THE INSOLVENCY ACT:
40 YEARS ON

3 HARE COURT

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FOREWORD

Chief Insolvency and Companies Court Judge Briggs

I

The proposition that insolvency law is part of a country's economic infrastructure is now orthodoxy. It was not always so. The World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes, designated by the Financial Stability Board as one of the key standards for sound financial systems, opens from the premise that:

'Efficient, reliable, and transparent creditor/debtor regimes and insolvency systems are of key importance for the reallocation of productive resources in the corporate sector, for investor confidence, and for forward-looking corporate restructuring.'

That much might be said of any well-drafted commercial statute. What the Principles go on to say is less often noticed and is of more direct interest to those who practise in this field. Having set out what the substantive law should contain, they turn to the institutions which must administer it, and provide that:

'Insolvency proceedings should be overseen and impartially disposed of by an independent court and assigned, where practical, to judges with specialized insolvency expertise.'

The two propositions belong together. The Principles treat the quality of the law and the competence of the forum as a single subject, on the view that a sound insolvency regime indifferently administered will not deliver what is expected of it. Substantive reform which is not matched by institutional capacity produces litigation rather than resolution, and delay rather than recovery. Value does not survive either.

II

Sir Kenneth Cork understood this. When his committee was appointed in January 1977 to carry out a fundamental and exhaustive reappraisal of the insolvency laws of England and Wales, it inherited a subject which was fragmented in two distinct respects. The law itself was scattered between the Companies Acts and the Bankruptcy Act 1914, with the consequence that corporate and personal insolvency had developed on separate tracks and answered similar questions differently. The jurisdiction was scattered too, divided between the High Court and the county courts, and administered in large part by judges for whom insolvency was an occasional visitor rather than a settled part of the work.

The Report which followed in 1982 addressed both. Cork's ambition was for a single comprehensive statute governing insolvency in all its forms, corporate and personal alike, resting on a coherent statement of what a modern insolvency law is for. He coupled that with a recommendation for a unified insolvency court, served by judges with specialist knowledge and experience of the subject, in which the registrars would do the greater part of the day-to-day work. He did not regard these as two recommendations. They were one, for the reason the World Bank has since restated: a code which is coherent on the page is of limited value if the forum which applies it lacks the expertise to make it work, and an expert forum cannot rescue a statute which has become impossible to navigate.

III

Forty years on, the question this collection puts, from five different directions, is how far that aspiration has been realised.

On the institutional side, the answer is a favourable one, although it arrived by a slower and more oblique route than Cork proposed. His unified insolvency court was not created in the form he envisaged. What emerged instead, over decades rather than at a stroke, was a specialist bench which grew out of the registrars, who are now the Insolvency and Companies Court Judges, sitting within the Business and Property Courts alongside the specialist jurisdictions with which insolvency work most closely interacts. The result is a forum which answers, in substance, to what the Principles describe, and which is one of the reasons for London's continuing standing as a restructuring and insolvency centre.

On the statute, the answer is more equivocal. The Insolvency Act 1986 as enacted was a consolidating measure of real coherence, and it achieved the unification of corporate and personal insolvency which Cork had sought. That is a substantial achievement which is too readily taken for granted. But the instrument we work with today is not

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the instrument of 1986. It is the 1986 Act as reshaped by the Enterprise Act 2002 and the Corporate Insolvency and Governance Act 2020, supplemented by a succession of special administration regimes, accompanied by the Insolvency (England and Wales) Rules 2016 and the Cross-Border Insolvency Regulations 2006, and sitting beside a restructuring jurisdiction which Parliament chose to locate in Part 26A of the Companies Act 2006 rather than in the insolvency legislation at all.

Each of those additions is defensible on its own terms. The aggregate is something nobody designed. Cork's single statute has become a network of instruments, joined at the edges, requiring the practitioner to know not only what each provision says but which instrument governs the question and what follows from that choice. The criticism that the law has become unnecessarily cumbersome is a fair one, and it carries a consequence which deserves more attention than it receives. Complexity of this kind is regressive in its effects. A listed group pursuing a cross-class cram-down can absorb the cost of navigating it. The small company, its directors and its unsecured creditors cannot, and it is in precisely those cases that the aims Cork identified are most likely to be defeated by the expense of pursuing them.

It is against that background that the five contributions which follow should be read. Adam Riley and Paul Bagon ask what has become of the rescue culture which Cork did most to inspire, and find its development uneven. Andrew Barns-Graham and Luke Harrison consider whether directors acting honestly are unfairly accountable for a company's failure. They tackle the difficult Supreme Court case of Sequana, noting along the path some of the criticisms that have been levelled at it. For example, critics argue that expanding fiduciary duties to creditors is legally unnecessary given existing statutory protections, and the divergent judicial reasoning on the duty's scope leaves directors facing highly vague and subjective triggers when navigating near-insolvency. Nicholas Leah and Frances Coulson consider how the tension between universalism and territoriality works in practice. In acknowledging that cooperation between states is necessary, they suggest three inquiries. Mr Leah's survey of the traps awaiting the unwary is, among other things, the clearest available evidence of the cost of statutory fragmentation, since so many of the pitfalls he identifies lie not within any single provision but in the joins between instruments where procedural missteps are easy to make. Anna Gatrell completes the picture by showing what the practitioner who has mastered the terrain can do with five 'secret weapons'.

Taken together they offer something more useful than a celebration. They are a reckoning, written by those who use the 1986 Act daily, with what it does well, what it does badly and what it has become. Cork's aspiration has been substantially, if imperfectly, met. The imperfection lies less in the original design than in what has since been attached to it. The authors of these essays remain upbeat and provide some practical steps.

21 September 2026

INTRODUCTION

By Tom Poole KC

Forty years after its enactment, the Insolvency Act 1986 (the 1986 Act) remains at the heart of the insolvency regime in England and Wales. It has, of course, been substantially amended along the way, most notably by the Enterprise Act 2002 and the Corporate Insolvency and Governance Act 2020. The result is a statutory framework which would be readily recognisable to a practitioner from 1986, but which now operates in a very different commercial and legal landscape.

To mark the anniversary, the Commercial & Insolvency Team at 3 Hare Court has brought together this series of five articles. Our purpose is not to attempt a comprehensive retrospective on four decades of insolvency law, but to consider some of the developments and issues which matter to practitioners now.

The contributions approach that task from different perspectives. They consider the development, and limits, of the rescue culture which helped inspire the 1986 Act; the difficult balance between allowing directors to attempt to rescue a company in financial distress and holding them accountable where things go wrong; and the internationalisation of a statutory regime conceived forty years ago but now routinely applied to companies, assets and disputes spanning multiple jurisdictions.

The series also has an intentionally practical focus. Two of the articles look at insolvency litigation from opposite directions: the traps capable of derailing an otherwise good claim, and some of the procedural and tactical tools which can give the insolvency litigator an advantage.

We hope the articles demonstrate both how much has changed since 1986 and how much of the framework established forty years ago continues to shape modern insolvency practice. Above all, they reflect what makes this such an interesting area of practice: the constant interaction between statute, commercial reality and litigation strategy.



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TRAPS FOR THE UNWARY: COMMON PITFALLS IN INSOLVENCY LITIGATION

3 HARE COURT



Authored by: Nicholas Leah (Barrister) – 3 Hare Court

Introduction

Forty years after its enactment, the Insolvency Act 1986 (the 1986 Act), together with the Insolvency (England and Wales) Rules 2016 (the 2016 Rules), remains the statutory framework governing insolvency proceedings in England and Wales. Its provisions are familiar, but they continue to generate procedural and substantive traps for a wide range of participants in insolvency litigation, from office-holders and creditors to directors and debtors.

This article considers common pitfalls across the full life cycle of insolvency litigation related to the following five themes: investigations, funding, statutory deadlines, transaction avoidance and reviews. The examples are not exhaustive. Rather, they illustrate recurring pitfalls that can derail otherwise meritorious claims, increase costs and create avoidable litigation risk.



Investigations

An office-holder's primary function is to take control of assets and realise value for creditors. To that end, their investigatory powers are extensive. In corporate insolvency, the relevant powers are sections 234, 235 and 236. The equivalent provisions for personal insolvency are sections 290, 365 and 366. Although broad investigatory tools, these provisions are subject to important legal and practical limits. The powers under sections 234, 235 and 236 'may only be invoked for a legitimate purpose'.[1] The same reasoning applies to the personal insolvency provisions.

Section 234 contains particular traps related to property. Subsection 234(2) allows administrators, administrative receivers and liquidators to seek delivery of property, books, papers or records 'to which the company appears entitled'. Requests for books, papers or records are more straightforward; the real controversy lies in 'property' due to its wide-ranging definition under section 436.[2] That definition can even include beneficial interests.[3]

Section 234, like section 212, is a summary procedure. It does not 'necessarily involve a determination of title',[4] a matter which may be the subject of subsequent proceedings.[5]

1 Sutton v GE Capital Commercial Finance Ltd and others [2004] EWCA Civ 315, [33], per Chadwick LJ.

2 Property includes 'money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property', per section 436(1) of the 1986 Act.

3 Carvill-Biggs v Reading [2025] EWCA Civ 61, [42], per Snowden LJ.

4 Re Coslett (Contractors Ltd) [2001] UKHL 58, [26], per Lord Hoffmann.

5 Ezain v Conn [2020] EWCA Civ 687, [26], per Patten LJ.

However, contrary to the summary premise, the courts have been increasingly willing to entertain questions of ownership,[6] some even suggesting that, together with the relevant procedural framework under the 2016 Rules, section 234 provides a proper forum for such disputes.[7] These decisions provide false comfort though and the use of section 234 to resolve substantive disputes remains fraught with risk.

