Autumn 2022

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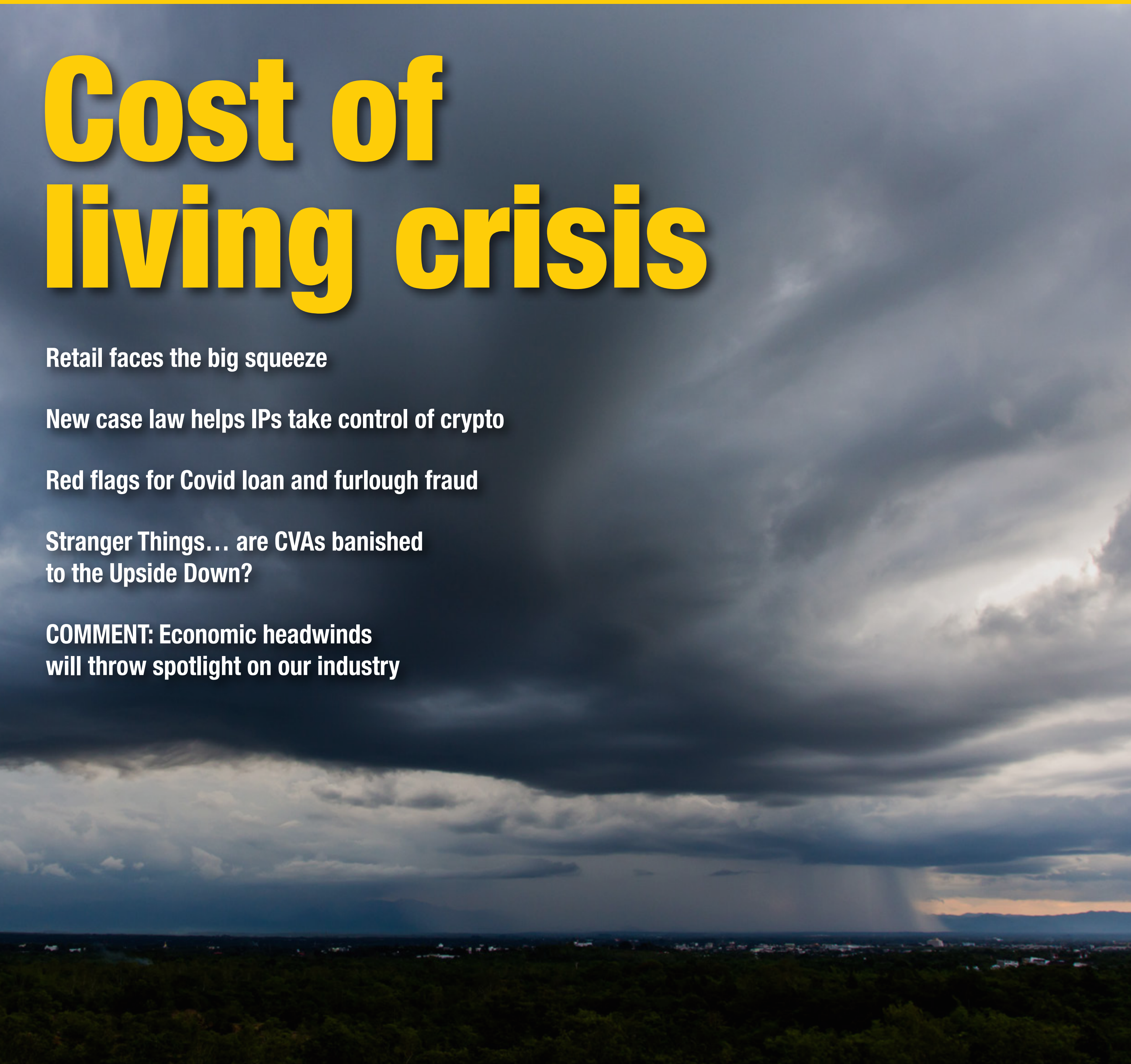
RECOVERY



Cost of living crisis

Retail faces the big squeeze

New case law helps IPs take control of crypto

Red flags for Covid loan and furlough fraud

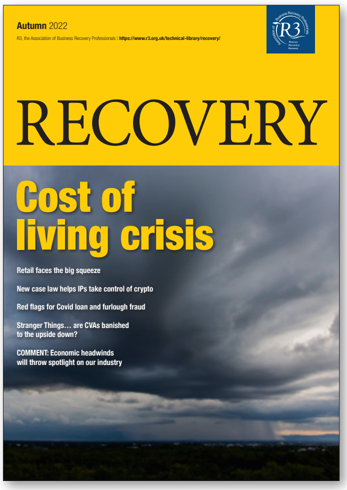
Stranger Things… are CVAs banished to the Upside Down?

COMMENT: Economic headwinds will throw spotlight on our industry

What do you think?

Readers' views are welcome. Have an opinion about a burning issue? Want to comment on articles or *Recovery* itself?

Please contact me at editor@r3.org.uk.



> The cost of living has been on everyone's lips through the summer and is the topic we had to cover in this issue

From the editor

It is what has been on everyone's lips through the summer and was clearly the topic that we had to cover in this edition, as I alluded to in my last editorial – the cost of living. Energy prices show no sign of levelling off as the conflict continues in Ukraine, which is also feeding into an ever-increasing inflation rate, which the Bank of England is trying to calm down with rising rates, whilst we await the identity of our next prime minister, which we should know by the time you read this.

Recession and opportunity I hear you cry – we shall see. What I can promise you in this edition is an insight into the effects of cost of living in various different sectors.

Zelf Hussain, Iain Reilly and Grace Whatman of PwC look at the cost of living in the retail sector; Gordon Thomson of RSM looks at the same in the casual dining sector; and Helen Dale of Grant Thornton looks at issues in the automotive sector.

As well as the impact on corporates, what about individuals? We hear from Meg van Rooyen at the Money Advice Trust on her experiences, and Jayne Gardner at Shakespeare Martineau talks about the Debt Respite Scheme.

If the cost of living does cause an upturn in solvency processes, other than liquidations, are CVAs still a viable tool? Howard Morris reviews Elaine Nolan and Tom Smith QC's book on the subject, and Elaine puts the case for, while Ben Luxford and Stewart Perry lament the potential demise of the CVA.

Away from the cost of living, Nicola McNeely and Alex Wild look at how the law can help IPs deal with crypto assets; Dominic Dumville of Mercer & Hole looks at the investigation of Covid loan fraud; and I write about opportunities in the higher education sector.

With regulation a hot topic in the industry at present, Dr Lézelle Jacobs of the University of Wolverhampton and Donna McKenzie Skene of the University of Aberdeen look at the question of IP ethics.

Emma Greenwood of Anderson Anderson & Brown speaks to David Smith of CBRE, David Melhuish of the Scottish Property Federation, and John Maclean, a freelance property and project finance consultant, on the key issues facing the Scottish property sector.

We also hear from Scott Atkins, the president of Insol International, and have an interview with new R3 council member Sonia Jordan.

Hopefully this edition will give you an interesting insight into where restructuring opportunities may exist in the current economic climate, as well as giving some food for thought on what is going on in our industry at present.

Neil Smyth is a partner at Mills & Reeve and is the editor of *Recovery*

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Back issues of *Recovery*
Recovery is distributed to R3 members as part of their membership benefits. After an issue of the magazine has been sent to members, a PDF of the previous issue is uploaded onto the R3 website.
www.r3.org.uk/technical-library/recovery/recovery-magazine

Published on behalf of R3 by:
Klarents Media,
2nd Floor, 18 Hatton Place,
London EC1N 8RU
T: 020 7841 5960
www.klarents.com

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The R3 Training Academy is designed to suit a range of learning styles and preferences, which enable professionals to grow and develop throughout their career in the insolvency and restructuring profession.

UPCOMING COURSES

Introduction to Insolvency eLearning series

Online

This series introduces all aspects of insolvency and related legislation, consisting of twenty-one webinars, covering both corporate and personal insolvency, with short-form tests at the end of each chapter and relevant case studies to illustrate the topics being covered.

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Online

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Starts Tuesday 6 September

Online

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Starts Thursday 15 September

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Bringing the profession together

Strong economic headwinds will mean a harsher spotlight from politicians and the media on how our profession operates, says **Christina Fitzgerald**

It has been a busy few months at R3 since the last edition of *Recovery*, with the team working really hard to deliver a host of fantastic events. At the beginning of July, we held our inaugural Contentious Insolvency and Creditors Forum, which pulled together opinions and insights from leading solicitors, barristers, investigators, litigation funders, and other members of the insolvency and restructuring profession. It was exciting to see almost 100 members attending – a great result for the first event of its kind.

We were also pleased to mark the return of the Northern Forum, held at the beautiful Ramside Hall Hotel in Durham. This was a particularly special event as it was the first Northern Forum in two years and the first time it has been held in the North East since 2017. It was great to welcome a variety of speakers, including an update from the Insolvency Service on the Bounce Back Loan scheme, Covid-19 fraud, and insights into topical sectors like football and energy.

At the time of writing, planning is now well underway for a range of regional and national events this autumn, with the long-awaited return of the Eastern Forum in September and R3's Business Lunch at the Royal Lancaster in London coming this October. That's not to mention regional networking and social events like the Scotland Annual Dinner, Big London Quiz, and Southern and Thames Valley Annual Ball.

"One task for the new government will be to decide exactly what form its insolvency regulation reforms will take – and we will be working to ensure they reflect the unique circumstances our profession works in, as well as the importance of a truly independent regulatory framework"

I want to offer my thanks to all the speakers, sponsors and, of course, the R3 team for putting in the hard work to make these events possible. When I first took office, one of my main priorities as R3 president was to help diversify and broaden our community – to enable opportunities for all members of the profession (old and new!) to get together.

I am especially committed to ensuring all our events are accessible to the younger generation. We were all new professionals at one point in our lives and I want to be able to give back the same opportunities that were afforded to me early in my career, so that all R3 members feel supported and represented in our community. In-person events are not only important for new professionals to be able to meet new faces and build contacts, but also for the broad and specialist technical expertise available in our sessions that I hope will enrich their insolvency knowledge – watch this space.

A change in policy from HMRC

As well as a range of excellent events since the last edition, we have also seen an important announcement from one of the profession's most important stakeholders: HMRC.

R3 has long called for HMRC to take a more constructive and engaged approach to supporting CVA and restructuring proposals, in an effort to bolster the profession's work in rescuing businesses and saving jobs. With the onset of the pandemic and the return of Crown preference – and as part of our Back to Business UK campaign – we set out last year to push for this change once again.

Working with the Institute of Directors, we wrote a joint letter to the then-business secretary Kwasi Kwarteng MP, urging him to ensure that "HMRC take[s] a commercial view as a preferential creditor, and drive[s] the rescue process" – all with a view to supporting business rescue at what was a critical time for the economy.

We were delighted to see HMRC confirm in July that it will be changing its approach to "be more proactive in the use of our voting rights and… vote on proposals" in voluntary arrangements.

This new approach is to be welcomed and we look forward to continuing our engagement with HMRC on this issue, with the aim of helping maximise returns to the Exchequer by ensuring more viable businesses can restructure.

Economic clouds on the horizon

At the time of writing, the Conservative Party is currently undertaking a leadership election, following the forced resignation of Boris Johnson, which will determine the next prime minister of the UK. Regardless of our personal political preferences, I am hoping for a period of stability in government, after what has seemed to be a tumultuous year to date.

Whether former chancellor of the exchequer Rishi Sunak MP or foreign secretary Liz Truss MP wins this election and takes the top job, there will be a new set of ministers installed and a new policy direction for the government. It is unclear what this will mean for insolvency and restructuring, but our press, policy and public affairs team will be ready to engage with new ministers to ensure the profession's voice is heard.

One task for the new government will be to decide exactly what form its insolvency regulation reforms will take – and we will be working to ensure they reflect the unique circumstances our profession works in, as well as the importance of a truly independent regulatory framework.

Against this political backdrop, we are also facing harsh economic headwinds that are only likely to get stronger through to the end of the year. Inflation is at a 40-year high, with energy costs putting businesses and individuals alike under severe strain. Supply chains too are under pressure while the labour market is very tight.

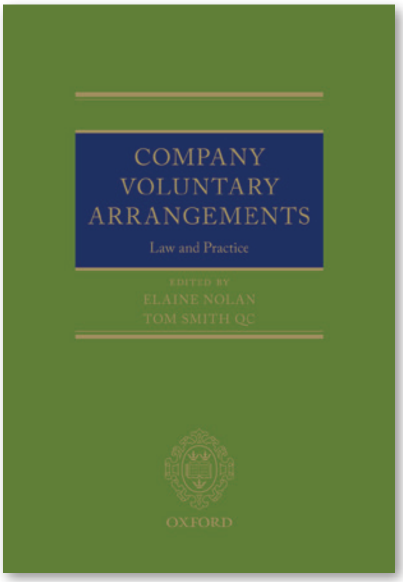
This situation poses difficulties for our profession. We are likely to have more businesses and individuals to try to support through financial difficulties, and this will place particular practical issues in front of us. This will also mean a harsher spotlight from politicians and the media on our work and the way we operate.

On both counts, R3 will be working hard to support, promote and defend its members in the difficult months ahead.

Christina Fitzgerald is a partner at Edwin Coe and current president of R3

Company Voluntary Arrangements – Law and Practice

Edited by: Elaine Nolan and Tom Smith QC
Publisher: Oxford University Press.
Pages: 416 **ISBN:** 9780192842886 **Price:** £195



Often I will have a slightly sinking feeling when I turn to a book for practitioners. I have a sense of defeat that the author figures I am not up to using a proper academic work, that what I am getting is 'SparkNotes' that won't trouble me with the difficult jurisprudential questions – but not with this book. While *Company Voluntary Arrangements* is written and set out in a style that helps a busy practitioner looking for a bluffer's guide, or the answer to the annoying procedural question or an answer to the question they're too embarrassed to ask a colleague, it covers the technical questions and satisfies the appetite to understand the law on CVAs as it has been developing.

This successful amalgam of practical quotidian problems with the esoteric is due to the expertise and deep insights of the editors and the authors. Elaine Nolan is a partner at Kirkland & Ellis – undoubtedly one of the preeminent restructuring and insolvency practices – while Tom Smith is one of the most highly sought out silks practising in the field. The authors who have contributed the chapters, each dealing with a different topic, are also almost all from Kirkland & Ellis or Tom's chambers, 3-4 South Square.

Not only does the book not shy away from complex legal questions, it also sets the CVA in its historical context, identifies where it fits within the framework of insolvency and restructuring law, and gives insights about how it may well develop. Like Professor Sarah Paterson's *Corporate Reorganization Law and Forces of Change*, this book shows how practitioners and judges come to deploy a legal procedure enacted for particular problems to meet other needs as the economy changes. For a long time, CVAs were seen as suitable for simple operational problems, to get creditors to accept less than they are due. We saw the CVA as the downmarket alternative to the scheme of arrangement. Not so any more and, in the face of the sexy, new Part 26A restructuring plan, the CVA plays an important role in restructuring.

There has been a lot of new case law recently and the book covers Debenhams, New Look and Regis. A common flaw with edited works is that topics are repeated in contradictory ways. There is some repetition in this book, which is largely necessary to address a new subject, but there are no contradictions.

I only have one criticism, which is that I am not convinced that the case study about Steinhoff – while definitely interesting – fits well with the overall scheme of the book.

Overall, however, the book is a well-timed, up-to-date, much-needed and thought-provoking analysis.

Howard Morris is head of the business restructuring and insolvency group, London at Morrison & Foerster

New case law and guidance helps IPs take control of crypto assets

Crypto assets used to be viewed as associated with fraud and murky business practices. But now IPs have a growing range of enforcement options, say **Nicola McNeely** and **Alex Wild**

Since first launching in 2009, the crypto asset market has exploded with an estimated value of more than $3 trillion at its peak in November 2021. This combines mainstream cryptocurrencies like Bitcoin, Ethereum and Tether with a growing market in non-fungible tokens (NFT), amongst many other developments.

For those who have been living under a rock for the last several years: a cryptocurrency is an intangible digital currency where transactions are automatically verified and stored on a decentralised ledger, rather than being maintained by a third party (such as a bank or payment provider); an NFT is a digital asset, the ownership and provenance of which is stored and recorded on a blockchain or decentralised ledger.

In both cases, a single transaction (either a sale or purchase of an NFT or a trade of cryptocurrency) appears as a block in the decentralised ledger, with a series of transactions/links forming a chain – hence the name blockchain.

