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Some Observations on the Significance of Time within Insolvency Processes under English Law

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Introduction

1 It is axiomatic that temporal considerations dominate the day to day operations of the institution of Law. Indeed, it would be no exaggeration to suggest that, without using the criterion of measurable time, the social construct that we know of as "Law" would become unworkable in practice. A form of institutional sclerosis would ensue. It is hardly surprising therefore that the linkage between this dimension and Law has generated a distinguished body of published scholarship.[1]

2 The purpose of this essay is to examine the connections that exist between temporal considerations and that body of law which deals with insolvent debtors. Time-related questions lie at the heart of many disputes in this area of law and practice. In undertaking this "parochial" study of a branch of law that straddles both Property Law and Commercial Law, we may have the opportunity to open another window on the general significance of time to the workings of the legal process as a whole.

Defining Time in Insolvency Law

3 In view of the centrality of time in insolvency proceedings one might have assumed that there would be standard measure adopted for the purposes of

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[1] Much of the discourse here has been produced on the Continent. As far as scholarship in the United Kingdom is concerned, see for example R. Tur, "Time and Law" (2002) 22 *Oxford Journal of Legal Studies* 463; A. Rodger, "A Time for Everything under the Law: Some Reflections on Retrospectivity" (2005) 121 *Law Quarterly Review* 57. An excellent philosophical analysis is provided by E. Melissaris, "The Chronology of the Legal" (2005] 50 *McGill Law Journal* 839.

calibration.[2] Not so. The relevant insolvency legislation refers variously to "years", "months", "weeks", "business days",[3] "working days", and simply "days". Does this linguistic inconsistency matter? Probably not, but the haphazard nature of the formulation has drawn a response from the Insolvency Service in its reforms contained in the Insolvency (Amendment) Rules 2010,[4] where an attempt has been made to promote standardisation in time measurement in the Insolvency Rules (but not in the Insolvency Act 1986 itself). Prior to that major initiative we also saw a more limited move away from the use of the injunction to act "forthwith" to the more flexible requirement to act "as soon as reasonably practicable".[5] This may suggest a liberalised approach towards compliance, but also has much to do with the use of "Modern English" linguistic terminology. What we can say when surveying these reforms is that the policymakers are at least thinking about how temporal criteria are expressed in legislation. It is hoped that this approach towards standardisation might carry over to the drafting of commercial legislation generally.

Priority of Legal Rules on Insolvency

4 Lawyers recognise that the simple elapse of time can become an instrument for legal validation. The doctrine of prescription in Property Law[6] bears out that truism. But chronology can also be used to evaluate the relative standing of competing claims. We can offer examples of this syndrome at work within Insolvency Law. So in *Bristol Airport v Powdrill*,[7] the Court of Appeal was confronted with the question of determining priority between conflicting provisions in the Civil Aviation Act 1982 and the Insolvency Act 1986, in the context of deciding whether an airport authority could exercise its power of statutory detention over aircraft owned by a company, which had gone into administration whilst owing landing dues to the airport. The power of statutory detention was expressly provided for in the 1982 Act, but equally explicit in the 1986 Act was the general moratorium on the enforcement of remedies against a company undergoing administration. In deciding the legislative priority the Court of Appeal looked not merely at policy issues concerned with business rescue, but also applied the well-known rule of statutory interpretation of *lex posterior derogat legi priori*. It concluded that the moratorium created by the 1986 Act once administration had

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[2] The Interpretation Act 1978 offers little in the way of guidance on temporal matters, apart from section 9, which deals with the relationship between Greenwich Mean Time and British Summer Time.
[3] Defined in section 251, Insolvency Act 1986 and Rule 13.13(1), Insolvency Rules 1986.
[4] SI 2010/686.
[5] By the Insolvency (Amendment) Rules 2009 (SI 2009/642).
[6] On the doctrine of prescription in English Law, see K. Gray and S.F. Gray, *Elements of Land Law* (5th ed) (2008, OUP, Oxford), at paragraphs 5.2.57-5.2.81. The concept of adverse possession should also be noted here – see *Pye (Oxford) Ltd v Graham* [2003] 1 AC 419. There were doubts raised as to whether this doctrine is compliant with the property right guarantees embodied in Article 1 of the First Protocol of the European Convention on Human Rights ("ECHR"), but these were calmed by the ruling of the Grand Chamber of the Court of Human Rights in the *Pye* case [2007] 46 EHRR 1083.
[7] [1990] Ch 744.

commenced prevailed over the statutory enforcement rights of the airport authority. A general principle of time-related law thereby served as a way of resolving a tricky conundrum.

Retroactivity in Insolvency Law

5 Legal expectations for the future can naturally be changed by legislation. This possibility of prospective change is not questioned by any rational observer.[8] Parliament cannot bind its successors. More controversial, however, is the rewriting of legal history and the neutralising of established rights by retrospective legislation.[9] An example of this process at work is provided by the curious tale of the Insolvency Act 1994, which was introduced at the behest of the "business rescue" lobby to neutralise an inconvenient Court of Appeal precedent.[10] This short Act, having been fast-tracked through Parliament in a matter of days, was given retroactive effect to a limited degree.[11] The impact of the legislation was to dilute the financial expectations of employees whose contracts of employment would otherwise have been deemed to have been adopted by incoming administrators and administrative receivers. This would have affected the fundamental economics of business rescue by increasing its associated cost. Hence, the perceived need for corrective legislation.

6 Another aspect of retrospectivity is to be found in the treatment of bankrupts who have gambled away their assets in the past. Gambling *per se* is not a crime, indeed one might argue that it has been officially encouraged in recent years by being seen as an important leisure business. However, under bankruptcy law (namely the provision formerly appearing as section 362 of the Insolvency Act 1986) gambling was retrospectively criminalised if it could be shown that rash and hazardous speculation had contributed to the gambler's bankruptcy. One can detect the hand of Victorian morality at work here. In more modern times, questions were raised as

[8] For a clever (but fruitless) attempt to do just that by invoking the protection of Article 14, ECHR, see *Malcolm v Mackenzie* [2005] BPIR 176.

[9] The American legal philosopher Lon Fuller listed retroactive legislation as one of the 8 ways to fail to make good law – see *The Morality of Law* (1964, Yale University Press, New Haven CT). It has been suggested that the Government backed away from abolishing administrative receivership retrospectively in its Enterprise Act 2002 reforms because of concerns that this might be challenged by banks on the grounds of infringement of Article 1 of the First Protocol, ECHR. Instead, it settled on prospective abolition using 15 September 2003 as the cut-off date.

[10] *Re Paramount Airways Ltd* [1994] BCC 172. Ironically, when the case got to the House of Lords (after the emergency legislation had been enacted), their Lordships produced a conclusion that was far less threatening than the Court of Appeal ruling – see *Powdrill v Watson* [1995] 2 AC 394, [1995] BCC 319. The legislation may therefore have been too precipitate.

