Spring 2023

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> **Property transactions and financing are showing signs of slowing up. An apt time, therefore, to be focusing on real estate in this edition**

From the editor

The economic outlook appears to be improving, but 2023 has already brought with it the administrations of Flybe and Paperchase, and record insolvency numbers. True, those numbers are mostly fuelled by liquidations, but administrations appear to be on the increase as the various economic headwinds start to have effect.

Personally, I have seen a number of assignments in the construction industry since the start of the year, associated both with those economic headwinds and also a struggling property market. Property transactions and financing are showing signs of slowing up. An apt time, therefore, to be focusing on real estate in this edition.

As enforcement against real estate is likely to see an increase this year, we get the lender's perspective on fixed charge receivership appointments from Matthew Creed at NatWest Group, and the insolvency practitioner's perspective of the advantages and disadvantages of fixed charge receivership as compared to administration from Chris Stevens at FRP Advisory Trading.

Alison Goldthorp of Charles Russell Speechlys looks at the responsibilities and different roles of receivers, administrators and liquidators on property disposals, whilst Elizabeth Alibhai, Paul Bagon and Will Beck at RPC look at the recent *Re Oceanfill* decision and its effect on the ability to recover from guarantors where the principal obligor has agreed a restructuring plan with its creditors. Meanwhile, James Davies and Simon Jones of Enterprise Chambers look at the pitfalls for IPs in respect of appointments over 'room sales' entities.

If 2023 is the year of financial distress in the real estate sector, was 2022 the year of crypto failures and are there more to come? David Baxendale and Jason Gunter at PwC UK look at some of the difficulties facing IPs appointed over such entities.

Rob Peck gives us the Official Receiver's perspective on appointments and his vision for the future of Official Receiver services, and Howard Morris of Morrison & Foerster sticks up for IPs' professionalism, which I can see being a popular read!

Tim Betts at BDO outlines some of the challenges taking appointments in the not-for-profit sector, whilst Marcus Rea at Teneo asks for your support to bring about advantageous tax reform.

Outside our profession, Denise Fawcett at Ofgem gives us an insight into her and Ofgem's role in various high profile energy supplier failures, and Kerry Martin from the FCA encourages early engagement by IPs with the FCA where they are looking at appointments in respect of regulated entities.

Finally, we also have two surveys in this edition. The first – complementing our coverage of property in the main section – is of real estate service suppliers. The second analyses the different offerings of recruitment companies who specialise in our sector.

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

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R3 matters

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A whirlwind term of office

In the final column of her presidency, **Christina Fitzgerald** looks back at her term of office, and ahead to what's coming up this year

This will be a busy year – for the profession and for R3. Insolvency numbers are set to continue to rise, there are two key policies on the Government's agenda which will impact on the profession, and the 2023 course and event calendar is rapidly being filled.

I realised when I was writing this column that the first eight months of my presidency have passed by in a blur of events, meetings, media interviews and parliamentarian briefings, as well as the day-to-day elements of the role.

I've been in touch with BEIS a lot in the past few months, not least because of the churn of business ministers, but I've taken this as an opportunity to promote the profession and the value it brings to the UK economy through the businesses we rescue and the jobs we save.

> **You can imagine my delight on spotting Kevin Hollinrake, the minister for small business. Given his less than complementary commentary on the profession, I did not waste the opportunity to put him right on a few things**

A first for me was being invited to attend the Conservative Party's 1922 Committee Christmas reception, which was a great opportunity to do my elevator pitch on behalf of the profession in a room full of prominent and influential MPs.

You can therefore imagine my delight on spotting Kevin Hollinrake MP – the minister for small business – in the room. Given his less than complementary commentary on the profession, I did not waste the opportunity to put him right on a few things.

From one Yorkshire native to another, it's fair to say we didn't beat around the bush, but it was a constructive and important conversation. We parted amicably (both agreeing Inghams in Filey serves the best fish and chips!) and I will be meeting with the minister again in 2023. A timely intervention with rumours that the minister might be taking on the insolvency portfolio in light of the recent reshuffle and split of the business department.

Reconnecting with the nations and regions

When I became president, a key priority was to go to as many of the regions and nations as possible, and meet as many of our members as I could, as the pandemic meant our once-thriving programme of events across the UK had to be completely rebuilt last year.

But we managed it. And I managed to get to virtually every one of the R3 regions and nations last year (and there's still time to visit those I haven't yet).

The networking opportunities R3 provides – and continues to provide – have been a key benefit for me in my time as a member and I'm really pleased we managed to bring those back last year.

It's also been incredibly useful for me to meet as many of you as possible, understand more about the challenges you face, and hear your views on issues like the regulatory reform proposals and what the Government should be doing to help businesses and individuals post-pandemic.

Full programme of events

Providing a full events programme nationally and in the nations and regions is a priority for R3 this year – and we're kicking off our 2023 conference programme with the Southern Forum at the end of March.

I'm really looking forward to catching up with members from the region, and hearing Jeremy Mindell's views on what's affecting and likely to affect the economy (here and across the world).

This event will be quickly followed by the Fraud Conference, which we're delivering with the Fraud Advisory Panel and Insol Europe at the Royal College of Physicians. The programme includes sessions on unethical behaviour, deepfakes and artificial intelligence, as well as updates on the Boris Becker trial, and the Post Office and Horizon IT.

We're also repeating our successful New Professional's Week in April, where we'll be running seminars and workshops covering technical and personal skills, as well as providing a range of networking opportunities. This event has grown hugely since its online debut in 2021 and I have every confidence it will be as successful as the ones which preceded it.

> **I'm hoping as many of you as possible will join us in Venice for what promises to be a great three days of content and networking**

And, of course, this year's Annual Conference will take place in May. Tickets are already on sale and I'm hoping as many of you as possible will join us in Venice for what promises to be a great three days of content and networking.

Passing the baton

At the end of April, I'll hand over the presidential chain to my successor, Nicky Fisher, who many of you will know from her work with the SPG community and her time on Council and with other R3 committees and working groups.

Nicky has been a great support to me as Vice President – we've worked side-by-side as part of R3's Executive Council and on the programme for R3's two flagship events last year, and I'm told we make a friendly but formidable team in meetings with parliamentarians and stakeholders.

I'm really looking forward to working with her during her term of office, and excited to see what her presidential year brings for R3 and its members.

Good luck, Nicky – if my experience is anything to go by, your year will pass very quickly!

Christina Fitzgerald is a partner at Edwin Coe and R3 president

Legal Q&A

Lydia Demnitz-King and Aino Miles answer your insolvency queries

Q I am advising a distressed company with secured debts, including a CLBILS loan, in relation to a potential solvent debt restructuring/refinancing. How does the existence of the CLBILS debt impact upon the client's options?

A The coronavirus large business interruption loan scheme was introduced as a temporary measure, with the aim of supporting the continued provision of finance to larger UK enterprises during the Covid-19 outbreak.

The scheme rules require that lending under CLBILS will not be subordinated to any other senior obligations of the borrower, subject to specific carve outs. The Government considered this an appropriate approach to ensure that taxpayer interests were suitably protected when providing the partial (80%) guarantee on each CLBILS facility.

The guidance of the British Business Bank is clear that CLBILS loans must be secured at least *pari passu* with the most senior security of a borrower at all times, with limited caveats allowing senior security to be granted over: (a) assets of not more than 10% in value of the company's total asset value; or (b) invoices or assets subject to invoice/asset financing agreements entered into in the ordinary course of business.

Any failure to comply with the CLBILS security priority rules is very likely to invalidate the Government guarantee. It should also be noted that the BBB guidance expressly states that "lenders and borrowers must not conspire to circumvent the spirit of [the rules] by seeking to structure around these requirements".

In light of the above, in the context of a potential refinancing, the devil will be in the detail and any intercreditor agreement should make clear the ongoing priority arrangements, which should not disadvantage the CLBILS guarantee (unless either of the limited exceptions apply). Thought should also be given to the value of any cash prepayment offer compared to the value of the Government guarantee. Depending on the situation and the other security which has already been granted by the borrower, the incumbent bank may feel it is more valuable to obtain a cash settlement upfront, rather than wait to rely on the guarantee.

Q Can a shareholder ever be made liable for the liabilities of its insolvent subsidiary by acting as a shadow director of the subsidiary?

A Parent companies are typically insulated from the liabilities of subsidiaries by virtue of their separate legal personality – sometimes known as the corporate veil. However, if a shareholder has been acting as a shadow director of the subsidiary, it could become subject to the same fiduciary and statutory duties that apply to appointed directors, and be liable if it breaches such duties.

A shadow director is someone – an individual or a corporate – in accordance with whose instructions the company is accustomed to act. This is a statutory definition (contained in sections 251 of each of the Companies Act 2006 and the Insolvency Act 1986) which has been expanded on in case law. Each case must be evaluated on its facts with reference to the level of control exercised, the role of the appointed board of the subsidiary and the manner in which decisions were made at the subsidiary level. It is generally recognised that a shareholder will often have some degree of control over its subsidiaries and therefore this alone will not make it a shadow director.

However, where a shareholder can be shown to be a shadow director, it will risk liability if it is found to have breached certain directors' duties that apply equally to shadow directors – for example, the general

duties of directors in the Companies Act, such as a duty to act in the best interests of the company and duty to avoid conflicts of interest. The shareholder company could also be found liable for wrongful trading (under sections 214 and 246ZB of the Insolvency Act) or for any false representations and material omissions where the subsidiary is being wound up under sections 210 and 211 of the Insolvency Act, potentially resulting in a liability to make a contribution to the subsidiary's assets.

Lydia Demnitz-King and **Aino Miles** are associates in the Leeds and Birmingham restructuring teams respectively at DLA Piper UK

Recent case summaries

The latest insolvency update from **Jonathan Titmuss** and **Alice Whyte**

Re Cargologicair Limited [2022] EWHC 3316 (Ch)

This is another case where the court was asked to invoke an insolvency process to assist the administration of English companies affected by sanctions imposed following the invasion of Ukraine. The application was for the appointment of administrators and permission to utilise the Insolvency Services Account to operate the business ('the Application').

The company was in the business of air freight, operating two Boeing 747 maindeck freighters. It held all of the appropriate licences issued by the Civil Aviation Authority.

The sanctioned individual was Mr Alexey Isaykin (pursuant to the Russia (Sanctions) (EU Exit) Regulations 2019). Mr Isaykin is the majority shareholder of the company's holding company, Cargo Logic Holding Ltd, and consequently both the company and its parent are subject to the sanctions regime.

The direct impact of sanctions was that both aircraft were grounded and, at the date of the application, both aircraft had been repossessed by their lessors.

Importantly for the application, the company banked with Citibank. Despite obtaining a basic needs licence from OFSI, Citibank issued a closure notice of the company's bank account and it seemed unlikely that another commercial bank would offer banking services as a result of the sanctions. There were also issues with the speed of the operation of the account, such that unpaid creditors of some £2 million had accrued despite the account being in credit of around $14 million.

The application came before Mr Justice Michael Green. In the ordinary way the court firstly considered the two-stage test contained in paragraph 11 of Schedule B1 of the Insolvency Act 1986, namely: (a) whether the company is or is likely to become unable to pay its debts; and (b) whether one of the three purposes of administration is likely to be achieved.

> **"The court concluded that there is a positive benefit (supporting the exercise of discretion) to placing sanctioned companies under the control of administrators to ensure an orderly wind down of the company's affairs whilst ensuring compliance with the sanctions regime"**

Consideration of the first test leads to one of four interesting points arising from this judgment. The court found, without hesitation, that the practical impediment to making payments to creditors caused by the closure of the Citibank account was sufficient to meet the cash flow test of insolvency.

As to the second test, the court concluded without significant difficulty that a purpose of administration could be achieved, whether that would be by the administrators being able to source aircraft to continue the business or by managing an orderly winding down of the company's affairs, including the sale of the valuable CAA licences (which may be withdrawn in liquidation).

The court then considered its exercise of discretion, the second of our four points to note. The court concluded (in approving a previous decision in *Re Sberbank CIB (UK) Ltd* [2022] EWHC 1059 Ch) that there is a positive benefit (supporting the exercise of discretion) to placing sanctioned companies under the control of administrators to ensure an orderly wind down of the company's affairs whilst ensuring compliance with the sanctions regime.

The third point to note is that the Insolvency Service was in agreement with the use of the Insolvency Services Account for the purposes of the operation of the company's finances. This is a useful tool in administrations where banking services are unlikely to be available or have already been withdrawn at the time of the appointment.

Finally, a more general point arises from this and other decisions. Office-holders are operating within the sanctions regime and various means of preventing sanction breach have already been foreshadowed, mostly involving ring fencing and holding funds that would otherwise be distributed to sanctioned entities. That is obviously appropriate and necessary, but the question arises, what happens next? With there being no apparent end to the war in sight and no suggestion that thought is being given to the point at governmental level, there is, it seems, a real risk that these ring fenced/sanctioned assets will need to be administered for a considerable period of time, or an alternative solution arranged.

Jonathan Titmuss and **Alice Whyte** are barristers at Gatehouse Chambers

Lenders weigh reputational risk of appointing FCRs

Many complex factors come into play, including the views of other stakeholders, when lenders decide how to realise property security in an insolvency, says **Matthew Creed**

When a lender has exhausted consensual options for repayment of defaulted debt, the lender will usually look to its security to provide repayment. The security granted by a corporate borrower can often provide its lender with multiple options through which to recover the amounts owed. Fixed charges over real estate property may enable the lender to appoint a fixed charge receiver over that property, whereas a qualifying floating charge may enable the lender to appoint, or consent to the appointment of, particular individuals as administrators over the borrowing entity.[1]

Other options available to the lender may be to appoint a Law of Property Act receiver (different to a fixed charge receiver, but the terminology is often used interchangeably) or to become mortgagee in possession of the property. These are, in our experience, less commonly used because of the associated risks to the lender. Both options require the lender to sell the property as mortgagee, giving the lender an obligation to achieve the best price for the property reasonably obtainable. For the purposes of this article, we will focus on a lender's options relating to the appointment of administrators and fixed charge receivers.

As with any decision relating to a financially distressed borrower where enforcement of security is a real possibility, a lender will carefully balance all risks, including credit, conduct and reputational risk when assessing its options. As a result, enforcement of security will always be a last resort and lenders in general are unlikely to have a default preference as to how they realise value from the property(ies) over which they hold security.

> **If the property secured by the fixed charge was a non-trading real estate asset, then a fixed charge receiver may be more cost-effective and achieve a higher net realisation from the asset**

There is a lot for a lender to consider, even in the relatively simple, hypothetical example on page opposite.

The company's directors will consider their position and make their own decisions in accordance with their duties. However, for the lender, the questions and decision process may be broadly as shown in the diagram below.

These questions are explored in the following in the context of the hotel example. Of course, there is no one-size-fits-all answer here, it depends on many factors and the circumstances of the individual case.

Can an appointment be avoided?

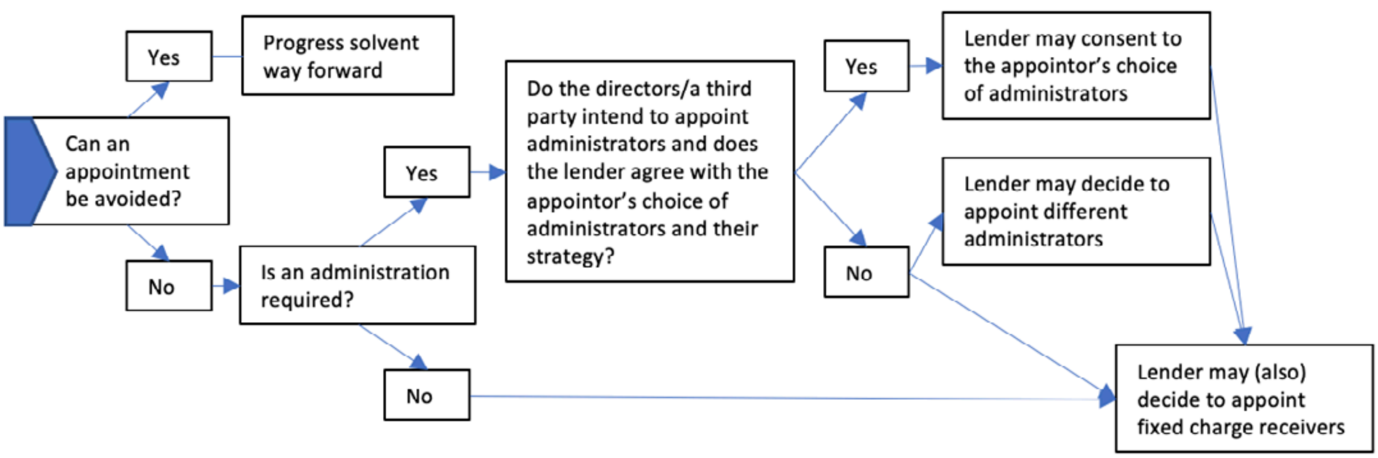
An insolvency appointment will ordinarily be the last resort for a lender, the preference being to work with financially distressed borrowers to achieve a consensual, solvent outcome, where possible.

If insolvency cannot be avoided, an initial consideration with the hotel example should be whether an immediate appointment is required or if it would be better, possibly with additional support from the lender, to market the hotel property for sale prior to any appointment. This would mitigate the negative impact that trading in administration could have on trading performance and/or the selling price achieved.

Is an administration required?

Some powers and duties of an administrator, which are not applicable to a fixed charge receiver, may point towards an administration being required. For example, an administration will provide a moratorium to protect against action by other creditors (which may be important for the hotel company given the other unpaid creditors) and give the administrator powers to investigate antecedent transactions.

Questions and decision process for lenders



Hypothetical example

Hotelco Ltd owns and trades a hotel. It is in financial difficulty and is unable to maintain its borrowing commitments or payments to other creditors.

X Lender has provided Hotelco with a term loan and overdraft secured by a fixed charge over the property and a debenture containing a qualifying floating charge. Both facilities are in default and the lender is entitled to enforce its security. The directors have provided personal guarantees to the lender.

Hotelco's directors discuss the position with the lender and propose to appoint administrators from IP Partners to trade the hotel in administration pending sale of the business and assets as a going concern.

X Lender is considering its options, including consenting to the appointment of administrators, appointing different administrators, and appointing fixed charge receivers over the property.

> "A going concern sale can preserve employees' jobs and benefit the wider community, which may make an administration more appropriate"

Other considerations for the lender include:

- **The nature and value of the property.** A property that is fundamental to the trading of the borrower's business, where value in the assets can be maximised via a going concern sale, may lend itself more to an administration appointment than a fixed charge receivership. It may be that a fixed charge receiver is not able to trade the hotel as they would not, for example, have powers to deal with floating charge assets and employees, whereas an administrator has wide ranging powers to continue to trade the business whilst trying to achieve the purpose of the administration. However, if there was no commercial rationale to trading the hotel in administration and it was closed or if, in a different scenario, the property secured by the fixed charge was a non-trading real estate asset then a fixed charge receiver may be more cost-effective and achieve a higher net realisation from the asset.
- **Other stakeholders.** In the hotel example, different insolvency processes/strategies could be more or less beneficial to each stakeholder group. For example, the insolvency process and strategy that maximises the recovery of the lender's exposure will also mitigate the guarantors' liability and may improve value for other creditors; a going concern sale can preserve employees' jobs and benefit the wider community, which may make an administration more appropriate. Personal guarantors who are involved in the business (such as the company's directors in the hotel example) may have a view on which insolvency process and appointee(s) will best mitigate their personal liability and the lender may wish to take that view into account, particularly where the guarantors' support is key to the success of the insolvency strategy (e.g. to help manage the business or provide important information/documents relating to the property).

Do the directors/a third party intend to appoint administrators, and does the lender agree with the appointor's choice of administrators and their strategy?

Where another party intends to appoint an administrator or, in a different scenario, a liquidator, the choice of insolvency practitioner will be important to the lender in deciding whether to consent to the appointment, appoint a different administrator and/or appoint a fixed charge receiver (subject to consent of the administrator or leave of the court where an administration moratorium is in effect) to deal specifically with the fixed charge property.

The lender's considerations in the hotel example may include their previous experiences with the proposed administrators; their relevant experience and capability to manage and maximise value in the business and assets (including the fixed charge property); their proposed strategy; which marketing agents they propose to use; and what fees and expenses they anticipate incurring against the fixed and floating charge assets.

Where the lender considers that the proposed insolvency practitioners are not best placed to deal with the fixed charge property, the lender may decide to appoint a different administrator or a fixed charge receiver depending on the relative merits of each process, discussed above, and their ability to achieve the best outcome.

> "Particularly where the borrowing entity will be placed into administration/liquidation by another stakeholder in any event, a lender may prefer to leave the decision to appoint with the other stakeholder"

Other insolvency practitioners and/or receivers may provide more competitive fee rates, and have specific expertise to better support the assessment of all issues and available options, such as improving value through stabilising operations, improving the property's EPC rating or seeking planning consent for alternative use.

Should the lender make the appointment?

If, having considered all the relevant issues, there is merit in the lender appointing a fixed charge receiver, reputational risk or other issues may dissuade the lender from doing so. Particularly where the borrowing entity will be placed into administration/liquidation by another stakeholder in any event (e.g. its directors or another creditor), a lender may prefer to leave the decision to appoint with the other stakeholder, resulting in the fixed charge asset being dealt with by the administrator/liquidator rather than a fixed charge receiver.

