(viii) repayment of capital to preference members; and
(ix) repayment of capital to ordinary members.

Any 'surplus assets' then go to whoever is entitled under the company's constitution; normally, this will be the ordinary members.

A Department of Trade and Industry review, now rather dated, suggested that average recovery rates in formal insolvency procedures were: 77% for the bank; 27% for preferential creditors; and virtually nil for unsecured creditors.[71]

(p. 821) ***A contract under which creditors agree to vary the statutory rules governing the distribution of a company's assets in a liquidation is contrary to public policy and void.***

[16.19] British Eagle International Air Lines Ltd v Cie Nationale Air France [1975] 1 WLR 758 (House of Lords)

Many airlines set up a 'clearing house' scheme under which their mutual debits and credits were not set off one against another but were pooled with a third party, IATA. Under the agreement, participants could not claim against each other but only against IATA for any net balance due to the particular airline under the scheme. British Eagle went into liquidation at a time when it was a net debtor to the scheme in respect of its aggregated claims but, as between itself and Air France, it was a net creditor. The liquidator successfully challenged the legality of the clearing house arrangement.

> LORD CROSS OF CHELSEA: [What] the respondents are saying here is that the parties to the 'clearing house' arrangements by agreeing that simple contract debts are to be satisfied in a particular way have succeeded in 'contracting out' of the provisions contained in [CA 1948 s 302] [IA 1986, s 107] for the payment of unsecured debts 'pari passu'. In such a context it is to my mind irrelevant that the parties to the 'clearing house' arrangements had good business reasons for entering into them and did not direct their minds to the question how the arrangements might be affected by the insolvency of one or more of the parties. Such a 'contracting out' must, to my mind, be contrary to public policy. The question is, in essence, whether what was called in argument the 'mini liquidation' flowing from the clearing house arrangements is to yield to or to prevail over the general liquidation. I cannot doubt that on principle the rules of the general liquidation should prevail …
>
> LORDS DIPLOCK and EDMUND-DAVIES concurred.
>
> LORDS MORRIS OF BORTH-Y-GEST and SIMON OF GLAISDALE dissented.

➢ Notes

1. The Supreme Court reaffirmed the strictness of this rule, *obiter*, in *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd and Lehman Brothers Special Financing Inc* **[16.18]**.

2. There may be strong public policy arguments for allowing creditors to vary the statutory priorities by arrangement among themselves. One such situation is when the existing creditors of a company in difficulties are willing to let a new creditor advance money in an attempt to save the company from liquidation, on the understanding that if the attempt is unsuccessful the claim of the 'rescuer' should not rank equally with their own, but have priority. Following *British Eagle*, there was for a time considerable uncertainty whether such an arrangement—at least if effected by contract between the parties—would be lawful. There was pressure for legislation to be passed which would expressly permit subordination agreements. However, in two decisions of Vinelott J, *Re British & Commonwealth Holdings plc (No 3)* [1992] BCLC 322 and *Re Maxwell Communications Corpn plc (No 2)* [1994] 1 BCLC 1 (where the agreements took the forms respectively of a trust and a contract), it was held that no violation of the *pari passu* principle is involved, where all that the subordinating

creditor agrees to is that its rights in an insolvency shall be *less than* what would obtain under the statutory scheme.

3. Special legislative provision has been made by Pt VII of CA 1989 (not moved to CA 2006) and the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (SI 1999/2979) to allow 'netting' arrangements of the type rejected in the *British Eagle* case to be used by investment exchanges, clearing houses and money market institutions and in banking and securities settlement arrangements.

(p. 822) 4. It is also sometimes possible to avoid the application of the *British Eagle* ruling by establishing a *trust*, so that the sum which would ordinarily be payable as a debt to a particular creditor is held by the company as a trustee on his behalf: see *Re Kayford Ltd* [1975] 1 WLR 279; *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] Ch 207. The courts have, on occasion, been prepared to *infer* the existence of a trust in such circumstances, for example *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567, HL, and more recently, *Mundy v Brown* [2011] EWHC 377 (Ch).

