

Institution: University of Wolverhampton		
Unit of Assessment: 18 Law		
Title of case study: Public Policy and the Funding of Insolvency Litigation		
Period when the underpinning research was undertaken: 2013-2020		
Details of staff conducting the underpinning research from the submitting unit:		
Name(s):	Role(s) (e.g. job title):	Period(s) employed by submitting HEI:
Professor Peter Walton	Professor of Insolvency Law	1988 - Present
Period when the claimed impact occurred: 2014-2020		
Is this case study continued from a case study submitted in 2014? N		
1. Summary of the impact		
<p>Research carried out by Professor Walton was used in Parliament and by professional and trade bodies to inform a public debate and caused the Government to delay the implementation of its policy on how insolvency litigation should be funded. The Jackson Reforms to Civil Justice in the UK were adopted wholesale by the UK Government. They cut across every area of litigation. Walton's research argued for an insolvency exception to the Jackson Reforms and received widespread support in Parliament and from business. The research also formed the basis of a very public debate between Walton and Lord Justice Jackson.</p>		
2. Underpinning research		
<p>The Impact in this case study is underpinned by three reports, which were commissioned by insolvency professional and trade bodies [R1, R2 and R3]. The research underpinning each report uniquely and originally investigated the use of Conditional Fee Agreements (CFAs) and third party funding in insolvency litigation. Parliament passed the Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) in 2012, which adopted the recommendations of Jackson LJ, who had recommended a ban on the recoverability of CFA uplifts. Under a CFA, a claimant's legal team is only paid if the case is won. In addition to their basic fee, they are also entitled to a percentage uplift on the fee. Prior to the Jackson reforms this uplift, as well as the basic fee, was recoverable by a successful claimant from a losing defendant. The research looked at the likely effect of the Jackson reforms on the unique case of insolvency. No such research had ever been carried out before nor has any such research been carried out by others since.</p> <p>The research examined the public policy nature of insolvency litigation and argued in favour of the continued use of recoverability of CFA uplifts in such actions. It traced the history of how insolvency litigation had been funded in the past and how it operated in 2014. It identified the unique nature of private insolvency litigation as having a significant public interest.</p> <p>Uniquely, the research [R1, R2 and R3] includes empirical findings on the use of CFAs and third party funding in insolvency. A major part of the research involved surveys being carried out of the entire insolvency profession to assess how practitioners funded insolvency litigation.</p> <p>The importance of the research was recognised by the Insolvency Service, which granted Walton access to its records of all the statutory sanctions requests relating to insolvency. This access enabled Walton to create a large database from which it was possible to estimate the annual value of insolvency claims realised by CFAs in 2014 was GBP160,000,000.</p> <p>The research [R1] produced several Findings [F] and concluded that:</p>		

F1. The loss of CFA recoverability in insolvency claims would have a significantly negative impact on the amount of litigation being taken on behalf of creditors and, consequently, advocated a reversal of policy by the Government or at least a delay until other suitable mechanisms could be put in place.

F2. Any alternative funding mechanism, such as that provided by third parties, would reduce the value realised for creditors, and

F3. The loss of CFA recoverability would increase the minimum size of claims being enforced on behalf of creditors.

Jackson LJ's subsequent public lecture [C8] advocated implementation of his recommendations without any exceptions. An updated research report [R2] was produced by Walton over the end of 2015 and the beginning of 2016. It found that the annual value of claims being pursued by CFA-backed insolvency litigation had risen to GBP1,000,000,000.

The third report [R3] by Walton in 2020 provides evidence that the main findings in [R1] have proved to be correct with a reduction in the value of CFA-backed claims being pursued (down to GBP800,000,000) [F1] and less value reaching creditors [F2] with only relatively large claims being pursued [F3].

3. References to the research

The following research outputs were authored by Walton. Each is a substantial research report of over 20,000 words in length and have been through a rigorous peer-review process. Each has been positively received and widely supported by their respective professional funders. R1 received the practical support of the Insolvency Service and has been the subject of Parliamentary and judicial debates.

R1. *The Likely Effect of the Jackson Reforms on Insolvency Litigation – an Empirical Investigation* R3 (Association of Business Recovery Professionals) (with the support of the Association of Chartered Certified Accountants (ACCA), the Institute of Chartered Accountants in England and Wales (ICAEW), Institute of Chartered Accountants of Scotland (ICAS), the Insolvency Practitioners Association (IPA), JLT Specialty Ltd, Moon Beever and Moore Stephens LLP) (April 2014). (REF 2 Output)

The above report was favourably received by the insolvency professional and trade bodies. Walton disseminated his findings at a number of conferences both within the UK and abroad (Insolvency Practitioners' Association Annual Conference May 2013, ICAEW Annual Conference June 2013, R3 London Conference September 2013, INSOL International conference March 2014 Hong Kong, R3 London Conference April 2015).

