***“Policy Subversion” in Corporate Insolvency: Political science, marxism and the role of power interests during the passage of insolvency legislation***

By

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**Abstract**

*It is well know that the “transmutation” of administration occurred during the passage of the Enterprise Bill leading up to the enactment of the Enterprise Act 2002 and the reforms that statute made to the Insolvency Act 1986. Similarly, the directors’ disqualification regime also suffered from last minute interference during its passage through the House of Lords who were examining, and influencing, the Insolvency and Companies Bills of the mid-1980s. Sir Kenneth Cork himself expressed dissatisfaction with this legislative meddling. The effect of which was to undermine the carefully considered plans of the Cork Committee meaning their final proposals in the famous Command Paper 8558 were not taken up in their totality by the Government in their Command Paper 9175 response, or in the subsequent Insolvency Act 1986 and associated statutes.*

*Drawing on the Cork Archive at the University of Liverpool, these and further examples are critically evaluated in this article to demonstrate how carefully considered insolvency policy has been subverted during the legislative process in both 1986 and 2002 by various vested power interests. It is argued that future reform activity should safeguard against these subversive diversions from carefully constructed policy approaches so as to ensure that the totality of the policy’s effect is not lost for all stakeholders.*

**Introduction**

This article examines how insolvency policy is translated into legislation. A political science and Marxist lens is used to critique the process and outcomes.[[2]](#footnote-2) It is argued that during the legislative process a form of policy undermining occurs where carefully thought through policy is subverted by vested power interests[[3]](#footnote-3) as the legislation passes through the various legislative stages.[[4]](#footnote-4) The consequence is that the resulting legislation is a mélange of ill-thought through provisions that achieve very little of what the original framers had in mind with a well-rounded and developed set of insolvency procedures. For the purposes of this article we will call this “policy subversion” from the original policy intent. The upshot of this policy subversion is that existing power interests are cemented and solidified through the apparatus of law, particularly the interests of the banking hegemony.

There are a bewildering number of stages that potential legislation has to pass through after the policy formulation stage as Figure One (below) demonstrates. Policy subversion can creep in at any stage, although the House of Lords appears to be a major forum for policy subversion interference in insolvency bills as will be demonstrated below. These legislative stages raise a number of important contradictory points, and the major rebuttals to the central argument in this article.

**Figure One: Legislative Process – an Insolvency Example**



The policy subversion thesis can potentially be rebutted on two grounds. First, amendment, tinkering and reflection is part of the legislative process. It is normal for influence to be brought to bear on the original policy proposals and for policy to change and morph as it progresses through the legislature. Second, and related, it is naïve to think that this sort of influence on policy is not going to occur, particularly when one examines the power of the vested interests involved, particularly secured creditor interests. For over a century the interests of secured creditors have dominated all other classes of creditors and wider non-contracting stakeholders. The secured creditor has been all powerful in exercising control over property and the management and strategic direction of insolvent estates, ably assisted by the apparatus of a legal regime that facilitates secured creditor dominance.[[5]](#footnote-5) Why would this pervasive influence change now and reduce in influence? That said there have been some recent attempts to address this dominance and rebalance interests in favour of other stakeholders having in mind their long experience subjugation, e.g. the eventual introduction of the prescribed part, the abolition of receivership (in intent if not form) wrought by the Enterprise Act 2002 and the House of Lords decision in *Re Spectrum Plus Ltd*,[[6]](#footnote-6) all went some way to address the balance of interests. If anything though these attacks on priority and interest further galvanised this powerful lobby group and their mouthpiece, the British Bankers’ Association (BBA). Other lobby groups also become more proactive as their interests are affected,[[7]](#footnote-7) all of which affects the carefully thought through policy intentions of the original policy framers.

Non-government legislators are, “…usually interested…in debating substantive policy and are unlikely to identify minor technical deficiencies.”[[8]](#footnote-8) The banking lobby is an example of an interest group keen to raise the interests of banks, as compared with other stakeholders, and comment on substantial changes to legislation which obviously in turn effects the underlying policy intentions of the original framers. This policy subversion can be monitored as there is a safeguarding mechanism. Legislators have to declare their interests, as Lord Sharman did during the passage of the Insolvency Bill in 2000. He observed: “My Lords, I must first declare an interest as a paid adviser to a firm which has a division practising insolvency.”[[9]](#footnote-9)

In a less problematic sense though the lack of balanced engagement through the policy and legislative process could be another example of stakeholder apathy. Here we go beyond the sort of shareholder apathy suggested by Berle and Means,[[10]](#footnote-10) but into the wider gamut of stakeholders as identified by Gross, namely, the environment, suppliers, customers, creditors (of all hues), the community, etc.[[11]](#footnote-11) If these stakeholders are not engaged in the corporate insolvency process they will not seek to hold powerful lobbying bodies to account.

