Insolvency office holder discretion and judicial intervention in commercial decisions

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Abstract

This article explores the use of discretion exercised by insolvency office holders in making commercial decisions, and the grounds in which they may be challenged. The traditional position of the courts to not interfere with office holder decisions is examined, before potential alternatives are considered.

Key words: Commercial decisions; discretion; insolvency; judicial control; office holder.

Introduction

The role that insolvency law plays within the commercial world is critical to the promotion of commercial predictability, which includes preventing injustices – whatever form that may take. Since the publication of the highly influential Report of the Insolvency Law Review Committee, *Insolvency Law and Practice* (hereafter Cork committee),[2] it was acknowledged that the success of an insolvency regime was almost entirely dependent on those that administer it, namely the insolvency office holders (hereafter IOH).[3] In order for the IOHs to undertake insolvency appointments it was considered necessary that they should be afforded the wide discretion to make commercial decisions with the aim to assist the insolvent company. While the courts have stressed for some time that IOHs must not consider their own personal or professional interests,[4] concerns remain that influences, such as firm-specific expectations could help determine the way in which an IOH may interpret and address risk within an insolvent company.[5] Since the type, extent, and likelihood of risk can be approached and interpreted in different ways, there remains some disparity in the way that an IOH may exercise their largely unfettered discretion.

Discretion exercised on commercial grounds have often thwarted successful challenges made by creditors since the courts have traditionally shown a reluctance to interfere with IOH commercial decisions unless there had been a wrong appreciation of the law, or the decision was conspicuously unfair to a particular creditor.[6] The courts' reluctance to review IOH

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[2] Report of the Insolvency Law Review Committee, *Insolvency Law and Practice* (Cmnd 8558, 1982).

[3] Report of the Insolvency Law Review Committee, *Insolvency Law and Practice* (Cmnd 8558, 1982), para 732. Note that office holder is a generic term that refers to qualified insolvency practitioners and is used in the Insolvency (England and Wales) Rules 2016.

[4] The courts have stressed for some time that IOHs must not consider their own personal or professional interests. They should not only be independent, but also seen to be independent, see *Re Lowestoft Traffic Services Co. Ltd* [1986] BCLC 81.

[5] See J Wood, 'Assessing the effectiveness of the UK's insolvency regulatory framework at deterring insolvency practitioners' opportunistic behaviour' (2019) Journal of Corporate Law Studies (2019) DOI: 10.1080/14735970.2018.1554551

[6] *BLV Realty Organization v Batten* [2009] BPIR 277, para 22.

decisions have continued to sometimes leave creditors with limited options to address their concerns that the IOH had not considered their interests, had selected the incorrect insolvency procedure, or in some cases had charged fees that were considered excessive and not reflective of the work undertaken.[7] Since IOHs decisions have far reaching consequences, yet are often not subject to scrutiny, there is a need to examine the extent and use of commercial decisions in insolvency proceedings. To address this matter, this article will refer to examples where the discretion was exercised in the sale of assets often allegedly at an undervalue, and in instances where the proofs of debts from creditors was rejected.

It will be seen that commercial predictability is promoted as a crucial principle of commercial law, yet the decisions made often rely on vast and constant shifting case law for assistance.[8] Since commercial law consists of special rules which derive mostly from the law of contract, this has ensured the focus of commercial decisions rest on what recognition should be given to the parties in a given transaction. The courts have made it clear that party autonomy is of unequivocal importance, and that they would refrain from intervening in commercial disputes unless it was for the purpose to achieve predictable legal decisions.

The second part of this article focuses on the instances in which the court could intervene to review IOH conduct or their decisions. The case law provides for a rich body of material that discusses the importance of key words such as 'natural justice' and 'fairness', and the extent to which these terms influence the courts' decisions; a factor that is also replicated when a challenge under paragraph 74 of Schedule B1 of the IA 1986 is considered.

Part three of the article illustrates why it is imperative to appreciate the use of discretion in an insolvency context, and why it is crucial to view IOH decisions taking place in a commercial environment. It is paramount that IOH decisions are based on sound, logical business realities, which in turn indicates that the IOH has taken into consideration a number of important factors, such as they have undertaken due diligence, acted in a fair and reasonable manner, and have given importance to officer holder autonomy. While these factors demonstrate some of the issues that the IOH must consider, it should be realised that the IOH is uniquely positioned to know what state the company is in, and therefore what decisions are required to be made. The discretion afforded to IOHs reflects this position and is supported by the courts who recognise that the IOHs are better placed than themselves to make commercial decisions.

While the IOH discretion is wide, there are a number of grounds in which their decisions could be challenged. Part four examines the options available to disgruntled creditors to challenge the decisions made by IOHs through the courts, namely under paragraphs 74 and 88 of Schedule B1 of the Insolvency Act 1986 (IA 1986), for administration, or section 168(5) of the IA 1986 for liquidation. However, while these options continue to be available the evidential threshold required by the courts to satisfy the creditors' claim remains high and it is often on the issue of proof that has led to the courts to dismiss challenges.

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[7] The difficulty in successfully challenging excessive fees lies with the court's requirement that evidence must be provided of the same. The court will not require evidence that the administrators' decision was perverse, although proof of perversity is likely to be good evidence of unfairness. The burden is on the applicants to show that the administrators have not put forward any cogent reason for their proposal, see *Re Meem SL Ltd (In Administration)* [2017] EWHC 2688 (Ch), paras 27 and 29.

[8] Predictability, rather than certainty is used in this article to indicate that predictability of legal application and thus the outcome of disputes on legal issues is a more accurate reflection of what commercial law aims to achieve. See generally, E McKendrick, *Goode on Commercial Law* (5th edn, LexisNexis 2016) 1300.

The courts' reluctance to intervene in commercial decisions, leads part five to consider whether the commercial discretion exercised by directors of a company offers any useful guidance when a comparison is made to the business judgement rule. This section concludes that the business judgment rule provides for a wide discretion for directors to act that is similar to IOH discretion. The law expects directors to make judgment decisions, as much as it expects the IOH to make commercial decisions as they see fit. As such, it is unlikely that the courts would intervene in business judgment cases, any more than it would in cases that concern commercial decisions made by IOHs.

The final section deliberates whether alternative measures could be adopted to make the commercial decisions more transparent and open to scrutiny. Here, the Australian 'reviewing liquidator' approach and United States 'specialist panels' are briefly examined. While both options could offer some additional value to the commercial decision debate, the article concludes that their application is likely to be limited based on workability.

Commercial decisions in context: the nature and function of commercial law

To appreciate the scope and merit of IOH commercial decisions, it is necessary to start with a rationale for why IOHs, as opposed to the courts, are better placed to make such decisions. To address this argument, it is of crucial importance to examine the recognition provided to commercial decisions that were made within a commercial context. Commercial law as a body of law is vast and complex, that consists of many rules and principles that govern the almost infinite variety of commercial transactions that concern businesses. To that end, if for example, it was questioned whether in the UK there were unifying principles that bind the almost infinite variety of transactions in which businessmen engage, the answer would more than likely be a resounding no.[9] This response would recognise the difficulties associated with the view that commercial law, notwithstanding its multifaceted nature, somehow contains principles that could be found in all variants of commercial law. However, an attempt to define a rigid definition of commercial law would be of little aid, while a set of principles would instead aim to accommodate the legitimate practices and expectations of the business community.[10] Thus, if it was presented that no unifying principles exist, commercial law would effectively be merely a 'label' to which no value or distinct legal authority could be attached.[11] Such an outcome would invariably lead to a lack of commercial predictability being attached to IOHs decisions, with their 'commercial decisions' being disregarded or unrecognised by those who would otherwise have been affected by the decision in question. It stands to reason that given the crucial role that insolvency law plays in providing investor confidence in the economy, and its propinquity to commercial law, IOH decisions are given the necessary legal authority to bind all concerned parties. The IOH entrepreneurial based decisions therefore do not only have identifiable unifying principles,[12] but they have also been identified as having distinct legal recognition, since they can flourish and adapt constantly to new business procedures, new instruments, and demands.[13] Despite the advantages that this position may provide, the ease in which commercial law can adjust has sometimes caused unintended complications since the

[9] R Goode, *Fundamental concepts of Commercial law: fifty years of reflection* (OUP 2018) 189; E McKendrick, *Goode on Commercial Law* (5th edn, LexisNexis 2016) 1299.

[10] E Baskind, G Osborne, L Roach, *Commercial Law* (2nd edn, OUP 2016) 4.

[11] LS Sealy and RJA Hooley, *Commercial Law: text, Cases and Material* (4th edn, OUP 2009) 6.

[12] The four principles can be identified as: predictability, flexibility, party autonomy, efficient dispute resolution.

