Corporate Insolvency Reforms in England: Rescuing a "Broken Bench"? A Critical Analysis of Light Touch Administrations and New Restructuring Plans

*Eugenio Vaccari**

«*Let no debt remain outstanding, except the continuing debt to love one another, for whoever loves others has fulfilled the law*» [Romans 13:8]

Abstract

Common wisdom suggests that corporate insolvency frameworks should be efficient, flexible and adaptable. Measuring such benchmarks is a challenging task better left to economists. This doctrinal paper assumes that the English corporate insolvency system can reach these goals if it offers a balanced and reasonably broad array of options to the debtors in distress. These options should include liquidation of assets, rescue of the business (or part of it) and rescue of the company (and as much of its business as possible).

The recently enacted *Corporate Insolvency and Governance Act 2020* addresses some of the alleged inefficiencies of the English framework. One of the key innovations is the introduction of a new restructuring plan. This paper assesses the need for such procedure in light of the established practice of light touch administrations.

Keywords

Covid-19; Flexibility and Adaptability; Regulatory Reforms; Company Rescue; Business Rescue; Administration; Restructuring Plan; Liquidation; Fairness and Transparency.

I. Introduction

The economic impact of the Covid-19 outbreak has triggered calls for emergency fiscal and legislative measures[1] to address liquidity and legal problems. All over the world, countries adopted measures to support companies[2] in financial[3] and economic[4] distress, sometimes introducing new or amending existing insolvency rules.[5]

---

* Lecturer in Company and Corporate Insolvency Law (University of Essex), PhD (City, University of London), LL.M. (London School of Economics and Political Science). The author is greatly indebted to Dr. *Yseult Marique* for her insightful comments on earlier drafts of this paper, and to *Ruaidhri Cantillon* for his constructive criticism of the manuscript and for his diligent proof-reading of this work. This article covers literature and case law published before 1 July 2020. The usual disclaimer applies.

[1] Institute of Directors, 'Business leaders' confidence plummets amid coronavirus concerns' (10 March 2020) <https://www.iod.com/news-campaigns/press-office/details/Business-leaders-confidence-plummets-amid-coronavirus-concern> accessed 1 July 2020 (arguing that the Government must be at the ready to take swift action to help cash-strapped businesses bridge); Institute of Chartered Accountants for England and Wales, 'COVID-19 and financial services' (11 March 2020) <https://www.icaew.com/technical/financial-services/covid-19-and-financial-services> accessed 1 July 2020; R3, 'R3 responds to Chancellor's COVID-19 measures' (18 March 2020) <https://www.r3.org.uk/press-policy-and-research/news/more/29296/page/1//> accessed 1 July 2020; K Makortoff and others, 'Thousands of firms may fail if rescue schemes not expanded, says CBI' *The Guardian* (London, 23 April 2020) <https://www.theguardian.com/business/2020/apr/23/thousands-of-firms-may-fail-if-rescue-schemes-not-expanded-says-cbi?utm_term=RWRpdG9yaWFsX0J1c2luZXNzVG9kYXktMjAwNDI0&utm_source=esp&utm_medium=Email&CMP=bustoday_email&utm_campaign=BusinessToday> accessed 1 July 2020.

[2] This article adopts the terms "company" and "corporation" as synonyms. It does not use the term "firm" because under the English tradition the latter connotes primarily a partnership.

[3] "Financial distress" is a condition in which a company (or individual) cannot generate revenue or income because it is unable to meet or cannot pay its financial obligations. This is generally due to high fixed costs, illiquid assets, or revenues sensitive to economic downturns. A financially distressed corporation can be viable if its business - i.e. the organized efforts and activities of individuals to produce and sell goods and services for profit - is sound and there is a market for its products.

[4] "Economic distress" is a condition in which a company (or individual) cannot generate revenue or income because the underlying business or activity is not viable and sound, as there is no market for the products manufactured or sold by the company (or individual).

[5] For a global guide on the measures adopted to support distressed corporations and businesses through the Covid-19 crisis, see the document prepared by the World Bank in association with INSOL International: <https://www.worldbank.org/en/topic/financialsector/brief/finance-and-covid-19-coronavirus> accessed 1 July 2020.

In England, the Government first enacted measures to make it more difficult for creditors to wind-up companies.[6] The judiciary and other bodies adopted initiatives to adapt to the new environment and working conditions emerging as a result of the Covid-19 pandemic.[7] More recently, the Government announced[8] new regulatory changes, soon after translated into the *Corporate Insolvency and Governance Act 2020* ('CIG Act').[9]

The CIG Act introduces temporary (such as the suspension of wrongful trading provisions) insolvency measures to deal with the effects of the Covid-19 pandemic. It also introduces permanent (such as a new restructuring plan) changes to the English framework to promote the rescue of distressed yet viable companies. This paper focuses on one of the long-term changes to the English framework, i.e. the introduction of such restructuring procedures.

The Government first proposed this new restructuring procedure on the basis that the English system did not feature debtor-in-possession ('DIP') formal insolvency procedures capable of binding all creditors, including dissenting junior classes, through the use of a cross-class cram down provision.[10] Some commentators,

---

[6] For instance, the Temporary Insolvency Practice Direction effective from 6 April 2020, which adjourned all non-urgent insolvency applications and petitions listed for hearing prior to 21 April 2020. Available here: <https://www.trinitychambers.co.uk/media/2654/temporary-ipd-april-2020_.pdf> para. 4, accessed 1 July 2020. According to the same document, HMRC has suspended the majority of insolvency activity for now, unless it is deemed to be essential (i.e. there is suspected fraud or criminal activity).

[7] For instance, the *Coronavirus Act 2020* provided generally for the increased use of remote hearings, as well as media access and the availability of recordings online. It was followed by a protocol prepared by the Judiciary of England and Wales, which implemented these measures. Further to this, the Master of the Rolls and Lord Chancellor have introduced new Emergency Practice Directions.

[8] The press release is available here: <https://www.gov.uk/Government/news/regulations-temporarily-suspended-to-fast-track-supplies-of-ppe-to-nhs-staff-and-protect-companies-hit-by-covid-19> accessed 1 July 2020.

[9] The CIG Act was fast-tracked through both Houses (the Bill was introduced on 20 May 2020), received royal assent on 25 June 2020 and entered into force the day after.

[10] Department for Business, Energy & Industrial Strategy, *Insolvency and Corporate Governance. Government Response* (26 August 2018) 63 <https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/736163/ICG_-_Government_response_doc_-_24_Aug_clean_version__with_Minister_s_photo_and_signature__AC.pdf> accessed 1 July 2020.

however, argued that the proposals were too similar to existing provisions in company law and insolvency law. As a result, the new restructuring procedure was not needed as it would add further complexity to the framework.[11]

These commentators were probably referring to the innovative practices developed by the insolvency industry to deal with companies in distress. One of these practices is the "light touch" administration ('LTA'). In LTAs, administrators rely on a provision of the Insolvency Act 1986 ('the Act')[12] to give consent to the directors to continue to exercise certain board powers during the procedure. As a result, administration is transformed from a practitioner-in-possession ('PIP') to a DIP procedure. This means that the debtor rather than an independent insolvency practitioner ('IP') retains the control of the company during the insolvency procedure.

LTAs happened in the past in high profile cases, such as *Railtrack*, *Metronet* and *Turner and Newall*. More recently, the retail company *Debenhams* announced its intention to use a LTA to turn around its business.[13] There is evidence that several of UK retailers and restaurant chains such as *Oasis & Warehouse*[14] intend to follow *Debenhams* in this process and are in talks to make use of LTAs during the Covid-19 pandemic.[15]

---

[11] Ibid.
[12] Paragraph 64, Schedule B1 IA 1986.
[13] J Booth, 'Debenhams administration could provide blueprint for 'freezing' companies during coronavirus crisis' *City A.M.* (London, 6 April 2020) <https://www.cityam.com/debenhams-administration-could-provide-blueprint-for-freezing-companies-during-coronavirus-crisis/> accessed 1 July 2020.
[14] E Jahshan, '202 immediate job cuts as Oasis & Warehouse files for administration' *Retail Gazette* (London, 15 April 2020) <https://www.retailgazette.co.uk/blog/2020/04/202-immediate-job-cuts-as-oasis-warehouse-files-for-administration/> accessed 1 July 2020.
[15] J Eley and T Kinder, 'Companies explore 'light touch' administration in the wake of Debenhams' *Financial Times* (London, 16 April 2020) <https://www.ft.com/content/76c7c985-ff8c-4707-b4e4-28eb7a8f7b62> accessed 1 July 2020.

Despite this apparent success, LTAs may have adverse effect: they may fill the market with "zombie" entities,[16] and make the insolvency framework less transparent and fair for the purpose of promoting efficiency,[17] flexibility and adaptability.

The purpose of this paper is to investigate to what extent (if any) the recent introduction of the restructuring procedure to the English insolvency corporate framework enhances the flexible and adaptable nature of the existing system without affecting its transparency and fairness.

The new restructuring plan is assessed against LTAs, a (so far) little researched tool. To the best knowledge of the author, this is the first paper to critically assess these procedures in light of the criteria mentioned above, and to encourage a discussion on the use of these procedures to promote company rescue. This critical analysis is particularly important due to the increasing popularity of LTAs (and the expected popularity of the new restructuring plan) as well as the relative lack of guidance from either the legislator or the courts.

