**HOUSE OF LORDS call for evidence MENTAL CAPACITY ACT 2005 ("MCA")**
**14 September 2013**

**Witness: Mira Makar (Miss) MA FCA**

The witness thanks the House of Lords for the opportunity to provide this evidence.

As requested, the evidence draws on experience without being case specific. It deals with abuse only.

## *Summary*

1. The MCA is dangerous. It replaces one person for another in respect of decisions which are properly made by the first, the person affected. Identity, rights, entitlement to be heard, to be able to challenge, to be able to choose, to be able to benefit from rights already won or to which there is entitlement, all disappear. The MCA can be, and is, used abusively including in particular where there is no evidence.

2. Perversely, the MCA facilitates a judicial forum and process from which a person is excluded. A process can start and reverse purportedly under the MCA, with no evidence. This is the exact opposite of the objectives of the MCA to facilitate inclusion and access, ***even if*** decision-making capacity is inadequate, and there is a surrogate or deputy required, to mimic the outcome, had there been capacity.

3. That forum in itself, by exclusion of the victim, facilitates an opportunist not replying to previous challenges (eg on the jurisdiction of the court) which have been made by the victim (and/or their representatives) and to making up evidence without it being subject to challenge by the victim.

4. There is no obligation on the person seeking to trigger the MCA against another being required to identify themselves or assert their complaint, prejudice which they have suffered or pecuniary benefit which they seek and state why they think they are entitled to it from the victim.

5. The MCA can therefore be used as one of a plethora of "*litigation weapons*" and indeed as a litigation weapon of last resort to achieve money benefits purportedly from the victim, the securing of which involves driving them into bankruptcy, thereby actually excluding them from access.

6. There appears a well oiled engine between the courts, the Official Solicitor, the police, social services, doctors and psychoanalysts that once triggered by any mechanism, operates in a manner that is unstoppable, to the exclusion of the victim.

7. These activities could not take place unless there is underlying identity theft, and theft, misuse and trading in personal data secured from private investigators and hacked from banking, solicitor, accountant records, amongst those concerned, lubricated by UNLESS orders from the courts.

8. Similarly they could not take place if the Official Solicitor did not refuse to deliver up personal data, refuse to account, and DACU (data access and compliance) omit to refer such abuse to the police.

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## Overview and context

*1. To what extent has the Mental Capacity Act 2005 (MCA) achieved its aims?*

1. The MCA has not achieved its aims. The evidence in this paper refers to cases of abuse only.

*2. Which areas of the Act, if any, require amendment; and how?*

2. A grass roots re-think is required of the fundamental principle of replacing a person with another; the impossibility of safeguards; and the need to be seen to speedily prosecute abuse, with the prosecution route well oiled.

3. It is extraordinary the MCA can be used for pecuniary gain as ruthlessly as it is so used, and that there are no consumer safeguards in place: for a person first hearing the word "capacity" by itself, the natural understanding is of resource capacity, eg "*can you take on a piece of work, do you have time, resources, budget*?" not "*does your brain work?"*

4. Empirical data and specific cases require public examination and offenders must be prosecuted.

*3. At the core of the MCA are its principles and definitions of capacity and best interests. Are these appropriate?*

5. No. The reasons are set out below for each principle.

***Principle 1**: 'A person must be assumed to have capacity unless it is established that he lacks capacity.' (section1(2))*

6. The principle should read "*A person is presumed to have capacity*" and stop.

7. This per se is sufficient together with human rights to record the correct position in law and to protect everyone.

8. The UNLESS qualification is extremely dangerous. This is because it says that a person will be treated "AS THOUGH" they did not have (mental) capacity (*implicitly: even if they do have*), as far as the courts are concerned, so long as "*it is established"* they do not.

9. Importantly "*it is established*" does not require the involvement of the person, their knowledge, their agreement.

10. The consequence is that, so long as there is an indicator of "*it is established*" by any person, in particular to the exclusion of the person involved, that person may, with purported impunity, have their identity used and their judicial standing usurped and know nothing about it.

11. The consequence is obvious: civil rights of the victim are given up, asset and contingent asset stripping, laundered and layered through the courts, all unbeknown to the victim and their dependants, who are voiceless throughout.

***Principle 2***: *'A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.' (section1(3))*

12. *"all practicable steps to help him to do so without success"* is an aspiration which is doomed to failure because the person (victim) is excluded.

13. Implicitly the principle says "*all practicable steps.. have been taken* ***by another person or persons****"* . This exclusion is totally opposite to principles of human rights and natural justice.

14. Similarly "all practicable steps to help him to do so have been taken without success". The exclusion of the person from establishing what is and what is not success and whether the steps taken are the right ones to establish success or failure fails because the person is excluded.

