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Should administration or compulsory liquidation be the process of c interest insolvencies?

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SHOULD ADMINISTRATION OR COMPULSORY LIQUIDATION BE THE PROCESS OF CHOICE FOR NATIONAL INTEREST INSOLVENCIES?

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1. EXECUTIVE SUMMARY

1.1 Introduction

In recent years, there have been a number of high-profile large national insolvencies that have gone into compulsory liquidation, with the official receiver (acting as liquidator) continuing to trade the company's business with the help of special managers. The cases are[1]:

Sahaviriya Steel Industries UK Limited (known as SSI) (2015);

Carillion (2018);

British Steel (2019); and

Thomas Cook (2019).

[1] We are aware of a fifth official receiver case in March 2021 in which special managers were appointed to companies in the Baglan group, which owned a gas turbine power station located in Baglan Bay. However, we have not included a full analysis of the case in this paper because the compulsory liquidation process affected only part of this group, the rest of which was subject to an administration process (also known as Calon Energy).

At the time, the fact that these cases were run as trading liquidations rather than administrations raised questions. This is because before 2015, trading a large[2] business in liquidation (whether or not the business qualified as a national interest case) was not at all commonplace.

Administration is generally regarded as the procedure of choice for trading insolvencies. Further, the power to trade in liquidation only applies in so far as it is necessary for the beneficial winding up of the company. As such, where national interest cases can use administration (or special administration) with private practice office holders, this would generally be the preferred option. An official receiver national interest insolvency, supported by the appointment of private practice special managers, is the fall back option.

The questions this paper seeks to explore are:

What are the barriers to using administration for national interest cases?

Could administration be reformed to help to make it more available for national interest cases?

How well does compulsory liquidation work for a trading insolvency?

Should compulsory liquidation be reformed to be better suited for official receiver national interest insolvencies?

1.2 National interest cases

The four official receiver National Interest Cases since SSI in 2015 shared overlapping features, but the one feature common to all four cases was that there was no insolvency practitioner willing to take the appointment as administrator. This, coupled with a market specific or socio-economic impact issue, required the government to step in and facilitate an official receiver-led compulsory liquidation, with private practice special managers appointed to assist.

An examination of national interest cases arising before 2015 confirms that historically similar cases have been managed using an administration (or sometimes a special administration such as in the case of Railtrack in 2001) rather than a compulsory liquidation. Going back as far as 1989, there is even an example of an insolvent chartered airline that flew whilst in administration.[3]

1.3 The choice of administration or compulsory liquidation

The factors affecting the choice of insolvency procedure for national interest insolvencies can be divided into two broad categories:

Liabilities including both:

the risk of the office holder incurring personal liability in connection with the appointment; and

the risk of a large unquantifiable priority expense arising that has the potential to swamp the economics of the insolvency process. Such an expense might relate to environmental or health and safety concerns.

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[2] There were instances of trading smaller insolvencies as creditor voluntary liquidations in the past, but this practice appears to have reduced in recent years. SSI, in 2015, was the first large trading liquidation of which we are aware.

[3] Insolvent airlines in recent years have been unable to fly whilst in administration because the CAA will typically immediately withdraw the air operating licence, and because of the lack of availability of insurance.

> Whereas the risk of either type of liability is generally thought to be low, insolvency practitioners will adopt a near zero tolerance approach given the very serious impact the liability could have on them and/or the insolvency process. In the absence of funding or insurance available to cover any potential liabilities, they are unlikely to be willing to take the appointment as administrators.

Funding requirements including:

the availability of working capital funding for the insolvency process taking into account cash or realisable assets in the estate;

the availability of insurance for any unfundable liabilities; and

the availability of an indemnity.

> In the absence of (public or private) external funding available to fund the insolvency process, an insolvency practitioner's ability to take an appointment as administrator will be restricted by the available cash or realisable assets in the estate.

1.4 Pros and cons of trading liquidations, and potential reforms

There are both pros and cons of using compulsory liquidation for these types of national interest cases. The main advantage is the liquidator's power to disclaim onerous property. The ability to disclaim onerous property that is subject to a potential environmental or health and safety liability is an obvious benefit of liquidation that is not available to administrators. The most obvious disadvantage is the potential taxpayer exposure in underwriting the compulsory liquidation, though, in some cases, the cost to the taxpayer might have been similar whether or not it was run as a compulsory liquidation or administration.

We have suggested for consideration some potential reforms to both the administration and the liquidation regimes. In an administration context, they are intended to make the regime more accessible to insolvency practitioners looking at taking national interest appointments. The proposed reforms to liquidation would help adapt the process to work better where the liquidator needs to trade the business in order to wind it down, which has been the case for all the official receiver National Interest Cases so far.

1.5 Executive summary conclusion

We conclude that the choice of administration or compulsory liquidation for large national interest insolvency cases is a matter of weighing up a number of factors. This is not all about personal liability as some commentators have suggested. Nor are there any sectors where companies could definitely not be put into administration. However, there will be cases where the environmental or health and safety risks are too great and prohibit a private practitioner appointment as administrator. In these cases, the availability of an official receiver compulsory liquidation with support from special managers is an effective fall back option that has been shown to work well.

Nevertheless, there are some official receiver National Interest Cases where we consider, with a slightly longer runway and/or a bit more cash left in the business, the case could have been run as an administration rather than a compulsory liquidation. The reforms we suggest could also make both options more efficient and potentially cost effective.

2. METHODOLOGY AND STRUCTURE

2.1 Methodology

We interviewed seven leading insolvency practitioners from firms acting as special managers on the four official receiver National Interest Cases to date, as well as a leading QC and solicitor with experience in acting on national interest cases over the past two decades.

Whilst the views and opinions expressed during the interviews have been collated and anonymised for the purposes of this paper, there was a notable consensus of opinion across all interviewees.

The views expressed in this paper are a combination of our interviewees and our own experience.

3. NATIONAL INTEREST CASES

National Interest Cases[4] can be defined as insolvencies that have one or more of the following characteristics, which give rise to an official receiver appointment rather than the appointment of a private practice administrator:

> large complex infrastructures
> market specific, sector or socio-economic impact
> significant financial and reputational risk
> significant environmental and health and safety risks.

3.1 Official receiver National Interest Cases

The below table analyses the four[5] official receiver National Interest Cases that have occurred since 2015 against the above four characteristics. The existence of a particular characteristic is not always black and white, however. A short description of the four official receiver National Interest Cases is provided in schedule 1 to this paper.

[4] This definition is taken from the government's Official Receiver's Legal Panel document (22 October 2021).

[5] See footnote 4 above.

	Objective	Large complex infrastructures	Market specific, sector or socio-economic impact	Significant financial and reputational risk	Significant environmental or health and safety risks
Sahaviriya Steel Industries UK Limited (referred to as **SSI**) (2015)	Orderly wind-down when business sale fell through	✔	✔	✔	✔
Carillion (2018)	Part business sale, part orderly wind-down	✔	✔	✔[6]	☐[7]
British Steel (2019)	Business sale	✔	✔	✔	✔
Thomas Cook (2019)	Part business sale, part orderly wind-down	☐[8]	✔[9]	✔	☐[10]

The other key feature that these cases had in common was that there was no insolvency practitioner willing to take an appointment as administrator.