[13] E McKendrick, *Goode on Commercial Law* (5th edn, LexisNexis 2016) 1299.

extent of its jurisdiction has become difficult to construe. In the absence of assistance in the form of a commercial code in the UK, commercial law must instead rely on the vast and constantly shifting case law to respond to the challenges of industrial growth.[14]

While the case law has provided the courts with some much needed assistance in how commercial law should be applied, in general the cases are incapable of providing a strict definition. Instead commercial law has been used more generically to refer to that portion of law which is concerned with commerce, trade and business.[15] These terms indicate that commercial law may be better understood when applied within the context of merchandise. This would lead to commercial law being defined within the special rules which apply to contracts for the sale of goods, and the rules that concern securing finance for the carrying out of contracts of sale.[16] These special rules are accorded significance as they ensure commercial law is associated and concerned with rights and duties arising from the supply of goods and services in the way of trade.[17] Given that parties in the course of business have the freedom to enter into their own designed contracts,[18] commercial law derives much of its sustenance from the law of contract, with equity as its handmaiden and the keeper of its conscience.[19] Therefore, the thread that runs through commercial law is how to govern, and what recognition should be given to, the transaction between the respective parties.[20]

The recognition afforded to business transactions can vary in purpose, but primarily it is understood to allow commercial persons to do business in the way that they want and not to require them to stick to forms that they may think are outmoded.[21] Should a dispute materialise during the facilitation of commercial transactions, the courts have made it clear how they would approach the situation. The courts, which prefer to be pragmatic in nature, would give sensible commercial effect to the transaction; not hinder or frustrate them, but merely remind themselves that they are there to "oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil".[22] While commercial law tends to be rational and responsive, with genuine attempts to accommodate and facilitate commercial practices of the business community,[23] the courts have been mindful not to overstep its jurisdiction and amend or alter the law to suit commercial needs, unless it was contrary to public policy.[24] Therefore, any desired change to commercial practice, to create new rules to accommodate the introduction of new technology, or the need for stronger regulation within the commercial industry, would be for Parliament to consider. While a rigid approach to commercial law would inhibit and disregard the fluidity of commercial law, judicial intervention in commercial matters should be in accordance with its judicial discretion, and not exercised to merely avoid an undesirable outcome. It remains essential that party autonomy, one of the key unifying principles of commercial law, is given unequivocal weighting in any judicial decision. If the courts did not

[14] E McKendrick, *Goode on Commercial Law* (5th edn, LexisNexis 2016) 1299.
[15] HW Disney, *The Elements of the Commercial Law* (MacDonald & Evans 1908) 1.
[16] HC Gutteridge, 'Contract and Commercial Law' (1935) 51 LQR 117.
[17] E McKendrick, *Goode on Commercial Law* (5th edn, Penguin 2016) 8.
[18] CM Schmitthoff, 'The concept of Economic Law in England' [1966] JBL 309, 315.
[19] R Goode, *Fundamental concepts of Commercial law: fifty years of reflection* (OUP 2018) 171. See also, G McCormack, 'Equitable influences and insolvency law' (2014) 3 Corporate Rescue and Insolvency 103.
[20] See generally, M A Clarke et al. *Commercial Law: Text, cases, and Materials* (5th edn, OUP 2017) 4.
[21] *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439, 444.
[22] See Sir Robert Goff, 'Commercial Contracts and the Commercial Court' [1984] LMCLQ 382, 385
[23] For example, see *Re Bank of Credit and Commerce International SA (No 8)* [1998] AC 214, where the House of Lords held that the court should be very slow to declare a practice of the commercial community to be conceptually impossible (at 288).
[24] See generally, R Goode, *Fundamental concepts of Commercial law: fifty years of reflection* (OUP 2018) 172.

respect the freedom of contract, and the sanctity of contract, commercial unpredictability would undoubtedly increase and this would in turn decimate the trade and value of contracts generally.[25] It should therefore be of little surprise that the importance given to party autonomy in English commercial law remains strong, especially between parties who had both been equally advised.[26] On this premise judicial intervention should be reserved for those instances where the law had been misinterpreted, or where there had been a "misalignment of commercial law and commercial practice".[27] To that end, it would be essential that the courts continue to promote commercial predictability and intervene in cases only for the purpose to achieve predictable legal decisions.[28]

While the unifying principles in commercial law feature heavily in case law decisions, there have been some instances that have demonstrated that these commercial expectations are not absolute.[29] For instance, party autonomy has not always been fiercely protected, with much being dependent on the parties and the area of commercial law in question. In relation to corporate insolvency law, it appears that much would depend on whether the insolvency case is categorised as 'pure' or 'impure' in a commercial law context. It must be made clear that the division between 'pure' and 'impure' commercial cases has important consequences. The distinction between the two can be explained by reference to who the decision would likely affect. For an 'impure' commercial case the decision would likely concern consumers, and in order to protect their legal position the courts would adopt a more relaxed approach to party autonomy than what would have ordinarily been afforded.[30] For 'pure' commercial cases, like those that often concern insolvency, the parties (excluding those that may pursue their rights under private law) are likely to be business people who made informed decisions to enter into various contracts. It is these 'pure' commercial decisions that would render judicial intervention as undesirable and intrusive since the sanctity of contract would dictate that the courts should not be too quick to invalidate contractual terms that had been freely entered into. Since IOHs are afforded the right to exercise their undoubted power of compromise, provided that they do not trespass outside the confines of that power,[31] it would be imperative that the courts reserve the right to intervene only in instances where it would be absolutely necessary. The courts could consider whether to intervene if the terms were deemed to be overly restrictive or oppressive, in breach of law, or if they had offended principles of public policy; but not all these conditions would guarantee judicial intervention. Instead, each case would have to be assessed on its own merits and the courts would be mindful of their response to not to produce commercial unpredictability since this could undermine the credibility of the commercial decisions made by the IOH. Should the courts decide to intervene then they have the jurisdiction to review the conduct of the IOHs and where necessary, permit action to be taken against them.

Judicial control of insolvency officer holders

[25] See R Goode, 'The Codification of Commercial Law' (1988) 14 Mon LR 135, 149.
[26] *Cavendish Square Holding BV v El Makdessi* [2015] UKSC 67, para 35; *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38, 103.
[27] G Villalta Puig, 'The Misalignment of Commercial Law and Commercial Practice' [2012] LMCLQ 317.
[28] *Vallejo v Wheeler* (1774) 1 Cowp 143, 153; *Mardorf Peach & Co Ltd v Attica Sea Carriers Corpn of Liberia, The Laconia* [1977] AC 850.
[29] For example, see *the Golden Victory* [2007] UKHL 12.
[30] See generally, R Bradgate, *Commercial Law* (3rd edn, OUP 2005) 6.
[31] *Wentworth Sons Sub-Debt SARL v Lomas* [2017] EWHC 3158 (Ch), para 51.

The above section revealed that the courts are unlikely to intervene in a commercial decision made by an IOH unless one of the few exceptions were satisfied. While intervention is likely to be a rare occurrence, what is imperative to examine is the relationship between the courts and the IOHs and the extent to which the courts' jurisdiction is exercised over the IOHs generally. For a better understanding as to why the IOH have such wide discretion, it was made clear in the Privy Council decision in *Deloitte & Touche AG v Johnson*, when Lord Millet said that the court's inherent jurisdiction to control the conduct of its own officers was "beyond dispute".[32] At this stage it is important to note the difference between office-holders who were officers of the court and those who were not, and the consequences that befall such a distinction.[33] The law is clear on this point; liquidators in compulsory liquidations[34] and administrators[35] were to be recognised as officers of the court, but liquidators in voluntary liquidations were not.[36] The consequence of being classified as an office of the court was set out by the Court of Appeal in *Ex Parte James*, which stated that an officer of the court would be subject to the courts' control and as such would be expected to comply with the relevant equitable requirements.[37] The rule in *Ex Parte James* has been expanded upon over the years, to the point where the rule encompassed new territory. For instance, the rule had become the legal authority to demonstrate that the courts would not permit IOHs to take any course of action or to take advantage of a technical position in law where it would be dishonourable.[38] While this had been interpreted to create a wider principle than just dealing with the recovery of payments made pursuant to a mistake of law,[39] to include the enrichment of the officer,[40] no matter how this had occurred, recently the rule has somewhat been given a restricted interpretation.[41]

Before the consequences of the recent case of *Lehman Brothers Australia v Lomas* ('LBA') are examined, it is worth noting the cases that have occurred in the last few years. In *TOC Investment Corporation v Beppler & Jackson Ltd*,[42] the rule in *Ex Parte James* was given the expansive view as taken in *Lomas v Burlington Loan Management Ltd.*[43] In *Lomas*, Richards J (as he then was), concluded that the rule cannot now be said to be confined to particular categories of cases.[44] The strong endorsement of the rule in *Ex Parte James* by the Court of Appeal, was based on a decision reached in an earlier case, *Re Wigzell*, in which Salter J observed that the court had a "discretionary jurisdiction to disregard legal right, and that such jurisdiction should be exercised wherever the enforcement of legal right would, in the opinion of the Court, be contrary to natural justice".[45] The reference to 'natural justice' was understood to result in the enforcement of the law, which in the opinion of the court, would be pronounced to be obviously "unjust by all right-minded people".[46] Therefore, it could be safely assumed

[32] [1999] 1 WLR 1605 (PC) 1612C.
[33] H Anderson '*The Framework of Corporate Insolvency*' (OUP 2017) 136.
[34] *Donaldson v O'Sullivan* [2008] EWCA Civ 879, [2009] 1 WLR 924, para 39.
[35] *Re Atlantic Computer Systems Plc* [1992] Ch 505 (CA) 529F, 543G; In re Lune Metal Products Ltd [2007] Bus LR 589, para 34.
[36] *Re TH Knitwear (Wholesale) Ltd* [1988] 1 Ch 275 (CA) 288E.
[37] (1874) LR 9 Ch App 609 (CA).
[38] *Re John Bateson & Co Ltd* [1985] BCLC 259, 261.
[39] For example, see *In re Clarke* [1975] 1 WLR 559.
[40] See *Green v Satangi* [1998] BIPR 55.
[41] The case of *Lehman Brothers Australia v Lomas* [2018] EWHC 2783 (Ch) is discussed below.
[42] [2016] EWHC 20 (Ch).
[43] [2015] BPIR 1162.
[44] *Lomas v Burlington Loan Management Ltd* [2015] BPIR 1162, para 174.
[45] *Re Wigzell* [1921] 2 KB 835, 845.
[46] *Re Wigzell* [1921] 2 KB 835, 845.

that slight or marginally unjust acts would not be enough to convince the court to exercise its discretion.