***Principle 3****: 'A person is not to be treated as unable to make a decision merely because he makes an unwise decision.' (section 1(4))*

15. There are at least two persons involved in this principle. The first is the person themselves (nr 1). The second is the person passing judgment (nr 2) on a purported decision made by the first.

16. The person, their choice and the decision they make are all the property of the person, including their rights to unfettered enjoyment, privacy, confidentiality, a fair trial, family life. This bundle of rights, it would appear, is thrown out of the window, when there is a second person, and doubt is thrown up by person 2 as to whether a decision of the first is "*unwise*" or not (lack of wisdom is an allegation which is disparaging of the person and will blacken their name in any event).

    If not "*merely unwise*" it may also suggest "*lacking capacity*", with the extra task of a determination of the difference between "*merely unwise*" and "*lacking capacity*", person 2 being in the driving seat and person 1 excluded.

***Principle 4**: 'An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.' (section 1(5))*

17. There is a fatal fudge in this principle. Implicitly it says "*An act may be done, or decision may be made, under this Act for or on behalf of a person….."* This should be made explicit so that MPs voting truly understand what is being said.

18. The principle is: "one person (nr 1) may be the surrogate of another (nr 2) in law and therefore the judicial system". In other words the INDENTITY and RIGHTS of person 1 can be assumed by person 2, and person 2 will be treated in law "as though" they were person 1.

19. The fundamental question for MPs is; "*Can a system of safeguards ever be robust enough that Parliament can be satisfied that the outcome would exactly mirror the outcome had the decision been that of person 1 plus the full consequences of further decisions and consequential decisions?"* Plainly the answer must be "no".

***Principle 5**: 'Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.' (section 1(6))*

20. Principle 5 is also a fudge: either a surrogate (person 2) assumes the identity and rights of person 1 in law and the judicial system, or they do not. A decision on the way in which person 1's "*rights and freedom of action"* are curtailed, to a greater or lesser extent, is made by person 2 and not person 1, and cannot be separated from the decision itself.

21. Recent rulings by the Family Court and the Court of Appeal on Family matters illustrate explosively that the judiciary have simply had enough, and do not except simply being the stooges of local authority workers: this is no more than the anonymous reports by Family court judges in the Guardian in December 2012 and February 2013, that Family court judges needed protection to carry out what they were being asked and expected to do, and that those objecting could be doing so with justification. In particular the police "hotline" gave no response.

22. Those circumstances are no different to those of persons making use of the Mental Capacity Act 2005, as yet another financial product for layering and laundering in the courts. This is a forum where there is no proceeds of crime vetting on case take on ie a free-for-all.

23. By this mechanism it is possible to steal the identity of another person and trade in their personal data, secured by infiltrating personal records including banking records, the perpetrators blagging their way including to securing access to confidential court records.

    They use private investigators to establish points of weakness and therefore leverage, in particular over financial businesses with control over victims' assets and finally they secure the services of the Official Solicitor, a mental health "expert", high court judges, pre-retirement or deputizing post retirement under the Mental Capacity Act 2005, freeze out the victim, obtain money benefit from a court of competent authority against the victim, and use statutory demands and the Companies and Bankruptcy Courts to bankrupt and asset strip the victims. In this court there is no public inspection of records available ie a secret court run essentially on behalf of the Insolvency Service.

*4. To what extent have the five principles of the MCA been implemented in frontline practice? What evidence is available to assess this? Is there a satisfactory balance between enablement and protection?*

24. The MCA has been used (in abusive cases, the subject of this evidence) to achieve the opposite of the purpose behind the MCA, to give voice to those who are voiceless when decision making capability stops them being able to do it for themselves.

25. The MCA has become yet another litigation weapon to steal from those who are not heard but whose identity has been used, financed by their property in order to secure pecuniary benefit at their expense to which there is, and can be, no proper entitlement.

*5. How effective was the Government's implementation plan? What measures were taken to ensure that professionals and families of those who lack capacity know about and act in accordance with the provisions of the MCA? Has it led to sustainable change?*

26. Hopeless. No warning was given to the public that this new litigation tool existed and was going to be used by the state against the electorate, with state officials purporting empowerment in secret trading of personal data and refusing all contact with witnesses/victims. The techniques used are what one imagines Stalin's Russia must have been like.

27. The Information Commissioner has not made his presence felt in this area at all, issued no warnings: the ***two months*** delay recently negotiated by him from the Home Office Committee in regard revelations on the clients of rogue private investigators, is piling pressure on exposing the trade in personal data, and the MCA and abuse in this area is fertile territory for investigation.

28. Similarly the investigations in regard WHISTLEBLOWING (now BIS, FCA re encouraging, and the Parliamentary Commission on Banking Standards), have not, it seems, properly reached the investigations into abuse of the MCA.

