INSOLVENCY LAW : A MATTER OF PUBLIC INTEREST?[1]

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Undoubtedly, the concept of the public interest is an important element in many areas of law, such as human rights, media, copyright, civil and criminal litigation, environmental law and company law, just as it is in many areas of life.[2] This is manifested by the significant amount of literature written in this regard.[3] However, do public interest issues exist as far as insolvency law is concerned? Insolvency is an area of law clearly categorised as "private law" and involving, *inter alia,* the rights of creditors against debtors. It is an area of the law, unlike consumer law, environmental law, employment law and human rights law, to name but some, which is not readily linked to the public interest. The focus of insolvency law is seen squarely to be on the rights of creditors against a particular debtor(s) and what those creditors will receive by way of payment (if anything).

This article argues that the concept of the public interest has a role to play in insolvency law. Second, it discusses the meaning of the expression, "public interest," and explains what "public interest" means in the context of insolvency law. Third, the article considers the arguments that have been put as to whether it is appropriate that the public interest has a role to play in insolvency law. Finally, the article, after arguing that the public interest has a role to play, considers the extent to which it should have a bearing on insolvency law matters.

I. IS THE PUBLIC INTEREST A FACTOR IN INSOLVENCY LAW?

Insolvency law is often seen as dealing with a very limited area. It is suggested that the prevailing view, in both the community at large and even amongst people who are versed in the law is that insolvency law is all about money[4] and more specifically about creditors of a debtor not getting paid what they are legally owed. In other words, it is about a person or a company failing to meet financial commitments. This is undoubtedly an important and significant aspect of insolvency law, but this area of law is wider than that. Increasingly, the law has become more and more concerned with providing measures both for the reconstruction of insolvent companies, in order that

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[1] I am indebted to the anonymous referee who made some helpful comments on an earlier version of the article. Any errors, of course, remain my responsibility.

[2] For example, in the administration of government.

[3] Probably most comment has emanated from the domain of political philosophy. A significant number of examples are set out later in the article.

[4] See K Gross, *Failure and Forgiveness : Rebalancing the Bankruptcy System* (1997) at 23.

they can be rescued and able to continue to do business,[5] and for individuals to escape bankruptcy by entering into some scheme with creditors.[6] A rehabilitation of a debtor may not only benefit the debtor, who avoids bankruptcy or liquidation, and creditors, who get paid more than they would if the debtor entered bankruptcy or liquidation, but it may well be of advantage to the general community because, for example, employees of the debtor keep their jobs. But, despite this broadening of the scope of insolvency law, it is not generally regarded as involving serious social issues which require consideration of the public interest.

Notwithstanding this, the Report of the Insolvency Law Review Committee, *Insolvency Law and Practice* (commonly known as the "Cork Report")[7] stated that English law has always recognised that the community has an interest in insolvency law,[8] and that in English law insolvency has never been treated as an exclusively private matter;[9] one can find many instances of references to the public interest in legislation and in judgments both in English and Commonwealth statutes and courts. The fact of the matter is that no area of life or legal issue can be seen as off limits to a consideration of the public interest.[10] Just because an issue, like one relating to insolvency law, does not involve all or a substantial number of members of the public, it does not mean that the public interest cannot be considered.[11]

It is possible to divide instances where the public interest is a factor in insolvency law into three very broad categories. First, it is in the public interest that insolvencies are resolved in an orderly and expeditious way. Second, it is in the public interest to ensure that commercial morality is enforced, so as, *inter alia*, to prevent fraud and other improper practices. Third, it is in the public interest that people are protected from the adverse effects which insolvency can produce.

Orderly and Expeditious Resolution of Insolvencies

It is a principle of insolvency law that insolvencies are handled in an orderly fashion.[12] Hence, to accommodate this principle, insolvency administrations, such as bankruptcies and liquidations, are collectivised. Bankruptcy and liquidation are procedures of an inherently collective nature[13] in that each creditor forfeits the individual right to take action to enforce the debt owed, and in lieu thereof the creditor must depend on the result of the collective

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5 For example, see the Report of the Insolvency Law Review Committee, *Insolvency Law and Practice, Cmnd* 8558 (1982) at *para* 198(f) ("Cork Report").
6 Such as, in the UK, individual voluntary arrangements.
7 *Cmnd* 8558, 1982.
8 *Ibid* at *para* 1734.
9 Cork Report, Cmnd 8558, 1982, at para 1734
10 See the comments in Daly, "*Amicus Curiae* and the Public Interest : A Search for a Standard" (1990) 12 *Law & Policy* 389 at 411.
11 See the comments in *R v Sussex Confirming Authority* [1937] 4 All ER 106 at 112.
12 See generally, Cork Report at para 198.
13 See *Re Western Welsh International System Buildings Ltd* [1983] 1 BCC 99, 296 at 297; *Re Lines Bros Ltd* [1983] Ch 1 at 20 per Brightman LJ; Fletcher, *The Law of Insolvency*, 2nd ed. (1996) at 2; Cork Report at paras 224-227, 232 .

proceedings:[14] that is, the primary beneficiary of the proceedings is the general group of unsecured creditors, each of whom is affected by the bankruptcy or winding up, albeit to different degrees.[15] The procedure is compulsory,[16] in order to ensure that there is a co-operative system which is orderly.[17] When a company is being wound up because of its insolvency, the members of the company have no interest in the assets[18] – the process involved is a collective procedure to bring about the distribution of the assets to the creditors according to their pre-liquidation or pre-bankruptcy entitlements. If there was no collective procedure, then creditors would enforce their debts and it would produce a 'first come, first served' situation which would be disorderly. Collectivism[19] is regarded as a preferable resolution of the insolvency of the debtor as no one or two creditors receive full payment at the expense of the rest, who receive little or nothing.[20] Not only does this balance the competing interests of creditors, it meets the public interest of ensuring an orderly and expeditious resolution of the company's demise, and so there is no unsavoury scramble by creditors for the assets of the insolvent, and an independent person, a licensed insolvency practitioner, oversees the distribution of assets and the general administration of all aspects of an estate.

The Need for Commercial Morality

The law protects the public in general by imposing standards of conduct. This is particularly the case in relation both to a person who has gone bankrupt and to officers of companies which end up in liquidation or are subject to administration under Part II of the Insolvency Act 1986 ("the Act"[21]). According to the Cork Report, "it is a basic objective of the law to

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[14] Jackson, "The Avoiding Powers in Bankruptcy" (1984) 36 *Stanford Law Review* 725 at 758; Friedman "Lender Exposure Under Sections 547 and 550 : Are Outsiders Really Insiders?" (1990) 44 *Southwestern Law Journal* 985 at 993.

[15] Cork Report at para 232.

[16] Prentice, "The Effect of Insolvency on Pre-Liquidation Transactions" in B G Pettet (ed),*Company Law in Change : Current Legal Problems* at 70. In his work, "The Nature of Bankruptcy" (1940) 89 *University of Pennsylvania Law Review* 1 at 8, Professor Radin asserted that the central notion of bankruptcy is the coercion of creditors into a class.

[17] T Jackson, *The Logic and Limits of Bankruptcy Law* (1986) at 17. Professor Warren ("Bankruptcy Policy In An Imperfect World" (1993) 92 *Michigan Law Review* 336 at 343) states that a collective process is inevitable. A collective process was employed under Roman law (Radin, "Fraudulent Conveyances at Roman Law" (1931) 18 *Virginia Law Review* 109 at 110).

[18] *Ayerst v C & K (Construction) Ltd* [1976] AC 167 (HL).

[19] "Collectivism" is a term coined by Professor Warren ("Bankruptcy Policy" (1987) 54 *University of Chicago Law Review* 775 at 776) and widely accepted, *eg*, see Ponoroff and Knippenberg, "The Implied Good Faith Filing Requirement: Sentinel of an Evolving Bankruptcy Policy" (1991) 85 *Northwestern Law Review* 919 at 948.

[20] T Jackson, *The Logic and Limits of Bankruptcy Law* (1986) at 16-17.