Applied to insolvency, it would appear that a successful challenge against an IOH decision would require it to be established that the decision in question was not commercially justifiable. The courts when deciding whether the stated commercial grounds were justifiable, would review the impact of the IOHs' decision and determine if an element of unfairness was present. Unfairness, in this context was understood to be part of the 'touchstone or test' to be applied for the court's intervention in the actions of IOH under the principle in *Ex Parte James.*[47] However, in LBA, Hildyard J held that the decisions in *Waterfall IIB*[48] and *Re Nortel*[49] were obiter, and therefore not binding on him, and distinguishable.[50] Instead, he considered the correct test to be "a stricter unconscionability test",[51] despite the relied upon authorities cited with approval by Lord Neuberger in *Re Nortel*[52] and David Richards J in *Waterfall IIB*[53] in their adoption of the "unfairness" test.

Recent authority indicated that the courts would be reluctant to direct or re-direct an IOH on the basis of fairness in a way or context which would affect and potentially undermine or unbalance bilateral (or multilateral) rights or obligations enjoyed under a contract freely entered into.[54] Evidence of unfair conduct provided the courts with wide discretion to question commercial decisions than would otherwise have been possible. Phrases such as "dishonourable and not high-minded",[55] or the conduct would be "unconscionable" for the officer to stand on their strict legal rights demonstrated what the courts were concerned with.[56] The courts have over the years attached great importance to the equitable standards applied by the IOH and how they conducted themselves in the decision making process. However, while equitable terms have offered some much needed flexibility in a commercial law environment, historically the approach taken by the courts had not always ensured a consistent and orderly conduct of business affairs.[57] Prior to the wide acceptance of equitable principles it was feared by some that the usage of equitable doctrines in commercial law would do "infinite mischief and paralyse the trade of the country".[58] As time passed the use of equitable principles have been enthusiastically utilised when and where it had been necessary to aid parties in a commercial context.[59] In an insolvency context, while the courts have remained reluctant to state that parties to a commercial contract occupy a fiduciary relationship, the courts have been inclined to enforce fiduciary obligations if the parties had intended for such obligations to arise.[60]

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[47] *Re Clarke (a Bankrupt)* [1972] 1 WLR 559, 563; *Re LBIE (Waterfall IIB)* [2015] BPIR 1162, para 183; which was cited in the Supreme Court in *Re Nortel GmbH* [2014] AC 209, para 122; and *Re Young* (unreported, 27 March 2017).

[48] [2015] BPIR 1162.

[49] [2014] AC 209.

[50] *Lehman Brothers Australia v Lomas* [2018] EWHC 2783, paras 49, 50, 81.

[51] *Lehman Brothers Australia v Lomas* [2018] EWHC 2783, paras 70, 81. As stated in *Re Wigzell* [1921] 2 KB 835; *Re T.H. Knitwear (Wholesale) Ltd* [1988] Ch 275; *Heis v Financial Services* [2018] EWHC 1372.

[52] *Re Nortel GmbH* [2014] AC 209, 122.

[53] *Re LBIE (Waterfall IIB)* [2015] BPIR 1162, paras 196, 177, 181.

[54] *Heis v Financial Services* [2018] EWHC 1372, para 143(6).

[55] *Re Wigzell* [1921] 2 KB 835, para 177.

[56] *Re Wigzell* [1921] 2 KB 835, para 177; *Lehman Brothers Australia v Lomas* [2018] EWHC 2783, para 61(2).

[57] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) 669, 704.

[58] *Manchester Trust v Furness* [1895] 2 QB 539 (CA) 545.

[59] Sir Peter Millett, 'Equity's Place in the Law of Commerce' (1998) 114 LQR 214, 214.

[60] See *Don King Productions Inc v Warren* [2000] Ch 291 (CA).

As a result, there are two observations that are important to note. First, both administrators and liquidators can be in a fiduciary position. Second, the courts have jurisdiction to intervene and investigate whether the IOHs' conduct contravened equitable principles. In regard to the latter point, the courts approach to any fiduciary breach committed by the IOH would depend on the insolvency procedure undertaken. For example, the liquidator would be in a fiduciary position in relation to the company and must act honestly and exercise their powers *bona fide* for the purpose for which they were conferred, and not for any private or collateral purpose.[61] To act honestly would infer that the IOH had acted equitably, a term which is interchangeable with legitimacy, legal, in good faith, honourable, by fair means, and with clean hands. Good faith in this context would imply that the actions of the IOH were sincere, but this would not necessarily mean that the decisions taken were without potential issues.

In comparison, an administrator could face liability under section 212 of the IA 1986 which deals with misfeasance and breach of duty. Should a creditor wish to bring misfeasance proceedings against the IOH to request the courts to compel the officer to contribute to company assets, the creditor would need to demonstrate that the IOH had breached their duty. If it was felt that a class claim was required as the company had suffered, rather than the individual, then paragraph 75 of Schedule B1 of the IA 1986 would be more appropriate. This would be apparent since it gives the courts permission to investigate the conduct of the IOH who appears to have "misapplied or retained, or had become accountable for, any money or other property of the company, or been guilty of any misfeasance or breach of fiduciary duty" (in relation to the company). To substantiate either claim would be difficult since the proceedings rely on evidence to demonstrate that a fiduciary breach had occurred. Recent case law would further suggest that a 'merits test' would apply, in that it would have to be proved that the IOH had not reached a bona fide view based on the materials available to them.[62] In addition, it would also have to be determined whether or not the IOH was acting as 'agent of the company'. Should the administrator prove to the courts that they were acting as an agent of the company, they would immediately be afforded exemption from prosecution.[63] It therefore appears that liability would depend on the individual wording of the contracts to decide whether liability could be rightfully asserted. Because of this discrepancy, many administrators would insist on clear contracts stipulating their personal non-liability thereby defeating attempts at judicial intervention.

While some contracts may protect administrators against liability, the courts approach to equitable principles may be more difficult to overcome.[64] It was discussed above how equitable behaviour would be interpreted following the rule in *Ex Parte* James, and how in subsequent case law, such as *Re Wigzell*, the rule was developed to include concepts such as natural justice. Natural justice has over the years been widely interpreted and can now be closely associated with "fairness". For example, in *Re Clark*, Walton J said "deliberately using for the purpose 'unemotive language', the rule provides that where it would be unfair for a trustee to take full advantage of his legal rights as such, the court will order him not to do so…".[65] While

[61] A liquidator who exercises powers in good faith after taking proper advice is not open to challenge: *Re Burnells Pty Ltd* (in liq); *Ex parte Brown and Burns* (1979) 4 ACLR 213.
[62] *Re One Blackfriars Ltd* [2018] EWHC 901 (Ch), para 30.
[63] In the cases of administrators, paragraph 69 of Schedule B1 of the Insolvency Act 1986 states that during the exercise of his functions 'an administrator acts as the company's agent'.
[64] For a discussion on challenging administrators, see A Mace, 'Challenging administrators: can they ever to any wrong?' (2010) 4 Corporate Rescue and Recovery 141.
[65] *Re Clark* [1975] 1 WLR 559, 563.

subsequent cases have deliberated whether 'unfair' was synonymous with dishonourable or even dishonest, it was decided that this would have been unlikely given that Walton J was not a judge known for a lack of precision in his use of language. It is better understood that his repeated use of the word unfair in his judgment portrayed his intention.[66] In support of this view it is worth noting that in the recent case of *Birdi v Price*, the court when it considered whether an officer of the court had to pay money to the person really entitled to it, that it would be so on the footing that it was the "honourable or honest" thing to.[67] Fairness was not in this instance referred to when the principle set out in *Ex Parte James* was considered.

Since *Re Clark*, it would seem that unfairness as a substantive legal concept has now become well embedded in the law,[68] and this is particularly evident in the challenges that could be made by virtue of paragraph 74 of Schedule B1 of the IA 1986, which will be discussed below. However, in the recent case of LBA, the court thought that it would be in rare circumstances when the "unjust by all right-minded people" test as applied in *Re Wigzell* would be used.[69] The court considered that it would likely only apply to circumstances where any "honest man would disclaim any such right or consider it dishonourable to assert it but there is a gap in the law and the law itself provides no recourse against its assertion. The obvious examples being mistake of law and receipts from third parties".[70] As such, the court in LBA rendered the "unfairness test" as applied in *Re Lehman Brothers International (Europe)(In Administration),[71] amongst others,[72]* as inappropriate and had become an "unruly horse" which should not be followed.[73] Instead, the court clarified its position on the application of *Ex Parte James*, stating that an expansion of the rule to enable the court to modify, control or remove contractual rights, and/or to provide a discretionary remedy where the law had already provided one (rectification was available in the instant case, subject to satisfaction of its conditions), was not necessary and was likely to be unwise.[74]

While LBA remains on appeal, the case has had some important consequences. Even though it has been since *Re Clark* when the rule in *Ex Parte James* last determined the result,[75] the strict interpretation means that it is likely that IOHs may consider that their conduct is now less at risk of a challenge under the rule than it was subject to the authorities prior to Hildyard J's judgment. It is also plausible that those who are dissatisfied by a decision or the conduct of the IOH may be less willing to challenge such decisions based on this ruling, especially where the IOH relies on contractual rights and obligations freely entered into and the law of contract does not allow the contract to be "reformed or rectified or otherwise invalidated".[76] With this in

