Autumn 2020
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Association of Business Recovery Professionals R3 Rescue Recovery Renewal

RECOVERY

Rescue

Corporate insolvency: bringing balance to the force
A look at the new Corporate Insolvency and Governance Act 2020 (CIGA) for rescue and restructuring in the UK

Breathing space: how to make moratorium work for your clients
Existing processes in the US and Canada point the way for the UK's new tool

The art of a light touch
What are the key considerations for a light-touch administrator?

Close, but no CIGA
Hear from professionals around the industry about their thoughts on the new Act

Where is the data? Data mapping in insolvency investigations
Practitioners need to adapt to the ever-increasing amount and complexity of data resulting from work in the modern age

Directors' duties live on past insolvency
A recent judgment shows that directors' duties can sometimes outlive a business in distress

Conservation and restoration: business turnaround after Covid-19
Rescue is the new watchword – how will turnaround and restructuring professionals fit into the post-Covid landscape?

Furlough and administration: when is a contract of employment 'adopted'?
The recent decision in *Debenhams* has started to outline the considerations for dealing with the furloughed workers of a company in administration

An interview with… Mike Ridley of the PPF
The head of restructuring for the PPF talks to RECOVERY about CVAs, Covid-19 and getting value for creditors under CIGA

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From the editor

Six months ago, the challenge was working away from the office in lockdown. The next challenge is going back to the office, how that will work and the effect it will have on us and our profession.

The country is in recession and various sectors are being ravaged by Covid-19. As we move into the autumn, the furlough scheme is coming to an end and financial distress of businesses across the land is inevitably going to increase.

So, who are they going to call? This is a time of opportunity and responsibility for our industry. Paul Davies gives the TMA's perspective of the role we can play on page 28.

We have new statutory tools at our disposal. Have you used moratorium protection yet? Georgia Quenby reviews the new legislation from the legal perspective in our Legal Update on page 9 and Ben Luxford interrogates it as part of the rescue culture on page 14.

We also have the results of an industry survey on CIGA (page 20), as it has become known, and a more informal feedback courtesy of Howard Morris (page 24). Some say that this legislation is the UK's 'mini Chapter 11' and we look at how debtor in possession procedures operate in the US and Canada on page 22.

Where does this all leave 'light-touch' administration? Alistair Massey of FRP gives us his views on page 26 and Lisa Linklater and Harriet Hartshorn of Exchange Chambers review the *Debenhams* decision on the treatment of furloughed employees in such an administration. We also have an interesting sector view on the effect that Covid-19 is having on the tourism and leisure industries on page 30.

Away from Covid-19 and CIGA, we look at data mapping as an investigation tool on page 32 and directors' duties post administration on page 36. Our interview on page 47 gives us the PPF's view of the current landscape. We also have views from the North West and Europe on pages 41–42.

So, dust off your cape and work on your alter egos. Your country needs you and your skills and your toolbox is packed and ready to go!

NEIL SMYTH is a partner at Mills & Reeve and is the editor of *RECOVERY*.

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President's column

Colin Haig announces new plans to educate the wider community on business rescue and promote the positive work of the profession.

No one can deny these are turbulent times. The Covid-19 pandemic has affected individuals, businesses and the economy in ways none of us could have predicted.

It has also had a serious effect on R3. Events have been cancelled, training has been delayed and we've had to make some real, rapid changes to how we work and the support we provide to our members.

But we've rallied. We've introduced a series of webinars on a range of key issues affecting the profession. We've planned a programme of virtual events and courses that we're looking to deliver over the next few months and into 2021.

And we've continued to promote and defend the profession throughout this period, at a time when the government has also introduced significant legislative changes to our framework.

You can read more about the last of these in the Press, Policy and Public Affairs Team's column on page 43.

Time to come together

The profession is going to be under an even brighter spotlight than usual over the next couple of years, there's no doubt about it.

As a result of Covid-19, once-viable businesses are likely to be turning to us for support because of the impact the pandemic has had, and people who would never have engaged with us previously will be seeking support from us.

Now is the time for us to make use of all the tools at our disposal, to innovate as much as we possibly can within the insolvency and restructuring framework to help save businesses, rescue jobs and support the economy.

But we also need to support each other and remember we are a community now more than ever.

Helping the UK get back to business

You're all aware that promoting and defending the profession is a core priority for R3.

Long before the pandemic and as we have always done, we were briefing journalists, meeting MPs and liaising with stakeholders to ensure the work of the profession was understood and recognised.

But as the economic effects of Covid-19 become clearer, we need to redouble our efforts to engage those who may need our help in future, and to help them understand why they need to seek advice as early as possible.

This September, R3 will be launching a programme of work to illustrate the crucial, positive role the insolvency and restructuring profession can play in supporting the UK's economic recovery post-Covid-19.

Under this programme, we will be producing webinars and online resources for directors, setting out how our framework operates and how we can support business rescue – underlining the importance of seeking early advice.

For individuals, we'll be publishing our *Debtor Advice Booklet*, which will set out the different options for dealing with money difficulties – ranging from budgeting advice to debt management solutions and statutory insolvency procedures.

> "Now is the time for us to make use of all the tools at our disposal, to innovate as much as we possibly can within the insolvency and restructuring framework to help save businesses, rescue jobs and support the economy."

For smaller creditors, we'll be updating and promoting our 'Creditor Insolvency Guide' website, which explains how to engage in the insolvency process.

And we'll be reaching out to the media, parliamentarians, the government, business stakeholder bodies and others, to seek their support in promoting this programme of work to the wider public.

I'm particularly grateful to Mark Phillips QC, Alison Goldthorp, and Paul Zalkin, for their support in delivering this project.

The projects mentioned above are only a few of the things we have planned over the coming months. We'll be keeping members updated in the coming weeks, so watch this space.

Remembering Matt Dunham

Some of you will be aware Matt Dunham passed away suddenly in July. Matt was a stalwart of R3, having been chair of our North West region and a presenter on our training courses and at our events and having served for nine years as a member of the R3 Council.

There is a tribute to Matt on page 8 of this magazine, but I also wanted to pay my respects to him and acknowledge the huge contribution he made to R3 and to the profession over the years.

For those of you who didn't know him, Matt was a fantastic guy – one of the nicest, most professional, and most genuine people in the profession.

He was recognised as an expert in football insolvency and restructuring by everyone in our world, and by many in government, sport and industry.

He was totally committed to R3 and always willing to share the tremendous knowledge, experience and insight he had amassed from his career with anyone who asked for his help, advice or views.

It is a tragedy that he has been taken so suddenly, and my thoughts – and the thoughts of everyone at R3 – are with his family and friends. To say he will be hugely missed is a massive understatement.

Looking to the future

In my last column for *RECOVERY*, I said that none of us knew what the future would look like. Four months on, we don't have any more of an idea.

However, it is clear is the after-effects of Covid-19 will be felt for many months and years to come.

It's also clear businesses and consumers are going to need as much support as possible to help manage the fallout from the pandemic.

We're well placed to provide this – and to make a difference to the UK's economy as it attempts to recover from Covid-19.

Time to step forward, folks. We'll be with you every step of the way. ◻

COLIN HAIG is the president of R3 and a restructuring partner at BDO.

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29TH - 10:00 - 11:00
Commercial Property Liabilities in the 'New Normal'
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OCTOBER

13TH - 10:00 - 11:00
Dealing With Distressed Care Homes
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22ND - 10:00 - 11:00
Keeping The Wheels Turning in the Automotive Sector
Live Webinar

NOVEMBER

10TH - 10:00 - 11:00
Aviation Insolvencies
Live Webinar

12TH - 09:30 - 10:30
Preferential Taxes in the Post-Pandemic Era
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16TH - 20TH
SPG Week
Virtual Conference

DECEMBER

1ST & 2ND
Fraud Conference
Virtual Conference

1ST - 10:00 - 11:00
Corporate Insolvency Legal Update 2020
Live Webinar

8TH - 10:00 - 11:00
Insurance Companies & Issues: Insolvency
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15TH - 10:00 - 11:00
Crypto Assets in Insolvency: Legal Theory, Cases & Law
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Tributes paid to Matt Dunham

Tributes have been paid to **Matt Dunham**, a well-known and respected figure in the profession, who passed away suddenly in July.

Matt, 55, had over 30 years' experience in insolvency. He was active within R3 where he completed in April nine years on the national council, served on the membership committee and was a former North West chair.

"The tributes to Matt show just how highly he was regarded. The profession has lost someone who always offered a pragmatic approach and an ability to guide clients through complex issues in a clear and concise way. I know I speak for many when I say that Matt will be missed personally and professionally."

John Dean, partner at Dunham Dean.

Not-for-profit adviser

He was acknowledged for his advisory and restructuring work in the not-for-profit sector, notably on high-profile cases such as Kids Company, and helping to save the national adoption charity, the British Association for Adoption and Fostering.

Football focused

Another area where Matt excelled was football finance. He advised more than 30 football league and non-league clubs on solvency issues and his experience led to his appointment as administrator of Bury and Barnsley Football Clubs and being a retained adviser on sporting sanctions by the English Football League (EFL).

His experience within football led him to develop a blueprint to address the current financial issues facing clubs leading to him being called to give evidence to the Parliamentary Digital, Culture, Media and Sport Select Committee investigation into football club administrations. Shortly before he died Matt had created the structure which saw Chesterfield FC Community Trust acquire Chesterfield FC – believed to be the first transaction where a charity has taken over a professional football club.

Life and work

Matt's career had begun at Big 4 firm EY and he later worked for RSM Robson Rhodes, BDO, Grant Thornton and Smith & Williamson before setting up Liverpool-based Dunham Dean Advisory with former EY colleague John Dean in 2017. The firm focuses on owner-managed and family businesses.

Matt leaves a wife, Sue, and two children. He was a keen cyclist and a season-ticket holder at Wigan Athletic. In 2018 he became a trustee of the Liverpool and Merseyside Theatre Trust, which includes the Everyman Theatre.

"Matt was a dedicated champion of our profession, which he served with distinction both at a regional and national level. He commanded huge respect for his expertise and professionalism and had the ability to communicate with people at all levels. Above all he was a true gentleman. He will be sadly missed."

Allan Cadman, current chair of R3 North West regional committee.

Corporate insolvency: bringing balance to the force

Georgia Quenby examines the key features of the Corporate Insolvency and Governance Act 2020 (CIGA), which creates new tools to bring about company rescue and reconstruction in the UK.

The CIGA is widely heralded as introducing the most sweeping changes to UK insolvency law for a generation. It has introduced three main features into the laws of England & Wales, Northern Ireland and Scotland:

- a new freestanding moratorium into the Insolvency Act 1986 (IA86);
- a restriction on *ipso facto* clauses, also known as a restriction on supplier termination clauses; and
- a new restructuring plan procedure as part 26A of the Companies Act 2006 (CA 2006) to allow for arrangements and reconstructions of a company in financial difficulty (a new restructuring plan under the CA 2006).

> The overarching objective of this [Act] is to provide businesses with the flexibility and breathing space they need to continue trading during this difficult time.

Temporary measures

In addition to the above there are a series of temporary measures, some of which modify entry criteria or effects of the three key new elements of the moratorium, the restriction on supplier termination clauses and the restructuring scheme, and some standalone temporary provisions. The standalone temporary measures: mitigate a director's potential personal liability for wrongful trading to the extent that the downturn in performance is Covid-19 related; make changes to the reporting requirements of companies; and prevent the presentation of most winding-up petitions.

This article focuses on the key features of the new restructuring plan and the use of the moratorium as a stepping stone to one of three rescue routes: a CVA, a restructuring plan or a recapitalisation. We don't have space to cover the temporary measures or the supplier termination restrictions here.

Purpose of the new permanent measures

The restructuring and insolvency landscape in the UK has long been regarded as secured lender-friendly, so much so that in 2002 the government introduced the Enterprise Act and modernised the administration regime. In the list of the three-tiered objectives of an administration of a company, the first objective for the administrators of a company was, and still is, to rescue the company as a going concern. It is an indicator of how rarely this first objective is achieved by an administration that the entry criteria to a moratorium include that the company is or is likely to become unable to pay its debts and that the proposed monitor believes that it is likely that 'a moratorium for the company would result in the rescue of the company as a going concern.'

The explanatory notes to the draft legislation were informative both as to the policy drivers and as to the expected use of both the moratorium and the new restructuring plan. The notes provide:

'The overarching objective of this bill is to provide businesses with the flexibility and breathing space they need to continue trading during this difficult time. The measures are designed to help UK companies and other similar entities by easing the burden on businesses and helping them avoid insolvency during this period of economic uncertainty.'

The notes go on to say that the purpose of providing breathing space to continue trading and avoid insolvency is met because the new laws:

'introduce greater flexibility into the insolvency regime, allowing companies breathing space to explore options for rescue while supplies are protected, so they can have the maximum chance of survival' and

'protect companies from aggressive creditor action'.

The same but different?

The new moratorium shares many features with the moratorium available to a company whose directors have filed a notice of intention to appoint administrators but a key distinction is that the new moratorium is a debtor-in-possession process, whereas once administrators are actually appointed the directors are no longer in control. This is also true of the new restructuring plan. So as a package what we have is a serious attempt by the UK government to create a debtor-in-possession restructuring toolkit, which will seem like a huge change to secured lenders who are accustomed to the administration and liquidation processes in which the incumbent directors' powers to bind the company cease immediately.

Both new processes are different in material respects from both their local and their American Chapter 11 cousins. The new processes build on prior experience and plug gaps in existing processes with the objective of creating a robust, business-friendly rescue culture by enabling debtor-in-possession reorganisation with the benefit of the breathing space produced by the moratorium.

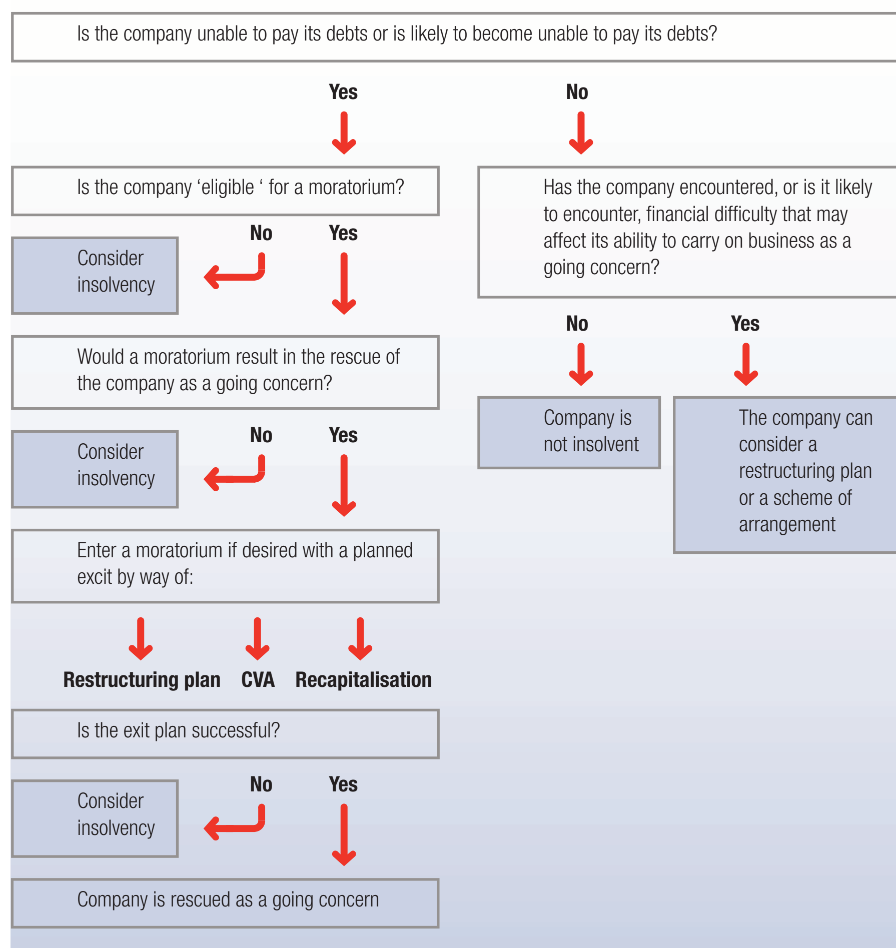
New moratorium v. administration moratorium	
Similarities	Differences
The monitor must be a licensed IP, free from conflicts of interest.	The holder of a qualifying floating charge cannot object to the identity of the monitor whereas they can select the administrators.
Company has 'breathing space' from its creditors to allow it to reorganise its business and explore its options for survival. No creditor can commence insolvency proceedings or enforce its security against a company that has the benefit of the new moratorium or the administration moratorium.	Directors remain in place in the new moratorium under the supervision of a monitor. Directors are disenfranchised upon the appointment of an administrator and the administrator takes full control of the company. No administrator can be appointed.
Similar to the 'out of court' administration route, a company can obtain the benefit of the new moratorium upon the presentation of the required legal paperwork at court.	The new moratorium prohibits creditors from crystallising floating charges and imposing any restrictions on disposals. The appointment of an administrator is typically, under a company's security documents, an event that causes a floating charge to crystallise into a fixed charge.
To enter the new moratorium and the administration moratorium, a company must be unable to pay its debts, or is likely to become so.	The new moratorium does not require the consent of (and provision of advance notice to) secured creditors. The appointment of an administrator (by a company or its directors) requires the qualifying floating charge holder to be given five business days' notice.
The monitor is required to end the new moratorium if he or she thinks that the moratorium is no longer likely to result in the rescue of the company as a going concern. An administrator must end the administration moratorium if he or she thinks that the administration can no longer achieve its purpose.	The new moratorium affords a company a 'payment holiday' for debts that fell due prior to, or during, the moratorium (subject to certain exceptions).
Suppliers are prohibited from invoking insolvency termination clauses in certain contracts with a company that is subject to the new moratorium or an administration.	The new moratorium lasts for an initial period of 20 business days, which can be extended for up to a year but only with the consent of the company's 'pre-moratorium creditors'. An administration lasts for an initial period of one year.

