Introduction
Since at least the mid 19th century, the English courts have admitted a common law principle of insolvency law referred to in contemporary parlance as the "anti-deprivation rule" (the "ADR"), and known historically as "fraud on the bankruptcy laws". The basic premise of the ADR is that a device through which a bankrupt estate is denuded of an asset in fraud of the bankruptcy laws is in essence void as a matter of policy. A good example of a provision which the ADR might strike at in practice would be a 150 year long leasehold interest in respect of real estate for which the "tenant" has paid a premium up-front and which contains a forfeiture provision which purports to be enforceable on the bankruptcy of the "tenant".

The ADR is a court developed rule which operates in tandem with the "pari passu principle" (the "PPP") of insolvency law under which a bankrupt estate must be distributed on a pro rata basis among the unsecured creditors such that, for example, if the bankrupt estate is sufficient to pay 20% of all unsecured creditors' claims then each unsecured creditor will receive 20p for each pound owed to it. So powerful is the PPP in English insolvency laws that an attempt to contract out of it can be void as a matter of policy (this is sometimes referred to as "the rule in British Eagle" per the leading case on the matter).

Whilst there is some overlap, the purpose of the ADR is to ensure that the bankrupt estate is maximised, whereas the purpose of the PPP is to ensure an equal and rateable distribution of the bankrupt estate to creditors.

The ADR and the PPP exist alongside the statutory provisions which allow for certain reviewable transactions to be susceptible to challenge in an insolvency scenario.

Since the turn of the 21st century, the ADR has been the subject of a flurry of cases in which its application in a commercial context has been tested and refined. The leading case in the jurisprudence is Belmont Park Investments Pty Ltd v. BNY Corporate Trustee Services Ltd ("Belmont"), which is a case involving a "flip-clause" in a complex structured finance transaction, which went on appeal to the Supreme Court.

However, perhaps the most high-profile case in which the ADR has been considered judicially is that of Revenue and Customs Commissioners v Football League Ltd ("HMRC's Case"), in which HMRC sought to challenge the validity of the so-called "football creditors' rule" as constituted by various provisions of the Articles of Association and the Rules and Regulations of the Football League Ltd (the "FCR"). The FCR...
takes effect in practice so that, in the insolvency of a member club, certain football creditors of the insolvent club are paid in full whereas other unsecured creditors of the insolvent club receive only a “pence in the pound” distribution. HMRC objected to this in principle and brought its action against the Football League on the basis that the FCR offends both the PPP and the ADR and should therefore be rendered void. This article will consider the following in this context:

1. The ADR under English law and the broad principles which underpin its application in a commercial context.

2. The PPP in the context of the rule in British Eagle.

3. The provisions of the Articles of Association and the Rules and Regulations of the Football League Ltd (the “EFL”) which constitute the FCR and the bases upon which the challenge brought in HMRC’s Case failed.

4. Whether Scots law would admit challenges to contractual provisions and other devices on the basis of rules which are equivalent to the PPP / the rule in British Eagle and/or the ADR in addition to the statutory provisions under the Insolvency Act 1986 pertaining to gratuitous alienations and unfair preferences and the related common law⁴.
5. The “football creditors rule” as it applies in Scotland in accordance with the Rules and Articles of the Scottish Professional Football League (the “SPFL”) and whether the Scottish FCR would be valid and enforceable in the context of the insolvency of a Scottish football club which is a member of the SPFL.

6. Enhancements and improvements which might be made to the Scottish FCR for the betterment of association football in Scotland as a whole, including in the context of the provision of finance to football clubs.

The Anti-Deprivation Rule

As mentioned above, the leading case in respect of the ADR is Belmont, in which the Supreme Court considered the ADR in the context of a “flip-clause” appearing in a complex structured finance transaction. In holding that the “flip-clause” at issue did not offend the ADR, Lord Collins set out what is now regarded by the English courts as the authoritative statement of the ADR, and from which the following can be discerned:

1. The policy behind the ADR is clear: “parties cannot, on bankruptcy, deprive the bankrupt of property which would otherwise be available for creditors” and, accordingly, a device which seeks to do so will be void as a fraud on the bankruptcy laws.

2. While there is some overlap with the rule in British Eagle, the ADR is distinct from it and is aimed at a different mischief.

3. The following elements must be present in order for the ADR to be engaged:
   a. An intention to evade the insolvency laws (although a subjective intention is not required so this is an objective test).
   b. An asset deprivation which is triggered by, or following the commencement of, an insolvency proceeding.
   c. The deprivation involves an asset of the debtor which would otherwise be available to creditors.

4. Except in the case of well-established categories such as leases and licences, it is the substance rather than the form which should be determinant.

5. The ADR is capable of being given a “common sense application which prevents its application to bona fide commercial transactions which do not have as their predominant purpose, or one of their main purposes, the deprivation of the property of one of the parties on bankruptcy.”

6. The more complex the underlying transaction, the less likely it is that the ADR will apply, provided that the parties have acted in good faith.

