Book Review: Corporate Governance and Insolvency: Accountability and Transparency- Andrew Keay, Peter Walton, and Joseph Curl QC.

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I. INTRODUCTION

In 2020 the UK went through one of its worst crises in the 21st century. It was a period when the Covid-19 pandemic ravaged the whole world with disastrous effects on nearly every part of human endeavour. Like the rest of the world, the UK struggled to find a solution to counter the harsh effects of the pandemic. The UK corporate sector was especially hard hit by the pandemic. Due to the nature of the impact, the UK government made several policies part of which was the restriction of gathering of multiple people, social distancing, and ban on office meetings among others. Companies were not an exception. Trading activities were halted, businesses of companies experienced adversity and as a result of this, companies struggled financially. Many companies became insolvent, some got liquidated while some were at the mercy of creditors. The financial impact on companies was better imagined. Based on the role companies play in the economy of the UK, the government stepped in to salvage the situation. The UK government made several legislation and policies to rescue companies generally. Directors of companies found their role and duties impacted and affected by certain legislation and innovations of the government policies. The end product of the pandemic was the introduction of the Corporate Insolvency and Governance Act 2020 (known as CIGA 2020) by the UK government. In addition to simplify and clarify government policy with respect to its effect on corporate and commercial world generally, to explain how insolvent companies will function with the new CIGA 2020, and to have an update on practice and the academic aspect of insolvency, this textbook came was written. This textbook was written by highly experienced and seasoned insolvency experts including a King's Counsel (formerly Queen's Counsel) and this adds a different dimension on the practicality of these rescue mechanisms. So the chapter/book is not a one-sided academic material but an all-round master piece which really helped me have a better understanding of restructuring plan ("RP").

As a PhD student researching in insolvency law, especially when my study falls and covers the period of Covid-19 and its aftermath, I have gained immense knowledge and the book's contribution to my research is unquantifiable. The beauty of this textbook is in its richness from the wealth of experiences gathered over the years from the field of insolvency

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law especially the changing dynamics and atmosphere of insolvency law in the UK. The book benefit from logical flow of thoughts, contents, argument and exposition of statutes and case laws.

As a PhD researcher, this review will focus on three chapters that are especially relevant to my thesis,[1] but also provide a brief overview of the book as a whole.

II. OVERVIEW OF THE BOOK

Corporate Governance and Insolvency- Accountability and Transparency by Andrew Keay, Peter Walton, Joseph Curl QC (1st edn, Edward Elgar publishing) is a potential leading textbook by three insolvency barons that concentrates on its microscope on governance of insolvent companies, companies experiencing financial difficulties or those within the twilight zone by directors and where relevant insolvency practitioners. The book concentrates on the various related legislative frameworks, their role and impact on the company, directors, creditors and even the insolvency practitioner. The textbook discusses the corresponding liabilities within the context of insolvency of the different role players. The textbook gives an outstanding analysis and explanation, among other issues, on governance of insolvent companies and how power shifts from the directors to the insolvency practitioners depending on whether it is a debtor in possession system or control under an insolvency practitioner.

This review will focus primarily the chapters relevant to my PhD thesis, however, it is important to provide a brief overview of the other chapters in order to provide some context to the focal chapters.

Chapter 2 elaborates on the meaning and features of corporate governance. The authors discuss the historical origin of corporate governance and explain the key points or features of insolvency. The authors provided several definitions of different authors on corporate governance and they also formulated their own definition.[2]

Chapter 3 introduces insolvency. The authors take time to explain and define the key words and terminologies associated with insolvency and insolvency proceedings.

Chapter 7 discusses extensively the role and work of insolvency practitioners in insolvency regimes. This relates to scenarios where the directors are not in control of the company because they were displaced by an insolvency practitioner who has taken over the management of the company (examples are administration and liquidation proceedings).

Chapter 8 deals with the control of insolvency practitioners in an insolvency regime. The insolvency practitioners' conduct, powers and decisions in office are scrutinized and analysed. They occupy a fiduciary position and as such may be liable for breach of duty by the relevant stakeholders.

[1] The title of my thesis is the Impact of Breaches of Directors' Duties on Insolvency in the UK: Nigeria Prospects and Challenges. The research probes on the activities/role of directors in the build up to insolvency and when the company is within the vicinity of insolvency within the context of a comparative analysis between UK and Nigeria.

