Looking beyond separate legal personality

Looking Beyond Separate Legal Personality

Or

How Many Titles have Rangers Won?

J Hardman*

1. INTRODUCTION

A company's separate legal personality has been frequently debated historically[1] and in the modern day[2] by corporate law scholars. The purpose of this article is to argue that separate legal personality fails to fully account for the realities of business vehicles. To adequately conceptualise separate legal personality, it is necessary to distil it to merely the ability of the vehicle to hold rights on its own and owe duties on its own.[3] Such distillation provides universality, in that it applies to all companies of all types. However, there are three issues with this approach. First, its precisely delineated meaning is unclear. Second, whilst corporate law scholars are keen to minimise the importance of separate legal personality of the company, using the word "personality" brings the concept into the wider law of persons.[4] As such, there is a dissonance between how corporate lawyers treat legal personality and its wider implications in the law of persons. Third, this universality comes at the expense of our understanding what makes a particular company in any way different from any other company. It is such difference, however, that matters in the real world – consumers relate more to brands than to the legal entity they are contracting with (for example, how many iPhone users are aware of, let alone care about, the Apple corporate group structure?). This is particularly acute when one legal entity transfers such a difference to another legal entity, normally on the insolvency of the first. Legal analysis holds them as being entirely separate vehicles, but something transfers from the first to the second, and law has a blind spot that needs to be filled by recognising this something. The author has called this blind spot elsewhere the company's "business".[5] Here, we call it the company's linguistic

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[1] John Dewey, "The historic background of corporate legal personality" (1926) 35 Yale Law Journal 655; Ron Harris, "The transplantation of the legal discourse on corporate personality theories: from German codification to British political pluralism and American business" (2006) 63 Washington and Lee Law Review 1421; Gregory A. Marks, "The personification of the business corporation in American law" 54 The University of Chicago Law Review 1441.

[2] See Susan M. Watson, "The corporate legal person" (2019) 19 (1) Journal of Corporate Law Studies 137; Laura Macgregor, "Partnerships and legal personality: cautionary tales from Scotland" (2020) 20 Journal of Corporate Law Studies 237; Jonathan Hardman, "Reconceptualising Scottish limited partnership law" (2021) 21 Journal of Corporate Law Studies 179.

[3] Dewey (n 1 above); Note, "What we talk about when we talk about persons: the language of a legal fiction" (2001) 114 Harvard Law Review 1745.

[4] E.g. Ngaire Naffine, "Who are law's persons? From Cheshire cats to responsible subjects" (2003) 66 Modern Law Review 346.

[5] Jonathan Hardman, "The nexus of contracts revisited: delineating the business, the firm, and the legal entity" (2021) Bond Law Review (forthcoming).

personality – the aspect that makes the company distinct in the world, but about which legal conceptualisation has nothing to say.

This issue transcends legal analysis, as the line between company law and wider economic theories of the firm is noted to be quite blurred.[6] Economic analysis in this field is frequently illustrated by example.[7] This article will therefore use Rangers Football Club as such a case study to illustrate this conceptual weakness in personality theories within the corporate context. In particular, we will explore the question as to how many titles Rangers have won. This is a question which has been of utmost relevance within Scottish football.[8] Theories of separate legal personality are undermined by the fact that they cannot answer this question of importance outside a narrow legal focus. In particular, they only demonstrate an understanding of the base, universal concept that ties all separate legal persons – that they can bear rights and duties – not what makes them relevant for their societal operation – which is the content of the rights and duties borne by the company. The latter has more relevance for how the company operates in society, and therefore should be the metric used in theoretical discussions.

There are two further reasons as to why how many titles Rangers have won matters for corporate law theory. First, at its heart, it is a debate about the link between a particular legal entity and the business that it operates for a particular time – in this case, a football club. As such, it becomes a question of which characteristics of the business can be attributed to the particular legal vehicle associated with it at any time. In other words, when a company buys any operation (including a "football club") from another company, does anything stay behind, or does the new company acquire an interest in events that took place before the company was created? Legal literature in respect of corporate attribution has mostly focused on whether acts of individuals can be attributed to the company.[9] There is therefore a gap in the legal literature as to the extent that elements of the business owned by the company from time to time can be attributed to that company. Second, if this is a question of relevance in wider society, and corporate law theory does not have an adequate answer for it, it points to a limitation in the scope of corporate law theory.

This article proceeds to explore the Rangers case study and use that to examine issues in corporate law theory. The club (in its widest possible sense) is the most successful club in the world since its

[6] Simon Deakin, David Gindis & Geoffrey Hodgson, "What is a firm? A reply to Jean-Philippe Robé" (2021) 17 Journal of Institutional Economics 861. See also the reply – Jean-Philippe Robé, "Firms *versus* corporations: a rebuttal of Simon Deakin, David Gindis, and Geoffry M. Hodgson" (2021) Journal of Institutional Economics DOI:10.1017/S1744137421000771.

[7] For example, the case study of GM Motors and Fisher Body is frequently used to explain the firm - see generally Benjamin Klein, "Vertical integration as organizational ownership: the Fisher Body-General Motors relationship revisited" (1988) 4 Journal of Law, Economics & Organization 199; Benjamin Klein, Robert Crawford & Armen Alchian, "Vertical integration, appropriable rents and competitive contracting process" (1978) 21 Journal of Law & Economics 297.

[8] See https://www.scotsman.com/sport/football/celtic/celtic-fans-fume-at-their-club-after-rangers-confirmed-scottish-champions-for-first-time-in-10-years-3157363 [Accessed 11 November 2021]; https://www.theguardian.com/football/2012/jul/27/rangers-relaunched-brechin [Accessed 11 November 2021]; https://www.dailyrecord.co.uk/sport/football/football-news/charles-green-insists-rangers-titles-1497932 [Accessed 11 November 2021].

[9] E.g. Jennifer Payne, "Corporate attribution and the lessons of Meridian" in Paul S. Davies and Justine Pila (eds), *The Jurisprudence of Lord Hoffman: A Festschrift for Leonard H Hoffman* (Oxford: Hart, 2015); Jennifer Payne, "The attribution of tortious liability between director and company" [1998] Journal of Business Law 153.

founding in 1872, with 55 titles.[10] However, the club currently sits in a company which was only incorporated in 2012. This company (with registered number SC425159[11]) ("**NewCo**") was incorporated on 29 May 2022 as Sevco Scotland Limited, but changed its name on 31 July 2012 to The Rangers Football Club Limited.[12] Since NewCo has owned Rangers, it has only won one title. As such, the issue underpinning this area of contention is whether we should judge Rangers' titles by reference to the number of titles won within its current ownership structure, or whether instead we should look beyond the narrow legal form towards a broader analysis that transcends legal form. The article engages with theoretical literature as to the nature of separate legal personality, and argues that it is such a vague and imprecise concept that it cannot be used to answer questions such as the Rangers' issue, and as such has limitations upon its use when company law theories try to connect beyond a theoretical landscape. The article argues that an alternative concept is required, that of linguistic personality, which focuses on what makes the separate legal person different rather than what links all separate legal persons together. As such, it is argued that we should judge Rangers' title wins not by their separate legal personality but by their linguistic personality. It thus demonstrates the need for legal and economics commentators to acknowledge the limits of separate legal personality, and to start to recognise a more ethereal concept, as yet not explored within legal literature, that runs consistently throughout the operation of the business.

Indeed, Rangers has, in recent years, raised a number of legal issues of interest to corporate lawyers. These include what constitutes unlawful financial assistance[13] (the rules that prevent a public company from helping someone buy their shares[14]), limitations on the use of phoenix companies[15] (liquidating one company and then setting up a new company with the same/similar name to run the same type of business[16]), clarity as to the freedom that parties have to choose the governing law of rights ancillary to property,[17] limitations on the taxation breaks that can be paid by way of employee benefit trusts,[18] and issues as to the law in respect of unlawful detentions.[19] It is therefore a case study which can be applied to a number of legal issues.

This article proceeds as follows. Part 2 outlines theoretical approaches to the company's separate legal personality, and issues arising under them. Part 3 introduces my concept of linguistic personality, and Part 4 applies this to the Rangers case study. Part 5 concludes.

2. THE COMPANY'S SEPARATE LEGAL PERSONALITY

[10] https://www.skysports.com/football/news/11788/12232773/scottish-premiership-champions-rangers-top-the-list-for-all-time-league-title-wins-in-world-football [Accessed 11 November 2021].

[11] https://find-and-update.company-information.service.gov.uk/company/SC425159 [Accessed 11 November 2021].

[12] See certificate on change of name issued on 31 July 2012 – available at https://find-and-update.company-information.service.gov.uk/company/SC425159/filing-history?page=4 [Accessed 11 November 2021].

[13] *Whyte v Her Majesty's Advocate* [2017] HCJAC 14.

[14] See discussion in Jennifer Payne, "Private equity and its regulation in Europe" (2011) 12 European Business Organization Law Review 559.

