A. R and Liddle, P. F. B, *Parliament of Commerce: The Story of the Association of British Chambers of Commerce* (London, 1960)

Jones, A. J, *A Letter to the Right Hon. Lord Brougham and Vaux on the Expediency of Transferring the Country Jurisdiction in Bankruptcy to the County Courts...* (London, 1853)

Keay, A. and Walton, P, *Insolvency Law: Corporate and Personal* (3rd edn Jordan Publishing Ltd, Bristol 2012)

Keay, A. and Walton, P, *Insolvency Law: Corporate and Personal* (4th edn LexisNexis, Bristol 2017)

Kilpi, J, *The Ethics of Bankruptcy* (Routledge, London 1998)

Lester, V. M, *Victorian Insolvency* (Oxford University Press, Oxford 1995)

Lubenow, W. C, *The Politics of Government Growth* (Newton Abbot, 1971)

Maine, H. S, *Lectures on the Early History of Institutions* (6th edn London, 1893)

McCulloch, J. R, *A Dictionary, Practical, Theoretical, and Historical, of Commerce and Commercial Navigation* (London, 1832)

Mokal, R, J, *Corporate Insolvency Law: Theory and Application* (Oxford University Press, Oxford 2005)

Paley, W, *The Principles of Moral and Political Philosophy* (10th edn, Boston 1821)

Paris, H, *Constitutional Bureaucracy: The Development of British Central Administration since the Eighteenth Century* (London, 1969)

Parkes, J, *A History of the Court of Chancery* (London, 1828)

Ricardo, D, *The works and Correspondence of David Ricardo* (ed) Sraffa, P and Dobb, M. H (Cambridge, 1951-5)

Robinson, M, *An Insolvent Debtors' Guide* (London, 1817)

Stephen, L, *The English Utilitarians* (London, 1900)

Woodward, E. L, *The Age of Reform 1815 – 1870* (Oxford, 1939)

Articles

Armour, J and Frisby, S, 'Rethinking Receivership' (2001) 21 Oxford Journal of Legal Studies 73

Armour, J and Mokal, R, J, 'Reforming the Governance of Corporate Rescue: the Enterprise Act 2002' (2005) Lloyds' Maritime and Commercial Law Quarterly

Armour, J, 'The Chequered History of the Floating Charge' (2004) 13 Griffiths Law Review 25

Armour, J, Hsu, A and Walters, A, 'The Impact of the Enterprise Act 2002 on Realisations and Costs in Corporate Rescue Proceedings' (2006): A Report Prepared for the Insolvency Service

Baird, D, G, 'Loss Distribution, Forum Shopping and Bankruptcy: A Reply to Warren' (1987) 54 University of Chicago Law Review 815 ("Baird, A Reply to Warren")

Bloom, A and Harris, S, 'Pre-packaged administrations – what should be done given the current disquiet?' (2006) 19 Insolvency Intelligence

Carlson, D, G, 'Philosophy in Bankruptcy' (1987) 85 Michigan Law Review

Clifford Chance, 'Administrator's functions: statutory objective' (2020) Practical Law Magazine 31(8)

Cohen, J, 'The History of Imprisonment for Debt and Its Relation to the Development of Discharge in Bankruptcy' (1982) Journal of Legal History 3

Crouch, R. L, 'Laissez-Fare in Nineteenth Century Britain: Myth or Reality?' (1967)
Manchester School of Economics and Social Studies, 35

Fletcher, I. F, 'UK Corporate Rescue: Recent Developments – Changes to
Administrative Receivership, Administration and Company Voluntary Arrangement –
The Insolvency Act 2000, The White Paper 2001 and the Enterprise Act 2002' (2004)
5 European Business Organisation Law Review

Frisby, S, 'In Search of a Rescue Regime: The Enterprise Act 2002' (2004) 67 Modern
Law Review 247.

Frisby, S, A preliminary analysis of pre-packaged administrations (2007): Report to
the Association of Business Recovery Professionals (R3)

Fry, G. K, The Growth of Government: The Development of Ideas about the Role of
the State and the Machinery and Function of Government in Britain since 1780
(London, 1979)

Goldman, L, 'The Social Science Association, 1857-1866: A Context for Mid-Victorian
Liberalism' (1986) English Historical Review 101

Gregory, R and Walton, P, 'Fixed and floating charges – a revelation' (2001) Lloyds
Maritime and Commercial Law Quarterly 1

Gross, K, 'Taking Community Interests into Account in Bankruptcy: An Essay' (1994)
72 Washington University Law Quarterly 1031

Heidt, K, 'The Automatic Stay in Environmental Bankruptcies' (1993) 67 American
Bankruptcy Law Journal 69

Jackson, T, H and Scott, R, 'On the Nature of Bankruptcy: An Essay on Bankruptcy
Sharing and The Creditors' Bargain' (1989) 75(2) Virginia Law Review 155

Jackson, T, H, 'Bankruptcy, Non-Bankruptcy Entitlements and the Creditors' Bargain' (1982) 91 Yale Law Journal 857