It is not suggested that we go as far as King and Crewe who have observed that, “as a legislative assembly the Parliament of the UK is, much of the time, either peripheral or totally irrelevant. It might as well not exist.”[[12]](#footnote-12) Nor is it suggested that Parliament is a “legislature on its knees”, “an elaborate rubber stamp” or even “God’s gift to dictatorship.”[[13]](#footnote-13) It is however argued that closer adherence to balanced policy formulation is required in future. This is because Parliament is performing its proper debating and amendment function in the realm of insolvency law. Both the Insolvency Act 1986 and the Enterprise Act 2002 were marked out for the voluminous number of amendments that were made to the respective Bills as they passed through the legislative process. Whilst those changes may legitimately occur, they must closely reflect the original holistic vision of the policy framers so as to deliver a rounded carefully thought through insolvency law.

We will now examine three areas where policy subversion has occurred in relation to corporate insolvency law.

1. **Wrongful Trading[[14]](#footnote-14)**

Professor Sir Roy Goode QC’s anecdote regarding the genesis of the ten percent fund, what we now call the prescribed part, is well known.[[15]](#footnote-15) Perhaps less well known is Professor David Graham QC’s (hereafter Graham) anecdote about the genesis of wrongful trading. Some years ago Graham informed the author that the phrasing and language for the s.214 Insolvency Act 1986 wrongful trading provisions were discussed by him and the late Mr. Alfred Goldman whilst they were on a train from Mill Hill Broadway to St Pancras station. Graham at that period in his career was frequently instructed to appear on behalf of bankrupts in court seeking their discharge. The relevant legislation at the time was s.26 of the Bankruptcy Act 1914 which provided a series of badges of misconduct that the court was required to take into account on such applications. Amongst these were such matters as whether the bankrupt had contributed to his insolvency by rash and hazardous speculations, or by unjustifiable extravagance in living, or by gambling, or by culpable neglect of his business affairs. But the most important badge was "that the bankrupt has continued to trade after knowing himself to be insolvent." The primary test was whether in all the circumstances his conduct ought to be regarded as unreasonable.

In the course of what must now be regarded as a momentous train journey Graham suggested to Goldman (both working on the Cork committee) that it was anomalous that whereas in winding up matters there was the concept of "fraudulent trading" there was no such concept of unreasonable trading. The burden of proof in fraudulent trading, both a criminal and civil matter under the same section, was regarded at the time as extremely difficult for a liquidator to discharge, requiring even in the winding up a criminal standard of proof.

The upshot was that Graham came up with the idea that to overcome the anomalous situation with bankruptcy there should be a concept of unreasonable trading in winding up matters. Even then Graham could be prolix and Goldman apparently retorted, quite bluntly, "why do we not suggest the introduction of a new concept into winding up to be known simply as "wrongful trading."" Graham had always believed that behind Goldman's suggestion was the need for a blunt Anglo-Saxon word rather than the more wooly "reasonable" adjective.

There is nothing new in the concept of continued problematic trading, something the famous bankruptcy judge Mr. Justice Cave recognised as early as 1887 when he observed in *Re Stainton* in relation to a bankrupt trader, "once he is insolvent, he is no longer going on at his own risk in case of failure: he is going on at the risk of his creditors."[[16]](#footnote-16)

But what of more recent developments? As the Graham anecdote makes clear the Cork Committee[[17]](#footnote-17) was concerned with the development of a wrongful trading provision to supplement the fraudulent trading provisions there were already on the statute book.[[18]](#footnote-18) What was envisaged? In particular the committee wanted to address the problems caused by the high standard of proof that was required to make use of the fraudulent trading provisions. Because of this necessary safeguard within the realm of criminal law this provision was seldom used, continuing to trade inappropriately, but something short of criminal, still seemed to be occurring. The proposal to move away from fraudulent trading as a civil remedy meant the introduction of wrongful trading as we have seen. However, in terms of the minutiae of the provision clause the Cork Committee framed its test as completely objective in formulation:

*“Our proposals substitute an objective test. It will constitute wrongful trading for a company to incur liabilities with no reasonable prospect of meeting them; and a director will be personally liable for its debts if, being party to the company’s trading, he knows or ought to have known that such trading was wrongful. In determining whether there was a reasonable prospect of the company meeting its liabilities and, if not, whether the director ought to have known this, the test will be objective, and the standard to be applied will be that of the ordinary, reasonable man.”*[[19]](#footnote-19)

What transpired? In its formal response the Government decided to retain fraudulent trading as a civil remedy. It did however agree to introduce wrongful trading. It noted:

*“…the Review Committee’s concept of wrongful trading will be introduced in a modified form, to enable a civil liability to be imposed upon a director (including a shadow director) who allows a company to continue to trade when he knew or should have known that there is no prospect of it being able to satisfy its liabilities…”*[[20]](#footnote-20)

But then we move to the Parliament stage and it is here that we see the first influence of lobbying groups, including the Institute of Directors (IoD), Confederation of British Industry (CBI) and the National Consumer Council. We also see where the original framer’s policy goes awry. In a House of Commons debate on the responsibility for company’s wrongful trading (sic) Mr Gould notes, “…the new clause is an alternative way to achieve the objective which the Government have set…The problem is that the clause departs from the straightforward, easily comprehensible, recommendations of the review committee.”[[21]](#footnote-21) The British Venture Capital Association supported this view when saying that “if the Bill’s wrongful trading clause is implemented as drafted, no sensible professional manager will run the additional risks of personal liability proposed…”.[[22]](#footnote-22) The overall consequence of this legislative input was a watering down of the wrongful trading provisions which subsequently made it difficult to make directors liable for trading whilst insolvent.[[23]](#footnote-23)

The introduction of the element of subjectivity, in addition to objectivity, within s.214(4) Insolvency Act 1986 is not always problematic. The provision states:

*“For the purposes of subsections (2) and (3) the facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both—*

*(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company, and* [Objective element]

*(b)the general knowledge, skill and experience that that director has.* [Subjective element]*”*[[24]](#footnote-24)

Factoring in what that specific director knows has caused problems for those directors when they exhibit certain skills sets, e.g. lawyers,[[25]](#footnote-25) or accountants,[[26]](#footnote-26) and where the company is closely held and the director has intimate knowledge of the company and its operations.[[27]](#footnote-27) Objectivity certainly helps where failures are lamentable and where conduct is well below that which would be expected of the reasonable director.[[28]](#footnote-28)

It could be argued that the lack of efficacy resulting from tests contained in the wrongful trading provisions has recently come home to roost and that the Government has realised that the whole regime is too lax. Evidence for this can be seen in the recent reform activities relating to tax and director liability. The Government is now considering again personal liability for directors in extended circumstances, e.g. a company’s VAT and tax liabilities.[[29]](#footnote-29)

So it could be argued that for thirty-three years there has been an ineffective wrongful trading regime as a result of interreference during the passage of the Insolvency Bill in 1985. The lack of use of the provisions would seem to indicate that this has occurred.

1. **Directors’ Disqualification**[[30]](#footnote-30)

The directors’ disqualification regime in its current guise is also a legislative creature of the mid-1980s. As with wrongful trading it also throws up interesting policy and legislative process issues. For example, does the jurisdiction exist to punish errant directors, or, are the regulatory provisions in place so as to protect creditors from directors who abuse the statutory privilege of limited liability through phoenixism and other miscreant activities?[[31]](#footnote-31) In the alternative do the provisions, when coupled with s.214 Insolvency Act 1986 wrongful trading, provide a compensatory device, or finally, are we dealing with a device or set of provisions which help to raise standards of business conduct and entrepreneurship? These debates are for elsewhere,[[32]](#footnote-32) here we must focus on the passage of the Company Directors Disqualification Act 1986 (CDDA86) and whether it reflects that which the policy framers intended.

We know that the CDDA86 regulatory jurisdiction exists to provide a protection mechanism for the general public, at least according to the Insolvency Service. Protection comes from the removal of, *inter alia*, “unfit”[[33]](#footnote-33) directors from the corporate world for a period of between 2 and 15 years depending on the degree of unfitness and how this sits on the late Dillon, LJ's *Re Sevenoaks Stationers (Retail) Ltd*[[34]](#footnote-34) scale. Some commentators might argue that the jurisdiction exists as a form of punishment for the miscreant director,[[35]](#footnote-35) especially when accompanied by culpability for s.213 Insolvency Act 1986 fraudulent trading (with that provision's attendant *mens rea* for dishonesty) or wrongful trading contributions to the company's assets as a result of s.214 Insolvency Act 1986 culpability. The corollary removal from one's professional body as a result of disqualification (i.e. being struck off as a solicitor) and the subsequent inhibiting of one's ability to earn may also be viewed as a form of punishment. An examination of the very early case law also helps to spread light on the question of what directors’ disqualification is for in the punishment or public protection sense, particularly from the viewpoint of contemporary thought of the legislators and policy formulators.[[36]](#footnote-36)