It follows from this that the ADR is perhaps of limited application in a commercial transaction which is complex or of a highly structured nature.
Nevertheless, the rule
does take effect to void
transactions in a commercial
context if there exists what
Lord Collins described
in Belmont as "a blatant
attempt to deprive a party
of property in the event of
liquidation". In so doing,
Lord Collins referred
specifically to the 2011 case
of Folgate London Market
Ltd v Chaucer Insurance
pic' ("Folgate"). In Folgate,
parties had entered into
a settlement agreement
in respect of an insurance
dispute which pertained
to a separate damages
claim raised by the victim
of a road traffic accident,
which damages claim was
uninsured as regards the
respondent due to errors
in the brokering of the
respondent's insurances.
The settlement agreement
contained an undertaking
under which F would pay M
various sums if M was found
liable under the damages
claim. However, the
indemnity and obligation
to pay were expressed
to be "automatically
released" in the event that
M "is placed into liquidation,
administration or a receiver
is appointed or a voluntary
arrangement is proposed
for the purposes of Part 1
of the Insolvency Act 1986".
The Court of Appeal had no
hesitation in finding that this
arrangement offended the
ADR and could not be relied
upon by F as a basis not to
pay M (which had gone into
liquidation).

It therefore follows that the
ADR is in certain (perhaps
limited) circumstances a
useful additional tool in an
insolvency practitioner's
kit to have transactions
set-aside and in that sense
complements the statutory
armoury detailed below in
footnote 3.

Pari Passu Principle (or "the
Rule in British Eagle")

The PPP can also be used
under English law to strike
at arrangements which seek
to negate its effect since a
contractual provision which
purports to contract out of
the PPP can be held to be
void ab initio and without
establishing any intention
to subvert the insolvency
laws. This is sometimes referred
to as "the rule in British
Eagle" (the "RBE") after the
leading case on the matter:
British Eagle International
Airlines Ltd v Compagnie
Nationale Air France
("British Eagle").

British Eagle involved the
rules of the International
Air Transport Association
("IATA") which operated
as a clearing-house for
member airlines pursuant to
which there was a monthly
clearance whereby the
debits and credits of each
member airline in respect
of services rendered to
or by it and to or by each
other member airline were
reduced to a single claim
for each member airline
comprising either a debit
balance (in which case
the member airline was
a debtor of IATA and owed
a payment) or a credit
balance (in which case
the member airline was
a creditor of IATA and
owed a payment by
IATA). British Eagle went
into liquidation and the
liquidator sought to enforce
a credit balance owed to it
by Air France for services
rendered despite the fact
that the netting and set-off
arrangements of the IATA
clearing rules purported to
take effect to reduce that
claim to nil when measured
against the claims of each
other member airline for
services rendered to British
Eagle, taking the view that
he was not bound by these
clearing rules in the
insolvency of British
Eagle.

The House of Lords agreed
that the liquidator was not
bound on a 3 to 2 split
decision, holding that it
was open to the English
courts to refuse to give
effect to provisions of a
contract which achieved a
distribution of an insolvent's
property which ran
counter to the insolvency
legislation. Accordingly,
insofar as the parties to the
IATA arrangements had,
by agreeing that simple
contract debts were to be
settled in a particular
way, contracted out of the
provisions of the insolvency
legislation for the payment
of unsecured debts pari
passu, those arrangements
were contrary to public
policy and the general
rules of the liquidation
prevailed over them. It
therefore followed that,
on the liquidation, British
Eagle became entitled to
recover payment of
the sums payable to it
by other member airlines
for services rendered by
it and that airlines which
had rendered services to it
became entitled to prove in
the liquidation for the sums
payable to them.

IATA amended its rules
shortly thereafter so that
mutual credits and debts
between member airlines
were replaced with equal
back-to-back credits and
debits with IATA itself
so that, in respect of a
particular service provided:

i. the airline providing
   a service had a
   claim against IATA;
   and

ii. IATA had a
    corresponding claim
    against the airline
    which received
    the benefit of the
    service.

By re-writing the rules
in this way, debts due to
the airline by IATA could
be legitimately netted-off
against debts due
by the airline to IATA
in the monthly clearing
process. The new IATA
rules were subject to
judicial consideration in
the Australian case of
International Air Transport
Association v Ansett
Australia Holdings Limited
, which held that the rule
in British Eagle was no
longer engaged in essence
because the IATA rules
no longer took effect to
wash-out mutual debit
and credits owed by one
airline to another against
entirely separate claims and,
accordingly, there was no
asset of the insolvent airline
which was being deprived
from the insolvent estate.
The RBE remains good law and therefore represents another tool which an insolvency practitioner can use in an English insolvency to have a contractual provision rendered void if it seeks to negate the PPP without having to establish any objective or subjective intention to evade the insolvency laws. The ADR and the RBE are similar, but they are different and are directed towards separate mischiefs. The ADR seeks to maximise the bankrupt estate for distribution, whereas the RBE seeks to ensure that all assets of a bankrupt estate are distributed in accordance with the PPP.

Football Creditors’ Rule

The so-called “football creditors’ rule” is in fact a series of articles and rules of the EFL which, when taken together, operate to ensure that certain “football creditors” are paid in full should a member football club fail. This can give rise to results which are difficult to reconcile with the key principle of the insolvency laws - i.e. that assets of an insolvent estate should be distributed to unsecured creditors on a pari passu basis. Why should it be supposed that, in the insolvency of a football club, unsecured creditors which are “football creditors” (such as, for example, players owed salary and other benefits and other football clubs owed transfer fees) are paid in full whereas other unsecured creditors of the football club (such as, for example, St Johns Ambulance for match-day first aid services rendered or HMRC in respect of taxes due) are left with a pence in the pound distribution? The arguments in support of the FCR generally revolve around sporting integrity and ensuring that no club gains a competitive advantage against other clubs in the league by incurring liabilities it cannot satisfy (e.g. in the acquisition of players and facilities) exposing prudently run clubs to the risk “of the financially incontinent”. Morally, however, some may question whether a club that chooses to spend the cash it has on satisfying football debts, but not non-football debts, gains any less of a sporting advantage than one that leaves football creditors trailing in its insolvent wake.

