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***Environmental liabilities in insolvency – an area ripe for reform?***

**I. Introduction**

This paper probes the perception that the law enables companies to shed their environmental liabilities through entry into insolvency proceedings. United Kingdom ('UK') company and insolvency law explicitly acknowledge the relevance of wider interests to a company's long-term growth and the effects of its failure. For example, s.172 Companies Act 2006 mandates a director, in promoting the company's success, to have regard to matters including 'the impact of the company's operations on the community and the environment'.<sup>1</sup> The *Report of the Review Committee on Insolvency Law and Practice*<sup>2</sup> ('Cork Report') notes that the community has always been regarded as having 'an important interest' in insolvency proceedings.<sup>3</sup> It accordingly includes, among the objectives of a good modern insolvency law, the need to recognise and safeguard the interests 'of society or... groups in society [that] are vitally affected by insolvency and its outcome'.<sup>4</sup>

The practical difficulty of achieving a balance between these community/social interests and the success or survival of companies when it comes to promoting environmental interests is however illustrated by a range of judicial decisions. This includes the attempt by People and Planet, an organization campaigning for action on climate change and respect for human rights, to ensure that the UK government exercised its power as a majority shareholder of the Royal Bank of Scotland ('RBS'), in a way which compelled RBS' board of directors to

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<sup>1</sup> s.172(1)(d).

<sup>2</sup> Cmnd 8558, (1982).

<sup>3</sup> *ibid*, paragraph 1734.

<sup>4</sup> *ibid*, paragraph 198(i).

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3 pursue policies which promoted environmental and human rights considerations in  
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5 accordance with the s.172(1)(d) Companies Act 2006 duty.<sup>5</sup> This application for permission  
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7 to bring judicial review proceedings failed on the basis that the imposition of the  
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9 government's own policies regarding combating climate change and promoting human  
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11 rights would interfere with the RBS board of directors' ability to manage the company for  
12  
13 the benefit of its shareholders as a whole. In rejecting the interventionist policy proposed by  
14  
15 People and Planet, the court upheld the 'commercial approach'<sup>6</sup> that the government had  
16  
17 adopted in respect of its investment in RBS (made as a result of the 'major financial  
18  
19 support'<sup>7</sup> extended to the bank in 2008).

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26 Likewise, in the absence of any special status for environmental claims in insolvency law,  
27  
28 academic interest has centred on cases involving the use of the disclaimer provision s.178  
29  
30 Insolvency Act 1986 ('IA 1986'). This empowers a liquidator to disclaim onerous property  
31  
32 (defined as 'any unprofitable contract' or property which is unsaleable or capable of giving  
33  
34 rise to financial or other onerous obligations<sup>8</sup>), thereby terminating the company's rights,  
35  
36 interests and obligations in respect of such property, and leaving anyone who has sustained  
37  
38 loss or damage in consequence of the disclaimer to prove a claim as a creditor in the  
39  
40 winding-up.<sup>9</sup> Case law has highlighted the tension between the use of this power in  
41  
42 liquidation to achieve the 'orderly and expeditious winding up of a company's affairs'<sup>10</sup>, and  
43  
44 the 'considerable public interest in the maintenance of a healthy environment' denoted by  
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53 <sup>5</sup> [2009] EWHC 3020.

54 <sup>6</sup> *Ibid*, [6]-[36]

55 <sup>7</sup> *ibid*, [1].

56 <sup>8</sup> s.178(3) IA 1986.

57 <sup>9</sup> s.178(6) IA 1986.

58 <sup>10</sup> Cork Report, (n.2) paragraph 1182. See e.g. *Re Celtic Extraction* [2001] Ch. 475, [42].

1  
2  
3 the polluter pays principle.<sup>11</sup> This latter objective is enforced for example through the  
4  
5 existence of the statutory regime aimed at ensuring that 'the disposal of controlled waste  
6  
7 does not give rise to: (i) pollution of the environment; (ii) harm to human health and; (iii)  
8  
9 serious detriment to the amenities of the locality...collectively known in the waste  
10  
11 management industry as "the three evils".<sup>12</sup> This tension has been settled in favour of the  
12  
13 former interest, meaning that the costs of compliance with a waste management licence  
14  
15 could not take priority over the debts owed by a company, nor could the company's assets  
16  
17 be 'set aside to pay for future compliance with the terms of the licence'.<sup>13</sup> Thus, in the  
18  
19 absence of clear words preventing s.178 from being applied to specific items of property or  
20  
21 specific types of debtors, liquidators have been held to be entitled to disclaim waste  
22  
23 management licences as onerous property.<sup>14</sup>  
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32 It may be expected that the goal of environmental protection can be more easily achieved in  
33  
34 circumstances where the emphasis is on rescuing, rather than liquidating, a financially  
35  
36 distressed company to ensure its continued operation. Administration proceedings, for  
37  
38 example, have the primary goal of 'rescuing the company as a going concern'.<sup>15</sup> The Cork  
39  
40 Committee, which recommended the introduction of the administration procedure,<sup>16</sup> was  
41  
42 conscious of the potentially disastrous impact of the 'chain reaction consequent upon any  
43  
44 given failure' on creditors, employees and the community,<sup>17</sup> a policy embraced by the  
45  
46 House of Lords in *Powdrill v Watson*: 'This "rescue culture" which seeks to preserve viable  
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52 <sup>11</sup> *Re Mineral Resources Ltd* [1999] 1 All ER 746, 757.

53 <sup>12</sup> *Re Rhondda Waste Disposal Ltd* [2001] Ch. 57, [43]-[44].

54 <sup>13</sup> *Ibid*, [39].

55 <sup>14</sup> *Re Celtic Extraction*, (n.10).

56 <sup>15</sup> IA 1986, Schedule B1, 3(1).

57 <sup>16</sup> (n.2), Chapter 9.

58 <sup>17</sup> *Ibid*, paragraph 204.

1  
2  
3 businesses was and is fundamental to much of the [Insolvency] Act of 1986.<sup>18</sup> However, in  
4  
5 keeping with the notion that society is more concerned with the ‘preservation of the  
6  
7 commercial enterprise’ rather than the rescue of the company per se,<sup>19</sup> recent insolvencies  
8  
9 demonstrate how administration proceedings can be used to sell the profitable parts of a  
10  
11 business, in conjunction with liquidation proceedings aimed at the disclaimer of  
12  
13 environmental liabilities. UK Coal Operations Ltd entered administration in July 2013, and  
14  
15 swiftly carried out a ‘restructuring [of the majority of its business and assets] following  
16  
17 sophisticated advice’<sup>20</sup> before entering liquidation to enable the liquidators (who were the  
18  
19 same individuals as the administrators) to disclaim onerous liabilities<sup>21</sup> - in particular a  
20  
21 damaged colliery, which would otherwise have cost more than £100,000 per week to  
22  
23 maintain.<sup>22</sup> Similarly, the liquidation of two major coal mining operators in 2013, Aardvark  
24  
25 (TMC) Ltd (‘ATL’) and The Scottish Coal Company Ltd (‘SCC’), was structured in such a way  
26  
27 that viable mining sites which were capable of being immediately transferred were sold to  
28  
29 the purchaser Hargreaves Services plc (‘HSP’), while more problematic mining sites which  
30  
31 were not capable of being transferred immediately were hived down to ATL/SCC  
32  
33 subsidiaries – the shareholding in which would in due course be conveyed to HSP.<sup>23</sup> The  
34  
35 remaining sites which carried substantial restoration liabilities were disclaimed by the  
36  
37 liquidators.<sup>24</sup> While recourse to the disclaimer powers (which are only available in  
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48 <sup>18</sup> [1995] 2 A.C. 394, 442.

49 <sup>19</sup> Cork report (n.2) paragraph 193; S. Frisby, ‘In Search of a Rescue Regime: The Enterprise Act 2002’ (2004) 67  
50 Modern L.Rev. 247, 248-249.

51 <sup>20</sup> *Re UK Coal Operations Ltd* [2013] EWHC 2581, [2].

52 <sup>21</sup> *Re UK Coal Operations Ltd* *ibid*, [5].

53 <sup>22</sup> Statement by PwC, *Ocanti Opco Limited – in Liquidation (formerly UK Coal Operations Limited)* available from  
54 <http://www.pwc.co.uk/services/business-recovery/administrations/ukcoal.html> (accessed 31 July 2016)

55 <sup>23</sup> See news releases by HSP: *Acquisition of Assets from Aardvark (TMC) Ltd* (16 May, 2013) and *Acquisition of*  
56 *Assets from The Scottish Coal Company Ltd* (5 July, 2013) - available from  
57 <http://www.hsgplc.co.uk/investors/regulatory-news.aspx> (accessed 31 July 2016); and *Firmin v Aardvark*  
58 *(TMC) Ltd* [2013] EWHC 1774, [2].

59 <sup>24</sup> *Ibid*; *Firmin v Aardvark (TMC) Ltd* *ibid*, [5].  
60

liquidation proceedings)<sup>25</sup> was justified on the ground of avoiding prejudice to unsecured creditors,<sup>26</sup> it is evident that the transactions as a whole were viewed as being widely beneficial. A significant number of jobs were preserved and on-going production was secured,<sup>27</sup> and the number of properties requiring disclaimer was minimized.<sup>28</sup>

This handful of examples indicates, at the very least, that the interplay between company/insolvency and environmental law is not quite clear-cut. In particular, the treatment of the mining sites in the recent UK Coal, Aardvark and Scottish Coal Company liquidations shows how insolvency proceedings are capable of being used in a rather strategic way, with a view to mitigating (rather than sidestepping) environmental liabilities. It has been questioned, based on previous case law,<sup>29</sup> whether it should fall to the judiciary to resolve the 'complex policy issues' arising in the clashes between environmental and insolvency law.<sup>30</sup> In similar vein, it may be debated whether the distinct solutions arrived at

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<sup>25</sup> s.178(1) and (2) IA 1986 – 'This [section applies] to a company that is being wound up in England and Wales ... [T]he liquidator may, by the giving of the prescribed notice, disclaim any onerous property...'

<sup>26</sup> See e.g. *Firmin v Aardvark (TMC) Ltd*, ((n.23) [6]): 'The reason why the joint liquidators wish to disclaim the onerous properties immediately is to prevent them from generating liabilities which will prejudice the company's creditors'; *Re Directions, Nimmo* [2013] CSOH 124, [7]: 'The noters wish to protect SCC's unsecured creditors and the bank, as holder of the floating charge, from the dissipation of the proceeds of disposal of SCC's assets which continued performance of the statutory obligations will entail'; Statement by PwC, *Ocanti Opco Limited – in Liquidation (formerly UK Coal Operations Limited* (n.22): 'The costs of securing and holding the [damaged] mine ... would have been an expense and, as such, these costs would have been paid ahead of the dividend to creditors.'

<sup>27</sup> PwC statement, *ibid*: 'As part of the restructuring the Administrators were able to protect around 1,500 Company jobs ...Over 400 jobs will also be preserved as part of the wider restructuring, under a separate insolvency process'; news release by HSP (n.23): *Acquisition of Assets from Aardvark (TMC) Ltd* (16 May, 2013) – 'Hargreaves has committed to offer employment to 237 members of staff' on completion of restructuring.

