THE EVOLUTION OF PERSONAL INSOLVENCY LAW IN THE WAKE OF THE CORK COMMITTEE REPORT (1982)

INTRODUCTION AND CONTEXT

This article will focus upon developments in English Law[1] over **the past 40 years** with regard to the treatment of individuals experiencing personal insolvency. In so doing, it will attempt to evaluate the extent to which the modern regulatory landscape has been shaped by the work of the Cork Committee on Insolvency Law and Practice (Cmnd 8558)[2]. It is an opportune moment to embark upon this analysis as the Insolvency Service is in the process of reviewing the Framework for Personal Insolvency Law, having issued a Call for Evidence in July 2022[3].

For clarification purposes we observe that we are only going to consider those collective debt resolution models regulated by externally imposed law. We will not consider private contractual arrangements such as debt management plans (DMPs). In brief, DMPs first appeared on the UK debt resolution scene in 1993. These still operate largely under the radar. The Financial Conduct Authority assumed oversight of DMPs in 2014[4] and has introduced stricter oversight. The lack of reliable statistics on DMPs however makes it difficult to place other personal insolvency solutions into context. But it is believed that the number of DMPs currently in operation runs into the tens of thousands. A set of regulatory provisions was introduced in Part 5 of Tribunals Courts and Enforcement Act 2007 (ss. 109-133) but these do not appear to have been brought into force. This inertia is a mystery. Certainly, greater clarity would be welcome on how DMPs are managed, regulated and assessed by outcome.

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[1] There are significant differences with the law of personal in Scotland and (less so) in Northern Ireland. We will not consider these jurisdictions in this essay.

[2] Insolvency Law and Practice (1982). Work on this comprehensive review commenced in 1977. Sir Kenneth Cork was an expert practitioner with decades of hands on experience of insolvency practice. For an account of his career see the autobiographical Cork on Cork (co-authored with H. Barty-King) (1988) (Macmillan). The team of members assisting in the Cork review consisted of a highly impressive group of lawyers and other insolvency practitioners. Sir Roy Goode (as he now is) was a co-opted member – see Appendix I of the Report.

[3] The present author, along with a number of other leading academics in the field (Katharina Moser, Joseph Spooner and John Tribe), helped with the preparation of that Call for Evidence. In this paper he draws upon insights gained from participation in that exercise, but emphasises that the views expressed below are personal to him.

[4] There are suggestions that the increased regulation of DMPs by the Financial Conduct Authority has lead to some loss of attraction in them by their providers and this may be one reason why the usage of IVAs has grown significantly in recent years to fill the vacuum.

Nor will our study of personal insolvency law consider purely self-interested debt collection procedures that lack a collective aspect[5]. This latter category of procedures would include charging orders[6], execution on goods[7], third party debt orders (TPDO)[8] , CRAR[9], and attachment of earnings orders[10]. Direct deduction procedures[11], favoured by HMRC to collect tax debts, also fall outwith this study. That said, many of these procedures drew comment from the Cork Committee, particularly in Chapter 5[12].

In order to contextualise this modern review we must first examine the state of personal insolvency law antecedents prior to 1982, as this issue was reviewed comprehensively in the Cork Report in Chapter 2[13]. An earlier review in the Blagden Committee[14] had produced only modest reform proposal and many of these had been allowed to gather dust. The main institutional player, of course, was the regime of bankruptcy law, which could be used as a debt resolution tool by both creditors and by debtors. It was thus two-dimensional in terms of function. Bankruptcy law, which dates back to Tudor times, had undergone considerable change in the 19th century[15] and the regulatory model that confronted the Cork Committee was located mainly in that consolidatory statute, namely the Bankruptcy Act 1914. That 1914 Act, which was built upon the great reforms embodied in the 1883 Bankruptcy Act, had been amended (only slightly) in 1926 and 1976. This legislative model was reinforced

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[5] County court administration orders do have a collective flavour, but they remain trapped in an outmoded legislative straightjacket. Again there has been a failure to bring into operation legislation that has been put on the statute book. The Cork Committee invested some effort in Chapter 6 in proposing reforms to such orders (by substituting debt arrangements orders), but to no immediate effect.

[6] Charging orders convert unsecured debt into a secured liability once the court grants an order. Ultimately they can lead to the now secured property being sold under court order. For charging orders see Charging Orders Act 1979 as amended. Reforms to the charging orders regime were made in 2013.

[7] Execution on goods is regulated by Tribunals Courts and Enforcement Act 2007 and associated delegated legislation.

[8] Civil Procedure Rules Part 72. Formerly described as garnishee orders. A TPDO can lead to funds payable to a debtor by a third party being diverted to a creditor.

[9] Commercial Rent Arrears Recovery. This replaced the old remedy of distress by landlords. CRAR is based upon s. 72 of the Tribunals, Courts and Enforcement Act 2007.

[10] Made under the Attachment of Earnings Act 1971. The Cork Committee did comment on these – see para [254].

[11] See s.51 of the Finance Act (No 2) 2015.

[12] For a review of the various procedures see D. Milman, "Debt Enforcement Regimes Outside Bankruptcy in English Law: Observations on Current Diversity and Future Complexity " Chapter 10 in P. Omar (ed), International Insolvency Law: Reform and Challenges (Ashgate)(2013) at 297.

[13] Ian Fletcher's Law of Bankruptcy (1978) (Macdonald and Evans) provides an excellent guide to that historical context.