---

[16] A "zombie" company is any corporation that uses its cash flow to repay the interests of existing debt, with little or no prospective of repaying the principal loan or creating added value for its stakeholders. For further discussion, see: M Stothard and C Giles, 'Zombies seen to hold back recovery' *Financial Times* (London, 13 November 2012) <https://www.ft.com/content/5fc26aaa-2dad-11e2-9988-00144feabdc0> accessed 1 July 2020; C Elliott, 'The Zombie Budget Deficit' (2013) 6 C.R. & I. 78; N Hood, 'The Inexorable Rise of Britain's Army of the Walking Corporate Debt' (2013) 6 C.R. & I. 180. See also: RN Banerjee and B Hofmann, 'The rise of zombie firms: causes and consequences' (Bank for International Settlements, 23 September 2018) <https://www.bis.org/publ/qtrpdf/r_qt1809g.htm> accessed 1 July 2020; R Armstrong, 'How to avoid a corporate zombie apocalypse' *Financial Times* (London, 5 February 2020) <https://www.ft.com/content/1d87c9ec-4762-11ea-aeb3-955839e06441> accessed 1 July 2020 (investigating the risk of zombie companies in the retail industry in particular); M Greene, 'Bailing out the oil industry brings a fate worse than death' *Financial Times* (London, 19 April 2020) <https://www.ft.com/content/4a6494e2-7fbe-11ea-b0fb-13524ae1056b> accessed 1 July 2020.

[17] It is possible to categorise "efficiency" as a substantive (ends-efficiency) or procedural (means-efficiency) goal: RJ Mokal, *Corporate Insolvency Law: Theory and Application* (OUP 2005) 24-26. A substantive goal of the law is the particular end that the law seeks to achieve and which justifies the existence and the mechanics of the statute. On the other hand, procedural goals are the benchmarks used to assess if a particular mechanism achieves its substantive goal in the desired manner (i.e. efficiently). This article adopts the procedural interpretation of the notion of "efficiency".

This paper strongly suggests that the recently introduced measures in light of existing statutes, cases and academic commentaries make the system more efficient, flexible and adaptable, but at the expense of transparency, fairness and accountability.

Building on a wide literature, this paper discusses the criteria to assess the flexibility, adaptability and efficiency of the system in light of the purposes of corporate insolvency law. Moving away from theoretical approaches, this paper focuses on a critical and pragmatic analysis of the law and case law. The point is not to achieve compliance with theoretical ideas but to ensure that a wide range of options exist to companies that file for a formal insolvency procedure.[18] These options include not only the liquidation of the debtor's assets, but also the rescue of the company or its business.

The first original contribution of this article is to demonstrate that the English corporate insolvency framework has developed into one of the most flexible and adaptable systems in the world thanks to its holistic, menu-approach to corporate distress. Petitioners under English insolvency law can rely on a wide range of efficient options, from liquidation of the company's assets to rescue of the company and/or its business. Debtors can, therefore, rely on procedures designed to address their temporary or long-term difficulties in an efficient manner.

Second, this paper shows that some of the recent regulatory reforms and the judicial interpretation of existing provisions are mis-focused, as they promote efficiency,

[18] "Formal procedures" are collective insolvency procedures, which involve all the creditors, under the control or supervision of a court and an independent practitioner. Debtors may retain the control of their assets (debtor-in-possession or 'DIP' procedures), but their freedom is significantly restricted. An automatic stay of individual enforcement actions is usually granted upon application. The liquidation or rescue plan is binding on all creditors, including dissenting ones. With reference to England, formal procedures include administration, creditors' voluntary liquidation and company voluntary arrangements. Administrative receivership is not a collective procedure, while schemes of arrangement (and the new restructuring plan) are not regulated by insolvency law.

adaptability and flexibility at the expense of fairness, transparency and accountability.

This article proceeds as follows. Part II demonstrates that what makes the English corporate insolvency framework efficient, flexible and adaptable is the balanced array of rescue and liquidation options for companies in crisis. Part III carries out a doctrinal analysis of LTAs to determine to what extent the existing provisions in the insolvency law as interpreted by the courts and applied by the practitioners result in an efficient, flexible and adaptable insolvency framework. Part IV extends the analysis to the new restructuring procedure introduced by the CIG Act, in order to determine if the new procedure is less prone to cause issues of transparency, accountability and fairness than LTAs. Part V of this paper summarises the findings of this research.

II. The Rationale Underpinning the English Corporate Insolvency Framework

The risk of business failure is an essential element of entrepreneurial activity and can only be eliminated by not doing business at all.[19] Insolvency is a fact of life.[20] Insolvency law becomes a topic whenever debtors are ultimately unable to meet their financial commitments.

The law provides principles for an orderly resolution of competing and sometimes irreconcilable interests. These principles are informed by the theories discussed in the next section of this paper. As demonstrated below, no one purpose should prevail over the others. As a result, it is argued that the flexibility, adaptability and efficiency of the English framework are dependent on offering a range of options that address the different situations of distress that debtors may encounter.

[19] R Goode, *Commercial Law in the Next Millennium* (Hamlyn Lectures 1998) (Sweet & Maxwell 1998) 45-46.
[20] I Fletcher, *The Law of Insolvency* (5th edn, Sweet & Maxwell 2017) 4-5.

II(a). Theoretical Framework

The English corporate insolvency framework is a combination of some of the most established theories on the purpose of this area of law. These theories have been translated into statutes, as outlined below.

Under English law, the main statutory sources include the Act, the *Company Directors Disqualification Act 1986* ('CDDA 1986') and their associated secondary legislation. These are complemented by other domestic legislation introducing special regimes for some entities,[21] carve-outs for classes of transactions, such as financial ones or special treatments for some creditors.[22] Finally, there is the need to consider common law rules applying alongside the law,[23] equitable principles[24] and EU laws.[25]

First, there are rules that promote the collective and equal treatment of creditors (*par condicio creditorum*) while prohibiting any deviation from the absolute priority rule[26] and the rights negotiated by the parties in solvent times.[27] Examples of these rules

---

[21] See, for instance, the special regime for NHS trusts in the *National Health Service Act 2006*.

[22] See, for instance: *Employment Rights Act 1996* and *Transfer of Undertakings (Protection of Employment) Regulations 2006*.

[23] See, among others, the anti-deprivation principle, i.e. a principle of public policy that "no person possessed of property can reserve that property to himself until he shall become bankrupt, and then provide that, in the event of his becoming bankrupt, it shall pass to another and not his creditors" (*Whitmore v Mason* (1861) 2 J & H 204, 212 per Sir William Page Wood V-C).See also: *Money Markets ltd v London Stock Exchange* [2002] 1 W.L.R. 1150; and *Belmont Park Investments Pty ltd v BNY Corporate Trustee Services ltd* [2011] UKSC 38; [2012] 1 A.C. 383. For an analysis, see, among others: K van Zwieten, *Goode on Principles of Corporate Insolvency Law* (5th edn, Sweet & Maxwell 2019) ch. 7.

[24] Such as that the company ceases to be the beneficial owner of its property upon winding-up: *Ayerst v C&K (Construction ltd)* [1976] AC 167 (HL).

[25] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (recast) [2015] OJ L 141/19.

[26] The absolute priority rule states that shareholders should receive nothing until creditors have been paid in full: D Baird and TH Jackson, 'Bargaining after the Fall and the Contours of the Absolute Priority Rule' (1988) 55 U. Chi. L. Rev. 97; TH Jackson and R Scott, 'On the Nature of Bankruptcy: an Essay on Bankruptcy Sharing and the Creditors' Bargain' (1989 75 Va L. Rev. 155.

[27] TH Jackson, 'Translating Assets and Liabilities to the Bankruptcy Forum' (1985) 14 Journal of Legal Studies 73.

are the automatic stay[28] on individual actions against the debtor[29] and the enforceability in insolvency proceedings of (among others): (i) security rights;[30] (ii) other contractual or statutory rights such as set-offs and netting;[31] and (iii) the right of forfeiture by peaceable re-entry.[32]

These rules have been advocated by scholars inspired by the law and economics movement (creditors' wealth maximisation theorists).[33] These commentators argue that insolvency law should be designed to deal in a rational and efficient manner with the common pool problem, i.e. a situation in which the debtor's assets are not enough to repay all creditors.[34] If these creditors were put behind a "transparent"[35]

---

[28] This article employs the term "automatic stay" instead of "moratorium". This is despite the Act makes reference to the notion of moratorium (paragraph 42, Schedule B1 IA 1986). However, these terms are not synonym. A moratorium implies a postponement of creditors' remedies, but what is provided by the law is simply a suspension of these remedies. See Anderson (n 23) 73 and *Barclays Mercantile Business Finance ltd v Sibec Developments lts* [1992] 1 WLR 1253 (Ch), [1257D].

[29] Paragraphs 42-44, Schedule B1 IA 1986.

[30] Section 4(3) IA 1986 (with reference to CVAs). The property subject to the secured claim belongs to the secured creditor up to the value of the claim. Such property does not form part of the insolvent estate. A court may enable the administrator of a company to dispose of a property subject to a security only where the court thinks that disposal of the property would be likely to promote the purpose of administration in respect of the company. Even in that case, the secured creditor has first priority over the net proceeds: see paragraph 71, Schedule B1 IA 1986.