However, here we are concerned with one particular aspect of early disqualification legislation and that relates to its scope. This also reflects on its function, especially when we consider that in its earliest iteration disqualification was meant to apply to ALL directors of companies that have gone into an insolvency procedure. If this had come to pass the punishment agenda could be said to be more prevalent as opposed to the more nuanced public protection agenda that we now have.

The proposal to make directors’ disqualification automatic apparently came from the chair of the Cork Committee, Sir Kenneth Cork. In a brief dated 19th September 1980 by John Hunter for the 46th meeting of the Insolvency Law Review Committee it was noted that, “The evidence we have received indicates clearly that section 9 of the Insolvency Act 1976 does not go far enough. I would favour the Chairman’s suggestion that disqualification should be automatic, subject to the director’s right of appeal to the Court to be relieved…I would like to see from the first liquidation…”[[37]](#footnote-37)

As Fletcher has noted in relation to the passage of the insolvency related legislation of the mid-1980s it was, “substantially altered by political forces which were brought to bear during the Parliamentary proceedings.”[[38]](#footnote-38) Over 1,200 amendments were made during the rushed passage of the Insolvency Bill, mainly by the Government. In the context of directors’ disqualification those forces were the CBI and the IOD and the numerous peers whose own personal interests would be severely affected by their removal from all boards on an automatic basis if they were associated with a company that went into any insolvency procedure.

Here we have controllers, the directors, seeking to extend and maintain their control over capital, to the detriment of general public protection and wider accountability. Again we see an example of the apparatus of the law being used to ensure power remained in the hands of capitalists who also happened to be legislators. What of the wider policy intent and the protection that would be afforded to the public by the removal of miscreant directors from the public sphere?

1. **Administration**[[39]](#footnote-39)

The Enterprise Act 2002 was supposed to herald fundamental changes to English and Welsh corporate insolvency law and in particular to the administration procedure. Building on the Cork committee’s original vision of a rescue culture the 2002 reforms were supposed to provide a fillip to administration and by extension to the languishing rescue culture agenda.

Commencing with the then Secretary of State for Trade and Industry (as the department was then called) Peter (later Lord) Mandelson’s sojourn to the United States, the reforms were afoot. Mandelson had been influenced by the Chapter 11 procedure and the can do attitude of our American cousins. There then followed an in-depth and sustained period of consultation. The *Rajak Report* proposed significant changes.[[40]](#footnote-40) These were taken up by the Government in 2001 when they noted that amongst other reforms the time was ripe to move away from the single creditor self-interested remedy that was receivership. Specifically they observed:

*“The Government’s view is that, on the grounds of both equity and efficiency, the time has come to make changes which will tip the balance firmly in favour of collective insolvency proceedings ... administrative receivership should cease to be a major insolvency procedure...”*[[41]](#footnote-41)

During the passage of the Enterprise Bill in the House of Lords, Lord Sainsbury further elaborated on the rationale for the reforms when he observed, “administration has been criticised as too inflexible, too slow and too expensive. The Bill addresses that by streamlining the procedure and providing a clearer focus on company rescue…and where that is clearly not a viable option, a better return for the company’s creditors as a whole.”[[42]](#footnote-42) He continued, “We believe that those changes to the corporate insolvency regime will encourage wider use of the procedure as a rescue vehicle and encourage …companies to make use of administration.”[[43]](#footnote-43) No real opposition seemed to be forthcoming from the Government’s opposition front benches. Indeed, Baroness Miller of Hendon noted, “We also welcome the restrictions on administrative receivership where one creditor seizes all the assets.”[[44]](#footnote-44)

However, what transpired in terms of overall outcome was wholly different. As McCormack has observed what we seem to be left with is an amalgam of the two procedures of administration and receivership. What is worse is that the surviving beast of administration is some sort of “receivership plus”[[45]](#footnote-45) where there has been a “…transmutation or merger of the administrative receivership and administration procedures ... rather than the end of administrative receivership.”[[46]](#footnote-46)This Frankenstein-esque creation has been achieved through a change to the purposes of administration. During the passage of the Enterprise Bill the purposes of administration were changed for the four purposes enunciated in s.8 of the Insolvency Act 1986 to the reformed purposes which now sit in Schedule B1 Paragraph 3 of the Insolvency Act 1986, as amended by the Enterprise Act 2002. The third purpose is that which gives cause for concern. The purposes of administration are now:

“3(1) The administrator of a company must perform his functions with the objective of—

(a) rescuing the company as a going concern, or

(b) achieving a better result for the company’s creditors as a whole than would be likely if the company were wound up (without first being in administration), or

***(c) realising property in order to make a distribution to one or more secured or preferential creditors****.”*[[47]](#footnote-47)

The consequences of this subverted reform attempt are the almost complete lack of use of administration as compared with liquidation as the figures in Figure Two (below) for 2018 and the preceding decade makes clear. Indeed, administrations are now so low in number that they do not warrant inclusion in the graph under their own head.

**Figure Two: Corporate Insolvency Rates 2009 – 2018**

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This type of use of administration certainly skews administration outcomes from the Cork Committee and Government aims of administration, as expressed in contemporaneous command papers.[[48]](#footnote-48) More broadly, the rescue culture is also undermined particularly where we are witnessing a high incidence of liquidation. But most importantly we see another example of secured creditor influence, control and dominance. This demonstrates a manipulation of power and consolidation of wealth to the detriment of other classes of creditor and wider non-contracting stakeholders.

There is a strong counter argument. To encourage banks and other financial institutions to lend, which in turn is used to invest in expansion, policy makers must recognise the need to provide for security to take priority. This priority status is then borne in mind when making distributions when framing an insolvency legislation, the purpose of which is to provide an ordered distribution of the available funds. Otherwise the risk of loss, and therefore the cost of borrowing, would be too great and uneconomical. This is of course the current orthodox position in English and Welsh insolvency law. But can this skewed favourtisim continue especially if it does not reflect the rescue culture ethos that is supposed to underpin our corporate insolvency laws?

 **Conclusion**

Why is any of this important? Future reform activity should safeguard against the subversive diversions from carefully constructed policy approaches identified in this article. This will ensure that the totality of the policy’s effect is not lost for all stakeholders.

If we are to see a *Restructuring Act 2021* a word of caution must be sounded. In the most recent Insolvency Service corporate insolvency reform documentation we have seen two new ideas. First, the new moratorium period to help business rescue. This provides another instance of “re-invigorating [the] rescue culture.”[[49]](#footnote-49) Secondly, we have the new “restructuring plan”, a device which provides “new ways to provide greater opportunities to effect corporate rescues.”[[50]](#footnote-50) Both these measures will require legislative change. Both have been formulated with the rescue culture in mind with the wider stakeholder audience that this entails. If the same policy subversion of the Enterprise Act 2002 reforms is permitted to take place this will lead to the same results as the “transmuted” administration reforms, namely, no boost to the rescue culture, only to the interests of secured creditors.

It must be noted that it is not only private sector stakeholders that are guilty of policy subversion. In the 2018 Budget Her Majesty’s Revenue & Customs (HMRC) received a £185m boost to its coffers as a result of a preferential status reform proposal put forward by Philip Hammond, Chancellor of the Exchequer.[[51]](#footnote-51) There appears to have been very little consultation on the change, at least in 2018. Leading up to 2002 there was plenty of policy and reform discussion extolling the virtues of the removal of the preferential status of HMRC and the gains this would bring for the rescue culture in bolstering the prescribed part fund and reducing unsecured creditor apathy.[[52]](#footnote-52) The Budget changes amount to little more than an opportunistic finance grab by a powerful stakeholder for a relatively small sum in the grand scheme of Government budgets. The fact the change has been envisaged with reactive consultation following consternation from the profession well after the proposed amendment was announced is also deeply problematic.[[53]](#footnote-53) Little, if any, regard seems to have been paid to the rescue culture and the effect on employees. One might even go so far as to question whether there have been serious and meaningful discussions between HMRC and the Insolvency Service on the proposed reforms.

As this article demonstrates, the policy subversion that manifests itself within the realm of corporate insolvency law provides a blatant example of the “conformity of the content of laws and legal institutions with the material interests of the ruling class,”[[54]](#footnote-54) in this instance the interests of secured creditors. What is worse, other than the complicity through the legislature with these powerful interest groups, is the denial to other stakeholders of an opportunity to foster and grow. In the battle for value within the finite estate the stakeholders chance to take part in a rehabilitated form is denied in the interests of greater claims to secured creditors.