R2. *Insolvency Litigation and the Jackson Reforms – An Update* R3 (with the support of ACCA, ICAEW, ICAS, the Insolvency Lawyers' Association (ILA), AUA Insolvency Risk Services Ltd, JLT Specialty Ltd, Willis Taylor Watson) (April 2016).

R3. *Insolvency Litigation Funding – in the best interests of creditors?* (with the support of Manolete Partners plc, ICAEW and IPA) (April 2020). The main UK insolvency-specific third party funder (Manolete Partners plc), with the support of the principal insolvency professional bodies, commissioned a further update report by Walton in 2019. The effect of the Jackson reforms on insolvency litigation remains a significant policy issue relevant in every insolvency. The results show that CFA-backed insolvency litigation has diminished by 20% and that less money is nowadays returned to creditors than before the Jackson reforms. The results support the conclusions reached by R1 and R2.

In each case, the research underpinning R1, R2 and R3 was conducted with the regular and rigorous guidance of different groups of experienced professional practitioners including judges.

Grants

R3 Association of Business Recovery Professionals, GBP22,091, for a Research Project on the Jackson Reforms.

Manolete Partners Plc, GBP16,667, for Analysis of Insolvency Litigation Funding.

4. Details of the impact

The impact has been materially to change Government policy in its support of the Jackson reforms in the context of insolvency litigation and to inform a public debate, a process that has continued right up until the present.

The research was recognised and supported by significant stakeholder groups; by Parliamentarians and ultimately by the Government of the day. The research examines how best to fund legal actions to return up to GBP1,000,000,000 of creditors' money per annum. It affects the financial interests of every creditor of an insolvent company or debtor. It argued for an insolvency exception to the Jackson reforms which the Government initially put into effect. Despite a later Government reversal of policy, the research continues to inform persistent representations by the legal and insurance sectors for the retraction of the reversion.

I1. Impact – Informing the Public Debate

The research [R1], [R2] and [R3] was sponsored by the insolvency profession. Support from stakeholder groups for the recommendations in the first report ([R1]) was overwhelming [F1-3]. Support was provided in letters to various ministers (signed on behalf of many professional and trade bodies including R3, ACCA, ICAEW, ICAS, IPA, ILA, FSB, Bar Council, ABI, BPF and CIM ([C1, C6 and C10]).

The research impact to the effective administering of justice in the context of insolvency litigation was thereby recognised explicitly by all of these bodies, each of which has experience and knowledge of how the system operates. They are all major stakeholders in insolvency litigation and all supported the research.

The value of the research was recognised by the then Under Secretary for BIS, Jo Swinson MP, in a letter to Walton dated 08 December 2014 [C3]. The research was referred to on numerous occasions in ministerial questions (e.g. [C2]) and was the subject of two well-supported Early Day Motions [C4 and C9].

I2. Impact – Change of Government Policy

The Government changed its policy on the basis of the research findings [F1-3]. It can be seen that the insolvency exception to the Jackson reforms was extended as a direct result of efforts highlighting the research. These culminated in January 2015 with the first Early Day Motion [C4] and the Parliamentary debate [C5] where the Minister agreed to an urgent meeting with the R3 Policy Group after discussing the findings of the research. A further letter to the Justice Secretary dated 23 February 2015 [C6] was swiftly followed by the announcement of the Government's change of policy very shortly thereafter on 26 February 2015 [C7].

The research had led to a change of Government policy making the return of up to GBP1,000,000,000 of creditors' money in insolvencies per annum far more likely.

I3. Impact – Government Policy Reverts

In October 2015 Walton met with Ministry of Justice officials. The second update report [R2] had been commissioned by then.

Jackson LJ, who did not favour any exception to his reforms to all civil litigation devoted his entire Mustill lecture in October 2015 [C8] to arguing why the research findings should not be acted upon.

The update report [R2] continued the public debate by addressing the points made by Jackson LJ in his Mustill lecture. It was published in April 2016 but came too late to influence the Government's decision in December 2015 to revert to its original policy and to end the insolvency exemption from the Jackson reforms without explanation or further discussion.

Walton subsequently met with the Ministry of Justice in July 2016 where he was informed that although the accuracy of the research was not disputed, the Ministry was not able, as a matter of policy decided by the then Secretary of State, to recognise it.

Walton's findings and impact within the sector are further underlined by the Manolete Report [R3], where the veracity and authority of [R1] and [R2] have been supported.

