

Deploying Communitarianism Bankruptcy Theory to Rescue Insolvent Charities and maintain Charitable Purposes

By

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Abstract

This chapter argues that English and Welsh insolvency law provisions must be perfected so that insolvent charities are administered to ensure that general charitable purposes continue to be achieved despite technical insolvency. The survival of general charitable purposes should usurp all other stakeholder interests, including those of the creditors.

By drawing an analogy between the “rescue culture” in English and Welsh insolvency law and the cy-près doctrine in charity law this chapter argues that the administration procedure can best achieve the continuation of general charitable purposes. If administration and its use is perfected towards this aim using “adapted cy-près” the underlying theoretical underpinnings of charity law and insolvency law will be unified for the ongoing benefit of society.

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Introduction

This chapter examines insolvency regulation as it applies to charities¹ and applies a rescue culture and communitarianism lens to the law of insolvent charities. The chapter develops the scant literature on the subject.² This dearth of treatment has arisen as a result of the borderline nature of charity insolvency sitting as it does between two separate and distinct areas of substantive law, namely, insolvency law and charity law.³

The application of a rescue and communitarian lens to insolvent charities in this chapter contributes a much needed novel perspective drawing across corporate rescue culture to the terrain of charities. The social nature of charities makes this a particularly fertile terrain for a communitarianism analysis. When an insolvent charity fails its remaining asset value is usually made available for the creditors through the liquidation procedure. Using administration as a rescue tool facilitates the survival of those remaining assets for charitable purposes for which they were given, as opposed to a piecemeal distribution amongst creditors and the breakup of the charitable entity. The rescue and communitarian approach which is advocated in this chapter benefits wider stakeholders and ensures that the general charitable purposes of the charity are continued.

¹ For a discussion of the dearth of statistical data on insolvent charities see: Tribe, J. *Charity Insolvency*, in: Mullen, M (Ed). *Tolley's Insolvency Law*. (Vol. 125, pp. C35-1-C35-22). LexisNexis, London, 2019. Hereafter *Tribe Charity Insolvency*.

² The most substantial treatment to date has been Yates' 1999 unpublished Ph.D. thesis and associated articles. See: Yates, E. *Winding up and insolvency of charities: including rescue mechanisms*. (Unpublished Ph.D. thesis) University of Liverpool, Liverpool, 1999. See also: Pearce, R & Barr, W. *Pearce & Stevens' Trusts and Equitable Obligations*. 7th Ed. OUP, Oxford, 2018, p.430 (Hereafter *Pearce & Barr*). The Law Commission have also recently touched on some aspects of charity insolvency in their 2017 report *Technical Issues in Charity Law*, Law Commission No. 375 (2017) in *Chapter 12: Charity and trustee insolvency*. Hereafter *Law Commission Technical Issues*. See also the brief: Framjee, P. *British Charities and Insolvency* (2009-2010) 12 Int'l J. Not-for-Profit L. 78.

³ For example, one of the leading texts on charity law, *Tudor on Charities*, (See further: Henderson, W & Fowles, J & Smith, J. *Tudor on Charities*. 10th Ed. Sweet & Maxwell Ltd, London, 2015, para. 21-041 – Hereafter *Tudor Charities*) notes “A full discussion of those provisions [the Insolvency Act 1986] is beyond the scope of this work, and the reader is referred to standard works on corporate insolvency...” A perusal of the leading texts on corporate insolvency (cited below) show that there is relatively scant treatment of insolvent charities.

Recent high profile news reports and reported cases,⁴ have brought the issue of insolvent charities to the fore. The Kids' Company,⁵ the Wedgwood Museum Trust,⁶ Age Concern Barking & Dagenham⁷ and the Work Foundation⁸ have all recently passed into various insolvency procedures. These high profile cases highlight how insolvent charities have been regulated over time and how different stakeholder interests are treated in charity insolvencies. The respective rights of debtors and creditors conflict in a unique manner in this area as the charitable purposes that the charity was created to achieve still potentially exist despite the insolvency. These charitable purposes can be considered as unique as no superior moral priority interest equivalent usually exists in an insolvency. This additional and complicating factor is discussed, particularly in the context of keeping this charitable purpose alive, whether that be through the imaginative use of an insolvency procedure such as administration to "rescue"⁹ the charitable purpose for communitarianism objectives, or by using an adapted version of the long held doctrine of *cy-près* which may be deployed to help safeguard the charity's assets for the benefit of the charitable purposes (to the exclusion of other interests such as creditors).¹⁰

The continued application of the funds for charitable purposes is in line with the idea that English and Welsh law treats any donation to charity as a charitable gift to be applied for charitable purposes generally, not just for the specific purpose that they were given. As Barr and Pearce observe: "charitable trusts...have a public

⁴ See further *Tribe Charity Insolvency*.

⁵ On the causes of the collapse of Kids' Company see: House of Commons Public Administration and Constitutional Affairs Committee, *The Collapse of Kids Company: Lessons for Charity Trustees, Professional Firms, the Charity Commission and Whitehall*. Fourth Report of the Session 2015-2016, HC433, 1 February 2016. See also: Parsons, C. *Kids Company: risks of insolvency to large charities* (2016) C.R. & I. 2016, 9(2), 68-69 (Hereafter *Parsons Kids*). See also: Weakley, K. *When the music stopped* (2015) Charity F, Oct, 12-14.

⁶ See: *Re Wedgwood Museum Trust Ltd (In Administration)* [2012] EWHC 1974 (Ch).

⁷ O'Connell, F & Patel, N & Piper, A. *Restructuring a charity: as easy as ACBD?* (2010) Recovery, Aut, 30-31.

⁸ Whittaker, S. *Making it work: a pre-packaged provisional liquidation* (2011) C.R. & I,4(1), 22-23. (a provisional liquidation of a Royal Charter entity).

⁹ On the burgeoning literature on the traditional "rescue culture" in corporate insolvency see: McCormack, G. *Business restructuring law in Europe: making a fresh start* (2017) JCLS, vol.2, pp.167-202; McCormack, G. *Corporate Rescue Law – An Anglo-American Perspective*. Edward Elgar, Cheltenham, 2008; Parry, R. *Corporate Rescue*. Sweet & Maxwell Ltd, London, 2008; Belcher, A. *Corporate Rescue*. Sweet & Maxwell Ltd, London, 1997.

¹⁰ On *cy-près* generally see: *Pearce & Barr*, pp.422-436. See also: Picton, J. *Contradiction in the law of charitable lapse* (2015) Conv. 2015, 6, 480-488. See also: Picton, J. *Reforming the prerogative cy-près doctrine* (2014) Conv, 6, 473-481. See also: Garton, J. *Justifying the cy-près doctrine* (2007) 21 Trust Law International 134.

character...the law regards property given for any specific charitable purpose as given not merely to that particular purpose, but dedicated to charity in the general sense.”¹¹ This is why the Attorney-General on behalf of the Crown,¹² and latterly the Charity Commission,¹³ have a general responsibility to ensure that charitable trusts are properly administered and enforced for their charitable purpose. Charity continuation is also in line with recent pronouncements by Lord Hodgson when reviewing the Charities Act 2006 and failed appeal funds. These, he opined, should go to charitable purposes.¹⁴ The concept of paramount (or general) charitable intention also shows a pervasive push towards the facilitation of charitable objects.¹⁵ Finally, the tax breaks upon which much charitable activity are based are provided by the legislature to encourage charitable giving.¹⁶ The central argument of this chapter, that (near) insolvent yet viable charitable companies should be rescued through administration using adapted *cy-près* like techniques, is geared towards these broad charity facilitation aims. It is no longer satisfactory that an accident of charity form choice at the creation date of the charity can lead to problems on the advent of insolvency, particularly where the vast majority of charities are now incorporated. This problem is especially acute when it is considered that on liquidation the remaining value in the insolvent charity company is distributed to creditors and therefore lost to the charitable purposes for which the charity was created and for which funds were originally donated.

