# Corporate Insolvency in the United Kingdom: The Impact of the Enterprise Act 2002

by

John Armour*, Audrey Hsu** and Adrian Walters***

*With effect from September 15, 2003, the Enterprise Act made significant changes to the governance of corporate rescue procedures in the United Kingdom which involved a shift away from a "concentrated creditor" model of governance towards a "dispersed creditor" model of governance which vests greater control rights in unsecured creditors collectively. These changes were motivated by fairness and efficiency concerns, notably the concern that the UK's administrative receivership procedure was not conducive to rescue outcomes and operated to the detriment of unsecured creditors. This article discusses the Enterprise Act reforms in the context of wider theoretical debates about the desirability (or otherwise) of secured creditor control of corporate rescue procedures. It then presents in summary form the findings of an empirical study carried out by the authors that sought to evaluate the impact of the Act by comparing the gross realizations, costs and net returns to creditors in a sample of 284 corporate insolvencies commenced before and after the law changed. Whilst we find that gross realizations have increased under the streamlined administration procedure introduced by the Act when compared with the old receivership procedure, we also find that costs have increased. These findings imply that secured creditor control of the insolvency procedure (as in receivership) may be no worse for unsecured creditors than control by dispersed unsecured creditors (as in administration) at least as regards returns.*

* Lovells Professor of Law and Finance, Faculty of Law, University of Oxford.

** Associate Professor, Department of Accounting, National Taiwan University.

*** Geldards LLP Professor of Corporate and Insolvency Law, Nottingham Law School, Nottingham Trent University.

All web links referred to in footnotes were visited and remained live on January 31, 2008. We are grateful to the UK Insolvency Service for funding the empirical research reported in this paper. We also thank participants in the 2nd ECFR Symposium on Corporate Insolvency held in Paris at the Université Paris-Descartes on October 12, 2007 for helpful comments following a presentation of this paper. The usual disclaimers apply.

*Table of Contents*

ECFR 2008, 148–171



## *I. Introduction*

In the world of corporate insolvency law and practice, the headline news over the last twenty years or so, both domestically and internationally, has been the growth of the so-called "rescue culture". In Great Britain, the introduction of the administration and corporate voluntary arrangement procedures by the Insolvency Act 1986 ("IA 1986")[1] on the recommendation of the Cork Committee was founded on the core principle that "a good modern insolvency law" should "provide the means for the preservation of viable commercial enterprises capable of making a useful contribution to the economic life of the country".[2] The emphasis on formal corporate rescue procedures in the scheme of the 1986 Act has been reinforced by the courts which have sought overtly to promote "rescue-friendly" constructions of its provisions.[3]

1 For territorial extent see IA 1986, s 440. Broadly speaking, the provisions on corporate insolvency apply in Great Britain which comprises the two "law districts" of England and Wales and Scotland. Northern Ireland, which like England and Wales and Scotland, forms part of the United Kingdom, has its own separate legislation albeit in virtually identical terms. Hereafter, for convenience, we refer to the "United Kingdom" and "UK law" when speaking of IA 1986. Even though strictly speaking IA 1986 only applies in Great Britain, its provisions reflect the legal position insofar as relevant in the whole of the United Kingdom of Great Britain and Northern Ireland.

2 Report of the Review Committee, *Insolvency Law and Practice*, Cmnd 8558 (June 1982) ("Cork Report"), para 198 and chs 7–9.

3 See, *eg*, *Powdrill v Watson* [1995] 2 AC 394, 442A–444A, *per* Lord Browne-Wilkinson: "The rescue culture which seeks to preserve viable businesses was and is fundamental to much of the Act of 1986 … If the words used by Parliament have a meaning consonant with its presumed intention not to frustrate the rescue culture, and not to produce unworkable consequences, then in my judgment that construction should be adopted."

Changes in banking practices, notably the establishment of "intensive care units" designed to address the problems of financially distressed customers within the clearing banks,[4] the re-branding of insolvency practitioners as "business recovery professionals"[5] and the increasing profile of the "turnaround" profession[6] have all signalled a sea-change in attitudes on the ground. Meanwhile, international institutions such as the International Monetary Fund, the World Bank and the United Nations Commission on International Trade Law have all been actively promoting the socio-economic benefits of rescue-oriented insolvency legislation.[7]

The IA 1986 Act, which first introduced the administration procedure, can be seen as the first wave of rescue-oriented insolvency law reform in the United Kingdom.[8] The enactment of Part 10 of the Enterprise Act 2002, which substantially revised and enhanced the administration procedure, can be seen as the second wave. Put simply, the Enterprise Act reforms aimed further to improve the prospects for corporate rescue whilst, at the same time, making formal rescue procedures fairer as between secured and unsecured creditors and more cost-effective.[9] This article explores the impact of the Enterprise Act

See also *Bristol Airport plc v Powdrill* [1990] Ch 744, 758; *Re Huddersfield Fine Worsteds Ltd; Re Ferrotech Ltd* [2005] EWCA Civ 1072, [2005] 4 All ER 886. See generally D Milman, "The Courts and the Administration Regime: Supporting Legislative Policy" [2001] Insolvency Lawyer 208.

4 See J Armour and S Frisby, "Rethinking Receivership" (2001) 20 Oxford Journal of Legal Studies 23; J Franks and O Sussman, "Financial Distress and Bank Restructuring of Small to Medium-Size UK Companies" (2005) 9 Review of Finance 65.

5 The main professional association for insolvency practitioners, formerly called the Society of Insolvency Practitioners, was renamed as the Association for Business Recovery Professionals (R3) in 2000.

6 The Society of Turnaround Professionals was inaugurated in 2000. See generally, V Finch, "The Recasting of Insolvency Law" (2005) 68 Modern Law Review 713; V Finch, "Doctoring in the Shadows of Insolvency" [2005] Journal of Business Law 690.

7 See International Monetary Fund, *Orderly & Effective Insolvency Procedures* (1999) available at http://www.imf.org/external/pubs/ft/orderly; World Bank, *Principles and Guidelines for Effective Insolvency and Creditor Rights Systems* (2001) available at http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/LAWANDJUSTICE/GILD/0,,contentMDK:20774193~pagePK:64065425~piPK:162156~theSitePK:215006,00.html; UNCITRAL Legislative Guide on Insolvency Law (2004) available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html.

8 See B Carruthers and T Halliday, *Rescuing Business – The Making of Corporate Bankruptcy Law in England and the United States* (Oxford: Clarendon Press, 1998) comparing the drivers behind the 1978 reforms of the United States Bankruptcy Code (including the enactment of Chapter 11) and the 1986 reforms in the United Kingdom.