It is not hard to see why the industry has also garnered the interest of insolvency professionals with: more than 200 cryptocurrencies currently trading with a market cap in excess of $100 million; over 2,000 cryptocurrencies failing since 2009 (many of them linked to fraudulent business and investment activities); and numerous noteworthy business failures and large-scale frauds.

The recent collapse of TerraUSD has led to an exodus from the crypto market, with some estimating that the market has reduced to $1 trillion, a loss of $2 trillion from the peak in 2021.

This has led to growing calls for regulation, with Japan set to be the first country to create a clear regulatory framework for cryptocurrencies, with Europe, the UK and the US likely to follow.

With crypto asset insolvencies only likely to rise in the coming years, it is important for insolvency professionals to stay abreast of developments. But where are we today?

Crypto assets are property

After many years of uncertainty in relation to the ownership of crypto assets and the extent to which they represent 'property', it is now clear that both Bitcoin[1] and NFTs[2] have been treated as 'property' following High Court judgments seeking proprietary and injunctive relief associated with fraudulent activity.

> "The courts of England and Wales have already illustrated their ability to adapt to the technological challenges to ensure access to justice, with numerous cases ongoing against parties or persons unknown"

Whilst the position is somewhat uncertain in relation to other crypto assets, particularly as the market continues to evolve at pace, it is hoped that the High Court will adopt a similar wide approach.

As the UK Jurisdiction Task Force identified, the Insolvency Act 1986[3] (IA86) provides a significantly wider definition of 'property' for the purposes of insolvency. This means that IPs can operate from a position of strength and on the assumption that the crypto assets form part of any insolvency estate.

Cryptocurrency as 'currency'

Whilst we can be quietly confident that cryptocurrency is 'property', more difficult questions arise as to whether cryptocurrency is 'currency' or a kind of 'commodity' with different jurisdiction taking different approaches. Notably: pursuant to *Skatteverket v David Hedqvist*[4], the European Court of Justice determined that cryptocurrencies are 'currencies' for tax purposes; and pursuant to *HashFast Technologies*[5], the US Federal Courts determined that crypto assets should be treated as currency when determining value. Although still in doubt, this does suggest a leaning towards a 'currency' status.

If that is the case, IA86 provides that claims denominated in 'foreign currencies' will be converted to sterling at the exchange rate prevailing on the date on which the debtor entered insolvency proceedings. Legislation is currently silent on claims relating to crypto assets. Considering the volatility of crypto asset markets, this issue alone has the potential to drastically affect the outcome for creditors with claims associated with crypto assets.

It is likely that the position will need to be determined by IPs on a case-by-case basis to determine whether the insolvency process is best managed by realising the assets for distribution to creditors or, alternatively, as in the case of a special administration, to achieve the objective of protecting and returning client monies and client assets.

In those cases, the IP will need to have regard to: the nature of the insolvent entity and whether they are regulated by the Prudential Regulatory Authority (PRA) or the Financial Conduct Authority (FCA); the extent to which they are able to control digital wallets, exchanges and other systems for the purposes of realising or transferring crypto assets; the extent to which crypto assets and creditor interests are identifiable; and where crypto assets are being realised, how and when any assets or claims should be converted.

Crypto asset tracing

In theory, the tracing and recovery of a crypto asset is no different from other assets, in particular money transfers being traced electronically. If anything, the process is simpler thanks to the blockchain, which creates a transparent and immutable record.

This means that, in most cases, anyone can check the blockchain and trace the flow of crypto assets, assuming they know how to read it and, more to the point, have the necessary specialist software.

In the majority of cases, any stolen crypto assets will be held in one or more digital wallets. If you are fortunate, the wallet service provider will hold documents for money laundering purposes, helping to identify the perpetrators, which the court will order as part of disclosure.

Even if this is not the case, the courts of England and Wales have already illustrated their ability to adapt to the technological challenges to ensure access to justice, with numerous cases ongoing against parties or persons unknown.

Cross-border

The nature of crypto assets means that they may be impossible to deal with without their relevant cryptographic keys.

By way of example, the administrators and liquidators of Dooga Ltd (trading as Cubits) reported throughout 2019 to 2021 that, although they had located the digital wallets containing the company's crypto assets and could verify transactions, they did not have the relevant account keys and could not therefore access or transfer the crypto assets.

This may mean, in similar circumstances, that an IP will be unable to deal with any crypto assets without cooperation from foreign domiciled individuals or entities, and that cooperation may or may not be forthcoming depending upon the parties and jurisdictions involved.

Recent case law

D'Aloia v (1) Persons Unknown (2) Binance Holdings Limited and others

In *D'Aloia v Persons Unknown*, the High Court embraced blockchain technology and ordered that those proceedings could be served using an NFT on anonymous defendants linked to fraudulent activity, on the basis that they could not be identified.

Jones v (1) Persons Unknown (2) Huobi Global Limited (unreported, 29 June 2022)

In a case in which this firm acted, the High Court made a prohibitory injunction, freezing order and bankers' trust disclosure order over a digital wallet containing $318 million of Bitcoin which was linked to theft and fraud. Using specialist software, the theft was traced to a digital wallet operated by the Huobi exchange (headquartered in the Seychelles) which was prohibited from dealing with or distributing the Bitcoin, and was required under the terms of the order to disclose payment related information and the identity of the party who owned the wallet.

Ion Science Ltd v Persons Unknown (unreported, 21 December 2020) & Danisz v (1) Persons Unknown (2) Huobi Global Limited[6]

Traditionally the courts have determined that the relevant governing law is the law of the place where the asset is located. Taking into consideration the virtual and moveable nature of crypto assets, the courts have held and reaffirmed the position that the applicable law in such cases is law of the jurisdiction in which the person or entity which owns the asset is domiciled. In a subsequent decision in the same proceedings in 2022[7] the court granted for the first time an interim third-party debt order in relation to cryptocurrency.

Key to any recovery effort is likely to be the extent to which foreign jurisdictions and third-party custodians will render assistance to an IP in the UK, where: a specific crypto asset has been transferred across borders; the nature of the blockchain is that it operates across all jurisdictions; and the parties themselves to any dispute or legal proceeding are based in numerous different jurisdictions.

Although the courts of England and Wales have determined that crypto assets are located where the person or entity which owns the asset is domiciled, it is likely many other jurisdictions may determine they also have jurisdiction taking into consideration other factors. IPs will therefore want to have regard to the other potential jurisdictions which might be relevant and which might provide: (a) alternative enforcement options; and (b) assistance to a foreign-registered officeholder. Existing cross-border insolvency laws already provide effective legal regimes for tracing and recovering assets across borders. This would include relevant crypto assets.

The UNCITRAL model law in particular provides an IP, once proceeding are recognised, with a range of powers and remedies in countries where it has been enacted, which includes the US, Singapore and Dubai.

In many other jurisdictions where the UNCITRAL model law has not been adopted, the courts regularly render assistance to representatives of foreign insolvency proceedings – in particular, commonwealth jurisdictions, such as the Cayman Islands, British Virgin Islands and Hong Kong.

For those involved in cases involving crypto assets, it is important to stay abreast of ongoing developments as the case law and guidance continues to grow.

Where crypto was once viewed as an asset often associated with fraud and other murky business practices, recent case law ably illustrates a growing range of enforcement options and strategies to assist an IP to fulfil their role to creditors.

1 AA v Persons Unknown [2019] EWHC 3556 (Comm) and UK Jurisdiction Task Force, Legal statement on cryptoassets and smart contracts (November 2019)
2 Lavinia Osbourne v (1) Persons Unknown (2) Ozone Networks Inc trading as OpenSea (Unreported)
3 s.436 Insolvency Act 1986
4 Skatteverket v David Hedqvist, Case C-264/14
5 HashFast Technologies, Case No 14–30725DM, Adv Pro No 1S-3011DM (Bankr ND, Cal Feb 19, 2016) (Montali, BJ) [Dkt No 48]
6 Danisz v (1) Persons Unknown (2) Huobi Global Limited [2022] EWHC 280 (QB)
7 Ion Science Ltd v Persons Unknown (unreported, 28 January 2022)

Nicola McNeely is head of technology at Harrison Clark Rickerbys

Alex Wild is restructuring partner at Harrison Clark Rickerbys

Legal Q&A

Mark Davies answers your insolvency queries

Q What can liquidators do if the company's director(s) does not provide books, papers or records relating to the company?

A The key role of a liquidator is to take control of the company's assets and realise them for the benefit of the company's creditors. To fulfil this duty, a liquidator needs to have accurate information about the company's assets, liabilities and creditors.

Directors have a duty to co-operate with the liquidator under section 235 of the Insolvency Act 1986 ("IA 1986"). This duty arises after the "effective date", which is the date on which the liquidator was appointed (section 235(4) IA 1986).

There is no set procedure for a liquidator to seek information in accordance with this duty. In the first instance, the liquidator may simply contact the director(s) requesting the information (of course, referring to section 235). Note that the liquidator should provide the director(s) with reasonable time for compliance, and clearly state what information is sought and their reasons for seeking such information.

If the director(s) fail to co-operate under section 235 IA 1986, the liquidator can apply to court for an order for compliance or a fine.

The liquidator also has the option to make an application under section 236 of the IA 1986 for the examination of the director(s) if it can be proven that the director(s) is capable of providing information concerning the promotion, formation, dealings, business, affairs or property of the company.

The liquidator should request the information and give prior notice to the director(s) before making an application under section 236 of the IA 1986. However, if the information is not forthcoming following notice, the liquidator may obtain an order for a hearing for the examination of the director(s). We would ordinarily invite the court to order that the director(s) file and serve, 14 days prior to hearing, witness statements and exhibits (which should include the company's books and records). If the director fails to attend the hearing, the judge has discretion to attach a penal notice to the order.

> "It is important to note the exception to assets in Lancaster or Cornwall. Freehold properties that are bona vacantia Lancaster and Cornwall will vest in the Duchy of Lancaster and the Duchy of Cornwall respectively"

Q Can a trustee in bankruptcy apply for a vesting order post-disclaimer?

A A notice of disclaimer is a mechanism which enables a trustee in bankruptcy to dispose of onerous property (section 315 of the Insolvency Act 1986 ("IA 1986")). A disclaimer has the effect of discharging the trustee from any personal liability in respect of the property as from the commencement of his trusteeship.

In the unlikely event that a trustee disclaims a freehold title, then the title passes to the Crown as *bona vacantia*. The Crown (acting by the Treasury Solicitor) must then also disclaim it in order for property to escheat to the Crown.

It is important to note the exception to assets in Lancaster or Cornwall. Freehold properties that are *bona vacantia* Lancaster and Cornwall will vest in the Duchy of Lancaster and the Duchy of Cornwall, respectively, and will be dealt with by Farrer & Co solicitors, rather than the Treasury Solicitor.

So what happens if the property is subsequently sold and realises a surplus?

This was considered in *Sleight v Crown Estate Commissioners [2018]*; in such case a trustee in bankruptcy of a deceased's estate applied for a vesting order under section 320 of the IA 1986, directing that the surplus created by the realisation of two disclaimed assets should vest in him. HHJ Davis-White QC refused the application on the basis that the trustee's argument had no merit; section 320(2) of the IA 1986 refers to a person who, at the time of making the application, has an interest in the property. The legislative regime is not referring to a person who is merely 'interested' in the property – this was the case with the trustee in *Sleight*.

In light of the important decision of HHJ Davis-White QC in *Sleight*, I encourage trustees to take care when disclaiming their interest in a freehold property; following disclaimer trustees will have no standing/locus or, at the very least, there will be considerable doubts as to a trustee's standing/locus to apply for a vesting order.

Mark Davies is head of restructuring and insolvency at Aaron & Partners

Recent case summaries

The latest insolvency update from **David Mohyuddin QC**

Re Edengate Homes (Butley Hall) Ltd (in Liquidation); Lock v Stanley [2022] EWCA Civ 626

Edengate was a special purchase vehicle, formed by Mrs Adele Lock and her husband to acquire and develop Butley Hall, a property in Cheshire. Mrs Lock's parents lent money to the company to assist with its financing. It went into creditors' voluntary and then compulsory liquidation. Mrs Lock was a director and a creditor of the company to which she had lent over £2 million.

The compulsory liquidator concluded that he and/or the company had claims against Mrs Lock, her husband, her parents and her parents' company. Those claims were valued at about £1.2 million plus interest. They were strongly disputed by Mrs Lock and her family.

> **"An applicant will not have standing where the relief is contrary to the interests of creditors as a class, which it will be where the application would result in a smaller recovery to creditors"**

Mrs Lock's application failed at first instance for want of standing and because, in any event, Mrs Lock could not meet the threshold for interfering with the liquidator's decision to assign the claims. She appealed.

The Court of Appeal's decision supports the ability of a liquidator to assign claims to a funder so that they can be pursued.

The court spent some time reviewing the authorities concerning standing and explained that, to have standing under s168(5) of the Insolvency Act 1986, the applicant must not only be a creditor, they must also have a legitimate interest in the relief sought. That will typically be shown where the applicant is acting in the interests of creditors. An applicant will not have standing where the relief is contrary to the interests of creditors as a class, which it will be when the application would result in a smaller recovery to creditors. Mrs Lock's application was for her benefit as a defendant, not for the benefit of the class of creditors.

The court then considered whether the Liquidator's decision to assign the claims was perverse ("so utterly unreasonable and absurd that no reasonable man would have done it"). The court confirmed that this is a formidable test. It requires that the judge evaluate all the circumstances of the case. Mrs Lock's complaint was that the liquidator had a duty to offer the claims to her and her family as the defendants, and that the failure to do so was a failure of process, which made the decision to sell the claims to the funder perverse. The court disagreed. Whilst it might be sensible or good practice, a failure to do so is not necessarily perverse – it depends on the facts.

Re PGD Limited (in Liquidation); Manolete Partners plc v Hope & Jones [2022] EWHC 1801 (Ch)

This is another case which supports the liquidator's ability to assign claims to a funder.

Mr Hope and Mr Jones were the shareholders and directors of PGD. In August 2014, they entered into a transaction to sell their shares, but the price was not to be paid by the purchasers and, instead, by PGD. By August 2015, they had each been paid nearly £400,000 and had also caused PGD to pay dividends which cleared their directors' loan accounts. PGD went into liquidation in April 2016. The shares transaction gave rise to several claims against them, but there were no funds in PGD's estate to pursue them, so they were assigned to litigation funder Manolete for an upfront payment and a share of the net recoveries.

The ICC judge found Mr Hope and Mr Jones liable for unlawful dividends and for transactions at an undervalue. Having given judgment, the judge then raised for the first time the idea that their total liability should be limited to ensure there was no possibility of a distribution to PGD's shareholders (i.e. the buyers of the shares) and included in his order a proviso that the total recoveries "shall not exceed the amount required to pay off all liquidation debts, fees, remuneration and expenses, together with applicable interest, in full and without return being made to the members of the Company as such.".

The ICC judge said that Manolete as assignee stood in the assignor's shoes and that the assignment ought not to result in any different recoveries. He rejected the objection that this would produce unintended consequences. Manolete appealed.

> **"Having given judgment, the judge then raised for the first time the idea that their total liability should be limited to ensure there was no possibility of a distribution to PGD's shareholders"**

Zacaroli J refused to express a view on the argument that the judge had no jurisdiction to impose the proviso. He approached the appeal assuming that the jurisdiction existed and on the basis that the ICC judge had erred in the exercise of his discretion.

He accepted Manolete's point that the proviso would leave it out of pocket and the discretion could not be exercised so as to prejudice innocent third parties, which it was. He said that the ICC judge's reasoning that an assignee stands in the shoes of the assignor did not justify the conclusion that the proviso (that the total recoveries should not exceed the amount required to pay off all liquidation fees, remuneration, and expenses and interest) should be imposed. All that meant was that the assignee can assert no better cause of action than the assignor. The discretion that was exercised related to the proceeds of the cause of action. It was wrong in principle to deprive Manolete of any part of those proceeds by the exercise of a discretion intended to prevent the proceeds reaching someone tainted with the same wrongdoing as Mr Hope and Mr Jones. That a proportion of the proceeds were to be retained by Manolete was simply the price to be paid by PGD's insolvent estate for recovering anything from the causes of action which had been assigned.

