

Editorial

15 Years of the Enterprise Act 2002 Insolvency Reforms: Reflection and thoughts on future reform

Autumn 2018 marked fifteen years since the Enterprise Act 2002 introduced significant and far-reaching reforms to the insolvency framework in the UK. From the introduction of a new streamlined administration process and the decline of administrative receivership, to the creation of the prescribed part for unsecured creditors and the abolition of the Crown preference, the Act sought to promote enterprise and a second chance for business.

There has been significant change over those fifteen years, not least the collapse of Lehman Brothers five years to the day after the major corporate insolvency reforms of the Enterprise Act 2002 were introduced, the subsequent Global Financial Crisis and more recently the economic and political impact of the 2016 referendum on the UK's membership of the European Union.

Much has changed in the operation of the insolvency framework in this period, including the introduction of out-of-court appointments of administrators leading to the emergence of pre-pack administrations, the growth of bankruptcy tourism, the operation of the prescribed part, changes in how insolvency litigation is funded, an expansion of the directors' disqualification regime and more recently the widespread media attention being given to the use of Company Voluntary Arrangements in the retail sector. Whilst there have been numerous consultations and some reforms since, the current framework is very much shaped by the Enterprise Act 2002 reforms.

To mark this milestone, and to reflect on the impact of the Enterprise Act 2002 insolvency reforms, Aston University and the University of Wolverhampton hosted a conference at Aston University in Birmingham city centre on 15th November 2018. The title of the Conference was "15 Years of the Enterprise Act 2002 Insolvency Reforms: Reflection and thoughts on future reform". Its timing proved apt, with the Government publishing proposals for the most far-reaching reforms to corporate insolvency proceedings since 2003 over the August 2018 Bank Holiday weekend¹ and the Chancellor of the Exchequer announcing in the October 2018 Budget that elements of the Crown Preference would be reintroduced from April 2020.²

The Conference featured papers from esteemed academics, practitioners, early career researchers and doctoral research students, and was well attended by a diverse audience including two former presidents of R3, a member of the Pre-Pack Pool, representatives from the Insolvency Service, judiciary and the Law Commission. In addition to bringing together academia and practitioners, the Conference was also intended to provide a platform for PhD students and early career researchers to present their research and develop their networks.

Eleven papers were presented across four sessions on a variety of themes, including corporate and personal insolvency, with an international perspective on each provided by visiting academics from Australia. We are delighted to present a number of the papers delivered at the Conference across

¹ 'Consultation on Insolvency and Corporate Governance: Government Response' (DBEIS, August 2018) available at <https://www.gov.uk/government/consultations/insolvency-and-corporate-governance>.

² See 'Budget 2018: Protecting your taxes in insolvency' (HMRC, October 2018) available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752136/insolvency_web.pdf. The Government has subsequently opened a consultation on the implementation of this reform, available at <https://www.gov.uk/government/consultations/protecting-your-taxes-in-insolvency>.

the next two issues of *Insolvency Intelligence* and would like to offer our thanks to the editorial board for its support.

A number of papers addressed the impact of current and ongoing reform proposals. In his paper 'Parable of the Prescribed Part: Much ado about nothing?', Dr Kayode Akintola from Lancaster University, reviewed the sustainability of the prescribed part fund, introduced by s.176A Insolvency Act 1986, as a realisation tonic for unsecured creditors in contemporary insolvency proceedings. The paper, which features in this issue and extends upon the author's previous work,³ was very timely in light of both the recent proposals to increase the upper limit of the prescribed part and the reintroduction of the Crown Preference from April 2020. Of equal currency, Dr Bolanle Adebola, from Reading University, proposed 'Re-examining the Role of the Pre-Pack Pool' in light of the May 2020 deadline for Government to consider action on sales in administration to connected parties,⁴ which formed part of the reforms introduced following the 2015 'Graham Review into Pre-Pack Administration.' Dr Adebola's paper, which also features in this issue, furthers the debate on the role of the Pre-Pack Pool and the suggestion of making referrals to it mandatory, a subject with which readers will be familiar.⁵ The conference closed with a practitioner's perspective on the latest reform proposals set out by the Government in its response to the Consultation on Insolvency and Corporate Governance in August 2018. In his paper, which will feature in the next issue, Marc Brown of St Philips Chambers examined the proposed reforms, including the introduction of a pre-insolvency moratorium and a new restructuring tool, with a view to assessing the extent to which these represent an extension and evolution of the reforms introduced by the Enterprise Act 2002.