[11] See sections 1(7) and 2(4). The Act received the Royal Assent on 24 March 1994 but it impacted upon contracts made on or after 15 March 1994. For a useful account of this legislation and the background to it see P. Mudd, " The Insolvency Act 1994 – Paramount Cured? "(1994) 10 *Insolvency Law and Practice* 38 and his follow up piece "Paramount: the House of Lords Decision – Is there Still Hope of Avoiding Some of Those Claims?" (1995) 11 *Insolvency Law and Practice* 78.

to whether the continued existence of this offence contravened the proscription in Article 7 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR"). This retrospective criminalisation was eventually recognised as illogical and the offence was abolished by section 263 of the Enterprise Act 2002.[12] An element of retroactivity backed by the force of criminal law was thus expunged from the face of Insolvency Law. Few will mourn its passing.

7 The common law doctrine of precedent is posited upon an innate respect for antiquity. There may also be sound commercial reasons for not disrupting what is seen as established law, as any such reappraisal could undermine the confidence of the business and professional communities that legitimate expectations will be upheld. Because of the nature of judicial decision-making in English law failure to apply a precedent can produce retrospective consequences. But, that said, the English courts have in recent times shown themselves willing to discard inconvenient precedents in order to maintain an effective system of Insolvency Law. Thus, in *Re Leyland DAF*,[13] the House of Lords controversially departed from a 30 year old Court of Appeal precedent[14] when handing down a ruling on the available source of funding available for payment of liquidation expenses. This ruling proved inconvenient and was both immediately overturned by legislation[15] and also mitigated by an extra statutory concession (see below).

8 Similarly, in *Re Spectrum Plus Ltd*,[16] the House of Lords withstood arguments that to discard the *Siebe Gorman v Barclays Bank*[17] precedent (on the criteria governing the creation of fixed charges over future book debts in bank debentures) would disrupt established lending practices. In the light of this, the tax authorities, which gained much from the House of Lords' determination because of their then status as preferential creditors, offered an extra statutory concession to mitigate consequences for practitioners who had made distributions to creditors on what now appeared to be a misperception of the law.[18] But extra statutory concessions offered by the state have their limitations.[19] In a different context in *Official*

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[12] The law found it difficult to give up the idea completely – gambling losses contributing to bankruptcy could expose the unsuccessful gambler to a bankruptcy restrictions order – see now section 281A and paragraph 2(2)(j), Schedule 4A, Insolvency Act 1986.
[13] *Buchler v Talbot* [2004] UKHL 9.
[14] *Re Barleycorn Enterprises Ltd* [1970] Ch 465.
[15] See section 1282, Companies Act 2006, inserting a new section 176ZA, Insolvency Act 1986.
[16] [2005] UKHL 41. For an incisive review, see A. Berg, "The Cuckoo in the Nest of Corporate Insolvency: Some Aspects of the Spectrum Case " [2006] *Journal of Business Law* 22.
[17] [1979] 2 Lloyds Rep 142.
[18] For details of these Crown Statements, see L. Sealy and D. Milman, *Annotated Guide to Insolvency Legislation* (14th ed) (2011, Sweet and Maxwell, London), Volume 2, Appendices IX and X. These documents are not included in the current edition of this text.
[19] So for instance, they cannot deprive *private* parties of their rights – this is relevant in the light of the "game changing" Court of Appeal ruling in *Pillar Denton Ltd v Jervis* [2014] EWCA Civ 180, which has recalibrated the respective rights of landlords and administrators where demised premises are occupied during administration.

Receiver v McKay,[20] we witnessed the Court of Appeal departing from an old precedent on bankruptcy annulment,[21] on the grounds that it had been undermined by the new legislative matrix created by the 1985-86 reforms. This is a general conundrum in interpreting any provision in the Insolvency Act 1986, namely to what extent it represents a "fresh start" as opposed to maintaining continuity.[22] Judges therefore do not feel themselves fettered by antiquity, but equally they reserve the right to follow old precedents.[23] The fundamental problem here, of course, is that of unpredictability, and the consequences of such uncertainty for those parties who have quite reasonably conducted their affairs in accordance with what appeared to be settled law. It is regrettable that English law not been prepared to admit the possibility of prospective overruling[24] in order to mitigate this hardship. Commercial lawyers, who structure arrangements on the basis of what is understood to be the law, would welcome such a step.

Insolvency and Limitation of Actions

9 As one might anticipate, there are several points of interface between the legal regulation of insolvency and the operation of principles governing limitation of actions.

10 Firstly, the expiry of the appropriate limitation period may bar the enforcement of a claim via the pursuit of insolvency proceedings. It is clear that a statute-barred debt cannot form the basis of either a bankruptcy or winding up petition.[25] But in *Ridgway Motors (Isleworth) Ltd v ALTS Ltd*,[26] the Court of Appeal determined that a winding up (or bankruptcy) petition could be based on an unsatisfied judgment debt that was the result of an order granted outside the six year limitation period fixed by section 24 of the Limitation Act 1980. An insolvency petition was not to be viewed as an "action upon a judgment" within the limitation restriction in section 24, but rather was to be viewed as *sui generis*.

11 Once corporate insolvency proceedings have been commenced, time ceases to run during an insolvency procedure involving the general distribution of

[20] [2009] EWCA Civ 467, [2009] BPIR 1061.
[21] *Re Keet* [1905] 2 KB 666.
[22] See the comments of Hoffmann J in *Re A Debtor (No. 784 of 1991*) [1992] Ch 554 (difficulty in casting overboard the intellectual freight). Compare the clean break approach taken in *Re a Debtor (No. 1 of 1987)* [1989] 1 WLR 271; *Smith v Braintree DC* [1990] 2 AC 215.
[23] See, for example, *Anglo Manx Group v Aitken* [2002] BPIR 215, which followed *Re Benzon* [1914] 2 Ch 68.
[24] This possibility was dismissed by the House of Lords in *Spectrum* (above note 16) but a limited form of prospectivity appears to have been used in *Royal Bank of Scotland v Etridge (No. 2)* [2002] 2 AC 773. Other sophisticated legal systems find no problem with the adoption of this concept – see the approach taken in the United States, India and Ireland. For a general discussion of prospective overruling, see M. Arden, "Prospective Overruling" (2004) 120 *Law Quarterly Review* 7.
[25] See *Jelly v All Type Roofing* [1997] BCC 465.
[26] [2005] EWCA Civ 92.

realisations to creditors.[27] Limitation periods are thus frozen as the clock stands still. This general freezing of time was qualified by the High Court in *Re Maxwell Fleet and Facilities Management Ltd*,[28] where the debtor company had entered "old-style" administration, an interim procedure that did not involve such a general realisation and distribution; in such a case time did not cease to run. Matters are again different in cases of bankruptcy. So, in *Anglo Manx Group Ltd v Aitken*,[29] the High Court held that time does not cease to run during the period of bankruptcy and a prospective claimant should consider issuing proceedings simply to protect its position in the event of a surplus in the estate. The courts have been left to grapple with these tricky matters and the jurisprudence that has emerged is complex and not without some doubts.