The relevant rules of the EFL are largely comprised in its Articles of Association as supplemented by its Rules & Regulations and the adoption of a set of broad outline Insolvency Principles. The most significant of these rules involves the so-called “golden share”. In order to participate in the EFL and be entitled to the payments which accrue to the EFL (most notably, money from the marketing of television broadcasting rights), a club must hold a share in the EFL. Article 4.8 specifically contemplates that a Notice may be withdrawn if “Football Creditors” are paid in full.
In practice, the EFL has utilised its Article 4 powers in the context of an Insolvency Event broadly as follows:

1. A member club suffering an Insolvency Event has a Notice served on it which is suspended whilst the member club seeks to trade out of the insolvency process typically by selling players so as to pay outstanding creditors and continue trading (e.g. as was the case in the administration of Crystal Palace FC).

2. If the member club comes out of the insolvency process and all "football creditors" have been paid in full, then the Notice is withdrawn and the member club is entitled to retain its share in the EFL. In practice, if the insolvent member club comes out of an insolvency process then this is likely to be pursuant to a CVA which all creditors will have had an opportunity to vote on thereby ensuring that creditor interests are recognised.

3. If a NewCo is established for the acquisition of the business and assets of the insolvent member club (OldCo), then the Notice is enforced compelling the transfer of the share to the NewCo, but subject to various conditions, including that the NewCo pays all Football Creditors of OldCo. The application of Article 4 in these circumstances clearly gives rise to a scenario in which Football Creditors are paid in full whereas other creditors will thereafter rank for a "pence in the pound" distribution in the winding-up of OldCo. This may be particularly hard to swallow for unsecured creditors in a "phoenix" scenario in which officers and members of the insolvent member club (OldCo) are officers and members of NewCo as well.

In each Division of the EFL at the end of each football season, the Articles allow for interim payments to be made to member clubs on account of their likely share of the Pool Account revenues at the end of the relevant season.

Articles 80.2 through 80.4 provide for the payment of the Football Creditors of a "Defaulting Club" from sums standing to the credit of the Pool Account which would otherwise be due to that Defaulting Club. Article 80.2 is in the following terms:

"80.2 Subject to the provisions of Articles 80.3 and 80.4, the Board shall apply any sums standing to the credit of the Pool Account which would otherwise be payable to a Defaulting Club, in discharging the [Football Creditors]....."

The remainder of Article 80.2 and Articles 80.3 and 80.4 deal with the ranking of priority of Football Creditors and the sharing of payments between each member of each level of the priority waterfall.

Crucially for the purposes of HMRC’s Case, Articles 77.1 and 77.3 take effect so that payments due to a member club under the Articles only become a legal liability of the EFL if a member club fulfils all of its fixture obligations for the relevant season:

"77.1 The Board may make interim payments from the Pool Account to any member club. These will be based upon the sums likely to be paid to member clubs under these Articles and will be paid on account....

77.3 Payments to member clubs under the Articles only become a legal liability of the League to a member club, if the member club completes all of its fixture obligations to the League for the relevant Season. This means that any interim payments under this Article 77 are repayable to the League on demand if the member club does not complete all of its fixture obligations."

Thus, a member club does not have a contractual entitlement to any payment until all fixtures are completed and, until that time, there is no asset which belongs to the member club in terms of sums standing to the credit of the Pool Account. Interim payments are essentially in the nature of "on-demand" loans which must be repaid in full if there is a failure to complete all fixtures.

HMRC’s Case

HMRC brought its case following a number of football club insolvencies in which the FCR had taken effect such that Football Creditors were paid in full whereas other unsecured creditors (including HMRC) received a de minimis "pence in
the pound" distribution. Thus, in the case of the administration of Crystal Palace FC, its Football Creditors were paid in full whereas ordinary unsecured creditors received a dividend of less than 2p in the pound. Equally, in the administration of Plymouth Argyll FC, Football Creditors were paid in full while the other unsecured creditors received a dividend of 0.77p in the pound.

HMRC’s Case was based on the PPP and the ADR pursuant to which HMRC sought the following declarations from the court for future insolvencies in respect of EFL member clubs:

1. That Article 77.3 (postponing the legal entitlement to payments from the Pool Account until all fixtures are complete) is a deprivation and is void and unenforceable.

2. That Article 80.2 is void and unenforceable in providing that Football Creditors receive payment direct out of monies which would otherwise be due to a Defaulting Member from the Pool Account.

3. That Article 4.7.4 (allowing for the EFL to require a transfer of a member club’s share in the event of its insolvency) is a deprivation provision and is void and unenforceable.

As regards Article 77.3, HMRC argued that, on a proper interpretation of the Articles and associated Rules, the true nature of payments from the Pool Account was that these were legal entitlements accruing to member clubs as they fulfilled fixtures and that this was supported by the fact that member clubs received payments in monthly instalments. Richards J disagreed with this analysis, noting that it had not been argued that Article 77.3 was a “sham”. If it is not a sham then it validly defines the nature of the legal entitlements to payments as between the EFL and its member clubs. Accordingly, the court would uphold Article 77.3 and give effect to its literal interpretation, which was to the effect that a legal entitlement to payments from the Pool Account only arose if the specified condition precedent was satisfied, being fulfilment of all fixtures.