9 For background see *A Review of Company Rescue and Business Reconstruction Mechanisms* (Insolvency Service, 1999); *A Review of Company Rescue and Business Recon-*

2002 on the *governance* of corporate rescue procedures in the United Kingdom. It proceeds as follows. Part II locates the Enterprise Act reforms within the theoretical debate surrounding the desirability (or otherwise) of secured creditor control of formal insolvency procedures. Part III provides further background on corporate rescue law and practice in the United Kingdom, with particular reference to the legal changes introduced by the Enterprise Act, and explains briefly how the reforms involved a shift away from a "concentrated creditor" model of governance (in which control of the rescue procedure is vested in a single secured creditor) towards a "dispersed creditor" model of governance (in which greater control rights are conferred on the unsecured creditors collectively). Part IV then presents in summary form the findings of an empirical study that was carried out by the authors as part of a programme of research into the effects of the Enterprise Act. The study sought to evaluate the impact of the change in the law by comparing the gross realizations, costs and net returns to creditors in a sample of formal insolvencies made up of cases commenced before and after the 15th September 2003, the date on which the relevant provisions of the Enterprise Act came into force. These findings enable us to draw some tentative conclusions in Part V about the relative performance in economic terms of concentrated and dispersed models of creditor governance in UK corporate insolvency proceedings.

*struction Mechanisms: Report by the Review Group* (Insolvency Service, 2000) ("Review of Company Rescue") available at http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/con_doc_archive/consultation/condoc/condocreport.htm; *Productivity and Enterprise: Insolvency – A Second Chance* (Insolvency Service, Cm 5234, 2001); J Armour and R Mokal, "Reforming the Governance of Corporate Rescue: The Enterprise Act 2002" [2005] Lloyds Maritime and Commercial Law Quarterly 28; "V Finch, "Reinvigorating Corporate Rescue" [2003] Journal of Business Law 527; I Fletcher, "UK Corporate Rescue: Recent Developments – Changes to Administrative Receivership, Administration and Company Voluntary Arrangements" (2004) 5 European Business Organization Law Review 119; S Frisby, "In Search of a Rescue Regime: The Enterprise Act 2002" (2004) 67 Modern Law Review 247; R Goode, *Principles of Corporate Insolvency Law* (London: Sweet & Maxwell, 3rd edn, 2005), chs 9–10; A McKnight, "The Reform of Corporate Insolvency Law in Great Britain" (2002) 17 Journal of International Banking Law 324; R Parry, "England and Wales: Administration Orders" in K Gromek Broc and R Parry (eds.), *Corporate Rescue – An Overview of Recent Developments* (Kluwer, 2006).

## II. Theoretical background

There has been much debate in recent law and finance literature over the extent to which it is desirable to allocate strong control rights over financially distressed companies to secured creditors.[10] It is clear that all-encompassing secured credit *facilitates* control by the secured lender, especially when combined with revolving credit lines and extensive loan covenants.[11] Advocates of strong control rights for secured creditors point to the benefits that a single, concentrated lender holding all-encompassing security can bring to the governance of companies. In particular, they argue that the presence of a concentrated secured lender can act to control the company's management which reduces the monitoring costs of shareholders and other classes of creditor. Working alongside the legal duties imposed on directors by corporate law, this form of "concentrated creditor" governance may offer a means of ameliorating the well-known agency problems that arise between managers and outside investors. Moreover, once companies become financially distressed,[12] "concentrated creditor" governance may serve to correct any tendency for the directors to "bet the firm" by committing to high risk strategies in which remote future benefits (the pay offs to all stakeholders in the unlikely event that such strategies succeed) are pursued with assets that in economic, if not strictly legal, terms are "owned" by the creditors.[13]

10 Much of this debate has arisen because of changes in US Chapter 11 practice. It is now recognized that secured creditors can contract for powerful governance rights over a debtor in possession through the provision of post-petition DIP financing. See, for example, E Warren and J Westbrook, "Secured Party in Possession" (2003) 22 American Bankruptcy Institute Journal 12; DA Skeel, Jr, "The Past, Present and Future of Debtor-in-Possession Financing" (2004) 25 Cardozo Law Review 1905; LA Weiss and V Capkun, "Bankruptcy Resolution: Priority of Claims with the Secured Creditor in Control", working paper (2007), available at http://law.bepress.com/cgi/viewcontent.cgi?article=1929&context=alea.

11 R Scott, "A Relational Theory of Secured Financing" (1986) 96 Columbia Law Review 901; RJ Daniels and GG Triantis, "The Role of Debt in Interactive Corporate Governance" (1995) 83 California Law Review 1073; Armour and Frisby (n 4); Franks and Sussman (n 4); J Armour, "Should we Redistribute in Insolvency?" in J Getzler and J Payne (eds.), *Company Charges: Spectrum and Beyond* (Oxford: Oxford University Press, 2006), 189; D Baird and R Rasmussen, "Private Debt and the Missing Lever of Corporate Governance" (2006) 154 University of Pennsylvania Law Review 101.

12 For present purposes we treat the expression "financial distress" as being coterminous with "cash flow" insolvency, *ie* the inability of a company to pay its debts as they fall due.

13 MC Jensen and WH Meckling, "Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure" (1976) 3 Journal of Financial Economics 305, 333–343; see also sources cited above, n 11.

Once companies are financially distressed, insolvency law casts its shadow. In many legal systems and traditions, insolvency law imposes *collective* governance mechanisms on an insolvent company and its creditors. In keeping with the international initiatives referred to in Part I, insolvency laws tend to provide a menu of collective procedures offering (at minimum) a choice between a terminal liquidation procedure for the orderly winding up of the insolvent company's affairs and a rescue or reorganization procedure, the centrepiece of which is invariably a wide-reaching stay of individual creditor collection and enforcement efforts. This stay is designed to facilitate the implementation of any of a number of possible "rescue" strategies, ranging from financial and operational restructuring to an auction sale of the company's business on a going concern basis.[14] Depending on the procedure employed, collective insolvency procedures – and, in particular, collective rescue procedures – may greatly impede the control that secured creditors are capable of exercising. Indeed, there is an invariably a tension between secured credit as an institution of private law (which protects and vindicates property rights) and collective rescue procedures (which generally suspend enforcement of property rights).[15]

Some insolvency theorists have argued that it is undesirable for insolvency law mandatorily to impose particular collective procedures on insolvent companies, and that companies should rather be free to contract *ex ante* over how control rights will be allocated in the event of default.[16] The legal system in United Kingdom has been regarded as a partial approximation to this "contract bankruptcy" model because, until the Enterprise Act changed things, a secured creditor holding an all-encompassing general floating charge was free to contract for the right to appoint an administrative receiver to take control of the company's affairs, realize the charged assets and repay that creditor's debt from the proceeds of realization.[17]

14 On the distinction between corporate reorganization and business rescue as it is understood in the UK, see text to n 23 below.