It is because of the general charitable purpose that it is imperative that insolvency law provides a mechanism through which the charitable purpose, or at least the asset value, can continue to exist and be applied for charitable purposes. In this sense technical insolvency can be seen as a “supervening impracticality”¹⁷ for the affected charity which insolvency law, and rescue procedures such as the administration procedure in particular, can forestall particularly if allied with the *cy-près* doctrine.

¹¹ See further: *Pearce & Barr*, p.422, who also refer to “the common pot’ of charity.” (p.357).

¹² See further: *Bradshaw v. University College of Wales, Aberystwyth* [1987] 3 All ER 200, 203, *per Hoffmann, J* (as he then was). See also: *Attorney-General v. Cocke* [1988] Ch.414.

¹³ See for example ss13-20 and s.84 Charities Act 2011.

¹⁴ See further: *Trusted and Independent: Giving Charity Back to Charities – Review of the Charities Act 2006* (July 2012), Appendix A, para.4.

¹⁵ See further: *Re Lysaght* [1966] Ch.191 and *Hanbury Equity*, para. 15-067.

¹⁶ e.g. Income Tax Act 2007 s.527 and Corporation Tax Act 2010, s.481.

¹⁷ *per* Roxburgh, J in *Re Lucas* [1948] Ch 175, 181 (cited in *Pearce & Barr*, p.422).

The rescue culture and *cy-près* are synonymous in a certain sense in that both exist to facilitate survival of a purpose. For a company rescue achieves ongoing activity whether that be profit wealth maximisation or the continued existence of a structure that facilitates non-charitable purposes. For a charity *cy-près* helps achieve the continuation of charitable purposes¹⁸ and in so doing, “increase(s) the resources available to the charity sector.”¹⁹ This synergy between rescue and *cy-près* has not been recognised previously in the leading texts on charity law, instead the focus tends to be on liquidation and winding up procedures that lead to the striking off or the company.²⁰ Language has focused on “termination”²¹ despite Charity Commission guidance to the contrary and the pressing need to rescue charitable purposes which this chapter advocates. The re-emphasis towards rescue techniques advocated here are important because the social purposes of charities make a rescue approach, based on communitarianism objectives, particularly apposite. Ensuring that the remaining asset value is rescued for charitable purpose is the apotheosis of the insolvency rescue culture approach.

This chapter is divided into three parts. In Part One it is argued that communitarianism is normatively right for profit-making corporations. Contrary arguments to this proposition are outlined and rebutted. Part Two demonstrates that if communitarianism is normatively right for profit-making corporations, then there is no doubt that it is also normatively right for non-profit corporations. Part Three follows through from the first two parts and demonstrates that charitable corporations should have an approach grounded in communitarianism applied to them. This approach is described as “adapted *cy-près*”. The rescue culture as it applies to insolvent companies and *cy-près* as it applies to charities is also examined. Communitarianism approaches to corporate insolvency law, as a development of pluralism, are unified with general charitable purposes. This unification provides a new approach to the rescue of insolvent charitable companies.

¹⁸ We are generally dealing with subsequent failure in this chapter, although initial failure is also encountered, especially if the company to whom a gift has been made has already been wound up.

¹⁹ See *Hanbury Equity*, para.15-066.

²⁰ Pursuant to s.1012 CA06.

²¹ See for example, *Tudor Charities*, Chapter 21.

A conclusion then follows that argues that insolvency tool rationalisation is needed to: (1) ensure that charitable purposes continue notwithstanding technical insolvency and claims within that arena; (2) a re-thinking of policy on priority is undertaken that gives precedence to the charitable purposes over other claimants in insolvency. This is a novel contribution that both exerts an influence on the academic field but also more broadly sets the agenda on how insolvent charities should be dealt with by regulators, officeholders and stakeholders going forward. Viable insolvent charities will be rescued and charitable purposes will be facilitated. Knowledge of how the world of insolvent charities are dealt with has changed.

(1) **Communitarianism and the For Profit Corporation**

There should be no doubt that communitarianism is normatively right for profit-making companies that are insolvent. Some commentators would argue against this proposition reflecting the fact that bankruptcy theory sits along a spectrum.²² This spectrum commences with law and economics scholars who are focused on creditor friendly regimes. For them creditor interests are the sole consideration in the design and implementation of a bankruptcy law.²³ Jackson and Baird are the main proponents of this approach. Their centre-right capitalist philosophy²⁴ epitomised in their creditors' bargain model takes a very narrow view of the way in which a bankruptcy law should operate and be formulated. For Jackson and Baird only pre-insolvency creditor-based entitlements should be considered. Indeed, for them no other stakeholders have a place within insolvency.²⁵ Hiding behind a Rawlsian veil of ignorance a hypothetical

²² See further: Tribe, J. *Corporate Insolvency Law: Challenging Orthodoxies in Theory, Design and Use*. Edward Elgar (forthcoming). See also: Finch, V. *The Measures of Insolvency Law* (1997) Oxford Journal of Legal Studies, Vol. 17, No. 2, pp. 227-251.

²³ See further: Jackson, TH. *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain* (1982) The Yale Law Journal, Vol. 91, No. 5, pp. 857-907. See also: Baird, DG & Jackson, TH. *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy* (1984) The University of Chicago Law Review, Vol. 51, No. 1, pp. 97-130. See also: Jackson, TH & Scott, RE. *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain* (1989) Virginia Law Review, Vol. 75, No. 2, Symposium on the Law and Economics of Bargaining (Mar., 1989), pp. 155-204.

²⁴ See *Flessner Philosophies*, p.23.

²⁵ See further: Jackson, TH. *The Logic and Limits of Bankruptcy Law*. Harvard University Press, Cambridge, Mass, 1986. See also: Baird, DG. *The Uneasy case for Corporate Re-organisation* (1986) 15 Journal of Legal Studies 127. See also: Baird, DG. *Loss Distribution, Forum Shopping and Bankruptcy: A Reply to Warren* (1987) 54 Univ.Chi.L.Rev, p.815.

creditor bargains for an outcome that they would most prefer in any future insolvency having in mind their ignorant unknowing status of how they may be affected in any subsequent insolvency process. They may involve creditors agreeing that they would all receive an equal share in any subsequent liquidation type process, or it may involve some bargaining which would allow pre-existing proprietary rights to be respected. This bargaining activity establishes creditor interests as being paramount. This is perhaps unsurprising. There is no place for other stakeholders, for the creditors wider stakeholder interests are simply not what a bankruptcy law is for. For them the function of bankruptcy law is to operate as a collectivised debt collection device that solely benefits creditors. In taking this view Jackson and Baird combat two main issues, namely, the race to the bottom and the common pool problem. In the United States bankruptcy law is federal and collectivised through, for example, the Chapter 11 procedure. At State level there can be a race to the bottom, i.e. whichever creditor gets to the assets first wins the entirety of assets. Collectivisation removes this competition and in so doing makes bankruptcy law both fairer and also potentially less costly, at least for those who would receive nothing if last in the race to the assets. The common pool problem is related and highlights the problems that arise when diverse ownership interests compete for a finite pool of resources. This competition can be inefficient and costly. The creditors' bargain model seeks to alleviate these problems by maximising the return to creditors by focusing on pre-insolvency creditor proprietary rights. Jackson and Baird's view of insolvency law does not therefore take account of a plurality of interests. The rescue culture and potentially interested stakeholders such as employees, directors, family members, the environment, etc, are not within their view of what a bankruptcy law should seek to achieve.