David Mohyuddin QC is a barrister at Radcliffe Chambers

Retail faces the big squeeze as confidence plummets

Even with the biggest fall in consumer confidence since 2008/09, there is still liquidity in the market and IPs should be advising businesses to raise more funding sooner rather than later, say **Zelf Hussain**, **Iain Reilly** and **Grace Whatman**

The retail sector is once again facing strong economic headwinds. With the cost of living rising for everyone, it is not surprising that consumers are getting increasingly nervous.

In March 2022, PwC's spring consumer sentiment survey showed the biggest year on year decline in confidence since the global financial crisis, eliminating nearly all of the post-pandemic pent-up demand, with a consumer sentiment index of -20. The survey that was performed again at the start of the summer saw another significant drop to -36. Sentiment is lower than at any point throughout the pandemic.

With more inflationary pressures to come, future sentiment will most likely dip further below these historic lows, particularly with another rise in utility bills set for autumn this year and the energy price cap to increase by over 50% in October.

Rising inflation is expected to contribute to the most significant squeeze on UK consumers' disposable income for more than 30 years, with real disposable incomes forecast to decline by about 2% in 2022 as wage inflation lags CPI.

Previous consumer sentiment surveys showed significant divergence between demographics. Even though confidence fell across nearly every group, the gulf between the most and least optimistic was widening. However, this summer, it has declined across all demographics and socioeconomic groups, with 76% of consumers worried by the rising costs of living.

Spending cutbacks

Concern over the increasing cost of living, combined with diminishing confidence, has seen 78% of all consumers make spending cutbacks over the past three months. Retail businesses have had to deal with pandemic-related store closures, then supply problems, and are now facing the largest fall in consumer sentiment since the start of the pandemic.

Consumers are tightening spending habits, by buying less or trading down in almost every spending category. Holidays appear to be more protected than expected this year, as relatively few people are looking to postpone them. However, no one is expecting that to continue next year.

Inflation has increased rapidly in the past few months, meaning more of people's money has been diverted to essentials, such as food, utilities, petrol and other non-discretionary spending, leaving less spare cash available for discretionary spending.

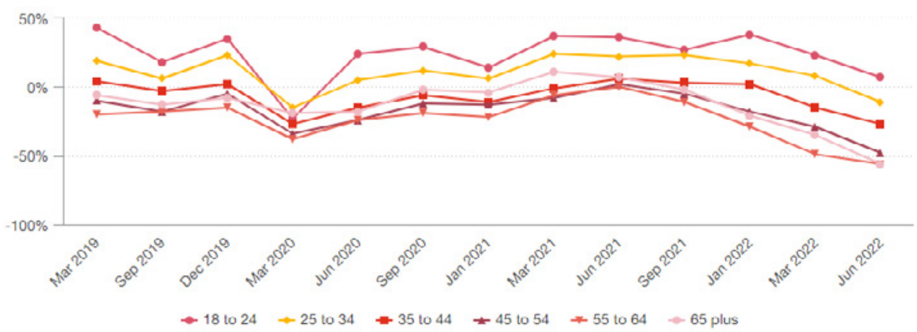
All discretionary spending has been hit hard, with intentions of spending money on fast fashion dropping significantly. We have already seen the impact of this with online fashion brand Missguided falling into insolvency in May. Home improvement saw substantial success throughout the pandemic. However, here again spending intentions have fallen sharply. Some home retailers are reporting falls in like-for-like orders of between 25% and 35%.

Record inflation

July's record rate of inflation of 10.1% across the UK is having a huge impact on the UK economy. Retailers are truly feeling the pinch of cost inflation, which is impacting the profitability of their business through a variety of different ways:

• Rising energy costs: there was a circa 600% increase in UK retail electricity prices over the last year. With Russia weaponising the

Consumer Sentiment Index by age group, 2019 to 2022



Source: PwC Consumer Sentiment Survey, June 2022 export of energy, this is expected to continue throughout the coming winter.

- Supply chain disruption: manufacturing organisations have had to grapple with not being able to operate production lines 24/7, leading to a shortage of raw materials and finished goods, with the resulting imbalance between supply and demand driving cost inflation.
- Cost base pressures: Brexit has resulted in new tariffs making it more costly to import raw materials and finished goods from the EU. The cost of bringing in a shipment container from China has increased by up to seven times since the pandemic started. In addition, UK road freight rates have hit their highest level in three years.
- Labour shortages: staff shortages have become a problem for many businesses. Between March and May, total vacancies reached a record 1.3 million.

Insolvencies amongst retailers

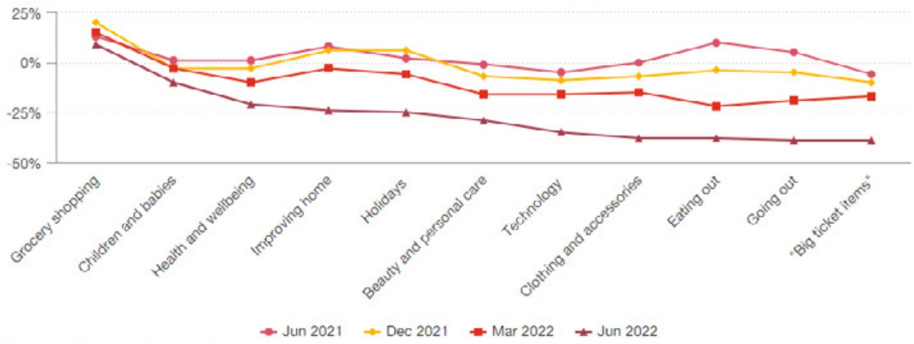
Things are likely to get worse before they get better. Data recently released by the Insolvency Service has shown that, in the past 12 months, insolvencies of UK retailers have risen 21% from 827 in 2020/21 to 997 in 2021/22.

Pre-packs seem to be the most popular restructuring tool of 2022, with the likes of Missguided, McColls, Studio Retail and TM Lewin all being bought out a few days after entering administration. Others have not been so fortunate. Sofa Workshop, for example, could not cope with supply chain delays and increases in transport costs causing over dependence on credit from suppliers, and is now in the process of selling off remaining stock and winding down.

Retailers and hospitality operators will be predicting and, consequently, preparing for tougher headwinds as the Covid-19 recovery stalls. With most consumers undertaking some form of cutting back, and over a third looking to trade down to cheaper items and make fewer purchases in general, retailers must ensure product lines can be adapted.

Businesses need to focus on streamlining their cost base and getting the basics right. They need to pull a range of levers to mitigate the impact of inflation, including: engineering the proposition to pass cost inflation through to consumers with, for example, value re-engineering, reduction in discounts, and mix management; optimising sourcing and the supply chain with, for example, forward buying and SKU (stock-keeping unit) rationalisation; and doubling down on traditional approaches to cost management. They need to have a clear target customer base, a differentiated proposition, and communicate value for money.

Net spending intention in the next 12 months



Source: PwC Consumer Sentiment Survey, June 2022

About the research

1. PwC's latest consumer sentiment survey was conducted between 17-20 June 2022 and includes responses from a nationally representative sample.

2. PwC has asked the same question every few months since April 2008: "Thinking about your disposable income (money remaining after household bills, credit cards, etc.), in the next 12 months do you expect that your household will be better off or worse off?". The index is calculated by subtracting the percentage of people who think they will be worse off from those who think they will be better off.

M&A activity

Recent macroeconomic and geopolitical events have eroded consumer confidence, which has led to a softening of M&A activity in the first six months of this year, compared to record levels of deal-making in 2021. The perceived impending impact on retail performance has knocked traditional investors' confidence in the sector, with high profile transactions, such as Boots, not progressing due to subdued debt capital markets impacting on valuation considerations.

Many retailers have undertaken restructuring during the last two years with tools such as CVAs. These mitigating measures have positioned their operating models to be nimble and respond to change quickly. For example, some companies – like with Ralph Lauren's sale of Club Monaco – are seeking to divest themselves of non-core brands to focus on their core customers. We expect further M&A activity as retailers seek to reduce costs and focus on their core proposition.

While the macro environment is challenging, there remains an abundance of capital to achieve strategic transactions.

Turnaround investors continue to have appetite in the sector, with examples including investments in French Connection, Missguided, Hanes Group, Footasylum and Cath Kidston. We expect this pool of capital to continue to act entrepreneurially in deploying capital into the sector.

What should IPs be doing?

Anyone advising a retail business should be telling them to plan ahead. In our experience, those that take pre-emptive actions tend to be the ones that survive. There is still liquidity in the market, but it is becoming more discerning, so businesses need to be thinking about raising more funding sooner rather than later. Certainly before the liquidity markets dry up.

Finally, before going down the route of a pre-pack administration, IPs should think about whether a restructuring plan would be better. We have seen recently with the Houst restructuring plan that these can now successfully be used for SMEs. This would certainly help save the business, minimise disruption and maximise value for all stakeholders.

Zelf Hussain is partner at PwC
Iain Reilly is director at PwC
Grace Whatman is manager at PwC

Tough times on the menu for mid-market casual dining

Without further government support, there will likely be more consolidation in the casual dining sector via sales through administration, says **Gordon Thomson**

Those in control of casual dining ventures could be forgiven for thinking their troubles will never end.

After the initial shock of Brexit, and the subsequent impact of Covid-19 and associated lockdown measures, the casual dining sector is now facing the most significant cost of living crisis in recent memory. The recent interest rate rise to 1.75% is the largest in almost 30 years and the Bank of England is now forecasting a recession that could remain through to 2024.

The pandemic

The impact of Covid and lockdown measures drove significant diversification and innovation, which enabled survival for many casual dining operators.

Within the restructuring sphere, many businesses sought consensual agreements with their landlords or used company voluntary arrangements to exit under-performing sites, together with linking their costs to revenues via turnover rents and 'Covid clauses'. Byron, GBK, Carluccios, Strada, Café Rouge and Bella Italia were among the mid-market operations which had to drop a considerable number of sites as their losses widened.

Overall – and as can be seen opposite – the rate of insolvencies associated with food and beverage activities has been tracking up since early 2021. This has contributed to a net reduction of around 9,000 outlets in the two years from March 2020 (including 700 chain restaurants) and, while the net position stabilised in the first half of 2022, this has disguised plenty of churn.

Current trading

These closures changed the balance of power between landlords and restaurateurs, opening the way for cheaper rent deals. As a result, some independent operators moved into locations exited by the chains, driving an increase in the number of local restaurants since March 2020.

The latest Coffer CGA Business Tracker recently reported that June's like-for-like sales at Britain's top managed restaurant, pub and bar groups were 5% ahead of the pre-Covid levels of June 2019. This represented the strongest month of like-for-like growth in 2022, although these results were positively impacted by the four-day Platinum Jubilee weekend.

Restaurants were the strongest performing of the three hospitality segments, with like-for-like growth of 8%, while pubs' sales were up by 3% on three years ago and bars' sales up by 5%. However, trading in London remains challenging, following the ongoing rail strikes and a sluggish growth in tourist numbers. Overall, sales growth is lagging behind inflation, and so the underlying trend is still one of squeezed margins and flat sales.

As a whole, the eating out sector is now not expected to return to pre-Covid levels until at least 2024. Restaurants are expected to endure a drawn-out recovery, with mid-market operators squeezed as consumers eat out less or go down-market. Higher-end restaurants are expected to be less impacted as they are seen to provide a special experience, while at the more price-sensitive end of the market, quick service restaurants are providing an attractive alternative to eating at home.

Indeed, takeaways boomed during the multiple lockdowns. Approximately 10-20% of restaurants' business now tends to be made up of delivery income, with some opening dark kitchens (with mixed results) or introducing brands from their existing kitchens to cater specifically for takeaways.

Headwinds and outlook

Underlying inflation has hit a 40-year high of 9%, which is translating into significant input cost increases for casual eateries, augmented by ongoing staff retention issues and the reduction of discretionary spend in the mid-market space, as consumers tighten their belts. Indeed, the top current issue for households is the cost of living.

Increases in ingredient costs (and limited supplies of the same), and the national living wage, VAT and utilities in particular, together with the introduction of mandatory calorie labelling on menus, will all increase expenses and erode margins. Inflation is feared to rise to exorbitant levels over the next year, requiring a higher and longer series of interest rate rises. The escalating cost of energy and food prices is expected to send inflation to 13% before the end of the year, while the retail price index is expected to hit 18%. Many larger operators are currently locked into favourable utility pricing until the autumn, but will then have to buy in the market which will see huge cost increases coming through.

High inflation also means sales are down in real terms and mounting costs continue to pile pressure on profit margins. As consumers struggle with rising living costs, operators must choose between passing on their increased expenses, accepting reduced profits or offering something cheaper.

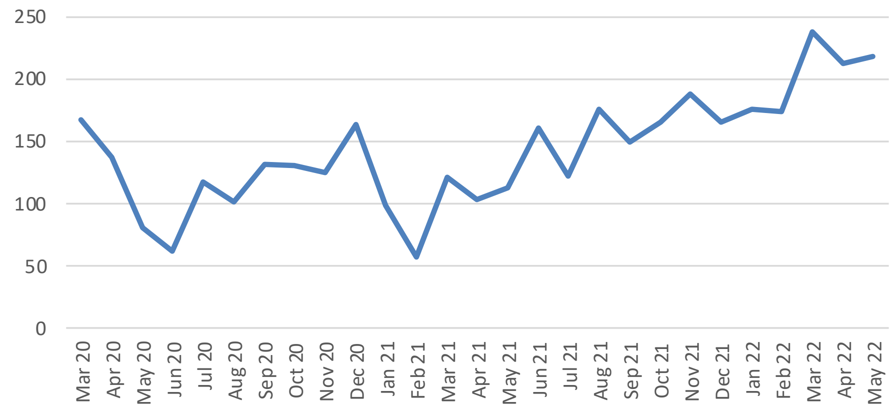
The other primary issue is staffing. The impact of Brexit is well known and many restaurant employees moved to alternative employment during the pandemic.

We now find that there is serious wage inflation and staff turnover is tremendous due to competition within the industry. It takes time for teams of people to figure out how to work together, and so high staff turnover leads to tremendous inefficiencies due to the required training time and costs.

There is also likely to be much competition for private equity investment due to losses suffered from previous restaurant ventures, which has limited the funding available. That said, interest is still there and there has been some recent consolidation in the casual dining sector, including The Restaurant Group's £7 million purchase of Barburrito and Tortilla Mexican Grill's acquisition of Chilango for £3 million. It is worth noting that both of those targets underwent restructuring procedures in the past two years.

> **Many of the CVAs introduced during the pandemic were used to link costs to activity, as well as to drop underperforming sites, and this worked well with reference to mandated closures. However, landlords have taken a considerable amount of pain over the past few years and will not be keen to accept more**

Food and beverage service activities insolvencies (England, Scotland and Wales)



Source: The Insolvency Service

Flexible offerings

It is becoming clear that it is no longer good enough to simply open a restaurant and serve people. With disposable income cut, mid-market diners are going out less and have adopted a more discerning approach, desiring better service and better food.

Restaurants need to be flexible with their offerings, pricing and operations to thrive, providing streamlined menus to mitigate challenges around staff shortages, supply chain disruption and volatile costs.

In terms of menu costs, some of the technology that's been adopted during the pandemic has made menu changing much easier and the associated investment should be seriously considered. Digital menus, accessed by an app or QR codes on every table, mean operators can rapidly remove items from the menu if they want to change the pricing or nutritional information.

Care has to be given to the size of portions – inflation has hit the price paid for consumer products and more subtly in the size of the product. This can drive savings, but may impact the dining experience and the effect of consistently adverse reviews on social media can be difficult to deal with.

A focus on customer experience to drive loyalty, investment in technology and careful cost management will support recovery. Digital ordering and new ways to pay will increase speed of service and improved customer satisfaction, and outdoor dining has proven to be a key development opportunity. Certain operators have also enticed customers via 'kids eat free' and other such incentives.

Staff retention strategies being rolled out include improved benefits (paid sick leave, cash bonuses or education assistance programmes), long-term career development opportunities (such as that publicised by Gusto), mental health support in what can be a stressful industry, flexible pay schedules and improved hiring processes. There has also been a renewed focus on building a strong culture, by regularly asking for feedback, improving communication between management and staff – and by simply showing appreciation.

Restructuring

So what do these issues mean for the restructuring industry? With a looming recession and interest rates increasing, it is clear that there are going to be numerous casualties and the services of restructuring professionals are going to be in demand.

A mid-market restaurateur now has to have a compelling offering and a great location, while running a flexible operation. Many of the CVAs introduced during the pandemic were used to link costs to activity, as well as to drop underperforming sites, and this worked well with reference to mandated closures. However, landlords have taken a considerable amount of pain over the past few years and will not be keen to accept more. Nevertheless, a consensual approach would yield a more favourable return to all parties.