3.2 Non official receiver national insolvency cases

National interest cases are, of course, not a new phenomenon. Earlier national interest cases were managed without needing to fall back on compulsory liquidation and the official receiver, and instead used a mixture of administration or special administration. The below table includes five such cases. A short description of each case is provided in schedule 2.

[6] Carillion had only £29m cash at bank at the start of its liquidation.

[7] Carillion was the contractor on several large construction sites and so health and safety considerations were relevant, but ordinary construction site risks are typically capable of being managed in an administration, and consequently this factor should not have been determinative in the choice of procedure.

[8] Thomas Cook had a large and complex corporate structure including a tour operator and an airline, but it could not be described as having large infrastructure so as to qualify as a national interest case on this ground alone.

[9] The persuasive national interest factor for Thomas Cook was the need to repatriate 150,000 holidaymakers stranded abroad when the company went into liquidation. This took nearly 800 flights and cost the taxpayer at least £83m. This was likely regarded as a significant financial or reputational risk, but it could also be characterised as market specific or a socio-economic factor.

[10] Although Thomas Cook included an airline, which typically presents some difficult liability and regulatory challenges for an insolvency office holder, there have been recent examples of airlines being dealt with in administration (e.g. Monarch Airlines, October 2017). Therefore the existence of Thomas Cook's airline did not present an unmanageable environmental or health and safety risk dictating the need for a compulsory liquidation.

	Description	Objective	Large complex infrastruct-ures	Market specific, sector or socio-economic impact	Significant financial and reputational risk	Significant environmental or health and safety risks
Paramount Airways (1989)[11]	Airline	Failed to find buyer, orderly wind-down	☐	☐	☐	?
Railtrack special administration [12] (2001)	National railway infrastructure operator	Transfer to Network Rail	✔	✔	✔	✔
Metronet special administration [13] (2007)	London underground infrastructure	Transfer to Transport for London	✔	✔	✔	✔
Jarvis administration (2010)	Support services to public and private sectors, construction (including railways)	Part business sale, part orderly wind-down	✔	✔	?	☐
Petroplus administration (2012)	Oil refinery	Failed to find buyer, orderly wind-down	✔	✔	✔	✔

In addition there are some significant national interest cases which were ultimately saved from filing for insolvency by a consensual restructuring, but where the contingency planning assumed administration. British Energy (2007) is a good example of this.

4. The choice of administration or compulsory liquidation

The main factors affecting the choice of administration or compulsory liquidation for large national interest cases can be divided into two broad categories:

[11] Paramount Airways probably does not qualify as a proper national interest case, but is included because it is an example (perhaps the last example) of a UK airline that flew whilst in an insolvency process. The administrators continued flights through the summer season for nearly four months before ceasing trading and closing the company down.

[12] A railway administration order was made under the Railways Act 1993.

[13] A PPP administration order was made pursuant to sections 220 to 224 of the Greater London Authority Act 1999.

liabilities, including the potential for personal liability for the office holder, and any large, unquantifiable administration expense (or priority) liability, for example of an environmental or health and safety nature; and

sources of funding for the potential administration including: the extent of cash or realisable assets, working capital or third party funding, the availability of insurance, and the availability of an indemnity.

4.1 Personal liability and administration expense risk

Personal liability risk

All insolvency practitioner interviewees agreed that the risk of personal liability, especially for an unquantifiable environmental or health and safety liability was a major (often the first and most important) consideration when considering a prospective appointment as administrator.

There are some cases where an insolvency practitioner can be comfortable with this risk after carrying out due diligence to establish the status and risk profile of assets and the company's operations. Aged or under-invested assets would present more risk. Insufficient time to carry out due diligence would reduce the likelihood of being able to take the appointment.

However, no industry is automatically off limits for an administration appointment. For example in 2020, partners from KPMG (now Interpath Advisory) took an appointment as administrators of Calon Energy, which owned power stations. Other fairly recent examples include hospitals and oil rigs.

In fact, none of our interviewees could recall a case where an administrator has actually been held personally liable for any major environmental or health and safety risk (although there have been examples where a risk has arisen but was ultimately resolved).

Notwithstanding this record, there are still some cases where insolvency practitioners are unable to reconcile the risk or personal liability, for example, SSI or British Steel.

Example: British Steel

Extract from judgment [2019] EWHC 1304 (Ch)

"12. In particular, the main site in Scunthorpe is very large, around 3.5 miles from border to border. The Scunthorpe site is regulated under the Control of Major Accident Hazard Regulations, as a top tier site (i.e. highest risk). There are numerous potential hazards. They include: (i) the fact that the gas pipe network at Scunthorpe from the furnaces and coke ovens contains pyrophoric iron sulphide and methane, and to prevent oxygen mixing with these gases, so as to create a risk of explosion, the network must be maintained at positive pressure, which may be lost if the plant is shut down; (ii) the site is prone to flooding if the water table is not constantly managed, presenting a safety risk to both the site and surrounding areas, and to any shutdown process; and (iii) the presence on site of very significant amounts of hazardous materials, including effluent lagoons and asbestos. The hazards are such that if the Company were to cease operations without careful supervision, the risks would increase significantly. These environmental and health and safety concerns are currently managed by the Company's management team and it is essential that skilled supervision continues in a controlled manner within a formal insolvency process.

13. In theory, one alternative to a winding up order might be the making of an administration order in relation to the Company. This is not, however, a viable option in this case. The evidence makes clear that the asset-based lenders, who are the only creditors entitled to appoint administrators under their security, have not agreed among themselves to fund an administration. The majority do, however, support the proposed liquidation and special manager approach. In addition, given the potential environmental and health and safety issues to which the Company's business gives rise, neither Ernst & Young, which has been advising the asset-based lenders, nor PwC, which has been advising the Company, are prepared to accept appointment as administrators."

Administration expense risk

The insolvency practitioner's approach to a potential large administration expense risk is similar to personal liability risk. The consequence of a large unfunded administration expense materialising is that it would be payable in priority to the administrators' fees and have the potential to swamp the economics of the administration.

Like personal liability, this is not a risk that insolvency practitioners (or their firms) will generally accept. Consequently there is an almost zero tolerance approach unless these liabilities can be funded (see the section below on funding).

Example: Queen Victoria blast furnace explosion at Appleby Frodingham Ironworks in Scunthorpe (November 1975)[14]

The blast furnace exploded, causing 11 fatalities and extensive damage.

"Some 90 tonnes of metal ejected from the torpedo carried away the refractory brickwork from the torpedo throat, the local exhaust ventilation hood, the metal spout of the iron runner and substantial parts of the adjacent building structure.

“The iron runner spout weighing, some 1 and a quarter tonnes, was later found in the roof of the cast house on the opposite side of the building.

“The local exhaust ventilation hood was blown vertically upwards through the roof of the cast house.

“Molten metal and red-hot brickwork from the ladle were sprayed over a wide area.”

The British Steel Corporation was fined £500 after admitting failing to ensure the safety of two employees by allowing the cooling systems to leak water and £200 for failing to supply three workers with suitable protective clothing.

It seems almost a certainty that were the same accident to happen today, the penalties and liabilities would be much higher.

