The Notion of Fairness and Insolvency and Company Law
(abbreviated version of the Annual lecture delivered to the Insolvency Practitioners Association on Wednesday 24 January 2018)

Introduction

1. The notion of fairness…

2. In the summer of 2017 while in Sicily I read a book called the notion of fairness by L Sun. The book first came to my attention after reading an article in the Modern Law Review written by Professor Paterson at the LSE. The notion of fairness maybe of interest to you as office-holders as fairness intervenes when dealing with directors, creditors (proofs of debt and meetings), debtors, employees and the court. Indeed, this very Association's principal aim is to promote and maintain high standards of performance and professional conduct amongst those engaged in insolvency.

Fairness

3. Sun thought that "fairness" is the most important rule that governs our daily interactions with spouses, lovers, friends, co-workers, employers and neighbours etc. Tax provides a simple example. It is a subject dear to most of our hearts. Is it fair to put people with greater income into higher tax brackets, or progressive taxation, which assumes that those who earn more can afford to part with a larger proportion of their income? If the answer is "yes" the economic advantage of those who do well is curtailed by the system, which as some argue, is unfair. If the answer is "no", why is such a policy supported by the vast majority of people, especially among the 99%? Our legal systems are rife with similar controversies on what is fair.

4. I am not going to discuss fairness only in a moral dimension, but it is worth exploring, how much of the law is borrowed from philosophers, the ancients and literature. Having explored these influences, I will discuss the concept of fairness in the context of insolvency. As I explore these influences some of you may be tempted to ask why you are listening to what may sound like an amateur's rummage into the Classics. As we will see, the influences I have mentioned are still discussed in our courts. They remain important. But I will come to that.

5. First the idea of fairness or justice. The theme of fairness is certainly not new. The concept is an old one. Homer refers to the Scales of justice, that great symbol of even-handedness, in the Iliad (Book 22).

6. In ancient Egypt, by contrast, the heart of a deceased person was weighed against the feather of Maat, the goddess of unalterable laws, whose name means evenness, to determine if the person could pass to the world beyond.

7. Our modern image of Lady Justice (as on the Old Bailey) stems more from the Greco-Roman mythology of Themis (300BC), the Greek goddess of Justice and Law, who became the first Delphic oracle, and Justitia (I AD) the Roman

goddess of justice, often portrayed as balancing scales and a sword and often blindfolded as well. The symbolism is obvious. But no discussion of justice, or fairness, is possible without turning to the ancient Greeks.

Ancient Greece

8. When Solon (known as the lawmaker) came to power in Athens, in the early part of the sixth century, there were great divisions between rich and poor. The economy was in crisis and many poorer Athenians fell into debt. Their loans were often secured by their own persons, and thousands of them were put into serfdom. The rich by contrast became ever richer by obtaining easy profits from loans. To resolve this conflict, Solon enacted laws prohibiting loans on the security of the person. He lowered the rate of interest, ordered the cancellation of all debts, and gave freedom to serfs. In fact he acted so moderately and impartially that he became thoroughly unpopular with both sides. (Debt the first 5000 years by David Graeber is an interesting read for those who want to know more on this subject).

9. Plato, a pupil of Socrates, was born around 428 B.C., during the final years of the Golden Age of Pericles'. He had much to say about justice (true justice being the highest virtue for the soul and state) and fairness. In Book I of the *Republic*, Socrates and his interlocutors discuss the meaning of justice. It has been suggested that the whole argument of the *Republic* is made in response to Thrasymachus' statement to Socrates: "Justice is nothing else than the interest of the stronger."

10. In his *Laws* Plato builds on the insights of Solon and his concept of balancing conflicting interests. In both the *Republic* and the *Laws*, Plato offers two different solutions to the problem of social peace, based on the equilibrium and harmonious union of different social classes. In summary, he suggests that justice is neither the right of the strong nor the advantage of the stronger, but the right of the best and the advantage of the whole community. As he stated, "Justice is the equity or fairness that grants each social group its due and ensures that each 'does one's own work'".

11. Aristotle, a pupil of Plato, makes the important observation that standards of justice or fairness are different in different regimes. He developed a theory of justice based on the notion of "complete" (or "general") justice and "partial" (or "particular") justice. His notion of complete justice corresponds roughly to the idea of rightness in modern English and denotes the quality or qualities of character that lead people to do the right thing, whether that involves being fair or exercising good judgment in some other way. His notion of partial justice is narrower and corresponds roughly to the ordinary concept of justice or fairness in English.