Continuing along the theoretical spectrum from Jackson and Baird we then progress through to scholars²⁶ who espouse a view that broader interests should be taken into account. These interests have very close synergies with Berle & Dodd's 1930s exchanges on the subject of pluralism when they discussed "For whom are corporate

²⁶ For other contributions to the spectrum see: Korobkin, DR. *Rehabilitating Values: A Jurisprudence of Bankruptcy* (1991) Columbia Law Review, Vol. 91, No. 4, pp. 717-789. See also: Schwartz, A. *A Contract Theory Approach to Business Bankruptcy* (1998) The Yale Law Journal, Vol. 107, No. 6 (Apr), pp. 1807-1851. See also: Mokal, R.J. *Corporate Insolvency Law: Theory and Application*. OUP, Oxford, 2005.

managers trustees?”²⁷ These wider stakeholders can include the community, and even charities.²⁸ This broader approach is represented by the theories promulgated by, *inter alia*, Warren²⁹ and Gross who postulate a pluralistic model of bankruptcy law. This “centre left”³⁰ view builds on the ideas that were first contained within the American Bankruptcy Act 1938.³¹ This view of insolvency law places the interests of other non-creditor stakeholders who have been impacted by an insolvency as an important factor when designing insolvency systems. Creditors are not the only and perhaps even paramount parties for the law to consider. Those framing a bankruptcy law, it is argued, should take into account a much broader range of stakeholders who “have an interest in a business’s continued existence”³², for example, “older employees, regular customers, suppliers, the local community, and the public interest.”³³ This is the view that Warren proselytises but also that which the United States Congress specifically enunciated in their policy pronouncements.³⁴ In relation to this more expansive view Warren sees bankruptcy as:

²⁷ Trustee is used in the American context in Dodd’s article title and Berle’s response. See: Dodd, ME. *For Whom Are Corporate Managers Trustees?* (1932) Harvard Law Review, Vol. 45, No. 7, pp. 1145-1163. See also: Berle, AA. *For Whom Corporate Managers Are Trustees: A Note* (1932) Harvard Law Review, Vol. 45, No. 8, pp. 1365-1372. See also: Katz, WG. *Responsibility and the Modern Corporation* (1960) The Journal of Law & Economics, Vol. 3, pp. 75-85; Weiner, JL. *The Berle-Dodd Dialogue on the Concept of the Corporation* (1964) Columbia Law Review, Vol. 64, No. 8 (Dec., 1964), pp. 1458-1467. See also: Hendry, J. *Missing the Target: Normative Stakeholder Theory and the Corporate Governance Debate* (2001) Business Ethics Quarterly, Vol. 11, No. 1, pp. 159-176. See also: Pettet, B. *The Stirring of Corporate Social Conscience: From 'Cakes and Ale' to Community Programmes*. Current Legal Problems, University College, London. Vol. 50, pages 279-314, 1997.

²⁸ See further: Prunty, BS. *Love and the Business Corporation* (1960) Virginia Law Review, Vol. 46, No. 3, Law and Philanthropy, pp. 467-476 *Corporations. Charities. Statute Making Contributions to Charity by Corporations Intra Vires* (1939) Harvard Law Review, Vol. 52, No. 3, pp. 538-539. See also: Werbelow, JM. *Corporations: Ultra Vires Acts: Gifts to Educational Institutions* (1954) Michigan Law Review, Vol. 52, No. 5, pp. 751-753. See also: Ruder, DS. *Public Obligations of Private Corporations* (1965) University of Pennsylvania Law Review, Vol. 114, No. 2, pp. 209-229.

²⁹ See for example, Warren, E. *Bankruptcy Policy* (1987) The University of Chicago Law Review, Vol. 54, No. 3 (Summer, 1987), pp. 775-814. Hereafter *Warren Policy*. See also: Warren, E & Westbrook, JL. *Contracting out of Bankruptcy: An Empirical Intervention* (2005) Harvard Law Review, Vol. 118, No. 4, pp. 1197-1254. See also: Warren, E. *Bankruptcy Policymaking in an Imperfect World* (1993) Michigan Law Review, Vol. 92, No. 2, pp. 336-387.

³⁰ See *Flessner Philosophies*, p.24.

³¹ Interestingly this places the early development of “insolvency pluralism” outcomes in corporate bankruptcy in America startlingly close to the development of Berle’s pluralism within general company law objectives. On the history of American bankruptcy law policy up until this point see: Coleman, PJ. *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607-1900*. The State Historical Society of Wisconsin, Madison, 1974. See also: Regis-Noel, F. *A History of the Bankruptcy Law*. Chas, H Potter & Co, Washington DC, 1919.

³² *Warren Policy*, p.783.

³³ *ibid.*

³⁴ *ibid.*

“...an attempt to reckon with a debtor’s multiple defaults and to distribute the consequences among a number of different actors.”³⁵

So in addition to creditors, bankruptcy law should also take into account the interests of, *inter alia*, and in no specific order: debtors, creditors of all types (e.g. tax, tort), employees, the environment, suppliers, and the local community. This is a broad panoply of interests but one which reflects the modern world and the business environment within which companies exist, be they profit wealth maximising entities or charitable companies. To focus purely on creditor interests is naïve and panders solely to the banking hegemony.

On the bankruptcy theory spectrum this takes us to the leading exponent of communitarianism approaches to bankruptcy law. In her seminal work on bankruptcy and communitarianism³⁶ Gross describes a bankruptcy law (to use the American parlance of her work) that takes into account far more interests than creditors. She advocates that, “community interests must be taken into account in both the corporate and personal bankruptcy systems.” She continues, “The application of communitarianism concepts to the world of bankruptcy suggests that the welfare of the community should be very much a part of corporate bankruptcy.”³⁷ In advocating this approach Gross rejects the argument that bankruptcy is not the instrument to deal with “employment in the local area.”³⁸ Simultaneously Gross also keeps creditor and shareholder interests within her conception of bankruptcy law. Her community interests do not “trump other interests.”³⁹ Gross does also not eject economic approaches. Instead she advocates for a “more expansive economic model”.⁴⁰ The Gross view is all inclusive. Multiple stakeholders must be considered when framing a bankruptcy law. This approach is to be commended as it respects and reflects the innate human interest that are prevalent in bankruptcy.

³⁵ *Warren Policy*, p.775.

³⁶ e.g. Gross, K. *Taking Community Interests into Account in Bankruptcy: An Essay* (1994) 72 Wash U.L.Q. 1031. Hereafter *Gross Community*. Expanded in her later work, see: Gross, K. *Failure and Forgiveness: Rebalancing the Bankruptcy System*. Yale University Press, Yale, 2009. Hereafter *Gross Rebalancing*.