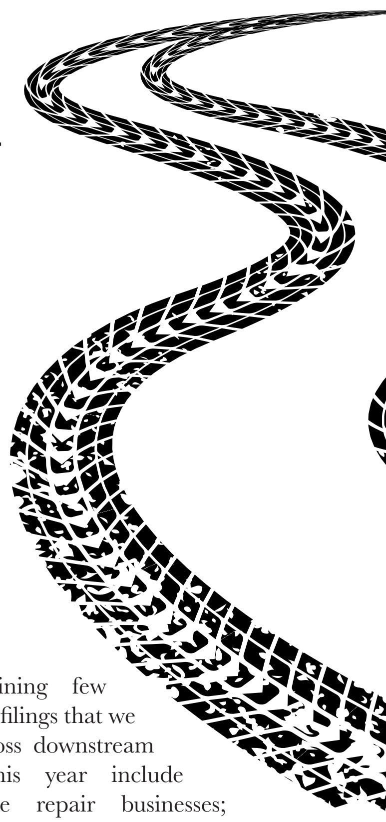
A CVA or a restructuring plan may also be used to assist a company's return to solvency, but these procedures will likely need both a significant capital injection to fund the associated commitments and a longer-term plan to ensure ongoing viability – or the can will simply be kicked down the road.

There are very few levers available to restaurant operators and, so without further government support via VAT and rates relief, I think we will see more consolidation via sales through administration. This may generate the economies of scale required to drive profit, with a 'clean' restart, but the cost of borrowing the money required to fund the acquisition may be prohibitive.

Noting that restaurants retain a measure of negotiating power, it is imperative that they try work out arrangements with landlords and lenders at the earliest sign of trouble in order to remain financially sound – and to seek restructuring advice as soon as possible. Therefore, planning, prioritising and negotiating must sit at the top of the agenda for businesses to navigate the year ahead and beyond.

Gordon Thomson is restructuring advisory director at RSM UK

Automotive swerves large scale insolvencies... for now



Insolvencies in automotive may depend on original equipment manufacturers' ability to dual source supply, says **Helen Dale**

The automotive industry must steady itself again as the cost of living crisis adds yet another hurdle for an industry otherwise poised to usher in the growth and opportunity of a global shift towards electrification. As an industry, automotive is not yet out of the semiconductor crisis, a shortage that contributed to many operating at the very edges of insolvency (but a surprising relative few ultimately filing).

As time marches on through 2022, increasing costs and declining consumer confidence provide the backdrop to what we expect will be a hard-earned UK production volume of under 1 million cars this year, compared to the 1.6 million of 2016. Businesses will require support to adapt and navigate the difficult trading conditions, given lower production volumes and continued market instability.

In this article we explore briefly why consumer confidence is weakening amidst the cost of living crisis and then look at the impact of this across the automotive industry, including where the risk of insolvency may be highest.

Consumer confidence

There are many well documented factors undermining consumer confidence, be that the impact of the recent pandemic, Brexit, a growing pessimism towards the outlook for the UK economy with increasing cost inflation and a weakening of exchange rates. As a fundamental component of a healthy automotive ecosystem, the weakening of consumer confidence adds further to the challenge for businesses navigating the next 12-24 months, increasing the risk of insolvencies.

Inflationary pressures have continued to intensify throughout 2022, with annualised consumer price inflation exceeding 9%. For automotive specifically, the sprawling reach of supply chains and distribution networks – alongside a heavy reliance on raw materials, including from Ukraine – has resulted in huge fall out across the sector.

Energy prices have surged, with some costs already passed on to the end consumer and further changes to the energy price cap are expected to drive up living costs again in October. The impact for both individuals and industry, particularly energy intensive, upstream automotive businesses, will be fierce. The extent of the insolvencies across the automotive supply chain may hang on the success of the original equipment manufacturers in reducing their own reliance on single source suppliers (and so improving their resilience in the face of supply chain failures and improving their hand when it comes to requests for support from distressed businesses in their supply chains).

Whilst the current economics are far from those that most in the automotive sector would wish for, a segment of the retail market is perhaps making the most of a more price-conscious end customer with some evidence from the shop floor of a shift to lower priced vehicles and to customers exploring options away from premium brands in the electric vehicle (EV) space. Advantageously for those retailers, they are typically also those with a lower overhead base and so, again, stand to fare better than those with more costly brand standards to maintain.

Many expect to see overheads increase by 5-10% this year for an average motor retailer, but the threat of insolvency appears to remain low for most. Whilst it is difficult to extract reliable insolvency data for the motor retail sector given the need to rely largely on accurate SIC code usage (being the Standard Industrial Classification of economic activities), a review of recent administration filings across England and Wales identified two relevant bricks and mortar dealership administrations in 2022 (year to date), and a comparative two filings in 2021. All four of the filings though related to small companies and, overall, the number of insolvencies is low.

What the sector may see from consumers in the months to come is perhaps more consumers weighing the options of new versus used vehicles, prestige versus lower-cost alternative, and PCP (personal contract purchase, a car financing option) over outright purchase – the latter being a trend already well in motion.

The remaining few administration filings that we have seen across downstream automotive this year include largely vehicle repair businesses; the online-only used vehicle retailer Carzam; and less mainstream activities, such as autonomous vehicles, kit cars and powersports. Mainstream retailers should be capable of adapting – it is perhaps across supply chains that we may see the increasing risk of insolvency most acutely.

Tracking insolvency or administrations data across upstream/supply chain automotive is more difficult still as many operate across multiple sectors and use a mix of identifying SIC codes. However, it is to be expected that more are to come.

Avoiding insolvencies

As the focus of many of the major manufacturers turns to 'mine to line' resilience – improving control of components and raw materials, particularly in EV, from mined raw materials through to parts on the production lines – and national sales companies (NSCs) seek to reimagine how sales and distribution channels might look for the future, there are businesses who may find that they no longer have a place in the system. They will need support to adapt or to call time in a manner that is least value destructive.

Helen Dale is advisory partner at Grant Thornton UK

Budgets buckle under rising debt burden

With substantial increases in people unable to repay priority debts, there is a new imperative on IPs to settle IVAs early, says **Meg van Rooyen**

Rising prices across the board are impacting all of us, but for people on lower incomes the impact is felt even harder.

Nearly two-thirds (63%) of callers to National Debtline have an annual net income below £20,000. For people on lower incomes, there is limited flex to absorb rising costs. Among the people we help, this challenge is clear to see, as average personal expenditure has risen by 7% in the last year, while average personal income has only increased 1%.

Amongst debt advice charities, we have seen a substantial increase in the number of people who cannot afford to pay their household bills from their income. This is still the case once we have completed a full financial statement and helped people to maximise their income, claim benefits where eligible, and minimise their outgoings where possible.

> **The average amount owed for bounce back loans standing at £25,830**

The proportion of callers to National Debtline in this situation – where they do not have enough coming in to cover essential costs – has risen by 8% in a year, up from 37% in 2021 to 45% in 2022. Even among callers who have a positive budget, the average surplus (the money they have left after paying essential bills) has gone down by 20%, which has implications for dealing with their debt, with less money to put towards repayments.

It is perhaps no surprise, therefore, that the most common reason for financial difficulty among people contacting National Debtline is that their income is too low for their basic needs.

More people with priority debts

As part of the debt advice process, we divide debts into priority and credit debts, depending upon the action a creditor can take if someone does not pay. We used to talk to people with mainly credit debts, such as credit cards, bank loans and overdrafts. However, this situation has changed substantially, and the proportion of people contacting us who have some form of priority debt – such as energy arrears, council tax and rent – has increased by 7 percentage points in the last year, (from 74% in 2021 to 81% in 2022).

This is coupled with an increase in the amount people owe on their priority debts, which has increased by 9% in the past year (£1,996, up from £1,834 in 2021). The average number of priority debts that people have has also risen: having been steady at an average of 2.3 per person since 2019, in 2022 this went up to 2.7. And, as you may expect, in June 2022, energy was the most common debt among callers to National Debtline (36% of callers), followed by council tax (26%) and credit cards (26%), with almost one in five callers (18%) having water debt.

Without more support for people with energy arrears in particular, this situation is not likely to improve in the immediate future.

Increased business costs

Our Business Debtline service has a different set of challenges. The effects of the Covid-19 pandemic remains the most common reason for financial difficulty among the self-employed people we help, although the proportion of callers citing this has been falling more recently.

We have found that many callers to Business Debtline have bounce back loans to deal with, taken out during the pandemic to keep their businesses afloat. This means that 30% of our callers in June 2022 are struggling to repay this type of debt, one that did not exist before the pandemic, with the average amount owed for bounce back loans standing at £25,830.

Unlike National Debtline clients, credit card (54%) and overdraft (38%) were the most common debt types amongst Business Debtline clients in June 2022, followed by bounce back loans (30%) and personal loans (26%). A smaller proportion of Business Debtline callers have council tax debt (23%) and 21% have energy debt. However, the average amount of energy arrears owed by people contacting Business Debtline has increased by almost £500 (or 40%) in the past year. Clients with energy arrears owe on average £1,719, up from £1,227 in 2021.

It is not just increased personal costs that self-employed people contacting the service face, but increased business costs too. The proportion of clients who have business priority debts, such as business VAT, income tax, capital gains tax or corporation tax, has risen by 8 percentage points in the past year (from 30% in 2021 to 38% in 2022). The average amount of business debt has increased by 6% (now at £32,213, up from £30,484 in 2021).

Policy changes

What we hear at National Debtline and Business Debtline informs our approach to debt policy in a range of areas. Our debt options briefing from 2020 outlined some of the possible changes we thought could be made to the existing debt options landscape in the wake of Covid. Whilst the Insolvency Service increased the debt relief order (DRO) limit, given the challenges that households – and particularly people on low incomes – are facing with rising costs, we believe more should be done to help.

There are a number of policy measures we think should be considered on a temporary basis. One such measure would be to temporarily extend the breathing space scheme to more than the current 60-day limit. We would like to see the government assess whether there is scope for a temporary extension in the breathing space period to help with the cost of living crisis, and rising inflation and energy bills.

Another option, to help people to access a DRO, could be waiving the £90 fee

> “It is clear there is a very real possibility that existing IVAs will not be sustainable once increased energy and other bills are factored into a household budget”

for an extended temporary period of 12 months for all applicants. And for those on income-related benefits, this waiver could be put in place on a permanent basis. In addition, there should be a temporary suspension of rules preventing people from taking a DRO for a second time if they have entered a DRO in the last six years, and changes to rules to allow a seamless transfer to a DRO where an IVA has failed.

More broadly, the DRO regulations should be amended to allow applications to include missing or overlooked debts to be added in retrospectively.

For bankruptcy, we see how the application fee acts as a very real barrier for many of our clients who want to go bankrupt. The Insolvency Service could waive the bankruptcy application fee for those on income-related benefits for an extended 12-month temporary period, which could then be reviewed at the end of this time frame. And, on IVAs, we worked on the revised IVA protocol guidance for IPs as part of the IVA standing committee. It is entirely sensible to require IPs to consider the predicted cost of living and energy price cap rises on the feasibility of new IVAs, and the additional guidance issued in June to support the existing IVA protocol is welcome. However, it is clear that there is a very real possibility that existing IVAs will not be sustainable once increased energy and other bills are factored into a household budget.

Whilst there has always been the potential to settle an IVA early, given the current crisis, there is a new imperative on IPs to make this happen. The regulatory bodies should ensure that IPs take action to propose an early settlement of an IVA based on funds paid in, when this is the best option for their clients. It is counterproductive for an IP to wait to fail an IVA after many months, as it makes for a very poor client journey to pass the client on to the over-burdened charitable sector to make an application for a DRO or bankruptcy. This is unlikely to be in the best interests of clients.

Further government support

While the support provided to help households impacted by high energy bills and rising costs so far is welcome, the circumstances are evolving. With energy prices predicted to reach over £4,000 in the new year, we believe more support is urgently needed from both government and regulators.

We would like to see short-term targeted support to low-income households to help with the cost of energy, given the price cap rises due in October and January, through non-repayable grants. The government should also expand access to, and increase the support available through, the Warm Home Discount scheme.

Increasing benefits is the most effective way to support people on lower incomes, hit hardest by rising prices and inflation. We believe that the government must significantly uprate benefits to avoid a real term cut to people's income. This updating should be put in place as soon as possible, as people on benefit income cannot wait until next year for this help.

We would agree with the chorus of voices, including the Parliamentary Work and Pensions Committee, that the government should also temporarily pause deductions from benefits to repay government debt, such as benefit overpayments. This will help to ensure that people receive the maximum possible support from the welfare system during this challenging time.

Regulators also have a vital role to play. We have joined with Citizens Advice and StepChange Debt Charity to call on Ofgem to significantly ramp up the protections in place for people with energy debt. Our briefing sets out a number of measures that Ofgem could introduce to help people with insurmountable energy debts this Winter.

Crucially, government, regulators (such as Ofgem) and creditors, including central and local government, will need to work together to ensure that anyone who does fall behind is treated fairly, including providing additional forbearance and pausing collection activity to help people who cannot afford to pay. These steps can make a big difference for the people we help, for whom there is little respite in sight from the impact of rising costs.

Meg van Rooyen is policy lead at the Money Advice Trust

The Insolvency Service published its call for evidence on the personal insolvency framework in July 2022. If you are interested in contributing to R3's response to the Call for Evidence, please contact R3's public affairs manager Pim Ungphakorn at pim.ungphakorn@r3.org.uk.

Creditors benefit from breathing space

With the number using the mental health breathing space doubling, the new Debt Respite Scheme is helping those who need it, says **Jayne Gardner**

The government's Debt Respite Scheme has been in place now for over a year, Its purpose being to give people in debt protection from their creditors, and give them breathing space and time to deal with problem debts.

There were two types of breathing space: a standard breathing space giving a fixed 60 day period where a creditor has to pause all action; and also a mental health breathing space, which has no time limit attached and is dealt with on a case by case basis.

We are over 12 months into this process, and there were 5772 breathing space registrations in June, 2% higher that the previous June, 85 of which were mental health breathing space registrations. While the overall registration number has increased by 2% over the previous year, the percentage of mental health breathing space registrations has increased by 35% over the same period. This is extremely concerning in itself.

> **"The number of consumers who are vulnerable and experiencing mental health problems, ostensibly caused or exacerbated by debt issues is growing"**

The pandemic has, without a doubt, been a big factor in this increase. Insolvencies have been on the rise, particularly in light of the government's Covid-19 financial support and tax relief ending in the spring of 2022. While many businesses weathered the storm of financial certainty over the last two years, HMRC scrapping the VAT cuts for businesses will push many into the red, on top of landlords and other debtors coming to collect any arrears built up since March 2020.

For individuals, it is no secret that the pandemic put many consumers' mental health through the ringer, with the entire UK population going through drastic lifestyle changes – for better or for worse – with the switch to home working. And for those individuals whose job security floundered as a product of economic uncertainty, this would surely be the latter.

All of this is without even mentioning the growing cost of living, of which the poorest and most vulnerable will bear the brunt. While the number of breathing space registrations at about 5,000 per month is high, this is a drop in the ocean when you consider the total number of consumers with debt problems. The key concern from our clients' perspective is the increase in mental health registrations. The number of consumers who are vulnerable and experiencing mental health problems, ostensibly caused or exacerbated by debt issues, is growing and remains a primary focus. If consumers can be supported before their debt issues become out of hand, they and their creditors will benefit. The breathing space supports this and it is giving respite to those who need it.

The 60-day period for a standard breathing space allows the debtor time to take advice and deal with their debts, and the creditor is able to resume their collection process at the expiry of this period.

The mental health breathing space does not afford a fixed time – it is dealt with on a case by case basis and the consumer must also be receiving mental health crisis treatment. Where a consumer is seeking breathing space due to mental health issues, for the most part the creditor is already aware of the situation and will be working with the consumer to find a solution.

There are criteria that have to be met for an individual to be eligible for breathing space under the Debt Respite Scheme, and they are not applicable for anyone with a debt relief order or undischarged bankrupts, or anyone in an IVA. Standard breathing space cannot be given if the individual has had a breathing space within the last 12 months. This helps protect the creditors from any individual who may attempt to use breathing space repeatedly and abuse a process that was introduced to help people in crisis.