For example, in the event that the lender is expected to be fully repaid from an insolvency, the choice of insolvency process and appointee may have more impact on other creditors and stakeholders. The lender may consequently be more prepared to accept another appointor's choice of insolvency process/practitioner, although they should still be mindful of how the strategy impacts other stakeholders.

There are potential benefits and drawbacks to both fixed charge receivership and administration appointments. The appropriate process will depend on the specific circumstances of each case, and a lender's decisions will be made after careful consideration of all the risks and the impact on the lender, the borrower, and other stakeholders.

1 This article is published for information purposes only and should not be regarded as providing any specific advice. No member of the NatWest group of companies accepts any responsibility or liability for any loss or damage arising in any way from any use made of or reliance placed on the same.

Matthew Creed is a senior director – restructuring at NatWest Group

Practical challenges in prime residential receiverships

Chris Stevens weighs the pros and cons of receiverships versus administrations and gives examples of how property receivers have helped recover debt

I have worked extensively in the field of residential property receiverships. The majority of my recent work has been focused on prime central London residences owned by high-net worth individuals who find themselves in financial difficulty for a variety of reasons. There are common themes that trigger the issues for the borrowers. These will include, but are not limited to, health, matrimonial and underlying business problems, which manifest themselves in the inability to service debt.

In the current market, where we are seeing higher interest rates for the first time in a very long time, there are increasing challenges for both borrowers and lenders alike. Most lenders are foreseeing increasing issues arising in their book, which will inevitably lead to a rise in receivership appointments. One of the greatest challenges for lenders is to secure staff with recoveries experience to assist in dealing with loans that are in default.

One key issue that arises for borrowers is that higher rates, combined with the fact that they are trying to refinance a loan in default, means that it is becoming increasingly challenging for borrowers to refinance their loans with the existing lender.

Inundated courts

The court system is also a challenge given that currently it is inundated with cases that backed up during Covid-19 (although it is now starting to ease slightly). This creates a particular issue for receivers that need to issue possession proceedings. These proceedings are ordinarily issued in the county court, unless there are specific circumstances giving rise to the ability to make the application in the high court.

The county court system has been particularly badly affected during Covid and, at the moment, it is taking several months to have cases listed for a hearing. This creates a problem for lenders who are looking to recover their funds. Coupled with the fact that the property market is currently struggling, and the disruption caused by Covid continues to settle, lenders are now facing challenges to recover defaulted loans.

The role of the receiver

The appointment of receivers is a relatively straightforward process. Where the bank is seeing a default, it will generally request panel solicitors to run a security review and check that all their documentation is in order. A reservation of rights letter and a formal demand are generally served on the borrower. Failure to settle the demand gives rise to the ability to appoint a fixed charge receiver. The receiver is appointed by way of a deed that is delivered by the bank. The initial acceptance of the appointment is verbal and followed up in writing.

The appointing lender has generally run their course with the borrower and has expended an unhealthy amount of management time in the process. They look to the receiver to take over the management role and negotiations with stakeholders, and report back as matters progress.

The receiver's role is a little unusual in that the receiver is an agent of the borrower and stands in their shoes as the only person who can deal with the property. However, the receiver has a specific, primary duty of care to the bank to recover and sell the property, and repay the loan.

The whole appointment process happens very quickly. In discussion with lenders who have properties in other countries, it is clear the process for property in England and Wales is far more straightforward and creditor-friendly than in other jurisdictions.

Advantages of administrations

One point to consider at the time of appointment is whether it may be appropriate to appoint an administrator rather than a receiver to deal with the property. Many residential properties are held in corporate vehicles, often in offshore jurisdictions. In complex and adversarial situations, it may be appropriate for an administrator to control the corporate as well as the property. It can have certain advantages, not least the ability to compel directors to cooperate and to avoid other creditors or the directors looking to appoint their own administrator, who is then able to ask the bank's receiver to vacate office. It may also give an option to sell the shares in the corporate and remove the

> **The borrower threatened to injunct the receivers on the basis they were proposing to accept an offer of approximately £26 million when the borrower had previously been negotiating a sale for the sum of £42 million**

need to pay stamp duty land tax. A couple of downsides are the fact that all creditors have to be dealt with and the increased costs associated with administration.

A further consideration is the need to maintain the good standing of the corporate vehicle in whichever jurisdiction it is located. There may be requirements to file documents in the local registry and the receiver may need to retain a local corporate service provider to assist. They may also need to rectify any outstanding filings to avoid the company being struck off, in which case the receiver will lose their agency status, which creates a host of other issues.

From a technical perspective, a receivership of a residential property can range from straightforward to very complex. In my experience, the factors that have the greatest impact are the attitude of the borrower; compliance with regulations, such as compliance and building control; the attitude of any occupants and other stakeholders, including family; and the market forces in play that affect the ability to either refinance or sell the property.

The receiver will need to engage all stakeholders, including other creditors who may have an interest in the property. This can be complex and contentious, particularly where the wishes and desires of the various parties and receivers are not aligned.

Third party assets within the property are often an added complication. These are not the subject of the appointment, but will impact the strategy to dispose of the property. The receiver will need to engage with the owners to confirm what was on-site upon appointment, and to advise that the receivers will not be responsible for the items and will not be insuring them.

In complex matters, the receiver may be covered from claims by way of an indemnity from the appointing lender. However, it is not always the case that a specific indemnity is given as a matter of course. Consideration must be given as to whether this should be requested on a case-by-case basis.

Case studies

Dealing with residential properties in prime central London, there have been some interesting case studies that have thrown up practical issues.

My first foray into this market was with a substantial property located in Notting Hill. The bank had a significant period with no debt service. The borrower had secured a purchaser, but negotiations on price caused the purchaser to walk away. The receivers gave a six-month period of grace to enable the borrower to try and refinance, which they were unable to do. Subsequently, the receivers put the property on the market and after eight weeks accepted an offer subject to contract. The borrower threatened to injunct the receivers on the basis they were proposing to accept an offer of approximately £26 million when the borrower had previously been negotiating a sale for the sum of £42 million.

The receivers appointed an independent surveyor to review the receivership process and determine whether the market had been properly tested. The outcome was to confirm that the sale by the receiver at £26 million was reflective of the current value of the property in the market and, accordingly, the sale proceeded. The borrower did not take steps to injunct. The key point here was ensuring that the market had been properly tested. A few recent cases have raised the same issue and, generally, the courts appear to be finding in favour of the receivers.

> **The key learning point here is to understand exactly what your borrower might be doing with an asset that forms the bank's security versus what they tell the bank**

In a case involving a property in the Royal Borough of Kensington and Chelsea, the building was listed, and the borrowers had carried out works to the property that were authorised by a planning application. Unfortunately, the completed works were not in line with planning and there were serious breaches of listed buildings regulations. A heritage report was commissioned and it was discovered that, at a high level, there were 32 separate breaches. These had a material impact on the value of the property in the order of £2 million. The receivers took out an indemnity policy that they could transfer to a purchaser.

A consequential issue was that any purchaser would struggle to secure mortgage lending given the breaches, which were declared to all interested parties. Fortunately, a cash buyer paid enough to see the bank fully repaid, plus all associated costs. The key learning point here is to understand exactly what your borrower might be doing with an asset that forms the bank's security versus what they tell the bank.

In a similar vein, investment properties ordinarily require the bank to consent to a tenancy before it is granted. On more than one case where I have been involved, the bank has either not consented or not known a tenancy was granted.

In one case, the property was supposed to be the borrower's London residence. Following the appointment of receivers, it became apparent that the property had been let on a tenancy for the past three years, and the bank was completely unaware and had not had the benefit of any rental income. On another case, the bank specifically declined to consent to a tenancy. Following the appointment of receivers, the agents advised that the new tenants were due to move in a week later. A tenancy agreement had been signed in direct defiance of the bank not providing consent. Fortunately for the bank, the receivers were able to refuse occupation to the tenant. Again, the learning point here is to be very careful about what your borrowers are doing versus what they are telling the bank.

The final point I want to touch on is in relation to refinancing. It is the case that borrowers still can refinance even if a receiver has been appointed. In a number of cases, the borrowers had been promising a refinance to the bank for a number of months only to persistently fail to perform. Following the appointment of the receivers, the borrowers have then realised the situation is serious and they run the risk that they would actually lose their property, and this results in a clear focus on the refinance process. Having successfully negotiated a refinance, they have then requested a redemption statement and settled the position to repay the bank in full, plus all associated costs. The obvious downside for the borrowers in this scenario is that the element of professional fees means their redemption figure is greater than it would have been had they dealt with the bank as promised.

The receivership world continues to throw up interesting cases particularly on the residential side. I anticipate there will be more challenges in the coming months, so watch this space.

Chris Stevens is an IP and a client partner at FRP Advisory Trading

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Choose good advisers, keep notes – and consult with stakeholders

Alison Goldthorp explains the different legal responsibilities of fixed charge receivers, administrative receivers, administrators and liquidators in property disposals

The duties of an office-holder when disposing of property have been under the spotlight in the courts in a number of cases over recent years, the latest detailed decision being *One Blackfriars Limited* [2021] EWHC 684 Ch. In that case the liquidators of the company made an unsuccessful claim against the former administrators for breaches of duty in relation to the sale in December 2011 of the real estate property development owned by the company, maintaining that the sale was at a significant undervalue. The value of the site had fallen very significantly during financial crisis in 2008. The issues in the case turned on the valuation of the site at the time of sale in 2011, and the steps taken by the former administrators to market and sell it.

In the current economic turbulence post-pandemic, with economic headwinds caused by the war in Ukraine and the energy crisis, it is a good time to review the potential pitfalls for office-holders of disposing of property. Those disposals are likely to be scrutinised by creditors and shareholders who, disappointed with the value obtained, make claims against the office-holder with the benefit of hindsight for breach of duty. Increasing numbers of claims that office-holders have sold property at an undervalue are inevitable.

The duties of the office-holder depend on whether they are administrators, liquidators, administrative receivers or fixed charge receivers and there are important differences to consider prior to taking an appointment.

Fixed charge receivers

Fixed charge receivers are appointed by the fixed charge holder under the terms of the charge granted over the property and have powers under the charge document and the Law of Property Act 1925. The judgment of Sir Richard Scott V-C in *Medforth v Blake* [2000] Ch 86 and the decision of the Court of Appeal in *Sliven Properties Limited v Royal Bank of Scotland* [2003] EWCA CIV 1409 are the leading authorities on the duties of the receiver. Receivers are required to exercise the power of sale acting in good faith with a view to securing the repayment of the debt to the chargeholder by the conversion of the security into money. The timing of the sale is left to the receiver and there is no obligation to incur expense to improve the security to sell at a higher price, or to make applications for planning permission to improve the value of the site, which would be likely to delay any sale beyond the normal period of marketing. Receivers are obliged to take reasonable care and skill to obtain the best price reasonably obtainable. This duty is owed to those interested in the equity of redemption and the mortgagor.

> **“The cases show the importance for the administrators to keep notes of internal and external meetings and email correspondence”**

If the receiver manages and runs a mortgaged business following appointment, it is clear from the judgment of Sir Richard Scott V-C in *Medforth v Blake* they are not required to continue to run the business: “*The receiver is not obliged to carry on the business. He can decide not to do so. He can decide to close it down. In taking these decisions he is entitled, perhaps bound, to have regard to the interests of the mortgagee in obtaining repayment of the secured debt. Provided he acts in good faith he is entitled to sacrifice the interest of the mortgagor in pursuit of that end…*”

Administrative receivers

The administrative receiver is a creature of statute, and their powers and duties are set out in the Insolvency Act 1986 as amended. Following the changes implemented by the Enterprise Act 2002, they can only now be appointed by a qualifying floating charge holder of a charge created prior to 15 September 2003, unless one of the statutory exceptions set out in sections 72B to 72GA IA 86 applies. These include a capital market arrangement, a public private partnership, or a project finance arrangement. As a result, administrative receivership is less common.

The principal duty of an administrative receiver is to realise the property of the company to repay the amounts due to the secured creditor who appointed them. Their duties are owed primarily to their appointor, with a secondary duty to the company over which they are appointed, as the company and its unsecured creditors have an interest in the equity of redemption in the charged assets. This is a duty to exercise reasonable care to avoid preventable loss.

As a result, the duties are very different to those of an administrator. The administrative receiver acts as agent over the borrower entity which granted security to their appointor, but is not required to consider whether the entity can be rescued (*Ahmad v Bank of Scotland*). The administrative receiver is not an officer of the court but can make an application to court for directions.

One of the reasons for the limiting of the ability of secured creditors to appoint

Purpose of administration

Paragraph 3 (1), Schedule B of the Insolvency Act 1986:

“The administrator of a company must perform his functions with the objective of—

(a) rescuing the company as a going concern, or

(b) achieving a better result for the company’s creditors as a whole than would be likely if the company were wound up (without first being in administration), or

(c) realising property in order to make a distribution to one or more secured or preferential creditors.”

administrative receivers in 2002 was to promote the rescue of companies and to meet the criticism that administrative receivers often sold property for a price that repaid the secured creditor but did not factor in the steps that could be taken to increase the potential price and the chances of realisations for the unsecured creditors. As a result, administration has been the most common insolvency procedure for trading businesses after 2003.

> **John Kimbell QC concluded that administrators are entitled to reasonably rely on advice from advisers that appeared to be competent as to the best price … The administrator could however be liable in negligence for the choice of agent or if their instructions to the advisers were negligent**

Administrators

The starting point for understanding the duties of administrators in relation to the sale of property is paragraph 3(1) of Schedule B1 IA 86. The duties of the administrator are to all creditors and are to achieve the three-part purpose set out in paragraph 3 (1) which sets out a waterfall of three objectives. The administrator must first look to rescue the company as a going concern (objective 1). Only if they consider that this is not reasonably practicable can they then pursue the second objective which is to achieve a better result for the company's creditors as a whole than would be likely if the company were wound up without first being in administration. This is usually achieved by a sale as a going concern. If that is not reasonably practicable the administrators should perform their functions in order to make a distribution to one or more secured creditors, with the *proviso* set out in paragraph 3 (4)(b) that "*he does not unnecessarily harm the interests of the creditors of the company as a whole.*"

This provision was considered in some detail in the decision of Snowden J in *Davey v Money* [2018] EWHC 766 (Ch). The conclusions reached by Snowden J were endorsed by Judge John Kimbell QC in *One Blackfriars*.

The good news for office-holders is that the decision as to which objective is reasonably and practically achievable is "*a matter for the judgment of the administrator*". The judgment of the administrator as to which of the statutory objectives he or she is going to pursue is "*a dynamic and iterative process which involves the exercise of commercial judgment. It begins before appointment and continues after appointment*". Finally, that decision can only be challenged if there has been bad faith on the part of the administrators, and the decision taken by the administrators was one that no reasonable administrator properly advised would take.

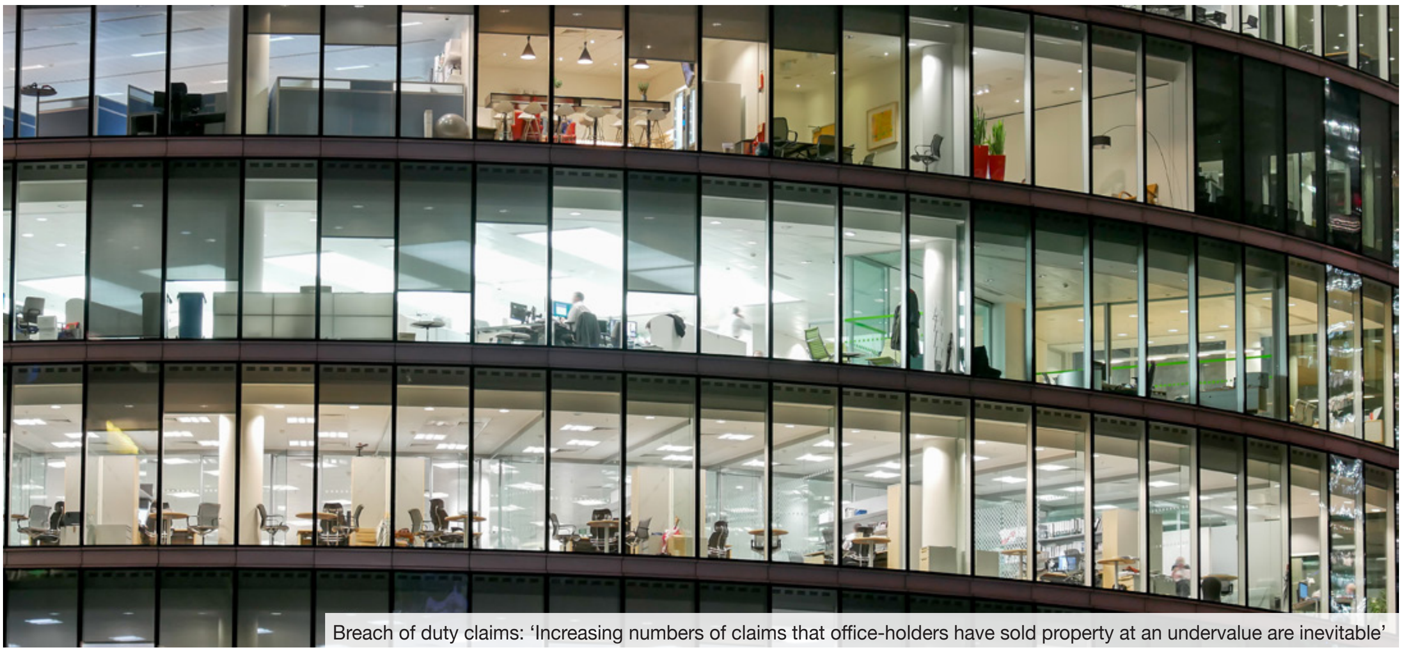
The cases show the importance for the administrators to keep notes of internal and external meetings and email correspondence. Record keeping is required by the Code of Ethics in any event, and also provides an invaluable contemporaneous record of the steps taken in the administration in the event of a subsequent challenge which may well take place long after the actual sale itself.

> **Choose advisers carefully having considered the skillset required and their experience. Draft instructions carefully and review whether instructions need updating. Ensure that you brief your advisers so that they understand your duties as office-holder**

Duty to obtain the best price

In terms of the price to be achieved for the sale of property, the duty was set out by Millet J in *Re Charnley Davies Limited (No 2)* [1990] BCC 605 at 618 B-C: "*It is to be observed that it is not an absolute duty to obtain the best price that the circumstances permit but only to take reasonable care to do so; and that in my judgment means the best price that circumstances as he reasonably perceives them to be permit*".

John Kimbell QC concluded that administrators are entitled to reasonably rely on advice from advisers that appeared to be competent as to the best price. Any claim against the advisers for negligence will be a claim which the company in liquidation can bring for the benefit of the creditors. The administrator could however be liable



Breach of duty claims: 'Increasing numbers of claims that office-holders have sold property at an undervalue are inevitable' in negligence for the choice of agent or if their instructions to the advisers were negligent. This contrasts with the position of receivers who are not permitted to delegate responsibility to an agent and have strict liability for the duty to obtain the best price that the circumstances permit.

Do you need to get a new valuation?

There was much debate in *One Blackfriars* as to whether a further valuation should have been obtained during the administration in addition to the valuations that the company and the lenders had obtained prior to the administration. The judge considered, having heard the expert evidence, that a further valuation would not have added anything, provided that the marketing process had been properly carried out in order to test the market. The market value was the best price that a purchaser was prepared to pay in the open market at the time of sale. It would not have been 'wrong' to get a further valuation, but the fact one was not obtained was not a breach of duty in the circumstances of the case.

What about looking to increase the value of the site?

A major issue in *One Blackfriars* was whether the administrators should have pursued an application for an amended planning permission. The judge considered that the administrators would need to weigh up the risks of losing the application, the costs and the delay, and the availability of funding in reaching a decision on whether or not making such an application would assist with achieving the purpose. On the facts of the case there was no breach of duty as a result of the decision not to apply for amended planning permission.

Liquidators

A liquidator sells property without the qualification in paragraph 3(4)(b) Schedule B1 IA 86 (that they do not unnecessarily harm the interests of the creditors of the company as a whole), but they must still exercise reasonable care and skill. This was considered recently in *Absolute Living Developments (in liquidation)* [2021] EWHC 2311 where an application for an injunction to prevent the sale of a property by a liquidator failed. The judge considered that the view taken by the liquidator regarding the sales process for the realisation of assets should not be challenged unless it was negligent or dishonest. In this case such an argument was hopeless and unarguable on the evidence.

“Regularly canvas directors, shareholders and lenders for their views on the sales process, and any possibilities of a refinancing, and record those conversations on your file”

One Blackfriars: 'The judge considered that a further valuation would not have added anything, provided that the marketing process had been properly carried out in order to test the market'

Practical steps for office-holders

So, what are the practical steps follow from the above for office-holders?

• Consider carefully the duties which apply to the office you hold in each case and review the latest case law applying to that particular office.

• Keep detailed attendance notes and email chains to demonstrate all decisions taken and make sure they are archived to be available if there is a subsequent challenge.

• Review any valuations obtained by the company and the lenders and consider whether the costs of obtaining a further valuation would be worthwhile.

• Choose advisers carefully having considered the skillset required for the particular job and the experience of possible advisers. Draft instructions carefully and review whether instructions need updating. Ensure that you brief your advisers so that they understand your duties as office-holder in the particular assignment.

• Regularly canvas directors, shareholders and lenders for their views on the sales process, and any possibilities of a refinancing, and record those conversations on your file.

• If you are an administrator, regularly review the objectives and the progress on achieving the purpose of administration, and make sure your progress reports reflect your current views on the objectives.