15 In the UK, the tension is mediated by the provision in some circumstances of relief from the stay (see IA 1986, Sch B1, para 43; *Re Atlantic Computer Systems plc* [1990] BCC 859, 880–882), along with a requirement that any proposals accepted by creditors must not impede secured creditors' ability to realize their collateral without their consent (IA 1986, Sch B1, para 73).

16 R Rasmussen, "Debtor's Choice: A Menu Approach to Corporate Bankruptcy" (1992) 71 Texas Law Review 51; A Schwartz, "A Contract Theory Approach to Business Bankruptcy" (1998) 107 Yale Law Journal 1807.

17 Schwartz (n 16); J Westbrook, "The Control of Wealth in Bankruptcy" (2004) 82 Texas Law Review 795. The approximation is only partial because, although UK firms were able to contract *ex ante* over the process of resolution of financial distress, the set of contracts they could write was limited to one with a secured creditor. A full contract bankruptcy regime would not impose such constraints.

Other scholars have been strongly critical of the "contract bankruptcy" model.[18] Their main objection is the scope that it gives to concentrated lenders, such as banks, to pursue their own interests at the expense of other stakeholders, notably unsecured creditors. In particular, the critics are concerned that procedures controlled by secured creditors may tend to result in outcomes biased against the continuation of the insolvent company's business and towards piecemeal liquidation, thus consistently failing to capture going concern value. The prevailing international trend appears to be on the side of the critics – that is, a strong preference for collective formal rescue proceedings in which control rights are vested (principally) in unsecured creditors. This is reflected in global and regional initiatives in the context of transnational insolvency such as the UNCITRAL Model Law on Cross-Border Insolvency[19] and the EC Regulation on Insolvency Proceedings.[20]

The United Kingdom provides a natural venue for further exploration of these issues. Before the Enterprise Act, control of financially distressed companies under UK law lay firmly in the hands of secured creditors. In particular, a secured creditor holding a general floating charge covering the whole, or substantially the whole, of the debtor company's assets could freely contract for the right to appoint an administrative receiver (hereafter "a receiver") out of court, who had plenary powers to manage the debtor company and yet owed fiduciary duties almost exclusively to the secured creditor. The appointment of a receiver did not depend on any formal requirement of insolvency, but merely upon the breach by the company, of the terms of the loan agreement.[21] Moreover, while IA 1986 introduced administration, a court-based collective "rescue" procedure, as an alternative to administrative receivership (hereafter "receivership") and winding-up, a secured creditor having the power to appoint a receiver could veto the making of an administration order and appoint a receiver instead. The old law was therefore structurally biased in favour of concentrated lenders holding floating charge security –

18 See Westbrook (n 17); LM Lopucki, "Contract Bankruptcy: A Reply to Alan Schwartz" (1999) 109 Yale Law Journal 317.

19 Adopted May 30, 1997. See http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html. The Model Law provides for automatic recognition of "foreign proceedings" defined in Article 2 as "collective judicial or administrative proceeding[s] in a foreign State … in which … the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation".

20 Regulation 1346/2000 EC, [2000] OJ L160/1. See, in particular, Articles 1(1), 2(a) and Annex A.

21 See generally G Lightman and G Moss, *The Law of Receivers and Administrators of Companies* (London: Sweet and Maxwell, 4th edn, 2007); Goode (n 9), ch 9.

usually banks. By conferring powerful control and decision-making rights on secured creditors, the old law underscored the common perception of the United Kingdom as a "bank friendly" jurisdiction.[22] An administration order would only be granted in circumstances where there was no floating charge or where the holder of the floating charge had consented in advance. As such, strong property rights buttressed by an out-of-court debt enforcement mechanism (receivership) could always win out over the collective rescue procedure (administration) with its moratorium on the enforcement of all claims (whether secured or unsecured). As we will see, the Enterprise Act reconfigured corporate rescue law in United Kingdom by simultaneously curtailing the power of a secured creditor to appoint a receiver and elevating the administration regime to a position of structural priority within the overall legal scheme.

## *III. Background to the Enterprise Act*

### *1. Corporate rescue terminology and practice in the United Kingdom*

By "corporate rescue", we refer to an outcome by which the business of an insolvent company avoids closure and is able to continue trading as a going concern, after having been through a *formal* or *informal* rescue procedure. Such a rescue may take one of two generic forms: either the continuation of the *company* as an entity (*eg* through reorganization, financial restructuring, refinancing, debt composition or rescheduling) or a going concern sale of the company's *undertaking* which may then continue under new ownership and management liberated from the company's debts.[23] Terminological confusion can sometimes arise from the fact that a going concern sale may be termed a "liquidation" sale in other jurisdictions (notably the United States), whereby "liquidation" simply denotes the conversion of the company's assets into cash by means of a sale, whether on a going concern or a break-up basis.

By "formal" rescue procedures, we refer to insolvency procedures, enshrined in or recognized by statute, that facilitate rescue outcomes.[24] On the eve of

22 Westbrook (n 17).

23 See further R Harmer, "Comparison of Trends in National Law: The Pacific Rim" (1997) 23 Brooklyn Journal of International Law 139; Frisby (n 9). Where the business is sold, the company is reduced to nothing more than a shell and the sale proceeds will be distributed to its creditors. In the United Kingdom, such distributions are commonly effected by means of a winding-up or a corporate voluntary arrangement although it is now (post-Enterprise Act) technically possible for distributions to unsecured creditors to be made in administration.

24 We should be clear that the use of what we have termed a formal rescue procedure does

the Enterprise Act, the following types of formal corporate insolvency procedure were available in UK law: (i) administration; (ii) receivership; (iii) corporate voluntary arrangements; (iv) schemes of arrangement under the companies legislation; and (v) liquidation or "winding-up". Of these, *administration* is a formal rescue procedure (as defined), and is capable of rescuing the company's business with or without the corporate entity – that is, through a reorganization or a going concern sale. Strictly speaking, *receivership* is a mechanism for enforcing security by a single creditor. However, because that creditor must hold security over the whole, or substantially the whole, of the company's assets, this process is also capable of facilitating a rescue of the company's business. Subject to his overriding duty to his appointing creditor, the receiver may choose to realize the security by selling the assets as a going concern. In both receivership and administration, the company's incumbent management is displaced by an outside appointee who is required by law to be a licensed insolvency practitioner.[25] Receivers and administrators have wide powers to manage the assets under their control including a power to carry on the company's business and a power of sale.[26]

*Corporate voluntary arrangements* and *schemes of arrangement* are essentially voting mechanisms that allow a company's debts to be restructured in accordance with the wishes of a majority of the creditors. As they facilitate financial restructuring, they can also be characterized as rescue procedures. However, they do not generally provide for a stay on creditors' claims in the period leading up to the creditor vote.[27] If a stay is required, the company will need to go into administration as a first step with the consequence that corporate voluntary arrangements and schemes will only rarely operate as free standing procedures. Finally, *winding-up* is a process for the collective realization of unsecured creditors' claims, but involves no stay of secured creditors and consequently rarely results in the continuation of the company's business. It is not, therefore, a "rescue" procedure in the sense we are discussing.