[31] Rule 14.24 of the *Insolvency (England and Wales) Rules 2016*.

[32] Section 146 *Law of Property Act 1925*. However, this right may be covered by the automatic stay in administration procedures: paragraph 43(4), Schedule B1 IA 1986.

[33] Among others, see: TH Jackson, *The Logic and Limits of Bankruptcy Law* (2nd edn, Harvard University Press: Cambridge, MA, 2001); TH Jackson, 'Bankruptcy, Non-Bankruptcy Entitlements and the Creditors' Bargain' (1982) 91 Yale L.J. 857; DG Baird, 'The Uneasy Case for Corporate Reorganizations' (Jan. 1986) 15(1) J. Legal Stud. 127; Jackson and Scott (n 26).

[34] A common pool *dilemma* usually arises whenever a company is unable to pay its debts as they fall due or when it appears from the company's books that it is hopelessly insolvent. Such a "dilemma" or "situation" exists when there are not (or there will not be in the near future) enough assets to meet the creditors' claims. These participants know that they would be better off if they managed to grab the assets when there are still some left. However, individual (ir)rational actions would result in lower overall returns to creditors on the whole and would cause disparities of treatment among similarly ranking claimants. This two-fold dilemma may develop into a *problem* whenever parties fail to co-ordinate their actions in order to maximise their collective benefit. On this topic, see: Jackson, *The Logic and Limits* (n 33) 10; JL Westbrook, 'A Global Solution to Multinational Default' (2000) 98(7) Mich. L. Rev. 2276.

[35] This veil of ignorance can be described as "transparent" because the participating creditors are aware of their legal status (whether they are employees, secured or unsecured creditors, etc), wealth, cognitive abilities, and bargaining strength.

"veil of ignorance",[36] they would acknowledge that the most appropriate course of action is not a race to the assets, as it would not maximise the return for *all* creditors but only for the most skilled and sophisticated.

A proper, value-maximising system of insolvency rules should impose a stay on individual actions, sell the debtor's assets at the highest bidder and distribute the proceeds to the creditors in a procedurally efficient manner. It should only provide a mechanism of collective execution against the property of the debtor.[37] It should mandate co-ordination in cross-border insolvency cases.[38]

A proper, value-maximising system of insolvency rules should not deal with the protection of non-creditor interests of other victims of the corporate decline, such as employees, managers and members of the community.[39] More importantly, it should not establish the existence of new rights[40] and it should not pursue the goal of keeping firms in operation.[41]

Second, there are broad-based contractarian scholars,[42] who argue that to deal with the common pool problem, creditors should be put behind a "strict" veil of ignorance. Behind this veil, parties are assumed to be free, equal and reasonable. They are given equal weight in the selection process, since their legal status (whether

---

[36] J Rawls, *A Theory of Justice* (Harvard University Press 1971).
[37] This view was embraced by Hoffmann LJ in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26, [2007] 1 AC 508 [13]-[14]. Although the Supreme Court later held in *Rubin v Eurofinance SA* ([2012] UKSC 46, [2013] 1 AC 236) that the case was wrongly decided, the nature of insolvency proceedings was recognised by Collins SCJ at [91], [106].
[38] For the importance of co-ordination in cross-border cases, see (among others): E Vaccari, 'O.W. Bunker: A Common Law Perspective on Multi-lateral Co-operation in Insolvency-related Cases' (2017) 28(7) I.C.C.L.R. 245.
[39] Jackson, *The Logic and Limits* (n 33) 25.
[40] DG Baird and T Jackson, 'Corporate Reorganisations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy' (1984) 51 U. Chi. L. Rev. 97.
[41] V Finch and D Milman, *Corporate Insolvency Law. Perspectives and Principles* (3rd edn, CUP 2017) 29.
[42] Among others, see: DR Korobkin, 'Contractarianism and the Normative Foundations of Bankruptcy Law' (1992) 71 Tex. L. Rev. 541; R Mokal, 'The Authentic Consent Model: Contractarianism, Creditors' Bargain, and Corporate Liquidation' (2001) 21(3) Leg. Stud. 400.

they are employees, secured or unsecured creditors, etc), wealth, cognitive abilities, and bargaining strength are all morally irrelevant in framing rules of justice ("dramatic ignorance").[43] They are also deprived of any knowledge of personal attributes and they are assumed to act rationally. This agreement is reached *ex ante*, before any lending has taken place.

This broad-based contractarian approach is more inclusive than the creditors' wealth maximisation theory. One of its main commentators[44] argues that insolvency proceedings should include and give voice to all the parties affected by the potential insolvency (principle of inclusion). The system as a whole should also feature rational solutions that do not unreasonably restrict the rights of creditors in the worst-off positions (principle of rational planning).[45]

The automatic stay on the individualistic collection efforts of unsecured creditors, which defines the collective liquidation regime, is argued as passing the tests set by this model.[46] However, this model also justifies variations to contractually negotiated rights that would be hard to defend under the model suggested by creditors' wealth maximisation theorists. Such variations include the prohibition to enforce securities over the company's property without a leave from the court or the administrator.[47] Other provisions compliant with the broad-based contractarian model (but not necessarily with value-maximising approaches) are the discipline of creditors' committees[48] and the powers conferred to them.[49]

---

[43] Mokal (n 42) 429.
[44] Korobkin (n 42).
[45] Ibid 575-89.
[46] Mokal (n 42). However, in administrations, English courts have adopted a strongly purposive approach to the interpretation of the automatic stay, arguing that it should be used not only to install the administrator but also to carry on the business of the company: *Bristol Airport plc v Powdrill* [1990] 1 Ch 744 (CA), [758F]. Such purposive approach may fail to meet the requirements of broad-based contractarian scholars (and it sits at odds with the assumptions of creditors wealth maximisation theorists).
[47] Paragraph 43(2), Schedule B1 IA 1986.
[48] Paragraph 57, Schedule B1 IA 1986.

The broad-based contractarian theorists also argue that deviation from the principle of *pari passu* distribution could be approved *ex ante* by the creditors behind the "strict" veil of ignorance.[50] As a result, a preferential treatment of some creditors such as employees may be justified under the law.[51] Another examples is the possibility for the administrator to dispose of property, subject to a floating charge (as created), as if the property were unencumbered, without the consent of the floating charge holder.[52] The latter may seem an example of re-distributive approaches to corporate insolvency, as discussed in the next paragraph. However, as the floating charge holder has first call on the proceeds of sale, there is no real re-distribution of assets but simply a rational use of what is left in the insolvent estate.

Third, communitarian theorists[53] see insolvency as a process for weighing the interests of a broad range of constituents and for facilitating the externalisation of costs. Where the contractarian approaches focus on distributing value according to pre-established or contractually negotiated rules, communitarian scholars argue for re-distributing value.

Under English law, there are relatively few rules that promote a redistribution of value.[54] The English system is in general pro-creditor,[55] but there are exceptions to

---

49 Paragraphs 57(2) and (3), Schedule B1 IA 1986. These include to determine the administrator's remuneration, as well as to require him or her to attend on the committee and provide its members with information about the exercise of their functions.

50 R Mokal, 'Priority as Pathology: The Pari Passu Myth' (2001) 60 CLJ 581.

51 Under category 5, paragraph 515, Schedule 6 IA 1986, employees are preferential creditors for wages due from work done in the four months before the insolvency date (up to £800 per person). Contributions to pension schemes and holiday pay are also given preferential status. These preferential claims are paid before unsecured creditors and holders of floating charges. However, these employees are also granted a more generous treatment in the same circumstances under Part III, *Employment Act 1986*.

52 Paragraph 70, Schedule B1 IA 1986.

53 Among others, see: E Warren, 'Bankruptcy Policy' (1987) 54 U. Chi. L. Rev. 775; K Gross, 'Taking Community Interests into Account in Bankruptcy: An Essay' (1994) 72 Wash. U. L.Q. 1031; V Finch, 'The Measures of Insolvency' (1997) 17 OJLS 227.

54 For an exhaustive debate on the topic, see: J Armour, 'Should We Redistribute in Insolvency?' in J Getzler and J Payne (eds), *Company Charges, Spectrum and Beyond* (OUP 2006), 189-226.

55 The distinction between pro-debtor and pro-creditor jurisdictions comes from PR Wood, *Principles of International Solvency* (Sweet and Maxwell: London, 1995). While the partition he proposed may no

this narrative.[56] These include the rules on the prescribed part, i.e. a portion of the proceeds obtained from the sale of assets subject to a floating charge that are distributed to unsecured creditors.[57] Other examples include exceptions to the enforceability of *ipso facto* clauses, for instance with reference to essential supply contracts.[58]

Where security rights are overridden,[59] this does not always lead to a re-distribution of the assets for the benefit of unsecured creditors. Hence, these provisions are not valid examples of redistributive, communitarian practices. On the contrary, they prove the general disfavour of the law to deviate from established contractual rights negotiated by the parties in solvent times. The only major exception is represented by certain preferential claims, which may surpass certain forms of security interests such as floating charges.