<sup>28</sup> News release by HSP, *ibid*: 'In comparison with an unstructured liquidation, we have saved or created over 230 jobs and been able to continue mining operations at two of the key sites. The number of properties that have had to be disclaimed by the liquidators have been significantly reduced.'

<sup>29</sup> *Re Celtic Extraction* (n.10); *Re Mineral Resources* (n.11); *Re Rhondda Waste Disposal* (n.12); *Environment Agency v Hillridge Ltd* [2003] EWHC 3023; *Re Wilmott Trading Ltd (in liquidation) (Nos 1 and 2)* [1999] 2 B.C.L.C. 541.

<sup>30</sup> J. Armour, 'Who Pays When Polluters Go Bust?' (2000) 11 L.Q.R. 200, 204. See also A. Keay and P. de Prez, 'Insolvency and Environmental Principles: a Case Study in a Conflict of Public Interests' [2001] 3 Env L Rev 90; A. Keay and P. de Prez, 'Should Insolvent Companies Pay? The Search for Environmental Principle' (2001) 9(1) Env. Liability 11.

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3 in the UK Coal, Aardvark and Scottish Coal Company liquidations, led by debtors and  
4 purchasers of their businesses/assets with limited court involvement, form the most  
5 advantageous response.<sup>31</sup> The central issue, of how best to manage conflicts between  
6 environmental and insolvency law, should be considered in light of recent lessons from the  
7 United States ('US'), outlined below.  
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## 17 II. 'Scary stories' in the US

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20 The research for this paper was motivated by an empirical study conducted in the US by  
21 Lawton and Oswald, published in 2008.<sup>32</sup> Against the background of criticisms and calls for  
22 the reform of environmental, corporate and bankruptcy law triggered by high-profile cases,  
23 they sought to determine 'whether firms are indeed inappropriately using bankruptcy as a  
24 way to escape environmental liabilities on any sort of pervasive, wide-scale basis'.<sup>33</sup> They  
25 argued that radical revisions of these areas of law should be preceded (and justified with  
26 reference to) some investigation into the existence and nature of the problem, compared to  
27 the 'scary stories' which had so far dominated the discussion surrounding the subject.<sup>34</sup> This  
28 is echoed in an analysis of the role of empirical data in formulating bankruptcy policy, which  
29 observes that policy responses premised on anecdotes risk being disproportionate: 'A  
30 statute may deploy vast enforcement resources to prevent or punish behaviours that rarely  
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50 <sup>31</sup> See for example *Firmin v Aardvark (TMC) Ltd*, (n.23) – the court granted the liquidators permission to  
51 exercise certain powers prior to the holding of a creditors' meeting under the IA 1986; and *Re UK Coal*  
52 *Operations Ltd* (n.20)– the court grant the administrators permission, in the interests of commercial necessity  
53 to dispense with the requirements to send proposals to creditors regarding the purpose of the administration  
54 and convene creditors' meetings to consider such proposals, in accordance with the IA 1986.

55 <sup>32</sup> A. Lawton and L. Oswald, 'Scary Stories and the Limited Liability Polluter in Chapter 11' (2008) 65 Wash.&  
56 Lee L.Rev. 451.

57 <sup>33</sup> *Ibid*, 457.

58 <sup>34</sup> *Ibid*, 454.  
59  
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3 occur.<sup>35</sup> It was therefore crucial to look beyond the unsubstantiated claims and anecdotal  
4  
5 reports of the routine evasion of environmental liabilities through the initiation of  
6  
7 bankruptcy proceedings.<sup>36</sup>  
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10 Lawton and Oswald recognised the difficulties of collecting data regarding environmental  
11  
12 liabilities which could arise at state or federal level, through statute or common law, and  
13  
14 take the form of various obligations such as penalties, repayment of clean-up costs and  
15  
16 remediation orders.<sup>37</sup> Coupled with the absence of official data on bankruptcy cases  
17  
18 involving environmental issues, this meant that it was necessary to conduct this exploratory  
19  
20 study with 'a narrow but manageable set of data'.<sup>38</sup> They accordingly focused on Chapter  
21  
22 11<sup>39</sup> bankruptcy reorganisation cases filed during the year 2004, with a view to ascertaining  
23  
24 the following:  
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29  
30 First, how many firms in the data set reported environmental violations,  
31  
32 liabilities, or other obligations? Second, of these firms, in how many  
33  
34 instances did the environmental issues play a role in the bankruptcy filing?  
35  
36 Third, of the firms in which environmental matters caused, even in part,  
37  
38 the bankruptcy filing, in how many cases did the debtor end up shifting the  
39  
40 cost of the environmental cleanup to the taxpayer? Fourth, even if  
41  
42 environmental obligations did not play a role in the decision to file for  
43  
44 bankruptcy, did the debtor avoid paying for environmental remediation  
45  
46 either by invoking the Bankruptcy Code's abandonment power or the right  
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54 <sup>35</sup> T. Sullivan, E. Warren, J. Westbrook, 'The Use of Empirical Data in Formulating Bankruptcy Policy' (1987) 50  
55 L.C.P. 195, 207.

56 <sup>36</sup> Lawton and Oswald, (n.32) 456.

57 <sup>37</sup> Ibid, 457.

58 <sup>38</sup> Ibid, 458.

59 <sup>39</sup> US Bankruptcy Code, Title 11 Chapter 11 U.S.C.  
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3 to discharge? Finally, is there any evidence that parent corporations  
4  
5 effectively shift the cost of environmental cleanup to the taxpayers by  
6  
7 creating subsidiaries with insufficient assets to pay for their environmental  
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9 obligations?<sup>40</sup>  
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12  
13 The findings of the study challenged many widely-held beliefs regarding the scale of the  
14  
15 problem and the pressing need for legal reform. One view, for example, was that  
16  
17 companies routinely avoided environmental liabilities by declaring bankruptcy, effectively  
18  
19 exploiting the 'loophole' whereby debt obligations are discharged through insolvency.<sup>41</sup> The  
20  
21 study in fact found that environmental liabilities or violations influenced the decision to  
22  
23 enter into Chapter 11 bankruptcy proceedings in less than 1% of the cases studied.<sup>42</sup>  
24  
25 Similarly, there was little support for the notion that the bankruptcy process enables the  
26  
27 burden of the costs of environmental remediation to be pushed onto taxpayers through  
28  
29 State intervention to clean up sites: overall, the bankruptcy process did not enable such  
30  
31 debtors to transfer the burden of environmental remediation costs to taxpayers through  
32  
33 State intervention.<sup>43</sup> In fact, the discharge of environmental debts occurred in less than 2%  
34  
35 of the cases examined, indicating that 'the shedding of environmental liabilities through the  
36  
37 bankruptcy discharge simply is not a common problem'.<sup>44</sup> However, on the rare occasions  
38  
39 where debtors successfully discharged their environmental obligations, the debts were  
40  
41 substantial<sup>45</sup> (though it was questionable whether this could justify comprehensive legal  
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51 <sup>40</sup> Lawton and Oswald, (n.32) 458.

52 <sup>41</sup> Ibid, 472-473; K. Bergmann, 'Bankruptcy, limited liability and CERCLA: closing the loophole and parting the  
53 veil' (2004) University of Maryland Public Law and Legal Theory Accepted and Working Research Paper Series  
54 No. 2004-02, 12-19.

55 <sup>42</sup> Lawton and Oswald, *ibid* 494.

56 <sup>43</sup> Ibid, 510.

57 <sup>44</sup> Ibid, 522.

58 <sup>45</sup> Ibid, 522-525.  
59  
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3 reform<sup>46</sup>). Thirdly, the abandonment of contaminated property in Chapter 11 proceedings in  
4  
5 accordance with §554 of the US Bankruptcy Code,<sup>47</sup> a procedure broadly similar to the  
6  
7 power of disclaimer under UK Insolvency Act s.178 (outlined in Part I above), and seen in the  
8  
9 US as ‘a loophole through which debtors pass in order to avoid their cleanup obligations  
10  
11 under state and federal environmental laws’,<sup>48</sup> was found to be ‘an extremely rare event’.<sup>49</sup>  
12  
13 It had been successfully invoked ‘[i]n only one case – less than one tenth of one percent of  
14  
15 the total number of cases’.<sup>50</sup> Finally, in terms of corporate structure and organisation, the  
16  
17 perception that companies endeavoured to structure their operations in such a way as to  
18  
19 ensure that the risks or burden of environmental liabilities were borne by subsidiaries with  
20  
21 insufficient assets to fulfil their obligations, thereby shielding the parent company’s assets,<sup>51</sup>  
22  
23 was examined. Of the small minority of firms in the data set where environmental liabilities  
24  
25 or violations had influenced the decision to file for bankruptcy, none was a subsidiary.<sup>52</sup>  
26  
27 Thus, the data did not substantiate the impression ‘that the world of Chapter 11  
28  
29 [bankruptcy] is disproportionately populated by shell subsidiary corporations with  
30  
31 significant environmental liabilities’.<sup>53</sup>  
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39 Lawton and Oswald accordingly concluded that in the absence of ‘any empirical evidence  
40  
41 demonstrating more widespread abuse, proposals for the reform of bankruptcy,  
42  
43 environmental or corporate law are based on nothing more than scary stories’<sup>54</sup>. Their study  
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47 <sup>46</sup> Ibid, 525.

48 <sup>47</sup> §554 (a): ‘After notice and a hearing, the trustee may abandon any property of the estate that is burdensome  
49 to the estate or that is of inconsequential value and benefit to the estate’, broadly similar to disclaimer power  
50 in IA 1986, s.178.

51 <sup>48</sup> 474; Bergmann, (n.41) 12

52 <sup>49</sup> Lawton and Oswald, (n.32) 514.

53 <sup>50</sup> Ibid, 458.

54 <sup>51</sup> Ibid, 454 and 456. See Bergmann (n.41), 20: this can deter parent companies ‘from practicing responsible  
55 environmental management or from supervising subsidiaries to ensure sound environmental practices’.

56 <sup>52</sup> Lawton and Oswald *ibid*, 494.

57 <sup>53</sup> Ibid, 526.

58 <sup>54</sup> Ibid, 527.

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2  
3 cast doubts on the view of bankruptcy ('insolvency' in the UK) as 'the last loophole for  
4  
5 polluters',<sup>55</sup> which facilitates the discharge of a company's obligations through its  
6  
7 restructuring, winding-up or dissolution,<sup>56</sup> bringing about the externalization of the costs of  
8  
9 environmental obligations which should borne by polluters.<sup>57</sup> This outcome is of interest  
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11  
12 from a UK perspective, given the similarities in context.  
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### 19 III. The insolvency 'shelter' from environmental obligations in the UK

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21  
22 Lawton and Oswald's observation that there were no data disclosing the real extent of the  
23  
24 use of bankruptcy proceedings to escape environmental liabilities, 'only unsupported  
25  
26 assertions and anecdotal "evidence"'<sup>58</sup> is reflected in the UK where, beyond a few reported  
27  
28 cases,<sup>59</sup> there is no statistical evidence of the extent to which insolvency mechanisms do in  
29  
30 fact facilitate the discharge of environmental claims.<sup>60</sup> Nor is there any official data  
31  
32 regarding the number of insolvency cases involving environmental claims; this information  
33  
34 would have to be extracted from the individual public records of corporate insolvency  
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43 <sup>55</sup> Bergmann (n.41), 2; D. Baker, 'Bankruptcy – the Last Environmental Loophole?' (1993) 34 S.Tex.L.Rev.379.

