

# Insolvency law through the lens of property law and theory

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## 1. Introduction

Property is inescapably at the core of insolvency law. Much of the latter is concerned with property issues, namely: ascertaining the property within the insolvent debtor's estate; determining the property rights various parties hold; and regulating the use, realisation, and distribution of the insolvent's property. Property law provides a necessary foundation for each of these matters. Meanwhile, from the perspective of property law, insolvency law offers a 'litmus test' for distinguishing property rights (rights *in rem*/real rights) from mere personal rights (rights *in personam*)<sup>1</sup> and helps to determine what property is. There is thus mutual dependency between property law and insolvency law.

This chapter will examine how property features in insolvency law, with particular reference to the United Kingdom (UK) (principally English law). After demonstrating the interconnectedness of property and insolvency, attention will turn to considering insolvency in the context of property law theory, followed by consideration of the reverse, namely, how property features in insolvency law theory. It will become apparent that further consideration of theories from one domain could create new opportunities for rethinking law or theory in the other, or for achieving desired objectives.

It should be pointed out that this chapter does not offer a theory of property law or insolvency law or a unifying theory. It also does not provide a normative framework. Rather, it seeks to explore the extent to which property and insolvency law and theory are integrated or utilised together and how they may be better combined or used in tandem in future.

## 2. Property in insolvency law

As stated by property law theorist Henry Smith, '[p]roperty is a platform for the rest of private law.'<sup>2</sup> Areas of law such as succession, trusts and, of course, insolvency, depend on property. Property and property law appear in insolvency in a variety of crucial ways and provide a body of rules with which insolvency law interacts. Indeed, it can be noted that insolvency law applies when the debtor's property cannot be used to pay debts due to creditors in full, either because the debtor's liabilities are greater than their assets or because the property is of a type that is not realisable in a way that enables debts to be paid as they fall due.

The significance of property law within insolvency law applies in legal systems generally, and is certainly true in the jurisdictions of the UK.<sup>3</sup> While in various respects property continues to exist in the same manner as before insolvency, there are divergences from the background law

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<sup>1</sup> These should not be conflated with real property and personal property.

<sup>2</sup> HE Smith, 'Property as the Law of Things' (2012) 125 Harvard Law Review 1691, 1691.

<sup>3</sup> The point is demonstrated by how many times 'property' is used in the Insolvency Act 1986.

too.<sup>4</sup> Insolvency proceedings<sup>5</sup> often lead to a debtor losing control of their property. For processes that are not debtor-in-possession, an insolvency officeholder will seek to take custody or control of the debtor's property and will have powers in relation to that property.<sup>6</sup> And in some contexts the debtor's property will or can vest in the insolvency officeholder, for the purposes of preserving the estate and dealing with the property and realising it.<sup>7</sup>

The definition of property in the Insolvency Act 1986 is wide and non-exhaustive, stating that the term 'includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property.'<sup>8</sup> While some property may be separately excluded from the insolvent's estate,<sup>9</sup> non-excluded property is subject to existing property rights (including those of secured creditors).<sup>10</sup> Within both insolvency and property law, the distinction between personal rights and real rights is crucial,<sup>11</sup> and the effectiveness of a right notwithstanding insolvency helps to determine whether a right is real. Parties frequently seek to contend that they have title to, or ownership of, property, thus removing it from the insolvent's estate.

Even where property is part of an insolvent's estate, some powers of parties with property rights may be suspended or lost. This could be the result of a moratorium, as exists in administration, which precludes enforcement of security over the company's property (which otherwise would be possible despite the insolvency procedure) and legal processes without the consent of the administrator or the court's permission.<sup>12</sup> An administrator even has the ability to obtain a court order to dispose of property subject to a (fixed) security as if it were not subject to the security, but only where the court thinks the disposal would be likely to promote the purpose of administration, and the security holder's interest is protected (as net proceeds are to be applied to discharging the sums secured by the security).<sup>13</sup> Insolvency law also allows for certain property earlier disposed of by the debtor to be returned to the estate (or its value paid), which would not be possible without insolvency. This is the case for challengeable transactions where property has been transferred under certain conditions (including at an undervalue) in particular

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<sup>4</sup> See R Calnan, *Proprietary Rights and Insolvency* (Oxford University Press 2016) para 1.130 for limits on proprietary rights in insolvency. In addition, property that is not ordinarily transferable may be subject to involuntary transfer to an insolvency office-holder.

<sup>5</sup> For what is meant by an insolvency proceeding (process), see R Mokal, 'What is an Insolvency Proceeding? Gategroup Lands in a Gated Community' (2022) 31 *International Insolvency Review* 418.

<sup>6</sup> See e.g. Insolvency Act 1986, ss 144; 234; 312 and Sch B1, paras 1(1) and 59(1). See Schs 1, 4 and 5 for the powers.

<sup>7</sup> This is possible but unusual for liquidation: Insolvency Act 1986, s 145. In bankruptcy, the bankrupt's estate vests in the trustee automatically, without any transfer: s 306.

<sup>8</sup> Insolvency Act 1986, s 436(1).

