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RESEARCH ARTICLE

Promoting fairness in English insolvency valuation cases

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Abstract

This is the second part of a comprehensive study on fair measurement of value in English insolvency law. The author has already demonstrated in a previous article the importance of posing and responding to questions about fairness in the insolvency process. That article developed a specific framework to measure whether assets and businesses are fairly valued in insolvency and bankruptcy cases. The proposed communitarian, fairness-oriented framework is based on a modified version of Rawls, Finch and Radin's concepts of fairness. It evidenced that, when assessed against fairness, none of the valuation techniques currently available to the courts are without limitations. Building on the findings of this previous work, this article investigates whether English case law: (i) achieves a fair valuation of the debtor's assets and business; and (ii) protects interested parties (mainly creditors and shareholders) who have realistic prospects of receiving a distribution- against unfair harm.

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1 | INTRODUCTION

This is the second part of a comprehensive study on fair measurement of value in English insolvency law. The author has already demonstrated in a previous article[1] the importance of posing and responding to questions about fairness in the insolvency process. That article developed a specific framework to measure whether assets and businesses are fairly valued in insolvency and bankruptcy cases. The proposed communitarian, fairness-oriented framework is based on a modified version of Rawls, Finch and Radin's concepts of fairness. It evidenced that when assessed against fairness, none of the valuation techniques currently available to the courts are without limitations. Building on the findings of this previous work, this article investigates whether English case law:

i achieves a fair valuation of the debtor's assets and business; and
ii protects interested parties (mainly creditors and shareholders),[2] who have realistic prospects of receiving a distribution,[3] against unfair harm.

As explained in the above-mentioned article, fairness is a key policy objective of English insolvency law and issues of fairness feature prominently in recent high-profile cases, thus prompting a regulatory debate in the area. This article adopts the same communitarian, fairness-oriented framework advocated in the article mentioned above, as this framework underpins English corporate insolvency law[4] and recent policy documents do not depart from this well-established approach.[5]

It is acknowledged that not all of English insolvency law follows communitarian tenets. In fact, English insolvency law to an extent reflects all the purposes laid out by the various contractarian theories. Creditor wealth maximization— emphasizing insolvency law as a pool of debt in which creditors assert their claims as a collective— is reflective to a larger extent of liquidation, and to a lesser extent of administration. Meanwhile, the broad-based contractarian approach encompassing both creditors and non-creditors to maximize aims are a reflection of the administration process with the primary objective of rescuing the corporation. This article shows that, while concepts of fairness have featured increasingly in courts' decisions, much still needs to be done to ensure substantive protection of non-sophisticated interested parties in insolvency valuation disputes. As a result, it argues that fairness-oriented approaches should be made transparent and become part of English insolvency law and policy. The findings of these articles suggest that the current de-regulatory approach in insolvency may fall short of achieving the policy goals advocated by the law.

This article makes several original contributions to the topic of measurement of value in insolvency and bankruptcy law. First, it carries out the first (as far as the author is aware) comprehensive documentary investigation into reported decisions on valuation disputes in English insolvency and bankruptcy cases. This substantial documentary analysis shows that English courts adopt consistent practices when valuing assets and businesses. These practices are based on traditional valuation methodologies, such as market tests and liquidation values. Yet, despite a praiseworthy usage of flexibility and discretion to achieve procedurally fair outcomes, English courts fail to consistently ensure that interested parties are treated in a substantially fair and just manner.

The second key contribution of this study is its discussion on the impact of a fairness-oriented framework, which addresses substantive as well as procedural issues, on judicial powers, and what is needed to make this approach transparent. In particular, this article investigates if and to what extent a fairness-oriented framework can be used to decide between competing valuations; to determine if assets and businesses are sold at a fair value, both in and outside pre-packaged administrations; and to assess if the office holders' actions have caused unfair harm to the interested parties.

In this study, fairness is understood as a substantive and procedural concept. It is submitted that procedural fairness is the propensity of the system to rely on replicable and competitive techniques to value assets and to allow interested parties to challenge decisions taken in the course of insolvency procedures. Substantive fairness is the propensity of the system to adjudicate in favour of the parties who have a lawful interest under the law whenever valuation decisions do not take the best interests of the parties concerned, the peculiarities of the valued assets, business or the market or the claimant-defendant relationship into reasonable account or do not treat similar situations alike.

This article proceeds as follows. Section 2 outlines the result of the documentary investigation. It shows that courts consistently apply procedural but not substantive notions of fairness in valuation cases. Section 3 demonstrates how the usage of a regulatory-heavy approach to promote substantive, and not simply procedural, fairness would impact the notions of "fair value" and "unfair harm." It also questions whether the regulatory-heavy approach should be preferred over de-regulatory practices currently followed by the English courts and the legislator. Recent developments in case law are also examined to show whether they promote substantive as well as procedural fairness. Section 4 sums up the conclusions of the study. It highlights the importance of giving more explicit recognition to the concept of procedural and substantive fairness in insolvency and suggests a list of regulatory recommendations.

2 | A FAIR JUDICIAL APPROACH TO THE VALUATION OF ASSETS?

The lack of uniform approaches and clear guidance for the evaluation of assets and challenges to valuations affects the behaviour of parties, inside and outside insolvency. In an influential piece in 2006, Baird and Bernstein argued that this uncertainty causes parties to opt for an out-of-court restructuring instead of the formal corporate insolvency procedures.[6] Others have observed that valuation uncertainties may induce the party with a better case to steer away from litigation, while the party with the worst case has an incentive to steer towards it in the hope of a windfall.[7]

It is pertinent, therefore, to investigate if English courts adopt a consistent approach in assessing the fair market value of the debtor's business and assets. It is equally appropriate to determine whether these approaches protect the interested parties from unfair harm. No valuation method is unfair per se. It is their use by the judiciary on the basis of the circumstances of the case that determines the overall degree of fairness of the system. As a result, a documentary analysis of 31 judgments has been carried out in order to test the fairness of the English judicial approach to measure value in insolvency cases. The following judgments were considered:

- All the judgments issued in corporate rescue procedures decided in the period January 1, 2014–June 30, 2019 that included the word "valuation" in a keyword search on *Westlaw*; and
- Some of the most frequently cited decisions on valuations in corporate rescue procedures for the years before December 31, 2013.

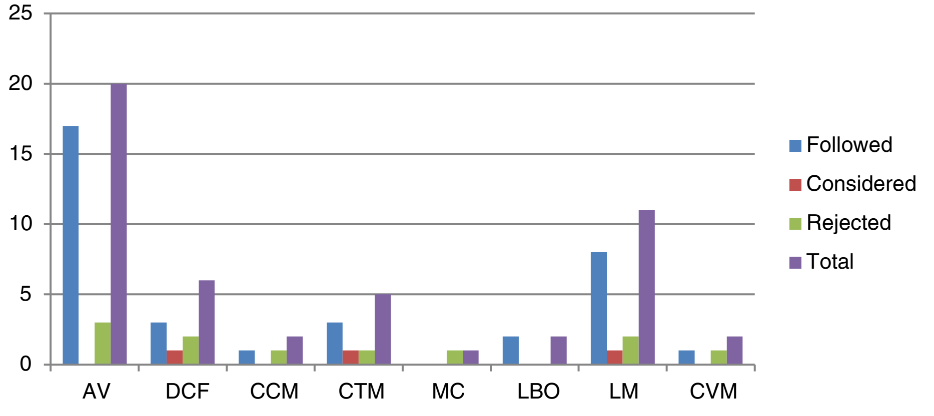

FIGURE 1 Valuation methods in English insolvency cases. *Source*: Survey data collection

These judgments offer a comprehensive and up-to-date picture of how English courts deal with valuation issues in bankruptcy and insolvency cases. Out of these judgments, only 26 rulings were relevant for the purposes of this review as in the remaining five cases the courts did not address valuation issues.

The results show that courts tend to rely on and apply primarily traditional valuation techniques. As evidenced by Figure 1:

- The actual valuation ("AV") method (market testing, usually by public auction) was mentioned in 20 cases (77% of the sample) and applied in 17 of them (65.4%); and
- The liquidation method ("LM") was mentioned in 11 cases (42.3%) and applied in 8 of them (30.8%).

The other valuation methods most frequently considered are the discounted cash-flow ("DCF") (7 cases, 23.1% of the sample) and the comparable transaction multiple ("CTM") (5 cases, 19.2 of the sample) methods. Valuation methodologies which require deeper knowledge of finance, economics and statistics in order to be understood and applied - such as comparable companies multiple, leveraged buy-out, contractual valuation mechanisms (2 cases, 7.7% each) and market capitalisation (1 case, 3.8%) - feature in a negligible number of rulings.

These preliminary findings cast doubt on the ability of the system to reach fair decisions, as courts make predominant use of methods that, as evidenced in a previous article,[8] only ensure procedural as opposed to substantive fairness.

These results also show that courts rely on market testing and/or expert valuations in 19 out of 26 cases (73.1%), mainly where the sale is to a connected party.[9] This figure is certainly meaningful. However, it is probably even more significant that in seven *valuation* cases (26.9% of the sample), judges did not rely on competitive market testing and/or independent valuations from experts to determine the value of the debtor's assets and business. This finding casts serious doubt on the overall fairness of the system. In the cases where no market tests or independent valuations are provided,[10] judges either rely on contractual clauses to determine the value of the contested assets[11] or on their own independent assessment to determine the *quantum meruit* of the case.[12] Another seven cases have been decided based on the DCF method, which is highly dependent on the co-operation and data provided by the debtor. These findings suggest

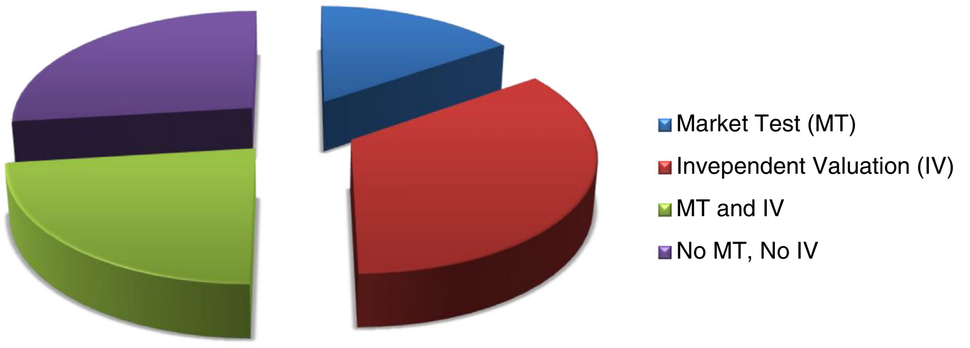

FIGURE 2 Evidence used in court. *Source*: Survey data collection

that claimants face an uphill struggle to achieve fair valuations. In fact, in 14 out of 26 cases (53.8% of the sample) there are questionable elements in relation to not only the substantive, but also the procedural fairness of the approach followed by the courts (and the parties) to measure the debtor's worth (Figure 2).

