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THE MAXWELL CASE

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THE MAXWELL CASE

*John A. E. Pottow**

ABSTRACT

International bankruptcy scholars well know the *Maxwell* case as probably the most important litigation precedent in this fledgling jurisprudential field. What they tend to know less about is the “back story” of the redoubtable Robert Maxwell (born Jan Ludwick Hock). A towering, inspiring, and larger than life figure, Maxwell built an international publishing empire that spanned the globe before it came crashing down in scandal after his mysterious death. This book chapter (in a book devoted to the back stories of famous bankruptcy cases) explores Maxwell’s life, business, fall from grace and, of course, posthumous bankruptcy. In so doing, it analyzes both the legal issues involved in the regulation of cross-border financial distress as well as certain eternal truths about the human condition (and, indeed, the corporate form).

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The *Maxwell* Case¹

John A.E. Pottow*

This chapter will provide some broader context regarding the famous Maxwell Communication bankruptcy, which is one of the most significant cross-border insolvency precedents to date. It does so by first looking at Bob Maxwell's life and business in roughly chronological stages (the good, the bad, and the ugly). It then explores the insolvency proceedings that bear his name (the beautiful) and one specific litigation action within those proceedings of particular importance (the exquisite). Finally, it offers some brief reflection on what the *Maxwell* case may have taught us (the sublime).

The Good

In a squalid Carpathian village called Solotvino, Jan Ludwik Hock was born on June 10, 1923. He would later become known by a variety of monikers, including the Bouncing Czech, Cap'n Bob, and, more formally, Ian Robert Maxwell. Maxwell rose from these impoverished beginnings (not to mention the murder of most of his family during the Holocaust) to become one of the wealthiest people in his adopted homeland, the United Kingdom. During his life, he ascended to the pinnacles of social acceptance, including sitting as Member of Parliament for North Buckinghamshire in the 1960s, and descended into the bowels of (mostly posthumous) disgrace. He was a huge figure, both physically and metaphorically, who will not easily be forgotten.

Maxwell's life began unremarkably in Eastern Europe. He started school in his village and then went away to Bratislava for further education. But soon thereafter the Second World War broke out, and the young Maxwell joined the Czech army. He then in turn transferred to the British army upon picking up English (one of the many languages he would ultimately master). Maxwell fought as a brave soldier for the United Kingdom against the Nazis, receiving the Military Cross by Field Marshal Montgomery and rising to the rank of Captain. But perhaps his most important accomplishment during wartime was noncombatant: he was assigned to help supervise a newspaper, *Der Telegraph*, which was the first licensed broadsheet in the British sector of occupied Berlin.

1. Apart from my own research, the sources for this chapter on Maxwell's life and business come primarily from two excellent books: TOM BOWER, *MAXWELL, THE FINAL VERDICT* (Harper Collins, 1996), written by an investigative journalist who attended the whole criminal trial, and NICK DAVIES, *DEATH OF A TYCOON: AN INSIDER'S ACCOUNT OF THE FALL OF ROBERT MAXWELL* (St. Martin's Press, 1992), written by the *Mirror's* foreign affairs editor.

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Running a newspaper must have kindled an entrepreneurial spark in the young Maxwell (a name which by this point he had adopted, after trying out, among others, Ivan du Maurier and Leslie Jones). He soon approached a German scientific publisher named Ferdinand Springer. Springer's company had established an excellent reputation in the international academic community before the war broke out, but was facing Allied-imposed restrictions on exports. Revealing his propensity for deal-making at an early age, Maxwell negotiated with Springer to become designated the U.K. and U.S. distributor of Springer publications. Fortuitously, at about the same time, the British government independently decided that the United Kingdom needed more Springer-like scientific publishing houses to advance its own scientific interests throughout the world and to disseminate British technology. Maxwell was thus excellently situated to leverage his new partnership with Springer in scientific publishing. To do so, he further teamed up with an Austrian scientist named Paul Rosabud (the spy who warned the British that the Germans were developing the bomb and who helped locate the Norway heavy water plant). Together, they bought out British publisher Butterworths' stake in a Butterworth-Springer joint business venture. With some help from the UK government, and combining Springer's international reputation with Rosabud's scientific acumen, Maxwell launched what became known as Pergamon Press. Pergamon quickly blossomed into a worldwide scientific publishing powerhouse.

Pergamon's ascent put Maxwell on the map as a serious international businessman. But this was not enough for a man of his ambition. What he seemed to hunger for—perhaps remembering his *Der Telegraph* days in Berlin, or perhaps craving the social acceptance of a still class-conscious postwar British society—was to own a newspaper. (Maxwell was indeed sensitive to status; it is well known, for example, that he preferred to be addressed as "Captain Maxwell" for quite some time after the war.) Accordingly, in the late 1960s, Maxwell launched a highly visible and quasi-hostile takeover bid of *News of the World*. He ultimately lost—scooped by his Australian rival, Rupert Murdoch. Moreover, in the process he had to put his beloved Pergamon on the block to finance the bid. This is what led to his first scandal. Maxwell had arranged to sell Pergamon to a young American entrepreneur named Saul Steinberg (an interesting character in his own right who had made his money in computer leasing—in the 1960s no less). The Pergamon sale, however, went south. Steinberg was not amused that the accounts at Pergamon were apparently inflated: the assets had not, as reported, tripled recently, and the profits were not, as claimed, £2 million. He complained formally, and Britain's Department of Trade and Industry (DTI) launched an investigation. The DTI officials ultimately produced a report in 1973 laying the blame on Maxwell, finding that he had "reckless and unjustified optimism which enabled him on some occasions to disregard unpalatable facts and on others to state what he must have known to be untrue." They accordingly concluded that "notwithstanding Mr[.] Maxwell's acknowledged abilities and energies," he was not "a person who can be relied on to exercise proper stewardship of a publicly quoted company." This was obviously humiliating for a prominent businessman like Maxwell, but he ended up getting the last laugh by repurchasing Pergamon for £1.5 million in 1974. The DTI's words, later to prove prophetic, went unheeded.

Indeed, by 1981, Maxwell had put the DTI behind him and was back to being the darling of the City (London's financial sector). He was given all sorts of money to acquire control of the British Printing Corporation ("BPC"), which later became British Printing & Communication Corp., and which in turn became Maxwell Communication Corp. ("MCC", a name Maxwell insisted was merely a modernization and not "an ego trip"). MCC was an important keystone in Maxwell's empire—which by the time of his death included over 400 companies—because it was the only major publicly traded company he controlled; he ultimately ended up owning about 60% of its shares. (Strictly speaking, Maxwell controlled a second major U.K. public company, the Mirror Group Newspapers, but that company only went public shortly before his death.) Maxwell's turnaround of MCC (nee BPC) exhibited the ruthlessness and genius for which Maxwell was deservedly famous. Busting the unions through a combination of charm, bravado, and sheer stamina, Maxwell turned Britain's largest publisher from a money loser into a profitable enterprise in just a number of years. In the 1980s era of the leveraged buy-out, banks tripped over themselves to shower Maxwell with money to finance his latest corporate acquisition. "Bob's gone shopping," the bankers would often joke as he would declare his latest target

(while they gorged themselves on the attendant fees).