<sup>9</sup> E.g. property the insolvent holds on trust for another (see e.g. Insolvency Act 1986, s 283(3)(a); L Tucker et al, *Lewin on Trusts* (Sweet & Maxwell 2020) para 27-029; *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 and *Re Kayford Ltd* [1975] 1 WLR 279). Also, in bankruptcy, various property is excluded including tools, books, vehicles and other equipment necessary for personal or business use, and clothing, bedding, furniture etc, 'necessary for satisfying the basic domestic needs of the bankrupt and his family': Insolvency Act 1986, s 283(2) and see also (3) and (3A).

<sup>10</sup> See e.g. Insolvency Act 1986, s 283(5) for bankruptcy.

<sup>11</sup> See e.g. S Mills (ed), *Goode on Proprietary Rights and Insolvency in Sales Transactions* (Sweet & Maxwell, 2010) para 1.06; R Calnan, *Proprietary Rights and Insolvency* (Oxford University Press 2016) para 1.89.

<sup>12</sup> Insolvency Act 1986, Sch B1, para 43. See also now the free-standing moratorium: Insolvency Act 1986, Part A1.

<sup>13</sup> Insolvency Act 1986, Sch B1, para 71. No such order is needed for property subject to a floating charge: para 70.

time periods prior to insolvency procedures.<sup>14</sup> As well as such rules regarding the overall size of the estate and its constituent property, there are rules regarding (unfair) preferences, which challenge the priority that a party has illegitimately received in comparison to other creditors in the run up to an insolvency procedure.<sup>15</sup>

The examples so far should make it clear that property law provides a starting point for insolvency law, but that insolvency justifies the departure from normal rules of property in a number of ways. This is true in relation to the debtor's control over property, the powers available to other parties with property rights and the property which may fall within the insolvency estate. Consequently, it is important that theories of property take account of the effects that insolvency has on property rights, as this helps to explain the nature and features of property.<sup>16</sup> Meanwhile, insolvency law theories should adequately justify why normal rules of property are to be departed from.

### 3. Insolvency in property law theory

Within property law theory, insolvency and insolvency law often only feature in a marginal way. This may be surprising given the variety of interactions between insolvency and property. Nevertheless, the uncertainty regarding what property actually is, means there is scope to consider how insolvency fits with or shapes different theories of property. It is indeed instructive that a concept as fundamental as 'property' in law is still so contested but its fundamentality may explain why it remains a subject of such debate. Much of property law theory revolves around questions such as: What is property? What does it mean to have a property right? Why does the law give effect to property rights? Whose interests does property law serve and whose interests should it serve? And against whom can a property right be exercised?<sup>17</sup>

#### 3.1 Concepts of property

Property refers to different concepts, depending on the context. In simple terms, property may refer to a 'thing'. A thing may or may not have a physical existence,<sup>18</sup> it could be land, a car, intellectual property, shares, a digital asset, a contractual claim against another party or something else recognised by the law.<sup>19</sup> A thing can be the object of a property right or interest, and that right is held by a legal person (whether natural or otherwise). Of particular significance for legal purposes, the relevant right or interest itself can be referred to as property.<sup>20</sup> Property

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<sup>14</sup> Insolvency Act 1986, s 238 for transactions at an undervalue in corporate insolvency; and s 339 for bankruptcy. See ss 423-425 for rules regarding transactions defrauding creditors, which do not require such time limits.

<sup>15</sup> Insolvency Act 1986, s 239 for corporate insolvency; and s 340 for bankruptcy. And see s 245 regarding the avoidance of certain floating charges.

<sup>16</sup> In this regard, at least some aspects of insolvency law may be considered components of property law.

<sup>17</sup> See e.g. the questions identified by A Bell and G Parchomovsky, 'A Theory of Property' (2005) 90 Cornell Law Review 531, 538 (see also 575-576).

<sup>18</sup> However, some systems only recognise corporeal objects as part of property law, narrowly defined, and have a separate regime for incorporeal objects, e.g. in Germany BGB § 90.

<sup>19</sup> Yet there can be debate as to whether certain things should be recognised as property in a narrow sense, including digital assets, contractual rights and even shares. See e.g. A Pretto-Sakmann, *Boundaries of Personal Property: Shares and Sub-Shares* (Hart 2005), especially chapters 4 and 5; Law Commission, *Digital Assets: Consultation Paper* (Law Com No 256, 2022) chapter 2. See also J Toomey, 'Property's Boundaries' (2023) 109 Virginia Law Review (Forthcoming) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4040141](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4040141)> accessed 25 March 2023.

<sup>20</sup> See e.g. AM Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press 1961) 128.

in this context is sometimes considered (largely) synonymous with ownership; however, subordinate forms of property interest (or rights) are also within the domain of property law.<sup>21</sup> As Kenneth Reid succinctly states, ‘property law is the law of things, and of rights in things (real rights).’<sup>22</sup> The essence of property, particularly in the ownership sense, continues to interest and animate property law theorists.