The new restructuring plan shares many features with a part 26 CA 2006 scheme of arrangement but again there are key differences, in particular with the inclusion of 'cross-class cram down'.

Restructuring plan v. scheme of arrangement	
Similarities	Differences
Both a restructuring plan and a scheme enable a company to compromise the rights of secured creditors, unsecured creditors and shareholders.	The restructuring plan includes a 'cross-class cram down', which means that, if certain conditions are met, the restructuring plan may be imposed on a dissenting class of creditors.
Both a restructuring plan and a scheme are court processes and require court approval. The court exercises a discretionary power to approve the terms of both a restructuring plan and a scheme – court approval is not a 'rubber stamp'.	The ability to cram down dissenting classes in a restructuring plan is likely to incentivise a company to propose multiple smaller classes to ensure that the plan succeeds, in contrast to the approach taken to class composition in a scheme.
The court processes for a restructuring plan and scheme are very similar and include a convening hearing and a sanction hearing.	A restructuring plan requires the approval of at least 75% in value of the voting creditors in each class. A scheme requires at least 75% in value, and a majority in number, of the voting creditors in each class.
Both a restructuring plan and scheme are available to domestic and foreign companies that can demonstrate 'sufficient connection' with England and Wales.	To enter a restructuring plan, a company must be experiencing, or be likely to experience, financial difficulties and the purpose of the restructuring plan must be to eliminate or reduce those difficulties.
If a company that is subject to the new moratorium enters into a restructuring plan or scheme, the new moratorium terminates once the restructuring plan or scheme is sanctioned.	Prohibition on *ipso facto* clauses in a restructuring plan.

Decision tree

The decision tree below indicates the likely choices and consequences facing a company in financial difficulty now that the moratorium and restructuring plan are available.



Moratorium

The new moratorium creates breathing space for the company by preventing creditors from taking any of the following action:

- enforcement of security;
- starting or continuing insolvency proceedings;
- crystallisation of floating charge or restricting disposals of floating charge assets;
- starting or continuing legal proceedings against the company (with some limited exceptions);
- repossession of HP/conditional sale/leased assets without permission of court; and
- forfeiture by landlords.

There is also an embedded incentive for a finance provider under a contract for financial services not to accelerate their debt, which is that they would lose a super-priority status in a subsequent insolvency if the moratorium fails in its objective of rescuing the company as a going concern.

Although most English companies are eligible for the protection of a moratorium, new schedule ZA1 to IA86 sets out a list of companies that are not eligible, for example banks, companies that have issued certain types of bonds, insurance companies, PPP companies and securitisation companies.

> "As a package what we have is a serious attempt by the UK government to create a debtor-in-possession restructuring toolkit, which will seem like a huge change to secured lenders."

The prospective insolvency test

The moratorium requires that the company and the prospective monitor agree that the company is unable or is likely to become unable to pay its debts, and that the moratorium would be likely to result in the rescue of the company as a going concern.

There is a clear intersection here between the legal nature of the condition and the view of the auditors of the company. In particular we expect the company to be focused on achieving sign off of its accounts on a going concern basis after the moratorium.

In combination, this will mean that the company, the monitor and the auditors will need rapidly to reach a consensus not just as to the company's operations during the moratorium (including, critically, as to funding of the business during the moratorium), but also as to the route out of the moratorium.

How and when does the moratorium start?

Usually entry into the moratorium will be an out-of-court process followed by notice to creditors.

Termination of the moratorium

The monitor can terminate the moratorium if the monitor thinks:

- the objective of rescuing the company as a going concern has been achieved;
- the moratorium is no longer likely to result in a rescue of the company;
- the company is unable to pay (i) moratorium debts or (ii) pre-moratorium debts for which there is no payment holiday, which have fallen due (the current obligations); or
- the monitor is unable to carry out its duties because the directors are not providing the necessary information allowing the monitor to carry out the role.

In going into the moratorium the company and its advisors will know what its current obligations are likely to be and these should be in the relevant short-term cash flow forecasts, along with any requirement for additional funding. This will almost certainly lead to negotiations with senior lenders, at least, upfront to ensure buy-in and the continued provision of finance, given that lenders are not required to provide new money to a company in a moratorium.

Payment holiday

The company has a payment holiday for pre-moratorium debts. 'Pre-moratorium debts' means debts that fell due prior to (or during) the moratorium. These are analogous to 'provable debts'. 'Moratorium debts' means debts incurred during a moratorium – eg rent, wages and expenses. These are analogous to 'expenses' and the government has suggested parties use the *Nortel* case as a guide in cases of doubt.

There are exceptions to the payment holiday for:

- debt incurred under financial services contracts (including loan and credit agreements and receivables purchase arrangements, but excluding accelerated debts);
- rent in respect of a period of use during moratorium;
- goods or services used during moratorium;

- monitor's fees and expenses;
- redundancy payments; and
- certain wages/salary payments.

Restructuring plan

The new restructuring plan shares heritage with the CA 2006 scheme of arrangement (Part 26 scheme), company voluntary arrangements under IA86 and a reorganisation under Chapter 11 of the US Bankruptcy Code. The government's explanatory notes make it clear that the new restructuring plan is deliberately similar to a scheme of arrangement and indicates that jurisprudence on matters such as class construction should be used to assist in determining creditor classifications in a restructuring plan.

The restructuring plan is inserted into CA 2006 but it is, nevertheless, a compromise or arrangement procedure specifically applicable to companies in, or anticipating, financial difficulty. This is a court-supervised procedure. An application is made to court to convene a meeting of creditors or shareholders (or the relevant classes of creditors/members), and a statement is sent to creditors/members which:

- explains the effect of the proposed compromise or arrangement; and
- states any material interests of the directors (in any capacity) and the effect on those interests of the proposed plan.

The following conditions are specified in the legislation for availability of the restructuring plan:

- **Condition A**: the company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern; and
- **Condition B**: a compromise or arrangement is proposed between the company and its creditors, or any class or them, or its members, or any class of them the purpose of which is to eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties which are affecting, or will or may effect, its ability to carry on business as a going concern.

The company, a creditor or a member can propose a plan, as can the administrators of a company. The plan can cover a wide range of restructurings and creditor and shareholder reconstructions, including acquisitions.

Voting

Classes are typically classified according to the following principle: a class is 'those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest'.

Once the classes have been confirmed there will be meetings of each class where the relevant creditors/members or relevant classes vote on the plan. The required threshold is 75% by value of those creditors/members (or relevant classes) present and voting whose rights are affected by the plan.

It is worth noting that creditors or members who do not have a 'genuine economic interest' in the company may be excluded from voting (which may include shareholders). This new feature enables out-of-the money classes of creditors to be excluded from the process, provided the court is persuaded that they do indeed have no such genuine economic interest.

There are certain 'special cases' who get protection, such as pre-moratorium financial creditors, who cannot be compromised or crammed down without their consent (even if 75% of their class voted in favour of the plan) if the restructuring plan is proposed within 12 weeks of the end of a moratorium. Generally, however, the conditions to cross-class cram down are that:

- **Condition A**: the court is satisfied that if the plan were to be approved, none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative.
- **Condition B**: the plan has been agreed by at least 75% in value of a class of creditors/members who would receive a payment, or have a genuine economic interest in the company, if the relevant alternative were to occur.

> "The moratorium requires that the company and the prospective monitor agree that the company is unable or is likely to become unable to pay its debts."

The 'relevant alternative' is described as being whatever the court considers would be most likely to occur in relation to the company if the restructuring plan were not sanctioned. Given the 'financial difficulties' entry requirement it is reasonable to expect this will generally be an insolvency procedure and so an estimated outcome statement will provide a useful comparator for the court in making this determination.

The court has ultimate discretion whether to approve a plan but, if approved, the plan is binding on the company and all its creditors and members.

A failed moratorium?

If a company that has entered a moratorium is unable to be rescued as a going concern then the moratorium terminates. The rights of the creditors who have been stayed by the moratorium spring back into life and so if those creditors (whether they are secured or unsecured) have not supported the company's exit strategy or been compromised by a CVA or a restructuring plan then the company is likely to enter insolvency, whether voluntarily or involuntarily. It is this prospect of failure that will keep directors and monitors' feet to the fire in terms of having sufficient funding and a viable exit substantially advanced as they enter a moratorium.

The reality?

Stressed companies usually turn to their lawyers and accounts to seek restructuring solutions that have generally focused on the use of a CVA or a recapitalisation. Now that the restructuring plan tool is available, we expect those companies to explore whether that may be a suitable method for dealing with the cause of actual or anticipated financial difficulty, with the goal at the end to have a rehabilitated business whose accounts can be signed off on a going concern basis.

It may well be that a moratorium provides a suitable stepping-stone to one of these restructuring tools.

In all of these scenarios stakeholder buy-in will be the key to ensuring that a funded plan can be developed, negotiated and carried out without undue reliance on court intervention.

Conclusion

The pendulum has now swung away from the receivership or administrative receivership- and creditor-dominated decision making of the latter half of the 20th century towards a debtor-oriented rescue culture. The policy objective of enabling company rescue and encouraging debtor-in-possession reorganisation is clear, but creditors in exchange are receiving statutory protections provided that they do not destabilise a rescue in progress.

We can expect to see new implementing rules given the declared culture of anti-avoidance, and new jurisprudence developing the law in this area, especially given the wide powers for affected parties to apply to court during a moratorium and the court-supervision and sanction role in the new restructuring plan. While the scales may be intended to be in balance there could be a few more swings one way or the other on the way to true equilibrium. ◻

GEORGIA QUENBY is a partner at Morgan, Lewis & Bockius UK LLP and is also a licensed insolvency practitioner.

▶ **LEGAL VOICE** The nature of the advice given is general and neither *RECOVERY* nor the writer is responsible for any consequential loss arising in connection with information given in this publication.

Legal Q&A

Bree Taylor answers your insolvency queries.

Q My (liquidator) client has a claim against an individual over some money paid by the company to the individual's son. There is no suggestion of any goods or services being provided. The payment appears to have been part of a wider fraud whereby the directors caused the company to pay away money to themselves and friends/family. I have made demand that the individual should repay the money to the company. The individual does not suggest there was any legitimate reason for him to have received the money, but he says I should be bringing a part 7 claim in relation to the fraud rather than treating the claim as a debt. Am I bound to treat this as a fraud claim? Is my only option to commence a part 7 claim or can I treat this as a debt, serve a statutory demand and proceed with a bankruptcy petition?

A The correct legal analysis of the payment depends upon the facts, but there is a legal presumption that money advanced for no consideration is a loan. You might, therefore, be quite right to make demand for repayment. A loan without an agreed payment date is repayable on demand. The fact that the money might have been paid to this individual as part of a wider fraud does not necessarily mean you are obliged to pursue this via a part 7 claim. It also does not mean you are obliged to pursue everyone involved in the alleged fraud. You will need to ascertain the facts and consider carefully what the person has to say about the payment to him but, on the face of it, you might be quite correct to treat it as a debt claim and pursue it as you would pursue any other debt where there is no genuine defence.

Q My client owns a flat that she has rented out to a tenant. The tenant hasn't paid any rent for the last four months. First, he said that 'someone is doing works upstairs' and it is very noisy. Then he said he had lost his job and cannot now pay the rent. He says he isn't liable to pay rent during the noisy works and so he only owes rent for the more recent period, but this has been 'cancelled' by changes to the law. My client has another tenant lined up and really would like this troublesome tenant out. What are my options?

A First of all, while there is a very widely publicised stay on all possession proceedings (for the moment), which would prevent your landlord client from taking possession of the flat, there is no stay on money claims against individuals. The changes to the law brought in as a result of Covid-19 have not 'cancelled' any obligations to pay rent. The rent that is due is a debt and can be claimed from the tenant in the usual manner. The tenant has raised a complaint about noise and this needs to be investigated and addressed as it may impact on your client's ability to claim all of the rent due. In principle rent continues to accrue and is an enforceable obligation under the usual principles and procedures, which might include serving a statutory demand on the individual tenant. Meanwhile, the legal stay on possession proceedings remains in force, at the time of writing, until 23 August 2020. There is a chance this might be extended so your client should not enter any commitments to the new tenant pending clarification of the legal position and her ability to pursue possession proceedings.

> "Whether you remain in the insolvency profession or branch out into other things, you need to look at everything as an opportunity."

Q I work in a small insolvency practice just outside London. Work and has been a bit 'up and down' over the last couple of years. Everyone keeps saying that the Covid-19 crisis is going to lead to an 'avalanche' of insolvency work but so far there is no evidence of this. Things have been quiet over the last few months, which makes me anxious. I am thinking a lot about my future, having enjoyed some time at home with the family over the summer. Should I stick with my firm and the insolvency profession or look at other options? If I leave the insolvency profession, will I be getting into some other sector that might never bounce back?

A So many of us are looking at the world through different eyes now. We have been through one of the most disruptive events in recent memory. We have been separated from friends and colleagues and thrown together with family members. For better or worse, we have had a change of scenery and this tends to bring a change of perspective. I remember well the beginning of the global financial crisis when there were runs on the banks, something not seen in generations. It was really very unsettling. For some practitioners there was an immediate increase in work. For others, the busy period came later when large numbers of UK companies eventually went into formal insolvency processes. Unfortunately, there cannot be such a disruption to the economy across a large number of sectors without a serious impact. Will these sectors bounce back? Of course they will. They might change and evolve to adapt to the new world but they will be back and, in some cases, be leaner, better, smarter and more resilient. Whether you remain in the insolvency profession or branch out into other things, you need to look at everything as an opportunity. Your skills could be useful in helping distressed businesses restructure and survive, which would bring you pride and job satisfaction. Or you could join a different sort of business and use everything you have learned in the insolvency profession to help the business avoid distress in the future. ◻

BREE TAYLOR is a partner at Fladgate LLP.

CIGA and the rush to rescue

Ben Luxford examines restructuring and rescue tools past and present to ask the question: are IPs ready for the future of rescue?

Prior to the release of the corporate insolvency and governance bill, which is now statute, R3 had been providing the Insolvency Service with technical input and views from members as the Service worked to complete this piece of emergency legislation. During those early discussions with members, one respondent stated 'The profession has not got a good track record of rescuing companies' while another asked whether the moratorium and restructuring provisions could be placed into a new 'Restructuring Act' rather than merely being added to the Insolvency Act 1986 in order to highlight that both new procedures are there to encourage 'rescue'. Both valid points from two well-established professionals, with whom I have previously worked.

A change in impetus

The permanent aspects of the Corporate Insolvency and Governance Act 2020 (CIGA) are certainly pushing for a change in impetus. The need for an IP to rescue a company rather than merely its business appears to be that change – but why? In 2016 the UK finished sixth overall in the World Bank's 'Doing Business' ranking and 13th in the 'Resolving Insolvency' ranking, while the US ranked fifth for insolvency. This incentivised the government to compete with aspects of Chapter 11 of the US Bankruptcy Code, as it was the lower 'Resolving Insolvency' ranking that impacted most on the UK's standing in the results. The importance of the ranking is simply to promote the UK as a better place to do business than other countries.

> The profession has not got a good track record of rescuing companies – *R3 member, 2020*

The moratorium

There have been copious articles about the new moratorium procedure, so I do not wish to mention it in great detail here. The moratorium is a rescue tool, which is clear from the requirement of an IP to provide a statement confirming that 'it is likely that a moratorium for the company would result in the rescue of the company as a going concern'. No mention of 'business' here. It

is the company or the tool that goes back into the option bag. This is quite a high threshold, but if the purpose of CIGA is rescue then the statement is spot on, in my view.

Restructuring plan

I personally took an interest in the plan as I have always thought of restructuring as exciting when compared to insolvency, despite working primarily on insolvency appointments for 14 years. So what is the plan?

The plan is a new commanding, flexible and court-supervised restructuring process inspired by the existing scheme of arrangement (scheme) under section 895 of the Companies Act 2006. A big difference between a scheme and the plan is the cross-class cram-down procedure. CIGA permits a plan to be imposed on a dissenting class of creditors.

In most cases the debtor/company is likely to be the one that proposes the plan. Creditors and shareholders are then able to make an application to court to comment on the procedure. For a plan to be considered, a company will have 'encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern'. No mention of the word 'insolvency' here. Clearly a rescue tool.

The plan must contain some form of compromise or arrangement, and the purpose of it is to deal with the company's financial difficulties. The plan enables the compromise of the debt and equity claims of creditors and/or shareholders who the court is satisfied have no genuine economic interest in the company. The consent of these persons with no genuine economic interest is not required and they therefore have no right to participate in the approval process.

> The plan is a new commanding, flexible and court-supervised restructuring process inspired by the existing scheme of arrangement.

The cross-class cram-down provisions provide an ability to limit the number of ransom creditors or hold out creditors from blocking a viable plan that has the overwhelming support of those creditors who retain an economic interest in the business. Dissenting classes of creditors are able to be crammed down only if they would be no worse off than in the relevant alternative. The relevant alternative is whatever the court considers would be most likely to occur in relation to the company if the plan were not sanctioned.