There are obvious areas where practitioners should exercise caution. Firstly, section 234 should not be used to seek vacant possession of a property. A court may conclude that a respondent should be afforded the same procedural protections available under CPR Part 55.[8] Secondly, section 234 should only be used to recover property that already belongs to the company, not for pursuing property that is subject to a genuine dispute.[9] Thirdly, leading commentators have criticised the use of section 234 to circumvent Part 7 proceedings in order to pursue company debts.[10]

For sections 235 and 236, a legitimate purpose is not enough. Office-holders must also establish that they 'reasonably require' the information sought.[11] The same threshold applies, by analogy, to section 366. A broad request to reconstitute a company's knowledge, without more, may not suffice. For example, a recent court decision rejected an 'everything forever' request.[12]

Applications for information or court attendance made without prior informal requests or notice risk being viewed as oppressive.[13] A without notice application may be justified, but the office-holder must show a 'good reason'.[14] Although an office-holder's views carry 'a good deal of weight', the court balances the importance of the information against potential oppression.[15]

To mitigate against these risks, office-holders should make informal requests first and, where relief is necessary, draft proportionate orders. Orders should (i) limit the scope to specific classes of documents or information; (ii) specify the time and manner of compliance; and (iii) identify the proper person to effect compliance.[16]



Funding

After investigations, the first practical question is often not whether there is a good claim, but who will fund it. Insolvency claims may be strong yet held by estates unable to finance litigation. In the decades since 1986, third-party funding has become mainstream and the rules on champerty and maintenance have relaxed sufficiently to permit assignment in appropriate cases.

Practitioners must remain alert to developments affecting the enforceability of litigation funding agreements (LFAs). The Supreme Court's decision in PACCAR created uncertainty by finding that funding agreements providing a return calculated by reference to damages may be unenforceable damages-based agreements.[17] Some funders have shifted to returns based on multiples of sums invested,[18] but uncertainty remains.

Legislative reform remains possible. In December 2025, Sarah Sackman KC MP described the post-PACCAR position as leaving claimants in 'unacceptable limbo'.[19] However, the King's Speech on 13 May 2026 omitted any bill about PACCAR. LFAs therefore remain vulnerable unless carefully structured and compliant with the regulatory regime. Existing and proposed arrangements should be carefully reviewed. Funders should also be warned that they cannot automatically cap adverse costs exposure at the level of their funding (the so-called 'Arkin cap').[20]

Since section 246ZD was inserted by the Small Business, Enterprise and Employment Act 2015, assignment has become increasingly common. The policy rationale behind section 246ZD is twofold: to provide immediate returns to insolvent estates on the one hand and to hold 'miscreant directors' to account on the other.[21] But not every cause of action is assignable. A section 212 application, for example, cannot be brought by an assignee

6 Euro Commercial Leasing Ltd v Cartwright & Lewis [1995] B.C.C. 830 (about a solicitor's lien); Re Cosslett (Contractors) Ltd [1998] Ch. 495 (about plant on a construction site); Conn v Ezair [2019] EWHC 1722 (Ch) (about properties held on constructive trust).

7 Re London Iron & Steel Co Ltd [1990] B.C.C. 159, 162G–H, per Warner J.

8 Maher v Investalet Ltd [2025] EWHC 3133 (Ch), [56.6], per ICC Judge Greenwood.

9 Kirkpatrick v Snoozebox Ltd [2014] B.C.C. 477, [11], per Master Leslie.

10 Andrew Keay, 'The Office-Holder's Delivery Up Power and the Recovery of Debts' [2011] 4 Corporate Rescue and Insolvency 3.

11 The 'reasonable requirement' applies to both section 235 and 236. Re British & Commonwealth Holdings plc (Nos 1 and 2) [1993] AC 426, 439, per Lord Slynn.

12 Re Eversholt Rail (365) Limited [2026] EWHC 101 (Ch), [48], per Sir Anthony Mann.

13 Re Embassy Art Products Ltd [1987] 3 BCC 292, 299, per Hoffmann J.

14 Maxwell Communications Corp plc [1994] BCC 741, 747D, per Vinelott J.

15 Sasea Finance Ltd (in liquidation) v KPMG (formerly KPMG Peat Marwick McLintock (No.1) [1998] BCC 216, 220F, per Robert Walker J.

16 Rule 12.19 of the 2016 Rules.

17 R (on the application of PACCAR Inc and others) Competition Appeal Tribunal and others [2023] UKSC 28.

18 Sony Limited v Alex Neill Class Rep. Ltd [2025] EWCA Civ 841.

19 Ben Rigby, 'UK government confirms plans to reverse PACCAR ruling on litigation funding' (Global Legal Post, 17 December 2025) https://www.globallegalpost.com/news/uk-government-confirms-plans-to-reverse-paccar-ruling-on-litigation-funding-1373753850 accessed 1 July 2026.

20 ChapelGate Credit Opportunity Master Fund v Money & Ors [2023] EWCA Civ 246, [18], per Newey LJ.

21 Cage Consultants Limited [2020] EWHC 2917, [9]–[16], per Snowden J.

who has purchased a claim from a liquidator.[22] In personal insolvency, claims that are personal to the bankrupt generally remain incapable of assignment as they do not vest in the trustee.[23] Office-holders run the risk of certain assignment decisions being challenged by creditors, though the bars for 'aggrieved' under section 168(5) and 'dissatisfied' under section 303(1) are high.[24] Nevertheless, office-holders should keep careful records to demonstrate why any proposed assignment best serves creditors' interests.[25]



Deadlines

Some of the most expensive mistakes in insolvency practice arise not from the merits of a case, but from missing statutory deadlines. Unlike ordinary case management dates or certain rules of the CPR, some statutory deadlines cannot be cured retrospectively, making careful diary management essential. Three obvious examples arise in bankruptcy, administration and liquidation.

In bankruptcy, section 283A gives a trustee three years from the bankruptcy order to deal with the bankrupt's interest in the family home. If no prescribed step is taken within the three years, the interest will cease to be comprised in the bankrupt's estate and will revest in the bankrupt, potentially depriving creditors of a valuable asset.

In administration, the appointment usually lasts one year unless extended. An extension application must be made before expiry and, absent 'special circumstances', at least one month before the end of the administration.[26] Once the appointment has lapsed, the court cannot simply revive it retrospectively.[27]

Section 216 creates a trap for directors following liquidation. A director or shadow director of a company in the 12 months before insolvent liquidation is restricted for five years from managing a company or business using the same, or a sufficiently similar, name unless a statutory exception applies or permission is obtained. Rule 22.2 requires, among other things, at least 14 days' notice to the Secretary of State seeking the court's leave to re-use a company name. Non-compliance may expose the director to criminal sanctions and personal liability for successor company debts.[28]

The lesson is straightforward: identify statutory deadlines at the outset of every appointment or brief and treat them as critical milestones rather than mere formalities. Effective systems for monitoring key dates are not merely good practice but are essential to avoid severe consequences and costly satellite litigation.



Transaction Avoidance

The transaction avoidance provisions at sections 213, 214, 238 and 239 create frequently used statutory claims. As multiple claims often arise out of the same facts, it is a common pitfall to assume that the relevant provisions are interchangeable. They are not: each addresses a different mischief and carry its own different requirements. Treating them interchangeably is a common pleading error.

Sections 213 and 214 are both compensatory, not punitive, in nature but differ significantly.[29] Fraudulent trading under section 213 is wider than wrongful trading under section 214: it can apply to any person 'knowingly' party to the fraud, not only directors.[30]

But it lacks the statutory defence available under section 214 where a director is absolved of liability if they took every step to minimise potential loss to creditors. The standards also differ as section 214 requires an act effectively tantamount to negligence, while section 213 requires 'actual dishonesty, involving real moral blame'.[31]

Sections 238 and 239 are both relied on to reverse the effect of transactions to persons 'connected' with the insolvent company. Although the same two-year 'look back period applies to connected persons unless they were merely employees, the presumption of insolvency at the relevant time only applies to transactions at an undervalue under section 238, not preferences under section 239.[32] Office-holders must therefore be prepared to prove inability to pay debts within section 123 at the relevant time, or in consequence of the preference.

Section 423 is not a simple antecedent transaction claim. Even if no formal insolvency proceedings are underway, any 'victim' of the transaction defrauding creditors may bring a claim. However, pursuant to rule 1.35(1), section 423 is not an insolvency proceeding within Parts A1 to 11 of the 1986 Act and must be commenced by Part 7 proceedings, making it a

22 Manolete Partners Plc v Hayward and Barrett Holdings Ltd [2021] EWHC 1481 (Ch), [43]–[48], per Chief ICC Judge Briggs.

23 Mulkerrins v Pricewaterhousecoopers (a firm) [2003] UKHL 41, [22], per Lord Walker; Addison v London European Securities Ltd [2022] EWHC 1077 (Ch), [97], per Jonathan Hilliard QC.

24 Re Edengate Homes (Butley Hall) Ltd [2022] EWCA Civ 626, [42]-[43], per Males LJ.

25 There is no difference of substance between an 'aggrieved' and a 'dissatisfied' person. Brake v Chedington Court Estate Ltd [2023] UKSC 29, [6], per Lord Richards.

26 Practice Direction – Insolvency Proceedings, paragraph 3.1.

27 Schedule B1 to the 1986 Act, paragraph 77(1)(b). See also, Re Mederco (Cardiff) Ltd [2021] EWHC 386 (Ch), [21], per HHJ Davis-White QC.

28 Section 217 of the 1986 Act.

29 Re Overnight Ltd (No.2) [2010] EWHC 613, [28]–[33], per Roth J.

30 Although relief under section 213 can be only sought in the course of winding up per section 213(1) of the 1986 Act.

31 Re Patrick and Lyon Ltd [1933] Ch. 77, 90, per Maugham J.

32 Section 240(2) of the 1986 Act.

more expensive route.[33] It is therefore important that clients are advised about the procedural requirements and costs before pursuing a section 423 claim.



Reviews

The insolvency court's power to review orders is unique.[34] The relevant powers are found in rule 12.59(1) for corporate insolvency and section 375 for personal insolvency. In particular, a review may be undertaken by the judge who made the order or another judge with jurisdiction.

The discretion is wide but constrained by established principles. Those principles are that: (i) an applicant must demonstrate circumstances which justify the exercise of discretion; (ii) those circumstances must be 'exceptional'; (iii) those circumstances must involve a material difference to what was before the court (i.e., something new); (iv) the court can take into account a change since the original order or significant facts which, though in existence at the time, were not brought to the court's attention; and (v) where the new circumstances include new evidence which could have been available at the original hearing, the explanation about why the evidence was not available will factor into the court's discretion.[35] Where new evidence could have been available earlier, the court will consider why it was not. The full Ladd v Marshall for appeals does not apply, but an explanation is expected.[36]

Non-attendance at the original hearing may amount to a material difference, but it is not enough on its own. Where a review application is based on non-attendance, then CPR 39.3(5) applies by analogy:[37] the applicant must act promptly,[38] have a good reason for not attending and have reasonable prospects of success.