• A 'light touch' administration (where fees are limited as the administrators are not trading the business) is OK provided that the administrators do not fetter their discretion, and continue to regularly review the objectives and purpose of administration.

Alison Goldthorp is a partner in the restructuring and insolvency team at Charles Russell Speechlys

Choppy waters ahead? The significance of Oceanfill

Restructuring plans could feature heavily in the property market in 2023, but proponents need to watch for 'ricochet' claims from rent guarantors that could undermine their viability, say **Elizabeth Alibhai**, **Paul Bagon** and **Will Beck**

As we enter 2023, the economic outlook for the UK remains uncertain. It seems almost certain that more companies may need to look to restructure their businesses in the coming months to ensure their continued survival. For companies with a large rental exposure, this may include looking to restructure, amongst other things, their rental liabilities through some form of compromise arrangement, such as through a CVA, scheme of arrangement or restructuring plan.

Restructuring plans and CVAs

It is nearly three years since the restructuring plan became part of UK insolvency law, allowing for the possibility of 'cross-class cram down'.

Whilst initial uptake was cautious, 2021 saw a raft of larger companies propose restructuring plans, including, notably from a property perspective, Virgin Active.

In the Insolvency Service's final evaluation report on CIGA published in December 2022, it was noted that, in general, the view from stakeholders within the restructuring and insolvency market was that the restructuring plan and, in particular, the cross-class cram down provision, were viewed as "an effective addition to the UK's rescue toolkit".

However, it was also clear that concerns remained that the process can be too costly and time-consuming for use by smaller companies. Until recently, the only restructuring plan to have been successfully proposed by an SME was Amicus Finance in 2021.

> **The Insolvency Service report noted that the sanction of the Houst restructuring plan can be seen as being indicative of a 'tipping point'**

The sanctioning of the restructuring plan for Houst Limited in July 2022, however, opens up the possibility that the process may become more viable and attractive for other SMEs. In this case, the court was mindful of the cost burden potentially faced by Houst – a SME property management service provider – in bringing the restructuring plan. In light of this, the court sought to adopt an approach which was described by the Insolvency Service in their report as "showing an encouraging pragmatism" with regards to the level and detail of the supporting documentation that Houst was required to produce in support of the plan. Furthermore, when exercising its discretion to sanction the plan, the court noted that "while it would in theory be possible to require [Houst] to start again and seek to negotiate with HMRC, that is highly undesirable, where the costs and delay in requiring it to do so would impose a disproportionate burden on the [company], a small to medium enterprise".

The CVA has traditionally been the compromise tool of choice for many companies looking to restructure their rental liabilities. This can, in part, be attributed to their relative ease of implementation, with a court not generally becoming involved unless the CVA is challenged. As a result, the costs of undertaking a CVA can be less than the respective costs of pursuing a scheme of arrangement or restructuring plan, which both involve court processes.

But CVAs are not without their challenges, for instance, see New Look, Regis, Caffè Nero, etc. There is also the added drawback that the claims of secured creditors and preferential creditors cannot be compromised (unless such creditors consent), or even crammed down, under the terms of the CVA itself.

This is not the case in a restructuring plan, where for example in Houst, the claims of HMRC (as preferential creditor) were successfully included within the plan.

As businesses continue to grapple with an uncertain and challenging economic outlook, we expect that CVAs will continue to play a role in the restructuring market; although, for the reasons set out above, that role may be less prominent than in recent years.

> **In light of the Oceanfill case, the scope of future [restructuring] plans may be expanded further to seek to compromise the liabilities of third party guarantors**

If the approach of the court in Houst is adopted by other SMEs, restructuring plans, with their potential to cram down classes of dissenting creditors, may feature heavily in the property market in 2023. This is reflected in the Insolvency Service report where it is noted that the sanction of the Houst restructuring plan "can be seen as being indicative of a 'tipping point' in that the situation seems to be changing due to more companies making use of the [restructuring plan] measure and it becoming more accessible to the SME market due to established principles being created through case law".

Oceanfill

In this context, the recent case of Oceanfill (*Oceanfill Limited v Nuffield Health Wellbeing Limited, Cannons Group Limited [2022] EWHC 2178 (Ch)*) may have important implications for future restructuring plans (and potentially other compromise arrangements, such as a CVA) which are proposed by, or affecting, tenants, landlords or guarantors.

This case arose out of the Virgin Active restructuring plan sanctioned in 2021. That plan had the effect of (amongst other things) compromising Virgin Active's rental liabilities under its lease with its landlord, Oceanfill Limited.

The lease had previously been assigned by Nuffield Health to Virgin Active in 2000. In connection with that assignment, Nuffield Health and Cannons Group had agreed to

> **Outgoing tenants and guarantors who guarantee the obligations of assignees in order to step out of leases should be increasingly mindful of being left in the 'hot seat' post-restructure**

guarantee Virgin Active's obligations under the lease.

Following the sanction of the Virgin Active restructuring plan, Oceanfill brought a claim against Nuffield Health and Cannons Group as guarantors for the outstanding rent under the Virgin Active lease.

The court held that, despite Virgin Active's obligations for the rent having been compromised by its restructuring plan, Nuffield Health and Cannons Group, as guarantors, remained liable for the outstanding rental liabilities. This was on the basis that the plan had only compromised Virgin Active's liabilities as the tenant under the lease. The liabilities of the guarantors for such debts had not been included within the scope of the plan. As such, the status of those liabilities remained unaltered and Oceanfill could seek to recover the outstanding rent from the guarantors.

The case illustrates that, depending on the terms of the restructuring plan and the underlying guarantees, a landlord may still be able to recover outstanding rent from extant guarantors, even where the plan has compromised the landlord's ability to recover those sums from the tenant.

This may have significant implications for future restructuring plans.

Where the rental guarantee has been given by another entity in the same corporate group as the proponent of the plan, or the guarantor is otherwise connected to the proponent, then it may be more likely that the proponent would also seek to compromise the guarantor's obligations through the plan. However, it is possible that, in the context of the Oceanfill case, the scope of future plans may be expanded further to seek to compromise the liabilities of third party guarantors and/or address any 'ricochet' claims that such guarantors might be able to bring against the primary obligor if they pay out under the guarantees.

Timely reminder

Faced with an uncertain and challenging economic outlook, companies, including those operating in the commercial real estate market, may increasingly turn to compromise tools in 2023, such as a restructuring plan or CVA, to restructure their liabilities and 'right-size' balance sheets.

Where this is the case, the judgment in Oceanfill comes as a timely reminder that, whether you are the proponent of a plan or one of the parties affected by it, it is always important to carefully consider the terms of the plan, the extent of the liabilities it is intending to address and the scope of any releases. In a real estate context, taking this approach should limit the prospect of 'ricochet' claims from guarantors that could otherwise threaten the underlying viability and purpose of the plan.

Outgoing tenants and guarantors who guarantee the obligations of assignees in order to step out of leases should also be increasingly mindful of being left in the 'hot seat' post-restructure, in light of the Oceanfill decision.

Elizabeth Alibhai is a partner in the property team at RPC, and **Paul Bagon** is a partner and **Will Beck** is an of counsel & knowledge lawyer in the restructuring & insolvency team at RPC

Why accounts payable audits should be mandatory

With refunds of 0.1-0.15% of annual turnover available by challenging historic property costs, IPs should do more to explore this source of income, says **Mike Sheath**

These days it is incumbent on business owners to perpetually review and challenge their historic property cost base, not merely in order to enjoy future ongoing savings through procurement, but also to claw back from suppliers what is rightfully theirs. In turnaround and insolvent scenarios, its importance is often greater. In parallel with investigating how assets can be monetised, IPs now increasingly commission full accounts payable (AP) audits.

A full AP audit will systematically interrogate historic payments data, contrasting ledger with contract, on any cost or transaction, excluding salaries. The audit will be looking for common errors relating to duplicate payments, dormant suppliers, missed credits, incorrect dates and inflated percentage rates (for example, a contract may stipulate 11.25%, whereas an audit highlights an invoice based on 11.75%). In a first 'sweep' trawl through thousands of individual supplier invoices, the IP can obtain an indication of size of the prize prior to the detailed manual forensics taking place. The process then involves a subtle blend of accountancy and honest supplier negotiation. The individual recoveries (cash clawed back or credit notes) can be hard-fought but, cumulatively, can be highly meaningful.

Human or systems errors

The average size of recovery differs between sector, type of business and level of annual turnover. The industry average recovery rate for AP audits in the past has been 0.1-0.15% of a company's annual sales. Those businesses which have relatively high property expenditure – for instance, consumer-facing organisations with multiple suppliers and high volume – can often be more fruitful. For example, a retailer or restauranteur which has expanded, relocated, renewed, disposed, refitted, and repaired its bricks and mortar empire will provide for a high volume of complex transactions each, with their own set of rules. Here, IPs can expect to recover between £1000 and £2000 per site against its rent, rates, service charges, insurance and utilities obligations. Much of this will be due to human or systems errors, and will have stayed largely invisible and uncorrected for years.

"The largest single area of recovery will be business rates. In the case of a well-known high street card retailer, a rates review was instructed by the IP culminating in refunds from across the various councils totalling £1.8 million"

Within that range, the largest single area of recovery will be business rates, which requires a myriad of calculations covering reliefs, exemptions, phasing and interest. In the case of a well-known high street card retailer, a rates review was instructed by the IP, culminating in refunds from across the various councils totalling £1.8 million. In another case, rates payments between 2017 and 2023 were audited across a 30-strong hotel chain and identified missed reliefs totalling £0.72 million. In addition, fresh appeals have been lodged which could raise a further £0.7 million.

Service charge expenditure is the second most popular recovery. A national supermarket chain recently audited its costs against services including cleaning, lighting, security and marketing. Across its 500 sites, it identified billed amounts which were expressly excluded within the leases and this led to refunds of over £0.5 million.

Catalyst for a business sale

Specific individual savings can often be the catalyst for a business being sold on by the IP. In the case of Quinns Radiators based in Wales, the administrators from Grant Thornton successfully appealed its rating assessment on what was an enormous manufacturing plant and office block. Part of the business was being sold and the purchaser needed an early guarantee that it would be liable for rates purely on the section it intended to occupy. The reduced liability amounted to over £630,000 of savings.

"By their very nature, these processes can also pave the way for procurement savings, with new and more sustainable terms sought from suppliers"

Just as important are the savings available during the trading/marketing period of an administration. Occasionally, an administrator will only be occupying a small part of a large headquarters building and will seek to pay rates relative to that space. With Monarch Airlines, the administrators from Interpath remained in a small section of its vast Luton complex comprising three hangars and a four storey office block. The rating assessment was appealed and split into four new entries, including that which the administrators occupied, resulting in savings of £580,000 against the remainder.

By their very nature, these processes can also pave the way for procurement savings, with new and more sustainable terms sought from suppliers.

Recoveries can be meaningful, if not substantial. In my opinion, such audits should be compulsory behaviour for business owners and, at the very least, sensible business practice. However, they are not, and IPs should thoroughly explore this source of income to the benefit of creditors.

Mike Sheath is a director of Capa

A collective mess? Pitfalls for IPs of room-sale schemes

Practitioners should carefully consider the extra challenges and risks of being involved with failed room-sale businesses, say **James Davies** and **Simon Jones**

In recent years, there have been a number of administrations and liquidations involving companies with a business model involving the sale of individual rooms in hotels, student accommodation and care homes (to name a few examples) for investment purposes[1]. This article seeks to explore some of the issues surrounding companies of this kind and provide thoughts on how anyone involved in such a company in an insolvency context might approach matters.

For the purposes of this article, we will refer to companies carrying on a business of this type as "PropCos". The manner in which PropCos structure their business varies. However, typically, they own the freehold or long leasehold interest in a building. In some instances, the building is fully built out. In others, the building requires considerable work to put it in a state in which it can be used for its intended purpose, whether that be as a hotel, student accommodation, a care home or for other similar purposes.

> **Upon appointment, office-holders are faced with a building which may have significant value. However, it is encumbered by any interests granted to the investors. In a large development, this could amount to hundreds of leases and/or liens**

The PropCo offers for sale a long leasehold interest in individual rooms in the building. Often the target investors are overseas, and their understanding of the offering may be hindered by not speaking English as a first language. As part of the investment proposition, the investors lease back the room either to PropCo or to another related company, which in turn derives income from the room's occupation, usually from licensing the room to a hotel guest, student or care home resident. The sub-lease guarantees the investor rent, whether or not the room is occupied, giving rise to the return on the investment.

Where the building has not been completed, the individual rooms are often sold to investors off-plan and the premiums paid by the investors are required in order to finance the works to the property. In many recent cases, the PropCo has run out of funds before the works are completed, resulting

“The interests of the office-holders and the investors may in some respects be opposed. This will be most acutely seen in terms of the distribution of any proceeds of sale of the building. The office-holder will want to maximise the sums coming into the insolvent estate, whereas the investors will want to obtain the greatest return possible for surrendering their individual security”

Paragraph 71 of Schedule B1 to the Insolvency Act 1986

“(1) The court may by order enable the administrator of a company to dispose of property which is subject to a security (other than a floating charge) as if it were not subject to the security.

(2) An order under sub-paragraph (1) may be made only: (a) on the application of the administrator, and (b) where the court thinks that disposal of the property would be likely to promote the purpose of administration in respect of the company.

(3) An order under this paragraph is subject to the condition that there be applied towards discharging the sums secured by the security: (a) the net proceeds of disposal of the property, and (b) any additional money required to be added to the net proceeds so as to produce the amount determined by the court as the net amount which would be realised on a sale of the property at market value.

(4) If an order under this paragraph relates to more than one security, application of money under sub-paragraph (3) shall be in the order of the priorities of the securities.

(5) An administrator who makes a successful application for an order under this paragraph shall send a copy of the order to the registrar of companies before the end of the period of 14 days starting with the date of the order.

(6) An administrator commits an offence if he fails to comply with sub-paragraph (5) without reasonable excuse.”

in the PropCo entering administration or liquidation.

The proprietary interest that the investors have in the building depends upon various factors. If the investor has simply paid a deposit, they will generally have the benefit of security in the form of a lien over the room. The lien is an equitable interest which can be protected by registration of a unilateral notice at HM Land Registry. However, where the investor has entered into a formal contract for the grant of a lease and has paid the entirety of the purchase price, the investor may have an equitable lease.

Upon appointment, office-holders (whether they be administrators or liquidators) are faced with a building which, leaving aside the investors' interests, may have significant value. However, it is encumbered by any interests granted to the investors. In a large development, this could amount to hundreds of leases and/or liens. As such, it is often necessary for the office-holders to devise a scheme whereby they can sell the building free of the investors' proprietary rights.

Broadly, this might be done in two ways. First, if the company is in administration, the office-holders might apply to court for an order under paragraph 71 of Schedule B1 to the Insolvency Act 1986 (see panel above) which permits the court to order the sale of property free of security interests. That provision is useful in circumstances where the investors have registered liens at HM Land Registry and some or all of them decline to consent to their removal. Second, the office-holders may be able to reach an agreement with the investors that they surrender their interest in the building in return for payment out of the proceeds of sale.

The difficulty for the office-holders is that the investors may not speak with one voice. Some may well recognise that the proposed use for the building cannot succeed and therefore be willing to surrender their interest in order to recoup some or all of the money that have expended. Others, however, may believe that a new party can be found to step into the shoes of the PropCo and take the business model forward. A third group may simply wish to ransom their interest in the hope of a greater return.

The interests of the office-holders and the investors may in some respects be opposed to one another. This will be most acutely seen in terms of the distribution of any proceeds of sale of the building. The office-holders, who will generally be bound to act in the best interests of all creditors, will want to maximise the sums coming into the insolvent estate of the PropCo, whereas the investors will want to obtain the greatest return possible for surrendering their individual security.

“If it is, or might be, a collective investment scheme, practitioners would be well advised to carefully consider the implications for the potential for any recovery against a delinquent director, or whether the business can be lawfully rescued as a going concern”

Accordingly, it is crucial for office-holders to engage with investors at an early stage and be as clear as possible about the office-holders' role and how the PropCo's assets can most efficiently be realised for the benefit of investors and other creditors.

Trust between the office-holder and the investors and building a consensus as to the way forward is key to unlocking the value in the PropCo's building.

Practitioners who encounter this style of business model also ought to keep in mind it may be a collective investment scheme. If it is, or might be, a CIS, practitioners would be well advised to carefully consider the implications for the potential for any recovery against a delinquent director, or whether the business can be lawfully rescued as a going concern.

At the highest of levels, operating a CIS is a regulated activity under the Financial Services and Markets Act 2000, and subject to regulation by the FCA. It is unlawful to establish or operate a CIS unless it is authorised by the FCA or exempt from the requirement of authorisation.

A CIS is defined by s.235 of the FSMA as “*any arrangements with respect to property of any description, including money, the purpose or effect of which is to enable persons taking part in the arrangements (whether by becoming owners of the property or any part of it or otherwise) to participate in or receive profits or income arising from the acquisition, holding, management or disposal of the property or sums paid out of such profits or income. The arrangements must be such that the* *persons who are to participate ("participants") do not have day-to-day control over the management of the property, whether or not they have the right to be consulted or to give directions. The arrangements must also have either or both of the following characteristics: the contributions of the participants and the profits or income out of which payments are to be made to them are pooled; the property is managed as a whole by or on behalf of the operator of the scheme. If arrangements provide for such pooling as is mentioned in subsection (3)(a) in relation to separate parts of the property, the arrangements are not to be regarded as constituting a single collective investment scheme unless the participants are entitled to exchange rights in one part for rights in another.*"

A broad variety of investments may therefore be CISs and certain guiding principles may be identified.

The definition of 'property' is wide enough to cover property of any form. It may include loans secured on land. Multiple cases confirm that in land banking cases (where investors purchase individual units of land on the expectation that the whole site will be repurposed for development, and they will in turn profit from the increase in value) that the 'property' is the site as a whole

"*Arrangements*" is a broad and untechnical word. It is apt to cover both the strict legal relationship between the parties and non-binding communications between the parties[2]. The court will look beyond the contractual documentation and consider how the scheme is to actually operate in practice[3].

The definition of "*property*" is wide enough to cover property of any form. It may include loans secured on land. Multiple cases confirm that in land banking cases (where investors purchase individual units of land on the expectation that the whole site will be repurposed for development, and they will in turn profit from the increase in value) the "*property*" is the site as a whole.

Those arrangements in respect of property must also have the "*purpose or effect*" of enabling the participants to profit or receive an income from participating in the scheme. Where assessing a "*purpose*", the relevant purpose is that of the operator of the scheme[4].

Operating a CIS when not authorised to do so is a criminal offence. If the purpose of the administration is to rescue a company as a going concern, practitioners must be careful to avoid continuing an unlawful scheme

It is also necessary to identify what property is to be managed as a whole. In the leading case of *FCA v Asset Land* [2016] UKSC 17 regarding a land banking scheme, investors had day-to-day control over their individual units. They did not, however, have day-to-day control over the whole scheme as the scheme organiser retained certain parts of the site (e.g., putative roadways) that were necessary for the scheme as a whole.

In respect of the "*pooling*" requirement, this requires that both the contributions and the profits/income be pooled, with "*pooling*" to bear its ordinary meaning[5].

Similarly, the second alternative of "*managed as a whole*" is an ordinary phrase. It requires a factual as opposed to legalistic analysis[6]. The focus of this analysis is on the management of the property as opposed to the management of the business of the scheme[7].

The question of course is: does this apply to this type of case? Is the model described above a CIS? Quite possibly.

The argument that investors being entitled to a fixed return from a fixed interest prevented the existence of a CIS was considered and rejected by David Richards LJ in the case of *Anderson v Sense Network Ltd* [2020] Bus LR 1 which considered the operation of what was in effect a Ponzi scheme.

In a specific property case, *Various Angelgate and Baltic House Claimants v Key Manchester Ltd* [2021] PNLR 15 concerned an application to amend pleadings. Investors had purchased flats as buy-to-let investments. Investors could opt to have a guaranteed return irrespective of whether the flat was let if they chose to appoint a management company associated with the vendor to manage their flats. It was held to be arguable with a real prospect of success that the scheme was a CIS.

We are aware of at least one current case concerning the sale of individual rooms in care homes for a guaranteed return where the FCA is taking regulatory action on the basis that this was a CIS. At the time of writing, that case is listed for an 11-day trial at the end of April 2023.[8]

And the second question is: why does this matter? There are at least two reasons:

First, operating a CIS when not authorised to do so is a criminal offence. If an administration is being used to wind down the scheme in an orderly way, this is unlikely to be a problem. However, if the purpose of the administration is to rescue a company as a going concern, practitioners must be careful to avoid continuing an unlawful scheme.

Secondly, the FCA has a wide range of enforcement powers. These include the power to seek restitution from persons "knowingly concerned" in the operation of a CIS. Claims against directors may diminish their assets, so reducing the prospect of effective enforcement by office-holders.

Whether any particular situation is a CIS requires a detailed and bespoke factual examination. Given the potential serious consequences, practitioners should be alive to the issues that may arise.