[2] A Keay, P Walton and J Curl, *Corporate Governance and Insolvency: Accountability and Transparency* (1st edn, EE Publishers, 2022) 33.

Chapter 9 discusses the function and role of creditors' and liquidation committees. These committees are synonymous to that of a board of directors of a company, but also differ because they are made up of creditors who oversee the company. They are either referred to as the creditors' or liquidators committee.

In Chapter 10, the authors discuss the office of special managers who are, in addition to the appointment of a liquidator or administrator, appointed by the court. The chapter discussed the origin of the office, power to appoint, and their duties and functions. Special manager can be appointed when the company is in liquidation,[3] for public interest,[4]

Chapter 11 focusses on the role and functions of the Insolvency Service within the context of insolvency. The insolvency service is an arm of the Department of Business, Energy and Industrial Strategy saddled with the responsibility of formulating government's policy on insolvency and regulation of the insolvency profession.[5]

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Chapter 1

This chapter introduces the title and theme and provides an opportunity for the authors to highlight the importance, structure and role of companies in the economy of any society or nation.[6] Companies are incorporated for carrying on businesses. The chapter notes the fact that it is an indispensable attribute of companies to borrow money in order to fund and carry on their businesses. At some point, these companies experience insolvency, that is, a state when they are unable to pay their debts. The authors stress that the focus of the book is not only corporate governance in insolvency but to address questions and issues that may arise subsequently.[7] The chapter ends by mentioning the players in in the insolvency scenario.[8]

This chapter lays the foundation for the study of insolvency and it also helped me as a PhD student to have a solid understanding and background of insolvency law. It was insightful as it stated the players and characters in insolvency law. The chapter/book is very useful and highly recommended for those in other disciplines because it has the potential to educate and enlighten them on what insolvency law is all about. What happens and the dramatis personae of insolvency law.

Chapter 4

Chapter 4 examines governance where companies are insolvent but not in an insolvency regime. The authors stressed the relevance and role of company secretaries briefly when discussing situations where companies are insolvent but not in an insolvency regime. I was somewhat ignorant regarding the extent of the role of company secretaries and that company

[3] IA 1986, s 177

[4] A Keay, P Walton and J Curl (n 2) 376.

[5] A Keay, P Walton and J Curl (n 2) 384.

[6] Some important roles companies play in the life of any nation are job employments, promotion of economic growth, wealth creation and development. See Antonio Llarden, "The Role Companies have in transforming society" [2017] *Current Affairs* available at https://www.antoniollarden.es/en/articulo/the-role-companies-have-in-transforming-society/ (accessed on 16th April, 2022).

[7] A Keay, P Walton and J Curl (n 2) 3-4.

[8] The actors include directors, insolvency practitioners/office holders, creditors, insolvency service, shareholders, company officers, the community, official receivers, the courts.

secretaries could also proffer relevant advice to directors in decision making while the company is in the twilight zone.[9]

The authors spend considerable time analysing directors' considerations in the twilight zone,[10] directors' duties in the twilight zone,[11] and protection of creditors.[12] What follows is an emphasis and analysis on how directors' duties interplay with creditors' interests once a company is in the twilight zone.[13] The major argument of the authors here is to re-emphasise the UK government's position on this area of law which is the protection of creditors' interest.[14] For example, non-insolvency law experts, legal practitioners, students or any category of people with no idea or limited idea will be able to easily read, comprehend and assimilate what the book is about, and by extension, insolvency law. The expertise of the authors, the background description of the duty of directors to creditors, the case law exposition, and the content of the duty in the book really assisted me in drafting the chapter of my thesis.