Jacobs, Lezelle, 'Corporate insolvency practitioner remuneration and ethics – Not a case of moral bankruptcy?' (2020): Special Report to INSOL International

Jones, W. J, 'The Foundations of English Bankruptcy: Statutes and Commissions in the Early Modern Period' (1979) Transactions of the American Philosophical Society 69/3

Katz, A and Mumford, M, J, Comparative study of administration and administrative receivership as corporate rescue vehicles (2003), Report Prepared for the Institute of Chartered Accountants of England and Wales (ICAEW)

Katz, A and Mumford, M, J, Study of Administration Cases (2006), Report Prepared for Insolvency Service

Keay, A and Walton, P, 'British Steel: is it a wind up?' (2019) 4 Corporate Rescue and Insolvency 125

Korobkin, D, 'Contractarianism and the Normative Foundations of Bankruptcy Law' (1993) 71 Texas Law Review 541

Korobkin, D, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91 Columbia Law Review 717

Levi, L, 'On the Abolition of Imprisonment for Debt' (1874) Law Magazine and Review 3

Levinthal, L. E, 'The Early History of English Bankruptcy Law' [1918] University of Pennsylvania Law Review 223

McCormack, G, 'Control and Corporate Rescue – An Anglo-American Evaluation' (2007) *International & Comparative Law Quarterly* 515

Miles, V, 'Assessing Modern Bankruptcy Law: An Example of Justice' (1996) 36 *Santa Clara Law Review* 1025

Phipps, S and Hoskins, H, 'Administrators and distributions to members' (2017) *Butterworths Journal of International Banking & Financial Law* 32(11)

Schermer, B, S, 'Response to Professor Gross: Taking the Interests of the Community into Account in Bankruptcy' (1994) 72 *Washington University Law Quarterly* 1049

Shuchman, P, 'An Attempt at Philosophy of Bankruptcy' (1973) 21 *University of California Los Angeles Law Review*

Steel, W. A, 'An Outline of Bankruptcy Legislation in England During the Present Century, Together with That of Some of the Principal Commercial Countries of the World; With a Comparison of the Objects Sought for and the Results Obtained' (1881) *Journal of the Institution of Bankers*, 2

Stubbins, M, 'What Kind of World Are We Living In? Creditor Wealth Maximisation, Contractarianism or Multiple Values in the Post-Enterprise Act 2002 Insolvency Regime?' (2019) 32 *Insolvency Intelligence*

Treiman, I, 'Majority Control in Compositions: Its Historical Origins and Development' (1937-38) *Virginia Law Review* 507

Tribe, J and Graham, D, 'Bacon in Debt – The Insolvency Judgements of Francis, Lord Verulam' (2006) *Insolvency Law & Practice* 22(1)

Tribe, J, "Policy Subversion" in Corporate Insolvency: Political Science, Marxism and the Role of Power Interests During the Passage of Insolvency Legislation (2019) 32 *Insolvency Intelligence*

Tribe, J. P, 'Company voluntary arrangements and rescue: a new hope and a Tudor orthodoxy' (2009) 5 *Journal of Business Law*

Walton, P, 'Assignment of Book Debts – outright transfer of rights or unregistered securities?' (2018) 1 *Wolverhampton Law Journal* 1

Walton, P, 'Directors' duty to act in the interests of creditors under section 172 of the Companies Act 2006 – Aussie Rules Gone Walkabout' (2019) 2 *Wolverhampton Law Journal* 1

Walton, P, Umfreville, C and Jacobs, L, *Company Voluntary Arrangements: Evaluating Success and Failure* (2018): Report to the Association of Business Recovery Professionals (R3)

Warren, E, 'Bankruptcy Policy' (1987) 54 *University of Chicago Law Review* 775

Weisberg, R, 'Commercial Morality, the Merchant Character, and the History of Voidable Preference' (1986-7) 5 *Stanford Law Review* 39

Official Reports

A Review of Company Rescue and Business Reconstruction Mechanisms, the Insolvency Service (London: HMSO, 1999)

A Revised Framework For Insolvency Law (HMSO, 1984) Cmnd 9175 (White Paper)

Insolvency Law and Practice: Report of the Review Committee (1982) Cmnd 8558 (the Cork Committee)

Report of the Bankruptcy Committee (1925) Cmnd 2326 (the Hansell Committee)

Report of the Committee appointed to enquire into Bankruptcy Law and its Administration (1906) Cmnd 4068 (the Muir Mackenzie Committee)

Report of the Committee appointed to enquire what amendments are necessary in the Acts relating to Joint Stock Companies (1906) Cmnd 3052 (the Loreburn Committee)

Report of the Committee on Bankruptcy Law and Deeds of Arrangement Law Amendment (1955) Cmnd 221 (the Bladgen Committee)

Report of the Committee on Company Law Amendment (1945) Cmnd 6659 (the Cohen Committee)

Report of the Company Law Committee (1959) Cmnd 6659 (the Jenkins Committee)