Having held that Article 77.3 was enforceable as correctly defining the entitlement of the member clubs to Pool Account monies, the Article 80.2 question could be easily disposed of. Quite simply, if a member club becomes insolvent during a season and before completion of all fixtures, and Article 80.2 took effect such that Football Creditors were paid from Pool Account monies by the EFL, neither the PPP nor the ADR were engaged because there was no asset of the insolvent club which was being deprived from its other creditors. However, the question was left open as to whether either the PPP or the ADR would be engaged if the insololvency arose after completion of a season with all fixtures fulfilled and at that stage Article 80.2 took effect such that Football Creditors were paid in full from Pool Account monies by the EFL, determining that this question would have to be decided in the context of a real case heard before the court as opposed to a hypothetical scenario which may or may not arise. Given this uncertainty and bearing in mind that, during the close season, a club will have wages and other debts due were paid and will not have any match-day income, a thoughtful insolvency practitioner may suggest that an appointment is made at 5pm on the final day of the season following fulfilment of all fixtures (if that is a practicable possibility).

Having disposed of those matters, Richards J went on to consider the position under Article 4.7.4 in terms of the alleged “deprivation” of a member club’s share in the event of an insolvency proceeding. This question had to be considered in the context of the bundle of rights which a share in the EPL brings. These are threefold:

1. A right to payments from the Pool Account. Following the analysis above as to the correct treatment of these entitlements, a forfeiture of the share could not be regarded as depriving an insolvent club to a right to payment because no such right existed under Article 77.3 at the relevant time.

2. A right to compete in the League competitions. Following the decisions of the Privy Council in The Official Assignee of Bombay v Shroff and Neuberger J in Money Markets International Stockbrokers Ltd v London Stock Exchange Ltd, which both involved the compulsory transfer for no consideration of a share in a stock exchange from which a member had been expelled on grounds of insolvency, Richards J held that this entitlement only accrued to the extent the other members of the EFL were content to continue to play fixtures against the insolvent club, and it was perfectly competent to constitute rules pertaining to a joint endeavour such as the EFL under which they would do so only to the extent that their debts due were paid and continued to be paid. Accordingly, this did not offend the ADR.

3. A right to have players registered with them. Since HMRC did not pursue this loss of entitlement as being in breach of the ADR,
Richards J did not consider the matter further save to note that if an insolvent club went into liquidation then it would cease business, its player registrations would terminate and it would lose the value of its playing squad in any event. Accordingly, HMRC lost the case and none of the declarations were made. Ultimately, the case turned on the true meaning of Article 77.3 which Richards J noted during the course of his judgment had clearly been carefully drafted so that neither the ADR nor the RBE would be engaged since at no stage was there an asset of the insolvent member club which was deprived from the unsecured creditors of the insolvent estate.

Before moving on from HMRC’s Case, it is worth noting one further aspect of the judgment. The EFL had sought to argue that because the trigger for Article 80.2 was non-payment of sums due to a Football Creditor as opposed to the occurrence of an insolvency event, the ADR could not be engaged. Richards J felt that this argument was closed-off in the Belmont case and held as follows:

1. If the non-payment triggering Article 80.2 payments to Football Creditors arose before an administration or liquidation, the ADR would not apply.
2. If the non-payment arose after the commencement of an administration or a liquidation, the ADR would take effect so as to challenge a contractual provision that sought to deprive the insolvent entity of the asset in question.

Accordingly, following Belmont and HMRC’s Case, it is not a necessary element for the ADR to apply that the trigger is an insolvency event. A non-payment trigger will also fall within its ambit if the non-payment relied upon as the basis for the deprivation arises after the commencement of an insolvency process.

The Scottish Perspective
As is so often the case in Scots law when it comes to legal principles in a commercial context, there is a comparative dearth of applicable case law. Whereas the ADR and the PPP are underpinned by a substantial line of cases in the English courts, there is nothing comparable in the Scottish jurisprudence. However, what can be said with some certainty is that, in a number of key respects, the insolvency laws in Scotland are very similar to those in England with many shared statutory laws and principles. For example, administration as an insolvency process is for all intents and purposes the same in Scotland as it is in England. Equally, English law and Scots law share sections 244 (Extortionate credit transactions) and 245 (Avoidance of certain floating charges) of the Insolvency Act 1986. And crucially, Scots insolvency law is essentially underpinned by the pari passu rule of distribution which is enshrined in our
insolvency laws through the Insolvency Act 1986 and the Insolvency (Scotland) Rules 1986, which are the statutory successors of the historic Bankruptcy Acts under which the pari passu rule was first set forth in statute.

Indeed, in the Scottish case of Farmer’s Mart Ltd v Milne, Lord Atkinson referred to the pari passu principle of distribution as being “… the great object and virtue of the Bankruptcy Acts”. That case involved an arrangement under which professional fees payable out of bankrupt estates to various trustees and factors in respect of the administration of those bankrupt estates were to be pooled and shared so that sums otherwise due to the trustees and factors in other capacities would be satisfied thereby generating other capacities would be.

Lord Dunedin gave the leading judgment of the House and in it he looked back to the institutional writers, and Bell’s Principles of the Laws of Scotland (1829) in particular, in which he found the following statement:

"Contracts for indecent or mischievous purposes or considerations, or prejudicial or offensive to the public or to third parties, or inconsistent with public law or arrangements, are invalid."

