***Big Bankruptcies: Evidencing “Insolvency” Eternal Recurrence, Bankruptcy Tourism and the Failure of Limited Liability***

By

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This paper was delivered as an annual Insolvency Practitioners’ Association (IPA) lecture in November 2020.

**Introduction**

Bankruptcies which feature incredibly large, almost telephone number size figures of indebtedness, are newsworthy. They invariably catch the attention of the reading public through the popular press, as well as insolvency specialists. At first blush It might appear prurient or sensationalist to mull on big bankruptcies for their own sake. What can they really teach us about the bankruptcy system and how it is used? Surely they are just noteworthy because of the size of the figures involved and for no other reason, other than being salacious. However, this relatively unusual type of bankruptcy does have the capacity to teach us a number of interesting lessons about the substance of personal insolvency law, and bankruptcy law in particular. Relief, rehabilitation and the nature of discharge are the most obvious qualities which big bankruptcies shine a light on. But there are more.

Big bankruptcies are also instructive because they highlight certain trends and weaknesses in our general system of transacting business, in particular personal guarantees and limited liability within the capitalist system. Big bankruptcies show some fissures in capitalism, at least in terms of how transactions are secured and confidence is maintained in the credit market place. Ultimately, big bankruptcies demonstrate that limited liability and personal guarantees can operate in a dysfunctional manner.

Big bankruptcies also show that bankruptcy can operate in a pre-1869 sense, i.e. as a form of limited liability for business bankruptcies. This is particularly true for those overwhelmed with astronomical quantities of debt where personal guarantees cause juristic person’s indebtedness to fall on the shoulders of a natural person. That individual cannot cope in a financial sense. They are deluged with the debt of another, albeit an artificial person, a legal fiction. Bankruptcy provides the tool of relief where limited liability has failed or where market conditions demand a personal guarantee. In so doing big bankruptcies also highlight the phenomenon of insolvency “eternal recurrence.” That is the cyclical recurrence of patterns of behaviour and use throughout insolvency history.

This essay is divided into three main parts. Part one demonstrates that big bankruptcies evidence bankruptcy law performing its proper function as a relief and rehabilitation system.

Part two opens a window on the past. It shows further evidence of Nietzsche’s “eternal recurrence” operating in insolvency law. Eternal recurrence applied to insolvency law demonstrates cyclical patterns of behaviour over time. In this instance bankruptcy operating as a form of limited liability for business bankrupts. Bankruptcy law caps their exposure in the same way limited liability caps the exposure of shareholders or those who have guaranteed the private limited company’s exposure to creditors.

Part three shines a light on big bankruptcies and attempts to highlight the drivers of the phenomenon and outline the ramifications for the way we do business. Personal guarantees and bankruptcy tourism are identified as two of the main drivers behind big bankruptcies.

A conclusion then follows which asks whether big bankruptcies highlight further cracks in capitalism and the various tools we use to transact business.

1. **Are big bankruptcies indicative of bankruptcy performing its proper function?**

In 2021 it is perhaps now trite to say that bankruptcy offers a relief and rehabilitation function. Recent work has clearly demonstrated that bankruptcy provides a relief mechanism in this credit biased world which is based on debt (e.g. Spooner, J (2019) *Bankruptcy - the Case for Relief in an Economy of Debt*, CUP; See also: Ramsay, I (2017) *Personal Insolvency in the 21st Century: A Comparative Study of the US and Europe,* Hart, Bloomsbury). We have moved on from bankruptcy performing some kind of punitive or deterrent function. Although some parts of the popular press still hold on to this view of insolvency, particularly on the corporate side of the subject, wheeling out the same old hackneyed tropes again and again. This is erroneous. Serious research and scholarship demonstrates a different picture of the function of bankruptcy. These negative views of bankruptcy reflect its long, and on occasion quasi-criminal history. To continue to view bankruptcy in this punitive manner, following the reforms introduced by the Enterprise Act 2002, is to completely miss the point of those reforms and subsequent scholarship that has sought to explain the purpose of the reforms and the nature of the bankruptcy jurisdiction.