The traditional view is that property is a right in relation to a thing that is enforceable against people generally (or the world). Blackstone stated that property is ‘that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe’.<sup>23</sup> While there is often more recognition nowadays of the ways in which ownership is subject to, or affected by, other rights and interests, the general approach still has significant support in many jurisdictions. Developments since the early twentieth century, particularly in the United States (US), have, however, led to a rival ‘bundle of rights’ approach. This was the product of the Hohfeldian atomisation of legal ‘rights’<sup>24</sup> applied and developed by legal realists to challenge existing notions of property and the role(s) it serves.<sup>25</sup> The approach breaks property down into different components or incidents, including use, exclusivity, and transferability.<sup>26</sup> While this perspective has been dominant in the US (and in a number of other countries) for some time, recent decades have witnessed a reaction against it.<sup>27</sup> Henry Smith has stated ‘it is the mediation of a thing that helps give property its in rem character – availing against persons generally’ and he contends that the law of things approach is supported by law and economics analysis.<sup>28</sup> He has even sought to challenge the notion of bundle of rights as a theory and notes that what is still required ‘is a theory of how the pieces fit together’.<sup>29</sup> Other recent property scholarship has sought to consider the purposes that property serves and there is a growing focus on sustainability and environmental protection.<sup>30</sup>

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<sup>21</sup> The notion of ‘ownership’ in English law is contested, in part due to the existence of relativity of title. For a view that English law does allow for ownership, see L Rostill, *Possession, Relative Title, and Ownership in English Law* (Oxford University Press 2021) especially chapter 7. More broadly, some commentators contend that ownership and other real rights are not applicable to certain types of things, especially personal rights: e.g. GL Gretton, ‘Ownership and its Objects’ (2007) 71 *Rechts Zeitschrift für ausländisches und internationales Privatrecht* 802; Pretto-Sakmann (n 19) 106-107.

<sup>22</sup> KGC Reid, *The Law of Property in Scotland* (Butterworths Law 1996) para 11.

<sup>23</sup> W Blackstone, *Commentaries on the Laws of England* (1765-1769) II, 1, 2, yet subsequent passages identify a number of qualifications to this statement.

<sup>24</sup> Particularly in relation to property rights, see WN Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1916–17) 26 *Yale Law Journal* 710, 718ff, where there is discussion of property as a combination of rights, powers, privileges and immunities exercisable against a very wide class of persons.

<sup>25</sup> See e.g. TC Grey, ‘The Disintegration of Property’ in JR Pennock and JW Chapman (eds), *Ethics, Economics and the Law of Property* (New York University Press 1980) 69; SR Munzer, *A Theory of Property* (Cambridge University Press 1990) 23; K Gray, ‘Property in Thin Air’ [1991] *Cambridge Law Journal* 252. This development is discussed by JE Penner, ‘The ‘Bundle of Rights’ Picture of Property’ (1996) 43 *UCLA Law Review* 711, 724ff.

<sup>26</sup> Reference can be made to e.g. Honoré (n 20); MJ Radin, ‘The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings’ (1988) 88 *Columbia Law Review* 1667.

<sup>27</sup> See e.g. JE Penner, *The Idea of Property in Law* (Oxford University Press 1997); TW Merrill, ‘Property and the Right to Exclude’ (1998) 77 *Nebraska Law Review* 730; Smith (n 2); S Douglas and B McFarlane, ‘Defining Property Rights’ in J Penner and HE Smith (eds), *Philosophical Foundations of Property Law* (Oxford University Press 2013); JE Penner, *Property Rights: A Re-Examination* (Oxford University Press 2020).

<sup>28</sup> Smith (n 2) 1691: ‘For information-cost reasons, property is, after all, a law of things.’ See also TW Merrill and HE Smith, ‘Optimal Standardization in the Law of Property: The Numerus Clausus Principle’ (2000) 110 *Yale Law Journal* 1, 8 where it is noted that standardisation of property rights reduces costs.

<sup>29</sup> Smith (n 2) 1709; 1725. For a defence of the bundle of rights approach, see JB Baron, ‘Rescuing the Bundle-of-Rights Metaphor in Property Law’ (2014) 82 *University of Cincinnati Law Review* 57.

<sup>30</sup> See below.

It is valuable to consider what viewing property law theories from the perspective of insolvency reveals and what this tells us about property itself. Any theory considering the nature or essence of property rights should give some regard to insolvency, as insolvency is often the context in which the existence of property rights (compared to mere personal rights) is most crucial. It can also, in some instances, represent a departure from 'normal' rules of property. Indeed, the way in which property is dealt with in insolvency may be considered as much an element of what property is as how it exists or functions in other contexts.

### **3.2 Property rights and personal rights**

The deconstruction and atomisation of property allows for a personalist approach to property, whereby property rights may simply be perceived as akin to personal rights but exercisable against an especially wide group of parties or as default contractual rules (in the sense that it is simply not possible for contracts to deal with all relevant situations and scenarios).<sup>31</sup> Yet this seems to undervalue the significance of property as a standalone concept and does not help to explain its distinctive character and the fact that various components, including its wider enforceability, serve to distinguish it from mere personal rights and require separate consideration. This is particularly true in insolvency where property rights continue to provide priorities of ranking and enforceability in relation to certain assets, as against all other parties, whereas personal rights do not. While it is true that rights (personal and real) are enforceable against other persons, the object of property is a key reference point and locus of property rights. Nevertheless, although there are often clear boundaries between personal rights and property rights, personal rights can give rise to property consequences in relation to debt enforcement and insolvency. A debtor's property can be the subject of enforcement to recoup payment and in insolvency their property may be sold off and proceeds distributed in an attempt to fulfil personal obligations to creditors. Thus, property is used to satisfy personal rights. In addition, from the perspective of the debtor's creditors, any claim the debtor has against another is an item of property (a thing/chose in action), even though between the debtor and their claim debtor it is only a personal right.