Insolvency litigators should remember that a review is not a substitute or an alternative route to an appeal and should not be used where, in substance, what is sought is a desire to re-open findings made.[39] The exercise of the review power is confined to cases in which there has been some change in circumstances since the original order.[40] It is not an opportunity to have a second bite of the cherry to convince the judge to change their mind.[41] Accordingly, the review jurisdiction should be used sparingly.

Conclusion

Forty years on, some of the most significant risks in insolvency litigation arise not from complex legal principles but from procedural missteps and overlooked statutory requirements. Whether investigating company affairs, securing funding, complying with time limits, pursuing antecedent transaction claims or seeking to review an order, careful attention to the statutory framework and procedural rules remains essential. Practitioners who are alert to these common pitfalls will be better placed to protect relevant interests, minimise unnecessary costs and avoid satellite litigation.

33 Manolete Partners Plc v Hayward and Barrett Holdings Ltd [2021] EWHC 1481 (Ch), [54], per Chief ICC Judge Briggs.

34 As opposed to merely vary or revoke per CPR 3.1(7).

35 For section 375, see Papanicola v Humphreys [2005] 2 All ER 418, [25], per Laddie J. For rule 12.59(1), see Discovery (Northampton) Ltd v Debenhams Retail Ltd [2020] EWHC 260, [11], per Sir Alastair Norris.

36 Ladd v Marshall [1954] 3 All ER 745.

37 Papanicola v Humphreys [2005] 2 All ER 418, [37].

38 Promptly means with 'all reasonable celerity in the circumstances' in Tinkler v Elliott [2012] EWCA Civ 1289, [25], per Maurice Kay LJ.

39 Re Paragon Offshore Plc (in liq.) [2020] EWHC 2740 (Ch), [10], per Deputy ICC Judge Agnello KC.

40 Mond v Hammond Suddards (No.2) [2000] Ch 40, 49B, per Chadwick LJ.

41 Re 38 Building Ltd [2000] BCC 422 at 425H, per Hazel Williamson QC.

FROM CLAIMS TO RECOVERY: SECRET WEAPONS IN INSOLVENCY LITIGATION

3 HARE COURT



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Introduction

As the Insolvency Act 1986 (the 1986 Act) marks its 40th anniversary, this article looks beyond the statute's familiar architecture to identify five practical 'secret weapons' that continue to give insolvency litigators a tactical edge.

Insolvency litigation resembles its contentious companions in that decisive advantage may come not only from the underlying facts, but also from the tactical approach adopted. In some circumstances, appropriate steps can alter the shape of a dispute from the outset; in others, they can shift the odds in a party's favour.

This article offers five 'top tips' for those involved in insolvency litigation, from both legal and practical perspectives. Costs can be used as a negotiating tool rather than viewed only as a concern; investigatory powers may expose evidential weaknesses at an early stage; and litigators and office-holders should remain open-minded about the nature of any potential claim.



Costs: Be Mindful of The Application of the CPR

Although the Insolvency (England and Wales) Rules 2016 (the 2016 Rules) provide a framework for insolvency proceedings, they do not exclude the CPR. Rule 12.1 of the 2016 Rules defines the scope of the CPR's application to proceedings under Part A1 to 11 of the 1986 Act, except so far as disapplied by or inconsistent with the 2016 Rules.

Litigators should bear the applicable provisions of the CPR in mind and use them where appropriate, particularly in relation to costs.

Rule 12.41(3) of the 2016 Rules expressly applies CPR Parts 44 and 47 to the costs of and in connection with insolvency proceedings. Other costs provisions may apply through rule 12.1. McGann v Eldonian has confirmed the application of CPR 46.7.[1] Part 36 may also apply. In Grant v FR Acquisitions Corporation (Europe) Ltd, its general application to insolvency litigation was confirmed.[2] In Laverty v Greensill Bank AG, the High Court observed that Part 36 was capable of applying to a directions application where the dispute was, in substance, adversarial.[3] Sir Anthony Mann (sitting as a judge of the High Court) held that:

'While it might be difficult in many cases to formulate Part 36 offers in some of those non-adversarial situations, that is no reason for a blanket disapplication. If Part 36 offers are made but the nature of the proceedings makes the full rigours of its application inappropriate, there is enough flexibility in the operation of Part 36 to provide the necessary adjustments'.[4]

1 McGann v Eldonian [2026] EWHC 66 (Ch).
2 Grant v FR Acquisitions Corporation (Europe) Ltd [2022] EWHC 3366 (Ch).
3 Laverty v Greensill Bank AG (Re Greensill Capital (UK) Ltd (in administration)) [2023] EWHC 2429 (Ch) at [23].
4 Ibid.

Part 36 is a self-contained procedural code with significant consequences under CPR 36.17. If a claimant fails to obtain a judgment more advantageous than a defendant's offer, the claimant will ordinarily be liable for the defendant's costs from the end of the relevant period, with interest on those costs. If a claimant matches or beats its own offer, the claimant will ordinarily obtain indemnity costs (or additional costs under CPR 36.24), enhanced interest and an additional amount. In each case, the prescribed consequences apply unless the court considers them unjust.

As Part 36 may apply to an insolvency application where the dispute is, in substance, adversarial, an early and well-pitched offer can materially shift the risk landscape. This tactic may be particularly effective in claims involving valuation uncertainty, such as misfeasance or transaction avoidance claims. Sophisticated use of Part 36 can exert settlement pressure and manage potential exposure, so it should always be borne in mind.



Obtain Targeted Evidence Early

Section 236 of the 1986 Act can be valuable before a claim has crystallised, particularly where section 234 will not suffice: for instance, where information is contained in documents that do not belong to the company. Section 236 is not merely a mechanism for obtaining documents: it enables an office-holder to seek information and, where appropriate, the examination of a person within the statutory categories. This section can help the office-holder understand transactions, identify potential defendants and test explanations before deciding whether litigation should be pursued and how any claim should be pleaded.

The class of persons who may be ordered by the court to attend for examination under section 236(2) is wide. It includes officers of the company; any person known or suspected to have company property in their possession; any person known or suspected to be indebted to the company, and any person whom the court thinks capable of giving information concerning the company's promotion, formation, business, dealings, affairs or property. Early use of section 236 can ensure that a claim is founded on material actually obtained rather than inference. The power is not automatically excluded merely because litigation is contemplated or under way, but it must not be used oppressively, as a substitute for ordinary disclosure or to obtain an unfair litigation advantage.[5]

The safeguards governing section 236 are important, particularly when an office-holder considers what is 'reasonably required'. A narrowly framed application, supported by evidence explaining why each category is sought, is far more likely to succeed than a broad-brush request for documents and an oral examination. In Webb v Eversholt Rail Ltd, Sir Anthony Mann dismissed the liquidators' appeal from the decision of ICC Judge Burton and confirmed that a test of reasonable requirement applies to section 236, as it does to section 235, and that the requirement must be evidenced.[6] In Dale v BDO LLP, ICC Judge Burton allowed a targeted application under sections 235 and 236, observing: 'I do not consider the Applicants' request to be too wide or general. It is not asking for every document that ever passed between the Companies and BDO. It seeks a targeted order […].'[7]

A liquidator may, with appropriate permission and safeguards, disclose material obtained under section 236 to an assignee for use in an assigned claim. In Re Sandford Farm Properties Ltd, Barling J permitted the extension to a second assignee of confidentiality arrangements governing examination material that had already been disclosed to another assignee.[8] More recently, in Asertis Ltd v Melhuish, Chief ICC Judge Briggs permitted relevant material to be made available to an assignee, subject to redaction of personal information so that only the fact of deposits into an account was disclosed.[9] Whether a permission application is required will depend on the circumstances; the judgment indicates that the office-holder and assignee should consider and ordinarily agree the nature and timing of any application. Section 236 can therefore remain valuable even where a claim is assigned.

Make Use of Section 423

Section 423 of the 1986 Act (transactions defrauding creditors) can be broader and more powerful than the insolvency-specific provisions found at sections 238 and 339. In particular, it does not require a debtor to have been insolvent at the time of the transaction, is not founded in fraud and need not be brought by an office-holder. Instead, section 423 can be invoked by any 'victim' of the transaction. Although its pitfalls are addressed elsewhere within this series (in particular, section 423 claims are not insolvency proceedings, so need to be issued under CPR Part 7), that is not to say that section 423 claims should be avoided; rather, litigators should bear in mind the distinct procedural requirements but make use of its broader scope.

In particular, and unlike sections 238 and 339, there is no statutory 'relevant time' look-back period and, following the Supreme Court's reasoning in THG Plc v Zedra Trust Co (Jersey) Ltd, and the decision of Master Bowles in Teixeira v Moaven, it now appears that claims under section 423 are not subject to the ordinary limitation periods in the Limitation Act 1980, nor considered actions on a specialty.[10] Of course, the court retains a discretion and may be reluctant to reopen very old transactions where doing so would be oppressive or contrary to the overriding objective, but there is no fixed statutory limitation bar. Accordingly, transactions long outside the reach of sections 238 and 339 may still be susceptible to challenge under section 423.

5 Re British & Commonwealth Holdings plc [1993] AC 426, 438-439, per Lord Slynn.

6 Webb v Eversholt Rail Ltd [2026] EWHC 101 (Ch).

7 Dale v BDO LLP [2025] EWHC 446 (Ch), [47x], per ICC Judge Burton.

8 Re Sandford Farm Properties Ltd [2015] EWHC 2999 (Ch).

9 Asertis Ltd v Melhuish [2024] EWHC 2819 (Ch).

10 THG Plc v Zedra Trust Co (Jersey) Ltd [2026] UKSC 6; Teixeira v Moaven [2026] EWHC 1215 (Ch).

The well-known decision in El-Husseiny v Invest Bank PSC has also added reach: a debtor can 'enter into a transaction' for the purpose of section 423 even where the relevant assets were moved via a company they own or control rather than personally.[11] Although the statutory requirements must be proven, a corporate structure interposed between a debtor and their assets is thus no shield against the claim.