Hansard

Hansard, 1st ser. (1818), xxxvii. 982-8

Hansard, 1st ser. (1806), vii. 839

Hansard, 1st ser. (1809), xii. 1141-7

Hansard, 1st ser. (1811), xx. 303-5

Hansard, 1st ser. (1817), xxxvi. 932-33

Hansard, 1st ser. (1842), lxxv. 489

Hansard, 2nd ser. (1820), i. 1008

Hansard, 2nd ser. (1822), vii. 1028-9

Hansard, 2nd ser. (1823), viii. 541

Hansard, 3rd ser. (1831), vii. 501

Hansard, 3rd ser. (1842), lxxv. 1087

Hansard, 3rd ser. (1842), lxxv. 1129

Hansard, 3rd ser. (1849), cv. 1142

Hansard, 3rd ser. (1858) cli. 2293

Hansard, 3rd ser. (1859), clii. 1142

Hansard, 3rd ser. (1860), clvii. 1582

Hansard, 3rd ser. (1860), clvii. 650

Hansard, 3rd ser. (1860), clvii. 674

Hansard, 3rd ser. (1860), clviii. 1565

Hansard, 3rd ser. (1861), clxi. 286

Hansard, 3rd ser. (1861), clxi. 293

Hansard, 3rd ser. (1861), clxi. 312-13

Hansard, 3rd ser. (1861), clxi. 388

Hansard, 3rd ser. (1861), clxii. 26061

Hansard, 3rd ser. (1861), clxiv

Hansard, 3rd ser. (1861), clxiv. 1103

Hansard, 3rd ser. (1861), clxiv. 1104

Hansard, 3rd ser. (1864), clxxiv. 686, 688

Hansard, 3rd ser. (1865), clxxix. 421-2

Hansard, 3rd ser. (1868), cxcii

Hansard, 3rd ser. (1869), cxcvi. 1212-1213

Hansard, 3rd ser. (1876), ccxxix. 1498

Hansard, 3rd ser. (1879), cclxxvii. 571, 846

Hansard, 3rd ser. (1881), cclx. 1057

Hansard, 3rd ser. (1881), cclx. 1067

Hansard, 3rd ser. (1883), cclx. 1068

Hansard, 3rd ser. (1883), cclxxvi

Hansard, 3rd ser. (1883), cclxxvii. 817

Hansard, 3rd ser. (1883), cclxxvii. 822

Hansard, 3rd ser. (1883), cclxxvii. 827

Hansard, 3rd ser. (1883), cclxxvii. 856

Hansard, 3rd ser. (1883), cclxxvii. 987

Hansard, HL Vol. 637, 138-190

Hansard, vol. 918, October 1976

Parliamentary Debates

JHC, xcvi. 574, 583, 589 (3 Aug. 1842)

JHC, xcvi. 93-442 (9 Jun. 1843)

JHC, lxxii. 296 (22 May 1817)

JHL, civ. (16 July 1872), 574

JHL, lxxix. 115 (29 Mar. 1847)

JHL, lxxvii. 1121 (5 Aug. 1845)

JHL, xciii. (26 Apr. 1861), 239

JHL, lxxiii. 226 (15 Feb. 1831)

PP 1867-8, i (145). 117-22: 'A Bill to Amend the Bankruptcy Act 1861' (28 May 1868):
31 & 32 Vict., c. 104 (1868)

PP 1815-16, iv (152). 534: 'Report From the Committee On the King's Bench, Fleet,
and Marshalsea Prisons etc...' (1 May 1815)

PP 1817, v (486). 60-1; 'Report from the Select Committee on Bankrupt Laws' (11 July
1817)

PP 1817, xvi (388). 100: 'Copy of the Rules, Orders and Regulations, for the
Government of the Debtors Prison for London and Middlesex' (2 June 1817)

PP 1818, ii (403). 191-236: 'A Bill to Alter and Amend the Laws Relating to Bankrupts'
(2 June 1818)

PP 1818, vi (276). 7; 'Report from the Select Committee on Bankrupt Laws' (8 May
1818)

PP 1818, vi (276). 82; 'Report from the Select Committee on Bankrupt Laws' (8 May
1818)

PP 1819, xvii (311). 47: 'A Return, Containing an Account of the Number of Persons
Discharged under the Insolvent Debtors Act...' (14 May 1819)

PP 1821, xvi (663). 22: 'Estimates and Accounts' (25 June 1831)

PP 1826-7, xix (108). 201-38: 'A Return of the Number of Persons Imprisoned for Debt
[on the 19th of April 1826] ...' (27 Feb. 1827)

PP 1831, xiii (28). 244: 'Estimates and Accounts' (25 June 1831)

PP 1831-2, xxv/1 (239). 60: 'Fourth Report...Practice and Procedures of the Superior Courts of Common Law' (6 Mar. 1832)

PP 1833, xxix (99). 221-56: 'Return of the Number of Prisoners confined for debt...', (22 Mar. 1833)

PP 1834 xviii (362). 201-36: Report from the Select Committee on Bankrupts' Estates Bill...' (10 June 1834)

PP 1836, i (447). 19-25: 'A Bill to Amend the Law Relating to Bankrupts' (15 July 1836)

