Insolvency Law Conference Report: 15 Years of the Enterprise Act 2002 Insolvency Reforms: Reflection and thoughts on future reform. (15 November 2018)

Pride Chanakira *

The conference aimed at reflecting on the changes introduced by the Enterprise Act 2002, and to propose desirable reforms for future consideration, was hosted by Aston University on 15 November 2018. The University of Wolverhampton Law School collaborated with the hosts in the organisation, preparation and indeed the successful delivery of the conference. Chris Umfreville, formerly with the University of Wolverhampton Law School, opened the conference by welcoming all the 11 distinguished speakers and 41 delegates representing various organisations comprised of representatives from the judiciary, the Law Commission, the Insolvency Service (IS), the International Association of Restructuring, Insolvency & Bankruptcy Professionals (INSOL), legal and consultancy firms, two former presidents of the Association of Business Recovery Professionals (R3), 20 academic institutions (including Adelaide Law School and Queensland University of Technology from Australia), a member of the Pre- Pack Pool, and insolvency practitioners, before inviting the Deputy Dean of Aston Business School Professor Caroline Elliot to deliver her opening remarks.

The Deputy Dean expressed how the introduction of the Enterprise Act 2002 had generally lifted hopes on the prospects of businesses around the UK. The 2002 changes were designed to encourage innovation and entrepreneurship and so that effectively offered businesses a second chance. Although the amendments also had an impact on personal insolvency, much of the reform was focused on corporate insolvency. The significant change to corporate insolvency was the way in which an administrator can be appointed when a company becomes, or is likely to become, insolvent. However I should concede that, even as a novice to the world of insolvency, I was somehow confident that some of the reflection would inevitably conclude flaws with the amendments. On the one hand I was curious and eager to hear all the thoughts, while on the other a little apprehensive, as it was my first conference experience, but the wonderful and collegiate atmosphere rescued the situation. Nevertheless, in view of the Government proposals published in 2018[1] after the Insolvency and Corporate Governance consultation in 2016,[2] the conference could not have been timed more conveniently.

* Doctoral Researcher at the University of Wolverhampton, ORCID ID: 0000-0001-6634-8446.
[1] See https://www.gov.uk/government/consultations/insolvency-and-corporate-governance last accessed 02/05/2019.
[2] Ibid.

On a personal level, the conference was precisely what any doctor of philosophy would have prescribed as a remedy for my own research melancholy. In the following passages the report focuses on the reflections on amendments first and then concludes by summarising the thoughts on future improvements.

In the opening session, chaired by Professor Peter Walton, Dr John Tribe, based at Liverpool University, reflected on how there had been a 'transmutation' of the administration process during passage of the Enterprise Bill in Parliament. Similarly, the Chairman of the Cork Committee[3] (the late Sir Kenneth Cork) also made reference to how carefully considered insolvency policy back in 1986 was undermined by legislative meddling. Drawing on the legislative courses of wrongful trading provisions (contained in section 214 of Insolvency Act 1986) and the Company Directors' Disqualification Act back in 1986, Dr Tribe used political science empirical work to demonstrate how intended insolvency policy was subverted through the legislative process by various vested interests with the consequence of watering down the provisions. The appropriateness of the prescribed part fund was reviewed by Dr Kayode Akintola, from Lancaster University, in terms of its volume, disapplication by office-holders, and the profile of unsecured creditors who benefit from the fund. It was observed that the fund is small and not frequently used although it offers the only source of reimbursement for unsecured creditor claimants. On the same token of unsecured creditors, Dennis Cardinaels, a PhD student from the University of Leeds, submitted that the changes under the Enterprise Act 2002 were focused on the group as a whole and so had categorically failed to acknowledge the existence of different factions of unsecured creditors from the onset.