Think Beyond the Clear Statutory Claims

Notwithstanding the clear routes available under sections 238, 339 and 423 of the 1986 Act, office-holders and litigators should not feel restricted to those particular causes of action. Thinking beyond those routes may increase prospects both of success and prospects of recovery.

Misfeasance under section 212 of the 1986 Act is one example. It does not serve as a separate cause of action but stands as a procedure for enforcing relevant breaches of duty (including fiduciary, common law or statutory under sections 171–177 of the Companies Act 2006). Although an exploration of relevant directors' duties is beyond the scope of this article, it is worth noting the duty under section 172 of the Companies Act 2006. Following the decision in Saxon Woods Investments Ltd v Costa (not itself an insolvency claim), a duty under section 172 may be considered a broad fiduciary duty of loyalty under which office-holders may have a broader means of bringing proceedings under section 212.[12]

Claims against third parties who received company property or assisted in wrongdoing can extend the reach of recovery beyond directors. Dishonest assistance enables litigators to target any third party who dishonestly helped a breach of trust or fiduciary duty (including those owed by directors). A claim in knowing receipt may be broader still: it does not require dishonesty, but rather that the recipient's retention of misapplied company property was unconscionable once the recipient had the relevant knowledge.[13] The two causes of action have distinct elements which should be explored before any such claim is made but may allow a party to 'follow the money' without being restricted to an insolvency-specific cause of action.

Keep Enforcement in Mind from The Outset

Although there is some irony in enforcement being the final point within the article, one of the easiest mistakes in insolvency litigation is to consider the merits of the claim in a legal sense, without considering the practical consequences. Obtaining judgment is a step in the process, not the end of it. The real objective for practitioners should always be recovery. A claim may be legally compelling and supported by strong evidence, but there is little benefit to pursuing it if there is (a) no realistic route to enforcement and/or (b) no assets against which to enforce.

In assessing the merits of a claim, office-holders should consider using relevant powers under sections 234–236 of the 1986 Act to explore prospects of recovery, and not just the substantive merits of a claim. Evidence obtained under section 236 can then engage section 237, which enables the court to order (upon application) that a person with possession of any property of the company to 'deliver the whole or any part of the property to the office-holder at such time, in such manner and on such terms as the court thinks fit' and to order a debtor to pay the office-holder in respect of such debt.

Where dissipation is a real risk, litigators and office-holders may wish to consider applying for a freezing injunction at an early stage of the process. In Re SP Commodities Ltd (in Liquidation), a liquidator's freezing order followed directly from investigation prompted by the defendant's conduct,[14] and in Integral Petroleum SA v Petrogat a worldwide freezing order was granted in support of a proposed section 423 claim.[15] Applicants are also ordinarily expected to give an unlimited cross-undertaking in damages, even if the applicant in question is a liquidator.[16] Practitioners must also remember that applications without notice come with a standard duty to make full and frank disclosure to the court; where the application is made by a liquidator, the liquidator should disclose the existence and terms of any relationship they may have with funders, so that the court may consider whether the cross-undertaking in damages should be supported in any way.[17]

Beyond injunctive relief, the ordinary enforcement powers reward the same early attention. Third party debt orders, charging orders and oral examination of a judgment debtor under CPR Part 71 are all available once judgment is obtained. Nonetheless, practitioners should not wait until obtaining judgment before considering enforcement mechanisms. Keeping enforcement in mind throughout helps ensure that litigation strategy remains aligned with that objective and avoids the risk of winning the case but losing the recovery.

Conclusion

Insolvency litigation is rarely won by identifying a viable claim alone. The most effective practitioners combine legal analysis with tactical judgment: using costs rules to shift risk, deploying investigatory powers with precision, widening the search for available claims and keeping enforcement firmly in view from the outset. The common thread is practical strategy. Where each procedural and substantive tool is considered early and used proportionately, insolvency litigation is more likely to achieve its real objective: meaningful recovery for the estate and its creditors.

11 El-Husseiny v Invest Bank PSC [2025] UKSC 4.
12 Saxon Woods Investments Ltd v Costa [2026] UKSC 21.
13 BCCI (Overseas) Ltd v Akindele [2001] Ch 437; Byers v Saudi National Bank [2023] UKSC 51.
14 Re SP Commodities Ltd (in Liquidation) [2024] EWHC 2747 (Ch).
15 Integral Petroleum SA v Petrogat [2021] EWHC 1365 (Comm).
16 Hunt v UBHI [2023] EWCA Civ 417, [32], per Newey LJ.
17 Franses v Al Assad [2007] BPIR 1233; John Bailey and Hugo Groves, Corporate Insolvency: Law and Practice (6th edn, LexisNexis 2022), paragraph 2.31.

"RESCUE CULTURE" 40 YEARS ON: WHERE ARE WE NOW?



3 HARE COURT

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Introduction

On 27 January 1977, a committee chaired by Sir Kenneth Cork was tasked with carrying out a 'fundamental and exhaustive reappraisal of all aspects of the insolvency laws of England and Wales'.[1] The resulting 1982 Cork Report revolutionised the field and laid the groundwork for the Insolvency Act 1986 (the 1986 Act). One aim of the report was 'to devise an insolvency code which will facilitate rescues rather than accelerate failures', thus embedding a commitment to 'rescue culture' in English law.[2]

Whether this policy has succeeded in practice is open to question. The past forty years suggest two conclusions. First, 'rescue' is often honoured in the breach as liquidation 'remains the key player in corporate insolvency law'.[3] Second, reforms prioritising rescue have produced uneven results, as the examples discussed in this article show.

Administration Enters The Scene

Before 1986 there was no collective process for appointing an external manager to hold and dispose of assets for the benefit of the company and its general body of creditors.[4] Action by individual creditors could also derail reorganisation. The 1986 Act introduced company administration to address these deficiencies and promote rescue.[5]

Administration's promise was initially stunted, until the near-total abolition of administrative receivership by the Enterprise Act 2002.[6] Previously, lenders with global security could appoint administrative receivers to pre-empt administration, largely eliminating any prospect of rescue.[7]

These reforms were driven in particular by the government's view that banks had failed to support viable businesses during the recession of the early 1990s, and had instead appointed receivers to protect their own interests.[8] The changes curbed

1 Review Committee on Insolvency Law and Practice, Insolvency Law and Practice: Report of the Review Committee (Cmnd 8558, 1982), 1 (Cork Report).

2 Cork Report (n 1), paragraph 1502; Philip R Wood, Principles of International Insolvency (2nd edn, Sweet & Maxwell 2007) 175; Roy Goode and Ewan McKendrick, Goode and McKendrick on Commercial Law (6th edn, Penguin 2021), paragraph 31.11.

3 David Milman, 'Forty Years of Corporate Insolvency Law' (2023) 15 Contemporary Issues in Law 5, 10.

4 Goode and McKendrick (n 2), paragraph 31.56.

5 Ibid, paragraph 31.08.

6 The limited exceptions allowing for the appointment of an administrative receiver are found in Chapter IV of Part III of the 1986 Act.

7 Kristin van Zwieten, 'Mid-Crisis Restructuring Law Reform in the United Kingdom' (2023) 24 European Business Organization Law Review 287, 289–290.

8 Mike Stevenson, 'The Enterprise Bill 2002 – a move towards a rescue culture?' (2002) 18 Tolley's Insolvency Law and Practice 155.

secured creditors' ability to '"scoop the jackpot" with little regard to other stakeholders'.[9] Section 248 of the Enterprise Act 2002 also overhauled administration, by introducing among other things schedule B1 to the 1986 Act, improving efficiency and confirming administration as the main statutory alternative to liquidation.

Commencing in 2011, the 1986 Act was modified to include 'special' administration regimes for insolvent businesses that provide a statutory or critical public service, such as financial services institutions, payment systems providers, utility suppliers and critical infrastructure companies. Depending on the applicable regime, special administrations include specific statutory objectives. For example, in respect of insolvent financial services institutions the regime provides for the protection of client money and the maintenance of market stability, while for relevant infrastructure entities the regimes provide for the preservation of the ongoing supply of critical services.

The special administration regime for financial institutions was first used in October 2011 following the insolvency of MF Global UK Limited. The special administration process led to protracted litigation culminating in the court approving the distribution of over US$1 billion in pooled client money and assets to creditors and claimants.



The 2020 Reforms: Some (Very) Brief Background

The Corporate Insolvency and Governance Act 2020 (CIGA) delivered the most significant reforms to English insolvency law since the Enterprise Act 2002.[10] Covid-19 caused an immediate collapse in demand across many sectors and created uncertainty about future demand.[11] That emergency accelerated reform. The Corporate Insolvency and Governance Bill was introduced on 20 May 2020 and received royal assent on 25 June 2020.[12] CIGA's three permanent reforms, discussed below, concern moratoria, supply contracts and restructuring plans.

Part A1 Moratoria: A Missed Opportunity?

CIGA inserted Part A1 into the 1986 Act, creating a new 'freestanding' moratorium, so called because it is not tied to any particular insolvency process and may not lead to one.[13] Its purpose is to give a company breathing space to explore rescue and restructuring options free from creditor action, as explained by in Minor Hotel Group MEA DMCC v Dymant.[14]

In this respect the Part A1 moratorium resembles Chapter 11 of the US Bankruptcy Code.[15] Chapter 11's efficacy stems in part from its 'debtor-in-possession' model, in which management is not displaced by an external insolvency practitioner. A monitoring officer may be appointed, but with far narrower powers than under a management-displacement regime, and such appointments are rare.[16] This keeps control with those who know the business, and reduces the friction involved in handing the reins to an outsider. Finally, and perhaps most significantly, section 362(a) of title 11 of the United States Code provides a broadly drawn automatic stay on litigation upon filing, subject to limited exemptions at section 362(b).

The payment holiday under a Part A1 moratorium is far narrower. It offers a reprieve mainly from what can be conveniently described as 'trade debts'.[17] Various pre-moratorium debts remain payable during the moratorium, including potentially substantial liabilities 'arising under a contract or other instrument involving financial services'.[18] To be effective, the company must persuade creditors to support the moratorium.[19] If a creditor insists on payment and the company cannot pay from cash reserves, realise assets immediately or secure immediate third-party funding, that will likely be fatal.[20]

In such circumstances, the intended breathing space is largely illusory and the use case for Part A1 moratoria as a rescue tool is limited. Low uptake is therefore unsurprising.[21] It has also been observed that Part A1 departs significantly from the pre-pandemic plan, which was premised on lenders being prevented from enforcing

9 Milman (n 3), 10.

10 Gerard McCormack, 'Permanent changes to the UK's corporate restructuring and insolvency laws in the wake of Covid-19' (2020) INSOL International 2.