It was not until 1984, however, when he was in his sixties, that Maxwell finally fulfilled that elusive dream: he acquired the Mirror Group newspapers for a little over £90 million. He set up headquarters in Maxwell House in Holborn (the printing section of London that includes Fleet Street), just next to the Mirror building, and declared himself "The Publisher." The *Daily Mirror*, a London staple, was a once-famous but then money-losing paper that Maxwell was determined to turn around. And he did, bringing it back to profit handsomely. Owning a major London paper, Maxwell seemed happy at last. He enjoyed its trappings to the fullest, such as dictating editorial page content. He had become a true media mogul.

But even wild financial success was not enough to sate Maxwell completely. He also became preoccupied during the 1980s with insinuating himself into positions of political prominence. In the crumbling days of the Soviet Empire, the multilingual Maxwell was especially interested in maintaining close contacts with senior Russian political figures, keeping up connections he had made that went all the way back to the war. (This was true in other countries as well; he was fond of telling people he dined with President Bush.) For example, one of his main Russian contacts was KGB head Yuri Andropov, who briefly succeeded Leonid Brezhnev as General Secretary before suddenly dying. Maxwell's greatest political "affiliation," however, was with Israel, where he would meet with various important officials such as Ariel Sharon, then-Health Minister Ehoud Omert, and Prime Minister Yitzhak Shamir. Thus, Maxwell had the ear (at least to some extent) of many world leaders—he famously once called Mikhail Gorbachev directly from Shamir's office and spoke to him in Russian—although he likely overstated his own importance. At the height of his self-aggrandizement of political importance he once rebuked *The Mirror's* editor, Roy Greenslade (whom he later sacked), regarding the Soviet invasion of Lithuania: "Do you realize that Gorbachev wouldn't do anything without ringing me first?" This anecdote is not to make fun of the late Maxwell's self-importance; he accomplished tremendous good through his international political hob-nobbing, including the arrangement of transit for Jews from the Soviet Union to Israel. Rather, it is to underscore the fact that at this point in his career, Maxwell was more focused on his public appearances than tending to his business empire.

When Maxwell did turn his attention to business in these later years, even that seemed more animated by fame than finance. For example, he likely overpaid in spending more than \$2 billion on the purchase of Macmillan, the prestigious American publishing company, in 1988. And his 1991 rescue buyout of the *New York Daily News* was nothing short of quixotic. The *Daily News* acquisition was vintage Maxwell: a highly publicized, against-all-odds kind of deal where he rode into Manhattan as a white knight aboard his ostentatious yacht, *The Lady Ghislaine*, to save the day. He was going to work the Maxwell magic and rescue a cultural icon from oblivion. Duly feted by the mayor of New York and appropriate public dignitaries, Maxwell proudly emblazoned his visage on the cover of the *News* at the culmination of the deal: *Cap'n Bob Bites the Big Apple*. His purchase of a New York newspaper accorded him a new source of cachet—an entry into an even tonier circle than his one at home in London.

Thus by the beginning of the 1990s, the world truly was Maxwell's oyster. He was a media mogul with a far-flung international business empire. There was only one, tiny problem: it was a fraudulent house of cards.

The Bad

Right about the time Maxwell was unsuccessfully trying to acquire *News of the World* in the late 1960s, an American comedy writer named Mel Brooks was directing his first film, *The Producers*. In the movie, a washed-up-theatrical producer and his nebbish accountant realize that an easier way to make money on Broadway than staging a hit is actually to stage a flop. This counterintuitive discovery comes from the idea that if the producers raise a pile of cash from investors to put on a play, but the play is a disaster, then no one is likely to request an accounting—in the way one might request an accounting to ensure the fair share of profit from a successful venture. If you produce a flop, there are no profits to share; everyone's lost everything, so there's no point fighting

for an accounting. The scheming protagonists extend this reasoning to conclude that if they can raise more money than they need to stage a play, but know from the outset that it will be a flop, then they can get away with siphoning off large amounts of the investors' money, secure in the knowledge there will never be an audit to expose them. (The comedic premise thus set, the two producers spend the movie seeking to stage the worst play ever, culminating in the debut of a fictional musical, *Springtime for Hitler*, "a gay romp for Eva and Adolf." Brooks deservedly picked up the Academy Award for Best Original Screenplay.)

One of the funnier scenes in the movie (or, more precisely, one of the funnier scenes in the movie to a professor of bankruptcy law) comes when Gene Wilder's accountant is adding aloud the various percentage shares they have sold of the play. His partner, Zero Mostel, is beside him, listening and eventually interrupts to ask in puzzlement just how many percentage shares they are allowed to sell. Wilder explains, "You can only sell 100% of anything." "And how much of *Springtime for Hitler* have we sold?" Pause. "25,000%." They realize there is no turning back.

It is an elegant con in its simplicity, and it is basically the same thing that Maxwell did. Unlike the fictional impresarios Bialystock & Bloom, however, Maxwell was not planning to go bankrupt. But he did effectively sell and re-sell the same shares of some of his companies to unwitting banks (who probably should have known better had they done sound due diligence) in a desperate attempt to raise funds for what was, despite its outward appearance, a secretly cash-starved empire. So structural were the financial flaws that at one point MCC was paying out a dividend of £112 million but only making £97 million in profit. Maxwell was duping the likes of Goldman Sachs in the United States, NatWest in the United Kingdom, and SocGen in France. When he asked for loans, they just could not say no to The Publisher (and his fees). Toward the end, Maxwell was literally borrowing from one bank to pay off loans to another as he tried to hide the mounting losses of his companies.

How specifically did Maxwell fool his lenders? He used several tricks. First of all, recognize that Maxwell privately owned much of his empire, through a holding company called Headington Investments (and actually owned most of it by a Liechtenstein *Stiftung*—a sort of trust that benefited from Liechtenstein's privacy-dominated banking laws as being inscrutable to outside regulators). This was called "the private side" of his empire. But there was also the "public side," namely, the stock-exchange-listed MCC, of which Maxwell owned a controlling stake through his private side holding companies. Never a stickler for legal formalities, Maxwell rarely recognized corporate form, so would often transfer funds freely from the public side to the private side via jointly controlled bank accounts. Indeed, he would even group his various corporate assets by sector for business purposes (such as the "Electronic Publishing Group") rather than by whether they were owned by the public side (MCC) or the private side (Headington Investments et al.). So one way he misbehaved was by looting the public side for the benefit of the private side by inter-company transfers.

The reason Maxwell made these payments from the public side to the private side was that he needed to service extensive private side loans. At first these loans were used to fund investments, but later they were used for more nefarious purposes. To secure these private side loans, Maxwell pledged shares of the various companies he owned as collateral, often even his shares of MCC itself. The dizzying pace of Maxwell's affairs made keeping track of the physical custody of these shares pledged as collateral difficult, even for banks that wanted to look. And besides, no one asks one of the wealthiest people in the world whether he is good for the property he is pledging as collateral, especially if one wants to earn future banking fees. Ironically, even the banks who were diligent enough to inspect the shares pledged as private side collateral would often find it difficult to penetrate the maze of subsidiaries and affiliates in Maxwell's corporate empire. For example, the physical shares would sometimes be in the name of "Bishopgates Investment Trust, as nominee," one of Maxwell's many subsidiaries. That would usually be enough for Maxwell's cronies to hand wave and say "see, these shares are owned somewhere on the private side." But in the postmortem of Maxwell's affairs, it became clear that the same shares had been pledged and repledged as collateral to multiple banks (the equivalent of

selling more than 100% of a play). More ominously, it also became clear that Bishopsgate was actually affiliated with the deliberately similarly named "London and Bishopsgate Investments," which was the corporation designed to invest the pool of Maxwell's various employee pension funds. In other words, he was not only repledging the same shares to different lenders, he was pledging shares that he did not even own in the first place: shares that belonged to his employees' pension fund, which he managed, with the approval of U.K. regulators, with one of his own private side companies.