[15] See Helen McArdle, "Court clears path for Dave King to become Rangers director", The Herald 7th April 2015.

[16] Insolvency Act 1986, s216; Timothy Mayer, "Personal liability for trading in a prohibited name: sections 216-217 Insolvency Act 1986" (2006) 27 The Company Lawyer 14.

[17] *Rangers Football Club plc, Noters* [2012] CSOH 55; George L Gretton, "The laws of the game" (2012) 16 Edinburgh Law Review 414; Andrew McAlpine, "Raising finance over claims to payment and reform to the law of outright assignation" [2015] Juridical Review 275.

[18] *Murray Group Holdings Ltd v Revenue and Customs Commissioners* [2017] UKSC 45; Guy Mulley, "The shifting sands of UK tax law" (2017) 76 Cambridge Law Journal 502.

[19] *Whitehouse v Chief Constable of Scotland* [2019] CSIH 52.

Separate legal personality was a "virtual obsession" in US legal literature for 50 years from the 1870s to 1926.[20] The literature debated the nature of separate legal personality.[21] There were a number of different schools of thought. The two extreme positions in respect of the company's separate legal personality were that a company was either (a) a real entity,[22] or (b) a legal fiction.[23] This debate was prevalent in nineteenth century Germany.[24] Von Gierke,[25] and his English law adherents Maitland[26] and Pollock[27] argued that corporations were, and ought to be, considered real people.

Against this, Savigny, following the views of Pope Innocent IV and earlier Roman law, argued that the corporate person was a legal fiction.[28] This debate slowly evolved into whether corporate personality was "natural" or "artificial."[29] If the latter, then it owed its separate legal personality to a concession from the state.[30] The importance of this argument is that if separate legal personality is a concession from the state, or state gift, then the state has more of a locus to set what that personality can do.[31] It implies that this fiction will only be recognised to the extent necessary to enable it to do the things allowed by the state. In other words, the burden of proof differs depending on which side of the debate one adheres to – if the company's separate legal personality is real, it can do everything that a real person can do unless the state provides a reason to limit its activities. If its separate legal personality arises as a result of a gift from the state, then the state can set limits upon that gift, and extract counter obligations for the gift, with the onus lying on the company to provide reasons to free itself from state control. As such, if the company is a fictitious person and separate legal personality arises by way of gift from the state, the state has greater locus to intervene in its internal workings.

[20] Morton J Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (Oxford: OUP, 1992), p.101.

[21] For previous overviews of this literature by the author, see Hardman (n 2 above); Jonathan Hardman, "The Butterfly Effect: The Butterfly Effect: theoretical implications of an apparently minor corporate transparency proposal" (2021) Common Law World Review - DOI: 10.1177/14737795211037701.

[22]Frederic W Maitland, "The corporation sole" (1900) 16 Law Quarterly Review 355; Frederic W Maitland, "The Crown as corporation" (1901) Law Quarterly Review 131; Frederick Pollock, "Has the common law received the fiction theory of corporations" (1911) 27 Law Quarterly Review 219.

[23] Watson (n 2 above), 150; Dewey (n 1 above), 665.

[24] See Walter Ullmann, "The mediaeval theory of legal and illegal organizations" (1944) 60 Law Quarterly Review 285.

[25] See Otto von Gierke, *Political Theories of the Middle Age* (Frederic W Maitland tr, Cambridge: CUP, 1913) p.xxii.

[26] See Maitland sources (n 22 above).

[27] Pollock (n 22 above). This is the mainstream UK conception of separate legal personality – William M Geldart, "Legal personality" (1911) 27 Law Quarterly Review 90.

[28] Dewey (n 1 above), 672; Maximilian Koessler, "The person in imagination or persona ficta of the corporation" (1949) 9 Louisiana Law Review 435.

[29] William W Bratton, "Berle and Means reconsidered at the century's turn" (2001) 26 Journal of Corporation Law 737,

[30] Brian R Cheffins, *The Trajectory of (Corporate Law) Scholarship* (Cambridge: CUP, 2004), p.39; Marks (n 1 above), 1470; Geldart (n 27 above).

[31] Paul G Mahoney, "Contract or concession? An essay on the history of corporate law" (2000) 34 Georgia Law Review 873; A Wolfe, "The modern corporation: private agent or public actor?" (1993) 50 Washington & Lee Law Review 1673.

The debate came to a sudden stop[32] with an article by a non-lawyer, John Dewey.[33] Dewey argued that the debate was being argued at cross purposes. The features that were being debated were not legally inherent in a "person", which just meant "right and duty bearing unit", with whatever rights and duties happened to be imbued in it.[34] Hager states that the confusion had arisen because commentators were working out what properties they thought applied to "persons", and then seeing whether companies had such properties.[35] As Dewey stated:

> This something-or-other must then be the same in whatever has rights and duties. The readiest starting point is a singular man; hence there is imposed the necessity of finding some nature or essence which belongs both to men in the singular and to corporate bodies. If one denies that he can find such a common essence he holds that "person" as applied to corporate bodies denotes only a fiction. But if he denies the fictitious character of a corporate entity, then some personality identical in essence, or with respect to "subjectivity" must be discovered for all right-and-duty bearing units.[36]

As such, those arguing that separate legal personality was fictitious would point to the fact that companies cannot marry[37] as evidence they were right, whereas those arguing that separate legal personality was real would point to the fact that companies can contract with third parties[38] as evidence that they were right. Dewey's article stopped this analysis,[39] and the idea that separate legal personality merely meant that a company could have rights and responsibilities took hold.[40] Corporate law scholarship moved on[41] to its next "master problem of research",[42] the separation of ownership and control in publicly listed companies.[43] However, elements of the debate remained. Indeed, it is arguable[44] that the contractarian school of corporate law scholarship[45] descends neatly from the "real

[32] Cheffins (n 30 above) 39; Marks (n 1 above).

[33] Dewey (n 1 above). Dewey was a philosopher and not a lawyer, but his philosophical school (pragmatism) overlapped with legal realists. For an interesting bibliographical take linking Dewey with Oliver Wendell Holmes, see Louis Menand, *The Metaphysical Club* (London: Harper Collins, 2001). The author is grateful to Prof Nehal Bhuta for identifying this book.

[34] Mark M Hager, "Bodies politic: the progressive history of organizational "Real Entity" theory" (1989) 50 University of Pittsburgh Law Review 575, 635.

[35] Ibid, 635.

[36] Dewey (n 1 above), 659.

[37] See Hardman (n 2 above).

[38] For an interesting insight into the mechanics in a UK context, see Payne, Meridian (n 8 above); Jennifer Payne & Dan Prentice, "Company contracts and vitiating factors: developments in the law on directors' authority" (2005) Lloyds Maritime & Commercial Law Quarterly 447; Jennifer Payne, "Company contracts and conundrums" (2004) European Company and Financial Law Review 235.

[39] Cheffins (n 30 above), 39 - 40. Some articles continued and mostly criticised the debate – see Max Radin "The endless problem of corporate personality" (1932) 32 Columbia Law Review 643.

[40] See Bryant Smith, "Legal personality" (1928) 37 Yale Law Journal 283; Murray A. Pickering, "The company as a separate legal entity" (1968) 31 Modern Law Review 481.

[41] Cheffins (n 30 above), 40; Adolfe A. Berle and Gardiner Means, *The Modern Corporation and Private Property* (revised edn, New York: Harcourt, Brace & World Inc, 1967), p.3.

[42] Roberta Romano "Metapolitics and corporate law reform" (1984) 36 Stanford Law Review 923, 923.

[43] Berle & Means, (n 41 above). This started agency cost analysis – see Michael C Jensen and William H Meckling, "Theory of the firm: managerial behaviour, agency costs and ownership structure" (1976) 3 Journal of Financial Economics 305; Jonathan Hardman "The plight of the UK private company minority shareholder" (2022) 33 European Business Law Review 87.

[44] See Hardman (n 2 above).

[45] E.g. Melvin Eisenberg, "The conception that the corporation is a nexus of contracts, and the dual nature of the firm" (1998) 24 Journal of Corporation Law 819. This line of argument was being advanced in the US at the time

entity" school of thought, on the grounds that they both concern the concept that the company's creation and operation is somehow natural. Conversely, the arguments that "organizational law" is necessary to provide a legal underpinning of corporate law, such as asset and entity shielding,[46] could be said to descend neatly from the fiction/state gift school on the ground that state intervention is necessary to enable the creation of a modern company. The debate has flared again in the last few years.[47]

The debate endures for three reasons. First, because Dewey is right – it is unclear what we mean by a legal person. Under Roman law, personality (at least the historic ancestor of our current concepts of legal personality) was not automatic to humans, and was tested purely by the ability to sue and be sued.[48] In modern discourse, *The Anatomy of Corporate Law* calls the label a "convenient heuristic formula" for the ability to contract, be sued, and provide entity shielding.[49] Prof Laura Macgregor demonstrated that this was not correct by the example of a Scottish partnership, which is well known for having separate legal personality,[50] but tends not to use any of these features. Similarly, certain vehicles enjoy those heuristic features but are not said to enjoy separate legal personality. As such, Macgregor argues "[o]ne must look behind the label to the reality of the legal system's recognition of the ability to act in group-form."[51] Macgregor argues that the issue is whether the constituents of the relevant entity can act effectively as a group in respect of the entity, if so it can be considered to have separate legal personality. This approach is reminiscent of issues faced in US partnership law,[52] and transcends business law to cover public law issues[53] and, indeed, all forms of group activity.[54] This undoubtedly highlights the key weakness with the specificity of separate legal personality. The danger with this approach, however, is that it risks merely transferring the issue – if separate legal personality just means the ability to act in group-form, we must then establish criteria which indicate the ability to act in group-form, thus not moving us particularly further forward from needing to establish criteria which indicated separate legal personality.