12 Limitation issues can sometimes arise with regard to recovery actions instituted by liquidators (in particular) against directors. Where a misfeasance claim pursuant to section 212 of the Insolvency Act 1986 is brought against a director, time begins to run from the date of the alleged breach of duty by the director.[30] The reason for this is that the liquidator is merely seeking to enforce a cause of action vested in the company. However, if the claim is based on alleged wrongful trading[31] or fraudulent trading[32] the limitation period only begins from the commencement of the liquidation, which in a case of compulsory liquidation will be the date of the winding up order.[33] This discrepancy arises because such claims are viewed as new claims vested exclusively in the liquidator and have nothing to do with the enforcement of any prior breaches of duty owed to the company. However, in practice there may be an overlap in terms of the substantive nature of the complaint and limitation considerations may therefore affect the way in which a cause of action against an errant director is pleaded.[34] Practitioners need to be aware of the nuances here. Even if a claim is pursued within the prescribed limitation period, the

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[27] See *Re General Rolling Stock Co* (1872) LR 7 Ch App 646; *Financial Services Compensation Scheme Ltd v Larnell (Insurances) Ltd* [2005] EWCA Civ 1408. A useful review of the position is provided by T. Hirst, "When Time Stands Still" (2006) 156 *New Law Journal* 1516.

[28] [2001] 1 WLR 323, [1999] 2 BCLC 721. See also *Re Leyland Printing Co Ltd* [2010] EWHC 2105 (Ch), [2011] BCC 358, another case on old-style pre-Enterprise Act 2002 administration. Whether these authorities apply to new-style administration is debateable, as the new procedure now has much in common with liquidation.

[29] [2002] BPIR 215, following *Re Benzon* [1914] 2 Ch 68. But it must be remembered that these cases were decided at a time when discharge periods in bankruptcy were lengthy – with one year discharge now available, one might wonder whether they still hold true.

[30] See *Re Eurocruit Ltd* [2007] EWHC 1433 (Ch), [2007] BCC 916. The limitation period here is 6 years.

[31] Section 214, Insolvency Act 1986.

[32] Ibid., section 213.

[33] See *Re Overnight Ltd* [2009] EWHC 601 (Ch), [2010] BCC 587. For the substantive determination of these proceedings, see *Re Overnight Ltd (No. 2)* [2010] EWHC 623 (Ch), [2010] 2 BCLC 186.

[34] Issues of substitution of claimant can also arise to circumvent problems caused by limitation and legal standing, for which see *Parkinson Engineering Services plc v Swan* [2009] EWCA Civ 1366; *Irwin v Lynch* [2010] EWCA Civ 1153, [2011] 1 WLR 1364.

court might refuse to support it if there has been a want of prosecution of the claim.[35]

13 Limitation periods for personal recovery claims against directors will normally be fixed at 6 years. But where a claim is founded on the allegation of a preference or transaction at an undervalue (discussed below), a 12 year limitation period will usually operate.[36]

Priority Gaining and the Race against Time

14 The priority status of a claim against the assets of an insolvent debtor may depend on the precise timing of interactions with the debtor. This is particularly true when evaluating the priority status of a floating charge secured against the assets of an insolvent company. The date of crystallisation of the floating charge can be critical as it converts a floating charge into a fixed equitable security and terminates the licence of the company to deal with the charged assets. We often here encounter a race or scramble for assets with the equitable "first in time" maxim (*qui priori est tempore potior est jure*) very much to the fore.

15 Timing is also important in the sense that if a company creates a registrable charge over its assets then, by virtue of a combination of sections 859A and 859H of the Companies Act 2006, the charge must be submitted for registration within 21 days of the creation of charge otherwise it will cease to be valid if the company then goes into liquidation or administration.[37] There is a facility for late registration under section 859F of Companies Act 2006 where a charge has not been registered due to inadvertence.[38] The replacement of Part 25 of the Companies Act 2006 in 2013 has not changed these well-established basic temporal features.[39]

16 With regard to judgment creditors there is a precise choreography to follow before they are protected *vis-à-vis* the claims of a party secured by floating charge.[40] Likewise, under section 346 of the Insolvency Act 1986, an execution

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[35] See *Re Farmizer Products Ltd* [1997] BCC 655. Compare *Re Overnight Ltd (No. 3)* [2010] EWHC 1587 (Ch), [2010] BCC 808.

[36] See *Re Priory Garage (Walthamstow) Ltd* [2001] BPIR 144; *Hill v Spread Trustees Ltd* [2006] BCC 646; *Stonham v Ramrattan* [2011] EWCA Civ 119.

[37] A certificate as to registration of charge is conclusive that the charge was registered in time: *Re Eric Holmes (Property) Ltd* [1965] Ch 1052; *Re CL Nye Ltd* [1971] Ch 442 (where there were errors in the date of the creation of the charge). There is a direct parallel here with certificates of incorporation, which are also conclusive as to the date of incorporation: *Jubilee Cotton Mills v Lewis* [1924] AC 958. A moment in time is therefore determined by bureaucratic act rather than by nature.

[38] This facility will however be exercised with caution, see *Re Ashpurton Estates Ltd* [1982] 3 WLR 964. A certificate of late registration is conclusive: *Exeter Trust Ltd v Screenways Ltd* [1991] BCC 477.

[39] See the Companies Act 2006 (Amendment of Part 25) Regulations 2013 (SI 2013/600).

[40] For an overview of the issues, see D. Hare and D. Milman, "Debenture Holders and Judgment Creditors – Problems of Priority" [1982] *Lloyds Maritime and Commercial Law Quarterly* 57.

process must be completed before the bankruptcy commences in order for the execution creditor to prevail over the general creditors. In the case of charging orders the judgment creditor will only get the benefit of the execution if the process can be said to be completed before formal insolvency intervenes. The House of Lords ruling in *Roberts Petroleum v Kenny Ltd*[41] indicates that a charging order nisi is not sufficient to protect the judgment creditor – the order must be made absolute before insolvency proceedings are commenced in order for the judgment creditor to prevail. The matter was revisited in *Nationwide Building Society v Wright*,[42] where it was confirmed that, if a charging order final is granted before the start of bankruptcy, then the fruits of endeavour can be retained.