5. The statutory rules as to set off,[72] like the *pari passu* distribution rule, are also regarded as mandatory and cannot be excluded by agreement between the parties (*National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd* [1972] AC 785, HL), or under any discretionary power of the court (*Re Bank of Credit and Commerce International SA (No 10)* [1997] Ch 213).

6. In *Barclays Bank plc v British & Commonwealth Holdings plc* [1996] 1 BCLC 1 (on appeal, but not on this issue, [1996] 1 BCLC 1 at 26) Harman J held as unlawful a tripartite arrangement between a company, one of its members and a third party which breached, by an indirect route, the principle that a company may not return capital to its members except by a procedure authorised by statute (see 'Consequences of an unauthorised distribution', p 544). It was also a consequence of the arrangement that a sum of money which would have been repayable to the shareholder *qua* shareholder in a liquidation was replaced by an equivalent amount payable to the third party as a debt. In effect, this altered the statutory order of priorities in a liquidation (since creditors rank before shareholders) and was a further ground justifying the finding of illegality. By contrast, the court sanctioned three schemes of arrangement which, despite excluding the mezzanine lenders, were held not unlawful because those lenders had no economic interest in the company in any event: *Re Bluebrook Ltd* [2009] EWHC 214 (Ch).

7. In the United States, the courts have developed an equitable jurisdiction under which they have a discretion to subordinate the claims of some creditors to others—for example, to postpone the claims of creditors who are members of the same corporate group. It would require legislation to bring about any reform along these lines in this country.

Investigating and reporting the affairs of the company

In any of the insolvency or rescue procedures just noted, an insolvency practitioner must take charge of the affairs of the company and put himself in a position to take action quickly. IA 1986, therefore, makes special provision for acquisition of information by the office-holder. In addition, an insolvency office-holder is required to investigate potential wrongdoing in relation to the company's affairs, in particular for the purpose of action under CDDA 1986.

Investigations

The office-holder has available the following rights against specified persons involved in the management of the company:

(i) The right to require a 'statement of affairs' verified by a statement of truth from persons connected with the company (IA 1986 ss 47, 99 and 131 and IR 1986 r 1.5).
(p. 823) **(ii)** Other than under CVAs, the right to require reasonable cooperation from persons connected with the company (IA 1986 ss 234(1) and 235). See*Bishopsgate Investment Management Ltd v Maxwell* [1993] Ch 1 at 57, for 'reasonableness'. Failure to comply without reasonable excuse is an offence (s 235).
(iii) Other than under CVAs, the right to require production of the company's books, papers and records (IA

1986 ss 234 and 246).
(iv) Other than under CVAs, the right to apply to court for an order requiring a 'private examination' (ie appearance for oral examination but with limited attendance); submission of an affidavit; or production of books, papers or other documents (IA 1986 ss 234, 236 and 237). An examinee is not entitled to privilege against self-incrimination (*Bishopsgate Investment Management Ltd v Maxwell* [1993] Ch 1), so the statutory protection that followed from *Saunders v United Kingdom* (1996) 23 EHRR 313 applies (see 'Inspections and the privilege against self-incrimination', p 737). On the discretion to order a private examination, see *British and Commonwealth Holdings plc v Spicer and Oppenheim* [1993] AC 426; on the conduct of private examinations, see *Re Richbell Strategic Holdings Ltd (No 2)* [2000] 2 BCLC 794; and on the successful application for the production of documents pursuant to s 236 by a foreign company under the UNCITRAL Model Law on Cross-Border Insolvency, see *Re Chesterfield United Inc* [2012] EWHC 244 (Ch).
(v) In compulsory (court-ordered) liquidations, the right of the official receiver (himself, or pursuant to a request by specified majorities of the company's creditors or contributories) to apply for a public examination of parties concerned in the promotion, formation or management of the company (IA 1986 s 133). Again, there is no privilege against self-incrimination (*Bishopsgate Investment Management Ltd v Maxwell* [1993] Ch 1). If the company is in voluntary liquidation, it seems a public examination may still be ordered (IA 1986 ss 122(1) and 133: see *Bishopsgate Investment Management Ltd v Maxwell* [1993] Ch 1 at 24, 46).