The issue is that we do not know which rights and obligations are required to deem a vehicle as having separate legal personality. Thus when Chesterman sought to establish whether artificial intelligence should be granted separate legal personality, he stated that "[l]egal personality brings with it rights

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of the initial debates see Victor Morawetz, *A Treatise on the Law of Private Corporations* (2nd edn, Boston: Little, Brown 1886), pp.1–2 – but not in the UK at the time – Harris (n 1 above), 1468.

[46] Henry Hansmann and Reinier Kraakman, "The essential role of organizational law" (2000) 110 Yale Law Journal 387; Henry Hansmann and Reinier Kraakman, "Organizational law as asset partitioning" (2000) 44 European Economic Review 807.

[47] Watson, (n 2 above) has argued that corporate legal personality is inherently a gift from the state, whereas the author (n 2 above) has argued that this is based upon certain doctrinal factors which may not be of universal application.

[48] See Laurent L J M Waelkens, "Medieval family and marriage law: from actions of status to legal doctrine" in John W Cairns and Paul J du Plessis (eds) *The Creation of the Ius Commune* (Edinburgh: Edinburgh University Press, 2010), pp.104 - 105. Even then, the Roman position as to "corporate" separate legal personality is confused – see Patrick W Duff, *Personality in Roman Private Law* (Cambridge, CUP, 1938), pp.35-66.

[49] Renier Kraakman et al, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford: OUP, 2017), pp.5- 8. The author is grateful to Jonathan Brown for identifying this historic overlap.

[50] Partnership Act 1890 s4(2); Johan J Henning, "Partnership law review: the joint consultation papers and the Limited Liability Act in brief historical and comparative perspective" (2004) 25 The Company Lawyer 163.

[51] Macgregor (n 2 above), 241 – 244.

[52] Harwell Wells, "The personification of the partnership" (2021) 74 Vanderbilt Law Review 1835.

[53] Richard Ekins, *The Nature of Legislative Intent* (Oxford: OUP, 2012).

[54] Christian List & Philip Pettit, *Group Agency: The Possibility, Design, and Status of Corporate Agents* (Oxford: OUP 2011). This author is grateful to Prof Nehal Bhuta for suggesting this book.

and obligations, but these need not be the same for all persons within a legal system."[55] This exposes the issues with separate legal personality. Rather than trying to establish whether AI should be given separate legal personality, he would have been better trying to establish whether AI should be given rights and duties and, if so, which rights and duties should be provided to AI. Thus we can see that separate legal personality becomes vaguer. As it is vaguer, it is less useful as an analytical tool.

Second, referring to separate legal personality takes us into the realm of the discussion of what it means to be a person.[56] If companies are treated as persons, that must put them on a spectrum of humanity. This must mean that there is analytical space to discuss whether there is scope for a company to, for example, claim human rights.[57] Whilst the average human and the average company are different, at the edges there is space for conflation – and so the (uncertain) themes running through a company's separate personality must be conceptually coherent with issues such as law's responses to matters such as slavery,[58] or a human who lacks legal capacity.[59] Placing the company within the scope of being a person raises questions as to whether a company can be said to have a morality[60] or a theology.[61] Similarly, it must mean that certain core responsibilities which apply to all humans as a result of their humanity must also apply to companies due to their separate legal personality. For example, a company must be able to, theoretically, commit a crime. However, problems of attribution arise here – courts have proved reticent to attribute to companies the sufficient *mens rea* to achieve a conviction.[62] The nature of the extent of the rights and responsibilities attributed to a company under its separate legal personality is fundamentally legal in nature,[63] yet law is weak at understanding and adequately setting these limits.[64] Certainly, law in this area provides a distributive impact upon all of society by providing a series of boosts to those involved in the company.[65] Thus corporate law's minimisation of the concepts underlying this phenomenon is actively unhelpful. That a company has separate legal personality places it amongst the major issue of what it means to be a person, and so corporate law's minimisation of the concept demonstrates that some other conception is missing.

Third, corporate law's attempt to understand separate legal personality has been to identify which thread runs through all companies. Thus the conception of separate legal personality must cater for a listed plc with no subsidiaries, a turnover in the billions, with tens of thousands of employees; and a newly incorporated company with a share capital of £1 which has not yet done anything. Thus

[55] Simon Chesterman, "Artificial intelligence and the limits of legal personality" (2021) 69 International & Comparative Law Quarterly 819, 824.
[56] Naffine (n 4 above).
[57] Anna Grear, "Human rights – human bodies? Some reflections on corporate human rights distortion, the legal subject, embodiment and human rights theory" (2006) 17 Law & Critique 171; Anna Grear, "Challenging corporate 'humanity': legal disembodiment, embodiment and human rights" (2007) 7 Human Rights Law Review 511.
[58] Note (n 3 above).
[59] Naffine (n 4 above).
[60] Peter A French, "The corporation as a moral person" (1979) 16 American Philosophical Quarterly 207; Roger Scruton, "Corporate persons" (1989) 63 Proceedings of the Aristotelian Society, Supplementary Volumes 239.
[61] Michael Novak, *Towards a Theology of the Corporation,* (Washington: American Enterprise Institute, 1981).
[62] See Nicola Lacey, "Philosophical foundations of the common law: social not metaphysical" in Jeremy Horder (ed) *Oxford Essays in Jurisprudence* (4th series, Oxford: OUP, 2000); Chris M. V. Clarkson, "Kicking corporate bodies and damning their souls" (1996) 59 Modern Law Review 557. Similar issues apply in respect of attributing an *actus reus* to a company rather than the individual who performed such action.
[63] Frederick H Lawson, "The creative use of legal concepts" (1957) 32 NYU Law Review 909.
[64] Nicholas James, "Separate legal personality: legal reality and metaphor" (1993) 5 Bond Law Review 217.
[65] Mark Neocleous, "Staging power: Marx, Hobbes and the personification of capital" (2003) 14 Law & Critique 147.

corporate law's conceptualisation of separate legal personality is a universalist approach,[66] and so deliberately misses a conceptualisation of what the actual personality of each individual company is. In other words, the scope of corporate law's enquiry is panned out to try to find the lowest common denominator applicable to all companies. It does not, then, try to explore the activities of any particular company, only what applies to all companies. Thus a number of companies will have features which are not part of this lowest common denominator, and this lowest common denominator is less useful when we zone in to any individual set of companies and establish what actual rights belong to, and which duties are owed by, a particular company.

This is not to say that this approach to our understanding of separate legal personality should be changed. It performs the function that it is meant to – it sets out, heuristically, a rough lowest common denominator of the rights and duties that you would expect a company would be able to undertake. There is space for more clarity but the argument here is that separate legal personality does not fully account for an understanding of how a particular company operates within the world. To achieve this, a new concept is needed.

3. SEPARATE LEGAL PERSONALITY AND LINGUISTIC PERSONALITY

The foregoing demonstrates the difficulty in relying on separate legal personality as a criterion to understand interactions between particular companies. We do not fully understand what separate legal personality is, nor what is required to provide separate legal personality. It does not fully engage with the area of the law that it is situated in, and it is aimed at universalisation of companies rather than specific understanding of a company. All that we know is that it means that the entity can have rights and responsibilities, not what the content of those rights and responsibilities are. As noted above, a large set of issues arise because of the use of the word "personality" in the phrase. It may arise under Roman law from the concept of the "persona", or player in a law suit.[67] However, it has further connotations in modern parlance. The Oxford English Dictionary provides that the word personality can be used as an adjective (she is a personality), or as a noun.[68] The only use noted as being "in extended use" is "the quality or collection of qualities which makes a person a distinctive individual; the distinctive personal or individual character of a person, esp. of a marked or unusual kind."[69] This linguistic definition is almost the polar opposite to the nature of enquiry into separate legal personality. Whilst the quest for defining separate legal personality is the quest to establish what universal features run through vehicles possessing this trait, the most common use of personality relates to identifying distinctive characteristics. In other words, the common use of the word relates not to universalising the relevant entities, but singularising each one – and this also forms part of the challenge of the law of persons.[70] It would be a lot of work for the words "separate" and "legal" to perform this diametrically opposed interpretation of meaning, and it is submitted that they fail to achieve that. As noted above, because "personality" is contained in the phrase "separate legal personality", it is only natural that the latter becomes seen as a specific manifestation of the former, rather than something diametrically opposed to it. Thus we can argue that the feature that company law's understanding of personality fails to provide for is the relevant company's *linguistic personality*.