[21] Any reference to a section of a statute in this article is a reference to the Insolvency Act 1986 unless the contrary is indicated.

support the maintenance of commercial morality,"[22] and, according to the courts, to ensure high standards are maintained.[23] Insolvency law provides for criminal and regulatory sanctions which can be applied:

> "on behalf of society at large against individual debtors, or against the directors or managers of insolvent companies, whose conduct amounts to a violation of, or a sufficiently serious threat to, the norms of acceptable commercial behaviour."[24]

The rule in *Ex parte James* is a principle which seeks to facilitate commercial morality. In broad terms, it provides that if an officer of the court is under an obligation of conscience then the court will direct the officer to fulfil that obligation. The rule, which derives from the law of bankruptcy, can be justified as a rule which is in the public interest. In the context of bankruptcy law the principle is that a trustee in bankruptcy will not be permitted to take advantage of his or her strict legal rights if this has the effect of unjustly enriching the estate at the expense of an innocent claimant. The result, in the seminal case of *Re Condon; Ex parte James*,[25] was that the trustee was ordered to restore moneys paid under a mistake of law which would otherwise have been irrecoverable, and the doctrine has since been considerably extended, even to the point of requiring repayment by the trustee of moneys lent to a bankrupt in ignorance of the fact that a receiving order had been made.[26] Since the decision in *Re Tyler*[27] in 1907, the courts have treated *Ex parte James* as standing for a wider principle than dealing with the recovery of payments made pursuant to a mistake of law.[28] It appears that the enrichment of the officer is the critical thing,[29] and it does not matter how that came about.[30] The rule has been applied to a liquidator in compulsory winding up[31] by reason of the fact that the liquidator too is an officer of the court acting under its control; a court will direct its officer to carry out an obligation of conscience or equity; this is even though if the legal position were interpreted strictly the creditors might well benefit from the liquidator taking advantage of the position.

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22 Para 191. Dillon LJ in *Bishopsgate Investment Management Ltd v Maxwell* [1992] 1 All ER 856 at 876 said that there is a public interest in ensuring that legislation deals with the dishonesty or malpractice of bankrupts and company directors.

23 See the comments of Atkin LJ in *Re Thellusson* [1919] 2 KB 735 at 764.

24 Fletcher, "Juggling with the Norms : the Conflict Between Collective and Individual Rights under Insolvency Law" in R Cranston (ed), *Making Commercial Law* (1997) at 394.

25 (1874) 9 Ch App 609.

26 *Re Thellusson* [1919] 2 KB 735.

27 [1907] 1 KB 865.

28 For example, see *In re Clarke* [1975] 1 WLR 559.

29 For example, see *Green v Satangi* [1998] BIPR 55.

30 See *In re Clarke* [1975] 1 WLR 559.

31 *Re Regent Finance & Guarantee Corp.* (1930) 69 LJ Ch 283; [1930] WN 523; *Re Cider (N.Z.) Ltd* [1936] NZLR 374; *Re Associated Dominions Assurance Co.* (1962) 109 CLR 516; *Re Wyvern Developments Ltd* [1974] 1 WLR 1097.

One of the purposes of liquidations and bankruptcies is to permit the investigation of the affairs of insolvents.[32] It is necessary, in the public interest, that the public is satisfied that there has been no commercial impropriety or perpetration of fraud by insolvents who have gone bankrupt, or, in relation to companies which have entered liquidation, by their officers or associates.[33] Hence, it is in the public interest that office-holders, such as trustees in bankruptcy and liquidators are able to carry out their investigative duties properly.[34] The investigative powers of office-holders in insolvency administrations were extended in the public interest by the Act to overcome dishonesty and malpractice.[35] There is public concern over the failure of companies, especially substantial and public ones, and there is a need to safeguard the public from the failures of such companies.[36] Insolvency can, of course, be related to some fraudulent activity and this would offend the public's concern for commercial morality in the marketplace. The relevance of the public interest to insolvency cases where matters of fraud might be involved is well articulated by Professor Fletcher when he states:

> "[I]t may be said that English insolvency law has during the past hundred years or so evolved a series of interlocking principles that are conspicuous for their acceptance of the paramountcy of the public interest in maximizing the detection and punishment of fraud and other forms of debtor misconduct. . . "[37].

One of the frequently invoked investigative powers which has been given to office-holders,[38] permits, subject to court approval, the examination in private of certain persons associated with insolvencies. Under section 236(2) an office-holder is able, in relation to a company, to apply for the examination of persons such as officers of the company and people who are able to give information about the affairs of the company. Likewise, the court may, on the application of the trustee of a bankrupt estate or the official receiver, summon persons such as the bankrupt and people who are able to give information about the affairs of the bankrupt to appear at a private

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32 See *British and Commonwealth Holdings plc (joint administrators)* v *Spicer & Oppenheim* [1993] BCLC 168 at 172 *per* Lord Slynn; Cork Report at para 194.

33 See Cork Report at para 198(h).

34 *Cloverbay Ltd* v *Bank of Credit & Commerce International SA* [1991] 1 All ER 894 at 905; *Bishopsgate Investment Management Ltd* v *Maxwell* [1992] 2 All ER 856, 903. Various statutory provisions impose obligations on office-holders to report to the Department of Trade and Industry and prosecuting authorities cases of suspected criminal conduct.

35 *Bishopsgate Investment Management Ltd* v *Maxwell* [1992] 2 All ER 856 at 876. The House of Lords in *Re Arrows Ltd* (No 4) [1994] BCC 641 at 646, adverted to the upsurge of financial fraud in companies during the early 1990s and the concern of the public that the fruits of fraud be recovered.

36 *Bishopsgate Investment Management Ltd* v *Maxwell* [1992] 2 All ER 856 at 871.

37 Fletcher, "Juggling with the Norms: the Conflict Between Collective and Individual Rights under Insolvency Law" in R Cranston (ed), *Making Commercial Law* (1997) at 395.

38 "Office-holders" includes the administrator pursuant to an administration order pursuant to Part II of the Act, an administrative receiver, a liquidator and a provisional liquidator: s234(1).

examination.[39] In addition, where a bankruptcy has occurred the official receiver is able to apply to the court for the examination of the bankrupt in public.[40] Pursuant to section 133, and in relation to a compulsory liquidation,[41] the official receiver is entitled to apply to the court for the public examination of: officers and former officers of the company; persons who have been or are liquidators, administrators and receivers and managers of the company; and persons who have been concerned, or taken part, in the promotion, formation or management of the company.

It is in relation to examinations that the issue of the public interest has been most frequently considered. This has been due to the fact that the courts have had to attempt to balance a number of potentially conflicting public interests. In determining whether a director of a company in administrative receivership was at liberty to decline to answer questions put at a private examination pursuant to section 236 of the Act, on the basis of the privilege against self-incrimination, Vinelott J in *Re Jeffrey S Levitt Limited*[42] took into account the public interest in ensuring that the inquiry of office-holders (administrative receivers in this case) was conducted thoroughly and expeditiously.[43] This is in line with a general tendency for courts to give more latitude to office-holders in recent days because of the greater concern over the perpetration of fraud, particularly by company officers.[44] It has been held that because of the public interest, information obtained by office-holders in relation to an insolvency administration is to be available to prosecuting authorities such as the Serious Fraud Office.[45]

There have been occasions when courts have refused to approve arrangements between insolvents and their creditors because to do so might not foster commercial morality. For instance, in New Zealand for an insolvent to be able to enter into an arrangement under Part XV of the Insolvency Act 1967 (NZ), the court must approve of it. *Inter alia*, the court may refuse to approve of it if it is of the opinion that for any reason it is not expedient that it should be approved.[46] In *Re Trott and Joy*[47] the New

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[39] S 366.
[40] S 290.
[41] There is authority for the proposition that while s133 only applies expressly to compulsory examinations, the power to order examination can also be exercise in relation to companies subject to voluntary liquidations: *Re Campbell Coverings Ltd (No2)* [1954] Ch 225 (CA); *Bishopsgate Investment Management Ltd v Maxwell* [1992] 2 All ER 856 at 870 (CA).
[42] [1992] BCC 137.
[43] *Ibid* at 147. This viewpoint, certainly as far as officers and former officers of companies are concerned, was accepted by Ferris J in *Re A E Farr Ltd* [1992] BCC 151; by the Court of Appeal in *Re London United Investments plc* [1992] BCC 202; *Bank of England v Riley* [1992] 2 WLR 840; [1992] 1 All ER 769; *Re Bishopsgate Investment Management Ltd* [1992] BCC 222, and by the House of Lords in *Re Arrows Ltd (No4)* [1994] BCC 641. The privilege is abrogated in relation to examinations in bankruptcy. See r 6.175 of the Insolvency Rules.
[44] See the comments of Lord Browne-Wilkinson in *Re Arrows Ltd (No4)* [1994] BCC 641 at 650.
[45] *Re Arrows Ltd (No4)* [1993] BCC 473 at 488 (CA).
[46] S 143(3).
[47] Unreported, High Court (NZ), Auckland, B1471/88, 14 April 1989, and referred to in *Re Fidow* [1989] 2 NZLR 431 at 442.

Zealand court refused to approve of an arrangement on this ground because of the misconduct of the debtor. Tompkins J said that the wider public interest was a factor which could be taken into account by a court in determining whether or not it was expedient for an arrangement to be approved. Likewise, in similar applications in Australia the courts have indicated that the enforcement of commercial morality is consistent with the public interest.[48]

Unless misconduct is identified and dealt with and, as a consequence, serves as a deterrent, then the system on which much of our commercial life is based (and which is designed, in part, to benefit society) will be held in contempt by some and avoided by others.