The following sub-sections assess the results of this documentary analysis in depth to determine if the existing valuation practices followed by the courts comply with the proposed fairness-oriented framework.

2.1 | Valuations: The issue of proper timing

With reference to timing, the results of the documentary analysis show that courts require the debtor's assessment to be carried out at a date as close as possible to the actual sale.[13] Courts tend to dismiss evidence that suggests a higher value of the assets or business in the near or not-so-near future, especially when the sold assets or businesses have been extensively tested in the market.[14] This is because courts consider that the (hypothetical) higher proceeds from the sale may not result in higher returns to creditors due to a variety of factors, such as depreciation of assets and increased interest on debt and professional fees.[15] Courts also dismiss claims that insolvency practitioners ("IPs") have an obligation to sell the assets or business at a propitious time, as this view is explicitly rejected with reference to mortgagees.[16]

It can be argued, however, that this focus on the value at the time of the sale may be misplaced. It may lead to results that do not represent the substantially fair value of the debtor's assets and business. It is common knowledge, in fact, that the value of the debtor's assets and business is dependent on the nature of the purchaser. Take, for instance, the case of a sale by auction of a car manufacturer ("A") in which there are two potential bidders. One is a real estate developer ("B") interested in closing the factories and selling the properties in the market for a profit. The other one is a competing car manufacturer ("C"), interested in preserving the profitable part of the insolvent business for the economies of scale arising from their merger.

In the first scenario (B buys A), the preferred valuation method would be the LM. In the second scenario (C buys A), the bidders would opt for a DCF method. Clearly, company B would be willing to pay a much lower price than company C. If company C buys the insolvent business at a price which is higher than the liquidation value but lower than the DCF price, would the sale be upheld by an English court? According to the evidence collected in this study, the answer would be in the affirmative. However, it is questionable whether this purchase price represents a substantially fair value of the debtor's assets and business. This example, therefore, shows that by adopting a mechanistic approach, courts may ensure consistency and predictability of outcomes and replicability of results (i.e., procedural fairness). However, they may fail to properly assess the "true," peculiar value of the assets and business for the purchaser and the nature of the relationship between debtor and creditor.

Another element that suggests the courts' focus on procedural rather than substantive fairness is the requirement for timely and constant involvement of the creditors throughout the negotiation phase. As a result, late challenges may affect the court's willingness to dismiss an existing valuation.[17] However, the lateness of a challenge should not in itself affect its outcome, as otherwise this solution would impinge on the substantive fairness of the procedure.

As mentioned in the previous sub-section, to assess the value of the debtor market testing is not always necessary.[18] In particular, in *Saltri III*, Eder J held that market testing is not needed if running a lengthier auction procedure would be impracticable, impossible or damaging and it would not yield higher offers.[19] In *Saltri III*, the mezzanine lenders argued that the actual value of the company was affected by the particularly challenging period in the automotive industry in the wake of the 2009 financial crisis and the Chapter 11 filings of *Chrysler* and *General Motors*. While admitting that there was no value left in their investment, the mezzanine lenders based their claims on the expected recovery of the restructured group.[20] In this case, the court held that it had no discretion to depart from AV valuations, potentially undervaluing the company (as it turned out to be the case) and ignoring issues of substantive fairness.

The author agrees that under perfect market conditions, auctions are "the best way of finding out the market value of an asset."[21] Unsurprisingly, courts held that in appropriate cases, the process of testing the market by holding an auction might make it reasonable to proceed without seeking valuation advice, particularly where the claim's valuation is difficult.[22] As a result, in *Goel v Grant*, Halpern J held that the company administrators had not unfairly harmed the interests of creditors under paragraph 74 of Schedule B1 of the Insolvency Act 1986 ("IA 1986") by deciding to auction a claim that the insolvent company potentially had against its former directors without obtaining a preliminary valuation of that claim.[23] Similarly, in *Wind Hellas*,[24] the court sacrificed the need to carry out a thorough valuation due to the urgency to complete the transaction to preserve the debtor's going concern.[25] There is the risk, however, that such decisions prove ill-judged and unfair to the affected creditors if the company later falls into liquidation, as was the case in *Wind Hellas*.[26]

It is not possible to draw general conclusions on whether this approach (auction without valuation) is "fair." It very much depends on the circumstances of the case and on the market for the assets or business. For instance, in *Wind Hellas*, while the business was market-tested through an auction process, the sale procedure resembled a validation technique rather than a true method of maximizing value.[27] In *Wind Hellas*, the junior lenders and third parties did not have enough time to complete due diligence and submit a competing bid. In *Goel v Grant*, the office holder obtained only a small amount of money for the sale of the claim. In other words, on both occasions the ways in which the auction procedures were carried out raise issues of substantive unfairness.

Finally, market testing can sometimes prevail over conflicting, independent valuations. This was what happened in *Chadwick*, where the court held that insufficient evidence of a clear intention by the parties to enter into a binding collateral agreement for the value of the property, as assessed by an independent valuer. The court allowed the trustee in bankruptcy to rely on the higher estimate of the value of the property that emerged from the market test rather than on the figure previously suggested by the independent expert.[28] Like *Goel v Grant*, *Chadwick* followed the precedent of *Ludsin*, where Baldwin J held that:

> "the best indication of the value of an asset at any particular time was what someone would pay for it after reasonable attempts had been made to sell it."[29]

As a result, evidence to the effect that nobody had been prepared to offer even GBP 2 million for a property after 6 months of marketing by a well-known and reputable agent was more persuasive than expert evidence, obtained before the marketing process had begun, of GBP 3.35 million. The circumstances of *Chadwick* may suggest that the result was substantially and not simply procedurally fair. However, courts do not always actively consider the peculiarities of the assets and those of the market at the time of the auction. As a result, both in *Ludsin* and *Chadwick*, the parties reached a substantially fair outcome more by chance than by a purposeful stride to achieve that outcome.

These cases show the English courts' reliance on market testing. This is usually described as an AV approach, but it shares many more similarities with a liquidation method, as the main concern is the price that a party would pay for the auctioned assets at the time of the sale. The courts have shown a reluctance to depart from market testing where there are no specific reasons that require a quick sale of the assets and where speed appears to be an excuse generated by the connected bidder to obtain a more favourable price for the debtor's assets or business.[30] At the same time, this reliance on market testing may result in undervaluing the debtor's assets and business. In fact, the hammer price is not always a fair assessment of the debtor's intrinsic and potential value as well as of the money that the bidder would be willing to pay for the assets or business, especially if the bidder was not aware of the distressed condition of the debtor.

2.2 | Valuations: The issue of proper methods

With reference to methods, the results of this substantial documentary analysis show that parties have no absolute obligation to follow any particular procedure or to obtain any particular advice in deciding how the debtor's assets should be sold.[31] However, creditors – and secured ones in particular – bear the burden of showing that they took reasonable steps to obtain a proper price,[32] especially in cases of sales to connected parties.[33] This seems to suggest that sufficient protections are being adopted to ensure that assets are sold at a fair price and that creditors are not unfairly harmed. In other words, this seems to suggest a stride towards substantive fairness in the valuation process.

In *Philbin*,[34] for instance, the court found that a secured creditor failed to meet that burden when the respondent took possession of the charged properties as mortgagee and sold them for GBP 2 million to a company he owned and controlled. The sale was conducted on the basis of the low estimates for fire sales valuations in the Christmas period "without vacant possession." The mortgagee made no effort to properly market the properties or to check if the tenants were willing to peacefully vacate them. The applicant produced valuations of GBP 4.8 million to GBP 5.5 million for the same properties, if these were sold at an auction under normal market conditions. This case shows that the court adopted the enhanced notion of fairness suggested by this article and assessed the transaction against this yardstick. It considered that the market price obtained for those properties was affected by the circumstances of the sale and, therefore, did not lead to a fair valuation of the debtor's assets.

Nevertheless, in general, courts tend to prefer AV, market-testing approaches over competing methodologies,[35] especially in real estate and liquidation cases.[36] As the market value is one to be determined as a matter of historic fact, based on expert evidence,[37] the focus is very much on procedural rather than substantive fairness. Some rescue cases where courts followed an AV approach also make reference to liquidation values when:

i this appears necessary to assess the rights of the claimants/creditors; and
ii the alternative to the proposed rescue procedure is a distribution of assets in a winding-up.[38]

Again, it is argued that this is not the proper course of action, as this approach overlooks the peculiarities of the claimant-defendant relationship and substantially undervalues the debtor's business. AVs on a going concern basis should be preferred where companies are only financially as opposed to economically distressed[39] and:

"assets have a higher value if kept together as a functioning unit than if sold off piecemeal."[40]

Yet, this study has shown no evidence that courts are willing to depart from market values solely on the basis that the price obtained from the competitive procedure underestimates the going concern value of the business.

At the same time, courts are willing to complement AV approaches with CTM and other market-testing methods whenever the insolvency procedure aims at liquidating/selling assets and there is a restrictive but competitive market for the company's assets.[41] Courts in particular appreciate techniques that lead to "true" market value and/or the best prices reasonably obtainable for the transaction.[42] In *IMO Car Wash*,[43] for instance, the court concluded that to determine the value of the distressed business on a going concern basis, valuations could be based on multiple standards, namely discounted cash-flow ("DCF"), comparable companies multiple ("CCM") and leveraged buy-out ("LBO").

This case law is promising, but it is very much inconsistent across the sample analysed in this study. In fact, multi-method approaches feature only in a minority of cases (5 cases, 19.2% of the sample).[44] Additionally, in a recent case,[45] the court rejected the multi-method approach and relied only on one valuation technique to determine the value of the debtor's assets.[46] English courts usually uphold the choice of the parties to rely on CVMs if:

i the clause is binding[47];
ii similar clauses are used in a variety of similar circumstances;
iii their use does not appear inappropriate in light of the circumstances of the instant case[48]; and
iv such use would have been approved by a person acting rationally and not arbitrarily or perversely.[49]

Pursuant to the established case law, the circumstances that the sale are carried out in an illiquid and distressed market are not in itself sufficient to dismiss the validity of a contractual valuation clause.[50] This is because the contracting parties should have considered the risk of economic or financial downturn at the time in which they negotiated the clause or entered into the agreement. If they failed to consider this risk, it is not for the courts to invalidate the clause, as this would result in a windfall for one of the parties.