The second part of the chapter, the authors discuss wrongful trading, what it means, how it applies to corporate governance with an emphasis on the defence available to directors. To assist directors from litigation, the authors discussed government's intervention during the Covid-19 pandemic to avoid unnecessary actions against directors through the introduction of the temporary CIGA 2020 measures of suspending liability for wrongful trading.[15] The authors demystify wrongful trading as a subject matter by breaking down what it entails, the components for a claim to be sustained and the defence available to such a claim. Due to the complex nature of corporate governance within wrongful trading, the authors proffer practical steps directors might take as a defence to wrongful trading such as administration, liquidation, professional advice.[16] Fraudulent trading is also examined by the authors which is also a potential liability directors might face. The authors examine the protection afforded creditors by providing some background of transactions defrauding creditors, transactions at an undervalue and unlawful distributions.[17] The authors next examine directors' disqualification and its consequences.[18] The grounds of disqualification within the ambit of case law and statutes, compensation undertaking and the innovation of 2015 which led to compensation of creditors are also explored by the authors. The presentation, style and clarity of the chapter, is very admirable. The chapter achieves what it sets out to do. The discussion is coherent, with a flow of ideas presented logically. The chapter even provided me with some ideas on how I could structure a similar discussion in my own thesis. As a PhD student in this field, I gained immensely from this chapter and it has broadened my knowledge base on the subject matter. Similarly, the book is recommended for academics, practitioners and people in other disciplines not related to insolvency. The chapter will give them a solid understanding of how companies that are insolvent but are not yet under any restructuring mechanism are administered. The chapter will also educate them on what insolvency is and add to their knowledge generally on

[9] The Twilight zone is used as a terminology to describe the transition period between solvency and insolvency until the commencement of the formal insolvency regime. See D Milman, "Strategies for Regulating Managerial Performance in the "Twilight Zone"- Familiar Dilemmas: New Considerations Mapping the Twilight Zone" [2004] *Journal of Business Law* 493.
[10] A Keay, P Walton and J Curl, (n 2), 108-113.
[11] A Keay, P Walton and J Curl, (n 2), 113-114.
[12] A Keay, P Walton and J Curl, (n 2), 115-116.
[13] The directors' duties referred to are codified under CA 2006, ss 171 – 177 and CA 2006, section 172(3) with respect to creditors' interest. The UK case laws in support as adduced by the authors are *Liquidator West Mercia Ltd v Dodd* [1988] 4 BCC 30, *Bilta (UK) Ltd (in Liquidation) v Nazir and others (No 2)* [2015] UKSC 23, [2016] AC 1; *BTI 2014 Ltd v Sequana SA* [2016] EWHC 1686 (CA).
[14] Company Law Review, *Modern Company law from a Competitive Economy:* The Strategic Framework, (DTI, 1999), para 5.1.6.
[15] A Keay, P Walton and J Curl, (n 2) 138.
[16] A Keay, P Walton and J Curl, (n 2) 144-146.
[17] A Keay, P Walton and J Curl, (n 2) 157-162.
[18] A Keay, P Walton and J Curl, (n 2) 164.

how a company functions during the twilight zone. It is not impossible for some people to hold shares in some companies. The chapter will sensitise them on the impact of such situation will have on their shares and their status as shareholders. For directors, it will educate them on what will become of their status once a company falls into financial distress. The chapter is very comprehensive. It puts directors through the spotlight on the possible and potential liabilities they are likely to face if found culpable after the insolvency practitioner takes over. Being a form of restriction, it educates directors in office while the company is solvent on the need to govern the company properly using their skills and having the best interest of the company in mind because should the unexpected happen, they risk their jobs and reputation. It also enlightens aspiring directors on the danger ahead if they refuse to govern diligently. Anybody could become a director in the future, hence, the need for all and sundry to purchase the book and its relevance goes beyond the legal profession. It has stimulated my critical thinking and increased my output level in a way to write an original chapter. The textbook was recently published and it is a potentially leading material on the subject matter. Due to its intellectual input, it is highly recommended for academics, students at all levels particularly researchers in insolvency law, legal practitioners, and judges.

Chapter 5

This chapter moves on to decision making within the context of insolvency. One of the reasons why this chapter is so important not only to my thesis but to the public is that it stresses the importance of making right and timely decisions by those at the helm of the company whether directors or the insolvency practitioners when the company is insolvent.

The chapter mirrors the importance of making key decisions by the board of directors such as putting the company into moratorium, administration, liquidation, CVA, and RP within the context of CIGA 2020. The authors assert the need for such decisions to be transparent because both the decisions and the decision makers could be challenged in court.[19] The authors distinguished and separated rescue mechanisms where directors are in possession such as the moratorium, schemes, a CVA and a RP on the one hand, and where insolvency practitioners are in control of the company such as administration and liquidation.