44 <sup>56</sup> J. Van Patten and R. Puetz, 'Bankruptcy and Environmental Obligations: the Clash between Private Relief and  
45 Public Policy' (1990) 35 S.D.L.Rev. 220, 220.

46 <sup>57</sup> See e.g. J. Boyd, 'Compensation for Oil Pollution Damages: The American Oil Pollution Act as an Example for  
47 Global Solutions?': 'Bankruptcy and corporate dissolution defeat the law's ability to force polluter cost  
48 internalization by allowing many firms to abandon environmental responsibilities after reaping short-term  
49 financial gains. Nonrecoverable environmental obligations are more than a theoretical possibility. The U.S.  
50 landscape is littered with environmentally damaging operations that were either abandoned entirely or left  
51 unreclaimed due to bankruptcy'; M. Faure and J. Hu (eds) *Prevention and Compensation of Marine Pollution  
52 Damage: Recent Developments in Europe, China and the US* (Kluwer, 2008), 157.

53 <sup>58</sup> (n.32), 456.

54 <sup>59</sup> In addition to those cited in n.29, see *County Durham Environmental Trust Ltd v Twizell* [2009] EWHC 2173.

55 <sup>60</sup> See however Shelbourn's comments linking increased 'burden of environmental protection' with growth in  
56 the number of companies in financial difficulties, and referring to the departure of a number of landfill  
57 operators from the sector (some via the insolvency route) as a result of increased regulation: C. Shelbourn,  
58 'Waste Management and the Insolvent Company' 2000 J.P.L 134, 138; and C. Shelbourn, 'Waste Management  
59 Sites, Insolvency and Long Term Financial Provisions - the Story Continues...' 2004 J.P.L. 697, 706.  
60

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3 cases.<sup>61</sup> While the Insolvency Service is currently releasing company liquidation statistics  
4  
5 broken down by industrial sector,<sup>62</sup> environmental claims can arise in a variety of areas,  
6  
7 such as mining and quarrying, manufacturing, transportation, energy or water supply. The  
8  
9 absence of numerical data which provides a breakdown of the different types of creditors  
10  
11 involved in a particular insolvency proceeding is an additional constraint.<sup>63</sup>  
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15 Similarly, the conflict which Lawton and Oswald identified between environmental  
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17 legislation which aims to impose responsibility for remedying contamination in accordance  
18  
19 with the polluter pays principle, and the 'fresh start' provided for debtors by the bankruptcy  
20  
21 regime, releasing them from their debts and ensuring equitable distribution of their assets  
22  
23 among their creditors,<sup>64</sup> is evident in some UK cases. As mentioned in Part I above, this  
24  
25 includes cases where the courts have been called upon to resolve the question 'whether a  
26  
27 Waste Management Licence granted pursuant to the provisions of [Part] 11 of the  
28  
29 Environmental Protection Act 1990 ... and held by a company can be disclaimed by a  
30  
31 liquidator of that company pursuant to s.178 of the Insolvency Act 1986'.<sup>65</sup> In *Re Celtic*  
32  
33 *Extraction Ltd*,<sup>66</sup> the established authority on this point, the Court of Appeal concluded that  
34  
35 a liquidator could disclaim a waste management licence on the basis that it was onerous  
36  
37 property, finding that it could not be inferred from the legislation that the application of the  
38  
39 'polluter pays' principle extended to cases where the polluter could not pay, thus shifting  
40  
41 the costs onto its unsecured creditors.<sup>67</sup> This decision was considered to have provided 'a  
42  
43 potentially useful mechanism by which insolvency practitioners may avoid environmental  
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51 <sup>61</sup> R. Tarling, 'The absence of insolvency data' 2013 Co Law 234.

52 <sup>62</sup> 'Industry breakdown' link accessible from, e.g., [https://www.gov.uk/government/statistics/insolvency-](https://www.gov.uk/government/statistics/insolvency-statistics-january-to-march-2016)  
53 [statistics-january-to-march-2016](https://www.gov.uk/government/statistics/insolvency-statistics-january-to-march-2016) (accessed 31 July 2016).

54 <sup>63</sup> Tarling, (n.61).

55 <sup>64</sup> Lawton and Oswald, (n.32) 460.

56 <sup>65</sup> *Re Mineral Resources*, (n.11) [1] – emphasis added.

57 <sup>66</sup> *Re Celtic Extraction* (n.10).

58 <sup>67</sup> *Re Celtic Extraction* *ibid*, [39].  
59  
60

1  
2  
3 liabilities facing companies in liquidation'.<sup>68</sup> Furthermore, the observation that the outcome  
4  
5 of this case would create perverse incentives for creditors to push for their debtors'  
6  
7 liquidation 'in order to *reduce* the quantum of clean-up costs which they would have to bear  
8  
9 in administration or similar proceedings' and thereby protect the debts they would recover  
10  
11 from being further diminished<sup>69</sup> is borne out in the recent Scottish Coal and UK Coal  
12  
13 insolvencies. As sketched in Part I above, in these instances liquidation proceedings were  
14  
15 embarked on for the purpose of enabling the disclaimer power (which applies only to  
16  
17 companies which are being wound up<sup>70</sup>) to be used to minimise the insolvent estate's  
18  
19 exposure to clean-up costs – a motivation acknowledged in the litigation concerning the  
20  
21 abandonment of statutory licences and land held by the Scottish Coal Company Ltd.<sup>71</sup>  
22  
23  
24  
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27  
28 The disclaimer facility also enabled the liquidators of UK Coal Ltd to dispense with a fire-  
29  
30 damaged colliery on the basis that this 'was a high risk site with substantial liabilities  
31  
32 attaching to it. The costs of securing and holding the mine ... would have been an expense  
33  
34 and, as such ... would have been paid ahead of the dividend to creditors'.<sup>72</sup> Similarly to the  
35  
36 case of Scottish Coal, this entry into liquidation for the purpose of disclaiming sites and/or  
37  
38 statutory licences proved necessary notwithstanding the fact that it had been possible to  
39  
40 sell or restructure the bulk of the debtors' business or assets.<sup>73</sup> Thus, although the case law  
41  
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47 <sup>68</sup> Shelbourn, 'Waste Management and the Insolvent Company' (n.60), 138.

48 <sup>69</sup> (n.30), 204 (original emphasis).

49 <sup>70</sup> See (n.25).

50 <sup>71</sup> *Re Directions, Nimmo* (n.26), [6]-[7] – 'SCC's directors applied for the company to be wound up rather than  
51  
52 appoint an administrator because it was insolvent and did not wish the cost of performing its environmental  
53  
54 obligations to use up the funds realised from the sale of its assets. . . . The [liquidators] wish to protect SCC's  
55  
56 unsecured creditors and the bank, as holder of the floating charge, from the dissipation of the proceeds of  
57  
58 disposal of SCC's assets which continued performance of the statutory obligations will entail.' appeal judgment  
59  
60 *Re Scottish Environment Protection Agency* [2013] CSIH 108.

<sup>72</sup> <http://www.pwc.co.uk/business-recovery/administrations/ukcoal/index.jhtml> (accessed 31 July 2016). See  
also *Firmin v Aardvark TMC Ltd* (n.23), [6] and [20]-[21].

<sup>73</sup> PWC statement <http://www.pwc.co.uk/business-recovery/administrations/ukcoal/index.jhtml>; news release  
by purchaser Hargreaves Services plc 'Acquisition of Assets from The Scottish Coal Company Limited) in

1  
2  
3 regarding the conflict between environmental law and insolvency law has grappled with the  
4  
5 question of whether the Environmental Protection Act 1990 should prevail over the  
6  
7 Insolvency Act 1986,<sup>74</sup> as outlined in Part I above with reference to the recent liquidations of  
8  
9 UK Coal Ltd, Aardvark (TMC) Ltd and Scottish Coal, it has to some extent proved possible in  
10  
11 practice for the parties to a corporate insolvency (i.e. the administrators/liquidators, debtor  
12  
13 organizations, and purchasers of the business/assets) to mediate these competing interests.  
14  
15

16  
17  
18 Against the backdrop of prominent cases such as *Re Celtic Extraction Ltd*, it is unsurprising  
19  
20 that calls for the UK legislature to address the conflict between environmental and  
21  
22 insolvency law have been based on significant judicial decisions, rather than widespread  
23  
24 perceptions of the abuse or strategic use of insolvency proceedings. Specific concerns relate  
25  
26 to the resolution of the conflict between these areas of law by the judiciary rather than  
27  
28 through legislation,<sup>75</sup> particularly where this creates uncertainty regarding the status of  
29  
30 environmental claims.<sup>76</sup> The questions whether an environmental regulator is entitled to  
31  
32 prove its claim in liquidation as an unsecured creditor following successful disclaimer of a  
33  
34 statutory licence,<sup>77</sup> or environmental liabilities enjoy some priority status as liquidation  
35  
36 expenses,<sup>78</sup> have not been conclusively settled. Prompted by the most recent judgment (in  
37  
38 the Scottish Coal Company liquidation) regarding the question whether the fulfilment of  
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45 liquidation) ("*Scottish Coal*") 5 July 2013; available from [http://hsprod.investis.com/ir/hsp/ir.jsp?page=news-](http://hsprod.investis.com/ir/hsp/ir.jsp?page=news-item&item=1546188226560000)  
46 [item&item=1546188226560000](http://hsprod.investis.com/ir/hsp/ir.jsp?page=news-item&item=1546188226560000) (accessed 31 July 2016); *Firmin v Aardvark* *ibid*, [5].

47 <sup>74</sup> See e.g. *Re Wilmott Trading Ltd* (n.29), 553, referring to the conclusion in *Re Mineral Resources* (n.11) 'that  
48 where the insolvency legislation appeared to collide with the environmental protection legislation ... the  
49 environmental protection legislation should prevail'; and the rejection in *Re Celtic Extraction* (n.10), [46] of  
50 the notion that s.35(11) Environmental Protection Act and s.178 Insolvency Act 1986 'are mutually inconsistent  
51 and irreconcilable'.

52 <sup>75</sup> Shelbourn 'Waste Management Sites, Insolvency and Long Term Financial Provisions ...' (n.60), 707; Keay  
53 and de Prez, (n.30), 101-111.

54 <sup>76</sup> Armour, (n.30) 203-204.

55 <sup>77</sup> D. Case and P. de Prez, 'The Power of Disclaimer and Environmental Licences' 2000 *Insolv.L.* 87, 90; *Re*  
56 *Scottish Environment Protection Agency* (n.71), [146]; *Re Mineral Resources Ltd* (n.11), 758-760.