However, if at any time a creditor is not happy with the situation and wants to challenge the decision, they can ask for a review of the breathing space which may result in further information being sought from the consumer and the breathing space may be cancelled if no longer considered appropriate, allowing the creditor to continue with their collection activity.

The key point to remember is the purpose of the breathing space is to offer protection from debt to those who need it; it was not introduced to allow people to avoid their responsibilities. Existing debts and liabilities still need to be addressed within any breathing space period and that includes honouring existing direct debits which are in place.

Sensitivities are certainly needed when working with vulnerable individuals on arrears repayments, so remaining vigilant and taking the right steps is imperative when something does not seem quite right or abuse of the scheme is suspected.

Jayne Gardner is partner at Shakespeare Martineau

Red flags for Covid loan and furlough fraud

IPs need to go beyond pre-pandemic checklists and work programs to avoid claims against them in respect of Covid support schemes, says **Dominic Dumville**

As we enter autumn of 2022, it is apparent that the Covid-19 pandemic which hit UK shores early in 2020 did not trigger the tsunami of corporate insolvencies that was initially feared. Few would disagree with the suggestion that this was largely due to the expensive and widely adopted government support schemes.

At a final count, £47 billion was loaned to UK companies in bounce back loans of up to £50,000 and a further £42 billion was loaned in larger amounts. A total of 1.6 million loans were approved under the government backed schemes between April 2020 and May 2021.

The Coronavirus Job Retention Scheme, to use its official title, was equally well-received; by November 2021, a total of £70 billion was paid out to 1.3 million employers that furloughed employees.

To put those numbers in perspective, according to HMRC statistics[1], in the financial year 2019-20, there were 1.6 million companies in the UK with gross taxable trading profits. The same number of companies that generated trading profits in that year received a government backed loan of some sort over the Covid period and 81% of that number claimed furlough.

As IPs take corporate appointments over the coming years, it is more likely than not that the company will have used a government scheme or two. We also know that the Insolvency Service is looking to our sector to spot, report on and, where possible, recover from those who may have abused the schemes.

Knowing what to look for

IPs and their teams need to ensure therefore that they are alive to the issues and know what to look for.

Due to the suspected levels of fraud surrounding the Covid support schemes, when taking an engagement, the IP needs to establish whether the company has made use of them; their existence in a case will directly impact the AML (anti-money laundering) risk profile. In March 2021, the Department for Business, Energy an Industrial Strategy estimated 11% of bounce back loans could be fraudulent. Similarly, I suspect all readers of *Recovery* will have heard at least one anecdote in the pub (or a West End bar) of directors flagrantly abusing the furlough scheme.

Once in office and aware that the company borrowed under one of the government schemes, work needs to be done to answer the obvious questions arising. The 'Dear IP Issue 115' Insolvency Service bulletin listed the possible offences we should be looking out for including "misuse of funds" and "obtaining funds with false information". At the very minimum, the borrowed cash should be identified landing in the bank statements and a note made of what happened next. IPs also need to be up to speed on the original loan application criteria. By way of an example, the maximum bounce back loan available to a company was one quarter of turnover up to £50,000 – so, where turnover was less

> While it would be useful in many of my cases, the use of a lie detector is not yet standard practice for IPs and might be stretching the powers of section 236

than £200,000 yet the company received the maximum £50,000, someone has been a little flexible with the truth.

A final thought on the loan schemes, not only does the IP need to establish whether there is a legal claim that is commercially viable, but they should also keep in mind their AML reporting obligations. Is a SAR (suspicious activity report) necessary and what if an element of the fraudulently obtained loan is still in the bank account? Possibly a DAML-SAR (defence against money laundering SAR)?

Investigation approach

Where the company has taken advantage of the furlough scheme, the investigation approach needs a little thought. It may not be practical to talk personally to all the employees in question and employees may not be entirely truthful if they fear being personally implicated. While it would be useful in many of my cases, the use of a lie detector is not yet standard practice for IPs and might be stretching the powers of section 236 of the Insolvency Act 1986.

The more obvious abuses to be looking out for are:

- Employees placed on furlough yet required to carry on working for the company. At the start of the scheme, unless told by their employer, there was no way for employees to know whether or not their employer had claimed in respect of their earnings.
- Employees taken on purely for the purposes of claiming furlough. The rules stated that claims could not be made on behalf of employees that were not included on an RTI submission at a particular date[2]. However, given the volume of claims HMRC were processing at the time, the speed at which the scheme was rolled out, and the fact that the claims were filed online (mostly typed manually) and paid within 6 working days, HMRC checks were possibly not 100% robust.
- Claims made in respect of ghost employees who may not exist at all or had nothing to do with the company. It is my understanding that, providing the manually typed NI number on the form was in a correct format, the form could be submitted and the amount claimed was received (I know of cases where NI numbers were erroneously entered with mistakes, yet the claim was unaffected).
- Abuse of the flexible furlough rules which were introduced in July 2020. Under the flexible rules, staff could be asked to work reduced hours from week to week and a claim made in respect of the hours they were on furlough.

In my practice, we are putting together a work program that looks to identify indicators that the furlough may not have been used correctly. The principle being that, if a company is claiming furlough, a relevant portion of its work force should be at home enjoying *Netflix* and not creating output for the business. That decline in output should be identifiable in the financials or other data.

> The court can 'declare that any persons who were knowingly parties to' the fraud 'are liable to make such contributions… as the court thinks proper'

For example, a shop, restaurant or cleaning business that sends its 'front line' staff home should record a dip in revenue over the same period. Similarly, reviewing staffing numbers over a period when furlough is being claimed and comparing to the value of furlough receipts might highlight an unexpected pattern.

Compensation orders

Where a preliminary review flags a suspicion of fraud, there is still a lot of work to do in order to generate a return for creditors; I have never tried to issue legal proceedings just on the strength of an analytical review. Depending on the nature of the fraud, evidence needs to be gathered, possibly with a number of employee interviews and as much contemporaneous evidence as you can get your hands on.

With the evidence gathered, input will be needed from your legal team on how the claim might be pleaded. At the moment, there is very little precedent to follow. Arguing that abusing a government Covid support scheme is a breach of duty should not be too difficult, but s212 IA86 allows the court to order the offender to contribute by way of compensation. Care needs to be taken to establish a loss which needs to be compensated. Such a loss may not exist if HMRC has not made a claim for the amounts fraudulently paid to the company. Where the evidence is strong enough, perhaps a fraudulent trading claim under s213 IA86 will be a more suitable claim to bring as the court's award is not compensatory in nature: the court can "declare that any persons who were knowingly parties to" the fraud "are liable to make such contributions… as the court thinks proper". In a couple of years' time I am sure this will be a well-trodden path but, at present, it is largely untested.

As previously set out, the figures suggest that the majority of corporate cases IPs take on over the coming year will include use of a government Covid support scheme in one way or another. Specific training for our teams is critical, as simply relying on pre-pandemic checklists and work programs could leave gaps in our case files that lead to regulatory action and/or claims against us.

1 HMRC issued Corporation Tax (CT) Statistics & Commentary, September 2020

2 19 March 2020 was the initial date but there were new dates each time the scheme was extended

Dominic Dumville is partner at Mercer & Hole

Restructuring in HE sector requires flexible approach

Universities and colleges suffering financial distress present a unique set of challenges. But with that come opportunities for IPs, says **Neil Smyth**

Whilst many may see higher education (HE) as a government-backed sector, it is a sector subject to financial distress, just like any other. The government may financially back the provision of teaching to UK students, but many operators in the sector have wide, diversified interests beyond that, relating to other areas like property development and international investment.

The sector has just come through a combination of a low point in school leaver numbers and Covid-19, reducing international student numbers and opportunities, and increasing dissatisfaction amongst paying students for the experience they have received.

Now the sector is facing, along with everyone else, the cost of living crisis, as well as lecturer strikes over pension rights and continued pressure from students for better value for money. At the same time, tuition fees are frozen. In other words, teaching revenue is not increasing, whilst costs are, so margins are tightening.

Restructuring opportunities in the HE sector will therefore continue to increase, but what are the challenges, legal and otherwise, and why is it an opportunity?

Royal Charter bodies

When dealing with corporate entities, we are used to advising companies and directors. In the HE sector, companies are in the minority. Many of the providers in the sector are incorporated by Royal Charter meaning, in essence, that they fall outside the companies and insolvency legislations. In addition, many of those operators are also registered charities with trustees – rather than directors – meaning that, whilst companies and insolvency legislation may not apply, charities and trust law do.

The challenge is therefore to convince trustees of HE providers that – while the insolvency legislation does not, on the face of it, apply to many providers – it could still have far-reaching consequences for those trustees personally, and that the trustees should act and approach matters as if they are directors of a company and take a more 'corporate' approach.

Nature of security granted

This then gives rise to a further legal challenge. If the HE provider is not incorporated and has granted security in respect of borrowings, it is unlikely to have the ability to grant a floating charge.

It can usually grant a mortgage or fixed charge over land, but HE providers are not just property developers – they provide education and other services to students across the whole of their campuses.

In my experience, HE providers have, historically, often only granted security over specific assets for specific borrowings, and sometimes that money has been lent purely on an unsecured basis, or has not been correctly granted or registered at Companies House.

Available insolvency processes

If the HE provider is not incorporated as a company then, pursuant to paragraph 111(1A) of Schedule B1 to the Insolvency Act 1986, it is not a 'company' that can be put or go into administration. Unlike with further education providers, there is no special administration process or legislation that applies companies and insolvency law to non-incorporated HE providers.

If an HE provider is unable to grant a floating charge, then a lender cannot appoint an administrative receiver, assuming that that option would be open to the lender in an event.

An unincorporated entity cannot propose a company voluntary arrangement, and is unlikely to be able to propose a scheme of

> As for those running an HE provider that is not a company, unless there is a special administration process, it is unclear whether 'directors' duties' apply

arrangement and/or a restructuring plan under the companies legislation or use the moratorium process.

This leaves only the two options of: the appointment of a fixed charge receiver under any security granted; or the provisional liquidation or liquidation of the entity as an unregistered company. Neither of these options are appealing either to any secured lender or an insolvency practitioner faced with trading an HE provider.

If you are advising a secured lender to an HE provider, it therefore makes sense to manage expectations at the outset with their recovery team, if that is who you are dealing with, and explain that the usual rules may not apply and that the more traditional enforcement routes may not be available. This means that the lenders, as well as the advisers, may need to be more flexible and accommodating to find a common solution, rather than it being the case that the lender holds the 'whip hand'.

Conflicting duties

As for those running an HE provider that is not a company, unless there is a special administration process, it is unclear whether 'directors' duties' apply and how they interact with duties that they may have as trustees of a charity. It is also unclear what legal obligation they have to the students and on what grounds, if any, they could be personally liable.

In addition, it is often a standard structure for an HE provider to have trustees overseeing a senior management team (SMT), who run day to day operations. This, in turn, gives rise to concerns about whether the SMT could be personally liable for their actions under any of the conflicting legislation.

Reputational risk

Many of the trustees on the boards of HE providers will be academics, but they will be supplemented with other experts from other areas, who may or may not be retired. They will include high profile and well-known individuals who will be looking to their roles in the HE sector to enhance their reputations.

Being personally associated with an organisation that may be deemed to be 'insolvent', in my experience, can lead to challenges in getting trustees to focus on the consequences of the HE provider being technically insolvent, rather than on the fact that the HE provider is insolvent. Insolvency is an emotive word, particularly in the HE sector.

Regulators

In addition, HE providers are regulated by the Office for Students (OfS). The OfS's primary focus is, understandably, on the best interests of the students. However, as there is no special administration regime in place for HE providers, any IP owes their duties primarily to the creditors under the insolvency legislation in the usual way.

There can therefore be a conflict between the position that an IP and the OfS will be taking. Again, the IP will have to be as creative and flexible as they can be in their role because, ultimately, if the IP cannot work with the OfS to transition students over to another provider, then the IP runs the risk that the OfS will intervene in any carefully laid plans around a 'realisation' of the HE provider's 'business and assets' to another provider.

Obviously, without the students, there is no proposition to maximise value to creditors, so a good relationship with the OfS and the Department of Education will be key. In addition, if the HE provider is a registered charity, it will be regulated by the Charity Commission.

> The IP runs the risk that the OfS will intervene in any carefully laid plans around a 'realisation' of the HE provider's 'business and assets' to another provider

However, in my experience, where more than one regulator is involved, one of the regulators will agree to take a lead role to avoid the IP having to liaise with all of the regulators at all times. Normally, for an HE provider, the OfS, in conjunction with the Department of Education, will take the lead regulator role.

Other stakeholders

As well as the regulators, the Student Loan Company is likely to have a large role in any financial difficulty, particularly an insolvency process, of an HE provider, as it will be advancing tuition fees on behalf of the students. Whilst logic would dictate that that money would be advanced on a term-by-term basis, that is not the case.

Other interested parties will include the Office of Independent Adjudicator (OIA), who deal with complaints (of which there will be many); UCAS, in respect of student applications; the Unions, on behalf of staff; and possibly pension providers like the USS.

PR

Many restructuring assignments, particularly where an insolvency process is used, create press interest. This is particularly the case where the provider is involved in education, is likely to be a major employer in the region, is connected to Government departments, involves parents who are often paying the tuition fees, and students, who are unsurprisingly very adept at using social media to create publicity and get their views (whether they are correct or otherwise) across.

Even more than any other sector therefore, it is crucial that included in the restructuring plan is the involvement of PR agents to try and control the flow of information sent out, and to monitor how that information is interpreted and responded to on platforms that only our kids will know about.

Opportunity

Having said all of that, with all these challenges, comes opportunity. Whilst the usual rule book for enforcement and suitable insolvency processes may well not apply, that does give an opportunity for a more level playing field between the stakeholders in achieving an outcome in the best interests of all.

All parties coming to the table in a restructuring of an HE provider will need to do so with an open mind and with the flexibility to find a solution that will revolve around the students. IPs will also have to accommodate more stakeholders with different perspectives, while those stakeholders will probably have less influence than they would usually have in a restructuring situation.

Insolvency professionals are therefore well-placed to add value and find solutions in these situations, even if the usual rules do not apply. To the extent that the sector is government-backed, then restructurings, rather than insolvency processes, are more likely to be achievable, particularly where public funds are available to fund a solution.

Neil Smyth is partner and national head of restructuring at Mills & Reeve

Stranger Things… CVAs banished to the Upside Down?

Whether CVAs continue to remain alive will depend on the patience of unsecured creditors and the size of HMRC's secondary preferential debts, say **Ben Luxford** and **Stewart Perry**

Preamble: This article is written based on the hit *Netflix* show ***Stranger Things***, an American science fiction drama set in the 1980s that centres on a number of mysteries and supernatural events.

The Upside Down is an alternate dimension existing in parallel to the insolvency world. The history of the Upside Down – a bad place – remains a mystery. Exactly how and why it came into existence, is an enigma.

However, some believe it came into existence on 1 December 2020 when HMRC partially re-introduced its preferential status under the guise of 'secondary preferential creditor'.

Using the Finance Act 2020, some speculate that HMRC opened an interdimensional gate that transported CVAs away from the insolvency world and into the Upside Down, where they will remain until, perhaps, HMRC sees the errors of its ways or, perhaps more likely, the Mind Flayer decides to wield its psychokinetic powers to possess the minds of those responsible and abolish the secondary preferential status in its entirety, restoring balance.

Whilst some consider that CVAs are to remain in the Upside Down because of HMRC's status as a secondary preferential creditor, others believe they are very much alive in the insolvency world, but require a little tweaking.

CVA mechanics

Has HMRC's status as a secondary preferential creditor changed the CVA mechanics? No. Directors of a company are still able to propose a CVA. The nominee's role is still to opine on the proposal. The nominee should still hold an opinion that the proposal has "a reasonable prospect of being approved and implemented". Unsecured creditors still need to agree to it by a majority of at least 75% in value of those creditors voting, and creditors may apply to the court if the CVA's terms are unfairly prejudicial or if there was some material irregularity in the procedure leading up to its approval.

A flexible tool

The CVA still remains a flexible tool, which is often seen as its biggest strength. The CVA effectively enables an IP to become Bob Ross – the creator of *The Joy of Painting* (an American instructional series in the 1980s, hosted by the painter Bob Ross) – and create a masterpiece from a blank canvas for a company (or group of companies).

Many useful and effective voluntary arrangements have been proposed in recent years. They continue to be seen as a particularly useful tool in the retail sector, with many unhappy landlords having unsuccessfully challenged the use of a CVA to restructure a property portfolio and allow a retailer to continue trading – for instance, Debenhams and New Look.