12. He believed in justice with "reciprocity in accordance with a proportion" rather than as an exchange of arithmetically equal values. If the parties are strict equals, justice is done when the benefits they exchange are of equal value, i.e. balanced reciprocity. If the parties are unequal in their respective merits, then justice is

served when the benefits exchanged differ in value in proportion to the different merits of the parties involved. Moving forward we come to Roman law.

Roman Law.

13. The basis of Roman law was that the exact form, not the intention, of words or of actions produced legal consequences. Justinian, who was Emperor in the East from AD 527 to 534, began work on his Codex Constitutionum soon after his accession, when he appointed a 10-man commission to go through all the known ordinances, or "constitutions," issued by the emperors, weed out the contradictory and obsolescent material, and adapt the provisions to the circumstances of that time. The Justinian code consists of four books: (1) Codex Constitutionum, (2) the Digesta, (3) the Institutiones, and (4) the Novellae Constitutiones Post Codicem. His title "Societas", Book 26 of the Institutes, contains detailed information about the different types of partnership (for example a general partnership or a particular partnership, for example for buying and selling slaves, oil, wine or corn (his examples)), and how they might be terminated (by death, termination of purpose, confiscation, or surrender). Serious thought had been given to how partnerships start and finish and confiscation raised an issue of fairness. Just in case you think this is all far removed from the present day, Roman law has been cited and considered with reasonable frequency and recently in our highest court: Foskett v McKeown in 2001 which concerned the relationship between unjust enrichment and property law; Fairchild v Glenhaven Funeral Services in 2002, which concerned causation in the law of torts; and OBG v Allen in 2007 where the boundaries of the tort of conversion where in issue.

14. De Societate in Justinian's Institutes was cited in Blisset v Daniel in 1853 (a company law case) referred to in Westbourne Galleries by the House of Lords 100 years later in 1973, which in turn was referenced by Lord Hoffmann in O'Neill v Phillips, 1999. In the latter he said:

    "[Company] law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman Societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, ben carried over into company law. The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. The second leads to a conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely on their strict legal rights."

15. The Romans developed alternative procedures that allowed greater fairness. For example, a Roman was entitled by law to make a will as he wished, but, if he did not leave his children at least 25 percent of his property, the magistrate would grant them an action to have the will declared invalid as an "irresponsible testament." This example seems very modern.

Shakespeare

16. From the ancient beginnings of the notion of fairness to the popularisation through works of art. We now skip to Shakespeare. Lord Hoffmann, who has been termed one of the most important and influential English jurists, clearly thought that Shakespeare had something relevant to say about company law matters; he referred in *O'Neill v Phillips* to Sonnet 129. This was in the context of saying that parties ought to be encouraged, where at all possible, to avoid the expense of money and spirit inevitably involved in lengthy litigation by making an offer to purchase shares at an early stage.

    The expense of spirit in a waste of shame
    Is lust in action; and till action, lust
    Is perjured, murderous, bloody, full of blame,
    Savage, extreme, rude, cruel, not to trust,
    Enjoy'd no sooner but despised straight,
    Past reason hunted, and no sooner had
    Past reason hated, as a swallow'd bait
    On purpose laid to make the taker mad;
    Mad in pursuit and in possession so;
    Had, having, and in quest to have, extreme;
    A bliss in proof, and proved, a very woe;
    Before, a joy proposed; behind, a dream.
      All this the world well knows; yet none knows well
      To shun the heaven that leads men to this hell.

17. Legal references occur so frequently in Shakespeare's works, that some scholars believe that he was a student of the law at the Inns of Court. Many of his plays deal with some aspect of the law. More than twenty of his plays have some form of trial scene. Apparently, many in his audience were law students, and he knew his public. In an exploration of fairness in the law one has to look at The Merchant of Venice which is, at heart, an examination of the tension between law and equity.

18. It needs to be borne in mind that in Shakespeare's time the courts of common law and the courts of equity, of strict construction and of principles of fairness, were still quite separate. Today equity, in fact, has become so intertwined with law in the justice system that it is difficult to see the lines of demarcation.