³⁷ *Gross Community*, p.1042.

³⁸ Aghion, P. et al. *Improving Bankruptcy Procedure* (1994) 72 Wash U.L.Q. 849.

³⁹ *Gross Community*, p.1033.

⁴⁰ *ibid.*

(2) Communitarianism and Non-profit Corporations

The previous section has demonstrated that communitarianism is normatively right for profit-making corporations. There is no doubt that it is also normatively right for non-profit corporations. This is because charities have social purposes which have broad support. This makes creditor interests less salient in policy terms. Some might argue to the contrary. They might suggest that charities are less significant than for-profits and so they do not need a communitarian regime. Or they might argue that charity insolvency, and the subsequent use of liquidation, is rare. As consequence there is no need for a communitarian regime. Both insights are wrong as the following section demonstrates. Before rebutting these points we must demonstrate why a communitarianism approach is right for non-profit corporations.

When citing a 1940s farming study Gross concentrates on “quality of community life” in an owner managed farming community noting that “Streets, sidewalks, parks, schools, and religious and political involvement were all better in the community...”⁴¹ These public concerns are familiar to charity lawyers, although of course if something is public it is not necessarily charitable.⁴² Charity case law abounds on parks,⁴³ schools,⁴⁴ religious⁴⁵ and political activity.⁴⁶ Indeed, the charitable head of community benefit⁴⁷ is quite close to bankruptcy communitarianism in the sense of objectives. Both approaches are grounded in altruistic behaviour. Both demonstrate that human nature is not inherently self-interested. Both engender belief in, “the goodness of human nature...”⁴⁸ Etzioni suggests that communitarianism seeks to safeguard and

⁴¹ *ibid.*

⁴² See *Blair v. Duncan* [1902] A.C. 37. See also *Re Diplock* [1941] Ch. 253 which discussed whether benevolence might not be charitable.

⁴³ *Guild v. IRC* [1992] 2 A.C. 310.

⁴⁴ On education see: *Re Mellody* [1918] 1 Ch. 228; *Re Shaw* [1958] 1 All E.R. 245; *Re Hopkins* [1965] Ch. 669; *Re Pinion* [1965] Ch. 85; *Independent Schools Council v. Charity Commission for England and Wales* [2011] 12 WLUK 67; *Abbey, Malvern Wells Ltd v. Minister of Local Government* [1951] Ch. 728.

⁴⁵ See further: *Neville Estates v. Madden* [1962] Ch. 832; *Re South Place Ethical Society* [1980] 1 W.L.R. 1565; *Varsani v. Jesani* [2002] 1 P. & C.R. DG11; *IRC v. Baddeley* [1955] A.C. 572; *Thornton v. Howe* 54 E.R. 1042; (1862) 31 Beav. 14; *United Grand Lodge v. Holborn* [1957] 1 W.L.R. 1080.

⁴⁶ *McGovern v. AG* [1982] Ch. 321; *R v. Radio Authority, ex parte Bull* [1998] Q.B. 294; *IRC v. Yorkshire Agricultural Society* [1928] 1 K.B. 611.

⁴⁷ On which see further: *Re Robinson* [1951] Ch. 198; *Re Wedgwood* [1915] 1 Ch. 113.

⁴⁸ *Gross Community*, p.1040.

enhance society's well-being.⁴⁹ This is exactly what charity also seeks to achieve and it is why insolvency laws should be refined to help facilitate the general charitable objective.

The parallel between this communitarianism reasoning and the social function of charities is striking. All that is missing from Gross' depiction of community are approaches that ameliorate the plight of the poor⁵⁰ and for the encouragement of sport.⁵¹ But both are of interest to a community, or at least a community that, "seeks to make individuals responsible for their community's well-being"⁵² i.e. act within a communitarianism framework. Furthermore, even employees have fallen within the purview of charity law, something that oftentimes struggles to come within some scholars' perception of bankruptcy law, as we have seen.⁵³ Is it tenable that bankruptcy law eschews the interests of employees whilst the law of charity embraces them?

A broadly conceived bankruptcy law grounded in the communitarianism philosophy works towards the same publicly beneficial objectives as charity law. It would be indefensible to silo academic progress in the field of corporate communitarianism and treat that learning as if it were separate from the charitable sector. We are focused on a multiplicity of interests that recognise, as does the law of charity, that bankruptcy, "is immensely more complex than simply determining which approach would yield the greatest recovery to one segment of society."⁵⁴ Charity law and a communitarian bankruptcy law are facilitating very similar objectives. Drawing them ever closer through adapted *cy-près* deployment demonstrates how the two approaches are natural bedfellows.

⁴⁹ See further: Etzioni, A. *The Spirit of Community: Rights, Responsibilities, and the Communitarian Agenda*. 1993. See also: Frazer, E. *The Problems of Communitarian Politics: Unity and Conflict*. OUP, Oxford, 1999.

⁵⁰ See further: *Re Coulthurst* [1951] Ch. 661; *Re Sanders* [1954] Ch. 265; *Re Resch* [1969] 1 A.C. 514; *Re Faraker* [1912] 2 Ch. 488.

⁵¹ *Re Dupree* [1945] Ch. 16.

⁵² *Gross Community*, p.1036.

⁵³ On employees as recipients of charity see: *Re Oppenheim* [1951] A.C. 297; *Dingle v. Turner* [1972] A.C. 601.

⁵⁴ *Gross Community*, p.1034.

Schermer objects to a communitarian view of bankruptcy for definitional and application reasons.⁵⁵ He notes “The problem is not that community interests cannot be identified, but that there are so many potential interests in every bankruptcy.”⁵⁶ Having a plethora of interests or broad term of art, i.e. community, does not make something impossible. Indeed, public benefit with charity law is routinely adjudicated on by the English and Welsh judiciary.

Community interests are difficult to quantify and are therefore excluded from the economic approach to bankruptcy. Public benefit within charity law has also been notoriously difficult to define, but this has not stopped the courts enforcing charitable instruments. Narrowly focused law and economics exponents simply argue that bankruptcy law is about creditors’ interests and increasing returns to creditors in the most efficient manner possible, meaning that, “community welfare and well-being are not appropriate concerns for bankruptcy.”⁵⁷

Gross’ broad approach is the closest we have to the suggestion of machinery that expedites a function or purpose of the juristic person that acknowledges the wider society in which that company sits and how that society is impacted by that company, be it charitable or profit wealth maximising.

This part of the chapter opened by noting the existence of a possible academic position that holds that charities are less significant than for-profits and so they do not need a communitarian regime. A possible position was also noted that charity insolvency, and the subsequent use of liquidation, is rare and there is no need for a communitarian regime. Both points are incorrect. There are numerous charities that have many millions of pounds worth of capitalisation, e.g. Oxfam, Save the Children International, Cancer Research UK and the National Trust.⁵⁸ If they run into financial difficulties and edge towards failure it is not appropriate to force them to use outmoded insolvency approaches, such as liquidation. Where possible the public benefit

⁵⁵ Schermer, BS. *Response to Professor Gross: Taking Community Interests into Account in Bankruptcy – a Modern Day Tale of Belling the Cat* (1994) 72 Wash U.L.Q. 1031. (Hereafter *Schermer Response*).