By way of contrast, a financially distressed company is rescued *informally* where, following a restructuring occurring without invoking a formal rescue

not necessarily imply that a rescue of the business will result in each and every case. It is not uncommon, for example, for businesses to be closed in receivership and administration. By "rescue procedures", we mean simply that the *possibility* of rescue is available.

25 IA 1986, ss 388–390.

26 IA 1986, Sch 1.

27 An exception was introduced by the Insolvency Act 2000 which, in the case of small companies that satisfy defined eligibility criteria, made available a moratorium for a period of up to 28 days to facilitate the proposing of and voting on a company voluntary arrangement: IA 1986, s 1A and Sch A1.

procedure, it is able to continue its business. Typically this will involve "turning around" the company's business to restore it to profitable trading, and/or a consensual "workout" involving a restructuring of the company's capital structure with the agreement of its creditors.[28] The practice among the leading UK banks is to work towards informal rescues of their customers wherever possible.[29] There are two principal reasons for this. First, such rescues are a means by which banks can preserve and prolong existing customer relationships. Secondly, once it has been acknowledged publicly that a company is in financial difficulties – as will happen when its entry into a formal insolvency procedure is advertised to the world at large – the value of its business tends to diminish extremely quickly.[30] Thus, the earlier the bank can intervene, the greater prospects it has of limiting its exposure. It follows that major lenders have powerful incentives to pursue informal rescues and increasingly view formal rescue procedures as mechanisms of last resort for salvaging value over and above the break-up value of the company's assets that would be obtained on a winding-up. More often than not, the chosen method for salvaging value is a sale of all or part of the undertaking. This means that the main formal rescue procedures (receivership and administration) have tended to function at best as mechanisms for rescuing the distressed company's *business* rather than the *corporate entity*.[31] As the Enterprise Act reforms were mostly concentrated on receivership and administration, we will say nothing further about informal rescues[32] or any of the other formal procedures.

28 Informal rescues may also involve a combination of operational restructuring overseen by a "company doctor", now more commonly referred to as a "turnaround professional", and financial restructuring supported by the company's creditors. For further discussion see Franks and Sussman (n 4) and Finch, "Doctoring" (n 6).

29 Franks and Sussman (n 4). See also Armour and Frisby (n 4); J Armour and S Deakin, "Norms in Private Insolvency: The 'London Approach' to the Resolution of Financial Distress" (2001) 1 Journal of Corporate Law Studies 21.

30 See G Meeks and JGT Meeks, "Self-Fulfilling Prophecies of Failure: The Endogenous Balance Sheets of Distressed Companies", working paper, University of Cambridge (2006), available at www.ssrn.com.

31 See S Frisby, *Report on Insolvency Outcomes* (London: Insolvency Service, 2006), 57–61, available at http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/corpdocs/InsolvencyOutcomes.pdf (5 % of administrations and 0 % of receiverships result in rescue of company).

32 Of course, changes to the law relating to formal insolvency procedures may indirectly affect the terms on which interested parties bargain in the shadow of the law. See Finch, "Recasting" (n 6) at 714–715 suggesting that the Enterprise Act has encouraged creditors to manage insolvency risks *ex ante* through greater monitoring efforts rather than *ex post*. See also D Prentice, "Bargaining in the Shadow of the Enterprise Act 2002" (2004) 5 European Business Organization Law Review 153.

### 2. *The aims of the Enterprise Act as regards formal corporate rescue procedures*

The main aims of the Enterprise Act in relation to corporate rescue can be discerned from the White Paper, *Productivity and Enterprise: Insolvency – A Second Chance*, which preceded its enactment.[33] Although, following the recommendations of the Cork Committee,[34] corporate rescue had been very much on the agenda in the earlier reforms of the mid-1980s, there was a perception that the administration order and corporate voluntary arrangement procedures introduced by IA 1986 had not been particularly effective in promoting corporate rescues. The number of companies availing themselves of these procedures when compared to the number of companies going into winding-up was described in the White Paper as "disappointingly low".[35] The infrequent usage of administration and corporate voluntary arrangements was considered by some to imply that the existing law was deficient. Part of the explanation for relatively low usage was thought to lie with the secured creditor's veto over the appointment of an administrator, which came under increasing scrutiny in policy circles.[36] It also became received wisdom that receivership was inefficient, in the sense that it failed to maximize value for creditors. It was widely thought that receivership led to excessive piecemeal liquidations and inflated costs on the theory that secured creditors (and, by extension, the receivers that they appointed) lacked the correct incentives to encourage them to maximize recoveries by favouring "going concern" outcomes and minimize the costs of their interventions. There was a "widespread concern" that the spike in receiverships at the height of the economic recession in the early 1990s "may have represented precipitate behaviour on the part of lenders, causing companies to fail unnecessarily."[37] The perverse

33 Insolvency Service, Cm 5234 (2001) ("Second Chance"). See also Insolvency Service, *Evaluation Planning Paper – Corporate Provisions of the Enterprise Act 2002* at http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/legislation/evaluation/CorporateProvisions/EvaluationPlanningPaperCorporateProvisions.pdf

34 Cork Report (n 2).

35 Second Chance (n 33), para 2.1.

36 Review of Company Rescue (n 9) at paras 72–73. The same report also noted (at paras 70–71) that in increasing numbers of cases companies were being allowed to go into administration even though the bank could have chosen to appoint a receiver. See also A Katz and M Mumford, *Comparative Study of Administration and Administrative Receivership as Business Rescue Mechanisms* (London: ICAEW, 2003) available at http://www.lums.lancs.ac.uk/publications/viewpdf/000242/ as Lancaster University Management School Working Paper 2003/097.