17 Temporal issues have been central to the resolution of certain social security cases where the claimant (who had later become bankrupt) was found to have been overpaid state welfare benefits and therefore on adjudication became subject to an obligation to repay.[43] If the determination that there had been an overpayment was made <u>before</u> commencement of bankruptcy that repayment obligation would be regarded as a bankruptcy debt capable of being discharged at the conclusion of the bankruptcy.[44] If, however, the adjudication did not take place until <u>after</u> the formal commencement of bankruptcy the courts previously had ruled that the liability to repay once determined could survive discharge as it was not a bankruptcy debt at the start of the bankruptcy. The problem here is that although contingent obligations may be seen as bankruptcy debts, obligations do not become contingent until they have been crystallised.[45] A <u>mere possibility</u> of some future liability being imposed did not count for legal purposes as a contingent obligation.[46] This narrow definition of what is a contingent liability was ripe for reconsideration as it was causing significant difficulties across the spectrum of insolvency law. That reconsideration took place in the Supreme Court in *Re The Nortel Companies (Bloom v Pensions Regulator)*[47] and the conclusion reached was that an expansive view should be taken, so as to include the risk of liability within the contingent liability family.[48] It remains to be seen how far this flexible approach extends. Further litigation mapping out the parameters of this change may be required.

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[41] [1983] 2 AC 192.
[42] [2009] BPIR 1047.
[43] See *R (Steele) v Birmingham CC* [2005] EWCA Civ 1824. Compare *Secretary of State for Work and Pensions v Balding* [2007] EWCA Civ 1327, where the liability had crystallised before bankruptcy and so was discharged.
[44] Section 382, Insolvency Act 1986.
[45] *R (Steele) v Birmingham CC* [2005] EWCA Civ 1824. See also *Casson and Wales v The Law Society* [2009] EWHC 1943 (Admin), [2010] BPIR 49.
[46] *Glenister v Rowe* [2000] Ch 76.
[47] [2013] UKSC 52.
[48] Cases such as *Glenister v Rowe* (above note 46) and *R (Steele) v Birmingham CC* (above note 43) were thus overruled.

Time and Initiation of Insolvency Proceedings

18 Temporal considerations are often spelled out as prerequisites for the commencement of insolvency proceedings. For example, three weeks is required to elapse between the presentation of a statutory demand and the service of a bankruptcy petition for non-compliance with such demand.[49] This is to allow the debtor an opportunity to respond either by paying up or by seeking to have the demand set aside. Under section 270 of the Insolvency Act 1986 an expedited bankruptcy petition is possible before the 3 weeks have elapsed if, for example, the debtor's assets appear to be at risk.

19 Legislation is specific as to when a liquidation commences. For a compulsory winding up it is backdated to the date when the successful creditor petition is presented (section 129(2) of the Insolvency Act 1986). The making of the winding up order is not the chosen event. We thus find an element of retrospectivity at work. This can cause some difficulties, in particular with regard to the validation of post-petition dispositions (see section 127). For instances of creditors' voluntary liquidation the position on commencement is simpler - it is the date of the shareholder resolution approving the entry into liquidation (section 86 of the Insolvency Act 1986).

20 There is similar degree of clarity for administration, which under Schedule B1 of the Insolvency Act 1986 specifies the date of commencement to be determined according to which method of appointment is used (see paragraphs 13, 19 and 31). Where the administrator is appointed by the court it will be the date specified in the court order, or failing that, the date of the order. In other instances it will be when proper notice of appointment is filed.

21 As for company voluntary arrangements ("CVAs"), the position under section 5(2)(a) of the Insolvency Act 1986 is that the arrangement is deemed to have commenced on the passing of the resolution by the required majority of creditors to support the proposal which forms the basis for the arrangement. The position for an individual voluntary arrangement ("IVA") is comparable to that of a CVA (see section 260(2) of the Insolvency Act 1986).

22 Turning to personal insolvency, bankruptcy commences on the making of the bankruptcy order (section 278 of the Insolvency Act 1986).[50] Debt relief orders granted under Part 7A of the Insolvency Act 1986 take effect when the official receiver registers the order (see section 251E).

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[49] Section 268, Insolvency Act 1986.

[50] This was a significant change introduced by the Insolvency Act 1986, which abolished the former procedure of a two stage initiation of receiving order and adjudication order necessitating the so-called "relation back" doctrine. For the background, see *Re Dennis* [1996] BPIR 106, at 109 et seq. (per Millett LJ).

23 In other cases, timing issues on commencement may be left to the contractual arrangements between debtor and creditor. Receivership provides a good example of this methodology at work. Normally, a debenture will require the making of a demand for repayment by the company of the money loaned, which, if unsatisfied, could lead to the appointment of a receiver. There is no requirement in English law that a reasonable time be given to the debtor company to meet this demand.[51] All that is required is that the debtor company be allowed sufficient time to arrange for payment of that debt – an immediate appointment of a receiver may thus be possible where there is no prospect of immediate repayment. Under section 33 of the Insolvency Act 1986 the appointment of a receiver (including an administrative receiver) takes effect when the instrument of appointment is delivered to the receiver provided the appointment is accepted before the end of the next business day.

24 It is important to determine when insolvency proceedings commence for a variety of reasons. It can affect priority disputes as rights crystallise on this date. Time periods (e.g. those relating to transactional avoidance) are calculated by reference to this date – witness the use of the term "the onset of insolvency" in section 240(3) for these purposes. It is clearly relevant to limitation of actions in the case of claims that only crystallise once insolvency has commenced. As some insolvency proceedings are of fixed duration it is necessarily to be able to say precisely when the proceedings began in order to calculate when the procedure is due to close. Continuing an insolvency procedure beyond the permitted deadline is fraught with difficulty, opening up possible liability in trespass and conversion.

Setting aside Antecedent Transactions

25 It has long been recognised that a debtor's transactions prior to the initiation of bankruptcy may need to be reviewed in order to deter improper behaviour and to replenish the estate for the benefit of its creditors. In order to do this the court at the behest of the insolvency practitioner will have to "rewind" time. The period will vary according to the precise legal nature of the challenge. The relationship between the parties can be relevant to determining the particular time periods. Those parties who are "connected" with a debtor will often find that the period of time specified before the possibility of a challenge is lost is extended by virtue of their relationship to the debtor. We can observe that time here is used as the instrument to balance the competing need for transactional certainty with the desire to discourage improper pre-bankruptcy transactions.

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[51] *Cripps (Pharmaceuticals) Ltd v Wickenden* [1973] 2 All ER 606. Compare the position in Canada, for which see D. Milman and A. Evans, "A Disappointing End to the Lister Saga" (1983) 4 *Company Lawyer* 90.