[66] *Lomas v Burlington Loan Management Ltd* [2015] BPIR 1162, para 180; *Re Nortel GmbH* [2013] UKSC 52, [2014] AC 209, para 122*; re T.H, Knitwear (Wholesale Ltd)* [1988] Ch 275, 290.
[67] [2018] EWHC 2943 (Ch), para 105.
[68] An observation that was also made by Mr Justice David Richards in *Lehman Brothers International (Europe) (In Administration)* [2015] EWHC 2270 (Ch) para 183.
[69] [2018] EWHC 2783 (Ch), para 61. See also, *Evans v Carter* [2017] EWHC 2163 (Ch), para 52: 'it does not seem to me that the enforcement of a claim to the vested interest in the property…is contrary in any way to natural justice, or is in any way unfair, or would be pronounced to be obviously unjust by all right-thinking, right-minded men or women'.
[70] [2018] EWHC 2783 (Ch), para 61(7).
[71] [2015] EWHC 2270 (Ch); [2015] BPIR 1162.
[72] *Re Wigzell* [1921] 2KB 835; *Re TH Knitwear (Wholesale) Ltd* [1988] Ch. 275.
[73] *Heis v Financial Services* [2018] EWHC 1372, para 143(1).
[74] [2018] EWHC 2783 (Ch), paras 39, 61, 70.
[75] [2018] EWHC 2783 (Ch), para 51.
[76] *Lehman Brothers Australia v Lomas* [2018] EWHC 2783, para 84.

mind, the next part of this article will examine the extent of the IOHs' discretion to make commercial decisions.

The insolvency office holders and their discretion to make commercial decisions

In order to appreciate the use of discretion in an insolvency context, it is crucial to view IOH decisions taking place in a commercial environment, and as such they should be based on sound, logical business realities. Within the ambit of insolvency law there lies a number of important decisions that have been made by the courts which have aided a better understanding of what is to be expected of the IOH and the extent of their discretion. The main expectations can be categorised into three distinct parts.

Due diligence

Often the IOH would rely upon expert advice as well as their own investigations in order to make an informed decision. Should an IOH commercial decision make use of the obtained advice, the courts have shown that they would be unwilling to interfere, or question that decision. In *CEDA Ltd v Fortune*, it was considered whether a commercial decision based on advice from an expert could provide grounds to remove the liquidator.[77] The court concluded that there was no such basis for a removal, stating that the liquidators make a commercial decision not only based upon expert advice but also taking into account the "risks of being embroiled in disputes … [which] were sufficiently great, the likely disproportionate costs and risks to the insolvent estates …".[78] The significance attached to a proper assessment of risk and advice was previously considered in detail by Neuberger J (as he then was) in *AMP Music Box Enterprises Ltd v Hoffman*,[79] which was also referred to in the decision of *CEDA Ltd*. Neuberger J, acknowledged that some IOH decisions would attract criticism, but nevertheless decided that it was all too easy for an IOH to say, with the benefit of hindsight, how they could have done it better.[80] This position would invariably be undesirable since it would encourage applicants to remove an IOH on such grounds, and there would be a risk that the courts would be flooded with applicants of this sort.[81] It is clear that the courts are reluctant to second guess commercial decisions made by the IOH, despite the possibility that a better alternative existed. Instead the focus would be on how the discretion was exercised by the IOH, with attention drawn to the presence of 'good faith' after taking proper advice.[82] Should the courts find that there was a lack of good faith, judicial intervention would take into account the overall disruption that this would cause to the insolvency process; taking into account the consequences of that intervention on encouraging other applicants to file challenges with the courts, even if some of the cases did have merit.

Fair and Reasonable

[77] *CEDA Ltd v Fortune* [2018] EWHC 674 (Ch), para 31.
[78] *CEDA Ltd v Fortune* [2018] EWHC 674 (Ch), para 33.
[79] [2002] BCC 996.
[80] *AMP Music Box Enterprises Ltd v Hoffman* [2002] BCC 996, 1001-2.
[81] *AMP Music Box Enterprises Ltd v Hoffman* [2002] BCC 996, 1001-2.
[82] *Re Burnells Pty Ltd* (in liq); *Ex parte Brown and Burns* (1979) 4 ACLR 213.

The second consideration concerns the expectation that the IOH decision would be fair and reasonable. The terms were explored in *Re The Co-operative Bank Plc*,[83] which referred to the earlier case of *Telewest Communications plc (No2).*[84] In the latter case, Richards J commented that it was not only necessary to recognise these equitable terms, but also to balance the two important factors. He went on to say that it must be a scheme that an "intelligent and honest man, a member of the class concerned and acting in respect of his interest might reasonably approve".[85] On this basis the scope of what would be deemed to be reasonable was not absolute since the test indicated that the scheme proposed need not to be the only fair scheme or even, in the court's view, the best scheme available. Necessarily, there may be reasonable differences in views on these issues.[86] It is the acceptance of the courts that different schemes may exist that allows the IOH a wide berth to use their discretion to guide the insolvency procedure. This should not be viewed as unwanted or something that has the potential to cause commercial unpredictability; instead it should be welcomed since the courts position appreciates the complexities that surround commercial insolvency decisions. Likewise, the courts have accepted that when it must determine whether a decision would satisfy the fair and reasonable criteria, only the creditors could really provide an adequate response since they would be "much better judges of their own interests than the courts",[87] and as such the courts would be slow to differ from the arguments put forward in the creditor meetings by the majority if this subsequently put some creditors in a bad position.

This position has become somewhat more polarised with the amendments made to the Insolvency Act 1986 by the Small Business, Enterprise and Employment Act 2015 ("SBEEA 2015"), and the introduction of the Insolvency Rules 2016 ("IR 2016"). Sections 246ZF and 379ZB of the IA 1986, as amended by section 122 of the SBEEA 2015, provide for a significant change in how the decisions of creditors would be taken in all insolvency proceedings. These sections together with Part 15 of the IR 2016 flesh out an entirely new decision making regime. Critically, the change removes the need for formal, and often costly, creditors' meetings with a process of 'deemed consent'.[88] The IOH would be expected to write to creditors with the proposals and include a deadline for registering objections. The proposals, which include remuneration and expenses, would be deemed 'approved' provided that at least ten per cent of creditors by value did not object.[89] Should any objection satisfy the threshold, modernised methods of communication such as email, virtual meetings and electronic voting could be used to resolve matters wherever possible (although a creditor could still request a formal, in-person meeting).[90] In that instance, the final creditors' meeting would be replaced with email correspondence. The amendments have been designed to lessen the regulatory burden on IOHs, and to streamline the insolvency process by placing a greater emphasis on the use of technology. Such initiatives also acknowledge that there are difficulties in the industry with creditor engagement and it is hoped that the greater use of e-communication and online platforms would make the process more accessible.

[83] [2017] EWHC 2269 (Ch).
[84] [2005] BCC 36.
[85] *Telewest Communications plc (No2)* [2005] BCC 36, paras 21-22.
[86] *Telewest Communications plc (No2)* [2005] BCC 36, paras 21-22.
[87] *Telewest Communications plc (No2)* [2005] BCC 36, paras 21-22.
[88] ss246ZF and 379ZB IA 1986, as amended by s122 SBEEA 2015. Further detail of how this provision works is set out in rules 3.38 and 15.7 IR 2016.
[89] Ibid s246ZF(6) of the IA 1986, as amended by s122 SBEEA 2015.
[90] ss246ZE and 379ZA IA 1986.

Whether the application of deemed consent would aid the IOH too much at the expense of the creditors' claim remains to be seen, but what should be noted is that before the changes occurred, creditors often did not attend and vote at meetings. Reasons provided often included the inconvenience of how long the meeting would take, and the distance needed to travel. In that respect, the greater use of e-communication could perhaps increase the opportunity for creditors to be involved. If any dispute did arise what is clear is that the courts would not have to determine whether the lack of creditor input was fair and reasonable since the legislation now provides for this approach. Instead, what the courts would be concerned with is whether the process had been conducted in accordance with the law. Judicial discretion would permit the courts to review procedural issues that may surround an IOH decision, but there would remain a reluctance to do so should the decision have commercial justification.

Office holder autonomy

The third expectation dictates that the IOH has the autonomy to make commercial decisions and they should not overly rely on the courts for assistance. In *Re Longmeade Ltd (In Administration),*[91] the court considered the impact to a liquidator's power to bring proceedings in the name of a company in compulsory liquidation in accordance to the IA 1986, as amended by the SBEEA 2015. Notwithstanding the significant changes made by SBEEA 2015, it is important to explore the position before 26 May 2015 since the case law provides some assistance as to what was the extent of the IOH powers. Under the old regime, the leading authority in relation to the approach taken by the courts to grant sanctions for the exercise of powers was *Re Greenhaven Motors Ltd (in liquidation).*[92] In regard to the extent of the liquidators' power, Chadwick LJ said:[93]

> …it is wrong in principle for the court to approach its task on the basis that the liquidator's wish to exercise the power should prevail unless it is satisfied that the liquidator is not acting bona fide or that he is acting a way in which no reasonable liquidator should act.