57 <sup>78</sup> *Re Scottish Environment Protection Agency* *ibid*, [143]-[145]; P. Cranston, 'The impudence of liquidators: the  
58 scope and limits of disclaimer' (2014) 7 *C.R.& I.* 3.  
59  
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1  
2  
3 environmental liabilities should prevail over repayment to creditors, the UK Insolvency  
4  
5 Lawyers Association urged that any compelling 'policy arguments for making creditors meet  
6  
7 environmental liabilities before the state steps in ... should be [adopted as] a matter of  
8  
9  
10 conscious insolvency policy, following debate and bearing in mind the potentially significant  
11  
12 and unpredictable nature of such environmental liabilities'.<sup>79</sup>  
13

14  
15 Adding to this cautionary note, this paper argues that any shift in insolvency policy towards  
16  
17 allowing environmental liabilities to be satisfied before repayment to creditors, should  
18  
19 furthermore be informed by an analysis of the means by which environmental law and  
20  
21 policy mechanisms enable the scale of such liabilities to be minimised, and thus affect the  
22  
23 need for reform. It begins by highlighting and evaluating some relevant factors below.  
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#### 32 **IV. Factors limiting the incidence of environmental claims in the UK**

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35 Baird contends that where environmental regulations are seen to have a limited effect in  
36  
37 the context of insolvency, firms may be encouraged to initiate proceedings to avoid their  
38  
39 obligations.<sup>80</sup> Conversely, as argued in this paper, the effectiveness of the policies and  
40  
41 regulations which apply outside insolvency can reduce the motivation or likelihood for  
42  
43 companies to resort to proceedings as a means of escaping their environmental obligations.  
44  
45 It is therefore worth examining how far insolvency risks are directly considered and/or  
46  
47 mitigated through tools such as (a) the operation of the contaminated land regime, (b)  
48  
49 criminal sentencing practice, and (c) the growing emphasis on the environment as a tool for  
50  
51 economic growth. These are considered in turn below.  
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54

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56 <sup>79</sup> 'Scottish Coal Company - Disclaimer, environmental liabilities and liquidation expenses' Bulletin No. 533  
57 (2014).

58 <sup>80</sup> D. Baird, 'A World Without Bankruptcy (1987) 50 L.C.P. 173,190-191.  
59  
60



#### IV(a) Role of the contaminated land regime

The regime for dealing with historical problems of contaminated land occupies an important place among the different types of financial obligations related to the environment which can arise. The costs of remediating contaminated land can be substantial – running into millions of pounds,<sup>81</sup> and therefore potentially overwhelming for a debtor. The original polluter of the land may be incapable of fulfilling its responsibility to bear these costs<sup>82</sup> - a problem which can be especially acute with respect to polluting businesses which have ceased trading.<sup>83</sup> From the perspective of an enforcement authority, it becomes necessary to attach responsibility to another ‘appropriate person’ such as an owner or occupier of the contaminated land.<sup>84</sup> However, the complexity of the process of identifying and imposing liability on appropriate persons can involve local authorities in expensive legal wrangles,<sup>85</sup> and this can prove a deterrent to enforcement activities aimed at ensuring that contaminated sites are cleaned up.<sup>86</sup> More generally, inherent flaws in the statutory regime for the remediation of contaminated land (laid down in Part 2A Environmental Protection Act 1990) may be seen to have rendered it unworkable, to the extent of hampering its

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<sup>81</sup> The regime is aimed at dealing with land ‘that poses a significant risk to health or the environment, where there is no alternative solution’ – Department for Environment, Food and Rural Affairs, *Environmental Protection Act 1990: Part 2A Contaminated Land Statutory Guidance* (Crown, 2012), 2. Recent examples of extensive liability include a polluted limestone quarry in Wales – ‘NRW finally recoups costs for toxic quarry’ *ENDS* (25 August 2015), and a 20 kilometre plume of contaminated groundwater in Hertfordshire – ‘Redland and Crest to start site clean-up’ *ENDS* (26 March 2010).

<sup>82</sup> In accordance with its obligations under the Environmental Protection Act 1990 (‘EPA 1990’), s.78F(2)-(3).

<sup>83</sup> S. Evans, ‘Contaminated land: how to fix Part 2A’ 2014 *ENDS* 467, 38. See e.g. *Environment Agency v Hillridge* (n.29), where the trust fund set aside under the conditions of a waste management licence became vested in the Crown as *bona vacantia* once the licence was disclaimed in the company’s liquidation – thwarting the Environment Agency’s recourse to the fund for the purpose of cleaning up the contaminated land.

<sup>84</sup> In accordance with the EPA 1990, s.78F(4)-5).

<sup>85</sup> The history and operation of the Part 2A regime are comprehensively analysed by V. Fogleman: ‘The contaminated land regime: time for a regime that is fit for purpose’ Part 1: (2014) 6(2) *I.J.L.B.E.* 43, and Part 2: (2014) 6(2) *I.J.L.B.E.* 129.

<sup>86</sup> S. Evans, ‘Insurance recovery: a blank cheque for contaminated land?’ *ENDS* (24 September 2013). In examples cited in n.81 above, the companies which were pursued by the regulators denied responsibility.

1  
2  
3 ability to facilitate the voluntary remediation of contaminated land.<sup>87</sup> Notwithstanding  
4  
5 these difficulties, two particular aspects of the regime's operation play a considerable part  
6  
7 in controlling the risk of insolvency arising from remediation obligations. For the purposes of  
8  
9 this paper, it is therefore instructive to consider how the planning system enables the costs  
10  
11 of cleaning up contaminated sites to be privately absorbed by developers, and the manner  
12  
13 in which the hardship criteria embodied in the Part 2A statutory regime provide a means of  
14  
15 anticipating and negating the possibility of claims for remedial costs being reflected among  
16  
17 the debts payable in an insolvency.  
18  
19  
20  
21

22  
23 Recent reviews of the progress made in dealing with contaminated land in England and  
24  
25 Wales have identified the planning system as foremost among the methods of remediating  
26  
27 existing contamination.<sup>88</sup> The use of the planning regime to deal with contaminated land by  
28  
29 facilitating the development of such sites was estimated at 80-90% of contaminated sites in  
30  
31 England and Wales between 2000 and 2007 (and 93% in Wales by the end of 2013).<sup>89</sup> The  
32  
33 Environment Agency regards this as 'a very cost-effective way to manage land  
34  
35 contamination as those who will benefit from the development usually pay to remediate it',  
36  
37 compared with the taxpayer-funded cost of a regulatory intervention.<sup>90</sup>  
38  
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42  
43 This use of the planning system is complemented by the Part 2A statutory regime for  
44  
45 dealing with contaminated land, which is targeted at contamination posing unacceptable  
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51 <sup>87</sup> V. Fogleman, 'The contaminated land regime: time for a regime that is fit for purpose (Part 2)' (2014) 6(2)  
52 I.J.L.B.E. 129, 135.

53 <sup>88</sup> *Dealing with Contaminated Land in England and Wales* (Environment Agency, 2009), 5; *The State of*  
54 *Contaminated Land in Wales* (Natural Resources Wales, 2016), 10.

55 <sup>89</sup> *Dealing with Contaminated Land* *ibid*, 6; *The State of Contaminated Land*, *ibid*.

56 <sup>90</sup> *Dealing with Contaminated Land* *ibid*, 5. See *The State of Contaminated Land*, (n.88): '...development of land  
57 through the planning process means that the cost of dealing with contaminated land is born (sic) by those  
58 likely to benefit from the redevelopment. Taking regulatory action is usually a last resort and can mean that  
59 the taxpayer has to bear some of the cost.'  
60

1  
2  
3 risks to human health and the environment'.<sup>91</sup> The policy objective underlying Part 2A of  
4  
5 ensuring that 'the burdens faced by individuals, companies and society as a whole are  
6  
7 proportionate'<sup>92</sup> is supported by the enforcement authorities' power, in situations where  
8  
9 they have engaged in remediation activities and are entitled to recover the reasonable costs  
10  
11 thereof from the appropriate person(s), to have regard to 'any hardship which the recovery  
12  
13 may cause to the person from whom the cost is recoverable', in deciding whether to seek  
14  
15 recovery of some or all of the costs.<sup>93</sup> With respect to small or medium-sized enterprises,  
16  
17 relevant considerations include whether recovery of the full cost involved 'would mean that  
18  
19 the enterprise is likely to become insolvent and thus cease to exist; and ... if so, the cost to  
20  
21 the local economy of such a closure'.<sup>94</sup> If the cost to the local economy of an enterprise's  
22  
23 closure appears to outweigh the remediation costs borne by the enforcing authority, 'the  
24  
25 authority should consider waiving or reducing its costs recovery to the extent needed to  
26  
27 avoid making the enterprise insolvent'.<sup>95</sup> Local authorities' decisions regarding cost recovery  
28  
29 may also be informed by relevant policies on promoting enterprise or encouraging  
30  
31 economic development.<sup>96</sup>

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34  
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38  
39 It would therefore seem unlikely that remediation costs would play a significant role in  
40  
41 bringing about the insolvency of a company, or in fact have a strong presence among the  
42  
43 environmental claims. This is reinforced by the indication in the Department for  
44  
45 Environment, Food and Rural Affairs' ('Defra') cost recovery guidance that it is unnecessary  
46  
47 to waive or reduce costs where 'it appears that the enterprise would be likely to become  
48  
49 insolvent whether or not recovery of the full cost takes place; or ... that the enterprise could  
50  
51

52  
53 <sup>91</sup> *Part 2A Contaminated Land Statutory Guidance* (n.81), 1.4-1.5.

54 <sup>92</sup> *Ibid*, 1.4.

55 <sup>93</sup> EPA 1990, s.78(P)(2); 'enforcing authority' defined s.78A(9).

56 <sup>94</sup> *Part 2A Contaminated Land Statutory Guidance* (n.81), 8.14. Small/medium-sized enterprise defined 8.17.

57 <sup>95</sup> *Ibid*, 8.15.

58 <sup>96</sup> *Ibid*, 8.18.

1  
2  
3 be kept in, or returned to, business even it does become insolvent under its current  
4  
5 ownership'.<sup>97</sup> Despite the long-standing concern that businesses are able to 'escape  
6  
7 environmental and other liabilities through careful corporate structuring',<sup>98</sup> enforcing  
8  
9 authorities are precluded from waiving or reducing costs where they are 'satisfied that an  
10  
11 enterprise has deliberately arranged matters so as to avoid responsibility for the costs of  
12  
13 remediation'.<sup>99</sup>  
14  
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16  
17  
18 Thus, a closer study of the handling of contaminated land in the UK shows that the 'polluter  
19  
20 pays' principle is not strictly enforced, insofar as the costs of remediation may be  
21  
22 shouldered by private sector developers or absorbed by the State through a costs waiver or  
23  
24 reduction by an enforcing authority. This is borne out by recent evidence indicating that  
25  
26 local authorities make limited efforts to recover remediation costs from current owners or  
27  
28 occupiers of land, especially homeowners (rather than the parties directly responsible for  
29  
30 the presence of the contaminating substance).<sup>100</sup> Lees notes that this reticence is apparently  
31  
32 premised on the assumption that it follows from the notion of fairness underlying the  
33  
34 'polluter pays' principle that it would be 'unfair to make an individual pay to clean up harm  
35  
36 which was not caused by his or her actions'.<sup>101</sup> The operation of the Part 2A regime  
37  
38 furthermore reveals the extent to which at enforcement level, hardship criteria can be  
39  
40 applied to avert insolvency in what may be considered 'genuine' cases: that is, instances  
41  
42 where an enterprise would not face insolvency if it were not for its liability for remediation  
43  
44 costs, or it is prevented by such liability from returning to a state of solvency.  
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54 <sup>97</sup> Ibid, 8.16.