The Conference also considered areas not currently subject to scrutiny but which warrant further attention, and possibly require reform. Professor Andrew Keay from the University of Leeds considered the role of s.172(3) of the Companies Act 2006 in corporate restructurings in his paper 'Financially Distressed Companies, Restructuring and Creditors' Interests: What is a Director to Do?' The paper examined two key questions: first, whether concerns about breaching the statutory provision lead directors to be risk averse when attempting a restructuring are realistic; and secondly, if they are, what should directors be doing to ensure they do not breach the obligation. This issue is of particular relevance in light of the recent Court of Appeal decision in *BTI 2014 LLC v Sequana S.A.* [2019] EWCA Civ 112. Creditors' interests were also the focus of Dennis Cardinaels, a PhD student at the University of Leeds, who presented on the 'Differentiation Between Groups of Unsecured Creditors: A Solution to Reduce Vulnerability?'. This paper, which will feature in the next issue of *Insolvency Intelligence*, suggested that different groups within the class of unsecured creditors ought to be recognised, to ensure fairer treatment of creditors.

In addition to contemplating further reform of the insolvency framework, the Conference considered the nature of the current system and how it was formed. Proceedings were opened by Dr John Tribe from Liverpool University, with his paper 'I have a cunning (insolvency policy) plan! Scuppering Insolvency Baldricks During the Legislative Process.' The paper, which features in this issue, considered the extent to which the intended reforms in both the Insolvency Act 1986 and Enterprise Act 2002 were shaped by Parliamentary interference, and the extent to which this resulted in the creation of a system different from that envisaged, first by the Cork Committee and later by the White Paper, 'Insolvency – A Second Chance.' The Conference also featured a theoretical

³ K. Akintola 'The prescribed part for unsecured creditors: a pithy review' *Insolv. Int.* 2017, 30(4), 55-58

⁴ Insolvency Act 1986, Schedule B1 para 60A

⁵ See for example T. Astle 'Pack up your troubles: addressing the negative image of pre-packs' *Insolv. Int.* 2015, 28(5), 72-74; C. Umfreville 'Review of the pre-pack industry measures: reconsidering the connected party sale before the sun sets' *Insolv. Int.* 2018, 31(2), 58-63

analysis of the impacts of the Enterprise Act 2002 reforms on the current insolvency infrastructure. In his paper 'What Kind of World Are We Living In? Creditor Wealth Maximisation, Contractarianism or Multiple Values in the Post-Enterprise Act 2002 Insolvency Regime?', Matthew Stubbins from Canterbury Christ Church University sought to establish which theoretical insolvency model, if any, is best embodied in the present system. This paper completes those presented in this issue.

Whilst the Enterprise Act 2002 reforms were significant and underpin the current insolvency framework, there have been a number of subsequent reforms in both corporate and personal insolvency. These have been introduced by statute, such as the Deregulation Act 2015 reforms to the appointment of administrators, and have also developed organically, such as the rise to prominence of the pre-pack administration following the introduction of out-of-court appointments and their acceptance by the courts.⁶ The developments in corporate insolvency were considered from a practitioner's perspective by Andrew Tate, insolvency practitioner, partner at Kreston Reeves LLP and former President of R3, in his paper 'In Practice – Have the Changes Over The Last Fifteen Years Benefited The Insolvency and Restructuring World?'. In particular, the paper considered whether the incremental developments of insolvency in the UK have provided practitioners with more tools at their disposal, or whether the UK now has a mixed and ineffective system in need of wholesale review. Professor David Milman from Lancaster University considered the developments in personal insolvency in his paper 'The Changing Face of the Formal Institutional Structures for the Resolution of Personal Insolvency in English Law'. The paper considered the decline in the dominance of bankruptcy, following the introduction of the Debt Relief Order and reforms to the Individual Voluntary Arrangement. Through subsequent legislative reform, professional developments and policy initiatives, Professor Milman concluded that the Enterprise Act 2002 did not represent a major reform in personal insolvency, but rather was part of a continuum of liberation related to bankruptcy.