26 For an alleged preference in a case of corporate insolvency the standard maximum period ("the relevant time") that may be looked at is 6 months. This becomes 2 years when the beneficiary of the alleged preference is connected to the debtor (see section 240 of the Act). Similar periods apply to preferences under bankruptcy law (see sections 340 and 341 of the Act). Note that the critical time here from which the clock starts to run is not when the preference was given, but rather when the decision was taken to give the preference.[52]

27 In the case of transactions at an undervalue made by corporate debtors (typically gifts) the period which may be investigated runs as far back as 2 years under section 238 of the Insolvency Act 1986. For bankruptcy cases the period specified in section 341 is 5 years.

28 Under section 245 of the Insolvency Act 1986 any floating charge created[53] within one year[54] of the onset of insolvency is invalid except to the extent that the company has been provided with fresh consideration at the same time as or after the charge was given. This mechanism reflects the negative attitude of English common law to the provision of past consideration as the basis for a valid contract.[55] The wording of the current provision in the 1986 Act is slightly different to its statutory predecessors, but nothing turns on that. In *Re Shoe Lace Ltd*,[56] the Court of Appeal had to determine what was meant by the phrase "at the same time as" for the purposes of section 245. At first instance Hoffmann J (as he then was) commented that the phrase had to be determined by its *context*. It might be said that various species of dinosaur became extinct at the same time even though the actual interval could be millions of years, whereas one could not claim that the second place runner in a 100 metres race finished at the same time as the winner, even though the gap might be a mere fraction of a second. He continued:

> " In section 245 the context is commercial and regulatory."[57]

29 Hoffmann J took the view that this phrase should be interpreted objectively by reference to how a reasonable businessperson would interpret it. This judgment was confirmed unanimously by the Court of Appeal. The Court of Appeal refused to take a more relaxed view of timing – there was no way that consideration provided *before* the creation of a charge could be said to have been given at the same time as

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52 See *Re Stealth Construction Ltd* [2011] EWHC 1305 (Ch).
53 Clearly identifying the date of creation of the floating charge is a critical issue. For an unsuccessful attempt to argue that the charge had been created earlier than its stated creation date, see *Rehman v Chamberlain* [2011] EWHC 2318 (Ch), [2012] BCC 770.
54 This is extended to two years if the recipient of the floating charge is connected with the company.
55 As reflected in cases like *Re McArdle* [1951] Ch 669.
56 [1992] BCC 367 (Hoffmann J); [1993] BCC 609 (CA).
57 [1992] BCC 367, at 369.

or after the creation of the charge. Previous authorities, suggesting such a concessionary interpretation could be adopted, were wrong.[58]

30 Returning to personal insolvency, the importance of chronology was never better illustrated than by *Warwick v Trustee in Bankruptcy of Yarwood*.[59] Here a divorcing couple were negotiating a property settlement. A provisional agreement had been reached, but this had not been finalised before a creditor stepped in and presented a bankruptcy petition against the husband and a bankruptcy order was subsequently made. That petition activated section 284 of the Insolvency Act 1986, which rendered void any disposition of the assets of the debtor. That in turn meant that the purported settlement of matrimonial property issues could not be put into effect.

31 Under section 423 of the Insolvency Act 1986,[60] no fixed time limit applies in terms of the period of vulnerability but the further back you go to review the debtor's conduct the more difficult it is to persuade the court to avoid a transaction because evidential difficulties of proving an intent to defeat creditors loom large. So for instance in *The Law Society v Southall*,[61] an attempt was made to challenge dispositions of property occurring some 40 years before the litigation. It was hardly surprising that the claim failed because the claimants could not establish the required intent on the part of the transferor. The inevitable question of limitation under section 423 has been reviewed in two further cases that have come before the Court of Appeal. Firstly, in *Hill v Spread Trustees*,[62] the Court of Appeal accepted that the Limitation Act 1980 applied to a section 423 claim. This created considerable concern in the commercial community. In *Giles v Rhind (No. 2)*,[63] the Court of Appeal interpreted section 32(2) of the Limitation Act 1980 (which allows for the extension of limitation periods in defined circumstances) in a flexible way so as to facilitate the potential application of section 423 of the Insolvency Act 1986.

32 The name of the game here for an opportunistic insolvent debtor is to play for time to ensure that the clock runs down and avoidance provisions are thereby neutralised. Thus, we see again that the passage of time may serve to validate transactions, but not perhaps in the way that the law would have hoped for. In order to combat this deviant behaviour it is therefore important that the flexibility provided by section 423 should not be unduly restricted.

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[58] See *Re Columbian Fireproofing Co Ltd* [1910] 2 Ch 120; *Re F & E Stanton Ltd* [1929] 1 Ch 180.
[59] [2010] EWHC 2272 (Ch), [2010] BPIR 1443.
[60] This is an odd provision that applies in situations of both corporate and personal insolvency and also in cases where there is no insolvency. Its origins lie outside insolvency law and can be traced back to the Statute of Fraudulent Conveyances 1571. On the continent, a similar avoidance tool is categorised as a Paulian action.
[61] [2001] EWCA Civ 2001, [2002] BPIR 336.
[62] [2006] BCC 646.
[63] [2009] BCC 590.

Identifying Flashpoints in Time

33 Within the context of an insolvency scenario the ability to pinpoint the date of the occurrence of pivotal events is critical. For example, one of the critical factors necessary to establish liability for wrongful trading under section 214 of the Insolvency Act 1986 is that at a certain point of time the directors must have realised that the company was heading for the rocks. Identifying this date is not merely a prerequisite to the imposition of liability – it can affect quantum of liability, as any liability fixed by the court is linked to debts accumulated after this date.[64] The courts have warned that a liquidator cannot pick and choose timings on wrongful trading nor leave the matter open for the court to determine.[65] In effect, therefore, the liquidator will have to make an irrevocable election when identifying dates, as this will affect the way the case is managed in the courts. Alternative dates may be identified,[66] but this hedging strategy needs to be carefully thought through and only one alternative is likely to be acceptable to the court. So, for example in *Re Hawkes Hill Publishing Co Ltd*,[67] alternative dates had been identified but then one was deselected; a late attempt by the liquidator to introduce another alternative date was rejected by Lewison J. This is a critical point of evidence, as the central question governing potential liability is often, "when did the directors realise that an insolvent liquidation was inevitable"? In view of this, it is important both for the defendant, when building his defence, and for the court, when managing the case, to have some clarity.

34 In a different context, the location of a precise point in time can be relevant when determining whether statements made by a debtor in support of a plea for a voluntary arrangement can be said to be true or false. What seems clear is that the passage of time can convert a true statement into one that is false. In the case of a voluntary arrangement, the precise determining moment in time is the date when the statement included in the proposal to creditors was the subject of a vote by them and not when it was originally made by the debtor.[68] There is an ongoing duty of good faith and a corresponding disclosure requirement.