[66] Jonathan Hardman, "Atomising corporate law: A battle cry for splitters" in Marc T Moore & Christopher Bruner (eds), *Research Agenda for Corporate Law* (Cheltenham: Elgar, 2022).
[67] Waelkens (n 48 above).
[68] https://www.oed.com/view/Entry/141486?redirectedFrom=personality#eid [Accessed 11 November 2021].
[69] Ibid.
[70] Naffine (n 4 above); Lacey (n 62 above).

The combination of a narrow conceptualisation of separate legal personality and no other concept to fill the gap left has allowed the conflation between the company law matter of identifying what universally runs through all corporate vehicles with the common linguistic matter of identifying differentiating features. For example, in the US there has been discussion as to whether a company has a race.[71] If such a feature can be imbued in a company, it will arise from the individuals associated with the company rather than the company itself. The company is merely an empty shell – many companies commence their life as "shelf companies", pre-incorporated by promoters, with shares owned by the promoter, with the promoter as the company's director and with a name consisting of some link to the promoter and a number.[72] They therefore exist in a latent state, and only gain distinctive qualities – traits of linguistic personality - when transferred to their end user.[73] Therefore, whilst they have separate legal personality (in its company law sense) from incorporation, they only obtain personality (in its common linguistic sense) when they come off the shelf.

Linguistic personality is important, but these traits of linguistic personality should not be merely an aggregate of the individuals involved in the company. This is because imbuing linguistic features of personality, which are based on characteristics of humanity not directly applicable to business entities, to a company *undermines* its separate legal personality, as it requires linkage to, and is dependent upon, natural persons.[74] In other words, to establish such distinctive personality traits as race[75] to a company, we must ignore the separate legal personality of the legal vehicle and look through to the individuals associated with that vehicle. Were this the case, identifying the linguistic personality of the company would involve ignoring its company law separate personality as the distinctive features of the company come from other separate legal persons. To fill the conceptual lacuna noted above, linguistic personality must sit alongside the legal fact that the company is a separate legal person able to have its own rights and duties. We therefore cannot state that linguistic personality is predicated upon the characteristics of individuals involved – having a shareholder, director, or manager (however dominant they may be) with certain linguistic personality traits does not act to imbue the company with these traits. We therefore need another metric to identify the linguistic personality of the company.

Instead, it is submitted that linguistic personality is imbued in a company (a right and duty bearing unit) by the rights and duties it bears. Whilst it remains a shelf company, even owned by individuals, it is not sufficient for any features of linguistic personality to be imbued in the company. Even when transferred to an individual or group of individuals – however dominant and full of linguistic personality they may be – this does not change. It is only when the company *does something* that these features of linguistic personality can be said to be imbued in the separate legal person. It only obtains linguistic personality by acting – by obtaining rights and assuming duties. The more consistent and coherent the acts of the company in obtaining rights and assuming duties the more consistent

[71] *Thinket Ink Info Res, Inc v Sun Microsystems, Inc*, 368 F3d 1053, 1058 (9th Cir 2004); Richard R. W. Brooks, "Incorporating race" (2006) 106 Columbia Law Review 2023, 2076–79.

[72] On shelf companies, see Peter Sparkes, "Off-the-shelf company lets" (1989) 52 Modern Law Review 557; Andrew Hicks, "Corporate form: questioning the unsung hero" [1997] Journal of Business Law 306; Horst Eidenmuller, Andreas Engert and Lars Hornuf, "Incorporating under European law: the Societas Europaea as a vehicle for legal arbitrage" (2009) 10 European Business Organization Law Review 1. For the importance of promoters, see J Hardman "Articles of association in UK private companies: an empirical leximetric study" (2021) 22 European Business Organization Law Review 517.

[73] The share is transferred, the directors changed, registered office changed, and the name changed.

[74] French states "to treat a corporation as an aggregate for any purposes is to fail to recognize the key logical differences between corporations and mobs" (French, n 60 above, 209). He expands upon this in P French, "Types of collectivities and blame" (1975) 56 The Personalist 160.

[75] The same must be true of gender and sexuality.

and coherent the linguistic personality of the company will be. This echoes Butler's concept (following de Beauvoir) that what is often a key part of a human's personality - their gender - is "an identity instituted by a stylized repetition of acts".[76] In the same way that gender identity becomes instituted by a repetition of complementary acts, so a company's linguistic personality must become instituted by a repetition of complementary acts. Having a football ground and operating a club from it would seem to be repetitions of complementary acts that mutually reinforce similar aspects of the distinctive qualities of the entity itself – the linguistic personality of the company. It also means that there is nothing inherent in linguistic personality to tie it to a particular separate legal person – not all separate legal persons will have linguistic personalities of equal strength, and multiple separate legal persons (either at the same time or in a chronologically linear fashion) can have overlapping linguistic personalities.

To connect linguistic personality to separate legal personality, we can say that it is the calibrations of rights and duties that dictate the linguistic personality of the company. This means that to identify the distinctive nature of a company, we must look beyond its right-and-duty-bearing status to identify the *content* of those rights and duties that have been ascribed to it. If this content transfers from a different legal vehicle, then the linguistic aspects of personality must also transfer.

There must be a temporal aspect to this: it must be that a single legal entity's linguistic personality can change. It is often postulated that the defining characteristic of a company is its permanence.[77] Thus unlike partnerships, whose separate legal personality is dissolved upon a change in the partners,[78] the company survives the change of all individuals involved in the company, and different calibrations of rights and duties. It thus survives, in a separate legal personality sense, and changes to its linguistic personality can occur over the life of the company. It is, of course, possible to imagine a company that never acquires a linguistic personality, or at least only acquires only a limited linguistic personality – a promoter may have five shelf companies set up at any one time, each with similar names (often with only one numerical digit difference), and the same directors, shareholders and constitutions. If they have linguistic personality, it is of a limited type. Indeed, given that historical limitations on a company's capacity have now been removed,[79] it must be possible for the nature of the company's business to change so entirely it amounts, over the company's life, to a total change to the rights and duties held by the company. Even if all linguistic aspects of personality were removed from the company, its separate legal personality must remain. It is entirely possible for a company's separate personality to start as a linguistic-personality-limited shelf company, attain the distinct characteristics of a business with real social impact (such as a football club), sell that asset and distribute all funds to shareholders and thus have prolonged periods in which they qualify as a "dormant company" – that is a company without a significant accounting transaction within any given period.[80] It could then acquire a totally different business, doing something totally different in a totally different geographical location with totally different assets and totally different people. For our purposes, though, whilst a

[76] Judith Butler, "Performance acts and gender constitution: an essay in phenomenology and feminist theory" (1988) 40 Theatre Journal 519.

[77] E.g. one of the first theoretical approaches to company law contained in Melvin Eisenberg, *The Structure of the Corporation, A Legal Analysis* (Boston: Little, Brown and Company, 1976), p.16. See also Peter C. Hemphill, "The personality of the partnership in Scotland" [1994] Juridical Review 208, 240.

[78] See Macgregor (n 2 above).

[79] Companies Act 2006 ss39-40; Lorraine Talbot, "A contextual analysis of the demise of the doctrine of ultra vires in English company law and the rhetoric and reality of enlightened shareholders" (2009) 30 The Company Lawyer 323; Chrispas Nyombi, "The gradual erosion of the ultra vires doctrine in English company law" (2014) 56 (5) International Journal of Law and Management 347.

[80] Companies Act 2006 s1169(1); (in the context of a previous regime) Judith Freedman and Matthew Godwin, "The statutory audit and the micro company – an empirical investigation" [1993] Journal of Business Law 105.

shelf company or a dormant company it would have no (or limited) linguistic personality. It would, though, have had two *different linguistic personalities* over the course of the life of its separate legal personality.