Some professionals have questioned whether the plan is only applicable to large, complex companies and has no real place in the SME sphere as a CVA is seen as the cost effective, speedy tool in the option bag. Let me put this question to you: 'will the ability to propose a CVA become more difficult from 1 December 2020, and why from that date?' Answer: the return of crown preference. If HMRC are (secondary) preferential creditors and unwilling to support a CVA proposal, will the plan's ability to implement 'cross-class cram-down' see a rise in plans and a decline in CVAs? Who is going to take the plunge?

> For these new rescue tools to flourish, it is going to take a growth mindset, one that embraces challenges, builds new skills and finds ways of applying the new rescue tools.

A different 'mindset'

That initial member opinion – 'the profession has not got a good track record of rescuing companies' – raises a further question. Is a change of 'mindset' required from IPs in order to rescue companies? From the quote, I believe so. Saving businesses has been the norm for a long period of time, and maybe IPs are in a fixed mindset. For these new rescue tools to flourish, it is going to take a growth mindset, one that embraces challenges, builds new skills and finds ways of applying the new rescue tools. IPs are known for their innovation and fortitude, so I have no doubt some will find ways to come to the rescue.

Old faithful

While the new rescue tools may not be appropriate for all companies in financial distress, it is always beneficial to have more tools in the bag than a mere few – ask a plumber or an electrician. It is important to remember that while the new tools promote 'rescue', IPs have had a rescue instrument in their toolkit since 2003. The primary purpose of an administration is to rescue the company as a going concern. For many professionals, rescuing the company as a going concern via administration may not be at the forefront of their minds. However, the use of administration as a rescue tool may have more benefits than a moratorium.

> I do believe the profession is ready to embrace CIGA and the challenges ahead with innovation and fortitude. But then again perhaps CIGA is ahead of its time.

Ahead of its time

Let's cast our minds back to 2003. Jonny Wilkinson kicked England Rugby to glory, Concorde took flight for the last time and I left school with the hope of becoming an IP (joking, of course). More importantly, the Enterprise Act 2002 received royal assent, which made the administration procedure operate more smoothly, easily and economically. The reactions of IPs during this time were likely similar to those reactions to CIGA: 'what is this sorcery?', 'it'll never work', 'too costly', and 'far too risky'. Fast forward to 2020, the administration procedure is certainly well established and has evolved, ie pre-pack administrations. So will the new rescue tools take time to become commonplace? Only time will tell; however, it may require a change in mindset from IPs.

In a more stable environment, I can see the new rescue tools playing a huge part in the restructuring and insolvency profession, but not right now. A pandemic creates uncertainty and unknowns; therefore the rescue of companies may prove ever more difficult.

I do believe the profession is ready to embrace CIGA and the challenges ahead with innovation and fortitude. But then again perhaps CIGA is ahead of its time. □

BEN LUXFORD is technical manager at R3.

Recent case summaries

The latest insolvency update from **Rachael Earle**.

PERSONAL INSOLVENCY

***Islandsbanki HF & Ors* v. *Stanford* [2020] EWCA Civ 480**

Islandsbanki HF (IB) obtained judgment against Mr Stanford in Iceland. IB then obtained a registration order in the High Court in England pursuant to the Lugano Convention. However, the convention allows the debtor a one-month period in which to appeal the registration and yet, before that month had passed, IB obtained a writ of control from the High Court (which allows an enforcement officer to take control of and sell the debtor's property). Steps were taken to enforce the writ but ultimately the debt was not recovered and IB presented a bankruptcy petition.

IB's petition was dismissed by ICC Judge Jones because, in his view, there had been no enforcement for the purpose of section 268(1)(b) of the Insolvency Act 1986 (IA86) and the writ of control was invalid. IB unsuccessfully appealed to the High Court.

> This case serves as an important reminder that creditors must carefully follow the articles of the Lugano Convention when seeking to enforce a foreign judgment.

The questions for the Court of Appeal were: (i) whether purported execution of a foreign judgment under the Lugano Convention can count as execution issued in respect of the judgment debt for the purposes of s268(1)(b) IA86 if the execution was made before the expiration of the period for appealing registration and (ii) whether the defect could be cured if this was not the case.

The Court of Appeal unanimously dismissed the appeal because:

- the purpose under the Lugano Convention was to create a single regime for enforcing foreign judgments in contracting states;
- article 47(3) of the convention and section 4A(3) both make express reference to the fact that during the one-month period no measures of enforcement may be taken;
- those articles impose an express prohibition;
- accordingly, any attempt to remedy the premature issue and execution under the writ of control by means of an exercise of the discretion under Civil Procedure Rules (CPR) r3.10(b), the use of CPR r3.1(2)(m) or 3.1(7), or even the inherent jurisdiction of the court, would fundamentally undermine article 47(3) and section 4A(3) in a way that is impermissible;
- while the writ of control was voidable rather than void, the court was under an obligation to set it aside as soon as it came to its attention.

The court therefore dismissed the appeal; the judge had been right to dismiss the petition.

This case serves as an important reminder that creditors must carefully follow the articles of the Lugano Convention when seeking to enforce a foreign judgment; forbidden enforcement does not constitute 'execution' for the purposes of section 268(1)(b) IA86.

CORPORATE INSOLVENCY

***Chalcot Training Limited* v. *Ralph & Ors* [2020] EWHC 1054 (Ch)**

The company entered into a tax avoidance scheme, the purpose of which was to allow the company to make payments to directors net of PAYE and NIC contributions.

HMRC later determined that the payments were remuneration and subject to tax.

As a result, the director-shareholders caused the company to bring proceedings against themselves, claiming that the payments were in fact unlawful distributions by the company to its shareholders (which would allow the director-shareholders to avoid paying tax on the payments).

The High Court was therefore asked to determine the proper characterisation of the payments.

Mr Michael Green QC (sitting as deputy High Court judge) held that the following principles applied:

- Whether a payment is a distribution is a matter of substance, not form. The label attached to the payment is not decisive.
- The court must ascertain the true purpose and substance of the payment by investigating all the relevant facts. Sometimes, this will include the state of mind of the human beings who orchestrate that payment.
- How the parties choose to describe a payment, both in the documents governing the payment and in documents such as the company's accounts, can also be relevant.
- Crucially, the court must decide whether there is a genuine exercise of the power to award remuneration or whether that power is being used to disguise payments that are really distributions to shareholders.
- In deciding this, the court will generally not interfere with commercial decisions taken by directors.

The deputy judge concluded that the payments did constitute remuneration to the directors because that was the purpose of the scheme (to pay remuneration and avoid PAYE and NIC), the company's board minutes recorded the payments as being made in recognition of the directors' contribution to the company and the payments were recorded in the accounts as 'employment expenses'.

It is perhaps unsurprising that the deputy judge refused to re-characterise the payments when he was being asked to do so by the same people who had characterised them in a different way in the first place. The key point to note is that the directors' decision to cause the company to make the payments must be a genuine exercise of the power to award remuneration rather than an abuse of that power in order to disguise payments that are really distributions to shareholders.

The directors have appealed to the Court of Appeal. □

RACHAEL EARLE is a barrister at Wilberforce Chambers.

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Key results from a survey on the new rescue provisions

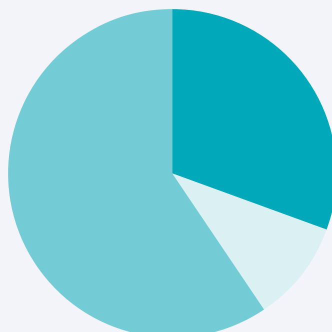
Eileen Maclean reveals the results of a survey on the insolvency profession's views on the moratorium and restructuring provisions in CIGA

Following the introduction of the Corporate Insolvency and Governance Act 2020 on 26 June 2020, Insolvency Support Services undertook research on the insolvency profession's views of the moratorium and restructuring provisions in the new legislation. Here we examine the main results of that research. You can find the full results via the link included at the end of this article.

A representative sample of 42 respondents participated in the research. They represent a cross-section of specialist insolvency practitioner (IP) firms as well as accountancy and law firms with insolvency and recovery practices, ranging from small to very large organisations, across the whole of the United Kingdom.

Use of the provisions

It is clear that, at the time of our survey, the majority of respondents did not know if they were going to use either of the new rescue procedures (60% indicated they did not know if they would use the moratorium provisions and 54% said likewise about the restructuring provisions). Of those who are intending to use the moratorium (31%) and restructuring (20%) provisions, there is a clear difference in the size of company in relation to whom it would apply: moratorium – for large companies 15%, for SMEs 38%, and for any size of company 46%, compared to restructuring – for large companies 63%, for SMEs 0%, and for any size of company 38%.



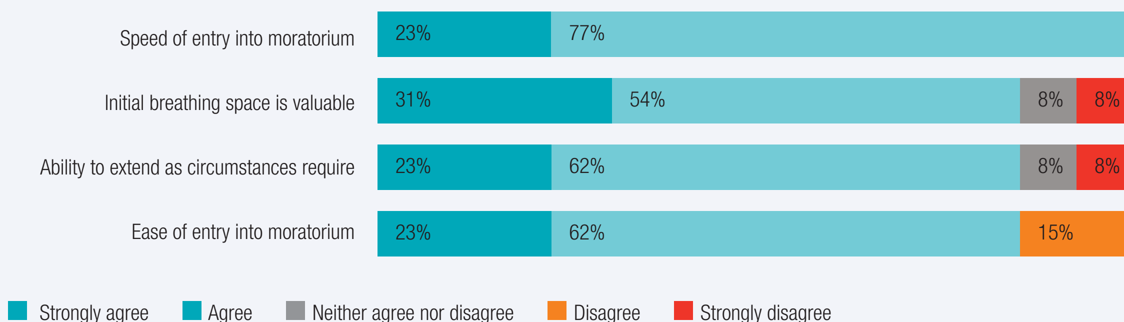
Moratorium provisions

Proponents of the moratorium agree or strongly agree that its main benefits are (in order): speed and ease of entry into moratorium, the ability to extend as circumstances require and the valuable breathing space it will give companies.

Of those not minded to use the moratorium provisions, the main reasons cited are the costs of monitoring being disproportionate to the benefits and that directors do not consult early enough to get the benefit of a moratorium. The latter is a long-standing complaint in insolvency and reflects the old adage that the sooner someone seeks assistance in relation to their business, the higher the chance of rescue. For the moratorium to be effective therefore, directors need to seek advice early.

> "The moratorium can only be overseen by an IP so, despite responses, it will be incumbent on us to use the moratorium provisions or risk losing the exclusivity of the role to other professionals."

To what extent do you agree that the new moratorium provisions are likely to bring the following benefits?



Strongly agree Agree Neither agree nor disagree Disagree Strongly disagree

The moratorium can only be overseen by an IP so, despite responses, it will be incumbent on us to use the moratorium provisions or risk losing the exclusivity of the role to other professionals. However, the cost is going to be an issue, as is the actual remit of the monitor.

It seems likely that a majority of moratoriums will be extended past the original 20 business days (as anticipated by 66% of respondents). Intuitively this seems right: unless a company can get very quick confirmation from its creditors to its proposals, in whatever form they might take, the vast majority of respondents (88%) think that a second period of 20 business days will be required.

Restructuring provisions

To what extent do you agree that the new moratorium provisions are likely to bring the following benefits?

It is clear that most respondents see the new restructuring tool being used at the higher end of the market. Of the respondents who will not be using the new provisions, 91% stated that it is because their client base is predominantly SME companies and directors. Although the SME market is not precluded from making a court application in terms of the new part 26A Companies Act provisions, the Insolvency Service shares the view that this is intended for the large company sector. That means only certain firms (advisory and legal) will be assisting companies in this work.

> “Unless a company can get very quick confirmation from its creditors to its proposals, in whatever form they might take, the vast majority of respondents (88%) think that a second period of 20 business days will be required.”

Those intending to use the restructuring provisions see the main benefits as the ability to bind dissenting creditors to the plan and the ability to remove creditors with no economic interest in the company. Most respondents also viewed voting thresholds, the ability of the court to sanction the plan not withstanding voting thresholds not being met and the wide scope of restructuring possible as benefits of the new restructuring provisions.

It will be interesting to watch the market's response, as well as that of the courts, to the impact these new provisions will have on lenders and suppliers going forward, once the implications are fully understood.

> “It will be interesting to watch the market's response, as well as that of the courts, to the impact these new provisions will have on lenders and suppliers going forward.”

You can see a full summary of the research findings online at **https://insolvencysupportservices.com/views-on-ciga/**

Why will you not be using the new restructuring provisions? Tick all that apply.

Do not consider that it is needed as a new provision
9%

Not consulted early enough by directors to be able to assist with restructuring
27%

Quality of management will be an issue
36%

Cost of process will be disproportionate to the benefits
45%

Client base is predominantly SME companies/directors
91%

EILEEN MACLEAN is a director of Insolvency Support Services.

Breathing space: how to make moratorium work for your clients

Mark Brownson, **John Mercer** and **Lucy Winterborne** draw on lessons from the US and Canada to explore the new UK provision.

The devastation Covid-19 has wrought on the UK economy has been the subject of 24/7 media attention, but it is still hard to filter out the impact on UK businesses from the noise. To put it in perspective, EY profit warnings data showed that there were 165 UK-quoted company warnings in Q2 of 2020. Thirty-three percent of all UK-quoted companies have issued a profit warning this year.

Given the limited amount of capital available to support distressed businesses, those in the restructuring profession need to identify firms that would have a viable future, without the pandemic, and focus on them.

The Corporate Insolvency and Governance Act 2020

The changes introduced by the Corporate Insolvency and Governance Act 2020 (CIGA), which came into force on 25 June 2020, were consulted on a number of times – latterly in 2016, but then fast-tracked to help businesses impacted by the pandemic. It is designed to improve current UK insolvency and restructuring law and, critically, to make it possible for companies with viable underlying businesses hit by the pandemic to come out of the crisis as a going concern, thereby saving many businesses from the potentially damaging impacts of an insolvency.

Excluding temporary measures, the CIGA does this by introducing the concept of a moratorium, and in turn monitorship, into UK law. These changes allow businesses that are, or are likely to become, insolvent an initial 20 days of breathing space (with the option to extend for a further 20 days without court approval or creditor consent) to explore rescue and restructuring options, free from creditor action. The goal is to encourage companies to act earlier to restructure, thereby improving their chances of success. Any costs incurred during the moratorium, from supply costs to advisor costs, rank as super priority debt in the event of subsequent insolvency proceedings.

> “By looking at the US Bankruptcy Code (Chapter 11) and the Canadian Companies’ Creditors Arrangements Act (CCAA), from which lessons have been learned for this Act, we can understand more about how it can be best used to deliver positive turnaround results.”

The CIGA, together with *A Guide for Monitors*, produced by the Insolvency Service, provides a lengthy description of how a moratorium works and the monitor’s role. However, by looking at the US Bankruptcy Code (Chapter 11) and the Canadian Companies’ Creditors Arrangements Act (CCAA), from which lessons have been learned for this Act, we can understand more about how it can be best used to deliver positive turnaround results.

The monitor’s role

A company entering moratorium requires an IP to consent to act as a monitor. The monitor’s role is principally:

- to ensure the company meets the requirements to go into moratorium; and
- confirm that it is likely the moratorium will result in the rescue of the company.

To fulfil these obligations, the monitor must include with the court filing a statement to the effect that ‘it is likely that a moratorium for the company would result in the rescue of the company as a going

concern'. The monitor must be, and remain, of the view that a rescue of the company is likely. If this is not the case, then the monitor must bring the moratorium to an end.

Forming a viewpoint

There is no specific guidance in the CIGA on how much information a monitor should obtain from management. Nor is there guidance on the level of review/challenge they should undertake for them to reasonably form the conclusion that the moratorium is likely to result in the rescue of the company. More scrutiny will be placed on the exit from the moratorium, which the monitor must plan for from the start.

Under CCAA, a statement to court must be supported by a detailed cash flow, which covers the period of the stay. In addition, a business plan and list of underlying assumptions are also required to get the creditors onside (since they vote on the restructuring plan). It is common for the monitor under CCAA to be involved with the preparation of the business plan or specifically commenting on the viability of the business plan in court submissions.

> It is our viewpoint that a moratorium would perhaps be best combined with a new debt restructuring plan.

While entry to a UK moratorium does not require this, an exit route most likely will. For example, a CVA requires the company and creditors to come to an arrangement, under the supervision of an IP, on how the debt will be paid back and the CVA must be voted on by creditors (once with connected and unconnected and once with unconnected only).

It is our viewpoint however, that a moratorium would perhaps be best combined with a new debt restructuring plan. This is a solvent procedure and is similar to the US' Chapter 11 process. For a debt restructuring plan, two court hearings are required, including a vote on the plan by creditors where 75% of each class must approve, subject to the ability to potentially cram down any class that does not approve the plan. It is in an exit route such as these that we will see similar work to what is required under CCAA, such as an inclusion of a short-term cash flow (among other key documents).

Debtor in possession (DIP) financing

Although not strictly related to a monitor's role, it is important to touch upon DIP financing as it could potentially cause some problems for the monitor when making their initial statement in the moratorium filing. John Mercer, a co-author of this piece, highlights this in his article: *Debtor in possession (DIP) financing – the missing piece in the proposed UK corporate insolvency and governance bill*[1].

Both Chapter 11 and CCAA have the goal of retaining the underlying business as a going concern. Therefore, they both have proceedings that allow for super priority DIP financing. This is driven by one simple reason – nobody will lend new money to a company at risk of liquidation if they will be at the end of the queue.

