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# A Principled Approach towards the Disclaimer of Environmental Liabilities: Lessons from Europe (and the Rest of the World)

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## The Problem

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Protection of the environment  
and maximization of creditors'  
dividends may give rise to a  
“conflict of near polar  
extremes”







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## Ranking of Environmental Claims in Germany

- Administrative law perspective:
  - Priority if so qualified under administrative law
  - *Case law* (e.g., BVerwG, decision of 23.09.2004 – 7 C 22.03)
- Insolvency law perspective
  - Priority if claim originates (esp. from action) during procedure
  - *Case law* (e.g., BGH, decision of 18.04.2002 - IX ZR 161/01)



## Disclaimer in German Insolvency Law

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- Unitary approach across different procedures (no differentiation between administration and liquidation)
- Disclaimer of onerous property is possible: therefore, no liability arising from ownership/possession of “polluted assets” removed from insolvency estate



# Environmental Claims in the UK (1)

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- Disclaimer of onerous property under s.178 IA 1986 (liquidation only)
- *Environmental Agency v Stout* (1999): *lex specialis* (EPA 1990) *derogate legi generali* (IA 1986)
- *Re Celtic Extraction* (CA, 2001): “there is no statutory or equitable rule that can force a liquidator or polluter to pay where there is no money to meet any environmental liabilities”





# Environmental Claims in the UK (2)

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- *Re Baglan Operations* (2022): can disclaimers be effected if they result in environmental damage to local communities?
- Issue: what powers do official receivers (and liquidators) have?
- Held: “*official receivers should operate in a manner that is fair, principled and honourable*”



# A Matter of Priorities?!?

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- *Orphan Well v Grant Thornton* (SC, 2019): environmental protection prevails over secured creditors' interests
- *Tubbs v Futurity Investments* (1998): insolvent estate funds should be used in priority for environmental claims
- *Dooning* (2018): remediation costs arising from the company's environmental liabilities had priority ranking over other liquidation expenses





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#### Avoid externalisation of business failure

- statutory interpretation is not sufficient
- an approach based solely on priorities is inadequate

#### Insolvency proceedings can have wide aims

- disclaimers can save viable businesses
- environmental concerns shall not be dismissed

#### Human Rights Due Diligence?

- 2011 United Nations Guiding Principles on Business and Human Rights (UNGPs)
- EU Directive on corporate sustainability due diligence (CSDDD)
- Queensland's *Environmental Protection (Chain of Responsibility) Amendment Act 2016* (CoRA)