[14] 1957 (Cmnd 221).

[15] See M.V. Lester, Victorian Insolvency (1995) (Clarendon Press).

by the Bankruptcy Rules 1952[16]. Apart from being out of date[17], English bankruptcy law, as it then stood, resulted in the problem of "lifetime bankrupts". These were individuals who could not, or would not, obtain a discharge from bankruptcy. Socially, this was an embarrassing state of affairs for English Law. This phenomenon had been partly addressed by the Insolvency Act 1976 with the advent of automatic discharge from bankruptcy after 5 years. More generally, looking at the pre Cork Committee insolvency statistics, in relative terms there were some 5000 bankruptcies recorded in 1976.

The only other available and enforceable model for debtors to engage with as part of a legally sanctioned debt resolution strategy with multiple creditors[18] was the deed of arrangement, which again originated in the formative 19th century period. Deeds of arrangement under the 1914 Act of that name survived in the pre Cork Committee era, but were hardly ever used as they were seen as too cumbersome. Thus, there were according to para [359] of the Cork Report, only 44 deeds of arrangement registered in 1979. They were finally abolished by the Deregulation Act 2015 (s. 19 and Sched 6).

This sterile legislative picture was reflected in the limited nature of the extant scholarship, with the outstanding work of Ian Fletcher being the exception that proved the rule.

WHAT DID THE CORK COMMITTEE RECOMMEND?

The final[19] Cork Report was a substantial 461 page affair consisting of 1982[20] paragraphs, about half of which is devoted to the reform of personal insolvency law. In general, Cork supported the role of the civil service via the instrumentality of the official receiver in maintaining confidence in the system (see Chapter 14 of the Report). That was an important statement of principle.

The broad thrust of the Cork Committee-inspired reform suggestions was directed towards modernisation and liberalisation of the substantive law of personal insolvency. This strategy was informed by the perception that the act of incurring consumer debt, which was a relatively new socio-economic phenomenon at the time[21], made a positive contribution to the economy. The move to a service economy was apparent. The Cork Committee argued

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[16] SI 1952/2113.

[17] This was apparent not least in the archaic language used in the legislation.

[18] Contractual concessionary arrangements with individual creditors faced enforcement difficulties due to the old precedent of *Pinnel's case* (1602) 5 Co Rep 117a, 77 ER 237 which decreed that a promise by a creditor to receive a lesser sum than was due was not binding as no valid consideration was being provided by the debtor.

[19] There was a preliminary or interim Cork Report which flagged up how ideas for reform within the Committee were developing – see Cmnd 7968 (1979).

[20] The fact that the number of paragraphs matched the year of the release of the report was no coincidence, rather it was regarded as an in-house joke.

[21] Credit cards first appeared in the UK 1966 with the unveiling of Barclaycard. Other types of credit card followed onto the market quickly. In many areas of credit they have replaced cheques and even cash.

that it was therefore incumbent on society and policymakers to provide legal facilities to deal compassionately with the resolution of consumer debt[22]. Debt forgiveness and the imperative of removing stigma from debtors became important new philosophies[23] to guide the future direction of travel of the law. The Cork Committee also wished to see an effective debtor-rehabilitation alternative to bankruptcy introduced, as bankruptcy could, on one level, be seen as a destructive process with its emphasis on "selling up" the debtor's assets. This new rescue strategy was particularly aimed at debtors who traded.

In spite of this desire to liberalise the substantive law, the Cork Committee felt that there was a need for **greater regulation** in terms of oversight of those practitioners handling personal insolvency cases. The existing laissez faire model had to be upgraded to guard against abuse.

The government responded to the Cork Report with its own White Paper[24]. Although a somewhat conservative response, it did support many of the recommendations put forward by the Cork Committee.

Looking at the underlying philosophy underpinning the Cork Report one can discern a number of idea/strategies that came to shape the future configuration of personal insolvency law in this jurisdiction. For the sake of brevity we have selected three critical ideas to focus upon in this article. These are viewed as the most important for our purposes. We will consider how they fared both in terms of immediate implementation in the years after 1982 and also in respect of their later evolution in subsequent decades. What follows therefore is a form of longitudinal study.

1. Developing alternative regimes to bankruptcy

We have stated that the Cork Committee felt that the personal insolvency regime structure should be made more flexible to deal with the varying cases of personal financial distress. So considerable reform across a number of areas was required. One result of this perspective was the genesis of the individual voluntary arrangement (IVA) idea. The IVA (as it became) was very much debtor-focused, though it was hoped that it would produce better returns for creditors than those available through bankruptcy.

Looking at the report in greater detail the key elements of the IVA are to be found in Chapter 7 of the Report. So it was intended to be a procedure under which a debtor could cut a deal with creditors to repay them over a period of time (say 3 years). The arrangement would not require a court order but the court would be kept informed.

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[22] See Cork Report, para [23]

[23] Of course debt forgiveness has a long history reflected in many religious texts across a range of cultures.

[24] See A Revised Framework for Insolvency Law (1984, Cmnd 9175). For contemporary comment see D. Milman and D. M. Hare, "Cutting Cork Down to Size" [1984] 128 Sols Jo 340.

2. Liberalisation of bankruptcy

The Cork Committee had concluded that the existing law was too harsh on many innocent bankrupts who were victims of misfortune[25]. Accordingly, the Cork Committee recommended a number of changes to redress the balance between debtors and creditors in favour of the former constituency.