Type of risk

There are three main types of risk that will cause concern to a prospective insolvency practitioner in large national interest cases:

Environmental liability: for example the legacy pollution or contaminated land issues that existed in the case of British Steel;

Health and safety liability: for example the Potters Bar train crash involving fatalities that occurred during the special administration of Railtrack (see box below); and

Public relations risk: this is not a monetary issue, but insolvency practitioner firms are increasingly aware of the PR impact to the wider firm of a major incident occurring in relation to a company over which partners in the firm are appointed, whether or not the office holders are legally liable.

The environmental and health and safety risks are problematic because they are often potentially substantial, and it is sometimes legally unclear whether there is a potential personal liability risk for an office holder, and it is often uncertain whether there is an expense risk. There is a tension between these regimes and the insolvency regime.

[14] Source: https://www.grimsbytelegraph.co.uk/news/local-news/remembering-queen-victoria-blast-furnace-4700626

The environmental and health and safety regimes often prescribe who should be liable. But they are not drafted with insolvency in mind. They sometimes (but not always) provide a carve out for office holder personal liability but they rarely rule in, or rule out, administration expense liability.[15] Furthermore, in some circumstances, liability can be criminal. Potential criminal liability cannot be resolved with insurance or an indemnity.

For a potential administrator the distinction between personal liability and administration expense is somewhat academic – they need to know that however the liability is ultimately categorised, it can be funded, together with the administrator's fees and other expenses. In big, heavy industrial companies with lots of legacy environmental and health and safety issues, this can be difficult.

Example: Potters Bar Fatal Rail Crash (2001)

Extract from Wikipedia:

"A West Anglia Great Northern train service left King's Cross station at 12:45 heading for King's Lynn in Norfolk, via Cambridge. At 12:55, travelling at 97 mph (156 km/h), the four-coach Class 365 Electric multiple unit (unit number: 365526) passed over a set of points "2182A" just south of Potters Bar railway station. The points moved under the train, causing the rear bogie of the third coach and the entire fourth carriage to derail. This caused the fourth coach to become detached and cross onto the adjacent line where it flipped into the air. The momentum threw the carriage into the station, where one end of the carriage struck Darkes Lane bridge parapet, destroying the masonry and sending debris onto the road below. It then mounted the platform and slid along before coming to rest under the platform canopy at 45 degrees. The front three coaches remained on the tracks, and came to a stop approximately 400 metres north of the station due to an automatic application of the brakes.

Six of the victims were travelling in the train, while a seventh, [name removed], was killed by the masonry falling from the bridge over Darkes Lane."

In the aftermath of the crash, Network Rail and Jarvis Rail (who was the sub-contractor responsible for the maintenance of the points) were charged under health and safety legislation. Jarvis ultimately took responsibility for the crash and compensating victims. Network Rail was fined £3m for safety failings. The special administrators were not liable (see below).

Use of a Responsible Person

One solution that has been used to help insulate administrators from the risk of personal liability is the power in paragraph 64 of Schedule B1 of the Insolvency Act 1986 which entitles the administrator to consent to management remaining responsible for day to day safety and operational aspects of the business. The person is known as a 'responsible person'. This tool was used effectively in Railtrack, and specifically referenced in the administration order itself. Notwithstanding the Potters Bar rail disaster, the special administrators were not liable.

However, there are mixed views in the market around the use and scope of this power and the protection that it (appropriately used) can offer. It will also not necessarily absolve an administrator of historic or latent liabilities.

[15] The guidance for whether a statutory liability is an administration expense is set out in *Re Nortel Companies and others [2013] UKSC 52*: A statutory liability will rank as an expense if either: (i) the liability came into being as a consequence of the actions of the relevant insolvency office-holder or (ii) the liability resulted from a statutory provision that was clearly intended to fall upon the insolvency office-holder to discharge. However, the relevant statutes are not clear. For example, liability for contaminated land under the Environmental Protection Act 1990 contains a carve out for insolvency practitioners, but is silent on the subject of whether the liability could or should be an administration expense.

Reduced appetite for risk in recent decades

Many of our interviewees observed a reduced tolerance for risk in recent decades. Several reasons were cited for this, including:

we live in a more litigious culture: insolvency office holders are more likely to be sued;

insolvency practitioner firms are nowadays more concerned about PR than was previously the case;

the potential environmental and health and safety risks have increased in scope and value, and there is a shift towards criminal liability (see the blast furnace explosion example in 1975 in the box above and note that the fine, which was only £700 for an explosion killing 11 people, was not imposed on individuals); and

the current generation of insolvency practitioners are perhaps less used to managing the daily risks of trading administrations, having grown up on a diet of pre-pack administrations.

Risk of personal or expense liability summary

Even though the risk of personal or expense liability is typically quite low, where it cannot be adequately resolved or funded, administration may cease to be an option, leaving an official receiver appointment as the appointment of last resort. This means that the risk then has to be managed in the liquidation, perhaps using the power of disclaimer. One way or another, the risk will often shift (from the insolvent company) to the taxpayer.

We discuss potential reforms to mitigate this issue later in the paper, but legislative reform to remove the potential for personal liability for administrators and/or to clarify that these sorts of liabilities are not intended to be administration expense liabilities is likely to be challenging. It would require a cross-departmental initiative and the resolution of long-standing policy tensions between insolvency and environmental, and health and safety priorities.

5. FUNDING, INSURANCE AND INDEMNITIES

There is a distinction between:

National interest cases with insufficient liquidity or private funding to fund the insolvency process. For example Carillion had only £29m in its bank account when the winding-up order was made and no access to alternative private funding. Funding was needed to enable it to continue to trade and perform its numerous, strategic, government contracts (such as providing school dinners, cleaning hospitals etc) thereby giving the official receiver (as liquidator) and the special managers sufficient time to find buyers and transfer contracts.

Cases where the funding issue is a potential unquantifiable personal liability or administration expense risk, which is unacceptable to any private practice office holder (e.g. a blast furnace explosion, or a rail disaster). Experience suggests that the risk of such liability materialising is low (see previous section), but its existence can be an absolute bar to a private practice insolvency practitioner's willingness to take the appointment unless the risk can be covered by either insurance or an indemnity.

Insurance is not always available[16], and if it is, it can be prohibitively expensive.

The availability or otherwise of a government indemnity or government funding is a sensitive and often confidential issue. However, it is often a pivotal factor in the choice between administration or compulsory liquidation.

5.1 Comparing recent and older national interest cases and the availability of a government indemnity

There are striking similarities between the national interest characteristics of some of the four recent official receiver National Interest Cases and some earlier non-official receiver national interest cases: for example, at a high level, the risk profiles of Metronet (as a special administration), Jarvis or Petroplus were not dissimilar to those of Carillion or British Steel. This begs the question as to why a case such as Metronet in 2007 and Jarvis in 2010 could be run as an administration (or special administration in the case of Metronet) whereas by 2018 no private practice insolvency practitioner was willing to take the appointment as administrator of Carillion. The most likely explanation is the availability (or otherwise) of funding or a government indemnity.

Sectoral similarities

	Pre 2015 private sector appointment	post 2015 or appointment
Heavy industry	Railtrack, Metronet and Petroplus	British Steel and SSI
Support Services	Jarvis	Carillion
Airline	Paramount	Thomas Cook

[16] We understand that insurance cover is not currently available for an insolvent airline (even supposing licensing issues with the Civil Aviation Authority can be resolved), which means that even if administration is an available option, it cannot fly its stranded passengers home.