PP 1837, i (349). 51-6: 'A Bill to Amend the Laws Relating to Bankrupts' (30 May 1837)

PP 1837-8, i (484). 71-7: 'A Bill to Diminish the Number of Commissioners and Deputy Registrars of the Court of Bankruptcy'

PP 1840, xvi (274). 1-600: 'Report of the Commissioners for Inquiring into Bankruptcy and Insolvency' (30 July 1840)

PP 1840, xvi [cmd. 274]. 24: 'Report of Commissioners' (30 July 1840)

PP 1841, xiv (22411). 404: 'Estimates and Accounts' (5 Apr. 1841)

PP 1849, i (370). 283-420: 'An Act to Amend, Methodize and Consolidate the Laws relating to Bankrupts...' (11 June 1849)

PP 1852-3, xxii (659). 34-5: 'Minutes of Evidence Taken before the Select Committee of the House of Lords Appointed to Consider the Bankruptcy Bill' (24 June 1853)

PP 1854, xxiii [cmd. 1770]. 1-56: 'Copy of the Report of Her Majesty's Commissioners Appointed to Inquire into Fees, Funds, and Establishments of the Court of Bankruptcy, and the Operation of the Bankruptcy Consolidation Act, 1849...' (10 Apr. 1854)

PP 1857-8, i (154). 79-260: 'A Bill to Amend and Consolidate the Laws Relating to Bankrupts and Insolvents' (22 June 1958)

PP 1860, i (75). 275-48: 'A Bill to Amend and Consolidate the Laws Relating to Bankruptcy and Insolvency in England' (15 Mar. 1860)

PP 1861, xxxiv (74). 509-62: 'Returns from the Official Mangers and Liquidators of Every Joint Stock Company Wound Up Under the Joint Stock Companies Winding-Up Acts...' (4 May 1861)

PP 1864, xlviii (31). 303: 'General Returns by the Chief Registrar of the Court of Bankruptcy' (11 Feb. 1864)

PP 1865, xii (144). 591-3: 'Report from the Committee on the Bankruptcy Act' (21 Mar. 1865)

PP 1866, i (106). 119-236: 'A Bill to Amend and Consolidate the Law Relating to Bankruptcy in England, and to Abolish Imprisonment for Debt in Final Process' (16 Apr. 1866)

PP 1873, liv (257). 9: 'General Report by the Comptroller in Bankruptcy' (18 June 1873)

PP 1878, I (89). 59-68: 'A Bill to Amend the Bankruptcy Act, 1869' (25 Jan. 1878)

PP 1880 lix (309). 14: 'General Report by the Comptroller in Bankruptcy' (27 July 1880)

PP 1880, viii (324). 212: 'Special Report from the Select Committee on the Bankruptcy Amendment Bill' (2 Aug. 1880)

PP 1881, I (137). 247-82: 'A Bill to Amend the Law of Bankruptcy' (8 Apr. 1881)

PP 1883, i (82). 327: 'A Bill to Amend the Law Relating to Bankruptcy' (16 Feb. 1883)

PP 1883, iv (286). 14: 'General Report by the Comptroller in Bankruptcy' (31 July 1883)

PP 1883, xi (224). 265: 'Report of the Standing Committee on Trade, Shipping and Manufacturers – Bankruptcy Bill' (25 June 1883)

SP 1842, ii (2140). 167: 'A Bill Intituled [sic] an Act for the Amendment of the Law of Bankruptcy' (14 Mar. 1842)

SP 1852-3, iii (57). 73: 'A Bill Intituled [sic] an Act further to Amend the Laws Relating to Bankrupts, to Extend the Jurisdiction of the Court of Bankruptcy, and to Make Such Court Auxiliary to the Court of Chancery' (10 Feb. 1853)

SP 1857-8, iii (291). 15: 'A Bill Intituled [sic] an Act to Amend the Law of Debtor and Creditor and Insolvency and Bankruptcy, and to Enable and Facilitate the Liquidation of a Debtor's Estate, and the Administration of Estates of Insolvent Traders Deceased' (30 July 1858)

SP 1876, iii (106). 55-8: 'A Bill Intituled [sic] an Act to Consolidate and Amend the Law of Bankruptcy and for Other Purposes' (1 June 1876)

Other Published Sources

'Bankruptcy and Insolvency Law' *The Times* (23 Nov. 1847), p 6

'Bankruptcy in the County Courts' *County Court Chronicles* (1 Feb. 1860)

'Bankruptcy Law Amendment' *Bankers Magazine and Journal Market* (Dec. 1880), p 975

'Consolidation of Bankrupt Laws' (1827) *Jurist* 1

'Court of Bankruptcy Bill' *The Times* (4 May 1842)

'Insolvents', *The Times* (29 June 1860)

'The Attorney-General's Bankruptcy Bill' *Bankers' Magazine and Journal of the Money Market* (Apr. 1861), p 98

'The Bankruptcy Bill' *The Times* (3 July 1876), p 7

'The Essential Element in Bankruptcy Reform' *Economist* (16 Feb. 1861), p 170

'The New Bankruptcy Bill' *Bankers Magazine and Journal of the Money Market* (June 1881), 447