1 Illustrations of such cases can be found in *Re CHF 2 Ltd* [2020] EWHC 2686 (Ch); [2021] 1 BCLC 456 and *Eason v Wong* [2017] EWHC 209 (Ch).
2 *FSA v Fradley* [2006] 2 BCLC 616
3 *Brown v Innovatorone Plc* [2012] EWHC 1321 at §1168
4 *Re Sky Land Consultants plc* [2010] EWHC 399 (Ch) at §167
5 *FCA v Capital Alternatives Ltd* [2014] EWHC 144 (Ch) at §159
6 *FCA v Capital Alternatives* [2015] EWCA Civ 284 at §72
7 *FCA v Asset Land* at §92
8 https://www.fca.org.uk/news/press-releases/fca-commences-high-court-proceedings-over-unauthorised-collective-investment-schemes

James Davies and **Simon Jones** are barristers at Enterprise Chambers

Data and ownership challenges in a rapidly changing landscape

With regulatory action set to increase after 2022's high profile crypto failures, **David Baxendale** and **Jason Gunter** outline the issues for insolvency professionals

Last year saw a stream of high profile failures of crypto businesses. Bitcoin and Ethereum both lost about 65% of their market value over the calendar year, materially underperforming against the S&P 500 (which didn't have a great year either). Three Arrows Capital, Voyager Digital, Celsius Network, FTX and, recently, Genesis are all now working through bankruptcy proceedings, leaving creditors wondering if, when and how they might recover their capital, and market commentators debating whether crypto is facing an existential crisis.

These cases raise complex issues relating to value, ownership, data protection, creditor claim status and creditor claim administration in an insolvency context. We anticipate a significant increase in regulatory action in 2023, and challenges for insolvency practitioners operating in a fluid and rapidly evolving space.

Multi-jurisdictional structures

Many crypto businesses have not viewed borders and domicile through the traditional lens. Digital native founders have established businesses with multi-jurisdictional group structures. Notwithstanding the relatively short lifespan of the industry, some crypto businesses have changed headquarters multiple times, often moving in response to developments in the rapidly changing regulatory landscape. This can make recovery action complex, difficult and time-consuming.

Where assets are located is relevant to the question as to what governing law applies to the recovery action and what remedies are available. Whether this is where the business is headquartered, regulated, the location of the custodian's infrastructure (including data and servers) or the location from which private keys are controlled are all relevant to the analysis.

The US bankruptcy courts have been the venue of choice for many of the largest collapses we have seen to date, but don't represent the only choice for these businesses and the jurisdictional presence of crypto businesses is likely to continue to shift during 2023, particularly in the face of a rapid acceleration in regulation. This may continue to open up (or close down) choices for debtors or creditors in respect of available forums for restructuring.

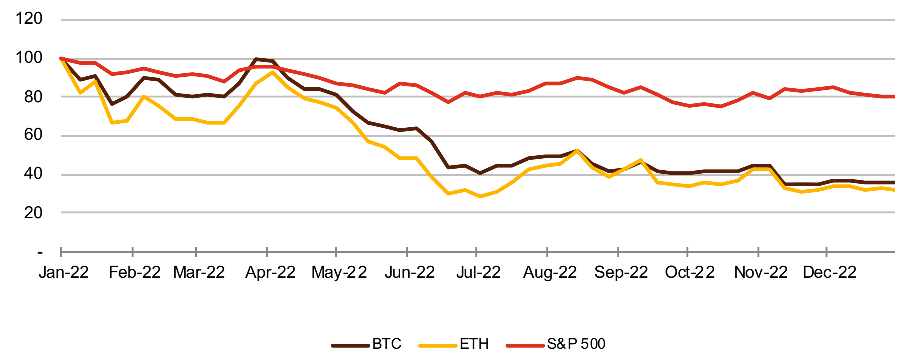
Market hype

The value of a cryptocurrency is, in part, a function of the underlying token and, materially, a function of market hype and expectation driving price. There are over 21,000 cryptocurrencies in circulation today, all with different technology geared towards use cases as digital currencies, utility tokens, security tokens or NFTs.

There is a vast array of potential future use cases for deployment of token and blockchain technology – for example, in enabling cheaper and more efficient facilitation of smart contracts, micro payments, peer-to-peer transactions, AML compliance, insurance and trade finance.

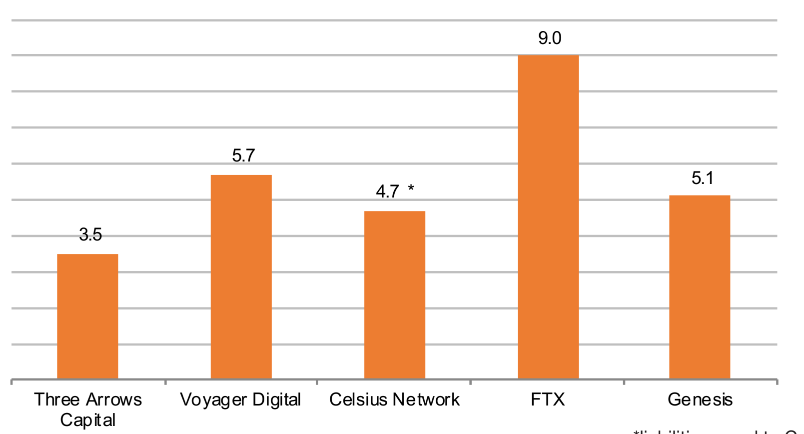
However, the value drivers of either the tokens or the businesses which exist in this market are generally not well understood. Differing approaches to managing token liquidity, circulating supply and technology developments all make like-for-like comparison between crypto projects difficult and reliance on quoted market capitalisation unreliable.

Market capitalisations (Indexed)



Source: coinmarketcap.com, spglobal.com

Estimated liabilities at bankruptcy (USD bn)



*liabilities owed to Celsius users at bankruptcy

Source: decrypt.co, pymnts.com, CNBC.com, ft.com, coindesk.com

> In the top five largest crypto bankruptcies in the last 12 months, there was over $28 billion in customer or investor liabilities at risk. The outcome and recovery for those creditors may depend materially on the status of their claims as either proprietary claimants to client assets or unsecured creditors

Some investors derive comfort from proof of reserve reports prepared by independent audit firms to verify holding values of cryptocurrency. However, these reports may be of limited use as they are point in time references and only verify part of the balance sheet. Asset balances can be inflated with the incurrence of further debt and, without auditing the entire balance sheet, the balance sheet solvency is impossible to verify.

Custody and ownership nuances

Beyond fundamental questions regarding valuation, many investors in cryptocurrencies are not sufficiently wise to the nuances of ownership and custody. Many investors believe that assets they hold in wallets with private keys managed by exchanges or custodians are held on trust. However, this has not been the case in some bankruptcies.

The bankruptcy court presiding over the Chapter 11 cases of digital asset platform Celsius Network concluded a key ruling on 4 January 2023 by saying that a significant portion of digital assets held in Celsius' customer accounts are property of the debtors' estates and, accordingly, holders of such accounts are unsecured creditors.

The fact pattern will vary case to case and the relevant analysis determining the status of creditors is in part driven by the terms of service between customers and platforms, but also by the manner in which fiat or tokens were managed, particularly where funds have been commingled.

In the top five largest crypto bankruptcies in the last 12 months, there was over $28 billion in customer or investor liabilities at risk. The outcome and recovery for those creditors may depend materially on the status of their claims as either proprietary claimants to client assets or unsecured creditors.

'Hope value' tokens

The level of recovery is also dependent upon the failed businesses' ability to successfully reorganise. Some crypto business reorganisations have seen debt shed from the balance sheet with out-of-pocket customers offered 'hope value' tokens, which are tradeable and may return some value based on a future successful turnaround of a business.

Bitfinex was hacked in August 2016 and hackers robbed the exchange of nearly 120,000 bitcoin. It created 'BFX tokens', each representing the dollar value of crypto lost, and allocated them to victims. BFX holders were then either able to redeem the tokens for a reduced dollar value or exchange them for stock in the exchange. Voyager, until the collapse of the pending sale to FTX, was exploring a variation of this solution, offering a combination of equity, recovery proceeds from Three Arrows Capital and 'Voyager tokens' to customers. Celsius is similarly exploring new 'asset share tokens', which are tradable and may provide a recovery dividend over time.

Where it is not possible to reorganise a business, recovery values will depend on the ability of an insolvency practitioner to secure assets and either return them to customers or investors, or maximise the realisable value for a partial dividend return.

Due to the nature of this industry and the manner in which digital assets are stored, data loss is a key risk. Steps must be taken to secure crypto assets as early as possible following an insolvency. This will require clarifying where assets are held and how private keys are controlled. Data breach is a material risk which has in some cases led to loss of value.

Although, in theory, a blockchain records all transactions, in practice – due to the utilisation of mixers, such as Tornado – tracing assets once they are lost is sometimes impossible.

The solutions available to insolvency practitioners to secure assets range from cold wallets, custodial services or private key management services. There are differing cost, operational and risk considerations attached to each option, which need to be considered on a case-by-case basis.

Weak governance structures

A data hack or data compromise event at any business poses significant risk to those managing an insolvency. At a business with crypto assets, the risk of material assets and value being lost through data loss is huge.

It is a day one priority task to identify where data is held, whether it is under the direct control of the business and whether the data can be secured. Due to the start-up nature of many crypto businesses, internal control and governance structures may be weak.

In most businesses we would expect to see a clear audit trail of key leadership decision-making, through meeting minutes and actions, as well as through email and other conventional communication channels. However, in crypto businesses we sometimes see a lack of even the most basic examples of effective governance, and the formats and platforms where key decisions are made and recorded are often very different.

Whenever markets or businesses develop rapidly, it takes time for the regulatory landscape to develop to protect customers and consumers. We see further volatility in the cryptocurrency industry in the year ahead, particularly as regulatory action increases in response to developments over 2022. The sums of value tied up in the industry are huge. The challenge for the insolvency industry is in dealing with the fallout in this space within such a fluid landscape.

David Baxendale is restructuring partner and **Jason Gunter** is restructuring director at PwC UK

IPs may get more cases where there are few, or no known, assets

Outlining his vision for the future of Official Receiver services, **Rob Peck** says it is not true that ORs administer cases that ought to be undertaken by IPs

The role of the Official Receiver (OR) has been a key part of our insolvency regime since it was created in 1883. As director of Official Receiver services, I am very proud of the role ORs continue to play in managing bankruptcies and compulsory liquidations, and I am focusing on providing the best possible service to all those impacted by these proceedings. I also recognise the crucial role insolvency practitioners play in providing the full range of insolvency and rescue solutions, including those cases where the OR has been involved at the start of the process. Through this partnership, we deliver an insolvency regime which is trusted and admired around the world.

My vision is for the OR to be a recognised and respected expert in handling bankruptcies and compulsory liquidations through our dedicated, highly skilled workforce – delivering the best outcomes possible, efficiently and effectively, for all our customers.

Reducing costs

There are currently 16 ORs across England and Wales. Except in a very few cases where the petitioner is the administrator or the supervisor of an individual voluntary arrangement (IVA) or corporate voluntary arrangement (CVA), the OR is appointed trustee in bankruptcies and, as liquidator, in compulsory liquidations. The OR does not get a say on being appointed – the court orders it. However, I am aware that some in the profession feel that the OR administers cases which ought more properly to be undertaken by IPs. This really is not the case. About half our cases have no realisable assets and less than 30% of cases have sufficient assets to fully recover our admin fee. Overall, shortfalls in cost coverage have to be made good by the taxpayer, so it is vital that we operate efficiently, reducing costs wherever possible.

> **“We will appoint an IP where the majority of creditors request it or where a request is made to the secretary of state because the case requires additional expertise or capacity”**

In those big 'national interest' cases – like Thomas Cook or Carillion – which are funded by the Government and where the Government has a real stake in the outcome, we often work in partnership with IPs acting as special managers to deliver the best outcome. This is often specialist work or requiring significant resources to support, so will not be suitable for every firm. However, we now have a panel of firms to support these cases which the OR can draw upon.

As I mentioned, ORs cannot choose which cases they take, and that includes the majority of our cases, where there are no assets but which still need to be administered and investigated. HM Treasury rules require that we must set our fees to cover our costs (including the cost of cases that cannot pay for themselves). Our fees are set by law, and we are not permitted to make a profit.

Not all cases stay with the OR. Approximately 25% of compulsory liquidations and creditor bankruptcy orders will be handed over to IPs. We will appoint an IP where the majority of creditors request it or where a request is made to the secretary of state because the case requires additional expertise or capacity. We are currently working with R3 to consider a pilot seeking to appoint insolvency practitioners on cases without tangible assets that have potential antecedent recoveries.

Our customers do not choose to be our customers, but we try to treat them as if they do. We work with them to secure the best outcomes, be they creditors, people subject to bankruptcy, directors or employees. We are investing in a digital first approach to make it easier to do business with us, and by the end of 2023/24 we aim to deliver a new online system for customers to lodge proofs of debt, access the Official Receiver's report to creditors and keep up to date on any dividend outcomes.

Formal complaints system

Our strict performance targets are set by ministers and are subject to National Audit Office scrutiny. We are required to report to Parliament annually on achievement of these, along with details of our finances (including the fee income generated by OR cases).

Like IPs, when ORs are acting as trustee or liquidator they must comply with the law and are subject to oversight by the court. However, unlike IPs who are subject to the regulatory and licencing framework, ORs are civil servants and bound by the civil service code. The Insolvency Service also produces policies and technical guidance which all ORs are required to follow. Altogether this provides ORs with a framework of standards for its work, coupled with a formal complaints system, which includes customer compensation payments for poor service and mechanisms for compensating insolvency estates in those rare cases where the OR has inadvertently caused a loss. In addition, the complaints process is ultimately overseen by an independent public body: the Parliamentary and Health Service Ombudsman.

Customer satisfaction

The Insolvency Service commissions an independent annual survey of our customers to measure levels of satisfaction with the service we provide. I am pleased to say that our users find the OR provides a good level of customer service which is evidenced by a customer satisfaction rating by bankrupts and creditors of over 80%[1], measured in early 2022, but we cannot be complacent and are always looking to continually improve the service we provide.

The OR in numbers

1990	Insolvency Service established as an executive agency
16	The number of ORs across England and Wales
~50%	Proportion of OR cases that have no realisable assets
<30%	Proportion of OR cases that have sufficient assets to cover administration
~25%	Percentage of compulsory liquidations and creditor bankruptcy orders that are handed over to IPs

In 2021/22:

8467	New insolvency cases handled
6669	Online debtor bankruptcy orders
1089	Creditor petition bankruptcies
712	Compulsory liquidations
316	Bankruptcy restrictions
£42.7m	Dividends returned to creditors and debtors
95%	Percentage of reports to creditors issued within 15 days of an attended interview

The Insolvency Service has a five-year strategy to help deliver its vision and ensure it continues to deliver for its customers. Themes include sharpening our financial model and ensuring our operating focus is sustainable and flexible, improving the experience for customers, and returning as much money as possible to creditors.

In November 2022, Parliament increased the upfront deposit fees paid by petitioning creditors to initiate creditor bankruptcy and compulsory liquidation proceedings. OR fees had not changed since April 2016, while insolvency case numbers have fallen to historically low levels, most of them having insufficient assets to recover the administration costs. The deposit increase will enable the OR to continue dealing with cases effectively, maximising outcomes for creditors whilst mitigating the risk of costs being passed on to the taxpayer.

Single point of contact

As part of our strategy, we have introduced a new Official Receiver central case team, creating a single point of contact for new cases. The new team will process high-volume, non-complex cases more efficiently; build a more robust case assessment; improve the customer journey; and reduce the cost of administering a case.

We are also creating a new team to administer queries and maintain our service delivery on cases that arise after the OR completes their administration. This includes cases previously dealt with by released IPs. These queries can be very wide-ranging – for example, complaints about the behaviour of the former insolvent, undisclosed matters or requests for documentation raised many years later.

We are investing in our IT infrastructure to ensure we have the modern tools to enable greater flexibility for our customers. Our new case management system is planned for implementation in 2024, providing shorter processing times and quicker payments to creditors. We will also be able to provide more responsive communications by making greater use of digital channels.

Professional qualifications

We also continue to invest in our people. Over the last two years we have had success in supporting a group of our staff in completing the same professional qualifications that are undertaken within the private sector. A number of ORs started studying for the Joint Insolvency Examination Board, with the first ORs to take the exams qualifying in early 2022. Meanwhile, deputy ORs are undertaking the Certificate in Insolvency with the ICAEW. Through this we can ensure that the OR function continues to have the necessary skills and expertise.

I am very excited by all of these initiatives, and we are all working hard to ensure that our processes are streamlined and efficient, and that we are delivering high-quality services to our customers and value for money for the taxpayer. I am keen to engage with R3 and its members to understand the perspectives of IPs, so that we can continue to work in partnership to deliver a world-class insolvency regime.

1 For more information on the survey, see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1115370/Insolvency_Service_CSAT_Research_2022_Executive_Summary_Report_IFF_.pdf

Rob Peck is director of Official Receiver services

The courts' trust in IPs is proof of their professionalism

The profession has come a long way since the law reforms of nearly 40 years ago, and its progress is a testament to the qualities of its members, says **Howard Morris**

As many experts expect a significant shake-out of companies in the next year, it is a good moment to take stock of the profession of insolvency practitioners. If there is a wave of corporate failures, be ready for headlines decrying IPs' scandalous fees and, of course, questions in Westminster.

I've worked for, and opposite, IPs for most of my career and, while PR is perhaps not front of most IPs' minds when doing the 'day job' (and cynics may say getting positive headlines is a hopeless cause), those of us who know the profession have huge regard for the IP, particularly if one has experience of how insolvency and restructuring goes in other parts of the world. Since the profession of regulated IP was constituted nearly 40 years ago, it is now an essential component of our legal regime for failing companies and insolvent individuals, and is highly respected by the other professionals in the system and, most importantly, the judges.

Punching above their weight

But back to the public perspective. Is the apt quotation to describe the IP mindset: "We're Millwall, nobody likes us and we don't care"? Or is it perhaps, in the words of Kipling's poem *Tommy*: "O it's Tommy this, an' Tommy that, and 'Tommy go away'; / But it's 'Thank you, Mister Atkins' when the band begins to play"? Truth be told, it's a bit of both. But most IPs don't get exercised about how they're viewed, save by their clients and colleagues, and those with power over the insolvency system and its laws. If we get very busy now, it will definitely be "Thank you, Mister Atkins".

> **As a profession, IPs punch well above their weight and, in 2019, saved just shy of 300,000 jobs and rescued over 7000 businesses**

The public would, in fact, be surprised to know that there are fewer than 1600 authorised IPs and, among them, only around 1300 take appointments. A small proportion concentrate on individual bankruptcy work, and so the corporate sector has to rely on a limited number of active IPs. Yet, as a profession IPs punch well above their weight and, in 2019, saved just shy of 300,000 jobs and rescued over 7000 businesses.

Recovery and insolvency are the economy's essential plumbing. The work is unglamorous, and few understand or recognise the skills and smarts needed to dig a vigorous business out of the wreck of a bankrupt company, to save value, even enhance it, to recover assets and save jobs. But the justification for our *laissez faire* economic system is a sort of Darwinian competition that enables the fittest to survive, and efficient businesses to acquire the assets and market share of the inefficient, the insolvent. As those least efficient businesses fail, the insolvency law regime manages that end of life and has, for nearly 40 years, been increasingly focused on the rescue of companies, as well as businesses. Restructuring and insolvency is also an industry that plays an important role in an entrepreneurial economy (although that is not often a phrase associated with recovery and insolvency); and the practices it follows are by law and regulation fair, transparent and proportionate.

Our insolvency regime rests on the pillars of English law, the judiciary and a tiny number of insolvency practitioners who get into the hottest of hot seats, who tackle problems not on a computer screen or in a soulless spreadsheet, but with the people whose livelihoods are at stake. They will manage the companies, they will deal with creditors, they will tell terrible news to staff.

Trust and exacting duty

Unlike the US system – about which there's much to respect, but is not at all perfect – the UK regime doesn't rely on a corps of specialist bankruptcy judges in dedicated bankruptcy courts. Here, it is IPs that take over the management of an insolvent and the court's involvement is broadly kept to matters in contention.

With the courts, IPs have developed an intimate relationship of trust and exacting duty. As officeholders, IPs are officers of the court in administrations and compulsory liquidations, and as supervisors of voluntary arrangements. As an officer of the court, the IP has an obligation to promote justice and the judicial system, to tell the truth to judges, and to assist the court, principles which have held since *ex parte James* back in 1874 when it was stipulated that a liquidator must act honourably and fairly.

The duties of insolvency officeholders have been most recently considered in *Re One Blackfriars Ltd (in liquidation)* [2021], looking at the duties of an administrator. Those duties are extensive and detailed, but are an elaboration of those fundamental precepts in *ex parte James* to act honourably and fairly. An insolvency officeholder must act reasonably and must not exact commercial advantage by sharp dealing or unfairness towards particular creditors. It is because of this context that the starting point for the court is not to undermine or second-guess IPs' judgments, unless there is compelling evidence that they have acted in a way that no reasonable officeholder would act. The relationship of confidence the courts have established with IPs means that even when not in office as liquidator, administrator or as supervisor of a VA, the court will look to them as reliable sources.

Since the profession of IP was created in the insolvency law reforms of 1985 and 1986, it has come a long way. Back then it was not held in regard, and the progress since is a testament to the professionalism of its members.

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

Collaborating to secure solutions with powerful stakeholders

In not-for-profit insolvencies and restructurings it is particularly important that someone takes responsibility for co-ordinating and holding people to account while understanding the drivers of their respective positions, says **Tim Betts**

For the UK's restructuring and insolvency community, formal company insolvencies tend to dominate media headlines and commentary. It is therefore not surprising that a common assumption outside of our profession is that formal insolvency appointments are the only function we perform.

This is not to diminish the value of this work to the UK, but its dominance perhaps down-plays our profession's other roles and skills, of which there are many. It also risks under-valuing how we routinely apply our skills and experience in novel ways, often under challenging circumstances.