Reduction of the Possible Adverse Effects of Insolvency in order to Provide Protection

The public interest dictates that the law protects people, as much as possible, from the consequences of the insolvency of individuals and companies. First, one of the principles of insolvency law is that secured creditors retain their rights against the security where the secured standing cannot be impugned and consequently they enjoy a form of priority compared with the general body of unsecured creditors. Obviously one of the principal reasons that creditors take security is to safeguard themselves against a debtor becoming insolvent. A second instance of insolvency law reducing the adverse effects of insolvency is the fact that insolvency administrations such as liquidations and bankruptcies are collective procedures. A collective process endeavours to ensure that creditors are treated equally, so that the social effects of the insolvency of a debtor are minimised; for example, there is a chance that each creditor will get something from a liquidation of the affairs of a debtor, rather than letting "a free for all" to take place whereby the stronger and more powerful creditors will take most, if not all, of the assets. Linked to the collective procedure is the most universal of all insolvency principles, the *pari passu* principle, which requires the assets of the insolvent to be equally divided amongst creditors. The principle may be traced back to at least the bankruptcy statute of 1542[49] which stated that:[50]

> ". . . for true satisfaction and payment of the said creditors: That is to say, to every of the said creditors, a Portion Rate and Rate alike, according to the Quantity of their Debts."

The principle was repeated in the 1570 statute and was clearly stated in the celebrated *Case of the Bankrupts*[51] in 1592 when Coke CJ said:

> "So that the intent of the makers of the said Act [Act of 1570], expressed in plain words, was to relieve the debtors of the

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[48] For example, see *Re Mascot Home Furnishers Pty Ltd* [1970] VLR 593; *Re Denistone Real Estate Pty Ltd* [1970] 3 NSWR 327; *Re Data Homes Pty Ltd* [1972] 2 NSWLR 22; *Re Universal Liquors Pty Ltd* (1991) 9 ACLC 918.

[49] 34 & 35 Hen 8 c 4. Garrido in "The Distributional Question in Insolvency: Comparative Aspects" (1995) 4 *International Insolvency Review* 25 at 29 briefly considers the origins of the principle in the middle ages in Italy.

[50] S 2.

[51] (1592) 2 Co Rep 25; 76 ER 441.

> bankrupt equally, and that there should be an equal and rateable proportion observed in the distribution of the bankrupt's goods amongst the creditors, having regard to the quantity of their debts. . ."[52].

The principle of equal distribution is still regarded today as the cornerstone of insolvency law.[53]

There have been indications from some courts that where a winding-up petition is brought against a company which is proved unequivocally to be insolvent, then even where the debt on which the petition is founded is disputed, the company should be wound up, because to allow it to carry on trading would be against the public interest. In *Re RA Foulds Limited*[54] Hoffmann J (as he then was) manifested concern about allowing companies to continue to trade where they are proved to be insolvent at the time of the hearing of a petition, but they are not wound up because the debt on which the petition is based is disputed.[55] His Lordship indicated that in "a typical case"[56] where a petition is presented against a company which in fact is unable to pay its debts and is under considerable pressure from its creditors, the company has overdraft facilities with its bank, but the bank does not take any action because it is protected by fixed and floating charges over company property. The company may be trading at a loss and falling into arrears with its PAYE and VAT payments, and its overdraft increases. When the company is finally wound up the bank and the revenue will usually be protected as secured and preferential creditors respectively, but the unsecured creditors will receive far less than they would have done if the company had been wound up on the original petition. There have been a number of Australian cases[57] and a New Zealand case[58] which have pointed up the injustice in permitting a company to continue to trade even though it is clearly insolvent.[59] It has been said that it is not in the public interest to permit a company, in such circumstances, to carry on trading.[60] However, it must be noted that the prevailing approach in England is not to wind up an

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52 *Ibid* at 464-478 (ER).

53 Cork Report at para 1072.

54 (1986) 2 BCC 99, 269.

55 This is the prevailing view in England. See *Mann v Goldstein* [1968] 1 WLR 1091. For a critique of this view, see Keay, "Insolvent Companies which are able to dispute debts owed to petitioning creditors: should they be wound up?" [1998] *Co Law* 231.

56 *Ibid*

57 See *National Mutual Life Association of Australasia Ltd* v *Oasis Developments Pty Ltd* (1983) 1 ACLC 1263; *General Welding and Construction Co (Qld) Pty Ltd* v *International Rigging (Aust) Pty Ltd* (1984) 2 ACLC 56; *Tecma Pty Ltd* v *Solah Blue Metal Pty Ltd* (1986) 6 ACLC 1080.

58 *In re a Private Company* [1935] NZLR 120.

59 See the discussion in Keay, "Insolvent Companies which are able to dispute debts owed to petitioning creditors: should they be wound up?" [1998] *Co Law* 231.

60 *Melbase Corporation Pty Ltd* v *Segenhoe Ltd* (1995) 17 ACSR 187 at 201. In *Re Hester* (1889) 22 QBD 632 at 635, Cave J noted in relation to an appeal from the making of a receiving order pursuant to the Bankruptcy Act 1883 that it was contrary to the public interest to permit a person who was insolvent to continue trading.

insolvent company where there is a disputed debt.[61] The courts take the strict legalistic view that because the debt on which a petition is disputed the petitioning creditor does not have standing and therefore the courts are unable to consider the issue of insolvency. In such cases there is insufficient attention given to the possible prejudice which can be caused to the public.

The concept of the public interest was frequently adverted to by courts in considering the rescission of receiving orders which were made under bankruptcy statutes.[62] The effect of rescission was to free the debtor from the bankruptcy process. If a rescission was detrimental to the public interest it would not be sanctioned.[63] Collins LJ, in *Re Izod*[64], said that "the greatest vigilance ought to be used in such cases for the protection of the interests of the creditors and the public."[65] The principles formulated by the courts in this regard have been applied in relation to applications considered by courts for the approval of schemes or compositions which are to keep either a person out of bankruptcy or a company out of liquidation.[66] In these cases the courts have time and again emphasised the fact that it would not be in the public interest, and would be against commercial morality in particular, to allow an insolvent to trade out of trouble,[67] for in doing so new credit providers and others could be prejudiced.

Bankrupts who are undischarged are prohibited from either obtaining credit to the extent of the prescribed amount (£250[68]) or more without informing credit providers of their status as bankrupts,[69] or engaging in a business under a name other than the one under which they were adjudged bankrupt unless they make the appropriate disclosure to the persons with whom they enter business.[70] These are instances of the legislation stopping a person gaining credit or carrying on business in a certain way because in either situation the person would be acting in a commercially improper manner.[71]

In recent years it has become recognised more and more that the collapse of a business can have significant and wide-ranging effects on a number of people in a community. For example, if a company stops trading then there

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61 See, for example, *Mann v Goldstein* [1968] 1 WLR 1091; *Re Lympne Investments Ltd* [1972] 1 WLR 523; *cf Niger Merchants Co* v *Capper* (1877) 18 Ch D 557n.

62 For example, see *In re Hester* (1889) 22 QBD 632; *In re Flatau* [1893] 1 QB 219; *In re Izod* [1897] 1 QB 241; *Re a Debtor* [1971] 1 All ER 504.

63 *In re Hester* (1889) 22 QBD 632, 640.

64 [1897] 1 QB 241.

65 *Ibid* at 255.

66 See *In re Telescriptor Syndicate Ltd* [1903] 2 Ch 174 at 180-181; *Re Denistone Real Estate Pty Ltd* [1970] 3 NSWR 327 at 329 and 330; *Re Mascot Home Furnishers Pty Ltd* [1970] VR 593 at 596; *Re Data Homes Pty Ltd* [1972] 2 NSWLR 22 at 26 and 28; *Re Fidow* [1989] 2 NZLR 431 at 444-445; *Re Avram Investments Pty Ltd* (1992) 8 ACSR 574 at 576.

67 For example, see the remarks of the Supreme Court of New South Wales in *Re Denistone Real Estate Pty Ltd* [1970] 3 NSWR 327 at 330 and the High Court of New Zealand in *Re Fidow* [1989] 2 NZLR 431 at 445 (the latter case relating to the insolvency of an individual).

68 Insolvency Proceedings (Monetary Limits) Order 1986 (SI 1986 No 1996).

69 S 360(1)(a).

70 S 360(1)(b).

71 See Cork Report at para 1765.

will be job losses and repercussions for the community in which the company's business is located. The job losses will mean that the former employees will not have money to spend in the community's shops and it may be incumbent on them to move to another area so as to secure another job. This may affect the community's schools and may lead to the need for fewer teachers and teachers' aides. The collapse of a business will mean that it, itself, will not be buying goods and services from community businesses. In addition, some community traders may be owed money by the company and that may lead to their inability to pay their own creditors, causing a ripple effect throughout the community, and perhaps beyond. As the Cork Report said:

> "We believe that a concern for the livelihood and well-being of those dependent upon an enterprise, which may well be the lifeblood of a whole town or even a region, is a legitimate factor to which a modern law of insolvency must have regard. The chain reaction consequent upon any given failure can potentially be so disastrous to creditors, employees and the community that it must not be overlooked."[72]

All of this means that it is often in the public interest that a company which is insolvent is rescued so that it can go on trading and enriching the community as well as benefiting individuals who own shares in it and who are employed by it.