Under the remodelled bankruptcy regime there was to be automatic discharge from bankruptcy after the elapse of 3 years. This was a shortening of the 5 year automatic discharge period introduced by the insolvency Act 1976.

Income payments orders were favoured as an alternative to simply selling up the bankrupt's assets[26]. The prior position was that such orders were geared in effect towards employed bankrupts, rather than their self-employed fellows. The Cork Committee argued at para [591] that the usage of future income to resolve historic debts needed to be broadened.

Investigation procedures were to be refined, with greater use of private examination as a means of acquiring information about the bankruptcy being model encouraged. Curbs having already been placed upon the feared public examination procedure[27]. But transactional avoidance possibilities were upgraded in order to deter improper conduct by debtors and to maximise potential returns for creditors. There was a small bankruptcies summary administration regime to be introduced with a lighter touch, but this was abolished by the Enterprise Act 2002 in the light of a general liberalisation of bankruptcy.

Procedurally, summary administration was recommended to be introduced. There was no need to use a sledgehammer to crush a nut in cases where the estate deficiency was small. The bankruptcy procedure generally was to be simplified by the removal of the arcane and intermediate receiving order stage. Acts of bankruptcy were also to be ditched in favour of a simpler initiation procedure. The collective nature of insolvency proceedings was reaffirmed (para [224]).

3. Professional regulation

It should be borne in mind that one important change embodied in the recommendations of the Cork Committee was that personal insolvency procedures should be managed by

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[25] A comparison was drawn with the apparent leniency on offer to errant company directors. See para [17] of the interim Cork Report. The 1914 Act recognised the concept of the unfortunate bankrupt by providing for the issue of "certificates of misfortune" – see s. 26(4) of the Bankruptcy Act 1914.

[26] See Cork Committee at para [907].

[27] The Insolvency Act 1976 had removed the automatic usage of public examination in all bankruptcy cases

authorised insolvency practitioners. So in Chapter 15 of the Report we find a debate over the pros and cons of such a change. There was some hesitancy in Cork's approach here, possibly for fear of a reaction from the professionals operating in the sector but there is no doubt that the Report made the right decision to restore a degree of confidence in the system.

THE POSITION IMMEDIATELY POST CORK REFORMS[28]

The original[29] Insolvency Act 1986 reforms left us with **two** main personal insolvency law regimes – bankruptcy and the individual voluntary arrangement (IVA). True, deeds of arrangement were technically still available[30] but they were never used. They were only finally abolished some 30 years later.

Bankruptcy remained as a Janus-like institution in that it was designed to be available to suit the needs of both creditors and debtors. That multi-purposive role did however create tensions in the operation of this model. The bankruptcy model that operated under the 1986 Act reflected many of Cork's ideas. So, for instance, the procedural suggestions in relation to bankruptcy were accepted. There was a much simpler entry route into bankruptcy via a statutory demand[31] and later petition, but it was still court based. Summary administration was introduced for small bankruptcies (see the now repealed Insolvency Act 1986 s. 275). Discharge from this form of "bankruptcy lite" was to occur after 2 years.

Turning to the IVA, the 1986 Act went largely along with Cork's proposals. The new statutory foundation was located in a relatively short Part VIII of the Insolvency Act 1986. Under this procedure a distressed debtor would need to seek immediate protection from the court in the form of an interim order. A nominee would have to be selected to cut a deal with creditors. In practice, if the creditors by the required majority supported the proposal, that nominee would then supervise the arrangement.

The 1986 Act, as Cork had suggested, ushered in greater regulation for the insolvency profession. That was true of both bankruptcies and IVAs – see s. 388 of the 1986 Act. In both situations only licensed practitioners could operate lawfully as office holders. The system was very much based upon *ad personam* authorisation; firms as such did not enjoy institutional authorisation.

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[28] For an overview see D. Milman, Personal Insolvency Law, Regulation and Policy (2005)(Ashgate).

[29] It must not be forgotten that the initial legislation was included in the Insolvency act 1985. But much of this Act was never brought into force with the 1986 legislation waiting in the wings.

[30] Cork had recommended their abolition – see para [366].

[31] See D. Milman, "Statutory Demands in Bankruptcy: A Retreat from Formalism in Bankruptcy Law" [1994] Conv 289.

MODIFYING THE 1986 REFORMS

So far we have been considering the changes that were introduced in the immediate aftermath of the Cork Report via the implementing 1986 legislation. But that is only part of the story. Significant developments occurred over the next 35 years with several statutes and numerous pieces of secondary legislation changing the landscape. Again our approach in reviewing this later pattern of development is to focus attention upon the same three key policy areas.

1. Alternative models to bankruptcy

The first change to the 1986 Cork-inspired IVA model came with the enactment of the Insolvency Act 2000 s.3 and Schedule 3 – this removed the need for an interim order from the court as a prerequisite to accessing the IVA. This decoupling of procedures appears to have been part of a technical upgrade of the system rather than a major policy move to deregulate the IVA model. However, this single reform had huge implications in terms of usage of this debt resolution model. It was not envisaged by Cork. This change lead to the IVA factory phenomenon.