Finally, the Conference also reviewed the importance of enterprise to, and the influence of the Enterprise Act 2002 insolvency reforms on, international developments, with two papers considering recent developments in corporate and personal insolvency in Australia. Associate Professor David Brown of Adelaide University, completing a visiting scholarship at Aston University, presented a paper on 'Australia's Corporate Rescue Laws: Boldly Going Aboard the Enterprise Mission?'. In his paper, which features in the next issue, Associate Professor Brown examined the Australian position on corporate rescue procedures, in particular voluntary administration, and the link to enterprise. Specific focus was paid to recent reforms aimed at increasing entrepreneurship and reducing the stigma of failure. These reforms include the restriction of *ipso facto* clauses and a 'safe harbour' carve-out for directors from personal liability for insolvent trading (the Australian equivalent to the UK's wrongful trading). Nicola Howell from Queensland University of Technology considered proposed reforms to personal insolvency in her paper 'Reducing the Duration of Bankruptcy: Arguing for Consumer Bankruptcy Reform Through An Innovation and Entrepreneurship Lens.' The paper, which also features in the next issue, examined the effect the Enterprise Act 2002 had on bankruptcy in the UK, followed by an analysis of its influence on personal bankruptcy reform in Australia. The approaches in the two countries were compared, with consideration of the effects on encouraging entrepreneurship and innovation, whilst identifying that focusing through an entrepreneurial lens does not do justice to the complexity of personal insolvency.

The Conference proceedings identified and addressed a number of important issues, both in respect of the existing insolvency framework and also the current and pressing reform proposals. The papers

⁶ See Insolvency Act 1986, Schedule B1 paras 14 and 22; *DKLL Solicitors v HMRC* [2007] B.C.C. 908

provided significant food for thought on a broad array of themes, with thoughtful questioning and debate from an engaged audience. The underlying message from the conference was that, rather than continuing to tinker around the edges of the insolvency framework to bring about improvement, it may be time for a fundamental root and branch review of the legislative framework and its operation, with a view to establishing a modern system fit for purpose in the much-changing and constantly evolving modern global economy.

The current system represents a melange of reforms introduced to the underlying structure to address contemporaneous issues, resulting in a framework which is seeking to achieve outcomes which are removed from those originally intended. The present administration process is a case in point. Proposed by the Cork Committee as a court-led process to provide an analogous procedure to administrative receivership to allow for a rescue of the insolvent company's viable business where there was no floating charge holder to effect an appointment,⁷ administration has morphed through the legislative process and subsequent reform to become an out-of-court procedure whose primary purpose is ostensibly to rescue the company, rather than the business, as a going concern.⁸ This is a prime example of a particular English tendency noted by Manson in the nineteenth century, that:

“The English mind, by a complex paradox, is constitutionally distrustful of change while full of reforming energy. The result is a superabundance of legislation, but of a tentative and temporising kind, unscientific, crude, confused; the despair of judges and all who value law as a science.”⁹

Nearly forty years on from the publication of the Report of the Cork Committee, and subsequent decades of tinkering to sate this reforming energy (arguably without bringing about the necessary change), perhaps it is time for a modern day equivalent to lay the groundwork for an insolvency framework more suited to the 21st century. That, though, is for another day. For now we hope that you enjoy the papers in this and the next issue.

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⁷ *Report of the Review Committee on Insolvency Law and Practice* (1982) Cmnd 8558, paras 495-497. See also Cork, K. *Cork on Cork* (Macmillan, London 1988) p.203

⁸ Insolvency Act 1986, Schedule B1 para 3(1)(a)

⁹ Manson, E 'Tinkering Company Law' (1890) 24 LQR 428-435, p.428.