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From the editor

Fingers crossed that this month will see a further lifting of Covid-19 restrictions, subject to variants. However, if there is a lifting of restrictions, it is likely to be followed by a lifting on various provisions that have prevented landlords from enforcing their rights and creditors serving statutory demands and winding-up petitions.

The government will undoubtedly continue to financially support society and the economy. However, the number of insolvency processes and restructurings will inevitably increase through the second half of this year into next year and beyond. So what tools do we now have at our disposal as we move into this busier period and how has the pandemic affected the industry and stakeholders?

The Corporate Insolvency and Governance Act 2020 (CIGA) brought us the restructuring plan last summer. CIGA also brought us the moratorium process, but unlike the moratorium process, the restructuring plan is actually being used. David Mohyuddin QC and Andrew Brown look at the initial cases starting on page 6. Since that article was written, the court has approved the use of the restructuring plan in compromising landlords' claims in the *Virgin Active* case.

Where does this leave the CVA now following the re-introduction of Crown preference? Glen Flannery and Ben Bodmer look at the evolution of the CVA through the pandemic (pages 14–16) and Gordon Thomson and Damian Webb look at the current relevance of CVAs and landlords' challenges in the *New Look*, and *Regis* cases, which have in the main been rejected by the court (pages 22–23).

So that covers some of the tools, but what about the challenges post pandemic? Yvonne Joyce and Eileen Maclean review the findings of a survey into the challenges facing the insolvency profession on pages 18–21 and Darren White looks at the potential disruption that cloud computing may cause our industry, starting on page 26.

We also hear from Malcolm Weir of the PPF on the current issues facing pension trustees following the pandemic on pages 30–31.

Away from the effect of the pandemic and in anticipation of a greater number of insolvency processes, Tim Evans looks at three high-profile unsuccessful claims against administrators and the lessons that should be learned for insolvency practitioners on pages 28–29.

We have busy and challenging times ahead. Let us hope we have the tools to demonstrate our value to the business world and the economy.

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

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Change and continuity at the top

R3 president **Colin Haig** gives an update on the association's activities – and his plans for his second year in office.

Reports of my departure as president were greatly exaggerated… I'm staying on for another year – and so are the executive committee and the members of R3's council.

I'm grateful to all the members who approved the proposals for this at the AGM. It's an approach we proposed to provide some continuity for R3 as we emerge from the changes and challenges of 2020 and carry out a governance improvement to ensure we have the right processes and procedures in place to best serve you and the profession. We'll resume elections for council members and the deputy vice president role next year.

While council and exco remain the same, Liz Bingham is stepping down as CEO after overseeing the association through arguably the most tumultuous year in its history.

The efforts of Liz and the senior team during her time in post have meant R3 is now in the best possible shape to serve you in the coming years, which are likely to be significantly challenging ones.

To replace her, we undertook a rigorous and robust recruitment process. Throughout this, Caroline Sumner was the stand-out candidate and I'm delighted to tell you she was confirmed by the council as R3's new CEO on Friday 1 May.

As head of technical, training and education, Caroline has driven a number of R3's major initiatives over the last five years. This, coupled with her extensive experience in the technical and legislative aspects of R3's work, and indeed in the profession herself, means that the continuity we feel is so important at this time will continue with Caroline's appointment.

Caroline took over the role on 1 June – near the mid-point of a year that hasn't shown any signs of being calmer than the last one, and one in which R3 will build on the initiatives we launched last year, while continuing to give the profession a voice in Westminster, the media and the wider business community.

> **"The continuity we feel is so important at this time will continue with Caroline's appointment."**

> **"We've met with a range of national business bodies to help them understand the profession and explore areas of joint working."**

Supporting the future

One key project the team has been working on since the last issue of *RECOVERY* is our New Professionals' Forum, which took place in the third week of April.

Over four days, we ran a series of virtual sessions looking at a range of topics that included the potential abuse of the government's Covid support measures and a networking masterclass.

We had more than 170 people sign up for the event and, given its success, I and the team are keen to repeat it in the near future.

Annual Conference returns!

This year, the R3 Annual Conference was back, albeit virtually. And by going virtual, we were able to combine the traditional conference programme with sessions and presentations from the different nations and regions.