37 Second Chance (n 33), para 2.1; Review of Company Rescue (n 9), para 46. The practice of bank-led turnarounds described in the text to and following n 29 (which is somewhat at odds with the notion that banks act precipitately) was acknowledged by policy

incentive was thought to be at its most powerful where the secured creditor was either fully secured or "over-secured": in other words, where the company's assets were worth at least as much as, or more than, the face value of the secured creditor's debt.[38] What incentive, the critics asked, did a receiver have to pursue a going concern strategy if the break-up value of the assets would be enough to repay the debt owing to the appointing creditor and cover the receiver's costs?[39] Worse still, receivers appointed by over-secured banks had incentives to inflate their costs needlessly, as the bank lacked any real incentive to monitor these where they were in effect being paid out of recoveries for unsecured creditors.[40] The overall implication was that secured creditor control tended to reduce or waste potential recoveries for unsecured creditors. Given this implication, it was argued that receivers were insufficiently accountable to the unsecured creditors.[41] Finally, it was thought that, from an international perspective, receivership as a *non-collective* insolvency procedure was not compatible with the emerging international law framework for the management of transnational insolvencies.[42]

In keeping with this critique, the Enterprise Act effected a *prima facie* transformation of the governance of corporate insolvencies, shifting power from secured to unsecured creditors with a view to encouraging greater usage of

makers in an earlier review of corporate rescue law. To the extent that it was a factor weighing in favour of leaving receivership untouched, it was ultimately outweighed by equity and efficiency concerns: Review of Company Rescue (n 9) at paras 47–76.

38 Second Chance (n 33), para 2.3.

39 Ibid. For academic criticism of receivership see P Aghion, O Hart and J Moore, "The Economics of Bankruptcy Reform" (1992) 8 Journal of Law Economics and Organisations 523; V Finch, *Corporate Insolvency Law: Principles and Policies* (Cambridge, Cambridge University Press, 2002) at 249–260; R Mokal, "Administration and Administrative Receivership: An Analysis" (2004) 57 Current Legal Problems 355.

40 Mokal (n 39).

41 As already noted, the receiver's duties are limited in scope. What is more, unsecured creditors have no decision rights in receivership even where firm value exceeds the value of the appointing creditor's debt. The receiver has a statutory obligation under IA 1986, s 48 to report to all creditors within three months of appointment on the conduct of the receivership and, unless the court otherwise directs, to convene a meeting of the unsecured creditors to consider the report. However, this provision is designed merely to facilitate provision of information.

42 Text to nn 19–20. The EC Regulation and UNCITRAL Model Law are instruments designed to facilitate co-ordination of transnational insolvencies by providing for the recognition in other countries of "main" insolvency proceedings commenced in the debtor's home country. Non-collective proceedings such as receivership do not qualify for recognition under these instruments. For further commentary on the EC Regulation see the contributions by M Menjucq and H Hirte in this issue.

the administration procedure.[43] This transformation was achieved by curtailing the secured creditor's right to appoint a receiver in all but a handful of exceptional cases[44] and establishing administration as the principal formal rescue procedure. Under a new dispensation, secured creditors may now control the appointment of the administrator.[45] However, the administrator is much more widely accountable than a receiver. He must seek to implement a hierarchy of objectives: in the first instance, to rescue the *company* as a going concern; failing that, to achieve a better return for the creditors as a whole than in liquidation; and failing that, to realize collateral for the benefit of secured and preferential creditors.[46] Thus, in contrast to a receiver, an administrator is statutorily obliged to try to achieve a value maximizing "rescue" – either of the *company* or the *business* – if he can. This duty is supplemented by two further express duties on the administrator: (i) a duty to perform his functions in the interests of the company's creditors as a whole[47] and (ii) a duty to perform his functions "as quickly and efficiently as is reasonably practicable".[48] In addition, his proposed course of action must be approved by a simple majority vote of the unsecured creditors.[49] The imposition of this wider legal accountability, coupled with new enforcement mechanisms,[50] was designed to address the perverse incentive problem associated with receivership by encouraging the insolvency practitioner to pursue a value-maximiz-

43 See further Armour and Mokal (n 9).

44 IA 1986, s 72A. There are a number of "carve-outs" from the prohibition on the appointment of a receiver relating to complex and specialist forms of financing such as capital market arrangements (involving sums of at least £ 50 million), public-private partnerships, utilities, urban regeneration and project finance: IA 1986, s 72B-H and Sch 2A.

45 A qualifying floating charge holder may make an out-of-court appointment of an administrator under IA 1986, Sch B1, para 14 and has some measure of control over the identity of the administrator in other circumstances under IA 1986, Sch B1, paras 26(1) and 36. In practice, therefore, the administrator will invariably be someone who is acceptable to a concentrated lender.

46 IA 1986, Sch B1, para 3(1).

47 IA 1986, Sch B1, para 3(2). In cases where the administrator is simply realizing property to make a distribution to secured or preferential creditors under para 3(1)(c) (which will usually be where the secured creditor is hopelessly under-secured and there is no prospect of a return to unsecured creditors), the duty to act in the interests of creditors as a whole is relaxed and substituted by a duty not to cause unnecessary harm to the interests of creditors as a whole: para 3(4)(b).

48 Ibid, para 4.

49 IA 1986, Sch B1, paras 3(2), 51–52. There is no need for a vote of the unsecured creditors if the administrator thinks that they will not receive anything after the secured creditors have been paid – that is, if they are "out of the money".

50 Ibid, paras 74–75.

ing strategy in the interests of all creditors wherever practicable. Thus, on paper, the Enterprise Act *weakened* the ability of secured creditors, in particular banks, to dictate the direction of the rescue strategy and correspondingly *strengthened* the governance rights of unsecured creditors with a view to improving their outcomes.

As well as conferring structural priority on administration within the legislative scheme, the Enterprise Act also "streamlined" the procedure that had been introduced by IA 1986 – in the sense of making it quicker and cheaper to operate – in the following ways.[51] First, powers were introduced for either a floating charge holder or the company and its directors to initiate administration proceedings without any need for an application to be made to the court.[52] This was designed, in part, to reduce the costs of administration, especially those involved in preparing for and attending the court hearing that was necessary to enter administration under the old law.[53] Secondly, a one-year time limit was also imposed on administration proceedings, so companies would not be permitted to languish in administration indefinitely.[54] Thirdly, exit routes from administration into other procedures such as winding-up were more clearly defined.[55] The cumulative intention behind the Enterprise Act reforms was therefore clear. The imposition of wider accountability on the insolvency practitioner was designed to increase the realizable value of the company's assets by addressing the problem of perverse incentives; the streamlining of administration was designed to make the procedure more flexible and easily accessible, and to reduce costs. The expectation of policymakers was that this twin approach would promote corporate rescue and, by increasing *gross realizations* and reducing the *costs* of formal rescue, produce better *net outcomes* for creditors across the board.