The hope behind this type of fraud is that it will never be discovered. After all, if the underlying loans could eventually be repaid or refinanced, then no one would have cared that the loans were backed with illegitimate collateral; the deceit would have been a kind of harmless error (at least so rationalizes the perpetrator). So unlike the outright thieves in *The Producers*, Maxwell was not trying to steal money from the pension funds; he was trying to use the pension fund's assets (illegally) to back loans that he genuinely believed would be paid off as soon as his businesses got back on course. Indeed, one of Maxwell's final financing attempts for the empire was a Hail Mary float of the Mirror Group on the London stock exchange in 1991 (in the U.S. this would be called "taking it public" with an "initial public offering" or "IPO"). Had the IPO been well received by the market, it could have generated enough cash to retire many of the loans; sadly, however, it fizzled in a recessionary environment. So the hope was that nobody would ever be the wiser about the doubly pledged collateral and use of pension fund shares to secure the bank loans. All would be fine so long as the monthly loan payments could be made on time. The problem of course, was that if the payments could not be made on the underlying loans, then the whole affair would come crashing down. This is essentially what happened, spectacularly, in 1991.

The first chinks in the armor were rumors that began circulating about extensive private side loans and that Maxwell was overleveraging his companies. There was also some talk about "questionable" profit forecasts. When banks get antsy about their exposure on a worrisome loan, but do not yet want to call it, what they often do is check their collateral to see how good it looks. (They also often ask for even more collateral to make themselves feel safe on these shaky debts.) So when the initial rumblings began, everyone started watching the public share price of MCC very closely—the dominant stock that served as loan collateral. According to his staff, Maxwell himself was notoriously obsessed with the daily price quote of MCC, probably knowing more than anyone else its true importance. He seemed outwardly relieved that it continued to remain high, even as the 1990s recession descended and unsustainable dividends poured out. What was uncovered only later in investigations was that one of the enthusiastic purchasers of MCC stock who kept the price in the market so high during this time was Maxwell himself, often through his inscrutable Lichtenstein *Stiftungs*, through buy-ups frequently laundered through his American brokers at Goldman Sachs. To finance these MCC shares (and declining to report publicly these accumulations, possibly on the theory the *Stiftungs* were beyond the jurisdiction of securities disclosure rules), Maxwell had to borrow even more money on the private side. This was the nefarious use of the borrowed funds: not only was he raising cash on the private side by pledging pension fund assets and sometimes even repledging the same assets to multiple banks, but he was using these loans to trick the market into thinking MCC's stock price would stay firm and hence that the banks had no need to call their loans.

Maxwell tried to maintain his charade for as long as possible. For example, when bankers would ask about missed loan payments, Maxwell or someone in his inner circle (mostly his heir apparent and youngest son, Kevin) would complain vaguely about a "back-office snafu," assuring the pressing lender that repayment would be forthcoming. Eventually, however, the wiser banks got fed up and started calling their loans and liquidating the collateral—the shares of MCC. This flood on the market of MCC stock depressed its price, making other banks that held MCC as security even more anxious with their positions, and hence more inclined to call their loans—which they began to do in increasing number. The death spiral began. Needless to say, litigation quickly arose when different creditors laid claim to the proceeds of the shares that were sold. The pension fund

itself laid claim to these shares too, contending Maxwell had breached his fiduciary duty by pledging them to banks in the first place. It was a mess. In the aftermath, the various banks and accountants all contributed money through fines and settlements into a pension recovery trust such that the pensioners were made mostly, but not completely, whole. Coopers & Lybrand, the auditors who insisted that their jobs as professionals did not encompass second-guessing the financial reports of in-house Maxwell financial staff, coughed up a cool £68 million in fines for the fund. In a pre-Enron era, this was huge.

While simultaneously assuaging external bankers, Maxwell also had to placate and confuse his internal financial staff. On the private side this was easier; he was able to hush things up by co-opting an inner circle of cronies, some of whom stood in dock at the Old Bailey to answer for their acts along with Maxwell's sons. The task was harder to do with MCC, which had to comply with public corporation compliance rules and file reports. Some of the eventual whistleblowers were the outside directors, led by Peter Laister and the finance chief at MCC, Basil Brookes. But even they were held at bay after their first inklings of fraud by a combination of cowardice, instruction by counsel not to disclose damaging information about the corporation (such as its fraudulent financial underpinnings), disinclination to cut off the gravy train of their salaries, and, perhaps most significantly, Maxwell's own overpowering charm and assurance. Basil Brookes, for example, later testified that when he approached Maxwell with irregular transfers to the private side and the draining of cash from MCC's corporate coffers, he was told that private side accountants would be looking into matters and getting to the bottom of it, so not to worry. He was also told it was largely irrelevant because MCC already owed the private side millions of pounds, for which the transfers could be considered "repayments." (This was false—the private side was actually heavily indebted to MCC through these transfers.) It is not surprising that even the accountants were confused. To give just a flavor of how some of these inter-company transactions operated, here is one example, as reported in the case *In re Maxwell Communication Corp.*² Property, say valuable real estate, from MCC would be "sold" to a freshly created legal entity, but with a deferred payment date of the purchase price. The legal entity, as new owner of the property, would of course have a debt to pay off a few years down the line, but before it would do so, the entity itself would be sold to one of the *Stiftung*-controlled companies for a pittance. As the new title holder of the real property, the *Stiftung* could then transfer the land directly to the private side, where it would in turn become available as collateral to raise more loans. All this would occur with no cash changing hands, as the deferred payment date on the original sale was still years off.

Even the great Maxwell, however, could only tap-dance for so long. At the same time that some of the more astute outside banks were getting wise and calling their loans, the outside directors of MCC were demanding explanations and screwing up the courage to present ultimatums to Maxwell. And it was just at this crucial time, when things were all beginning to unravel, that Robert Maxwell's body was found floating in the Mediterranean Sea, on 5 November 1991.

To call his death "mysterious" puts matters mildly. It is clear that he entered the sea from the *Lady Ghislaine*, which was operating on her last voyage of the season with a skeleton crew and no guests, somewhere near the Canary Islands. (Maxwell had telephoned the Captain, Gus Rankin, unexpectedly just a few days before and said he wanted one last visit to the yacht while she was still in Europe.) Whether Maxwell jumped off, was pushed, or accidentally stumbled (or was somehow else killed and then dumped) fueled a cottage industry of conspiracy theorists intrigued by his clear connections to the KGB and Mossad. (One of the popular KGB theories has to do with a role Maxwell had in laundering its money for the outside world and the speculation that when the Berlin Wall and old guard fell, some were disappointed to discover the amount of money he siphoned off for himself as payment for services.)