The programme was packed and it was great to have R3's flagship event back up and running – even if it was in a different format from what we're used to.

Let's hope we can build on the success of this event next year – and that we're able to hold the 2022 conference in person.

An inaugural event

As I was finishing this column, the programme was confirmed for our inaugural Scottish Forum – a virtual conference for members of the profession north of the border.

And it's an impressive one. We've got speakers from the Bank of England and HMRC, as well as a number of top firms from the profession and from industry.

They'll be discussing a range of key issues like the future of Scotland's economy post-Covid, the outlook for Scottish businesses, fraud, and the opportunities and challenges for the profession as the country emerges from the pandemic.

You can read more about the Scottish Forum on page 40.

Promoting the profession

Our Back to Business UK campaign continues. We've met with a range of national business bodies to help them understand the profession and explore areas of joint working.

We've given the profession a voice in parliament and the media as the Corporate Insolvency and Governance Act 2020 measures were extended and the new pre-pack regulations were debated and introduced.

And we've published our *Value of the Profession* report, which shows just how much of a contribution we make to businesses, individuals and the wider economy.

There's more on the horizon. As this magazine went to press, we were putting the finishing touches to our directors' advice website – an online resource that we've developed to educate those in charge of businesses about the profession and to promote you, our members, as a trusted source of professional business advice.

That will be one of the new projects we work on over the summer – as well as continuing with the current ones. I'm hugely grateful to the committee for their continued support, and to everyone who has taken the time to present at webinars or attend meetings with MPs, journalists and stakeholders – we couldn't do it without you. □

> **"We've given the profession a voice in parliament and the media as the Corporate Insolvency and Governance Act 2020 measures were extended and the new pre-pack regulations were debated and introduced."**

COLIN HAIG is the president of R3 and head of restructuring at Azets.

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One year of the profession's new power tool: restructuring plans

David Mohyuddin QC and **Andrew Brown** review the judgments made on restructuring plans to identify common themes in their usage.

For many, the past year has provided a sense of suspended animation as the various lockdowns have slowed change and opportunity. The same cannot be said for the field of corporate insolvency and restructuring, which has seen the genesis of the new 'restructuring tool' introduced in June last year by the Corporate Insolvency and Governance Act 2020 (CIGA). Billed as a sort of 'UK version' of US Chapter 11 corporate bankruptcy, the tool allows for a court-sanctioned restructuring within which a company might be able to 'cross-class cram down' dissenting classes of creditors and bind them to a compromise when it is facing financial difficulties, and propose an alternative that would provide a better result for creditors. This provides an alternative to the existing English schemes of arrangement, which do not allow such cram downs.

Initially billed as an opportunity for larger corporates to restructure their liabilities in the face of financial difficulties, it was not known how the tool would ultimately be used – and whether it would filter its way down to SMEs. The past year has seen a small but steady stream of plans and their associated judgments, which has provided some guidance for those seeking to use the tool in the future. Rather than a mere rehashing of how the tool might be used, this article attempts to review the themes that can be drawn from those matters that have been the subject of judgments.

Class composition

The headline change brought about by the new tool is the potential for a cram down. This focuses the mind on the issue of how a company proposing to use a plan organises its creditors into classes. CIGA does not give direct guidance on how classes might be composed and it was assumed that the approach to schemes of arrangement might be adopted. In schemes, the court determines whether the legal rights to be released or varied under the scheme or the new rights to be given under the scheme are so distinct that the scheme has to be treated as a compromise or arrangement with more than one class of creditor or member, as appropriate. If any such rights are so dissimilar as to make it impossible for the relevant creditors to consult together with a view to their common interest, then separate class meetings should be convened.

The first case relating to the tool and class composition was considered by Trower J in *Virgin Atlantic Airways Ltd* [2020] EWHC 2191 (Ch). In that case, four classes of creditors were proposed:

(i) lenders under a secured credit facility;
(ii) lessors of 24 aircraft;
(iii) connected parties who were creditors under agreements; and
(iv) certain unsecured trade creditors.

There were no contentious submissions

"The past year has seen a small but steady stream of plans and their associated judgments, which has provided some guidance for those seeking to use the tool in the future."

on this point and the judge applied the criteria to class composition regarding schemes of arrangement as set out above.