---

longer be actual, the offered criteria are still valid. In particular, the author classifies as 'pro-creditor' any insolvency jurisdiction whose main focus is to "help the creditor escape the debacle, e.g. by recognizing a wide security or a set-off", while 'pro-debtor' insolvency jurisdictions seek to "aggrandize the debtor's estate, e.g. by restricting security, refusing insolvency set-off, […]" (36). For a challenge to the standard characterization as U.S. law being 'pro-debtor' and U.K. law being 'pro-creditor', see: G McCormack, 'Apples and Oranges? Corporate Rescue and Functional Convergence in the US and UK' (2009) 18 Int. Insolv. Rev. 109.
It is acknowledged that these labels tend to over-simplify an otherwise very complex classification problem. As a general rule, pro-creditor systems tend not to infringe significantly on the rights bargained by creditors in solvent times. On the opposite end of the spectrum, pro-debtor systems erode those rights whenever it appears to be appropriate to achieve the rehabilitation of the distressed business. Among others: M Pomerleano and W Shaw, *Corporate Restructuring. Lessons from Experience* (The World Bank: Washington D.C. 2005) 308. More recently, it was observed that traditional pro-debtor countries such as the U.S. tend to have a legislation that protect the interests of managers and shareholders to a wider extent and in a more comprehensive manner that pro-creditor jurisdictions such as the U.K. At the same time, it was observed that secured creditors enjoy a similar level of protection in both pro-creditor and pro-debtor countries, even if the form of the protection is different.

[56] Van Zwieten (n 23) 76.

[57] Section 176A IA 1986. A prescribed part is the part of the proceeds from realising the assets covered by a floating charge, that is set aside and kept available, so it can satisfy any unsecured debts. The Cork Committee proposed a 10% fund to be carved out of floating charge assets for the benefit of unsecured creditors. (Report of the Insolvency Law Review Committee *Insolvency Law & Practice* ('Cork Report'), Cmnd 8558 (1982) paragraph 1538). Under the most recent rules, the prescribed part consists of 50% of the first £10,000 of net floating charge realisations plus 20% of anything after, subject to a maximum of £800,000.

[58] Sections 233 and 233A IA 1986.

[59] Paragraphs 70-72, Schedule B1 IA 1986.

Asking whether any of these approaches prevail under the law is pointless. English corporate insolvency law is a blend of these approaches. More in general, it has been correctly observed that "legal systems make special provisions for dealing with the phenomenon of insolvency in accordance with the prevailing social ethos towards economic and financial failure",[60] even if "the philosophy underpinning English corporate insolvency law is much harder to state [than the U.S. philosophy] since it has rarely been clearly articulated".[61]

II(b). The Blended Approach Confirmed by the Enterprise Act 2002

In this country, the Governmental policy is towards the promotion of enterprise, but this is not a one-dimensional perspective,[62] as repeated in the most recent consultations on the corporate insolvency framework.[63] The goals promoted by each of these theoretical approaches discussed above (procedural efficiency, rational planning and inclusion, and social justice) are blended together to create a flexible and adaptable system aimed at promoting entrepreneurship and maximising the return to creditors.

This is particularly evident in the *Enterprise Act 2002* ('EA 2002'). This Act aimed at redressing the existing imbalance in favour of liquidation and business-rescue practices by promoting rescue practices aimed at rescuing companies rather than businesses.[64] It also aimed at establishing an environment which promoted and

---

[60] Fletcher (n 20) 5.
[61] Van Zwieten (n 23) 75.
[62] Anderson (n 23) 9.
[63] Department for Business, Energy & Industrial Strategy, *Insolvency and Corporate Governance* (20 March 2018) 5 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691857/Condoc_-_Insolvency_and_Corporate_Governance_FINAL_.pdf > accessed 1 July 2020.
[64] Finch and Milman (n 41) 323. This was done by:

1. Prohibiting directors from calling a meeting of members to consider liquidation and creditors from presenting a winding-up petition;
2. Replacing administrative receivership with the more inclusive arrangements of a revised administration process and by ending the Crown's status as preferential creditor.

managed insolvency risks proactively[65] by transferring control over the debtor from the secured creditor and its administrative receiver to unsecured creditors and independent administrators.[66] Finally, it also aimed at addressing some of the barriers to the use of administration, such as: (i) the time and cost involved in the procedure; (ii) the "unduly exacting standards set by the courts"[67] to exercise some of the powers outlined in the law; and (iii) the veto powers of floating charge holders.[68] Unsurprisingly, the Explanatory Notes to the EA 2002 clarify that the changes to the existing corporate insolvency regime aim at restricting the use of administrative receivership and streamlining administration.[69]

The same Notes disclose that one of the purposes of the reform was to place greater emphasis on company rescue.[70] As a result, paragraph 3, Schedule B1 of the Act replaces the existing four statutory purposes under old schedule 8(3) of the Act.[71] Under a single overarching purpose, which applies to all cases of administration, the administrator is required, where he or she thinks it is reasonably practicable, to carry out his or her functions with the objective of rescuing the company as a going

---

In the 2018 Budget, the Government announced the intention to re-introduce this preference, at least with reference to VAT, PAYE income tax, student loan repayments, employee National Insurance Contributions (NICs) and construction industry scheme deductions. This change should have been effective from 6 April 2020, but it has now been postponed to all insolvencies commencing on or after 1 December 2020: HM Treasury, *Budget 2020* (12 March 2020) <https://www.gov.uk/government/publications/budget-2020-documents/budget-2020> accessed 1 July 2020.

65 This goal was frustrated by the fact that administration orders could only be applied if the court was satisfied that the company was or was likely to become unable to pay its debts (section 123 IA 1986). The EA 2002 facilitated the use of administration as a rescue device, for instance by introducing an out-of-court appointment procedure on the application of the holder of a qualifying floating charge (paragraphs 14-21, Schedule B1 IA 1986) or the company and its directors (paragraphs 22-34, Schedule B1 IA 1986). Also, the EA 2002 removed the insolvency requirement in case of applications by a qualifying floating charge holder (paragraph 35, Schedule B1 IA 1986).

66 Van Zwieten (n 23) 16.

67 Fletcher (n 20) 486.

68 For an outline of these barriers, see: Insolvency Service, *Company Voluntary Arrangements and Administration Orders: A Consultative Document* (October 1993).

69 Explanatory Notes to the EA 2002, paragraphs 640 and 645.

70 Ibid paragraph 647.

71 For a contrast between the old and new obligations to identify the purposes of administration, see: *Hammonds (a firm) v Pro-Fit USA ltd* [2007] EWHC 1998 (Ch), [2008] 2 B.C.L.C. 159, [20]; *Re Berkshire Homes (Northern) ltd* [2018] EWHC 938 (Ch), [2018] Bus. L.R. 1744, [22]-[23].

concern. In a significant departure from Cork's recommendations,[72] Parliament conceived administration as a mechanism to rescue companies, rather than businesses.

Where that objective is not reasonably practicable or would not provide the best result for the company's creditors as a whole, the administrator may pursue the second objective of rescuing the business. The third objective (basically, a liquidation of the assets) can only be pursued if:[73]

1. The administrator thinks that it is not reasonably practicable to achieve either obj. a) or b); and
2. This does not unnecessarily harm the interests of the creditors of the company as a whole.

These purposes are, therefore, listed in order of priority.

In order to ensure the promotion of company and – to a lesser extent – business rescue, the new paragraph 49, Schedule B1 of the Act provides that, as soon as reasonably practicable, or, in any event, within 8 weeks of the administration commencing, the administrator is required to make a statement setting out proposals for achieving the purpose of administration.[74] In the same proposal, the administrator has to explain why company rescue is not deemed reasonably practicable, or would not yield the best outcome for creditors if this is not the choice of action recommended.[75]

Finally, creditors are given powers to accept, reject or even modify the proposal, thus holding the administrator accountable and ensuring – at least in theory – that

[72] Cork Report (n 57) paragraph 193; See also: van Zwieten (n 23) 478.
[73] Paragraph 3(4), Schedule B1 IA 1986.
[74] Explanatory Notes to the EA 2002, paragraph 678.
[75] Ibid paragraph 682.

the purpose of rescuing the company is considered and discarded only when not reasonably achievable.[76]

All these innovations suggest a renewed, powerful and focused interest at rebalancing the rescue efforts towards the company rather than its business (or parts of it). In practice, however, the cumbersome, procedural and lengthy nature of the administration procedure pushed parties to disattend the original goals underpinning the EA 2002 and develop the alternative approaches to rescue and liquidation described in the next part of the paper.

II(c). Concluding Assessment

It appears that the corporate insolvency framework as amended by the EA 2002 promotes the efficient use of resources, as well as flexibility and adaptability. These goals are achieved by giving administrators – who are officers of the court – the power to choose among a broad range of alternative options: rescuing the company or its business, or liquidating its assets when rescue is not reasonably practicable and this would lead to a higher return to creditors.

At the same time, the system is not perfectly balanced, as the two main formal insolvency rescue procedures (administration and company voluntary arrangements) both aim first at rescuing the company and – only when this is not reasonably practicable – its business. In other words, the legislator did not fully promote the use of a balanced range of liquidation, business-rescue and company-rescue options.