If one examines registered IVA numbers we find that in 2000 there were 7979 IVAs recorded. By 2010 this figure had increased more than six fold to 50,694. The factors behind this significant increase in usage over a decade will be considered later. The truth is that the IVA has continually grown in popularity since it was first introduced. However, there were substantial increases in usage in the mid-2000s. So, once again, there were no less than 77,982 recorded in 2019 (increasing to 78,478 in 2020). In 2021-22 the IVA total for England and Wales was 85,111. It is now by far the most popular of the formal debt resolution procedures in those cases where official statistics exist. Contractual resolution of personal debt distress is now the order of the day, rather than having externally imposed solutions through bankruptcy[32].

To some extent that increased usage of the IVA has been promoted by media offerings and marketing. It also appeals to certain debtors who are not willing to face up to the immediate crisis or who fear loss of employment in the event of bankruptcy. But that success in boosting the customer appeal of the IVA has created difficulties in practice. It has been noted by some observers that in reality there are in fact two species of IVAs: those customised IVAs for single, often high profile, debtors and standard form IVAs, which are utilised for the bulk consumer debtor end of the market. But the law does not differentiate between these varying types of IVA. Again we make the point that this mass produced IVA

[32] For this trend see K. Moser, "Making Sense of the Numbers: The Shift from Non-Consensual to Consensual Debt Relief and the Construction of the Consumer Debtor" [2019] 46 Jo of Law and Soc 240.

model was not part of the Cork Committee plan. The Cork Committee would have been surprised at this phenomenon and could not be held responsible for the emergence of this apparent problem.

The inescapable truth is that a high percentage of IVAs fail. This is confirmed by official statistics[33]. The Insolvency Service published its annual *IVA Outcomes and Providers 2020* report on 26 February 2021. This is a valuable source of data on how the IVA is operating in practice. But, like in the case of all data sources, there is scope for different interpretations of the figures. That said, the result of this high mortality rate is often bankruptcy for the debtor concerned. These failures may occur because of too optimistic predictions by debtors as to future income, miss-selling of IVAs by firms to unsuitable clients, changes in the personal circumstances of individual debtors or worsening economic conditions at large in society. Further research is needed here. To be clear, no supervisor can guarantee IVA success[34].

Another perceived (and related) problem in the IVA context which we have noted above has been the arrival on the scene of "volume providers"[35] operating through so-called IVA "factories". Questions have been asked as to what is the appropriate level of regulation where the oversight role of the insolvency practitioner has become more marginalised to the extent that the role is one of signing off pre-packaged arrangements using standard forms. We note the Insolvency Service *Review of the Monitoring and Regulation of Insolvency Practitioners* (2018) here. What is clear is that in house bureaucratic procedures designed to reduce costs cannot displace legal requirements[36].

Both the profession and the Insolvency Service have responded to these concerns. The profession has used Statement of Insolvency Practice ("SIP") 3.1 to introduce better standards. There is also a Code of Ethics. The IVA Protocol (which first appeared in 2008) has also reinforced the promotion of standards though regulation and to allay concerns of repeat creditors (such as banks) that IVAs were being abused. The latest version of the Protocol appeared in May 2021[37]. The Protocol is also intended to offer greater protection to consumer debtors. Also recently, the Insolvency Practitioners Association (in collaboration with other stakeholders from the profession and regulators) has from January

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[33] For the latest picture see Insolvency Service Press Release of 1 March 2022 on Enforcement Outcomes. This shows a slight drop in termination rates for IVAs – but they are still high.

[34] The courts have said that IVA supervisors are not underwriters – *Heritage Joinery v Krasner* [1999] BPIR 683 and *Pitt v Mond* [2001] BPIR 624.

[35] For background see for example the "Varden Nuttall affair" illustrated by *Varden Nuttall v Nuttall* [2019] BPIR 738.

[36] *RBS v Munikwa* [2020] EWHC 786 (Ch). Here the court was critical of how the IVA firm was operating in handling proposal modifications this regard.

[37] See the Insolvency Service bulletin "Dear IP" (No. 126) explaining how the 2021 IVA Protocol differs from its 2016 predecessor (which should not be used after July 2021). Basically the role of the IP is further enhanced

2019 introduced a scheme for monitoring IVA volume providers. No one can say that concerns about the operation of IVAs are being ignored.

As a majority of complaints against insolvency practitioners in numerical (as opposed to percentage) terms feature IVAs, action was seen as needed. The introduction by the Insolvency Service of the single Complaints Gateway in June 2013 has improved the process of complaints handling. It seems that IVAs account for 40% of complaints in the Gateway, but as IVAs make up a lot more than 40% of the total number of personal insolvency cases that statistic is not surprising. It may be that IVAs have been unfairly cast in the role as the villains. The problem here could be one of disappointment on the part of debtors where the IVA does not deliver through no fault of any party. Also, for instance, there are no equivalent figures available for DMP complaints from which to draw appropriate comparisons. IVAs are, as stated above, regulated by the profession – so we have SIP 3.1 to factor into our discussion. There is also a new regulatory structure for insolvency practitioners in general set up by the Small Business, Enterprise and Employment Act 2015, which now forms a revised Part 13 of the Insolvency Act 1986[38].

The IVA has been a great success in terms of take up. Attempts have been made over time to expand the range of IVA offerings. So, we have the post-bankruptcy IVA. This has not proved popular. The reasons for this are obvious. Once a debtor has entered bankruptcy there is little point in going back. There was also the "Fast Track IVA" introduced via the Enterprise Act 2002, but this also did not appeal to debtors and was scrapped by s. 135 of the Small Business, Enterprise and Employment Act 2015.