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[64] See, for example, *Re Purpoint Ltd* [1991] BCC 121.
[65] See *Re Continental Assurance plc* [2001] BPIR 733, at 766-7 (paragraph 99) (per Park J).
[66] On this, see *Re Idesssa (UK) Ltd* [2011] EWHC 804 (Ch).
[67] [2007] BCC 937, at paragraphs 37-38. See also *Re Sherborne Associates Ltd* [1995] BCC 40. For an informative discussion, see A. Keay, "Wrongful Trading and the Point of Liability" [2006] 19 *Insolvency Intelligence* 132, where the point is made that the courts have not always been consistent in their approach.
[68] *Cadbury Schweppes plc v Somji* [2001] 1 WLR 615; *National Westminster Bank v Kapoor* [2011] EWCA Civ 1083.

Duration of Insolvency Procedures

35 Insolvency proceedings can by their very nature be protracted. Although it seems likely that extreme delay in court proceedings leading to a formal declaration of insolvency does come within Article 6 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR"),[69] it is more questionable whether the operational administration of a prolonged insolvency regime, such as a liquidation process, would contravene the expectations embodied in Article 6.[70] That said, legal systems are increasingly aware of criticism that the liquidation of the assets of an insolvent debtor is taking too long.

36 Traditionally winding up proceedings could operate without a temporal limit. Some liquidations have run for very long periods.[71] The same is true technically speaking of administrative receivership. This is clearly unsatisfactory in an age where there is much public disquiet over the delay and cost involved in dealing with the realisation of assets of insolvent companies. Parliament has recognised this legitimate concern and the revamped administration procedure is made an exception. So we are told that administrators must discharge their mission "quickly".[72] Under paragraph 76 of Schedule B1 of the Insolvency Act 1986 the administration must be concluded within 12 months unless an extension can be obtained under paragraph 77. The courts are cautious about offering such a facility, but in an appropriate case they will oblige.[73] There have even been instances where retrospective extensions have been secured.[74]

37 Bankruptcy used to persist until the bankrupt bothered to apply to court for a discharge,[75] which often never happened. "Perpetual" bankruptcies were not uncommon. That position was changed by the Insolvency Act 1986, which introduced the five year automatic discharge.[76] The use of an automatic time trigger was a clever strategy because at a stroke it reduced the need for bankrupts to apply to the court to obtain a discharge. That five year period was then reduced to 3 years in 1986. Under the amended section 279 of the Insolvency Act 1986,[77] we now

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[69] The principle also applies to debt collection procedures: *Skurcak v Slovakia* [2007] BPIR 440.
[70] See *GJ v Luxembourg* [2000] BPIR 1021. See also *Holtham v Kelmanson* [2006] BPIR 1422; *Foyle v Turner* [2007] BPIR 43.
[71] The liquidation of BCCI, for example, lasted 21 years. Note also the Scottish case of *Jackson, Official Liquidator of Weir Construction (Contracts) Ltd* [2012] CSOH 51, where the winding up, for good reason, took 28 years.
[72] See paragraph 4, Schedule B1, Insolvency Act 1986.
[73] *Re Top Marques Car Rental* [2006] BPIR 1328.
[74] *Re TT Industries Ltd* [2006] BCC 372 (problems caused by delays in the court system).
[75] Discharge was introduced in 1705 by 4 and 5 Anne, c.17.
[76] See section 7(2), Insolvency Act 1976.
[77] The one year period was introduced by section 256, Enterprise Act 2002, with effect from April 2004.

have automatic discharge after a one year period,[78] though an uncooperative bankrupt might well find discharge suspended. But that does not mean the bankruptcy is over for all intents and purposes; discharge merely terminates the status of being an undischarged bankrupt. The powers of the trustee can survive until all assets have been realised and provable debts paid off to the fullest possible extent. In effect, bankruptcy might continue for many months after the official period has come to an end. This can pose problems of protracted realisation, as we shall see later.

38 Automatic termination by expiry of time is a favoured device for many modern insolvency procedures. This is the position for both CVAs,[79] IVAs[80] and for cases of administration.[81] In the former case the court enjoys no power of extension. For administrations there is an explicit power in paragraph 76(2) of Schedule B1 to extend the period of administration though the courts are wary about doing this. The debt relief order regime and its associated moratorium will also end automatically once one year has elapsed from the commencement of the procedure (section 251H of the Insolvency Act 1986).

39 Even after an insolvency regime has ended. there may be temporal requirements imposed – e.g. the insolvency practitioner may be required to notify the end of the regime or his participation in it (e.g. section 45(4) of the Insolvency Act 1986).

Operational Issues

40 Within the day to day conduct of the administration of insolvent estates certain time limits apply for the performance of various actions, including applications to the court. Formerly, there was an express provision in the Insolvency Rules (Rule 12.9) which provided direct linkage with the provisions in the Civil Procedure Rules with regard to computation of time for the purposes of matters to be done by the Insolvency Rules. That specific provision disappeared from the amended Insolvency Rules and has been reconstituted by Rule 12A.55. There is no doubt that the courts will have regard to provisions in the Civil Procedure Rules when addressing temporal issues. This is apparent from *Re Legal and Equitable Securities plc*,[82] where the CPR rules[83] on extensions of time were applied to an appeal on a disputed proof of debt.

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[78] Even earlier discharge was possible under the now repealed section 279(2), Insolvency Act 1986, but this possibility was eliminated in October 2013 as a result of a change sponsored by section 73 and Schedule 21 Part 3, Enterprise and Regulatory Reform Act 2013. See also SI 2013/2135.

[79] This deadline will be specified in the terms of the arrangement. The courts have no power to vary it: *Re Alpa Lighting Ltd* [1997] BPIR 341. Therefore some flexibility under the terms of the arrangement is advisable.

[80] *Strongmaster v Kaye* [2002] BPIR 1259.

[81] See paragraph 76(1), Schedule B1, Insolvency Act 1986.

[82] [2011] BCC 354.

41 Claims under sections 307 or 308 of the Insolvency Act 1986 by a trustee in bankruptcy for the recovery of after-acquired property vesting in the bankrupt or for the replacement of excess value property must be made within 42 days of the trustee becoming aware of such vesting or the existence of such property.[84] The courts are reluctant to extend this window of opportunity. Again the need to protect legitimate expectations is apparent.

42 One unique power vested in liquidators (and trustees in bankruptcy) is the power to disclaim onerous assets. This used to be subject to a 12 month cut off to avoid uncertainty. The Cork Committee reviewed this matter and sought other ways of ensuring clarity.[85] In spite of the Cork Committee's support for the *status quo*, the Insolvency Act 1986 saw the removal of 12 month time limit on disclaimer. Utilitarianism prevailed.