⁵⁶ *Schermer Response*, p.1051

⁵⁷ *Gross Community*, p.1035.

⁵⁸ See further: https://www.ncvo.org.uk/images/documents/policy_and_research/Britains-biggest-charities-key-features_final.pdf

elements of their work must be permitted to survive. As with for profit companies, non-profit charities should be using the latest techniques in restructuring and insolvency. The rescue agenda should be as alive and buoyant in the charity sector as it is in the private for profit sector. Indeed, rescue should be more prevalent in charity insolvency because of the social and community interests that charities strive to achieve. This includes a communitarianism approach through the administration procedure.

The next part of the chapter demonstrates why charity insolvency is, unfortunately, far from rare and why new approaches are needed to charity insolvency. To ignore the incidence of charity insolvency neglects the important activity of this engine of social good. But to compound the neglect by engaging in charity insolvency by adhering to narrow liquidation outcomes or a focus on creditor interests, as opposed to broader interests, neglects the unique nature of charities and their charitable purposes. This chapter doesn't go so far as to advocate the introduction of a special administration regime, which exists for colleges⁵⁹ and railways,⁶⁰ but it does call for a sea-change in approach as the next section demonstrates.

(3) Insolvent Charitable Corporations, Rescue and “adapted *Cy-près*”

Charity law already contains a mechanism that can meet the demand raised in this chapter for a communitarian based rescue culture approach to insolvent charities, namely, *cy-près*. An adapted version of *cy-près* would help facilitate the administration of an insolvent charity with rescue aims, most importantly, the survival of the charitable purpose of the insolvent charity. This novel idea of adapted *cy-près* is the main contribution of this chapter to the current unsatisfactory position of insolvent charities.

To facilitate the rescue of insolvent charitable corporations they should have available “adapted *cy-près*” through the administration process. This is a perfection and

⁵⁹ The first education administration order has been made under the Technical and Further Education Act 2017 (TAFEA 2017). The Corporation of Hadlow College went into administration in June 2019. The TAFEA 2017 special administration regime protects the interests of college students.

⁶⁰ See: Railways Act 1993, s.59(1). See also: The Railway Administration Order Rules 2001, 2001 No. 3352. Railtrack PLC, for example, went in railway administration on the 7th October 2001.

adaptation of an existing charity device. This proposal advocates a change in approach to the historic position of *cy-près*, i.e. a device that seeks to serve the interests of a single donor. Adapted *cy-près* seeks to serve the interests of the wider community by helping to facilitate the rescue of an insolvent charity. Adapted *cy-près* could be used as part of an insolvency process to ensure that an insolvent charity, that is fundamentally viable, is restructured so that the charity is still able to carry out its charitable purposes. For example, a charitable company that is used to administer a museum, which is part of a wider group of insolvent companies, need not fail with the rest of the group of companies if adapted *cy-près* administration was available. The procedure would be used to ensure that the charitable entity was rescued and could continue to fulfil the charitable purposes for which it was formed. Before developing this point we will examine some foundational points on charity insolvency. These demonstrate why adapted *cy-près* administration is required.

As part of charity trustees continuing fiduciary obligations they are required to monitor the financial health of the charity,⁶¹ including making decisions on whether or not to borrow,⁶² or on general issues of financial stability. If insolvency becomes an issue⁶³ trustees have a number of tools to use depending on which legal device has been adopted, e.g. liquidation, administration, receivership, company voluntary arrangements (CVAs), etc.⁶⁴ These continuing obligations make the need for adapted *cy-près* to facilitate a rescue administration all the more obvious. These positive obligations for trustees to monitor and maintain the financial health of the charity help to ensure that the charitable purposes are achieved. Adapted *cy-près* extends this continuation of charitable purposes, as well as attendant financial responsibility, through illiquid periods.

⁶¹ For a general overview see the Charity Commission's guidance document: *Managing a charity's finances: planning, managing difficulties and insolvency* (CC12) June 2010 (Updated January 2016 - New format January 2017). Hereafter *Charities Commission Insolvency*. See further: Yates, E. *Winding Up and Insolvency of Charities (Including Rescue Mechanisms)*. Ph.D. thesis, University of Liverpool, 1999. Summarised in: Yates, E. *Winding up charitable companies - special cases?* (2000) *Insolv. L.*, 3(May), 120-125. See also: Yates, E. *Problems of winding up charities* (2002) *C.L. & P.R.*, 8(1), 53-61. For a brief overview of insolvency rules and charities see: Arnott, M & Ransley, L. *When charities come to grief*. (2014) *Recovery*, Sum, 18-20. See also: Pepper, A & Rumley, J. *Restructuring and insolvency of charities* (2006) *Recovery*, Win, 30-31.

⁶² See further Sims, C. *When and how should charities borrow?* (2014) *T.P.A. & A.*, 25(4), 46.

⁶³ Pursuant to the tests contained in s.123 Insolvency Act 1986, on which see: *BNY Corporate Trustee Services Limited and others (Respondents) v. Eurosail-UK 2007-3BL PLC (Appellant)* [2013] UKSC 28.

⁶⁴ See further *Tribe Charity Insolvency*.

In addition to the insolvency tools that are used in the context of an insolvent charity it is important to remind ourselves of the underlying tensions that exist behind the use of these tools. In the context of insolvent charities we are dealing with debtors and creditors but also with the additional tension of a charitable purpose and money being gifted towards facilitating that purpose by donors, not placating creditor interests in any subsequent insolvency procedure. This balancing of interests around a finite sum is not a new phenomenon generally or within the context of charity insolvency. As Jones has noted in the early modern period stage of charity law development, the charitable use trumped bankruptcy law's distributional purposes. He observed:

“Identifiable property (land or chattels) held to charitable uses by the bankrupt as feoffee was not an asset available for distribution amongst his creditors ‘quia nest part de lour estate’”⁶⁵

Whether or not the interests of charity and charitable purposes in particular can now usurp the interests of creditors (and other stakeholders) in the battle for value makes up the next part of the chapter.⁶⁶

Why the Cases are Anti-Communitarian

There are a number of conceptually refined cases that explore the position of charitable companies that are going through an insolvency procedure and who have asset value that could be used in the liquidation to satisfy creditors, or in the alternative, to undertake the charitable purposes for which the original gifts were given. This question becomes particularly important where the gifts are given for a charitable purpose before the company to which they are given goes into an insolvency procedure and where the testators die before that insolvency procedure is instigated.

⁶⁵ Jones, G. *History of the Law of Charity 1532-1827*. CUP, Cambridge, 1969, p.95. Author's underlined emphasis. (Hereafter *Jones Charities*) Jones continues, “But if money given to a charitable use were lent to one who became bankrupt, the charitable use would rank with other creditors...” This grouping together of the charitable use with the general body of creditors seems to indicate that in this instance charity law did not trump insolvency law as seems to be the case with quote cited in the body text.

⁶⁶ On charities and how they own assets see further: Dawson, I & Alder, J. *The nature of the proprietary interest of a charitable company or a community interest company in its property* (2007) Tru. L.I., 21(1), 3-16.

If that company then goes into administration or liquidation the insolvency practitioner will have to determine whether or not the money should be used for: (1) the charitable purposes for which the donors gave the money, or (2) be distributed through a liquidation to the company's creditors as part of the general assets of the company. Simply put, should an insolvency procedure render gifts to a charitable company ineffective?