UK law tacitly acknowledges the role that linguistic personality plays in the UK commercial landscape. Sales of businesses from one legal person to another are frequent.[81] The majority of legal analysis in this field arises in the context of insolvency law – when a legal vehicle has too many liabilities to operate, but has a business which would be profitable in the absence of such liabilities, it frequently transfers that business to a new legal vehicle free of the old liabilities.[82] Indeed, often the sale is negotiated at the same time as preparations for the old vehicle to enter insolvency, leading to a sale promptly upon the entering into of insolvency. As the insolvency and asset sale are inherently linked, this is known as a "pre-packaged" insolvency, or a pre-pack.[83] This mechanic was rare in the UK until certain reforms were introduced in 2003,[84] but five years later was empirically found to represent between 50% and 80% of all transfers of going concerns from insolvent vehicles.[85] As such, the issues in this article are prevalent across the commercial landscape. So much so that jurisdictions frequently restrict the same individuals setting up a new vehicle and transferring the business of the old vehicle into it: it is perceived, ultimately, that creditors are likely to confuse the legal personality of the vehicles with the linguistic personality of the business being transferred.[86] If separate legal personality were more important in society than linguistic personality - i.e. the calibration of rights and duties held by the company at any time - such protections would be unnecessary. The need for protections when an entire business is sold from one corporate legal person to another demonstrates that the linguistic personality of the company is important to the public – not which legal vehicle they deal with, but whether they are dealing with the wider concept of the features of that vehicle. Thus there is a risk that the public is misled if that vehicle can be left behind and the linguistic personality moved into a new vehicle. However, this tacit acknowledgment goes unconceptualised. Only by acknowledging that these legal protections arise because of linguistic personality can we start to explore what other legal provisions should apply in respect of linguistic personality. Unfortunately space precludes further expansion here.

The clash between separate legal personality and linguistic personality is a clash between academic legal company law debate and the real world – a focus by the former on the narrow features that are ignored by the latter. Indeed, company law frequently comes into such tension with the real world.

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[81] Further analysis of the points raised in this paragraph is included in Hardman (n 5). Thomas Bates, "Asset Sales, Investment Opportunities, and the Use of Proceeds" (2005) 60 The Journal of Finance 105; Ulrich Hege et al, "Equity and Cash in Intercorporate Asset Sales: Theory and Evidence" (2009) 22 The Review of Financial Studies 681.

[82] Graeme Smith, "How insolvency practitioners value a business" (2015) 28 Insolvency Intelligence 24; Ian Fletcher, "Pensions again – "just when you thought it was safe to go into administration"" (2014) 27 Insolvency Intelligence 59; Mark Hyde and Iain White, "Pre-pack administrations: Unwrapped" (2009) 3 Law and Financial Markets Review 134.

[83] See discussion in Jennifer Payne, "The role of the court in debt restructuring" (2018) 77 Cambridge Law Journal 124; Vanessa Finch, "Pre-packaged administrations and the construction of propriety" (2011) 11 Journal of Corporate Law Studies 1; Jennifer Payne, "Debt restructuring in English law: lessons from the United States and the need for reform" (2014) 130 Law Quarterly Review 282.

[84] Peter Walton, "Pre-packin' in the UK" (2009) 18 International Insolvency Review 85.

[85] Sandra Frisby, *A preliminary analysis of pre-packaged administrations: Report to The Association of Business Recovery Professionals* (August 2007); Sandra Frisby, "A preponderance of pre-packs?" (2008) 1 Journal of International Banking and Financial Law 23. The author is grateful to Scott Wortley for pointing this out.

[86] Lee Aitken, ""Piercing the corporate veil" and the "remedial constructive contract"" (2013) 129 Law Quarterly Review 21; Helen Anderson, "Creditors' Rights of Recovery: Economic Theory, Corporate Jurisprudence and the Role of Fairness" (2006) 30 Melbourne University Law Review 1.

For UK company law,[87] the word "company" is narrowly defined – it has a technical meaning under legislation as a company incorporated under the Companies Act 2006 or the act repealed by it, the Companies Act 1985[88] (which, itself, included all companies incorporated under predecessor acts[89]). However, in common parlance, this is not the case – historically, the word "company" was frequently used in society to refer to a number of legal vehicles,[90] a gap in use which remains today.[91] Thus when understanding societal issues it is wrong to look to narrow legal definitions. We need instead to look to the wider concept of linguistic personality to explore how a business operates in the world rather than focus on separate legal personality.

4. HOW MANY TITLES HAVE RANGERS WON?

These concepts relate to Scottish football, and particularly the question of Rangers' titles, because this issue exposes the folly of relying on separate legal personality as a tool to explore how companies operate. Rangers was founded in 1872 when four rowers observed people playing football on Glasgow Green.[92] The name "Rangers" has been claimed to be taken from an English rugby team, Swindon Rangers.[93] There is no evidence of a profit motive required in respect of the early founding of the club. This is legally important because without this profit motive, the initially formed vehicle cannot be said to be a partnership.[94] Instead, in the absence of profit, the club will have been formed as an unincorporated association.[95] Unincorporated associations do not have separate legal personality,[96] and therefore recourse against them has to be undertaken by suing their officers.[97] This provides a slight incongruity, as under Scots law both companies[98] and partnerships[99] enjoy separate legal personality.[100] In a frequently referenced[101] quotation, Sir Neil MacCormick argued that this is mistaken:

> The fact of the matter surely is that the law's non-personification of certain types of social collectivity is far more a matter of fiction than its conferment of personality is in the case of others. The fiction is not that the Royal Bank of Scotland has corporate identity, but that the

[87] This is deliberately limited to UK company law, as in international contexts there are attempts to universalise beyond these narrow definitions – see Kraakman et al (n 49 above).
[88] Companies Act 2006 s1.
[89] Companies Act 1985 s735.
[90] Philip Cottrell, *Industrial Finance 1830-1914* (London: Methuen, 1980), p.39.
[91] Deakin, Gindis & Hodgson (n 6 above).
[92] See L Herron, *Rangers: The Official Illustrated History* (London: Hachette, 2012), p.20.
[93] https://www.swindonadvertiser.co.uk/news/10651129.we-belong-to-glasgow-sort-of/ [Accessed 11 November 2021].
[94] For a discussion of the rules at the time, see Francis W Clark, *A Treatise on the Law of Partnership and Joint Stock Companies According to the Law of Scotland* (Edinburgh: T. & T. Clark, 1860), Vol.1, p.46. This is now governed by Partnership Act 1890, s1(1).
[95] *Conservative and Unionist Central Office v Burrell* [1982] 2 All ER 1; Douglas Bain, "Associations and Clubs (Reissue)" in Stair Memorial Encyclopaedia, para 1.
[96] Scottish Law Commission *Discussion Paper on Unincorporated Associations* (Discussion Paper No 140) December 2008, para 2.3.
[97] E.g. *Somerville v Rowbotham* (1862) 24 D. 1187; *Harrison v West of Scotland Kart Club* 2004 SC 615.
[98] Companies Act 2006, s16.
[99] Partnership Act 1890 s4(2); Macgregor (n 2 above). See also Hemphill (n 77 above), who argues that the claim of a Scottish partnership to enjoy separate legal personality is overstated.
[100] See also Hector MacQueen and Lord Eassie (eds) *Gloag and Henderson: The Law of Scotland* (14th edn, London: Sweet & Maxwell, 2017), Ch.47.
[101] *Kershaw v Connel Community Council* [2018] CSOH 111; *Discussion Paper on Unincorporated Associations* (n 96 above), para 1.5.

> National Union of Bank Employees lacks it. Indeed, clubs, trade unions and other unincorporated associations often have… much more reality than some such legally incorporated bodies as the one-man company in the celebrated case of Salomon v Salomon and Co Ltd. In the common law systems, there are various devices by way of manipulation of the law of trusts, of agency, and of contract, whereby to accommodate the social realities of unrecognised corporateness. The artificiality of these devices seems rather more obvious than the supposed artificiality of legal corporate personality.[102]

In addition to demonstrating a need for separate legal personality for unincorporated associations, it also demonstrates that separate legal personality does not provide an holistic overview of the interaction that the company has with the real world. These associations demonstrate linguistic personality even as they lack legal personality.

Nonetheless, when it was founded in 1872, Rangers did not have separate legal personality. Rangers does not seem to have let this get in the way of their footballing activity, as this was the case when the first "old firm" game was played in 1888,[103] when Rangers won their first Scottish Football League title in 1890,[104] and when they won their first Scottish Cup in 1894.[105] There is no doubt, though, that these were attributable to Rangers Football Club rather than the individual officers of the unincorporated association who ran the club at the time. The linguistic personality of the unincorporated association is evident even in the lack of separate legal personality – those operating were doing so within known rules applying to the whole group, and so the results of the outcomes of such operations must be attributable to the whole group rather than any individual, or even the aggregate of such individuals.[106]

The club incorporated on 27 May 1899, to form The Rangers Football Club P.L.C. (Registered number SC004276)[107] ("**OldCo**"). Incorporation is the "mysterious" creation of a new entity: before incorporation there is nothing, after incorporation a new person exists.[108] Incorporation, though, only creates a separate legal person – it does not imbue that separate legal person with any assets or contractual rights. Indeed, the initial memorandum of OldCo stated that its purpose was

> To take over and acquire, for the purpose of carrying on a Football Club, the whole property and assets and others referred to in and upon the terms defined by an agreement between the President, Vice-President, Treasurer and Secretary, and other Members of Committee of the Rangers Football Club, Glasgow, of the first part, and John Douglas MacIntyre, Writer, Glasgow, as Trustee for behoof of a Company to be formed and registered under the name of

[102] Neil MacCormick, *Institutions of Law* (Oxford: OUP, 2007), p.84.