The moratorium

For many years, the CVA suffered from an apparent weakness – no moratorium on actions

 Editor editor@r3.org.uk

“IPs may need some 1980s business acumen and engage with creditors to illustrate the benefits of the CVA if they are to persuade creditors to wait until year two or three for a dividend after the payment of HMRC, to obtain their support for the CVA”

The **Upside Down** is an alternate dimension existing in parallel to the human world in *Stranger Things*, an American science fiction horror drama television series, first released in 2016. The Upside Down dimension originally consisted entirely of sprawling mountains and floating rocks, and was home to a race of human predators. Somehow, the Upside Down transformed from its original state and became a perfect copy of the human world, exactly as it existed on 6 November 1983. However, unlike the human world, this new incarnation of the Upside Down was overrun with alien vines, spores and membranes, and completely devoid of human life.

The alien vines, along with the humanoid predators and a species of bat-like creatures, formed a shared hive mind. This shared psychic connection was made possible via the **Mind Flayer**, a powerful entity native to the Upside Down, which the human Henry Creel (who from the fourth series transformed into the main antagonist **Vecna**) possessed control over.

against the company whilst the CVA proposal is prepared and considered. Creditors could therefore frustrate a possible CVA by enforcing their rights prior to the decision-making procedures convened to approve the proposal. However, the Corporate Insolvency and Governance Act 2020 changed this following the introduction of the part A1, moratorium. So perhaps this weakness has been eradicated? Only time will tell.

The main antagonist, Vecna

Even though with CVAs a bespoke plan can be created that is tailored for the specific debtor and IPs can advise on the use of a moratorium to steer it through to voting stages, IPs must now also consider HMRC's position on secondary preferential debts.

Readers will be aware that no proposal can be approved “under which… any preferential debt of the company is to be paid otherwise than in priority to such of its debts as are not preferential debts” unless the preferential creditor consents (section 4 of the Insolvency Act 1986). In other words, Crown preference debt must be paid in full before the voluntary arrangement can allow unsecured creditors to receive any dividend (unless HMRC agrees otherwise). And against that backdrop we have HMRC's statement that “HMRC will reject a voluntary arrangement which proposes to exclude or modify the preferential treatment of any creditor, including HMRC”.

We are not suggesting that HMRC is out to destroy humanity like Vecna – a fearsome creature aligned with the Upside Down – but this statement does appear to destroy the option of a CVA for a lot of companies in financial distress. To counterbalance this inflexible stance by HMRC, directors will need to engage with the insolvency profession at a much earlier time to see if there are ways to minimise the impact that the debt to HMRC has on ruining the chances of the CVA being an option.

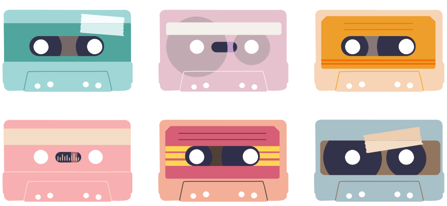
Furthermore, IPs may need some 1980s business acumen, and engage with creditors to illustrate the benefits of the CVA if they are to persuade creditors to wait until year two or three for a dividend after the payment of HMRC, to obtain their support for the CVA.

Alternatively, the new kid on the block – ‘the restructuring plan’ – may be an appropriate alternative following the recent success of property developer Houst Limited in the High Court in London, where HMRC were crammed down.

‘Mostly dead’

And this brings us to the big question: are CVAs viable if HMRC won't budge on Crown preference? The view of at least one of us is that they are mostly dead. There is a sea of small companies that cannot afford restructuring plans, with large amounts of rolled VAT and PAYE (which rank as preferential). There is little likelihood that any nominee could conclude that normal unsecured creditors would vote in favour of a proposal that saw them get nothing for years – why would they bother?

“When thinking about the time before 1 December 2020, I bet some IPs resonate with the words of Kate Bush's smash hit *Running Up That Hill*”



According to the government, the reintroduction of Crown preference was only supposed to net the Treasury £185 million in the 2022/23 tax year. This played down the impact this would have on secondary lending (which is obviously most affected, given its reliance on floating charges), and now also impacts on genuinely good companies hit by the pandemic from entering into CVAs, which will in turn mean bounce bank loans and CBILs fail to be paid, alongside other unsecured creditors. A foolish measure, made doubly so by the Treasury continuing with its implementation post-pandemic.

Without wishing to be even more of a doom monger, the quarterly statistics are already showing the impact of this. If a small company CVA is impossible, the more likely outcome is perhaps a CVL. The number of CVLs in the second quarter of 2022 compared to the second quarter of 2021 increased by 74% to 4,908. CVAs were up only 28% and to a grand total of 32.

Whether CVAs are alive in the insolvency world or banished to the Upside Down remains to be seen. One thing is for certain though, CVAs remain a flexible tool for IPs when advising clients and do give companies a chance to survive. However, whether a CVA is appropriate will depend on the patience of unsecured creditors and the size of HMRC's secondary preferential debts.

When thinking about the time before 1 December 2020, we bet some IPs resonate with the words of Kate Bush's smash hit *Running Up That Hill* and the chorus ‘And if I only could, I'd make a deal with God, And I'd get him to swap our places’. It would be good to swap back to the late 1980s and a time when, perhaps, CVAs were an easier option to propose.

Ben Luxford is head of technical at R3
Stewart Perry is partner at Fieldfisher

A flexible and viable restructuring tool

With clear support from recent court judgments and the Insolvency Service, CVAs still have a future for some distressed companies, argues **Elaine Nolan**

The CVA has firmly developed as a flexible restructuring tool that will continue to assist distressed companies. This is particularly so in light of the current macro-economic headwinds facing many businesses. CVAs will continue to play a central role for companies looking to implement real estate lease restructurings and, in this regard, the Debenhams[1] and New Look[2] High Court judgments (in 2019 and 2021, respectively) have not only endorsed the use of the CVA, but also provide great clarity to restructuring practitioners.

The court has rightly taken a very commercial approach to the use of CVAs to compromise leasehold liabilities. Provided compromised landlords have the right to recover their premises and the relevant comparator (the amount they would receive if the CVA is not approved) clearly evidences a lower return to them than the CVA, the 'fairness' of the modifications itself is not something which the court would assess as part of an unfair prejudice challenge. The key takeaways from recent judgments are outlined in brief below.

Modifications to lease terms

Landlords have often complained that any CVA should not compromise rent such that it falls below 'market rent'. Further, in New Look, landlords argued that certain modifications (for example, a move to turnover rent or rolling break rights) should only be compromised to the "minimum extent necessary"[3] (quoting a comment by Norris J in Debenhams).

The New Look judgment made clear, however, that there is no such rigid test when formulating the rent reductions and modifications to leases in a CVA. Instead, one has to look at all the circumstances, especially when considering what landlords

would receive in the relevant comparator. Ultimately, such modifications are purely a 'commercial question'. The 'fairness' of the modifications itself is not something which the court would review as part of an unfair prejudice challenge, provided landlords have a break right to terminate their lease and recover the premises.

Going forward, this means that amendments to leases can be assessed by the company and its advisers as to what is commercially fair and reasonable to obtain support of landlords, whilst ensuring that a break right is available to landlords and that the CVA offers the best outcome.

Landlord voting claims

The Insolvency Rules permit a discount to be applied for voting purposes in relation to future contingent claims (i.e. future rent).

In the first landlord CVA (JJB Sports in 2009), this discount was set at 75%. Over the years, this has been the subject of much debate and the market has, in the last few years, moved to a 25-50% discount.

In Regis[4], the court held there was no adequate justification for the 75% discount. In New Look, the court accepted that the 25% discount was not objectionable.

Going forward, it is expected that the 25% discount will be applied to value future rent claims for voting purposes. This is welcome clarity for practitioners.

Secured financial creditors

In New Look, the secured noteholders voted the 'under-secured' portion of their total claim, which contributed to a successful vote. The noteholders were also, in parallel, being compromised under a scheme of arrangement and exchanging secured debt for equity in the restructured business.

The court found that it was not unfairly prejudicial for financial creditors to vote their under-secured claim. The judge took a holistic view of the circumstances. Whilst the noteholders were not being affected directly by the terms of the CVA itself, they were being impaired and their claims compromised under a parallel scheme of arrangement.

Accordingly, a secured creditor can vote its 'under-secured' portion of its total claim (that is any shortfall where the value of the security does not meet the total amount of the creditor's claim) and this would not constitute unfair prejudice, depending upon the background and circumstances of the specific case.

Insolvency Service research

Since the judgments outlined above, in June 2022[5], the Insolvency Service commissioned

> **"Some commentators believe that since HMRC regained preferential status, this could kill off the use of the CVA... This however is far from certain and will depend on each case, including the size of HMRC's claim and if 'time to pay' arrangements can be agreed"**

research into the treatment of landlords in CVAs. The overall conclusion of the report was that "landlords are, broadly, equitably treated compared to other classes of unsecured creditors". The report concluded that: "...it is our opinion that the CVA offers a flexible and cost-effective solution that bridges the gap between informal negotiations and formal insolvency procedures such as administration/ liquidation. A CVA enables companies to implement a legally binding financial restructuring swiftly, thereby providing an increased chance for the business to survive as a going concern, arguably a cornerstone of the UK's rescue culture."

Other creditors

Some commentators believe that since HMRC regained preferential status, this could kill off the use of the CVA in circumstances where HMRC insist on being paid in full against other unsecured creditors. This, however, is far from certain and will depend on each case, including the size of HMRC's claim and if 'time to pay' arrangements can be agreed.

On 7 July 2022, HMRC also issued a statement that it will be changing its approach to "be more proactive in the use of [its] voting rights and... vote on proposals". HMRC confirmed that this approach aligns with the BEIS minister's commitment to the R3 President that HMRC will take a more commercial approach to restructuring proposals. This appears to be a welcome development.

Many businesses in the retail, hospitality and leisure sectors are no longer benefitting from the business rates relief provided during the Covid-19 pandemic. A CVA can also compromise business rates and assist distressed tenants with these significant costs, alongside rent reductions or compromises.

Cross-border

One of the most recent significant cross-border developments in 2020 was the recognition of the All Saints landlord CVA. All Saints USA Limited (ASUSA) is an English incorporated and domiciled company which has a retail store presence solely in the US and Canada. All of its real estate leases were governed by US and Canadian law. The ASUSA CVA is novel for a number of reasons: it was the first landlord CVA recognised in the US under Chapter 15; it was the first CVA recognised in Canada; and it was the first CVA to compromise US and Canadian lease and parent guarantee liabilities. This case demonstrates the capability for companies with North American and/or Canadian leases, which are either incorporated in England and/or have an English COMI, to compromise real estate contracts utilising a CVA.

To conclude, in circumstances where a company requires an operational restructuring, or has a capital structure with unsecured debt (for example, from shareholder funding/intercompany loans or third-party debt instruments, as we saw in Steinhoff) or under-secured debt, a CVA is still a very viable restructuring tool that now has both clear endorsement from recent judgments and support from the Insolvency Service.

1 Discovery (Northampton) Limited and others v Debenhams Retail Limited and others [2019] EWHC 2441 (Ch)
2 Re Lazari Properties 2 Limited and others v New Look Retailers Ltd and others [2021] EWHC 1209 (Ch)
3 Ibid para 71
4 Re Carraway Guildford (Nominee A) Limited and others v Regis UK Limited and others [2021] EWHC 1294 (Ch)
5 Company voluntary arrangement research report by RSM for the Insolvency Service, published 28 June 2022.

Elaine Nolan is partner at Kirkland & Ellis and co-editor of 'Company Voluntary Arrangements: Law and Practice' published by Oxford University Press

Pandemic-driven changes raise ethical concerns

The current principles-based insolvency code of ethics cannot deal with new threats in relation to IPs' behaviour. IPs need to be given more specific and nuanced guidance, argue **Lézelle Jacobs** and **Donna McKenzie Skene**

It was evident from the start of the Covid-19 pandemic that the insolvency profession had an unmistakeable role to play in assisting debtors and creditors to maintain some sort of order in the chaotic fallout that resulted from it. It could even be argued that IPs were fulfilling an essential service, especially where their work related to the administering of estates of debtors that are regarded as essential or critical.

However, one thing was clear – insolvency practice also had to adapt to the changed environment. The measures put in place to ensure the safety of the public had an unprecedented impact on the world of the IP.

This article has two main aims: first, to look at three main aspects relating to insolvency practice to highlight issues that have arisen due to the changes made as a result of the pandemic; second, to highlight professional standards issues that should attract attention in a post-pandemic world.

Insolvency law and practice

In order to support businesses experiencing financial distress during the pandemic, several measures were introduced, including temporary restrictions on the use of statutory demands and certain winding-up petitions, the suspension of wrongful trading provisions, and even special measures on evictions, as well as enhanced financial support to companies by way of the bounce back loan and furlough schemes.

> **The plight of debtors, their management and their employees were given priority, whilst creditors, and especially financial creditors, were required to be patient**

Another momentous development was the enactment of the Corporate Insolvency and Governance Act 2020 (CIGA). CIGA has been described as the most significant change to the UK's corporate insolvency regime in 20 years. The three permanent CIGA measures are: the new restructuring plan (RP) under Part 26A of the Companies Act 2006; the standalone moratorium under Part A1 of the Insolvency Act 1986 (the Act); and the restriction on contractual termination (ipso facto) clauses under s 233B of the Act.

The clear aim of all the measures above was the fiscal survival of persons and entities. Moreover, what most of these measures have in common is that they reflect a more communitarian approach to insolvency than the usual creditor-oriented approach. The plight of debtors, their management and their employees were given priority, whilst creditors, and especially financial creditors, were required to be patient.

As a matter of policy, the question could be asked whether the enhanced realisation during the pandemic that corporate insolvency affects more than just the creditors is something which ought to be retained post-pandemic.

Practical considerations

The pandemic gave rise to numerous practical issues in relation to the normal operation of insolvency procedures, from the inability of IPs to physically attend business premises, take control of assets, books and records, and interview directors and others in person, to the inability to access courts, and other relevant institutions and bodies in the normal way and to comply fully – or at all – with legislative provisions or best practice guidance.

In order to address these issues, most jurisdictions took steps to ameliorate the position. In England and Wales, for example, temporary practice directions were issued to adapt certain aspects of insolvency procedures which could no longer operate normally. These included provisions relating to the filing of notice to appoint an administrator and notice of appointment of an administrator; remote hearings; pending petitions and applications; winding up and bankruptcy petitions; urgent hearings; and statutory declarations. Some of these changes have now been made permanent.

> **Ethical IPs are key in chaotic insolvency situations and during the pandemic insolvency situations were complicated even further. The vulnerability that arose during the pandemic emphasised the importance of trustworthy and competent office holders**

IPs had to come to terms with the provisions (both temporary and permanent) brought about by CIGA. Companies House also introduced temporary measures for the electronic filing of documents. These have not been made permanent, but the ongoing wider review on corporate transparency and register reform may result in greater use of electronic filing in future.

Other practical steps to assist IPs during the pandemic included the development of a new standard form Covid CVA proposal and accompanying standard conditions by R3, and the development of a protocol on 'light touch' administration by the Insolvency Lawyers Association and City of London Law Society.

Some of these measures, such as the increased use of electronic filing and the move to remote meetings of creditors, can be seen as a trend to extend the use of technology in insolvency processes, which was already ongoing. This, together with the fact that some of them have been or are being made permanent, suggests that they are relatively, if not wholly, uncontroversial. However, while measures such as remote creditors meetings can be seen as making increased creditor participation easier, the flip side is that creditors need to have access to the relevant technology, and a sufficiently strong and reliable internet connection, which is not always the case. Furthermore, there may be a lingering sense that some things are still better done in person, in particular court hearings, at least where they involve witnesses (with the corresponding need to assess credibility) or are otherwise contentious.

Ethical considerations

Ethical IPs are key in chaotic insolvency situations and during the pandemic insolvency situations were complicated even further. The vulnerability that arose during the pandemic emphasised the importance of trustworthy and competent office holders.

A new insolvency code of ethics, which had been in gestation for a considerable time, was introduced on 1 May 2020. The code is principles-based and should, therefore, be adaptable to any particular set of circumstances, but the nature of the response to the pandemic could be said to have given rise to a unique set of ethical challenges. For example, the move to working from home can be seen to have given rise to novel issues, such as confidentiality, as IPs and their staff work in an environment which heightens the difficulties of maintaining strict confidentiality. The increased reliance on technology may also have accelerated the use of artificial intelligence, which also raises ethical issues. The extent to which an IP can and should rely on such technology, especially as a potential substitute for their own judgment, is an interesting area for debate.