While the conduct of the liquidator would be the fundamental consideration, the opinions of the liquidator would to a large degree also be taken into account. On this point, Chadwick LJ thought that the correct approach to s167(1)(a) IA 1986 was identified by Lightman J in *Re Edennote Ltd (No2).*[94] In this decision it was established that where a liquidator sought the sanction of the court and took the view that a compromise was in the best interests of the creditors, there would be no suggestion of lack of good faith by the liquidator or that they were partisan. The courts would instead attach considerable weight to the liquidator's views unless the evidence revealed substantial reasons why it should not do so, or that for some other reason the IOH view was flawed.[95]

For the courts to be satisfied that the required threshold had been reached to justify an interference with an IOH decision, it would need to balance, but not trade-off, the interests of the creditors with that of the IOHs. As with all commercial transactions, the creditors may be able to demonstrate that their wishes would not be served in the best way should the IOH proceed with their intended course of action. While it was previously established that it would be the creditors to whom would be in the best position to determine what their best interests

[91] [2016] Bus LR 506.
[92] [1999] 1 BCLC 635.
[93] *Re Greenhaven Motors Ltd (in liquidation)* [1999] 1 BCLC 635, 642h-643c.
[94] [1997] 2 BCLC 89, 92.
[95] *Re Edennote Ltd (No2)* [1997] 2 BCLC 89, 643a-c.

were, the courts have demonstrated that they would be flexible on this point. Given the professional status of IOHs, the courts have often reached the conclusion that the IOH would be capable of reaching an informed objective view of the situation.[96] That said, the courts have preferred to let the strongest argument prevail, and as such the courts would permit a creditor, should they wish, to voice their interests for or against a winding-up petition, subject to being able to substantiate (with evidence) the reasons why they have pursued that course of action.[97] However, this position is not absolute since the reasoned views of the majority of creditors, would not in itself oblige the IOH to follow those views if there were special circumstances that dictated otherwise.[98] In other words, creditor satisfaction is difficult, if not often impossible, to achieve especially when the IOH would be obliged to consider the interests of the creditors as a whole. The creditors are likely to vote in their own self-interest, even when on committees, and the public interest will mean little to them.[99] Creditor dissatisfaction often stems from them having unrealistic expectations about what the insolvency process can provide, what the IOH duties are, or what the IOH has done to them i.e. rejected or reducing a proof, or is suing them for a preference.[100] To that end, it would be entirely feasible that a majority held view by the creditors and the view shared by the remainder of the class could be different.[101]

The discretion afforded to an IOH to exercise commercial judgment has long been the position of the courts who have refused to interfere in a disputed case unless the IOH was acting *mala fide* or the decision was one which no reasonable liquidator could have taken.[102] The courts have indicated that they would be "very slow to substitute its judgment for the liquidators' on what is essentially a businessman's decision".[103] Given that the courts rarely depart from this view, the amendments made to the IA 1986, as amended by SBBEA 2015, have strengthened the discretion exercised by IOHs. SBEEA 2015 has removed the need for a liquidator to obtain sanction (approval of either the courts or a creditors' committee)[104] before causing the company to commence of defend legal proceedings.[105] The change made to Schedule 4, contained in section 167 of the IA 1986, has brought liquidation into line with administration; a move that was made possible due to the current disciplinary regulatory requirements being deemed sufficient to ensure liquidators act in the interests of creditors as a whole.[106] While the courts have signalled that the change should not be seen as endorsing a new approach,[107] the move

[96] *Re Edennote Ltd (No2)* [1997] 2 BCLC 89, 643g-h.
[97] *Re Vuma Ltd* [1960] 1 WLR 1283; *Re BCCI (No.3)* [1993] BCLC 1490, 1502.
[98] *Re BCCI (No.3)* [1993] BCLC 1490, 1502-03.
[99] See J Wood, 'Assessing the effectiveness of the UK's insolvency regulatory framework at deterring insolvency practitioners' opportunistic behaviour', (2019) Journal of Corporate Law Studies (2019) DOI: 10.1080/14735970.2018.1554551 at 9.
[100] For example, in *Re BW Estates Ltd* [2016] BCC 475, which stated that the creditors of a company that had been in administration were not entitled to an order that the remuneration of the administrators should be disallowed. The administrators had been entitled to conclude that the company could be rescued as a going concern and, save in relation to one matter, they had not acted unreasonably during the administration.
[101] *See Re a Company* [1983] BCLC 492, referred to in *Ebbvale v Hosking* [2013] 2 BCLC 204 (PC), para 28.
[102] *Greehaven Motors Ltd (in liquidation)* [1999] 1 BCLC 635, 643i-644a.
[103] See *Mitchell v Buckingham International plc* [1998] 2 BCLC 369, 391f, following the decision in *Re Edennote Ltd, Tottenham Hotspur plc v Ryman* [1996] 2 BCLC 389, 394.
[104] Or where there is none, the Secretary of State or a meeting or creditors.
[105] See section 167 of Schedule 4 to the IA 1986, as amended by section 120 of the SBBEA 2015.
[106] See *Re Longmeade Ltd (In Administration)* [2016] Bus LR 506, para 52. Also note para 59, which referred to Explanatory Notes to the SBBE Bill that was omitted from the Explanatory Notes to the 2015 Act itself.
[107] *Re Longmeade Ltd (In Administration)* [2016] Bus LR 506, para 60.

has nevertheless permitted administrators' decisions to be considered in the same light as those made by a liquidator.

The respective case law that demonstrate the court's reluctance to intervene with IOHs have shown the importance attached to commercial decisions. For example, in *Re T&D Industries plc*, Neuberger J said:[108]

> …a person appointed to act as an administrator may be called upon to make important and urgent decisions. He has a responsible and potentially demanding role. Commercial and administrative decisions are for him, and the court is not there to act as a sort of bomb shelter for him.

This reliance on the IOH to make commercial decisions was confirmed in *Re MF Global UK Limited*,[109] which stated that while administrators could in complex matters obtain directions from the courts, the scope to do so would be limited.[110] In general terms it would be expected that in commercial matters, IOHs' would exercise their own judgment rather than rely on the approval or endorsement of the courts to their proposed course of action.[111] Whether or not the courts should interfere with a IOH decision was considered in *Re CE King Limited*, in which Neuberger said:[112]

> …at least in principle and in general, it is not for the court to interfere with such commercial decisions: those are to be left to the administrator…[but] if the administrators are proposing to take a course which is based on a wrong appreciation of the law and/or is conspicuously unfair to a particular creditor or contractor of the company, then the court can, and in an appropriate case, should be prepared to interfere.

As the wrong appreciation of the law requires little discretion from the courts, what amounts to unfair or unreasonable treatment to a creditor has become the focal point for challenges to an IOH decision. However, it is important to note that the law requires a speedy and often expedient decision making process, and that IOH's decisions should be assessed in that context.[113] Therefore, hindsight judgment that takes into account unknown information at the time the decision was made should be avoided. Nonetheless, the criteria as it will be seen is not without difficulties to satisfy. But before the grounds for challenge are explored in detail it is important to consider what importance has been attached to public interest.

The importance of public interest

The courts in considering whether or not to interfere with an IOHs' commercial decision have made reference to the importance and relevance of public interest arguments. It was noted above that the function of commercial law was to ensure that commercial persons are allowed to do business in the way that they want, and as such the courts have shown reluctance to assign much weight to the public interest arguments. However, while little weight has often been assigned to public interests, they have not always been entirely dismissed. The courts have

[108] [2000] 1 WLR 646, 557.
[109] [2014] Bus LR 1156.
[110] *Re MF Global UK Limited* [2014] Bus LR 1156, para 41. See also the discouragement of "bomb shelter" applications as stated by Registrar Barber in the case of *Re Chinn* [2016] B.P.I.R. 346.
[111] *Re MF Global UK Limited* [2014] Bus LR 1156 at para 41, referring to the decision in *Re T&D Industries plc* [2000] 1 WLR 646, 552.
[112] [2000] 2 BCLC 297, 303; see also *BLV Realty Organisation v Batten* [2009] EWHC 2994 (Ch), para 22.
[113] See *Re T&D Industries plc* [2000] 1 WLR 646, 657. See also, *Re Consumer & Industrial Press Ltd (No.2)* (1988) 4 BCC 72, at 74.

accepted that it could in some instances have a role to play, but it would not usually be a decisive consideration that would influence the courts' judgment.[114] While public interest arguments would often be a marginal factor, it is worth noting that they could have considerable weight in cases that involved IOH behaviour that amounted to an abuse of process.[115] It is therefore important that when the courts consider the interests of creditors that they do not dismiss the public interest arguments too readily, especially if there was a danger that by doing so the courts run the risk of openly approving, and thereby creating a precedent for, IOH conduct that harms the applicants interests. Challenges to IOH decisions are therefore required to ensure that there is some accountability placed on IOHs for the decisions made, and that the decisions can be subject, if required, to a level of scrutiny that encourages IOHs to provide meaningful justification for their actions taken.

Grounds for challenging office holder decisions

It was noted above that IOHs have wide discretion to make decisions as they see fit, but it is imperative that commercial decisions are still based on reasonable justified grounds. Under the former administration regime there were schemes in place that allowed creditors to challenge the actions of an administrator. Applications could, for example, be made under section 27 of the IA 1986 that alleged unfair prejudice, but it was often the case that these challenges failed.[116] Significant changes were introduced under the new administration procedure set out in Schedule B1 of the IA 1986, as inserted by the Enterprise Act 2002. Under the new regime a challenge can take one of two forms. Paragraph 88 of Schedule B1 of the IA 1986, permits an applicant to petition to the courts for an IOH to be removed with sufficient cause, and paragraph 74 of Schedule B1 of the IA 1986, allows for a dissatisfied creditor or member to apply to the courts with the allegation that the actual or proposed actions of the IOH would unfairly harm the applicants' interests. While the slight change in terminology has not necessarily led to a greater number of successful interventions,[117] difficulty remains with attempts to convince the courts that the commercial grounds used to justify a decision were not sufficient.