From a communitarian perspective we might expect that the money would still be used for the charitable purposes for which it was given, as opposed to the position at law which is that the money is available to placate the general body of creditors (some of whom may of course be charities themselves). We cannot commune with the dead donors to divine their intentions when an insolvency event has intervened after their own death and once the company has passed into an insolvency procedure.⁶⁷ At least one judge has noted that it is unlikely that the testator would have wanted their donation to be given to the company if they had known of the liquidation⁶⁸ and another has apparently suggested that the donor would certainly not have intended that their gift was to be made generally available to creditors.⁶⁹ However, the plain words of the will override these considerations and the court will not speculate about a given testator's intentions. They will interpret and apply the plain words of the testamentary document in relation to the gift. Judges have taken the view that *cy-près* is just about doing whatever the donor wants.⁷⁰ Invariably this intention is to help further charitable purposes of a specific charity. So all that adapted *cy-près* would be doing when

⁶⁷ This supernatural contact has been tried in the context of private purposes trusts, albeit in an entirely fictional, yet enlightening, conversation. See: Sheridan, LA. *Power to Appoint for a non-charitable purpose: A Duologue or Endacott's Ghost* [1963-64] 13 DePaul L.Rev. 210.

⁶⁸ Neuberger, J in *Re ARMS (Multiple Sclerosis Research) Ltd* [1997] 1 W.L.R. 877 (See below). Neuberger, J noted: "...while I have sympathy for the proposition that the testator would not have intended the gift to the company to take effect had he known that the company was in insolvent liquidation at the date of his death." (p.883(C)).

⁶⁹ Millett, J (as he then was) was quoted in the liquidator's affidavit in *Re ARMS (Multiple Sclerosis Research) Ltd* [1997] 1 W.L.R. 877 (at 870(B)) as indicating, "that he was not happy with the possibility that future funds given with the intention of being used for charitable purposes might not be so used but might be used to pay creditors."

⁷⁰ See for example: *Philpott v. Saint George's Hospital* (1859) 27 Beav 107; *Re Weir Hospital* [1910] 2 Ch 124; *Attorney General v. Sherbourne Grammar School* (1854) 18 Beav 256; *Re Wilson* [1913] 1 Ch 314. On *cy-près* and these authorities see further: Picton, J. *Charitable Intention in the Cy-Pres Doctrine and Related Trust Principles*. University of Liverpool Ph.D. thesis (unpublished), Liverpool, 2013.

deployed in an insolvent environment, as defined and argued in this chapter, is to also further donor intention and charitable purposes.

Here two leading cases are used to bring out the conceptual complexity; *Liverpool and District Hospital for Diseases of the Heart v. Attorney-General*⁷¹ and *Re Wedgwood Museum Trust Ltd (in administration)*⁷² highlight the tensions at play between creditors and charitable purposes.⁷³ The cases also demonstrate, particularly the *Re Wedgwood Museum Trust Ltd* case, why it is important to rescue a charity for communitarian objectives. As we will see creditors were actually the main beneficiaries in the case, but the charity was able to continue due to Government intervention. If charity insolvency law is used to permit adapted *cy-près* and a rescue through administration, then insolvency law itself will achieve this positive and beneficial outcome, namely, the survival of an internationally important porcelain collection and pottery museum.

Cy-près is the tool that can be used to ensure that charity is still facilitated despite some interruption to the legal form that is administering that charity. *Cy-près* is an incredibly powerful equitable doctrine that allows the court to alter the objects of a charity.⁷⁴ Traditionally, *cy-près* has only applied to charitable trusts. More recently the doctrine has been extended to companies,⁷⁵ perhaps as part of a general move away from confines such as impossibility and impracticality.⁷⁶ Furthermore, in this chapter we are discussing the spirit of the *cy-près* doctrine as well as its minutiae. Administrative schemes are also of note,⁷⁷ but we are dealing with entities that have gone into an insolvency procedure and which may not survive, particularly if there is no viability. This makes the application of an administrative scheme difficult, whereas *cy-près* can look to new entities as part of any rescue attempt. The concept of failure is also important to *cy-près* as without it the doctrine cannot be applied. If the charity

⁷¹ [1981] Ch. 193.

⁷² [2011] EWHC 3782 (Ch); [2013] B.C.C. 281 (Ch D (Birmingham)).

⁷³ For further cases see *Tribe Charity Insolvency*.

⁷⁴ See: Garton, J. *Justifying the cy-près doctrine* (2007) *Tru. L.I.* 2007, 21(3), 134-149.

⁷⁵ For a recent example see: *Phillips v. The Royal Society for the Protection of Birds* [2012] EWHC 618 (Ch.).

⁷⁶ See *Pearce & Barr*, p.424, citing *Re Weir Hospital* [1910] 2 Ch.124, and, *Report of the Committee on the Law and Practice relating to Charitable Trusts* (1952) (Cmd 8710), para.365. (The Nathan Committee).

⁷⁷ *ibid*, p.426.

is able to continue in some way there is no failure and *cy-près* cannot be applied. Technical insolvency and subsequent passage into an insolvency procedure is being taken as evidence of failure in this chapter.

Liverpool and District Hospital for Diseases of the Heart

*Liverpool and District Hospital for Diseases of the Heart v. Attorney-General*⁷⁸ concerned a heart disease research and treatment charity that was run through a company limited by guarantee, the Liverpool and District Hospital for Diseases of the Heart (LDHDH), which was in liquidation. LDHDH's main activity had been transferred to a local National Health Service hospital in 1948 as a result of the National Health Service Act 1946. The architect of these reforms, Nye Bevan, echoed the 19th century dissatisfaction with charity and philanthropy,⁷⁹ as opposed to State provision, when in 1946 he claimed that it was “repugnant in a civilized community for hospitals to have to rely upon private charity.”⁸⁰ He continued, “I have always felt a shudder of repulsion when I see nurses and sisters who ought to be at their work ... going about the streets collecting money for the hospitals”⁸¹

The hospital became vested in the Minister of Health in July 1948. The charity's research into causes and cure of heart disease and other ailments continued for a short time under the auspices of the Institute of Research for the Prevention of Disease. This ceased in or around December 1968. These “research assets” did not vest in the Minister. In 1978 the Attorney-General brought a successful winding up petition to wind the company up.⁸² There was a surplus of £14,727 in 1979, approximately £70,820.00 in 2019 prices.

Slade, J had to consider was whether the assets of the company should be used: (1) in satisfaction of the company's members, or (2) whether any surplus should be

⁷⁸ [1981] Ch. 193. See: Dawson, I & Alder, J. *The nature of the proprietary interest of a charitable company or a community interest company in its property* (2007) Tru. L.I., 21(1), 3-16.

⁷⁹ On which see further *Tribe Charity Insolvency*.

⁸⁰ *Finlayson*, 1994, p.272.

⁸¹ *ibid.*

⁸² Pursuant to s.30(1) Charities Act 1960 (as it then was).

distributed to an institution or institutions having similar objects to those of the charity, i.e. the value should be distributed *cy-près*? This second destination for the funds adhered to a clause in the company's memorandum of association.