Lord Dunedin then went on to hold that the arrangement at issue in the case clearly constituted such a contract:

"Now the truth is that a case of this sort… is not only prejudicial to third parties, but it is inconsistent with public law and arrangement; and it is equally inconsistent with public law and arrangement whether it contravenes an actual section of the Bankruptcy Act… or whether it goes against those general principles which are just as much applied to private arrangements in Scotland, such as trust deeds, as they are to the general arrangements which are prescribed in a sequestration."

This case, referring back to the institutional writers for principle as it does, is in our view authority for the proposition that Scots law is broadly the same as English law insofar as the pari passu principle is concerned and, accordingly, the rule in British Eagle would find equal application in the Scottish courts to render void any contractual arrangement which sought to provide an unsecured creditor with a larger distribution from a bankrupt estate than he would otherwise receive under the Scottish insolvency laws.

However, caution is required when considering whether this broad principle is also underpinned by something equivalent to the ADR. The case of Munro v Rothschild casts some doubt upon the matter. In this case, a group of creditors entered into a general arrangement with their mutual debtor under which they agreed to share on a pro rata basis a sum of £300 per annum to be paid out of the debtor’s income to a trustee on their behalf, in return for which the creditors agreed not to enforce their claims against the debtor. Prior to that, one of the creditors (R) party to the general arrangement had agreed with the debtor that, if the general arrangement was completed, then R would be paid in full by three instalments falling due three, four and six months after the date of the general arrangement. R then sought to enforce his special arrangement for payment of his claim in full and was awarded judgment in absentia, whereupon the trustee under the general arrangement (M) brought proceedings seeking suspension of the decree. R argued that the general arrangement was void as a fraud on the bankruptcy laws following the Farmers’ Mart case. The House of Lords disagreed, holding that the general arrangement was a perfectly competent contract, albeit that it might be voidable as an illegal preference at the instance of any creditor who was not party thereto, but it was not void ab initio. Certain of the judgments in the House suggest that Farmers’ Mart is to be regarded as a case which is very much limited to its particular facts and circumstances and does not have general application to ordinary contractual arrangements. Having said that, Lord Dunedin (who also heard the Farmers’ Mart appeal) made a distinction between the general arrangement and R’s separate special arrangement thus (our emphasis):

"…… [R’s special arrangement] probably is contrary to public policy, because it seems to me to fall almost exactly under
the words of Professor Bell in the passage in his Principles which I cited in the Farmers' Mart case.... [The general arrangement] was an agreement that would defer distressing the debtor if each of [the creditors] got their equal share of the funds the debtor had given over to the trustee; and in fraud of that he, Rothfield, gets a preference to himself.

That is a very good illustration, perhaps, of an agreement against public policy. The [general arrangement].... is not of that character at all. There is nothing illegal in a debtor proposing to pay his creditors. There is nothing illegal in a debtor saying, "I will set apart a portion of my funds to pay A, B, and C." But the common law and the bankruptcy law of Scotland come in and say, "If it was the fact that you were insolvent when you made those arrangements, then we will give the privilege to other creditors who have already got debts and were not parties to this arrangement to cut it down." That, as has already been pointed out, is a case of a voidable not a void agreement."

It appears that there is then a category of arrangement which will be void as a matter of public policy if it constitutes a "fraud on the bankruptcy laws". Whether this is struck at as in essence the Scottish equivalent of the RBE or whether it can be regarded as something akin to the ADR is perhaps of little practical importance. What we think can be said with some confidence in this regard is that, having established that there is a "fraud on the bankruptcy laws" rule in Scots law, the line of English cases on the RBE and the ADR are likely to be persuasive, subject to the caveat discussed in the next paragraph.

As noted in para 13-10 of the Law of Corporate Insolvency in Scotland (4th edition) by St Clair & Drummond Young, the Scottish common law admits very wide and powerful "self-help" remedies in a bankruptcy scenario under the "retention" and "balancing of account in bankruptcy" laws which may in practice negate a "fraud on the bankruptcy" challenge in most circumstances. Thus, if a contractual arrangement goes no further than conferring rights which would be available at common law in any event then it will not be void, but if it exceeds the available common law remedies, then it will be void. To illustrate the point, St Clair & Drummond Young refer to the early English case on the ADR of In re Jeavons exparte Mackay22. In that case, there were a series of related transactions under which a patent was sold by J to B in consideration of payment of the royalties accruing under the patent to J by B for a period of 6 years, under agreement that, in return for not demanding payment under a loan from B to J, B would retain 50% of the royalties, which would "flip" to 100% of the royalties on J's bankruptcy. This "flip" was held by the English court to contravene the ADR as a fraud on the bankruptcy laws. According to St Clair & Drummond Young, the case would have been decided differently by a Scottish court because, by retaining that portion of the royalties which would otherwise have been due to B, J would have been doing no more than enforcing his common law rights of retention on the basis that B could not repay the loan J had advanced to him.

So, some caution is required in this context and it may be that the circumstances in which a transaction will be void as a "fraud on the bankruptcy laws" under
Scots law are limited. It is certainly the case that the great majority of challenges to transactions and arrangements in a Scots insolvency are brought on the basis of the statutory gratuitous alienation and unfair preferences laws, with the common law precedents thereof (gratuitous alienations and fraudulent preferences) being rarely used in practice. Equally, “fraud on the bankruptcy laws” challenges are rarely if ever taken in the Scottish courts, but this does not mean that the remedy does not exist, even if it is embedded in the institutional writers and comparatively aged case law. It is submitted that a “fraud on the bankruptcy laws” challenge under Scots law is certainly the case that the distinctions between English and Scots law in this regard are marginal and that both bodies of law will produce broadly similar results in respect of a “fraud on the bankruptcy laws” or a flagrant deprivation scenario.