Once again, the existing system of checks and balances is not appropriate to ensure enhanced fairness in the valuation process. The standard for challenging the usage of these clauses (perversity and negligent behaviour) is too high. Additionally, the praiseworthy mention that courts should consider the specific circumstances of the case is de facto counterbalanced by the lack of available remedies if the sale is carried out in an illiquid or distressed market.

By upholding the choice of the parties to rely on CVMs, English courts promote consistency and predictability of results over protection from abusive market practices. Nevertheless, courts are aware that undervaluation of assets is likely to happen in sales to connected parties, as in *Philbin*, due to the proximity of seller and buyer. *Philbin* was not an isolated case. In *Brewer*,[51] intangible assets worth between GBP 1.9 and GBP 2.35 million were sold to an associated company for GBP 40,000. In *Goel*,[52] the administrators arranged a pre-packaged sale for GBP 1.5 million to a connected company owned by a minority shareholder and director of the debtor. In the following trial on the assignment of a claim against the previous directors for unlawful means conspiracy, it was argued that the sale undervalued the company by almost GBP 12 million![53]

Many of the cases and the guidance provided by courts in the area focus on giving detailed directions on valuations in sales to connected parties.[54] It was held that in any sales to associates and/or connected parties, the sale is presumed invalid unless the seller can demonstrate that he acted in good faith[55] and can exclude the possibility of any conscious or unconscious preference. The sellers must show that they took all reasonable precautions to obtain the best possible price[56] or, at least, that they took reasonable care to maximize the return from the property.[57] This generally means that the sale was carried out by means of a public auction rather than as a private sale *and* that the reserve price was determined on the basis of independently-obtained expert valuations.[58] In some instances, this obligation might include a duty to attempt to sell a business as a going concern, unless the proprietors had closed down the business and moved from the premises prior to the mortgagee repossessing the property.[59]

Two caveats apply to this expansion of the rights and responsibilities of the office holders. First, as mentioned in the previous section of this article, sale by auction (or by another competitive method) does not in itself result in fair valuations, especially if it only produces one or very few bids.[60] The price bid at auction tells one nothing about the value of the property.[61] Secondly and more importantly, it is well established that office holders are not subject to the same equitable duties and standards as a trustee when selling property of the company under his control.[62] Office holders in general, and administrators in particular, are subject to the fiduciary duties of agents to act in good faith, loyally and for proper purposes.[63] The duty to exercise reasonable skill and care is tested against the standard of an ordinary, skilled practitioner.[64] Challenging a decision from an office holder requires proof of negligent or perverse behaviour[65] that would unfairly harm the creditors. It requires proof of behaviour that could not be justified by reference to the creditors' interests as a whole or to the administration's objective.[66]

These safeguards ensure procedurally fair outcomes. They result in replicable and predictable decisions and allow interested parties to challenge any deviations from the established approaches. The rules are not, however, set in stone. Courts use their discretion to validate transactions that are the result of negligent or perverse behaviour but, otherwise, in the best interest of all creditors. In particular, courts have reiterated that there is no *absolute* obligation on the mortgagee/IP to take and act upon independent expert advice.[67]

Consequently, in *Alpstream*, Clarke LJ refused to invalidate a private sale to a connected party, even though the mortgagee did not take all:

"reasonable precautions to obtain the best price reasonably obtainable at the time of sale."[68]

In fact, the mortgagee did not rely on any independent valuation and the auction process was poorly carried out. However, it was proven to the satisfaction of the court that there was no bidder prepared to pay the independent valuation price at the time of the sale. The price offered by the connected party was comfortably above what others had offered or would have offered at a perfectly arranged auction, and the connected party was not prepared to pay more.[69] As no unfair harm was caused to creditors and the price paid by the connected party was overall fair, the court dismissed a claim for damages against the mortgagee and the connected purchaser.[70]

Furthermore, some cases seem to suggest that where the sale of a charged asset is to a connected, affiliated or associated person, there is no absolute obligation for the mortgagee to take and act upon independent expert advice as to the steps which ought to be taken to make the sale a success.[71] These authorities do not prescribe any particular procedure which a mortgagee should adopt in deciding the manner in which the charged asset should be sold, whether as to marketing, advertising or otherwise.[72] This leaves us with conflicting guidelines.

It is true that English courts stress the need to ensure fairness and achieve a "fair value" for the creditors,[73] values which feature in a significant number (10) and portion (38.5%) of the cases in the sample. Additionally, courts are ready to accept that creditors' interests outweigh all other considerations[74] and that expert valuations can be challenged.[75] However, creditors' rights do not prevail over those of innocent third parties absent fraud.[76] Additionally, courts are unlikely to challenge any valuation which appears to be procedurally fair, even if a market-based approach would have yielded a different result[77] and even if such a value contrasts with the opinion of an expert valuer.[78] Claimants do not have any remedy if they are not capable of proving that the failure to carry out a market test or independent valuation has caused any loss to them.[79]

This, however, represents a significantly high burden of proof for petitions submitted by third-party and generally unsecured creditors. Where there has been no independent valuation, the claim is dismissed if no better price would have been obtained and the connected party had been under no duty to pay more than it was prepared to pay.[80] If there was no proper marketing and sales process, the claim is dismissed in the overwhelming likelihood that the price obtained would not have been higher with a competitive marketing and sales process in place than the liabilities owed to the preferential lenders.[81]

Courts have also dismissed claims by creditors whenever the cause of action was a difficult asset to value and the decision to sell it by auction (AV method) did not unfairly harm the claimants.[82] Equally, they have dismissed claims whenever it appeared from expert valuations that the non-connected buyer acted in good faith and purchased the asset for full value or near full value.[83] Once again, these examples show the significantly high thresholds that any potential claimants have to overcome in valuation cases.

To sum up, courts do not interfere with the decision made by the office holder unless:

i the IP treated the applicants less favourably than other creditors;
ii the decision could not be justified by reference to the interests of the creditors as a whole or to achieve the objective of the procedure; and

iii the decision did not withstand logical analysis, which *probably* meant the same as "perversity."[84]

Reliance on this three-prong test and – in particular – on the last element of this test means that existing case law fails to provide sufficient protection against substantive unfairness. This conclusion is further supported by the fact that, where valuations present certain features, they are unlikely to be questioned by the courts. In particular, valuations are not closely scrutinized if:

i the IPs relied on independent experts and on objective data[85] as well as their own judgment[86];
ii valuations are easy to understand for non-financial professionals; and
iii valuations offer a single point value rather than a range of values or – even worse – a range of possibilities.[87]

While valuations need not to be perfect to be relevant, they may rely on evidence of secondary markets.[88] If valuations present these features and are not subject to criticism from the creditors, courts find it unreasonable to carry out an extensive analysis of the criteria and outcome of these valuations.

It is appropriate to say, however, that it does not follow that any valuations that present the characteristics mentioned above cannot be subject to judicial scrutiny. For instance, in *Sinclair*,[89] a substantial difference between the price of a property sold in a formal insolvency procedure and that of its immediate subsequent sale was found sufficient to grant permission for an action for breach of duty against the IP. This conclusion was reached irrespective of the fact that the IP relied on two independent valuations from reputable national firms and the sale occurred through expert selling agents.[90] Such a course of action is consistent with other cases which, while falling short on imposing an obligation on the mortgagee to delay a sale in the hope of getting a higher price in the future,[91] hint at the possibility of demonstrating unfairness where there is an expectation of market improvement in the near future.[92] Yet the cases where courts focused on substantive rather than procedural unfairness are few and far between. The consistent approach adopted by English courts has been to ensure procedural fairness and predictability of outcomes.

The final element that needs to be assessed to determine if courts' practices lead to fair market values and claimants are protected against unfair harm is the judicial approach to the case of similarly objective and independent valuations. Courts are unanimous in claiming that valuations should not be averaged but they should be distinguished based on their persuasiveness.[93] This statement fits very well with the proposed fairness-oriented framework because it allows interested parties to go beyond a mechanistic approach to valuation.

In *Stanley J Holmes*,[94] Arden LJ stated that when judges are faced with two different valuations, they have to find a way of distinguishing the two. This approach to the assessment of expert valuations was followed in *Wilson*, where the court accepted a valuation of a property based on an investment method, rather than on an owner-occupation method. This is because the property subject to valuation was a commercial property and, therefore, more likely to attract a retail investor rather than a property owner.[95] This approach was equally followed in *Cahillane*, where the registrar rejected an argument that properties should be valued on the basis of their potential future value rather than the present one. This is because the independent expert who supported the future value approach had no statistical data in support of his analysis, made conflicting statements, did not consider alternative methods and did not inspect any of the properties.[96]

In *Brewer*, Briggs J, after having established the existence of a breach of duty of care and skill by the administrator of a pre-packaged sale, went on to quantify the equitable compensation for breach of fiduciary duty. In doing so, he considered the expert evidence provided by both the applicant (the joint liquidators) and the defendant (Mr Iqbal). He eventually decided to rely on the applicant's expert due to a variety of considerations, including the fact that the valuer had been active in the market for Electronic Programming Guides ("EPGs") (the intangible assets of the sale) since its establishment 15 years before. Furthermore, Briggs J did not accept the applicant's findings at face value, as the court discounted the expert valuation of a figure between 50 and 80% due to a variety of factors listed in some detail. Other cases equally dismissed independent reports based on dubious or incomplete evidence,[97] their lack of clarity in the methodology and their reliance on subjective assessments.[98]

Courts also recognize that the persuasiveness of a valuation is highly dependent on the qualities of the expert witness and on whether the valuation procedure considered different methods to maximize the value of the debtors' assets or business.[99] Preference is normally given to valuations where the methodology and key assumptions are clearly articulated[100] and which are not based on speculations.[101] Courts have to consider all the circumstances to determine if a valuation has been carried out properly.[102] Should the valuation be based on unfair terms and relationships, courts may confirm the method chosen for the valuation but they would be able to vary rates of interest, impose penalties and deprive the respondent of all or some of the interest claimed.[103] If there is nothing to choose between valuers, judges should not arbitrarily pick up a half-way figure, but they should rely on the *lower* estimate produced by the parties. This is the conclusion reiterated by Arden LJ in *Stanley J Holmes*,[104] where the Court of Appeal reversed the lower court's decision to fix the value of machinery:

> "on a figure of GBP 65,000, which happens to be half-way between GBP 50,000 and GBP 80,000 (the figures from the expert valuations)."[105]

Arden LJ emphatically observed that:

> "it is not a judicial process simply to fix a midway point between the two valuers. [...] The judge was faced with two different valuations and he had either to find a way of distinguishing the two or he had to conclude that he was not persuaded that anything more than [GBP] 50,000 was justified."[106]

However, valuation is and remains a discretionary process. Courts acknowledge this circumstance, as they have consistently reinstated that judicial assessment should be allowed and preferred over more mechanistic and robotic valuations. Valuers and courts should have the discretion to make some real-world judgements as to what is likely to happen.[107] For instance, in *Rowbury*, the court estimated the applicants' debt at the value of GBP 1 because, despite the existence of a conditional fee agreement upon which the credit was based, the bill lacked explanation, included non-agreed costs, failed to itemize statements and presented some inaccuracies.[108]

Courts also make wide and generally wise use of their discretion.[109] For instance, *AMT Coffee* reinstates the English courts' reluctance to identify fixed, pre-determined approaches to valuation. According to this decision, the proper method should be determined in light of the circumstances of the case. The "proper method" is the one that – depending on the said circumstances – appears the most appropriate to achieve justice and lead to a "fair price."[110] It is questionable, however, whether these clarifications are sufficient to ensure procedurally and substantially fair outcomes in insolvency valuation cases when other cases analysed in this section show a lack of consistency of approaches to this matter.