Sufficient cause for the removal of an administrator

Within paragraph 88 of Schedule B1 of the IA 1986, the courts may by order remove an administrator from office. The application to remove an administrator does not have to involve misconduct, personal unfitness, or imputation against the integrity of the administrator.[118] The discretion of the courts must be exercised in accordance with the correct legal principles, having regard to all the relevant circumstances, which could include the wishes of the majority of creditors.[119] While the discretion of the courts is wide, it must be established by evidence that there is a good or sufficient ground of cause for the removal of the administrator.[120] Before

[114] *Whitehouse v Wilson* [2007] BCC 595, para 55; *Faryab v Smith* [2001] BPIR 246, para 40.
[115] For example, see *Giles v Rhind* [2006] CH 618, para 44; which was followed in *Re Meem SL Ltd (In Administration)* [2018] Bus LR 393, para 44.
[116] For example, see *Re Charnley Davies Ltd (No.2)* [1990] BCC 605 Ch D (Companies Ct); *MTI Trading Systems Ltd v Winter* [1998] BCC 591 Ch D (Companies Ct).
[117] For example, see *Sisu Capital Fund Limited v Tucker* [2006] BCC 463; *Re Lehman Bros International (Europe) (in admin.)* [2008] EWHC 2869 (Ch).
[118] *Clydesdale Financial Services v Smailes* [2009] BCC 810, para 14.
[119] *Finnerty and another v Clark and another* [2012] Bus LR 594, para 16. For an overview of this case see M Shean, 'Administrators: above the law?' (2011) 6 Corporate Rescue and Insolvency 184.
[120] *Finnerty and another v Clark and another* [2012] Bus LR 594, para 33.

the courts could exercise its discretion it would have to consider what were the relevant factors for or against an order for removal, as well as the beneficial consequences or success in possible legal proceedings.[121] Although examples of what amounts to sufficient cause are not extensive, any decision that does not provide consideration to the wishes of the majority of creditors could potentially satisfy the removal of an administrator under paragraph 88.[122] While a successful paragraph 88 challenge does remove an administrator, the removal in itself does not imply misconduct by the administrators, a factor that may help to encourage the courts to exercise its discretion.

Unfairly harmed the interests of the applicant

Turning to paragraph 74 of Schedule B1 of the IA 1986, the courts may grant relief where a creditor or member of a company in administration claims that:

(a) the administrator is acting or has acted so as unfairly to harm the interests of the applicant (whether alone or in common with some or all other members or creditors), or
(b) the administrator proposes to act in a way which would unfairly harm the interests of the applicant (whether alone or in common with some or all other members or creditors).

While paragraph 74 appears to be quite broad,[123] the cases that have taken place after the new administration procedure was inserted by the Enterprise Act 2002 would suggest that the threshold required by the courts has not changed.[124] However, while the threshold may not have changed it would appear that the judgment in LAB has provided a restrictive interpretation of the power of the court under paragraph 74. The judgment appears to suggest that it would likely be more difficult for a person (such as a creditor) who is dissatisfied by a decision or conduct of an IOH to challenge such decision or conduct under the rule in Ex Parte James.[125] While this remains to be seen, in cases where the rule may be applicable, paragraph 74 when properly construed should be read in line with the well-established principles of just and equitable winding up petitions,[126] along with unfair prejudice petitions as the applicant must initially discharge the burden of establishing a tangible interest.[127] The interest would likely be financial, in the relief sought in the application, and would require the applicant to establish that their position could have been improved if it was not for the decision that was made in the administration.

[121] *Finnerty and another v Clark and another* [2012] Bus LR 594, para 33.
[122] See *SISU Capital Fund Limited v Tucker* [2006] BCC 463, paras 82–90. See also, *Clydesdale Financial Services v Smailes* [2009] BCC 810.
[123] *SISU Capital Fund Limited v Tucker* [2006] BPIR 154, para 88.
[124] D Milman 'The rise of the objective concept of "unfairness" in UK company law' (2010) Co.L.N. 286, 3. Under the former regime, Applications could be made under section 27 of the Insolvency Act 1986 alleging unfair prejudice, but it was often the case that these challenges failed.
[125] *Lehman Brothers Australia v Lomas* [2018] EWHC 2783, para 61(8).
[126] Under s122(1)(g) of the Insolvency Act 1986.
[127] Under s994, Companies Act 2006. See also *Re Lehamn Brothers International (Europe) (in administration), Four Private Investment Funds v Lomas* [2008] EWHC 2869 (Ch), paras 38-39.

The presence of 'harm' by itself should not be seen as sufficient to satisfy a claim under paragraph 74. It is clear that unfair harm should be read as conduct or proposed conduct of the administrator that is not only harmful but unfairly harmful to the applicant. In *Re Coniston Hotel*, it was made clear that 'unfair harm' would ordinarily mean unequal or differential treatment to the disadvantage of the applicant (or applicant class), which could not be justified by reference to the interests of the creditors as a whole, or on the premise to achieve the objective of the administration.[128] To act unfairly to harm the interests of 'all other members or creditors', so that unequal or differential treatment had not occurred, would appear to arise only in relation to issues that concerned the expenses of the administration, or where the administrator was also an office-holder in another insolvency. It is doubtful that the conduct of an administrator could unfairly harm all of the creditors if unfairness was to be judged by the standard of comparing the applicant's position to some or all of the other creditors of the company.[129]

The scope of harm was explored in *Re Sheridan Millennium Ltd*, *Curistan v Keenan*,[130] but the approach was differentiated in the decision of *Hockin V Marsden,*[131] which after referring to *Coniston* and *Sheridan*, concluded that:[132]

> Paragraph 74 required unfair harm, not merely harm, and the requirement of unfairness certainly prevented a creditor complaining of a disadvantage to his own interests when the disadvantage was justifiable by reference to the interests of the creditors as a whole. But there was no reason why the requisite unfairness must necessarily be found in an unjustifiable discrimination. A lack of commercial justification for a decision that causes harm to the creditors as a whole may be unfair if the harm was not one which they should be expected to suffer. The submission for differential treatment would have the consequence that an reckless decision by an administrator which affected all creditors equally was incapable of challenge under para 74.

It follows that an unfair harm challenge should not be dependent on whether discrimination between creditors had occurred. Unequal treatment between the creditors could be justified on commercial grounds,[133] but a challenge could be permitted where the conduct in question was unfair to everybody within the designated class,[134] or where there was a lack of commercial justification for a decision causing harm to the creditors as a whole.[135] This accords with the general scheme of Schedule B1 which indicates that the courts should have a wider, rather than a narrower power to grant relief.[136]

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[128] *Re Coniston Hotel (Kent) LLP (In Liq)* [2015] BCC 1, para 36. This approach has also been followed by *Re Sheridan Millennium Ltd, Curistan v Keenan* [2013] NICh 13.
[129] See *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 12 at 31C; *Nicholas v Soundcraft Electronics Ltd* [1993] BCLC 360 at 366H and 372I.
[130] [2013] NICh 13.
[131] [2017] BCC 433.
[132] *Hockin V Marsden* [2017] BCC 433, para 7.
[133] See *Re Zegna III Holdings Inc* [2009] EWHC 2994 (Ch), para 22.
[134] *In Re Meem SL Ltd (in administration)* [2018] Bus LR 393, para 34.
[135] *Hockin v Marsden* [2014] EWHC 763 (Ch), para 19; *Lehman Brothers Australia v Lomas* [2018] EWHC 2783 (Ch), para 79.
[136] *In Re Meem SL Ltd (in administration)* [2018] Bus LR 393, para 35.

To determine whether the administrator had proposed to act in a way which would have unfairly harmed the interests of the applicant, subsection (b) should be assessed at least as high as it would be for a liquidator, given that administrators are typically appointed in order to achieve expeditious results.[137] Should a swift approach not be achieved, the administrator could face a challenge from an applicant if it could be shown that the administrator's approach had led to the applicants interests being unfairly harmed.[138] To satisfy the test the applicant would have to demonstrate that there was a causal link between the action of the administrator in question and the harm to the applicants' interests.[139] However, to establish the necessary link would be difficult as conclusive evidence would be required to convince the courts that the threshold had been met for it to exercise its discretion. For example, if the ground for challenge suggested that the applicant's interests were unfairly harmed because the administrators' did not devote enough time and resources to answer creditor questions, then this could easily be dismissed by administrators if it they could demonstrate that they had acted in accordance with their obligations under Schedule B1.[140] Therefore while the term unfairly harmed may open up the possibility for judicial intervention, it would be in limited instances when the courts would do so, and paragraph 74 should not be treated as a "magic wand" to sanction IOH actions that go beyond their statutory duties.[141]

Aggrieved status in liquidation

Should the challenge concern a decision made in liquidation, section 168(5) of the IA 1986 provides that if any person is aggrieved by an act or a decision of the liquidator, that person may apply to the court who may reverse or modify the act or decision complained of, and make such order in the case as it thinks just. To establish when the courts would make an order there are a number of elements within section 168(5) that require further attention. First, there remains no legal meaning attached to the word 'aggrieved', as the courts have considered it neither necessary nor desirable to attempt to classify those persons who may be aggrieved by an act or decision of a liquidator in a compulsory winding up.[142] However, to assist in this matter a number of cases have provided some guidance as to when the courts would intervene. Traditionally, it would appear that an applicant who relied on this section would have to establish a legal grievance or that they had been wrongly deprived of something or it affected their right to do something.[143] This interpretation is likely to lead section 168(5) to be applied narrowly, which would be contrary to how it has been recently interpreted by the courts.[144]