11 World Bank Group, INSOL International and International Association of Insolvency Regulators, 'From Hibernation to Revitalisation: Analysis of Insolvency COVID-19 Response Measures and their Wind-Down' (Report, May 2022), 15.

12 van Zwieten (n 7), 303.

13 McCormack (n 10), 4.

14 Minor Hotel Group MEA DMCC v Dymant [2022] EWHC 340 (Ch), [6], per Sir Alastair Norris.

15 Canadian Pacific Forest Products Ltd v JD Irving Ltd (1995) 66 F 3d 1436 (6th Cir) 1442.

16 McCormack (n 10), 10–12.

17 Ibid, 6.

18 Section A18 and schedule ZA2 to the 1986 Act.

19 Jennifer Payne, 'An Assessment of the UK Restructuring Moratorium' (2021) Lloyd's Maritime and Commercial Law Quarterly 454, 464–465.

20 Minor Hotel Group MEA DMCC v Dymant [2022] EWHC 340 (Ch), [33], per Sir Alastair Norris.

21 Peter Walton and Lézelle Jacobs, Corporate Insolvency and Governance Act 2020 – Final Evaluation Report November 2022 (Insolvency Service 2022).

pre-commencement arrears.[22] This suggests that, in a Part A1 moratorium 'it is financial creditors, rather than the debtor, that are "in the driving seat"'. [23]



The New Regulation of Supply Contracts: A Bridge Too Far?

An ipso facto clause is triggered by an insolvency event (or likely insolvency) and terminates or modifies a contract regardless of breach, automatically or on election, typically in executory contracts. The US Bankruptcy Code enables debtors to 'cherry-pick' beneficial contracts, while section 365(e) of title 11 of the United States Code invalidates ipso facto clauses.[24]

Party autonomy is central to English commercial law but historically created difficulties in insolvency. Before 1986, a supplier of essential goods could force payment of pre-liquidation debts by threatening to cut off supply unless arrears were paid or guaranteed personally by the liquidator.[25] This allowed suppliers to jump the queue by demanding priority payment in exchange for continued supply. Section 233 of the 1986 Act prohibited such 'ransom' payments and the Insolvency (Protection of Essential Supplies) Order 2015 broadened this regime, introducing section 233A.

Sections 233 and 233A made only a limited statutory inroad in favour of rescue, confined to 'essential' supplies. Where a company depended on an essential supply outside the statutory list, section 233A offered no help. Further, suppliers could demand a personal guarantee from the office-holder for post-insolvency charges, failing which termination rights revived, often fatal for companies with limited liquidity.

Section 233B of the 1986 Act marks a major shift towards debtor protection. It applies where a company enters a relevant insolvency procedure and covers all contracts for the supply of goods and services, not just 'essential' supplies. This narrows the gap with the US position, though US law remains broader (covering all executory contracts). Section 233B disables clauses that purport to terminate or cause 'any other thing' to take place after entry into an insolvency procedure, whether automatic or at the supplier's election.[26]

Suppliers are also prevented from exercising termination rights triggered by pre-insolvency events where the entitlement arose before the start of the insolvency period.[27] This went beyond what was trailed before enactment. In 2018, the government's plan targeted termination rights arising by reason of entry into an insolvency process, not rights unconnected to insolvency or the company's finances.[28]

The explanatory notes to CIGA state that the policy intention was, among other things, to maintain the supply of goods and services to distressed companies.[29] But if the policy aim is 'rescue', why is the prohibition engaged in liquidation (where rescue is not possible) or in an administration where rescue is not being pursued? The policy does not clearly justify encouraging differential treatment between creditors in those contexts.[30]

Practically, to disapply the prohibition the supplier must obtain consent from the office-holder or the company, or apply to court at its own cost and satisfy the court that continued supply would 'cause the supplier hardship'. The government suggested this would be a 'safeguard of last resort' with a high bar.[31] Section 233B also raises interpretive issues likely to be litigated, including the scope of 'supply of goods or services', extra-territorial effect and whether the regime is prospective or retrospective.

In short, increased debtor protection has been achieved, at least in part, by making continued supply the default for distressed companies. However, this may do so in a way that leaves some suppliers themselves in an 'unnecessarily precarious' position.[32]

22 van Zwieten (n 7), 303.

23 Ibid, 303.

24 McCormack (n 10), 28.

25 Wellworth Cash & Carry (North Shields) Ltd v North Eastern Electricity Board (1986) 2 BCC 99265; David Milman and Peter Bailey (eds), Sealy & Milman: Annotated Guide to the Insolvency Legislation (28th edn, Sweet & Maxwell 2025), commentary on section 233.

26 Section 233B(3)(a)–(b) of the 1986 Act.

27 Section 233B(4) and (8) of the 1986 Act.

28 van Zwieten (n 7), 305.

29 Explanatory Notes to the Corporate Insolvency and Governance Act 2020, paragraph 39.

30 Schedule 4ZZA to the 1986 Act.

31 Lorraine Conway, Commons Library analysis of the Corporate Insolvency and Governance Bill [HC 2019–21] (House of Commons Library Briefing Paper 8922, 2020) 30.

32 van Zwieten (n 7), 306.



Part 26A Restructuring Plans: New Vistas, New Battlegrounds

CIGA introduced Part 26A of the Companies Act 2006, creating restructuring plans. It applies where section 901A(1)–(3) are satisfied. Condition A requires actual or likely financial difficulties affecting (or potentially affecting) the company's ability to carry on business as a going concern. Condition B requires (a) a proposed compromise or arrangement with creditors, members or any class of either and (b) that the purpose is to 'eliminate, reduce or prevent, or mitigate the effect of' the financial difficulties in section 901A(2).

Under section 901C, the court may order meetings of creditors or classes of creditors. It may also exclude creditors with no 'genuine economic interest in the company' under section 901C(4).

The court's power to sanction a Part 26A plan is in section 901F(1). In outline, if at least 75 per cent in value of a class of creditors or members present and voting at the section 901C meeting agree the compromise or arrangement, the court may sanction it following an application.

A key distinction between Part 26A and the traditional scheme of arrangement under Part 26 is the 'cross-class cram-down'. Under section 901G, the court has a discretion to sanction a plan even where one or more classes fail to approve it by the requisite majority, provided two conditions are met.

Condition A requires the court to be satisfied that, if the plan were sanctioned under section 901F, members of any dissenting class 'would be no worse off than they would be in the event of the relevant alternative'. Section 901G(4) defines the 'relevant alternative' as whatever the court considers would be most likely to occur absent sanction. The 'no worse off' test was considered extensively in Re Petrofac Ltd.[33]

Condition B requires approval by at least 75 per cent in value of a class of creditors or members present and voting at the section 901C meeting who would receive a payment, or have a genuine economic interest, in the relevant alternative.

The recent decision in Re Poundstretcher Ltd reaffirms the court's willingness to sanction restructuring plans in which the interests of some classes of creditors may be materially impaired, in circumstances in which it is established that the insolvency alternative would result in a worse outcome for impacted creditors.[34]

The statutory scheme contains multiple potential points for the wily litigator acting for the plan proponent or a dissenting creditor, some of which are discussed below.

Subject to eligibility, a distressed company can seek a Part A1 moratorium while preparing a restructuring proposal. Otherwise, where appropriate, companies may be well advised to apply to stay individual creditor claims under CPR 3.1(2) or stay enforcement of a judgment under CPR 83.7(4)(a) pending consideration of a plan.[35]



A commonly used way to engage the court's Part 26A (and Part 26) jurisdiction is to insert a newly incorporated English company as substitute or co-obligor for a debt, without assets to meet the assumed liabilities (and therefore in 'financial difficulty'). This approach has been sanctioned at first instance. In Re AGPS Bondco plc, Snowden LJ considered but did not decide whether the artificiality of this technique could justify refusing sanction.[36] Its use may attract tactical challenge from dissenting creditors.

Under section 901C(4), creditors or shareholders with no 'genuine economic interest' can be excluded from voting, giving plan proponents a route to neutralise those who are 'out of the money'. The use of this power has generated intense disputes at convening and sanction hearings. When and how to deploy section 901C(4) to maximum effect, and how to respond, will be critical.[37]

As 'cross-class cram-down' can bind dissenting creditors, it creates greater scope (and sometimes greater incentive) for contested litigation than a traditional scheme of arrangement. That can increase costs and delay implementation of the reorganisation needed to rescue the business. But where creditors will not agree, companies may have little choice but to incur the expense and litigation risk.

Conclusion

The commitment to 'rescue culture' is embedded in English insolvency law, but its development to date is uneven. The Enterprise Act 2002 entrenched administration as the main formal alternative to liquidation. CIGA's three reforms show ambition, but also the limits of progress without a wholesale commitment to 'rescue' of the kind seen elsewhere. The use case for Part A1 moratoria is narrow because financial services liabilities remain payable during the moratorium. Section 233B, by contrast, arguably goes too far in negating ipso facto clauses while providing for differential creditor treatment that is sometimes hard to explain. Part 26A restructuring plans, though potentially costly, add a powerful tool in the event of creditor dissent: 'cross-class cram-down'.

To keep pace with changing conditions, further reform will doubtless be considered in future, and the pendulum may swing further towards 'rescue' if international trends continue along their current trajectories. In any event, difficult questions of policy and principle will remain.

33 Re Petrofac Ltd [2025] EWCA Civ 821.
34 Re Poundstretcher Ltd [2026] EWHC 1438 (Ch).
35 Riverside CREM 3 Ltd v Virgin Active Health Clubs Ltd [2021] EWHC 746 (Ch).
36 Re AGPS Bondco plc [2024] EWCA Civ 24 [33]–[34], per Snowden LJ.
37 Re Smile Telecoms Holdings Ltd [2022] EWHC 387 (Ch).