Moving on from the IVA, the policymakers, following on from the Cork Committee's analysis, recognised that both of the existing main debt resolution models available in English law were not suited to the constituency of debtors lacking significant income streams and valuable assets. There was the phenomenon of the NINA debtor with "No Income, No Assets". Many young people who rent and struggle to generate reserve capital fall into this grouping. How should personal insolvency law address such a person when they encounter financial distress? For debtors falling into this particular category there was insufficient future income to service the demands of an IVA and no assets to realise to generate funds in a bankruptcy solution. The key policy document outlining a solution to this everyday conundrum was *A Choice of Paths: Better Options to Manage Over-Indebtedness and Multiple Debt* (Department of Constitutional Affairs, 2004).

The new policy for assisting this category of debtor was given formal expression via the Tribunals, Courts and Enforcement Act 2007 s. 108 and Schedules 17-20, which lead to the introduction of debt relief orders (DROs) with effect from April 2009. The DRO regime is now located in Part 7A of the Insolvency Act 1986 and associated secondary legislation. The DRO process involves the use of an authorised intermediary who makes an application to

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[38] See J.M. Wood, "One Ring to Rule them All. Has the Call for a Single Regulator Been Answered? " [2020] 33 Ins Intell 55 for an overview of the current regulatory model. What seems likely in the near future is that the current decentralised model will be replaced by a Single Regulator.

the authorities on behalf of the debtor. This is an important quality control mechanism designed to weed out hopeless cases. The up-front cost of seeking a DRO is currently £90.[39] Under the DRO procedure the Official Receiver is the central figure who determines the outcome of the application (s. 251C). Most applications for a DRO succeed. Again, an attempt to control abuse of this debt relief facility was made by the introduction of debt relief restriction orders and undertakings (DRROs and DRRUs). The relevant provisions are located within Insolvency Act 1986 schedule 4ZB.

DROs have proved popular – there were 20,321 recorded in 2020. This is down from the figure of 27,497 in 2019 before the COVID pandemic struck but then all insolvency figures were depressed at that point in time. The figure recorded for 2021-22 was 28,096. Their arrival on the scene has impacted upon the number of bankruptcies, which in the years since 2010 have reduced as a percentage of all personal insolvencies. But the financial criteria restricting access to the DRO were stringent; the debtor had to show that debts were less than £20k, assets held were worth less than £1k and surplus monthly income did not exceed £50. This lead to a number of potential DROs being rejected and others being revoked[40]. One problem that has been identified was that debtors with fluctuating and/or seasonal earnings were sometimes advised not to go down the DRO route if there was any possibility that they would breach the financial criteria at some point during the currency of the DRO. A revocation of a DRO would put them back to square one. This matter was the subject of an Insolvency Service consultation in early 2021 and the more relaxed criteria were introduced later in the year by Insolvency Proceedings (Monetary Limits)(Amendment) Order 2021 (SI 2021/673) and the Insolvency (England and Wales) (Amendment) Rules (SI 2021/672). The current qualification figures are now: debts must not exceed £30K, assets must not exceed £2K[41] and surplus monthly income must not be more than £75. This change has been welcomed and has helped with DRO take up.

2. Liberalisation of bankruptcy

The "second chance**"** philosophy of giving debtors and opportunity to make a fresh start was developed through the policy document entitled *Bankruptcy: A Fresh Start* (2000) and then followed up by the White Paper *Insolvency: A Second Chance* (2001, Cm 5234). This new liberal vision of the plight of the indebted was influenced by the US approach to bankrupts; it was reasoned by the UK policymakers that a further liberalisation of bankruptcy based upon this American approach would encourage risk-taking in enterprise. Bankruptcy was thus seen as the inevitable downside of business. But, even at this stage,

[39] The Woolard Review, conducted under the auspices of the Financial Conduct Authority, recommended in its 2021 report that thought should be given to reducing the cost of obtaining a DRO (Recommendation 6). But the current figure is modest and public expenditure needs controlling. To bankrupt oneself the upfront figure is several times greater.

[40] On revocation of a DRO see s. 251M(6) of the Insolvency Act 1986.

[41] In addition a debtor is allowed to retain a car provided it is not worth more than £2K.

most bankrupts in the UK were consumer debtors rather than traders. So the rationale for the policy was flawed. However, in fact, it fitted in perfectly into an era where unsustainable consumer debt was increasing and solutions were required. It also complimented the insights apparent in the Cork Report itself.

This new relaxed policy towards bankrupts as reflected in the Enterprise Act 2002[42] lead to the introduction of the 1 year maximum period automatic discharge from bankruptcy[43]. This liberalisation was intended to be compensated for by use of bankruptcy restriction orders (or undertakings) for undeserving cases. The relevant provisions are now located in s. 281A and Schedule 4A of the Insolvency Act 1986[44]. The BRO (and BRU) have never been used as extensively as might have been anticipated at the time of their introduction. This liberalisation included greater protection against protracted realisation of the family home – see for instance the "use it or lose it" principle introduced by s. 261 of the Enterprise Act 2002 and now embodied in s. 283A of the Insolvency Act 1986[45].