Perhaps the greatest indicators of this push towards bankruptcy being a true fresh start relief and rehabilitation mechanism are the reforms that led to the online debtors’ petition mechanisms and the adjudicator system (on this mechanism see: *Budniok v. Adjudicator, Insolvency Service* [2017] EWHC 368 (Ch)). Government policy has been focused on making the bankruptcy system more accessible and user friendly for debtors. This policy direction is pushing us as far away from the Tudor roots of the jurisdiction as terminology allows.

This view of bankruptcy means that those facing bankruptcy in the last decade or so have the clearest example of a rehabilitation and relief mechanism that has existed in English and Welsh law. In other words, we are currently at a high point in debtor friendliness and relief and rehabilitation approaches. So what does this mean for big bankruptcies and what do they mean for the bankruptcy jurisdiction? Table One (below) outlines some of the big bankruptcies in English and Welsh law that have been witnessed over the last forty years or so.

**Table One: Big Bankruptcies by GBP and Year in England & Wales under the Insolvency Act 1986 and its predecessors**

|  |  |  |  |
| --- | --- | --- | --- |
| **Bankrupt** | **Year** | **Relevant Statute** | **Amount (GBP - £)** |
| Boris Becker | 2017 | Insolvency Act 1986 | 4.5m |
| Chris Eubank | 2005 | Insolvency Act 1986 | 1,300,000 |
| David Haigh | 2020 | No bankruptcy order | 4m |
| Jim Davidson | 2006 | Insolvency Act 1986 | 700,000 |
| Jimmie Nicol(1914/1926 Bankruptcy Act) | 1965 | Bankruptcy Act 1925 | 4066 |
| John Ignatius Quinn (Sean Quinn) | 2012 | Insolvency Act 1986 | €253,951,810.67 |
| Karen Millen | 2016 | Insolvency Act 1986 | 6m |
| Kevin Maxwell | 1992 | Insolvency Act 1986 | 406.5m |
| Oscar Wilde(1883 Bankruptcy Act) | 1895 | Bankruptcy Act 1883 | 3591 |
| Patrick Hegarty | 2010 | (Sequestration) | 500m |
| Rajendra Sethia | 1979 | Bankruptcy Act 1975 | 140m |
| Vijay Mallya | 2020 | Insolvency Act 1986 | 1bn |
| Vladimir Abramovich Kekhman | 2015 | Insolvency Act 1986 | 316m |
| William Roche | 1999 | Insolvency Act 1986 | 300,000 |
| Willie Stern | 1978 | Bankruptcy Act | 118m |
| Willie Thorne | 2015 | Insolvency Act 1986 | 601,204 |

These big bankruptcies, particularly the more recent ones (e.g. Quinn, Kekhman, and Millen) demonstrate that the bankruptcy jurisdiction in England and Wales has been used to fulfil its relief and rehabilitation functions, particularly by those that arguably need it most. That is, those faced with insurmountable debt obligations. Sums so vast that there is very little, if any, chance of fulfilling those obligations. In these cases bankruptcy serves as a relief mechanism absolving those individuals from the debt responsibilities. Relief and rehabilitation follow from discharge for the indebtedness. Without the bankruptcy procedure individuals would be saddled with enormous debt which is neither good for their mental health, nor their ability to get on with their lives, in a personal or business sense.

So it could be said that big bankruptcies evidence the epitome of the jurisdiction both in terms of indebtedness and relief figures but also in terms of rehabilitative effect.

1. **Further Evidence of Nietzsche’s Eternal Recurrence Operating in Insolvency Law?**

The first part of this essay briefly examined the bankruptcy jurisdiction’s modern function. This part of the essay looks at its function in historical perspective. This is because big bankruptcies highlight a recurrent theme in English and Welsh law and this theme taps on to an interesting thought experiment that has been deployed in English and Welsh insolvency law, namely, the use of Nietzsche’s eternal recurrence in an insolvency setting (see: Tribe, J. *Nietzsche’s Eternal Recurrence and the Renaissance of English and Welsh Insolvency Law Reform* (2020) Legal Studies, Vol.40, Issue 3, pp. 419-441).