Monitors will need to understand from their client's management teams and professional advisers how they see the company exiting moratorium. Without DIP financing, companies may struggle to build a clear exit route and should, therefore, consider all the options available to them including the new debt restructuring plan.

Timeframe

A final area that is important to highlight is the timeframe within which applications for moratoriums are likely to be made, and the speed with which management and the monitors working with them, will need to act.

Our own view is that, as the government support schemes taper off and creditors begin to better understand the situation before them, creditors will look to enforce earlier before a moratorium is instigated in an effort to minimise losses. This will protect them from being another step back in the queue behind the super priority debt and, in their eyes, an additional potential loss. As a result, monitors will need to act quickly to establish a firm's true potential to exit a moratorium as a going concern and place it into moratorium before the debt is called in and default is reached.

Summary

The challenge for monitors will be in quickly assessing which companies have viable underlying businesses and should be protected. When working with management teams, this means two things: filing at court early to prevent creditor action and making sure the company has a strong recovery plan and exit route. By combining a moratorium with the new debt restructuring plan, the monitor puts themselves in a good position with a clear exit route and we believe this will be highly effective in saving many businesses from the potentially damaging impacts of an insolvency.

> By combining a moratorium with the new debt restructuring plan, the monitor puts themselves in a good position with a clear exit route.

The feedback John has received from the turnaround panels he sits on is that most companies are in a 'wait and see' mode. They are waiting to see if more government assistance will be made available and what the impact of the Brexit trade talks will be. We believe companies, and in particular SMEs, should be planning now for any actions they may want to take (including a moratorium, debt restructuring plan etc) so that they can do so proactively rather than reactively should the relevant circumstances arise. This is where we hope the audience of this article can exercise their influence with the management teams of their respective clients. □

[1] https://www.linkedin.com/pulse/debtor-possession-dip-financing-missing-piece-proposed-john-w-mercer

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Close, but no CIGA

Howard Morris speaks to restructuring and insolvency stakeholders far and wide to gather their views on the new Act.

In welcoming the Corporate Insolvency and Governance Act 2020 (CIGA) reforms Mark Byers of Grant Thornton cautioned me not to expect altruism. But altruism is really what the corporate rescue culture is about: it calls for some stakeholders to act at their own expense in order to benefit another. Of course, Mark is right – it can't be altruism if it is compelled and enforced by rules such as CIGA.

Over the last couple of months, I've been speaking to people inside and outside of the restructuring and insolvency industry to see how CIGA is viewed.

CIGA, running unopposed?

No one I spoke to opposes the reforms. The well-known academics, Professor Christoph Paulus of The Humboldt University (now at White & Case) and Irit Mevorach, professor of international commercial law at Nottingham, echoed a lot of the respondents in expressing admiration for the speed with which the Act was drafted, debated and passed. Graham Bushby, head of restructuring advisory at RSM sees the reforms as a needed move towards debtor-in-possession (DIP) rescue procedures and thinks the industry broadly welcomes the changes, also cautioning that the challenge will be raising the additional funding needed for debtors to continue trading. The missed chance to introduce DIP funding was reiterated by Elizabeth Turner, European counsel with investment firm Castlelake. She contrasted the UK reform with what's expected from the new European directive. Elizabeth expects that the reforms will increase the cost of capital, and senior creditors will look for extra protections against the risk of cram down. Maurice Moses, the restructuring specialist, notes that we're entering a time of disruption and distress and the new measures are an important addition to what we have.

> "The big problem, Geoff said, and all of the IPs with whom I spoke agreed, is the responsibilities of the monitor. IPs can clearly see a variety of legal and practical risks."

The moratorium: old news?

I started by asking people about the *new* moratorium and was pulled up straightaway by Christoph Paulus on the point that there is, in fact, nothing new under the sun. Did I not know, he asked me, that the town charter of Freiburg legislated for a moratorium back in 1520? Geoff Carton-Kelly of FRP noted that the moratorium is an urgent solution for something that isn't, at the moment, an issue, stating that there are 'no burning platforms yet but in due course there will be'.

The big problem, Geoff said, and all of the IPs with whom I spoke agreed, is the responsibilities of the monitor. IPs can clearly see a variety of legal and practical risks. Creditors will expect them to be able to police the debtor without the power or real-time information to do so. At the same time, they will have to rely on an uncertain area of new law without the full-blooded protections many would like. Many IPs I spoke to prefer the informal forbearance approach that is common but the moratorium procedure, or the threat of one, will be useful to stop creditors breaking ranks. But, as CRO and restructuring professional David Hargrave observed, the informal forbearance approach will be tested by the ending of government support programmes, the end of the VAT holiday and the return of Crown preference. On the Crown preference point Lucy Armstrong, CEO of fast-growth business advisory firm The Alchemists and chair of UK Finance's Professional Standards Council, feels that Crown preference will have a chilling effect on funding for SMEs.

Senthil Alagar and Chris Laverty of Grant Thornton feel that the moratorium has been rushed into law, and ruefully noted that many in the profession have been struggling for years to get a debtor-

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controlled rescue procedure. Others, such as Jo Hewitt and Ben Cairns of Alvarez & Marsal feel that the moratorium period is just too short. While it could be useful for an operational restructuring it has its limitations. Saro Bos of Imperial Capital noted the moratorium isn't available for a company that has issued bonds, disqualifying many companies that could make use of a stay on hostile creditor action in order to restructure. Maurice Moses observed that while a light-touch administration, of which we have seen recent instances following its first use by EY some years ago, lasts longer than the new moratorium, although it brings with it costly obligations including reporting and investigations.

> Did I not know, he asked me, that the town charter of Freiburg legislated for a moratorium back in 1520?

Graham Bushby, head of restructuring advisory at RSM, sees the moratorium as a useful alternative to administration but was one of the respondents puzzling about the super priority given to debts in the moratorium. This could have a serious effect on Accelerated M&As and pre-packs, which may become unaffordable. Others foresee ingenuity being brought to bear on gaming the rules about this super priority.

Before we get to the new restructuring plan, a word about the *ipso facto* rule. Again, it is welcomed but professionals are smart enough to figure out what will be the common work-around of suppliers and what has become commonplace in the US: inexplicable delivery vehicle break downs or unavailable stock. Like the moratorium it's seen as shifting the balance of power in negotiation but is not a game-changer.

Inter-creditor politics

The new restructuring plan that permits a whole class of creditor that votes against a deal to be compelled to accept it, cross-class cram down (CCCD), received the most and most varied comments.

Generally, there is disappointment that there is little sign that the procedure will cost less than a part 26 scheme of arrangement and so is out of reach for SMEs. Jo Hewitt, who worked on Virgin's restructuring, the very first use of a part 26A restructuring plan, comments that a lot of preparatory work has to be done and it will be crucial. Jim Peck, the former federal bankruptcy judge in the Lehman Brothers Chapter 11 filing and head of my firm's cross-border restructuring and insolvency practice, speaks for a number of experts with experience of Chapter 11 when he says that the Chapter's plan of reorganisation is part of a sophisticated matrix of provisions and rules to ensure protections in the use of its provisions. Rick Morris of HPS Investment Partners thinks that senior secured creditors who sit at the top of a borrower's capital structure will be alarmed at their apparent vulnerability to CCCD. In the US there is the absolute priority rule (APR) providing that a dissenting class must be paid in full before a more junior class receives any payment. Instead we are relying on a test of what is fair and equitable. Barrister Riz Mokal of South Square, an academic with a deep knowledge of the US Chapter 11 process, is sanguine about the lack of an APR. Riz observes that in Chapter 11 cases, rather like the *pari pasu* principle, APR informs the jurisprudence but issues are invariably solved through the exceptions to the rule. Secondly, notwithstanding that the UK has never had the APR rule, it has nonetheless become a prominent jurisdiction of choice for restructuring. Thirdly, the counterfactual, that no creditor class should be left worse off than it would be in the relevant alternative ensures that the only value at play is the value added or preserved by the restructuring. This doesn't soothe everyone's concerns that CCCD will be too easy to achieve and consequently investors will, as Elizabeth Turner observes, want more protections in the inter-creditor agreement and those in that top layer of a company's debt stack will be less willing to invest or want a better return for doing so.

Choosing to omit an APR won't avoid controversy, I've been told. The battlefield will be valuation. To determine which creditors can vote on the plan one must know where the value breaks and figure out if the plan meets the test of offering creditors an outcome not worse than the relevant alternative, which is what the court considers would be the most likely alternative if the plan isn't confirmed. Valuation is key. And, as Rick Morris posits, what if if the likely alternative is a restructuring in France, for senior secured creditors? Their outcome in that restructuring could be that their claim isn't then repayable for ten more years at a low-interest rate.

The English scheme of arrangement and, it is expected, the new restructuring plan are pre-negotiated before they reach the court for sanction. In contrast, the US Bankruptcy Court is traditionally closely involved in the making of a commercial deal, although pre-packed deals in Chapter 11 are more and more common. While the English courts and English judges are not at all inclined or supposed to be involved in hashing our commercial deals, they also aren't in the business of being a rubber stamp. With more plans, CCCD, and disputes about valuation, the counterfactual and fairness to be decided with little precedent to call upon, there is an expectation that there will be more litigation.

Towards a Chapter 11-ish future

The UK is a centre for international restructuring. This earns the country millions of pounds and adds lustre to the profession. The CIGA reforms bring us into line with the World Bank's endorsed global direction of travel, and towards a Chapter 11-ish future. Remaining a centre for this business post-Brexit is a goal for some and they believe that the reputation of our courts and the concentration of expertise and experience in the UK profession, along with the modernisation of our laws by CIGA, will help the UK retain its international position. While so many countries are adopting substantially similar reforms, such as the European Commission's insolvency directive requiring EU members reach the standard of a common framework and the new Dutch insolvency legislation due to become law in October, there will be competitors for restructuring assignments that might otherwise have come to the UK.

> Change is never easy, even change for the better poses challenges, but the great strength of the industry is its adaptability.

Reform isn't over. The government will be looking carefully at the effect of CIGA. But there are elements of our restructuring and insolvency regime that will attract greater interest as we wrestle with the recession and its aftermath. Dame Teresa Graham thinks that the pre-pack sale to a connected party will become a focus of attention.

Change is never easy, even change for the better poses challenges, but the great strength of the industry is its adaptability. While the tools may not be quite right to fix the problems with which we must deal, speaking with those around the industry has reinforced my view that we have the intellectual muscle and commercial chops to meet those challenges. ◻

HOWARD MORRIS is head of restructuring at Morrison & Foerster LLP.

The art of a light touch

Alastair Massey explains the key elements of a light-touch administration.

The Covid-19 pandemic has brought to the fore a powerful element in an administrator's existing arsenal – a process that has become known as the 'light-touch' administration.

Instead of assuming full management responsibilities – a usual course of action in administration proceedings – light-touch administrations involve administrators permitting the continuation of certain management powers to a business' existing management team; leveraging their existing expertise, including organisational and sector knowledge, to help support the administration's purpose.

Due to the unforeseen pandemic and its unprecedented effect on businesses, there has been further cause for the appointment of light-touch administrations, as many businesses were in difficulty due to external factors outside of their control.

However, they are still relatively rare and can be limited in their useful application, although understanding how they work and learning from recent cases can undoubtedly help us as administrators to support businesses in distress.

What are light-touch administrations?

The light-touch administration is an underused tool for IPs, but the foundation of these processes has long been established by UK insolvency law.

From a legal perspective, the contemporary light-touch administration is underpinned by the stipulations of paragraph 64 of schedule B1 to the Insolvency Act 1986, which grants administrators the power to allow a company's existing management team to continue running a business in administration – with their supervision – without having to seek creditor approval first.

Within this framework, a light-touch administration involves administrators consenting to the management team of a business in administration carrying out certain management functions while the administration is underway. The light-touch of the name reflects this structure.

As a result of delegating certain responsibilities, administrators take more of a supervisory role in the running of the business while it is in the administration process – working alongside management teams, rather than replacing them outright. This can offer a number of advantages.

> "A light-touch administration involves administrators consenting to the management team of a business in administration carrying out certain management functions while the administration is underway."

It enables administrators to supplement their own expert skills sets with the on-the-ground knowledge of management team members to ultimately bolster the business' chance of being successfully rescued. Maintaining this consistent leadership, and preserving relationships that management team members hold with internal and external stakeholders, can help to minimise disruption throughout the administration procedure.

The administrators are intrinsically involved in the day-to-day running of the business; however, by avoiding the need to replace every management function with a member of an administrator's team, it can help to lower the cost of administration.

Light-touch administration will not be suitable in all cases. Ultimately, the process hinges on administrators and stakeholders having full confidence that the continued inclusion of a firm's leadership team in its management serves the best interest of the company overall.

In many instances, that confidence will have been shaken and full management responsibilities will be assumed by the administrators – as some creditors may prefer to work directly with the IPs while a business recovers. Against this backdrop, light-touch administrations will likely only be pursued in instances where firms are deemed to need the protection of administration through no fault of leadership team members themselves.

Key considerations for light-touch administrators

The success of a light-touch administration will ultimately hinge on the administrators managing the risk of any behaviour that would jeopardise the administration procedure while still being able to execute their statutory duties and, if possible, rescue the company as a going concern.

With this in mind, the very first consideration will be determining whether a light-touch administration would be appropriate for the business in question.

To be suitable, the senior leadership team needs to be well advised, experienced and mindful of their fiduciary responsibilities, and the administrator must have a high degree of trust in the integrity of the management team.

In addition to reviewing the leadership, it will be important to assess the strength and quality of a business' internal processes and financial reporting – administrators should be satisfied that these are robust enough to protect against vulnerabilities like fraud.

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Establish a consent protocol

As a light-touch administration involves delegating management responsibilities, administrators will need to establish exactly what management teams will, and won't, be permitted to do as their next action.

This is achieved by establishing a 'protocol agreement', commonly referred to as a 'consent protocol' – a contract that establishes powers that company directors are authorised to hold and the conditions they must comply with to exercise these powers.

> The administrators will need to determine how they efficiently deploy their own team members to ensure adequate supervision without duplicating efforts.

The details of a consent protocol will vary from business to business. However, it could set parameters around commitments to costs that would rank as expenses of the administration, payment authorisations, consent to administrators having access to company bank accounts and stipulations on how and when directors are expected to report to the administration team.

The consent protocol is the foundation to a light-touch administration's execution, so careful consideration should be given to what powers are permitted. Protocols can be adjusted as administrations proceed but, in my experience, it is better to set stringent parameters from the outset as it will likely be easier to relax restrictions at a later date than to tighten them later down the line.

Set control and oversight procedures

Once consent protocols have been agreed, administrators will need to review the current business processes and reporting lines to ensure sufficient control is maintained. Any weaknesses identified will need to be augmented with additional controls.

The administrators will need to determine how they efficiently deploy their own team members to ensure adequate supervision without duplicating efforts – the very nature of a light-touch administration means that administrators don't need to replicate every role in a management team, but will need to ensure they have enough 'touch points' to have sufficient control of operations.

Initially, cash payments and undertaking commitments with suppliers are fundamental to control and reporting lines should be established to ensure that administration expenses and payments out of the business cannot be effected without administrators' staff sign-off.

Initial negotiations with suppliers can be undertaken by company staff with strict parameters around what agreements can be made, and this can be augmented by the administrators' staff.

Having a process like this in place means you are able to leverage the insight and experience of the management team, while carefully controlling costs and cash flow in line with the administration's objectives.

Communicate

It's not just enough to establish control mechanisms – they also need to be communicated to all relevant stakeholders. This will naturally involve internal communication – outlining to heads of departments and their teams what powers they do and don't have – but should also be extended to stakeholders outside the business.

The administrator should contact the business' suppliers on day one of appointment to explain that all costs and commitments need first to be approved by a member of the administration team. Employees of the business would be able to provide evidence to suppliers that an agreement had been fully approved.

Ultimately, this is to help reduce the risk of unauthorised and unexpected commitments – if suppliers are also aware of the controls in place, they are less likely to agree to an unsanctioned commitment. Most suppliers will wish to conclude negotiations directly with the administrator rather than with their existing relationship contact within the business.

> Where conditions are right, light-touch administrations can provide administrators with an effective method for protecting and stabilising a company in times of distress.

Despite best efforts to the contrary, it is possible that single staff members working independently attempt to work outside of the agreed framework to negotiate their own deals without sufficient authorisation.

These actions should be identified by control processes implemented and potential commitments not authorised with no detriment to the estate. Ultimately, strong oversight procedures and good communication – with internal and external stakeholders – will help to reduce the likelihood of such incidents occurring, and minimise the risk to the administration team.

What does the future hold?

Covid-19 has generated specific circumstances where light-touch administrations provide an effective method for protecting otherwise viable businesses against creditor action.

However, at this stage in the pandemic it is potentially less likely that we'll see an increase in the number of light-touch administrations applied. If businesses have made it this far under unprecedented pressure, a rescue option such as a pre-pack sale or a trade administration may present a better option as we start to see a move to a new normal.

In the longer term, light-touch administrations are likely to remain relatively niche. This is precisely because the conditions in which they are likely to be a viable option – specifically, where a business is forced to enter administration due to pressures outside of the management team's control – are so rare.

Despite this, their value should not be overlooked. Where conditions are right, light-touch administrations can provide administrators with an effective method for protecting and stabilising a company in times of distress – leveraging a management team to help give a business the best chance of survival, while reducing disruption and cutting costs. ◻

ALASTAIR MASSEY is a restructuring advisory partner at specialist business advisory firm FRP.

Conservation and restoration: business turnaround after Covid-19

Paul Davies, president elect of the Turnaround Management Association, explains where turnaround and restructuring professionals fit in the picture of post-Covid recovery.