55 <sup>98</sup> Lawton & Oswald, (n.32) 460-461

56 <sup>99</sup> *Part 2A Contaminated Land Statutory Guidance* (n.81), 8.16.

57 <sup>100</sup> E. Lees, 'Interpreting the contaminated land regime: should the 'polluter' pay?' 2012 *Env. L. Rev.* 98, 102.

58 <sup>101</sup> Ibid, 103.  
59  
60

#### IV(b) Role of criminal sentencing policy and practice

The impact of criminal sentencing policy and practice is likewise strongly relevant in considering the extent to which fines for environmental offences may cause or contribute to a company's failure, or encourage recourse to insolvency proceedings. Although environmental enforcement techniques have been expanded through the introduction of the civil sanctions framework<sup>102</sup> aimed at providing 'a more proportionate and flexible response to cases of regulatory non-compliance normally dealt with in the criminal courts',<sup>103</sup> the criminal law continues to play a vital role in relation to serious breaches of environmental law.<sup>104</sup> Hence, this analysis focuses on the effectiveness of criminal sentencing policy and practice in reducing the potential for sanctions arising from a company's breach of its environmental obligations to contribute/lead to its insolvency.

The strength of this element should be regarded against the backdrop of a recent review of sentencing for environmental offences in the UK. The review highlighted concerns that fines were not sufficiently high, did not reflect the severity of offences or have an adequate deterrent effect, and that there were inconsistencies in fines involving similar offences committed by similar offenders across the country.<sup>105</sup> Research identified magistrates' limited experience of sentencing environmental offences due to the infrequency with which these came to court, and their 'lack of confidence' in evaluating the seriousness of offences

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<sup>102</sup> Introduced by the Regulatory Enforcement and Sanctions Act 2008 ('RES Act').

<sup>103</sup> Department for Business Enterprise and Regulatory Reform, *Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act* (Crown, 2008), 7; RES Act, Explanatory Notes paragraphs 3-9.

<sup>104</sup> R. Macrory, 'Sentencing guidance for large companies' 2014 *ENDS* 469, 29.

<sup>105</sup> Sentencing Council, *Environmental Offences Guideline Consultation* (Crown, 2013), 5.

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2  
3 and appropriate levels of fines, especially with respect to corporate offenders.<sup>106</sup> Levels of  
4  
5 fines 'in some relatively severe cases involving corporations were too low'.<sup>107</sup>  
6  
7  
8 Sentencing guidelines for environmental offences,<sup>108</sup> released following the review, govern  
9  
10 'high volume offences'<sup>109</sup> under key environmental legislation.<sup>110</sup> The guidelines emphasise  
11  
12 that compensation orders should be considered as a first step for injury, loss or damage,  
13  
14 and prioritised over financial penalties where an offender is of limited means.<sup>111</sup> This  
15  
16 specific prompt<sup>112</sup> may assist in overcoming past judicial unease regarding the role of the  
17  
18 criminal courts in dealing with 'complex compensation issues',<sup>113</sup> and lead to a  
19  
20 predominance of compensation orders over fines in relation to financially distressed  
21  
22 companies. In determining the appropriate level of fine to impose according to the  
23  
24 seriousness of the offence, aggravating factors include evidence of its wider impact (e.g. on  
25  
26 the community) or its commission for financial gain.<sup>114</sup> Conversely, mitigating factors include  
27  
28 steps taken to remedy the problem, voluntary payments made to remedy the harm caused,  
29  
30 and the absence of commercial motivation or lack of financial gain.<sup>115</sup> The guidelines  
31  
32 furthermore dictate a series of steps whereby the court determines that its sanction  
33  
34 'removes any economic benefit derived from the offending' and is proportionate to the  
35  
36 offender's means, notably taking account of the principle that  
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44  
45 <sup>106</sup> Ibid.

46 <sup>107</sup> Sentencing Council, *Final resource assessment: Environmental Offences* (Crown, 2014), 8.2.

47 <sup>108</sup> Sentencing Council, *Environmental Offences: Definitive Guideline* (Crown, 2014).

48 <sup>109</sup> I. Kaminski, 'Sentencing guidelines raise fines for environmental offences' *ENDS Report* (26 February 2014).

49 <sup>110</sup> *Environmental Offences: Definitive Guideline* (n.108), 3 and 14.

50 <sup>111</sup> *Definitive Guideline* *ibid.*, 4.

51 <sup>112</sup> Sentencing Council, *Environmental Offences: Response to Consultation* (Crown, 2014), 4.

52 <sup>113</sup> *R v Thames Water Utilities Ltd* [2010] EWCA Crim 202, [39].

53 <sup>114</sup> *Definitive Guideline* (n.108), 11.

54 <sup>115</sup> *Ibid.* As with aggravating factors, this list is non-exhaustive. In the first case applying these guidelines, *R v Thames Water Utilities Ltd* [2015] EWCA Crim 960: 'In environmental pollution cases [relevant mitigating features] will include prompt and effective measures to rectify the harm caused by the offence and to prevent its recurrence, frankness and co-operation with the authorities, the prompt payment of full compensation to those harmed by the offence, and a prompt plea of guilty. In addition, significant expense voluntarily incurred – so-called "reparation" – in recognition of the public harm done should be taken into account...' (at [[41]).

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2  
3 The combination of financial orders must be sufficiently substantial to have  
4  
5 a real economic impact which will bring home to both management and  
6  
7 shareholders the need to improve regulatory compliance. **Whether the**  
8  
9 **fine will have the effect of putting the offender out of business will be**  
10  
11 **relevant; in some bad cases this may be an acceptable consequence.**<sup>116</sup>  
12  
13  
14

15  
16 Further 'factual elements' relevant to increasing or reducing the proposed fine include the  
17  
18 extent to which a fine impairs the offender's ability to compensate victims or make the  
19  
20 organisational changes necessary to improve compliance, and the impact of the fine on  
21  
22 employees, customers/service users and the local economy.<sup>117</sup> In considering an offender's  
23  
24 ability to pay a financial penalty, the court has 'the power to allow time for payment or to  
25  
26 order that the amount be paid in instalments'.<sup>118</sup> The existence of corporate group  
27  
28 relationships, viewed in academic literature as a means of curbing liability through the use  
29  
30 of subsidiaries which are undercapitalised or subject to intra-group transfers of value,<sup>119</sup> is  
31  
32 relevant to the adjustment of fines insofar as a court considering an offender's financial  
33  
34 circumstances may be influenced by any demonstration 'that the resources of a linked  
35  
36 organisation are available and can properly be taken into account'.<sup>120</sup>  
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45 <sup>116</sup> *Definitive Guideline* (n.108), 12 (emphasis added).

46 <sup>117</sup> *Ibid*, 13.

47 <sup>118</sup> *Ibid*, 12.

48 <sup>119</sup> F. Easterbrook and D. Fischel, 'Limited liability and the corporation' (1985) 52 *University of Chicago Law*  
49 *Review* 89, 111; H. Anderson, 'Parent Company Liability for Asbestos Claims: Some International Insights'  
50 (2011) 31 *LS* 547, 551; A. Ringleb and S. Wiggins, 'Liability and Large-Scale Long-Term Hazards' (1990) 98  
51 *J.Pol.Econ.*574; M. Carey, 'Piercing the Veil When Corporate Subsidiaries Commit Torts' (2008)  
52 <http://ssrn.com/abstract=1309302>, 32-33 (accessed 31 July 2016). See in particular Hansmann and Kraakman's  
53 indication in 1991 that a large proportion of small firms entering all hazardous industries in the US were  
54 motivated primarily by a desire to avoid liability for consumer, employee and environmental harms; In  
55 addition, empirical evidence indicated that increasing exposure to tort liability (including potentially massive  
56 liability for environmental harms) had led to widespread reorganisation of businesses to evade damage claims  
57 – H. Hansmann and R. Kraakman, 'Toward Unlimited Shareholder Liability for Corporate Torts' (1991) 100 *Yale*  
58 *L.J.* 1879, 1881.

59 <sup>120</sup> *Definitive Guideline* (n.108), 6.  
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1  
2  
3 The courts' overall discretion to mould the sentence to individual circumstances<sup>121</sup> suggests  
4  
5 that the need for an insolvency shelter for companies subject to criminal sanctions is  
6  
7 minimal. At the same time, the inadequate sentencing of corporate offenders prior to the  
8  
9 introduction of the guidelines (among the reasons for reform in this area, as identified  
10  
11 above), diminishes the possibility that an insolvency 'loophole' was relied on in the past as a  
12  
13 means of evading criminal penalties. Historically in fact, an offender's substantial voluntary  
14  
15 reparation for harm could negate the need for a compensation order, and provide a strong  
16  
17 mitigating factor in support of a reduction in the deterrent (and possibly punitive) element  
18  
19 of a fine. In *R v Thames Water Utilities Ltd*, decided in 2010,<sup>122</sup> the offender's  
20  
21 'unprecedented [voluntary] payment and pledge of the total sum of £500,000 – a sum vastly  
22  
23 in excess of any which the court could have ordered by way of compensation' was among  
24  
25 the mitigating features weighed against the seriousness of the offence.<sup>123</sup> The Court of  
26  
27 Appeal noted that a misleading impression may be created in such circumstances where 'on  
28  
29 the face of the court record, a relatively modest sentence may have been imposed for what  
30  
31 was, in fact, an offence which would normally attract a higher (or possibly much higher)  
32  
33 sentence'.<sup>124</sup> Thus, seemingly low fines might not adequately reflect the extent to which an  
34  
35 offender has internalised the costs of its harmful activities, sometimes well beyond the  
36  
37 amount of any potential compensation order.<sup>125</sup> The implementation of the new sentencing  
38  
39 guidelines may have the same impact: in the first decision involving their application,  
40  
41 incidentally also *R v Thames Water Utilities Ltd*, the Court of Appeal considered that '[c]lear  
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43 and accepted evidence from the Chief Executive or Chairman of the main board that the  
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54 <sup>121</sup> *Environmental Offences: Response to Consultation* (n.112), 8.

55 <sup>122</sup> *R v Thames Water Utilities Ltd* [2010] EWCA Crim 202.

56 <sup>123</sup> *Ibid.*, [50].

57 <sup>124</sup> *Ibid.*

58 <sup>125</sup> *Ibid.*, [49].