Besides ensuring that the public in general is not prejudiced by insolvencies, English law has determined that it is in the public interest that bankrupts should not be too harshly treated, and that they should get a 'fresh start' following their bankruptcy.[73] In other words the law should not deal too harshly with bankrupts unless they have acted dishonestly or improperly. Consequently, unless an order is made under section 310 of the Act that a portion of a bankrupt's income is to be paid to his or her trustee in bankruptcy, the bankrupt is entitled to retain income and build up his or her financial position again, despite the fact that a large number of creditors may be owed substantial sums.[74] But even if an order is made, which is not a frequent occurrence,[75] section 310(2) provides that the order is not to reduce

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72 Para 204. Also, see the comments of Veach in relation to corporate rescues: "On Considering the Public Interest in Bankruptcy: Looking to the Railroads for Answers" (1997) 72 *Indiana LJ* 1211 at 1225. There have been examples of this in recent days. For instance there is Harland and Wolff in Northern Ireland and the Rover factory at Longbridge in the West Midlands of England.

73 This is to be contrasted with South Africa and many civil law jurisdictions where the 'fresh start' principle does not apply.

74 The situation in Australia should be contrasted with this. Formerly the Australian position was the same as that which exists in the United Kingdom, but now, ever since the enactment of the Bankruptcy Amendment Act 1991 (Cth), bankrupts who earn in excess of a certain amount (after allowing for the payment of income tax and the number of dependents which the bankrupt has), must pay a portion to their trustees for the benefit of creditors (see Subdivision C of Division 4B of the Bankruptcy Act 1966 (Cth)).

75 In the period from April 1998 to March 1999 there were 2,297 orders made: DTI Statistices Directorate. An example of a recent case where a payments order was made is *Kilivert* v *Flackett* [1998] BPIR 721.

the income of the bankrupt below what are the reasonable domestic needs of the bankrupt.[76]

Also, as indicated above, while restrictions are placed on a bankrupt as far as obtaining credit and carrying on business are concerned, and being prevented from holding certain positions of trust and confidence (where a record of integrity and competence is required), such restrictions terminate when the bankrupt is discharged from bankruptcy, and this is, in most cases, three years after the commencement of the bankruptcy.[77] Soon the position of bankrupts may be ameliorated quite substantially as far as discharge is concerned because the Insolvency Service in a recently published consultation document, "Bankruptcy: A Fresh Start,"[78] has advocated that honest bankrupts (seen by the Insolvency Service as representing the majority of bankrupts) should be discharged within six months. Three years is a long period of time for bankrupts to be subject to the restrictions imposed by the Act. In many ways this period can involve bankrupts merely "marking time." It might be argued that bankrupts are unable to really "get back on their feet" and plan for the future. It is suggested by the Insolvency Service that a longer period for bankruptcy is not necessary today, in order to protect the public.[79] However, while providing for a shorter period before discharge is obviously promoting the fresh start principle, it might be thought that such action could conflict somewhat with the public interest of ensuring that fraud and deception are not encouraged and that bankruptcy is taken seriously. Furthermore, a discharge period of six months may be too short a period for a failed businessperson to reflect on his or her fall into insolvency,[80] and the businessperson could repeat, without adequate reflection, some of the errors and failings in judgment that may have contributed to financial demise.

II. WHAT IS THE PUBLIC INTEREST?

While we have seen that the public interest is regarded as a factor in insolvency law, the question remains as to what is the definition of "the public interest." The expression is used frequently, but often bandied around without much thought for what it entails. It is, in the main, seen as something that is good and commendable to take into account. But what does "the public interest" actually mean? This is an issue which has been considered on many occasions by writers, principally by commentators in disciplines other than law, notably political science, and there are a

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76 Recently the United States has amended its Bankruptcy Code to prevent people from entering bankruptcy (under Chapter 7 of the Code), securing a discharge and then living a comfortable life on a substantial income. Such persons may now be required to enter Chapter 13 bankruptcy which involves, *inter alia*, entering into a repayment plan.

77 S 279(2)(b). Discharge was first introduced in 1706. See McCoid, "Discharge: The Most Important Development in Bankruptcy History" (1996) 70 *Am Bank LR* 163.

78 This document is available on the Insolvency Service website at www.insolvency.gov.uk

79 Para 7.2. of "Bankruptcy: A Fresh Start."

80 Milman, "Enterprise, Risk and Bankruptcy Law" [1999] *Insolvency Lawyer* 281.

significant number of theories of the public interest.[81] In fact it is rare to see a legal article, let alone a judgment or statute,[82] which makes reference to the public interest, actually considering its meaning. This may be because many scholars are oblivious to the fact that the expression is a concept that is problematic.[83] However, to fail to address the issue would be to duck what is an important (and difficult) question, and it is probably both improper and difficult to further a discussion of public interest in insolvency without attempting to ascertain what is meant by the expression.

The Difficulties with Meaning

Ascertaining the meaning of "the public interest" is a difficult task,[84] and may be the reason for the fact that most articles which have considered the issue of the public interest in various areas of the law have failed to examine its meaning, and also to arrive at some definition.[85] In terms of insolvency law it is a great shame that the Cork Report, which provided such an extensive and, in many ways, meritorious examination of insolvency law, did not spell out what it meant by "the public interest."

There is little doubt that the meaning of the expression is nebulous. While most would agree that deterring violent crime is in the public interest, it not so easy in many other areas of life to pin down what is in the public interest. Many have asserted that 'the public interest' has no meaning. Others have said that the term is "vacuous, deceptive and generally useless."[86] One commentator found consideration of the concept "mired in a semantic chaos," and went on to note that no scholarly consensus existed in relation to

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81 McHarg in "Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights" (1999) 62 *MLR* 671 at 674-678 summarises the theories.

82 See *ibid* at 674.

83 This is the view of McHarg *ibid*.

84 For example see the comments in Anthony, "Facts, Fiction and Functions: Some Questions About Public Interest Intervention and Public Law in the United Kingdom" (1997) 48 *NILQ* 307; Justice, *A Matter of Public Interest: Reforming the law and practice on interventions in public interest cases,* London, 1996 at 4. McHarg in "Reconciling Human Rights and the Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights" (1999) 62 *MLR* 671, summarises the theories of the public interest (at 674-678).

85 For example, see Polden, "Private Estate Planning and the Public Interest" (1986) 49 *MLR* 195; Fawcett, "Trial in England or Abroad: The Underlying Policy Considerations" (1989) 9 *OJLS* 205; Grenville, 'Hiding the Public Interest' (1989) 5(5) IL & P 139; Bainham, "The Privatisation of the Public Interest in Children" (1990) 53 *MLR* 206; Chiappineli, "Reinventing A Security: Arguments for a Public Interest Definition" (1992) 49 *Washington and Lee Law Review* 957; Feldman, "Public Interest Litigation and Constitutional Theory in Comparative Perspective" (1992) 55 *MLR* 44; Cane, 'Standing up for the Public' [1995] *Public Law* 276; Miers, "Regulation and the Public Interest : Commercial Gambling and the Public Interest" (1996) 59 *MLR* 489; Fleming, "Media Ownership: In the Public Interest?" (1997) 60 *MLR* 378; Middleton, "Australian Securities Commission Investigations of Fiduciaries and Proceedings Against Constructive Trustees" (1998) 16 *Company & Securities Law Journal* 16.

86 Held, *The Public Interest and Individual Interests* (1970) at 1.

the meaning of the term.[87] Veach has said, most adroitly, that "the only certainty in the definition of the public interest is the absence of unanimity."[88] For example, there seems to be divergence of opinion over whether public interest is a normative concept. Flathman argues that it is a normative concept and, therefore, normative considerations apply,[89] while Barry disagreed on the basis that as the public interest is the common interest, that is, the results of satisfying all of the members of a community, the concept need not have any normative content.[90]

The view of Downs in 1962 that:

> "The term public interest is constantly used by politicians, lobbyists, political theorists, and voters, but any detailed inquiry about its exact meaning plunges the inquirer into a welter of platitudes, generalities and philosophical arguments. It soon becomes apparent that no general agreement exists about whether the term has any meaning at all, or, if it has, what the meaning is, which specific actions are in the public interest and which are not, and how to distinguish between them"[91]

appears to remain accurate. In general there seems to be confusion over the expression.[92]

This appears to be the case in relation to the use of the expression in the courts. When used by the courts there is no articulation of the meaning of the term; the courts appear to assume that everyone knows what it means or signifies. Does it encompass the interests of all those who constitute the public? Does it refer only to those who are potentially affected by a decision or action? Does it refer to some overarching principle which seeks to look over the community like some guardian angel?