DIRECTORS: SCAPEGOATS OR PROPER TARGETS?



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Introduction

Does the Insolvency Act 1986 (the 1986 Act) treat directors as scapegoats by holding them unfairly accountable when their companies collapse financially?

In some respects, clearly not. A director who engages in fraudulent trading or misfeasance is rightly held to account. But what about the director who, acting in good faith, tries and fails to trade a company out of financial distress?

In certain jurisdictions, attempting to trade out of insolvency is unlawful in itself. Austria, for example, presumes a company to be illiquid as soon as it ceases making payments, at which point directors must open insolvency proceedings without undue delay. The position is similar in Germany, where there are strict obligations to file for insolvency when a company is illiquid (Zahlungsunfähigkeit) or over-indebted (Überschuldung). This approach creates a binary, insolvency-triggered filing obligation.

English law imposes no such strict obligation. On the contrary, one of the 1986 Act's central policies is to prioritise the rescue of struggling enterprises. A key aspect of this policy is that the 1986 Act does not, contrary to common misconception, necessarily prohibit trading while cash-flow or balance-sheet insolvent, even where doing so carries some risk of further deterioration.

The real question, therefore, is where English law draws the line. Two aspects are relevant: liability for wrongful trading under section 214 of the 1986 Act, and liability for breach of the creditor duty (confirmed in Sequana) which arises where the company is insolvent, bordering on insolvency or insolvent liquidation or administration is probable.[1]



Wrongful Trading

Section 214(2) of the 1986 Act empowers the court to order a director to contribute to an insolvent company's assets if 'at some time before the commencement of the winding up of the company', the director 'knew or ought to have concluded that there was no reasonable prospect' of the company avoiding insolvent liquidation or administration.

1 BTI 2014 LLC v Sequana SA & Ors [2022] UKSC 25, [12], Lord Reed.

Thus, whereas the Austrian or German director faces a binary rule (insolvency triggers an immediate duty to file in Austria and a duty to file within 6 weeks in Germany), the English director must look forward and assess whether there remains a reasonable prospect of recovery. Inevitably, this requirement introduces an element of risk.

The test also includes an objective element ('ought to have concluded'), meaning it is no defence that a director honestly omitted to take the reasonable steps necessary to understand the company's financial position. As an early authority put it: 'Patently, [the directors'] own knowledge, skill and experience were hopelessly inadequate for the task they undertook. That is not sufficient to protect them'.[2]

A director therefore cannot rely on ignorance as a shield. Where a director causes the company to continue incurring liabilities at a time when its cash-flow position makes this unsustainable, the court will treat that as wrongful trading if a reasonably diligent director would have appreciated the company had no reasonable prospect of avoiding insolvent liquidation. Equally, it is not reasonable to continue trading at creditors' risk based on 'nothing more than a speculative hope that it might work out'.[3]

A director may invoke the defence in section 214(3), which protects them from liability if they 'took every step with a view to minimising the potential loss to the company's creditors as […] he ought to have taken'. However, this defence is a narrow one. Parliament deliberately chose the stringent 'every step' formulation, rejecting 'every reasonable step' as an alternative. It also opted for 'minimising' rather than 'reducing'.

Further, the defence under section 1157 of the Companies Act 2006 (which allows the court to relieve a director from liability if they have acted honestly and ought fairly to be excused) does not apply to section 214 claims.[4] This decision reflects Parliament's intention that wrongful trading should not be diluted by a broad fairness based discretion.

In some respects, therefore, section 214 imposes a demanding standard. But in others, the approach is more forgiving.

First, the test is one of prospect, not hindsight. As stated in Re Sherborne Associates Ltd, the court is cognisant of 'the danger of assuming that what has in fact happened was always bound to happen and was apparent'.[5]

Second, liability arises only where there is 'no reasonable prospect' of avoiding insolvent liquidation or administration. The court has paraphrased this test as meaning the absence of 'light at the end of the tunnel' or any 'rational basis for continuing to trade'.[6]

Third, any contribution ordered is capped at the increase in the company's net asset deficiency caused by the wrongful trading; if the directors' conduct does not worsen the creditors' position, no liability arises.[7] English law therefore favours a compensatory measure, rather than the alternative view (preferred by some commentators) that liability should track the full quantum of new creditor debt incurred after the trigger event. The court also retains discretion to order a lower sum, taking into account the director's culpability, insurance and means. Where multiple directors bear distinct responsibility, liability may be several rather than joint and several.

In our view, section 214 strikes a fair balance: it gives directors the space to pursue a rescue and to take hard commercial decisions when a company is under strain, while holding them to account if they act in a way no rational director could justify. It does not treat them as scapegoats.



The Sequana Duty

In Sequana, the Supreme Court confirmed that directors owe a common law duty, preserved by section 172(3) of the Companies Act 2006, to consider creditor interests and balance them against conflicting shareholder interests. This duty qualifies the general directors' duty under section 172(1) of the Companies Act 2006 to promote the company's success for the benefit of its shareholders.

The duty is triggered at an earlier stage than section 214 of the 1986 Act. As confirmed in Sequana, it arises as soon as the directors know, or ought to know, that the company is insolvent, bordering on insolvency or that insolvency is probable (that is, more likely than not).

It is also clear that the creditor duty may arise even if the directors misunderstand the company's financial position. In Hunt v Singh, the company was insolvent due to a tax liability which the directors wrongly believed had been lawfully avoided. The High Court held that the duty arose as soon as the directors knew or ought to have known that there was at least a 'real prospect' that the liability existed.[8]

The jurisprudence setting out the detailed contents and contours of the Sequana duty remains limited, but it requires directors to 'consider' creditor interests.

On the one hand, such a duty demands a more nuanced analysis

2 Re DKG Contractors Ltd [1990] BCC 903, 912, per John Weeks QC.

3 Singla v Hedman [2010] EWHC 902 (Ch), [107], per Peter Smith J.

4 Re Produce Marketing Consortium Ltd; Halls v David [1989] 1 WLR 745.

5 Re Sherborne Associates Ltd [1995] BCC 40, 54C, per His Honour Judge Jack QC.

6 Wright v Chappell [2024] EWHC 1417 (Ch), [473], [477] and [893], per Leech J.

7 Re Ralls Builders Ltd, Grant v Ralls [2016] EWHC 243 (Ch).

8 Hunt v Singh [2023] EWHC 1784 (Ch). Zacaroli J remitted the question whether the duty had been breached and, if so, what the liability was.

than section 214: the majority held in Sequana that directors must give creditor interests appropriate weight and balance them against shareholder interests. As the company's financial position deteriorates, the weight to be given to creditors' interests correspondingly increases. Once insolvent liquidation or administration becomes inevitable, the shareholders lose their economic interest and the creditors' interests become paramount.

On the other hand, a duty merely to 'consider' creditor interests might appear relatively weak. Further, the courts recognise the importance of affording directors a wide margin of discretion when balancing competing interests. This point goes to a paradox at the heart of insolvency and company law: the more directors are required to accommodate the different interests of multiple stakeholders, the less likely it is that they will be held accountable to any of them.

However, the fallout from the BHS insolvency shows the Sequana duty can have significant consequences. In Wright v Chappell, the directors were held liable for breach of the Sequana duty from a date three months earlier than the start of their wrongful trading under section 214. The resulting net asset deficiency was assessed at around £110 million.[9]

This decision may understandably cause concern for directors. The 1986 Act encourages corporate rescue and imposes statutory liability for wrongful trading only in narrow circumstances, and yet the common law duty is broader and more uncertain.

In theory, such a duty could expose directors to scapegoating. In our view, the courts can be expected to guard against this risk. The case law repeatedly warns against applying hindsight. Moreover, in contrast to the position under section 214, the section 1157 defence does apply to breaches of the Sequana duty. This section provides an important safety-valve.



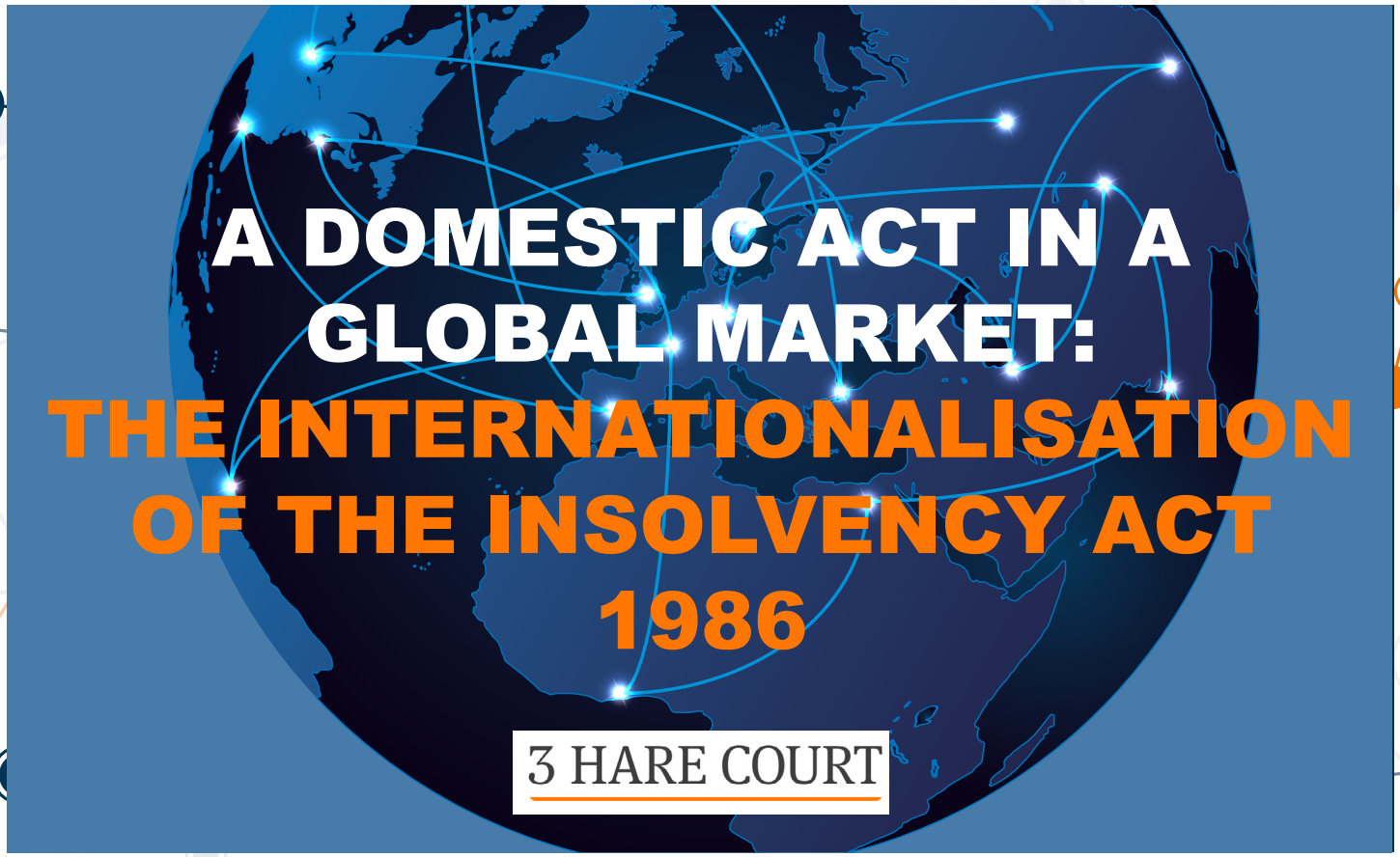
Nevertheless, directors should protect themselves by continually assessing the company's insolvency risk and seeking professional advice as soon as the spectre of insolvency arises. In doing so, they must avoid selectively presenting information to advisers. As Leech J emphasised in Wright v Chappell, had the directors provided a full and accurate picture to their advisers, they would have been advised to enter insolvency proceedings at an earlier stage.[10] Had they done so, they would have avoided personal liability.