Understandably, the availability or otherwise of government funding or a government-backed indemnity for the insolvency of a failed private enterprise is a politically sensitive subject, about which there is not always much publicly available information. It may be that, just as the private practice insolvency practitioner's tolerance to risk appears to have changed over time (see above), so has the government's appetite for providing an indemnity to an administrator, notwithstanding the administrator being an officer of the court. One feature of a government indemnity is that it would typically bring some transparency and certain controls to the government. However in a normal administration, the administrator has statutory duties to creditors which can conflict with the public policy objectives (see 5.2 and 5.4 below for further analysis of this point).

5.2 Special administration regimes

Government-backed indemnities are sometimes more readily available where there is the option of using a special administration regime. A special administration regime is a modified insolvency regime that imposes special (public interest) objectives on an administrator to a company in a particular sector or industry. In an essential services sector, the special objectives will usually include continuity of the essential service (for example as in the Railtrack case). These special objectives take priority over the objectives of a normal administration.

Notably, many of the special administration regimes (including the railways, water companies, air traffic control, and protected energy companies)[17] expressly enable the Secretary of State (sometimes with the consent of Treasury) to agree to provide an indemnity to the special administrators against losses incurred in carrying out their functions. There is no mandatory obligation to provide an indemnity, but it is expressly contemplated in the statute.

Therefore, the existence of a special administration regime might make it easier for government to give an indemnity to a private practice office holder since the availability of an indemnity was expressly contemplated by Parliament when legislating for the special administration regime. Furthermore, the special administrators are tasked with pursuing the special objective, which will be related to the national interest element of the case, so there will be alignment with any government funding and the national interest.

5.3 Where special administration is not an option

Such alignment of funding to national interest objective may not be present in an ordinary[18] administration, where the administrator has statutory duties to act independently, in the interests of creditors as a whole, and in accordance with the ordinary administration statutory objectives.[19] An ordinary administrator is not tasked by statute to address an overriding national interest purpose. Neither can

[17] We note that the listed special administration regimes each concern the continuation of an essential public service, in respect of which a government-backed indemnity may in an appropriate case be necessary and justified on public interest grounds. By contrast, financial services special administration regimes do not contain an indemnity provision. This may be because the special objective in financial services cases is typically return of client monies or protection of savings, in respect of which the case for a government-backed indemnity is less compelling. Funding for financial services special administrations is usually provided by a combination of funds available in the administration estate, together (sometimes) with funding from the Financial Services Compensation Scheme.

[18] i.e. a Schedule B1 administration.

[19] Paragraph 3(1) of Schedule B1 of the Insolvency Act 1986, namely (i) to rescue the company, (ii) to achieve a better result for the company's creditors than liquidation or (iii) to realise property to make a distribution to a secured or preferential creditor.

the government legally assert direct control over how the administration is run or the funding is used, so as to direct funds towards the national interest element.

In practice, conditions can be put on administration funding agreements, so, within the constraints of the administrator's statutory duties, lenders to administrations can in fact wield influence. But government funding for or an indemnity provided in respect of an ordinary administration cannot be as controlled as perhaps the government might like.

For this reason, where there is no special regime available, but the government has concluded that taxpayer funding is necessary, they may prefer to do so using an appointment of the official receiver, who is a public official and may give the government the feeling of greater control as we explore below.

5.4 The role of the official receiver

The origins of the official receiver role date back to 1883 for individual insolvency and 1890 for corporate insolvency.[20] The official receiver is a government appointee, an employee of the Insolvency Service, and a civil servant. Official receivers perform a variety of functions including undertaking investigations, acting as first trustee in bankruptcy and first liquidator in compulsory liquidations, and investigating and pursuing directors' disqualification prosecutions.

The role has a public interest element, but it is important to distinguish between those functions of the role which serve the public interest merely because they provide a collective solution for insolvent companies (such as being the default liquidator or trustee in bankruptcy) and those functions where the official receiver is under a duty to act in the public interest (for example where the official receiver pursues directors' duties disqualification prosecutions in order to protect the public).

The role of official receiver does not exist in Scotland and consequently, faced with a national interest case north of the border, there is no option to appoint the official receiver. A private practice office holder has to be persuaded (or indemnified) to take the appointment. This can lead to delays and difficulties to the detriment of the public interest in Scottish cases or in matters which straddle the border.

So the existence of the official receiver role serves the public interest. However, when the official receiver acts as liquidator (or trustee in bankruptcy), their functions and duties are the same as those of any liquidator, i.e. to realise and distribute the assets of the company, and to act in the interests of creditors as a whole[21] and for the beneficial winding up of the company.[22] Specifically, the official receiver as liquidator is not under any overriding general duty to act in the public interest[23].

Therefore, while the official receiver's role has a public interest element, and may, in cases like *Baglan* include a broader purpose than just achieving a financial outcome, it is not such as to enable them, as liquidator, to act in the general public interest if acting in such a way would conflict with their liquidators' duties to

[20] Companies (Winding Up) Act 1890.

[21] The case of *Re Baglan Operations Limited (in compulsory liquidation) [2022] EWHC 647 (Ch)* suggests that in some cases, a compulsory liquidation is run for the interests of a wider body of persons than just its financial creditors. In Baglan, the purpose of the liquidation included public interest and safety (there being no expected return to creditors). But the judge also provided that the case should be limited to its facts.

[22] Section 143 of the Insolvency Act 1986.

[23] But see Re *Baglan Operations Limited (in compulsory liquidation) [2022] EWHC 647 (Ch)* above.

act in the interest of creditors as a whole and for the beneficial winding up of the company. Equally, there is no express statutory power for the government to control the liquidation even where the official receiver is the liquidator and the government is providing the funding. The liquidator must act impartially and independently.

Normally, where a commercial lender (for example, a bank) is funding insolvency proceedings, it is possible to condition the funding agreement so as to facilitate some influence over how the money is spent and the insolvency proceedings are run (subject to the constraints of the administrator's statutory duties). By contrast, in a typical compulsory liquidation, there is no funding agreement as such. Instead, the official receiver's fees and expenses are prescribed by legislation and recouped from the estate (to the extent that there are adequate assets). Any costs overrun is covered by the taxpayer. Typically, therefore, the regime does not expressly afford government the ability to condition the funding of a compulsory liquidation.[24]

Consequently, whereas the government might lean towards an official receiver appointment because of the public interest in the insolvency proceedings being run in a certain way, or because it offers greater financial control over the insolvency proceedings, these benefits are not formally enshrined in statute. Nevertheless, it is still likely that the appointment of the official receiver as liquidator will in reality give the government greater influence over the conduct of the insolvency proceedings, as well as over any special managers who have been appointed to conduct the day to day running of the case, and who will typically need to report to the official receiver under the terms of the special manager protocol.

5.5 Summary of conclusions on funding, insurance and availability of an indemnity

Funding can be problematic either because there are inadequate funds in the company to trade an administration or because there is the risk of an unquantifiable environmental or health and safety liability that needs to be funded.

Both funding requirements need to be met with cash or, where appropriate, insurance or an indemnity.