'The New Bankruptcy Bill' *Economist* (31 Mar. 1860), p 337

ACC Papers 14,476 (2), minute book: annual meeting, 2 Mar. 1871

ACC Papers, 14,476 (3), minute book: annual meeting, 2 Feb. 1881

ACC Papers, 14,476 (3), minute book: executive council meeting, 8 June 1877

ACC Papers, 14,746 (2), minute book: annual meeting, 22-4 Feb. 1870

ACC Papers, 14,746 (2), minute book: special meeting of the executive council, 24 Nov. 1870

ACC Papers, 14,474: meeting 2 Feb. 1860, first annual meeting 6-7 Feb. 1861 (reporting on formation of the association)

Accountant (25 Dec. 1880), p 4-5

Accountant (25 June 1881), p 3-4

Birmingham CC Papers, council minute book, 13 Jan. 1863

Birmingham CC Papers: council report, 29 July 1869

Birmingham Law Society Papers, Book A (20 Jan. 1854)

Bristol CC Papers, 38605/M/2, p. 125: general meeting, 21 May 1860

Bristol CC Papers, 38605/M/2, p. 127: chamber meeting, 6 June 1860 (discussion of communication from the Wolverhampton CC on the bill)

Bristol CC Papers, 38605/M/2, p. 3: annual meeting, 26 Jan. 1859

Bristol CC Papers, 38605/M/2, pp. 58-9: chamber meeting, 18 Nov. 1859

Bristol CC Papers, 38605/M/4, minute book, p. 30: meeting, 12 Oct. 1870

Bristol CC Papers, 38605/M/5, minute book: pp. 284-5: general meeting, 26 Nov. 1879

Bristol CC Papers, 38605/M/6, p. 24: parliamentary committee meeting, 16 July 1880

Bristol CC Papers, LD 1989/4/201, letter book: Thomas Browning, secretary of Manchester CC, 1 June 1881

Bristol Chamber of Commerce, Report from the Board of Directors of the Chamber at the Annual Meeting Held January 25th, 1830 (Bristol, 1830)

Bristol Papers 38605/M/4, minute book, p.164: general meeting, 20 June 1873

Cobbett's Parliamentary Debates 1st ser. (1806)

County Courts Chronicle (1 Apr. 1869), p 98

Dod's Parliamentary Companion (London, 1833)

Dod's Parliamentary Companion (London, 1883)

Duffy, I. P. H, 'Bankruptcy and Insolvency in London in the Late Eighteenth and Early Nineteenth Centuries' (University of Oxford, PhD Thesis 1973)

Economist (23 Dec 1883), p 1584

Economist (23 Dec. 1882), p 1583

Gladstone Papers, 44,642, fo. 11: Gladstone's notes of cabinet meeting 14 May 1880

ICA Papers, minutes of general meeting, book A, P. 112: meeting 23 Apr. 1879,

Country Bankers, Assoc. Papers 4517: 'Report for the Year Ending May 1878'

ICA Papers, Reports of Committees, book A, p. 36: report of the bankruptcy committee, 2 May 1883

Journal of the Institute of Bankers (Dec. 1883), 553-4

Law Society of the UK, Annual Report of the Council of the Law Society of the United Kingdom, 16 July 1869 (London, 1896), p 16

Law Society, Bankruptcy Bill: Suggestions and Observations of the Provincial Law Societies (London, 1883) 2-3

Law Society, Proceedings and Resolutions of the Annual Meeting of the Law Society of the United Kingdom (London, 1877), p 14

Law Times (14 Oct. 1865), p 607

Law Times (16 Feb. 1869), p 6

Law Times (17 Oct. 1868), p 433

Law Times (25 Apr. 1869), p 23

Law Times (27 Mar. 1847), p 561

Law Times (3 Sept. 1864), p 479

Leeds CC Papers, minute book, ii (unnumbered pages): chamber meeting, 24 June 1868

Leeds CC Papers, minute book, ii. 304: special meeting to discuss bankruptcy reform, 30 Sept. 1857

Leeds CC Papers, minute book, ii. 335: meeting, 25 Feb. 1858

Leeds CC Papers, minute book, ii. 414, 420: chamber meeting, 28 Mar. 1860

Leeds CC Papers, minute book, ii. 458: special meeting, 19 Feb. 1861

Leeds CC Papers, minute book, ii. 463: chamber meeting, 27 Mar. 1861

Leeds CC Papers, minute book, ii. 467: chamber meeting, 24 Apr. 1861

Leeds CC Papers, minute book, ii. 474: chamber meeting, 5 June 1861

Leeds CC Papers, minute book, iii. 443: parliamentary and legal committee meeting, 2 Apr. 1883

Leicester and County CC, Leicester and County Chamber of Commerce, 1860-1960 (Leicester, 1860)

Liverpool CC Papers, 380 Com 1/1, p. 71: special meeting of the council, 24 June 1861