Covid-19 has shaken the world and undoubtedly presented business leaders and directors with the biggest crisis most have ever, or will ever, see. Helping to steer British businesses to recovery is a task that everyone is invested in but few possess the skills to do. Funding schemes, furlough provisions, VAT delays and rent holidays have all provided essential relief but, for those businesses now looking to the future, planning and strategy is critical.

Even highly competent management teams are likely to be ill-equipped to deal with the scale of this crisis and what is required to keep afloat. The Covid-19 pandemic has created unprecedented and complex challenges for businesses whose leaders don't have the specialist range of skills that are unique to those who deal with crises on a daily basis.

I am of course talking about turnaround and restructuring professionals. And while no one has dealt with a crisis of this magnitude – not even the fallout from the 2008 crash compares to that of Covid-19 – turnaround and restructuring professionals are better equipped than most, which is why I expect us to have a crucial important role in restoring businesses in the coming months and years.

Experts in crisis

Most of the business leaders and directors I have spoken with in recent months have said that they feel like they are stumbling around in the dark, not knowing where to begin in dealing with the damage that's been done to their business. This is no surprise considering that many business leaders might never encounter a crisis beyond a temporary IT failure, minor data breach or power cut.

It will be a shock to the system, and many will have made rash decisions or, worse, struggled to make any decisions at all. As professionals who deal with crisis regularly, and therefore have the necessary expertise and business skills, our job is to guide these directors through what is likely to be the most difficult time in their careers. In holding the uniquely broad, yet specialist, set of skills that many of us do, I think we are some of the only people suited to do so.

The period of crisis decision making about emergency loan support, putting staff on furlough and crisis negotiation with creditors for payment holidays is largely past, but there is still a huge amount of work to be done before the hundreds of thousands of businesses that went into hibernation can emerge and prosper.

Now, the immediate challenge for many businesses, particularly smaller ones, is likely to be one of understanding their cash situation. Many smaller businesses were struggling to maintain even basic cash

> "Even highly competent management teams are likely to be ill-equipped to deal with the scale of this crisis and what is required to keep afloat."

flow forecasts before the pandemic, getting by month to month. Covid-19 has exposed weak cash management and those businesses that thought they were bumping along just fine have found themselves in difficulty where they can't make their finances work, are struggling to assess whether or not they can afford to keep all their employees beyond October, can't work out how much they can spend on purchasing supplies, and don't know whether they can pay rent and ultimately reopen their doors. Fashion retailers, for example, will be having a particularly hard time as they have to plan, order and pay for stock several seasons in advance. How can they forecast what their sales will be like next spring and how much money have they lost in unsold stock over the last few months?

> Many restructuring and turnaround professionals are ideally suited to assist directors to fulfil their obligations to the monitor.

In such cases, which are unfortunately very common right now, our role is to help the business to understand their key financial and operational issues, address those that need it and create a robust plan for the future. Thirteen-week rolling cash flow forecasts, financial stress-tests, workforce planning and supply chain management are all going to be key.

It can't be ignored that all the loans borrowed to defray the immediate impact of the pandemic need to be repaid and businesses will need a plan to do so. And if repayments are likely to be difficult, early engagement with stakeholders is critical as, provided the business is still viable, it will be in everyone's best interest to negotiate and reschedule existing commitments.

Restructuring options

It is often difficult for many business leaders to accept that after a crisis their company may not be able to continue as it had before. It's hard for them to accept that what may be necessary for their business' survival is to cut certain products or services they might have previously introduced or worked hard to promote. Efficiencies may need to be made which often involves selling assets, altering credit terms or changing the business model.

We've already seen a lot of this in the retail sector over the last couple of months with companies such as Cath Kidston and TM Lewin moving fully online, John Lewis announcing the closure of its least successful stores and many more announcing store closures and extensive job cuts.

Pre-pack deals have been popular with companies such as Monsoon Accessorize, Le Pain Quotidien, Go Outdoors, Oak Furnitureland, Bensons for Beds and Harveys Furniture all opting for them. For other companies such as Travelodge, Poundstretcher and Pizza Express, a CVA has been used as the rescue tool. All of these examples are of turnarounds that have been driven by licensed IPs and demonstrate support for the rescue culture.

As restructuring and turnaround professionals we often need to help directors 'see the wood for the trees', so engrossed are they in the details of their business that they often struggle to see the big picture until it is too late.

Our role, therefore, is to help business leaders understand their options and why a departure from their current business model might improve their prospects for recovery and future survival. While loans may have been necessary to stave off imminent failure, little thought will have been given about how they will be repaid in two to three years' time.

As turnaround professionals, we need to help businesses look beyond the next six months to consider what shape and size their business might take in three to five years. Along with company structure and financial resilience, this also means looking at key employees and whether the company needs to reorganise to ensure that those in senior management roles will be capable of implementing a turnaround plan. It's no use giving great advice if the business' leaders can't implement it when you're gone.

The new moratorium

The new moratorium has been hotly discussed in our industry with many wondering how it will work in practice and whether the requirements are too burdensome for IPs to want to take up the role of monitor. But, largely, there has been agreement that this is a positive addition to the UK's insolvency regime, which we expect will be tested over the next few months.

As readers will know, the moratorium will give companies a short window to take steps to restructure, seek new investment or pursue a turnaround strategy free from the immediate threat of creditor action. Unlike the UK's other formal rescue procedures, incumbent management remain in control, which is why it's likely to be an attractive option for directors. The IP who acts as monitor is appointed to protect the interests of creditors and their role is limited although they have clear duties to perform, which for some may be uncomfortable.

A huge amount of preparatory work is required before an IP accepts the appointment as a monitor and such preparatory work may be beyond many directors. This is an area where I see non-IP restructuring and turnaround professionals providing invaluable support to businesses.

With experience of both running companies and working with IPs, many restructuring and turnaround professionals are ideally suited to assist directors to fulfil their obligations to the monitor and to reassure the monitor that they are getting the information they need both to accept the appointment and to fulfil their duties relating to keeping track of the moratorium and turnaround process.

Challenges

As is often the case, the challenge will be getting businesses to seek or accept assistance. One of the biggest concerns directors have is that they don't want to pay for advice when their company is struggling financially. In reality, of course, the amount they might pay a turnaround professional will be insignificant in comparison to the amounts involved if their company becomes insolvent or how much they could save by engaging with such expertise at an early stage.

> For businesses that might not want to accept that they need help, it is often only at the last moment that we are called in. And sometimes it's just too late.

Of course, we know that the earlier we become involved, the more of a chance the business has. But for businesses that might not want to accept that they need help, it is often only at the last moment that we are called in. And sometimes it's just too late and rescue is no longer possible.

We have an important job in getting the message out to businesses and their leaders that we genuinely want to help businesses. Unfortunately, there is sometimes a stigma that calling in help means insolvency is imminent or the directors haven't done their job properly, but this just isn't the case. Sometimes, a specialist is needed and that's where we come in to help them survive and prosper.

PAUL DAVIES is a partner at BTG Advisory LLP and president elect of the Turnaround Management Association.

A coastal Covid rescue case study

VisitEastbourne provided *RECOVERY* with an insight into their efforts to save the tourism and hospitality-centric seaside town.

Eastbourne had bucked the trend for the UK's coastal towns prior to the Covid-19 outbreak. Visitors to Eastbourne increased 5% in 2018, further bulking up its £502m per year tourism economy, at a time when national headlines were lamenting the lack of investment, opportunities for young people and an over-reliance on tourism along the UK's shores.

Nearly a third of all the jobs in Eastbourne are supported by tourism, making it essential to the town's survival. When the pandemic hit, the outlook was dire, with members of the Eastbourne Hospitality Association estimating losses of around £40m during the lockdown period alone. It was clear that the town needed a plan to protect its jobs and allow businesses to continue trading, which it created in the form of a multi-sector initiative called 'Covid-Ready'.

> It was clear that the town needed a plan to protect its jobs and allow businesses to continue trading.

Covid-Ready

Covid-Ready is the only free primary authority-supported quality scheme in the UK to cover all industry sectors. Spanning accommodation, restaurants and attractions, the scheme also includes retailers, pubs, takeaways, hairdressers, open-air markets, conference venues and even offices. It was open to industry members from the Eastbourne Hospitality Association, Chamber of Commerce, the Business Improvement District and Eastbourne Borough Council's **VisitEastbourne.com** website. The scheme has already seen business sign-ups across all sectors and from businesses of all sizes.

The scheme provides expert guidance on best practice for social distancing measures, cleaning regimes, staff training and rapid response for tackling any signs of infection quickly and effectively. It is part-funded by the European Regional Development Fund via the Reopening High Streets Safely Fund and supported by East Sussex Primary Authority, including

Trading Standards, Environmental Health and East Sussex Fire & Rescue Service.

To register, businesses complete the risk assessment template provided and sign up online to declare that all of the latest guidance and control measures are in place. In return they receive a business toolkit with digital logos and templates, and a welcome pack including a 'Covid-Ready' window sticker and branded sanitiser. This makes them easily identifiable to the public and gives residents and visitors additional reassurance that their safety is priority.

Safety first

Businesses can be inspected at any time to ensure the highest standards are always met. They can also feature, free of charge, within a Covid-Ready list of venues on the VisitEastbourne website, as well as seeing their registration announced on the scheme's Facebook page.

The scheme was the first of its kind to be raised in Parliament by the town's MP and, as well as inspiring public confidence, the scheme supports 'book local' and 'buy local' initiatives, allowing visitors to book accommodation online through the VisitEastbourne website. This ensures that every pound spent supports the local economy, rather than the commission fees of associated with major international booking websites.

An online PPE shop provided by the Eastbourne Hospitality Association is also open to businesses to buy competitively priced items, including gloves, masks, sanitiser, aprons and anti-viral disinfectants, all locally and responsibly sourced to ensure that vital NHS supplies are protected.

Socially distanced holidays

Following on from the public safety campaign was an industry-wide 'Love Eastbourne' marketing campaign, run and funded by **VisitEastbourne.com**, the Eastbourne Hospitality Association and Your Eastbourne BID. It was designed to target new visitors quickly and cost-effectively.

The new campaign utilises social media advertising, e-marketing and new photography and videography techniques in a quick and effective campaign designed to maximise 'staycation' visits towards the end of the summer and extend the peak season further into the autumn.

Targeted digital advertising has been placed across London and the south east using social media, websites and billboards, and a launch competition attracted thousands of entries in its first week. The campaign will run until mid-September, using themes such as families, romance, wellbeing and active holidays.

The campaign has provided a high level of engagement with the generation of brand-new leads and visitor data capture at a cost-effective rate. The end result is a highly engaged new audience for Eastbourne and an ongoing library of digital content that can be utilised into 2021.

> The scheme was the first of its kind to be raised in Parliament by the town's MP and, as well as inspiring public confidence, the scheme supports 'book local' and 'buy local' initiatives.

The result

Following the joint action between business leaders and the primary authority on the safety and marketing campaigns, the Sussex seaside town successfully reopened as a 'Covid-Ready resort' in July. The pandemic may be far from over, but Eastbourne certainly appears to be ready for what comes next. □

Contributed by VisitEastbourne, under Lewes District Council and Eastbourne Borough Council.

Litigation Funding: 2020 vision

Mark Beaumont examines the wide range of litigation claims and how they can be managed moving forward.

It's fair to say that insolvency litigation is unlike most other types of litigation, given that there can be both a private and a public benefit to pursuing many claims. In fact, holding individuals to account for their conduct can be a central aim of pursuing an insolvency case through the courts.

This brings challenges, not least of which is how to manage the costs and risks of such an action – balanced against the hidden costs and professional risks of not pursuing a valid claim. Understanding these risks and identifying appropriate options are therefore important factors when entering the market, and ones that any conscientious broker should take professional pride in providing.

> Ultimately, insolvency practitioners are fiduciaries who must act in what they believe to be the best interests of the creditors.

Exploding the funding myths

The team at Annecto Legal has worked in law firms and litigation costs recovery environments and brings a broad range of experience to the table. This includes knowledge of retainers and *inter partes* costs recovery as well as the various forms of litigation funding and after-the-event (ATE) legal expenses insurance for both adverse and own-costs risk management. Not all of those working in insurance, funding or, indeed, broking have such a wide perspective on the ways that litigation can be pursued. In fact, many in this market could be viewed as having a deliberately narrow focus, as they seek to push their own funding or insurance product as the best solution, sometimes before they've even begun to understand the circumstances of the case.

Working in the legal costs world around the time of the Jackson reforms was an interesting experience: fundamental changes to litigation were introduced at the same time as a lot of confusion and misunderstanding. Some of the misconceptions are still around today – years after implementation concluded – especially around conditional fee agreements (CFAs), discounted CFAs and damages-based agreements (DBAs). The result appears to be that fewer cases are brought than before and less money finds its way to the creditors.

Up until 2015, third-party funders accounted for only a very small part of the insolvency litigation market, but then insolvency office-holder actions were made assignable to third-party funders and all that changed. With success fees for CFAs no longer recoverable, nor ATE premia, the attractiveness of funders has risen considerably. This does not, however, mean that the model suits all cases, or indeed that there is only one model of third-party litigation funding for insolvency litigation.

There are numerous funders now operating at all sizes of insolvency dispute, whether via taking assignment of claims or funding them as a third party. There are also insurance models that can protect investments in litigation, whether made by the IP, creditors, the lawyers or indeed external funders. Use of insurance in this fashion is one of the fastest growing areas of the market but is poorly understood (if known about at all) by large swathes of the profession. Given the relatively low price of insurance compared with litigation funding, this is probably the one area that practitioners at all levels would do well to understand: it can work on really low-value disputes, unlike typical funding, although this does not preclude it from being used on larger cases too.

Ultimately, insolvency practitioners are fiduciaries who must act in what they believe to be the best interests of the creditors, and as such it makes sense to understand a range of options and seek the most practical solution for each potential case. It is also good practice to cover your bases and make sure that you have a record of exploring the options, should the question ever be asked.

> In today's world we need to be looking forward for the opportunities to grow our practice, find an edge on the competition and provide better value to our clients.

Hindsight is always clearer

In practice, often two or more of the funding options outlined above are combined – some costs may be self-funded, for instance, with others subject to a full or partial CFA, perhaps all backed by ATE insurance. Where commercial funders are financing litigation, they will sometimes require the lawyers to act on a partial CFA to help align interests and, again, ATE will typically be involved too. Funding can therefore involve arrangements that may alter as the stages of litigation progress. Even comparing the various options can be difficult unless your broker is able to do so for you in a simple and straightforward fashion for you.

We all know that hindsight is with 20-20 vision, but in today's world we need to be looking forward for the opportunities to grow our practice, find an edge on the competition and provide better value to our clients. Our team is here to help you navigate a fast-evolving market and help you find the right options on every case. ◻

MARK BEAUMONT is co-founder of Annecto Legal Ltd, a national broker of after-the-event (ATE) legal expenses insurance and a wide range of funding for insolvency litigation and arbitration claims. Annecto is happy to assist with smaller claims, as well as mid-market, large-scale and complex cases. Contact Annecto Legal on 0800 612 6587 or Mark Beaumont directly on mark.beaumont@annectolegal.co.uk or 07730 217 643.

Where is the data? Data mapping in insolvency investigations

Tom Whittaker and **Emily Scaife** explain the importance of data mapping in insolvency investigations.

Imagine that IPs have been appointed as administrators of an aerospace engineering company that operates around the world. The company was financially stressed before the Covid-19 pandemic and then sales dried up. With no reasonable prospect in sight, the directors filed for administration and questions have since been raised about how the directors conducted the company's affairs shortly before it entered administration.

So where do the office-holders start? Investigations are not a new concept for IPs and they will be familiar with collecting the company's books and information but, as the amount, nature and location of the data available raises ever-more complex questions, office-holders must continue to adapt how they manage that investigation.

One crucial, and potentially overlooked issue is consideration of how to identify, locate and obtain the company's documents or other information relevant to the office-holder's role generally, and not just the company's books. This is the aim of data mapping, a term regularly used in the electronic discovery industry and one that is of particular use in investigations. Data mapping is important as there is an increased expectation from courts, regulators and stakeholders for companies to explain where their data is. Often, office-holders will need to engage experts to assist in managing the data mapping and collection process.

Requirement to investigate

Administrators and liquidators have a duty to investigate what assets belong to the company (including potential claims against third parties including the directors) and what recoveries can be made.

They are required to carry out investigations into insolvent companies in accordance with the compliance standards set out in the Statement of Insolvency Practice 2 (SIP2). SIP2 requires that an office-holder should document, at the time, initial assessments, investigations and conclusions, including any finding that further investigation or action is not required or feasible, and also any decision to restrict the content of reports to creditors. What data was identified, collected and reviewed will be relevant. IPs should be familiar with what is referred to as data mapping in the electronic discovery industry.

What is data mapping?

Data mapping is a process of:

- identifying an individual or organisation's data sources, which may hold documents relevant to an issue or issues; and
- understanding:
  - how those data sources are stored, structured, managed and accessed;
  - how those data sources and the data are used within the organisation;
  - who is responsible for those data sources; and
  - the applicable retention and back-up practices and policies for the data sources.

The definition above is the working definition of the data mapping project team of the Electronic Discovery Reference Model (EDRM), a US-based organisation that produces resources for electronic discovery that reflect, or become, industry best practice and are often used globally.

However, data mapping has different terms depending on the context, who you are speaking with and where you are in the world. For example, data protection officers may know of data mapping as part of their work to understand how their organisation controls and processes personal data for the purposes of regulatory compliance and best practice. When talking about data mapping it is important to be clear about what it is that you are doing and trying to achieve.