The transformation of corporate rescue procedures was, however, not quite as radical as it first appears. In addition to a series of specific "carve outs",[56] the banking lobby extracted an important concession in that the removal of the floating charge holder's right to appoint a receiver took effect only *prospectively* rather than *retrospectively*. Thus, the holder of a so-called "grandfathered" floating charge – that is a charge created before 15th September 2003 –

51 On a very literal view, to call the changes "streamlining" is a misnomer, as they involved a sizeable expansion of the legislative provisions governing administration.

52 IA 1986, Sch B1, paras 14 and 22.

53 Second Chance (n 33), paras 2.7–2.17.

54 IA 1986, Sch B1, para 76. The administrator's term of office can be extended by consent for a maximum of six months or by the court for a specified period.

55 IA 1986, Sch B1, para 83–84.

56 Above, n 44.

retains the right to appoint a receiver where the terms of the contract so provide. Holders of "grandfathered" floating charges can therefore choose whether to appoint a receiver or an administrator to manage the distressed company whereas the only formal rescue option available to holders of floating charges created on or after 15th September 2003 is to appoint an administrator.

## *IV. Empirical evaluation*

This section of the article provides a summary of the main findings from an empirical study carried out by the authors during 2005 and 2006.[57] Our study was designed to evaluate the impact of the Enterprise Act reforms in practice and, in particular, to address two questions: (i) whether streamlined administrations have generated greater gross realizations than receivership because of the wider legal accountability of the insolvency practitioner and (ii) whether streamlined administrations have generated lower costs than receivership. We sought to address these questions through a combination of qualitative and quantitative methodologies. Our qualitative data derive from thirteen interviews with practitioners (including insolvency practitioners and bankers) about the way in which the Act has affected their practice. Our quantitative dataset consists of 284 receivership and administration cases in England and Wales, spanning the period from January 1, 2001 to December 31, 2004. This dataset derives from a random sample of 500 cases, comprising 250 receiverships under the old law (commencing between January 1, 2001 and September 14, 2003) and 250 administrations under the new law (commencing between September 15, 2003 and December 31, 2004) identified using the index of insolvency appointments published in the *London Gazette*. Data on these companies were obtained from publicly available reports and returns that insolvency practitioners are required by law to file at Companies House, the UK's companies registry, and statistical tests were performed to compare realizations and costs under streamlined administration with those under receivership. We excluded from the original 500 cases those in respect of which the insolvency procedure was not completed by February 1, 2006 and those for which abstracts of receipts and payments (from which data on our principal variables of interest were extracted) were not available in electronic

57 We gratefully acknowledge the support of the Insolvency Service (the principal executive agency having policy responsibility for corporate insolvency law in the United Kingdom) who funded the research upon which this section is based. A full length report of our findings can be accessed on the Insolvency Service's website at http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/corpdocs/ImpactofEAReport.pdf.

form. Of the remaining 284 cases, 102 were receiverships and 182 were administrations.

### *1. Official statistics*

Table 1 and Figure 1 report the trends in incidence of liquidations, receiverships and administrations in England and Wales between 1999 and 2006.

Table 1: Incidence of Corporate Insolvency Procedures in England and Wales, 1999–2006.

| Year | Liquidations | Receiverships | Administrations |
|---|---|---|---|
| 1999 | 14,280 | 1,618 | 440 |
| 2000 | 14,317 | 1,595 | 438 |
| 2001 | 14,972 | 1,914 | 698 |
| 2002 | 16,306 | 1,541 | 643 |
| 2003 | 14,184 | 1,261 | 744* |
| 2004 | 12,192 | 864 | 1,601 |
| 2005 | 12,893 | 590 | 2,257 |
| 2006 | 13,137 | 588 | 3,560 |

Source: Department of Business, Enterprise and Regulatory Reform

* Of wich 497 were appointments made under the old law.

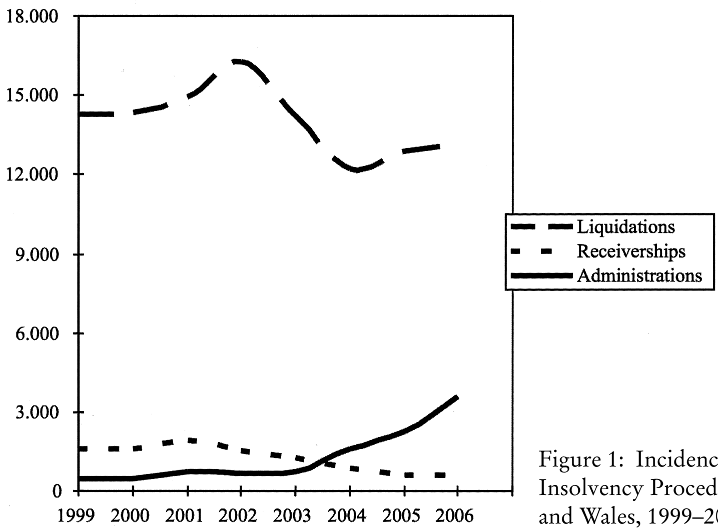


Figure 1: Incidence of Corporate Insolvency Procedures in England and Wales, 1999–2006.

Since the Enterprise Act came into force the incidence of administrations has increased whilst the incidence of receiverships has decreased. The figures suggest that receiverships were already declining in the two years immediately preceding 15th September 2003.[58] The sharp increase in administrations and declining number of receiverships since 15th September 2003 indicates that lenders with grandfathered security, who are still entitled to appoint receivers, are, more often than not, choosing to appoint administrators instead.

### 2. *Interview data*

Our interviewees explained the rise in the use of administration, and associated decline in receivership, by reference to a desire on the part of banks to distance themselves from the negative publicity and perceptions associated with receivership. Receivership is instead being reserved for cases where the bank is "under-secured", or where net realizations can be increased through the mitigation of corporation tax that would otherwise be payable in administration.[59] We infer from this that there is a substitution effect: many cases that previously would have been receiverships are now being conducted as administrations.

We asked the insolvency practitioners among our interviewees about the impact, if any, of their new duties to creditors under the Enterprise Act on their decision-making processes as regards commercial strategy and deployment of assets. Their views were somewhat mixed. Some felt that the changes to the law simply brought it into line with existing best practice: they considered that their role was, and had always been, to maximize realizations regardless of procedure and regardless of who controlled their appointment. Others indicated that the administrator's broader duties encouraged them to take steps to promote the interests of unsecured creditors which they would not previously have taken. Significantly, insolvency practitioners feel constrained by professional regulation and reputational concerns to "do the job properly."

58 Figures for 1987–1999 – which show a significant spike in the incidence of receiverships during the economic recession of the early 1990s – are reported in Review of Company Rescue (n 9), paras 44–45.