This is now a tool for silencing whistle blowers (eg case of airline pilot who blew the whistle on the toxic air that is breathed in aircrafts), usually associated with asset stripping them, putting burden on them, and racking up legal expenses that cannot be paid and which are used to take the person's home.

29. The use of the Official Solicitor in bankruptcy cases for vulnerable people is also open to question: with the staff of the Official Solicitor publicly evidencing they want to come in at the start and take over.

    There is absolutely no protection for victims of the Official Solicitor and his staff. It is a mystery that either BIS or the courts put up with this disorderliness.

    The administration staff make statements that they know are not true (on existence of records and who did what) and when they finally decide to come clean, exclude their victims, and never remotely consider apologising.

30. The Official Solicitor operates in contravention of the Data Protection Act, does not provide personal data within 40 days and ought to be at least suspended for investigation and possibly closed down for trading illegally, for the protection of the public.

*6. Is the Act widely known and understood by professionals required to implement it? How does this differ across different sectors, such as health, social care, banking and others?*

31. The paths of abuse are well trodden and well known. Victims facing the abuse for the first time suffer from the hurdle of disbelief. It beggars belief that state bodies and officials can act in co-operation in such flagrant abuse of the law. That they can stoop to procuring "court orders" that are sent late to the wrong address so they do not arrive, so they can rail-road through what they want and get paid, is shocking.

32. The mere fact that any person can trigger such a process against another, ***without proving either who they are or what prejudice they have suffered***, speaks volumes for how the MCA is merely regarded as yet another "tool". This is just the same as getting a "Civil Restraint Order" against someone in order to stop access to civil relief, or compelling someone who is a witness/victim to file under PIDA (public interest disclosure act), In such a case they have to survive the opponents publicly destroying their character (the underlying wrongdoing does not get aired), rather like the ducking stool in the middle ages where you were declared innocent if you drowned. A person who dies loses their human rights; those left behind are not regarded as having lost anything.

*7. Is the Act widely known and understood by those who are directly affected by it and by their non-professional carers? To what extent does the Act provide protection and reassurance for informal carers? Has the right balance between struck between protection of the carer and protection of the individual lacking capacity?*

33. No. In particular there are no public reports on evidence and those that have begun to collect evidence explicitly are not collecting case specific evidence. However without case specific evidence, trends cannot be properly established.

34. MoJ/HMCTS do not run MIS (management information systems) to provide the required data on abuse.

35. The use of "PRIVATE" hearings has become a device to purportedly legitimise bring in the perpetrators and excluding the public.

    Police say that there is no indictable offence in the uncertainty and terror including mental anguish this causes to victims and their families and dependants; it would have to be indicted as GBH (grievous bodily harm, offences against the person), as mental damage is an offence against a person as much as a physical attack is.

36. The MCA does not explicitly provide for offences under the Act, and a cause of action to the victims against the perpetrators and those who authorise or wilfully permit their action, including the right to have their identity revealed and a prosecution path without burden.

*8. Has the Act ushered in the expected, or any, change in the culture of care?*

37. Yes. Made it a "financial product" as many others, requiring explicit consumer and public protection.

*9. Is there any evidence that the provisions of the MCA affect some groups disproportionately? If so, what data exists to compare representation across different socio-economic groups, Black and Minority Ethnic groups, and gender?*

38. Yes. Those whose identity is being stolen: their families and dependant families; executors of the estates of the dead; anyone who gets caught up in a dispute/standoff not directly involving them, but in which the disputing parties decide the victim will pay *("close the file in this case, but retain the relationship between us"*); cases where the prosecuting bodies decide to prosecute according to who the villain is rather that what the crime is (fraudulent misrepresentation, identity theft, trade in personal data, conspiracy, acts of perverting the course of justice, blackmail, bribery, money laundering, false accounting etc), thereby leaving them at large and no protection for the victims .

## Decision making

*10. Are those directly affected by the Act being enabled and supported to make decisions for themselves to a greater or lesser extent than they would have been in the past? Does the means by which the decision is made – 'general authority', Lasting Power of Attorney, deputyship, Court of Protection – affect the quality of decision making?*

39. The MCA is used against those with no decision making difficulties and no evidence in order to achieve financial gain for others.

40. The principle of "surrogacy" is the one that is open to challenge, not the detailed form.

*11. What evidence is there that advance decisions to refuse treatment are being made and followed?*

41. By excluding a person, with a label "mentally incapacitated", the question of mental capacity is not considered, evidence is not required, and therefore the outcome is a matter of speculation and leverage.