Outside insolvency processes, a party may have many creditors and a range of obligations, but only inside insolvency is there likely to be direct competition between the creditors. An insolvency proceeding provides a forum in which such competing claims are assessed and ranked with distributions taking place accordingly. Related to this, insolvency is a testing ground for determining whether a right is a personal right or a real right. There is usually a clear delineation between the two in insolvency processes and different consequences arise dependent upon the determination. If a party has a property right, then one or more of the following applies: they are able to separate property from the insolvent estate;<sup>32</sup> they have the ability to independently enforce; they have special voting rights; they are unaffected (in legal terms) by the insolvency; and/or they receive a priority of distribution in comparison to those who only have personal rights. These features alone provide further support for the distinct importance of property and indicate that its essence involves a level of durability and non-disturbance that can survive the debtor entering insolvency, in a way that will often render a mere personal right ineffective or of significantly reduced utility (e.g. because its holder receives only a fraction of an amount due from the debtor). Insolvency therefore highlights the

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<sup>31</sup> See e.g. RH Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law & Economics* 1; Bell and Parchomovsky (n 17) 535.

<sup>32</sup> When we refer to property in the debtor's estate, this can be conceptualised as encompassing all of a debtor's rights and powers subject to exceptions.

‘special’ nature of property and underlines why it deserves to be considered separately from obligations.

### 3.3 Elements of property

Accounts of property that seek to explain the key ingredients or elements of property must recognise insolvency’s potential for shaping, or providing caveats to, or conditions for, those elements. For instance, if we consider the right to exclude to be a key or even decisive element of property,<sup>33</sup> it must be noted that in some insolvency processes even if the debtor retains property in a legal sense<sup>34</sup> they personally lose the ability to exclude, and that instead such power is exercised by an insolvency officeholder, who is acting in the interests of the creditors. The insolvency officeholder has the power to obtain possession or control of the property and may thereby exclude the debtor (as well as others), while the debtor is not able to exclude the officeholder from the property. In addition, in certain insolvency processes, the debtor can also no longer *include* and grant or transfer rights or apply their property in satisfaction of debts in the way they choose (subject to other property rights). Instead, the officeholder can grant and transfer rights, but this should only be done if it is in the interests of the creditors. While it can be contended that the insolvency officeholder is acting as agent of the debtor,<sup>35</sup> this is a form of agency in which the principal has no ability to deal with property itself and the agent is acting for the benefit of third parties, indicating that property in legal terms has been separated from its benefit or value. This all raises questions as to what is meant by property here and who holds it.

In the midst of a number of insolvency processes, the ‘debtor’s’ property also receives special protections that do not always apply outside such a process, as other parties are not able to enforce and thereby obtain rights in the property without permission from a court or the officeholder.<sup>36</sup> As well as being able to transfer property to another party without the ‘owner’s’ permission, some insolvency office-holders can disclaim onerous property.<sup>37</sup> A debtor will have lost the ability to transfer the property due to the insolvency process<sup>38</sup> and at an earlier stage their transactions may have become potentially challengeable transactions. Insolvency upholds the notion of property being formally held by the debtor (at least for a while) but disables the debtor (temporarily or permanently) in terms of dealing with the property and excluding others.

Some accounts of the elements or incidents of property give express regard to insolvency law. In his eleven standard incidents of ownership, Anthony Honoré includes liability to execution, which extends to insolvency, and involves the liability of an owner’s interest to be taken away.<sup>39</sup> Yet liability to execution is clearly not a *necessary* element of property,<sup>40</sup> as various items are excluded from insolvency and execution but a debtor’s interest in them is undeniably property. It can also be noted that until the property is formally transferred to another, other elements relating to ownership are compromised without the express agreement of the ‘owner’,

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<sup>33</sup> Some writers consider it to be critical, e.g. Merrill (n 27) 731-734.

<sup>34</sup> In others the property may vest in an insolvency office-holder or the debtor may retain ownership and the ability to exclude.

<sup>35</sup> Perhaps ‘representative’ is more accurate, despite the use of ‘agent’ in the Insolvency Act 1986.

<sup>36</sup> The moratorium in administration is noted above. See also Insolvency Act 1986, s 130(2) (liquidation); s 285 (bankruptcy).

<sup>37</sup> Insolvency Act 1986, s 178 (liquidator); s 315 (trustee in bankruptcy).

<sup>38</sup> See e.g. Insolvency Act 1986, ss 127 and 284.

<sup>39</sup> Honoré (n 20) 107.

<sup>40</sup> Honoré himself acknowledges that none of the elements are individually necessary.

such as the right to possess, the right to use, the right to manage and so on. The insolvency officeholder may exercise these and the property could be considered held on trust for the benefit of the creditors (e.g. in liquidation) but even in the strongest case there is an absence of incidents of ownership held by the creditors.<sup>41</sup> Can it really be said that the office-holder or creditors are ‘owners’ of the property, unless perhaps there is vesting? In any event, insolvency poses difficult questions for the notion of property.