This led to some issues. For instance, key creditors – especially secured ones – enjoy disproportionate power in insolvency procedures. The protection of secured creditors is demonstrated (among others) by their powers to appoint an

[76] Ibid paragraph 682.

administrator out of court.[77] More in general, creditors retained the power to enforce *ipso facto* clauses triggered by the commencement of an insolvency procedure (despite some exceptions).[78] This power has been removed by the CIG Act, which introduced a general ban on the enforceability of *ipso facto* clauses.[79]

Finally, at least with reference to administration, there are obstacles in the law for the use of this procedure to rescue companies. These include the debtor's dispossession of its assets and the appointment of an outsider to run the company; the inability to "force" a reorganisation plan on secured creditors;[80] the lack of provisions for financing companies in financial difficulties; and the short time frame to carry out the reorganisation efforts.[81] These issues became even more prominent as a result of the Covid-19 pandemic, as a large number of companies are now fighting for survival.

The next part focuses on LTAs. The purpose is to demonstrate if and to what extent the use of LTAs has proven consistent with the goal of creating a balanced, efficient, adaptable and flexible framework that promotes both corporate and business rescue (as well as liquidation of assets where rescue is not a viable option).

---

[77] Paragraphs 14-21, Schedule B1 IA 1986.

[78] English courts have consistently recognised the validity of clauses that prevent the application of insolvency statutory remedies. For instance, creditors can enter into "non-petition agreements" whereby they bind themselves not to trigger formal insolvency proceedings and thus rendering the debtor "bankruptcy remote": *Re Colt Telecom Plc (No 2)* [2002] EWHC 2815 (Ch), [2003] BPIR 324; *BNY Corporate Trustee Services v Eurosail-UK 2007-3BL Plc* [2013] UKSC 28, [2013] 1 WLR 1408. For a comprehensive analysis of the cases in which parties can contract out of English insolvency law: H Anderson, *The Framework of Corporate Insolvency Law* (OUP 2017) 270. Equally, English courts have held that there is nothing objectionable in a creditor using its bargaining strength to hold the office-holder "to ransom", as no person can be compelled to trade with another absent any statutory or contractual obligations: *Leyland DAF ltd v Automotive Products plc* [1993] B.C.C. 389 (CA), 398 (Dillon LJ).

[79] Section 14(3) CIG Act, which introduces section 233B to the Act.

[80] G McCormack, 'Super-priority New Financing and Corporate Rescue' (2007) JBL 701.

[81] For an outline, see Finch and Milman (n 41) 316.

III. Light Touch Administrations

Restructuring administrations have been a feature of the English insolvency framework since the EA 2002. The idea of restructuring or "light touch" administration ('LTA') was recently reinstated in a briefing to the Government prepared by the Insolvency Lawyers Association (ILA).[82] This idea originated as a mechanism to combine the principles of receiverships[83] and the powers of the administrators.[84]

Under English insolvency law, upon the appointment of an administrator, the directors remain in office, and have a duty to co-operate with the appointed IP.[85] However, in a traditional administration, the management is usually replaced by IPs upon the opening of the procedure. In addition, the administrator has the power to appoint and remove directors[86] or to allow them to exercise specific powers.[87]

While administration is widely seen as a management-displacing procedure, the law allows the administrators to leave management powers within the existing directors

[82] Insolvency Lawyer Association. 'Changing the Narrative around Administration' (London, 26 March 2020) <http://www.citysolicitors.org.uk/storage/2020/03/UKP1-ChangingtheNarrative.pdf> accessed 1 July 2020.

[83] In an administrative receivership, company contracts usually continue to be enforceable, the company is not divested of its asserts and the directors remain in office: L Doyle, 'The Residual Status of Directors in Receivership' (1996) 17 Co. Law. 131.

[84] Paragraphs 59-68, Schedule B1 IA 1986. See also: van Zwieten (n 23) 533-538.

[85] Schedule 235 IA 1986 and paragraphs 47-48, Schedule B1 IA 1986.

[86] *Denny v Yeldon* [1995] 1 B.C.L.C. 560 (Ch, [564e]; *Polly Peck International plc (in administration) v Henry* [1998] 11 W.L.U.K. 510.

[87] *Re Lehman Brothers Europe ltd (in administration) (No 9) and another* [2017] EWHC 2031 (Ch), [2018] Bus. L.R. 439, where the court gave permission to the administrators to appoint a director and a shareholder to implement the distribution to the sole shareholder further to a reduction of capital as permitted by the CA 2006. This was consistent with the administrators' duty to deal with the administration for the purpose for which it was sought, in the interests of creditors and expeditiously. In any case, directors retain the power to cause the company to challenge the validity of an out-of-court appointment of administrators: *Stephen, Petitioner* [2011] CSOH 119, [2012] B.C.C. 537; *Closegate Hotel Development (Durham ltd) v McLean* [2013] EWHC 3237 (Ch), [2014] Bus. L.R. 405.

of the company.[88] In LTAs, the management is, therefore, not replaced by the appointed administrator.

In LTAs, the respective powers and duties of the administrators and directors are regulated by a 'Consent Protocol' prepared by the ILA and the City of London Law Society[89] by Mark Phillips QC, William Willson and Stephen Robins of South Square.

The management displacing aspect of administration arises out of a deeply rooted belief in English law that the party responsible for the company's problems ought not to be left in control.[90] However, the debtor's crisis might be determined by external factors,[91] such as the closure of a business due to Covid-19 emergency legislation and the ensuing downturn in the economy. In these circumstances, the argument that directors should be replaced because they are responsible for the company's demise is less powerful. Hence, the need to explore solutions that retain the expertise of the existing management and workers, while providing respite from financial problems.

This section carries out a doctrinal analysis of LTAs in order to determine to what extent the existing provisions in the insolvency law as interpreted by the courts and applied by the practitioners result in an efficient, flexible and adaptable insolvency framework.

---

[88] Paragraph 64, Schedule B1 IA 1986. There is a parallel with schedule 103 IA 1986, which provides that on the appointment of the liquidator, all of the directors' powers cease. However, the liquidation committee or the creditors can sanction their continuance.

[89] Available here: < https://www.ilauk.com/docs/ILA.consent_.protocol_.17.April_.2020.V2_.pdf> accessed 1 July 2020.

[90] Finch and Milman (n 41) 301.

[91] Finch and Milman (n 41) 131-140.

III(a). Critical Assessment of LTAs

LTAs seem to represent a valid mechanism to boost the efficiency, flexibility and adaptability of the system as they afford the company a breathing space in which the business can be stabilised and protected by individual actions from the creditors.

In LTAs, the existing management team remains in place under the control and supervision of administrators and with the benefit of a stay from enforcement actions. This does not involve the delegation of powers from the administrator to the directors. Rather, the administrator simply consents to management retaining the powers which they already have so that they can get on with running the business. This DIP approach emulates what happens during U.S. Chapter 11 proceedings.[92]

The idea behind the LTA is to protect the company in the period in which it cannot trade due to the lock-down measures or – more broadly – due to the consequences of the Covid-19 pandemic. Once these measures are lifted, the stores reopen and the economy 'bounces back', the staff who are on the furlough scheme will come back into the business and there will be extra money injected by the current owners and lenders.[93]

In the past, LTAs were more frequently used in procedures involving real estate companies. In these proceedings, the properties are formally controlled by the administrators but managed by estate agents for a fee.[94] This suggests that outside emergency times, LTAs are used by companies that are affected by unexpected downturns in the market and which may benefit from the expertise of the existing management in their sale or turnaround process.

---

[92] 11 U.S. Code.
[93] Of course, not all stores will reopen, as in the case of *Debenhams*, which decided to liquidate its Irish chain: Z Wood, 'Debenhams appoints administrators and liquidates Irish chain' *The Guardian* (London, 9 April 2020) <https://www.theguardian.com/business/2020/apr/09/debenhams-appoints-administrators-and-liquidates-irish-chain> accessed 1 July 2020.
[94] See, among others: *Re Partnership of Isaacs (in administration)* [2017] EWHC 2405 (Ch), [2018] B.C.C. 551 (where, however, the court granted permission for the receivers to be re-appointed to enforce rights of sale because the administrator's decision to remove the receivers was not reasonable on the basis of the circumstances of the case).

The time of writing (spring/summer 2020) is unique and exceptional. Many companies from different sectors of the economy are struggling for the forced closures imposed to slow the spread of the Covid-19 pandemic. These companies are certainly distressed due to lack or significant reduction in their revenues, but they may be viable in the long term.

According to the Office of National Statistics,[95] some sectors of the economy have been particularly badly affected by the Covid-19 pandemic. In the period 6-19 April 2020, more than 1 out of 5 companies in the UK had temporarily closed or paused trading. This percentage, however, increased to 80.6 percent for companies operating in accommodation and food & services, and to 79.5 percent for companies operating in arts, entertainment and recreation. Unsurprisingly, where 23.4 percent of surveyed companies blamed a decrease in their turnover by 23.4 percent on a national basis, this percentage raised to 57 percent in the accommodation and food service sector, and to 50.9 percent in the arts, entertainment and recreation sector.

Distressed yet viable companies from particularly badly affected sectors of the economy – such as those mentioned in the previous paragraph – can make a strong case for LTAs over traditional or pre-packaged administrations. This is because at the moment there is no market for these distressed companies and their assets, and there may be no need to liquidate otherwise profitable companies.