[103] See Joseph M. Bradley, "British colonialism, Ireland and the 'old firm': postcolonial identities and contemporary Scottish football and society" (2021) Postcolonial Studies https://doi.org/10.1080/13688790.2021.1932255.

[104] Herron (n 96 above), p.21; https://spfl.co.uk/league/premiership/archive/102 [Accessed 11 November 2021].

[105] Herron (n 96 above), p.21; https://www.scottishfa.co.uk/scottish-cup/archive/scottish-cup-history/scottish-cup-winners/ [Accessed 11 November 2021].

[106] Gunther Teubner, "Enterprise Corporatism: New Industrial Policy and the "Essence" of the Legal Person" (1988) 36 American Journal of Comparative Law 130; French (n 60 above).

[107] https://find-and-update.company-information.service.gov.uk/company/SC004276 [Accessed 11 November 2021].

[108] E Merrick Dodd, "For Whom are Corporate Managers Trustees?" (1932) 45 Harvard Law Review 1145, 1160.

> The Rangers Football Club, Limited, of the second part, dated the twenty-fifth day of May, eighteen hundred and ninety-nine, or upon such other terms as may be agreed upon.[109]

The intention, then, was that OldCo acquired the property and assets of the club. An alternative would have been for the club to subscribe for shares in OldCo in exchange for the transfer of the property and assets that constituted the club to OldCo, which was a relatively common method of incorporation in the late nineteenth century.[110] In either event, though, a transfer of property and assets to OldCo was required. In other words, there was no continuity in legal vehicle between the previous unincorporated association with no legal personality and the new company with legal personality – there was a transfer of the business and assets from the club's officers to OldCo in 1899. Thus we see here limitations of separate legal personality analysis: the club continued but changed legal vehicle. This demonstrates the need for law to conceptualise the linguistic personality that continued throughout this transition.

In 1988, the majority of shares in OldCo were acquired by Murray International Holdings Limited, and its ultimate owner, David Murray, became the club's Chairman.[111] It appears that Murray International Holdings Limited sold all their shares in OldCo (amounting to 85.3%[112]) to Craig Whyte in May 2011 for £1, and as part of that transaction Whyte also bought the receivable owed by OldCo to Lloyds Banking Group, quantified at £18,000,000.[113] The transaction appears to have completed on the back of a solicitors' undertaking that certain funds were held by solicitors in preparation for completion[114] which was subsequently alleged not to present the true picture.[115] By early 2012, the financial performance of OldCo had deteriorated, caused in part by the dispute with HMRC as to the tax treatment of certain option schemes,[116] OldCo not paying other amounts due to HMRC,[117] and actions raised against the club by directors who resigned following the takeover.[118] As a result, OldCo filed[119] a notice of intention to appoint an administrator[120] on 13 February 2012, and duly appointed administrators as of 14 February 2012.

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[109] See Memorandum of Association filed on incorporation – available at https://find-and-update.company-information.service.gov.uk/company/SC004276/filing-history?page=9, paragraph 3(1) [Accessed 11 November 2021].

[110] E.g. see *Re Heyford, Pell's Case* (1869) L.R. 5 Ch. App. 11; *In re Baglan Hall Colliery Company* (1869-70) L.R. Ch. App. 346.

[111] See Full Accounts made up to 31 May 1989, filed on 23 February 1990 and available at https://find-and-update.company-information.service.gov.uk/company/SC004276/filing-history?page=8 [Accessed 11 November 2021].

[112] *The Rangers Football Club plc (in Administration) v Collyer Bristow* [2012] EWHC 1427 (Ch), [2].

[113] Scottish Football Association "Determination: Disciplinary Tribunal" Note of Reasons, 30 April 2012 para 34; Stephen Morrow, "Power and logics in Scottish football: the financial collapse of Rangers FC" (2015) 5 Sport, Business and Management 325.

[114] SFA Note of Reasons (n 113 above) para 25.

[115] *HMA v Withey* [2017] HCJAC 47; *The Rangers Football Club plc (in Administration) v Collyer Bristow* [2012] EWHC 1427 (Ch), [6].

[116] Form 2.16B(Scot): The Rangers Football Club plc (in Administration) Joint Administrator's Report to Creditors and Statement of Proposal, 5 April 2012 filed on 17 April 2012, available at https://find-and-update.company-information.service.gov.uk/company/SC004276/filing-history?page=1, para 5.19 [Accessed 11 November 2021].

[117] Ibid, para 5.13.

[118] Ibid, paras 5.15-5.16.

[119] See Form 2.11B(Scot) filed on 22 February 2012 available at https://find-and-update.company-information.service.gov.uk/company/SC004276/filing-history?page=1 [Accessed 11 November 2021].

[120] This took place under the then-applicable insolvency rules, the Insolvency (Scotland) Rules 1986 (SI 1986/1915) (as amended), Rule 2.19.

The act of entering administration meant that Rangers was docked 10 points in the Scottish Premier League.[121] The primary purpose of administration is to try to save the legal entity as a going concern,[122] as part of the UK's rescue culture.[123] The administrators of OldCo tried to achieve[124] this by undertaking a CVA,[125] and noted that should this fail then the intention was to transfer the entire business as OldCo to a new company, stating "[t]his would enable the business to continue, subject to approval by the relevant football authorities, under a different company registration number."[126] The CVA failed, due to resistance by HMRC, a major creditor. HMRC (according to the administrator) took "the view that the public interest will be better served with the liquidation of The Rangers Football Club plc as a corporate entity. The Club will continue to operate as it has always done but within a new company structure."[127] Thus the administrators clearly stated an intention to transfer the linguistic personality of Rangers to a different legal person. Rangers would continue, but the legal vehicle would change. Once more, this shows the need to have a conceptualisation to cover exactly what transferred from OldCo to NewCo.

NewCo bought the assets, business and undertaking of OldCo on 14 June 2012.[128] The result of such a business transfer was that an amount was paid from NewCo to OldCo, all assets and business transferred from OldCo to NewCo, but (crucially) the liabilities associated with the club remained in OldCo.[129] As a matter of law, the amounts owed by OldCo would not be transferred to be owed by NewCo. This is an interesting contrast to partnership law, whereby there is a presumption that a new vehicle which takes on the assets of an old vehicle also assumes its debts.[130] It is an evident area to explore further in respect of protections for the public when it comes to linguistic personality.

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[121] Scottish Premier League, *The Rules of the Scottish Premier League,* effective 14 May 2012, rule A6.8. See also Morrow (n 113 above). The SPL merged with the Scottish Football League in 2013 to form the Scottish Professional Football League – current rules result in a deduction of 15 points in the first season and 5 points in the second (subject to certain exceptions) – see *The Rules and Regulations of the Scottish Professional Football League* as at 29 July 2021 – available at https://spfl.co.uk/admin/filemanager/images/shares/pdfs/SPFL%20Rules%20and%20Regulations%2029-Jul-21%20(MASTER%20COPY)%20CLEAN.pdf, rule E1 [Accessed 11 November 2021].

[122] Insolvency Act 1986 Sch B1, para 3.

[123] Department of Trade and Industry "Insolvency – A Second Chance" White Paper July 2001 (CM 5234). For academic discussion, see Sandra Frisby, "In Search of a Rescue Regime: The Enterprise Act 2002" (2004) 67(2) Modern Law Review 247, and Ian F Fletcher, "UK Corporate Rescue: Recent Developments – Changes to Administrative Receivership, Administration and Company Voluntary Arrangements – The Insolvency Act 2000, The White Paper 2001 and the Enterprise Act 2002" (2004) 5(1) European Business Organization Law Review 119.

[124] Form 2.16B(Scot): The Rangers Football Club plc (in Administration) Joint Administrator's Report to Creditors and Statement of Proposal, 5 April 2012 filed on 17 April 2012, available at https://find-and-update.company-information.service.gov.uk/company/SC004276/filing-history?page=1, para 6.2 [Accessed 11 November 2021].

[125] See Gerard McCormack, "Control and corporate rescue: an Anglo-American evaluation" (2007) International and Comparative Law Quarterly 515. In the context of the Rangers discussion, see Gretton (n 17 above).

[126] Form 2.16B(Scot): The Rangers Football Club plc (in Administration) Joint Administrator's Report to Creditors and Statement of Proposal, 5 April 2012 filed on 17 April 2012, available at https://find-and-update.company-information.service.gov.uk/company/SC004276/filing-history?page=1, para 6.4 [Accessed 11 November 2021].

[127] See "Rangers takeover: Duff and Phelps Statement in full", The Scotsman, 12 June 2012.

[128] See https://www.bbc.co.uk/news/uk-scotland-glasgow-west-18447530 [Accessed 11 November 2021].