Despite limited case law in the UK some assistance may be provided in the recent case of *Fairfield Sentry Ltd (in liquidation) & ors*.[145] In the Court of Appeal of the Eastern Caribbean Supreme Court, it was considered who was a 'person aggrieved' by a decision of a liquidator

[137] Paragraph 4 of Schedule B1 of the Insolvency Act 1986. This would also reflect the decision in *Re C E King* that was considered above.
[138] *Lomas v Burlington Loan Management Ltd* [2015] EWHC 2270 (Ch), para 187.
[139] *Re Lehamn Brothers International (Europe), Four Private Investment Funds v Lomas* [2008] EWHC 2869, [2009] BCC 632, para 34.
[140] *Fraser Turner Ltd v PricewaterhouseCoopers LLP* [2018] EWHC 1743 (Ch), para 39.
[141] *Re Lehamn Brothers Australia* [2018] EWHC 2783 (Ch), para 81.
[142] *Re Edennote Ltd* [1996] BCC 718, para 723.
[143] *Re S ex parte Sidebottom* (1880) 14 Ch D 458, 465.
[144] *Mahomed v Morris (No2)* [2001] BCC 233 (CA) [24]-[26].
[145] *Fairfield Sentry Ltd (in liquidation) & ors; ABN AMRO Fund Services & ors v Krys & ors,* Case no. BVIHCMAP: 11-16, 23-28 of 2016, Court of Appeal of the Eastern Caribbean Supreme Court, 20 November 2017.

and, as such, had standing to complain under the BVI equivalent of section 168(3) of the IA 1986.[146] It was held that the mere fact that a person had 'technical capacity' to apply (e.g. they were a creditor) was insufficient. It was essential that the applicant must have been aggrieved in that capacity (and not in some other capacity e.g. as a defendant to proceedings brought by the liquidator).[147] The decision in *Fairfield Sentry Ltd* is likely to provide some useful guidance for English and offshore practitioners alike since it provides clarity that a 'person aggrieved' must have a legitimate interest in the conduct of the liquidation.[148] It would therefore be insufficient that an applicants' interest, in a broader sense, was affected by the officeholder's conduct.

As part of the process to determine whether to intervene the courts would also examine the fiduciary and other duties and powers of the liquidators to ensure that they were exercised properly.[149] The fiduciary position and its importance was discussed above, which established that the exercise of the IOHs' discretion could be brought into question where it could be confirmed that despite the presence of good faith, certain issues were considered that need not have been considered.[150] This position would also apply should the liquidator had not taken into account issues that should have been considered.[151] The success in either of these arguments would rely on whether the court was convinced that the decisions made were done so on commercial grounds.[152]

It has often been the case that aggrieved claims against the liquidator would concern allegations that assets of the company had been disposed of at an undervalue. To counter such a claim, the liquidator would have to demonstrate, amongst other things, that they obtained proper advice and it was reasonable in the circumstances to act on that advice. The importance of due diligence was discussed above, which showed that if the liquidator was able to demonstrate that they had acted reasonably, then a challenge under section 168(5) would fail. In *Re Hans Place Ltd*, it was indicated that the court would only reverse a decision by a liquidator under section 168(5) where it was satisfied that it amounted to *mala fide* or was so "perverse as to demonstrate that no liquidator properly advised could have taken it".[153] While there would be instances where the liquidator would not need to obtain and act on advice, if however the matter was complex, or the decision had the potential to be called into question, then it would likely be perceived by the courts that a reasonable liquidator would have requested such advice. Notwithstanding this position, it still remains the case that the courts would be reluctant to interfere with a liquidators' decision unless the liquidator had done something "so utterly unreasonable and absurd" that no reasonable liquidator would have so acted.[154] To assess what would amount to unreasonable or absurd behaviour, as long as the liquidator had exercised

[146] Section 273 of the Insolvency Act 2003.
[147] *Fairfield Sentry Ltd (in liquidation) & ors; ABN AMRO Fund Services & ors v Krys & ors,* Case no. BVIHCMAP: 11-16, 23-28 of 2016, Court of Appeal of the Eastern Caribbean Supreme Court, 20 November 2017, paras 30-31.
[148] *Fairfield Sentry Ltd (in liquidation) & ors; ABN AMRO Fund Services & ors v Krys & ors,* Case no. BVIHCMAP: 11-16, 23-28 of 2016, Court of Appeal of the Eastern Caribbean Supreme Court, 20 November 2017, para 31.
[149] *Craig v Humberclyde Industrial Finance Ltd* [1999] 1 WLR 129. For a greater discussion on the liquidators' duties see A Keay '*McPherson & Keay: The Law of Company Liquidation'* (4th edn, Sweet & Maxwell 2018) 468.
[150] *Re Edennote Ltd* [1995] 2 BCLC 248, 257-258.
[151] *Re Edennote Ltd* [1995] 2 BCLC 248, 257-258.
[152] *Re Edennote Ltd* [1996] BCC 718, 720; *Mitchell v Buckingham International plc* [1998] 2 BCLC 369, 390-391.
[153] [1992] BCC 737, 745. *Re Greenhaven Motors Ltd* [1997] BCC 547; *Re Edennote Ltd* [1996] BCC 718; *Hamilton v Official Receiver* [1998] BPIR 602.
[154] *Leon v York-O-Matic Ltd* [1966] 1 WLR 1450, 1454; *Re Wyvern Developments Ltd* [1974] 1 WLR 1079; *Mitchell v Buckingham International plc* [1998] 2 BCLC 369, 390-391.

their discretion *bona fide*, and not fraudulently, then the courts would unlikely intervene.[155] This approach had been followed in *Stanford v Akers*,[156] with the British Virgin Island case going on to clarify that the threshold for perversity was high and could not overcome the judge's factual findings.[157] The Court of Appeal of the Eastern Caribbean Supreme Court placed great weight on the commercial decisions made by IOHs and that it was within the IOH discretion to make such decisions so there was no basis to challenge this position.[158]

Commercial decisions and business judgments: a tale of two concepts, same approach?

So far the article has explored commercial discretion exercised by IOHs, but there is another use of this discretion, only this time it is exercised by directors within a company. A review of how directors exercise their commercial discretion within a company requires the business judgement rule to be examined. As with IOHs, the courts have also refrained from holding directors liable for decisions that may amount to a breach of duty, instead deferring to directors' judgments.[159] The position of the courts unwilling to substitute their judgment for that of the directors has been referred to as the business judgment rule. While no such rule has been officially recognised in the UK, the business judgment rule has been heavily influenced by other jurisdictions.[160] This rule is particularly important as it appears to show some characteristic similarities with how the courts approach IOHs commercial decisions. While some variations between the two are expected, given that the law has been shaped by different factors for IOHs and directors,[161] at the core of the matter they are both driven by accountability, which provides the necessarily pretext to legitimise the discretion needed to make decisions.[162] As such, the strength of this accountability should be questioned and regularly tested. This however is not to say that all decisions must be challenged, rather those decisions that need to be are. This is necessary not just to ensure that the decision making process has integrity, but also to promote commercial predictability.[163]

Commercial predictability, whilst it is promoted as a crucial and desirable concept in commercial law, is not absolute. In a commercial environment there are so many variables to consider that the decisions made are often based on a game of chance; a projected outcome that has been calculated on the available information known at the time. On that basis IOHs' commercial decisions, like business judgments made by directors are overlapped to such a

[155] *Leon v York-O-Matic Ltd* [1966] 1 WLR 1450, 1455.
[156] Case no. BVIHCMAP2017/0019, Court of Appeal of the Eastern Caribbean Supreme Court, 12 July 2018.
[157] *Stanford v Akers,* Case no. BVIHCMAP2017/0019, Court of Appeal of the Eastern Caribbean Supreme Court, 12 July 2018, 3.
[158] *Stanford v Akers,* Case no. BVIHCMAP2017/0019, Court of Appeal of the Eastern Caribbean Supreme Court, 12 July 2018, 2-4.
[159] See *Re Elgindata Ltd* [1991] BCLC 959 at 993; *Circle Petroleum (Qld) Pty Ltd v Greenslade* [1998] 16 ACLC 1577. For a thorough discussion see A Keay and J Loughrey, 'The concept of business judgment' (2019) 1 Legal Studies 36-55.
[160] In particularly Delaware (US) and Australia. For further discussion, see A Keay and J Loughrey, 'The concept of business judgment' (2019) 1 Legal Studies 36, 36.
[161] For a discussion on how insolvency practitioners have shaped the law, See J Wood, 'Assessing the effectiveness of the UK's insolvency regulatory framework at deterring insolvency practitioners' opportunistic behaviour', (2019) Journal of Corporate Law Studies (2019) DOI: 10.1080/14735970.2018.1554551
[162] For directors see, A Keay, *Board Accountability in Corporate Governance* (Abingdon: Routledge, 2015) 95-102. For IOHs see, D Milman and V Finch, *Corporate Insolvency Law* (CUP, 2017) 165-168; V Finch, 'Insolvency Practitioners: The Avenues of Accountability' (2012) 8 *Journal of Business Law* 645.
[163] See above.

degree that they can be classified as being similar in nature.[164] However, the difficulty with these type of decisions rests with the approach taken by the courts in correctly identifying whether the decision made was one that could be made by the IOH or the director. Such is the importance of this task since it would determine whether or not the courts should intervene. A review of the case law has shown that the courts have found it troublesome to correctly identify when a decision should be classed a business judgment.[165] While in some cases from other jurisdictions, such as Delaware, refer to final decisions or those decisions that lead up to the final decision fall within the concept of judgment,[166] others have referred to the ability meaning of judgment that widens the scope of what can be considered as a business judgment.[167] The lack of an agreed terminology has not helped the matter, but it appears that the courts may have treated entrepreneurial judgment as business judgment.[168] This reference to entrepreneurial indicates that a rationale must exist for why some decisions are, or are not, treated as commercial decisions or business judgments. However, the case law has indicated that the courts have not articulated why they are treated differently; an approach that undermines commercial predictability.[169]

In comparison, commercial decisions made by IOHs have been widely interpreted by the courts, who have been careful not to create anything that may be construed as a precedent. Much of the discussion in this article has centred on the issue that concerns creditors and whether they have been unfairly harmed by the decisions made by the IOH. Evidence of unfair harm or prejudice against the creditors' interests was identified as the usual obstacle for the courts to intervene. While the courts have in regard to IOHs and directors placed much emphasis on equitable principles, especially those of a fiduciary nature, the law provides wide discretion on how *they* may act.[170] Thus, the law expects directors to make judgment decisions, as much as it expects the IOH to make commercial decisions as they see fit.[171] As such, it is unlikely that the courts will intervene on a more regular basis, but it is hoped that when they do decide to intervene clearer reasons as to why they have done so are provided.