If a debtor in an insolvency process may be considered the owner, or an owner, of property in the insolvent estate, it can support the view that property has an outer shell, which could contain various elements, but its existence does not necessarily depend on the presence of any such element(s) at a given time.<sup>42</sup> Once powers and rights relating to the property but held by others lapse or are exhausted, they return to the property owner. Property therefore provides that such powers/rights are reobtained, or the property interest is no longer encumbered by them. An insolvency process facilitates the transfer of property to another party, who, once they become owner, will not be burdened with various limitations faced by the debtor in the context of insolvency – incidents of property temporarily disapplied for the debtor as owner are ‘restored’ when another obtains the property interest.<sup>43</sup>

### 3.4. Purpose(s) of property

Insolvency law can also help our understanding of the purpose of property and, in this regard, the extent to which insolvency law may take priority over ‘normal’ property rules is significant. Abraham Bell and Gideon Parchomovsky have noted that property’s function ‘as a device for capturing and retaining certain kinds of value—is almost completely absent from modern conceptual discussions of property’.<sup>44</sup> They contend that if ‘defending value’ is the ‘overriding goal’ involving property, then property ‘must sometimes give way to a rule that protects value’, and insolvency law can achieve this.<sup>45</sup> Of course, in an insolvency process, a debtor’s property interest can be lost without their express consent, and other parties’ property rights may be impinged upon, which may be viewed as insolvency law taking precedence over property law.<sup>46</sup> The preservation of value may be best served ordinarily by a party having the ability to protect their interest and having a wide array of powers in relation to an object. Upon insolvency, however, preserving the property’s value becomes most important for the creditors and so protective measures intruding upon the debtor’s property rights, and protecting creditors from one another as well as the actions of the debtor, may be necessary. In addition, not only does insolvency law seek to preserve value, but it must determine the allocation of the value arising from realisation of the debtor’s property. It needs to provide a hierarchy for the entirety of a debtor’s property (subject to some exceptions), which is unnecessary outside insolvency.

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<sup>41</sup> For discussion of the trust analysis and the status of creditors as beneficiaries, see RJ Mokal, ‘At the Intersection of Property and Insolvency: The Insolvent Company’s Encumbered Assets’ (2008) 20 Singapore Academy of Law Journal 495. The creditors are not ordinary beneficiaries as they merely have a right to receive proceeds in the relevant order of distribution.

<sup>42</sup> There are some parallels here with the ‘residuary character’ incident of ownership identified by Honoré (n 20) 126-128. Honoré warns that his discussion is subject to the ‘troubled waters of split ownership’, which also has relevance here.

<sup>43</sup> Likewise, if a debtor somehow manages to retain property upon exiting an insolvency process, they will no longer be subject to those same disabilities.

<sup>44</sup> Bell and Parchomovsky (n 17) 536.

<sup>45</sup> *ibid* 539.

<sup>46</sup> See e.g. *ibid* 608ff.

Of course, it is widely accepted that even in insolvency there is some property of which an individual debtor should not be deprived.<sup>47</sup> The protection of such property can be justified for the purposes of protecting human dignity, while also supporting human flourishing and future productivity. When determining the property which ought to be excluded from insolvency, the personal connection between the object and the individual may be considered an important factor. Margaret Radin draws a distinction between ‘personal property’ and ‘fungible property’, with the latter having a level of replaceability that does not apply to the former.<sup>48</sup> The removal of personal property, such as a wedding ring belonging to a devoted spouse, will cause distress because it is an important part of the individual’s personhood or identity, and such property cannot adequately be replaced. While insolvency law does not tend to give regard to the sentimentality and personal connection that a person has in relation to a particular object,<sup>49</sup> it may validly be queried whether, in fact, it ought to do so to a greater extent than is currently the case.<sup>50</sup> For example, a war medal or a necklace that has been in a family for generations, even with a relatively low value, may have considerable personal significance to a party that will almost certainly not be true for a purchaser or indeed for creditors.<sup>51</sup> There is a contrast between a debtor’s interest in such property and the fact that creditors do not wish to receive particular assets and instead would merely like payment (thus fungible property). Consequently, there can be a transfer of property which may have significant personal value for an insolvent debtor, to a purchaser who is unlikely to have a personal connection to the property (at least initially) and for whom the property is fungible, while the proceeds distributed to creditors are also fungible.

A creditor’s right to demand or receive payment of a debt, including within insolvency, can be considered as a property object and it has been suggested that this right is ‘rooted in a sense of fidelity to property rights’.<sup>52</sup> However, while we consider that a party should ordinarily repay their debts, we may take a view that the repayment of some debts is more justifiable than others, whether because of the impact on wider society or public policy concerns.<sup>53</sup> In addition, the effects of insolvency law on property support the view that property rights may be limited or reformulated in the interests of a wider group,<sup>54</sup> whether that is creditors alone, as in insolvency, or potentially even a wider body of stakeholders. It may be contended that the importance of property rules as the default position, and the need for fairness to the owner, mean that a departure from these rules should only take place exceptionally and for highly significant policy purposes. Nevertheless, property already does give effect to community and public interests in various ways.<sup>55</sup>

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<sup>47</sup> Beyond protecting the property itself, there would of course be the potential for significant economic and social cost if the position were otherwise.