Nietzsche’s eternal recurrence was an aphorism, or thought experiment, which first appeared in his book the *Gay Science* (1882). Nietzsche was, *inter alia*, suggesting an alternative to a Christian God and an afterlife when he suggested the aphorism:

*“What if some day or night a demon were to steal into your loneliest loneliness and say to you: ‘This life as you now live it and have lived it you will have to live once again and innumerable times again; and there will be nothing new in it, but every pain and every joy and every thought and sigh and* ***everything unspeakably small or great in your life must return to you, all in the same succession and sequence*** *– even this spider and this moonlight between the trees, and even this moment and I myself. The eternal hour glass of existence is turned over again and again, and you with it, speck of dust!” Would you not throw yourself down and gnash your teeth and curse the demon who spoke thus?”* (Nietzsche *Gay Science*, para.341, p.194. Author’s bold emphasis)

Whilst there is an obvious disparity between Nietzsche describing time as infinite, whereas insolvency law is a temporal mini-blip, eternal recurrence can be used in an insolvency context to aid analysis and critique. Insolvency eternal recurrence can be defined in three ways. First, as “Narrow Eternal Recurrence”. Examples of this might include recurrent themes in our subject such as super priority financing, miscreant director provisions (wrongful trading (s.214IA86), s.174CA06)), etc. Secondly there is “Broad Eternal Recurrence”. This takes in wider concepts within the subject of insolvency. These can include collectivisation, *pari passu* distribution, property definitions, rescue, and, rehabilitation. Finally, “Deep Eternal Recurrence” within the context of insolvency can include credit use generally, the debtor friendliness or creditor friendliness of a regime, etc.

Bankruptcy operating as a discharge mechanism for business persons (as opposed to consumer debtors) is another example of broad insolvency eternal recurrence. This is because bankruptcy operated in this business focused manner before the advent of general purpose limited liability. The bankruptcy jurisdiction was introduced in 1542 in addition to the parallel imprisonment for debt jurisdiction (see: Cadwallader, FJJ (1965) *In pursuit of the merchant debtor and bankrupt: 1066-1732*. Unpublished Ph.D. thesis. University College London). From 1571 to the Limited Liability Act 1855 (the advent of general purpose limited liability) the bankruptcy jurisdiction was only available to traders, i.e. those transacting business. The term “trader” was also very narrowly defined. This continued to be the case up until the Debtors’ Act 1869 (see: Duffy, IPH (1985) *Bankruptcy and Insolvency in London during the Industrial Revolution*. Garland Publishing, Inc. New York & London). By this stage of commercial development the private limited company had become the primary legal fiction through which business was undertaken. There was less need for a separate insolvency jurisdiction that would be available for business related debt. Bankruptcy became more widely available for debtors, including non-trader debtors, following the Bankruptcy Act 1883 (see further: Lester, VM (1995) *Victorian Insolvency*. Clarendon Press, Oxford).

The theme of debtor relief for business related debt and business persons through bankruptcy existed between 1571 and 1869. It is this theme that modern big bankruptcies are revisiting, namely, the ability of the bankruptcy jurisdiction to provide relief and rehabilitation to business people as a result of business activity and the over indebtedness that flows from that activity.

1. **Drivers of the Phenomenon and Cracks in Capitalism?**

This section of the paper examines what drives big bankruptcies and what flows from these drivers and their effects in terms of policy development. Here we focus on personal guarantees and bankruptcy tourism, although there are other drivers such as, *inter alia*, “rash and hazardous” property speculation (as well as personal guarantees, see: *Re Stern (A Bankrupt) Ex p. Keyser Ullman* [1982] 1 W.L.R. 860), pension fraud (see: *Bishopsgate Investment Management Ltd. (In Provisional Liquidation) v. Maxwell and Another* [1993] Ch.1), fraud (*In re Jokai Tea Holdings Ltd.* [1992] 1 W.L.R. 1196), and enormous lending activity by banks (see: *State Bank of India & Ors v. Mallya* [2020] EWHC 1981 (Ch)).