2.3 | Abstract

The analysis of the sample of cases investigated in this article shows that courts adopt recognized and consistent approaches to valuations, capable of ensuring adequate levels of procedural safeguards against unfair harm. With reference to substantive safeguards, the findings from the review of cases provide ambiguous answers. On the one hand, claimants seem to face a high burden of proof to challenge valuations and the "fair" nature of a market-tested price. On the other, courts seem to use their discretion and legal expertise to choose between competing valuations. Overall, however, it seems that the courts' main concern is to ensure procedural fairness and predictability of outcomes, which is not necessarily in line with the fairness-oriented framework advocated by this article.

3 | REGULATORY CHALLENGES

Two approaches are possible to ensure fairness of outcomes in valuation disputes. The merits and limits of the light-touch, de-regulatory approach currently used by English courts have been discussed in the previous section. It is now pertinent to explore if encompassing enhanced fairness tenets (the so-called interventionist, regulatory-heavy approach) in the law is to be preferred over the existing de-regulatory practices.

3.1 | The critical concept of "fair (market) value"

A critical aspect that emerges from the case law analysed for this research is the centrality of the definition of "fair (market) value." Courts can use their discretion to depart from sale prices and expert valuations if these are not "fair." According to the case law, a valuation is fair if it is in the best interest of creditors or such as an intelligent and honest creditor would reasonably approve.[111] This may suggest that courts do adopt a definition of fairness, which is close to the one proposed in this article because it considers elements of substantive fairness.

Fair value is a term that appears frequently in insolvency cases,[112] but it is much more commonly used in valuations prepared for tax, financial reporting and investment purposes. In the absence of any statutory guidance in the IA 1986, English courts apply the standards defined in the accounting literature to insolvency cases.

In non-insolvency contexts, according to the International Financial Reporting Standard ("IFRS") 13, "fair value" represents the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date (an exit price).[113] However, it can be argued that the notion of fair value may and should differ from non-insolvency cases. In fact, IFRS standards are useful to obtain the actual valuation of an asset. They promote procedural fairness, but they are less useful in dealing with the substantive side of this concept.

Some decisions,[114] many of them not even in the insolvency context,[115] have provided some guidance for the general use of the notion of fair value outside the context for which it was conceived (i.e., reporting practices). These guidelines are influenced by the fact that most of these decisions deal with valuation issues for shares in a company. With reference to insolvency cases, *LBI EHF*[116] is a seminal case, specifically in relation to those contracts that are subject to Global Master Repurchase Agreement ("GMRA") terms. Other cases have also highlighted that the concept of "fair value" is strictly linked to a "fair valuation date," which is a date as close as possible to the actual sale.[117]

Fair values can be obtained even when the sale is carried out in a distressed market.[118] Such a conclusion is in line with the absence of any obligation on IPs to delay a sale in the hope of receiving a higher price.[119] Fair values can be determined in accordance with specific provisions in the company's articles of association[120] and/or pursuant to clauses in a contract[121] and/or in a joint venture agreement.[122] It is a well-established rule when valuing assets and businesses at a particular date to exclude evidence of events which occurred after that date.[123] However, a reasonable forecast of the future can be included in the fair value assessment.[124] The latter point is contentious, as courts seem to depart from including evidence of future events on some occasions.[125]

Therefore, it seems inasmuch that English case law on "fair value" ensures only procedural, as opposed to substantive fairness. English courts have clarified that it is not up to judges to determine what the fair value is.[126] As a result, courts will interfere in the non-defaulting party's assessment only in extreme circumstances, such as when the assessment appears as extreme as to be irrational.[127] This is because courts do not "seek to establish an 'objectively reasonable' fair market value."[128]

Nevertheless, on some occasions, English courts depart from this narrative. In *Ahmed* it was held that "fair value" is something separate from "market value": "shares should be valued at a fair value, as opposed to a market value."[129] This conclusion, which goes beyond the guidance from IFRS 13 in order to promote substantive over procedural fairness, has been adopted only in a minority of cases. The majority approach is the one described in *AMT Coffee*, where the court held that:

> "sale and purchase of the shares at an undiscounted valuation will do justice, and amount to a 'fair price'."[130]

In other words, the court in *AMT Coffee* held that fair value amounted to the market price for those shares. Moreover, in *Cuckmere Brick*, the Court of Appeal conflated the notion of proper, fair and best price in what they preferred to call "the true market value."[131]

Enhanced clarity on this notion is, therefore, needed to ensure substantive and not simply procedural fairness in valuation disputes. As a way forward, it is submitted that a promising approach is to introduce a revised version of the insolvency provisions dealing with transactions at undervalue, which are section 238 of the IA 1986 (with reference to companies) and section 339 of the IA 1986 (with reference to people). These sections should include a general definition of "fair value" for insolvency and bankruptcy cases, which would apply absent any alternative choice made by the parties. For the reasons evidenced in this sub-section, the proposed definition of "fair value" should not be the indubitable equivalent of the concept of "market value" and, consequently, of the definition provided by IFRS 13. If "fair value" were not different from "market value," it would represent the amount for which an asset, liability or business could be exchanged in an arm's length transaction between unrelated, willing parties who are reasonably well-informed.

However, prevailing market conditions may mean that nobody at that particular moment in time is willing to pay a fair, market price for the assets or business on sale.[132] As a result, the notion of fair value should also make reference to the notion of "disposal value" set out in Article 12(5) of the regulation on valuation before resolution.[133] The disposal value is the value that "the entity can reasonably expect in the currently prevailing market conditions through an orderly sale or transfer of assets or liabilities." Finally, it should also be clarified that a reasonable forecast of future events should be included in the fair value assessment to ensure substantive and not just procedural fairness.

The other issue related to fair value assessment is the courts' attitude to second-guess business judgments. The requirements set out in *LBI EHF* (no challenges to valuations which appear to be procedurally fair, even if a market-based approach would have yielded a different result) make it extremely difficult for the claimants to contest the decision of the IP with reference to the price of the debtor's assets and business. As a result, it is argued that courts should not discuss the fairness of the valuation solely in "extreme" circumstances. A preferred approach would be to argue that, if a claimant submits sufficient evidence to question the fairness of the valuation, the burden of proving that the price is "fair" should shift onto the IP who approved the transaction.

3.2 | The evidentiary threshold for "unfair harm"

Some of the most common failures of IPs relate to the ability to obtain valuations for intangible assets (such as goodwill) in pre-packaged sales to connected parties and/or to explain the basis for the value given to those assets.[134] Furthermore, when these mistakes happen, as was the case in *Brewer* and *Goel*, they are significant. These mistakes have the potential to affect a large number of stakeholders and they usually occur in pre-packaged sales to connected or otherwise interested parties. In theory, interested parties can challenge these mistakes if they can prove that they suffered "unfair harm" from the actions of an administrator.[135]

This statutory duty on administrators to act in the interests of the creditors as a whole came into force in September 2003, as part of the new administration regime introduced by the EA 2002. A similar power is also recognized in liquidation procedures, where any person aggrieved[136] by an act of the liquidator can apply to the court. As a result of that application, the court may confirm, reverse or modify the act or decision complained of.[137]

Creditors can challenge the use of administrators' powers[138] if they prove that a decision caused or would have caused disadvantage to the claimant;[139] and/or they have been subject to differential treatment from equally ranking claimants, including the decision to sell an asset at an undervalue.[140] Alternatively, they can prove that the decision cannot be justified by reference to the interests of creditors as a whole or in achieving the objective of the relevant insolvency process and/or is discriminatory in effect.[141] Once again, the overall picture seems to suggest a substantive, not simply procedural protection against unfair treatment, in line with the fairness-oriented framework suggested by this article.

Furthermore, recent cases suggest that the concept of "unfair harm" is not limited to differential treatment[142] and that such a petition can be brought against an administrator even if the company is no longer in administration.[143] Applying a principle from *Citicorp*,[144] the courts also held that, whenever a creditor petitions for the assignment of a potential claim that a company in administration might have against a third party – which is a rather common request in administrations –, the administrators should in principle agree to that request unless they can demonstrate that the claim had no prospect of success.[145] The same principles apply in liquidation cases.[146] If the potential claim is assigned, this assignment can be challenged if there was no evidence that the liquidator had investigated matters to evaluate the strengths of any assigned claims of the company; there was no evidence of negotiations being carried out by the liquidator and the assignee in regard to the assignments; and there was no evidence that the liquidator had looked elsewhere for offers beyond that made by the assignee.[147] In other words, in *Supperstone*,[148] the High Court reversed the burden of proof between claimants and administrators. It is no longer for the claimant to prove that an action has merit, but it is for the administrators to prove that a cause of action is without merit if they do not want to assign it.