Reporting

When a company is subject to any of the insolvency or liquidation procedures other than a CVA, the relevant office-holder must submit a report to the Secretary of State on the conduct of any director whom the office-holder believes should be disqualified under CDDA 1986 s 6 (CDDA 1986 s 7(3)), and must, in any event, within six months of appointment, submit a return listing every director and stating whether a report has been made and, if not, why not (Insolvent Companies (Reports on Conduct of Directors) Rules 1996 (SI 1996/1909) r 4).

In compulsory liquidations, the official receiver has a duty to investigate the affairs of the company, and may make a report to the court (IA 1986 s 132(1)).

In any type of liquidation, the liquidator must report any criminal offences apparently committed in relation to the company by any past or present officers or members (IA 1986 s 118). This may lead to a public investigation of the company (see 'Public investigation of companies', pp 730ff).

Dissolution of the company

The corporate entity created under the Companies Act ceases to exist by the formal act of *dissolution*, effected by removing the name of the company from the register at Companies **(p. 824)** House. Dissolution ends the company's separate personality, terminates any legal relationships[73] and dissolves the relationship between the company and its members.

Dissolution may take place in a variety of ways (most requiring some form of publication in the *Gazette* at an appropriate stage in the process), including:

(i) On completion of liquidation, automatically, three months after the registrar has been notified of the completion of the winding-up procedure (IA 1986 ss 94, 106, 172(8), 201 and 205). The processes vary slightly for voluntary and compulsory liquidations.
(ii) By the registrar, where the registrar has reasonable cause to believe that no liquidator is acting or the affairs of the company have been fully wound up, and yet the required returns (see (i)) have not been made for a period of six months (CA 2006 s 1001).
(iii) On application by the official receiver, automatically, three months after requesting early dissolution (unless some interested person intervenes in the meantime), if it appears that the realisable assets of the company are insufficient to cover the expenses of liquidation and that the affairs of the company do not require further investigation (IA 1986 s 202).
(iv) On completion of administration, three months after notification by the administrator that there is nothing to distribute to the creditors (IA 1986 Sch B1, para 84).

(v) By order of the court, in conjunction with compromises, arrangements and reconstructions (CA 2006 s 900).
(vi) On application by the company itself, three months after publication of the application in the *Gazette* (CA 2006 s 1003). This option for voluntary striking off is subject to a wide variety of restrictions and conditions (CA 2006 ss 1004–1010), but it does enable the expense of a formal liquidation to be avoided.
(vii) By the registrar, exercising an administrative power to strike off (CA 2006 s 1000). In practice, the largest number of companies are dissolved by the simple administrative procedure of 'striking off the register'. CA 2006 s 1000 empowers the registrar to do this, after advertisement, if his inquiries show or suggest that the company has ceased to carry on business. This is a useful sanction in the case of a company which has failed to file accounts or annual returns.

Restoration to the register

Restoration of dissolved companies to the register may be necessary if, for example, further assets are discovered, or someone wishes to bring a damages claim for which the former company was insured.

There are two procedures available for restoring companies to the register:

(i) an administrative procedure, available when companies have been incorrectly struck off as defunct under CA 2006 s 1000 or 1001 (see points (ii) and (vii) in the previous section), requiring application to the registrar by the company's former directors or former members within six years of the date of dissolution (CA 2006 s 1024); and
(ii) a judicial procedure, requiring application to court (CA 2006 s 1029), in all other cases. The application may be made by a wide class of people (s 1029(2)), and must generally be made within six years of the dissolution of the company, although there are (p. 825) various exceptions. For example, there is no time limit where the application is for the purpose of bringing proceedings against the company for damages for personal injury (s 1030(1)). The court has wide powers to make restoration, including any case in which the court thinks it just to do so (s 1031(1)(c)).

CA 2006 ss 1024–1034 provide detailed rules on the pre-conditions and consequences of the procedures, including special supplementary rules dealing with company names and with restoration of property that had vested in the Crown.

