



## Ceri Bryant QC

**Unwrapping the present: predicting the future  
of Jersey's company law reforms**



## **Pennycuik J in *Ridge Securities Ltd v IRC* [1964] 1 WLR 479**

*“The corporators may take the assets out of the company by way of dividend or, with the leave of the court, by way of a reduction of capital, or in a winding up. They may of course acquire them for full consideration. They cannot take assets out of the company by way of voluntary disposition, however described, and, if they attempt to do so, the disposition is ultra vires the company.”*



## Lord Watson in *Trevor v Whitworth* (1887) 12 App Cas 409

*“Paid up capital may be diminished or lost in the course of the company’s trading; ...but persons who deal with, and give credit to a limited company naturally rely upon the fact that the company is trading with a certain amount of capital already paid, as well as upon the responsibility of its members for the capital remaining at call; and they are entitled to assume that no part of the capital which has been put into the coffers of the company has been subsequently paid out, except in the legitimate course of its business.”*



**In January 1887, Thomas Stevens returns to San Francisco, as the first person to have cycled around the world**





## Statutory framework for distributions in Companies Act 2006

Section 829(1):

*“(1) “distribution” means every description of distribution of a company’s assets to its members, whether in cash or otherwise, subject to the following exceptions:*

*(2) The following are not distributions ....:*

- (a) An issue of shares as fully or partly paid bonus shares;*
- (b) The reduction of share capital...*
- (c) The redemption or purchase of the company’s own shares...*
- (d) A distribution of assets to members of the company on its winding up.”*



**Lord Greene MR in *Re VGM Holdings Ltd* [1942] Ch 235,  
concerned about speculators who**

*“finding a company with a substantial balance or easily realisable assets ... bought up the whole, or the greater part, of the shares for cash, and so arranged matters that the purchase money which they then become bound to provide was advanced to them by the company whose shares they were acquiring, either out of its cash balance or by realisation of its liquid investments. That type of transaction was a common one, and it gave rise to a great dissatisfaction and, in some cases, great scandals.”*

## Great changes in 1981





## Second Company Law Directive

2006 – Directive amended to include amongst the conditions for purchase of own shares *“that the acquisition shall not prejudice the satisfaction of creditors’ claims”*





## Companies Act 1981

Solvency statement (+ auditors' report) for giving financial assistance, referring to the date of assistance and stating that the directors are of the opinion that there is *“no ground on which their company could then be found to be unable to pay its debts”*, and it will be *“able to pay its debts as they fall due”* through the following year, taking into account its contingent and prospective liabilities



## Companies Act 1981

Solvency statement (+ auditors' report) for purchase of own shares out of capital, stating date of payment and that there is *"no ground on which the company could then be found to be unable to pay its debts"*, and as regards its prospects for the following year that, having regard to the directors' intentions with respect to management, and the amount and character of its available financial resources for that year, it will be able through the year to *"carry on business as a going concern"* and *"pay its debts as they fall due"*



## Companies (Jersey) Law 1991

Solvency statement for purchase of own shares, stating date of payment and that there is *“the company will be able to discharge its liabilities as they fall due”*, and having regard to its prospects and the directors’ intentions with respect to management, and the amount and character of its available financial resources, it will be able throughout the following year to *“continue to carry on business”* and *“discharge its liabilities as they fall due”*



## 2008-2014 reforms of Jersey law

- Companies (Amendment No 2) (Jersey) Regulations – solvency statement need not be made after full inquiry – but see *Re a Flap Co Ltd* (2003) BCC 487
- Companies (Amendment No 9) (Jersey) Law – solvency statement distributions are permitted
- Companies (Amendment No 11) (Jersey) Law – solvency statement reductions of capital are permitted



## 2014 – solvency statement reductions of capital in Jersey

Solvency statement for reduction of capital, stating that at date of statement *“the company is able to discharge its liabilities as they fall due”*, and having regard to its prospects and the directors’ intentions with respect to management, and the amount and character of its available financial resources, it will be able throughout the following year to *“continue to carry on business”* and *“discharge its liabilities as they fall due”*



## Paying debts/discharging liabilities as they fall due

Supreme Court in *BNY Corporate Trustee Services Ltd v Eurosail UK* [2013] UKSC 28

- When is a company “*unable to pay its debts*” or “*unable to pay its debts as and when they fall due*”?
- Look at the “*reasonably near future*”
- What is “*reasonably near future*” depends on circumstances
- Reject the test of “*the point of no return*”



## Part of a trend?

In *Eurosail* Lord Walker draws upon:

- Nourse J in *Re a Company* [1986] BCLC 261
- Nicholls LJ in *Byblos Bank SAL v Al-Khudhairi* [1987] BCLC 232
- Briggs J in *Re Cheyne Finance plc* [2008] 1 BCLC 741



## Developments in court-sanctioned reductions in England & Scotland

- Since 1 October 2009, the Court must consider whether there is “*a real likelihood that the reduction would result in the company being unable to discharge its debt or claim when it fell due*”
- *Liberty International plc* [2010] EWHC 1060
- *Royal Scottish Assurance plc* [2011] CSOH 2
- *Sportech plc* [2012] CSOH 58
- *Re Vodafone plc* [2014] EWHC 1357
- bank guarantees, and ring-fenced bank accounts, increasingly difficult to arrange



## Other Jersey reforms in the area of maintenance of capital

- Consideration for own share purchases need not be in cash
- Provision for purchase of depositary receipts
- Upstream guarantees are not distributions
- Court-sanctioned procedure for ratifying unlawful distributions without shareholder approval



## Other Jersey reforms

- New procedure for ratifying breaches of directors' duties
- Members' written resolutions: new thresholds for validity
- AGMs become optional for private companies
- Meetings on short notice require only 90% approval
- Rationalisation of timings for delivery of proxies
- Squeeze-out provisions updated



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