Where the only option available is for the government to fund the national interest insolvency proceedings or provide an indemnity, this appears to have recently tipped the choice towards compulsory liquidation.

Technically, the official receiver acting as liquidator offers government no formal control over the funding, nor does it impose an obligation on the official receiver as liquidator to act in the general public interest any more than a private practice administrator is so obliged. But in practice, there is likely more influence over the process with an official receiver appointee than a private practice administrator. And perhaps official receivers do have some leeway to be more mindful of the national interest objective than an administrator would, merely because of the official receiver's wider public interest role.

[24] There may be more scope in the very large official receiver cases that have complex funding needs.

6. PROS AND CONS OF LIQUIDATION FOR A TRADING INSOLVENCY

In this section we explore the pros and cons of using compulsory liquidation for a trading insolvency.

6.1 Pros

Availability of official receiver solution

The availability of an official receiver appointment in circumstances where administration (or special administration) is not an option is a definite advantage of compulsory liquidation proceedings. In some national interest cases, an administration appointment is just not an option for the reasons explored above and without the official receiver the company could be left in limbo at severe detriment to the public interest and its creditors. As previously mentioned, this can be demonstrated by observing that national interest cases in jurisdictions without an official receiver option (such as Scotland) can be heavily delayed while a private practice solution is negotiated.

Power to disclaim onerous property

A liquidator has the power to disclaim onerous property[25], which can provide a real advantage over administration. For example, in the right circumstances, a liquidator can disclaim polluted assets.

There is, however, some unresolved tension between the environmental protection and health and safety regimes and the law of disclaimer, creating some uncertainty as to precisely what assets can and cannot be disclaimed. There are also some conflicting Scottish authorities that cloud the legal picture. Nevertheless, this power is exclusive to liquidation and can greatly assist in the orderly wind-down of various aspects of a debtor's business.

It is worth noting, however, that upon disclaimer of, say, a polluted parcel of land, the land passes to the Crown. While there are options for the Crown itself to then disclaim the land, it is also probably the case that if an environmental disaster were subsequently to occur on the land that put the public at risk, it might ultimately fall to the taxpayer (via the Environmental Protection Agency) to bear the cost of cleaning up. So the power of disclaimer may help the economics of the liquidation proceedings, but it may not ultimately spare the taxpayer from bearing the clean-up cost.

Power to trade

The liquidator has an adequate power to trade, which enables compulsory liquidation to be used in these very large national interest cases that require a certain period of trading to facilitate an orderly sale of the business and wind-down of the company's affairs.

While nowadays (outside of national interest cases) liquidation is rarely used for trading insolvencies, this has not always been the case. If you go back far enough, there are plenty of examples of trading liquidations. For example, the liquidation in the often cited case of *In re Lundy Granite Company (1870-71) L.R. 6 Ch. App. 462* involved a trading period in excess of two years.

The liquidator (including the official receiver acting as liquidator) has power to carry on the business so far as may be necessary for the company's beneficial

[25] Section 178 of the Insolvency Act 1986.

winding up.[26] Notably, in the *Baglan*[27] case, it was decided that the phrase "beneficial winding up" in this context would not always be confined to financial considerations, but could encompass a benefit to the persons in whose interest the liquidation process is being undertaken.[28]

Whereas the liquidation power to trade is more restrictive than its administration equivalent, and it cannot be used for a purely rescue purpose, it has so far been sufficient for the purposes of the National Interest Cases. For example, British Steel, which out of the four cases we have referenced traded the most extensively from appointment in May 2019 until completion of the sale of its steelworks in March 2020. We suspect, though, that the British Steel case is something of an anomaly: the original market expectation was that the company would trade for a much shorter period. Indications from government in other situations point towards a preference for only a minimal period of trading and a rapid controlled, safe shut-down of operations.

6.2 Cons

Cost to the taxpayer

Compulsory liquidation is run at the taxpayers' risk (and, where funds are insufficient, at the taxpayers' expense). This is a disadvantage to the extent that the cost to the taxpayer of a compulsory liquidation would exceed any funding government might be required to provide the same case were it to be run as a private practice administration. Unfortunately it is impossible to run a detailed analysis before a possible insolvency to test the comparative cost.

The official receiver normally requires insolvency practitioners to be appointed concurrently as special managers in order to resource these very large complex cases. With two teams, there is the potential to run up extra costs. However, most interviewees felt that this risk wasn't borne out in practice. The official receiver's and special managers' teams worked together well and without duplication.

No express power to use and dispose of floating charge assets

Another point of uncertainty on a crucial issue is whether liquidators (like administrators) have a power to use or dispose of floating charge assets without the secured creditor's consent, and a power to apply to court for consent to dispose of fixed charge assets. Views differ, but the better (more prudent) view is that there may be no such power.

Administrators have express powers to deal with secured assets in paragraphs 70 and 71 of Schedule B1 of the Insolvency Act 1986 (albeit in the case of a fixed charge asset, the consent of the secured creditor or the court is required). No such express powers exist for liquidators.

The problem stems from the decision of *Leyland Daf (Buchler & another v Talbot & another) [2004] UKHL 9*, which is authority for the principle that the company's property is its unencumbered assets, and these are separate from any floating charged assets. It follows that the liquidator has power to deal only with the company's property, not its floating charge assets. Whereas Parliament acted to reverse the *Leyland Daf* decision insofar as it applied to liquidation expenses, it

[26] Paragraph 5 of Schedule 4 of the Insolvency Act 1986.

[27] *Re Baglan Operations Limited (in compulsory liquidation) [2022] EWHC 647 (Ch).*

[28] In that case, the purpose of the liquidation was found to include a public health and safety element, and the official receiver was entitled to take into account broader environmental factors and the potential detriment to the locality when deciding whether to continue trading.

did not introduce any express power for a liquidator to deal with charged assets, with or without the court's consent.

The contrary view is that a power to dispose of floating charge assets for the purpose of meeting expenses of the liquidation can be implied.

This unresolved issue could cause problems in a national interest compulsory liquidation case involving uncooperative secured creditors: it could hamper the official receiver's ability to trade the business and achieve an orderly wind-down. Nevertheless we believe there are a number of options and mitigating factors that can be applied to deal with the problem.

Uncertain impact of liquidation on employment contracts

There is also some legal uncertainty about the effect of compulsory liquidation on employment contracts. Traditionally, it was thought that compulsory liquidation automatically terminates employment contracts with immediate effect.[29] If correct, this would create a serious problem for the official receiver as liquidator seeking to trade the business in liquidation, since it would be impossible to do so without any employees, and rehiring employees in order to trade in liquidation is not a good option.

However, the position is now understood to be more nuanced than the traditional view would suggest. Indeed, some employees of all four official receiver National Interest Cases continued in employment during the period of liquidation trading. Their employment contracts likewise appeared to continue. It seems therefore that the traditional view is an over-simplification, and since liquidations so rarely trade, it has not in recent years been challenged through the courts.

The more nuanced view relies upon a reinterpretation of some old authorities[30] which concludes that compulsory liquidation does not automatically terminate the employment contracts, but instead constitutes a fundamental breach of the employment contract, which the employee may accept, or decline to accept, as termination of the relationship. If the employee continues working, they have clearly declined to accept the breach, and the employment contract continues, provided also that the liquidator acts clearly and unambiguously to treat the employment contracts as ongoing.