43 At the other end of the spectrum, trustees in bankruptcy were often criticised for delay in realising assets that might appreciate in value. Policymakers took note of these criticisms and a three year "use it or lose it" rule designed to deal with protracted realisation was introduced by the Enterprise Act 2002. Now under section 283A of the Insolvency Act 1986 a trustee has three years from taking office to take realisation action. What is deemed to be a "realization" for these purposes? In *Lewis v Metropolitan Property Realisations*,[86] the Court of Appeal ruled that accepting deferred consideration does not constitute a realisation for the purposes of section 283A. This is an unfortunate ruling that takes a narrow view of timing. In principle deferred consideration is seen in commercial circles as a valuable asset. Here we see the need to comply with the new temporal requirements affecting the integrity of the realisation process. This case should be compared with the growing number of instances,[87] where the courts have set their face against attempts to invoke the use it or lose it concession in inappropriate circumstances.

44 Time issues are relevant in other operational contexts. So in cases of receivership the directors are given a deadline of 21 days from the date of request to submit a statement of affairs, but the receiver has power under section 47(5) of the Insolvency Act 1986 to extend this period of grace. If he fails to do this an application may be made to the court. Conversely, the receiver must make a report to creditors within 3 months (section 48).

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[83] See rules 3.1 and 3.9, CPR, as explained in *Sayers v Clark Walker (a firm)* [2002] 1 WLR 3095. There is general linkage to the CPR as a result of Rule 7.51A, unless contrary provision is contained in the Insolvency Rules 1986.

[84] See section 309, Insolvency Act 1986. Note also *Solomons v Williams* [2001] BPIR 1123; *Franses v Oomerjee* [2005] BPIR 1320.

[85] Cmnd 8558, at paragraph 1195.

[86] [2009] EWCA Civ 448.

[87] See, for example, *Stonham v Ramrattan* [2011] EWCA Civ 119; *Doyle v Jones* [2010] BPIR 1063; *Young v OR* [2010] BPIR 1477.

45 In terms of operational matters the administration procedure provides a useful case study of how policy makers are developing their thinking on matters of timing. Under the old administration order mechanism a leisurely pace of administration was permitted. Administrators must now act quickly. They must produce reports to creditors within 10 weeks (as opposed to 3 months previously) and the administration should last for no more than 12 months. There is much to be said for this highly prescriptive model.

46 Time can come into play when it comes to lodging claims in an insolvency process. Under liquidation/ bankruptcy law proof of claim must be lodged by the date specified in the notice sent out by the office holder (see Rule 11.2(2)).[88] For other insolvency procedures the position is more flexible. In the case of a CVA the terms of the arrangement may fix the period for the lodging of claims.[89]

47 We have seen that there is an inevitable conflict between the dictates of time management and the need for certainty. This is most apparent when an arrangement between a debtor and creditors is being challenged. If the arrangement is in the form of a CVA the challenge must by virtue of section 6(3) of the Act be launched within 28 days or else it is timed out. No extension for the period of challenge is possible.[90] The provisions in the CPR cannot operate in the face of this explicit prohibition.[91] Perversely, if the arrangement is an IVA, there is general power vested in the court by section 376 of the Insolvency Act 1986 to extend time limits.[92] It is difficult to justify this differential approach between cases of corporate and personal insolvency. Indeed, it is interesting to note that the newest corporate insolvency procedure (that is administration under the Enterprise Act 2002) specifically includes provision for the extension of time limits (see paragraph 107 of Schedule B1). That is a useful pointer to future developments.

Time expended as a Measure of Reward

48 Insolvency practitioners traditionally have been paid either by reference to a percentage of realisations or by reference to time expended in conducting the insolvency process. Both mechanisms are effective, but equally both are now

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[88] But the office holder enjoys a discretion to extend such deadlines: *Painter v Hutchison* [2008] BPIR 170.
[89] See *Re Energy Holdings (No. 3) Ltd* [2009] BPIR 704.
[90] *Re Bournemouth and Boscombe* [1998] BPIR 183; *Re Beloit Walmsley Ltd* [2008] BPIR 1448; *Wood v Heart Hospital* [2009] BPIR 1538. This rule has led to indirect challenges based upon the argument that what is being proposed is not a CVA within the meaning of the statutory concept, for which see *Adam v IRC* [2002] BCC 247.
[91] *Re Beloit Walmsley Ltd* [2008] BPIR 1448.
[92] On section 376, see *Tager v Westpac Banking Corp* [1998] BCC 73; *Warley Continental Services v Johal* [2004] BPIR 353. On the extension of time periods on liquidation, see Rule 4.3.

regarded with some scepticism in that they may be seen as being too generous to the insolvency practitioner.[93]

49 In response to these concerns we have witnessed the advent of "value for money" criterion – the critical question now is "was the time well spent?"

50 This new criterion was expounded most clearly in the *Practice Direction: Remuneration of Appointees.*[94] The impact of this measure was reflected in *Simion v Brown*,[95] David Richards J pared back the claim of the trustee in bankruptcy on the ground that some of the time costs were excessive. In *Hunt v Yearwood-Grazette*,[96] the court also reduced the claim submitted by the trustee in bankruptcy. By way of comparison the claim by the insolvency practitioner was upheld in *Freeburn v Hunt.*[97] In *Brook v Reed*,[98] the Court of Appeal stressed that the *Practice Direction*[99] very much represented the way forward – the days of mathematical totting up of hours spent and used as the basis for a professional fees claim were long gone. In addition to the adoption of this new criterion we have seen the advent of new procedures designed to allow disgruntled parties to challenge levels of remuneration/ disbursement. So in Rule 6.142, creditors can challenge office holder remuneration and expenses by making an application to the court within specified periods of identifiable trigger points (see Rule 6.142(1B)).

Time used as an Instrument of Corrective Sanction

51 At the other extreme, time can be used as a measure of sanction to express society's disapproval with the behaviour of an insolvent, or a person managing an insolvent company. Typically this will work through a mechanism of disqualification.

52 Similar temporal issues can arise in connection with the commencing of disqualification proceedings. As a rule proceedings must by virtue of section 7(2)

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[93] The Kempson Review of IP Fees (July 2013) and the follow up Insolvency Service Consultative Document "Strengthening the Regulatory Regime and Fee Structure for Insolvency Practitioners" (February 2014) illustrate this disquiet over the use of time-based remuneration models.

[94] [2004] BPIR 953. This *Practice Direction* was reconstituted in Part V of the *Practice Direction: Insolvency Proceedings* [2012] BCC 265. No significant change was made in respect of the issues under consideration here.

[95] [2007] EWHC 511 (Ch).

[96] [2009] BPIR 810.

[97] [2010] BPIR 325.

[98] [2011] EWCA Civ 331. In reading the judgment of the court, David Richards J pointed out that this Practice Direction is being used as a guide in a number of common law jurisdictions. For its pervasive impact in English law, see *Salliss v Hunt* [2014] EWHC 229 (Ch).