<sup>48</sup> MJ Radin, ‘Property and Personhood’ (1982) 34 *Stanford Law Review* 957, 959ff.

<sup>49</sup> An exception is personal correspondence of a debtor, which has been held to be excluded from their estate in bankruptcy on the basis that it is ‘of a nature peculiarly personal to him and his life as a human being’: *Haig v Aitken* [2001] Ch 110 (Rattee J). In addition, in Scots law, in debt enforcement (diligence), an enforcing officer may not attach articles (under an exceptional attachment order), if they consider the items ‘likely to be of sentimental value to the debtor’ but only where the aggregate value does not exceed £150: *Debt Arrangement and Attachment (Scotland) Act 2002*, ss 51-52.

<sup>50</sup> There would, however, need to be limits (monetary or otherwise), to achieve fairness for creditors.

<sup>51</sup> Items with a low value might be uneconomical to sell and so in practice could be excluded from realisation of the estate.

<sup>52</sup> CK Odinet, ‘Of Progressive Property and Public Debt’ (2016) 51 *Wake Forest Law Review* 1101, 1102.

<sup>53</sup> *ibid.*

<sup>54</sup> It can be debated whether this involves limitation of property rights from outside property or, instead, reformulation of rights within property, taking account of wider interests.

<sup>55</sup> See e.g. KA Turčan, ‘US Property Law: A Revised View’ (2021) 45 *William & Mary Environmental Law & Policy Review* 319.

For many progressive scholars, property's role is to serve underlying human values that are often community-focused and they consider that it should shape and reflect social relationships beyond merely being concerned with the protection of an individual's control of resources.<sup>56</sup> Within this field, there is a growing body of literature examining property theory through a critical lens focusing on protecting the environment and sustainability.<sup>57</sup> Insolvency may be considered a suitable forum in which to further similar policy goals, such as by not allowing for the disclaiming of contaminated property or by giving priority status to environmental claims over the debtor's estate. In addition, some theorists would suggest that employees or workers have special property entitlements,<sup>58</sup> which are often not formally realised in the legal system generally, but which insolvency law could facilitate through preferences and protections.<sup>59</sup>

#### **4. Property in insolvency law theory**

On the basis of the above, descriptive and normative theories of insolvency ought to incorporate consideration of property and would benefit from paying regard to property theory. It must be acknowledged that much of the division within insolvency theory since the 1980s *has* revolved around the extent to which insolvency should, and does, give effect to pre-existing property entitlements (such as security rights), or whether it should, and does, allow for a departure from such entitlements in order to prefer other parties. Indeed, given the significance of property rights within legal systems, and the protected status of such rights generally, insolvency theories must justify not only the removal of property from a debtor but also why certain parties without property rights should receive priority status over those who do hold such rights.

As various theories and approaches to insolvency law are discussed elsewhere in this book, they will not be considered in detail here. Instead, property-focused aspects of some of those theories will be selectively drawn upon.

##### **4.1 Respecting property entitlements**

Thomas Jackson's well-known account of insolvency law in *The Logic and Limits of Bankruptcy* places particular importance on property rights.<sup>60</sup> One of his key points is that bankruptcy (in a wide sense of the term including corporate insolvency) should only be triggered if it is in the interests of creditors as a group, and that new entitlements in bankruptcy create incentives for certain parties to resort to it to gain advantages even where bankruptcy would not be in the collective interest.<sup>61</sup> As such, pre-bankruptcy entitlements, particularly

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<sup>56</sup> See GS Alexander et al, 'A Statement of Progressive Property' (2009) 94 Cornell Law Review 743.

<sup>57</sup> For recent work, see e.g. J Fraley, 'Climate Change, Sustainability, and the Failure of Modern Property Theory' (2020) 104 Marquette Law Review 93; LL Butler, 'The Importance of Viewing Property as a System' (2021) 58 San Diego Law Review 73; B Akkermans, '(Normative) Models of Property Law. Using Van Erp's Framework to Advance Sustainable Property Law' in B Akkermans and A Berlee (eds), *Sjef-Sache – Essays in Honour of Prof mr dr JHM (Sjef) van Erp on the Occasion of his Retirement* (Eleven International Publishing 2021) 3.

<sup>58</sup> The labour theory of property formulated by J Locke, *The Second Treatise of Government* (Awnsham Churchill 1689) §27, is influential in this area.

<sup>59</sup> See further below.

<sup>60</sup> TH Jackson, *The Logic and Limits of Bankruptcy* (Harvard University Press 1986) 1: he notes his departure from the notion that insolvency law has its own substantive goals that may require to be balanced with other areas of law, such as property law.