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2. On Marxist approaches to the law generally see: Pashukanis, EB. *Law and Marxism: A General Theory*. Pluto Press, 1989. Hereafter *Pashukanis*. See also: Collins, H. *Marxism and Law*. Oxford University Press, Oxford, 1982. Hereafter *Collins Marxism.* See also: Chambliss, WJ. *Law, Order, and Power*. 2nd Ed. Reading, MA, Addison-Wesley, 1982. For an interesting discussion of Marxism in the insolvency context see: Nsubuga, HJ. *Corporate Insolvency and Employment Protection: A Theoretical Perspective* (2016) 4(1) NIBLeJ 4. [↑](#footnote-ref-2)
3. On these interest groups see: Russell, M & Gover, D & Wollter, K & Benton, M. *Actors, Motivations and Outcomes in the Legislative Process: Policy Influence at Westminster* (2017) Government and Opposition, vol.52, no.1, pp.1-27. Hereafter *Russell Influence.* [↑](#footnote-ref-3)
4. For an interesting empirical study of the passage of legislation see: Russell, M & Goer, D & Wollter, K. *Does the Executive Dominate the Westminster Legislative Process?: Six Reasons for Doubt* (2016) 69, Parliamentary Affairs, pp.286-308. Hereafter *Russell Process.* See also the much early study of the British legislative process: Griffith, JAG. *Parliamentary Scrutiny of Government Bills*. Allen and Unwin, London, 1974. [↑](#footnote-ref-4)
5. See early decisions favourable to security interests in *Holroyd v. Marshall* (1862) HL Cas 191; *Re Panama, New Zealand, and Australian Royal Mail Company* (1870) Ch App 318; and, *Salomon v. Salomon* [1987] AC 22. [↑](#footnote-ref-5)
6. *Re Spectrum Plus Ltd* [2005] UKHL 41. [↑](#footnote-ref-6)
7. That said the environmental lobby was noteworthy by its lack of lobbying when the question of environmental waste licences came to be litigated with the tension between the protection mechanisms in the Environmental Protection Act 1990 and the Insolvency Act 1986 provisions on disclaimer. See further: Insolvency Act 1986, section 178 (company), s.315 (Trustee in Bankruptcy). See also: *Re Potters Oil* [1985] BCLC 203; *Hindcastle Ltd v. Barbara Attenborough Associates Ltd* [1996] BCC 636; *Re Park Air Services plc* [1999] 2 WLR 396; *Re Mineral Resources Ltd* [1999] 2 BCLC 516; *Re Celtic Extraction Ltd; Blue Stone Chemicals Ltd* [1999] 2 BCLC 555, CofA; *Capital Prim Properties plc v. Worthgate Ltd* [2000] BCC 525. [↑](#footnote-ref-7)
8. *Russell Process*, p.294. [↑](#footnote-ref-8)
9. *per* Lord Sharman, Hansard, House of Lords, Debates, 04 April 2000, vol.611, cc.1248-73. [↑](#footnote-ref-9)
10. See further: Berle, A & Means, G. *The Modern Corporation and Private Property*. Transaction Press, New York, 1932. [↑](#footnote-ref-10)
11. On communitarianism in corporate insolvency see: e.g. Gross, K. *Taking Community Interests into Account in Bankruptcy: An Essay* (1994) 72 Wash U.LQ. 1031. Expanded in her later work, see: Gross, K. *Failure and Forgiveness: Rebalancing the Bankruptcy System*. Yale University Press, Yale, 2009. [↑](#footnote-ref-11)
12. King, A & Crewe, I. *The Blunders of Our Governments.* Oneworld, London, 2013. [↑](#footnote-ref-12)
13. See: *Russell Process*, p.286. [↑](#footnote-ref-13)
14. On wrongful trading generally see: Moss, G. *No compensation for wrongful trading - where did it all go wrong?* (2017) Insolv. Int, 30(4), 49-53. See also: Williams, R. *What can we expect to gain from reforming the insolvent trading remedy?* (2015) M.L.R, 78(1), 55-84. [↑](#footnote-ref-14)