*12. Has the MCA fostered appropriate involvement of carers and families in decision-making?*

42. These are excluded and not informed. Where the person labelled "mentally incapacitated" has dependants, family, staff, all are excluded, leading to ending of careers, closing of businesses, inability to look after older folk at home in families where the main bread winner is made redundant, and death in cases where the care home falls short of standards.

43. There is no organized way to collect data on damage, consequential damage and loss to the economy.

*13. Has the role of the Independent Mental Capacity Advocate (IMCA) succeeded in providing a voice for clients and an additional safeguard against abuse and exploitation for those who have no-one to speak on their behalf?*

44. No. The Official Solicitor (Alistair Pitblado) and his staff (as John Ingram) step in, refuse to communicate, refuse to meet or take calls, refuse to provide personal data and hire counsel in court to the exclusion of the person whose identity is taken and used.

*14. Has the level of referrals to IMCAs met expectations? What are the reasons for the regional variations in the number of referrals?*

45. No first hand experience

*15. Are IMCAs adequately resourced and skilled to assist in supported or substituted decision making for people lacking capacity?*

46. No first hand experience

## Deprivation of Liberty Safeguards

*16. Are the safeguards in the Deprivation of Liberty Safeguards (DoLS) adequate?*

47. No first hand experience

*17. Are the processes for authorisation, review and challenge of DoLS sufficiently clear, accessible and timely?*

48. No first hand experience

## The Court of Protection and the Office of the Public Guardian

*18. Are the Court of Protection and the Office of the Public Guardian sufficiently understood and accessible to all? Are they operating effectively and successfully?*

49. No first hand experience

*19. What has been the impact of the introduction of Lasting Powers of Attorney (LPA), especially with regard to decision making on matters of personal care and welfare?*

50. No first hand experience

*20. What concerns, if any, are there regarding the costs associated with registering an LPA, or with making an application to the Court of Protection?*

51. No first hand experience

*21. Is legal aid available and sufficient? What impact will the recent and proposed reforms to legal aid have?*

52. No first hand experience

## Regulation

*22. Is the role of the Care Quality Commission in inspecting on the MCA standards adequate and appropriate? Is there a case for additional powers?*

53. The Care Quality Commission has been publicly discredited. I have nothing to add to the public evidence that has already come out. There is a vacuum in regard what it ought to be doing.

*23. Should other regulatory bodies, such as health and social care professional regulators, be acting in this area?*

54. Social services are used by police to turn financial crimes reported into an issue with the person who is the witness/victim. However where the perpetrators who abuse MCA are not stopped by police/others, the witnesses/victims do not get protection under the witness and victim protection schemes.

55. Social services co-operate with police to gain unlawful access to victims medical records and details of registration, secretly communicate with doctors and use the doctors to gain inspection of the victims/witnesses, as a back-door method of securing evidence that can then be used under the MCA.

56. Social services are offensive about personal faith, exclude spiritual healing from their tool-kit, and therefore support from clergy. They assert they prefer "*something more practical*" in reference to forced attendance at a doctor to secure the record that would support incapacity and exclusion etc.

57. The courts co operate in this process by UNLESS Orders and "embargo'ed" decisions that it would be an offence to reveal including to citizens advice and an MP or family.

58. Reports to MoJ (Petty France) and to Ministers Grayling and Grant do not reach them: MoJ say they can only refer them to a "complaints" team who then say they have no experience and do not know what to do. The honesty is refreshing.

59. Those local authorities with control over the homes of the victims/witnesses are able to exercise leverage by ending leases and offering the opportunity of co-operation to the perpetrators such that the witnesses/victims may be evicted, the properties sold and the proceeds shared.

60. MoJ (and HMCTS) are signed up to the Domestic Violence, Crime and Victims Act and Code, but in practice do not treat the witnesses/victims as such, but rather as the wrong-doers themselves, and enter into arrangements with the wrong-doers to go down the MCA route.

61. Trading in personal data is endemic, in particular including between the perpetrators, the courts, the Official Solicitor and counsel. Judiciary refer these matters to DACU (data access and compliance) who elicit "there is nothing wrong" from one or two sources and write a letter saying to go away, without any contact details.

62. The MoJ has not carried out any investigations into the Senior Court Costs Office, a division of the High Court that operates without Notice of Issue, identification of claimant benefiting, and responds to a dispute on its jurisdiction by excluding the complainant, using the MCA and with the agreement of the perpetrators.

## Other legislation

*24. How well is the relationship with the mental health system and legislation understood in practice?*

63. Very well as a litigation tool to achieve financial gain.

64. Not at all as a means of stopping abuse. There is a disconnect between abuses in court caused by those whose activities have been referred to the SFO (Attorney General's Office, MoJ) and doing anything about the abuse.

65. HMCTS says SECURITY is empowered (Courts Act), SECURITY say this work is not in the job spec of its staff. Both statements are accurate.