During the second session, chaired by Dr Lézelle Jacobs, it was observed that business restructuring out of court has increased since the advent of the Enterprise Act 2002. Professor Andrew Keay, from the University of Leeds, noted that although the amendments were promoting out of court restructuring, the judiciary's approach in cases of alleged breach of duty by directors under s. 172(3) of the Companies Act 2006, who attempt restructuring, for failing to take into consideration the interests of the company's creditors is discouraging. The logical extension of the position is that companies with some prospect of continuing to trade end up being unnecessarily placed into administration or liquidation for the simple fact that directors would rather not take the risk of being held liable for breach of duty if they attempt 'rescue'. Paradoxically, the law is not clear on how directors should act. Allied to out of court restructuring is the phenomenon of "pre-packs" whereby a deal to sell the business is agreed prior to the company entering administration. Following a review of the controversial practice in 2014 the pre-pack pool was introduced to improve transparency especially where people connected to the distressed company propose to purchase its business.[4] Objectively, Dr Bolanle Adebola, from Reading University, questioned the role and effectiveness of the pool considering that applying to the pool is a voluntary act in the first place.

From an insolvency practitioner's perspective the changes in the last 15 years have, arguably, been restrained by the UK's lending structure to some extent. At times the incremental developments have made the system more complex because one size does not certainly fit all and the move away from creditors' meetings in practice was considered a backward step by Andrew Tate, a former president of R3 and partner at Kreston Reeves LLP: virtual meetings do not compare to real human interaction and not everyone is technology

[3] The Cork Committee, *Insolvency Law and Practice: Report of the Review Committee*, Cmnd 8558 (1982).
[4] See Graham review into Pre-pack Administration available at: https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration last accessed 02/05/2019.

savvy. After lunch, Professor David Milman, from Lancaster University, viewed the amendments on personal insolvency as insignificant. The only noteworthy change was the introduction of a shorter period of bankruptcy (12 months). Nicola Howell, from Queensland University of Technology, reflected on how the reduction of the period of bankruptcy had influenced a bill intended to similarly reduce bankruptcy to 12 months in Australia despite the fact that most bankruptcies "Down Under" are not business-related.

As far as theory is concerned, Matthew Stubbins, from Canterbury Christ Church University, argued that under the 2002 insolvency reforms, we are living in the days of creditor wealth maximisation, albeit, all the three dominant theories (Creditors' Bargain theory, Communitarian approach and Multiple Values approach) are part and parcel of the current insolvency policy. The 2002 amendments significantly restricted administrative receivership and, instead, promoted administration which is meant to be a collective process (no piece-meal break-up of assets). Perhaps it is not surprising that recently in Australia the Government has embarked on insolvency reform under the banner of Enterprise and Innovation (in other words moving away from the concept of 'rescue' to restructuring) taking into account the fact that our existing administration process was remodelled on the Australian corporate rescue procedure known as 'voluntary administration'. Associate Professor David Brown presented a paper which explored the link between voluntary administration and enterprise: "Australia's Corporate Rescue Laws: Boldly Going Aboard the Enterprise Mission?". Marc Brown, a barrister at St-Phillips Chambers, suggested that introducing a new moratorium process as a single 'gateway' for financially distressed businesses published in the government's response to its 2016 consultation[5] was great on paper but perhaps not so great in practice. From all the discussions on the various closely related insolvency law topics, I took away the almost pervasive development of how the administration process was being manipulated, as a result of the amendments, to initiate a 'quasi-liquidation' of the company for further research.

A consideration of the practicality of business 'rescue' manifested a recommendation of change in the terminology closely associated with the practice: less use of 'rescue' and more of business restructuring or reorganisation or renewal. There also needs to be a way of safeguarding against the subversive diversions in order to preserve carefully considered insolvency policy in the future. In regards to unsecured creditors an increase in the cap of the prescribed part fund was recommended and it was also suggested that swelling the fund would unequivocally improve the situation. The insolvency practitioners strongly advocated increasing the availability of 'rescue' finance. The overriding recommendation was that of a general review of the law of insolvency soon rather than later. It is on this basis that my research on the administration provisions, under Schedule B1 of Insolvency Act 1986, seeks to review the effectiveness of the UK's corporate 'rescue' framework.

[5] See https://www.gov.uk/government/consultations/insolvency-and-corporate-governance last accessed 02/05/2019.