Other ethical issues related directly to the financial support measures for business put in place during the pandemic – in particular the bounce back loan scheme – including issues around advising directors on whether to take advantage of those measures, the appropriate (and inappropriate) use of any funding obtained, and later decisions, such as whether to put companies into voluntary liquidation where such support had been accessed, but not repaid. One would hope to see IPs who did not uphold the appropriate ethical standards in those situations being held to account in terms of the Company Directors Disqualification Act by perhaps utilising the Compensation Order mechanism.

As noted earlier, a protocol was developed to regulate 'light touch' administrations, which were particularly helpful during the pandemic due to the restrictions. Within the existing statutory framework, the protocol allowed for IPs to fulfil the tasks and duties of an administrator in innovative ways by transferring some of their responsibilities to the company's management. Whilst the protocol provided the flexibility IPs needed during the pandemic, allowing the practice to continue post-pandemic raises several issues. The exceptional and unprecedented circumstances which created the need for the protocol are arguably no longer relevant, and there is no reason for administrators to not engage with

> **"Parallels can be drawn between the protocol for 'light touch' administrations and the contentious pre-pack administration in so far as both can give rise to perceptions of IPs doing deals with directors at the expense of other stakeholders"**

their duties (including fiduciary and equitable) as envisaged by the insolvency framework. Parallels can also be drawn between the protocol for 'light touch' administrations and the contentious pre-pack administration in so far as both can give rise to perceptions of IPs doing deals with directors at the expense of other stakeholders.

Perhaps, therefore, the protocol and its use in a post-pandemic world should be re-evaluated as stakeholders and the public at large may be sceptical about the IP's objectivity and control of what is inevitably a polarising insolvency situation, and may perceive the IP is not as engaged as might be expected. In our opinion, it creates a dent in the trust and confidence that stakeholders should be able to place in the administrator.

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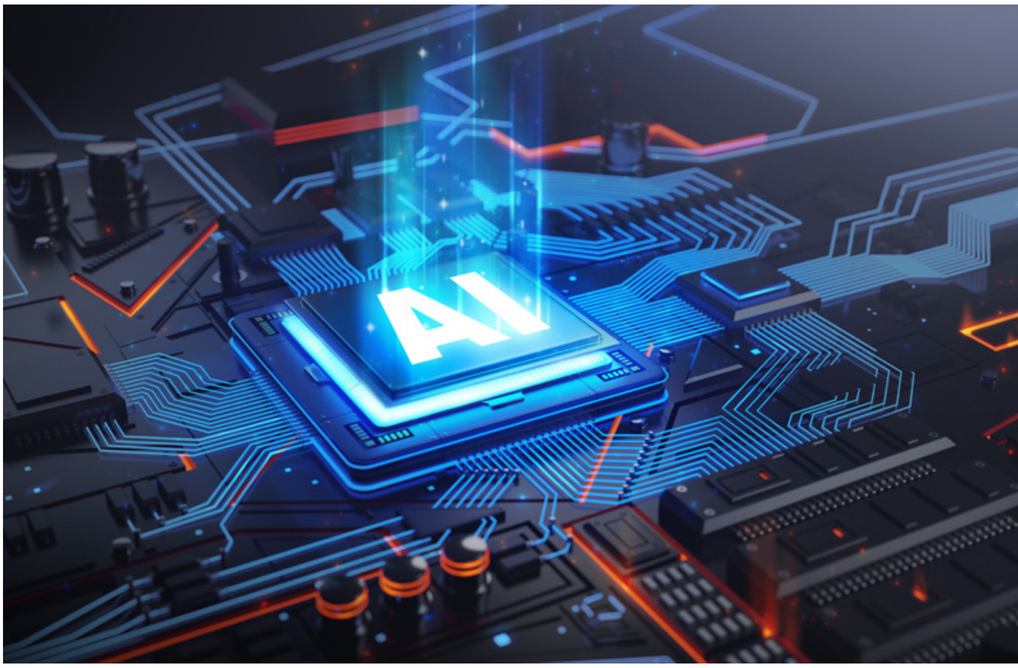
Professional conduct issues

The way in which IPs conduct themselves is always of great importance. However, with an economy hard-hit, their ethics, morals and dutiful conduct is even more pertinent. IPs sometimes fall foul of ethical standards due to confusion or a lack of understanding. Below we highlight some issues that might contribute to that.

For IPs who are also members of another profession, such as the legal or accountancy profession, an issue arises when they are effectively subject to 'dual regulation' and are consequently subject to the ethical codes of their 'other' profession, as well as the insolvency code of ethics. These codes might be similar, but they will not be identical. The regulation of IPs in the UK has very recently been the subject of consultation, with the preferred alternative being the introduction of a single regulator, but even if implemented, the introduction of a single regulator would not address this particular issue. The position might be even further complicated if an IP is providing services which are not exempt and therefore subject to the requirements of the Financial Conduct Authority Handbook.

Another potential area of conflict arises where an IP is an employee, or even a partner or member of a limited liability partnership. In such cases, there is the potential for conflict between the IP's statutory, common law and ethical duties and the requirements imposed by the employer or partnership. Such conflicts have been most readily seen in the context of so-called individual voluntary arrangement or protected trust deed 'factories'. Another example of a conflict can be found in discretionary decisions of the IP that may not be in the best interests of creditors, like not suggesting the new company moratorium for an eligible company. The IP ought not to be influenced by their firm or employer's fear of reputational risk due to the required statement of possible success should the moratorium be unsuccessful.

"It is by no means a new discovery that IPs suffer crises of identity at times due to being members of other professions as well. More certainty is needed as to the autonomy and identity of individual IPs as appointment takers"



Owing duties to various parties where the parties' interests are not always aligned increases the risk of acting unethically or in breach of duty. The new code of ethics references potential conflicts of interest for an IP as an employee in R2380, and clearly states the need for compliance with ethical and other duties owed during the course of the insolvency appointment. It specifically mentions someone attempting to influence the decision-making process of the IP. Moreover, IPs will, in most insolvency processes, also be officers of court, even if not appointed by the court, which adds further consequential duties to the court for the IP.

Recommendations

The more inclusive 'stakeholder' approach seen during the pandemic was a welcome change. However, the UK insolvency framework is arguably not set up to give optimum effect to this on a practical level post-pandemic and it is therefore highly unlikely that the temporary shift will give rise to a new status quo. Nevertheless, we would argue that retaining these changes should be considered.

The various practical changes allowed the profession to continue with the business of the day during the pandemic and thereafter have the ability to increase the efficiency of IPs in executing their tasks. The technological advances can also increase the level of creditor engagement as well. There might, however, be unintended consequences in incorporating some of these changes on a permanent basis. Therefore, in our opinion, an in-depth review by, for example, the Insolvency Service or the recognised professional bodies of the 'new' practical approaches to insolvency work would be sensible to identify and address the risks that might arise of breaches of ethical norms and conduct falling below the expected standards.

Whilst the new insolvency code of ethics was introduced during the pandemic, its principles-based approach will not have been able to incorporate all the possible new threats in relation to behaviour. Codes of conduct and/or ethics are meant to be dynamic, but they cannot sensibly stay up to date with contemporary issues if they take years to be developed and agreed by the profession.

Whilst the regulation of IPs is enjoying some attention, an attempt to provide IPs with nuanced and specific guidance as to their duties and expected standards of conduct and behaviour should be made. It is by no means a new discovery that IPs suffer crises of identity at times due to being members of other professions as well. More certainty is needed as to the autonomy and identity of individual IPs as appointment takers.

Dr Lézelle Jacobs is senior lecturer in insolvency and commercial law at the University of Wolverhampton

Donna McKenzie Skene is emerita professor of insolvency law at the University of Aberdeen

Scottish property adapts to new challenges in post-Covid world

The pandemic reshaped the way we work and live. With additional factors now, such as the ESG agenda, Emma Greenwood spoke to three experts on the key issues facing the Scottish property sector: David Smith, executive director at CBRE and head of the Glasgow office, David Melhuish, director at the Scottish Property Federation, and John Maclean, a freelance property and project finance consultant who has worked with distressed property companies for 15 years

EG: What are the key challenges facing the office sector?

DS: This is potentially the sector most affected by recent events. The two key drivers here are the pandemic and the move to hybrid/home working, as well as the importance of ESG, driven by net zero carbon targets and new working practices. Eventually, buildings which don't meet the ESG criteria will be left behind and, ultimately, may prove to be unlettable or uninvestable to many real estate investors. Equally, post-pandemic, many are reviewing their requirements, given people's desire to work from home or have a hybrid approach. Some businesses are happy to accommodate this and others are being forced to do so in order to retain staff. This has meant a move to a smaller, but better quality, office footprint – although, due to lease events, this will take some time to shake out. Total occupancy of offices will reduce, but by how much is difficult to measure.

DM: There appears, bizarrely, to be upwards pressure on office rents right now due to lack of the right quality of stock for occupiers – hence, Glasgow and Edinburgh are up to record levels of office rents. A huge concern must be the availability of good smaller space for start-ups, as Grade B/C space is converted to other uses. The office market is certainly not dead, but it is in transition.

JM: The main question is whether the 'great reset' holds. As we move further towards 'normality', will people be happy to settle back into the old commuting? I rather suspect employers will increasingly insist on it, as I believe that a large proportion of senior management really doesn't buy into the idea of hybrid working. The battle between that mindset and the obvious cost benefits of smaller (or no) offices will be interesting to observe.

Retail and hospitality

EG: Retail and hospitality have been adapting for a number of years. How do you see the sectors surviving the current cost of living crisis and the economic climate?

DS: The pandemic has accelerated the structural changes in retail real estate, but these changes were already happening. While the overall footprint of bricks and mortar retail has fallen, we have seen a big bounce back in retail park values and some increasing resilience in high streets.

The best local authorities, landlords and retailers have responded by repositioning shopping centres, investing in improvements, such as public realm and complementary uses, although this can take some time.

DM: Retail parks were certainly more resilient once early lockdown restrictions were eased and this continues to be reflected in the number of investment transactions. Consumers clearly liked the ability to travel and park. Retail parks had, of course, been evolving pre-pandemic to try and get more diversification into their makeup. Shopping centres are seeing more radical change, with extensive proposals to reimagine Buchanan Galleries in Glasgow, while St James in Edinburgh and Union Square

David Smith: bounce back

> "There is a growing gap between values of prime properties and everything else. Prime property not only includes the traditional criteria of tenant credit, lease lengths and location, but also ESG"

David Melhuish: huge opportunity

> **Retail parks were certainly more resilient once early lockdown restrictions were eased and this continues to be reflected in the number of investment transactions. Consumers clearly liked the ability to travel and park**

in Aberdeen demonstrate how higher end brands, combined with excellent leisure, food and beverages, are giving people the experience they desire.

JM: Of all the market segments, retail is probably the most used to evolution – whether forced or organic. This can be seen on almost any high street – new stores open and close all the time, but good operators tend to be ahead of the curve. A couple of decades ago, the idea of supermarkets in town centres was pretty alien. Now the 'metro' store concept is in every town. So I think retail will evolve and survive; it always does.

Build to rent

EG: The build to rent (BTR) market has boomed in recent years. How do you see this market adapting and surviving in the current economy?

DS: This market remains in its infancy, particularly in Scotland where Glasgow has four major schemes of over 1500 units under construction, with a total pipeline of about 6,000 units, while Edinburgh has a pipeline of about 3,000. Outside the two largest cities, operational BTR is very small and is largely restricted to high density apartments. It accounts for less than 2% of households. Compare this to the US, where 20% of newbuild is this use, and it is this area where we may see the most growth.

DM: There appears to be a clear demand for this type of product and, as long as regulation does not frustrate this nascent market, then in the big two cities there appears to be a bright future for BTR. The real challenge is to diversify the BTR product, for example, to look to some of the work led by Sigma Capital to deliver new, modern, private sector homes for rent, as well as traditional, affordable housing requirements for registered social landlords.

JM: One of the recurring themes in my experience of the property sector is the rapid shift from under- to over-supply. BTR is certainly an emerging asset class, but it is in its infancy, and my concern is that too many property people are seeing it as a resilient asset class. Despite very limited historic evidence of demand, the red flags are all there. Unproven market, rapid growth in supply, optimistic projections.

There is also the cost of living crisis to consider, and the threat of tight rental and eviction controls from government, so I think there will be casualties. Good, well-managed schemes will do well. Some, particularly if the model does not work out (lower occupancy, higher costs), will fall by the wayside. This has always been the way.

Net zero and ESG

EG: There is a drive by the Scottish Government to be net zero by 2045 (in the context of the UK's overall target to get there by 2050). How do you see this and the general ESG agenda impacting on property values?

DS: There is a growing gap between values of prime properties and everything else. Prime property not only includes the traditional criteria of tenant credit, lease lengths and location, but also ESG (wellness and carbon use being the key points).

The advent of all audited companies being assessed for carbon use is also a key driver for occupiers, and the large landlords and property companies.

The impact on the office market is potentially huge. For example, in Glasgow, total office stock in the metropolitan area is 22.7 million ft^2. Of this, some 89% is Grade B/C and, therefore, potentially needs some capital investment to meet net zero carbon targets. If even 50% is not upgraded due to lack of capital, lack of demand or simply being uneconomic, then this would be over 10 million ft^2. Already vacant space in the city has crept up to 2.7 million ft^2.

DM: A big question to be answered is how we treat embodied carbon when assessing redevelopment from a sustainability perspective. I feel the industry could use some help from government and other stakeholders here. The industry has a huge opportunity to demonstrate its ability to innovate with buildings, but this will require investment and probably replacement of a lot of older stock.

Insolvencies

EG: There has been a shift in the traditional lending market from high street banks to challenger banks and investment funds. This has resulted in fewer formal insolvencies and bank-led property appointments in recent years. What do you think solutions look like for these new lenders?

JM: How new market entrants approach a sustained period of downturn is going to be quite interesting to observe, because most have come into the market in the period post-2008. There is going to be some inexperience in dealing with a market where significant numbers of loans default.

It is important to consider how some of these lenders are structured. They all are lending money raised from institutions or other banks, with some with a significant number of retail investors lured by the promise of a higher return. Most, if not all, need to go back into that market to grow.

In this model, a high level of bad debts indicates poor underwriting, which means you will struggle to raise fresh capital to lend. Therefore, I think these lenders will have a natural inclination to try to work out problems, as opposed to opting for insolvency appointments as an exit mechanism.

John Maclean: casualties

> **One of the recurring themes of the property sector is the rapid shift from under- to over-supply. Build to rent is an emerging asset class, but it is in its infancy, and my concern is too many are seeing it as a resilient asset class**

EG: I want to say thank you to the participants for raising some interesting points. At AAB, our property and construction team are reporting similar trends from conversations with our clients, and we are particularly seeing developers positioning themselves towards the ESG agenda to meet the requirement from tenants. This is likely to rise up the list of tenant priorities in the coming years.

Emma Greenwood is restructuring assistant manager at Anderson Anderson & Brown

Shaping global growth

With the launch of Insol Reimagined, Insol International is creating new pathways and a legacy we can all be proud of, says **Scott Atkins**

From 26 to 28 June 2022, Insol International held its annual conference in London. This marked Insol International's 40th anniversary and brought together a record number of 920 delegates from 58 countries at their first in-person conference since 2019. Once again, Insol International demonstrated that it is the global meeting place of the entire restructuring and insolvency ecosystem.

From the opening reception, the energy among attendees was palpable. There was a sense of optimism, excitement, inspiration and gratitude, as we celebrated the chance to connect, share, engage and recalibrate after some of the most difficult times in our lives since 2019. This was sustained throughout the conference programme, which featured 13 technical sessions, and a wealth of opportunities to network and collaborate.

A highlight was Priya Lakhani's keynote address, as we were inspired to transform adversity and find power in pausing, reflecting, and choosing a future in alignment with our values. Ian Rheeder shared his world-leading research on how trust, confidence and emotional engagement underpins effective leadership. We had a panel session with Rebecca Hume, Caroline Moran, Christopher Weil, and Amanda Wick on the challenges and opportunities in recovering assets in a digital economy. And our judicial panel proved to be another highlight, as it is every year.

The conference also hosted nine ancillary meetings, including the first meetings of our Alternative Dispute Resolution Colloquium and our Financiers Colloquium.