Further Reading

ANDERSON, H, 'Receivership Preferential Creditors' (1994) 15 *Company Lawyer* 195.
Find This Resource

DEAKIN, S and ARMOUR, JH, 'Norms in Private Insolvency: The "London Approach" to the Resolution of Financial Distress' (2001) 1 *Journal of Corporate Law Studies*21.
Find This Resource

DOYLE, LG, 'The Residual Status of Directors in Receivership' (1996) 17 *Company Lawyer* 131.
Find This Resource

FERRAN, E, 'The Duties of an Administrative Receiver to Unsecured Creditors' (1998) 9 *Company Lawyer* 58.
Find This Resource

FINCH, V, 'Corporate Rescue in a World of Debt' [2008] 8 JBL 756.
Find This Resource

FRISBY, S, 'Making a Silk Purse Out of a Pig's Ear—*Medforth v Blake*' (2000) 63 MLR 413.
Find This Resource

HANSMANN, H and KRAAKMAN, RH, 'The Essential Role of Organisational Law' (2000) 110 *Yale Law*

Journal 387.
Find This Resource

KASTRINOU, A, 'An Analysis of the Pre-Pack Technique and Recent Developments in the Area' (2008) 29 *Company Lawyer* 259.
Find This Resource

KEAY, A, 'The Duty of Directors to Take Account of Creditors' Interests; Has It Any Role to Play?' [2002] JBL 379.
Find This Resource

MOKAL, R, 'What Liquidation Does for Secured Creditors and What It Does for You?' (2008) 71 MLR 699.
Find This Resource

SCHILLIG, M, '"Deepening Insolvency"—Liability for Wrongful Trading in the United States?' (2009) 30 *Company Lawyer* 298.
Find This Resource

WALTERS, A, 'Corporate Restructuring under Schedule B1 of the Insolvency Act 1986' (2005) 26 *Company Lawyer* 97.
Find This Resource

WORTHINGTON, S, 'Good Faith, Flawed Assets and the Emasculation of the UK Anti-Deprivation Rule' (2012) 75 MLR 112.
Find This Resource

Notes:

[1] This procedure is only available to solvent companies.

[2] The official receiver attached to the court automatically becomes the company's liquidator in a court-ordered (compulsory) liquidation (see 'Liquidation or winding up', p 788), but the creditors, the Secretary of State or the official receiver himself can seek his replacement by an insolvency practitioner (IA 1986 ss 136 and 137).

[3] Unless the articles provide otherwise, as with charitable companies.

[4] There is statutory provision for restoration of companies to the register, if dissolution is later found to have been premature: see 'Restoration to the register', p 824.

[5] For an overview of the definition, role and policy justification for a moratorium in the insolvency context, see D Milman, 'Moratoria in UK Insolvency Law: Policy and Practical Implications?' (2012) 317 *Company Law Newsletter* 1.

[6] Theoretically a scheme of arrangement, under Companies Act 2006 (CA 2006) s 895 provides a further alternative, but the process is generally considered too complex, time-consuming and expensive: see 'Arrangements and reconstructions under CA 2006 ss 895–901', p 744.

[7] For a recent example, see *Re Gatnom Capital & Finance Ltd* [2010] EWHC 3353 (Ch). The Companies Court reversed a previous decision approving the CVA in question, on the ground that the creditors' meeting to approve the CVA was carried only because of the votes based on certain sham liabilities.

[8] See IA 1986 s 175 and Sch 6. See 'Distribution of assets subject to the receivership', pp 787ff.

[9] And it is not possible for a floating charge holder to specify that obtaining or preparing for a moratorium crystallises the floating charge: IA 1986 Sch A1, para 43.

[10] The 'old' provisions on administration contained in IA 1986 Pt II are retained and apply to special categories of companies (water companies, railway companies, air traffic services companies, public–private partnership

companies and building societies). They are not discussed here.

[11] For suggested reforms in the area of administration, see European High Yield Association (EHYA), *Submission on Insolvency Law Reform* (2009). And on evaluating the effectiveness of administration, see V Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, 2009), pp 392–410.

[12] *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982), para 495.

[13] Where there is a difference in view as to the choice of administrator, all things being equal, the Companies Court in *Healthcare Management Services Ltd v Caremark Properties Ltd* [2012] EWHC 1693 (Ch) regarded the choice of the largest creditor (in terms of the value of the debt owed to it by the company) as being the 'tie-breaker'.