There are unanswered questions still to this day. As recently as 2005, a Discovery Channel documentary explored the possibility that the cause of Maxwell's death was

2. [1995] 1 BCLC 521.

actually injected air to make an embolism, and in 2006, it was revealed that Maxwell was being investigated for an alleged war crime at the time of his death. Two autopsies were conducted in 1991, and his insurers, unenthusiastic about paying out a £20 million policy, declared it was suicide. The ambiguous medical evidence suggested a possible minor heart attack, but that only begged the question whether it happened on board, causing him to stumble, or after he fell (or jumped) (or was pushed) overboard. There were no witnesses. The forensic evidence also raised some eyebrows, such as the amount of time his body was in the water in light of the prevailing ocean currents. There was also Rankin's curious statement that Maxwell's empty stateroom was locked from the inside when the crew tried to rouse him in the morning. While Maxwell was quickly given something akin to a state funeral in Israel (with Chaim Herzog, Yitzhak Shamir, Shimon Peres, Ariel Sharon, and Ehoud Olmert all in attendance) and buried at the Mount of Olives, the mystery surrounding his death was only beginning.

Maxwell died in November. While his son Kevin tried to maintain the facade with the banks for a bit longer, he was eventually pushed aside by MCC's directors (as well as the Mirror Group's, which had become publicly traded). By December the whole empire, both public and private, was put into bankruptcy proceedings. Thus began what is probably the most important transnational insolvency case to date: *In re Maxwell Communication Corp. plc.*³

The Ugly

One of the hardest tasks in sifting through Maxwell's affairs after his death was disentangling his byzantine empire of over 400 companies. Where were the assets? Who held them? Who had claims against them? How many were left? Which were owned by the public side and which by the private side? How many were secreted away in inscrutable Lichtenstein trusts? How much money did the private side truly owe the public side through Maxwell-sanctioned, inter-company loans? That on its own was a difficult headache of forensic accountancy. But what made this already challenging task even more complicated were lingering choice of law issues. For example, if there were fraud claims, as it quickly appeared there would be, would they be resolved under U.S. law? British law? Lichtenstein law? The dizzying transactions and loans within the empire soon made clear that the whole network would probably have to be "washed" through the insolvency system and subjected to legal scrutiny, even stand-alone companies, such as Macmillan, that on their own seemed profitable and solvent.

Accordingly, everyone conceded that a bankruptcy day of reckoning had arrived. (Even Kevin Maxwell himself had to file for bankruptcy in the United Kingdom in 1992, making his the largest personal bankruptcy estate ever administered, at £406 million.) But a key, and difficult, question remained: *where* to file? For Headington, that seemed easy: it was a U.K. holding company that held mostly U.K. investments. It filed a petition before the High Court in England and an administrator (the court-appointed officer who takes over an insolvent company under U.K. law—usually an accountant) was appointed. But on the public side, MCC presented a more unusual case. It was a British corporation, traded on the British stock exchange, overseen by British directors, and managed by Maxwell out of his "Maxwell House" Holborn headquarters in London. But by 1991, between 75-80% of its assets were U.S. businesses: most prominently, the two jewels of Macmillan and Official Airlines Guide. Thus at some level, MCC might have been seen as a glorified holding company of U.S. businesses, in which case maybe its proper "home" should have been deemed to be the United States. (Imagine, as a thought experiment, if Macmillan had never been bought by MCC and was just a standalone U.S. corporation. Now imagine further that one day it decided to incorporate a Bermudan shell company, merged itself into it, and then announced it was henceforth a Bermudan company. Surely that self-characterization might raise some eyebrows with what would be clearly still a U.S. business. This is a variation on a stunt allegedly pulled by Singer, a once-American but then Singaporean sewing machine company, when it wanted to "re-Americanize" itself

3. [1992] BCLC 1402 (original appointment of British insolvency administrators).

before filing for chapter 11 in the United States.)⁴

Why did establishing MCCs "home" as either the United Kingdom or the United States matter so much? There are several reasons the debtor's home matters in bankruptcy. First, some countries like debtors to file for bankruptcy within their home courts as an anti-sham rule, a requirement that is usually enforced indirectly by dismissing petitions for bankruptcy from foreign debtors whom a local court decides should file elsewhere. For example, some thought this type of "jurisdictional stretching" occurred when Russian oil giant Yukos tried to file a chapter 11 bankruptcy proceeding in Texas, notwithstanding Yukos' utter lack of connection to the United States.⁵ But that was not the main reason in this case; indeed, MCC's assets were so dispersed around the world it was unlikely any court would kick it out for lack of jurisdiction. A more important reason (although not the only one) the administrators and their lawyers wanted to determine MCC's home was that a debtor's home becomes relevant for many complicated legal issues, such as choice of law questions, that arise in cross-border bankruptcy cases. Presumably, where MCC's petition was filed would set the agenda for courts in considering which country was MCC's presumptive home (on the assumption, which is often true but not invariably, that debtors generally file for insolvency in their home jurisdictions).

MCC also had other considerations about where to file that were not even related to its home. The least subtle one was good old-fashioned forum shopping: there are different rules under U.S. and U.K. bankruptcy law—irrespective of where the debtor's home is—that the case-placers wanted to arbitrage as best they could. So in watching where MCC filed its bankruptcy petition, observers were not just reading where the home country might be implied, but also looking for broader signs of which procedural laws MCC wanted to operate under in administering its bankruptcy.

Just in case the reader thinks this might have been an easy, binary decision (U.K. vs. U.S.), she should understand an important further aspect about transnational bankruptcies. Simply because a company files in one country does not mean that every other country will agree with that choice. (Nor does it even mean that the company cannot turn around and file a second bankruptcy proceeding in another country.) Consider in this regard the U.S. Bankruptcy Code's expansive assertion of subject-matter jurisdiction. Section 541 of the Code states that a U.S. bankruptcy case has jurisdiction over all the debtor's property, "wherever located, and by whomever held."⁶ This means that if MCC filed a chapter 11 proceeding, the U.S. bankruptcy judge would have had jurisdiction, under U.S. law, to administer assets sitting in a bank account in London. But U.S. judges cannot issue enforceable writs to London bankers, regardless of the power U.S. law purports to confer. Only U.K. judges can issue U.K. writs. All a U.S. court can do is issue a U.S. order, and then the debtor can take it to a London court to see if, out of international "comity," a U.K. court will recognize it and give it legal force in the United Kingdom. (Many treaties regarding recognition of judgments address these legal questions, such as the Brussels Convention, but that specifically excludes insolvency proceedings from its scope.)⁷ In other words, a cross-border bankruptcy depends upon judicial cooperation.

What if the U.K. court does not want to help? What if, for example, the U.K. court thinks the debtor should have filed in the United Kingdom? What if British creditors ignore the U.S. chapter 11 proceeding and initiate an involuntary insolvency proceeding in the United Kingdom under U.K. law? Or what if the court wants to help, but British law is different from U.S. law on what should happen to this London bank account? Perhaps U.S. law says it is property of the bankruptcy estate, but British law says the bank has a valid

4. See LYNN M. LOPUCKI, *COURTING FAILURE* (University of Michigan Press 2005), at 227-28 (internal quotations and citations omitted).

5. See *In re Yukos Oil Co.*, 321 B.R. 396 (Bankr. S.D. Tex. 2005) (dismissing petition as exercise of discretion, although acknowledging subject-matter jurisdiction and venue).

6. 11 U.S.C. §541(a).