It is important that, as a professional community, we confidently and clearly communicate the value and broad spectrum of solutions we bring to financially stressed or distressed situations (whether actual or impending). Central to this is how we collaborate with others.

Our community is regularly introduced to situations where there is no clear answer. Relationships may have become frayed or even fractured. Information may be poor, teams stressed and trust between stakeholders absent. It is not uncommon, therefore, that the simple act of us being there catalyses a reset, with the first step in securing an agreed solution to be implemented.

> **"Charities operate in different guises across numerous and often regulated activities including healthcare, public transport and schools"**

Some of the skills and expertise we bring to the situations we become involved in include:

• In-depth sector knowledge;

• Situational and technical experience, combined with commercial acumen, to support and influence a wide range of stakeholders; and

• The ability to un-pack, prioritise and manage potentially complex, competing issues and priorities, often under tight time pressures.

Identifying the least-worst option

Collaboration is at the heart of what we do. This requires constructive input from multiple parties, which can be particularly challenging in distressed situations, when arriving at an agreement may simply require identifying the least-worst option.

Importantly, collaborative working requires leadership; someone to take responsibility for co-ordinating and holding people to account while understanding the drivers of their respective positions. In many scenarios, this leadership role is performed by our profession; we navigate the conflicting needs of multiple stakeholders and lead them towards the most appropriate solution.

This is particularly the case in the not-for-profit sector, where there are often a large number of important and powerful stakeholders in restructuring and insolvency situations: the entities and institutions themselves; ultimate beneficiaries and service users; lenders; regulators; government departments; pension funds; debtors and creditors; and beyond.

Some examples of the role our profession has played within various sectors of the not-for-profit area are detailed in the following.

Charities

Charities operate in different guises across numerous and often regulated activities, including healthcare, public transport and schools. Acting by their trustee directors, they are commonly structured as private limited companies by guarantee, i.e. they have no share capital and 'profits' or surplus income is retained.

As purpose rather than profit driven, they have a charitable objective – one that provides

Charities: 'Collaboration requires 'buy-in' from a significant number of highly engaged and passionate stakeholders, whose motives often go beyond commercial' a benefit to a section of society, society as a whole or the world around us more generally.

Collaboration in such cases requires 'buy-in' from a significant number of highly engaged and passionate stakeholders, whose motives often go beyond the commercial.

A recent example was a charity operating nationally in the special needs public transport sector. Our profession was engaged to advise on stabilising the business and to support its restructure to find appropriate homes for the sustainable parts of its operations, whilst balancing the, at times, competing priorities of its diverse stakeholder group. This included its social impact lenders, regulators, the board of trustees with oversight, staff, and ultimate service users.

Our professional community led the co-ordination of specialist charity sector experts from across various disciplines, including tax, financial modelling, financial controls, governance and risk.

This was only possible through effective collaboration, and clear and straightforward communication (both internally and externally) with stakeholders to enable timely decisions to be made and implemented within the relevant governance structures. It also involved identifying effective, practical solutions to achieve the best possible outcome for the creditors, the charity itself, its ultimate beneficiaries, and the wider stakeholder group.

Further education

Further education colleges offer academic, technical and vocational courses to a wide range of learners. The sector manages over £6 billion of income per annum and has experienced a period of significant structural change over recent years, with many colleges completing mergers and undertaking operational restructurings.

Our professional community was at the forefront of this change programme due to the overlap between the skills required and the skills our profession has.

Each scenario involved interaction with and/or consideration of a range of stakeholders, including the colleges, their staff, learners, boards, management, government departments and agencies, local councils, lenders, financial due diligence providers, pension experts, tax experts, deal advisory experts, legal advisors, property advisors and project managers. Each scenario also included the need to secure new funding.

Every stakeholder had:

- Its own priorities, which differed in each specific situation;
- Its own specific information requirements, red-lines and key risk areas; and
- Its own decision-making process and timings, including board meetings, credit committee and other approval levels.

Our profession held leading roles in these engagements, working with stakeholders to progress each situation. It is also interesting to note that several stakeholders themselves were led by former members of our professional community.

> **The challenge was finding a pathway to transfer all students who wanted to continue studies to a willing and appropriate provider, allowing the student real choice in this process and with minimised disruption**

Only through collaboration was it possible to understand the relevant positions, parameters and timelines. This reduced duplication and promoted quicker progress towards a solution.

Collaboration will continue to be key in this sector as it works through the impacts of further education colleges being re-classified into the public sector in November 2022, which include changing the sector's ability to access debt and capex funding.

Higher education

The higher education sector includes universities and other institutions of varying sizes and specialisms, with the legal status ranging from charter bodies to for-profit limited companies with shareholders.

The success of the collaborative approach was exemplified in the case of GSM London Ltd, a private limited company with share capital and extensive bank borrowing.

GSM provided degree-level teaching to students. In 2019, it had over 3000 students on its roster, mainly studying for business-related degrees. It was private equity owned, banked by a high street lender, regulated by the Department for Education, and funded by students accessing the Student Loan Company. It had significant financial and operational issues making its business unsustainable.

The challenge was finding a pathway to transfer all students who wanted to continue studies to a willing and appropriate provider, allowing the student real choice in this process and with minimised disruption.

The extraordinary was achieved as the above parties – joined by, amongst others, UCAS, the Department of Work and Pensions, the Office of the Independent Adjudicator, the nascent Office for Students and GSM's degree validation partner – worked together to make it so.

This was a novel situation; legally challenging (student loans have no protected status, for example), operationally difficult and, as with all such cases, filled with commercial issues outside of GSM's control.

Our professional community, leveraging sector experience, prior relationships and deep institutional knowledge, co-ordinated the formulation of the strategy and delivered it. It barely made the news, but the vast majority of students completed their studies, and obtained the degrees for which they had worked so hard and paid so much.

GSM London Ltd – case study

GSM London was one of England's biggest private higher education providers when it went into administration in 2019.

Despite having secured £22 million of capital injections in the previous two and a half years, the college had not been able to recruit and retain sufficient numbers of students to generate enough revenue to be sustainable.

Formerly known as the Greenwich School of Management, the 1974-established GSM London offered pre-university foundation courses, and bachelors and masters degrees accredited by the University of Plymouth.

In late 2017, it was named in a BBC Panorama investigation on alleged abuse of the government's student loan system. A subsequent inspection later cleared the college of wrongdoing, but the institution's enrolment numbers continued to suffer in the aftermath.

Within just a year, the for-profit institution lost 2000 students, going from 5440 students in the 2017/2018 academic year to 3500 in 2019, and made losses of nearly £9.6 million in 2016/2017, followed by a further loss before tax of £1.3 million in the following year.

As enrolments continued to falter, the GSM Board tried to find a new owner, but this failed too, leading to their decision to appoint administrators.

Tim Betts is a partner at BDO

Navigating insolvency law to help keep energy flowing

After *Croxen v GEMA*, **Denise Fawcett** gives an insider's view of how the energy supply industry is regulated, and the role played by office-holders when suppliers fail

Ofgem is the independent regulatory authority for energy markets in Great Britain, governed by the Gas and Electricity Markets Authority (GEMA). Ofgem's principal objective is to protect energy consumers.

Never has that objective come into sharper and more public focus than during the global energy crisis, caused by economic recovery following the Covid-19 pandemic, weather conditions affecting renewable energy sources, problems with interconnectors bringing energy into the country, and the Russian invasion of Ukraine. Consequential increased energy prices have impacted retail energy markets and energy customers. In 2021, 28 suppliers failed and, in 2022, Ofgem's price cap, designed to protect customers on variable rates, was supplemented by the Government through financial support for domestic and business consumers' energy costs.

Ofgem's 'supplier of last resort' (or SoLR) process, set out in the supply licence, allows Ofgem to direct a supplier to take over responsibility for supplying the customers of a failed supplier. This 'safety net'[1] provides continuation of supply services and the protection of domestic customers' credit balances, which are honoured by the SoLR.

> **Office-holders are stepping into the shoes of directors in a sector that touches the lives of most adults in Great Britain and all businesses. With this comes a responsibility, particularly where vulnerable customers and small businesses are concerned**

The procedure was developed in 2016 and, until 2021, was used no more than a few times a year. In 2016, GB Energy2 was the first insolvent supplier after the Energy Act 2011 came into force. It urgently needed to go into voluntary liquidation, but provisions in the Energy Act (applying to licenced suppliers) prevented this without the permission of the court, and on 14 days' notice of the application to GEMA and the Secretary of State. Ofgem recognised that the interests of consumers were at risk, but the statutory requirements cannot be circumvented. Most grounds of licence revocation take 30 days or longer, but insolvency-related grounds require only 24 hours' notice, including where a supplier is unable to pay its debts within the meaning of

> **The SoLR process prevents prolonged accrual of industry costs that a failing supplier will be unable to pay, thereby minimising mutualised costs**

section 123(1)(e) and/or (2) of the Insolvency Act 1986 (cashflow and balance sheet insolvency). As both sub-sections require inability to pay debts to be proved 'to the satisfaction of the court', an emergency court application was made by Ofgem, seeking a declaration of insolvency. Having obtained the declaration, Ofgem revoked GB Energy's licences and contemporaneously appointed a SoLR. GB Energy (no longer being a licensed entity) was then free to pass a resolution for liquidation. Most insolvent suppliers go into administration, following revocation. The administrators continue the business for limited purposes, including transferring customer accounts to the SoLR and final billing.

Statutory transfer schemes

At the end of 2021, the energy supply company administration regime (under the Energy Act 2011) was used for the first time for Bulb Energy, to protect its 1.7 million customers[3]. On Ofgem's application, special administrators were appointed with the statutory objective of continuing energy supplies at the lowest possible cost until the administration is no longer needed. Another 'first' was the use of the energy transfer scheme to transfer the business of Bulb to an acquirer, thereby achieving the second part of the statutory objective. Statutory transfer schemes allow a business to be transferred without requiring the usual third-party consents and novations associated with a business sale.

In this period of increased supplier insolvencies and novel issues arising out of them, the insolvency industry has played an important role, navigating insolvency law as it applies to energy markets, in a regulated environment. Office-holders are stepping into the shoes of directors in a sector that touches the lives of most adults in Great Britain and all businesses. With this comes a responsibility, particularly where vulnerable customers and small businesses are concerned. Ofgem has set out its expectations of office-holders operating in the energy retail market in open letters[4].

Mutualisation of costs

When suppliers fail, energy continues to flow to end consumers and others bear the unpaid costs of supply. For example, the SoLR is entitled to make a claim for credit balances honoured, and other irrecoverable costs of taking on the failed suppliers' customers, through what is commonly known as the 'SoLR levy'. This is a claim for costs, paid by energy network companies, which are then recovered through charges made for the use of the energy networks. Through various mechanisms, costs of failure are 'mutualised' across the energy industry and some may ultimately be borne by consumers through increased energy bills. This 'mutualisation' of the costs of corporate failure places a strain on the industry, as well as impacting costs of living for consumers. The SoLR process prevents prolonged accrual of industry costs that a failing supplier will be unable to pay, thereby minimising mutualised costs.

> **The court found that unjust enrichment was established in respect of credit balances honoured by the SoLRs and that the remedy was subrogation, such that SoLRs could prove for these claims in the place of customers**

Remedy for unjust enrichment

The ability of Ofgem and SoLRs to recover otherwise mutualised costs, and the status of those claims in insolvency, was recently tested in *Croxen and others v GEMA and others*[5]. The office-holders of 10 failed energy companies sought directions from the court regarding various creditor claims, including claims of the SoLRs for reimbursement of credit balances due to customers when the companies failed and which were honoured by the SoLRs. These claims raised issues around the law of unjust enrichment and the remedy of subrogation.

The court heard representations from the various office-holders, GEMA, SoLRs, and a large creditor as to whether a failed supplier owed SoLRs for the reimbursement of these credit balances and whether the claims of customers (once satisfied by the SoLRs) were discharged. The court clarified the law of unjust enrichment, which was the subject of numerous court of appeal decisions considered in the judgment. Essential elements of unjust enrichment claims were found to be (1) whether a party had been enriched; (2) at the expense of another; (3) whether that enrichment was unjust; and (4) whether there was a defence to the claim. The court found that unjust enrichment was established in respect of credit balances honoured by the SoLRs and that the remedy was subrogation, such that SoLRs could prove for these claims in the place of customers.

Root causes of supplier failures

The best way to protect consumers is to have financially robust suppliers and a regulatory regime that supports this. Ofgem commissioned an independent review by economics and financial consultancy Oxera into the root causes of recent supplier failures and work is underway to address the issues identified. Retail market reforms have been introduced or proposed that compel business practices that improve financial standards, increase control over assets and protect against the mutualisation of costs of failure. There are requirements on suppliers wishing to enter the market, including 'fit and proper' and financial and operational tests, that are being rigorously applied.

If suppliers do not comply with licence conditions, then their licence can be revoked. Ofgem can enforce licence conditions by making orders (provisional or final) under the Gas Act 1986 and Electricity Act 1989 to compel compliance or issue financial penalties and can ultimately revoke supply licences. Directors cannot, therefore, ignore the company's regulatory obligations if it is to continue as a going concern and avoid such penalties. Regulatory obligations are therefore relevant to directors' compliance with their duties and so, here again, energy law interacts with company and insolvency law.

1 https://www.ofgem.gov.uk/information-consumers/energy-advice-households/what-happens-if-your-energy-supplier-goes-bust

2 Gas and Electricity Markets v GB Energy Supply Ltd [2016] EWHC 3341 (Ch)

3 Re Bulb Energy Limited [2021] EWHC 3735 (Ch)

4 https://www.ofgem.gov.uk/publications/open-letter-insolvency-practitioners-appointed-failed-energy-supply-companies and https://www.ofgem.gov.uk/publications/open-letter-energy-suppliers-and-insolvency-practitioners-who-undertake-charge-recovery-action

5 [2022] EWHC 2826 (Ch)

Denise Fawcett is senior legal adviser, consumer & competition legal team, Ofgem Office of the General Counsel

Improve outcomes for consumers by engaging early with FCA

IPs are more likely to get what they need from a statutory perspective if there is early engagement between a regulated firm and the FCA, says **Kerry Martin**

Last year was turbulent in so many ways. Even focusing only on financial services, firms and businesses had to quickly adapt to a changing economic environment with sharply rising interest rates, the war in Ukraine, the rising cost of living and market volatility. All these have created challenges for consumers and businesses. The Government's insolvency statistics[1] show corporate insolvencies in January 2023 were 1671, an increase of 7% compared to January 2022's figure of 1567, and 11% higher than the number registered three years previously (1502 in January 2020).

Minimising harm

Some insolvency practitioners have indicated that this increase involves liquidations of firms with little or no assets, suggesting it may be part of a 'reopening' of the insolvency market following the pandemic. However, given the stresses in the market, it is prudent to assume that UK insolvencies will likely increase. Regulated firms are typically more financially resilient than those in the wider economy; however, there remains a risk that there could be an increase in regulated firm failures in the future.

The Financial Conduct Authority's statutory objectives focus on protecting consumers of financial services and maintaining market integrity. Reducing harm from firm failure is one of our public commitments in our three-year strategy and annual business plan. Firm failure itself is a feature of a functioning competitive market but, while we cannot and do not stop firms from failing, we aim to minimise harm when this happens. We want to help ensure that insolvency appointments for the firms we regulate are handled well, and minimise harm to consumers and markets.

> **We expect to be engaged both before (with appropriate consent) and after appointment over a regulated firm, and our level of engagement will be driven by our assessment of the harm, or potential harm, to consumers and markets**

Guidance for IPs

The past few years have seen developments in the restructuring and insolvency of regulated firms which should help to reduce harm when they fail. For example, the Government introduced a new modified insolvency process for payment and electronic money institutions[2], and we published guidance on our approach to compromise arrangements for regulated firms[3], as well as guidance for insolvency practitioners (*Guidance for IPs*) on how to approach insolvencies of regulated firms[4].

Harm when firms fail can take many forms. This can include loss of access to key products and services, unpaid redress liabilities, loss of client money or custody assets, and the risk of contagion to other regulated firms. The outcome we aim to achieve is that we quickly identify firms under stresses that could lead to failure, and the firm takes action to recover, winds down solvently, or enters insolvency in a way which minimises harm to consumers and maintains market integrity. Engaging with us as early as possible is essential to achieving this outcome.

We expect every regulated firm facing a potential failure to engage with us, regardless of whether it is entering an insolvency process. This engagement should include a notification, in accordance with Principle 11 of the FCA's Principles for Businesses, and the rules and guidance in Chapter 15 of the FCA's Supervision Manual ('SUP 15') that the firm is proposing a restructuring or reorganisation. When proportionate (when the risk of harm could be material) this may result in regular calls and meetings to discuss the firm's strategy, its options and decisions that may be required. If the firm is entering an insolvency process, our engagement is likely to focus on the IP's strategy, how the firm will continue to meet its regulatory obligations and its communications to consumers.

Image: © FCA

Participation rights

Early engagement between the regulated firm and the FCA about any proposed appointment will help IPs in getting what they need from a statutory perspective, such as statutory consent to their appointment. It will also give them an understanding of our views and concerns, help them develop a strategy that accurately reflects what we expect and, ultimately, help them achieve an outcome that minimises harm to consumers and markets.

We have specific powers and participation rights for insolvency procedures derived from

the Financial Services and Markets Act 2000 (FSMA). Our role will vary depending on the type of firm, the facts of the case and the risks of potential harm. Examples include:

- An out-of-court administration appointment may require our consent.
- The IP's strategy could be affected if we have imposed an asset restriction over a firm, as it may mean our consent is required to deal with the assets of the firm or of the firm's clients.
- There will be circumstances where we could be applying to court to place a firm in an insolvency process or challenging a court application made by the firm's administrators.
- We are given the right to be heard at directions hearings.

The most common occasion where IPs will need to interact with us before taking an appointment over a regulated firm is when applying for a director-led or company-led out-of-court administration appointment. Section 362A of FSMA requires our consent in such cases for all firms which are, or were, FCA authorised or appointed representatives, or which are, or have been, carrying on a regulated activity in contravention of the general prohibition. Following a recent legislative change, section 362A of FSMA also applies to payment and electronic money institutions.

If IPs don't get this statutory consent, they should seek legal advice on the validity of their appointment. IPs should request consent by completing a template letter – which is available in an appendix to *Guidance for IPs* – and sending it to firm.queries@fca.org.uk. We expect to be engaged both before (with appropriate consent) and after appointment over a regulated firm, and our level of engagement will be driven by our assessment of the harm, or potential harm, to consumers and markets.

We also expect early engagement when a firm is proposing a compromise. The firm should notify us of the proposed compromise and give us relevant information at an early stage so that we can assess it. Our recent guidance on compromises, which covers schemes of arrangement, restructuring plans and voluntary arrangements, sets out our expectations where a compromise is proposed by a regulated firm.

Regulatory obligations

If an IP is taking an appointment over a regulated firm, they are taking control of a firm which continues to have regulatory obligations. So it is important that the IP ensures compliance with our rules and guidance, and relevant legislation, to achieve better outcomes for consumers and market participants following a firm failure. Firms have an obligation under Principle 11 of the FCA's *Principles for Businesses* to deal with their regulator in an open and cooperative way. The principle continues to apply once the firm is in an insolvency process. SUP 15 contains the format and further guidance around such notifications. Principle 11 also applies to payment and electronic money institutions alongside other statutory notification requirements.

Restrictions on activities

A key area where we expect early engagement is either where a firm has agreed to voluntary requirements or we have imposed requirements on it. These requirements generally restrict the activity that a firm can undertake and may also restrict its use of its assets, or assets it holds for clients, including the ability to distribute them. These requirements usually continue in force during an insolvency process and so firms must continue to comply with them, notwithstanding insolvency.

Such requirements may also place obligations on the firm to report certain information to us, as well as the regulatory reporting required under our rules, such as amounts of client assets, or the number and status of customer complaints. These reporting obligations should be factored into advice provided to the firm or the strategy when seeking an appointment over the firm.

In summary, we expect early engagement when IPs and advisers become involved with a regulated firm which is failing or fails. But there is a lot in it for IPs and advisers too. By engaging early, we can work with you to improve the outcomes for the customers of those firms and market participants. If you need to contact the FCA and you do not have a supervisory contact, send an email to firm.queries@fca.org.uk in the first instance and we'll get the ball rolling.

1 Official Statistics, Commentary – Monthly Insolvency Statistics, January 2023 (https://www.gov.uk/government/statistics/monthly-insolvency-statistics-january-2023/commentary-monthly-insolvency-statistics-january-2023)

2 The new modified insolvency process for payment and electronic money institutions involved introducing a new special administration regime and extending the FCA's powers to participate in standard insolvency procedures governed by the Insolvency Act for payments and e-money institutions (see Payment and Electronic Money Institution Insolvency Regulations 2021 and Payment and Electronic Money Institution Insolvency Rules 2021).

3 https://www.fca.org.uk/publication/finalised-guidance/fg22-4.pdf

4 https://www.fca.org.uk/publication/finalised-guidance/fg21-4.pdf

Kerry Martin is lead associate, resolution & insolvency department – specialist directorate, supervision, policy & competition – markets at the Financial Conduct Authority

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Tax rule 'straw' that risks breaking corporate rescues

Marcus Rea highlights the substantial problems with HMRC's recent decision on non-substantial changes to corporate debt, and calls for readers to help change it

As the UK enters a period of higher interest rates and economic uncertainty, there is every expectation that the insolvency and restructuring profession will get busier. A typical first port of call is to amend and extend corporate debts. However, even full-scale restructurings often result in significant changes to the terms of surviving debt on corporate balance sheets.