## Devolved administrations and international context

*25. Does the implementation of the Mental Capacity Act differ significantly in Wales?*

66. No first hand experience

*26. What lessons, if any, can be learnt from the approaches taken to mental capacity legislation in Scotland and Northern Ireland, or in other jurisdictions?*

67. No first hand experience

*27. Is the MCA compliant with the United Nations Convention on the Rights of Persons with Disability (CRPD)? Are there lessons that can be learnt from the CRPD for the successful implementation of the MCA?*

68. The MCA is not compliant with the European Convention on Human Rights and has no "guardians"

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Below evidence is set out as to how the MCA is abused for financial gain by those not entitled, at the expense of others, using the courts and other state registries and functions including the Official Solicitor.

In particular, its use as a "***litigation weapon"*** of last resort is explained, in order to usurp the rights of others.

As requested the points are set out as principles and techniques of general exploitation (abuse), and not case specific, save by giving one example, to illustrate the points made.

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# *no prejudice no relief:*

*a permanent state of affairs why attempts to deploy the deputizing might of the state as a litigation weapon are doomed to failure*
**27 March 2013**

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## *human right to a just trial and to be heard*

*includes the right to a deputy who does not represent you,*
*but is a surrogate to complete a judicial process (subject to safeguards), but only if there is expert evidence that long term you are incapable of making a decision*

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## *if no prejudice, no improvement by going to court*

*if a court cannot grant relief (without a surrogate),*
*the position cannot be improved with a surrogate*

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## *if no prejudice, expert evidence is irrelevant*

*if a court cannot grant relief (without expert evidence),*
*the position cannot be improved with that evidence*

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## *evidence of prejudice is essential and sufficient*

*must be served on notice by the person prejudiced (or their deputy) to the person from whom the relief is sought*

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## *finding requiring expert evidence, yet made without any, is meaningless and ineffective*

*anything that emanates from such has no resilience,*
*and falls on the challenge of a puff*

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## *the boat has been missed, if no preliminary establishing of jurisdiction or reply to proper challenge on jurisdiction*

*where the boat has been missed, the position of the passenger left behind cannot be improved, regardless of whether there is prejudice or not, or whether the court can grant the relief sought or not*

## *what is hopeless without consent, or without ceding to the jurisdiction of the court which it does not properly have, remains hopeless, whatever the trappings*

*the evidence knowledge and submissions of a person cannot be buried, retrospectively or otherwise, by their volunteering a surrogate*

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## *the appointment of a deputy cannot operate retrospectively to eliminate the judicial status quo at the date of appointment*

*what was private before, is private after*
*what was an abuse before, is an abuse after*

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## *if no evidence to allow appointment of a deputy for one purpose, the deputy cannot act for another*

*a paid deputy can never be party to their own appointment:*
*if they are, they are no longer independent and can go no further*

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## *if the gate is shut in one accounting period for gain, it cannot be open in another, by the mere expedient of shifting or other act of arbitrage*

*paracitic and leeching activities may succeed in transient perceived gain but are otherwise futile: culpability goes with encashment*

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## *a block that is permanent can never be removed*

*exposure of fraudulent trading will not be prevented by removal of any STAY or other civil protection for the benefit of the witnesses and victims, regardless of how many levels down in the judicial heirarchy the perpetrators go or however many counsel they incentivize*

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*The following paragraphs below give case illustration (principles) of how the MCA is being used as a tool in the courts to cover on fraudulent trading, alienation and asset stripping of witnesses to, and victims of, financial crime through acts of abuse of the courts, Land Registry and other registers, Companies House, the Regulated News Service, in order to achieve after death what could not be achieved during life. HoL MCA review currently excludes evidence from specific cases and empirical evidence of how widespread the abuse which is described is. It can usefully be extended.*