The London conference also provided an opportunity to officially launch Insol Reimagined – our new Strategic Plan to take us to 2030.

Disruptive trends

Insol Reimagined is grounded in the feedback and aspirations of our members. Across 53 interviews and 510 survey responses, our members helped us to shape Insol International's future, as we proactively lead – not merely respond to – the disruptive trends transforming the restructuring and insolvency landscape.

> **"We will lead our community by enhancing our member experience, expanding networking opportunities, and strengthening our global mindset, diversity and reach"**

Going forward, Insol International will remain the peak global restructuring and insolvency association, with deep networks extending to every corner of the world. We will also continue to actively drive restructuring and insolvency policy and practice – and, in turn, shape innovation and global economic growth.

At the same time, Insol International will pursue six key shifts: greater diversity to connect and strengthen our association; broader engagement across all of our networks; expanding our reach to all legal systems and insolvency processes; empowering our members to remain at the forefront of disruptive trends; investing in research and market insights to lead innovation and the reform agenda; and pursuing greater collaboration among our members, member associations, fellows, G36 firms and partners.

In pursuing these shifts, Insol International will rely on and embed four pillars of leadership. Firstly, we will lead our community by enhancing our member experience, expanding networking opportunities and strengthening our global mindset, diversity and reach. Secondly, we will build capability by engaging with emerging economies, expanding our highly regarded technical education programmes to cover emerging areas such as asset tracing, mediation and ESG, and investing in the Insol Think Tank to deliver cutting-edge market insights and research. Thirdly, we will lead our industry by enhancing our global advocacy and impact, while working with our partners – including UNCITRAL, the World Bank, the Asian Development Bank and the International Association of Deposit Insurers – on defining issues, such as model law implementation and the transition to net zero. And, lastly, we will lead our association through a clear value proposition for members, aligning Insol International's operating and business models with our new strategy, and striving for sustainability, transparency and continuous improvement.

InsolTech established

In the last two months, we have rapidly advanced the implementation of Insol Reimagined. We have welcomed two new member associations – the Xiamen Association of Bankruptcy Administrators and the Association of Turnaround and Insolvency Kenya. We have established the African Advisory Council to accelerate engagement across Africa, taking after the incredible success of our Asia Hub, which continues to build closer partnerships and judicial and institutional cooperation across the Asian region. We have also established the Asset Tracing and Recovery Colloquium to advance key issues, policies and law reform measures in a digital age. And we have established InsolTech in partnership with the Singapore Management University's Global Restructuring Initiative. InsolTech will arm our members with knowledge of important digital and technological disruptive trends, while also acting as a world leader on policy development and the exchange of ideas.

As we look towards the future, and acknowledge the global challenges we face due to ongoing supply chain disruptions, the war in the Ukraine, rising inflation and energy security, Insol International will lead the way for our members. We will create pathways so that each of us can leverage our unique expertise and deep relationships to contribute to law and policy reform, and the strength and sustainability of our economy and communities across the world. Together, we will create a legacy we can all be proud of.

Scott Atkins
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A changing landscape

Pim Ungphakorn outlines what R3's press, policy and public affairs team has been doing on the profession's behalf since the last issue of *Recovery*

The past three months have seen several significant policy developments for the profession, with the government publishing its first overarching review of the personal insolvency framework in 40 years and HMRC announcing a new approach to voting on restructuring proposals.

With the political landscape set to change yet again as we went to press, and with new ministers to be appointed, we will be engaging with the new government to ensure the profession's voice on these and other key issues continues to be heard.

Personal insolvency review

While recent years have seen significant reforms to the UK's corporate insolvency framework, July saw the government publish an overarching review of the personal insolvency framework for the first time since 1982, in a call for evidence which poses open-ended questions about the framework's operation and effectiveness. At this stage, the government is not putting forward proposals for reform, but the review will help to inform future policy recommendations.

R3 has welcomed this call for evidence given how long it has been since the last major review of personal insolvency, with only individual reforms to the framework having taken place since then, such as last year's welcome introduction of the breathing space scheme. With many people currently struggling with the rising cost of living and with inflation at a 40-year high, now is the right time to ensure our framework is best placed to help indebted individuals deal with their financial issues.

> **"We are also planning to publish a new policy paper containing recommendations for reform to help tackle fraud and improve the UK's corporate governance framework once the new government is in place"**

We will be engaging with members in the coming months to discuss the review and garner feedback to help inform our response to the call for evidence, ahead of its October deadline. We will be issuing a member survey on the review and will be discussing the consultation questions line by line with our personal insolvency committee, with the aim of ensuring that the profession's views are accurately represented to government on this important issue.

New approach by HMRC to voting

At R3's Annual Conference in May, HMRC representatives announced that it would take a more active role as a creditor when asked to vote on a CVA or restructuring plan proposal going forward. HMRC's guidance confirming this announcement acknowledged that it has not always voted on such proposals in the past, but would be doing so from now on "to try and support business restructuring to help them recover from the effects of the past two years", as well as in light of "HMRC's increased creditor status" in insolvencies from December 2020.

R3 has long campaigned for HMRC to take a more constructive and engaged approach to supporting CVA and restructuring proposals. After we lobbied the secretary of state for business, energy and industrial strategy Kwasi Kwarteng MP on this as part of our Back to Business Campaign last year, he supported our calls for HMRC to change its approach. HMRC's guidance noted that its new approach "also aligns with the BEIS Minister's commitment to the R3 chairman that HMRC will take a more commercial approach to restructuring proposals".

We really welcome this new approach and will continue to work with HMRC, and other government departments, to ensure that the profession can carry out its important work in an environment that is as conducive as possible to business rescue.

Legislative delay

While we were expecting a response to the 'Future of Insolvency Regulation' consultation in September, a change in government will likely mean delay to the legislative timetable and ongoing policy development work. Once a new cabinet is in place, we will be in touch with relevant ministers to reiterate the points made in our consultation response, and the need for the government to take these into account when the final policy is announced.

We are also planning to publish a new policy paper containing recommendations for reform to help tackle fraud and improve the UK's corporate governance framework, once the new government is in place. We will be engaging with parliamentarians to promote our proposals, which we believe will support government departments and law enforcement agencies in the fight against fraud, while also providing the profession with more tools to carry out their own anti-fraud work more effectively.

R3 in the news

R3's commentary on insolvency statistics continues to be popular with national media, and has been quoted in stories in *The Times*, *The Telegraph*, *the Guardian* business blog and *The Sun*, as well as in a range of trade and regional publications, such as *Credit Connect*, *Accounting Web*, *Business Up North* and *Business Magazine*.

Our comments on the Queen's Speech featured in several articles in the trade media, while our president Christina Fitzgerald was quoted in *Credit Connect*, responding to plans to reform to Companies House. We also featured in stories in *LexisNexis* and *Accounting Web*, discussing concerns over the speed at which the economic crime and corporate transparency bill will be introduced.

And finally, R3's work on 'myth busting' around insolvency practitioner fees continued, with vice president Nicky Fisher quoted in *Accounting Web*, explaining the difference between what is charged and what is actually received in fees in insolvency cases.

Pim Ungphakorn is public affairs manager at R3

Editor editor@r3.org.uk

Forthcoming R3 Events 2022

07

7 October 2022:
R3 Business Lunch London

SOLD OUT

Hilco Valuation Services

13

13 October 2022:
South West & Wales Golf and Cycle Day Bristol

10

10 November 2022:
Southern & Thames Valley Annual Ball Southampton

25

25 November 2022:
Yorkshire Autumn Lunch Leeds

Association of Business Recovery Professionals R3 Rescue Recovery Renewal

SPG FORUM 2022

2-4 November 2022 | The Belfry

Leading the way for smaller practices

To register go to www.r3.org.uk/events-training/ or email the team events@r3.org.uk

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Advertisers' index

An interview with… Sonia Jordan, new R3 council member

IBB Law LLP partner and recently appointed R3 council member **Sonia Jordan** talks about her personal concerns for potential conflicts of interest under a new industry regulator, and why the profession needs to be more diverse and inclusive

Q How and why did you join the insolvency profession originally?

A I had been pretty fortunate compared with a lot of people who eventually wend their way to their happy place. I was a somewhat precocious teenager and decided on law when I was 13, literally. I watched a TV programme, it was all about lawyers, and I decided that's going to be me. I chose to do business law for my honours degree because I was always interested in business. I don't understand why, bearing in mind my parents who came to England from Barbados in the 1960s had no contacts within the legal profession and were not business people.

> "The Insolvency Service will regulate the insolvency profession, and the Insolvency Service will also compete with the insolvency profession. It's alarming"

I then decided I would go into the solicitor side of the profession, not the bar, because I wanted to be involved at the early stages of the client's decision-making process. Towards the end of my two-year training contract – you do four six-month seat rotations in different departments – I worked in the corporate department, in which the insolvency department sat. Even at that early stage it seemed to me that it was the real reason for which I had entered the legal profession. You're giving real help to financially stressed and distressed businesses and individuals in real time and when it matters most. I loved it immediately. And it was a very social area of law, more so than any other. So I stayed on, did my fourth seat in insolvency and, when I qualified, I was offered and took a job in insolvency. That was 25 years ago.

Q What have been the most significant moments in your career?

A My career highlight was during the administration of a high-profile retailer, selling certain flagship stores. It was a very newsworthy, well-known administration, and I was leading the team of lawyers advising the administrators and liaising with the secured creditor.

However, it was also the low point of my career. Professionally, it was the best of times; personally, it was the worst of times because – I will never forget – when we were closing the deal, my daughter was under one year, and I had left home on the Tuesday morning and could not get back until the Friday afternoon as I had been working round the clock trying to close this deal. It was before the days when you were set up for remote working. It was a low point, because it was so stressful. Family life took an obvious back seat and making that decision was an extremely difficult one. That situation caused me to critically assess how I balance my career and my family.

Q What do you think are the biggest issues for the insolvency profession at the moment?

A The biggest issue I see is the government's proposals for the regulation of our industry. This could make our industry a very difficult industry in which to operate successfully. The concern I have is that ministers, who might be very well meaning, are not experts, and there is an element of appeasing and making wholesale changes in our industry, without fully understanding how it operates or the benefits we offer in particularly stressful, difficult situations.

The government is proposing a single regulator who, at the same time, would be competing with private practice for insolvency work. I don't know of any other situation in professional practice that mirrors that. The Insolvency Service will regulate the insolvency profession, and the Insolvency Service will also compete with the insolvency profession in acting as liquidators and trustees in bankruptcy.

It's alarming, firstly because the potential for conflicts of interest is huge and, secondly, from where is the Insolvency Service's specialism going to come? You have to know how the industry operates in order to regulate the industry. So they would have to have people within that function, who have come from industry and have a practical understanding of the ambit in which we work and our best practice models. In order to do that, they are going to have to offer sufficient financial compensation to attract the right candidates.

Sonia Jordan
biography

Born: Birmingham

Raised: Birmingham

Education: University of Huddersfield – LLB (Hons), Business Law

Career:

1994-1999: Pictons Solicitors (trainee and solicitor)

1999-2002: Davies Arnold Cooper (now DAC Beachcroft LLP) (solicitor)

2002-2015: Dentons UKMEA LLP (incorporating Salans LLP) (senior associate 2002-2007 and partner from 2007)

2016-2020: Gresham Legal – consultant solicitor

2020-July 2021: Brecher LLP – partner

Sept 2021-present: IBB Law LLP – partner

So the fear is that, if they haven't got the funding in order to have it staffed at a sufficiently high level of experience and expertise, then what quality of regulator will we have? And consequently, what rules and regulations are they are going to seek to impose? If there is going to be a single regulator, which I don't oppose, it's vitally important that we get it right at the outset.

Q What else is on your wish list for the profession?

A In one of the panel sessions at the R3 Conference in May, an audience member asked the question: "What are you doing about BAME [black and minority ethnic] under-representation in our profession?". They ran out of time and could not answer the question, so I was asked by the current president Christina to say a couple of words. I hadn't had time to prepare anything, so I just had to speak off the cuff and from the heart, and said that I walked into an R3 event 25 years ago as a newly qualified lawyer, and I looked about and I was the only person who looked like me. It struck me that 25 years later at the R3 conference – and there might have been other black women there – I am looking around the room and I am still the only person there that looks like me. That cannot be right.

Clearly, there are people of colour within the insolvency profession, but we are so under-represented that I can still be at an R3 event in 2022 and not see others like me. It caused me to think "what have I done to redress this imbalance?". The simple fact is that the world in which we operate is not solely comprised of white, middle aged, middle class men. The world is diverse and our profession should reflect that diversity, but I am not sure that it does.

Q Why do you think the insolvency profession does not reflect the diversity of the world we live in and what can, or should, be done about it?

A I fell into the area of insolvency. It was not something I had learned about at university or even at law school. When I started going out and about into the world of insolvency, it was very white male dominated. Now, that was not off-putting for me, but it may be off-putting for a number of people. If you look around and see the successful people in the area are all white males, you might think "Well, I'm not going to be able to climb to the top". If you see the majority of people who are like you – be that female or of colour – in lower ranks, but you don't see anybody at the top table who looks like you, then you might perceive that means you are going to hit a glass ceiling pretty quickly, so why would you

> **"Positive discrimination has got a bad reputation because it has been used as just a numbers game. I would much rather talk about levelling up"**

sweat blood and tears to get through? Why would you put that level of effort in? That is not my way of thinking about it, but I have to acknowledge that that might be something that affects a large number of people, so we have to reach out to the younger generations, we have to promote inclusion. I'm no expert and I don't know exactly how you do that, but it is something we have to do.

Q Have you experienced much discrimination, either as a woman or because of your colour that you are aware of?

A When I came into the profession, at networking events, the atmosphere could sometimes be quite boisterous. I might hear disparaging comments made by people about any number of people. That's not a positive thing, but I didn't ever experience, from insolvency professionals, any out-and-out racial discrimination. I may have been aware of some negative assumptions held by some people, but nothing overt.

In the days before LinkedIn, when people did not check you out online before they spoke to you, I might have been speaking to someone on the telephone and had many conversations with them, got on well with them, and I knew from those conversations that they were thinking "you're impressive" or "you're the person who can help me". Then, we've had our first meeting and you could see the shock on their face. Generally, people are far too polite to actually say anything, but you can see the look of surprise. For me, the challenge of that was "By the time you leave this meeting, that shock is going to be the furthest thing from your mind, because you are going to be back on the page saying 'Yes, Sonia is going to help me and she's the right person for the job' ". That was how I dealt with it. I saw it as a challenge and – I am not going to lie – there was a large element of personal satisfaction in getting people from A to B.

Q In other industries, there is a big push to put different faces on the industry, so that people from different ethnic backgrounds, women, people with different sexualities, and so on feel more included. Is that the sort of thing you are thinking of?

A Absolutely, but it's got to be more than lip service. Diversity in its true sense, be it gender, sexual identification, skin colour, can't just be seen on a firm's website; you have to walk into their board rooms and be able to see it. I think there are certain firms that are absolutely doing that because they see that they are missing talent and opportunity; businesses have changed. Business is no longer the preserve of a certain gender or colour. Therefore, diversity and inclusion leads to business opportunity.

Q Do you think that goes as far as positive discrimination?

A Now that is such a hot potato. I would not want to do that. Positive discrimination has got a bad reputation because it has been used as just a numbers game. I would much rather talk about levelling up.

Q What does levelling up mean in practice?

A It means attracting more entrants into our profession from much more diverse backgrounds and understanding that some candidates might need assistance, be it by mentoring or by exposing them to additional experiences within the work place. They might not have had a family member or friend who has been in the same business environment and been able to tell them how to progress through that. They may be the only person in their social network who's working in that professional environment. In such cases, they may need a mentor from within, to help them navigate that space. I want to see a level playing field and promotion by talent. It's not saying "Oh gosh, we need to have a black female, a black male, an Asian female, an Asian male at these levels within our organisation, therefore let's just pick one." It's recognising the innate talent within people and then helping them to develop it.

Q How do you 'defrag' when you're not working?

A I'm a mum to a 12-year-old girl, which is pretty hands on. She is my joy. I live out in the Chiltern Hills in some beautiful countryside, so I could be wandering around there with my dog and my daughter. My guilty pleasure is binge-watching reality TV. That is my mental escape [laughs]. Joking aside, I am a Christian, and I am involved in my church and Christians Against Poverty, which is a charity that offers debt and counselling advice to the community. That is my way to give back and use the skills I've been given in order to give real help to those who need it and have nowhere else to turn.