Slade, J held that the company was both the legal and beneficial owner of the assets.⁸³ Whilst operating as a charity, the company was nevertheless not a trustee over the fund. Therefore on winding up the assets were to be distributed to the company's members pursuant to the relevant statutory provisions.⁸⁴ Clause 9 of the company's constitution became operative. As the company held the assets for strictly charitable purposes pursuant to its constitution a scheme would be directed on the premise that the property and funds of the company were applied *cy-près*. The judge observed: "In my judgment, the court, in exercise of its jurisdiction over charities, can and should give effect to this provision [clause 9] by directing a *cy-près* scheme."⁸⁵ The case has been cited as authority for the proposition that the "court has *cy-près* jurisdiction on winding up."⁸⁶

Counsel for the Attorney-General acting on behalf of charity and charitable purpose facilitation argued for Clause 9 of the company's constitution to be operative and for the money to be applied *cy-près* on the winding up of the company. This was because the members of the charity had no interest in its assets. He was successful in part but not on the company occupying the position of trustee argument. As part of his argument he noted that:

*"The Companies Act 1948 does not provide a complete code regulating the affairs and assets of a charitable company on its liquidation. It is necessary to examine the provisions in the memorandum and the chapters and to the general principles of law concerning charitable trusts and their administration by the court."*⁸⁷

Slade, J's judgment is a progressive move forwards towards communitarian approaches to charity insolvency. In permitting the use of *cy-près* in an insolvent environment, albeit in a liquidation, Slade, J facilitated the continued use of the

⁸³ Following: *Bowman v. Secular Society Ltd* [1917] AC 406.

⁸⁴ In this instance s.265 Companies Act 1948.

⁸⁵ [1981] Ch. 193, *per* Slade, J at p.215(F).

⁸⁶ See: Martin, JE. *Hanbury & Martin Modern Equity*. 15th Ed. Sweet & Maxwell Ltd, London, 1997, p. 433, citing Companies Act 1985, s.558 (a provision which has now been superseded).

⁸⁷ [1981] Ch. 193, p.196(H).

remaining asset value in the company for charitable purposes. Indeed, the drafters of Clause 9 brought this about through their design of the clause. Slade, J then enabled their intentions to be realised. If this approach is scaled up and refined for use in the context of a rescue culture led by administration then communitarian objectives can be achieved and charitable purposes satisfied despite insolvency. This approach is desirable as it ensures the widest number of stakeholders benefit following a charity insolvency. Here we are eschewing the narrow law and economics approach to bankruptcy law of Jackson and Baird as discussed above. Instead we are adhering to Gross communitarianism in bankruptcy law with its wider stakeholder benefiting attributes. In the context of insolvent charities the charitable purposes are the principal beneficiaries of this approach.

We have come a long way since 1980 and not necessarily for the better. It could be argued that the scales of insolvent charity regulation have rebalanced in another direction to such an extent that there is now a confusing morass of provisions that apply to an ever increasing array of legal forms. This makes the job of the trustee much more complicated than it need be. The multiplicity of insolvency provisions that relate to insolvent charities depending on the legal form that has been used to transact the charitable activity adds to the burden. It is especially intolerable when considering the overarching point of charities and why the State treats them so specially in all these other regards, that the form that is chosen at the moment of creation (possibly with little thought or knowledge of the complexities) leads to such different insolvency outcomes. Some streamlining is in order. One reform suggestion is that one specific procedure be applied to all insolvent charities, irrespective of legal form. In this sense we would ape the generally applicability of American bankruptcy procedures, such as Chapter 11, as greatly simplify the insolvent charity landscape. The superior moral priority of the charitable purpose makes for a strong moral argument that there should be one approach for all insolvent charities, and it should be adapted *cy-près*.

Re Wedgwood Musuem Trust Ltd

*Re Wedgwood Museum Trust Ltd (in administration)*⁸⁸ concerned the 2009 insolvency of the Wedgwood Group of companies. The group included a trading company (Josiah Wedgwood and Sons Ltd) and a museum company (the Wedgwood Museum Trust Ltd).⁸⁹ His Honour Judge Purle QC had to consider whether the museum company held property on charitable trust, or if in the alternative, if the company held the gifted property for the benefit of the costs, charges and expenses of the administration and the liabilities of the museum company to its creditors. £134.7 million pension deficit liabilities rested on this question because of s.75 Pension Act 1995, which makes the surviving group company liable.

The museum company was incorporated in 1962. The collection was gifted to the museum company in 1964. The motivation for this transfer from a trading company within the Wedgwood group was to protect the collection from adverse trading activities. Presumably this would include ultimately exposure to creditors, particularly those of the trading company, but also creditors more generally, including those of the museum company. In devising this corporate structure there would be a permanent inalienable collection. As HHJ Purle QC noted the collection, valued between £11.5 and £18 million, “is a unique collection of pottery and other artefacts and items of historical importance built up over many decades...”⁹⁰

The 1964 deed poll activating the gift did not mention a charitable trust. The museum company was identified as the beneficiary. As noted above insolvency occurred in 2009 and the museum company was placed into administration.

The Attorney-General argued that the museum company held the 1964 gift on charitable trust for charitable purposes. The pension fund trustee argued that the company owned the collection in law and had done since the 1964 transfer. Accordingly, the collection was available for the company’s creditors pursuant to the Insolvency legislation.

⁸⁸ *Re Wedgwood Museum Trust Ltd (In Administration)* [2011] EWHC 3782 (Ch); [2013] B.C.C. 281 (Ch D (Birmingham)). See: Farlow-King, C. *Going to pot?* (2015) T.E.L. & T.J, 172(Dec), 12-15.

⁸⁹ The Wedgwood family were not strangers to insolvency. See: Tribe, J & Graham, D. *Bankruptcy in Crisis - a Regency Saga: Part 4 - Basil Montagu (1770-1851)* (2009) *Insol.Intel*, 22(9), pp. 132-140.

⁹⁰ [2011] EWHC 3782 (Ch); [2013] B.C.C. 281 (Ch D (Birmingham)), *per* HHJ Purle QC, paras.2&7.

HHJ Purle QC held that the assets were those of the museum company and that they were not held on charitable trust. The assets were therefore available for the company's creditors, including the pension fund, across the whole of the Wedgwood group of companies. This meant that the museum collection could potentially be broken up and sold in order to satisfy the pension deficit. HHJ Purle QC reflected on this when he observed:

“This is a sad conclusion for those who are concerned to preserve a collection which is...part of our cultural heritage and of immense importance, but it is the combined result of the pension protection and insolvency legislation”⁹¹

However, there is a counter balancing argument and one to which HHJ Purle QC paid heed. He observed, “It is at least a legitimate view that the tragedy that befalls working people when their pensions are affected by insolvency is at least as great as the tragedy that has befallen, or may now befall, the collection in this case.”⁹² It is the Wedgwood collection, and the benefits it brings for arts, scholarship and wider stakeholders, that is the loser. In communitarianism terms the outcome of the decision of HHJ Purle QC is problematic with its strict adherence to insolvency distribution techniques. Creditors benefit, including pension fund employees, but wider stakeholders and indeed the continued existence of the museum as a centre of international importance for Wedgwood pottery suffers dramatically. A communitarian insolvency law seeking to rescue the charitable entity through administration would have engaged prior to the pension deficit issues and would have sought to restructure the group of companies so that the Wedgwood collection was not placed in danger.