These circumstances seemingly facilitate the burden of proof for applications from creditors. In any case, it should be noted that a petition based on "unfair harm" is distinct from a case centred on breach of fiduciary or other duty, which should be brought under paragraph 75 of Schedule B1 of the IA 1986 and which could lead to compensation for personal losses.[149] This apparently pro-claimant, fairness-oriented approach is mitigated by the fact that unequal or differential treatment is not necessarily unfair if the administrator demonstrates that the inequality is in the best interests of the creditors.[150] If there is a cogent rational explanation for the differential treatment of a particular creditor, any harm caused will not be unfair.[151] The administrator, however, has to rely on sound commercial reasons relating to the interests of the creditors as a whole to justify choosing to implement unequal or differential treatment.[152]

The real issue, however, is another. Establishing a breach of common law and equitable duty of care requires a high standard of proof, that is, the existence of negligent behaviour.[153] Courts restrict their intervention to cases in which the decisions of the office holders do not withstand logical analysis, which probably means the same as perversity,[154] to the extent that some commentators argue that office holders can never do wrong.[155]

While the above-mentioned judicial approach on determining breaches of the duty of care may make for happy reading for office holders,[156] not all courts agree on the need to demonstrate perversity in applications under paragraph 74 of Schedule B1 of the IA 1986. For instance, in *Hockin*, the court held that:

> "to adopt a test of perversity in place of the statutory test of unfair harm would plainly be impermissible, and to adopt it in addition to the statutory test would lack any legislative warrant."[157]

As a result, the court concluded that an administrator breached the duty not to unfairly harm the debtor's creditors if he declined to assign claims that, if successful, would have resulted in a benefit for the creditors and, if unsuccessful, would have caused no prejudice to the same creditors.[158] However, even after the *Hockin* test, courts do not interfere with the IPs' decisions unless they are based on a wrong appreciation of the law or are conspicuously unfair to a particular creditor or contractor.[159] The government itself did not want courts to interfere with the administrators' business judgment without evidence of irrationality.[160]

It is argued that in the absence of any suggestion that the administrator was acting improperly, it is contrary to the nature and purpose of an administration for the courts to interfere with the detailed day-to-day management of the administration.[161] However, it is also submitted that courts probably give greater latitude to administrators than desirable by stating that they would interfere with their judgements only in case of total unreasonableness or perversity. In doing so, they are not investigating if there has been a substantive breach of the principle of fairness.

In liquidation cases, there is an equally strict attitude to challenging the IPs' decisions. Courts have consistently held that an exercise by a liquidator of powers conferred on him or her by statute could be called into question *only* when utterly unreasonable[162] and in exceptional circumstances.[163] Exceptional circumstances arise whenever decisions go beyond what any reasonable person properly instructed could have considered proper. This high standard of proof makes life extremely hard for aggrieved and probably unfairly treated claimants. Although in *Edennote*, the claimants were successful in challenging the decision of the liquidator, it seems that the threshold of establishing the existence of "unfair harm" or otherwise challenge any other unreasonable act is too high as gathering evidence of perverse behaviour is extremely difficult.[164]

A solution to this dilemma would be to judge the acts of the IP by reference to what is commonly referred to as the *Wednesbury* test.[165] According to this test, an exercise of a statutory power or discretion may be called into question, not only if it can be shown that the exercise of the power is utterly unreasonable, but also if it was shown that the person exercising the power, though acting in good faith, took into account considerations which he or she ought not to have taken into account or failed to take into account considerations which he or she ought to have taken into account.[166] This approach would be entirely consistent with the fairness-oriented approach advocated by this article because it would give the interested parties a real, fair chance to challenge the IP's decision.

This course of action was suggested in the first instance decision of the *Edennote* case with reference to the judicial assessment of the powers of the liquidators. However, the Court of Appeal rejected this interpretation. On appeal, it was held that the fact that the lower court also referred to the *Wednesbury* test of reasonableness, which applies to administrative acts by public servants, may have been confusing but did not mean that the wrong test had been applied.[167] The Court of Appeal did not want to depart from the well-established tradition of the judicial assessment of the powers of liquidators. Considerations of predictability once again trumped any opposing argument for fairness-oriented approaches.

It is respectfully submitted that the reasoning of the Court of Appeal is not persuasive. In *Edennote*, it is clear that the lower court tried to apply the *Wednesbury* test to extend the circumstances in which liquidators can be found in breach of their statutory duties. The *Wednesbury test* would not significantly alter the officeholders' liability towards the creditors as a whole. Creditors would still be unable, for instance, to demand the revocation of an agreed sale if they are incapable of proving that the company could be rescued as a going concern and/or constituted a viable business.[168] It is, therefore, appropriate to introduce the *Wednesbury* test into the law, as the threshold for challenging IPs' decisions is too high (see *Goel*) and courts are unwilling to lower the burden of proof for the claimants (see *Edennote* in the Court of Appeal).

3.3 | Recent developments

The purpose of this section is to investigate if recent cases mark a significant step forward in granting enhanced protection to interested parties in case of unfair valuations of the debtor's assets and/or business. In case of an affirmative answer, the argument for regulatory-heavy solutions would emerge weaker.

Over the past few years, there has been a flurry of cases concerning criticisms by interested parties (creditors and shareholders) of the actions and omissions by IPs. The cases analysed below have been chosen because they deal with three of the most contentious issues described in the article:

i the IP's duties and the notion of "unfair harm";
ii the notion of "fair value"; and
iii the assessment of independent valuations.

While it is submitted that these cases are illustrative of recent trends in case law, one qualification is that claims in this area are always highly fact sensitive.

In the recent case of *Goel*,[169] the High Court refused to restrain the joint administrators from auctioning a proposed claim. This case reinforced the courts' reluctance to interfere with reasonable commercial decisions of officeholders, in the absence of unfair harm. The court also reinstated that, while claimants do not need to show negligent or perverse behaviour on the part of the office holder, the threshold for interference is a high one. Consequently, administrators are generally given a wide measure of latitude when exercising their duties and powers. In fact, according to the judgment, courts should only intervene in circumstances where the administrators are proposing a course of action, which is based on either the wrong appreciation of the law and/or is conspicuously unfair to a particular creditor or creditors of the company.

This approach to claims under paragraph 74 of Schedule B1 of the IA 1986 has later been confirmed in *Lomas*.[170] Lehman Brothers Australia ("LBA") claimed in the English administration of Lehman Brothers International (Europe) ("LBIE") for the net balance of sums due from LBIE to LBA as an unsecured net creditor of LBIE. The request was approved subject to a "Claims Determination Deed" ("CDD"), which precluded LBA's agreed claim from being revised upwards. After the discovery of a material mistake in the arithmetic calculation of the claim, LBA applied for a variation in the approved claim as a consequence of the application of the rule in *ex parte James*[171] or, alternatively, pursuant to the court's powers to prevent "unfair harm" by administrators. In rejecting the second claim, the court adopted a conservative approach. It held that paragraph 74 of Schedule B1 of the IA 1986 concerns the misuse or abuse of the powers vested in an administrator for the purposes of conducting the administration. The statutory provision provides for the intervention of the court by controlling or preventing the exercise of the powers so vested. It is not intended as a procedure or mechanism to impose overriding moral constraints on the exercise of legally enforceable contractual rights or to prevent the unjust enrichment of the estate.[172]

In *Brewer* et al. *(as joint liquidators of ARI Digital UK ltd) v Iqbal*,[173] an administrator (Mr Iqbal) was charged with allegations that he acted negligently or in breach of his equitable duty of care[174] in a pre-packaged sale to a connected purchaser. In particular, the case concerned the sale of intangible assets, that is, three valuable *Sky* satellite television channels and their EPGs, and the goodwill of the debtor.[175] The case falls squarely within the established judicial approach to valuations, and to the determination of the existence of fair value and due consideration for the debtor's assets. Despite finding for the claimants, Briggs J followed a long line of precedents[176] in holding that reliance on apparently competent advice, such as a valuation provided by an independent and qualified expert, does not result in personal liability for the administrator should the advice turn out to be wrong. The only exception is if such decision is taken outside the scope of the administrator's powers or contrary to the law.[177]

If, however, the administrator departs from proper market testing and does not rely on competent and timely independent advice (as in *Brewer*), the court is not bound to conclude that the sale price represents a truthful assessment of the value of the assets and/or the business. Still, this occurs only when the administrator's decision does not withstand logical analysis and not – as suggested in this article – when the administrator fails to take reasonable steps to get the fair price for the assets.

Less controversially, the decision in *Brewer* also follows the established judicial approach on the assessment of conflicting expert evidence. This was also the key issue in the two decisions in *AMT Coffee*,[178] where Matthews J had to determine if excessive remuneration was paid to directors and the price of the petitioners' shares. Once again, in *AMT Coffee* the learned judge followed the established approach that, in case of similarly objective and independent valuations, courts should not average among them, but should distinguish them on the basis of their persuasiveness. Matthews J clearly explained the reasons why he took no account of that expert evidence. Nevertheless, the metaphor of the heap of grain used to justify the conclusion that directors' remuneration was excessive shows that courts still have to find proper, replicable and sound approaches to value assets in the absence of independent valuations.

These decisions, therefore, show that recent case law does not embrace the revised, socially just notion of fairness advocated in this article. Priority is given to ensuring consistency and predictability, while the protection against abuse is limited to fraudulent or exceptional cases.

3.4 | Abstract

"Fair value" is likely to remain a very contentious and highly litigated notion in the future in the absence of clear statutory guidance. As stated elsewhere:

> "anyone attempting to determine the 'fair' price also has to contend with the risk that any of her embedded assumptions could be wrong, as well as the fact that she could be wrong about the possible size of those errors."[179]

It is argued, however, that some statutory guidance should enhance the fairness of the insolvency framework, and result in more balanced and equitable decisions in valuation issues. A critical assessment of English case law suggests that more should be done to ensure that assets and businesses are properly assessed and that unsecured creditors are not unfairly harmed.

4 | CONCLUSION

The purpose of this article was to investigate the degree of fairness (and consistency) in the valuation practices adopted by English courts by providing an original interpretation of values underpinning the modern English insolvency framework. The overarching research questions were to determine if English case law:

i achieves a fair valuation of the debtor's assets and business; and
ii protects interested parties (mainly creditors and shareholders) who have realistic prospects of receiving a distribution in foreseeable circumstances against unfair harm.

This article argued that a fairness-oriented approach should be made transparent and become an express part of English insolvency law and policy. Under the framework developed here, valuations of assets and businesses in formal insolvency procedures should be based on an enhanced, procedural and substantive notion of fairness.

The documentary analysis of this article shows that courts only implement a consistent but procedurally fair approach to valuations. Case law falls short of implementing substantially fair practices. This situation prompts calls for transparency and implementation into law of the substantially and not just the procedurally fair framework. If the specific fairness-oriented framework proposed in this article was applied in insolvency cases, a flexible yet prescriptive notion of "fair value" should be introduced into the IA 1986. This notion should apply absent any different choice by the parties and should be developed based on internationally accepted standards such as the IFRS 13 and the regulation on valuation before resolution.