59 Under UK tax law, the appointment of a receiver does not automatically terminate an accounting period for tax purposes in contrast to the appointment of an administrator which does have this effect. The result is that corporation tax accruing on asset realizations made by an administrator cannot be set off against pre-administration losses. Thus, if there is likely to be a significant asset or assets the sale of which could crystallize a corporation tax liability and all other factors are neutral, receivership will be regarded as the appropriate vehicle so long as it remains available because pre-receivership trading losses can be used to reduce or eliminate the post-receivership tax liability.

Our interviewees also told us that costs had increased over time because of the impact of greater professional regulation and more stringent "best practice" guidelines from their firms. They considered that the legislative emphasis on explaining and justifying decisions in streamlined administration, when coupled with professional regulation, had increased process costs. Moreover, we were told by interviewees from banks, who are both concentrated lenders and repeat players, that they typically negotiate discounted "wholesale" rates with insolvency practitioners as regards fee arrangements. This was formerly done in the context of receiverships; it is now only done in administrations where the bank is under-secured. In contrast, in administration cases where the bank is over-secured and the unsecured creditors stand to receive a payment from the assets, insolvency practitioners seek approval for their fees from the creditors' meeting, and our bank interviewees expressed concern that the rates charged might be higher.

### 3. *Working hypotheses*

In the light of the interview data, we formulated two general hypotheses:

1. *Realizations.* The shift from receivership to administration should in theory lead to *increased* gross asset realizations because of the administrator's enhanced legal incentives. We hypothesized that this effect would be most pronounced in cases where floating charge holders are over-secured based on the break-up value of the assets because these are precisely the cases where a receiver would have the least incentive to pursue a value maximizing strategy, whereas an administrator owes a statutory duty to the unsecured creditors, who are the residual claimants.

2. *Costs.* Two factors lead us to anticipate that the total direct costs of the new administration procedure are likely to be greater than receivership. First, notwithstanding the "streamlining" the new administration procedure (designed to reduce costs compared to the old administration procedure), it may be expected to generate greater *process costs* than receivership, because of the statutory requirements to prepare and circulate reports to creditors and hold creditors' meetings and through the perceived need by practitioners – confirmed by our interviewees – to document their decision-making processes in order to guard against legal liability.[60] Secondly, our interviews lead us to suggest that dispersed unsecured creditors may be *less* effective than a concentrated creditor in controlling administrators' fees. This is because unsecured creditors suffer from free-rider problems:

60 See further Armour and Mokal (n 9).

> there are many of them, each with a relatively small claim, and so no-one has a strong incentive to engage in overseeing the administrator. We therefore hypothesized that the shift to the new regime would be likely to lead to *increased* rather than reduced costs.[61]

Accordingly, we expected both gross realizations *and* costs to increase. It is hard to predict *a priori* the cumulative effect of these predicted changes on *net* returns to creditors (that is, gross realizations less costs), so we did not have a clear hypothesis as to the overall expected effect.

In the course of formulating our two hypotheses, we identified a number of other variables which could impact on realizations and costs as well as the shift in control from secured to unsecured creditors brought about by the change in the law. So, for example, we would expect realizations and costs to be increasing in line with the size of the firm, the duration of the procedure and the outcome of the procedure ("going concern" as opposed to "break-up" sale).[62]

### 4. *Summary of main findings*

In order to test our hypotheses, we compared *gross realizations*, *direct bankruptcy costs* (that is, the costs attributable to running the insolvency procedure, including in particular the remuneration of the insolvency practitioner),[63] and *net returns* to creditors in the receivership and administration cases in our dataset. The receivership and administration subsamples had no statistically significant differences as regards key firm characteristics such as age, turnover, number of employees, book value of assets, gearing/leverage, and industry composition. The receivership and administration samples were also very similar in terms of the frequency with which the insolvency practitioner continued to trade the business rather than immediately close it down

61 Again, our prediction a priori was that this effect would be most pronounced in cases where floating charge holders are over-secured and so have little incentive to control costs once they have received a full pay out, a prediction further reinforced by the apparent ability of insolvency practitioners to negotiate higher fee rates with unsecured creditors uncovered during the interviews.

62 See, *eg*, LM LoPucki and JW Doherty, "The Determinants of Professional Fees in Large Bankruptcy Reorganization Cases" (2004) 1 Journal of Empirical Legal Studies 111; A Bris, I Welch, and N Zhu, "The Costs of Bankruptcy: Chapter 7 Liquidation vs Chapter 11 Reorganization" (2006) 61 Journal of Finance 1253.

63 Other examples of direct costs are fees paid to professionals such as lawyers, accountants, valuers, consultants and marketing experts in connection with the preservation and realization of the assets.

and the frequency with which a going concern sale of the assets rather than a break-up sale was achieved.

Initially, we measured the total actual realizations achieved by the insolvency practitioner following sales of assets as a percentage of the estimated total value of the assets at the date of entry into the insolvency procedure (the latter values deriving from the Statement of Affairs prepared by the directors shortly after the appointment of the insolvency practitioner). However, in cases where the insolvency practitioner continued to trade the business, the insolvency practitioner also receives payments in the form of trading receipts following ongoing sales. Net trading receipts, if any, are also available to creditors, and so to ensure that our results are not simply an artefact of the way we measure realizations, we also consider an alternative measure that includes both receipts from asset sales plus net trading receipts. Comparing the mean and median values for our receivership and administration subsamples in each case, we found that realizations on both measures, expressed as a percentage of the estimated firm value at the start of the proceedings, were higher in administration than receivership, as Table 2 illustrates.

Table 2: Average realizations (as a proportion of estimated value of the firm's assets) in receiverships and administrations.

| | Receivership | Administration | Receivership | Administration |
|---|---|---|---|---|
| | Means | | Medians | |
| Realizations from asset sales / estimated value | 78 % | 98 % | 69 % | 88 % |
| (Realizations from asset sales + net trading receipts) / estimated value | 77 % | 103 % | 67 % | 93 % |

Two measures of the direct costs of insolvency procedures were employed: (i) the remuneration paid to insolvency practitioners and (ii) total direct costs – that is, all the costs and fees associated with the realization of assets including insolvency practitioner remuneration. Again, for purposes of meaningful comparison, we standardized the measures by expressing remuneration and total direct costs as a percentage of the value of the assets. We used two different measures of the value of the assets – first, the estimated value (by the directors) on entry to the proceedings, and secondly, the actual value of the gross realizations from asset sales (as per our discussion on realizations). Comparing the mean and median values for our receivership and administration subsamples, we found that costs were higher on all four measures in administration than receivership, as Table 3 illustrates.