7. See Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, *done* Sept. 27 1968, art. 1(2), 29 I.L.M. 1417-18.

setoff and need not turn the account over. One can quickly see how things become messy. (We will assume for simplicity that the U.S. bankruptcy court would be seeking to apply U.S. bankruptcy law, but even that is not a necessary assumption.) When courts disagree as to what should happen, things can get ugly for the parties, who might be subject to orders commanding them to do different things by different courts. Imagine, for example, a U.S. judge issuing an order to the London bank that has a branch office in New York (and hence personal jurisdiction in the United States) to turn over the account and a British court enjoining it from doing so. This is essentially what happened in the bankruptcy of a global shipping company, United States Lines.⁸

Perhaps envisioning this potential for problems, some countries countenance multiple proceedings in different countries and permit "ancillary" bankruptcy cases. In the United States, this was covered until very recently by section 304 of the Bankruptcy Code. A section 304 proceeding is like a limited or "mini" bankruptcy, restricted to U.S.-situated assets (unlike a regular, or "plenary" bankruptcy, which covers all the debtor's assets wherever located, per §541). Its function is to allow a foreign bankruptcy representative, who is administering a foreign debtor's bankruptcy in a court presumably in the debtor's home country, to come to the United States and open a limited proceeding to bring U.S.-located assets under the protection of the U.S. bankruptcy courts. For example, a section 304 proceeding could be used to stop state law attachment proceedings against U.S. assets of a foreign debtor in bankruptcy proceedings abroad. What happens to those U.S. assets, once they have been corralled into a U.S. forum? Are they distributed in accordance with U.S. bankruptcy law (as the jurisdiction with territorial sovereignty over the assets) to creditors who show up to the section 304 proceeding, or are they administered under the bankruptcy law of the foreign jurisdiction (which is presumably the law of the debtor's "home")? Should it depend on the case? If so, should it depend on how different the foreign laws are? Should it depend on how U.S. creditors would fare under them?

These questions helped prompt an explosion of bankruptcy scholarship. Some scholars, the "universalists," say that the best solution is to have one bankruptcy law generally govern everywhere—the law of the debtor's home country—so that ancillary proceedings should essentially be conducted under foreign law. The reasoning is that then it will not matter, from a choice of law perspective, where the business' assets happen to be scattered around the world on the day bankruptcy occurs. (Universalists worry that otherwise banks will have to follow all the debtor's assets from jurisdiction to jurisdiction to figure out which bankruptcy law will apply if the debtor ever falters—an expensive undertaking.)⁹ Others, the "territorialists," respond that that is wishful thinking: not only are there operational difficulties in defining a debtor's "home," especially for messy situations like *Maxwell*, but also there are real concerns about sovereignty that will not go away easily; countries will not want to cede jurisdiction over assets falling under their physical control, because they will want to protect local creditors and local interests that will most likely be privileged under domestic law. Accordingly, until there is the establishment of some international supra-tribunal that can force countries to turn over assets, or until some mega-worldwide bankruptcy treaty is ratified, we should just stick with the bright-line status quo of strict territorial jurisdiction. Viewed another way, there should be no such thing as "main" and "ancillary" bankruptcy proceedings; there should just be "co-equal" proceedings in every locale where the bankrupt debtor has assets, regardless of the debtor's home, that are each subject to local bankruptcy law.¹⁰ Still others, the "contractualists," think that if the concern universalists really have with

8. See *Felixstowe Dock Co. v. U.S. Lines, Inc.*, [1989] Q.B. 360 (declining to dissolve British injunction that forbade turnover of British assets to main chapter 11 reorganization proceeding in New York); *In re Maclean Indus., Inc.*, 76 B.R. 291 (Bankr. S.D.N.Y. 1987) (sanctioning foreign creditor for not respecting U.S. automatic stay in same chapter 11).

9. See, e.g., Jay Lawrence Westbrook, *A Global Solution to Multinational Default*, 98 Mich. L. Rev. 2276 (2000).

10. See, e.g., Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 28 Mich. L. Rev. 2216 (2000).

territorialism is the messiness of a bunch of different legal rules applying based on the happenstance of where a debtor's assets are located on the day it files for bankruptcy, then a better way to promote efficiency would be to allow companies to choose up front which bankruptcy rules will apply in the event they ever go bankrupt.¹¹ Companies that choose outrageously pro-debtor regimes will be punished by their lenders, who will offset a premium in pricing their loans. The market will generally police matters, and certain adjustments can be made for situations in which the market cannot work well.

In the United States, the way section 304 worked for ancillary proceedings was by allowing a U.S. bankruptcy judge the discretion to cooperate with a foreign court, by "turning over" the U.S. assets to the foreign representative, presumably to be administered under foreign law. This seems like universalism, assuming the foreign representative comes from the debtor's home country. But section 304 only allowed a judge to turn over assets after considering a list of factors. Some of these factors covered the difference between U.S. law and foreign law, as well as the possibly negative effect foreign law could have on U.S. creditors' dividends. These concerns reflect the position of the territorialists. So section 304 was sort of a hodge-podge that both the universalists and the territorialists alike claimed buttressed their respective positions (although the universalists probably had the slight edge based on the case law). What this meant for the *Maxwell* case was that if MCC chose to file in the United Kingdom, there would very likely be a section 304 proceeding filed in the United States to deal with the U.S. assets. If it filed in the United States, then there would probably be a British ancillary proceeding. So the stakeholders waiting to see where MCC would file were really waiting to see where MCC would file its main bankruptcy proceeding. Because the main bankruptcy proceeding would mostly be driving the show, and because disadvantaged litigants would probably attack the choice, these watchers were waiting with some anxiety.

MCC's creditors and the bankruptcy community more generally, were surprised by what happened. MCC filed in *both* jurisdictions. This was not a main proceeding in one and an ancillary in the other. No, this was a highly unusual "parallel" filing of *two* main proceedings in both the United States (a chapter 11 petition under the 1978 Bankruptcy Code) and the United Kingdom (a scheme of arrangement under the Insolvency Act of 1986). Both petitions were filed within a day of each other in December 1991. Some cynically suggested that Kevin Maxwell wanted to file in the United States so he could stay in control of MCC because U.S. bankruptcy law, in contrast to U.K. law, does not displace management upon filing bankruptcy. Upon this decision, however, the other British directors worried that filing chapter 11 was an admission that MCC was insolvent—which meant they had a duty under U.K. corporate law to put MCC into bankruptcy, and they were not sure a U.S. chapter 11 filing would discharge this duty, so they filed in the United Kingdom to cover themselves.

Whatever the reason for the choice, people thought this would be chaos. What would happen? How could two proceedings assert overlapping subject-matter jurisdiction to all MCC's worldwide assets? Which law would apply, and to which assets? The ancillary proceeding system—which is supposed to foster international comity in cross-border bankruptcies—was being turned on its head. In a "parallel" filing, which judge would get to call the shots? Would it be the first one to issue an order? Would there thus be a race for hearings? What would happen if the second judge countermanded the first judge and issued an injunction enforcing his will? Would there be a devolution into "dueling injunctions?" How could there be a plan of reorganization (or scheme of arrangement)? Capturing this apparent disorder (just when everyone thought the late Maxwell's affairs could not get any more confusing) was one simple example of confusion: no-one was sure who was running MCC. Under British law, the administration petition instantly divested the board of directors of powers and vested control in the court-appointed administrators. Under U.S. law, however, the company's management was still in control and not beholden to any "administrators" that were foreign to U.S. law. Suffice it to say, things

11. See, e.g., Robert K. Rasmussen, *Colloquy, International Bankruptcy: Resolving Transnational Insolvencies Through Private Ordering*, 98 Mich. L. Rev. 2252 (2000).

were looking grim. (In the scholarly arena, the universalists and the territorialists at first seemed equally horrified.)