15. On the ten per cent fund see: Goode, R. *Is the Law Too Favourable to Secured Creditors?* (1983) Canadian Business Law Journal, Vol. 8, Issue 1, pp. 53-80. On the anecdote see: Getzler, J & Payne, J (Eds). *Company Charges: Spectrum and Beyond.* Oxford University Press, Oxford, 2006, p.13.fn7. Professor Sir Roy Goode QC states in his third edition of his *Principles of Corporate Insolvency Law* that the ten percent fund for unsecured creditors (an arbitrary figure of ten percent according to Professor Stevens) has its genesis in a "conversation over two pints of beer he [Sir Roy] had at St Pancras Station with a member of the committee." In the same collection (at page 13, footnote 7) Sir Roy takes up the story in his own words, "The origin of this recommendation is not generally known - even to members of the Insolvency Law Review Committee itself! It was the present writer, who, while serving on the Legal Panel set up by the Committee, light-heartedly suggested it to a member of the Committee, as a means of taking some heat off the floating charge, whilst passing the time in conversation on the train home after cerebral stimulation in the shape of a couple of pints of beer at St Pancras Station..." [↑](#footnote-ref-15)
16. *Re Stainton* (1887) 4 Morr, 242. [↑](#footnote-ref-16)
17. See: *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558 (Hereafter: *Cork Report*). See the Government’s response: *A revised framework for insolvency law*. Cmnd 9175, White Paper, 1984. See also: Cork, K. *Cork on Cork*. Macmillan, London 1988, Chapter 10. On the work of the committee generally see further: Fletcher, IF. *The genesis of modern insolvency law - an odyssey of law reform* (1989) J.B.L., Sep, 365-376. Hereafter *Fletcher Odyssey*. See also: Fletcher, IF. *Insolvency Law Reform* (1995) J.B.L., Mar, 210-211 where it was noted: “The process of reform in the field of Insolvency Law appears to have assumed a cyclical aspect…” See also: Hare, D. and Milman, D. *Corporate Insolvency: The Cork committee Proposals I* (1983) 127 Sol.Jo. 230. [↑](#footnote-ref-17)
18. *Cork Report*, Chapter 44. [↑](#footnote-ref-18)
19. *Cork Report*, para.1783. [↑](#footnote-ref-19)
20. *A Revised Framework for Insolvency Law*. Department of Trade and Industry. Cmnd 9175, para.52. [↑](#footnote-ref-20)
21. House of Commons’ Debates, Hansard, 18th July 1985, vo.83, cc.559-70. [↑](#footnote-ref-21)
22. Cited by Mr Gould at: House of Commons’ Debates, Hansard, 18th July 1985, vo.83, cc.559-70. [↑](#footnote-ref-22)
23. See for example: *Re SEIL Trade Finance Ltd* [1992] B.C.C. 538. [↑](#footnote-ref-23)
24. s.214(4) Insolvency Act 1986. [↑](#footnote-ref-24)
25. See: *Norman v. Theodore Goddard* [1992] B.C.C. 14; [1991] B.C.L.C 1028. [↑](#footnote-ref-25)
26. See: *Dorchester Finance Co v. Stebbing* [1989] BCLC 498. [↑](#footnote-ref-26)
27. See for example *Re D'Jan of London Ltd* [1994] 1 BCLC 561 in the broader directors’ duties sense, now governed by the remarkably similar s.174 Companies Act 2006. [↑](#footnote-ref-27)
28. See: *Re Produce Marketing Consortium Ltd (No 2)* [1989] 5 BCC 569. [↑](#footnote-ref-28)
29. See further: HMRC’ s *Tax Abuse and Insolvency: a Discussion Document* (April 2018). Available here: <https://www.gov.uk/government/consultations/tax-abuse-and-insolvency> [↑](#footnote-ref-29)
30. See further: Davis-White, M & Walters, A. *Directors' Disqualification and Insolvency Restrictions*. 3rd Ed. Sweet & Maxwell Ltd, 2009. See also: Williams, R. *Disqualifying directors: a remedy worse than the disease?* (2007) J.C.L.S. 2007, 7(2), 213-242. [↑](#footnote-ref-30)
31. as Professor Sir Otto Kahn Freund QC FBA might hope, see: Kahn Freund, O. *Some Reflections on Company Law Reform* (1944) MLR, Vol. 7, Issues 1 and 2, pp. 54-66. [↑](#footnote-ref-31)
32. Tribe, J. *The disqualification of company directors: background to the regime and some recent reform activity in the United Kingdom* (2013) Insol.LB, 14(3), 47-54. [↑](#footnote-ref-32)
33. s.6 CDDA. [↑](#footnote-ref-33)
34. [1991] BCLC 325, [1991] Ch 164. [↑](#footnote-ref-34)
35. Professor Sally Wheeler's essay on directors disqualification (Wheeler, S. *Disqualification of Directors: A Broader View*, in: Rajak, H (Ed). *Insolvency Law: Theory and Practice*. Sweet and Maxwell Ltd, London, 1991) provides an interesting discussion of the area, particularly from the perspective of how civil provisions are used to punish directors and how judges may be using inappropriate policy mechanisms when coming to their decisions. [↑](#footnote-ref-35)