Sir Alistair Norris QC took the same approach to class composition in *Pizza Express Financing 2 Plc* [2020] EWHC 2873 (Ch), which split the interested parties into three classes: a plan member company holding all of the company's shares, holders of senior secured loan notes and holders of senior unsecured loan notes. The reasoning was straightforward as the plan member was merely a shareholder, and the unsecured note holders subordinated the secured note holders, so were fundamentally different in their legal rights.

In *Gategroup Guarantee Ltd* [2021] EWHC 304 (Ch), the court was unwilling to sanction the initially proposed class composition of having only one class for senior lenders and bondholders. It considered this inappropriate and required different class meetings. In this regard, Zacaroli J drew upon *Virgin* and its application of the rules from schemes of arrangement regarding whether the rights of the proposed groups are so dissimilar as to make it impossible for communal consultation.

What remains to be seen is the court's approach where the proposed class composition is controversial. Previously, schemes of arrangement have as few classes as possible in order to prevent a creditor or a class of creditors holding a veto – essentially to water down each creditor's vote within the group. When seeking to use a plan, the opposite might be true as it is more likely to be to the company's advantage to have more classes as the cram down provisions can apply if even one of these classes approve the plan. This potential manipulation is well known in US Chapter 11 bankruptcies (known as gerrymandering), and, in *Virgin*, Trower J was aware of the possibility but was ultimately satisfied with the class composition.

The foreign element

In keeping with the international flavour of today's world, CIGA allows the tool to be used on foreign companies as well as domestic. Under s901A(4) of the Companies Act 2006, a 'company' is defined as one that is liable to be wound up under the Insolvency Act 1986. That will obviously apply to companies incorporated in this jurisdiction, such as was the case in *Virgin*. However, it will also apply to overseas companies, where the court will adopt the same approach used in schemes, namely whether the company has a sufficient connection to the jurisdiction, such as assets or trade here (*Re Noble* [2018] EWHC 2911).

This potential application to foreign companies was first put to the test by Trower J, making his second appearance in this article, in *Smile Telecoms Holdings Ltd* [2021] EWHC 685 (Ch), which concerned a Mauritian incorporated holding company of an African telecoms business. At the sanctioning hearing, the judge was satisfied of a sufficient connection as the company's liabilities to plan creditors were nearly all governed by English law with English jurisdiction clauses, and the company had shifted its COMI to England in June 2020 by moving its administrative offices to London, registering with Companies House as a foreign establishment and maintaining an English bank account. The final sanctioning of the plan was adjourned at the last reported hearing in March to consider other elements of the plan, but the issue of jurisdiction was resolved positively.

A related issue arose in *Gategroup*, wherein Zacaroli J had to consider the applicability of the Lugano Convention (Lugano) to plans, which would have potential significant impact on future cross-border insolvency work. Lugano allows cross-border enforcement of judgments between member countries, which otherwise would need to be dealt with by various domestic regulations depending on the particular state. Post-Brexit, the UK has not yet joined the Lugano Convention. While recent indications from the European Commission have poured some cold water on expectations, the hope is still that the UK will be able to join in the future. However, Lugano and the Hague Convention specifically carve out insolvency proceedings as being outside their ambit, so the decision in *Gategroup* would have an impact on potential future applicability of cross-border restructuring plans. Previously, schemes of arrangement have been held *not* to be insolvency proceedings, so would be enforceable under Lugano (*Re Magyar Telecom BV* [2014] BCC 448). Following an analysis of the law, Zacaroli J ultimately held that plans were 'insolvency' proceedings primarily because the threshold condition for using the tool was that the company was in financial difficulties, which distinguished it from schemes. Further, a plan is a collective action overseen and sanctioned by the court, which is a reflection of insolvency proceedings.

> **"CIGA does not give direct guidance on how classes might be composed and it was assumed that the approach to schemes of arrangement might be adopted."**

In *Gategroup*, the disapplication of Lugano was ultimately beneficial to the company as it meant the English court had jurisdiction to consider the underlying issue of Swiss jurisdiction bonds, but this might cut against future cross-border plans. Companies considering issues of enforcement across borders will have to think carefully about the potential applicability of any judgment sanctioning a plan in the UK to the individual foreign jurisdiction, and if the UK does join Lugano then a scheme of arrangement might be more attractive as it could be enforceable under the convention rather than having to consider individual nation recognition.