The Beautiful

Yet there was a method to this madness. Indeed, the decision to file the parallel proceedings was not just a jurisdictional hedge; it was a conscious decision to elide the difficult choice of law (and even choice of jurisdiction) questions that would bog down the case from the outset when there was non-trivial ambiguity to MCC's home. Had MCC filed in the United Kingdom alone, for example, then U.S. creditors may have tried to get the case dismissed on a *forum non conueniens* argument, or at the very least might have launched a choice of law fight and sought a declaration of the applicability of U.S. bankruptcy law to the proceedings, notwithstanding the case's location in a British forum. By filing in both jurisdictions, MCC avoided a jurisdictional fight by basically keeping everyone guessing. Parties were able to interpret the swirling legal ambiguities self-servingly, thus deferring difficult problems to a later date.

But the real lynchpin to this plan was to bring both courts on board as soon as possible by hammering out a set of ground rules on how to deal with disputes *before* they arose, so the *Felixstowe* spectre of dueling injunctions could be avoided. This was done by designing a joint "protocol," fashioned by the U.K. administrators and an examiner appointed by the U.S. court (to be the American cognate to the administrators). This was accomplished quickly, and within about a month (by January 1992), both courts had entered orders implementing the famous "*Maxwell* Protocol." Among other things, the protocol acknowledged that the administrators would be recognized formally in the United States as the management of MCC; that intermediate compromise rules to U.S. and U.K. law would govern such procedural issues as the deadline to file claims; that the administrators, as managers, would consult with the examiner before taking major action with MCC; that the administrators and examiner would negotiate a single chapter 11 plan/scheme of arrangement that would be co-presented to creditors in each jurisdiction simultaneously and subjected to each jurisdiction's voting rules; and, most importantly, that the courts would try to resolve disputed legal issues as the case unfolded collaboratively, to the maximum extent permissible by law, with the administrators and examiner pre-discussing their legal positions.

The protocol was ingenious and, in at least one sense, something of a vindication of the ad hoc contractualists—although even they had some wind taken out of their sails.¹² It meant that the lawyers could get around to negotiating a rescue plan (which, sensibly, resulted in selling off the profitable standalone businesses such as Macmillan as independent entities and liquidating the empire's dregs), while legal squabbles would be deferred or ideally avoided. As tax lawyers will remind, taxes deferred are almost as good as taxes avoided. This approach, for the most part, worked. The administrators and examiner shrewdly identified the issues that would likely bring up jurisdictional fights and headed them off at the pass. For example, one intractable way cross-border insolvencies raise disputes pertains to protecting local creditors and local interests, because favored creditors under local law will want their bankruptcy law to apply to as many of the debtor's assets as possible and will shun the application of foreign law.¹³ Recognizing this consensus-unraveling potential, the joint plan/scheme stipulated that all "priority" creditors in the U.S. and all "preferred" creditors in the U.K. would be paid in full at plan confirmation, thus silencing the constituencies most likely to care about choice of law.

12. See *In re Maxwell Communication Corp. plc*, 186 B.R. 807, 818 (S.D.N.Y. 1995) (noting protocol "did not purport—and could not—govern the choice of law issues that are at the crux of this case"), *aff'd* 93 F.3d 1036 (2d Cir. 1996).

13. See John A. E. Pottow, *Greed and Pride in International Bankruptcy: The Problems of and Proposed Solutions to "Local Interests"*, 104 Mich. L. Rev. 1899 (2006); see also *In re Maxwell Communications Corp. plc*, 93 F.3d 1036, 1052 (2d Cir. 1996) (noting complicating consideration of "potential effect[s]" on "local economies" in deciding whether to cooperate out of comity with foreign bankruptcy proceedings).

Recall that it was deliberately never decided in the protocol which substantive bankruptcy law would govern resolution of the assets. Following this idea of avoiding a choice of law showdown, the plan further provided that the proceeds of all the assets sold, once these special claimants were paid off, would be put into an international pot and would be shared by all creditors, regardless where they filed their claims (provided that they did not effectively try double-recovery). With many potential hot spots defused, it is not surprising that when the plan/scheme was ultimately unveiled in February 1993, it was approved by 99% majorities in both jurisdictions and confirmed in both courts by the summer. *Maxwell* was over—or at least mostly so.

The Exquisite

There was, however, one wrinkle with the seeming smoothness of the *Maxwell* case. To be sure, it was only one, narrow choice of law dispute. Because over \$100 million was at stake, however, passions were inflamed. The issue involved pre-bankruptcy payments to several banks by MCC. The payments arose out of the disposition of one of Macmillan's subsidiaries, called "QUE," to Prentice-Hall in 1991 (recall Macmillan itself was a subsidiary of MCC). When QUE was sold, MCC used the proceeds in November 1991 to reduce its credit lines at several banks, who by this point were clamoring hungrily for repayment. American readers trained in bankruptcy will recognize this as a voidable preference under U.S. law, as the unusual transfer occurred within the 90 days preceding filing. Under U.K. law, by contrast, a payment to be voidable requires not just improvement of the creditor's position as an objective matter, but also an actual intent by the debtor to prefer the creditor ("playing favorites," so to speak). There was a good argument that these transfers of the QUE proceeds under U.K. law would not rise to the level of being what were called "reviewable transactions." So it is not tricky to figure out who argued what on choice of law: the banks maintained (to keep their money) that U.K. law had to apply to these impugned transfers, and the administrators/examiner maintained (to disgorge the payments as preferences to add back to the communal creditor pool) that U.S. law governed.

The protocol had nothing to say about this. It simply encouraged courts to work out disputes collaboratively but did not opine which substantive bankruptcy law would govern in any given dispute. The plan/scheme also sidestepped this issue, wisely not wanting to rock the cooperative boat; it merely provided that if and when any money came in from a preference dispute, under whatever law, such money would be distributed at a later time to the creditors' liquidating trust. Indeed, one impatient (and prescient) bank tried to preempt this process by seeking an injunction in U.K. court forbidding the administrators from voiding its transfer under U.S. law. The injunction request was an attempt to get an effective declaratory judgment that (favorable) U.K. law would control any preference challenge against the bank, wherever brought. It succeeded, albeit briefly; an interim injunction was granted by a duty judge barring the administrators from seeking to set aside the bank's payments in U.S. court under U.S. law. But shortly thereafter, the main bankruptcy judge in the United Kingdom (now-Lord Hoffman), properly vacated the injunction as impermissibly and prematurely trying to dictate how the choice of preference law question should be resolved. An injunction would be against the spirit of the protocol's command that the two countries' judges resolve disputed issues in concert and not by issuing anti-suit injunctions. Lord Hoffman also observed that a choice of law matter should be resolved by the court in which the dispute is going to be heard, not preemptively by another court through an injunction. Thus even if the banks wanted U.K. law to apply, a possibility that Lord Hoffman was not foreclosing, they should not be making that argument in a U.K. forum unless and until a litigation had been initiated in the United Kingdom. If litigation were to arise in U.S. court (a likely development given the basis of the claim in U.S. law), then the choice of law question would have to be passed on by the U.S. judge in due course.¹⁴