# PRE-EMPTIVE LITIGATION UNDERWRITTEN BY PROPERTY OF VICTIMS AND WITNESSES

***as sold, after it was too late, by***

**Paul Parker, Robert Marsden, David Forsdick, Zoe Leventhal, and David Rees**

***and why it is bound to fail***

**December 2012-April 2013**

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1. The MCA is used as a "pre-pack" meaning a ***pre packaged financial instrument***, traded amongst and through layering of intermediaries to achieve a circumvention of the rules that could otherwise not be achieved.
2. The purpose is in order ***to exclude those whose identity and property is being taken***, using the courts (Companies, Bankruptcy, Senior Court Costs Office, County Court, first instance High court, Court of Appeal, bulk centres, enforcement, those in crown dependencies), in parallel with the disablement of enforcers through a variety of trodden routes, including compromise.
3. The further purpose is to achieve ***pecuniary advantage*** in circumstances in which the court has no jurisdiction, and there is no reply to challenge on grounds of jurisdiction.
4. The pecuniary advantage is achieved through the mechanism of a ***token*** (or tokens) obtained from a court / court official, and used as "currency" elsewhere (other courts, Land Registry, to obtain the benefit of a psychoanalyst (expert), an "embargo'ed" judgment made public, Companies House register, public company share registers, press coverage, with insurers/underwriters, others not identified, administration and bankruptcy court etc).
5. The overall objective is that a person or ***persons may gain***, using the court, in circumstances in which they can show ***no proper complaint*** for which they may use the court.
6. The MCA is a catalyst, as it excludes the witness/victim, whose identity and property is being used, and therefore the ***prejudice to the witness/victim*** is not heard, ie they are rendered voiceless.

# "Sometimes an attempt to alleviate a problem has unexpected consequences" Aitken LJ April 2013 Court of Appeal

***"This is a tale of the consequences of actions taken by employees of [RBS] who used changes in [accounting rules] to augment the value of [RBS's] banking book during the dark days of the bank's crisis in the financial maelstom that followed the collapse of Lehman Brothers in September 2008. The result has been extensive litigation...."***

2013 EWCA Civ 328 (2012 EWHC 1278 (Comm) Burton J)
Royal Bank of Scotland v Highland Financial Partners LP & Ors

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7. As the MCA is used as a device or tool to exclude, it can operate to exclude lawful creditors of a bankrupt or one that is trading fraudulently and / or to prolong the period to account to enable further "wrappering" of the state of fraudulently trading.

8. Therefore ***creditors*** of those fraudulently trading can be amongst those excluded through the use of the MCA.

9. Those benefiting (prolongation of the period before they are held to account, if ever), may succeed in converting their own legal obligation to ***call in an administrator*** by ***pulling down another***, and ***attempting to step in their shoes,*** thereby purportedly white-washing their own fatal defaults.

10. A bank, facing an exposure of its own, is ripe for a proposition of this kind, an opportunistic gambit, that will inevitably, in the first instance at least, seem to have paid off, even if longer term a court may say "no".

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# defeating a (professional negligence) claim that has not been made can never improve or mitigate a fatal liability

***Illustration; 2012 Folio 336, default judgment 18 July 2012***

***From 2005, Baker Tilly, a partnership trading as a public accountant, decided to take advantage of converting to a "Limited Liability Partnership" on a tax free basis. This was in the mistaken belief it could sell its land and buildings, thus taking them out of the reach of its (contingent) creditors, and rely on insurance and underwriting arrangements, secured with a solicitor, who could access such markets, and whose accounts it would certify as auditor.***

***Unfortunately the plot did not work, as fatal contingent liabilities are neither insured nor insurable (unlike professional negligence claims).***

11. As illustrated further below, the MCA was deployed in this example with effect from 18 July 2012, to achieve what could not be otherwise achieved, as a "litigation weapon" of last resorts when all else failed.

12. On 18 July 2012 HMCTS also called in SECURITY, the City of London police having refused to provide protection for financial and other offences on the premises of the court, and late March 2013 called in police.

13. In December 2012 and February 2013, HMCTS informed publicly (Guardian) that SECURITY are the equivalent of police on the premises of the courts and in regard conduct of access to justice efficiently. This was after Family Court judges reported anonymously on lack of security in the courts.

14. SECURITY inform they are not operationally geared up for POCA vetting of those entering the courts, the use of "private" hearings to exclude the public but include the wrongdoers, and all aspects of protection of victims in circumstances of abuse of the MCA to exclude and deprive victims of their rights.

15. The courts are signed up to the Victims Code in principle but have no operational guidelines to implement the benefits of these protections.

# post January 2005

***The ambitious plan required (i) the contingent and fatal liabilities accruing from January 2005, at which time the firm was unable to apply to renew its licence to audit from the ICAEW, to be defeated by one devise or other; (ii) an accounting policy that only recognised those liabilities that were not defeated; and (iii) a steely determination to manage off balance sheet what it could not manage on the balance sheet and thus visible to members, staff, customers, suppliers, auditor, insurer.***

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***The plan also required (iv) careful timing, with the firm's auditor securing its own audited accounts first, then reporting on those of the firm, and last, armed with both of these, the firm would provide the auditor's report on the solicitor, who (v) provided the opinions for the underwriter and insurer that those risks that appeared were covered ("professional negligence"). It relied also on (vi) the precise licenses that it held not being publicly reportable, and (vii) neither auditor nor insurer publicly identified until some considerable while after the tax free incorporation on 1 April 2007.***

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***The hope of the firm was that it would be able to preserve accounts filed at Companies House (viii) "as though" its contingent liabilities were not fatal, and/or were successfully warded off before they came home to roost.***