The same conclusion may not be reached for companies operating in other sectors of the economy, where the restrictions imposed by the responses to the Covid-19 pandemic have not significantly restricted trading opportunities. For instance, only 3 percent of companies offering professional, scientific and technical services, and 4.5 percent of firms operating in the IT sector were forced to close in the immediate

[95] J Gough, *Business Impact of COVID-19 Survey* (Office for National Statistics, 7 May 2020) <https://www.ons.gov.uk/economy/economicoutputandproductivity/output/datasets/businessimpactofcovid19surveybics> accessed 19 June 2020.

aftermath of the Government-imposed lockdown.[96] According to the most recent available data, in some sectors such as wholesale and retail trade, as well as transportation and storage, 17 and 10 percent of companies respectively reported an increase in their turnover compared with what is normally expected for the same time of the year.[97]

If any of the companies operating in these sectors were to cease trading and enter into a formal insolvency procedure, it is argued that traditional remedies (liquidation and administration) may prove more effective than LTAs. This is because there is a market and demand for their assets and activities, with the result that their value had not been negatively affected.

All these elements seem to suggest that LTAs represent a powerful tool to enhance the rescue options available to English companies in a balanced manner and in compliance with the established turnaround approaches under the law. However, is this really so?

III(b). Recent Case Law on LTAs

The recent case of *Davey v Money*[98] decided in April 2018 has given administrators guidance on LTAs and on how they can minimise their risk of liability for breach of duty when selling company assets. This case is primarily about an alleged breach of duty of the administrators, as the applicant argued that they failed to exercise independent judgment and instead paid excessive regard to the interests and wishes of the charge holder who had appointed them.

Snowden J gave three main guidelines in the instant case:

---

[96] Ibid.
[97] J Gough, *Coronavirus and the economic impacts on the UK: 18 June 2020* (Office for National statistics, 18 June 2020) <https://www.ons.gov.uk/businessindustryandtrade/business/businessservices/bulletins/coronavirusandtheeconomicimpactsontheuk/latest> accessed 19 June 2020.
[98] *Davey v Money* [2018] EWHC 766 (Ch), [2018] Bus. L.R. 1903.

1. Administrators have no obligation to consult on the shareholders and existing directors to decide the best course of action in insolvency;
2. The persons who manage the company under the supervision of the administrator may be appointed or otherwise connected with the creditor who submitted the administration petition;
3. There is no obligation to sell the debtor's assets in a competitive tendering process.

Unlike the case of *Debenhams*, in *Davey* the LTA was used to make a distribution to the secured creditor in accordance with paragraph 3(1)(c), Schedule B1 of the Act. At the same time, the court highlighted that "the more deferential standard of review of the decision of the administrator as to which objective to pursue does not also extend to the methods adopted by the administrator to pursue his chosen course".[99] This suggests that, at least in theory, LTAs are not the modern version of old administrative receiverships, where the receiver acts only in the interest of the appointor[100] and is not adequately incentivised to maximise the return to all creditors.[101] So far, therefore, the positive narrative surrounding LTAs seems to be confirmed.

In giving the judgment, Snowden J correctly observed that administrators have discretion to decide the best course of actions in the procedure, including opting for a LTA. Snowden J also observed that there is no "fundamental" rule requiring the administrators in every case to go through a process of consultation with the directors and shareholders, on how to conduct the procedure and on its main

[99] Ibid [256].
[100] *Re B. Johnson & Co. (Builders) ltd* [1955] Ch 634, 661-2; *Gomba Holdings UK ltd and others v Homan and Bird* [1986] 1 WLR 1301, 1304-5 (Hoffmann J); *Downsview Nominees ltd v First City Corporation* [1993] AC 295. At the same time, the Court of Appeal in *Medforth v Blake* ([1999] 3 All. E.R. 97) held that when administrative receivers manage a property, they need to do it with due diligence.
[101] DTI, *Productivity and Enterprise: Insolvency – A Second Chance* (Cm 5234, 2001), [2.2]-[2.3].

purpose.[102] Failure to consult with the shareholders does not lead to a claim for breach of duty.[103] In the absence of any suggestion that administrators were acting improperly, it would be contrary to the nature and purpose of an administration if the court were to interfere in the detailed day to day management of the administration.[104]

The decision in this case, however, may fail to properly put into practice the predicament that LTAs are not the modern version of old administrative receiverships.

The case was brought by the sole shareholder of the debtor. The claimant complained that the administrator decided before being appointed that the purpose of the procedure was only to make a distribution to the secured creditor, without properly considering alternative outcomes. The claimant also alleged a breach of duty of the administrator because he left the day-to-day management of the property and its sale to an agent appointed by the secured creditor.

Nevertheless, the court held that the chosen objective should be open to challenge only if it was made in "bad faith or was clearly perverse".[105] This should apply in the instant case, where the administrator agreed on the course of action and to cap his fees in the sum of £42,000 before being appointed.[106]

In the author's view, the applicant was right to argue that the appointors can tailor the selection of the purpose of the administration, depending on how much they are willing to pay the administrator. The court should have been open to adopt a more interventionist standard of review of an administrator's opinion in regards to the purpose of the procedure. It is not realistic to think that a professional would consider carrying out an extensive, complex insolvency procedure for the money

[102] *Davey* (n 98) [287].
[103] Ibid [325].
[104] *Lehman* (n 87).
[105] Ibid [255].
[106] *Davey* (n 98) [263].

negotiated to conduct a LTA designed to liquidate assets for the benefit of one creditor.

According to the facts of the case, the IP was constrained in the exercise of his functions as administrator by his discussions or arrangements on fees with the secured creditor. It was not possible to renegotiate the fee arrangement should the administrator have chosen a different course of action during the procedure.

A LTA commenced under these premises should be open to challenge from interested parties because there is a high risk of: (i) abuse of the procedure[107] and collusion between the administrator and the appointor; and (ii) failing to properly assess the prospects for achieving the two primary purposes of administration, i.e. rescuing the company or its business. As a result, it is submitted that the guidance given by Snowden J in this case is open to criticism because it does not strike a proper balance between the interest of all the parties involved in the procedure.

Furthermore, the court held that it is not necessary for the administrator to appoint property agents who are independent of the charge-holder.[108] However, it is a well-established principle of common law that officers of the court like administrators[109] should "maintain an even and impartial hand between all the individuals whose

---

[107] For a detailed analysis of the notion of "abuse of law" in the English tradition, see (among others): E Vaccari, 'English Pre-packaged Corporate Rescue Procedures: Is There a Case for Propping Industry Self-regulation and Industry-led Measures such as the Pre-Pack Pool?' (2020) 31(3) I.C.C.L.R. 170, 178-185. For a case law perspectives, see (among others): *Re Kayley Vending ltd* [2009] EWHC 904 (Ch), [2009] B.C.C. 578 (arguing that in exercising its discretion in pre-pack cases, the court had to be alert to see that the procedure was not being abused to the disadvantage of creditors); *Vedanta Resources Plc v Lungowe* [2019] UKSC 20; [2019] 2 W.L.R. 1051 (arguing that to prove the existence of such abuse, is not sufficient to show that a statute has been misused or circumvented, but also that this improper use is the result of a collusive decision of the parties designed to subvert other statutory provisions); and *Pendragon Plc v Revenue and Customs Commissioners* [2015] UKSC 37; [2015] 1 W.L.R. 2838 (arguing that aiming at a legitimate commercial purpose may not justify the use of a method designed to subvert the law).

[108] *Davey* (n 98) [341]: "The essential question in all cases will be whether the agents to be appointed are competent and able to discharge their fiduciary duties to the company".

[109] Paragraph 5, Schedule B1 IA 1986, stating that "an administrator is an officer of the court (whether or not he is appointed by the court)".

interests are involved"[110] in the procedure. As a result, a creditor or member of a company in administration may apply to the court claiming that the administrator is acting, has acted or proposes to act so as unfairly to harm the interests of the applicant.[111]

The actions of the administrator should rightly be assessed holistically.[112] The courts would not challenge decisions only where they appear unbiased and the administrators were entitled to reach such decision on the basis of the material in front of them.[113] Furthermore, it is an established common law principle[114] that courts will not permit their officers to act in a way which, although lawful and in accordance with enforceable rights, does not accord with the standards which right-thinking people or, as it may be put, society would think should govern the conduct of the court or its officers. Courts apply the standard on an objective basis[115] and the principle is not limited to cases where the court officer was pursuing a course of conduct which the court thought was dishonest.[116]

Referring the day-to-day management of the assets of a company to a non-independent party, who has no duty or obligation towards the creditors as a whole is potentially a breach of the administrators' duties. Snowden J argued that as the administrator is an agent but not a trustee of the company, the administrator is merely subject to the fiduciary duties to act in good faith, loyally and for proper