This reinterpretation of the traditional analysis seems to have been accepted in the four official receiver National Interest Cases to date.

No section 233A of the Insolvency Act 1986 for essential supplies

Section 233 of the Insolvency Act 1986 applies to both administration and liquidation (among other processes). It provides that where the office holder requests an essential supplier of gas, water, electricity and IT services to continue to supply to the insolvent company, the supplier can request a personal guarantee from the office holder, but it cannot demand a ransom payment of unpaid arrears.

Section 233A was introduced to bolster section 233, providing further that for the same designated supplies, the supplier cannot rely upon an insolvency termination trigger in their contract to avoid having to supply. However, section 233A does not apply to liquidation.

[29] Re General Rolling Stock Co (Chapman's case) (1865-66) LR 1 Eq 346.

[30] Pacific and General Insurance Co. Ltd v Hazell [1997] BCC 400l, Re Foster Clark Ltd's Indenture Trusts, Loveland v Horscroft [1966] 1 WLR 125, MacDowell's case, and Chapman's case (see above).

Whereas section 233B (also known as the *ipso facto* provision) has introduced a broader prohibition on terminating contracts for the supply of goods or services on grounds of insolvency, supplies listed in section 233(3) (i.e. those supplies to which section 233 applies) are excluded from its scope (see paragraph 1(2)(b) of schedule 4ZZA of the Insolvency Act 1986).

The upshot is that contracts for supply of utilities and IT services to companies in liquidation (as opposed to administration) remain capable of termination on grounds of insolvency.

In a typical liquidation in which the business ceases to trade immediately this might be less problematic, but for a trading liquidation, which will need to rely upon numerous IT platform, website, and electronic payment services in addition to electricity and other utility supplies to run its business, this could cause problems.

A narrower moratorium

When liquidation commences, it imposes a stay on any existing or future legal proceedings.[31] However, the liquidation stay (in section 130 of the Insolvency Act 1986) is considerably narrower than the administration moratorium (in paragraph 43 of Schedule B1 to the Insolvency Act 1986). For example, the administration moratorium prevents the enforcement of security, enforcement of retention of title claims, and forfeiture by peaceable re-entry, whereas the liquidation stay does not. In a trading liquidation in which, for example, use of secured assets, or the leasehold property is needed to achieve the purpose of the liquidation, this leaves the official receiver less well equipped to deal with any uncooperative secured creditors or landlords.

Liquidation is not perceived as a rescue procedure

It is true that rescue is not a proper purpose of liquidation and some argue that the procedure should not be used for a large trading insolvency that is intended to achieve a sale of the business. However, achieving an orderly wind-down for the benefit of the creditors is one of the key purposes of liquidation, and there is overlap between a business sale in order to rescue the business, and a business sale in order to realise the company's assets to maximise returns to creditor as part of an orderly wind-down.

Apart from British Steel, which continued trading for approximately ten months in order to achieve the sale of its business, all the other official receiver National Interest Cases have involved relatively short periods of trading in order to realise assets and wind-down the company's business and affairs. Arguably, therefore, none of the National Interest Cases so far have been about rescue and so the criticism that liquidation should not be used as a rescue procedure is hollow.

The reality is that there are sometimes circumstances in which administration is not an available option. If a trading compulsory liquidation can provide a pragmatic solution in those circumstances then it would be odd not to use it.

Lack of carve out for liquidators in the National Security and Investment Act 2021 ("NSIA")

The NSIA imposes a requirement for certain transactions concerning entities in 17 specified sectors, which could potentially be of concern to national security, to be notified to and cleared by the Investment and Security Unit in advance. Failure to notify can render the transaction void, and is a criminal offence. There is a carve

[31] See FCA v Carillion Plc [2021] EWHC 2871 (Ch).

out where the transaction is the appointment of an administrator.[32] However, no equivalent carve out is included for liquidators. Consequently if the company which is to be wound up falls within scope, then clearance for the winding-up order should be obtained before the winding up order is made. Where clearance cannot be obtained on an expedited basis, this will delay the entry of the company into compulsory liquidation.

6.3 Summary of pros and cons of liquidation for a trading insolvency

There are both significant pros and cons of using compulsory liquidation for a trading insolvency, the severity of which will depend on the relevant facts (for example if there is an uncooperative secured lender, the inability to safely deal with floating charge assets might create an issue). However, as has been seen in the four cases referenced to date, compulsory liquidation has adapted well to provide a solution when administration has not been available, and it appears that workarounds can be found to resolve most issues.

[32] Paragraph 6(2) of Schedule 1 to the National Security and Investment Act 2021.

7. Reforms to consider

In this section we consider some potential reforms. The first section looks at potential reforms to the administration regime and the second section contains some potential improvements to the liquidation regime.

7.1 Reforms to administration to make it more suitable for a quasi-liquidation

Administration is commonly used as a quasi-liquidation process, where the business and assets are sold, the proceeds are distributed to creditors and the company is dissolved. These suggested reforms would improve the process for those types of administrations (which is most of them), as well as potentially making administration a more feasible option for national interest cases:

Power to disclaim

Give administrators the power to disclaim onerous property. In a case where funding is not an issue but there are onerous assets in the company, providing administrators with this power could tip the balance in favour of enabling private practice insolvency practitioners to take the appointment as an administrator.

If there are concerns that it could be misused in a rescue administration, the power could be expressed to be available if and only if the administrators decide against, or abandon, the rescue objective and pursue the second or third statutory objective instead.

Provide guidance on use of the "Responsible Person" tool

As we saw in the Railtrack example, appointing a member (or members) of existing management to be a "responsible person", in charge of the day to day management of safety and operations, can be a good way to discharge the administrator's management duties but without exposing them to the relevant potential personal liability.

This power already exists in paragraph 64 of Schedule B1 of the Insolvency Act 1986 but its scope is perhaps not widely understood. Guidance might encourage administrators (or prospective administrators) to use it more.

Resolve the tension between HSE liabilities and insolvency

If the law could be clarified to make it clear which environmental and health and safety liabilities (if any) can be imposed upon insolvency office holders personally and/or whether such liabilities are intended to be an administration expense, this would enable insolvency practitioners to make informed decisions about these potential liabilities.

However, such a legislative change might just be too difficult, especially when Parliament's time is currently so stretched. This is because not only would such a proposal require cross-departmental primary legislation, but it would also require policy clarification on the vexed point of whether insolvency should trump environmental, and health and safety regulations or vice versa.

Set off

In administration, insolvency set off applies only if, and from the time when, the administrator issues a notice of intention to make a distribution. In large cases this notice can occur months or years after the commencement of the administration, notwithstanding that it will have been known from early on that the administration purpose will not be rescue but instead will be to provide a return to creditors. In such cases, it would be more equitable for insolvency set off to apply

from the point when the administrator decides to abandon the statutory rescue objective in paragraph 3(1)(a) of schedule B1 to the Insolvency Act.

7.2 Reforms to compulsory liquidation to enable easier trading:

These suggested reforms are intended to address some of the gaps in the regime that can cause issues in a trading liquidation. The reforms could be applied to all liquidations, or just to trading liquidations (which would need to be defined). Alternatively they could apply at the court's discretion if application is made on day one of the liquidations.