Conclusion

In conclusion, although the Sequana duty exposes directors to risks that go beyond section 214, it does not treat them as scapegoats. But it does underscore the importance of directors being proactive whenever insolvency looms and seeking timely, well-informed professional advice.

9 Wright v Chappell [2024] EWHC 2166 (Ch), [82], per Leech J.

10 Wright v Chappell [2024] EWHC 1417 (Ch), [1112], per Leech J.



A DOMESTIC ACT IN A GLOBAL MARKET: THE INTERNATIONALISATION OF THE INSOLVENCY ACT 1986

3 HARE COURT

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Introduction

The Insolvency Act 1986 (the 1986 Act) was enacted for a corporate environment that was already international. Forty years on, cross-border insolvency is more common and complex. Corporate groups, assets, records, directors, creditors and disputed proceeds may now span several jurisdictions. The international dimension of the 1986 Act is therefore an everyday reality of insolvency litigation.

The 1986 Act forms part of a wider cross-border framework, operating alongside the common law and the Cross-Border Insolvency Regulations 2006 (CBIR 2006), which implement the UNCITRAL Model Law on Cross-Border Insolvency 1997 (MLCBI). Until Brexit, they also operated within the European insolvency regime. These sources reflect a recurring tension: insolvency is inherently collective, and increasingly international, but courts and legislation remain territorially confined.

This article considers how the tension between universalism and territoriality works in practice. It considers when a foreign company may enter an English insolvency process, how an English liquidation may be protected abroad and the ability of English office-holders to pursue overseas transactions, assets and evidence. It then turns to recognition and assistance for foreign insolvency proceedings in England and the distinct considerations raised by foreign judgments and insolvency processes. The result is both an 'outbound' and an 'inbound' picture of a regime which has internationalised but remains dependent on the particular statutory or common law route available.



A Worldwide Regime?

The liquidation provisions under the 1986 Act contain an apparent contradiction. A winding-up order is a 'collective remedy'. In the eyes of the common law, it has universal effect and applies to assets wherever they are situated in the world.[1] The general function of a liquidator is

1 Re Azoff-Don Commercial Bank [1954] Ch 315, 333, per Wynn-Parry J.

to get in, realise and distribute the company's assets regardless of where they are found.[2] That function reflects the underlying objective of English insolvency law; if each creditor could seize whichever asset happened to be within reach, the result would be the very 'free-for-all' that collective proceedings are designed to prevent.[3]

Yet the 1986 Act is domestic legislation. UK statutes are generally presumed not to have extra-territorial effect, and the ability of English courts to make orders affecting persons, assets or conduct abroad is subject to jurisdictional constraints. The 1986 Act does not resolve the tension between universalism and territoriality through a single provision. Some provisions have substantial international reach; others remain territorially confined. Even where an English order purports to affect an overseas person or asset, its practical effect may depend on recognition and enforcement in the foreign state.

The result is often described as 'modified universalism'.[4] The English court seeks, so far as substantive law and public policy permit, to assist a single worldwide regime while respecting foreign law and the territorial limits of judicial power. As this article explores, the cross-border elements of the 1986 Act are best understood not as a single worldwide regime, but as a collection of statutory and common law routes whose availability and reach must be tested separately.



Opening an English Process for a Foreign Company

The international reach of the 1986 Act begins at the front door: a foreign company may itself be brought within an English insolvency process. The statute permits the court to wind up an 'unregistered company', a category broad enough to include a foreign company.[5] The familiar three jurisdictional requirements are that: (i) the foreign company must have a sufficient connection with England and Wales which might, but does not necessarily, require assets within the jurisdiction; (ii) if a winding-up order is made, there must be a reasonable possibility of benefit to the petitioner; and (iii) one or more persons interested in the distribution of the foreign company's assets must be persons over whom the court can exercise jurisdiction.[6]

The court also retains discretion. It will not exercise its discretion to wind up a foreign company (or bankrupt a foreign individual) where there are no assets, no connection to the jurisdiction and no purpose to be fulfilled; however, it probably will exercise its discretion if there is an obvious benefit, a strong connection and something to administer.[7]

The power to wind up a foreign company has enabled English insolvency proceedings to play an ancillary role where the principal liquidation is elsewhere, and it helps explain London's continuing importance as a restructuring and insolvency forum. Before petitioning, however, practitioners should identify the intended objective and realistic benefit of the English process. An ancillary liquidation that duplicates a foreign process, eats away at estate assets and produces no additional remedy is unlikely to justify itself.



Protecting The English Process Abroad

Once an English winding-up order is made, the focus shifts from entry into the English regime to protection of the liquidation abroad. Section 130(2) of the 1986 Act prevents actions or proceedings against the company or its property without the court's permission. Consistently with the collective nature of liquidation, the 'statutory stay' protects the administration of the estate from individual creditor action.

The statutory stay is not universal. It does not automatically extend to proceedings in a foreign court.[8] A creditor may therefore be able to commence or continue proceedings against the company abroad without first obtaining permission from the English court, cutting across the collective process taking place in England.

2 Section 143(1) of the 1986 Act.

3 Stichting Shell Pensioenfonds v Krys [2014] UKPC 41, [24], per Lord Sumption and Lord Toulson.

4 The principle of modified universalism was described as the 'golden thread' running throughout English cross-border insolvency law in Re HIH Casualty and General Insurance Ltd [2008] UKHL 21, [30], per Lord Hoffmann. The practical force of the principle has since been the subject of debate. In Rubin v Eurofinance SA [2012] UKSC 46, the Supreme Court declined to develop a special rule for the enforcement of foreign insolvency judgments. In Singularis Holdings Ltd v PricewaterhouseCoopers [2014] UKPC 36, the Privy Council explored the limits of modified universalism but nonetheless recognised it as a principle of the common law, [23], per Lord Sumption.

5 Sections 221 and 225 of the 1986 Act.

6 Re Real Estate Development Co [1991] BCLC 210, 217, per Knox J. As restated by the Court of Appeal in Stocznia Gdanska SA v Latreefers Inc (No.2) (2001) 2 BCC 174, 179, per Lloyd J.

7 JSC Bank of Moscow v Kekhman [2014] BPIR 959, [106], per Registrar Baister.

8 Mazur Media Ltd v Mazur Media GmbH [2004] EWHC 1566 (Ch); Bloom v Harms Offshore AHT "Taurus" GmbH & Co KG [2009] EWCA Civ 632.

The English court is not necessarily powerless to protect the English process in those circumstances. It may restrain a party subject to its jurisdiction from bringing or continuing foreign proceedings.[9] This power provides some support for the universalist position, albeit within orthodox territorial limits. The anti-suit injunction operates personally against the party; it does not bind the foreign court or export the statutory stay.

Where the creditor is not amenable to the English court's jurisdiction, protection of the English liquidation may instead depend on recognition and assistance abroad. The combination of an English statutory stay and an in personam power to restrain a creditor illustrates both the attraction and the limits of modified universalism: English law may seek to protect a collective process, but its effectiveness remains territorially constrained.

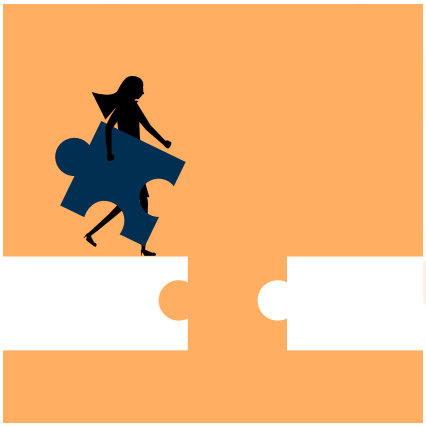


Following Assets

The transaction avoidance provisions show the 1986 Act at its most outward-looking. There are numerous judicial statements recognising the extra-territorial effect of those provisions. In Re Paramount Airways (No 2), the Court of Appeal held that section 238 (transactions at an undervalue) could apply to a transaction and a respondent outside the jurisdiction, subject to the court's discretion and a sufficiently close connection with England and Wales.[10] In Bilta (No 2), the Supreme Court confirmed that section 213 (fraudulent trading) can reach persons and conduct abroad.[11] The Supreme Court commented that the section contained no express limits on its territorial application and that, in an increasingly globalised world, it could not achieve its objective if its application was confined to the UK.[12] Subject to the usual safeguards of a sufficient connection, section 423, which is available even outside a formal insolvency process, is likewise capable of extra-territorial application.[13]

The fact that the transaction avoidance provisions are capable of extra-territorial application does not, however, mean that every cross-border claim should be pursued in England. Orexim Trading Ltd provides a cautionary tale. Although the Court of Appeal accepted a gateway for service for a section 423 claim, it refused to grant permission to serve out of the jurisdiction because none of the defendant companies were incorporated in England, none of them had assets within the jurisdiction and there was no evidence of loss sustained in the jurisdiction. Notwithstanding a settlement agreement governed by English law, that fact alone did not provide a sufficient connection to the jurisdiction.[14]

Extra-territorial capacity is only the first stage. Service, forum, choice of law, comity, personal jurisdiction and enforceability remain live questions. Practitioners should distinguish: (i) whether the provision can apply abroad; (ii) whether the English court has jurisdiction over the respondent; and (iii) whether the relief sought will be effective where compliance or execution must occur. A worldwide order that cannot be recognised, enforced or converted into control of the asset may add costs without adding value. The remedy should always be designed backwards from the jurisdiction in which it must ultimately work.