The chapter is recommended to the general public in other disciplines because anybody can become a director of a company. As a result of this, it educates and teaches on what directors do and can do when the company they preside over is insolvent. Furthermore, directors of companies will do themselves a great harm and disservice by not purchasing the book because it directs, teaches, educates and illuminates on what to do and how to go about their duties once the company is insolvent.

The chapter then examines the roles and effects of the decisions made systematically. The authors discussed debtors in rescue procedures one after the other. Moratorium was considered as introduced by CIGA 2020. The role and liability of directors was critically stated, being a debtor in possession procedure, how it could be commenced, what it aims to achieve, what happens when it is still valid and how it could be terminated.[20]

The merit of this chapter is how the authors dissect the differences between a scheme and a RP. Although very similar in nature, the authors clarify the divergence between both

[19] A Keay, P Walton and J Curl, (n 2) 173.
[20] A Keay, P Walton and J Curl, (n 2) 174-176.

restructuring mechanisms, coupled with its brevity is highly commendable. Accordingly, law students, lawyers and lay men including people from other disciplines who want to learn and appreciate the differences between both mechanisms will find this book extremely helpful. Before closing the chapter, the authors examine formal procedures under the control of an insolvency practitioner which are administration and liquidation.

For insolvency practitioners, this book is highly recommended because the chapter/book also focuses on their role, functions and activities alongside their corresponding liabilities in an insolvency regime. They stand to learn and gain a lot from this chapter/book as it teaches them on how to go about conducting the affairs of an insolvent company and avoiding liabilities especially. So even an experienced insolvency practitioner will always have something to gain from this chapter/book as they might see another perspective into their duties which could help them in their future duties.

Chapter 6

The authors commence this chapter by explaining the status of directors in a formal insolvency procedure and depending on the type of insolvency procedure adopted, directors continue to remain in office. As a PhD student, this chapter has added to my knowledge to the effect that directors remain accountable for their conduct and duties during a company's insolvency whether they continue in office or not. The authors stress the point that directors continue to owe duties to the company when the company enters into a rescue procedure.[21] Formal debtor-in-possession procedures are examined in this chapter. The authors described a moratorium and how a company could be a placed in a moratorium with potential liability of directors in a moratorium.[22] Mentioned briefly is a CVA, its proposal by directors and their corresponding liabilities if found wanting.[23] The authors also contrast a scheme of arrangement and a RP and directs liabilities under both procedures and how the law imposed more obligation on directors under a RP.[24] The authors also briefly mentioned administration and liquidation under the control of an insolvency practitioner.[25] The chapter shows the power and rights an administrator or a liquidator has over a director.

This chapter threw more light and unravelled the activities of directors when the company is insolvent. In achieving this, the authors were able to analyse strongly what directors do to rescue the company from insolvency. The depth of the chapter is highly commendable and those who have been finding it difficult understanding this area of insolvency law will find this chapter/book high helpful. The simple and plain language adopted by the authors made understanding and comprehending the chapter very easy. This chapter/ book is highly recommended to all especially those in the business and commercial world including those in other disciplines who would like to know about insolvency law and rescue mechanisms because of its rich and highly beneficial content. The book will educate directors and those wishing or aspiring to become directors of companies because it paints the position and status of directors once a company enters into formal insolvency proceedings. Through the presentation technique of the book, it portrays the right insolvency practitioners have over

[21] A Keay, P Walton and J Curl, (n 2) 194.
[22] A Keay, P Walton and J Curl, (n 2) 195- 196.
[23] A Keay, P Walton and J Curl, (n 2) 197.
[24] A Keay, P Walton and J Curl, (n 2) 197-198.
[25] A Keay, P Walton and J Curl, (n 2) 199-200.

directors such as displacing them from office and bringing an action against them such as wrongful or fraudulent trading which could lead to a disqualification order being made.

III. CONCLUSION

The book is really useful for law students, lawyers, insolvency practitioners, most especially for company directors. The authors must be commended by taking a step further in advising directors of companies in the twilight zone on what steps to take when they find themselves in such a difficult situation. The narrative of the book goes beyond just theoretical and academic description of insolvent companies. It portrays reality and practicability of what happens in the affairs of companies in the twilight zone via the relationships between creditors, directors and shareholders. This is an advantage and edge the book has over other books.