Data mapping in potential litigation

There may be specific requirements for data mapping depending on the context, in particular if there is litigation. For example, if the investigations result in court proceedings or the company finds itself involved in litigation, there may be a requirement to complete a document that records what types of data there are, where they are and whether they can be accessed.

Whether and to what extent the court requires an office-holder to engage with data mapping depends on what type of claim is made. In the opening paragraph of this article, we gave the example of the aerospace engineering company. In this example the office-holders may have some idea that there is the potential for claims under the Insolvency Act 1986 (IA86) against one of the former directors, for example, falsification of company's books (section 209), false representations to creditors (section 211), fraudulent trading (section 213) and reviewable/antecedent transactions.

Of course, it is impossible to know in advance what claims there may be against the former directors; that is why investigations are essential. Practically, it is not possible to identify in advance which

court rules will apply to any future claim and therefore what is required for data mapping.

Take for example the Disclosure Pilot Scheme, which is the set of rules governing how disclosure is given in certain types of cases. The scheme requires the parties to explain what potentially relevant sources of electronic documents exist and where they are in the 'data mapping' section of what is known as the disclosure review document. However, this scheme will not be relevant to all insolvencies: it does not apply to some claims, such as petitions, applications or claims without particulars of claim, but it does apply to unfair prejudice claims under section 994 of the Companies Act 2006.

Even if the court rules do not require the office-holder to engage with data mapping there remains a risk that the court or another party raises questions about the company's documents. In fraud cases, questions may be raised about the veracity of a company's documents and IT systems.

The result is that data mapping needs to allow the office-holder to respond to any type of claim. Clearly it is not possible to design a document that cross-references every type of procedural rule, but the data map will need to allow the office-holder to be flexible depending on what information may be required and to respond with the correct, up-to-date information promptly. In any event, data mapping helps office-holders to understand the potentially relevant data sources even if litigation never occurs.

Given the importance of understanding the potentially relevant data sources, obtaining technical knowledge from experts is often crucial.

Where does the office-holder start with data mapping?

Generally speaking the data map will be a single document that records the key information and the relevant details about the data source, date and integrity. What the data map looks like will be tailored to each case and will be regularly updated throughout its life. If possible, it should be formatted in a way so that searches and analysis can be done efficiently and effectively; if a spreadsheet is used, think of filters and pivot tables.

Preparation is critical. What information is required depends on the facts of each matter. This will determine what information is required and form the basis of what information is to be recorded in the data map. The office-holder will need to identify what they are required, and may be required, to do. In our aerospace example, the office-holders have a duty to investigate what assets belong to the aerospace company and what recoveries can be made. They may also expect detailed investigations into, and potential litigation regarding, the directors and the antecedent transactions. The relevant data for this could be held globally, across multiple sites and on an array of devices, each with their own document creation and retention policies.

Also, office-holders should be aware that documents may be located in unexpected places and formats due to changing work patterns caused by Covid-19 restrictions; the directors may have used various different video-conferencing or document collaboration systems when trying to keep operating in the changing circumstances, for example.

Preparation also allows the office-holder to determine with whom they need to speak. Bear in mind the office-holder's broad powers to obtain information under the IA86, for example under section 235. Identifying not just who holds potentially relevant information about documentation, but also with whom it is most appropriate to speak, are important steps in ensuring that any enquiries can be made as efficiently as possible. The data map will need to record the source of information so that there is an audit trail of who said what and when, and to allow follow-up questions if needed.

> "Data mapping needs to allow the office-holder to respond to any type of claim."

The data map needs to be designed to allow cross-referencing. The amount of detail that could be captured is likely to be considerable, so the data map will need to cross-refer to other documents for further detail.

While preparation is key, ultimately, the data map needs to be flexible and user-friendly by design. As investigations progress, new information will come to light and new trains of enquiry will be pursued. The data map will be a living document, ready to adapt to the changing requirements of a matter. It will also be relevant to the work of a variety of people who need to understand what documents are available. It has to be user-friendly so that the information it contains – reflecting the office-holder's enquiries – can be used effectively as part of the office-holder's work.

As a living document, the data map will reflect the work already done by IPs in investigations and. in particular, the growing complexity of identifying, collecting and reviewing data as IT systems and working practices continue to change. At whatever stage it is required, the IPs should be able to rely upon the data map to respond to the court, regulator or stakeholders' questions about the company and the essential question 'where is the data?' ◻

The role of the forensic technology team

Steven Bain, director in the forensic technology team at FRP, explores the role of the forensic technology team in the data mapping process.

Data can quickly become evidence and it is important to think about this from the outset. Can potential data sources be identified and relied upon in the future?

Specialists in forensic technology are able to ask the necessary technical questions when identifying potentially relevant data sources – such as where it is located, how it is stored and whether there is a need to act in order to preserve data that may be in line for a deletion policy – and when collecting and reviewing the data itself.

Forensic technology teams will include specialists in digital forensics and eDiscovery. Their experience in previous data mapping exercises, consulting, data collection, data processing and best practice guidelines will help to identify the necessary technical questions to ask. Often, forensic technology specialists will also require additional infrastructure and information security support, so will connect with other teams for added expertise.

Asking the right questions to identify the relevant data sources is particularly important at the outset of an appointment, so that data sources are preserved and a full chain of custody for the evidence can be demonstrated. This is vital if the evidence is required for legal proceedings and it can have a significant impact on the eventual outcome of a case.

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Furlough and administration: when is a contract of employment 'adopted'?

Lisa Linklater and **Harriet Hartshorn** explain the recent Court of Appeal decision in *Debenhams Retail Limited (in Administration)* on furloughed workers and administration.

The Coronavirus Job Retention Scheme (the scheme) has been ground breaking for employers, employees and administrators of insolvent companies, each of whom have swiftly adjusted to the practical and commercial effects of the scheme. The scheme very quickly gave rise to applications to the High Court, by administrators of high-profile companies, for directions as to whether a contract of employment of a 'furloughed employee' had been 'adopted' by an administrator. If it was, the 'wages or salary' (which are defined by paragraph 99(6) of schedule B1 of the Insolvency Act 1986 (the Act) to include holiday pay and sick pay) would have super-priority over (a) the administrators' remuneration and (b) a floating charge, under paragraph 99(3) and (4) of schedule B1 of the Act.

This issue has far-reaching financial and practical impact in administrations. The Court of Appeal decision in the matter of *Debenhams Retail Limited (in Administration)* [2020] EWCA Civ 600 on 6 May 2020 that the administrators of Debenhams had 'adopted' the contracts of employment of furloughed employees is significant for both employees and administrators. Even when the scheme concludes (currently anticipated to be in October of this year), the decision will continue to be important for the issue of 'adoption' of contracts of employment by administrators.

The case background

By the time of the appointment of the administrators, Debenhams Retail Limited (the company) had closed its stores and written to the majority of employees, informing them that they were being placed on furlough. The administrators were subsequently appointed by the directors of the company. The purpose of the administration was to seek to rescue the company as a going concern. The administrators had consented to management continuing to exercise their functions, with the aim of resuming trading from its stores once the lockdown measures were lifted. The administrators considered that the purpose of the administration would be best furthered if the employees remained on furlough under the scheme. They would continue to pay salaries up to the limits reimbursed or funded under the scheme, but they would not make any further payments to top up salaries. The vast majority of employees expressly agreed to being furloughed and a consequent reduction in pay following correspondence from the administrators.

> "There is no statutory definition of 'adoption' in the Act. The Court of Appeal considered and applied the leading House of Lords decision of *Paramount*."

Analysis

The administrators contended (at [46]) that there had to be: (i) words or conduct on the part of the administrators; (ii) which objectively construed evidences an election on the part of the administrator; (iii) to treat the liabilities arising under the contract of employment as enjoying super-priority. The administrators accepted that such election was to be judged objectively and not by reference to the subjective intentions of the administrators.

There is no statutory definition of 'adoption' in the Act. The Court of Appeal considered and applied the leading House of Lords decision of *Powdrill v. Watson, Re Paramount Airways Ltd* [1995] 2 AC 394 (*Paramount*). David Richards LJ, giving the leading judgment of the court, identified *'one crucial difference'* between the facts in *Paramount* and those in *Debenhams*: the employees in Paramount had all performed services for their employers after the 14-day grace period for which they had not been paid (at [34]). By contrast, under the terms of the scheme, as it was when considered by the Court of Appeal, a furloughed employee must be instructed to cease all work for 21 days or more (at [22]).

At [39], David Richards LJ stated that Lord Browne-Wilkinson in *Paramount* dispelled the notion that by doing nothing, an office-holder adopted an employment contract. It was not necessary, to avoid

adoption, for the office-holder to give notice of termination before expiry of the 14 days after appointment or at all. David Richards LJ stated that the question is *'not whether the employment continues, but whether the office-holder has adopted the employment contract'*, the company being the employer.

David Richards LJ set out Lord Browne-Wilkinson's summary in *Paramount* at [44]:

'I therefore reach the following conclusions: (a) for the purposes of both section 19 and section 44 an employee's contract of employment is "adopted" if he or she is continued in employment for more than 14 days after the appointment of the administrator or receiver; (b) it is not possible for an administrator or receiver to avoid this result or alter its consequences unilaterally by informing the employees that he or she is not adopting their contracts or only doing so on terms; (c) in the case of both administration and receivership the consequence of adoption of contracts of employment is to give priority only to liabilities incurred by the administrator or receiver during his or her tenure of office.'

'Continued in employment', referred to the conduct of the office-holder in continuing the employment (at [45]).

At [53], David Richards LJ noted that *'the essence of the test'* as Lord Browne-Wilkinson said in *Paramount*, *'is whether the office-holder has "continued" the employment of the relevant employees … If the office-holder has continued their employment, in other words has taken active steps to continue their employment, that necessarily results in super-priority for the relevant liabilities under the contracts of employment'*. The key issue was wholly objective, focused entirely upon the conduct of the administrator.

At [54], David Richards LJ confirmed that the Court of Appeal agreed with the way Laddie J summarised the effect of *Paramount* on the meaning of adoption in *Re Antal International Ltd* [2003] EWHC 1339 (Ch), [2003] 2 BCLC 406:

'What Lord Browne-Wilkinson was pointing out was that it was important to find some conduct on behalf of the administrator or receiver which could be treated as an election or could be regarded as him exercising a choice as to whether or not the contracts of employment were to be adopted'.

'Adoption' on the Facts of Re Debenhams

David Richards LJ identified the following three facts to support the conclusion that the administrators had continued the employment of the furloughed employees:

- The administrators will continue to pay the wages or salaries of the furloughed employees up to the limits of the scheme [57]. David Richards LJ noted that the *'employees' entitlement to those payments is derived exclusively from their contracts'*.
- All furloughed employees who have accepted the continuation of their employment on these terms *'will remain bound by their contracts of employment, save only as regards the obligation to be available for work during the furlough period'* [58].
- In continuing to pay the furloughed employees, the administrators are acting with the objective of rescuing the company as a going concern, that being the purpose of the administration, and in the interests of the company's creditors as a whole [59].

> The decision in *Debenhams* will need careful consideration and application to the facts in each case as the scheme changes.

The appellants relied upon three grounds to oppose this conclusion (see [60]):

- First, that the employees *'are not and will not be providing any services to the company'*. While David Richards LJ considered this to be a significant factor distinguishing the case from *Paramount*, he concluded that it is *'not decisive and must be balanced against the continued performance of the employment contracts by both sides in all other respects, save for the limit on remuneration, and against the administrator's purpose in continuing with the employment contracts and the potential benefit to the administration'* [61] – [62].
- Secondly, that the employees' remuneration is limited to that which is covered by the scheme such that the effect was neutral as far as the administration was concerned. The court determined that the furloughed employees remain employed and are paid the *'remuneration due under their contracts, subject to the maximum under the scheme. The remuneration is an expense of the company and the government grants are income of the company'* [63].
- Finally, that any decision regarding terminating the contracts of the furloughed employees would take place only after the scheme ends. In this respect David Richards LJ noted that the administrators had taken steps to keep the contracts in being *'in the hope, for which there must exist reasonable grounds, that the employees will be able to resume work under their contracts either during the administration or on its successful conclusion'* [64].

The court was therefore satisfied that, having taken these competing factors into consideration, the administrators had adopted the contracts of the furloughed employees [65].

It is of note that the court agreed with the appellants' submission that paragraph 66 of schedule B1 to the Act is an appropriate and *'perhaps the most obvious source of authority for these payments'* [68].

In conclusion at [71], David Richards LJ identified that *'there may be good reasons of policy for excluding action restricted to implementation of the scheme from the scope of "adoption" under paragraph 99, but such exclusion cannot be accommodated under the law as it stands.'*

Conclusion

In *Debenhams*, by the time of the Court of Appeal decision, the administrators had been able to obtain the express consent of employees to being furloughed and to their pay being reduced to the amount payable by the scheme (at that time 80% of gross earnings, employer national insurance contributions in respect of those earnings and minimum automatic enrolment employer pension contributions), ([31] and [71]). However, there was still *'arguably'* super-priority for 20% of holiday pay.

Administrators will have to take into account practical factors such as ease of communication with employees and the timing of the next payroll to allow any variation of their employment to be agreed. The high level of agreement from employees in Debenhams indicates the financial importance of the content of the communication by administrators with employees.

With changes to the scheme to allow for flexible furlough and the amount of government contribution, the practical issues for administrators have become even more intricate. The decision in *Debenhams* will need careful consideration and application to the facts in each case as the scheme changes. □

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Directors' duties live on past insolvency

Jim Varley and **Raj Arumugam** explore the implications for directors' duties post-insolvency as a result of the judgment in *System Building Services Group Limited (in Liquidation)*.

System Building Services Group Limited (in Liquidation) is the first reported case on whether a director's duties to a company and its creditors survived the company entering into an insolvency process – in this case administration. The judge found that those duties did maintain post-administration and that the attempt by a company director to purchase a property from the IP 'on the cheap' was a breach of those duties.

The judgment

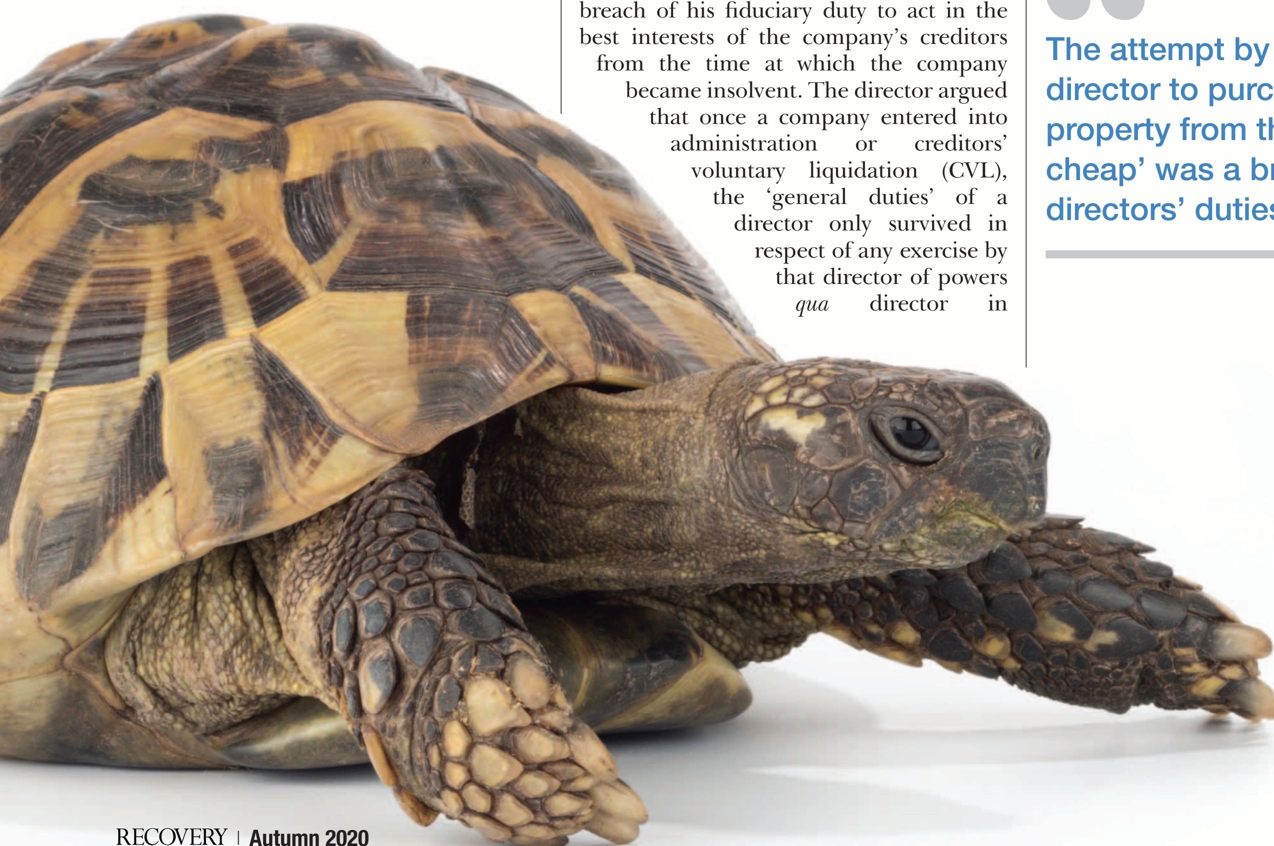
On 21 January 2020, ICCJ Barber handed down judgment in the case of *System Building Services Group Limited (in Liquidation)* in relation to various claims brought by Stephen Hunt (Mr Hunt) as successor liquidator against the former director, Brian Michie, and his successor company. Mr Michie was the sole director, company secretary and sole shareholder of System Building Services Group Limited (the company). Over two years after the company had been placed first into administration and subsequently liquidation, he purchased from the company, acting by its liquidator, a property at what the director knew to be a substantial undervalue. At trial, it was common ground that under the Insolvency Act 1986, schedule B1 paras 61 and 64, and s103, directors remain in office despite a company's entry into administration and thereafter voluntary liquidation, but they could not exercise a management power without the consent of the administrator or unless sanctioned by the liquidation committee or the creditors. The issue was whether, and to what extent, a director's 'general duties', as identified in the Companies Act 2006 ss170–177, survived the company's entry into a formal insolvency process.