19. A contract, like the one made between Shylock and Antonio, was "fully enforceable at law". Any penalty stipulated in the contract would be automatically awarded if the contract were not strictly upheld. Shylock seeks a justice based upon vengeance, not "fairness." He has a strictly enforceable contract. Portia on the other hand urges the consideration of principles of equity. She delivers a passionate speech on the need for considerations of mercy in the administration of the law:

    Though justice be thy plea, consider this,

That in the course of justice none of us

Should see salvation. We do pray for mercy,

And that same prayer doth teach us all to render

The deeds of mercy (IV.i.196-200).

The imposition of basic principles of fairness upon the strict letter of the law, lies at the heart of equity. In other words, Portia argues, there is a better form of justice to be obtained when mercy or fairness become considerations.

20. Portia, of course, fails to persuade Shylock to show mercy and changes tack to beat him at his own literal game by insisting that his pound of flesh should include no blood; a most effective legal technicality.

From theory to context

21. In his main work, *A Theory of Justice* (1971), Rawls develops his theory of "Justice as Fairness". He argues that specific principles of justice can be justified by showing that they would be chosen by representative individuals placed in a carefully constructed, artificial choice situation. To ensure that the choice of principles is not influenced by people's particular interests, John Rawls employs a hypothetical "veil of ignorance." Individuals are to make their decision without knowledge of their specific identities or attributes, e.g., economic or social position, religion, sex, age, etc. Because of the representative individuals' concern that, once the veil of ignorance is lifted, they might turn out to be disadvantaged members of society, Rawls argues that they will choose principles that protect the weaker or "least advantaged" members. Think winter fuel allowance; think taxation; think the prescribed part.

22. The "veil of ignorance" perhaps plays its part when considering the theoretical purposes of insolvency law. A collective process designed to provide equality for all those who, to borrow a phrase from Thomas Jackson, fish in the same lake. Professor Roy Goode, in his *Principles of Corporate Insolvency Law*, refers to the "fundamental principle …that the debtor's assets are to be distributed *pari passu*". There are many academic articles on the subject. Thomas Jackson in the Logic and Limits of Bankruptcy Law wrote of the tension between maintaining pre-bankruptcy creditor rights and the division of assets post-bankruptcy. He explained that a rule is required to provide a fair division of the assets to "innumerable creditors, from two to many thousands…..assuming that you were concerned only with unsecured creditors, you presumably would devise a pro rata rule that would result in equal division". He went on to suggest that a pro-rata division often reflects the odds that any one creditor will see a return.

23. Professor Paterson is Professor of Corporate Insolvency at the London School of Economics and Political Science, and previously a partner in Slaughter and May. She has given some serious thought to how the notion of fairness operates within the law of insolvency and corporate restructuring. Her proposition is that fairness, when used in the context of the distribution of money or goods, is

strongly associated with treating identically situated persons equally or, if there is not enough to go around, at least proportionately, sometimes referred to as the principle of 'horizontal equity'. Well-defined criteria must be developed to decide whether or not one party is equal with another. Sometimes these concepts are codified in rules or laws and sometimes they are simply widely understood. When a company is in administration, the broadest differentiating criterion in English law is whether a party has security or not. Reflecting some of the theoretical thinking I have mentioned she says, some of the claims of employees are considered before the claims of other creditors. This makes a relatively small proportion of the realisations of certain secured creditors available to unsecured creditors, and elevates the claims of creditors who dealt with the administrator *after* appointment above those of creditors who have dealt with her before. These rules mark out the principle of equal treatment in English insolvency law, and its boundaries

24. In her recent very readable article published in the Modern Law Review (2017) 80(4) MLR 600–623 entitled *Debt Restructuring and Notions of Fairness* Professor Paterson considers three different types of debt restructuring in English law: the restructuring of a small or medium sized enterprise; of a large corporate entity; and of a financial institution. She aims to identify accurately the fairness concerns, and to explore the quality of fairness in each of the situations with which it is concerned. I shall not summarise her thoughts about financial institutions, but I shall attempt to explain what she thinks about the first two types of debt restructuring.