Impact – Summary

Evidence informed a very public debate [I1] on a most significant and practical problem affecting at least GBP1,000,000,000 of creditor money each year. The Government was persuaded to alter its policy [I2] albeit only temporarily. The public debate continued [I3]. The insolvency profession had an additional year to prepare for the Jackson reforms. This led to a further year's increased returns to insolvent estates which was brought to an end by the Government in 2016.

5. Sources to corroborate the impact

C1. 15 October 2014 a letter was sent to the Prime Minister, signed on behalf of representative professional and trade bodies (ICAEW, ACCA, ICAS, R3, the Institute of Credit Management (ICM) and the British Property Federation (BPF)), which called for a change in Government policy based upon the findings and recommendations made in Professor Walton's Report [I1]. Saved as PDF.

C2. 04 November 2014 Parliamentary Debate on the Small Business, Enterprise and Employment Bill the report by Professor Walton was cited in support by the Shadow Minister for BIS (Toby Perkins MP). The Under Secretary for BIS, Jo Swinson MP, referred to the same report in response [I1].

<https://publications.parliament.uk/pa/cm201415/cmpublic/smallbusiness/141104/am/141104s01.htm>

C3. 08 December 2014 letter to Professor Walton from Under Secretary for BIS, Jo Swinson MP valuing research [I1]. Saved as PDF.

C4. 8 January 2015 Early Day Motion 673 - 69 signatories from across the political spectrum including: Toby Perkins MP (Lab), then Shadow Minister for BIS; the Rt Hon Jeremy Corbyn MP (Lab), then member of the House of Commons Justice Committee and Henry Bellingham MP (Con), former Shadow Justice Minister and former Shadow Trade and Industry Minister [I1], [I2].

<https://www.parliament.uk/edm/2014-15/673>

C5. 21 January 2015 references in Hansard to the results of the research leading to Government minister, Baroness Neville-Rolfe, agreeing to urgent meeting noting "concerns that litigation brought on behalf of insolvent estates has some differences in principle to other types of litigation [and] ... concerns about the potential impacts on litigation practice on behalf of insolvent estates"

– reference to “independent research” highlighting Government policy putting at risk GBP160,000,000 and to October letter (see above) to Prime Minister Column GC375 et seq [I2].

<https://publications.parliament.uk/pa/ld201415/ldhansrd/text/150121-gc0001.htm#15012195000290>

C6. 23 February 2015 letter to Chris Grayling MP, then Secretary of State for Justice, referring to the early day motion [C4] and research report [R1], signed on behalf of representative professional and trade bodies (ICAEW, ACCA, ICAS, R3, ICM, the Federation of Small Businesses (FSB) and BPF) [I1], [I2]. Saved as PDF.

C7. 26 February 2015 Government announces change of policy – statement by Mr Shailesh Vara MP Under Secretary of State for Justice 26 Feb 2015: Column 29WS [I2].

<https://hansard.parliament.uk/Commons/2015-02-26/debates/15022648000029/Part2OfTheLegalAidSentencingAndPunishmentOfOffendersAct2012#contribution-15022648000143>

C8. 16 October 2015 Mustill lecture by Jackson LJ entitled The Civil Justice Reforms and Whether Insolvency Litigation Should be Exempt delivered by Jackson LJ on 16 October 2015 (‘Mustill Lecture’) – at paragraph 4.4 “Relevance of Walton Report. Those who support a continuation of the insolvency exemption rely heavily upon the Walton Report. R3 make extensive reference to that report in their literature. R3’s counsel summarised and relied upon the Walton Report in their written submissions to the Supreme Court in *Lawrence v Fen Tigers Ltd (No. 3)* [2015] UKSC 50; [2015] 1 WLR 3485. The Bar Council has also pressed for an extension of the insolvency exemption, again citing the research of Professor Walton as support for its case. In those circumstances, I shall pay close attention to the Walton Report in explaining the four reasons why – with the utmost respect – I disagree with R3, the Bar Council and many other campaigners on this issue.” [I3].

<https://www.judiciary.gov.uk/wp-content/uploads/2015/10/mustill-jackson-lj.pdf>.

C9. 18 November 2015 Early Day Motion 732 - 28 signatories again from across the political spectrum including: Scottish and Welsh Nationalists, MPs from Northern Ireland, and Caroline Lucas MP, Leader of the Green Party [I1].

<https://www.parliament.uk/edm/2015-16/732>

C10. 20 November 2015 letter to Michael Gove MP, Secretary of State for Justice signed by R3, Federation of Small Businesses, Bar Council, Association of British Insurers, British Property Federation, Chartered Institute of Credit Management, ICAEW, ICAS, IPA and ACCA [I1]. Saved as PDF.