Express power to dispose of floating charge assets

Give liquidators an express power to dispose of floating charge assets without consent, and the power to seek permission from the court (or the secured creditor) to dispose of fixed charge assets, thereby putting liquidators in the same position as administrators (see 6.2 above).

Employment contracts

Codify the impact of compulsory liquidation on employment contracts to clarify that there is no automatic termination (see 6.2 above).

Administration style moratorium

Apply an administration-style moratorium to prevent the enforcement of security, lease forfeiture, repossession of retention of title property etc. in addition to the existing liquidation stay on legal proceedings (see 6.2 above).

Section 233A

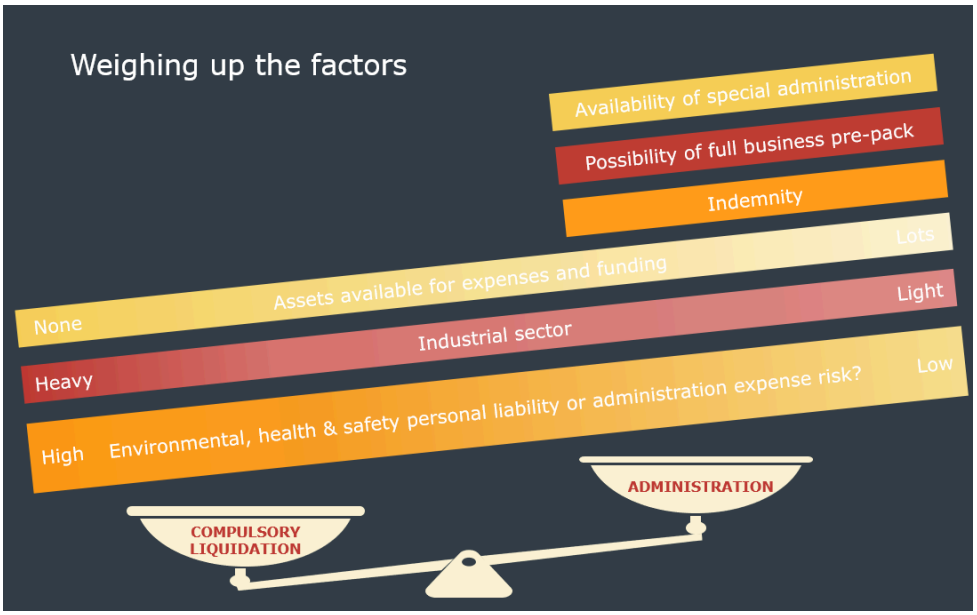
Apply section 233A of the Insolvency Act 1986 (on essential supplies) to compulsory liquidation (see 6.2 above).

NSIA

Extend the insolvency carve out to the NSIA regime to include liquidators as well as administrators (see 6.2 above).

8. CONCLUSIONS

There are multiple factors that determine whether national interest cases are likely to file for administration or compulsory liquidation. A pictorial version of these factors would look something like this:



There is no simple answer to the question of whether administration or liquidation should be the process of choice for large national interest insolvencies. Whereas administration might traditionally be thought of as more suitable to a trading insolvency, there are cases where the risks or lack of funding mean that private practice office holders are not willing to take an administration appointment, and compulsory liquidation can provide a useful alternative. There needs to be a case by case analysis to decide which procedure is more suitable.

The on-going (and lamentable) policy tension between environmental, health and safety, and insolvency regimes makes it impossible to provide certainty to prospective administrators on the issue of potential personal liability and/or administration expenses. Fixing this would go some way towards making administration more accessible as the process of choice for large national interest insolvencies, but given the growing focus on environmentally sustainable solutions this may not attract strong political support and would require primary cross-departmental legislation, for which there may be no capacity or appetite at the moment.

In cases where there is no insolvency practitioner willing to take an appointment as administrator, the availability of government funding and/or an indemnity will become key. If there is a special administration procedure available, this issue might become easier.

In cases where no government funding or an indemnity for a private practice office holder is forthcoming, there may be a need for an official receiver appointment. This is more likely to be the case in heavy industry cases with historic environmental risks (e.g. British Steel).

Likewise were there to be another case with a similar lack of liquidity and/or creditor-funding problem, and a very short runway to insolvency, such as was encountered in Carillion, it may still need to be a compulsory liquidation to prevent an uncontrolled collapse and termination of public contracts.

Given these conclusions, our recommendation is that the focus should be around considering the above suggested reforms both to administration and to compulsory liquidation.

SCHEDULE 1
OFFICIAL RECEIVER NATIONAL INTEREST CASES

case	description
SAHAVIRIYA STEEL INDUSTRIES UK LIMITED (SSI Steel) (2015)	Following a global collapse in the price of steel, the Thai-owned Redcar steelworks company went into compulsory liquidation on 2 October 2015. Partners from PwC were appointed as special managers. Ten days later, no buyer had been found, and a decision was taken to close the steelworks in Redcar on Teesside, with the loss of 2,200 jobs. The Official Receiver oversaw the safe and secure hard closure of the site, with the benefit of an indemnity from BEIS.[33].
CARILLION (2018)	On 15 January 2018, six companies in the Carillion multinational construction and facilities management group were ordered to be wound up after rescue attempts had failed. Six partners of PwC were appointed special managers. Further filings followed, both in the UK and abroad, and by the end of 2018, 91 Carillion companies had been liquidated. Carillion had been the second largest UK construction company and was listed on the London Stock Exchange. It supplied many essential public services to HM Government (including cleaning, school meals, hospital maintenance and defence accommodation). It also had a range of private and public construction projects, including hospitals and transport. The official receiver traded the liquidation and many of its contracts pending transfer to new suppliers/contractors. Its liquidation was thought to be the largest ever trading liquidation in the UK, with group debts estimated in April 2018 to be some £6.9 billion. Government provided the necessary funding for the official receiver to maintain the public services carried on by Carillion staff, subcontractors and suppliers. Later, estimates of the total cost to the taxpayer of the Carillion liquidation were in the region of £180m. At the start of the liquidation, Carillion employed 18,000 people in the UK, of which nearly 14,000 kept their jobs through business transfers. The Carillion liquidation had wide-ranging political and legal impact, including in relation to audit practice, the award of UK Government contracts and outsourcing public services, pensions, the termination of future PFI projects and corporate governance.