Personal Guarantees

Vast debt responsibility, flowing from big or mega-bankruptcies, largely stems from personal guarantees given to lenders to guarantee the exposure of a company which has borrowed from those creditors. These guarantees have been provided by individuals associated with the debtor company. This was the case with Kekhman, who owed £86m under English law guarantees but whose total indebtedness was £316m (see: *JSC Bank of Moscow v. Kekhman and others* [2015] EWHC 396 (Ch); Tribe, J. (2015) *The Kekhman quintessence: what is English personal insolvency law for?* NBILJ, 3(18), 331-367) and Sean Quinn who owed €253,951,810.67 to his creditors (*Irish Bank Resolution Corp Ltd v. Quinn* [2012] NICh 1, see further below). Personal guarantees have become ubiquitous, particularly in the small and medium sized enterprise (SME) market. But personal guarantees do not only exist in the SME market, as some of the mega-bankruptcies demonstrate. They also exist, spectre like, behind some very large enterprises.

The use of a personal guarantee totally undermines the concept of limited liability. It does this by shifting responsibility for the company’s indebtedness from the company itself, as a separate legal juristic person, and its (limited liability) shareholder owners to another person, namely, the individual guarantor. That guarantor may be a director of the company. The guarantor may also be a shareholder in the company. This is particularly true where the companies are small closely held companies where shares are held by a small group of individuals. But the main point is that it is now a given individual who is responsible for the company’s indebtedness. That indebtedness is overwhelming for the company, hence why the personal guarantee is being called upon, but it can be even more financially significant for the individual who is now swamped with debt.

Personal guarantees cause a failure of limited liability because they shift liability to another individual and away from the company and shareholders. The personal guarantee undermines the bedrock of capitalism, the limited liability company, which is based on the separation of ownership and control solidified by portions of shares which are finite in terms of exposure for each shareholder. Shareholders are (generally) only exposed to the extent of their individual investment, i.e. the value of their shares (on shares see further: Milman, D (2018) *The Company Share: Legal Regulation and Public Policy*. Edward Elgar). The demand for the personal guarantee makes the existence of the limited liability structure superfluous. Like a house of cards it falls away in the gusts of creditor exposure. It is in effect a straw man, a true fiction, that is undermined and brushed aside in the pursuit of payment, from whomever can potentially pay. Often-times, as this entire paper demonstrates, that other is hardly in a position to make good the gargantuan exposure.

The personal guarantee bolsters creditors. It demonstrates how creditor friendly the regime is when one of capitalism’s sacred cows can be sacrificed in the interests of creditors. This is no afterthought either. Typically personal guarantees are provided in solvent periods when no hint of insolvency is on the horizon. In this way personal guarantees perform a belt and braces function for the creditor.

There has been some recent variation to this personal guarantee axiom during 2020. Whilst the COVID pandemic has reduced the requirement for personal guarantees because of the Coronavirus Business Interruption Loan Scheme (CBILS) the personal guarantee system may make a comeback when CBILS ends and when Her Majesty’s Revenue & Customs (HMRC) becomes a preferential creditor again when the Finance Act 2020 comes into force in late 2020. This wholesale policy reversal, an unacceptable *volte-face* for some sectors of the insolvency industry, will mean that lenders will be keen to increase their use of personal guarantees given that their floating charges will rank below HMRC.

Bankruptcy tourism

Bankruptcy tourism has been a feature of English and Welsh insolvency law over the last couple of decades (e.g. *Stojevic v. Official Receiver* [2007] BPIR 141; *Steinhardt v. Eichler* [2011] BPIR 1293; Briggs, J (2010) *Debtor forum shopping*. Insolv. Int, 23(2), 28-30). Amongst those indebted individuals searching for a better outcome are those that fall under the big bankruptcy umbrella. Bankruptcy tourism accounts for some of the big bankruptcies that have passed through the English and Welsh courts.

Whilst this form of “Delaware Effect” has its advantages and proponents, there are those who view such forum shopping developments in insolvencies with an international flavour with suspicion. Some rather extreme commentators have likened our position to that of a “bankruptcy brothel.” *(“London becomes bankruptcy capital of Europe.”* Daily Mail, 6th March 2010). Put in less excitable and more factual and measured terms, debtors choose or favour one jurisdiction over another and attempt to argue that they are located in that favourable jurisdiction so as to get the benefits of the insolvency laws in that more favourable jurisdiction.