25. In her SME example, the owner/managers of a struggling company sell the business and assets as a going concern. They subscribe for all the shares in a new company (Bidco). Bidco then negotiates a sale and purchase agreement with the seller's administrator-in-waiting, financing the purchase price by borrowing a fully secured loan from the seller's bank. The directors of the seller appoint the administrator and place the company into administration. The sale and purchase agreement is immediately signed by the administrator and Bidco, and the purchase price is paid to the seller. Together with the owner/managers, the bank agrees with the administrator that the seller has five suppliers who should be paid in full for all invoices outstanding at the date of the administration. Many other small suppliers have substantial outstanding debts with the company at the administration date but these debts are not paid in full; apart from payments to the five selected suppliers, certain amounts due to employees and a small deduction which is legally required to be divided amongst all the unsecured creditors, the purchase price is distributed to the bank as the seller's secured creditor. After the transaction is completed and the economy has begun to recover, Bidco raises a new, cheaper loan from alternative lenders and repays the bank in full. The owner/managers continue to own all the shares in the newly restructured business.

26. Is it fair, Professor Paterson asks, that some unsecured creditors are paid in full, thus deviating from the principle of equal treatment? Can this be justified on the basis that that the suppliers who are paid in full are objectively different because they are more critical to the business than the other suppliers? Is it reasonable for the trader to feel he has been unfairly treated? Does the loss falling of those

least able to bear it? Is the system biased against those with a lesser voice? These are perhaps questions that may be tested in time, against the benchmark of fairness in the courts.

27. It is apparent, Professor Paterson asserts, that in large corporate restructuring there is a more level playing field, and statute law provides greater safeguards against unfairness against smaller creditors than in the case of SME restructuring. However, there may well be room for improvement.

28. The principle of equal treatment in a scheme of arrangement is established first, by requiring a determination as to whether creditors can vote as a single class, or should be divided into separate classes for voting purposes, and secondly, by mandating that the scheme can only proceed if creditors in each separate class accounting for a majority in number and 75 per cent in value of the claims present and voting in that class vote in favour of the scheme.

29. It is possible that some of the senior lenders voting on the scheme have entered into lock-up agreements in which they commit to support the scheme before it is proposed, have received consent fees in return for voting in support of the scheme, hold an interest in another part of the company's capital structure which may influence their overall assessment of the restructuring or are content to support the scheme only because of the discount at which they acquired their interest.

30. As a result, after voting on the scheme, a second court hearing is held at which the court decides whether to sanction the scheme. The court will be alert to the possibility that any group of creditors even in properly constituted classes have been unfairly coerced by the majority within their class.

31. So what about some hard law to put some flesh on the bones?

The Concept of fairness and Insolvency

32. The concept of fairness developed in nineteenth century in company and bankruptcy law. The best example is one with which you will be familiar: the much-cited case of *Re Condon, exp James (1874) 9 ch app 609*. In this case the sheriff took possession of goods belonging to Condon. Condon was later adjudicated bankrupt and James was appointed his trustee in bankruptcy. Bradshaw, the recipient of the goods possessed by the sheriff, believed that he was legally bound to repay the money to James, as urged by James, and did so. In fact it turned out, following a case decided quite separately by the Court of Appeal, that he was not legally bound to repay the money. He applied for it to be refunded and the Court of Appeal upheld the Registrar's order that this should be done.

33. James LJ stated, "I am of opinion that a trustee in bankruptcy is an officer of the Court. He has inquisitorial powers given him by the Court, and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The trustee, then, finding that he has in his hands money which in equity belongs to someone else, ought to set an example

to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people".

34. The effect of this, put simply, is that a trustee in bankruptcy, or a liquidator, must avoid invoking strict legal rights where this would go against principles of fairness. This was of course exactly Portia's argument: fairness rather than legal entitlement.

35. This 19C case has stood the test of time. For example it was cited in Re *Oasis Merchandising Ltd [1998] Ch 170*: "The liquidator is an officer of the court. As such, he has a duty to act fairly and impartially." Its principles have also been applied to a claim for payment by an employee of a company in liquidation: *Re Associated Dominions Assurance Society plc Ltd (1962) 109 CLR 516.*

36. The rule was given comprehensive consideration by David Richards J (as he then was) in *Lomas & others v Burlington Loan Management Ltd [2015]EWCH 2270 (ch).* He stated that the rule cannot now be confined to particular categories of case. Most recently, it was applied by Chief Registrar Baister (as he then was), in *Allen v Young 2017.* His analysis taken from Lomas provides what I regard as interesting examples of the notion of fairness in insolvency.

37. Stephen expressed the view that the principle in Ex parte James is an anomalous jurisdiction but well-established. Importantly he considers that the principle provides a means by which the court can control the conduct of its officers even in the absence of an express statutory power. Administrators, liquidators in a compulsory winding-up and trustees in bankruptcy are all officers of the court and subject to this jurisdiction.