Mr Hunt claimed that the director had acted in breach of the duties he owed to the company under ss171–175 of the Companies Act 2006, in particular in breach of his fiduciary duty to act in the best interests of the company's creditors from the time at which the company became insolvent. The director argued that once a company entered into administration or creditors' voluntary liquidation (CVL), the 'general duties' of a director only survived in respect of any exercise by that director of powers *qua* director in accordance with the Insolvency Act 1986.

The judge agreed that the 1986 Act made it clear that a company's entry into administration or voluntary liquidation did not result in the removal of a director from office. The judge found that the 'general duties' of a director extended beyond the exercise of any given power as director. She found that s172(3) expressly preserved a director's duties in certain circumstances 'to .... act in the interests of creditors of the company' and that there was no authority that such duties ceased on a company's entry into a formal insolvency process.

In procuring an off-market sale of the company's property to himself at a significant undervalue, the director had acted entirely out of self-interest and failed to have regard to the interests of the creditors as a whole.

> "The attempt by a company director to purchase a property from the IP 'on the cheap' was a breach of directors' duties."



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Background

The company was placed into administration in July 2012 and Gagen Sharma (Ms Sharma) was appointed as administrator. The administration was converted into a CVL in July 2013 and Ms Sharma was appointed as liquidator. At the time the company entered administration and thereafter liquidation, Mr Michie was the company's sole director. The company was dissolved in February 2016 but was restored by Mr Hunt in April 2017.

The background to the company's restoration is that, in 2014, while still serving as the company's liquidator, Ms Sharma was found liable in unrelated proceedings for misfeasance in office. In June 2016, just four months after the company was dissolved, Ms Sharma was adjudged bankrupt. Following her bankruptcy, Mr Hunt took over several of Ms Sharma's appointments pursuant to a block transfer order. Following his investigation into the affairs of the company and the conduct of Ms Sharma, Mr Hunt made an application to restore the company. Once the company was restored, Mr Hunt was appointed as liquidator and brought the instant proceedings. Since Ms Sharma was bankrupt, Mr Hunt had no realistic prospect of bringing misfeasance proceedings against her.

The company owned a property known as 55 Crown Road (the property), purchased in 2009 for the sum of £185,000. In 2014, while the company was in liquidation, Mr Michie purchased the property from the company (effected by Ms Sharma as liquidator) for the sum of £120,000 – which Mr Hunt contended was a substantial undervalue. This amount was lower than: (i) the price at which the company had purchased the property in 2009; (ii) the value attributed to the property in the company's latest available accounts; (iii) the estimated value of the property in the statement of affairs signed by Mr Michie in September 2012 (£200,000); and (iv) an independent valuation of the property obtained by Ms Sharma in September 2012 (£195,000).

In cross-examination, it became apparent that in December 2012 Mr Michie reached an agreement in principle with Ms Sharma to purchase the property for 'its proper value' although (bizarrely) no specific figure was identified. On 2 July 2014, Mr Michie and Ms Sharma agreed that the purchase price would be £120,000, and Mr Michie paid a £40,000 deposit into Ms Sharma's client account. The balance was paid in September 2014 and completion took place in December 2014. At no point during the liquidation had the property ever been listed on the open market.

ICCJ Barber found that '…at all material times, Mr Michie knew that the property was worth significantly more than the price he paid for it.'

ICCJ Barber said that 'Mr Michie acted entirely out of self-interest and failed to have regard to the interests of the creditors as a whole' before adding that 'the court must ask itself whether an intelligent and honest man in the position of a director of the company could, in the circumstances, have reasonably believed that the transaction was for the benefit of the creditors as a whole. The answer is plainly "no"'.'

> "The judge found that the 'general duties' of a director extended beyond the exercise of any given power as director."

It was held, therefore, that Mr Michie had breached his duties to the company in purchasing the property from the company at an undervalue notwithstanding the fact that: (i) the company was in liquidation at the time of the transaction; and (ii) the transaction was effected on behalf of the company by Ms Sharma as liquidator rather than Mr Michie as director.

ICCJ Barber held that Mr Michie had breached his director's duties, since in purchasing the property at an undervalue he failed to have proper regard to the interests of the company's creditors, and instead acted in his own interests. The court ruled that Mr Michie held the property on trust for the company with credit to be given for the £120,000 purchase price he had paid.

Buy backs and pre-packs

An unusual feature of this case was that normally in cases where an IP has acted inappropriately in selling assets back to a director 'on the cheap', the focus of any claim would be against the IP, rather than against the director – here that was not an option as Ms Sharma was bankrupt and her insurance cover had been withdrawn. So, the claim had to be brought against the director.

Had this transaction taken place at a time before the company entered into an insolvency process this would have been a relatively straightforward claim against the director for a transaction at an undervalue and/or breach of duty. Because the transaction occurred after the company had been placed into an insolvency process, a TUV claim against the director was no longer possible and so the claim against him was framed as a breach of duty claim.

The director sought to argue that he could not be culpable because he no longer had control over the company's affairs. This did not wash with the judge – the director was well aware of the value of the property and seeking to take advantage of a 'weak' IP for his own gain at the expense of the creditors was simply not on.

Directors seeking to buy back assets on the cheap from a 'friendly' IP during the course of insolvency proceedings will no longer be able to hide behind the IP in seeking to avoid any subsequent action being brought against them for wrongdoing. Both they and the IP have separate and actionable duties, albeit running in parallel.

There has been much discussion following the decision as to whether office-holders can now enter into 'pre-pack' transactions with directors at all. Quite often directors are the only people who are able to act sufficiently quickly (because they understand the underlying business) to preserve continuity, save employee jobs, and thereby enhance creditor recoveries. In our view, there is nothing inherently wrong with 'pre-packs' *per se*, but there will be a greater need going forward to ensure that the price paid is the correct and proper price. While this may result on occasion in 'pre-pack' transactions taking a bit longer than they may previously have done while independent valuations are undertaken, if the net result is that directors are no longer able to 'pull a fast one' and grab valuable assets at an unduly knocked down price, then that can only be a good thing.

This case also highlights the responsibility of directors to ensure that they consider the interests of the company's creditors even after an office-holder has taken over the affairs of a company. While a director may no longer have control over the company's affairs, his or her duties remain in force and directors should be alive to the potential risks posed by and the care needed in a transaction between them and an office-holder. □

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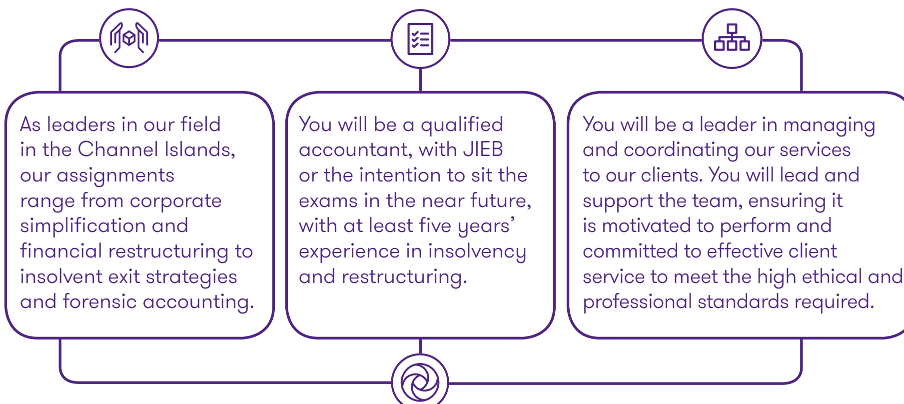

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Pooling rescue knowledge across Europe

Alice van der Schee explains INSOL Europe's country coordinators, who work in tandem with local associations to raise awareness.

During the Covid-19 pandemic the focus of INSOL Europe over the last few months has been to keep up to date with all the different government initiatives to keep businesses alive and prevent mass layoffs. Part of those efforts are the 'Covid-Coffee Breaks' – short recorded web conversations with insolvency professionals all over Europe. However, as autumn approaches, the expectations are that many government measures will be discontinued or altered. As a consequence, a lot of businesses in the hard-hit sectors such as leisure and hospitality, transportation, and retail are likely to become insolvent. This means that the relevance of the insolvency profession will increase in the short term.

Country coordinators

In order to increase membership and facilitate networking opportunities, INSOL Europe has appointed country coordinators in more than 25 jurisdictions across Europe. The country coordinators in several jurisdictions are also members of the council of INSOL Europe, and have specific knowledge of the way the insolvency profession is organised in their jurisdiction. As the general aim is to facilitate networking and increase the membership of INSOL Europe, the idea is that the country coordinators will be able to devise a plan that is most effective for each jurisdiction.

A lot of European countries have large national or local associations with more members than INSOL Europe. The country coordinator will liaise with their country's local association(s), fostering the relationship between such associations and INSOL Europe, and raise and maintain INSOL Europe's profile. As cross-border insolvencies become more common – not only when companies are part of a European group or have a European footprint but also smaller companies with international suppliers – members of the national associations might want to have easier access to colleagues across the border. This wish can be fulfilled through the membership of INSOL Europe, having more than 1,200 insolvency professionals as members all across Europe.

An important part of the work of the country coordinators will be aimed at academics and the judiciary in their respective country. As the academic wing and the judicial wing of INSOL Europe can only prosper when all, or as many as possible, jurisdictions are represented, this means that sometimes an awareness campaign needs to be put in place and possible obstacles for membership need to be removed. With the increased focus of the EU on restructuring and insolvency, the input of leading academics on new legislation national or union-wide is invaluable. The input of the judiciary is very important as well. The EU Recast Insolvency Regulation requires judges from all over Europe to decide cases with a cross-border impact, and it is vital that the judges are informed and also able to get in touch with their counterparts in other jurisdictions.

Working with local associations

The plans that the country coordinators have devised are thus aimed at the national associations, leading academics in the field of restructuring and insolvency, and at the judiciary. The country coordinators will also try to reach insolvency professionals directly through articles in relevant journals, by organising meetings and by encouraging professionals from their respective country to attend the conferences of INSOL Europe as soon as the Covid-19 pandemic is behind us. The activities that the country coordinators will organise will be funded in part by INSOL Europe, and a small budget has been created for these activities.

Currently the Membership Development Committee (MDC) is busy filling in the last positions of country coordinators. Furthermore, the MDC is evaluating the plans already devised by the country coordinators. Due to Covid-19, meetings and events that the country coordinators have planned for 2020 have been postponed, but we are sure that such activities will be held as soon as it is possible. With the consequences of the pandemic and Brexit in mind, the importance of being internationally well connected is expected to increase. INSOL Europe aims to facilitate just that for its members. ◻

The INSOL Europe Membership Development Committee (MDC) (**https://www.insol-europe.org/membership-development-committee**) was established in 2019 to stimulate local visibility of INSOL Europe in each country, to increase the INSOL Europe membership and facilitate the networking between INSOL Europe members. This committee is one of the outcomes of INSOL Europe's Strategic Taskforce 2025 that looked at the way INSOL Europe could improve and continue its activities and increase its footprint over time. The MDC comprises three members of the council of INSOL Europe and country coordinators for each jurisdiction in Europe.

ALICE VAN DER SCHEE, is a partner at Van Benthem & Keulen B.V. and is a member of the INSOL Europe Membership Development Committee.

VIEW FROM THE REGIONS

Wrestling with recovery from the pandemic

Allan Cadman, R3 chair in the North West, offers his take on business rescue in the post-pandemic world.

Since March the words 'forbearance' and 'furlough' have been uppermost in the business vocabulary. It is absolutely clear that these measures have cocooned the business world from the cataclysmic economic effect of the coronavirus pandemic and lockdown. The North West has been particularly affected in the tourism sector, including the Lake District and Blackpool, which are among our most popular locations and have a history of higher-than-average insolvency issues. Likewise, the demise of the travel industry has affected the aerospace industry in the region.

The business community is taking tentative steps, blinking into the glare of the prospect of tapering furlough, towards the end of VAT forbearance and the beginning of income generation in a socially distanced world with a profound lack of customer confidence, which won't be helped by localised spikes in the virus and partial lockdowns (as has happened recently in Greater Manchester and parts of Lancashire).

There is an understandable desperation on behalf of the government for the sake of UK Plc's economy. It was widely expected that we were headed for a recession prior to the virus and the eyewatering numbers thrown at damage limitation since mean that it may take the best part of a decade to recover.

Vital to the North West will be continued investment in the Northern Powerhouse project and the investment in infrastructure linking east and west, as well as locally. The North West was the fastest growing region in the UK prior to Covid-19. Massive investment in 'green' schemes in housing, agriculture and leisure, together with growth sectors such as health and pharma, and life sciences, will be key to employment and recovery generally.

The front line of recovery

The turnaround and insolvency professions will be the vanguards of the recovery under heightened public scrutiny while they wrestle with the bespoke circumstances of individual businesses. It is to be expected that company directors will cite Covid-19 as the primary cause of an insolvency situation warranting IP advice. IPs need to double down on due diligence and to scratch below the surface to properly identify those that are outside of the pandemic's impact. Inevitably, many principals will seek advice too late to be 'rescued'.

So, assuming a rescue is a possibility, what will it look like? Well, we have a new tool in the bag with the Corporate Insolvency and Governance Act 2020 (CIGA). The first decision will be whether the 'company' is capable of recue or the 'business in whole or part'. This will be a determining factor in whether to consider the moratorium or to look to administration. The moratorium will appear attractive to (over-) optimistic directors who are looking at instant relief from the pressures at the coal face. Advising IPs must look beyond any bravado, given that they must form the opinion and state that a company is capable of rescue as a going concern, with the emphasis on due diligence to ensure there are no 'skeletons'. The IP as monitor must be alive to ongoing information and be prepared to advise if this affects the prospect of rescue, and be prepared to impart this news to directors.

The restructuring plan is a development of the existing scheme of arrangement. It will be interesting to see the courts' interpretation of classes of creditor and also the attitude of lenders. It is of course available with the protection of the moratorium or as a standalone procedure under the Companies Act 2006.

At the time of writing, there is little evidence, either empirical or anecdotal, to make an informed judgement of the effect of the CIGA. It may well be that there will be a spike in the use of the temporary coronavirus provisions. In the medium and long term, and in the SME world that I largely inhabit, I see the moratorium as being mainly used to enable a proper CVA proposal to be put together without the brinksmanship pressure often facing businesses who previously had no protection from creditor action.

You can read more about the changes enacted under CIGA on pages 9, 14, 22 and 24.

Changing dynamics

The attitudes of key stakeholders will of course have a major impact on the rescue culture. The spectre of HMRC's preferential status will now loom large. The pandemic gave the government the opportunity to look at this again in the spirit of promoting the intent of the CIGA, but it chose not to do so in a meaningful way. This will inevitably change the dynamic between themselves, floating charge holders and the poor old unsecured creditors who will be most affected by this change.

Also, to enable a successful rescue, funders will also need to remain supportive of good businesses. I don't think the profession wants to see a return to the early 90s where appointments were sometimes made by banks at optimum exposure, when faced with the potential for substantial preferential claims in an insolvency. The moratorium addresses this if recognised early enough.

In the North West

North West members have concerns over the future appetite for rescue measures of HMRC, which will have a particular dilemma. When deferred taxation becomes due for payment in Q1 of 2021, the taxman will no doubt be under pressure to use any means necessary to recoup for the treasury. They will have the option of extending forbearance further or of pulling companies down, as they will presumably be able to petition again by then. HMRC will be creditors in every business and, emboldened by preferential status, will wish to engage in rescue and insolvency processes more than they have done previously. They will also no doubt consider whether a business has used their funds from furlough, loans and deferrals with propriety when approvals are sought.

Recovery and insolvency professionals have the skills sets and aptitude to promote business rescue and recovery using the procedures at their disposal. It is widely acknowledged that there will be casualties, but the underlying good businesses will be able to adapt and thrive post-pandemic with the assistance of the profession, provided as always that directors seek advice early enough. □

ALLAN CADMAN is a partner at Poppleton and Appleby and is chair of R3's North West Regional Committee.

Perception management in a pandemic

The PPP team has taken the profession's voice to Parliament over Crown preference and the CIGA.

Three things have kept the Press, Policy and Public Affairs (PPP) team occupied since the last issue of *RECOVERY*.

The first has been lobbying on the profession's behalf as the two largest pieces of insolvency and restructuring legislation for 20 years completed their journey through Parliament.

The second is managing a host of enquiries from journalists as media interest in the profession and future insolvency levels increased.

And the third? Launching a major piece of research to give us data about the value of the insolvency and restructuring profession to the UK economy.

The Corporate Insolvency and Governance Act 2020

In May, the government published its corporate insolvency and governance bill, which gained royal assent in June. The new legislation introduces a number of reforms to the UK's insolvency and restructuring framework, as well as a series of temporary changes to the corporate governance requirements for companies and other entities.