Against that backdrop, all UK companies adopting IFRS (or FRS101) must be aware of the concept of substantial modification of debt. And in 2018, accounting standards were amended to include the notion of non-substantial modifications.

A modification of debt terms may include changes to any, or a combination, of the following:

- The stated interest rate for the remaining original life of the debt;
- The maturity date;
- The face amount of the debt;
- Accrued interest;
- The priority of the obligation;
- Collateral (a requirement for or changes in the type of); or
- Covenants (including their waiver).

Quantitative and qualitative tests

The scale of a modification is determined by both quantitative and qualitative tests. The former is obviously the more objective measure: a substantial modification arises if the net present value of cashflows associated with the debt are changed by 10% or more; a non-substantial modification, as the name suggests, is one that doesn't meet that test. The qualitative tests are inevitably subjective but, in particular, look at the non-cash related changes that fundamentally change the nature of the debt.

If there is a substantial modification, the original debt is derecognised in the accounts and replaced by the fair value of the 'new' debt, with any difference taken to the income statement. If there is a non-substantial modification, the original debt is not removed from the balance sheet, but is restated by any difference in the net present values, with the movement taken to the income statement.

Reduction in balance sheet liability

Inevitably, in most corporate rescue restructurings, the borrower is given some level of relief by its lenders. This, therefore, normally results in a reduction in the liability on the balance sheet and a credit to the company's income statement. And critically here, the tax treatment follows the accounts; so, *prima facie*, a credit to the P&L will result in taxable income.

> **"Paradoxically, this encourages greater changes to debt terms than might otherwise be negotiated in order to access the substantial modification safe harbour"**

In 2015, R3's tax committee had successfully petitioned for the corporate rescue exemption – originally introduced for debt releases and to give more flexibility for rescues than automatically requiring a debt for equity swap – to be extended to allow the P&L credit arising from a substantial modification to be exempt from tax.

Safety net

This iteration of the corporate rescue exemption essentially requires that, but for the modification (and any associated arrangements), there would have been a material risk that the company would be unable to pay its debts within the next 12 months. 'Unable to pay its debts' is further defined effectively to be the Insolvency Act tests of either cashflow or balance sheet insolvency. These are potentially subjective tests (not least as they are applied prospectively) and definitely need proper consideration (there is no clearance procedure here and each case succeeds or fails on its merits). But at least they afford a safety net for restructurings designed to save a business.

In 2018, when non-substantial modifications became a thing, HMRC was approached to further extend the exemption (as the legislation was specifically drafted to exempt a substantial modification credit only). The legislative tweak required would have been small and we felt the situation was not dissimilar to where we had successfully requested an amendment to the law when accounting rules changed for onerous lease provisions. Equally, we felt that the tweak would be in the spirit of the corporate rescue culture that the Revenue had ostensibly adopted. Unfortunately, this request has fallen on deaf ears; a fact recently reconfirmed at the beginning of February 2023.

Tax consequences

It is important, therefore, that practitioners are aware that debt modifications (particularly, and perversely, non-substantial ones) have a real risk of tax consequences. A sub-10% adjustment to cashflows on a debt could still be a significant number in the context of an individual business and yet there is no statutory exemption for corporate rescue situations in this instance. Paradoxically, this encourages greater changes to debt terms than might otherwise be negotiated in order to access the substantial modification safe harbour. Worryingly, it may also mean that certain corporate rescues fail because the tax charge is the straw that breaks the camel's back.

The Revenue has offered to revisit its decision if we can show that the absence of an exemption has caused significant difficulties in specific corporate rescue situations. While this will regrettably not help the first few groups that suffer those problems, I would encourage practitioners to inform R3 of any issues that arise with non-substantial modifications so that we can produce a body of evidence demonstrating the need for change.

Marcus Rea is a senior managing director at Teneo and chairman of R3's tax committee

SURVEY:
Real estate services

Hilco Valuation Services

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- HVS were engaged on 700 restructuring and insolvency engagements
- HVS undertook valuations of over £10 billion of assets for our secured lending and restructuring clients across all asset classes
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Opening up new pathways for partnerships

Welcome to our survey[1] of providers of specialist real estate services for insolvency professionals, *writes Rupert Darrington*. As the effects of higher interest rates and other economic headwinds start to place ever greater burdens on over-geared businesses and individuals over the coming year and beyond, we can expect to see rising numbers of situations where office-holders become responsible for managing and/or disposing of high-value property assets.

Top 5: Most real estate sold on behalf of IPs in 2022[2]

Company	Value £
CBRE	£200m
Hilco Valuation Services	£75m
Colliers	£35m
Carter Jonas	£15m
SIA Group Asset Ingenuity	£15m

We therefore felt it was timely to survey the gamut of real estate service providers in order to give IPs and their advisers a fuller picture of the range and depth of specialised services available to help them deliver best value for creditors.

With a total of 39 companies listed, the main focus of this survey is the details of the work of the real estate sales agents operating in the market for distressed property assets. However, we have also profiled companies providing other specialist real estate services, such as property insurance (for example, Aon), lease renegotiation (Cedar Dean), fixed charge receivership (Belleveue Mortlakes), on-site security (First Response Group) and property-related cost recovery services (Capa).

Meanwhile, in our buyers guide, we have also highlighted some of the non-real estate services provided by some of the companies featured, such as the disposition of plant and machinery, boats, aircraft, road vehicles, stock and inventory and intellectual property, as well as profiled companies' industry sector specialisms.

Top 5: Lowest minimum sales commission

Company	Commission %
CBRE	0.5%
Colliers	0.5%
Fletcher Bond	0.5%
SIA Group Asset Ingenuity	0.75%
Carter Jonas	0.75%

We hope you find this survey useful for you in your work, and that it helps you to potentially open up new pathways for partnerships in the future.

1 This survey was compiled by the Recovery magazine publishing team from data supplied by the companies concerned, unless indicated otherwise. Please see the key at the bottom of each page of data tables for further details.

2 Approximate value of real estate sold on behalf of IPs in 2022.

The views expressed in this article are not necessarily those of R3 or of the Recovery editorial board.

Rupert Darrington is managing editor of *Recovery*

Real estate firms – Who's who								
Trading name of UK business	**Contact tel for IPs**	**Contact name for IPs**	**Contact email for IPs**	**Website**	**Main address in UK**	**Top/parent company in group**	**Registered country of top/parent company**	**Registered company no of top/ parent company**
Alder King	*0117 317 1000*	*n/s*	*n/s*	*www.alderking.com*	*Pembroke House, 15 Pembroke Road, Bristol BS8 3BA*	*n/s*	*n/s*	*n/s*
Aon	07901 934 868	Samantha Taylor	samantha.l.taylor@aon.co.uk	www.aon.com	The Aon Centre, The Leadenhall Building, 122 Leadenhall Street, London EC3V 4AN	Aon UK Ltd	UK	00210725
Avison Young	0844 902 0304	Alan Ryall	alan.ryall@avisonyoung.com	www.avisonyoung.co.uk	65 Gresham Street, London EC2V 7NQ	Avison Young	Canada	*n/s*
Belleveue Mortlakes	07841 249 737	Hinesh Varsani	hvarsani@bmortlakes.com	www.bmortlakes.com	17 Hanover Square, London W1S 1BN	Belleveue Mortlakes	UK	*n/s*
CAPA	020 7224 7222	Mike Sheath	mike@capa.uk.com	www.capa.uk.com	7 Stratford Place, London W1C 1AY	Consultiam Property Limited	UK	4906350
Carter Jonas	07771 635 015	Dudley Holme-Turner	dudley.holme-turner@carterjonas.co.uk	www.carterjonas.co.uk	One Chapel Place, London W1B OBG	Carter Jonas LLP	UK	OC304417
CBRE	020 7182 2921	Tim Perkin	tim.perkin@cbre.com	www.cbre.com	Henrietta House, Henrietta Place, London W1G 0NB	CBRE Limited	UK	03536032
Cedar Dean Commercial	020 7100 6013	Noelle Hegarty	noelle@cedardean.com	www.cedardean.com	30 Berwick St, Soho, London	Cedar Dean Commercial Ltd	UK	07687144
Christie & Co	020 7227 0763	Stephen Jacobs	stephen.jacobs@christie.com	www.christie.com	Whitefriars House, 6 Carmelite Street, London EC4Y 0BS	Christie Group Plc	UK	01471939
Clive Emson Land & Property Auctioneers	0345 850 0333	Martin Hardy	auctions@cliveemson.co.uk	www.cliveemson.co.uk	Rocky Hill, London Road, Maidstone, Kent ME16 8PY	Regional Property Services Ltd	UK	02399687
Colliers	07717 652 778	Nick Hammond	nick.hammond@colliers.com	www.colliers.com/en-gb/services/advisory-restructuring	103 Colmore Row, Birmingham B3 3AG	Colliers International Property Consultants Limited	UK	7996509
Copping Joyce Surveyors	*n/s*	*n/s*	*n/s*	https://coppingjoyce.co.uk	28-30 Worship Street, London EC2A 2AH	Copping Joyce Surveyors Ltd	UK	Copping Joyce Surveyors Ltd
Cushman & Wakefield	*n/s*	*n/s*	*n/s*	*www.cushmanwakefield.com*	*125 Old Broad Street, London EC2N 1AR*	*n/s*	*n/s*	*n/s*
Eddisons Commercial	*n/s*	*n/s*	*n/s*	*www.eddisons.com*	*Toronto Square, Toronto Street, Leeds LS1 2HJ*	*n/s*	*n/s*	*n/s*
First Response Group	0330 124 6019	Jennie Duff	vacants@firstresponsegroup.com	www.firstresponsegroup.com/insolvency	Unit 2, Gemini Business Park, Sheepscar Way, Leeds LS7 3JB	First Response Group Ltd	UK	06263326

table continued overleaf

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Text in italic font = text supplied by the *Recovery* publishing team based on publicly available information

■ = Sells real estate ■ = Provides other services
■ = Both of the above

Real estate firms – Who's who continued

Trading name of UK business	Contact tel for IPs	Contact name for IPs	Contact email for IPs	Website	Main address in UK	Top/parent company in group	Registered country of top/parent company	Registered company no of top/parent company
Fletcher Bond	0161 552 2599	Rory Dillon	rory.dillon@fletcherbond.co.uk	www.fletcherbond.co.uk	61 Mosley Street, Manchester M2 3HZ	Fletcher Bond Property Consulting Limited	UK	10827693
Fraser Real Estate	020 7440 7510	Joe Pitt	joe.pitt@fraserrealestate.co.uk	www.fraserrealestate.co.uk	32-33 Cowcross Street, London EC1M 6DF	Fraser CRE Ltd	UK	02842090
Generator Real Estate Solutions	020 7426 5555	Paul Isaacs	paul.isaacs@generatorgroup.co.uk	www.generatorgroup.co.uk	Townfield House, 27-29 Townfield Street, Chelmsford CM1 1QL	Generator Real Estate Solutions Ltd	UK	11069378
Gordon Brothers	*020 7647 5120*	*n/s*	*n/s*	*www.gordonbrothers.com*	Third Floor, 13 Hanover Square, London W1S 1HN	*n/s*	*n/s*	*n/s*
Hilco Valuation Services	020 7374 5300	Jon Cookson	jcookson@hilcoglobal.eu	www.hilcovs.co.uk	11 Ironmonger Lane, London EC2V 8EY	Hilco Global	USA	*n/s*
J9 Advisory	*n/s*	*n/s*	*n/s*	www.j9advisory.com	Leeds	J9 Advisory Limited	UK	09158072
Knight Frank	020 7861 5171	Marc Nardini	marc.nardini@knightfrank.com	www.knightfrank.co.uk	55 Baker Street, London W1U 8AN	Knight Frank LLP	UK	OC305934
Lambert Smith Hampton	*020 7198 2000 / 07979 541 236*	*Nick Blackwell*	*nblackwell@lsh.co.uk*	*www.lsh.co.uk*	*55 Wells Street, London W1T 3PT*	*n/s*	*n/s*	*n/s*
MEN-SEC Group	*0330 133 1751*	*n/s*	*enquiries@mensec.co.uk*	*https://mensec.co.uk*	*85 Great Portland Street, London W1W 7LT*	*n/s*	*n/s*	*n/s*
MJ Group International	020 3463 8725	Mark Downham	mark.downham@mjgroupint.com	www.mjgroupint.com	15 Alfred Place, London WC1E 7EB	MJ Group International Limited	UK	05985443
Moorcroft Property Group	*0333 700 0130*	*n/s*	*info@moorcroftpg.com*	*http://moorcroftpg.com*	*Unit 4, Pudsey Business Park, 47 Kent Road, Leeds LS28 9BB*	*n/s*	*n/s*	*n/s*
Paarl Property Consultants	01562 952 424	Jim Roberts	jim.roberts@paarlprop.com	www.paarlprop.com	Suite 4, 3rd Floor, 26 Church Street, Kidderminster DY10 2AR	Paarl Property Services Limited	UK	08442197
PACT Property & Assets	07979 541 215	Chris Price	chris.price@pactproperty.co.uk	www.pactproperty.co.uk	Phoenix Works, Phoenix Mill, Stroud GL5 2BU	PACT Property & Assets Limited	UK	11345566
Peter Fenwick & Co	07831 588 299	Peter Fenwick	peter@peterfenwickandco.com	www.peterfenwickandco.com	4 St James's Square, London SW1Y 4JU	n/a (Sole Trader)	n/a	n/a
Proudley Associates	01425 200 366	Olivia Proudley	op@proudleyassociates.com	www.proudleyassociates.com	Unit 4C Austin Park, Yeoman Road, Forest Gate Business Park, Ringwood BH24 3FG	Proudley Associates Ltd	UK	05899848
RAM RE Property Advisors	029 2274 2471 / 07980 666 073	Richard Murphy	richard.murphy@ram-re.com	www.ram-re.com	RAM RE Property Advisors, 3rd Floor, Capital Tower, Cardiff CF10 3AG	RAM RE LTD	UK	13009562

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Real estate firms – Who's who continued

Trading name of UK business	Contact tel for IPs	Contact name for IPs	Contact email for IPs	Website	Main address in UK	Top/parent company in group	Registered country of top/parent company	Registered company no of top/parent company
RPRS ■	020 3148 7500	Richard Reed MRICS MNAVA	property@rprs.co.uk	www.rprs.co.uk	124 City Road, London EC1V 2NX	RPRS Group Ltd	UK	13424660
Sanderson Weatherall ■	*0800 122 3050*	*Daniel Hardy*	*enquiries@sw.co.uk*	*www.sw.co.uk*	*6th Floor Central Square, 29 Wellington Street, Leeds, West Yorkshire LS1 4DL*	*n/s*	*n/s*	*n/s*
Savills ■	020 7409 8898	Matthew Nagle	mnagle@savills.com	www.savills.co.uk	33 Margaret Street, London W1G 0JD	Savills Plc	UK	02122174
Secure Empty Property ■	01372 450 669	Andrew Mapstone	andrew.mapstone@secureemptyproperty.com	www.secureempty property.com	Integrity House, Charles Lane, Lancashire BB4 5EH	Secure Empty Property Limited	UK	07930767
SIA Group Asset Ingenuity ■	020 7498 4900	Matt Brumpton	matt.brumpton@sia-group.co.uk	www.sia-group.co.uk	107 Cheapside, London EC2V 6DN	SIA Group Asset Ingenuity Ltd	UK	SIA Group Asset Ingenuity Ltd
Thainstone Specialist Auctions ■	01467 623 871	Neil Simpson	neil.simpson@anmgroup.co.uk	www.tsaauctions.co.uk	Thainstone Centre, Inverurie, Aberdeenshire AB51 5XZ	ANM Group Ltd	UK	265 3429 51
Walker Singleton ■	*n/s*	*n/s*	*n/s*	*www.walker singleton.co.uk*	*Property House, Lister Lane, Halifax HX1 5AS*	*n/s*	*n/s*	*n/s*
Wilsons Auctions ■	01294 833 444	Lorren Mullen	lorrenmullen@wilsonsauctions.com	www.wilsons auctions.com	6 Kilwinning Road, Dalry KA24 4LG, Scotland	Wilsons Auctions Limited	UK	NI011967

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Company profiles

Trading name of UK business	Who regulated by and parts of business, groups, or individuals that are regulated, if appropriate	Years providing services for IPs	Approx % of turnover that relates to services for UK IPs	Services	How different to other providers
Alder King ■	*Our receivers are all licensed under the RICS Fixed Charge Receiver Licensing Scheme and hold full membership of the Association of Property and Fixed Charge Receivers (NARA).*	*n/s*	*n/s*	*Alder King acts as fixed charge receivers for a wide range of banks, financial institutions and finance companies.*	*n/s*
Aon ■	Financial Conduct Authority (FCA)	5	*n/s*	Aon provides fixed charge/Law of Property Act receivers with immediate flexible insurance cover for real estate that they become responsible for post-appointment. Cover is available up to £30 million and can cover vacant or occupied buildings.	On tenanted commercial properties Aon can price match the pre-appointment insurance, eliminating the need to rely on pre-appointment policies that may be out of date and based on data gathering criteria receivers were not party to.
Avison Young ■	*n/s*	30	*n/s*	*We provide a full range of property services.*	*We are market leaders in advising on all real estate matters within the context of insolvency. The services we provide span both corporate and personal insolvency.*
Belleveue Mortlakes ■	RICS, NARA, IPA	*n/s*	80%	*Belleveue Mortlakes chartered surveyors are specialists in property insolvency, experienced in both residential and commercial fixed charge receiverships and appointments under the Law of Property Act 1925.*	*n/s*
CAPA ■	Royal Institute of Chartered Surveyors and Institute Of Revenues Rating & Valuation	20	50%	We value and transact on commercial freehold and leasehold property and negotiate occupancy savings whilst businesses are sold. Plus we interrogate historic property and accounts payables data forensically in order to highlight and recover overspend. On multi-site portfolios and across all sectors. Clients save otherwise 'invisible' sums, achieve flexibility and cap future obligations.	Tenant representation only – no conflicts of interest. UK's largest independent property cost auditor. Large back catalogue of cases across 20 years. Contingency fee basis – no win/no fee.
Carter Jonas ■	RICS	*n/s*	1%	Valuation, agency, general due diligence, professional work such as lease renewals, rent reviews, etc., planning asset management.	Very broad range of expertise covering both commercial residential and rural, and with very wide range of specialist expertise, including planning, development, strategic land, educational assets, marinas and leisure parks.
CBRE ■	Royal Institution of Chartered Surveyors (RICS)	30+	<1%	CBRE's 4000 professionals across 15 UK-based offices provide a full range of real estate advisory services across every sector of the real estate market in the UK and overseas.	CBRE is the largest commercial property advisor in the UK. CBRE's Loan Recovery team has an in-depth understanding of IPs' requirements and challenges. It regularly acts as a conduit for IPs looking to access the specialist services at CBRE.
Cedar Dean Commercial ■	*n/s*	15	75%	Cedar Dean has been supporting commercial tenants to successfully restructure their leases for over 15 years. We specialise in: commercial lease restructures, rent reviews and reductions, and strategic lease management.	Cedar Dean's unique selling point is our bespoke and strategic approach to landlord negotiations. We have an exceptional and diverse team of experts from chartered surveyors to insolvency practitioners and retail and hospitality specialists.
Christie & Co ■	Our valuation business is regulated by RICS. We have a national team of RICS registered valuers.	43	*n/s*	Value, sell and advise on operational real estate – care, leisure, hospitality, medical, childcare and education, retail sectors. Marketing appraisals, asset disposal – closed/going concern, RICS valuations, Capex condition, lease advisory, market intel.	Market leading, award winning sector specialists. Largest and most active team of experts enabling best in class advice and outcomes. Dedicated team for R&I professionals. Rapid response to review businesses nationwide – single asset/large portfolios.