[129] See Form 2.20B(Scot), Administrator's Progress Report filed on 28 August 2012, available at https://find-and-update.company-information.service.gov.uk/company/SC004276/filing-history?page=1 [Accessed 11 November 2021].

[130] *Scottish Pension Fund Trustees Ltd v Marshall Ross & Munro* [2018] CSIH 39. See discussion in Macgregor (n 2 above).

Amongst the assets frequently transferred in such a business and asset sale, such as that from OldCo to NewCo, are all licences held by the business at the time.[131] As such, it is no surprise that a key part of the business and asset sale was the licence that Rangers had to play in the top tier of Scottish football – known as its "SPL share".[132] Such transfer was subject, at the time, to approval from all of the chairmen of the 12 Scottish Premier League clubs. This approval was denied,[133] meaning that NewCo could not take OldCo's place in the Scottish Premier League.

The sale and purchase agreement between OldCo and NewCo mandated OldCo to assist NewCo in acquiring membership of the Scottish Football Association and at least one of its leagues – the SPL (the top league), or the lower leagues contained in the Scottish Football League.[134] Agreement was ultimately reached among the various parties that OldCo's SPL share would be transferred to Dundee Football Club (who had been the runners up of the second division the previous year), that OldCo's SFA membership would be transferred to NewCo, that due to OldCo's conduct there would be a transfer embargo on NewCo for 12 months, that NewCo would settle all of OldCo's debts to third parties, and NewCo would enter the lowest and fourth tier of the SFL.[135] Thus we see that NewCo were willing to take two steps which were not technically required by law: assuming the debts of OldCo, and taking on membership in a lower division. The former was not required as a matter of law, and the latter was a lesser asset than OldCo enjoyed. So eager was NewCo to acquire the linguistic personality of Rangers that they did so despite these hurdles.

NewCo's first accounts state that they paid £2,721,000 of the football debts that had accrued to OldCo.[136] They also state that there had been a high degree of turnover of first team players ("[o]nly seven of the 2011/12 squad remained with the Club, with a further two players going out on loan in 2012/13"[137]). On 19 December 2012, Rangers listed its shares on the capital market,[138] known as an initial public offering, or IPO.[139] To achieve this, a second new company called Rangers Football plc (registered number SC437060) ("**ListCo**") was incorporated on 16 November 2012.[140] ListCo changed its name on 27 November 2012 to Rangers International Football Club plc.[141] On

[131] On the prevalence of licenses, see Andrew Tettenborn, "Of Bunkers and Retention of Title: When is a Sale Not a Sale?" [2016] Lloyds Maritime and Commercial Law Quarterly 24. Licences are frequently material in respect of transfers of business and assets – see *Daniel Reeds v EM ESS Chemists* [1995] CLC 1405.

[132] See Form 2.20B(Scot), (n 129 above) at paras 6.2 and 6.3.

[133] https://www.bbc.co.uk/sport/football/18703183 [Accessed 11 November 2021].

[134] See Form 2.20B(Scot), (n 129 above) at para 6.3.

[135] Ibid para 6.3. See also "In Full: Agreement on transfer of membership between Rangers FC and The Rangers FC", available at http://www.scotzine.com/2012/07/in-full-agreement-on-transfer-of-membership-between-rangers-fc-and-the-rangers-fc/ [Accessed 11 November 2021].

[136] The Rangers Football Club Limited Annual Report and Financial Statements for the Period Ended 30 June 2012, filed on 4 April 2014, available at https://find-and-update.company-information.service.gov.uk/company/SC425159/filing-history?page=3 p3 [Accessed 11 November 2021].

[137] Ibid.

[138] https://www.bbc.co.uk/news/uk-scotland-glasgow-west-20773142 [Accessed 11 November 2021].

[139] See discussion in Luca Enriques and Tobias H. Troger, "Issuer choice in Europe" (2008) 67 Cambridge Law Journal 521; Andrew F. Tuch, "Securities underwriters in public capital markets: the existence, parameters and consequences of the fiduciary obligation to avoid conflicts" (2007) 7 Journal of Corporate Law Studies 51. For discussion of the process in comparison to other processes in the US and Canada, see Cécile Carpentier, Douglas Cumming and Jean-Marc Suret, "The value of capital market regulation: IPOs versus reverse mergers" (2012) 9 Journal of Empirical Legal Studies 56.

[140] https://find-and-update.company-information.service.gov.uk/company/SC437060 [Accessed 11 November 2021].

[141] See certificate of change on name issued on 27 November 2012, available at https://find-and-update.company-information.service.gov.uk/company/SC437060/filing-history?page=5 [Accessed 11 November 2021].

19 December 2012, ListCo's shares were IPO'd, and it acquired the entire share capital of NewCo by way of a share-for-share exchange,[142] in which existing shares in NewCo were transferred to ListCo in exchange for the issue of shares in ListCo to those who had previously held shares in NewCo.[143]

Rangers won their first title since the transfer from OldCo to NewCo in the 2020-21 season. To recap: Rangers spent the first 27 years of its life as an unincorporated association, with no separate legal personality, when it won its first title. It incorporated in 1899, necessitating a transfer of all business and assets from this association into OldCo. All assets transferred from OldCo to NewCo on 14 June 2012. NewCo still owns the club, but its share ownership has changed as a result of the introduction of ListCo, the share-for-share exchange, and ListCo's subsequent listing. So does this represent a 55th title – a continuation of the club's tradition started at Glasgow Green as an unincorporated association nearly 150 years ago - or the first title as OldCo no longer runs the club? As this question is of some importance within Scottish football and wider society, it is important that corporate law theory can provide an answer as to whether the transfer of OldCo's assets to NewCo included the right to have titles attributed before its incorporation.

In favour of continuity lie the continual branding and name running through, the transfer of the SFA membership, the transfer of all of OldCo's assets into NewCo, the voluntary assumption of some of OldCo's liabilities by NewCo, the fact that NewCo accepted a punishment for the activities of OldCo, and the fact that players transferred. In other words, the arguments in favour of continuity are that NewCo acquired the linguistic personality of OldCo. In favour of the new club idea lie two arguments – that Rangers required to be readmitted at the bottom tier of the Scottish Football League (as a result of a vote by clubs), and that it is now owned by a separate legal person to OldCo.

As a societal phenomenon, Rangers Football Club continued in its transfer from OldCo to NewCo. Only in its narrowest legal form – based on the vague notion of OldCo and NewCo enjoying separate legal personality from each other – does NewCo not attain the previous 54 titles. After all, the club remains. All that separate legal personality means is that the legal entity can have rights and obligations, not what the content of those rights and obligations is. By assuming all the rights and some of the liabilities of OldCo, NewCo adopted substantially the same calibration of rights and duties as OldCo. It is this content, this linguistic personality, that should be judged to answer the question. There is still doubt about what counts as substantially the same calibration of rights and obligations. What if OldCo had sold Rangers' historic ground, Ibrox, to one company and Rangers' name and brand to another? Which then would, under the arguments advanced above, obtain the linguistic personality of OldCo? This is an important issue but unfortunately the precise nature of the content that must be transferred is an issue which is broader than the scope of this article allows as it is irrelevant for the issue at hand: OldCo's assets, and some of its liabilities, were transferred to NewCo. This demonstrates the value of linguistic personality in solving issues such as this over separate legal personality. The benefits of conceptualising through linguistic personality become evident by way of simple example: if OldCo sold Rangers to NewCo,

[142] The Rangers Football Club Limited Annual Report and Financial Statements for the Period Ended 30 June 2012, filed on 4 April 2014, available at https://find-and-update.company-information.service.gov.uk/company/SC425159/filing-history?page=3 p30 [Accessed 11 November 2021].

[143] See discussion in Fedilis Oditah, "Takeovers, share exchanges and the meaning of loss" (1996) 112 Law Quarterly Review 424. The technique historically provided tax advantages – see Dominic Gibbs, "Anti-avoidance: Trustees of the Morrison 2002 Maintenance Trust v Revenue and Customers Commissioners" (2021) 42 The Company Lawyer 27.

but instead of being liquidated OldCo then bought the Italian football club S.S. Lazio, we would not believe that, in some way, S.S. Lazio had won any Scottish football titles even though the legal person stayed the same.

Of course, the nature of enquiry is different between separate legal personality and linguistic personality. Whilst company law notions of separate legal personality are used to identify unifying notions of corporateness, linguistic notions of personality are used to differentiate between persons. Thus, as the OED stated, a person's linguistic personality consists of qualities that make that person distinctive from another person. The social qualities transferred from OldCo to NewCo are myriad – the Club itself, consisting of the club's historic[144] ground, player book, SFA membership,[145] and all other incidents of football are indicative of the distinctive qualities of OldCo being transferred to NewCo. Thus, in linguistic terms, OldCo's personality was transferred to NewCo. This is because the calibration of rights held by OldCo, and some of its duties, were passed to NewCo. This must include moral right to titles that OldCo held – whether originally won by OldCo, or acquired by OldCo when the unincorporated association incorporated in 1899.