[33] Source: Statement for BEIS on 1 November 2016: https://questions-statements.parliament.uk/written-statements/detail/2016-11-01/HLWS233 (accessed on 14 November 2021).

case	description
BRITISH STEEL (2019)	Suffering from financial difficulties due to a fall in price for steel, declining demand due to Brexit uncertainties and competition from alternative suppliers, and following the break-down in rescue talks between the government and the company's owner, Greybull, the official receiver was appointed as liquidator of British Steel Limited (in compulsory liquidation) in May 2019. Three partners from EY ware simultaneously appointed as special managers to support him. In the winding-up judgment[34], the judge cited significant environmental and health and safety concerns as factors he took into account: it was essential that skilled supervision continued in a controlled manner within a formal insolvency process. British Steel was the UK's second largest steel producer, operating steel-making and processing facilities in Scunthorpe and on Teesside. The main site at Scunthorpe was regulated under the Control of Major Accident Hazard Regulations as a top tier site (i.e. highest risk). It was also imperative to guard against the risk of explosion that the coke ovens and pipes be maintained at the requisite pressure and the water table level be managed. The collapse of British Steel put 5,000 jobs at risk at its plants in Scunthorpe, Teesside and Skinningrove, and endangered a further 20,000 jobs in the supply chain. During the liquidation, the official receiver traded the company with the benefit of an indemnity from government[35], and successfully concluded a sale to Jingye Steel (UK) Ltd in November 2019 (which completed in March 2020) of the steelworks at Scunthorpe, the UK mills at Teesside and Skinningrove, and the subsidiary business FN Steel. In August 2021, the UK based Liberty Steel acquired the former Sogerail plant in Havange, France. The cost of the liquidation to the tax payer is estimated to be £500m.[36]

[34] [2019] EWHC 1304 (Ch).

[35] Theresa May statement to Parliament (https://en.wikipedia.org/wiki/British_Steel_Limited).

[36] https://www.bbc.co.uk/news/business-56824423.

case	description
THOMAS COOK (2019)	After 178 years in business, but suffering from over gearing and the internet revolution in holiday booking, Thomas Cook went into compulsory liquidation with the official receiver as liquidator on 23 September 2019. Simultaneously, special managers from both AlixPartners and KPMG (now Interpath Advisory) were appointed to separate sub-groups of companies within the group. The collapse left 150,000 holidaymakers stranded abroad and prompted an enormous repatriation exercise co-ordinated by the Civil Aviation Authority. The £481m cost of the repatriation and refund costs depleted the majority of the CAA's funds, with a top up required by government (reported by the National Audit Office in March 2020 to be £83m). Whilst the Thomas Cook airline was immediately grounded at the start of the liquidation, the company's business continued to trade for the first few months to support the repatriation exercise and assure the orderly wind-down and realisation of assets. Thomas Cook had employed approximately 21,000 staff worldwide with 9,000 in the UK. Interestingly, the last time Thomas Cook suffered an insolvency crisis was after the second world war. It was considered of such national importance that the company was nationalised in 1948[37] and remained in public hands as part of British Railways until 1972.[38] In 2019, the national interest was served not by nationalising or providing a public bail-out, but by cushioning the stranded holiday-makers from an uncontrolled, and unfunded insolvency.

[37] https://en.wikipedia.org/wiki/Thomas_Cook_%26_Son.

[38] From Guardian article: Why did Thomas Cook collapse after 178 years in business? https://www.theguardian.com/business/2019/sep/23/thomas-cook-as-the-world-turned-the-sun-ceased-to-shine-on-venerable-tour-operator (accessed 16 November 2021).

SCHEDULE 2
EARLIER NATIONAL INTEREST INSOLVENCIES (NO OFFICIAL RECEIVER APPOINTMENT)

case	description
PARAMOUNT ADMINISTRATION (1989)	Paramount Airways was a 1980s British charter airline based at Bristol Airport. It operated flights from Bristol, Belfast and Birmingham to Mediterranean destinations. The airline went into administration on 7 August 1989, but the company continued trading during the summer season whilst seeking a buyer. No buyer having been found, the airline ceased trading on 30 November 1989 (having traded for nearly 4 months). The case is well known to insolvency lawyers for its House of Lords judgment (Powdrill v Watson [1995] 2 A.C. 394) on whether the contracts of employment were "adopted" by the administrators. While the case may not have qualified as a national interest case by reference to today's criteria in terms of size and impact, its significance for this paper is that the airline operated flights while in administration, which would be unlikely to happen in the 2020s..
RAILTRACK SPECIAL ADMINISTRATION (2001)	On 7 October 2001, four partners of Ernst & Young LLP (as it then was) were appointed as joint special railway administrators of Railtrack PLC as the company had been badly managed and was unable to pay its debts. Railtrack held a network licence under the Railways Act. It owned and operated the principal national railway networks, responsible for the provision, maintenance, and management of the railway infrastructure. Part of its role was to manage timetabling, train planning and signalling. The company's parent was listed on the London Stock Exchange. In its order the court permitted the special railway administrators to consent to the continued exercise by the company and its directors of all functions relating to the health and safety, meaning that the executive directors retained day to day operational responsibility. The tragic Potters Bar rail crash (see box in 4.1) happened during the special administration period. The crash was caused by poorly maintained points, and killed seven people. Later, Jarvis, the sub-contractor responsible for maintenance of the points, took responsibility for the crash. Network Rail (as Railtrack's successor) was also fined £3m for safety failings. The special administrators were not liable. The government provided funding for the special administration, at the end of which, the railways were renationalised and transferred to Network Rail.

case	description
METRONET SPECIAL ADMINISTRATION (2007)	Metronet Rail was one of two infrastructure companies in a public-private-partnership with London Underground. It was responsible for the maintenance, renewal, and upgrade of the infrastructure (track, tunnels, signals and stations) on nine London Underground lines from 2003 to 2008. Due to financial difficulties, the company went into special administration in July 2007. A PPP administration order was made pursuant to sections 220 to 224 of the Greater London Authority Act 1999. Partners at EY acted as special administrators. The government reportedly provided funding of nearly £2bn.[39] After the special administration, the company's responsibilities were transferred back to public ownership under the authority of Transport for London. The National Audit Office estimated that the failure of Metronet's PPP contract cost the taxpayer between £170m and £410m.
JARVIS ADMINISTRATION (2010)	Jarvis was once the UK's largest construction company with a division specialising in rail maintenance. Jarvis' decline began with the Potters Bar rail crash in May 2002 (see box in 4.1) because Jarvis was the contractor responsible for that stretch of track. It was forced to sell its PFI business in 2004, but the company continued to struggle and in 2010, over-indebtedness and funding difficulties caused the company to file. Partners from Deloitte were appointed administrators. While the administrators traded the business for a time, a buyer could not be found and most of the business was wound up, resulting in over 1,100 job losses.
PETROPLUS ADMINISTRATION (2012)	Petroplus was Europe's largest independent oil refinery. Failure to agree a deal to reinstate credit lines with its lenders led to one of the most complex cross-border insolvencies seen at the time, with group liabilities exceeding $2.3bn, and operations scattered across Europe. Multiple insolvency procedures ensued in different jurisdictions. Partners from PwC were appointed to Petroplus Refining and Marketing Limited in the UK in January 2012. The company's main asset was the Coryton refinery in Essex. It owed guarantee liabilities on bonds issued by the group of $1.75bn. Coryton was a key supplier of fuel to south-east England, and the collapse of the parent led to fears of shortages or even closure just weeks ahead of the London 2012 Olympics. The company traded in administration, restarting oil supplies to the region. However, a buyer could not be found and the oil refinery was closed, with the loss of 500 jobs and additional contractors and supply-chain impact. The site was eventually sold for alternative use and the company exited administration into liquidation in 2013, with private practice liquidators appointed.

[39] "Govt in £2bn Metronet bail-out" www.inthenews.co.uk 7 February 2008. http://www.inthenews.co.uk/transport/govt-in-2bn-metronet-bail-out-$1197787.htm (accessed 27 March 2022).