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Company profiles continued

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Clive Emson Land & Property Auctioneers	We are regulated by The Property Ombudsman scheme with our auctioneers and appraisal staff belonging to a mixture of the following trade associations: RICS, NAVA and NAEA.	34	*n/s*	We provide a high-profile land and property auctioneering facility for insolvency professionals, corporate and independent estate agents, private clients and statutory bodies, giving a platform to specialist land and property auctions.	Clive Emson provides a specialist land and property auctioneering service and, therefore, does not compete with the traditional estate agency, mortgage broking, insurance or any other aspect of the property world.
Colliers	RICS	15	60%	We provide valuation, strategy and disposal advice for all property sectors nationally, helping IPs to deliver restructuring solutions across the UK by working collaboratively to assess value, identify opportunities, mitigate risk and release capital.	We provide a cross-section of real estate services and sectors with significant breadth, depth and agility, ensuring that every project is delivered with integrity to achieve consistent, efficient and equitable results, always maximising realisations.
Copping Joyce Surveyors	RICS and NARA	20	*n/s*	*n/s*	*n/s*
Cushman & Wakefield	*n/s*	*n/s*	*n/s*	*Services include fixed charge/LPA receivership, pre-enforcement strategic advice, and advice to insolvency practitioners.*	*Covering the whole of the UK from offices in London, Cardiff and Leeds, we design bespoke solutions for situations where real estate performance has impacted loan covenants.*
Eddisons Commercial	*n/s*	*n/s*	*n/s*	*Services for the insolvency sector: property agency, property auctions, asset sales, building consultancy, property management, valuations.*	*n/s*
First Response Group	Security Industry Authority (SIA) – SIA Approved Contractor Scheme (ACS) status for the provision of security guarding, key holding and public space CCTV. National Security Inspectorate (NSI) – manned guarding and keyholding services, CCTV, access control and intruder detection services.	15	*n/s*	FRG deliver rapid, insurance approved security, fire and facilities management solutions to protect and maintain vacant properties and sites including CCTV, alarms, security officers, canine teams, property inspections and eviction services.	FRG has extensive experience and knowledge working with UK insurance providers and recommends risk reduction measures in line with insurance industry compliance requirements. Free, no obligation risk assessments conducted by dedicated experts.
Fletcher Bond	RICS and IPA	5	60%	Strategic valuation and agency/disposal advice of real estate assets on behalf of receivers and insolvency practitioners.	Niche specialists in development of part complete commercial and residential schemes as well as general commercial business real estate asset disposals.
Fraser Real Estate	RICS	30	30%	A full range of property advice provided to IP's in respect of corporate real estate owned or occupied by entities in distress; as well as acting for secured lenders in reviewing or enforcing over their security.	A niche practice with a team that is 100% focused on the provision of property advice in respect of distressed real estate investment and development and recognised as property problem solvers.
Generator Real Estate Solutions	n/a	12+	n/a	*n/s*	*n/s*
Gordon Brothers	*n/s*	*n/s*	*n/s*	*Valuation, appraisal and disposition of retail, consumer products and industrial inventory, and of machinery and equipment.*	*Leveraging the world's largest proprietary asset-recovery database and a century of disposition expertise, we deliver the insight and accuracy clients need to make sound decisions.*

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The Property Ombudsman RICS NAEA National Association of Estate Agents

Company profiles continued					
Trading name of UK business	**Who regulated by and parts of business, groups, or individuals that are regulated, if appropriate**	**Years providing services for IPs**	**Approx % of turnover that relates to services for UK IPs**	**Services**	**How different to other providers**
Hilco Valuation Services ■ Hilco Global Real Estate Advisory	RICS and IPA	20	15%	Our corporate restructuring advisory teams across all asset classes help meet the tight timeframes that the restructuring environment demands by delivering market specific valuation, option reports and disposition services at a pace, with the asset sale capability that will release liquidity.	Our real estate team has a combined 150 years of experience in providing dedicated tailored real estate solutions to the restructuring market place and community, across all real estate asset classes, and across the UK and Europe.
J9 Advisory ■	ICAEW	9	*n/s*	*We facilitate services to assist with business asset disposal and security services; from disposing of a particular asset, through to project managing the full closure and disposal of a non-performing business.*	*We can potentially source a day-one purchase price for non-performing assets and businesses*
Knight Frank ■	*n/s*	30+	*n/s*	Knight Frank is a real estate advisor providing a range of residential and commercial property services across the UK and around the world, including: valuations, disposals, property management, building consultancy, planning and much more.	UK and international reach. Exceptional network of institutional and private investors. Partnership which enables strong collaboration between transactional and consultancy teams.
Lambert Smith Hampton ■	*n/s*	*n/s*	*n/s*	*Our services include asset valuation and disposal for property (private treaty, tender and online auction platform), plant and machinery (realisation strategies, LSH online auction platform and private treaty) and intangible assets.*	*Our team of specialist valuers have unrivalled market experience and an in-depth understanding of insolvency procedures enabling us to maximise outcomes in all situations.*
MEN-SEC Group ■	*n/s*	*n/s*	*n/s*	*The MEN-SEC Group simplify the management of unoccupied property, and deliver a host of services designed to protect our clients assets and mitigate risk exposure.*	*Our approach includes pre and post appointment advisory, delivery of rapid security response services and unoccupied premises insurance compliance management.*
MJ Group International ■	Insolvency Practitioners Association, Royal Institution of Chartered Surveyors and NARA – Association of Property and Fixed Charge Receivers. Mark Downham FRICS, MBA, FNARA, RPR.	*n/s*	n/a*	We provide independent property valuation and asset management advice and consultancy.	*n/s*
Moorcroft Property Group ■	*n/s*	*n/s*	*n/s*	*Moorcroft Vacant Property Management take control of a site on behalf of the insolvency practitioner and manage that site from day one until it sells or is occupied again.*	*n/s*
Paarl Property Consultants ■	RICS – all areas of professional work; HMRC – anti-money laundering and estate agency practices; ICO – GDPR and other data storage.	10	25%	*n/s*	As a small practice we are not subject to any 'boundaries' of any sort – so should an IP contact us with any aspect of real estate services then we can help them immediately, accurately and cost efficiently.
PACT Property & Assets ■	Royal Institution of Chartered Surveyors – RICS – all aspects of our professional work for IPs and turnaround professionals.	33	70%	Valuation, management and sale of real estate, plant and machinery and business assets.	Our specialist insolvency surveyors have combined property and plant expertise, ensuring overall returns are maximised having a clear understanding of the challenges faced by IPs and stakeholders of an insolvent business.
Peter Fenwick & Co ■	Peter Fenwick is jointly regulated by the IPA and the RICS. Peter Fenwick does not take receivership appointments.	30	100%	Full service chartered surveyors and property strategists with 30 years' experience. Valuation, security, management, planning, adding value, exit options and marketing strategy. Always in association with the very best local / expert advisors. All property sectors, nationwide.	Peter Fenwick & Co has never been sued. We are a completely independent strategist that assembles the very best specialist and local advisors to value, secure, plan, add value and, finally, sell any asset, anywhere. The highest sale price is achieved.

*Additional information supplied by MJ Group International for 'Approx % of turnover that relates to services for UK IPs': We have just launched a new property and fixed charge receivership business line with live work in progress.

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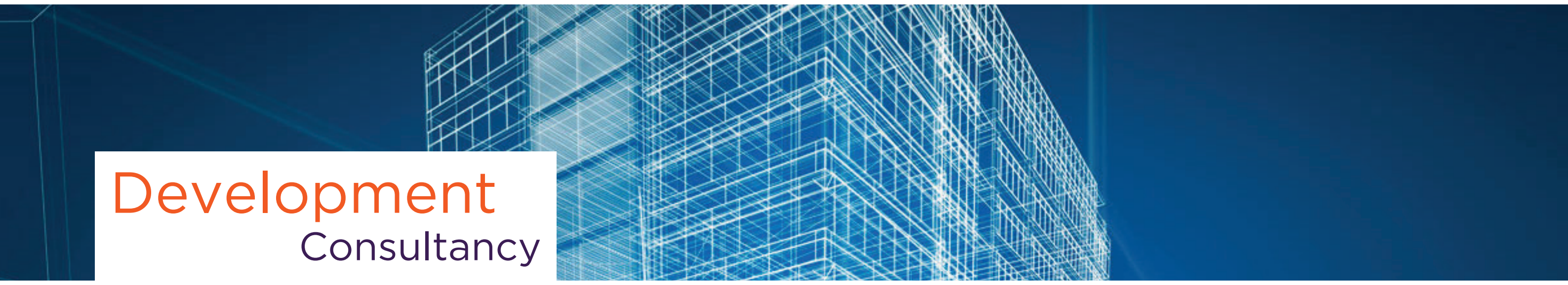

Development Consultancy

Copping Joyce has a seasoned team of professionals with extensive experience in development consultancy and transactional services for both commercial and residential sectors. We assist financial institutions in maximising value and minimising risk for troubled projects, whether inherited, near receivership or part-built. Our due diligence process minimises potential issues and we can restructure the capital stack with a mix of equity, debt, or mezzanine finance if required.

Our team of top-notch consultants helps to extract maximum value from the asset, either through completion, re-positioning, or disposal. Our flexible structure allows clients to vary the level of service while still enjoying preferential rates with our panel of consultants. Our valuers will value the project both in its current state, and post completion.

We offer comprehensive development management services, including but not limited to project viability, planning policy analysis, investment, funding, remodelling, affordable housing assessment, design and procurement, construction, and completion. Our aim is to understand the client's goals and tailor a proposal to their specific needs and level of service required.

Falmouth, Cornwall – 110 Kimberley Park Rd, Falmouth TR11 2FF

- 118 PBSA units delivered in Falmouth
- Development management – stepping in to assist in the completion of the development whereby the previous contractor had walked off site
- Took the project through to PC, marketing and disposal of the completed development to a family office

Friern Barnet Hospital Site, Barnet, London N20

- Freehold development site
- Services provided
- Disposal advice and due diligence
- Planning and development consultancy
- Marketing and sales consultancy
- Major redevelopment undertaken, including a new housing development of 730 dwelling on former farmland and a historic hospital conversion comprising 256 apartments

Former Allied Domecq Site, Clerkenwell, London EC

- 3-acre freehold development site acquisition and subsequent sale with planning
- Services provided
- Acquisition advice and due diligence
- Asset management
- Planning and development consultancy
- Marketing and disposal of the site with planning
- One of Clerkenwell's largest redevelopment schemes

Contact Tom Goldsmith on 07471 945 766

Property Valuation Services

Our team of experienced RICS Chartered Surveyors and Registered Valuers provides professional and robust advice based on the most recent transactional evidence with all information presented to our clients clearly and concisely. Our Red Book valuation reports provide in-depth advice relating to the asset being valued. We provide the following services, although we have our own recoveries department taking LPA appointments, we regularly provide best price valuations for other receivers and IPs.

- Commercial Valuation
- Trading Valuation
- Residential Valuation
- Development Valuation
- Capital Gains Valuation
- Loan Security Valuation
- Tax Purposes Valuation
- Internal Purposes Valuation
- Probate Valuation
- Charities Act Valuation Report

Contact Thanos Mesochoritis on 075 9965 7363

Please revert to our website for a full list of our clients

Company profiles continued

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Proudley Associates	NAVA Propertymark, NAEA Propertymark and The Property Ombudsman. Olivia Proudley is regulated by The Royal Institution of Chartered Surveyors.	14	*n/s*	Valuation and disposal of all types of assets both tangible and intangible, including businesses and shares.	We are a small and flexible team which allows us to adapt to individual requirements and be cost-effective in a challenging market.
RAM RE Property Advisors	RICS, NARA and IPA	30	10%	RAM RE Property Advisors provide high level strategic advice to insolvency professionals and delivers pro-active/cost-effective realisation strategies across all property classes and throughout the UK. We ensure the right team and deliver results.	RAM RE Property Advisors is truly independent. We fully understand the context of insolvency, having over 30 years, experience of working closely with insolvency practitioners. We are always prepared to link our remuneration to our performance.
RPRS	RICS – Regulated by RICS; Propertymark – Propertymark Protected; The Property Ombudsman.	14	100%	RPRS is an insolvency property agency. The RPRS nationwide services for commercial and residential properties include: RICS consultancy, valuations, sales (private treaty and auction), vacant property services and property renovation.	RPRS is a chartered surveying practice providing specialist property services for insolvency related instructions for IPs nationwide. All property services and advice tailored specifically to insolvency related professionals and cases.
Sanderson Weatherall	*n/s*	*n/s*	*n/s*	*One of the UK's largest independent property consultancies for restructuring and recovery services to insolvency practitioners. Working alongside our machinery and business assets division, we offer a service across a wide range of asset classes.*	*n/s*
Savills	Royal Institution of Chartered Surveyors – RICS	*n/s*	*n/s*	*Our recoveries and receivership experts work directly with lenders who anticipate or have defaulted loans.*	*n/s*
Secure Empty Property	Regulated and accredited by British Security Industry Authority (BSIA), The Security Systems and Alarms Inspection Board (SSAIB), ConstructionLine and ISOQAR quality management.	10	20%	Secure Empty Property deliver specialist vacant property security and asset management services nationwide.	Our remotely monitored alarm technology delivers 95% of the security of a static guard at 10% of the cost.
SIA Group Asset Ingenuity	RICS	11	10%	Valuation and disposal services across a number of assets classes, including debtors, machinery and equipment, inventory, real estate and intellectual property.	We provide insolvency practitioners with a distinctive and comprehensive valuation, and disposal service across all asset classes from a single point of contact.
Thainstone Specialist Auctions	F.I.A Scotland	20	10%	Thainstone Specialist Auctions provides plant, equipment and vehicle auctions and specialist business valuation services. Largest FCA regulated valuations team in Scotland, providing accurate and impartial valuation services, whatever the requirement.	Quick response, delivering a professional and thorough service that can be relied upon. Comprehensive network of buyers and sellers, together with a variety of sales platforms.
Walker Singleton	*n/s*	*n/s*	*n/s*	*Valuation and disposal advice to recovery and restructuring professionals on commercial, industrial and retail properties. Offices in Bradford, Leeds, Halifax, London, Huddersfield and Manchester.*	*n/s*
Wilsons Auctions	National Association of Motor Auctions; National Association of Valuers and Auctioneers; National Association of Estate Agents; Royal Institute of Chartered Surveyors; Property Services Regulatory Authority's (PSRA) PSRA Licence No: 001527; Society of Chartered Surveyors Ireland.	20	10%	Providing the complete corporate recovery service to insolvency practitioners. Our wide span of expertise encompasses every field enabling us to provide a comprehensive review of all recovery options without delay.	We have an enviable reputation for maximising asset realisation while minimising costs, providing inventive and commercial solutions for each instruction.

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= Sells real estate = Provides other services
= Both of the above

Sales services

Trading name of UK business	Minimum sales commission (%)	Maximum sales commission (%)	Average sales commission (%)	Willing to structure sales commission on ratcheted basis?	Charge IPs retainer, fixed fee, or similar, as well as commission?	Willing to act on multi-agency basis	Do you/can you guarantee a minimum sale price and/or pay money upfront?	Details	Approx value of real estate sold on behalf of IPs in 2022
Avison Young	*n/s*	*n/s*	*n/s*	Sometimes	Sometimes	Sometimes	Sometimes	*n/s*	*n/s*
Belleveue Mortlakes	1	2	1.5	Sometimes	Never	Sometimes	Never	*n/a*	*n/s*
CAPA	1.5% / 10%*	5.0% / 20%*	2.5% / 15%*	Sometimes	Never	Sometimes	Never	*n/a*	n/a*
Carter Jonas	0.75	1.5	1	Sometimes	Sometimes	Sometimes	Never	*n/a*	£15m
CBRE	0.5	1.5	1	Sometimes	Sometimes	Sometimes	Never	*n/a*	£200m
Christie & Co	*n/s*	*n/s*	*n/s*	Sometimes	Never	Sometimes	Never	*n/a*	*n/s*
Clive Emson Land & Property Auctioneers	*n/s*	*n/s*	*n/s*	Sometimes	Never	Sometimes	Never	*n/a*	*n/s*
Colliers	0.5	2	1	Sometimes	Sometimes	Sometimes	Never	*n/a*	£35m
Copping Joyce Surveyors	*n/s*	*n/s*	*n/s*	Sometimes	Sometimes	Never	Never	*n/a*	*n/s*
Fletcher Bond	0.5	15	2.5	Sometimes	Never	Sometimes	Never	*n/a*	£10m
Hilco Valuation Services	1.25	2	1.5	Sometimes	Never	Sometimes	Never	*n/a*	£75m
Knight Frank	1.5	2	*n/s*	Sometimes	Sometimes	Sometimes	Never	*n/a*	*n/s*
Lambert Smith Hampton	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/a*	*n/s*
Paarl Property Consultants	1.5	3	2	Sometimes	Never	Sometimes	Never	*n/a*	£1.5m
PACT Property & Assets	1.5	2	1.75	Always	Never	Sometimes	Sometimes	Part complete development sites where a buildout is considered. We work with specially selected developers who would underwrite a value having completed the necessary due diligence.	£4m
Peter Fenwick & Co	1	2	1.5	Always	Never	Always	Always	A RICS Red Book market value is commissioned from an independent expert local firm. This sets the minimum sale price. All valuation, security and marketing costs are payable at completion.	£10m
Proudley Associates	1.5	2.5	1.5	Always	Never	Always	Sometimes	*n/s*	*n/s*
RAM RE Property Advisors	*n/s*	*n/s*	*n/s*	Sometimes	Sometimes	Sometimes	Never	*n/a*	*n/s*
RPRS	Case specific	Case specific	Case specific	Sometimes	Sometimes	Sometimes	Sometimes	Reserves set for properties sold at auction.	£4m
Sanderson Weatherall	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/a*	*n/s*
Savills	*n/s*	*n/s*	*n/s*	Sometimes	Sometimes	Sometimes	Never	*n/a*	*n/s*
SIA Group Asset Ingenuity	0.75	2	1	Sometimes	Sometimes	Always	Sometimes	*n/s*	£15m
Walker Singleton	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/a*	*n/s*
Wilsons Auctions	2	10	5	Sometimes	Sometimes	Sometimes	Never	*n/a*	£0.5m

*Additional information supplied by CAPA for 'Minimum sales commission (%)': 1.5% of realisation for freeholds; 10% of premium for leaseholds. 'Maximum sales commission (%)': 5.0% of realisation for freeholds; 20% of premium for leaseholds. 'Average sales commission (%)': 2.5% of realisation for freeholds; 15% of premium for leaseholds. 'Approx value of real estate sold on behalf of IPs in 2022': As many assets are multi-site leaseholds and occasionally part of a larger corporate transaction.

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■ = Sells real estate ■ = Provides other services
■ = Both of the above

Buyers guide

Sales channels

Advertise on third party platforms

CAPA
Carter Jonas
Hilco Valuation Services
Paarl Property Consultants
Proudley Associates
SIA Group Asset Ingenuity
Vail Williams

Online auctions (own platform)

Clive Emson Land & Property Auctioneers
RPRS
Wilsons Auctions

Private treaty sales

Avison Young
Belleveue Mortlakes
CAPA
CBRE
Christie & Co
Colliers
Copping Joyce Surveyors
Fletcher Bond
Hilco Valuation Services
Paarl Property Consultants
PACT Property & Assets
RPRS
SIA Group Asset Ingenuity
Vail Williams

Tender sales

Hilco Valuation Services
SIA Group Asset Ingenuity
Vail Williams

Other real estate services

Fixed charge receivership

Alder King
Belleveue Mortlakes
Carter Jonas
Colliers
Copping Joyce Surveyors
Cushman & Wakefield
Fletcher Bond
Hilco Valuation Services
PACT Property & Assets
RAM RE Property Advisors
Sanderson Weatherall

Information memorandums

Hilco Valuation Services

Insurance

Aon
Hilco Valuation Services

Inventory analysis

Hilco Valuation Services
SIA Group Asset Ingenuity

Landlord negotiations/lease advisory

CAPA
Cedar Dean Commercial
Colliers
Copping Joyce Surveyors
Hilco Valuation Services

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Loan security valuations & loan book reviews
Colliers
Hilco Valuation Services
SIA Group Asset Ingenuity

Multi-asset disposal services
Hilco Valuation Services
PACT Property & Assets
Peter Fenwick & Co
SIA Group Asset Ingenuity
Thainstone Specialist Auctions
Wilsons Auctions

On-site security services
First Response Group
MEN-SEC Group
Moorcroft Property Group
Secure Empty Property
SIA Group Asset Ingenuity

Property audits
CAPA

Real estate development
Colliers
Copping Joyce Surveyors
Hilco Valuation Services
Peter Fenwick & Co

Real estate management
Colliers
Eddisons Commercial
RPRS
Walker Singleton

Retention of title management
Hilco Valuation Services
SIA Group Asset Ingenuity

SIP16 compliance reports
Hilco Valuation Services
Paarl Property Consultants
PACT Property & Assets
SIA Group Asset Ingenuity

Site clearances
Hilco Valuation Services
SIA Group Asset Ingenuity

Site inspections
Hilco Valuation Services
SIA Group Asset Ingenuity

Valuation and option reports on real estate for restructuring purposes
CAPA
Copping Joyce Surveyors
Hilco Valuation Services
MJ Group International
Paarl Property Consultants
PACT Property & Assets
Peter Fenwick & Co
Proudley Associates

Sector specialisms

Brownfield sites
Copping Joyce Surveyors
Hilco Valuation Services

Construction/property development
Colliers
Copping Joyce Surveyors
Fletcher Bond
Hilco Valuation Services
PACT Property & Assets
Secure Empty Property

Education
Hilco Valuation Services

Energy
Hilco Valuation Services
SIA Group Asset Ingenuity

Healthcare (including care homes)
Colliers
Copping Joyce Surveyors
Hilco Valuation Services
Peter Fenwick & Co

Heavy industrial sites
Copping Joyce Surveyors
Hilco Valuation Services
Proudley Associates
RPRS
SIA Group Asset Ingenuity

Leisure and entertainment operations
CAPA
Colliers
Copping Joyce Surveyors
Hilco Valuation Services
SIA Group Asset Ingenuity

Manufacturing sites
Colliers
Copping Joyce Surveyors
Hilco Valuation Services
Paarl Property Consultants
PACT Property & Assets

Offices
Belleveue Mortlakes
Colliers
Copping Joyce Surveyors
First Response Group
Hilco Valuation Services
SIA Group Asset Ingenuity

Residential
Colliers
Copping Joyce Surveyors
Hilco Valuation Services
MJ Group International
Paarl Property Consultants
Peter Fenwick & Co
RPRS
SIA Group Asset Ingenuity
Wilsons Auctions

Restaurants, bars, cafes
CAPA
Cedar Dean Commercial
Colliers
Copping Joyce Surveyors
First Response Group
Hilco Valuation Services
Peter Fenwick & Co

Retail
CAPA
Colliers
Copping Joyce Surveyors
First Response Group
Hilco Valuation Services
Peter Fenwick & Co
SIA Group Asset Ingenuity