[99] Above note 94.

of the Company Directors Disqualification Act 1986 be brought[100] within 2 years of the commencement of the relevant corporate insolvency proceedings. Can this limit be extended? This question has been considered in a number of cases[101] and the factors that will have to be addressed include: the length of the delay, the reasons for the delay and the potential prejudice to the respondent. Moreover, the defendant director should under section 16(1) be given 10 days' notice of any pending proceedings. This requirement can, according to *Secretary of State for Trade and Industry v Smith*,[102] be waived as the statutory provision was merely directory and not mandatory. This is questionable, particularly when disqualifications have been challenged successfully on other grounds under the ECHR.

53 Moving to the determination of a period of disqualification being imposed against errant directors we see temporal issues coming to the fore. The period of disqualification is explicitly linked to the degree of unfitness established, as is apparent from the leading authority of *Re Sevenoaks Stationers Ltd*.[103] In this case the Court of Appeal designated three levels of unfitness and fixed appropriate disqualification periods accordingly. The most serious of cases might merit a disqualification of 15 years. Minor cases justify a disqualification between 2 and 5 years with the middle bracket running from 5 to 10 years.

54 We note that the use of disqualification proceedings against unfit directors of insolvent companies is a legitimate tool to maintain appropriate managerial standards – but it is important that it is deployed in timely fashion. For in *Eastaway v UK*,[104] the European Court of Human Rights ruled that there was a potential breach of Article 6 in the protracted pursuit of disqualification proceedings which had taken almost none years to complete.

55 To compensate for its generally liberal approach towards bankrupts, the Enterprise Act 2002 introduced bankruptcy restriction orders ("BROs") to penalise the more feckless members of that constituency. The position is regulated by section 281A and Schedule 4A. The BRO period can run up to 15 years. In the years immediately following the coming into force of these provisions (in April 2004) we saw a surge in litigation as the courts laid down working rules. In handing

[100] On when proceedings are brought, see *Secretary of State for Trade and Industry v Vohora* [2009] BCC 369. The two year period for bringing claims is likely to be extended to something like five years – see DBIS, *Transparency and Trust* (July 2013), at paragraph 12.5.
[101] See L.S. Sealy and D. Milman, *Sealy and Milman: Annotated Guide to Insolvency Legislation* (16th ed) (2013, Sweet and Maxwell, London), Volume 2 at 26-27.
[102] [2009] BCC 497.
[103] [1991] Ch 164.
[104] [2005] 40 EHRR 17, [2006] 2 BCLC 361. But this delay did not invalidate undertakings given by the director in question: *Re Blackspur Group plc (No. 4) (Eastaway v Secretary of State for Trade and Industry)* [2007] EWCA Civ 225, [2008] 1 BCLC 153.

down rulings on the length of a bankruptcy restriction, the courts have adopted the principles developed in the director disqualification cases.[105]

Abridging Time/Extending Time

56 We have noted that under section 270 of the Insolvency Act 1986 a temporal requirement can be abridged. Under Rule 7.55, the courts enjoy discretion to overlook failure to meet temporal requirements.[106] The courts also have more general jurisdiction to counter the difficulties posed by strict temporal requirements. Thus in *Re Globespan Airways Ltd*,[107] the Court of Appeal was confronted with temporal issues relating to the conversion of an administration into a process of Creditors' Voluntary Liquidation ("CVL"). The problem here was that there had been a delay in registering the notice to terminate the administration. The Court of Appeal held that the CVL did not commence until that registration had occurred but the administration could be impliedly extended to ensure that there was a seamless transition where this mode of administration exit was chosen.

Overview

57 This short survey should serve to highlight how critical a role is played by the criterion of time in the orderly running of any system of Insolvency Law. Insolvency practitioners need to be alert to its central importance. Time is used as a multi-purpose tool to regulate priority, to protect legitimate expectations, to promote commercial confidence, to reduce the need for applications to be made to the court, to regulate suspect transactions, to punish miscreants, to measure the cost of inputs into the insolvency process and to promote good case management within the broad parameters of Insolvency Law. Although the focus in this essay has been on one discrete area of substantive English law, lessons of general relevance may be learned from this exercise.

58 Firstly, we note a lack of consistency both in terms of legislation and judicial decision on certain common issues. For example, when should the courts waive time limits? We see here the traditional tension between the need for certainty and the desirability of flexibility when issues of time extension arise. Mixed messages emerge here. This lack of consistency, which is found in many other fields of law, does not promote positive behaviour on the part of practitioners and may encourage laxity.

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[105] This is made clear in authorities such as *Randhawa v Official Receiver* [2006] BPIR 1435.
[106] See, for example, *Re Care People Ltd* [2013] EWHC 1734 (Ch). Compare *Re Eco Link Resources Ltd* [2012] BCC 731.
[107] [2012] EWCA Civ 1159.

59 Should we adopt a common measure for time in Law? Inconsistency is the order of the day both between the primary and secondary legislation and within each of these regimes internally. The Insolvency (Amendment) Rules 2010[108] have made a move in this direction by their preference for the use of the criterion of "business days". But that preference is not absolute. Witness Rules 1.4(3), 1. 9 and 1.48, for example. There is more work to be done here (perhaps via a general amendment of the Interpretation Act 1978), but at least the nettle has begun to be grasped.

60 We have become more time sensitive in the sense that there are efforts to ensure that insolvency procedures are not conducted in a leisurely fashion and that time expended by insolvency practitioners (or their lawyers) is well spent. The old adage "time costs money" is never more apposite than in this context. All insolvency proceeding should be subject to an initial (but sensible) time limit. Using administration as an all-purpose gateway in cases of corporate insolvency might facilitate this. That said, there is a tension between the need for a quick realisation/ distribution exercise to be carried out and the need for a proper investigation of the conduct of debtors.

61 Keeping detailed work diaries is a recommended policy for the honest risk-averse director and the prudent insolvency practitioner. Time records maintained by directors and practitioners represent important pieces of evidence.

62 We need to think carefully about the beneficial effects of the passage of time. So in the rush to promote early bankruptcy discharge in order to promote rehabilitation, are we overlooking the need for a period of reflection on the part of debtors? It is unfortunate that there is no compulsory debt counselling required in English law.[109] Such a mechanism might serve to help bankrupts who at present are sometimes discharged at far too early a stage for their own good. The R3 paper "The Personal Insolvency Landscape: A Way Forward for Formal Debt Relief" reflects this concern and suggests a return to more realistic bankruptcy discharge periods (of say 3 years) save in clear cut cases where earlier discharge is appropriate.[110] This is a sensible suggestion.

63 In terms of general proposals for reform there is a strong case for wider use by the courts of prospective overruling in Insolvency Law. The trauma attendant on the existing model of judicial decision-making cannot be justified.

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[108] SI 2010/686.
[109] On this, see D. Milman, *Personal Insolvency Law, Regulation and Policy* (2005, Ashgate, Aldershot), at 154.
[110] January 2014, at 13.

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