[14] 'Pre-packs' or arrangements under which the sale of all or part of the company's business or assets is negotiated prior to the appointment of an administator and then effected shortly after the appointment, are increasingly common, but not considered here. See J Anderson, 'Minmar (2): Quite Possibly Mar!?' (2012) 309 *Company Law Newsletter* 1.

[15] For appointments by a floating charge holder, the floating charge must simply be enforceable.

[16] [1988] BCLC 177 at 178.

[17] Sch B1, paras 70 and 71, although the proceeds must be deployed according to the statutory priorities accorded to such chargees.

[18] Except on a public interest petition by the Secretary of Sate or the Financial Conduct Authority (Sch B1, para 42).

[19] [1971] Ch 949. See, however, 'Duties of administrative receivers', pp 782ff.

[20] [1982] 1 WLR 1410.

[21] [1995] 2 AC 145, HL.

[22] [2001] BCC 87C, CA.

[23] This part of the proceedings dealt with the cost consequences following a determination of the validity of the purported assignment: *Re Capitol Films Ltd (In Administration)* [2010] EWHC 2240 (Ch) (see Note 1 following *Criterion Properties plc v Stratford UK Properties LLC* **[3.13]**, p 120).

[24] If a company in administration is in rateable occupation of property, the non-domestic rates payable during the administration are 'necessary disbursements by the administrator in the course of the administration' and, under IR 1986 r 2.67, rank for payment before the administrator's remuneration (*Exeter City Council v Bairstow* [2007] EWHC 400 (Ch)). This case has been highly criticised: see, eg G Moss, 'Rescue Culture Speared by *Trident*?' (2007) 20 *Insolvency Intelligence* 72.

[25] For an analysis of the wider implications of this case, see I Fletcher and G Squires, '*Nortel* in the Court of Appeal—How Damaging is the Result to the Wider Interests of the Rescue Culture? Part 1?' (2012) 25 (5) *Insolvency International* 77; and Part 2 at (2012) 25(6) *Insolvency International* 93.

[26] On the future of receivership generally, V Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, 2009), pp 358–362.

[27] In *Tudor Grange Holdings Ltd v Citibank NA* [1992] Ch 53, Browne-Wilkinson V-C expressed doubts whether the *Newhart* case was rightly decided. He ruled that in any event the directors could not sue on a cause of action which it was competent for the receiver to bring, and later cases have made it plain that any action brought by the directors must be funded from sources other than the assets under the receiver's control.

[28] Or a person who would be such a receiver but for the fact that there is someone else already in office as the

receiver of part of the company's property under a prior-ranking charge.

[29] The practice was adopted to avoid the receiver being the agent of the chargee, and thus exposing the chargee to the onerous duties of a mortgagee in possession.

[30] The exceptions relate to large-scale marketable loans, projects with step-in rights, financial market charges, registered social landlords and some utility companies.

[31] But note *Re Croftbell Ltd* [1990] BCLC 844, where a receiver appointed under a charge over 'the whole of [the company's] undertaking and all its property and assets' was held to be an administrative receiver notwithstanding that, at the time of appointment, the company's only asset (other than a small debt owed by the parent company) would not come into the receiver's control because it was separately charged to a third party.

[32] Section 44 has since been amended: see the Note following.

[33] The quotation is from the judgment of Jenkins LJ in *Re B Johnson & Co (Builders) Ltd* [1955] Ch 634 at 662–663.

[34] [1971] Ch 949.

[35] See the earlier case of *Standard Chartered Bank Ltd v Walker* [1982] 1 WLR 1410, CA, discussing the duty as if it were a common law duty; contrast *Downsview* **[16.05]**.

[36] Contrast *Standard Chartered Bank Ltd v Walker* [1982] 1 WLR 1410, CA, and *Downsview* **[16.05]**; the conclusion in the former case must now be regarded as wrong, given the decision in *Downsview*.

[37] IA 1986 s 115 (and s 156 for compulsory liquidations), and IR 1986 r 4.218, defining both what counts as a liquidation expense (according to *Re Toshoku Finance UK plc, Kahn v IRC* [2002] UKHL 6, [2002] 1 WLR 671, HL), and setting out the order of priority in which they are to be paid.