---

[110] *Re Contract Corp* (1872) 7 Ch App 207, 211. The judgment was issued with reference to the duties of liquidators in a winding-up procedure but it applies to all officers of the court.
[111] Paragraph 74, Schedule B1 IA 1986.
[112] *Nimat Halal Food Ltd v Nimish Patel (in his capacity as administrator of Tariq Halal Meat (Ilford) Ltd)* [2020] EWHC 734 (Ch), 2020 WL 01666535.
[113] *Re St George's Property Services (London) Ltd (in administration)* [2010] EWHC 2538 (Ch), [2010] Bus. L.R. 1747.
[114] *Re Condon (ex parte James)* (1873-74) L.R. 9 Ch. App. 609; *Ex parte Simmonds* (1885) QBD 308, 312 per Lord Esher MR; *Re Tyler* [1907] 1 KB 865 per Vaughan Williams LJ at 869, Farwell LJ at 871 and Buckley LJ at 873. See also: *Re Thellusson (ex parte Abdy)* [1919] 2 K.B. 735 and *Re Wigzell (ex parte Hart)* [1921] 2 K.B. 835. This principle was recently reinstated and exhaustively analysed by the Court of Appeal in *Lehman Brothers Australia ltd (in liquidation) v MacNamara* [2020] EWCA Civ 321, [2020] 3 W.L.U.K. 21, [35]-[69].
[115] *Lehman v MacNamara* (n 114) [36].
[116] *Thellusson* (n 114) 743.

purposes, as well as the non-fiduciary duty to exercise reasonable care.[117] In other words, the fact that the person appointed to manage the company in administration had no duty towards the creditors is not a problem. As a result, this judgment may represent a significant, unwarranted departure from the principle that administrators (and their collaborators) should be, and be seen to be, independent and impartial in their management of the company and its property.[118]

It is also to be noted that such light touch approach to the revision of administrators' duties sits at odds with recent decisions from higher courts. For instance, in *Lehman v MacNamara* the Court of Appeal rejected the strict interpretation of the principle in *ex parte James* given at first instance (and basically later followed in *Davey*). Richard LJ, to whom Newey LJ and Patten LJ concurred, relied on relatively recent authorities[119] to hold that it was appropriate to depend on the substantive and objective concept of fairness to determine if an officer of the court acted in breach of his or her fiduciary duties.[120]

At the same time, nothing in *Davey* suggests that the actions of the non-independent property agents resulted in an unfair advantage to someone or in "a tangible detriment to an individual creditor compared to another creditor or creditors".[121] In the absence of a loss or damage to one of the parties, the principle of *ex parte James* does not apply.[122] Therefore, the case was correctly decided on this point but the

---

[117] *Davey* (n 98) [385].

[118] Paragraph 3(2), Schedule B1 IA 1986. However, the alleged existence of a "close relationship" between the administrators and one of the major creditors interested in buying the debtor's assets is not enough to suggest lack of independence and perception of bias if the applicants have no economic interest in the administration: *Re SS Agri Power ltd* [2017] EWHC 2431 (Ch), [2017] 9 W.L.U.K. 384. Courts also adopt a hard stance on tactical petitions: *Re TPS Investments (UK) ltd (in administration)* [2018] EWHC 360 (Ch), [2019] 1 B.C.L.C. 61, holding that: (i) an application to remove an administrator on the basis of a conflict of interest should never be made without careful consideration of the position; and (ii) precipitate and tactical applications (such as in the instant case) were to be deprecated.

[119] *Re Lune Metal Products Ltd* [2006] EWCA Civ 1720, [2007] 2 BCLC 746; *Re Nortel GmbH (in administration)* [2013] UKSC 52, [2014] AC 209

[120] *Lehman v MacNamara* (n 114) [68].

[121] *Re Sheridan Millenium Ltd* [2013] NICh 13, [2013] 9 W.L.U.K. 347.

[122] *Re TH Knitwear (Wholesale) Ltd* [1988] Ch 275, 290.

rationale given by Snowden J (i.e. his guidelines in LTAs) may potentially unduly promote the use of these procedures against alternative rescue and liquidation options.

Finally, the court held that administrators will not necessarily breach their duties by selling real property following a 'soft marketing' campaign where only particular specialised and complex potential purchasers are targeted and contacted.[123]

This outcome is in line with established precedents. In *Meem*, the High Court held that company administrators had not unfairly harmed the interests of creditors by auctioning a claim against the debtor's former directors, as the proposed auction would achieve a fixed price without delay for an asset whose value was difficult to assess.[124] Neither in *Meem* nor in *Davey* there was evidence that the sale process resulted in an unfair harm of the creditors' interests. Additionally, courts have consistently refused to challenge the decision of an administrator if he or she was unbiased and was entitled on the material before him or her to reach a relevant conclusion.[125]

It follows that, according to the *Davey*'s guidelines:

a) IPs have almost unfettered discretion to decide whether administration should take place as a pre-packaged, light touch or fully-fledged procedure;

b) Courts exercise a light touch revision of the administrators' decisions, even if there is evidence of extensive negotiations between appointor and administrator before the commencement of the procedure, the persons in control of the company during administration are not independent of the charge-holder and the assets are not sold in a competitive tendering process.

---

[123] Ibid [413].
[124] *Re Meem SL ltd (in administration)* [2017] EWHC 2688 (Ch), [2018] Bus. L.R. 393.
[125] *St George's Property* (n 113).

III(c). Concluding Remarks

The analysis of these guidelines shows a pro-LTA attitude of the English commercial courts. If unchecked, this may favour the interests of some parties (mainly, the appointor and leading creditors) at the expense of other key, interested players. These guidelines also raise issues of transparency and fairness similar to those observed with reference to pre-packs before the *Graham Review*[126] and the ensuing reforms.

It is too early to determine if other courts will adopt a more interventionist approach than *Davey* to ensure that directors act in the interest of all creditors under the effective supervision of the administrator. *Davey* seems to suggest that courts are unwilling to exercise a close scrutiny on this matter. The authority of the judge who issued the judgment suggests that courts are unlikely to significantly depart from this approach absent any statutory or regulatory intervention.

The next part of this paper extends the investigation to the new restructuring procedure recently introduced by the CIG Act. The purpose of this preliminary assessment is to determine if the new restructuring procedure enhances the efficiency, adaptability and flexibility of the system in a balanced manner, i.e. by not minimising or overlooking the issues of transparency and fairness evidenced in the practice of LTAs.

---

[126] T Graham, 'Graham Review into Pre-pack Administration: Report to the Rt Hon Vince Cable MP' *The Insolvency Service* (London, 16 June 2014) paragraph 5.3 <https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration> accessed 1 July 2020.

IV. The New Restructuring Plan[127]

The restructuring plan was first proposed in a consultation in 2016. [128] The 2016 consultation was followed by another consultation in 2018[129] triggered by several high-profile cases, such as *BHS Ltd* and *Carillion Plc*. The 2016 consultation was the UK response on the European debate on preventive restructuring measures, which led to the directive no. 2019/1023 on preventive restructuring frameworks.[130] The Government published a joint response to these consultations on 26 August 2018.[131] The new restructuring plan was finally introduced by schedule 9 of the CIG Act, which inserted Part 26A to the *Companies Act 2006* ('CA 2006').

The procedure of the new restructuring plan is largely based on the schemes of arrangement,[132] in order to build on their flexible nature as well as to rely on their extensive jurisprudence. Not surprisingly, the short legislative provisions on plans are located immediately after those on schemes in the CA 2006 instead of the *Insolvency Act* 1986.

---

[127] A preliminary analysis of this procedure appeared here: E Vaccari, 'The New Corporate Insolvency and Governance Act 2020 – An Extraordinary Act for Extraordinary Times? A Quick Look at the Act's Long-Term Statutory Reforms' (*Essex Law Research*, 1 July 2020) <https://essexlawresearch.blog/2020/07/01/the-new-corporate-insolvency-and-governance-act-2020-an-extraordinary-act-for-extraordinary-times-a-quick-look-at-the-acts-long-term-statutory-reforms/> accessed 8 July 2020.

[128] The Insolvency Service, *A Review of the Corporate Insolvency Framework. A Consultation on Options for Reform* (May 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/525523/A_Review_of_the_Corporate_Insolvency_Framework.pdf > accessed 1 July 2020. The consultation closed on 6 July 2016 and the Department for Business, Energy & Industrial Strategy ('BEIS') published a summary of responses on 28 September 2016: The Insolvency Service, *Summary of Responses: A Review of the Corporate Insolvency Framework* (September 2016) <https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/578524/Summary_of_responses_26-10-16_Redacted.pdf> accessed 1 July 2020.

[129] BEIS, *Insolvency and Corporate Governance* (n 80).

[130] Directive (EU) 2019/2013 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring framework [2019] OJ L 172/18.

[131] BEIS, *Insolvency and Corporate Governance. Government Response* (n 10).

[132] Part 26 CA 2006.

The procedure commences with a petition from the company (or its administrator or liquidator), a creditor or a member.[133] In practice, the company and its directors need to support the arrangement for the court to allow the petition and convene the creditors' meeting. The court will grant leave to convene if it is satisfied that the composition of classes is fair and reasonable and that the company has encountered or is likely to encounter financial difficulties that are affecting or will affect its ability to carry on business as a going concern.[134].

Only creditors and members who have a "genuine economic interest" in the company should be allowed to vote on the plan.[135] The CIG Act does not provide a definition of "genuine economic interest". Nevertheless, parties are understood to have such interest if they are likely to receive a distribution of assets or money as a result of the arrangement or the relevant alternative.

The creditors and members are then required to vote in different classes on the plan prepared by the company and on the basis of the statements made available before the meeting.[136] At least 75 per cent in value of each relevant class of creditors must vote in favour of the restructuring plan for it to proceed to sanction.[137] However, courts can also sanction such plan if one or more of the impaired classes vote against the plan.[138]

Similar to LTAs and schemes of arrangement, this new restructuring plan emulates U.S. Chapter 11 proceedings[139] despite notable differences. For instance, super-priority security is not available to facilitate DIP financing while this mechanism is accessible under U.S. bankruptcy law.

