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Transfer of ownership project
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30 October 2020

Dear Sir / Madame

**LAW COMMISSION - CONSUMER SALES CONTRACTS: TRANSFER OF OWNERSHIP CONSULTATION
CONSULTATION RESPONSE**

1. INTRODUCTION

- 1.1 R3 is the trade association for the UK's insolvency, restructuring, advisory, and turnaround professionals. We represent licensed insolvency practitioners, lawyers, turnaround and restructuring experts, students, and others in the profession. Our members work across the spectrum of the profession, from the global legal and accountancy firms through to smaller, local practices.
- 1.2 The insolvency, restructuring and turnaround profession is a vital part of the UK economy. The profession rescues businesses and jobs, creates the confidence to trade and lend by returning money fairly to creditors after insolvencies, investigates and disrupts fraud, and helps indebted individuals get back on their feet. Our members have direct experience of insolvencies and their impact on the UK economy and insolvent companies' stakeholders.
- 1.3 This response has been prepared by R3 in collaboration with members of its General Technical Committee and we thank them for their input. The committee deals with issues of general importance and significance to the profession in the United Kingdom, keeping under review all UK and EU legislation, prospective and other matters relating to insolvency law and. The Committee is multi-disciplinary and has a good spread of representation, including practising insolvency practitioners, lawyers, solicitors, academics and others working within the insolvency profession.
- 1.4 If you would like to virtually meet or if you have any other queries, please contact R3's Technical Manager, Ben Luxford, at ben.luxford@r3.org.uk or on 020 7566 4218.

2. GENERAL OBSERVATIONS

- 2.1 In September 2015, R3 provided comments in response to the consultation paper issued by the Law Commission in June 2015 titled 'Consumer prepayments on retail insolvency'. In our response we advised that we saw some merit in providing an enhanced degree of protection for consumers in the event of insolvency, but not at the cost of further complicating statutory insolvency procedures or burdening other creditors of the insolvent estate with the costs of administering those protections. Most consumer claims were seen to be for comparatively small amounts, and the priority of such creditors will be to receive some repayment as quickly as possible, with minimal formality and complexity. It was considered that some enhancement of redress procedures outside formal insolvency was most likely to achieve this, and we suggested that proposals for reform should be focused on this area, together with initiatives to improve consumers' awareness of the remedies available to them. Adding complexity to existing insolvency processes would merely add cost and delays, and in most cases be unlikely to result in an increase in funds available for consumer creditors.
- 2.2 Following the report being published on the 2015 consultation in 2016, the Insolvency Service worked with R3, the Insolvency Lawyers Association, ICAEW, UKCA, card schemes (Mastercard and Visa), the Law Commission and consumer

groups to develop the guidance on the information which should be made available to consumers when seeking a chargeback where there has been a retail insolvency. The main element of the guidance is that a standard notice should be published by the office-holder on the insolvent retailer's website. This clearly shows the profession did support the voluntary measure of improving education of consumers on their rights.

- 2.3 Despite our comments in 2015, a considerable time ago, this consultation paper and accompanying draft legislation does not appear to address our primary concerns outlined in 2015. Whilst we appreciate the modernisation and clarification of the language used in part, our concerns around additional costs remain. The proposed changes may have limited benefits to consumers in a retail insolvency scenario but would increase the costs of administering an insolvency appointment and so reduce the amounts available to creditors as a whole, which include HMRC, Redundancy Payments Service, small suppliers and finance providers.
- 2.4 The consultation anticipates *"that firms providing insolvency services may incur familiarisation costs if the proposed rules in the draft Bill are introduced into law. In particular, insolvency practitioners and insolvency lawyers would need to receive training on the new rules"*. However, to think these costs would be minimal is misleading. Creating and delivering training to deal with the proposed legislative changes is going to involve considerable time and resources. This is not a *"relatively small change to the existing law"*. Furthermore, Insolvency Practitioners ('IPs') often (available funds permitted) retain retail staff to assist with appointments and so retail staff would also need to be trained on the changes. In addition to the costs of training, IPs and their staff are likely to need to spend time adapting their work practices and processes to accommodate the change in approach to dealing with consumers and assessing the nature of their claim in an insolvency situation.
- 2.5 Familiarisation costs are one aspect of additional costs, another is in relation to consumers seeking to exercise their new rights, whether directly or through consumer groups. IPs are likely to face considerably more queries or claims from consumers, all of which will take time to deal with. For a solvent business, this is all part of the commercial equation, but creditors of an insolvent business may not welcome the diversion of resources that would be involved. There is also a risk that consumers will not understand the possible practical shortcomings of the legal rights they have been given, with potential for misunderstandings, disputes and damage to perception of the insolvency regime.
- 2.6 Additional costs to an insolvency estate will arise when upon appointment the company has no money to continue to trade or keep staff on the payroll and therefore need to close down operations immediately. When a situation like this occurs, under these new proposals, the consumers will own goods made to order when they are manufactured or otherwise when the rules provide (e.g. they have been labelled, sent for dispatch or otherwise identified). These goods could be anywhere in the country or even abroad, which places a huge burden on the IP as costs will need to be incurred to (1) locate the items (2) determine ownership (3) make contact with the owner (4) arrange delivery or wait for the consumer to collect, whilst incurring storage costs on an item the company or its creditors would not receive any benefit for.
- 2.7 It is difficult to see why an IP would incur costs to do so. Similarly, absent some mandatory requirement, it is not apparent why an IP would facilitate arrangements for a consumer to collect goods from premises of the insolvent business (even if it is in a position to do so) or how long such obligations would last. The proposals raise the prospect of goods being stuck at the insolvent business (or its suppliers) for an indefinite time and it is unclear what duties an IP would have to safeguard or dispose of the goods. In principle, you would expect uncollected goods to be disposed of or it will be impossible to completely wind-down an estate.
- 2.8 The retailer may have rights to claim against the consumer, but the expense of pursuing small claims will often be prohibitive. In the ordinary course, retailers might just regard defaulting consumers as a cost of business and pass the costs onto other consumers. In the case of insolvency, the costs of trying to recover consumer debts would be borne by creditors and IPs may well conclude in many cases that it would be counterproductive to pursue individual consumers. Those consumers then get something for nothing while others lose out.

3. CONSULTATION QUESTIONS

- 3.1 Please find attached responses to the questions raised in the consultation.

4. CONCLUSION

- 4.1 The proposed new rules are likely to present practical difficulties for IPs in all insolvency scenarios when trying to establish where ownership of remaining property lies.
- 4.2 We suggest the proposals and accompanying draft legislation are reviewed and further consideration of the additional costs incurred in applying this legislation, as against the benefits to be gained for a small minority of creditors, are reviewed. The additional costs would ultimately be to the detriment of creditors as a whole.

Yours faithfully

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