38. The touchstone for the application of the principle has been expressed in different terms over the years. In Ex parte James itself, the Court said that the trustee:

"ought to set an example to the world by paying it [the money paid under a mistake of law] to the person really entitled to it."

39. In Re Wigzell [1921] 2 KB 835, Salter J, in a judgment which was strongly endorsed by the Court of Appeal said that the "jurisdiction should be exercised wherever the enforcement of legal right would, in the opinion of the Court, be contrary to natural justice". But he added a cautionary note:

"The effect of exercising the jurisdiction which these decisions have asserted and defined is to deprive the creditors of money which is divisible among them by law. I feel sure that such a power should not be used unless the result of enforcing the law is such that, in the opinion of the Court, it would be pronounced to be obviously unjust by all right-minded men." (an objective test)

40. In the same case in the Court of Appeal, Lord Sterndale MR said that the court would not allow its officer to do "something which in its opinion is dishonourable and not high-minded". Younger LJ considered that it applied

where it would be "unconscionable" for the officer to stand on his strict legal rights.

41. In 1975 Walton J reviewed the authorities in Re Clark ([1975] 1 WLR 559). In his judgment he repeatedly expressed the relevant test as one of unfairness. So, for example, at p.563, he said:

"Stating the matter in very broad terms indeed for the moment, and deliberately using for the purpose 'unemotive language', the rule provides that where it would be unfair for a trustee to take full advantage of his legal rights as such, the court will order him not to do so …"

42. When applying the principle to the facts of the case before him, namely whether the trustee should recover the amount of two cheques paid to a supplier to the bankrupt, he said at p. 567:

"The question as I feel it ought to be posed, is simply: 'Is it fair that the trustee should recover the amount of these two cheques from Texaco?'"

43. He said that he had no hesitation in answering that it was not fair.

44. The latest and most authoritative word on the subject is in the judgment of Lord Neuberger in Re Nortel GmbH [2013] UKSC 52, [2014] AC 209. He said at [122]:

"As to the common law,…… a principle has been developed and applied to the effect that 'where it would be unfair' for a trustee in bankruptcy 'to take full advantage of his legal rights as such, the court will order him not to do so'…..

'where a bankrupt's estate is being administered … under the supervision of a court, that court has a discretionary jurisdiction to disregard legal right', which 'should be exercised wherever the enforcement of legal right would … be contrary to natural justice'. The principle obviously applies to administrators and liquidators"

45. Giving a plug, if I may, for Hamish Anderson's excellent and readable work "The Framework of Corporate Insolvency Law" he cites a later decided case in the Lehman Brothers run of decisions where David Richards J said of this aspect of the principle:

"I take it that unfairness is a sufficient ground for the application of the principle in Ex parte James, if the court thinks that, in all the circumstances, it is right to apply the principle. This is not a surprising development. While in some of the earlier cases the judges refer to the difficulty in applying the principle in Ex parte James because it involved moral rather than legal judgments, unfairness as a substantive legal concept is now well embedded in our law".
He went on to say:
"…… What constitutes unfairness will, just like what constitutes dishonourable conduct, depend on the circumstances of the case."

46. Is it good enough to simply refer to "all the circumstances of the case". In my view this concern is partly answered by the identity of the decision maker. Judges are uniquely placed in our society to make these calls as they all wear the metaphorical veil of ignorance. They have no prior knowledge of the specific identities or attributes of a party and are uniquely equipped by experience and position in an independent judiciary, to put aside predilections and prejudice.

47. In corporate insolvency the notion of fairness is prevalent in liquidation, CVAs and Schemes of Arrangement. According to the editors of *Insolvency Legislation Annotations and Commentary*, the Courts will exercise their discretion and order a winding up, on the basis of fairness and commercial morality, when they feel that the circumstances of the company warrant special scrutiny and to ensure that the creditors' interests were not prejudiced: Re Zirceram Ltd is an example. Courts have made orders where the creditors lack confidence in the liquidator, and the latter is perceived as not being impartial (a breach of fairness): Re Palmer Marine Surveys Ltd.

48. In the context of a CVA Henderson J (as he was) summarised some useful principles in Mourant & Co Trustees Ltd v Sixty UK:

'(a) Any CVA which leaves a creditor in a less advantageous position than before the CVA will be prejudicial to the creditor. The real issue is generally whether the prejudice is "unfair".