The new liberalised bankruptcy regime was in part designed to make bankruptcy a more attractive option for debtors seeking to resolve their financial woes. But there was no requirement in English Law for a putative bankrupt to seek debt advice before initiating the bankruptcy procedure. The position in Scotland and in other comparable jurisdictions differs. Debt advice is important to ensure that lessons from the painful process are learned.

These reforms, made via the Enterprise Act 2002, took effect in April 2004. They contributed to the expansion in usage of bankruptcy. So, in 2004 there were 21,550 bankruptcies recorded. By 2010 this figure had increased to 59,173.

However, recourse to the court in any personal insolvency procedure (such as bankruptcy) could be expensive. That caused problems where money on the part of a would-be bankrupt was in short supply[46] and at those all too frequent times where public expenditure

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[42] For an overview of this legislation see A.J. Walters, "Personal Insolvency Law After the Enterprise Act: An Appraisal" [2005] 5 JCLS 65.

[43] Indeed there was some discussion at the time that a 6 month period would be preferred. Fortunately, this unworkable idea was not accepted.

[44] See K. Moser, "Restrictions After Personal Insolvency" [2013] JBL 679 for an overview of bankruptcy restrictions.

[45] See L. Sealy and D. Milman, Annotated Guide to Insolvency Legislation (25 ed) (2022)(Sweet and Maxwell) at pp. 452-455 for details on this homestead protection measure.

[46] A deposit has to be paid by the debtor to cover administrative costs. The courts have upheld this requirement – see *R v Lord Chancellor ex parte Lightfoot* [2000] 2 WLR 318. For critique see J. Spooner, "Bankruptcy Policy in a Dematerialised Insolvency Law: Glimpses of a Hidden System" (2019) 32 Ins Intell 30 at 33-34. An excellent historical overview of this issue is provided by J. Tribe in a two part article, "The Lightfoot Paradox: Financing the Cost of Personal Insolvency Relief Through Bankruptcy Revenue Stamps and Sliding Scales" [2016] 29 Ins Intell 97 and 116. Charities have in the past provided funds to allow debtors to access bankruptcy. This might seem odd, but the new liberal bankruptcy regime in some

needed to be reined in. Traces of this strategy of limiting the judicial role were apparent in the decoupling of the interim order from the IVA in the Insolvency Act 2000. The usage of Income Payment Agreements (introduced in 2004), Bankruptcy Restriction Undertakings and Debt Relief Restriction Undertakings form part of this cost saving strategy by rendering judicial involvement minimal[47].

As most **debtor** petitions in bankruptcy were uncontested, the question was asked by economy-minded policymakers, why should the court be involved at all? That question, after some debate was answered by taking the process of "self bankrupting" outside the confines of the court. The policy of limiting the judicial role was reflected in the Enterprise and Regulatory Reform Act 2013 s. 71 which became Chapter AI of Part 9 of the Insolvency Act 1986 (effective from April 2016). In future debtor applications in bankruptcy were to be handled by adjudicators using online procedures[48]. This change has proved to be a great success and has resulted in little litigation.

As part of limiting judicial involvement a £5K minimum debt for bankruptcy petitions **presented by creditors** was introduced in 2015 by the Insolvency Act 1986 (Amendment) Order 2015 (SI 2015/922). In 2020 there were 12,625 bankruptcies, of which some 80% were debtor-generated using the adjudicated entry mode. This figure is down from the comparable figure of 16,702 bankruptcies recorded for 2019. The statistic for 2021-22 bankruptcy totals in England and Wales is 7142, a further significant decline in usage. Of this total once again more than 80% of the cases involve debtors self-bankrupting via adjudication.

More generally, the policy of pursuing economy in bankruptcy proceedings was reflected by the Red Tape review – see the Insolvency Service Consultation *Red Tape Challenge – Changes to Insolvency Law to Reduce Unnecessary Regulation and Simplify Procedures* (July 2013). This was translated into legislative form by provisions in Part 10 of the Small Business, Enterprise and Employment Act 2015. Under this reformed regime physical creditors meetings can be done away with and new methods of communication (such as using websites) utilised. The key provisions in the Insolvency Act 1986 now are to be found in sections 379ZA – 379C of the Act and Part 15 of the Insolvency Rules 2016.

3. Professional regulation

The Cork Committee, as we have seen, favoured the role of authorised insolvency practitioners in managing personal insolvency procedures. Insolvency practitioners are authorised through membership of a recognised professional body ("RPB"). There are currently in the UK some 4 RPBs in existence and something like 1600 licensed insolvency

cases can be seen as a safe harbour for certain debtors with little to lose and hoping for a fresh start.

47 But of course the courts may be asked later in the day to review these matters.

48 See Insolvency Rules 2016 r.10.36(1).

practitioners. The external regulation of RPBs is dealt with by Part 13 of the Insolvency Act 1986 (as amended).

Under s. 390A of the Insolvency Act 1986 it is possible for an insolvency practitioner to seek partial authorisation (by limiting the type of offices that could be undertaken). This option was introduced by the Deregulation Act 2015. In effect an insolvency practitioner can seek authorisation to take on only personal (as opposed to corporate) work. Indications are that this option is rarely chosen with perhaps as few as 24 partial authorisations in place for personal insolvency practice.