Pursuant to the same framework, courts should challenge the valuations produced by IPs and independent experts not only when they do not withstand logical analysis but also when the interested claimants submit sufficient evidence to question the fairness of the value paid for the debtor's assets and business. If the notion of "fair value" is linked not only to the concept of "market value" but also to "disposal value," courts and IPs should be able to dismiss petitions that fail to consider the peculiar conditions of the market at the time of the sale.

With reference to "unfair harm" - a notion expressly mentioned only in administration cases but, in reality, relevant to liquidation procedures as well - this article showed that the problem does not lie primarily in the clarity and scope of the notion. English courts have adopted a flexible definition, capable of encompassing any differential treatment from equally ranking claimants, including the decision to sell an asset at an undervalue, provided that claimants can demonstrate that the decision cannot be justified by reference to the interests of creditors. It is submitted that this represents a reasonably adequate balance between the competing rights of the creditors to have their interests protected and the IPs' rights not to see any of their decisions pretentiously challenged in front of a court.

In the case of "unfair harm," substantially fair outcomes are not achieved mainly due to the high burden of proof required by the courts to reverse or modify the act or decision challenged by the interested party. The High Court in *Edennote* suggested that this threshold should be lowered by judging the IPs' decisions on the basis of the *Wednesbury* test. If that approach was followed, an exercise of statutory power or discretion may be called into question if it was shown that the person exercising the power, by acting in good faith, has taken into account considerations which he or she ought not to have taken into account or failed to take into account considerations which he ought to have taken into account. As a result, it is argued here that there is the need for codification of the *Wednesbury* test into the relevant sections of the IA 1986 dealing with the duties of administrators and liquidators.

This study (reported in two separate articles) has highlighted the importance of social justice in insolvency and bankruptcy cases, evidenced the inadequacy of existing theories to implement social justice tenets in this context, and proposed a specific, fairness-oriented framework to understand whether assets and businesses are fairly valued in insolvency and bankruptcy cases. It has subsequently discussed the extent to which existing valuation techniques and their practical implementation by the English courts promote a fairness-oriented approach to valuation of assets and businesses in insolvency. Finally, it has discussed the impact that a fairness-oriented framework which addresses substantive as well as procedural issues would have on judicial powers. The conclusions of this article can be applied to valuation of assets for both corporate insolvency and personal bankruptcy cases.

This second article has made a case for regulatory reforms to address the shortcomings demonstrated in this article rather than prescribing more detailed and prescriptive procedures to assess corporate assets in insolvency. The issue is not primarily the availability of valuation methodologies, but their proper and informed use by the judiciary.

Further research may be needed to examine the extent to which the fairness-oriented framework discussed in this article is suitable for transplantation more generally into English corporate insolvency and personal bankruptcy law. In fact, issues of balance between conflicting interests may feature more prominently in areas such as distribution of assets and creditors' voting rights. Further research may also be needed to investigate if there are significant and important value differences as to what is fair, as suggested by some authors,[180] and the extent to which the consent of those affected by a decision is relevant to its fairness.[181]

The judicial approach to valuations of the assets and businesses of failing companies is not flawed in its entirety. It is in need of retuning, in order to better deal with fair measurement issues, especially in connected sales or where expert valuations are not fully persuasive, and to protect those interested parties who are affected by unfair transactions and who suffered unfair harm from the IPs. If regulatory changes are limited to the areas suggested in this article, it is expected that the distributive policies advocated in it would not decay into base rent seeking or in windfalls for those who have political sway.

ENDNOTES

[1]Eugenio Vaccari, "Broken Companies or Broken System? Charting the English Insolvency Valuation Framework in Search for Fairness" [2020] 35(4) JIBLR 135.

[2]Interested parties are understood in this article as any creditors and shareholders who have realistic prospects of receiving a distribution of assets or proceeds in foreseeable circumstances.

[3]It is well-established that English courts give no weight to the opposition of those who had no realistic prospect of receiving a distribution in any foreseeable circumstances: *Re Greenhaven Motors Ltd* [1999] BCC 463.

[4]Sir Kenneth Cork, *Report of the Insolvency Law Review Committee Insolvency Law & Practice* (Cmnd 8558, 1982), paragraphs 191–198.

[5]See the emphasis on improving transparency and accountability, as well as protecting creditors and limiting the impact of corporate failures on customers, suppliers and employees in: Department for Business, Energy and Industrial Strategy, "Insolvency and Corporate Governance. Government Response" (26 August 2018), (i)-(ii)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/736207/ICG_-_Government_response_doc_-_24_Aug_clean_version__with_Minister_s_photo_and_signature__AC_final.pdf>.

[6]Douglas Baird and Donald Bernstein, "Absolute Priority, Valuation Uncertainty, and the Reorganization Bargain" (2006) 115 Yale LJ 1930.

[7]Owen Fiss, "Against Settlement" (1984) 93 Yale LJ 1073; Adam Badawi, "Self-Help and the Rules of Engagement" (2012) 29 Yale J on Reg 1; Anthony Casey and Julia Simon-Kerr, "A Simple Theory of Complex Valuation" (2015) 113 Mich L Rev 1175, 1180.

[8]Vaccari (above note 1).

[9]This is a requirement for pre-packaged sales in administration, as set out in SIP16. SIP 16 defines "connected party" with reference to sections 249 and 435, Insolvency Act 1986 ("IA 1986"), and Articles 4 and 7, Insolvency (NI) Order 1986. Directors, shadow directors, associate persons of the debtor, close family members, companies in the same group and anybody with significant prior connection to the debtor fall within the definition of connected party. However, SIP 16 contains a carve out for secured lenders over one third or more of the shares in the insolvent company.

[10]I am grateful to Nikhil Gokani for drawing my attention to a potential issue here.

[11]*Re AMT Coffee Ltd* [2019] EWHC 377 (Ch); [2019] 2 WLUK 605; *Re AMT Coffee Ltd* [2019] EWHC 46 (Ch); 2019 WL 00359907; *LBI EHF v Raiffeisen Bank International AG* [2018] EWCA Civ 719; [2018] 4 WLUK 84.

[12]*Rowbury v Official Receiver* [2015] EWHC 2951 (Ch); [2015] 10 WLUK 433.

[13]*Profinance Trust SA v Gladstone* [2001] EWCA Civ 1031; [2001] 7 WLUK 14; *Chadwick v Thomas-Chambers* [2017] 11 WLUK 412; [2018] BPIR 354; *AMT Coffee* 377 (Ch) (above note 11).

[14]*Kamyab v Investec Bank (Channel Islands) Ltd* [2014] EWHC 2427 (QB); [2014] 6 WLUK 324 (where something like 50 viewings of the property had been arranged and a variety of offers made before one was accepted); *National Asset Loan Management v Cahillane* [2015] EWHC 62 (Ch); [2016] 1 WLR 45.

[15]*Alpstream AG v PK Airfinance sarl* [2015] EWCA Civ 1318; [2015] 12 WLUK 712, [156]. For a detailed analysis of this case, see: Sunay Radia and Michael Freeman, "Alpstream AG and others v PK Airfinance s.a.r.l. [2015] EWCA Civ 1318, Mortgage in Possession Duties and Considerations" [2016] 13(6) Int CR 439.

[16]The starting point for this approach is *Farrar v Farrars Ltd* (1888) 40 Ch D 395 (arguing that lenders can exercise their power of sale at any time and they are not bound to wait for an upturn in the market). See also: *Tse Kwong Lam v Wong Chit Sen* [1983] 1 WLR 1349, [1355B]; *Silven Properties Ltd v RBS* [2003] EWCA Civ 1409; [2004] 1 WLR 997, [14], rejecting the contrary view expressed *obiter* by Denning LJ in *Standard Chartered Bank v Walker* [1982] 1 WLR 1410; *Alpstream* (above note 15), [198].

[17]*Re Bluebrook Ltd (aka IMO Carwash)* [2009] EWHC 2114 (Ch); [2010] BCC 209 [46].

[18]However, the office holder has the obligation to consider and disclose the alternatives to a connected pre-packaged sale: SIP 13, [9] (effective from 1 December 2016) <https://www.r3.org.uk/media/documents/technical_library/SIPS/SIP%2013%20-%20Disposal%20of%20Assets%20to%20Connected%20Parties%20in%20an%20Insolvency%20Process%20(effective%20from%201%20December%202016).pdf>.

[19]*Saltri III Ltd v MD Mezzanine SA SICAR* [2012] EWHC 3025 (Comm); [2013] 1 All ER (Comm), [211].

[20]Ibid., [53].

[21]*Goel v Grant* [2017] EWHC 2688 (Ch); [2018] Bus LR 393, [27].

[22]Idem.

[23]Idem.

[24]*Re Hellas Telecommunications (Luxembourg) II SCA* [2009] EWHC 3199 (Ch); [2009] 11 WLUK 655.

[25]Sandy Purcell and Alex Boyce, "The Courts Speak on Valuation in Restructurings: IMO Car Wash, SAS and Wind Hellas lessons" [2010] 7(2) Int CR 129, 131.

[26]*Re Hellas Telecommunications (Luxembourg) II SCA (in admin.)* [2011] EWHC 3176 (Ch), [2011] 11 WLUK 881.

[27]Ibid., 132.

[28]*Chadwick* (above note 13), [59] and following.

[29]*Ludsin Overseas Ltd v Douglas John Maggs* [2014] EWHC 3566 (Ch); [2014] 10 WLUK 893, [23].

[30]*Philbin v Davies* [2018] EWHC 3472 (Ch); [2018] 6 WLUK 695; *Brewer* et al. *(as joint liquidators of ARI Digital UK Ltd) v Iqbal* [2019] EWHC 182 (Ch); [2019] PNLR 15. For an analysis of the latter case, see Hardwicke Chambers (various authors), "Brewer v Iqbal" (2019) 12(2) *CR & I* 70.

[31]*Saltri III* (above note 19).

[32]*Tse Kwong Lam* (above note 16); *Alpstream* (above note 15); *Philbin* (above note 30), [54].

[33]*Tse Kwong Lam* (above note 16); *Philbin* (above note 30).

[34]*Philbin* (above note 30).

[35]See, among others: *Sea Assets Ltd v PT Garuda Indonesia (No. 2)* [2001] 6 WLUK 583; *Alpstream* (above note 15); *Goel* (above note 21).

[36]*R (on the application of Glatt) v Sinclair* [2011] EWCA Civ 1317; [2011] 11 WLUK 660, [34]–[40]; *Chadwick* (above note 13); *Philbin* (above note 30).

[37]*Skipton Building Society v Bratley* [2001] QB 261.