---

133 Section 901C(2) CA 2006.
134 Section 901A(2) CA 2006.
135 Section 901C(4) CA 2006.
136 Section 901D CA 2006.
137 Section 901F(1) CA 2006.
138 Section 901G CA 2006.
139 11 U.S. Code.

The new restructuring plan combines the benefit of other, existing English rescue procedures. It represents a DIP procedure (such as a CVA) with an automatic stay on individual actions against the debtor (such as in administration).[140] This new restructuring plan is binding on all the creditors if their class votes in favour of the plan (such as in schemes of arrangement).[141] Unlike schemes, as mentioned above, it also includes a cross-class cram-down mechanism.[142]

"Cross-class cram down" is a prominent feature of the US Chapter 11 process. Usually, a restructuring plan can only be approved if the required majority of creditors vote in favour of it. If creditors are divided in classes, all classes need to reach the required majority but dissenting *creditors* within that class are out-voted by the other creditors within the same class. If cross-class cram down is allowed, dissenting *classes* of creditors can be out-voted provided that the other classes vote in favour of the restructuring plan.

The addition of a cram-down mechanism across classes is particularly notable. It means that the debtor could force both out-of-the-money and in-the-money classes of creditors to accept a plan, an option which is not currently available neither in CVAs nor in schemes of arrangement. The cram-down mechanism is subject to the court being satisfied that the plan is fair and equitable, and that the dissenting creditors would be no worse off than in the relevant alternative.[143] The plan, however, needs to have received the assent of at least one class of creditors who would obtain a payment, or have a genuine economic interest in the company, in the event of the relevant alternative. This relevant alternative is whatever the court considers would be most likely to occur in relation to the company if the

[140] An automatic stay is also granted to small companies undertaking a CVA: see section 1A IA 1986, introduced by the Insolvency Act 2000. However, the CVA stay lasts either until a company meeting takes place and the creditors decide whether to approve the proposal or for up to 28 days (subject to extension for up to 2 months).
[141] Section 901F(5) CA 2006.
[142] Section 901G CA 2006.
[143] Section 901G(3) CA 2006.

compromise or arrangement were not sanctioned under section 901F CA 2006.[144] This usually means the insolvency counter-factual, i.e. a pre-packaged administration procedure.

IV(a). Critical Analysis of the New Restructuring Plans

These measures seem to go in the direction of promoting the rescue of the company over its business or the liquidation of its assets. This procedure is designed to be triggered by a petition from the debtors (although creditors and office holders also have the right to submit such petition). It is a debtor-led rescue procedure which allows the proposing party to put forward a plan and to implement it against dissenting (classes of) creditors. It is foreseeable that debtors would favour the implementation of rescue plans, where the renegotiation of existing financial obligations and the restructuring of the business do not lead to wiping out the existing shareholders and management. Unlike independently appointed administrators, debtors have strong incentives to explore rescue of the company over alternative solutions.

Other elements promote company rescue over alternative goals. First, the plan requires the approval of either 75 percent by value of voting creditors across each class, or 75 percent by value of voting creditors in one class, provided that dissenting classes are paid in full before a junior class is paid out, and that the plan is in their best interests. It is salient to note that two requirements applicable to schemes and CVAs have not been replicated, with reference to the new restructuring plan, thus making it easier to achieve the requisite majority. These are the requirements that more than half in value of unconnected creditors and that the majority in number vote in favour of the plan.

[144] Section 901G(4) CA 2006.

Second, the court involvement is limited to two hearings. In the first one, the courts are asked to convene the meeting and examine the proposed class composition. In the second hearing, the courts sanction the vote and approve the plan if the statutory conditions for approval are met and if it is just and equitable to do so. The out-of-court nature of the procedure facilitates negotiations between the parties. Additionally, if courts show willingness to streamline the procedure for the first hearing, the new restructuring plan can become extremely appealing to micro, small and medium enterprises. This would address one of the drawbacks of the schemes, which are currently used primarily by large corporations restructuring financial debt.

Third, the restructuring plan is available to all companies that are encountering, or are likely to encounter, financial difficulties that are affecting, or will or may affect, their ability to carry on business as a going concern.[145] There is, therefore, no need for the debtor to be insolvent and the plan is virtually a blank canvas.[146] Debtors are, therefore, encouraged to make use of this instrument as early as possible to wipe out existing liabilities while retaining control of their companies.

Finally, the House of Lords' removal of the protections initially included for creditors with aircraft-related interests means that that they can be compromised by a scheme or restructuring plan. This is welcome news for the distressed airline industry, which can now make use of those processes.

It is apparent that the restructuring plan reinvigorates the country's rescue culture by changing and expanding the corporate restructuring toolkit. Together with the new standalone automatic stay, this instrument promotes one goal (company rescue) over alternative outcomes (business rescue and liquidation of assets). It provides key stakeholders (debtors) with the power to prioritise their interests (e.g. continue

[145] Section 901A(2) CA 2006.
[146] Section 901A(4) CA 2006.

trading and retain control of the company) over competing ones (e.g. maximisation of returns to creditors).[147]

There are, however, some aspects that may prevent the use of these mechanisms as company rescue procedures. For instance, with reference to the new restructuring plan, valuation plays a key role as it is the element which determines if impaired classes can be "crammed-down". However, as evidenced elsewhere,[148] valuation is an extremely controversial process. The new restructuring plan builds on the existing case law for scheme on valuations. Unfortunately, valuation is not salient in schemes, as the court's focus in these procedures is on ensuring that parties behave in good faith. As a result, English courts have generally accepted valuations based on the debtor's current market value as opposed to the more complex approach followed by U.S. Bankruptcy Courts that require valuations to be based on the post-reorganisation value determined on the basis of discounted cash-flow methods.[149]

There is also the risk of reverse cram-down, or "cram-up". This is when the restructuring plan is used in a strategic manner by junior classes of creditors and/or the company's members to "impose" a plan on dissenting senior creditors. Courts could in theory discourage this practice by not sanctioning plans that are not "just and equitable". However, English courts have proven reluctant to interfere with business judgments.[150] Additionally, the absence of any absolute priority rule –

---

[147] Even if creditors who have a claim not subject to a moratorium holiday, such as loan agreements, have to be paid in full during the standalone moratorium. As a result, their interests are unlikely to be affected.

[148] E Vaccari, 'Broken Companies or Broken System? Charting the English Insolvency Valuation Framework in Search for Fairness' (2020) 35(4) JIBLR 135; E Vaccari, 'Promoting Fairness in English Insolvency Valuation Cases' (2020) 29(2) Int. Insolv. Rev. 1.

[149] Vaccari, 'Charting the Framework' (n 137).

[150] See, for instance, *Re City Equitable Fire Insurance Co ltd* [1925] Ch 407, where the court held that directors need to manifest no more skill than someone as competent or inexperienced as they were. Additionally, directors were not bound to give continuous attention to the affairs of their companies. More recent cases have adopted a more stringent approach towards errant directors: *Norman v Theodore Goddard* [1991] 7 WLUK 121; *Re D'Jan of London ltd* [1993] B.C.C. 646; *Jackson v Casey* [2019] EWHC 1657 (Ch), [2019] 6 WLUK 651.

which was nevertheless touted when the reforms were first announced in August 2018 – may further promote a liberal judicial approach in the sanctioning hearing.

IV(b). Concluding Remarks

The concern that the new restructuring plan is too similar to existing provisions and practices is, to a large extent, unfounded. The restructuring plans boost the remedies available to debtors to rescue their company and their business.

However, the risks associated with the implementation and judicial supervision of the new restructuring plans may mean that little progress is achieved in the areas of transparency and fairness.

V. Conclusion

The Explanatory Notes to the EA 2002 outline different scenarios of companies facing financial difficulties. Where the company is facing temporary financial difficulties that require a composition of its debt or an arrangement with its creditors, the Notes suggest that the best approach is to rescue the company.[151] Conversely, where part of the business model is unprofitable and no support is forthcoming from the lenders, the same Notes suggest that a preferable approach is to rescue the business.[152]

The Notes and the analysis carried out in part II of this paper suggest the need for a balanced range of options to deal with companies in distress. These shall be rescuing the company or its business, or liquidating its assets when rescue is not reasonably practicable and this would lead to a higher return to creditors.

[151] Explanatory Notes to the EA 2002, [647].
[152] Ibid [650].

The argument underpinning this paper is that the English corporate insolvency framework should preserve and promote the use of a balanced range of liquidation, business-rescue and company-rescue options in order to be efficient, flexible and adaptable.

Saint Paul in the *Romans* did suggest that we should not let any debt remain outstanding.[153] However, this paper shows that some of the recent regulatory reforms and the judicial interpretation of existing provisions are mis-focused, as they promote efficiency, adaptability and flexibility at the expense of fairness, transparency and accountability. This gives unfettered power to key players (mainly, directors, administrators and charge-holders) and increases the chances of abusive or at least strategic use of insolvency procedures.

[153] The Apostle also suggested that paying our debt to love others fulfil the law, but this is beyond the scope of this paper.