The sceptic may say that it is impossible to ascertain what is meant by "the public interest," therefore any reference to the public interest should be regarded with suspicion at best and eschewed at worst. For instance, some things that may on the surface appear to be in the public interest, are not always able to be so classified. Take for example legislation which deters crime. That appears to be in the public interest, yet if the legislation is draconian or impinges on civil liberties it is arguable that the legislation is not in fact in the public interest. Others may say that the expression can be and has been used by politicians and civil servants as "a handy smoke-screen to cover their decisions, which are actually designed to conciliate the most

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87 Sorauf, "The Conceptual Muddle" in C Friedrich (ed), *The Public Interest: Nomos V*, (1962) at 186 and reprinted in R Flathman (ed), *Concepts in Social and Political Philosophy* (1973) at 491.

88 "On Considering the Public Interest in Bankruptcy: Looking to the Railroads for Answers" (1997) 72 *Indiana LJ* 1211 at 1213.

89 *The Public Interest: An Essay Concerning the Normative Discourse of Politics* (1966) at 1-5.

90 "The Use and Abuse of "The Public Interest" " in C Friedrich (ed), *The Public Interest: Nomos V*, (1962) at 196.

91 Downs, "The Public Interest: Its Meaning in a Democracy" 29 *Social Research* (Spring 1962) at 1-2.

92 See Held, *The Public Interest and Individual Interests* (1970) at 5.

effectively deployed interest."[93] Proponents of this view may suggest that the expression is used by courts as a basis of their decisions where no other basis can be found.

Given the problems with defining the meaning of public interest are there, therefore, grounds for ignoring the concept altogether? Some commentators in the political science field have argued that the concept cannot have a serious meaning and should be disregarded.[94] However many other commentators have denied that the concept can be dispensed with.[95] Colm has said that "it is difficult to imagine that politicians, statesmen, judges, and officials concerned with the formulation of government policies could do without this concept."[96] Certainly, as indicated in the previous section of this article, the legislature and the courts have seen fit to employ the concept of the public interest, and taking into account the frequency of the use of the concept it is likely that its use will prevail.

Defining the Public Interest

As we have seen there is little consistency in defining the public interest. It can mean people in general who reside in a nation or it can be as specific as a small portion of the public, such as those investing in companies.[97]

If the concept is indispensable, which appears to be the predominant view of the political scientists and probably that of the legislators and jurists, given its wide usage, there is a need to arrive at a definition to meet the need in our society for the law to be consistent. However, it is highly debatable as to whether it is possible to provide one definition for all circumstances. It is submitted that the concept cannot be normative. A number of assertions have been made as to the definition of the expression. It seems that where the expression has been defined the tendency has been to define it in such idealistic terms[98] that it is of little practical use. Hume said that a government acts in the public interest when it does that which advantages a preponderance of the individuals who submit to the government.[99] Another view, advocated by persons such as Rousseau, was that the public interest

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93 Barry, "The Public Interest" in W Connolly (ed), *Bias and Pluralism* (1969) at 160. See the comments of Edwards in *The Attorney-General, Politics and the Public Interest* (1984) at 337.

94 Dahl and Lindblom, *Politics, Economics and Welfare* (1963) at 501; Schubert, *The Public Interest* (1960) at 224.

95 For example, Bell and Kristol, "What Is the Public Interest?" *The Public Interest* 1 (Spring 1965), 5; Colm, "In Defense of the Public Interest" 27(3) *Social Research* 306-307 (Fall 1965); Held, *The Public Interest and Individual Interests* (1970) at 9-11.

96 Colm, "In Defense of the Public Interest" 27(3) *Social Research* 306-307 (Fall 1965).

97 As to the investing public, see Middleton, "Australian Securities Commission Investigations of Fiduciaries and Proceedings Against Constructive Trustees" (1998) 16 *Company & Securities Law Journal* 16 at 19.

98 See Groenendijk, "Litigation, Politics and Publicity : Public Interest Law or How to Share the Burden of Change" (1985) 14 *Anglo Am LR* 337.

99 "Of the First Principles of Government" in H Aiken (ed), *Hume's Moral and Political Philosophy*, (1947) at 307 and referred to in Held, *The Public Interest and Individual Interests*, (1970) at 57.

consists of those individual interests which all members of a community have in common.[100] Griffiths, putting the view of a sociologist, said that the public interest is something which conforms to the moral standings of a community at a particular time.[101] The fact of the matter is that so often an understanding of what the public interest is, is not sought after, for the public interest serves little more than rationalisation for the interests of a particular group in the community.[102]

All of the aforementioned definitions arguably have little relevance to the construction of a definition for the purposes of insolvency law. There are two definitions which may have more relevance. Shaviro states that the public interest involves maximising social wealth and distributing it equitably.[103] Second, in its report on reforming the law on interventions in public interest cases, a committee of JUSTICE, the British Section of the International Commission of Jurists, used "'public interest" to refer to those cases which "raise a serious issue which affects or may affect the public generally or a section of it."[104]

It is submitted that the conclusion of Held is adroit when she states that the concept of the public interest is in a state of confusion, that a lengthy investigation into its usage is unlikely to be beneficial, and yet the concept is indispensable.[105]

The Public Interest in Insolvency Law

The fact of the matter is that where the public interest is concerned it is extremely difficult, if not impossible to come, to any consensus. The public interest is almost an existential thing in that we know what it is when we see it, but it is nigh impossible to construct some normative theory of the public interest. As stated above, it is not possible to have a single definition that applies across the board, and it is clear from the writings of the political scientists that it is impossible to find unanimity.

The sceptic may say that this proves that one cannot engage in making decisions in the public interest, and to talk about doing something in the public interest is merely an excuse to enable a person to justify the decision which he or she wants to make.

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100 Held, *The Public Interest and Individual Interests* at 99. This is similar to the view expressed by Barry who sees the public interest as equivalent to the interests which persons have in common *qua* members of the public ("Public and Community Interests" in R Flathman (ed), *Concepts in Social and Political Philosophy* (1973) at 503); *cf* Raz, "Rights and Individual Well-Being" (1992) 5(2) *Ratio Juris* 127 at 135.

101 "The Ethical Foundations of the Public Interest" in C Friedrich (ed), *The Public Interest : Nomos V* at 15.

102 Sorauf, "The Conceptual Muddle" in R Flathman (ed), *Concepts in Social and Political Philosophy* (1973) at 493.

103 "Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s" (1990) 139 *U Pa LR* 1 at 45.

104 JUSTICE, *A Matter of Public Interest: Reforming the law and practice on interventions in public interest cases*, (1996) at 4-5.

105 Held, *The Public Interest and Individual Interests* at 18.

It would seem that we can take little from other disciplines or other areas of the law in arriving at some definition of the public interest for the purposes of insolvency law. Consistent with other areas of the law there appears to have been little attempt at defining the concept for insolvency law. In her defence of the need to take into account community interests in insolvency (as well as the interests of creditors and equity holders), Professor Gross[106] does not define what she means by "community interests," an expression which can be equated with public interest. Veach states that scholars have defined public interest by default "as the interests of those, beside the debtor, who have not invested capital in whatever business is in bankruptcy."[107] Veach wonders whether this definition is a shorthand way of spelling out "those who do not have a credit interest in the business."[108] Quite rightly, it is respectfully submitted, Veach states that this definition is too narrow in that secured and unsecured creditors are both members of the public and their financial well-being is critical to the health of the nation's economy.[109] Veach also adds that the interests of debtors need to be taken into account as part of the public interest.[110] The learned commentator ends up defining the public interest for the purposes of her discussion as including the interests of anyone who has a stake, financial or otherwise, in the business in bankruptcy.[111] With respect, there are three principal concerns which I have with this definition. First, probably because of its brevity, the definition is vague as far as indicating who has an interest in the bankruptcy. Creditors, debtors and employees of both creditors and debtors are clearly covered, but who else is? One would expect that the communities in which businesses are situated must be included as stakeholders, but to what extent? The shopkeepers could be said to be stakeholders as the demise of a substantial business would probably result in less being spent in their stores by their customers and might well lead to a reduction in the number of their customers, because employees of the business might have to relocate elsewhere in order to secure other employment. Are councils, schools and government offices within the definition? Whether such institutions should be considered will be discussed later. Also, it is not clear whether the definition seeks to encompass the wider interests of society, such as the need to investigate insolvencies to ensure that there has not been any improper activity which has precipitated the insolvency. My second concern is whether the interests of creditors and debtors should be included in the public interest. Veach argues that those who make up both categories are members of the public. That is not questioned. What is questioned is the fact that in the eyes of the Companies Court, when it considers a corporate insolvency case, creditors are seen as private individuals[112] and also Veach seems to be seeing "public interest" as a preponderance of the interests of

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106 "Taking Community Interests into Account in Bankruptcy: An Essay" (1994) 72 *Wash U L Q* 1031.
107 "On Considering the Public Interest in Bankruptcy: Looking to the Railroads for Answers" (1997) 72 *Indiana LJ* 1211 at 1214.
108 *Ibid*.
109 *Ibid*.
110 *Ibid*.
111 *Ibid*.
112 *Cloverbay Ltd* v *Bank of Credit & Commerce International SA* [1991] 1 All ER 894 at 905.

members of the public. “Public interest” should not be seen in such a light in the context of insolvency law. I shall return to this point shortly.