2. An arrangement such as that in Folgate in which an indemnity was expressed to be no longer binding on the party providing the indemnity if the indemnified party was to go into an insolvency process. Again, this would go beyond the common law retention and balancing of account in bankruptcy laws if there was no corresponding obligation or liability of the indemnified party for the indemnifier to retain or balance against. It must surely therefore fail as a “fraud on the bankruptcy laws”.

The benefit of a “fraud on the bankruptcy laws” challenge is that, unlike challenges under the gratuitous alienations and unfair preferences laws, there is no requirement to establish that the debtor was insolvent at the time the bargain was struck, nor is it necessary that the bargain was struck during a suspect period ending on the commencement of the liquidation or the administration. The key factor is whether a valuable asset simply disappears upon insolvency for no good reason other than the mere fact of the insolvency itself.

Since the trend under the English line of cases on the ADR is a reluctance to interfere with commercial arrangements concluded between sophisticated participants, it may be the case that the distinctions between English and Scots law in this regard are marginal and that both bodies of law will produce broadly similar results in respect of a “fraud on the bankruptcy laws” or a flagrant deprivation scenario.

Scottish FCR - Rules of the SPFL

The rules and regulations applicable to the SPFL are to be found in the Articles of Association of The Scottish Professional Football League Limited (the “SPFL Articles”) and the Rules of the Scottish Professional Football League (the “SPFL Rules”). As with the EFL Articles and Rules, entitlements to participate in the SPFL league and cup competitions, to participate in the commercial revenues of the SPFL and to hold player registrations are embedded in the holding of a share in The Scottish Professional Football League Limited, there being an authorised and issued share capital of 42 shares of £1.00 each, representing the 42 clubs which comprise the four divisions of the SPFL (being the Scottish Premiership, the Scottish Championship, Scottish League One and Scottish League Two). As with the EFL Articles, the SPFL has an entitlement in its Articles to serve notice directing that any share held by a member which becomes subject to an “Insolvency Event” can become subject to a notice requiring that it is transferred to either:

1. the Secretary of the SPFL or a trustee or nominee as trustee for all of the members of the SPFL (Article 32); or

2. such transferee as may be notified by the board of the SPFL at a price of £1.00, whereupon the football club operated by the member shall cease to be a member of the SPFL (Article 86).

Note that the SPFL Articles do not contain the same broad powers to suspend or withhold any such notice nor to impose conditions for such suspension, nor do they specifically contemplate that a transfer notice may be withdrawn if “football creditors” are paid. Nevertheless, clearly there is a power to forfeit a member club’s share on the occurrence of an Insolvency Event, meaning that the insolvent club would have no further entitlement to participate in the SPFL competitions, to receive payments from the SPFL’s commercial activities or to hold player registrations.
Our understanding is that, in practice, when directing or consenting to the transfer of a share from an insolvent OldCo to a NewCo taking title to the business and assets of the OldCo, the SPFL (or its predecessors) are (or were) likely to require that football creditors of the OldCo are or were paid in full.

Bearing in mind the line of cases under English law on such a forfeiture (which will be persuasive in a Scottish court)\(^2\), it seems highly unlikely that the Scottish courts would regard such an imposed transfer as a “fraud on the bankruptcy laws” under Scots insolvency laws of itself. It is difficult to see a Scottish court departing from the reasoning given by the English courts in those cases in holding that the ADR was not engaged in such circumstances, particularly given that the Scottish “fraud on the bankruptcy laws” rule is not as clearly defined as the ADR under English law and, if anything, is likely to be less robust in protecting the interests of the creditors of a bankrupt estate.

Payments from commercial revenues generated by the SPFL are prescribed in Articles 149 to 153. The key features of these payments are as follows:

i. The payment is described as a fee and it is derived from commercial revenues which are generated by the SPFL through its commercial activities in operating the league and cup competitions of the SPFL, including exploiting television and radio broadcasting rights (Articles 149 through 153).

ii. The fee is paid from the net commercial revenues after the SPFL has deducted therefrom all of its costs and operating expenses in respect of the administering and running of the League (Article 152).

iii. The fee is expressed to be paid as consideration for the various rights, licences, facilities and services which the member clubs provide to the SPFL to allow the SPFL to perform its obligations under the various commercial contracts it enters into to generate its commercial revenues (Article 150).

iv. The fee is payable to the member clubs on a “ladder” basis depending upon each member club’s position in the League at the end of the relevant season. The member club finishing top of the Scottish Premiership is entitled to a fee in the sum of 13.40% of the net commercial revenues of the SPFL with this percentage descending to 9.60% for the club finishing second in the Scottish Premiership, 8.25% for third and so on and so forth with the club finishing bottom of Scottish Division Two receiving a fee of 0.18% of the net commercial revenues of the SPFL (Articles 153.1 and 153.2).

v. Neither the Articles nor the Rules contemplate that interim payments of the fee will be made. It is presumably therefore the case that payments are made in one lump sum at the end of the relevant season and are therefore inherently dependent upon a member club fulfilling its fixture obligations during the relevant season so that its final position in the League can be determined. This interpretation is enhanced through Article 153.3, which provides for a modification of fee payments in various circumstances (including a club ceasing during the course of a season to participate in the League or having its share subjected to a transfer notice under Articles 32 or 36) amongst the other member clubs in such manner as the board of the SPFL “shall in its absolute discretion determine the most equitable basis.”\(^2\)

vi. In any event, payment of the fee is subject to the SPFL Rules, Rule 139 of which is as follows:

“If, in the opinion of the Board, there are grounds to believe that a Club may not fulfil or be able, on the basis of information available to the Board, to fulfil all or any of its fixture obligations in Official Matches in the course of a Season then the Board may withhold, retain and/or defer payment of any sums which would otherwise be payable and/or be expected to be paid by the [SPFL] to such Club until such time as the Board is satisfied that such fixture obligations have or will be fulfilled.”