[38] So reversing the controversial decision in *Re Leyland DAF Ltd, Buchler v Talbot* [2004] UKHL 9, [2004] 2 AC 298, which denied priority to liquidation expenses (and which had itself overruled the long-standing Court of Appeal authority allowing such priority: *Re Barleycorn Enterprises Ltd* [1970] Ch 465).

[39] And floating charge holders cannot claim against this fund, as 'unsecured creditors', for any shortfall in the recovery of their secured debts (for the simple reason that they are not 'unsecured creditors'): *Re Airbase (UK) Ltd* [2008] EWHC 124 (Ch), [2008] BCC 213. On the other hand, a secured creditor can waive or forego its security entirely, so that it becomes an unsecured creditor who is then entitled to participate in the 'prescribed part' as with other unsecured creditors: *Re JT Frith Ltd* [2012] EWHC 196 (Ch); *Kelly v Inflexion Fund 2 Ltd* [2010] EWHC 2850 (Ch). Secured creditors may be motivated to take this step where their security rights are subordinated, and there are insufficient funds to repay both debts.

[40] It is possible to vary this rule by means of a CVA: IA 1986 s 176A(4).

[41] Defined in IA 1986 s 386 and Sch 6, although the Crown preference was abolished by EA 2002 reforms.

[42] By statute in voluntary liquidations (IA 1986 s 90(2)), and by common law in compulsory liquidations (*Re Farrow's Bank Ltd* [1921] 2 Ch 164).

[43] The Official Receiver is a public officer who is appointed by the Secretary of State to act in the administration of bankruptcies and company liquidations. There are in fact many Official Receivers, each attached to a particular court. Since the coming into force of IA 1986, many more bankruptcies and liquidations have been placed in the hands of private insolvency practitioners than was the case under the former law, so enabling the Official Receiver to devote his attention to the larger or more complex insolvencies, and in particular those in which fraud or other wrongdoing is suspected.

[44] The 'just and equitable' ground is less common now that CA 2006 s 994 provides better and more tailored remedies.

[45] Although note the conditions in IA 1986 s 124(2) and (3). 'Contributory' refers to members and some former members: IA 1986 s 79.

[46] [1997] 1 BCLC 572, CA.

[47] [1997] 1 WLR 534.

[48] The test advocated in the Court of Appeal: [2011] EWCA Civ 227, CA, [47]–[49] (Lord Neuberger MR).

[49] On the 'just and equitable' ground generally, see BH McPherson, 'Winding Up on the Just and Equitable Ground?' (1964) 27 MLR 282, suggesting that the decided cases fall into three broad categories: (i) where it initially is, or later becomes, impossible to achieve the objects for which the company was formed; (ii) where it has become impossible for the company to carry on its business; and (iii) where there has been serious fraud, misconduct or oppression in regard to the affairs of the company.

[50] This narrow construction was later rejected: see the *Ebrahimi* case **[16.13]**.

[51] *Re German Date Coffee Co* (1882) 20 Ch D 169, CA.

[52] Although an important factor, it is probably not vital. In some jurisdictions overseas it has been held that the principle is not confined to domestic companies: see *Re Wondoflex Textiles Pty Ltd* [1951] VLR 458; *Re RJ Jowsey Mining Co Ltd* [1969] 2 OR 549.

[53] Later cases, particularly those in which there has been a breakdown of personal relationships between the parties (eg a husband and wife who have divorced), seem to adopt a less restrictive approach: see, eg, *Belman v Belman* (1995) 26 OR (3d) 56, and cf the remarks of Lord Wilberforce in the *Ebrahimi* case **[16.13]**, 'any circumstances of justice or equity which affect him in his relations … with the other shareholders'.

[54] [1951] VLR 458.

[55] And on the accountability of liquidators post the Human Rights Act, see V Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, 2009), p 569.

[56] But not all: eg, the value of a debt is reckoned for the purpose of proof at the date when the company goes into liquidation: *Re Lines Bros Ltd* [1983] Ch 1, [1982] 2 All ER 183, CA; and the periods of time prescribed by the Limitation Act 1980 cease to run against the company's creditors (other than the petitioning creditor himself) on the making of the winding-up order: *Re Cases of Taff's Well Ltd* [1992] Ch 179, [1992] BCLC 11.