Court's discretion over dissent

Despite the cram down being the element of the tool that received the greatest press at the time of its inception, there has been limited use of this aspect. In fact, only one judgment, another from Trower J (making a third appearance) in *DeepOcean 1 UK Ltd* [2021] EWHC 138 (Ch), has had to consider the approach of the court when deciding whether to exercise its discretion in approving a cram down. In this case, three subsidiary companies in the DeepOcean group sought to use the tool to restructure their debts in a solvent wind-down, which would ostensibly give each creditor a better return than they otherwise would have received in an insolvency. Two of the three companies achieved the 75% approval from each class of creditors as required by s901F Companies Act 2006, but one of the companies had only a 64.6% approval from the non-secured creditor class, which meant the court had to consider whether it would exercise its discretion if the dissenting creditors would not be worse off than in the relevant alternative. The judge ultimately approved the plan, and relied upon the following: a company will have a 'fair wind' behind it where it has satisfied the court that no members of a dissenting class would be worse off than in the alternative and the plan had been approved by a class who would receive payment; the preponderance of approval by other creditors of the three companies was influential; a 'horizontal analysis' (such as those used in CVA challenges) indicated that while the treatment of secured and unsecured creditors was different, it was justified due to the nature of the debts; and, finally, the court had no issues with the mechanism of how the plan would operate.

> "The picture becomes blurry where there might be a multiplicity of unsecured or secured creditors in different classes with different levels of approval, and the court might have to balance interests from similar but distinct classes of creditors."

While *DeepOcean* certainly provides some guidance moving forward, it is somewhat exceptional on its facts, which sit outside the intended use of the tool for corporate rescue. The companies in question were never intending rescue as going concerns, so the court did not have to consider the structure of reorganisation (and what some creditors might lose) against the successful survival of the companies. Likewise, the use of the 'horizontal comparison' was easily done as there were simply two classes of creditors to consider: secured and unsecured. The picture becomes blurry where there might be a multiplicity of unsecured or secured creditors in different classes with different levels of approval, and the court might have to balance interests from similar but distinct classes of creditors.

SMEs – the next wave?

So far, the cases involving uses of the tool have been relatively limited in number, and largely concerned with large companies (often involving international elements). It remains to be seen whether there will be any attraction to SMEs in using the tool, and the next edition of *RECOVERY* will consider this very question. However, in the view of these authors, the tool provides a useful and accessible way of restructuring companies that are in financial difficulty. The statutory provisions are no less applicable to SMEs than they are to large corporates.

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Legal Q&A

Pippa Hill and **Natalie Peacock** answer your insolvency queries.

Q I am advising a company with a substantial retail leasehold portfolio. I am advising on a rationalisation of the leasehold portfolio in which some landlords will see their premises closed, and others will be asked to accept a reduced rent. Is the new restructuring plan a better alternative to the well-trodden path of the CVA?

A When the government reduces the support currently afforded to companies (whether that is on 1 July 2021 or further extended), many companies will face significant pressure as tenants strive to pay rent/service charge-related arrears that have accumulated during the Covid-19 pandemic. For many of those companies, seeking a statutory compromise with their creditors through a CVA is an avenue they will currently be exploring. But with the restructuring plan under the new s26A of the Companies Act 2006 being used more frequently, practitioners are blessed with an additional option in the toolkit.

As a court-sanctioned and relatively new process, the restructuring plan is undeniably expensive. It does however have some key advantages. Obvious among these is the ability to include both secured and unsecured liabilities in the plan, which can be beneficial both in terms of the overall scope of the restructuring carried out and also the inclusion of secured creditors in the voting. Additionally, as well as the ability to split creditors into classes, there is the possibility of using the 'cross-class cram down' (where one assenting creditor class that is genuinely affected and approves the plan can cram down dissenting classes where such creditors can demonstrably be shown to be 'no worse off' under the plan than in the relevant alternative). Both of these features were demonstrated in the recently sanctioned Virgin Active restructuring plan (*Virgin Active Holdings Ltd & Ors, Re* [2021] EWHC 1246 (Ch)), in which the court sanctioned a plan cramming down dissenting landlords in the Virgin Active real estate portfolio.