Liverpool CC Papers, 380 Com 1/1. p. 26: council meeting, 1 Oct. 1860

London Chamber of Commerce (Incorporated), First Annual Report of the Council to the Members of the Chamber (London, 1883)

Manchester CC Papers, M8/2/5, P. 609: annual report, 1 Feb. 1858

NAPSS, Transactions 1868, 283

NAPSS, Transactions 1868, 294-5

Nash, *Westbury*, i. 301

Neale, *Prisoner's Guide*, 8

Sheffield CC Papers, LD 1986/1, council report at annual meeting, p 361: chamber meeting, 29 Jan. 1875

Sheffield CC Papers, LD 1986/1, p. 120: council meeting, 18 June 1868

Sheffield CC Papers, LD 1986/2, minute book, p. 289: meeting 5 Apr. 1883

Sheffield CC Papers, LD 1989/4/201, letter book: Thomas Browning, secretary of the Manchester CC, 1 June 1881

Solicitors' Journal and Reporter (14 Apr. 1883), p 393

Solicitors' Journal and Reporter (17 Mar. 1860)

Solicitors' Journal and Reporter (28 Mar. 1868)

The Holy Bible, Deuteronomy 15: 1-18

The Times (11 Jan. 1861)

The Times (13 July 1868), p 6

The Times (22 June 1861), p 5

The Times (22 Mar. 1883), p 4

The Times (23 Aug. 1844)

The Times (24 Aug. 1844)

The Times (28 Feb. 1859)

Wolverhampton CC Papers, minute book, i: chamber meeting, 18 Apr. 1861

World Bank, *The World Bank principles and guidelines for effective insolvency and creditor rights systems* (2001) Washington DC: World Bank

Electronic Sources

A Review of the Corporate Insolvency Framework consultation in May 2016 available at:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736163/ICG - Government response doc - 24 Aug clean version with Minister s photo and signature AC.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736163/ICG_-_Government_response_doc_-_24_Aug_clean_version_with_Minister_s_photo_and_signature_AC.pdf)

[Accessed 29/08/19].

BBC available at: <https://www.bbc.co.uk/news/business-48365241> [Accessed 28/05/19]

Creditor Rights and Insolvency Standard available at: http://siteresources.worldbank.org/INTGILD/Resources/ICRStandard_Jan2011_with_C1617.pdf [Accessed 17/10/19]

Express & Star available at: <https://www.expressandstar.com/news/business/2018/08/06/last-carillion-contracts-transferred-as-liquidation-enters-final-phase/> [Accessed 21/06/19]

GOV.UK available at: <https://www.gov.uk/government/news/british-steel-limited-in-liquidation-information-for-customers-employees-and-creditors> [Accessed 20/06/19]

Government response available at: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736163/ICG - Government response doc -](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736163/ICG_-_Government_response_doc_-_)

[_24_Aug_clean_version_with_Minister_s_photo_and_signature_AC.pdf](#)

[Accessed 15/10/19]

Graham Review into Pre-pack Administration (2014) available at:

<https://www.gov.uk/government/publications/graham-review-into-pre-pack-administrations> [Accessed 25/06/19]

Hein Online available at: <http://heinonline.org/HOL/Welcome> [Accessed 15 January 2019]

HMRC, Budget 2018: Protecting your taxes in insolvency (October 2018) available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752136/Insovcncy_web.pdf [Accessed 10/05/19]

Insolvency Code of Ethics available at:

<https://www.gov.uk/government/publications/insolvency-practitioner-code-of-ethics>

[Accessed 13/11/19]

Legislation.gov.uk available at: <http://www.legislation.gov.uk/> [Accessed 18 January

2019]

LexisNexis Library available at:

[http://www.lexisnexis.com/uk/legal/auth/checkbrowser.do?t=1421602487024&bhcp=](http://www.lexisnexis.com/uk/legal/auth/checkbrowser.do?t=1421602487024&bhcp=1)

[1](#) [Accessed 03 January 2019]

P. Walton and C. Umfreville, 'Pre-pack Empirical Research: Characteristic and Outcome Analysis of Pre-pack Administration (2014) available at:

<https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration> [Accessed 31/10/19]

R3, Corporate Insolvency in the UK: A Decade of Change available at:
<http://www.r3.org.uk/publications> [Accessed 05/09/19]

Sky News available at: <https://news.sky.com/story/carillion-liquidation-to-cost-taxpayers-148m-investigation-11397089> [Accessed 21/06/19]

The Insolvency Service available at:
[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/798393/Commentary -
_Company_Insolvency_Statistics_Q1_2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/798393/Commentary_-_Company_Insolvency_Statistics_Q1_2019.pdf) [Accessed 26/06/19]

The principles for effective insolvency frameworks promoted by the World Bank available at: <http://documents.worldbank.org/curated/en/936851468152703005/The-World-Bank-principles-and-guidelines-for-effective-insolvency-and-creditor-rights-systems> [Accessed 08/10/19]

The World Bank available at: <https://www.worldbank.org/en/home> [Accessed 23/05/22]