***It knew it could rely on its auditor, market leader in the mid tier, distinguished by its known integrity, to be compelled to preserve its independence to report properly. This was by (ix) accepting draft accounts in accordance with the accounting policy, that meant that, (x) to the extent that the firm "got away with" deflecting a contingent liability, it could with purported impunity report on the basis of what came home to roost only, "regardless" of how it got there.***

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# arbitrage- exploiting mismatches

***The firm was in a strong position to realize its hopes. It was a market leader in developing, marketing, selling and using instruments of arbitrage, as well as exploiting on an opportunistic basis, what it perceived as a "mismatch".***

***Put simply, this is the difference between implicit and explicit law, that it considered it could lobby is "lawful" and therefore requiring Parliament to end. This it conveniently branded a "loophole", that it would never be caught out by, since developments in law are not generally retrospective in impact.***

***As former licensed statutory auditor, it knew that "the auditor shall report (to the directors severally)", is not the same as "the auditor shall look (to agree the underlying truth to the draft accounts)" or an auditor's certification that they had in fact looked, and they could confirm that the truth was properly recorded. Thus "what you can get away with" was how it would continue to succeed, it both hoped and, with some justification and track-record, expected.***

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16. "*What you can get away with"* is a perfectly effective accounting policy so long as the preparer "*gets away with it*".
17. The MCA becomes a *"litigation weapon*" of last resort, once foul play became the sole means of prolonging *"getting away with it".*

# pre-emptive litigation weapons

## the might of the sword in and out of the courts



# arbitrage between the courts and Companies House

***in Companies House, the firm and its solicitor were two persons, linked by the "independent auditor's report" of the firm on the solicitor***

***to the insurer, underwriter and the courts, they were as one***

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# goal posts moved

*whether a contingent liability was fatal or not (ie was insurable and insured), no longer in point*

***so long as the unity of the firm with the solicitor succeeded in deflecting contingent liabilities, it made no difference whether they were fatal or not***

***HOWEVER, a fatal contingency that came home to roost, would bring them both down, if pre emptive court litigation weapons (or collateral attacks on judgment) did not succeed***

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18. On service of the Claim Form 2012 Folio 336, on 4 July 2012, the litigation weapon of the firm and its solicitor, was effectively disabled. Judgment in default of any proper reply was entered on 18 July 2012, the day the perpetrators resorted to the MCA, as their "***litigation weapon of last resort***".
19. It was to no avail, and on 6 December 2012, the contingent fatal claim, HQ12XO3512, against the firm was served.
20. From that day on, the firm was fraudulently trading, foul play and the use of the MCA its only remaining litigation weapons.

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# high risk approach, no plan B

*protecting the accounts filed in Companies House by action taken in the courts is bound to fail unless the witnesses and victims are wiped out*

***Victims and witnesses must file in court by six years under the Statute of Limitation and must serve by four months of the issue date: once this happens, their position is unassailable.***

***UNLESS this process is frustrated, by some device or other, the unity of the firm and its solicitor have no protection, and both automatically tumble.***

***There are restrictions and barriers to using the courts as a surrogate for the absence of a Plan B ("foul play").***

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# disapplication of the privilege from self-incrimination

*and the requirement to come to the court with "clean hands"*

***any use of the courts, the Land Registry, other mechanisms involving the court and /or securing pecuniary gain (including irregular means to achieve the mitigation of reputational damage brought on themselves by the firm and its solicitor), require the presentation of the true position including where it is harmful to the person claiming the benefit or relief. That evidence cannot be used against them in another forum, but the general circumstances revealed can be.***

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# Senior Court Act 1981 s72

*disapplication of the privilege from self incrimination*

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# Theft Act 1968 s31, Fraud Act 2006 s13

*disapplication of the privilege from self incrimination*

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# Land Registry Act 2002 s77, s78

*disapplication of the privilege from self incrimination*

*offences s123, 124, 125*

*gives a cause of action and extends to those who permit or*

*authorise the unlawful conduct*

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21. The use of the MCA to exclude and to usurp a victim's standing in the judicial system, including their entitlement to access, to be heard and to challenge, means that perpetrators can proceed unfettered to claim whatever relief they seek, without the requirement to present the true position, and without challenge or opposition, as well as not being compelled to reply to challenges already made (eg on jurisdiction).
22. Whereas in principle, the outcome can only be of no effect, nevertheless if accepted as being of value, for all practical purposes, it is. Therefore use of the MCA can achieve value and rights shifts that could not be achieved without, to the exclusion of the victim whose identity and presence in the judicial system has been taken.