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2  
3 main board was taking effective steps to secure substantial overall improvement in the  
4  
5 company's fulfilment of its environmental duties would be a significant mitigating factor'.<sup>126</sup>  
6  
7

8 While an escalation in the levels of fines imposed in cases involving offences committed by  
9  
10 companies is predicted following the release of the new sentencing guidelines,<sup>127</sup> the  
11  
12 requirement for sentences to be proportionate<sup>128</sup> will affect the levels of fines imposed on  
13  
14 certain types of companies. For small companies, it is recognised that a 'degree of overlap'  
15  
16 should be maintained between the range of sentences applicable to individual offenders  
17  
18 and to small companies,<sup>129</sup> to prevent disparities between sentences for small companies  
19  
20 and unincorporated enterprises with similar characteristics (e.g. sole trader or family-run  
21  
22 business).<sup>130</sup> This enables artificial distinctions to be avoided, but from the point of view of  
23  
24 any investigation, it also means that data regarding the effect of environmental liabilities on  
25  
26 small companies would not easily be generalizable.  
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32  
33 Non-generalizability is also evident in the sentencing of large companies, where in taking  
34  
35 account of the financial circumstances of an offender,<sup>131</sup> it is seen as being of 'particular  
36  
37 importance',<sup>132</sup> that fines should be fixed so as to ensure 'that the message is brought home  
38  
39 to the directors and members of the company (usually the shareholders)'.<sup>133</sup> The recent  
40  
41 Court of Appeal decision in *R v Sellafield Ltd; R v Network Rail Infrastructure Ltd*<sup>134</sup> illustrates  
42  
43 how this objective is applied in relation to environmental and health and safety offences  
44  
45 committed by companies with a turnover exceeding £1 billion.  
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51 <sup>126</sup> *R v Thames Water Utilities Ltd* [2015] EWCA Crim 960, [41].

52 <sup>127</sup> *Final resource assessment* (n.107), 8.2.

53 <sup>128</sup> *Definitive Guideline* (n.108), 12.

54 <sup>129</sup> *Guideline Consultation* (n.105), 24.

55 <sup>130</sup> *Response to Consultation* (n.112), 19-20; *Definitive Guideline* (n.108), 7-10.

56 <sup>131</sup> s.164 Criminal Justice Act 2003.

57 <sup>132</sup> *R v Thames Water Utilities* (n.126), [35].

58 <sup>133</sup> *R v Sellafield Ltd; R v Network Rail Infrastructure Ltd* [2014] EWCA Crim 49, [6].

59 <sup>134</sup> *ibid.*  
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2  
3 This matter involved appeals by Sellafield Ltd ('SL') and Network Rail Infrastructure Ltd  
4 ('NRIL') against fines between £500,000-£700,000 for breach of requirements for the  
5 storage and disposal of radioactive waste, and a collision at an unmanned level crossing  
6 respectively, on the basis that the fines were manifestly excessive. Comparing the  
7 governance of SL with that of NRIL, the Court of Appeal considered that it was evident that  
8 the imposition of a fine would affect them differently. As an 'ordinary commercial  
9 company',<sup>135</sup> SL's shareholders enjoyed profits by way of dividend and were few enough in  
10 number to be able to hold the directors to account for criminal breaches and future  
11 compliance;<sup>136</sup> whereas NRIL was owned by a parent body which was a 'not for dividend  
12 company'<sup>137</sup> and invested its profits in the railway infrastructure 'for the public benefit'.<sup>138</sup> A  
13 substantial fine could therefore harm the public interest by undermining investment in the  
14 rail network and creating a deficit which would necessitate support from State funds.<sup>139</sup> The  
15 court nonetheless had regard to evidence that directors' bonus remuneration had been  
16 reduced partly due to NRIL's poor safety record, a material factor in cases 'where a fine  
17 inflicts no direct punishment on anyone':

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If...a bonus incentivises an executive director to perform better, the prospect of a significant reduction of a bonus will incentivise the executive directors on the board of companies such as Network Rail to pay the highest attention to protecting the lives of those who are at real risk from its activities. In short, it will demonstrate to the court the company's

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<sup>135</sup> Ibid, [7].

<sup>136</sup> Ibid, [56].

<sup>137</sup> Ibid, [57].

<sup>138</sup> Ibid, [69].

<sup>139</sup> Ibid.

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3 efforts, at the level of those ultimately responsible, to address its offending  
4  
5 behaviour, to reform and rehabilitate itself and to protect the public.<sup>140</sup>  
6  
7

8  
9 Thus, with respect to companies fulfilling a 'public' role, apparently low levels of fines may  
10 be complemented by the financial loss borne by their management. Together with the  
11 pressure exerted on directors by significant fines imposed on large commercial concerns  
12 such as SL (equivalent to slightly 'more than a week's profit and about 2% of its weekly  
13 income'<sup>141</sup>), these sentencing factors are capable of being among the less visible  
14 contributors to the changes in corporate conduct aimed at averting or minimising future  
15 liability. This is reinforced by the Court of Appeal judgment in *R v Thames Water Utilities*  
16 *Ltd*,<sup>142</sup> which indicates that in sentencing very large commercial organisations run for profit,  
17 the courts are not bound to adhere to, or even to start from, the range of fines provided by  
18 the Sentencing Council in relation to large organisations.<sup>143</sup> In the most severe of these  
19 cases, regard to an offender's full financial circumstances<sup>144</sup> could well result in a fine  
20 representing 'a substantial percentage, up to 100%, of the company's pre-tax net profit for  
21 the year in question ... even if this results in fines in excess of £100 million'.<sup>145</sup> These are  
22 consistent with the size of fines imposed in the financial services sector for breach of  
23 regulations.<sup>146</sup> In the same vein, it may be anticipated that the necessity of bringing home  
24 the aggravating effect of repeated offences to directors and shareholders in this context will  
25 bring about a significant increase in the level of fines, to an extent that would be 'sufficient  
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52 <sup>140</sup> Ibid, [70].

53 <sup>141</sup> Ibid, [65].

54 <sup>142</sup> (n.115).

55 <sup>143</sup> Ibid, [36].

56 <sup>144</sup> Ibid, [40].

57 <sup>145</sup> Ibid.

58 <sup>146</sup> Ibid.

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3 to have a material impact on the finances of the company as a whole'.<sup>147</sup> Dismissing this  
4  
5 appeal against a £250,000 fine, the Court of Appeal asserted that it would not have  
6  
7 hesitated to uphold 'a very substantially higher fine'<sup>148</sup> – an outcome in keeping with its  
8  
9 stance in previous cases involving environmental offences, against interfering with fines  
10  
11 markedly greater than six figures.<sup>149</sup> The financial implications of criminal sentencing  
12  
13 practice should accordingly produce a severely punitive or deterrent effect<sup>150</sup> for large and  
14  
15 very large companies, as compared with small and medium enterprises, a point emphasised  
16  
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18  
19 in the judgment:  
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23 Even in the case of a large organisation with a hitherto impeccable record,  
24  
25 the fine must be large enough to bring the appropriate message home to  
26  
27 the directors and shareholders and to punish them. In the case of repeat  
28  
29 offenders, the fine should be far higher and should rise to the level  
30  
31 necessary to ensure that the directors and shareholders of the organisation  
32  
33 take effective measures properly to reform themselves and ensure that  
34  
35 they fulfil their environmental obligations.<sup>151</sup>  
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40 The impact of this approach has been noted by the Environment Agency's director of legal  
41  
42 services, who discerns that a significant result of the introduction of the sentencing  
43  
44 guidelines has been 'far greater engagement from senior managers of large companies' in  
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53 <sup>147</sup> Ibid.

54 <sup>148</sup> Ibid, [46].

55 <sup>149</sup> Ibid, [38].

56 <sup>150</sup> Purposes of sentencing set out in Criminal Justice Act 2003, s.142.

57 <sup>151</sup> (n.115), [42]. See more recently I. Kaminski, 'Yorkshire Water nets record-breaking £1.1 m fine for sewage  
58 pollution' *ENDS* (29 April 2016).  
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3 response to demands from the courts for 'repeat offenders to explain at a senior level what  
4  
5 they are doing to prevent recurrences rather than leave mitigation to junior managers'.<sup>152</sup>  
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8  
9 These developments in criminal sentencing should not be viewed in isolation. Changes in  
10  
11 enforcement strategies may help, more generally, to reduce the number of criminal fines  
12  
13 imposed on companies. The recent fall in waste crime prosecutions in England for example,  
14  
15 is attributed to the Environment Agency's 'proactive approach of targeting particular  
16  
17 offenders', reserving prosecution for 'more prolific and serious offenders'.<sup>153</sup> An  
18  
19 improvement in the effectiveness of the Agency's operations may be attributable to its  
20  
21 increased reliance on intelligence resources, enhanced collaboration with other agencies,  
22  
23 and new data collection and enforcement techniques.<sup>154</sup>  
24  
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27  
28 The scale of prosecution activity with respect to environmental offences is accordingly  
29  
30 limited in its capacity to reveal the full part played by criminal sanctions in triggering or  
31  
32 encouraging entry into insolvency proceedings. While this may be seen as a consequence of  
33  
34 the breadth and effectiveness of the remediation/enforcement strategies currently  
35  
36 employed by regulators and judicial sentencing authorities, low penalty levels or numbers of  
37  
38 criminal enforcement sanctions may also be ascribed to deficiencies in implementation such  
39  
40 as those identified with respect to the nature of sentencing practice in the past. Inversely,  
41  
42 offences may be committed in an effort to stave off financial distress – in a recent  
43  
44 prosecution of a waste management company and its director for storing 80 tonnes of  
45  
46 illegal hazardous waste despite a previous conviction (with a £10,000 fine) and warnings  
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56 <sup>152</sup> P. Kellett, The EA's approach to enforcement undertakings' 2016 *ENDS* 493.

57 <sup>153</sup> *Cracking Down on Waste Crime: Waste Crime Report 2012-2013* (Environment Agency, 2013), 13.

58 <sup>154</sup> *Ibid*, 13-17.  
59  
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3 from the Environment Agency, it was admitted that deliveries of waste to the site had  
4  
5 continued 'for commercial reasons' in order to avoid insolvency.<sup>155</sup>  
6  
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8  
9 On this basis, it is submitted that it is the effectiveness of enforcement methods which calls  
10  
11 for thorough examination and response. This argument is supported by the independent  
12  
13 review of the regulation of opencast coal operations in East Ayrshire, conducted following  
14  
15 the insolvent liquidation of the Scottish Coal Company Ltd ('SCC') and Aardvark (TMC) Ltd  
16  
17 ('ATL') – both major coal-mining operators in the area – that highlighted several failings.<sup>156</sup>

18  
19 These included the 'wholly deficient and defective' process in place for calculating and  
20  
21 monitoring restoration guarantee bonds,<sup>157</sup> and 'wholly inadequate' monitoring of the sites  
22  
23 which (together with the operators' persistent breaches of their planning permission and  
24  
25 statutory agreements) 'created extensive environmental degradation'.<sup>158</sup> A consultation  
26  
27 launched by the Scottish Government in the wake of the collapse of SCC and ATL reflected  
28  
29 on how regulation of the opencast coal sector could be strengthened to ensure greater  
30  
31 restoration of sites, through various pre-emptive devices such as guarantees provided by  
32  
33 the mining operator or its parent company, industry-led restoration schemes, the  
34  
35 imposition of liability on landowners, increased community involvement through liaison  
36  
37 committees and enhanced support for planning authorities or compliance monitoring  
38  
39 activities.<sup>159</sup> Inasmuch as regulatory action through civil sanctions<sup>160</sup> or the prospect of  
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49 <sup>155</sup> C. McGlone, 'Cornish waste firm fined again for permit breach' *ENDS* (21 April 2016)

50  
51 <sup>156</sup> J. Mackinnon, C. Norman and J. Fowlie, *Report of Independent Review of Regulation of Opencast Coal  
52 Operations in East Ayrshire* (2014).