Accordingly, after the reorganization plan/rescue scheme was confirmed and claims processing began in 1993, the QUE preference dispute could no longer be avoided. As

14. See *Barclays Bank plc v. Homan & Ors.* (In re Maxwell Communication Corp. plc.), [1992] BCC 757, *aff'd* [1993] BCLC 680 (C.A.).

expected, the administrators and examiner jointly initiated an adversary proceeding in the U.S. court seeking to recover the bank payments as preferences under U.S. law. (Theoretically, they could have launched such an action in the U.K. court had they desired—especially since the attempt to enjoin them from doing so failed—but they probably predicted that the odds of finding that U.S. law would govern the impugned transactions were better if that choice of law question were submitted to a U.S. court.) When bankruptcy professors talk about "the *Maxwell* decision," they are usually talking about this specific piece of litigation: the U.S. adversary proceeding regarding the challenged bank payments.¹⁵ Bankruptcy professors also get excited about the *Maxwell* case because a bankruptcy professor, Jay Westbrook from the University of Texas, was appointed special *amicus curiae* by the Bankruptcy Court to provide an opinion on the choice of law question (and professors tend to get excited at the implication that academic opinions are valued by courts).

In August 1994, U.S. Bankruptcy Judge Brozman issued a long and thoughtful choice-of-law opinion outlining the complexity of the issue. On the one hand, MCC's home, notwithstanding its sizable U.S. asset base, truly was the United Kingdom. Recall, as discussed above, that the debtor's home is often relevant in choice of law issues in bankruptcy. Indeed, prior case law had held that a section 304 ancillary proceeding *must* apply the debtor's home country avoidance law.¹⁶ But because MCC was a full-blown "plenary" case under chapter 11 this precedent was not binding on the choice of avoidance law issue. In fact, another precedent had expressly allowed foreign bankruptcy representatives to use chapter 11 plenary proceedings simply to bring an avoidance action under U.S. law even if the United States was not the debtor's home.¹⁷ So even though not required by precedent, Judge Brozman did begin her analysis by determining MCC's home was in the United Kingdom, which she viewed as a factor in favor of applying U.K. law.

Additionally, Judge Brozman further considered that the loan contracts were all based in London and were made out to British (and French) banks. Thus the debtor's home and the contractual relationship both suggested a connection to the United Kingdom. On the other hand, the main asset providing the source of the challenged funds, QUE, was an American company, owned by an American subsidiary, and some of the transferred payments physically cleared at U.S. branches of the relevant banks (indeed, the QUE proceeds were first deposited into a NatWest U.S. dollars account in New York on route to London). So there was a U.S. connection to the transactions too.

On the whole, however, while there were connections to both the United States and United Kingdom, the "center of gravity" of the challenged transactions was found to be in England. As such, Judge Brozman ruled that English law would apply. (Interestingly, she concurred in Professor Westbrook's ultimate conclusion that U.K. law should govern, but declined in adopting his reasoning: a bright-line, universalist rule that the debtor's home-country law should govern bankruptcy avoidance issues, wherever they might arise and be litigated.)¹⁸ Having resolved the threshold choice of law question, Judge Brozman technically might have been able to adjudicate an English law preference dispute in her courtroom under the British Insolvency Act of 1986, but that would seem a poor use of institutional resources. Accordingly, since there was no action that could proceed under U.S. law, which is what was pled in the complaint, she dismissed the adversary proceeding. Recognizing that it was probably a loser under U.K. law to allege a reviewable transaction regarding the QUE payments, the administrators and examiner never tried to replead it in England before Lord Hoffman. They did, however fight appeals in the United States up to the District Court (where they lost) and the Court of Appeals (where they lost again). While

15. (*In re Maxwell Communication Corp. plc*), 170 B.R. 800 (Bankr. S.D.N.Y. 1994), *aff'd* 186 B.R. 807 (S.D.N.Y. 1995), *aff'd* 93 F.3d 1036 (2d Cir. 1996). See *Maxwell Communication Corp. plc ex rel. Homan et al. v. Barclays Bank plc*.

16. See *In re Metzeler*, 78 B.R. 674 (Bankr. S.D.N.Y. 1987).

17. See *In re Axona International Credit & Commerce*, 88 B.R. 597 (Bankr. S.D.N.Y. 1988), *aff'd* 115 B.R. 442 (S.D.N.Y. 1990).

18. For more discussion of his proposal, which he softens slightly but nevertheless soundly sticks to, see Jay Lawrence Westbrook, *The Lessons of Maxwell Communications*, 64 *Fordham L. Rev.* 2531 (1996).

many talk of "the *Maxwell* decision" as referring to the 1996 Second Circuit published opinion, a much richer analysis of the issues actually occurs in Judge Brozman's initial holding on the matter.

The Sublime

When thinking of the lessons of *Maxwell*, at least of the specific preference litigation, one of the most succinct and apt is Professor Westbrook's: "politeness matters."¹⁹ The ultimate arbiter of the non-applicability of American preference law was Judge Brozman in a New York forum. The same holding could have been reached had Lord Hoffman in London upheld the injunction that forbade the administrators from launching a preference action in New York. But consider how that would have been received by an American judge where cross-border goodwill and cooperation had been steadily building up over the months of the proceedings. Is it off-base to speculate that a different result might have obtained—especially given the arguably close facts—had, rather than being asked whether the case in her courtroom should be dismissed due to the applicability of U.K. law, Judge Brozman had been commanded, by a U.K. judge issuing an antisuit injunction, that the case would have to be dismissed due the applicability of U.K. law?

This is an important lesson, to be sure. But what might be even better to think about as the lessons of *Maxwell* stem not from the specific and highly visible litigation to the Second Circuit in 1996, but from the less litigated but nevertheless remarkable joint plan of reorganization/scheme of arrangement of 1993. There are three considerations worth some further reflection on that plan and on the process that produced it.

First, *Maxwell*, properly viewed, should be seen as a success rather than a failure of the cross-border insolvency "system." That is, the theoretical purist at the time likely despaired that the lack of certainty in international commercial law and the absence of a multinational bankruptcy treaty necessitated the duplicative ambiguity of "parallel proceedings." The *Maxwell* proceedings were pulled together ad hoc and out of a hat; only by sheer good luck did they work out so smoothly. A better legal world would have made clear up front that the United Kingdom was MCC's home and hence the whole insolvency should have proceeded in British court under British law, with perhaps a U.S. section 304 hearing to assist matters. In short, pure universalism would have provided a swifter and more efficient resolution of the case. That may be so, but that is not the world in which we live and certainly was not the world of a decade ago. To be sure, universalism is on the rise and gaining acceptance,²⁰ but the world today still does not yet have a global insolvency treaty or any other such clear universalist mandate. In the face of that undeveloped legal environment, *Maxwell* could well have devolved into a territorialist race for assets that would have killed the chance to sell off viable businesses within the empire. Thus the theoretical possibility that *Maxwell* might have been better under pure universalism should not overshadow the more important fact that it was very, very good. Creditors saved millions of dollars as many healthy businesses were preserved as going concerns. (In fact, some international law and relations scholars even take the view that rather than being a second-best outcome, the "ad hococracy" of the *Maxwell* case was actually its greatest strength: a functionalist tour-de-force of institutions working across jurisdictional boundaries and traditional constraints to deal with a specific legal problem.)²¹

Second, the *Maxwell* insolvency reminds us that whatever the system, and whatever the legal default rules, when cross-border proceedings rely upon a decentralized network of courts for enforcement in the absence of an all-powerful supranational tribunal, forum shopping will be inevitable. When multiple plausible claims to jurisdiction lie, parties will always seek to maximize their legal advantage by playing a venue arbitrage. In *Maxwell*,

19. See ELIZABETH WARREN AND JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* (4th ed. 201(1) at 1021.

20. See John A. E. Pottow, *Procedural Incrementalism: A Model for International Bankruptcy*, 45 Va. J. Int'l L. 935 (2005) (suggesting incremental acceptance of universalism throughout various insolvency reform efforts).