Table 3: Costs in administration and receivership.

| | Receivership (Means) | Administration (Means) | Receivership (Medians) | Administration (Medians) |
|---|---|---|---|---|
| Remuneration costs / est. asset value at start of proceedings | 16 % | 29 % | 11 % | 19 % |
| Remuneration costs / actual realizations | 23 % | 29 % | 17 % | 24 % |
| Total direct costs / est. asset value at start of proceedings | 28 % | 49 % | 17 % | 33 % |
| Total direct costs / actual realizations | 38 % | 49 % | 29 % | 43 % |

For each of our measures of realizations and costs, the observed differences between the means in the receivership and administration subsamples are statistically significant at the 5 % level: that is, we can be 95 % confident that these differences are a consequence of underlying differences in the general population of receivership and administration cases, as opposed simply to random variation in our particular sample.

As well as comparing costs and realizations, we also compared the average recovery rates across different classes of creditor claims as a proportion of their face value. Whilst the average return to each class of creditors was slightly higher in administration than in receivership, these differences were generally not statistically significant. The one exception concerned recoveries for preferential creditors,[64] in relation to which the differences in the means for the administration and receivership subsamples was weakly statistically significant, at the 10 % level. This, however, is most readily explained by the fact that the categories of preferential creditors were reduced by the Enterprise Act: prior to 15th September 2003, certain tax claims were treated as preferential creditors, in addition to certain claims of employees for unpaid wages, pension contributions, and the like. The preferential status of tax claims was abolished by the Enterprise Act, leaving only employee claims. As there are likely to be fewer preferential claims lodged in our administration subsample (post-Enterprise Act) than our receivership subsample (pre-Enterprise Act), one

64 That is, certain categories of unsecured creditor who have statutory priority over unsecured creditors generally: see IA 1986, ss 175, 386 and Sch 6.

would expect the proportion of their face value that is paid to increase, as is observed. However, the differences for other classes of creditor are not statistically significant. Thus, there is no compelling statistical evidence that creditors as a whole do better out of administration than they did out of receivership.

Table 4: Mean recovery rates in administration and receivership.

| Recovery rate (net payment/face value of claim) | Administration | Receivership |
|---|---|---|
| Secured creditors | 61 % | 55 % |
| Preferential creditors | 36 % | 25 % |
| Unsecured creditors | 0.6 % | 0.2 % |

These cross-sectional comparisons of mean and median averages do not take account of a range of factors outside our variable of interest (namely, the change in the law) and so may be biased by other variables already mentioned (such as firm size, duration of procedure, outcome of procedure) that could also be affecting the size of realizations and costs. To take these factors into account, we employed multiple regression analysis with a range of specifications, incorporating these other potential determinants of realizations and costs, with the aim being to try and isolate that part of the difference in realizations and costs associated with the change in the legal regime. Using this methodology, we found robust statistical evidence that administration is positively associated with higher realizations and costs than receivership, holding the other variables constant.[65] Thus, our principal finding is that streamlined administration has tended to generate *both* higher gross realizations and higher direct costs in line with our hypotheses.

We then sought to establish whether this result was being driven by cases in which the secured creditor was over-secured. It will be recalled that we expected the impact of the Enterprise Act changes to be most pronounced in cases where, in theory, the insolvency practitioner had the least incentive to maximize realizations and the secured creditor had the least incentive to control costs. Accordingly, we divided the sample into cases where, at the outset of the insolvency procedure, the senior lender was either over-secured or

65 The methodology and results are described in detail in J Armour, A Hsu, and A Walters, "The Costs and Benefits of Secured Creditor Control in Bankruptcy: Evidence from the UK", University of Cambridge Centre for Business Research Working Paper No 332 (2006), available at www.srrn.com.

under-secured and then ran a fresh set of regressions comparing realizations and costs in each of the two sub-samples. On this analysis, we found that realizations in administration in the over-secured sub-sample were on average around 60 % higher than in receivership. Conversely, using the same specification in the under-secured sub-sample, we did not find any statistically significant difference in levels of asset realization achieved in the two procedures. The implication is that the observed increase in realizations is largely confined to cases in which the secured creditor was over-secured: in other words, in precisely those cases where the impact of wider legal accountability might be expected to be at its most pronounced.

Finally, we ran a variety of "robustness checks": additional statistical tests designed to guard against the possibility that other factors might be affecting the results. These did not cause us to reconsider the findings. For example, we ran a check to see if our results – in particular, the observed increase in costs – might be a function of the increasing felt burden of professional regulation reported by our interviewees rather than the Enterprise Act reforms. The check was carried out by comparing a separate sample of 31 post-Enterprise Act receivership cases (which would also be subject to any wider regulatory impact or time effect affecting the streamlined administration cases) with all the other cases in our dataset. On this test, we found that costs were significantly higher in the streamlined administration cases than in *all* the receivership cases put together (whether pre- or post-Enterprise Act). From this we infer that the increased costs in the streamlined administration cases are an effect of the Enterprise Act changes. We also ran a check to ensure that our findings were not skewed by a tendency, also identified by our interviewees, for streamlined administration to be used as a substitute for winding-up.

## *V. Conclusion*

To conclude, our principal finding is that both gross realizations and direct costs are higher under the new streamlined administration procedure than under receivership. This implies that the increased recoveries in administration cases may have been eaten up by increased costs, which inference is supported by the general lack of any statistically significant increase in net recoveries to creditors under the new administration procedure.

As with any study of this nature there are limitations. Our statistical data give a snapshot of procedures that were commenced up to the 31st December 2004. The finding of increased direct costs, while statistically robust, might simply reflect the increased costs incurred as practitioners educate themselves about the way in which the new regime operates – if so, then we might expect costs to show a decline over time. Nevertheless, our study does carry the implication that net outcomes in receivership may be at least as good as those in administration. Put another way, the results imply – at least as regards returns to unsecured creditors – that concentrated creditor control of insolvency (as in receivership) may be *no worse* for unsecured creditors than control by dispersed unsecured creditors (as in administration). Streamlined administration appears to be a superior model for generating realizations, but by shifting the locus of control away from secured creditors it may be less effective at controlling costs.[66]

66 A wider implication is that out-of-court debt enforcement by secured creditors is no more or less efficient in terms of preserving firm value than formal bankruptcy proceedings. This is consistent with broader studies which have suggested that variables such as the legal origin of commercial/bankruptcy laws and *per capita* income (as a measure of national wealth) are more powerful determinants of the efficiency of a country's debt enforcement and bankruptcy procedures than the legal configuration of such procedures, including how control rights are allocated. See S Djankov, O Hart, C McLeish and A Shleifer, "Debt Enforcement Around the World", National Bureau of Economic Research Working Paper No. 12807 (December 2006) available at http://www.nber.org/papers/w12807.