Bankruptcy tourism has involved, *inter alia*, Irish debtors, German debtors, and Russian debtors, attempting to argue that their centre of main interests (COMI) is located in England and Wales (See: Hickey, S (2013) *Ireland's 'bankruptcy tourists' face tougher treatment in English courts*. The Observer, Sunday 3 March; Hickey, S (2013). *O'Donnell makes fresh bid for bankruptcy in UK*. Irish Independent, 6th March). Specific marketing activity in those countries may have caused this upsurge in bankruptcy tourism. The marketing material often extolled the virtues of other more “liberal” bankruptcy regimes than the debtor’s home jurisdiction. (e.g. *Re Eichler (No.2)* [2011] BPIR 1293, paras 47 & 48, which mentions International Networks Solutions Ltd, a company offering England and Wales based debt relief solutions).

In terms of big bankruptcies the case of *Irish Bank Resolution Corp v. Quinn* ([2012] NICh 1; [2012] B.C.C. 608. See: Swift, S (2012) *Forum shopping in personal insolvency - a question of ascertainability?* C.R. & I,5(4), 137-138) is instructive.

The Quinn case involved a high profile Irish debtor engaging in bankruptcy tourism. The case can also be classified as a big bankruptcy as €253,951,810.67 were owed by the debtor to his creditors. The case involved a property developer, John Ignatius Quinn (commonly known as Sean Quinn), who was based in the Republic of Ireland. He attempted to assert that his COMI was in Northern Ireland. This would enable him to gain access to the more liberal bankruptcy provisions north of the border. Discharge would come automatically after 12 months, instead of the Republic of Ireland’s then more lengthy twelve years. The Master in Bankruptcy made a bankruptcy order in November 2011.

The annulment applicant creditor, the Irish Bank Resolution Corporation (formerly known as Allied Irish Bank), contended that the Northern Irish court lacked jurisdiction pursuant to article 3(1) of the European Insolvency Regulation because Quinn’s COMI was not in Northern Ireland at the date of the bankruptcy order (November 2011). The bank asserted that Quinn’s thirty years of residence, various company interests, and tax payment arrangements all indicated that his COMI was in the Republic. They claimed that the bankruptcy order had been obtained through misrepresentation and non-disclosure. Quinn claimed that his COMI was in Northern Ireland because since May 2011 he has been working from an office in Northern Ireland most days of the week.

Sitting in the High Court in Belfast Deeny, J annulled the bankruptcy order. He held that Quinn’s COMI was not in Northern Ireland. After reviewing the evidence Deeny, J concluded that Quinn’s business activities in the commercial offices in Northern Ireland were not sufficiently proven to allow a finding of business COMI in that jurisdiction. Quinn’s supposed interests in forestry and litigation in Northern Ireland were insufficient. The judge noted that the disparity between length of discharge might provide a “temptation” to debtors to seek to assert their COMI in the country with the most liberal regime.

The Quinn bankruptcy, and the Kekhman bankruptcy, which featured similar themes in terms of massive over-indebtedness and an attempt to locate COMI in a different jurisdiction, highlight why England and Wales is attractive in bankruptcy jurisdiction terms. The relatively short period before automatic discharge occurs makes the jurisdiction attractive, particularly to those international business people who find themselves overwhelmed with debt. In this way bankruptcy law is providing its proper relief and rehabilitation functions, perhaps even beyond borders, in a certain sense.

**Conclusion**

Big bankruptcies demonstrate the relief and rehabilitation functions of the bankruptcy jurisdiction on a grand scale. But the issues they raise in terms of pressure, stress and strain are not novel to those exposed to multi-million pound indebtedness. The effects of indebtedness trickle down the insolvency scale to the most modest of debtors. What is good for the mega-bankrupt is good for the average bankrupt.

What big bankruptcies teach us is that limited liability can be undermined with the use of the personal guarantee. Limited liability means little if a personal guarantee sits behind the scenes. This guarantee may have facilitated some form of trading, but it falls to be dealt with by the bankruptcy system if things go array. If that bankruptcy system, as within England and Wales, promotes relief and rehabilitation perhaps that is no bad thing.

Finally, big bankruptcies demonstrate that insolvency eternal recurrence is extant in English and Welsh bankruptcy law and the proverb *plus ça change, plus c'est la même chose* is true for bankruptcy in terms of its use and functions in the realm of business.