21. See, e.g., Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 Eur. J. Int'l L. 504 (1995); see also Lore Unt, *International Relations and International Insolvency Cooperation: Liberalism, Institutionalism, and Transnational Legal Dialogue*, 28 Law & Pol'y Int'l Bus. 1037 (1997).

this was seen in the choice of preference law fight most directly. There is, however, a different, more positive side to forum shopping. Consider the threshold filing decision: it was presented, cynically, as an English management trying to skirt English law by seeking refuge in an American bankruptcy court (a practice that persists to this day in cross-border disputes²²). That is the negative side of forum shopping. But now consider that one of the other reasons MCC wanted to file in the United States was that its directors were concerned that the swift pace of U.K. administration could lead to piecemeal sell-off of the assets, rather than the slower pace of chapter 11 that is more conducive to going-concern sales. Indeed, it has been suggested that one reason Macmillan was able to stay in business is that its U.S. trading partners were comforted that it was under chapter 11 and hence would be more likely to survive intact than it might have been under U.K. law. Thus while there may be bad sides of forum shopping—and there usually are—there may also be good sides too. The theoretical import of this observation is that rather than worry about the negative forum shopping potential of contractualism (or even universalism for that matter), its positive potential deserves more serious consideration.

Third (and this is really more of a caveat than a lesson), *Maxwell* should serve as a reminder that business ventures, like people, can be sometimes unpredictable and odd. That is, while the territorialist might seize upon MCC's bankruptcy to prove the difficulty of establishing a debtor company's "home" due to the competing tug between the United Kingdom and United States in that case, a better conclusion might be that Maxwell was an atypical array of overlapping and deliberately obfuscated corporate entities. Accordingly, if universalism can find a home country easily in the other nine cases out of ten (and even in *Maxwell*, Judge Brozman did ultimately find the essential "Englishness" of MCC), then we should not overly fixate on the unusual case at the margin—even if it is highly visible and intriguing. Indeed, in the less publicized resolution of the private side of Maxwell's empire, Headington was basically administered under smoothly cooperative universalist proceedings: a U.K. administration as the main proceeding and a U.S. section 304 ancillary proceeding in which the court willingly and helpfully cooperated.²³ To be sure, there will always be difficult cases. But even difficult cases can be resolved, and their resolution will only strengthen fledgling efforts at universalism that depend upon identifying home jurisdictions. Consider in this regard the recent clarification of home-country rules by the European Court of Justice in the *Eurofood* case under the new EU Insolvency Regulation.²⁴ Therefore, territorialist critics who seize upon *Maxwell* to show the difficulty of identifying a home country may be living in a past decade, left behind by not only the rapid pace of international insolvency reform but also its increasing refinement at dealing with issues like identification of home country.

The Conclusion

The specific aftermath of the *Maxwell* insolvency was that Kevin, his brother Ian (the Happy Loman of the Maxwell clan), and some of their inner circle cronies stood trial for fraud. After a year-long proceeding, they were all ultimately acquitted in 1996. It was an expensive case that resulted in yet another embarrassing loss for the U.K.'s Serious Fraud Office. Pergamon was sold to rival publisher Elsevier in 1992; Macmillan went through its own chapter 11 and was sold as a standalone business in 1995 to a German company seeking an entree into the States. *The Daily News* also had its own chapter 11 and survives to this day as a New York icon. *The Mirror* lives on, too; it ultimately merged into media conglomerate Trinity. (Maxwell's failed attempt to launch an English-language European newspaper, *The European*, did not survive; it was sold to the quirky Barclay brothers of Brecqhou, who shut it down and now devote themselves to trying to secede from Sark, although they have recently emerged to pick up *The Telegraph* from The Lord Black of Crossharbour (born Conrad) as he flails under indictment.) As mentioned, the pensioners

22. See *In re Yukos Oil Co.*, *supra* note 5.

23. See *In re Brierley*, 145 B.R. 151 (Bankr. S.D.N.Y. 1992).

24. See *Eurofood IFSC Ltd.*, Case C-341/04, European Court of Justice (May 2, 2006) (interpreting EC Regulation 1346/2000).

got a lot of their money back in the end. And better late than never, in 2001, the DTI finally completed its 700-page report investigating the Maxwell debacle. DTI found that although "The Publisher" single-handedly was responsible for most of the transgressions ("Maxwell had always regarded the pension funds as his own and ran his companies and the pension funds as if they were one"), the sons were not purely blameless. The report explicitly stated that Kevin had acted "inexcusably" in his role overseeing the pension funds as a trustee. Coopers and Goldman also got their respective shares of blame as well, as did other professionals, but by then it was water under the bridge. Indeed, by 2001, Kevin Maxwell was on to new things, being feted as a rising-from-the-ashes success story with his assumption of the chairmanship of Telemonde—which wound up shortly thereafter in chapter 11.

Perhaps the *Maxwell* case's greatest legacy was in the seeds it sowed for what is freshly enacted chapter 15 of the U.S. Bankruptcy Code. Scrapping (or, more accurately, augmenting) section 304 ancillary proceedings, chapter 15 adopts a regime based on the UNCITRAL Model Law on Cross-Border Insolvency and the EU Insolvency Regulation. Chapter 15 has two noteworthy characteristics: first, while being mostly universalist in its design (and much more so than former section 304), it retains some strongly territorialist caveats. Secondly, it codifies a swath of procedural provisions aimed at facilitating cooperation and communication amongst courts in cross-border settings. Both sets or attributes find at least some root in *Maxwell*. The latter are obviously designed to encourage the creation of Maxwell-inspired "protocols" and the value-enhancing judicial cooperation exhibited by Lord Hoffman and Judge Brozman. The former, with a vague commitment to universalism but with some territorialist retrenchment, might be seen, in a sense, as embracing the very vagueness and indeterminacy that made the Maxwell Protocol so unique: maybe in a touchy and inchoate area like international bankruptcy it is better to leave some things fuzzy and see what the future brings rather than hammer them out on Day One.

As for Maxwell himself, while he lies in peace in Israel (although sometimes with broken glass thrown at his grave), whatever can be said about his bending or in some instances outright breaking of the laws, this Holocaust survivor built up an enormous empire—much of which survives—turned around several major business ventures on the verge of demise, and remains, without a doubt, one of the most interesting entrepreneurs (or spies) of the Twentieth Century. One can only hope that his assassins will be brought to justice soon.