<sup>61</sup> *ibid* 21. There may be some scepticism about the suggestion that a party will resort to pushing their debtor into an insolvency process to obtain a new entitlement, given that in many cases various negative consequences are

property rights, should not ordinarily be departed from. He also states that although bankruptcy law touches upon other areas of law, it is ‘at its core [...] debt-collection law’.<sup>62</sup> Bankruptcy is considered a collective forum for dealing with the relative rights of ‘owners’ (‘creditors and others with rights against a debtor’s assets’)<sup>63</sup> and gives ‘protection against the destructive effects of an individual remedies system when there are not enough assets to go around’.<sup>64</sup> Insolvency law therefore stops parties from obtaining property rights for their own individual benefit over the debtor’s property through debt enforcement. Jackson also asserts that a key question in insolvency is how to convert the ownership of assets from debtor to creditors and insolvency law is concerned with reducing conversion costs.<sup>65</sup>

In reality, insolvency law does pay significant regard to the sanctity of property entitlements and property serves as a default starting point, from which any departures must be forcefully justified. In the UK, for instance, even preferential claims do not give priority over fixed security, their priority status only applying against floating security, which is subordinated because of its wide-ranging scope and ability to cover all of a debtor’s property, as this may leave little for other creditors. If insolvency law does not respect property entitlements, and gives priority to those without such rights, this blurs the distinction between property rights and personal rights.<sup>66</sup>

## 4.2 Overriding property rights

Property law’s stability and certainty, and potential rigidity, may seem to favour more conservative approaches to insolvency law, such as creditors’ wealth maximisation approaches. Yet given that insolvency does provide a forum to determine and rank the claims of different parties, this can open the question as to whether some parties are more deserving than others in terms of dividing up proceeds from the realisation of the debtor’s property. While security rights and other property rights continue to exist from outside the insolvency process, insolvency law does have the potential to override or to impinge upon such rights. In addition, given that the distribution can relate to the assets of the business as a whole, or a significant proportion of it, rather than just individual items, it may be contended that certain parties should have priority in relation to the overall business due to their contribution to it and its asset base. However, this can only be fulfilled through the proceeds arising from the sale of property. Related to this, it can be noted that the original justification for the prioritisation of the limited preferential claims of employees over floating charge holders, in English law, included that they had contributed to the production of the company’s assets and that their relative loss would be greater if they did not rank ahead.<sup>67</sup> Preference rights may be considered to reflect the contributions that parties have made to the business, by reference to the whole asset base.<sup>68</sup> Yet

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likely to arise from this, including a diminution in the estate’s value. However, some parties, including debtors, no doubt do use insolvency processes to obtain certain advantages: see e.g. LD Simon, ‘Bankruptcy Grifters’ (2022) 131 *Yale Law Journal* 1154.

<sup>62</sup> Jackson (n 60) p. 3.

<sup>63</sup> Jackson refers to creditors as owners in relation to the debtor’s assets, which is justifiable in a broad sense, but not a strict legal sense.

<sup>64</sup> *ibid* 20.

<sup>65</sup> *ibid* 5.

<sup>66</sup> See e.g. Ki. van Zwieten, *Goode on Principles of Corporate Insolvency Law* (Sweet & Maxwell 2018) paras 2-29.

<sup>67</sup> See HC Deb 10 Feb 1897, cols 70–87, regarding the Bill that became the Preferential Payments in Bankruptcy Amendment Act 1897.

<sup>68</sup> But claims as preferential creditors for limited amounts are insufficient compensation for what employees may stand to lose if the company enters insolvency in terms of e.g. job losses, dislocation, fear and uncertainty.

if we accept that parties such as employees are deserving of a special level of priority, the current limitations on this in insolvency seem to undermine such an approach and should be revisited.<sup>69</sup> In a sense, insolvency collectivises property, as it can be viewed as giving all creditors an interest in the debtor's property, and therefore insolvency law must then rank their respective entitlements.<sup>70</sup>

Of course, a number of other writers have sought to use contractarian (and indeed Rawlsian) approaches to achieve more progressive outcomes with less reverence for pre-existing property entitlements. Notably, Donald Korobkin contends that the parties behind the veil in a contractarian approach should be wider and include various different parties who would potentially be impacted by the failure of the company, such as employees and members of the wider community, as well as creditors.<sup>71</sup> Such an approach allows for favouring of such parties at the expense of those with pre-existing property entitlements, and may not even necessarily be limited to those with debts in the legal sense. Communitarian approaches also involve consideration of a range of stakeholder parties and focus on disturbing property entitlements and redistribution to a significant degree.<sup>72</sup> These approaches can support the relegation or limitation of pre-existing property interests, to further progressive ends, such as environmental protection or supporting vulnerable stakeholders.<sup>73</sup> Additional support for these positions can be derived from the progressive theories of property law referred to above. Indeed, there are opportunities for collaboration between property and insolvency theorists in order to formulate approaches that advance mutual objectives.

### 4.3 Reconciling property and insolvency theories?

In proposing his own contractualist model ('authentic consent model') Riz Mokal makes the point that if the goals being pursued are desirable in insolvency they ought to be pursued by the general (non-insolvency) law, unless the goals relate to circumstances peculiar to insolvency.<sup>74</sup> Otherwise, there can be 'arbitrary distinctions' between parties in formal insolvency processes and financially distressed companies outside these processes. Such an approach can also help to point towards a means of reconciling property and insolvency theories. Rather than merely focusing on insolvency law when trying to achieve progressive (or other) objectives, the reinterpretation or amendment of property law should also be focused on. This would blunt some of the objections about respecting pre-existing property entitlements and avoiding the incentivisation of insolvency procedures.

There are different ways in which property law could be adapted to give effect to particular policy objectives that are also of relevance in insolvency law. For instance, environmental

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<sup>69</sup> Albeit that employees in the UK have the ability to claim unpaid wages and redundancy payments from the state: Employment Rights Act 1996, ss 166-170 and ss 182-190.