Although professional authorisation is a positive move, it is not a panacea. There have been problems relating to insolvency practitioners' fee charging rates and the handling of complaints. The former issue has been addressed by a much more transparent regime for fees based upon the criterion of value for money in the services provided rather than calculated via simply the amount of time expended[49]. Complaints about insolvency practitioners are now handled via a Gateway set up by the Insolvency Service in 2013.[50]

The public sector has always undertaken a key role in personal insolvency cases. The Cork Committee was a stout defender of this public interest role (see para [714]). When a bankruptcy order is made today (either on a creditor petition or through the adjudication process) the Official Receiver is automatically appointed trustee in bankruptcy. Creditors may seek to appoint an insolvency practitioner as trustee instead of the Official Receiver if certain criteria are met, or the Secretary of State may appoint a named insolvency practitioner if there are reasons to do so. The reality therefore is that the Official Receiver will be trustee in the majority of unless other action is taken to appoint an insolvency practitioner.

Adjudicators have been appointed to deal with debtor applications in bankruptcy – but an Official Receiver cannot be an adjudicator (s. 398A).

There is an increasing usage of intermediaries in the current personal insolvency law system. The debt advice sector illustrates this phenomenon at work. These intermediaries are significant players in initiating the DRO process as the application must be channelled through an approved intermediary (ss. 251B, s. 251U)). The new debt respite scheme, to be discussed shortly, depends largely upon the input of debt advice providers and approved mental health professionals, etc, both in terms of initiation and management – see Regs 3, 25 and 29 of the 2020 Regulations (see below).

NEW IDEAS IN PERSONAL INSOLVENCY LAW NOT LINKED TO THE CORK COMMITTEE

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[49] See the original *Practice Direction* [2004] BPIR 953 (now encompassed within *Practice Direction: Insolvency Proceedings* [2020] BCC 698 Part 6 and also now Insolvency Rules 2016 Part 18 (fixing fees and fee estimates).

[50] On the Complaints Gateway see J.M. Wood, "Review of the Regulatory System: How Effective Has the Complaints Gateway Been?" [2017] 30 Ins Intell 106.

In undertaking a study of the development of personal insolvency law in the past 40 years it would be misleading to suggest that all roads can be traced back to the work of the Cork Committee. Other factors have come into play to shape the current legal position.

So, for instance, although Cork was aware of the emerging issue of cross border insolvency[51], it is unlikely that the problem of "bankruptcy tourism" would have been contemplated. This became an issue after the millennium under which foreign debtors, aided and abetted by EU law[52], sought to take advantage of the liberal facilities offered by English Law to resolve their financial difficulties. This was not a problem for the UK but it was a considerable irritation for EU Member States and creditors located in other EU Member States. With Brexit, this problem of European debtors engaged in jurisdiction shopping is slowly going away as far as English Law is concerned. But the issue of cross border insolvency has not and how best to deal with it has, as far as the UK is concerned, now moved into a global arena[53].

One of these new considerations is the idea of a "breathing space" or debt respite. This surfaced in the Conservative Party Manifesto of 2017, *Forward, Together*. The commitment for "fair debt" was made at p. 60 of this document as part of a general policy of promoting fairness in society. This proposal was firmed up by a HM Treasury document of June 2019 entitled *Breathing Space Scheme: Response to a Policy Proposal*. This political commitment and policy was carried through into legislation via the instrumentality of the Financial Guidance and Claims Act 2018. Section 7 of that Act mandates the making of secondary rules. Some further amendment was made by s. 35 of the Financial Services Act 2021.

The Debt Respite (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020 (SI 2020/1311)[54] (effective from May 2021) were made under the auspices of the 2018 Act. It must be noted that these regulations did <u>not</u> provide for a debt resolution model in itself, but rather, by establishing a breathing space, it hopefully would promote an effective choice as to which debt resolution solution was more appropriate for debtors based upon their personal circumstances. It must be further noted

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[51] See Chapter 49 of the Report.

[52] Originally the EC Regulation on Insolvency Proceedings (1346/2000) which was then Restated by EU Regulation 2015/848. These measures allowed debtors to use the national legal system where their centre of main interests ("COMI") was located at the time of the opening of the bankruptcy proceedings in order to resolve their position. The jurisdiction where the underlying debts were contracted was less important. This encouraged last minute "tourism"

[53] UNCITRAL Model Law on Cross Border Insolvency 1997. The government was permitted to adopt this Model Law by s. 14 of the Insolvency Act 2000 and did so via the Cross Border Insolvency Regulations 2006 (SI 2006/1030).

[54] For judicial comment see *Lees v Kaye* [2022] BPIR 1018, *Axnoller Events Ltd v Brake* [2021] EWHC 2308 (Ch) and a later instalment in this complex litigation in *Brake v Guy* [2022] EWHC 2797 (Ch) (which featured a different debtor).

that there exists a modified regime for those debtors suffering a mental health crisis[55]. This mental health crisis is defined in the Regulations. This reform was opportune in the context of the stresses placed upon individual debtors by the COVID-19 pandemic

It is too early to evaluate the effect of this change, but it was taken advantage of in more than 63,864 cases in the first 12 months of its operation. Of these registrations the vast majority comprise "standard" applications with a very small minority featuring a mental health crisis. What we do not know is whether this scheme is producing long term optimal solutions for debt resolution or whether it is simply delaying matters by holding creditors at bay.

FUTURE REFORM OVER THE HORIZON

The Cork Committee had neither a crystal ball nor a telescope. Nor do we. But we can indulge in some educated speculation on future developments.