53  
54 <sup>157</sup> *Ibid.*, 4.

55  
56 <sup>158</sup> *Ibid.*

57  
58 <sup>159</sup> *Consultation on Opencast Coal Restoration and Effective Regulation* (Scottish Government, 2013) available  
59 at <http://www.gov.scot/Resource/0043/00439587.pdf> (accessed 31 July 2016).

60  
<sup>160</sup> See e.g. O. Pedersen, 'Environmental Enforcement Undertakings and Possible Implications: Responsive,  
Smarter or Rent Seeking?' (2013) 76 (2) *MLR* 319, 342-343: the self-reflection attendant on the process of  
formulating and agreeing an enforcement undertaking may bring about long-term changes in the organisation  
and conduct of offending bodies. I. Kaminski, 'The growing role of enforcement undertakings' *ENDS* (04

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2  
3 heavy criminal fines have spurred businesses to engage more actively with environmental  
4  
5 compliance requirements, this example implants some hope that corporate failures of this  
6  
7 nature will provide significant markers against which governmental authorities can measure  
8  
9 the adequacy of their enforcement policies and procedures. Such governmental  
10  
11 considerations will become increasingly important as recognition of the contribution that  
12  
13 environmental policy and regulation can make to economic growth becomes more  
14  
15 widespread, as discussed below.  
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#### 24 **IV(c) The role of the environment as a tool for economic growth**

##### 25 **IV(c)(i) Linking environmental interests with economic growth**

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29  
30 Increased emphasis in the UK on environmental policy and regulation as a tool for economic  
31  
32 growth may further lessen insolvency risks (or incentives) for businesses. Contrary to the  
33  
34 view that 'economic growth is ... necessarily at odds with the environment', the central role  
35  
36 of the natural environment in relation to economic activity and growth dictates that  
37  
38 '[e]conomic and environmental performance must go hand in hand'.<sup>161</sup> This is  
39  
40 acknowledged by Defra:  
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45 Designing policies such that the regulatory burden on the economy is  
46  
47 minimised is essential for realising all the potential growth benefits of  
48  
49 environmental policy – in terms of improving overall economic efficiency  
50  
51 and in terms of securing long-term growth. Through this, environmental  
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54 February 2014) cites the example of an environmental consultancy seeking advice from local conservation  
55 groups on behalf of an offender.

56  
57 <sup>161</sup> T. Everett, M. Ishwaran, G. Ansaloni and A. Rubin, *Economic Growth and the Environment* Defra Evidence  
58 and Analysis Series Paper 2 (Defra, 2010), 5.  
59  
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2  
3 policy can help increase prosperity and wellbeing – not just greater  
4  
5 incomes but improved health, education and quality of life – for future  
6  
7 generations.<sup>162</sup>  
8  
9

10 Measures aimed at easing regulatory burdens to enable economic growth considerations to  
11  
12 be integrated more deeply into approaches to regulation, include the duty for non-economic  
13  
14 regulators to ‘have regard to the desirability of promoting economic growth’ in exercising  
15  
16 their functions. This ‘growth’ duty, enacted through the Deregulation Act 2015,<sup>163</sup> extends to  
17  
18 regulators such as the Environment Agency and Natural England,<sup>164</sup> seeking to ensure that  
19  
20 their duties are performed in a proportionate manner and with due consideration to the  
21  
22 economic consequences of their actions.<sup>165</sup> Its introduction through primary legislation  
23  
24 signals that ‘economic consequences can and should be a key factor taken into account in  
25  
26 regulators’ decision-making’,<sup>166</sup> empowering regulators to ‘support prosperity as well as to  
27  
28 protect’ in the exercise of their regulatory functions.<sup>167</sup> The duty is expected to propel  
29  
30 regulators’ recourse towards interventions which favour growth as well as compliance,<sup>168</sup>  
31  
32 and is thus consistent with the shift from ‘traditional enforcement methods and sanctions’,<sup>169</sup>  
33  
34 in the context of environmental protection. Its significance is underlined by the expectation  
35  
36 that regulatory interventions which do not support growth should be justified.<sup>170</sup> The belief  
37  
38 that ‘protection and growth are not mutually exclusive’ and regulatory frameworks are  
39  
40 capable of contributing to both goals, has also been echoed with respect to the recent  
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49 <sup>162</sup> Ibid, 42.

50 <sup>163</sup> s.108; *Consultation Paper – Non-economic Regulators: Duty to Have Regard to Growth* (Crown, 2013), 2.7;  
51 *Government Response – Non-economic Regulators: Duty to Have Regard to Growth* (Crown, 2013).

52 <sup>164</sup> *Government Response* *ibid*, Annex A.

53 <sup>165</sup> *ibid*, 1.2.

54 <sup>166</sup> *ibid*, 2.1.

55 <sup>167</sup> *ibid*, 3.1.

56 <sup>168</sup> *ibid*, 4.10.

57 <sup>169</sup> *ibid*.

58 <sup>170</sup> *ibid*, 3.7.



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2  
3 revision of the statutory code of practice for regulators, the Regulators' Compliance Code.<sup>171</sup>

4  
5 A key principle of the newly-published Regulators' Code, to which regulators are required to  
6  
7 have regard in the adoption of policies and procedures supporting performance of their  
8  
9 duties, is that 'regulators should carry out their activities in a way that supports those they  
10  
11 regulate to comply and grow'.<sup>172</sup> This entails avoiding the imposition of unnecessary  
12  
13 burdens, considering 'whether similar social, environmental and economic outcomes could  
14  
15 be achieved by less burdensome means'; and selecting 'proportionate approaches to those  
16  
17 they regulate, based on relevant factors including, for example, business size and  
18  
19 capacity'.<sup>173</sup> It moreover requires regulators, in designing and reviewing their policies,  
20  
21 procedures and practices, to evaluate the extent to which they promote economic growth,  
22  
23 for instance by minimising the costs of compliance and the 'negative economic impacts of ...  
24  
25 regulatory activities'.<sup>174</sup>  
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#### 35 **IV(c)(ii) Waste policy and economic growth**

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38 This co-option of regulatory protection interests into the economic growth agenda, although  
39  
40 somewhat nascent, seems set to curtail rather than strengthen the likelihood of  
41  
42 environmental claims featuring widely in corporate insolvencies. The link between  
43  
44 environmental and economic interests is further supported by the development of policies  
45  
46 surrounding the prevention and reuse of waste. The Government has identified a crucial  
47  
48 priority to boost economic growth 'whilst continuing to improve the environment' through  
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55 <sup>171</sup> Ibid, 1.2; Part 2 Legislative and Regulatory Reform Act 2006.

56 <sup>172</sup> Department for Business Innovation and Skills, *Regulators' Code* (Crown, 2014), 3.

57 <sup>173</sup> Ibid, 1.1.

58 <sup>174</sup> Ibid, 1.2.

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2  
3 the development of ‘a more resource efficient, circular economy’.<sup>175</sup> Effective waste  
4  
5 prevention, reduction and reuse will not only enable businesses to make a major  
6  
7 contribution to the economy, but also create savings capable of enhancing their financial  
8  
9 position and competitiveness.<sup>176</sup> Added benefits include generating opportunities for the  
10  
11 development of innovative products, technologies and services; and reducing the  
12  
13 environmental impact of waste in the form of carbon emissions and the use of hazardous  
14  
15 materials.<sup>177</sup> Similarly, the House of Lords Science and Technology Select Committee has  
16  
17 stressed that ‘environmental and economic imperatives need not be seen to be in conflict’ in  
18  
19 the context of waste policy,<sup>178</sup> as a waste-based bioeconomy can yield significant financial  
20  
21 returns and support employment.<sup>179</sup> The Government has adopted<sup>180</sup> the Committee’s  
22  
23 recommendation that responsibility for championing waste as a resource, coordinating  
24  
25 activities across Government, and producing a long-term plan to support the extraction of  
26  
27 maximum value from waste be conferred on a Minister in the Department for Business  
28  
29 Innovation and Skills (‘DBIS’).<sup>181</sup> This accords with the Conservative Party 2020 Group’s  
30  
31 proposals for the reform of waste policy.<sup>182</sup> The Group notes the advantages of treating  
32  
33 waste ‘as a business opportunity that can drive higher profits for UK businesses’ through the  
34  
35 reduction and reuse of inputs,<sup>183</sup> and the emergence of new markets for products derived  
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45 <sup>175</sup> HM Government, *Prevention is better than cure: The role of waste prevention in moving to a more resource*  
46 *efficient economy* (Crown, 2013), 5.

47 <sup>176</sup> *Ibid*, 25. Waste hierarchy outlined in Directive (EC) 2008/98/EC on waste [2008] OJ L 312, 22.11.2008,  
48 Article 4.

49 <sup>177</sup> *Prevention is better than cure* (n.175), 10-11.

50 <sup>178</sup> *Waste or resource? Stimulating a bioeconomy* HL Paper 141 (Stationery Office, 2014), 5.

51 <sup>179</sup> *Ibid*, [150].

52 <sup>180</sup> *Government Response to the House of Lords Science and Technology Committee Report: ‘Waste or*  
53 *resource? Stimulating a bioeconomy’* (2014); S. Inglethorpe, ‘Fallon gains new role as BIS “waste champion”’  
54 *ENDS* (23 June 2014).

55 <sup>181</sup> *Waste or resource* (n.178), [148].

56 <sup>182</sup> *Sweating our Assets: Productivity and Efficiency Across the UK Economy* (2020 Productivity and Efficiency  
57 Group, 2014).

58 <sup>183</sup> *Ibid*, 19.

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2  
3 from waste.<sup>184</sup> It consequently advocates that State policy regarding waste be re-designated  
4  
5 'resources', with responsibility for its oversight and implementation transferred from Defra  
6  
7 to DBIS where it would enjoy 'strong sectoral support as a commercial opportunity' rather  
8  
9 than remaining confined to environmental considerations.<sup>185</sup> At European Union level, this  
10  
11 outlook is expressed in policy moves aimed at transforming Europe 'into a more competitive  
12  
13 resource-efficient economy' through measures including legislative proposals on waste  
14  
15 targets.<sup>186</sup> It is thus widely recognised that the exploitation of economic opportunities  
16  
17 provided by waste can contribute to a reduction in landfill<sup>187</sup> by diverting waste for the  
18  
19 purpose of converting it into valuable assets,<sup>188</sup> and promoting resource efficiency through  
20  
21 the reuse/recycling<sup>189</sup> and enhanced durability<sup>190</sup> of products. Development of these policies  
22  
23 may affect the incidence of claims arising from waste management operations, including  
24  
25 potential civil claims arising from the effects of poor waste management on human  
26  
27 health.<sup>191</sup> It may furthermore assist in easing pressures on landfill operators: the financial  
28  
29 distress and dissolution of companies in this sector has in the past been attributed to the  
30  
31 weight of environmental protection requirements.<sup>192</sup>  
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45 <sup>184</sup> Ibid, 20.