The third concern which I have in relation to the definition is that it tends to be too narrow in that it is restricted to business insolvencies. What about the insolvency of consumers? While the insolvency of individual persons will not have the same impact as the insolvency of a business, we should not depreciate the importance of the public interest in relation to the former types of cases. Unfortunately, for too long, the numbers, and the increase in those numbers, of consumer bankruptcies that we have in the United Kingdom have not attracted sufficient concern.

Rather than formulating a comprehensive definition of the public interest which may well be unworkable, it is sufficient to say, for the purposes of insolvency law, that the public interest involves taking into account interests which society has regard for and which are wider than the interests of those parties directly involved in any given insolvency situation, that is, the debtor and the creditors.[113] In other words, the public interest does not include or consist of the interests of creditors and the debtor in a given case as it is very much "other than" such interests; it is objective and cannot be seen as an accumulation of private interests.[114] An example is the need for commercial morality. This is a societal norm as opposed to being in anyone’s individual interest.

“Public interest” has been contrasted with the interests of creditors in a number of cases[115] and the interests of the debtor,[116] and is something which transcends individual interests, but of course the public interest may well overlap with the interests of the creditors and/or the debtor in any given case. Two examples may suffice. First, it is submitted that it is in the public interest that creditors be able to recover as much as possible from an insolvent as the provision of credit is critical for the development of commerce – if creditors are not assisted then they are unlikely to extend credit, or extend it so readily. Second, in *Re Bank of Credit and Commerce International SA*,[117] where Brown Wilkinson V-C (as he then was) said that in relation to a company that was insolvent and whose affairs had been conducted in a scandalously fraudulent manner, it was in the public interest that the company’s trading should be halted.[118] It was also clearly in the interests of creditors that trading should stop.

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[113] Particularly on this issue I am indebted to the comments of the anonymous referee.

[114] This was the view of the Court of Appeal in *Cloverbay Ltd* v *Bank of Credit and Commerce International SA* [1991] BCLC 135 (CA), in relation to the interests of creditors of a company in liquidation.

[115] *In re Hester* (1889) 22 QBD 632 at 639; *Re Flatau* [1893] 2 QB 219 at 223 and 224; *Re Izod* [1898] 1 QB 241 at 255; *Re Telescriptor Syndicate Ltd* [1903] 2 Ch 174 at 180-181; *Re Denistone Real Estate Pty Ltd* [1970] 3 NSWR 327 at 330; *Re Mascot Home Furnishers Pty Ltd* [1970] VR 593 at 596; *Re Data Homes Pty Ltd* [1972] 2 NSWLR 22 at 26; *Re Avram Investments Pty Ltd* (1992) 8 ACSR 574.

[116] *In re Hester* (1889) 22 QBD 632 at 635 per Cave J.

[117] [1992] BCC 83.

[118] *Ibid* at 89.

What must be recognised, and is discussed later in this article, is that when ascertaining what is the public interest, there is likely, in some cases, to be a conflict of interests. An example of conflict can be seen in the following example. X is allowed to strike as it is accepted that people should be entitled to withdraw their labour if they so choose. The services provided by X, which are regarded as essential, are provided to large sections of the public. Is it in the public interest to prefer the right to withdraw labour over and above the right of people to have essential services, or *vice versa*? There may even be instances of a conflict between different public interest factors. In the case of *Attorney-General* v *Guardian Newspapers (No2)*[119] (known generally as the "Spycatcher" case) Bingham LJ acknowledged that there were two competing public interests to be considered in coming to a decision, namely that there should be "a leak-proof, reliable and efficient security service"[120] on the one hand, and freedom of speech, on the other hand.[121]

III. SHOULD THE PUBLIC INTEREST BE A FACTOR?

We have seen that the public interest is a factor in insolvency law. It remains now to ask whether the public interest should be taken into account in insolvency? This is a policy issue and is a matter which has been the subject of no little debate in the United States, but has attracted no significant consideration in the United Kingdom, or for that matter in most of the rest of the common law world.

Professor Jackson, who comes out of the economics and law school of thought in the United States, would say that the social effects of an insolvency are not issues that relate to insolvency law. The ultimate question in insolvency for Jackson and members of the economic account view is: what do creditors get? This view, in line with economic analysis approach to the law, has at its centre the satisfaction of individual preferences and the "realization of allocative efficiency, by which resources are allocated according to their value as expressed by individuals' willingness to pay."[122] Jackson takes the view that bankruptcy is concerned with the systematic satisfying of the claims of creditors.[123] He sees bankruptcy as involving a

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119 [1990] 1 AC 109.

120 *Ibid* at 213.

121 *Ibid*.

122 Daly, "Amicus Curiae and the Public Interest: A Search for a Standard" (1990) 12 *Law & Society* 389 at 401

123 For example, see "The Fresh Start Policy in Bankruptcy Law" (1985) 98 *Harvard L.R.* 1393 at 1395. Jackson sees bankruptcy as a way of "ameliorating a common pool problem created by a system of individual creditor remedies" (*The Logic and Limits of Bankruptcy Law* (1986) at 16-17). The approach taken by Jackson, and those academics who agree with his general approach, for instance Professors Baird (with Jackson in "Corporate Reorganisations and the Treatment of Diverse Ownership Interests : A Comment on Adequate Protection of Secured Creditors in Bankruptcy" (1984) 51 *University of Chicago Law Review* 97) and Scott (with Jackson in "On the Nature of Bankruptcy : An Essay on Bankruptcy Sharing and the Creditors' Bargain" (1989) 75 *Virginia Law Review* 155), has been trenchantly criticised by others, notably by Professors Warren (see, for example, "Bankruptcy Policy" (1987) 54 *University of Chicago Law Review* 775 and "Bankruptcy Policymaking in an Imperfect World" (1993) 92 *Michigan Law*

creditors' bargain, that is, putting it simply and succinctly, bankruptcy should mirror the agreement one would expect creditors to agree among themselves were they able to negotiate such an agreement from an *ex ante* position.[124]

Although not taking the same approach as Jackson, an American bankruptcy judge, Judge Schermer, argues, extra-judicially, against the taking into account of public interest factors on the basis that a bankruptcy court is not able to identify, apply and consider them.[125] His Honour's reluctance in taking the public interest into account is not, like Jackson's, one of policy but of practicality. But should we be so concerned about practicality? If it is right, from a policy perspective, to have regard for the public interest, should we not find ways of providing for this in practice?

Is insolvency law all about satisfying creditors or are there wider concerns which must be taken into account? It is glib to say, as those outside the discipline may and some insolvency law commentators such as Professor Jackson do, that insolvency law only deals with economics and is only concerned with the plight of persons who have not been paid what they are owed. It is almost equally glib to say that insolvency is only concerned with ensuring that creditors get as much of their debts paid as possible and the predicament of the debtor. While the insolvency of a company or a person manifests itself in economic terms, primarily the failure of the debtor being unable to pay creditors, it has been recognised that the law of insolvency has significant implications not only for economic issues but also for social issues.[126] For example workers may lose jobs, traders lose customers, communities may lose employers, which may create community disruption, and creditors lose money. As Millett J (as he then was) said in *Re Barlow Clowes Gilt Managers Limited* in relation to the liquidation of companies:[127]

> "The liquidation of an insolvent company can affect many thousands, even tens of thousands, of innocent people. . . it can affect people's savings. In the case of a major trading company it can affect its customers and suppliers and the livelihood of many thousands or persons employed by other

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Review 346), Gross (see, for example, "Taking Community Interests into Account in Bankruptcy: An Essay" (1994) 72 *Wash ULQ* 1031 and her monograph, *Failure and Forgiveness* (Yale University Press, New Haven, 1997)), Korobkin (see, for example, "Rehabilitating Values: A Jurisprudence of Bankruptcy" (1991) 91 *Columbia Law Review* 717; "Contractarianism and the Normative Foundations of Bankruptcy Law" (1993) 71 *Texas Law Review* 541) and Carlson (see, for example, "Bankruptcy Theory and the Creditors' Bargain" (1992) 61 *University of Cincinnati Law Review* 453) in the United States, and in Britain by Vanessa Finch (see, "The Measures of Insolvency Law" (1997) 17 *OJLS* 227.)

124 See, Jackson, "Avoiding Powers in Bankruptcy" (1984) 36 *Stanford Law Review* 725 and the author's later monograph, *The Logic and Limits of Bankruptcy Law* (1986).