Adapted Cy-Pres

Specific insolvency procedures have qualities that lend themselves to different outcomes. As noted above, it is a communitarian axiom in English and Welsh corporate insolvency law that rescue is the mantra that should be applied to troubled companies. As the above treatment has highlighted there is no reason why this should

⁹¹ See: *Re Wedgwood Museum Trust Ltd (In Administration)* [2011] EWHC 3782 (Ch); [2013] B.C.C. 281 (Ch D (Birmingham)), per HHJ Purle QC, para.56.

⁹² *ibid.*

not be equally true of charitable companies where administration is a relevant procedure, i.e. there is viability.

Within the context of insolvent charities there are two major ways forward in terms of reform that will potentially benefit the overall coherence of insolvency law policy delivery. First, we could maintain the *status quo* and trust the professionalism of Insolvency Practitioners and their professional advisors to handle insolvent charities with the appropriate devices. This is the least favoured option. This approach has not worked well to date in the context of insolvent charities. Few have been rescued. If we do have to focus on the substance of current tools and techniques we may learn from Martin's expansive view of *cy-près*, where she noted, "A testator should always be careful to identify his beneficiary correctly. It is difficult to see why this should automatically negative a general charitable intention."⁹³ It is this facilitative view which could enable the funds of an insolvent charity to be applied to general charitable purposes instead of creditor claims. This approach is exemplified by *Re Finger's Will Trusts* where a gift failed, "but was saved from lapse by the finding of a general charitable intention, and was accordingly applied *cy-près*."⁹⁴

Alternatively, and as a second and preferred approach, we should instead undertake a root and branch reform at the same time as a much wider policy reform is undertaken. It is this second route that is being advocated in this chapter. Adapted *cy-près* within the context of a rescue culture based on the administration procedure is the vehicle to achieve communitarianism objectives.

It is well known that corporate insolvency law treats trusts as separate and distinct from the general body of assets.⁹⁵ Whether this be, for example, a purpose trust⁹⁶ or a resulting trust.⁹⁷ Why then are charitable trusts treated differently and subsumed into the assets of the company? The short answer is that the assets are not held on trust

⁹³ Martin, JE. *Hanbury & Martin Modern Equity*. 15th Ed. Sweet & Maxwell Ltd, London, 1997, p. 435.

⁹⁴ *ibid*, p.434.

⁹⁵ See further: *Van-Zwieten*, para.6-41.

⁹⁶ *Barclays Bank Ltd v. Quistclose Investments Ltd* [1968] UKHL 4, [1970] AC 567. See further, Swadling, W (Ed). *The Quistclose Trust: Critical Essays*. Hart, Oxford, 2004. See also: Goodhart, W & Jones, G. *The Infiltration of Equitable Doctrine into English Commercial Law* (1980) MLR, Vol. 43, No. 5, pp. 489-513.

⁹⁷ See: *Prest v. Petrodel Resources Ltd* [2013] 2 AC 415. See further: Tribe, J. *Who would be a creditor? - Prest in the UK Supreme Court and the effect of trusts on insolvency* (2013) CR& I, pp. 91-94.

per se by the company even though they are held for a charitable purpose. The assets form part of the company's estate pursuant to s.436 Insolvency Act 1986.⁹⁸ However, it is submitted that charitable asset value, whether held on trust by the company or not, should be treated as if it were held on trust, thus helping the general push towards continued charitable activity advocated in this chapter. If the property is held in this way then it is available for charitable use.

If adapted *cy-près* is used to facilitate the continued existence of the charitable purposes through administration, as opposed to asset value distribution to creditors via liquidation, then the *cy-près* criteria contained in s.67 of the Charities Act 2011 may in themselves come to be viewed as communitarian in nature, or at least facilitative of communitarianism objectives. The "matters" which the court or Charity Commission are to consider when formulating a *cy-près* scheme are:

*"(a) the spirit of the original gift, (b) the desirability of securing that the property is applied for charitable purposes which are close to the original purposes, and, (c) the need for the relevant charity to have purposes which are suitable and effective in the light of current social and economic circumstances."*⁹⁹

It is the last of these "matters" that is closest to communitarian objectives, particularly "current social...circumstances".¹⁰⁰ These could include benefiting the multiplicity of stakeholders that have been identified in this chapter. In any future reform these social circumstances could be clearly enunciated and include the continued existence of charitable purposes through an insolvency and administration to benefit wider stakeholders. The second s.67(3) Charities Act 2011 "matter" contained in subsection (b) and in particular the section of the clause that reads, "securing that the property is applied for charitable purposes"¹⁰¹ is the essence of what adapted *cy-près* is attempting to achieve in an insolvent environment. Using adapted *cy-près* in an insolvent environment would ensure that the donors' intentions are carried out and that charitable activity is not hampered by the insolvency of the corporate form that is being used to administer the charitable purposes. This charitable purpose rescue can

⁹⁸ Which states: "'property' includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property."

⁹⁹ s.67(3) Charities Act 2011.

¹⁰⁰ s.67(3)(c) Charities Act 2011.

¹⁰¹ s.67(3)(b) Charities Act 2011.

obviously only occur when there is substantial asset value remaining pursuant to the statutory insolvency tests.¹⁰²

Conclusion

The philanthropists of the 19th century recognised a pressing human need that required sating. By facilitating the continued activity of charitable companies we will continue with the long philanthropic and charitable tradition of “improving society and the quality of life for all.”¹⁰³

In setting out the framework for insolvent charities this chapter has shown that nearly the entire corpus of insolvency mechanisms are available to deal with insolvent charities. In part this is good as it allows the deployment of rescue mechanisms and clearly structured liquidation provisions. But this choice perhaps says more about the current state of English and Welsh insolvency law.

If the now insolvent charity had been formed as a trust, as opposed to a company, the general charitable purpose would continue as the money wouldn't be available for the general body of creditors.

From the communitarian perspective advanced in this chapter the anomalous position between a not-for profit entity and a for profit entity should no longer be countenanced. The corporate form should either be withdrawn from use for charities or there should be a specific condition within the memorandum of association which stipulates that on the advent of insolvency the money will be held for the benefit of the general charitable purpose. Creditors have constructive notice of this document, and as with objects clauses creditors can take measures to protect themselves when dealing with this species of company. The *quid pro quo* could be an elevation of the standard expected of directors in charitable company is to reflect the large amount of asset value that will never be available for creditors. It is irretrievably bound to the general charitable

¹⁰² Contained in s.123 Insolvency Act 1986.

¹⁰³ *Rimel Evolving*, p.588.

purpose. Failure to adhere to higher duties could result in greater contributions from unfit charitable company directors.

In the light of the communitarian approach and rescue culture lens applied in this chapter, it has been argued that is not satisfactory that insolvent charities are treated differently based upon their form. This may be tolerable for for-profit companies, but it is not for charities because of the superior moral priority of the charitable purpose. The issue has become especially acute as it has become more common for charities to take a form that does not offer the protection of rescue culture administration to charitable assets.

This chapter has argued for a single treatment for all insolvent charities that use the corporate form as their organisational and structural base. That treatment should be a communitarian based approach that seeks to satisfy multiple stakeholders and which seeks to facilitate the continued existence of the charitable purpose that the insolvent charity was created to pursue. Adapted *cy-près* and the full use of administration as a rescue device are the key tools to achieve this objective. This application of communitarian principles is superior to narrow liquidation approaches to insolvent charities and offers a number of distinct policy advantages not least the continuation of charitable purposes for the benefit of numerous stakeholders and society more generally.