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# Royal Bank of Scotland v Highland Financial Partners LP

*April 2013 (gist) "even if the court satisfies itself it knows what the outcome ought to have been had the full and true picture been presented in the first place, the fact it has not been, is sufficient for no relief to be granted. Attribution rules apply."*



23. The courts will now deny relief and damages to those who would have been entitled, had they litigated honestly in the first instance. They have made no pronouncement on those who have gained using the courts and the MPA, that gain being one to which they never had any entitlement, and which was secured solely by dishonesty in litigation and exclusion of those who had succeeded against them.

## consequences of no Plan B

*issuing, serving and entering judgment in default of acknowledgment of service or defence against the unity of the firm and its solicitor has no proper response. It means the firm is disarmed when, subsequently a claim is received, since its shield and litigation weapons sword through the*

*unity with its solicitor have already been defeated*

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## consequences of no Plan B

*issuing against the firm must succeed so long as the claim form is served on time. Bullying, harassment, terror campaigns, forced servitude and forced labour for no pay may not suffice to frustrate service and can only be*

*regarded as the residue of "spent" litigation weapons*

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***A defaulter who ought properly to have been indicted but has not been, and where their defaults have given rise to a cause of action in favour of the victim (eg theft), must properly file an admission on receipt of a Claim Form, and may be found in contempt of court if he does not. If he makes no return, the Claim Form is not made publicly available on inspection (until default judgment is entered by the claimant)***

# consequences of no Plan B

*entering judgment in default of acknowledgment of service or defence against the firm must succeed, including in making the claim form and judgment public, so long as the court file is "clean". Others may file for judgment on the points deemed admitted.*

24. Service of a Claim Form which is fatal, ends the corporate existence of the recipient. The MCA, used abusively, allows:
    - the MCA law (and process) to be triggered, without the required evidence;
    - a subsequent forum from which the victim is excluded, in which it is said, there is no evidence, and in fact there is persuasive contrary evidence (eg on these events recent standing up to twelve hostile counsel acting together, over three days) but in which:
        i. other "*evidence*" ( the ***"made up evidence")*** is put forward;
        ii. there is **no challenge** to the "*made up evidence*" (due to **the exclusion of the victim**) – in contravention of the human rights requirement that there must be an opportunity to cross examine;
        iii. **pecuniary and other benefits are secured**, paid for by the victim, to which there is no proper entitlement, including the opportunity to push the victim into bankruptcy, to take further benefits and exclude them from the judicial system, as well as the reliefs to which they are already entitled: ie a collateral attack on the service of the claim form (and entry of default judgment that makes the claim form available publicly on inspection – HQ12XO3512, issued 24/8/12; served 6/12/12; default judgment 27/02/13).

25. Therefore the process itself can provide opportunists with pecuniary advantages at the expense of the victim, through the mechanism of their exclusion, as facilitated by the MCA.

# claim form and judgment cannot retrospectively be buried

## *litigation weapons a spent force once it is too late*

***MCA becomes a litigation weapon of last resort when all else has failed***

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| ***the witness/victim is replaced by a deputy under the MCA*** |
| ***victim's name/identity is used in without notice events in court*** |
| ***the witnesses/victims are excluded from the court*** |
| ***the certificates of service of the claim form are destroyed and case communications with judiciary are deflected*** |
| ***the court file is taken over, "as though" the claim had lapsed, (or never made), before it sees the light of day*** |
| ***fraudulent "cost" certificates are obtained*** |
| ***money "wins" from previous shams are revived and used to bankrupt victim and steal from estate of deceased and those surviving*** |

26. The MCA (used abusively as a litigation weapon) usurps the rights (and therefore judicial standing) of the witness/victim, including unbeknown to them.
27. The power and might of the state is deployed against the witness/victim, using their own identity, resources and personal data.
28. Those harmed are voiceless. The court sees no evidence of the damage, consequential damage and loss of opportunity.
29. Crimes and irregularities are traceless and wrongdoing and prejudice is "attributed" to offices (or officials) of state (ie no-one).
30. This (ab)use of the MCA, by usurping the identity, data and resources of the victim, in essence, records that the victim consents (or has not objected), and that claims that they have made to preserve or recover what is theirs, have "voluntarily" been forfeited, albeit through a surrogate, who in fact was never appointed, ie the surrogacy has effectively been mimicked, including tracelessly.

## *CONCLUSIONS*

**The MCA is used abusively as a litigation weapon of last resort, deployed after fatal contingent liabilities have come home to roost and after other litigation weapons have been spent or effectively disabled.**

**The MCA allows the abuse because it provides for surrogacy ie it legitimizes exclusion. Those taking advantage neither have to "prove" their own detriment (loss/prejudice) nor "prove" that there is no prejudice to the victims and their dependants.**

**Human rights end on death therefore there is no accountability. Properly such abuse ought to be indictable, without burden on victims and survivors.**

**14 September 2013**