46 <sup>185</sup> *Sweating our Assets* (n.182).

47 <sup>186</sup> European Commission, 'Closing the loop – An EU action plan for the circular economy'  
48 [http://ec.europa.eu/environment/circular-economy/index\\_en.htm](http://ec.europa.eu/environment/circular-economy/index_en.htm) (accessed 31 July 2016); Speech by  
49 Commissioner Vella at the 2015 European Circular Economy Conference, 5 March 2015  
50 [http://europa.eu/rapid/press-release\\_SPEECH-15-4559\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-15-4559_en.htm) (accessed 31 July 2016). See however S.  
51 Inglethorpe, 'Government rejects circular economy policies' *ENDS* (3 November 2014).

52 <sup>187</sup> *Sweating our Assets* (n.182).

53 <sup>188</sup> *Waste or resource?* (n.178), [9].

54 <sup>189</sup> European Commission, 'Roadmap to a Resource Efficient Europe' COM/2011/571 final, 8.

55 <sup>190</sup> S. Inglethorpe, 'DEFRA launches £0.8m fund for innovative waste prevention partnerships' *ENDS* (29 May  
56 2014).

57 <sup>191</sup> L. Rushton, 'Health hazards and waste management' (2003) 68 Br. Med. Bull. 183.

58 <sup>192</sup> Shelbourn, (n.60).  
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#### IV(c)(iii) The 'natural capital' movement

These developments coincide with increasing interest in the 'natural capital agenda', whereby the UK's 'natural assets are valued in the same way as national infrastructure'.<sup>193</sup>

Proponents argue that increasing the visibility of nature in an economic sense will help to prevent continued unsustainable levels of damage by ensuring that all benefits attached to such assets are accounted for by valuing them, and using techniques such as pollution taxes to avert a decline in their 'overall amount and condition'.<sup>194</sup> This would enable businesses to identify and avoid costly or hazardous risks and practices, for instance opting to develop brownfield sites rather than destroy woodland areas.<sup>195</sup> Additional motivation may be provided in future by the introduction of environmental impact bonds, under which the government would contract to pay a certain amount in exchange for the fulfilment of environmental targets.<sup>196</sup>

It has yet to be seen to what extent this growing consensus towards economic interests being promoted, rather than impeded, by environmental protection objectives (and contributing positively to the latter) will have a discernible or lasting impact. Will they, for example, boost the remediation of contaminated land by private developers, or the effectiveness of waste management? It is recorded that landowners are 'sitting on two million acres of wasteland that could generate around £7 [billion] in natural capital', and such financial values could inform decision-making regarding the management of such land.<sup>197</sup> Importantly, would these developments affect companies of all sizes in equal

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<sup>193</sup> R. Salvidge, 'Truss backs natural capital agenda' *ENDS* (15 October 2015) – indicating that the UK's natural assets were worth at least £1.6 trillion.

<sup>194</sup> Ibid; R. Salvidge, 'Valuing nature: a necessary evil' *ENDS* (26 October 2015.)

<sup>195</sup> Salvidge, 'Valuing nature', *ibid*.

<sup>196</sup> Salvidge, 'Truss backs...' (n.193).

<sup>197</sup> R. Salvidge, 'Wasteland could generate £7bn in natural capital' *ENDS* (12 October 2015)

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2  
3 measure? The 'natural capital protocol', aimed at enabling businesses to 'assess and better  
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5 manage their direct [and] indirect interactions with natural capital' by providing guidance on  
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7 valuing their impact and dependence on natural assets,<sup>198</sup> is being developed by a coalition  
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9 which focuses on 'global stakeholder engagement' and has many large (and multi-national)  
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11 corporations among its members<sup>199</sup> - more than 40 of whom have led the first trial of the  
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13 protocol.<sup>200</sup> Although the protocol promises to be useable 'in different business applications'  
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15 at 'different organizational levels' in 'all business sectors across all geographies',<sup>201</sup> it may  
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17 prove difficult for an instrument of such breadth to meet the needs of a wide variety of  
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19 business types and sizes.  
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25 Arguably, the motivation for large companies to engage with such initiatives may stem more  
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27 forcefully from their exposure to substantial criminal penalties for environmental offences  
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29 (discussed in IV(b) above). Indeed, the Environment Agency's director of legal services has  
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31 also identified a significant effect of the introduction of the sentencing guidelines as being  
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33 that 'some previously intractable problems have been fixed, perhaps because the level of  
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35 sanction has driven investment and creativity'.<sup>202</sup> The extensive nature of these businesses'  
36  
37 operations means that the benefits of their improved compliance and handling of natural  
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39 resources would have far-reaching effects. However, it is less clear what incentives would  
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41 drive smaller businesses to embrace voluntary initiatives when their levels of compliance  
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43 with statutory obligations are already a source of concern: recent research has established  
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45 that 94% of businesses which fail to comply with their statutory obligations regarding the  
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51 <sup>198</sup> <http://www.naturalcapitalcoalition.org/natural-capital-protocol.html> (accessed 31 July 2016).

52 <sup>199</sup> Including Burberry, Coca-Cola, Marks and Spencer, Nestle, Novartis, Roche, Shell, Skanska, Tata, WalMart:  
53 <http://www.naturalcapitalcoalition.org/about/coalition-members.html> (accessed 31 July 2016).

54 <sup>200</sup> R. Salvidge, 'Multinationals pilot natural capital protocol' *ENDS* (13 October 2015) – 'companies trialling [the  
55 pilot programme] include the Coca-Cola Company, the Dow Chemical Co, F. Hoffman-LaRoche, Hugo Boss,  
56 Kering, Natura, Nespresso, Nestle, Olam International and Shell.'

57 <sup>201</sup> <http://www.naturalcapitalcoalition.org/natural-capital-protocol.html> (accessed 31 July 2016).

58 <sup>202</sup> (n.152).  
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3 safe management of waste are small and medium-sized enterprises.<sup>203</sup> The impact of the  
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5 developments outlined above might therefore take some time to permeate all relevant  
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7 types of business operations.  
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## 10 11 12 13 14 **V. Conclusions** 15

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17 Ultimately, the issue of how the law can effectively respond to situations where a company  
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19 which is subject to environmental obligations becomes insolvent should be addressed, in  
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21 particular the question whether it calls for resolution through legislative reform. This paper  
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23 questions the urgency of such reform, taking account of the extent to which certain  
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25 mechanisms within the framework of environmental protection already play a part in  
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27 tempering the danger of (or necessity for) a company to rely on insolvency proceedings for  
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29 shelter from such liabilities. There is room to explore the scope for these, and any other  
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31 mechanisms, to be developed in a way that more strongly supports the diminution of this  
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33 insolvency risk – without compromising the goal of environmental protection.  
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39 It is accepted that the mechanisms considered above are not without their weaknesses.  
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41 These include the complexity of the Part 2A regime for dealing with historic  
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43 contamination,<sup>204</sup> the uncertainty resulting from the looming cessation of State funding for  
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45 investigation and remediation of sites under the regime,<sup>205</sup> and the public cost incurred due  
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50 <sup>203</sup> See awareness-raising campaign managed by Environmental Services Association -  
51 [http://www.rightwasterightplace.com/news/2016/4/11/duty-of-care-awareness-campaign-launched-as-](http://www.rightwasterightplace.com/news/2016/4/11/duty-of-care-awareness-campaign-launched-as-research-suggests-56-of-uk-businesses-are-not-complying-with-the-law)  
52 [research-suggests-56-of-uk-businesses-are-not-complying-with-the-law](http://www.rightwasterightplace.com/news/2016/4/11/duty-of-care-awareness-campaign-launched-as-research-suggests-56-of-uk-businesses-are-not-complying-with-the-law) (accessed 31 July 2016); C. McGlone,  
53 'Waste industry launches SME campaign to tackle waste crime' *ENDS* (12 April 2016).  
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55 <sup>204</sup> Fogleman, (n.85).

56 <sup>205</sup> S. Evans, 'Death knell for Part 2A funding' *ENDS* (10 December 2013); *Examination of contaminated land*  
57 *sector activity in England and Wales – SP1011* (Cranfield University, C.L.A.I.R.E., 2014); R. Salvidge,  
58 'Contaminated land figures contested as remediation funding dries up' *ENDS* (22 April 2015); G.Simkins, 'Wales  
59 slow to remediate contaminated land' *ENDS* (21 April 2016).  
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3 to the apparent generosity of local authorities' application of the hardship criteria in their  
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5 decisions regarding recovery of remediation costs.<sup>206</sup> The financial downturn has  
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7 furthermore hampered the ability of developers to undertake voluntary remediation  
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9 through the planning regime,<sup>207</sup> while governmental funding for tackling waste crime seems  
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11 limited.<sup>208</sup>  
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16 On the basis of the factors considered in Part IV above, it may however be doubted whether  
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18 evidence could be found depicting the widespread evasion or discharge of environmental  
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20 claims through insolvency proceedings in the UK. Moreover, insofar as these factors shed  
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22 some light on the ways in which environmental law and policy can be (and is) employed in  
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24 the balancing act between the goal of environmental protection and the survival of  
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26 companies, they helpfully restore the focus on the ability of the enforcement framework to  
27  
28 support companies in preventing and remedying environmental damage. An approach that  
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30 aims at strengthening these efforts would help to steer the debate away from the apparent  
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32 inadequacy of the insolvency legislation to ensure that a debtor's environmental obligations  
33  
34 are fulfilled. This could in time lead to the insolvency legislation being regarded as playing a  
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36 residual role, intervening as a last resort where the most robust policy and legal safeguards  
37  
38 have failed. Even then, the liquidation of a company would not necessarily preclude the  
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40 restructuring or sale of its business/assets with a view to ensuring that the elements which  
41  
42 require in-depth restoration can gradually be taken over by the purchaser – as witnessed in  
43  
44 the sale of assets by the `Scottish Coal Company and Aardvark (TMC) Ltd, whereby mining  
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46 activities in problematic sites owned by the two companies would initially be supported by  
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55 <sup>206</sup> Lees, (n.100).

56 <sup>207</sup> A. Wiseman, 'Getting to grips with the new land remediation guidance' *ENDS* (Special Report, October  
57 2013).

58 <sup>208</sup> I. Kaminski, 'No clear funding for new DEFRA waste crime pledges' *ENDS* (9 September 2014).  
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3 the company which had purchased the companies' viable sites.<sup>209</sup> In due course, if the  
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5 'outstanding restoration issues were resolved on commercially acceptable terms' the  
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7 purchaser would take over the two companies' interests in the problematic sites and  
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9 integrate them into its corporate group.<sup>210</sup> The task of calibrating the ideal balance between  
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11 striving for the highest degree of environmental protection, and curbing the negative effects  
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13 of a company's failure, will be of prime importance in the future development of this area of  
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15 law.  
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55 <sup>209</sup> See news releases by HSP: *Acquisition of Assets from Aardvark (TMC) Ltd* (16 May, 2013) and *Acquisition of*  
56 *Assets from The Scottish Coal Company Ltd* (5 July, 2013) - available from  
57 <http://www.hsgplc.co.uk/investors/regulatory-news.aspx> (accessed 31 July 2016).

58 <sup>210</sup> Ibid.  
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