The provisions of the SPFL Articles and SPFL Rules pertaining to “football creditors” themselves are not as detailed as those contained in the EFL.
Articles and Rules. They are contained in Rule I38 (our emphasis):

“I38 If any Club defaults in making payment of any sum or sums due to the [SPFL] and/or to another Club the Board shall be entitled to apply any sums which, including in terms of Rules and/or the Articles, would otherwise be payable to the defaulting Club by the [SPFL] in discharge of any debt due by such Club in default to the [SPFL] and/or such other Club in such manner as the Board shall determine.”

The following points can be derived from Rule I38:

a. Under the SPFL Rules, “football creditors” are limited to the SPFL and other member clubs. This compares to the EFL Rules which prescribes a very broad range of “Football Creditors” including related English league organisations, and full-time players and staff of the insolvent club.

b. Rule I38 is drafted widely enough to allow the SPFL to pay the limited category of “football creditors” specified therein from fee payments which would otherwise be due to the member club (in other words, from television and radio broadcast rights monies).

c. However, Rule I38 is expressed as a discretion which is vested in the board of the SPFL. Compare this to Article 82 of the EFL Articles (our emphasis): “the Board shall apply any sums standing to the credit of the Pool Account which would otherwise be payable to a Defaulting Club, in discharging the [Football Creditors]”. There is no discretion. The Football Creditors of an EFL member club “shall” be paid.

d. The SPFL’s entitlement to pay “football creditors” is triggered by a payment default and not an insolvency event of itself, although this distinction is likely to be irrelevant to any “fraud on the bankruptcy laws” analysis following the judgments in Belmont and HMRC’s Case if the payment default arises after the commencement of the insolvency process.

In our view it is unlikely that an allocation of “net commercial revenues” to pay football creditors of an insolvent club during the course of a season that would otherwise have been payable to the insolvent club in the form of a fee at the end of the season will fail as a “fraud on the bankruptcy laws”. This is because of the points made at paragraphs v. and vi. above - i.e. that the fee is structured so that it is impliedly the case that there is no entitlement to payment until all fixtures have been completed since only then can a member club’s final position in the League be ascertained. Accordingly, there is no asset of the insolvent club which is depriving so as to provide for payments to football creditors beyond the distributions they would otherwise have received under the insolvency laws17. Further, per point iii. above, the fee is expressed to be in consideration for the various rights, licences, facilities and services which the member clubs provide to the SPFL to allow the SPFL to perform its obligations under the various commercial contracts it enters into to generate its commercial revenues (Article 150). If a member club is in an insolvency process, its ability to provide those various rights, licences, facilities and services to the SPFL is likely to be materially impaired and so withholding payment of the fee may be no more than the SPFL would be entitled to do using its common law rights of retention.

Football Finance
The FCR in England is robust. It has been specifically drafted to be robust. Football Creditors have a high degree of certainty that they will be paid to the extent that their aggregate claims against an English football club do not exceed that club’s entitlement to payments from the Pool Account. Since the Pool Account holds the monies derived from the likes of Sky and BT for the right to broadcast EFL matches, this is a valuable backstop and protection against insolvency. Following HMRC’s Case, Football Creditors can now have certainty that their entitlement to payment will be enforceable in an insolvency scenario in most circumstances, there being no basis under the English insolvency laws for the relevant Articles and Rules to be set aside whether under the statutory provisions of the Insolvency Act 1986 or under the common law in the form of the PPP and the ADR. This in turn makes it easier for English football clubs to raise finance against receivables due to a Football Creditor from a “football debtor”.

By way of example, let’s consider the transfer of a player registration from Club A to Club B under which Club B agrees to pay £10mn to Club A in two equal instalments with the first instalment due on completion and the second instalment due 12 months following completion. Club A becomes a Football Creditor of Club B in respect
of the £5mn deferred consideration payment. Any lender providing credit to Club A against the deferred consideration payment can know that payment of the receivable is back-stopped by the FCR under which, if Club B fails to pay for any reason (including its insolvency), the receivable will be paid to Club A in any event either from television and other commercial revenues standing to the credit of the Pool Account or from a purchaser of Club B’s share in the EFL to the extent the insolvency process involves the transfer of the business and assets of Club B to a NewCo or otherwise if Club B is able to emerge from an insolvency process whether pursuant to a CVA or a return to solvent trading. In such circumstances, a lender may be prepared to provide non-recourse or limited recourse funding to an English football club in respect of receivables due to it as a Football Creditor thereby providing immediate liquidity to the football club in question in respect of payments it might otherwise have to wait to receive over extended periods of time. The lender must of course take care to structure its financing of the relevant debt such that the debt is not taken outwith the category of “football debts”.