One further advantage when compared to a CVA is certainty. While a number of CVAs have been challenged by disgruntled landlords after coming into effect in recent years, the restructuring plan has the benefit of having obtained court sanction at the point in comes into effect.

That said, fears of landlord challenges to CVAs were somewhat assuaged in May by the New Look judgment (*Lazari Properties 2 Limited & Ors* v. *New Look Retailers Limited & Ors* [2021] EWHC 1209 (Ch)), in which the landlords' challenges to the CVA on grounds of jurisdiction, unfair prejudice and material irregularity were comprehensively rejected.

While it should be noted that the landlords in New Look have been granted leave to appeal (and indeed that, on limited grounds, the Regis CVA challenge did indeed succeed shortly afterwards – *Carraway Guildford (Nominee A Limited) & Ors* v. *Regis UK Limited & Ors* [2021] EWHC 1294 (Ch)), it is clear that CVAs remain very much a viable option for restructuring companies and groups with substantial lease portfolios. As to which will be the best option for your client, that will come down to a number of factors including the creditor make up and any likely holdouts, timing and cost implications.

Q I've heard that witness statements have become more complex and costly to prepare due to recent legal reforms – can you shed any light?

A The reform that you are referring to is practice direction 57AC on trial witness statements in the Business & Property Courts (in which the Insolvency & Companies Court sits) that recently came into force on 6 April 2021. Let's consider first what changes the new practice direction has made to the preparation of witness statements, and then how this might affect insolvency proceedings.

Practice direction 57AC has been introduced with the laudable aim of reducing the ability of parties to argue their case through witness statements. It requires witness statements to contain only matters of fact, of which the witness has personal knowledge and that are relevant to the issues that need to be proved at trial. To achieve this aim, it requires a list to be prepared of any documents that the witness has referred to (or indeed been referred to) in preparing the statement. It also requires confirmation of compliance (in addition to the statement of truth) from the witness themselves, and a certificate of compliance to be provided by their legal representative. The criticism around the new practice direction has focused on the complexity – and therefore the potentially substantial cost – of providing a full list of documents.

“Practice direction 57AC has been introduced with the laudable aim of reducing the ability of parties to argue their case through witness statements.”

The starting point for insolvency proceedings (with the exception referred to below) is that, unless the court at any stage directs otherwise, the new practice direction does not apply to applications made under the Insolvency Act 1986, the Insolvency (England and Wales) Rules 2016 or special insolvency/administration regimes, under schedule 2 of the Cross-Border Insolvency Regulations 2006 or under s26A of the Companies Act 2006 (restructuring plans). This is a fairly comprehensive list covering the majority of matters with which insolvency lawyers and IPs will deal. The exception to that rule is that it does automatically apply to just and equitable winding-up petitions under section 122(g) of the Insolvency Act. Perhaps a bigger exception though, and the devil in the detail, is the proviso that it doesn't apply in the cases set out above 'unless the court at any stage directs that it is to apply'. We have already heard anecdotally of successful applications being made in insolvency cases for the practice direction to apply. Practitioners need to be familiar with the practice direction's contents, therefore, so as to understand the impact if the other side seeks to persuade the judge to apply it. □

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Recent case summaries

The latest insolvency update from **Emily Saunderson** and **Nicola Allsop**.

CORPORATE INSOLVENCY

Mitchell v. *Al Jaber*

In *Mitchell* v. *Al Jaber* [2021] EWHC 912 (Ch), Joanna Smith J decided examinations under s236 of the Insolvency Act 1986 (IA) do not attract the protection of witness immunity from suit. Permission to appeal has been granted, so this will not be the final word.

Facts

The decision was made in the context of a mid-trial application by the liquidators of a company (the company) to amend their claims against a company director.

The amendment application was triggered by changes that the director said he wanted to make to his evidence, just before he was called as a witness.