125 "Response to Professor Gross : Taking the Interests of the Community into Account in Bankruptcy – A Modern Tale of Belling the Cat" (1994) 72 *Wash ULQ* 1049 at 1050.

126 Gross, *Failure and Forgiveness : Rebalancing the Bankruptcy System* (1997) at 23.

127 [1991] BCLC 750.

> companies whose viability is threatened by the collapse of the company in liquidation."[128]

Also, the economic failure of a business or a person is not usually just about incurring debts and being unable to pay them. Professor Gross, an American commentator, has said most poignantly:

> "Money is the stand-in for larger failures – failures of particular industries, or failures in the health care system, the commercial and personal lending system, and the educational system. Bankruptcy [meaning corporate and personal insolvency in British terms] addresses the failures within families, such as death or divorce, and the failures caused by nature, such as hurricanes, floods and tornadoes."[129]

The Cork Committee made the point in its report that insolvency has:

> "Never been treated in English law as an exclusively private matter between the debtor and his creditors; the community itself has always been recognised as having an important interest in them."[130]

While this is undoubtedly correct, there has been little or no express acceptance of this fact and little or no elaboration of what interest the public has in relation to insolvency law. The Cork Committee did list some matters which, because of concern for the public interest, had to be considered in insolvency law. These are:

> The cause of the insolvent's failure;
>
> Is any fault or blame to be attributed to the insolvent's conduct?
>
> Punishment for an insolvent whose conduct so merits;
>
> Insolvents should be restricted in their dealings so as to protect society;
>
> Restrictions on insolvents should not inhibit their re-establishment of legitimate trading activities;
>
> Consideration of whether the insolvency is to be attributed to some person other than the insolvent.[131]

As stated earlier in this article, insolvency law is often regarded as involving individual or private interests and therefore the public interest has no relevance. However, it is inaccurate to make a hard and fast delineation between private and public interests. Any case involving the law, while it may appear only to involve private rights, will have a public dimension because the law has an inherently social and public character.[132] This does not mean that the private interests of individuals are to be ignored, because the public interest is concerned that private individual interests are valued.

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128 *Ibid* at 760.
129 Gross, *Failure and Forgiveness: Rebalancing the Bankruptcy System*, at 23.
130 Para 1734.
131 Para 1735.
132 Daly, "Amicus Curiae and the Public Interest: A Search for a Standard" (1990) 12 *Law & Society* 389 at 400.

For example, in English insolvency law when a person is the subject of an examination on the application of an office-holder, such as a liquidator, his or her right to privacy is one of the aspects of the public interest which courts take into account when considering whether the examination should proceed in the first place, and later, if it is decided that the examination should proceed, whether a particular question asked of the examinee should be allowed.[133]

It may be argued that the courts are not able to discern what is the public interest and therefore they should not seek to determine whether something is or is not in the public interest. Yet the courts have been doing this for many years and, relatively speaking, there has been little dissension. Veach has pointed out that the United States' bankruptcy courts have been taking the public interest into account for over 60 years while considering the reorganisation of railroad companies which were insolvent.[134] As discussed earlier, English courts consider the public interest in relation to a number of aspects of insolvency law. This is manifested clearly in the string of cases which have emanated from the catastrophic collapse of the Bank of Credit and Commerce International.[135]

However, it may be argued that it depends on what area of insolvency law is being considered as to whether the public interest has a role to play. For instance, it is argued by some commentators that where the creditors are agreeable to a particular course of action, such as the entering into an arrangement to keep the insolvent from bankruptcy or liquidation, then the public interest should not override the creditors' decision.[136] However, the contrary view is that it may be in the public interest that the insolvent, in some cases, should be made bankrupt or put into liquidation so that the affairs of the insolvent can be carefully investigated.[137] The former view ignores, it is submitted, that debts are incurred in a society and any issue of insolvency not only involves the creditors and the debtor, it involves society and affects people in society other than the creditors and the debtor.[138] Credit is extended and debts are incurred as part of commercial life which relies on assumptions, expectations and beliefs, such as that the parties are acting in good faith and debts will be repaid.[139] If the legal system and the procedures which it prescribes do not underpin the assumptions, expectations and beliefs then the foundations of commercial life are undermined and, probably, will be damaged.[140] There is a public interest in ensuring that commercial life is

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133 See *Re Poulson; Ex parte Granada Television Ltd* v *Maudling* [1976] 2 All ER 1020 (CA).

134 "On Considering the Public Interest in Bankruptcy: Looking to the Railroads for Answers" (1997) 72 *Indiana LJ* 1211 at 1215-1224.

135 For example, *Pharaon v BCCI (in liq)* [1998] 4 All E.R. 455.

136 Heath, "Proposals under Part XV Insolvency Act: Is the public interest relevant?" [1991] *NZLJ* 52.

137 *Re Duncan Holdings Ltd* (unrep, High Court (NZ), Hardie Boys J, 1 February 1982, M306/81) and referred to in *Re Fidow* [1989] 2 NZLR 431 at 442; Cork Report at para 193.

138 Cork Report at paras 192 and 197(I).

139 Fletcher, "Juggling with the Norms: the Conflict Between Collective and Individual Rights under Insolvency Law" in R Cranston, *Making Commercial Law* (1997) at 393.

140 *Ibid*.

not damaged. Society ensures that this is done by providing for the investigation of the affairs of insolvents in order to ascertain whether there has been any improper activity which has, *inter alia*, led to the insolvency. The public interest must be satisfied that there has been no improper activity, if society is to continue to foster trade.

In sum, any case could potentially affect wider public interest concerns, and these should not be forgotten. Insolvency law is not an island; it affects other areas of the law and other areas of life. There has been, over the years, a substantial number of cases which hold unequivocally that public interest factors outweigh the interests of the debtor and the creditors, especially when it comes to ensuring commercial morality.[141]

IV. TO WHAT EXTENT SHOULD THE PUBLIC INTEREST BE TAKEN INTO ACCOUNT?

If it is accepted that the public interest should intrude into insolvency law matters, it is incumbent to ask to what extent is it entitled to do so. What is its role in relation to insolvency issues?

It is submitted that what courts must do in insolvency cases is to have regard initially for the interests of the debtor and the creditors, and then to consider whether any public interest factor is relevant, and if it is, to explore whether it is of more importance than the interests of the debtor and the creditors. For example, say a reconstruction of an insolvent company is sought through the medium of a company voluntary arrangement, where the company agrees to give a lump sum for distribution to creditors and then to pay £X per month for division amongst the creditors. Suppose that a creditor or someone else opposes it, applying to the court for it to exercise its power under section 6 of the Act to prevent the arrangement proceeding. If the court finds that the arrangement would benefit the debtor and the creditors, the court should then see if the arrangement is consistent with promoting, and how it affects, public interest factors.[142] The approach has been criticised in an extra-judicial way, in the realm of insolvency, by Judge Schermer who asserts that courts cannot take into account the public interest. His Honour states that "there are an infinite number of community interests at stake in each bankruptcy [used in the American sense to cover insolvency cases] and their boundaries are limitless."[143] There may, admittedly, be a plethora of interests in any insolvency, and it may be difficult to weigh up those interests, but that does not mean that the courts cannot do it. Engaging in a balancing exercise, whereby they weigh one interest against another, is not something which the courts are unaccustomed to doing. There are several areas where they have had to do such a thing. For example, in *Lion Laboratories Limited v*

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[141] For example, *Re Hester* (1889) 22 QBD 632; *In re Flatau* [1893] 1 QB 219; *Re Denistone Real Estate Pty Ltd* [1970] 3 NSWR 327; *Re Data Homes Pty Ltd* [1972] 2 NSWLR 22; *Re Universal Liquors Pty Ltd* (1991) 9 ACLC 918.

[142] This approach was adopted by Aldous J in *Secretary of State for the Home Department* v *Central Broadcasting* [1993] EMLR 253,when considering whether or not a television programme should be broadcast.

[143] "Response to Professor Gross: Taking the Interests of the Community into Account in Bankruptcy – A Modern Tale of Belling the Cat" (1994) 72 *Wash ULQ* 1049 at 1050.

Evans,[144] a case dealing with confidentiality and copyright, the conflicting public interests which existed were the preservation of the right of organisations to retain confidential information and the public interest in being aware of confidential information in certain circumstances. The Court of Appeal carried out a balancing exercise between the competing interests in arriving at its decision. The Court, in deciding whether or not to allow the publication of a story, said that it had to weigh up the public interest for and against publication.[145] As Finch has adroitly stated:

> "[J]udges inevitably and in all sectors of the law advert to public and community interests. . . and. . . if community interests impinge on judicial decisions they should be dealt with openly and fully."[146]

While this approach may be seen as a very pragmatic way of resolving a problem, we cannot escape from the fact that ultimately a choice has to be made according to the relative strengths of both or all interests involved in the issue at hand.