From a purely contractual perspective, the FCR under the SPFL Articles and the SPFL Rules is less robust. For a start, the category of “football creditors” in respect of SPFL member clubs is not as broad as it is in England. It does not, for example, include players and staff of a member club. Secondly, Rule 13B under which the SPFL can pay “football creditors” from net commercial revenues of the SPFL (including television money) is expressed as a discretion which is vested in the SPFL which it may or may not exercise, whereas under the EFL Articles, “Football Creditors” shall be paid from the Pool Account to the extent of the relevant club’s entitlement therein. Finally, the FCR in England has been through “trial by fire” in the English courts and has been found to be robust and capable of surviving the insolvency of a member club which is a debtor of a Football Creditor. In contrast, the FCR in Scotland has not been subjected to a court process and might therefore be viewed with suspicion by providers of credit. Having said that, we consider that it is unlikely that the FCR as it is framed in the SPFL Articles and the SPFL Rules would be voided as a “fraud on the bankruptcy laws” in respect of the insolvency of a member club, but there would be no harm in putting the matter beyond reasonable doubt by making certain amendments bringing the Articles and Rules into line with the EFL Rules and Articles, which have been tested in the courts.
The SPFL might therefore consider the following amendments to its Articles and Rules:

1. Broadening the scope of “football creditors” in line with the EFL concept so that players and employees of member clubs are afforded the protection provided by the FCR.

2. Amending the Articles regarding transferring the share in the SPFL held by an insolvent club to third parties to make it clear that any notice served can be suspended, made subject to such conditions as the SPFL stipulates and be revoked, and to specifically refer to payment of “football creditors” as a pre-condition to a possible revocation.

3. Amending Rule I39 to make it clear that:
   a. there is no contractual obligation on the SPFL to pay any fee to a member club from net commercial revenues until such time as all fixtures in the season have been completed thereby strengthening the protection of the FCR from the rule in British Eagle and any available “fraud on the bankruptcy laws” challenge; and
   b. to the extent interim payments on account of any fee are made, that these are “on-demand” loans which must be repaid to the SPFL on its demand at any time up until the point at which the member club in question fulfils all of its fixture obligations for the season.

4. Introducing a Pool Account mechanism similar to that contained in the EFL Articles, which account should be opened in the name of the SPFL to hold all commercial revenues in its own name until such time as all fixtures are fulfilled. This would assist with the analysis that the cash collections received by the SPFL from its commercial activities belong to the SPFL and not the member clubs until the end of the season when all fixtures have been fulfilled.

5. Amending Rule I38 to make it clear that the SPFL “must” pay football creditors from any fee payment that it would otherwise be due to pay to a football club thereby providing certainty to football creditors and their lenders that payments are under-pinned by net commercial revenues and television monies in particular.
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1. See Whitmore v Mason (1861) 2 John & H 204 and In re Jeavons exparte Mackay (1873-74) L.R. 9 Ch. App. 128.

2. Which should be distinguished from occupational leases under which the tenant’s right to occupy is the quid pro quo for ongoing payment of the rents and which are capable of forfeiture on bankruptcy without offending the ADR.

3. In English law, these statutory rules are to be found under the following sections of the Insolvency Act 1986 (and related sections): section 238 (Transactions at an undervalue (England and Wales)), section 239 (Preferences (England and Wales)), section 244 (Extortionate credit transactions), section 245 (Avoidance of certain floating charges) and section 423 (Transactions at an undervalue (Scotland)) of the Insolvency Act 1986.


5. [2012] EWHC 1372 (Ch).

6. These provisions being sections 242 (Gratuitous alienations (Scotland)) and 243 (Unfair preferences (Scotland)) (and the common law predecessors from which they are derived and which continue to apply since they are not excluded by the statutory provisions, although the common law is rarely relied upon).


10. We understand that the The English Premier League operates a broadly similar regime, but this article focusses on the FCR as applicable to the EFL on the basis that it is these rules which have been the subject of judicial consideration.


12. “Insolvency Event” is defined broadly in the Articles to cover all forms of insolvency process, including liquidation, administration, receivership, a company voluntary arrangement and equivalent or analogous proceedings in other jurisdictions.

13. “Football Creditors” is defined widely in Articles 2.1 and 80.1, and includes (i) the EFL, the EPL and the FA; (ii) any pension scheme operated by the EFL; (iii) any member club and any club which is a member of the EPL; (iv) arrears of remuneration due to full-time employees or former full-time employees of member clubs; and (v) various other affiliated or associated English football league organisations.

14. However, there is unlikely to be a remedy under the insolvency laws in this regard because payment of the Football Creditors of OldCo by NewCo does not of itself denude the assets of OldCo.

15. “Defaulting Club” is defined in Article 80.1 as a member club which “defaults in making any payment due to any [Football Creditor]”.

16. HMRC also sought in their pleadings to strike at Article 77.3 on the basis that it was a penalty clause, but Richards J noted in his judgment that this line of attack was not pursued by HMRC in court. One can only conclude that HMRC took the view that this argument was unlikely to succeed. Since then, the Supreme Court has recast the rules applicable to penalty clauses in case of an Insolvency Event.

17. (1932) 48 TLR 443.


19. As an aside, it is not clear whether the termination of the player registrations might itself offend against the ADR.

20. 1914 S.C. (H.L.) 84.


22. (1873-74) L.R. 9 Ch. App. 128.

23. Sections 242 (Gratuitous alienations (Scotland)) and 243 (Unfair preferences (Scotland)) of the Insolvency Act 1986.
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