Alternative approaches to IOH discretion: referrals to expert judges or specialist panels

In the current climate it has been illustrated that it remains difficult for creditors to challenge an IOH commercial decision since the courts have maintained its reluctance to intervene in such matters. However, the last part of this article briefly explores whether the regimes evident in Australia and the United States could provide any viable alternatives to reviewing the conduct of IOHs.

[164] *Cobden Investment Ltd v RWM Langport Ltd* [2008] EWHC 2810 (Ch) at [754]. Also note that administrators are treated in the same way as directors under Australian legislation, for example see *Robit Nominees Pty Ltd v Oceanlinx (in liq)* (2016) 111 ACSR 427.

[165] The notion of judgment has been described as a 'fairly murky one', see N Tichy and W Bennis, 'Making judgment calls' (2007) 85 Harvard Business Review 94, 95.

[166] D Rosenberg, 'Supplying the adverb: the future of corporate risk-taking and the business judgment rule' (2009) 6 Berkeley Law Journal 216, 217.

[167] See *Cinerama Inc v Technicolor Inc* 663 A 2d 1134 (1994); *In re Tyson Foods Inc* 919 a 2d 563 (2007).

[168] See A Keay and J Loughrey, 'The concept of business judgment' (2019) 1 Legal Studies 36, 37.

[169] A Keay and J Loughrey, 'The concept of business judgment' (2019) 1 Legal Studies 36, 48.

[170] For example, s172 CA 2006 stipulates that a director must 'act in the way *he* considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole'.

[171] For example, para 3(3) of Sch B1 of the IA 1986 stipulates that the administrator must consider rescuing the company as a going concern unless *he* thinks that it is not reasonably practical to achieve that objective.

In Australia, recent changes to the law in the form of the Insolvency Law Reform Act 2016 (ILRA), have introduced a provision known as the 'reviewing liquidators', which permits an independent, registered liquidator to carry out a review into a matter that relates to the external administration of the company.[172] What this means is that the ASIC or the court have the power to ask a liquidator to review the conduct of an existing IOH administration, and report back to the court.[173] The Australian Securities and Investments Commission (ASIC), or the court in the exercise of its power must specify the matters which are required to be reviewed, and the way in which the review is to determined.[174] What matters can form part of the review include an assessment into the remuneration, costs or expenses claimed and whether the amounts were properly incurred.[175] Upon the review being received by the court, the court has wide powers to make orders, including orders replacing the external administrator or dealing with losses resulting from a breach of duty by the external administrator.[176] The court could also request further information, or request a further review into matters that were not originally requested.[177]

While the review is restricted to the examination of remuneration, costs and expenses, in order to assess whether the amounts have been properly incurred, the reviewing liquidator would have little choice but to examine the conduct of the IOH. This invariably would include an assessment as to whether the decisions that were made were in fact commercial decisions that were justifiable in the circumstances. Naturally, caution is required here to avoid hindsight judgment, the review must be based on whether the reviewer would have made the same or a similar decision. To apply this approach to the UK could assist the court in its ability to examine commercial decisions more thoroughly without itself being concerned with not having the expert knowledge to do so. To make this review process possible would require great care to be taken to ensure that any familiarity threats (reviewers knowing the reviewed) was appropriately monitored. To prevent the potential over reliance of the review system its use could be restricted to cases over a certain value.[178]

In the United States, insolvency issues are referred to District courts that have subject-matter jurisdiction over bankruptcy matters. However, each district may, by order, refer bankruptcy matters to the Bankruptcy Court, which ensures that expert judges, or a panel of experts review the disputed matters. While this option would allow experienced insolvency judges the opportunity to review matters in perhaps greater scrutiny than a generalised commercial judge would be able to, it still faces the issue as to whether the commercial decision in question would be any better understood than the IOH, or IOHs in general, who make these type of decisions on a daily basis. In the UK, the County Court can hear certain insolvency matters that are of low value (below £120,000) and generally deals with the less complex cases; otherwise it is the specialised Chancery Division of the High Court that would deal with these matters. While there is no restriction on the length that an insolvency case can take at court, it is generally understood that they should last no more than three weeks. While having specialist courts to hear insolvency cases may appear attractive, the time, expertise and cost needed to make this a

[172] s90-23 of subdivision C of division 90, Schedule 2 of the ILRA 2016.

[173] Also note that a reviewing liquidator could be appointed by creditors under s90-24 IRLA 2016.

[174] s90-24 (5) and (9) of Schedule 2 of the ILRA 2016 respectively.

[175] S90-26 (2), (3) of Schedule 2 of the IRLA 2016.

[176] s90-15 of Schedule 2 of the IRLA 2016.

[177] s90-28 (2) of Schedule 2 of the IRLA 2016.

[178] A similar idea was put forward by the Select Committee on Social Security's report of 1993 on the work of the Maxwell insolvency practitioners. For a discussion on this point see D Milman and V Finch, *Corporate Insolvency Law* (CUP, 2017) 177.

reality would be high. As it stands, the UK would have to significantly revise its approach to how insolvency cases are reviewed, in a time where the appetite and justification for doing so remains thin on the ground.

Conclusion

Applicants who wish to challenge an IOH decision that had been made in a commercial context would continue to struggle to convince the courts that they should deviate from the orthodox philosophy and intervene. The professional discretion afforded to the IOH by the legislation is wide enough to justify almost all commercial decisions, and is given a wide berth by the courts. This can be seen in instances where there may be a number of options available to the IOH, yet the courts would not be concerned with whether the best scheme was adopted, but whether it could be justified on commercial grounds. As such applicants may face some difficult barriers in their bid to have a successful challenge. Of the challenges that have successfully convinced the courts to intervene, the cases have often involved decisions that were unreasonable, not commercially justifiable, or they concerned excessive remuneration. The courts have therefore made a distinction between IOH decisions that have been made in a commercial context, and those which have not. The former is concerned with protecting the sanctity of contract and with it to ensure commercial predictability prevails. Decisions that lack commercial grounds opens the door for the courts to bypass IOH discretion, and question whether in that instant the IOH was better placed to make that decision.

Since the courts have often found reason to not intervene on commercial grounds, applicants have often been left frustrated by the lack of clarity that surrounds the IOH use of discretion to make commercial decisions. A review of the business judgment rule indicates a similar story with that of directors. The courts are mindful that directors, like IOHs, are often required to make difficult decisions that are likely to be risky and unpopular with certain interested parties. Business judgment, while not well defined, has been associated with entrepreneurial ability and thus seen to fit with judicial practice. This has important implications as it sheds light on how the courts make distinctions between the different type of decisions that directors take.[179] Applied to this article, the same conclusion can be reached in that the courts have approached the use of IOH discretion by reference to decisions that were warranted in a commercial context i.e. the IOH was required to use their entrepreneurial ability to make a judgment call that they considered would best suit the insolvent company. Whether this in fact amounts to a decision, since it will often be the case that few options are left available, is something that requires further academic attention. It is likely that in such instances 'decisions' that have heavily driven by commercial circumstances would still be seen as a commercial decision, even if the eventual outcome has been dictated to the IOH.

To introduce the Australian equivalent of a 'reviewing IOH' in the UK could prove useful if its use was focused and monitored to ensure it was not overly relied upon by the courts. Whether such a need is required would depend on what is the true picture behind creditor dissatisfaction. If it is, as mentioned above, a case of unrealistic expectations placed on the insolvency process, or a misunderstanding of what are the duties of the IOH, then this review

[179] A Keay and J Loughrey, 'The concept of business judgment' (2019) 1 Legal Studies 36, 54.

process would be of limited value. If on the other hand the review process would be utilised sparingly to aid the court in those exceptional cases, then it could be a reliable and worthy tool.

Overall, possible Judicial intervention should be limited and used in a reserved fashion. Future case law would do well to ensure that if judicial intervention was required, it was done so to promote commercial predictability on the one hand, and to prevent injustice caused by the lack of recourse for applicants on the other. While the courts should not be hesitant to overcome the reluctance to intervene in worthy cases, it remains crucial that the courts are careful not to over step their own use of discretion and interpret the law to restrict IOH discretion. If changes are required, then quite simply it is for Parliament to decide.