(b) There is no single and universal test for judging unfairness in this context, and the question must depend on all the circumstances of the case, including in particular the alternatives available and the practical consequences of a decision to confirm or reject the arrangement.

(c) In assessing the question of unfairness, a number of techniques may be used, including what may be described as "vertical" and "horizontal" comparisons. A vertical comparison is a comparison between the position that a creditor would occupy and the benefits it would enjoy in a hypothetical liquidation, as compared with its position under the CVA. The importance of this comparison is that it generally identifies the irreducible minimum below which the return in the CVA cannot go. As David Richards J said in Re T & N Limited [2004] EWHC 2361 (Ch), [2005] 2 BCLC 488, at paragraph 82 of his judgment:

"I find it very difficult to envisage a case where the court would sanction a scheme of arrangement, or not interfere with a CVA, which was an alternative to a winding up but which was likely to result in creditors, or some of them, receiving less than they would in a winding up of the company, assuming that the return in a winding up would in reality be achieved and within an acceptable time-scale: see Re English, Scottish and Australian Chartered Bank [1893] 3 Ch 385."

49. '[The underlying test of fairness] is deliberately a broad test to be applied on a case by case basis, and courts have struggled to do better than the approach adopted by the Court of Appeal in Re Alabama, New Orleans, Texas and Pacific Junction Railway Co [1891] Ch 213 and summarised in the often-cited passage from a leading textbook, Buckley on the Companies Acts:

"In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with, second that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promise interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve. …"

Conclusion

50. We have seen that the notion of fairness has been given treatment from early times. It is a concept that pervades our lives, pervaded the lives of those who came before us and will pervade the lives of those who come after us. We have in this short lecture travelled a long road. From weighing the heart of a deceased person in ancient Egypt, Greek and Roman Philosophers, Shakespeare's pound of flesh with no blood, John Rawls' Theory of Justice embodied in the veil of ignorance and the emergence of fairness in English law to a position where David Richards J has recently said that "unfairness as a substantive legal concept is now well embedded in our law".

51. Fairness will mean different things to different people depending on where they stand, but in law at least there emerges some conceptual threads that can be plucked. First, the protection of the many against the few. Fairness intervenes to ensure the silent few are not 'locked-up' without an opportunity to have a voice. Secondly, employing the veil of ignorance, fairness is likely to be reflected when the largest number of creditors benefit- the basis of *pari passu* distribution. But I would add here one personal thought. English Law gives great priority to secured creditors. Secured creditors come in many different guises: fixed charges, floating charges, equitable liens, ROTs and others. The game is on for creditors to prove a proprietary stake. Once a proprietary stake is established the queue can be jumped. These increasing incursions into the *pari passu* principle reduce its significance and thereby reduce fairness of outcome. The stronger more powerful creditors are more able to bargain for security or argue they have security than the less powerful trade creditor. The odds of a return for the unsecured creditor inevitably diminish. This maybe why there has been some legislative innovation - the prescribed part. I suggest that more innovations are required to redress the balance if the *pari passu* principle is to have any meaning and endure. Thirdly, officers of the court should not stand on their strict legal rights if by doing so it would lead to unfairness.

52. It follows that it is not woolly to agree and promote the idea that there is no, nor should there be any, universal test for judging unfairness, and the question must depend on all the circumstances of the case. I agree with Professor Paterson we must guard against generalising from one situation to another when the situations ought properly to be differentiated from each other. She explains why it is dangerous to regard the idea of fairness as an intuitive concept, associated with some sort of imbalance between how one person is treated compared with another, and between how losses fall on the weak and upon the strong. She persuasively argues that not every case of imbalance will be unfair, and many

factors may vindicate the situation. She also thinks that there cannot be a single definition applicable to all contexts; any definition can only be applied to a real situation. As she puts it, "First, we risk generalising from one situation to another when the situations ought properly to be differentiated from each other. Secondly, to the extent that we suggest reform to address a fairness concern, that reform may be only weakly related to the real fairness issues in the particular context. Finally, when we weigh fairness concerns against other considerations, we may have a poorly defined idea of what it is that we are putting in the balance." Commercial certainty need also be weighed in the balance.

53. I leave you with a quote of Lord Hoffmann in O'Neill v Phillips:

"Although fairness is a notion which can be applied to all kinds of activities its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In sports it may require, at best, observance of the rules, in others ("it's not cricket") it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very important."