As the Act progressed towards completion, we had a number of discussions with parliamentarians, officials and stakeholders. These led to a series of briefings with MPs and peers – and multiple mentions of R3 and the profession's views and concerns on various elements of the legislation in debates in both Houses.

There were also two key lobbying wins for R3 from this piece of legislation: the fact that the moratorium is available to insolvent firms, and that the monitor overseeing this process must be an IP.

The government has been working on corporate insolvency framework reforms for a number of years, and it's only recently as a result of our engagement with officials that these two changes were included in the eventual legislation. Thank you to those members who have supported us with our campaign to bring these about.

Now the Act is in place, we will continue our work on the profession's behalf, seeking and raising feedback on the measures it contains so that the government understands what needs to be changed as time progresses, to ensure this legislation can most effectively support the business rescue process.

The return of Crown preference

Less positively, Wednesday 22 July saw the finance bill 2019–21 receive royal assent, bringing with it a change in HMRC's creditor status from 1 December 2020 – the reintroduction of 'Crown preference'.

Since the last issue of *RECOVERY*, we've continued to campaign against this change. We raised the issue with MPs and lords before debates on both the Corporate Insolvency and Governance Act (CIGA) and the finance bill, given that the changes proposed in the latter would undermine what the government is trying to do with the former to promote a culture of business rescue.

Our efforts led to the issue of Crown preference – and the profession's opposition to it – being raised more than 25 times in debates in both Houses. In addition, Alison Thewliss MP tabled amendments to the finance bill that would have mitigated the impact of Crown preference, which sadly were not adopted.

It's a shame that Crown preference has reached the statute book despite the amount of column inches and parliamentary airtime its potential consequences have had over the last two years, and despite the clear evidence of the damage it will do to UK Plc.

But our campaign isn't over. Now the bill has become law, we will monitor its impact and continue to campaign against it and the consequences it will have for businesses, jobs, and the economy.

R3 in the media

Turning to R3's media work, the PPP team has been busy fielding requests from a range of journalists about insolvency and restructuring, future insolvency levels and the two pieces of legislation mentioned above.

R3 spokespeople have carried out more than 40 journalist briefings between the middle of March and the end of July on all of these topics, with journalists from publications that include *Accountancy Age*, *The Wall Street Journal*, and *The Sunday Times*.

Since the last issue of *RECOVERY*, R3 has appeared in a number of local, trade and national media outlets talking about the potential effects of the pandemic on businesses, individuals and the profession, our opposition to Crown preference, personal and corporate insolvency numbers, and the CIGA.

Our comments on the various sets of monthly and quarterly insolvency statistics were covered by outlets that include the *Dow Jones newswire*, *PA Media* and *MailOnline*. Our views on the CIGA were quoted in pieces from a range of outlets, including *PA Media* and the *Sunday Telegraph*, and our Covid-19 member survey results featured in stories in *The Times* and *The i* newspapers, as well as a number of regional and trade publications.

More of the same…

As the pandemic continues, we'll carry on reaching out to journalists, responding to stories and engaging with parliamentarians and stakeholders to ensure the work of the profession is understood, its concerns about legislative changes are heard and acknowledged, and the economic contribution it makes is recognised.

A key tool in this task will be the results of our 'Value of the Profession' survey, whose fieldwork ended as this piece went to press.

Thank you to everyone who took the time to complete it and helped us get the updated stats, facts and data that we need. We look forward to showcasing the results in the next issue of *RECOVERY*. ◻

JAMES JEFFREYS (LEFT) is senior press, policy and public affairs manager at R3.

STUART MCBRIDE (RIGHT) is communications manager at R3.

Finding your fees during Covid-19

Penny McCoull and **Antoniya Mercer** provide a brief examination of the fee approval process during the Covid-19 crisis from both sides of Hadrian's Wall.

How do you get approval for fees if there is no liquidation committee?

Scottish IPs rely heavily on the courts for approval of fees, so the closure of the court system to insolvency matters during the pandemic had – and is continuing to have – a huge impact on the cash flow of firms in Scotland.

From 25 March 2020, all insolvency matters were adjourned or continued, and some courts were closed completely. Nine courts operated under restricted conditions, temporarily dealing with business normally heard at 34 different courts.

The Scottish Technical Committee worked with R3 and ICAS to prepare a comprehensive schedule of insolvency matters normally dealt with by the courts and gave suggestions as to how these matters could be dealt with.

Most courts opened again on 1 June 2020, but the backlog of business before the courts means that applications normally turned around in a week are taking at least two months to be processed to the first stage of appointing the reporter. This has impacted the income level of insolvency firms as well as delaying dividends to creditors and the closure of cases.

A lot of IPs will now be pushing for a Liquidation Committee in future appointments to prevent delays of this nature again.

In England and Wales, liquidators are required to seek a decision of the creditors of the company to fix the basis of their remuneration by a decision procedure if the liquidation committee does not make a determination or there is no committee. There are exceptions where a liquidation (voluntary or compulsory) follows administration and the administrator becomes liquidator. In those cases the liquidator's fees are fixed on the same basis as the previous administrator.

An application to the court for an order fixing the basis of remuneration of a liquidator is only necessary where creditors fail to reach a decision or where they fail to engage in the process altogether. The application must be made within 18 months of appointment.

Since the coming into force of the Insolvency (England and Wales) Rules 2016 there has been an increase in court applications, in particular in cases of creditor apathy. Engagement with creditors has remained the main method by which liquidators' remuneration is fixed.

Where applications to court have been necessary during the pandemic, the Business and Property Courts of England and Wales have been conducting hearings on the basis of the High Court contingency plan, which identifies processes for dealing with 'urgent business' and 'business as usual'. As prior to the pandemic, applications to fix office-holders' remunerations continued to fall in the latter category and were dealt with on the basis of the availability of resources in each individual court centre.

When can you take credit for the fee that has been approved by the court?

Once the report is completed, the court normally issues an approval within a week. This is now taking at least a month and you will still need to wait for the expiry of the 14-day appeal period for objections – it would be a foolhardy IP who risked taking credit for their fees before they are due. The RPBs have dismissed any suggestion of IPs being allowed to take the fee recommended by the reporter before approval was received from the court – this would be considered a breach of regulations, be warned!

On an application to fix the remuneration of an office-holder, the court has discretion to make an order allowing payment of remuneration to be made on account subject to final approval, whether by the court or otherwise.

Once the basis of the liquidator's remuneration is fixed, there is no statutory requirement for further approval of the drawing of fees, but practitioners will be aware of creditors' rights to challenge excessive remuneration within eight weeks of a progress report or final report.

Is there a way of getting approval to use funds in the case if they are insufficient to meet your fees?

Yes, by application to court for dissolution under s204 and requesting the court's authority to use the funds held in the case against your time costs. Again, heed the warning above: do not assume your application will be granted and take funds out of the liquidation bank account before the court issues approval. Some courts operate a ceiling for the level of fees they will authorise in this manner without an independent reporter being appointed and will either reject your application or get you a note from the sheriff clerk saying the sheriff 'wishes to be addressed' – in which case you have to decide what is the most cost-effective way to proceed.

How do I get paid if I act as monitor in relation to a new moratorium under schedule A1 to the Insolvency Act 1986?

The monitor's remuneration is a contractual matter to be agreed between the company and the monitor. As such, it is not subject to the provisions of the Insolvency (England and Wales) Rules 2016 relating to office-holders' remuneration.

The monitor's remuneration can be challenged within two years of the end of the moratorium by a subsequently appointed administrator or liquidator on the basis that it is excessive. The court may order that some or all of the monitor's remuneration be treated as not being an expense of the moratorium or it may make an order for the monitor to repay the amount of the excess, or such part of the excess as the court specifies. The cause of action can be assigned. ◻

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An interview with… Mike Ridley of the PPF

The head of restructuring for the PPF talks to *RECOVERY* about CVAs, Covid-19 and getting value for creditors under CIGA.

Q Do you find a lot of similarities between what you've done in corporate banking and what you're doing at the PPF?

A Yes. If you strip away all of the pension or banking aspects of a transaction, which are both complicated, technical and require input from specialist advisers, you're left with a very similar set of circumstances. You've got a company that's in distress with a financial obligation that needs to be dealt with, be that debt, pension liability or something else. Often a restructuring is needed to return the company to good health and deal with the liabilities.

Q What's the PPF's view on the likely impact of Covid-19 on UK insolvencies?

A Looking at official statistics, there is a lower number of insolvencies this year compared to last year. But there has been an enormous global economic shock and the UK is in a deep recession. That pattern of insolvencies is therefore likely to reverse, but when is almost impossible to predict.

Perhaps the reasons why we've seen a slowing number of insolvencies is the level of government support for companies (eg the Coronavirus Job Retention Scheme, various financing facilities and VAT deferrals) coupled with changes to legislation – eg a relaxation of wrongful trading rules. These measures may have delayed the timing of some insolvencies.

Q What sort of information and resources have you been putting together during the Covid-19 pandemic? And how difficult has it been to do with everybody remote working?

A The entire organisation has been working at home, which has enabled us to become adept in using Zoom, Skype, WebEx and Teams. The PPF was set up to pay people's compensation and that doesn't change because we're working remotely. Our members should feel reassured that they won't see any change around what's happening with their pension and the service they are used to receiving.

We also created a guide around Covid-19 and pensions in collaboration with six other pension bodies, including the Department for Work and Pensions (DWP), the Pensions Regulator (tPR) and FSCS, directing members on where to get help and who to contact with questions around pensions and Covid-19.

For IPs there is a suite of guidance notes available on our website around CVAs, our general principles on restructurings, and pre-packs. The team's email and telephone contact details are also available on the website.

Q What's the main difference between the PPF and tPR?

A The way I would separate them is by who they are protecting – tPR has a wide-ranging regulatory role that covers not just defined benefit schemes but also the bigger area of defined contribution schemes. It has a statutory obligation to protect scheme members' interests, but it also has an obligation to reduce the risk of calls being made on the PPF.

I view the PPF as similar to an insurance company, which protects members of defined benefit schemes and pays compensation to our members. The PPF is in part funded by investment returns and payments from our Levy payers, and we protect them and our members through the work we do to get the best outcome for the PPF in restructuring situations.

We work together with tPR on every restructuring situation, even though they don't all result in an employer entering the PPF. For example, we may be working together on a CVA proposal where the PPF has creditor rights. We'll be voting on the proposals and tPR will be standing alongside us, working to get the best outcome for the pension schemes where if the company survives, it will avoid PPF

Mike Ridley biography

- Mike started his career immediately after leaving school by joining Barclays Bank, where he would remain for over 30 years.
- After 15 years on the south coast he relocated to the City to cut his teeth in corporate banking, moving soon after to become a director in the restructuring and workout team. The change gave him the opportunity to work with some high calibre people in the fields of advisory and banking, as well as meet a lot of the customers themselves.
- After ten years, Mike was looking for a further challenge. It was through conversations with those already working at the PPF that he became aware of a job advert for an upcoming role here.
- He took up the post of head of restructuring in July last year.
- Outside of work Mike likes to keep active and spend a lot of time outdoors, retaining a childhood passion for football. He is also dragged 'here there and everywhere' on travels with his wife and daughter.

entry and the tPR will have fulfilled its obligation of reducing the calls on the PPF. If the plan fails, we will agree protections to ensure the PPF is no worse off as a consequence.

In situations where a restructuring does result in PPF entry, which would include a regulated apportionment arrangement, we are side by side at the negotiating table.

For an IP, the first point of contact regarding restructuring generally would be the PPF.

Q How do you see the role of the IP acting as a monitor under the new moratorium regime?

A We're obviously supportive of genuine attempts to restructure viable businesses that allow them to continue to meet their pension obligations. We'll be focusing on the need for the monitor to issue a statement that it is 'likely that a moratorium for the company *would* result in the rescue of the company as a going concern'. We think that's quite a high threshold to meet, and it's certainly different from '*might* result in the rescue of the company'. If you're going into a moratorium, it's because there's a high degree of confidence that you will emerge as a rescued entity and will restructure the rescued entity.

We will consider the position of the PPF and the effects of a future claim upon it, the impact that might have on levy payers, and the strategy that directors are pursuing with a moratorium and how that affects different classes of stakeholders. We expect any proposals for restructuring to be aligned to our guidance and for everyone to be treated in an equitable manner.

We will also have a keen eye on any proposals that might set dangerous precedents for the PPF itself. We're acutely alert to things that might construe pension dumping or might result in an inappropriate opportunity for PPF entry.

Q Do you have concerns around the implications of the new restructuring plan regime for pension schemes? You mentioned being alert for pension dumping; is it already entering that territory?

A We're pleased that the legislation gave the PPF creditor rights, which means we'll be responsible for voting on the plan. Pension liabilities are often very big, so we expect to have a significant seat at the table. The restructuring plan is very similar to a scheme of arrangement that might be used in more complex situations where there are multiple classes of creditors.

When we're considering whether to support a restructuring plan it shouldn't come as any surprise to IPs that we will focus on making sure that the plan is something that can be executed, that there's fair treatment among the creditors and that the position of the PPF doesn't deteriorate while the plan is being executed.

> I view the PPF as similar to an insurance company, which protects members of defined benefit schemes and pays compensation to our members.

Q When it comes to equal or fair treatment, do you find that key trade creditors get paid as a priority to the PPF because they are 'key'?

A Without those trade creditors you may not have an ongoing business and, therefore, in a restructuring plan, they often have to be paid. I have seen situations where they've taken a bit of a 'haircut', but generally they are more important in maintaining supply chain continuity than other liabilities such as HMRC, landlords or debt providers.

We need to look at everything in the round and won't compromise on our principles if there's a danger of setting precedent. However, if there is a package put to us with some very strong ingredients in certain areas, but one ingredient is a little bit weak, we may agree to accept that weakness because of the other valuable elements.

Q What criteria does the PPF use in deciding the percentage of the equity it requires when considering a CVA proposal?

A There isn't a magic formula. Equity is there to make sure that we not only receive the cash when we're undertaking a transaction but also – if the restructured company emerges and is successful, which we all hope – that there is some future value flowing to the PPF.

As a minimum, we seek a 33% equity stake, but this could be higher. For example, where the value of the restructured business is still smaller than the debt that's been compromised, there is justification to have a higher debt holding – sometimes greater than 75%. If you've made a big concession on the debt and the company's value increases, it's appropriate that you are sharing in a larger proportion of that increase.

There are also occasions where we might consider taking a smaller equity share, but only where all the stakeholders are new. For example, if a new owner is involved in a transaction and is able to provide cash to the PPF, that easily exceeds the insolvency return and is comfortably proportionate to the section 75 debt that would be compromised. The money that they're introducing significantly exceeds the thresholds that we need to overcome as part of our principles which may justify a lower equity stake, albeit I should stress that we will not accept less than 10%.

> We're acutely alert to things that might construe pension dumping or might result in an inappropriate opportunity for PPF entry.

Q What is the view of the PPF on pre-packs?

A Where used appropriately to run an orderly sales process and create competitive bidding in the process, pre-packs can deliver a better outcome for creditors. Where pre-packs aren't used appropriately, in our view, is where a major creditor has absolutely no engagement with us in the process and we only find out about the insolvency event once it has happened. In situations like this, we will take steps, when necessary, to investigate what happened in the administration and how those transactions were completed. We're looking for best value, which in our experience typically comes through a marketing process.

KEVIN MURPHY is a partner at CVR Global.

MATT JUKES is publishing manager of *RECOVERY* magazine.

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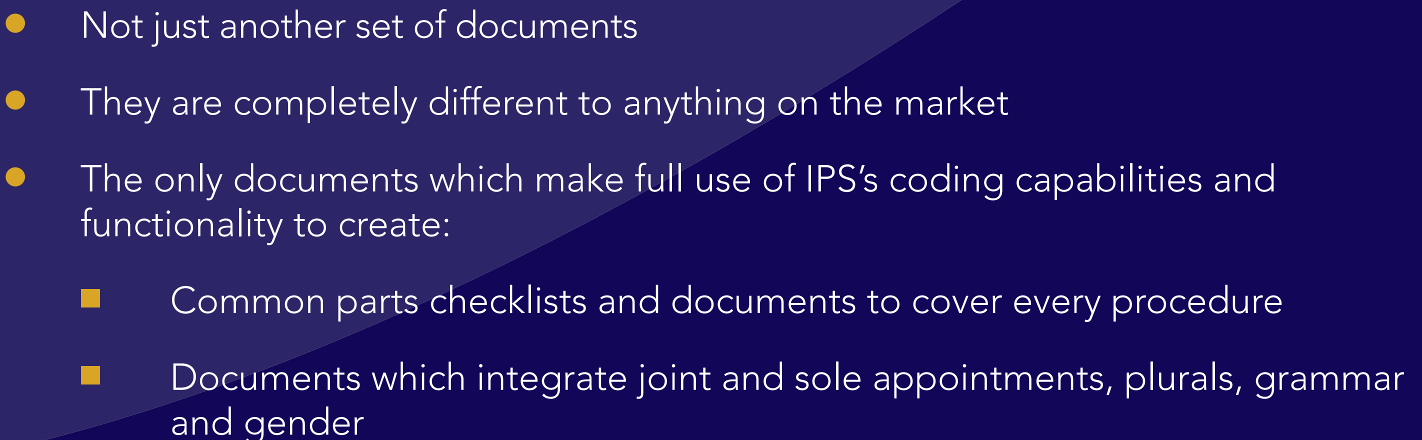

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