Transport infrastructure
SIA Group Asset Ingenuity

Other assets sold/disposed of

Aircraft
Hilco Valuation Services
SIA Group Asset Ingenuity

Boats
Hilco Valuation Services
SIA Group Asset Ingenuity

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Business brands

Hilco Valuation Services

Intellectual property

Hilco Valuation Services
SIA Group Asset Ingenuity

Plant, equipment and machinery – agricultural

Hilco Valuation Services

Plant, equipment and machinery – manufacturing/industrial

Hilco Valuation Services
PACT Property & Assets
Lambert Smith Hampton
Sanderson Weatherall
SIA Group Asset Ingenuity
Thainstone Specialist Auctions

Railway rolling stock

Hilco Valuation Services

Road vehicles

Hilco Valuation Services

Stock and inventory

Hilco Valuation Services
Proudley Associates
RPRS
SIA Group Asset Ingenuity

Regional services (by R3 region)

Eastern (including Cambridge, Ely, Norwich, Peterborough)

Copping Joyce Surveyors
Hilco Valuation Services
SIA Group Asset Ingenuity

London & South East (including Brighton and Hove, Canterbury, Chichester)

Aon
Avison Young
Belleveue Mortlakes
CAPA
Carter Jonas
CBRE
Cedar Dean Commercial
Clive Emson Land & Property Auctioneers
Copping Joyce Surveyors
Cushman & Wakefield
First Response Group
Fraser Real Estate
Generator Real Estate Solutions
Gordon Brothers
Hilco Valuation Services
Knight Frank
Lambert Smith Hampton
MEN-SEC Group
MJ Group International
Peter Fenwick & Co
RPRS
Savills
Secure Empty Property
SIA Group Asset Ingenuity

Midlands (including Birmingham, Coventry, Derby, Leicester, Lichfield, Lincoln, Nottingham, St Albans, Stoke-on-Trent, Wolverhampton, Worcester)

CAPA
Copping Joyce Surveyors
First Response Group
Hilco Valuation Services
Paarl Property Consultants
Peter Fenwick & Co
RPRS
SIA Group Asset Ingenuity

North East (including Durham, Newcastle upon Tyne, Preston, Sunderland)

CAPA
Hilco Valuation Services
Peter Fenwick & Co
SIA Group Asset Ingenuity

North West (including Carlisle, Chester, Lancaster, Liverpool, Manchester, Salford)

CAPA
First Response Group
Fletcher Bond
Hilco Valuation Services
SIA Group Asset Ingenuity
Wilsons Auctions

Northern Ireland

Hilco Valuation Services

Scotland

CAPA
First Response Group
Hilco Valuation Services
SIA Group Asset Ingenuity
Thainstone Specialist Auctions

South West and Wales (including Bath, Bristol, Exeter, Gloucester, Hereford, Plymouth, Truro, Wells)

Alder King
Hilco Valuation Services
Paarl Property Consultants
PACT Property & Assets
Peter Fenwick & Co
RAM RE Property Advisors
SIA Group Asset Ingenuity

Southern & Thames Valley (including Oxford, Portsmouth, Salisbury, Southampton, Winchester)

CAPA
Hilco Valuation Services
Peter Fenwick & Co
Proudley Associates
SIA Group Asset Ingenuity

Yorkshire (including Bradford, Kingston upon Hull, Leeds, Ripon, Sheffield, Wakefield, York)

CAPA
Eddisons Commercial
First Response Group
Hilco Valuation Services
J9 Advisory
Moorcroft Property Group
Sanderson Weatherall
SIA Group Asset Ingenuity
Walker Singleton

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SURVEY:
Recruitment services

Survey sponsored by:
Levitate Recruitment

LEVITATE RECRUITMENT
ACHIEVING ASPIRATIONS

Helping the profession to fill skills gaps

There are only a small number of firms that truly specialise in recruiting insolvency and restructuring, *writes Rupert Darrington*. In this survey[1], we have profiled nine of the most important ones. Three are based in London (Ambition Europe, Gambit Search, and Stonebridge Executive Search), with the others located in various parts of England.

For some of these firms (for example, Gambit Search, Harvey Sutton and Levitate Recruitment), helping UK firms fill vacant insolvency and restructuring roles is almost the only thing they do. For others, such as the Australia-headquartered Ambition Europe, their work in this sector is only a small part of their business, but it is nevertheless very substantial in volume terms compared with their competitors.

We invited each firm to be transparent about their fees, their guarantee periods, and their track record in this sector, and most of the main players have supplied this information. For this, we at the Recovery publishing team would like to extend to them a huge thank you for their tremendous commitment to transparency with their clients, which will greatly help readers to make more informed, and more efficient, recruitment decisions.

With activity levels in the insolvency and restructuring sector continuing to increase, and with skills shortages apparent across the profession, recruitment is increasingly a priority for senior managers and leaders in the profession wishing to delivering the quality of service that the public needs and expects. The recruitment companies who specialise in serving the profession play a vital role, as intermediaries, in helping solve these skills gaps. We hope this survey will help readers to understand better the different offerings of these recruitment companies, and as a result position them to choose the best value company – or companies – to partner with in the future.

Top 3: Recruiters most focused on insolvency & restructuring roles for UK-based firms in 2022[2]

Company	% of turnover
Gambit Search	85%
Harvey Sutton	80%
Levitate Recruitment	80%

Top 3: Recruiters who have been placing candidates into UK-based insolvency & restructuring roles for longest[3]

Company	No of years
Harvey Sutton	30
Stonebridge Executive Search	*~30*
Ambition Europe	20

Top 3: Recruiters who placed the most candidates in 2022[4]

Company	No of candidates
Ambition Europe	54
Levitate Recruitment	41
Numero Recruitment	26

Top 5: Recruiters with lowest average fees[5]

Company	% of starting salary
GGT Insolvency Recruitment	15%
Burton Recruitment	20%
Gambit Search	20%
Levitate Recruitment	20%
Numero Recruitment	20%

1 This survey was compiled by the Recovery magazine publishing team from data supplied by the companies concerned, unless indicated otherwise. Please see the key at the bottom of each page of the survey data for further details.
2 Approximate percentage of all roles successfully filled by firm's group of companies in 2022 which were roles in insolvency and restructuring with UK-based accountancy and/or law firms.
3 Number of years have been placing candidates in insolvency and restructuring roles for UK-based accountancy and/or law firms.
4 Number of candidates successfully placed in an insolvency and/or restructuring position for a UK-based accountancy or law firm during 2022 who started work.
5 Approximate average (median) fee charged, as % of basic starting salary.

The views expressed in this article are not necessarily those of R3 or of the Recovery editorial board.

Rupert Darrington is managing editor of *Recovery*

RECOVERY

What do you think?

Do you have an opinion about any of the articles in this edition? Would you like to write an article yourself for a future edition of *RECOVERY* magazine?

If so, we would love to hear from you. Email or call the managing editor, Rupert Darrington, on 020 7841 5960 or rupert.darrington@klarents.com.

RECOVERY magazine – setting the agenda for the insolvency and restructuring profession

Recruitment consultancies – Who's who

Trading name of UK business	Contact tel for IPs	Contact name for IPs	Contact email for IPs	Website	Main address in UK	Top/parent company in group	Registered country of top/parent company	Registered company no of top/parent company
Ambition Europe	020 7430 7264	Chris Stark	insolvency@ambition.com.au	www.ambition.co.uk	25 Southampton Buildings, London WC2A 1AL	Ambition Group Ltd	Australia	ABN 31 089 183 362
Burton Recruitment	07368 395 359	Gemma Taylor	gemma.taylor@burtonrecruitment.com	www.burtonrecruitment.com	*3 Leigh Barn, Hennel Lane, Lostock Hall, Preston PR5 5UH*	Burton Recruitment Limited	UK	09423229
First 2 Recruit	*01722 440 168*	*Louise Shepherd*	*office@first2recruit.co.uk*	*www.first2recruit.co.uk*	*Unit 4 Hilltop Farm, Devizes Road, Salisbury, Wiltshire SP3 4UF*	*First 2 Recruit Ltd*	*UK*	*06339156*
Gambit Search	020 3633 2500	Adam Silver	hello@gambitsearch.co.uk	www.gambitsearch.co.uk	4 Crown Place, London EC2A 4BT	Gambit Search Limited	UK	13453660
GGT Insolvency Recruitment	0333 577 5705	Sheona Gee	sheona@insol-jobs.co.uk	www.insol-jobs.co.uk	Morweth Court, Torpoint, Cornwall PL11 3JP	Ultim8 Limited	UK	05939311
Harvey Sutton	020 7250 0000	Ben Jackson	bjackson@harveysutton.co.uk	www.harveysutton.co.uk	The Cobalt Building, 1600 Eureka Park, Lower Pemberton, Ashford, Kent TN25 4BF	Harvey Sutton Limited	UK	10276765
Levitate Recruitment	0161 850 1990 / 020 7183 0967	Scott Lowes	slowes@levitaterecruitment.com	www.levitaterecruitment.com	Suite 5, Albany House, 535 Liverpool Road, Irlam, Manchester M44 6ZS	Levitate Recruitment Limited	UK	08243975
Numero Recruitment	020 3011 1929	Kevin Elvin	kevin@numerorecruitment.com	www.numerorecruitment.com	50 Holly Walk, Leamington Spa CV32 4HY	Numero Recruitment Limited	UK	11641636
Stonebridge Executive Search	*020 3330 0103*	*Rob Worthington*	*rob@stonebridgerecruitment.com*	*www.stonebridgerecruitment.com*	*Birchin Court, 20 Birchin Lane, London EC3V 9DU*	*Stonebridge Partners Ltd*	*UK*	*11788554*

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Company profiles

Trading name of UK business	Regulated by	Services	How different to other providers	No of years placing candidates in insolvency and restructuring roles for UK-based accountancy and/or law firms	No of candidates successfully placed in an insolvency and/or restructuring position for a UK-based accountancy/ law firm during 2022 who started work	Approx what % of all the roles successfully filled by your group of companies in 2022 were for roles in insolvency and restructuring with UK-based accountancy and/or law firms?	Regularly provide staff on contract or temp basis? (Yes/No)
Ambition Europe	n/a	Ambition has a team of specialist recruiters hiring into the insolvency market across the UK and internationally. We recruit for insolvency practitioners and accountancy practices across all levels ranging from partner to trainee administrator.	Ambition has been recruiting into the insolvency industry for longer than any other recruitment agency. All of our team are industry experts that truly understand the market in detail. We also offer bespoke salary benchmarking services for clients.	20	54	14	Yes
Burton Recruitment	*n/s*	*n/s*	*n/s*	10	10	25	No
First 2 Recruit	*REC*	*We are recruitment specialists in accountancy practice, insolvency, restructuring and pensions across the UK. An owner managed consultancy, we offer the full recruitment cycle.*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*
Gambit Search	*n/s*	We connect senior insolvency and restructuring professionals through both formal and informal recruitment processes across the UK, as well as overseas in the Caribbean, Channel Islands, Middle East and Europe.	n/a	1	*n/s*	85	No
GGT Insolvency Recruitment	*n/s*	GGT is a specialist in recruiting insolvency professionals across England and Wales at all levels for insolvency and turnaround practices. We don't recruit for any other sector, so we are totally focused on insolvency, our candidates and our clients!	GGT was set up by a former insolvency practitioner who continues to oversee the business, so we understand insolvency, having spent a lifetime working in and for the profession. We really understand what makes a good insolvency professional!	14	*n/s*	*n/s*	No
Harvey Sutton	n/a	Having been recruiting in the insolvency sector for 30 years, we have an in-depth knowledge of the area enabling us to match our clients' requirements with the right calibre of candidates and, likewise, candidates to the right client.	n/a	30	13	80	No
Levitate Recruitment	n/a	We're specialists in recruiting insolvency and restructuring professionals, across the UK and overseas. By adopting a dedicated, consultative approach, we truly understand each candidate and client we work with. #insolvencyjobs	With over 10 years of experience as a dedicated specialist recruiter in insolvency and restructuring, Levitate Recruitment has an in-depth understanding of the sector, and the best advertised and 'hidden' roles across the UK and overseas.	10	41	80	Yes
Numero Recruitment	n/a	Career mapping – planning short, medium and long term career goals. Market overview. CV writing. Company targeting. Interview preparation. Offer management. Assistance with relocation both in the UK and overseas. Salary guide.	15-plus years' experience with a huge network across all firm types. Operate UK wide in every city and town. International roles: Caribbean (Cayman and BVI), Australasia and Channel Islands. Recruit all levels. Proven in ensuring a candidate's career comes first.	15	26	21	No

table continued overleaf

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Company profiles continued

Trading name of UK business	Regulated by	Services	How different to other providers	No of years placing candidates in insolvency and restructuring roles for UK-based accountancy and/or law firms	No of candidates successfully placed in an insolvency and/or restructuring position for a UK-based accountancy/law firm during 2022 who started work	Approx what % of all the roles successfully filled by your group of companies in 2022 were for roles in insolvency and restructuring with UK-based accountancy and/or law firms?	Regularly provide staff on contract or temp basis? (Yes/No)
Stonebridge Executive Search	*n/s*	*We identify the market's top talent in our specialist fields of restructuring and insolvency and indirect tax. With over 30 years of expertise, we thrive on exceeding candidates' and clients' expectations.*	*Our experience is unrivalled due to our 30 years' experience within the legal and accounting markets. Our unprecedented knowledge and network gives us the cutting edge to deliver a first class service to candidates and clients.*	*~30*	*n/s*	*n/s*	*n/s*

Fees and T&Cs

Trading name of UK business	Approx average (median) fee charged, as % of basic starting salary	Maximum fee charged, as % of basic starting salary	How typically get paid for placing candidates in permanent roles[1]	Guarantee period: At what point after candidate starts work will there be no refund/rebate/waiver of client fees if candidate quits their job[2]
Ambition Europe	21.5%	30%	Mostly on a 100% contingency basis, but also receive some upfront fees/retainers in respect of some roles	Candidate leaves >56 days after start date
Burton Recruitment	20%	20%	Mostly on a 100% contingency basis, but also receive some upfront fees/retainers in respect of some roles	*n/s*
First 2 Recruit	*n/s*	*n/s*	*n/s*	*n/s*
Gambit Search	20%	25%	Mostly on a 100% contingency basis, but also receive some upfront fees/retainers in respect of some roles	Candidate leaves >56 days after start date
GGT Insolvency Recruitment	15%	17.5%	100% of fees on contingency basis	Candidate leaves >84 days after start date
Harvey Sutton	22%	25%	Mostly on a 100% contingency basis, but also receive some upfront fees/retainers in respect of some roles	Candidate leaves >84 days after start date
Levitate Recruitment	20%	30%	Mostly on a 100% contingency basis, but also receive some upfront fees/retainers in respect of some roles	Candidate leaves >168 days after start date
Numero Recruitment	20%	25%	100% of fees on contingency basis	Candidate leaves >84 days after start date
Stonebridge Executive Search	*n/s*	*n/s*	*n/s*	*n/s*

1 In answer to the question 'How do you typically get paid?', recruitment companies were asked to choose one of the following five options:

- 100% of our fees on all placements are on a contingency basis (ie we only get paid after our candidate starts work with an employer)
- Mostly roles are paid on a 100% contingency basis, but we also receive some upfront fee retainer in respect of some roles
- Approximately half of our assignments are paid on a 100% contingency basis, and approximately half are with some upfront fee/retainer paid
- Most of our assignments are paid for at least in part on a retained or upfront fee basis
- 100% of our assignments include some fees paid by the client on a retained or upfront fee basis

2 In answer to the question on the guarantee period ('at what point after a candidate starts work will there be no refund/rebate/waiver of client fees if candidate quits their job?'), recruitment firms were asked to choose one of the following options:

- Candidate leaves 0-28 days after start date
- Candidate leaves >28 days after start date
- Candidate leaves >56 days after start date
- Candidate leaves >84 days after start date
- Candidate leaves >168 days after start date
- Candidate leaves >365 days after start date
- Candidate leaves >730 days after start date

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Buyers guide

Job type specialisms

Accountancy jobs

First 2 Recruit
GGT Insolvency Recruitment
Harvey Sutton
Levitate Recruitment

Turnaround and restructuring jobs

Ambition Europe
Burton Recruitment
Gambit Search
Levitate Recruitment
Numero Recruitment

Job seniority specialisms

Senior (i.e. partner, licensed insolvency practitioner, MD, CEO, or equivalent)

Gambit Search
GGT Insolvency Recruitment
Levitate Recruitment

Mid level

Burton Recruitment
First 2 Recruit
GGT Insolvency Recruitment
Harvey Sutton
Levitate Recruitment
Numero Recruitment

Junior/new qualified

GGT Insolvency Recruitment
Levitate Recruitment

Where based (by R3 region)

London & South East (including Brighton and Hove, Canterbury, Chichester)

Ambition Europe
Gambit Search
Harvey Sutton
Stonebridge Executive Search

Midlands (including Birmingham, Coventry, Derby, Leicester, Lichfield, Lincoln, Nottingham, St Albans, Stoke-on-Trent, Wolverhampton, Worcester)

Numero Recruitment

North West (including Carlisle, Chester, Lancaster, Liverpool, Manchester, Salford)

Burton Recruitment
Levitate Recruitment

South West and Wales (including Bath, Bristol, Exeter, Gloucester, Hereford, Plymouth, Truro, Wells)

GGT Insolvency Recruitment

Southern & Thames Valley (including Oxford, Portsmouth, Salisbury, Southampton, Winchester)

First 2 Recruit

Countries and overseas regions where specialise in placing candidates

Australia & New Zealand

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Advertisers' index

Ensuring the value of the profession is understood

Amelia Franklin summarises the big wins for the profession last year, and outlines R3's plans to ensure the views of its members are clearly heard in 2023

The festive period has been and gone since the last edition of the magazine, but work for R3's press, policy and public affairs (PPP) team did not slow down over Christmas, with ongoing engagement with the Government on economic crime; a presentation to the debt and personal finance all-party parliamentary group (APPG); and continuing to give the profession a voice on a range of key issues in the media.

Movement on economic crime

Welcome reforms to Companies House are edging closer to reality under the new economic crime and corporate transparency (ECCT) bill, which finished its committee stage in the House of Commons in November.

A number of our concerns with the bill were raised by MPs during the committee stage debates, with R3 mentioned by name on four occasions.

We were also pleased to see Seema Malhotra MP table an amendment to the bill based on our recommendations which would: "expand the categories of persons who can use the administrative route by allowing former creditors and former liquidators to apply to the registrar for a dissolved company to be restored to the register".

Whilst initially rejected, it was raised again in parliament in January. Meanwhile, the parliamentary under secretary of state agreed to consider the issue further to help IPs access information under more specific circumstances.

An invitation from the APPG

In October, we submitted our response to the Government's call for evidence on the personal insolvency framework and, in the following month, our CEO Caroline Sumner was invited to speak at the debt and personal finance APPG to discuss personal insolvency in more detail.

This meeting was an opportunity for stakeholders from across the profession, including the Insolvency Service, charities, and regulatory bodies to come together and discuss how the framework is working and how it could be improved.

> **"It is likely that we will see big changes to the way insolvency regulation operates, so we would like to thank all of you who took the time to share your thoughts to help inform our written responses"**

Several points were echoed by the speakers – particularly around cost of entry to certain processes, lack of freedom of movement between the processes, and concerns around volume IVA providers.

The Insolvency Service is now working through the feedback they received, and we expect to see a full consultation on the findings and subsequent recommendations on this area of policy later this year.

Reflecting on 2022

With another year over, as a team we sat down in January to take stock of our key wins and moments from 2022, and discuss how we can build on these moving forward.

Two key areas of insolvency were under review last year, with work on both the 'future of insolvency regulation' consultation and the personal insolvency framework review. It is likely that we will see big changes to the way insolvency regulation operates, so we would like to thank all of you who took the time to share your thoughts with us to help inform our written responses. We will keep you updated with any further developments as they arise.

We also published two new papers last year – one on insolvency practitioner fees and another on economic crime. Both papers were well received by you – our members – as well as parliamentarians, journalists and other stakeholders.

Our paper on economic crime outlined our proposals to improving the corporate governance framework and was published just in time for the start of the ECCT bill's parliamentary journey in September. The paper was used as an engagement point with MPs to emphasise the role IPs play in tackling fraud and explain our concerns with the current framework.

On the media side, interest in the profession and its work remained high, and we took every opportunity to speak on national and regional insolvency trends, as well as sector insolvency trends like hospitality, transport and construction.

We also earned seven broadcast appearances last year, including segments on BBC Radio 4's Money Box, Channel 4 News, BBC London, BBC Spotlight news and Greatest Hits South Wales.

Looking at the year ahead

Following a year of parliamentary mentions and engagement, media coverage and policy papers, the PPP team is geared up to hit the ground running in 2023.

Work on key legislative issues – such as regulatory reforms to the insolvency framework and economic crime – will continue, and we will be working hard to make sure the value of the profession is understood by MPs and the public, and that our voice is well represented during policy debates.

We are also getting closer to the next general election and a possible change of government, so we will be ramping up our engagement with politicians from all sides of the political spectrum. As part of this, we will be looking at new ways of engaging with policy makers to ensure the views of the profession are clearly listened to.

But, most importantly, we will continue to work closely with you all to ensure we remain fully aware of your views on the biggest issues and concerns you are facing, and ensure your voices are heard at every possibility, whether in parliament or in the media.

Amelia Franklin is communications officer at R3

Association of Business Recovery Professionals

R3

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