UNCITRAL Legislative Guide on Insolvency Part four: Directors' obligations in the period approaching insolvency available at:
https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-11273_part_4_ebook.pdf [Accessed 23/05/22]

UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006) available at:
https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration [Accessed 22/08/19]

World Bank Group *Doing Business* 2020 Report available at:

<https://russian.doingbusiness.org/content/dam/doingBusiness/pdf/db2020/Doing-Business-2020.pdf> [Accessed 28/10/19]

Table of Statutes

Administration of Justice Act 1970 c. 31

Bankruptcy (Amendment) Act 1926 c. 7

Bankruptcy Act 1542, 34 & 35 Hen. VIII. c. 4

Bankruptcy Act 1570, 13 Eliz. I. c. 7

Bankruptcy Act 1623, 21 James. I. c. 19

Bankruptcy Act 1662, 13 & 14 Car. II. c. 24

Bankruptcy Act 1670, 22& 23 Car. II. c. 20

Bankruptcy Act 1697, 8 & 9 Wm. III. c. 18

Bankruptcy Act 1703, 2 & 3 Anne, c. 16

Bankruptcy Act 1705, 4 & 5 Anne. c. 17

Bankruptcy Act 1711, 10 Anne, c. 20

Bankruptcy Act 1718, 5 Geo. I. c. 24

Bankruptcy Act 1720, 7 Geo. I. c. 31

Bankruptcy Act 1725, 12 Geo. I. c. 29

Bankruptcy Act 1729, 6 Geo. I. c. 22

Bankruptcy Act 1732, 5 Geo. II. c. 31

Bankruptcy Act 1737, 10 Geo. II. c. 26

Bankruptcy Act 1748, 21 Geo. II, c. 33

Bankruptcy Act 1755, 28 Geo. II. c. 13

Bankruptcy Act 1765, 5 Geo. III. c. 41

Bankruptcy Act 1772, 12 Geo. III. c.23

Bankruptcy Act 1779, 19 Geo. III. c. 7

Bankruptcy Act 1781, 21 Geo. III. c. 44

Bankruptcy Act 1791, 6 Geo. I. c. 22

Bankruptcy Act 1809, 49 Geo. III. c. 121

Bankruptcy Act 1812, 52 Geo. II. c. 13

Bankruptcy Act 1813, Geo. III. c. 102

Bankruptcy Act 1816, 56 Geo. III. c. 138

Bankruptcy Act 1820, 1 Geo. IV. c. 119

Bankruptcy Act 1822, 3 Geo. IV. c. 74

Bankruptcy Act 1822, 3 Geo. IV. c. 81

Bankruptcy Act 1825, 6 Geo. IV. c. 16

Bankruptcy Act 1826, 7 Geo. IV. c. 121

Bankruptcy Act 1827, 7 & 8 Geo. IV. c. 71

Bankruptcy Act 1835, 5 & 6 Wm IV. c. 29

Bankruptcy Act 1838, 1 & 2 Vict. c. 102

Bankruptcy Act 1838, 1 & 2 Vict. c. 102

Bankruptcy Act 1838, 1 & 2 Vict. c. 110

Bankruptcy Act 1844, 7 & 8 Vict. c. 96

Bankruptcy Act 1847, 10 & 11 Vict. c. 102

Bankruptcy Act 1849, 12 & 13 Vict. c. 106

Bankruptcy Act 1854, 17 & 18 Vict. c. 119

Bankruptcy Act 1861, 24 & 25 Vict. c. 134

Bankruptcy Act 1869, 32 & 33 Vict. c. 62

Bankruptcy Act 1869, 32 & 33 Vict. c. 71

Bankruptcy Act 1883, 46 & 47 Vict. c. 52

Bankruptcy Act 1914 c. 59

Bankruptcy Amendment Act 1868 c. 104

Bills of Sale Act (1878) Amendment Act 1882 c. 43

Bubble Act 1720, 6 Geo. I. c. 18

Chartered Company Act 1837 c. 73

Companies (Winding up) Act 1890, 53 & 54 Vict. c. 63

Companies Act 1900 c. 48

Companies Act 2006, c. 46

Deeds of Arrangement Act 1887 c. 57

Deeds of Arrangement Act 1914 c. 47

Enterprise Act 2002 c. 40

European Communities Act 1972 c. 68

European Union (Withdrawal Agreement) Act 2020 c. 1

European Union (Future Relationship) Act 2020 c. 29

Human Rights Act 1998 c. 42

Insolvency Act 1976 c. 60

Insolvency Act 1985, c. 65

Insolvency Act 1986, c. 45

Insolvency Act 2000, c. 39

Joint Stock Companies Act 1844, 7 & 8 Vict. c. 110.