[57] Also see *Leedon Ltd v Hurry* [2010] UKPC 27, where the Privy Council held that a clause in a shareholders' agreement granting pre-emption rights on the sale of the company's assets was not intended to be applied following liquidation of the company as the detailed and prescriptive requirements of the clause would prevent the liquidators from achieving a satisfactory realisation of the assets.

[58] In any case, the rights of creditors in levying execution etc, are restricted by ss 183–184 in every type of winding up.

[59] Note that the liquidator, too, may be sued under this provision, and may be sued by a creditor or any contributory.

[60] They are dealt with in IA 1986 Sch B1, para 75.

[61] Contrast CA 2006 s 1157.

[62] Also note the fraudulent trading provision in CA 2006 s 993, where *criminal* liability is imposed in circumstances not limited to winding up. This is the provision where penal remedies are appropriate.

[63] *Re Produce Marketing Consortium Ltd (Halls v David)* **[16.16]**.

[64] Unless leave of the court has been obtained permitting such activity: s 216(3).

[65] In *Re Patrick and Lyon Ltd* [1933] Ch 786 at 790.

[66] Note that leases and licences which terminate on the insolvency of the debtor have never been regarded as subject to avoidance under this principle: see *Belmont* **[16.18]**at paras [84]–[88].

[67] Lord Walker agreed and added further points by way of 'footnote', while Lords Phillips, Hope and Clarke and Lady Hale agreed without further comment. Lord Mance delivered a separate judgment (not extracted here) which dissented from the majority in a number of crucially significant matters although not in its conclusion.

[68] Although, despite its name, a 'fraud on the statute' does not require any type of fraud or intention; the wrong is committed if the arrangement achieves an outcome contrary to the statute, regardless of good faith, etc.

[69] This issue has attracted a wealth of writing: S Worthington, 'Good Faith, Flawed Assets and the Emasculation of the UK Anti-Deprivation Rule?' (2012) 75 MLR 112; R Goode, 'Flip Clauses: The End of the Affair?' (2012) 128 LQR 171; S Worthington, 'Insolvency Deprivation, Public Policy and Priority Flip Clauses' (2010) *International Corporate Rescue* 28; S Worthington, 'Making Sense of Arguments about the Anti-Deprivation Rule' (2011) *International Corporate Rescue* 26; T Cleary, 'Lehman Brothers and the Anti-Deprivation Principle: Current Uncertainties and Proposals for Reform?' (2011) 6 *Capital Markets Law Journal* 411; S Worthington, 'Testing the Anti-Deprivation Rule: A Response to "Lehman Brothers and the Anti-Deprivation Principle: Current Uncertainties and Proposals for Reform"?' (2011) 6 *Capital Markets Law Journal* 450.

[70] And this rule has also been amended to cover litigation expenses under IA 1986 ss 213, 214, 238, 239, 242, 243 and 423, all of which are claims to recover assets or seek contributions to the company's assets, but where the *claims* are not 'assets of the company' (see Note 1 following *Produce Marketing* **[16.16]**, p 815), and so litigation expenses relating to them were not previously allowed: *Re MC Bacon Ltd* [1990] BCLC 607; *Re Floor Fourteen Ltd, Lewis v IRC* [2001] 2 BCLC 392, CA.

[71] Insolvency Service, *A Review of Company Rescue and Business Reconstruction Mechanisms: Report by the Review Group* (2000), para 57.

[72] All the various set-off rules have enormous practical importance: see, eg, *Fearns v Anglo-Dutch Paints & Chemical Co Ltd* [2010] EWHC 2366 (Ch) (legal set-off), *Geldof Constructivie NV v Simon Carves Ltd* [2010] EWCA Civ 667 (equitable set-off) and *Re Kaupthing Singer and Friedlander Ltd* [2010] EWCA Civ 518 (insolvency set-off), together with *Re Kaupthing Singer and Friedlander Ltd* [2011] UKSC 48 (set-off and the rule in *Cherry v Boultbee*).

[73] So, eg, the company's property passes as *bona vacantia* to the Crown: CA 2006 s 1012.

Index