The Investigation Gap

An office-holder's investigatory powers expose a sharper fault line between universalism and territoriality. Sections 133 and 236 are central to reconstructing a company's affairs. Public examination under section 133 has been treated as capable of reaching a person abroad where necessary;[15] however, private examination under section 236 has a more troubled history.

In Re Tucker, the court held that the predecessor power did not authorise the court to compel a person outside England and Wales to appear before the court in a private examination.[16] In Re Akkurate, the Chancellor of the High Court treated that authority as binding for the purposes of section 236.[17] The Chancellor saw merit in the argument that section 236 should be applied to persons abroad but nevertheless regarded section 237(3) as a stumbling block to a wider extra-territorial reading of section 236.

In both Re Akkurate and Re Carna Meats, the courts construed the EU Insolvency Regulation as extending the ambit of an office-holder's investigatory powers under section 236 from the UK to the territorial domain of the EU

9 For example, in Re Vocalion (Foreign) Ltd [1932] 2 Ch 196. Compare with Kemsley v Barclays Bank plc [2013] EWHC 1274 (Ch), in which an injunction was refused.

10 Re Paramount Airways Ltd (No 2) [1993] Ch 223, 239–240, per Sir Donald Nicholls VC.

11 Bilta (UK) Ltd v Nazir (No 2) [2015] UKSC 23, [6], per Lord Neuberger.

12 Ibid, [10], per Lord Neuberger, [108]–[110], per Lord Sumption and [213]–[214], per Lord Hodge and Lord Toulson.

13 Orexim Trading Ltd v Mahavir Port and Terminal Private Ltd [2018] EWCA Civ 1660, [29], per Lewison LJ; HMRC v Begum [2010] EWHC 1799 (Ch).

14 Ibid, [59], per Lewison LJ.

15 Re Seagull Manufacturing Co Ltd [1993] Ch 345.

16 Re Tucker [1990] Ch 148 considered the court's power in personal bankruptcy under section 25 of the Bankruptcy Act 1914.

17 Re Akkurate Ltd [2020] EWHC 1433 (Ch), [54], per Sir Geoffrey Vos C.

(but the EU only).[18] Brexit, however, removed that EU route for new UK insolvency proceedings. The result is a striking asymmetry: an office-holder may be able to pursue an avoidance claim in England in respect of an overseas transaction, but lack the power to compel a person abroad to provide the documents or evidence needed to prove that claim.

Until there is legislative reform, practitioners need an evidential plan with more than one track. As a starting point, voluntary requests to respondents should be precise and proportionate. Where compulsion or judicial assistance is required, the available route will depend on the jurisdiction concerned. Recognition in a state which has enacted MLCBI may also unlock local assistance, but implementation and available relief differ by country.[19] Section 426 of the 1986 Act can provide powerful court-to-court assistance, but only in relation to designated countries and territories (generally those with a common law tradition).[20] It is an unusually flexible provision in permitting the assisting court, in relation to the matters specified in the request, to apply either its own insolvency law or the insolvency law applicable in the requesting court.[21]

Other routes, including letters of request, local disclosure procedures and parallel proceedings, may also be needed. The evidential route should be identified early, including the location of documents, data controllers and custodians, before dissipation or limitation makes the gap decisive.



Recognition Inbound

The international character of the English insolvency regime is not only outward-facing. Under the CBIR, a 'foreign representative' may apply to the English court for recognition of a foreign insolvency process.[22] The CBIR framework distinguishes between foreign main proceedings, taking place where the debtor has its centre of main interests, and foreign non-main proceedings, where the debtor has an establishment. Recognition of a foreign main proceeding triggers the automatic relief provided by article 20, including restrictions on creditor enforcement and dealings with the debtor's assets. Article 21 also gives the court a broad discretion, following recognition of either a main or non-main proceeding, to grant further relief, including the preservation of assets and examination of witnesses.

Recognition under the CBIR sits alongside the common law principle of modified universalism, but neither provides an unrestricted power to give effect to foreign insolvency proceedings. In Rubin, the Supreme Court considered the enforceability of judgments and orders made in foreign bankruptcy proceedings against a person who was neither present nor resident in that country and had not submitted to the jurisdiction of its courts. Given that such judgments would not ordinarily be enforceable in England, the Supreme Court rejected the argument that modified universalism justified a more liberal rule simply because the judgments arose from insolvency proceedings.[23]

Singularis subsequently recognised a common law power to assist a foreign liquidation by compelling the production of information but emphasised that the power was subject to important limits. Assistance cannot be used to give a foreign office-holder powers which were unavailable under the law governing the foreign insolvency, and any relief had to be consistent with the substantive law and public policy of the assisting court.[24] Modified universalism therefore facilitates cooperation between insolvency regimes but does not permit ordinary rules of English law to be displaced simply in the interests of a worldwide regime.

Beyond Recognition

Recognition and assistance do not exhaust the questions which arise when a foreign insolvency process or judgment encounters English law. The Supreme Court decision in Servis Terminal LLC v Drelle provides a recent example.[25] The Supreme Court held that a final and conclusive, unrecognised and unregistrable foreign money judgment can create an immediate common law obligation to pay and may therefore constitute a 'debt' capable of supporting a bankruptcy petition under section 267 of the 1986 Act.[26] The decision is helpful to creditors in removing a potentially costly preliminary step in insolvency proceedings. Its broader universalist significance is, however, more limited: it does not make the foreign judgment equivalent to an English judgment or make the ordinary methods of execution, such as a charging order or a third-party debt order, immediately available.

18 Re Carna Meats [2019] EWHC 2503 (Ch).

19 CBIR 2006, SI 2006/1030, schedule 1; UNCITRAL Model Law on Cross-Border Insolvency (1997).

20 Section 426(11) of the 1986 Act.

21 Section 426(5) of the 1986 Act.

22 CBIR 2006, SI 2006/1030, schedule 1, articles 15–21.

23 Rubin v Eurofinance SA [2012] UKSC 46, [115]–[132], per Lord Collins.

24 Singularis Holdings Ltd v PricewaterhouseCoopers [2014] UKPC 36, [25], per Lord Sumption.

25 Servis-Terminal LLC v Drelle [2026] UKSC 29.

26 Ibid, [75] and [89], per Lord Briggs and Lord Hamblen.

The Gibbs rule illustrates the converse point. Whilst Servis Terminal LLC v Drelle shows that a foreign judgment may have consequences under English insolvency law without prior recognition, the Gibbs rule shows that recognition of a foreign insolvency proceeding does not necessarily mean that English law will give effect to everything done within that proceeding. In Antony Gibbs & Sons, the Court of Appeal established the principle that the discharge of a contractual debt is governed by the law applicable to that debt.[27] Consequently, a foreign insolvency proceeding or restructuring which purports to discharge an English law-governed debt will not ordinarily discharge that debt for English law purposes. The rule has been criticised for sitting uneasily with the universalist objectives of modern insolvency law, while its defenders emphasise contractual certainty and the protection of creditors against having their contractual rights altered under a law they did not choose.[28]

The framework for recognising foreign insolvency-related judgments may yet change. The UK is considering the implementation of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments 2018 (MLIJ).[29] The Insolvency Service has favoured partial implementation through article X rather than adoption of the full MLIJ.[30] Article X of the MLIJ would clarify that relief under article 21 of MLCBI may include recognition and enforcement of an insolvency-related judgment, addressing the difficulty identified in Rubin. This approach would preserve judicial discretion and is intended to leave the Gibbs rule undisturbed. However, implementation of the MLIJ remains under consideration, with further stakeholder engagement being undertaken. The debate about the Gibbs rule brings this article back to the central tension running throughout the international development of English insolvency law: how far should English law facilitate an effective worldwide insolvency regime while preserving the territorial and substantive limits of domestic law?

Conclusion

Over forty years, the 1986 Act has internationalised without becoming a world insolvency code. Foreign companies may enter English insolvency processes, English office-holders may pursue certain misconduct abroad and foreign representatives may obtain recognition and assistance in England. The common law and the CBIR 2006 supplement the statutory architecture, but its development remains uneven. The territorial reach of one power under the 1986 Act does not determine that of another, and even where a provision has extra-territorial effect, its practical value may depend on jurisdiction, access to evidence and recognition or enforcement abroad.

The tension between universalism and territoriality therefore remains embedded in the operation of the 1986 Act and the common law.

Modified universalism necessarily operates through cooperation between legal systems. For practitioners, the challenge is identifying in advance where that cooperation will be needed and where the reach of the English regime ends. Three questions should therefore be kept distinct: does the English court have jurisdiction? Does the relevant insolvency power extend extra-territorially? Can the resulting order be recognised or enforced where the relevant person, asset or evidence is located? In cross-border insolvency, the value of an order ultimately lies not in the breadth of its language, but in whether it can produce a result where it matters.

27 Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux (1890) 25 QBD 399 (CA).

28 For a nuanced analysis: Sarah Paterson, 'A Qualified Defence of the Rule in Gibbs' (2026) 75 International & Comparative Law Quarterly 221.

29 UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018), article X.

30 The Insolvency Service, 'Implementation of two UNCITRAL Model Laws on Insolvency: Summary of consultation responses and Government response' (10 July 2023) https://www.gov.uk/government/consultations/implementation-of-two-uncitral-model-laws-on-insolvency/implementation-of-two-uncitral-model-laws-on-insolvency-consultation accessed on 11 September 2026.

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