When considering the likely shape of the future topography of personal insolvency law framework we must take account of imminent arrival of statutory debt repayment plans (SDRPs). These are pencilled in for introduction in 2024. Details of this policy initiative can be found in Chapter 4 of the HM Treasury document *Breathing Space Scheme: Response to a Policy Proposal* (June 2019). Much greater detail is located in the HM Treasury consultation document of 13 May 2022[56]. A perusal of these documents indicates that SDRPs will represent a significant change to the overall debt solution marketplace inasmuch as, although they do not offer debt forgiveness, they are envisaged as being a structured product that deals with the totality of a person's debts (other than excluded categories of debt). In effect, SDRPs will represent a formalised and standardised version of a DMP. They may impact upon the future usage of IVAs but they are expected to operate over a much longer time frame (possibly 7 to 10 years).

Looking at other areas of personal insolvency law it may fairly be assumed that further regulation will be introduced into the IVA mechanism. Some effort has been made to tidy up practice here, but further regulation seems likely.

The future of debt relief orders seems to be assured and one might expect further liberalisation of the access criteria. This procedure is growing in importance in terms of its usage.

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[55] It is not the first time that concessionary measures have been put in place for such individuals. The prohibition on disability discrimination and the need to promote equality is an important factor in such cases. See, for instance, Insolvency Rules 2016 rr 12.23-12.26 and cases such as *Haworth v Cartmel and HMRC* [2011] BPIR 428.

[56] This consultation document includes detailed Draft Regulations (some 56 pp), which are available for comment.

Bankruptcy is disappearing before our very highs but it is felt that it will remain on the personal insolvency menu card because it continues to serve a need for both debtors and creditors.

OVERVIEW OF THE CORK COMMITTEE IMPACT

To put things into numerical context, there were some 111,424 recorded cases of personal insolvency in England and Wales in 2021-22. Of these, 85,111 were individual voluntary arrangements, 28,096 were debt relief orders and bankruptcies made up the residue of some 7142 cases. Something like 1 in 405 adults in England and Wales now fall within this statistical panorama. That is a significant percentage of the relevant population. Figures are rising again as the economic climate worsens and some of the concessions granted to debtors during the COVID crisis are withdrawn. This is one reason why the Insolvency Service is undertaking a measured review of the current Framework.

This survey should indicate the degree of complexity and sophistication of current personal insolvency law. That is reflected in the growth of academic literature on the subject with a strong cohort of younger scholars emerging. To a considerable extent the work of the Cork Committee four decades ago contributed to that more nuanced topography. But an objective observer must recognise that the Cork Report influence has been supplemented in recent times by new policies and strategies. The Cork Committee had no crystal ball and was viewing socio-economic matters largely through a 1970s lens. That said, it is arguable that the Cork Committee set in motion the policies that lead to many of the legislative changes that were to materialise later.

Finally, any reconsideration of insolvency procedures must now take into account the implications of the availability of new communications technology. The Cork Committee, working in the early 1980s, could not have anticipated all of these developments (such as arrival of the internet, Skype, etc) and how they would impact on insolvency practice. As it happens this technology has saved the insolvency system from collapse during the COVID era. Looking to the future we must ask in particular, how do debtors now access information about debt advice/debt resolution procedures and can that information be relied upon as being objective? Following on, can the application procedure be accessed electronically with ease and how does technology aid the operation of said procedures? The Cork Committee did not have to grapple with these matters but the policymakers who have followed Cork address them.

There are now several personal insolvency regimes potentially available to debtors. But how is the process of choice of the most suitable solution for any particular debtor to be regulated? Choice is usually a boon, but it can create problems in practice by increasing uncertainty. Financial criteria may limit debtor choice in some instances, but in other circumstances there is an obligation on insolvency practitioners/debt advisors to point debtors in the right direction. Should that obligation be put on a clearer statutory footing? The Gateway idea under which debtors are channelled in the right direction via a triage

model is gaining traction[57]. The precise formulation of the role of debt advisers, which again was not a focus issue at the time of the Cork Committee, has become prominent in everyday practice.

There have been areas where the vision of the Cork Committee has not come to fruition. The proposed[58] office of an Insolvency Ombudsman has not materialised, though the handling of complaints about practitioners is much more effective today. We do not have a series of formally designated Insolvency Law Reports[59] but the private sector[60] (and charitable initiatives[61]) have stepped in to provide such a dedicated service of prompt reporting. More importantly, the Cork Committee failed in its goal to get debt enforcement procedures in English Law put on a sensible footing. This has proved a major setback but the fault cannot be placed on Cork's doorstep. Creditors can still utilise bankruptcy and can also exploit debt enforcement procedures such as charging orders, execution against goods, etc. Again there has been a failure to implement all of the reforms enacted in the Tribunals, Courts and Enforcement Act 2007. Again the finger of blame must lie elsewhere.

Those points made, no one could seriously question the impact of the Cork Committee on determining the shape of the present law of personal insolvency. It was a landmark event.

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[57] See P. Walton, "Individual Insolvency – The Case for a Single Gateway" [2022] 7 Wolv L Jo 1.

[58] See paras [1772]-[1773] of the Cork Report.

[59] See para [1030] of the Report.

[60] The Bankruptcy and Personal Insolvency Reports commenced in 1996. The present author was one of the founder editors.

[61] Bailii (British and Irish Legal Information Institute) has made a massive contribution in terms of timely law reporting. Cases reported via bailii are now lodged in the National Archives.