36. See for example: *Re Sevenoaks Stationers (Retail) Ltd* [1991] BCLC 325, [1991] Ch 164 (5 years disqualification for, inter alia, failing to keep proper accounting records of one of the companies); *Re Lo-Line Electric Motors Limited* [1988] Ch 477 (3 years disqualification where director who had traded through limited companies when he knew them to be insolvent); *Re Stanford Services Limited* [1987] BCLC 607 (2 years disqualification for use of Crown debts to finance a company’s trading activities); *Re Rolus Properties Limited* (1988) 4 BCC 446 (2 years disqualification for absence, among other things, of adequate books and accounting records for the companies in question); *Re Western Welsh International System Buildings Limited* (1988) 4 BCC 449 (5 years failure to keep proper books or produce proper accounts and trading while insolvent); *Re J and B Lynch (Builders) Limited* [1989] BCLC 376 (3 years for substantial unpaid Crown debts). [↑](#footnote-ref-36)
37. Cork Archive: *Insolvency Law Review Committee (ILRC), 46th Meeting, Brief for Item 7 of ILRC 135-136))*, 19th September 1980. Available at: [www.thecorkarchive.com](http://www.thecorkarchive.com) [↑](#footnote-ref-37)
38. *Fletcher Odyssey.* [↑](#footnote-ref-38)
39. On administration generally see: Walton, P & Robinson, T. (Eds). *Kerr & Hunter on Receivers and Administrators*. 12th Ed. Para.14.1-17.38. [↑](#footnote-ref-39)
40. See: Rajak, H. *A Review of Company Rescue and Business Reconstruction Mechanisms*. Insolvency Service, London, 2001. [↑](#footnote-ref-40)
41. Department of Trade and Industry: *Insolvency – A Second Chance*. White Paper, Cm.5234, July 2001, paras 2.5-2.6. [↑](#footnote-ref-41)
42. *per* the Parliamentary Under-Secretary of State, Department of Trade and Industry (Lord Sainsbury of Turville), House of Lords Debate, Hansard, 02 July 2002, vol.637, cc138-90. [↑](#footnote-ref-42)
43. *ibid.* [↑](#footnote-ref-43)
44. *ibid.* [↑](#footnote-ref-44)
45. See: McCormack, G. *Control and Corporate Rescue - An Anglo-American Evaluation* (2007) Int’l & Comp L.Q. 515. Hereafter *McCormack Rescue.* [↑](#footnote-ref-45)
46. *ibid.* [↑](#footnote-ref-46)
47. Insolvency Act 1986, Schedule B1, paragraph 3. (Author’s italicised and emboldened emphasis). [↑](#footnote-ref-47)
48. e.g. Department of Trade and Industry: *Insolvency – A Second Chance*. White Paper, Cm.5234, July 2001. [↑](#footnote-ref-48)
49. *Insolvency and Corporate Governance – Government Response*. Department for Business, Energy & Industrial Strategy. 26th August 2018, p.8. [↑](#footnote-ref-49)
50. *ibid,* p.i. [↑](#footnote-ref-50)
51. See: *Budget 2018*, HM Treasury, HC1629, October 2018, para.3.87 where it states: “Protecting your taxes in insolvency – From 6 April 2020, when a business enters insolvency, more of the taxes paid in good faith by its employees and customers, and temporarily held in trust by the business, will go to fund public services rather than being distributed to other creditors. This reform will only apply to taxes collected and held by businesses on behalf of other taxpayers (VAT, PAYE Income Tax, employee NICs, and Construction Industry Scheme deductions). The rules will remain unchanged for taxes owed by businesses themselves, such as Corporation Tax and employer NICs.” [↑](#footnote-ref-51)
52. For Enterprise Bill period discussion see: Davies, S. (Ed). *Insolvency and the Enterprise Act 2002*. Jordans Publishing Ltd, 2003, pp.19, 27-36. [↑](#footnote-ref-52)
53. *Protecting Your Taxes In Insolvency – Consultation Document*. Her Majesty’s Revenue and Customs (HMRC), February 2019. [↑](#footnote-ref-53)
54. *Pashukanis*, p.13. [↑](#footnote-ref-54)