Joint Stock Companies Act 1856, 19 & 20 Vict. c. 47

Joint Stock Companies Winding up (Amendment) Act 1848, 11 & 12 Vict. c. 12

Joint Stock Companies Winding Up Act 1844, 7 & 8 Vict. c. 111

Judicature Act 1875 c. 77

Law of Property Act 1925 c. 20

Law of Property Act 1969 c. 59

Limitation Act 1980 c. 58

Preferential Payments in Bankruptcy Amendment Act 1897 c. 19

Statute 3 Jac. 1. c. 18

Statute of Acton Burnell 1283

Statute of Marlborough 1267 c. 23

Statute of Merchants, 13 Edw. I 1285

Trading Companies Act 1834

Tribunals, Courts and Enforcement Act 2007 c. 15

Secondary Legislation

Insolvency (England and Wales) Rules 2016

Insolvency Rules 1986

Statement of Insolvency Practice 13 (SIP 13)

Statement of Insolvency Practice 16 (SIP 16)

The Administration (Restriction on Disposals etc. to Connected Persons) Regulations 2021 (SI 2021/247)

Transfer of Undertakings (Protection of Employment) (TUPE) Regulations 2006 (SI 2006/246)

EU Legislation

Directive (EU) 2019/1023 of the European Parliament and of the Council on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on preventive restructuring and insolvency)

Regulation (EU) 1346/2000 of 29 May 2000 on insolvency proceedings

Regulation (EU) 2015/848 on insolvency proceedings (recast)

The Treaty on European Union (TEU; Maastricht Treaty, effective since 1993)

Table of Cases

Ashbury Railway Carriage Co Ltd v Riche (1875) LR 7 HL 653

Billson v Residential Apartments Ltd [1992] 1 AC 494

BNY Corporate Trustee Service Ltd v Eurosail-UK 2007-3BL plc [2013] UKSC 28,
[2013] 1 WLR 1408.

Brown v City of London Corporation [1996] 1 WLR 1070

Claughton v Charalamabous [1998] BPIR 558

Commissioners of Inland Revenue v The Wimbledon Football Club Ltd and others
[2004] EWCA Civ 655

Davey v Money & Anor [2019] EWHC 997 (Ch)

Downsview Nominees v First City Corporation [1993] AC 295

Drew v Collins (1851), 6 Exch. 670

ECM v Cox [1999] IRLR 559

Evans v Rival Granite Quarries [1910] 2 KB 979

Ex parte Story (1817), 1 Bucks's Reports 70

Fowler v Paget (1798) 7 Term Rep 509, 101 ER 1103

Gaskel v Gosling (1896) 1 QB 669

Gaskel v Gosling (1897) AC 575

Holroyd v Marshall (1862) 10 HLC 191

Jacks v Pemberton, 5 TR 552

Knight v Cox (1856) 18 C.B. 645

Lathia v Dronsfild Bros [1987] BCLC 321

Levy v Abercorris Slate and Slab Co (1887) 37 Ch D 260

On Demand Information plc v Michael Gerson Finance plc [2000] 4 All ER 734

Perkes v Seven 7 ER 194

Pinnell's Case (1602), 5 Co. Rep. 117a

R v Fox (1841) 2 QB 246

RCO Support Services v Unison [2002] EWCA Civ 464

Re Atlantic Computer Systems plc [1992]

Re B Johnson & Co (Builders) Ltd [1995] 1 Ch 634

Re Berkeley Securities [1980] 3 All ER 513

Re British Steel Ltd [2019] EWHC 1304 (Ch)

Re Cambridge Analytica (UK) Ltd [2019] EWHC 954 (Ch)

Re Citro [1991] Ch 142

Re Consumer and Industrial Press Ltd (1988) 4 BCC 68

Re Cosslett (Contractors) Ltd (1998) Ch 495

Re Exchange Banking Co (1882) 21 Ch 518

Re Florence Land and Public Works Co (1878) 10 Ch 530

Re General South America Co (1876) 2 Ch 337

Re Harris Simons Construction Ltd [1989] 1 WLR 368

Re Henry Pound (1889) 42 Ch 402

Re Leyland DAF Ltd (Buchler v Talbot) [2004] 2 AC 298

Re Morritt (1868) 18 QBD 222

Re Oriental Bank Corp (1884) 28 Ch 643

Re Panama, New Zealand and Australia Royal Mail Co (1870) LR 5 Ch App 318

Re Rowbotham Baxter Ltd [1990] BCC 113

Re Ruiz [2012] BPIR 446

Re SCL Building Services Ltd (1989) 5 BCC 746

Re W F Fearman Ltd (1998) 4 BCC 139

Rhodes v Allied Dunbar Pension Services [1989] 1 All ER 1161

Salford Van Hire (Contracts) Ltd v Bocholt Developments Ltd [1995] CLC 611

Salomon v A. Salomon & Co Ltd [1897] AC 22

Tenowitz v Tenny Investments 1979 (2) SA 680

Transag Haulage Ltd v Leyland DAF Finance plc [1994] BCC 356

Unidare plc v Cohen [2006] 2 BCLC 140

Whitaker v Palmer [1901] 1 Ch 9

Appendix

'Traditional' Administrations Dataset



'Traditional'
Administrations Dat

Pre-packaged Administrations ('Pre-packs') Dataset



Pre-packs
Dataset.xlsx

Creditors' Voluntary Liquidations (CVLs) Dataset



CVLs Dataset.ods