[38]*Re Telewest Communications Plc (No. 2)* [2004] EWHC 1466 (Ch); [2004] 6 WLUK 428, [15], applying the principle expressed in *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241; [2002] BCC 300. See also: *Re MyTravel*

Group Plc [2004] EWHC 2741 (Ch); [2005] 1 WLR 2365; and [2004] EWCA Civ 1734; [2004] 12 WLUK 456 (as analysed by Michael Crystal and Riz Mokal, "The Valuation of Distressed Companies – A Conceptual Framework" (2006) 3(2) *Int CR* 63 and 3(3) *Int CR* 123 (in two parts); *Re Frigoglass Finance BV* [2017] EWHC 3869 (Ch); [2017] 8 WLUK 13.

[39]Debtors facing financial distress cannot generate enough revenue or income to meet their financial obligations but they may be viable as going concerns. In contrast, debtors facing economic distress are characterized by low or negative operating profitability and have questionable going concern value even in the absence of leverage.

[40]Jennifer Payne, "Debt Restructuring in English Law: Lessons from the United States and Need for Reform" (2014) 130 (Apr) *LQR* 282, 297, discussing the approach adopted in *Bluebrook* (above note 17). See also: Jay Westbrook, "The Control of Wealth in Bankruptcy" [2004] 82(4) Tex L Rev 795.

[41]*Brewer* (above note 30).

[42]*Saltri III* (above note 19), [135]; *Philbin* (above note 30), [24].

[43]*Bluebrook* (above note 17).

[44]*Bluebrook* (above note 17); *Saltri III* (above note 19); *Ludsin* (above note 29); *Frigoglass* (above note 38). See also the case of *Sinclair* (above note 36) (but to a more limited extent).

[45]*Brewer* (above note 30).

[46]It is fair to say, however, that the court in *Brewer* relied on a CTM method, which is potentially the most promising technique to ensure that enhanced fairness is achieved during the valuation process.

[47]*Chadwick* (above note 13), where the court resorted to more traditional AV/LMs because there was insufficient evidence of a clear intention by the parties to enter into a binding collateral agreement for the value of the property to be assessed by an independent jointly appointed valuer.

[48]*LBI EHF* (above note 11), [36]–[39] and [45]–[47].

[49]*Socimer Bank Ltd v Standard Bank Ltd* [2008] EWCA Civ 116; [2008] Bus LR 1304; *Lehman Brothers Int'l (Europe) v Exxonmobil Financial Services BV* [2016] EWHC 2699 (Comm); [2017] 2 All ER (Comm) 959, [280]; *LBI EHF* (above note 11), [10] and [38].

[50]*LBI EHF* (above note 11), [48]: "there is [...] no warrant for limiting the width of the discretion provided by the contract wording by requiring the non-Defaulting Party to disregard the evidence of the market merely because it was illiquid or distressed at the particular time."

[51]*Brewer* (above note 30).

[52]*Goel* (above note 21).

[53]Ibid., 395.

[54]See, in general: Amin Doulai, "Realising What It's Worth" [2016] 30(55) IFL Rev 40.

[55]*Downsview Nominees Ltd v First City Corporation Ltd* [1993] AC 295, 312.

[56]*Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949, 969; *Tse Kwong Lam* (above note 16); *Downsview* (above note 55); *Sinclair* (above note 36); *Saltri III* (above note 19), [135]–[138]; *Alpstream* (above note 15). For an analysis of IP's duty to obtain the best price, see: David Gray, "On the Receiving End: A Review of the Receiver's Duty of Care" [2012] 5(2) CR & I 53; Malti Shah, "Whose Duties Are They Anyway? Court of Appeal Provides Welcome Clarity on the Extent of a Mortgagee's Duties" [2016] 9(3) CR & I 102; Louise Lamb et al., "Mortgagee's Duty to Obtain the Best Price When Exercising a Power of Sale" [2016] 31(3) BJIB & FL 179.

[57]*Palk v Mortgage Services Funding* [1993] Ch 330, 337.

[58]*Tse Kwong Lam* (above note 16), [1359G].

[59]*AIB Finance Ltd v Alsop* [1998] 2 All ER 929.

[60]*York Buildings Co v Mackenzie* [1795] 1 WLUK 1; *Warner v Jacob* [1882] 3 WLUK 27; *Farrar* (above note 16); *Kennedy v De Trafford* [1897] AC 180; *Hodson v Deans* [1903] 2 Ch 647; *Cuckmere Brick* (above note 56); *Tse Kwong Lam* (above note 16).

[61]*Tse Kwong Lam* (above note 16), [1358F]: "the fact that no one bid more than [HKD] 1.2 [million] at this auction does not necessarily mean that the property could not have been sold for more than [HKD] 1.2 [million]."

[62]*Davey v Money* [2018] EWHC 766 (Ch); [2018] Bus LR 1903.

[63]Paragraphs 67–68, Schedule B1, IA 1986. The seminal case in the area is *Kyrris v Oldham* [2003] EWCA Civ 1506; [2004] BCC 111 (arguing that administrators owe no general common law duty of care to unsecured creditors in relation to his conduct of the administration, but only to the company). See also: *Hague v Nam Tai Electronics* [2008] UKPC 13; [2008] 2 WLUK 524; *Fraser Turner Ltd v PricewaterhouseCoopers LLP* [2019] EWCA Civ 1290; [2019] 7 WLUK 303.

[64]*Brewer* (above note 30), [79]–[89].

[65]Paragraph 74, Schedule B1, IA 1986. *Re St George's Property Services (London) Ltd (in admin.)* [2010] EWHC 2538 (Ch); [2010] Bus LR 1747; *Hockin v Marsden* [2014] EWHC 763 (Ch); [2014] Bus LR 441.

[66]*Re Coniston Hotel (Kent) LLP (in liq.)* [2013] EWHC 93 (Ch); [2015] BCC 1; *Re Meem SL Ltd (in admin.)* [2017] EWHC 2688 (Ch); [2018] Bus LR 393.

[67]*Tse Kwong Lam* (above note 16), [1359G]; *Medforth v Blake* [2000] Ch 86; *Michael v Miller* [2004] EWCA Civ 282; [2004] 2 EGLR 151; *Newport Farm Ltd v Damesh Holdings Ltd* [2003] UKPC 54; [2003] 7 WLUK 180, [25]; *Saltri III* (above note 19), [136]. See also: Richard Hooley, "Release Provisions in Intercreditor Agreements" [2012] 3 JBL 213, 231.

[68]*Tse Kwong Lam* (above note 16), [1356H].

[69]*Alpstream* (above note 15), [249].

[70]Ibid., [250].

[71]*Tse Kwong Lam* (above note 16); *Saltri III* (above note 19).

[72]*Silven Properties* (above note 16); *Michael* (above note 67).

[73]*Re Ahmed (A Debtor)* [2018] EWCA Civ 519; [2018] 3 WLUK 422; *LBI EHF* (above note 11); *AMT Coffee* 377 (Ch) (above note 11).

[74]*Chadwick* (above note 13), [67].

[75]*Platts v Western Trust and Savings Ltd* [1996] BPIR 399 [CA].

[76]*Wilson v SMC Properties Ltd* [2015] EWHC 870 (Ch); [2015] 4 WLUK 65, [76].

[77]*LBI EHF* (above note 11).

[78]*Ahmed* (above note 73), [64]–[65].

[79]*Saltri III* (above note 19).

[80]*Alpstream* (above note 15).

[81]*Newport Farm* (above note 67); *Saltri III* (above note 19).

[82]*Goel* (above note 21).

[83]*Wilson* (above note 76).

[84]*Re Edennote Ltd* [1996] BCC 718; *Goel* (above note 21), [44(i)-(ii)].

[85]*Frigoglass* (above note 38), where the chairman sought the advice of independent valuers following a negative impairment on the assets of two companies in a group and informed the creditors at the meeting of the effect of this impairment.

[86]*Brewer* (above note 30), [35].

[87]*Bluebrook* (above note 17), [45]: "I am sure that a correct approach to valuation in many cases will be to specify a range."

[88]*Saltri III* (above note 19). See also: G. Smith and D. King, "How Insolvency Practitioners Value a Business" [2015] 28(2) Insolv Int 20, 23–24.

[89]*Sinclair* (above note 36).

[90]Ibid., [3]–[10].

[91]*Cuckmere Brick* (above note 56), 966; *Tse Kwong Lam* (above note 16), 1355.

[92]*Bluebrook* (above note 17).

[93]*Brewer* (above note 30).

[94]*Stanley J Holmes & Sons Ltd v Davenham Trust Plc* [2006] EWCA Civ 1568; [2007] BCC 485.

[95]*Wilson* (above note 76), [66]. Other reasons also induced the court to rely on the lowest, investment-oriented valuation.

[96]*Cahillane* (above note 14).

[97]*AIB Finance* (above note 59).

[98]*Bluebrook* (above note 17), [42] and [49].

[99]*Brewer* (above note 30), [110].

[100]*Bluebrook* (above note 17), [14] and [43].

[101]*Philbin* (above note 30), [67].

[102]*Goel* (above note 21).

[103]*Philbin* (above note 30).

[104]*Stanley J Holmes* (above note 94).

[105]Ibid., [7]. The Court of Appeal also questioned the equal persuasiveness of the valuations, as the valuation submitted by the respondents was drafted by a qualified valuer who possessed knowledge of the individual plant and machinery involved in the transaction. No comparable information was available with reference to the other valuer, who submitted the lower estimation of GBP 50,000.

[106]Ibid., [19].

[107]*Bluebrook* (above note 17), [45], [50].

[108]*Rowbury* (above note 12).

[109]See, among others: *Sea Assets* (above note 35).

[110]*AMT Coffee* 46 (Ch) (above note 11), [216].

[111]*Telewest Communications (No. 2)* (above note 38).

[112]Among others, see: *Butters v BBC Worldwide Ltd* [2009] EWHC 1954 (Ch); [2009] 8 WLUK 206; *Re Natural Duvet & Pillow Co Ltd v Ng* [2011] EWHC 1834 (Ch); [2011] 7 WLUK 509; *Re Porritt* [2011] 9 WLUK 420; *Re Beppler & Jacobson Ltd* [2014] EWHC 4533 (Ch); [2014] 12 WLUK 5; *LBI EHF* (above note 11); *Ahmed* (above note 73).

[113]*Porritt* (above note 112), [58]: "the fair value [...] is the fair value of each share to be sold."

[114]Among others, see: *Bluebrook* (above note 17); *Kamyab* (above note 14); *Alpstream* (above note 15); *Ahmed* (above note 73); *LBI EHF* (above note 11).