The result of implementing this approach is that in some cases a public interest factor will override or outweigh the interests of parties who are directly concerned with the insolvency. Is this appropriate? Some believe that there are situations, such as approving arrangements entered into by a debtor and his or her creditors pursuant to an established and statutory process, that should not entail consideration of public interest factors.[147] It may be felt that there are situations in insolvency where all that matters are the debtor's and the creditors' interests. In *Re Egnia Pty Limited*[148] when hearing an application for leave to call a meeting of creditors which would consider a scheme of arrangement in relation to an insolvent company, Anderson J of the Western Australian Supreme Court, while acknowledging the need to consider the public interest, appeared to place significant weight on the interests of creditors compared with the public interest. In contrast, there have been English cases in which the courts have refused to rescind a receiving order (for bankruptcy) made against a debtor where he or she has come to an arrangement with creditors because of a concern for the public.[149] The courts have recognised that they need to consider the interests of creditors but suggest that in some circumstances this might not accord with the public interest, which might be better served by the bankruptcy of a debtor, thereby allowing for an investigation and a curtailment of the debtor's activities. In like fashion there have been a significant number of

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144 [1985] QB 526 (CA).

145 *Ibid* at 538. The same kind of exercise, in a similar type of situation, was conducted by the courts in *British Steel Corporation* v *Granada Television Ltd* [1981] AC 1096; *Secretary of State for the Home Department* v *Central Broadcasting* [1993] EMLR 253; *Beggars Banquet Records Ltd* v *Carlton Television* [1993] EMLR 349.

146 "The Measures of Insolvency Law" (1997) 17 *OJLS* 227 at 238.

147 Heath in "Proposals Under Part XV Insolvency Act: Is the public interest relevant?" [1994] *NZLJ* 52 at 54. This view is not recent in origin. In the Australian case of *Re City of Melbourne Bank Ltd* (1897) 3 ALR 220 at 228 Madden CJ espoused a similar view.

148 (1991) 5 ACSR 781; 9 ACLC 1561.

149 *In re Hester* (1889) 12 QBD 632; *In re Flatau* [1893] 2 QB 219.

cases in New Zealand where courts have held that arrangements agreed to by a debtor and his or her creditors, enabling bankruptcy to be avoided, should not be approved because the conduct of the debtors was such that they should suffer some disqualifications that accompany bankruptcy.[150] In the corporate context there are several English and Australian cases where courts have refused either to stay winding-up proceedings or to sanction an arrangement made by a debtor company and its creditors because to do so would infringe the public interest, namely letting a company continue in the market place accumulating debt and being a grave risk to people with whom the company deals.[151] The fact that so many statutes around the world provide that a court must approve of an arrangement between an insolvent debtor and his or her creditors indicates that legislatures want courts to exercise discretion and to consider all pertinent factors, including those relating to the public interest.

Whether or not a public interest factor in any given situation should override or outweigh the interests of the debtor and the creditors might well depend on the strength of that factor. In some cases in Australia[152] the courts have clearly taken a tolerant view and approved schemes of arrangements when there was some public interest factor which appertained to the circumstances of the insolvency, but was not so strong as to warrant an overriding of the interests of the creditors. So it can be said that "recognizing the import of community interests does not mean *a fortiori*, that community interests trump other interests."[153] In the New Zealand case of *Re Fidow*,[154] Fisher J of the High Court said that the court must have regard to the public interest "in a way that transcends the interest of the immediate parties to the proceedings."[155] With respect, it is submitted that that is putting the case for the public interest too highly. In many cases the public interest will transcend the interests of individuals if those interests are inconsistent with the public interest, but there will be cases where a public interest factor(s) will not be so strong as to do so. Again each case must be considered on its merits. In direct contrast to the view of Fisher J, one commentator has said that when an application is made to a court for it to approve an arrangement between the creditors and the debtor and sanctioned by these parties, the court should not refuse to do so on the basis that the public interest

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150 For example, see *Re Sturdee* [1985] 2 NZLR 627; *Re Trott and Joy*, unreported, High Court (NZ), Auckland, B1471/88, 14 April 1989, and referred to in *Re Fidow* [1989] 2 NZLR 431, at 442.

151 For example, see *In re Telescriptor Syndicate Ltd* [1903] 2 Ch. 180; *Re Mascot Home Furnishers Pty Ltd* [1970] VLR 593; *Re Universal Liquors Pty Ltd* (1991) 9 ACLC 918. Similar comments were made by Street J in *Re Denistone Real Estate Pty Ltd* [1970] 3 NSWR 327 at 329-331 and the New South Wales' Court of Appeal in *Re Data Homes Pty Ltd* [1972] 2 NSWLR 22 at 26-27 in relation to an application for a stay of a winding up which accompanied an application for the court to order the calling of meetings of creditors to consider an arrangement.

152 Such as *Re Egnia Pty Ltd* (1991) 5 ACSR 781; 9 ACLC 1561; *Deputy Commissioner of Taxation v Best & Less (Wollongong) Pty Ltd* (1992) 7 ASCR 245; *Re Snodyne International Ltd* (1994) 15 ACSR 494.

153 Gross, "Taking Community Interests into Account in Bankruptcy: An Essay" (1994) 72 *Wash ULQ* 1031 at 1033.

154 [1989] 2 NZLR 431.

155 *Ibid* at 444.

outweighs the creditors' and debtor's interests.[156] This view is also somewhat extreme. There are undoubtedly going to be cases where the public interest should override the interests of the parties directly concerned with an insolvency. The whole question of which interest is to prevail cannot be reduced to some mathematical formula. We may not like the fact that relying on the discretion of the court in deciding which interest will be regarded as pre-eminent leads to some degree of uncertainty, but there does not seem to be any other just and reasonable way of resolving the issue.

Rather than saying glibly that an interest should override or outweigh any other interest, it is submitted that it is necessary for a court to consider the relevant interests and carry out a balancing exercise. In doing this in some cases interest A may override interest B, yet in other cases interest B may override interest A.[157] The carrying out of a balancing exercise will often lead to a result which suggests that one interest has been outweighed by another interest. But in some cases it may be possible for a court to effect such a balance that it makes an order whereby aspects of each kind of interest involved may be safeguarded.

V. CONCLUSION

While some may argue that the public interest should not have any, or a limited, effect on insolvency law, it has been demonstrated here that Parliament, law reform commissions and the courts do take the public interest into account when considering significant insolvency law issues. Notwithstanding the fact that insolvency rarely involves consideration of the grand and almost universal public interest factors such as freedom of speech and freedom of assembly, some important public interest issues will need to be considered in resolving insolvency questions which arise.

It has been submitted that it is difficult to define the concept of the public interest, and there is no general consensus as to what the public interest involves. For the purposes of insolvency law it is preferable, rather than formulating a comprehensive definition which may well be unworkable, to say that the public interest involves taking into account interests which society has regard for and which are wider than the interests of those parties directly involved in any given insolvency situation, that is, the debtor and the creditors.

It is contended that it is critical that the public interest is regarded as a factor to be taken into account in insolvency law issues. Notwithstanding the arguments of those espousing a law and economics approach to insolvency, who see insolvency as essentially a creditor/debtor issue alone, it must be acknowledged that besides impacting on the direct creditor of an insolvent, insolvency has a much broader effect. Insolvency is not divorced from society and many things that can occur in relation to an insolvency might well have wide-ranging repercussions and affect aspects of the public interest. Directly or indirectly insolvencies can cause communities to be

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[156] Heath, "Proposals Under Part XV Insolvency Act: Is the public interest relevant?" [1994] *NZLJ* 52

[157] For example see the respective results in *Re Barlow Clowes Gilt Managers Ltd* [1991] 4 All ER 385 and *Re Clowes* [1992] 3 All ER 440.

prejudiced, and they can damage society's fundamental values and structures, such as commercial morality in trade. In this article I have argued for what Professor Flessner calls, in relation to corporate insolvency, an "enterprise and forum philosophy:"[158] that is any enterprise is the focus of many more interests besides those of the persons who own it and are owed money by it. The same can often be said in relation to any insolvency issue. Unless the public interest is considered it is likely that rudimentary elements of our society will be damaged and the law will be regarded with contempt and as something which is aloof from everyday life.

The article has stated that courts must, in insolvency cases, initially consider the interests of the debtor and the creditors, and then go on to examine whether any public interest factor is relevant, and if it is, to explore whether it is more important than the interests of the debtor and the creditors. It is impossible to glibly lay down rules that one interest overrides another interest. It will be necessary for the courts to engage in a careful balancing exercise, an activity which they are used to doing, in order to determine which interest, if any, should take precedence given both the facts and what ramifications may result from their decision. Unless this is done then insolvency will be seen as something which is limited to money matters and having no relevance to life in general, a conclusion which is patently not correct and not to be fostered.

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[158] Flessner,"Philosophies of Business Bankruptcy Law: An International Overview" in J Ziegel, *Current Developments in International and Comparative Corporate Insolvency Law* (1994) at 24.