The argument advanced, then, is that by acquiring the business and assets of OldCo, NewCo acquired its personality in the linguistic sense, as the content of OldCo's rights in and to the assets of Rangers Football Club were transferred to NewCo, and NewCo voluntarily assumed a key part of OldCo's liabilities – being those owed to other football clubs. As such, whilst separate legal personality becomes a vaguer – and therefore weaker – analytical tool with which to examine the issue, linguistic personality tells us that the distinctive features of Rangers – those which mutually reinforced themselves towards linguistic personality of the intangible concept of "Rangers Football Club" - must have transferred from OldCo to NewCo. Indeed, this link between OldCo and NewCo will have been subject to the tacit legal protections in respect of linguistic personality that were identified above.

This may appear to be bad news for those who wish to argue that NewCo only holds one title – particularly Rangers' arch rivals also from Glasgow, Celtic.[146] However, closer examination reveals that all may ultimately be content to let NewCo retain their titles – Celtic started playing in 1887,[147] won titles in 1892/93, 1893/94, and 1895/96,[148] and yet were only incorporated at Celtic plc in 1897.[149] Thus, if the amorphous concept of separate legal personality trumps anything, whilst Celtic was an unincorporated association, it had no separate legal personality, and thus the incorporation of Celtic plc would represent a similar break in continuity to that faced by Rangers in 1899. More pertinently, though, the accounts of Celtic plc (the company incorporated in 1897) tell an important story – stating that "The Company's wholly owned subsidiary undertaking continues to be Celtic F.C. Limited, the main activity of which is the operation of a professional

[144] Rangers moved to Ibrox in 1899 – see Herron (n 92 above), p.21.

[145] "The Scottish FA is the governing body for football in Scotland. It is a members' organisation, made up of 89 clubs and nine affiliated regional associations" - https://www.scottishfa.co.uk/scottish-fa/organisation/strategy-structure/who-we-are/ [Accessed 11 November 2021].

[146] See Herron (n 92), Ch.8.

[147] See https://www.celticfc.com/history/history-timeline [Accessed 11 November 2021].

[148] For final league positions for each, see https://spfl.co.uk/league/premiership/archive/100; https://spfl.co.uk/league/premiership/archive/99; [Accessed 11 November 2021] https://spfl.co.uk/league/premiership/archive/97.

[149] https://find-and-update.company-information.service.gov.uk/company/SC003487 [Accessed 11 November 2021].

football club."[150] Elsewhere it states "The principal activity of the Company [Celtic plc] is to control and manage the main assets of the business whilst the majority of operating activity is carried out by a subsidiary of Celtic plc, Celtic F.C. Limited."[151]

Celtic F.C. Limited was incorporated on 24 September 2001,[152] as a shelf company originally named "HMS (402) Limited", by Harper MacLeod Solicitors, with their registered office at the same registered office as such solicitors, the secretary being "HMS Secretaries Limited", the director being "HMS Directors Limited" and the initial shareholders being HMS Directors Limited and HMS Secretaries Limited.[153] This company changed its name to Celtic F.C. Limited on 17 January 2002.[154] The first accounts filed for Celtic F.C. Limited contain the phrase "[o]n 15 February 2002, aspects of the trade of Celtic plc, together with certain assets and liabilities were transferred to Celtic FC [sic] Limited. The principal activity of the Company is the operation of a football club together with related ancillary activities."[155] By this time, Celtic F.C. Limited was wholly owned by Celtic plc.[156] It therefore seems obvious that Celtic Football Club was subject to a "hive-down"[157] – with the football club transferred from Celtic plc to Celtic F.C. Limited – a club wholly owned by Celtic plc. This makes it fundamentally different to the transfer from OldCo to NewCo, as the old company became the owner of all shares in the new company, rather than the old company and new company being entirely unrelated. Nevertheless, this transfer was also to what law considers to be a separate legal person. As such, if Rangers – through NewCo – have won one title rather than 55; then Celtic – through Celtic F.C. Limited – have won 13 titles rather than 51. This would mean that the most successful Scottish football club was OldCo, with 52 titles, followed by Celtic plc (which is not currently running a football club, but owns the shares in a separate legal person who now owns the football club) with 34 titles, followed by Celtic F.C. Limited with 13. This is before we trace the history of those titles – as the Scottish Football League from 1890-91 to 1997-98, to the Scottish Premier League from 1998-99 to 2013, and the Scottish Premiership from 2013 to date.[158] Atomisation to separate legal personality may result in legal certainty, but at the expense of aggregate understanding of societal phenomena at play. The football club context demonstrates how misguided it would be for legal analysis to focus on the former at the expense of the latter.

Football clubs are, perhaps, not typical companies. Certainly, arguments have been raised that they should be conceptualised as more social phenomena, rooted in their communities, and as

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[150] https://cdn.celticfc.com/assets/downloads/SE_notifications/Celtic_plc_Annual_Report_30June2020.pdf, p 66 [Accessed 11 November 2021].

[151] Ibid, 7.

[152] https://find-and-update.company-information.service.gov.uk/company/SC223604 [Accessed 11 November 2021].

[153] See Incorporation forms filed on 24 September 2001, available at https://find-and-update.company-information.service.gov.uk/company/SC223604/filing-history?page=4 [Accessed 11 November 2021].

[154] See certificate on change of name issued on 17 January 2002, available at https://find-and-update.company-information.service.gov.uk/company/SC223604/filing-history?page=3 [Accessed 11 November 2021].

[155] See full accounts filed on 19 March 2003, available at https://find-and-update.company-information.service.gov.uk/company/SC223604/filing-history?page=3 [Accessed 11 November 2021].

[156] See return made up to 24 September 2002 filed as of 8 October 2002, available at https://find-and-update.company-information.service.gov.uk/company/SC223604/filing-history?page=3 [Accessed 11 November 2021].

[157] See discussions in Marion Simmons, "Some reflections on administrations, crown preference and ring-fenced sums in the Enterprise Act" [2004] Journal of Business Law 423; David Cabrelli, "The case against the floating charge in Scotland" (2005) 9 Edinburgh Law Review 407.

[158] See https://www.bbc.co.uk/sport/football/23435136 [Accessed 11 November 2021].

such have different characteristics to the typical company.[159] However, the fact that the gap between the narrow conception of separate legal personality and the club's linguistic personality is bigger in football clubs merely itself illustrates that there is a gap between the wider concept of the business and the legal entity in which the business sits from time to time. This gap is filled by linguistic personality. The role that linguistic personality has to fulfil (the space between the narrow concept of separate legal personality and the wider understanding of how the company exists in the world) will ebb and flow depending on the company in question. It will, however, exist – and legal analysis needs to better conceptualise it.

5. CONCLUSION

Separate legal personality is here to stay as a descriptive and analytical concept. We therefore cannot replace separate legal personality with something more akin to linguistic personality. The benefit, though, of us not being able to understand fully what separate legal personality means, with its vaguer universal conception, is that we do not need to try to. We merely need to understand its limitations. OldCo and NewCo each have separate legal personalities. Someone at Ibrox on the day of the transfer, though, would not have been able to tell the difference between the transfer of assets and the transfer of shares from OldCo's previous owners to new owners (coupled with sufficient capital injection to repay OldCo's unsatisfied liabilities). This perhaps tells us that the societal impact of separate legal personality is less important than the societal impact of linguistic personality.

So how many titles have Rangers won? Well, it depends. If we focus on separate legal personality, The Rangers Football Club Limited (NewCo) (Registered Number SC425159) has won one title, The Rangers Football Club P.L.C. (OldCo) (Registered number SC004276) won 52 titles, and the unincorporated association of Rangers Football Club won two. However, the indeterminancy of what we mean by separate legal personality – coupled with its opposite use to linguistic personality – means that it is too loose a concept to use to answer such a question outside of a law classroom.

Instead we should follow McCormick's approach – the fiction is not that each of NewCo and OldCo in some way have separate legal personality, but that the aspect that connects them both, and where the linguistic personality of both lay, is lacking in legal analysis. As Dewey stated 95 years ago, being a separate legal person only means that you can have rights and duties. It does not tell us what those rights and duties are, and the calibrations of those rights and duties make a much bigger societal impact than the bland ability to have rights and duties.

Linguistic personality currently appears only tacitly in law. We spot it in the need for a few insolvency concepts and some insolvency practice. It remains, though, without a conceptual legal footing. This must be a lacuna in our legal understanding of business entities. The way to start remedying this is to state clearly that Rangers Football Club has 55 titles. The legal entities involved are as irrelevant to this answer as a hive-down in 2002 was for Celtic.

[159] Sean Hamil and Stephen Morrow, "Corporate social responsibility in the Scottish Premier League: Context and Motivation" (2011) 11 European Sport Management Quarterly 143; Benoît Senaux, "A stakeholder approach to football club governance" (2008) 4 International Journal of Sport Management and Marketing 4; Morrow (n 113).