[115]*Re Phoenix Contracts (Leicester) Ltd* [2010] EWHC 2375 (Ch); [2010] 9 WLUK 419; *Joseph v LEBC Group Ltd* [2018] EWHC] 876 (Comm); [2018] 4 WLUK 336; *Signia Wealth Ltd v Vector Trustees Ltd* [2018] EWHC 1040 (Ch); [2018] 5 WLUK 119.

[116]*LBI EHF* (above note 11), arguing that in the absence in the agreement of an express or implied limitation on the exercise of discretion, the only limitation was that the decision-maker had to act rationally and not arbitrarily or perversely.

[117]*Scottish Cooperative and Wholesale Society Limited v Meyer* [1959] AC 324; *Re London School of Electronics Limited* [1985] BCLC 273; *Re a Company (No 002612 of 1984)* (1986) 2 BCC 99; *Re OC (Transport) Services Limited* [1984] BCLC 251; *Re Bird Precision Bellows* [1985] BCLC 493 (on appeal from *Re a Company* above); *Re Cumana Limited* [1986] BCLC 430; *Re Elgindata Ltd* [1991] BCLC 959; *Profinance Trust* (above note 13); *Phoenix Contracts* (above note 115), [145]–[147].

[118]*LBI EHF* (above note 11).

[119]*Bluebrook* (above note 17).

[120]*Porritt* (above note 112).

[121]*Cream Holdings Ltd v Davenport* [2008] EWCA Civ 1363; [2008] 12 WLUK 226; *Joseph* (above note 115).

[122]*Butters* (above note 112).

[123]*Re Holt* [1953] 2 All ER 1499; *Joiner v George* [2002] EWCA Civ 160; [2003] BCC 298, [68]; *Natural Duvet* (above note 112), [17].

[124]*Natural Duvet* (above note 112), [17].

[125]*Kamyab* (above note 14), [14].

[126]*LBI EHF* (above note 11).

[127]Rhodri Davies QC, "Fair Market Value under the GMRA: How Fair is Fair?" [2018] 7 BJIB & FL 403.

[128]*Exxonmobil* (above note 49).

[129]*Ahmed* (above note 73), [62].

[130]*AMT Coffee* 46 (Ch) (above note 11), [216].

[131]*Cuckmere Brick* (above note 56), 966.

[132]*Alpstream* (above note 15).

[133]Commission Delegated Regulation (EU) 2018/345 of 14 November 2017 supplementing Directive 2014/59/EU of the European Parliament and of the Council with regard to regulatory technical standards specifying the criteria relating to the methodology for assessing the value of assets and liabilities of institutions or entities [2018] OJ L 67/2018.

[134]See: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/753656/Publicised_Sanction_Steven_Wiseglass.pdf>.

[135]Paragraph 74, Schedule B1, IA 1986, which replaced the older section 27 of the Act, changing the wording from "unfairly prejudicial" to "unfairly harm."

[136]These are any creditor, debtor or other person aggrieved: *Re Edennote Ltd* [1995] BCC 389, 394. The list does not include a surety claiming subrogation rights: *Mahomed v Morris (No.2)* [2000] 2 WLUK 606.

[137]Section 168(5), IA 1986.

[138]For an outline of the key principles on the rights and responsibilities of corporate administrators which have emerged from relevant case law, see: Matthew Weaver, "Administrators: rights and responsibilities" (2018) 11(5) *CR & I* 177.

[139]*Hockin* (above note 65).

[140]*Coniston* (above note 66). For an analysis of this case, see: Emma Zymanczyk, "Mind the Gap: The Scope of Administrators' Personal Liability" [2013] 6(2) CR & I 70.

[141]*Lehman Brothers Australia Ltd (in liq.) v Lomas* [2018] EWHC 2783 (Ch); [2018] 10 WLUK 385, [78]–[80]. Those requirements were not met in the instant case.

[142]*Meem* (above note 66). For a comment, see: Adam Jones and Tom Hilton-Stevens, "How administrators should value and dispose of a cause of action and the role of the public interest in preventing the assignment of a claim to a defendant: a look at Re Meem SL Ltd (In Administration)" [2018] 11(2) CR & I 46.

[143]*Coniston* (above note 66).

[144]*Citicorp Australia v Official Trustee in Bankruptcy* [1996] FCA 1115.

[145]*LF2 Ltd v Supperstone* [2018] EWHC 1776 (Ch); [2018] Bus LR 2303.

[146]*Re Hans Place Ltd* [1992] BCC 737; *Hamilton v Official Receiver* [1996] 3 WLUK 119 (holding that liquidators should sell a speculative claim if there was no risk of liability for the insolvent estate and even if there were concerns that the claim was sold at an undervalue, provided that no other offer was forthcoming).

[147]*Ultraframe (UK) Ltd v Rigby* [2005] EWCA Civ 276; [2005] 1 WLUK 236.

[148]*LF2 Ltd* (above note 145).

[149]*Coniston* (above note 66), [35]–[36] and [68].

[150]See, among others: *BLV Realty Organization Ltd v Batten* [2009] EWHC 2994 (Ch); [2009] 11 WLUK 506, [22].

[151]Amanda Cohen, “The Duty of Administrators to Act in the Interests of Creditors as a Whole and the Concept of Unfair Harm” [2010] 2 BJIB & FL 117, 117.

[152]*Hockin* (above note 139), [19]–[20]. For some comments, see: Andrea Monks et al., “High Court orders administrators to assign claims they were minded not to pursue themselves: Hockin and others v Marsden and others” (2014) 26(6) *BJIB & FL* 408; S. Gray, “Swap Shop: Administrators Forced to Assign Swap Claims in Hockin” [2014] 57(5) Insolv Int 68; Donna McKenzie Skene, “Unfair Harm in Administration” [2014] 132(Oct) Bus LB 5.

[153]*Re Charnley Davies Ltd (No 2)* [1990] BCLC 760; *Bristol & West Building Society v Mothew (t/a Stapley & Co.)* [1998] Ch 1, [775a]–[776a]: “a complaint that [the administrator] has failed to take reasonable case in the same of the company's assets is, therefore, a complaint of professional negligence and in my judgment the established principles applicable to cases of professional negligence are equally applicable in such a case.” With reference to liquidation cases, see *Edennote* (above note 84), 722 (confirming the lower court decision in *Edennote* (above note 136), 396C): “(fraud and bad faith apart) [...] the court will only interfere with the act of a liquidator if he has done something so utterly unreasonable and absurd that no reasonable man would have done it.”

[154]*Edennote* (above note 196); *Meem* (above note 66). Against, see *Hockin* (above note 139), [16]: “to adopt a test of perversity in place of the statutory test of unfair harm would plainly be impermissible, and to adopt it in addition to the statutory test would lack any legislative warrant.”

[155]Andrew Mace, “Challenging Administrators: Can They Ever Do Wrong?” [2010] 3(4) CR & I 141.

[156]Weaver (above note 138), 178.

[157]*Hockin* (above note 139), [16].

[158]Idem. For an analysis, see: Robert Hantusch, “Harm Without Perversity – An Extra Burden for the Administrator?” [2014] 7(4) CR & I 135.

[159]*Re CE King Ltd (in admin.)* [2000] 2 BCLC 297; [1999] 4 WLUK 334; *BLV Realty Organization* (above note 150).

[160]Vanessa Finch and David Milman, *Corporate Insolvency Law: Perspectives and Principles* (3rd edn) (CUP 2017) 364.

[161]*Re Lehman Brothers Int'l (Europe) (in admin)* [2008] EWHC 2869 (Ch); [2008] 11 WLUK 598.

[162]*Re Peters, ex parte Lloyd* (1882) 47 LT 64; *Re a Debtor, ex parte the Debtor v Dodwell (the Trustee)* [1949] Ch 236; *Leon v York-o-Matic Ltd* [1966] 1 WLR 1450; *Harold M Pitman & Co v Top Business Systems (Nottingham) Ltd* (1985) 1 BCC 99; *Edennote* (above note 84).

[163]*Re Buckingham International Plc (in liq.) (No.2)* [1997] 11 WLUK 66.

[164]*Edennote* (above note 84); *Goel* (above note 21).

[165]*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

[166]*Edennote* (above note 136), 396; as affirmed on appeal in *Edennote* (above note 84).

[167]*Edennote* (above note 84).

[168]*Holgate v Reid* [2013] EWHC 4630 (Ch); [2013] 2 WLUK 558.

[169]*Goel* (above note 21).

[170]*Lomas* (above note 141). For an analysis, see: Marcus Haywood, “Creditor Challenges to Decisions of Administrators: Developments in Relation to the Rule in *Ex Parte* James” [2019] 2 BJIB & FL 110.

[171]*Re Condon, ex parte James* (1874) 9 Ch App 609. According to this ruling, the court may intervene in the actions of its office holders, notwithstanding their legal rights, in certain circumstances. The decision in *Lomas* (above note 141) suggests that this is the case when the proposed conduct is pronounced to be obviously unjust by all right-minded men ([61]).

[172]*Lomas* (above note 141).

[173][2019] EWHC 182 (Ch); [2019] PNLR 15.

[174]For an outline of these duties, see: *Charnley Davies* (above note 153); *Bristol & West Building Society* (above note 153).

[175]*Brewer* (above note 30), [27].

[176]*Re Hastings-Bass (Deceased)* [1975] Ch 75; *Faryab (A Bankrupt) v Smith (Trustee in Bankruptcy)* [2000] 12 WLUK 40; *Pitt v Holt* [2013] UKSC 26; [2013] 2AC 108.

[177]*Brewer* (above note 30), [57]–[58].

[178]*AMT Coffee* 46 (Ch) (above note 11); *AMT Coffee* 377 (Ch) (above note 11).

[179]Matthew Klein, "Illiquid, Insolvent, What's the Difference?" *Financial Times* (30 September 2014).

[180]Jon Elster, *Local Justice: How Institutions Allocate Scarce Goods and Necessary Burdens* (CUP 1992) 149.

[181]Riz Mokal, "On Fairness and Efficiency" (2003) 66 *MLR* 452. This question has been addressed by philosophers – among others: Thomas Hobbes, *The Leviathan* (1651); Immanuel Kant, *Groundwork of the Metaphysics of Morals* (1785); John Rawls, *A Theory of Justice* (Harvard University Press 1971); John Rawls, *Justice as Fairness. A Restatement* (3rd edn) (Harvard University Press 2003); Ronald Dworkin, "Why Efficiency?" (1980) 8 *Hofstra L Rev* 563 - and insolvency scholars – among others: Thomas Jackson, *The Logic and Limits of Bankruptcy Law* (2nd edn) (Harvard University Press, 2001); Donald Korobkin, "Contractarianism and the Normative Foundations of Bankruptcy Law" [1992] 71 Tex L Rev 541.

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