<sup>70</sup> It may also be pointed out that the law is not necessarily determining who has the best title to the debtor's property, but who has the best claim to its value.

<sup>71</sup> DR Korobkin, 'Contractarianism and the Normative Foundations of Bankruptcy Law' (1993) 71 *Texas Law Review* 541.

<sup>72</sup> E.g. E Warren, 'Bankruptcy Policy' (1987) 54 *University Chicago Law Review* 775; E Warren, 'Bankruptcy Policymaking in an Imperfect World' (1993) 92 *Michigan Law Review* 336; K Gross, 'Taking Community Interests into Account in Bankruptcy: An Essay' (1994) 72 *Washington University Law Review* 1031. See also V Finch and D Milman, *Corporate Insolvency Law: Perspectives and Principles* (Oxford University Press 2017) for an excellent overview of various insolvency theories.

<sup>73</sup> E.g. B Mamutse and V Fogleman, 'Improving the Treatment of Environmental Claims in Insolvency' [2013] *Journal of Business Law* 486; A Wardrop, 'Theorising About Insolvency Law and the Public Interest in the Context of Insolvent Utilities: An Australian Perspective' (2014) 29 *Banking and Finance Law Review* 435.

<sup>74</sup> RJ Mokal, *Corporate Insolvency Law: Theory and Application* (Oxford University Press 2005) 66.

liability could give rise to a form of high-ranking security right that would exist both outside and inside insolvency.<sup>75</sup> Such a security could be over a particular asset (or assets) or floating. Utilising this approach for more disparate groups such as employees or tort claimants is more difficult, particularly where there is no specific item(s) of property to which the claims relate. A radical overhaul of the law could, for example, provide that a company's assets are to be preserved by a trustee for the benefit of a company's stakeholders, which would help protect the interests of involuntary and non-adjusting creditors.<sup>76</sup> Yet such a change seems rather unlikely at the present time and would have to overcome a number of practical difficulties. It can also be contended that the issues certain parties, such as employees, have in voluntarily acquiring property rights under the current law and the problems inherent in providing these creditors with property rights automatically, mean that insolvency law is a suitable forum for addressing such unfairness. This is particularly so as the debtor's property is being (re-)allocated and priorities are being determined anyway. Furthermore, sometimes it is only in insolvency that vulnerable parties actually need special protection. Yet where the issues involved are broader and extend beyond insolvency, there may justification for utilising other areas of law, such as employment law, environmental law, and, indeed, property law, either alone or in tandem with insolvency law, to meet policy objectives.

## 5. Conclusion

This chapter has identified and discussed a number of aspects of the interrelationship between property and insolvency. There is certainly a significant level of circularity and mutual dependency between property and insolvency. Property is fundamental to insolvency and how it works, including with respect to management and realisation of the debtor's estate, and insolvency sets some of the parameters of property. Insolvency law and its effects raise questions for the meaning of property and need to be integrated into broader property theories. Theorists and policymakers in insolvency law would also benefit from acquiring greater familiarity with property theory and policy, as this would provide further assistance in achieving desired objectives. A more joined-up approach to property and insolvency theory would be of mutual benefit and could more effectively shape the law in both domains in future.

On one view, much of insolvency law may be considered merely a branch of property law. It is a means of formally reallocating property resources and their value from one party to others. The management or control of the debtor's property may be passed to someone else, while the transfer of the debtor's property to others is facilitated, and the proceeds acquired in return (which are also property) are distributed in accordance with an order of priority, reflecting the perceived merits of different parties and their own rights in the debtor's property. Other parts of insolvency law can be viewed largely as the apparatus necessary to achieve these results. Yet while property is a fundamental component of insolvency law, insolvency does not simply involve a collection of property and how it should be allocated.<sup>77</sup> The increased focus on the rescue of companies in recent decades, as well as the discharge and protection for individual

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<sup>75</sup> For some consideration of this, see e.g. C Mackie and MM Combe, 'Charges on Land for Environmental Liabilities: A Matter Of "Priority" For Scotland' (2019) 31 *Journal of Environmental Law* 83.

<sup>76</sup> See e.g. Jennifer LL Gant, 'Floating Charges and Moral Hazard: Finding Fairness for Involuntary and Vulnerable Stakeholders' in J Hardman and ADJ MacPherson (eds), *Floating Charges in Scotland: New Perspectives and Current Issues* (Edinburgh University Press 2022) 228, and the sources cited there.

<sup>77</sup> Related to this, Korobkin challenges the view that a company in insolvency is simply a pool of assets, stating: 'Unlike mere property, a corporation, whether in or out of bankruptcy, has potential': DR Korobkin, 'Rehabilitating Values: A Jurisprudence of Bankruptcy' (1991) 91 *Columbia Law Review* 717, 745. However, the suggestion that property does not have potential (at least in some hands) can be readily contested.

insolvent debtors show that insolvency law has its own components and priorities separate from property law. In fact, given that normal rules of property sometimes give way to insolvency law, property may be viewed as subservient to insolvency in this regard. More broadly, insolvency law is also an intersection point for other areas of law such as obligations, persons, companies and actions. As with the relationship between property and insolvency, much further work can also be done to explore the relationship between these areas and insolvency law and theory.