In pleading the claim, the liquidators had relied on information provided by the director under s236 IA including two witness statements, and information given in the course of two sworn testimonies before Insolvency and Companies Court judges.

The liquidators' proposed amendments included allegations that the director had knowingly provided false information in the course of his s236 IA examinations

The director objected to the amendments because, among other matters, he claimed that s236 IA investigations were protected by the witness immunity rule further to which, as a matter of public policy, all those taking part in proceedings are given civil immunity for their participation: see *Hall* v. *Simons* [2002] 1 AC 615 at 740.

Decision

Joanna Smith J decided that immunity from suit did not apply because s236 examinations do not constitute judicial proceedings in which witnesses give evidence; they are an investigative process to help the liquidator fulfil his or her statutory functions.

In finding that s236 is not analogous to judicial proceedings, the judge noted, among other matters, that there is no dispute between adverse parties; the court may refuse to allow an examination if it would be oppressive; questioning takes place in private; and there is no privilege against self-incrimination. The examinee is simply providing information which may be used against him or her as evidence further to s433 IA.

The judge said there may be cases where a s236 IA examinee could have extended witness immunity, which applies to acts preparatory to giving evidence in court, where, for example a s236 IA investigation was undertaken with a view to an action that was already under consideration, but that was not this case.

The decision will give comfort to IPs, but the fact that permission to appeal has been granted suggests this is not the straightforward point that many may have thought.

“The director objected to the amendments because, among other matters, he claimed that s236 IA investigations were protected by the witness immunity rule.”

Lazari Properties 2 Limited & Ors v. *New Look Retailers Limited & Ors [2021]* **EWHC 1209 (Ch)**

Zacaroli J rejected challenges by certain landlord creditors to a CVA approved in respect of the clothing retailer, New Look.

Facts

Like many retail businesses, New Look suffered enormously as a result of the Covid-19 pandemic. In order to avoid administration, it proposed a restructuring comprising: (1) the re-negotiation, by agreement with relevant creditors, of finance facilities; (2) a scheme of arrangement with holders of senior secured notes; and (3) a company voluntary arrangement.

The CVA divided creditors into numerous different classes, including various classes of landlords whose rights were varied, in particular by reducing the rent payable under leases to a turnover rent.

The CVA was approved by a majority of 81.6% by value of those attending and voting.

Landlords, whose rights were compromised under the CVA, challenged it on a number of grounds, summarised under the headings of (1) jurisdictional, (2) material irregularity and (3) unfair prejudice.

Decision

The challenges were unsuccessful, with the court finding (among other things):

- That a CVA that provided for different treatment of different sub-groups of creditors was not for that reason outside s1(1) of the IA or necessarily unfairly prejudicial.
- The fact that a statutory majority for a CVA was achieved by the votes of unimpaired or differently treated creditors would be an important consideration in determining whether unfair prejudice existed, but a CVA approved in such circumstances was not necessarily unfairly prejudicial.
- There was considerable force in the contention that a permanent or long-term reduction in rent imposed on landlords without the option to terminate would be inherently unfairly prejudicial, certainly if achieved by the votes of other, unaffected creditors. However, that situation did not apply to the New Look CVA.
- The long-term lease modifications were not unfair, given the landlords' right to terminate, and the fact that compromised landlords would receive more under the CVA than they would have done in the event of an administration, meaning the vertical comparator was satisfied.
- There was no material irregularity by reason of the 25% discount applied to the claims of landlords for voting purposes. Nor was there any material irregularity in the valuation of dilapidations claims and break premiums. There had been no material non-disclosure in the CVA proposal.

The outcome in this case demonstrates the difficulties faced by landlord creditors wishing to challenge a CVA and is reminiscent of the largely unsuccessful challenge brought by landlords against Debenhams' CVA.

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Pandemic-era CVAs and beyond

Glen Flannery and **Ben Bodmer** reflect on recent trends in the restructuring of commercial lease obligations and ask what lies ahead as businesses emerge from lockdown.

Readers of *RECOVERY* will be familiar with the company voluntary arrangement (CVA) and how it has been used extensively by struggling tenants to restructure their lease obligations. The cases date back to 2009, when retailers such as JJB Sports and Blacks Leisure pioneered use of the CVA to force compromises on landlords across their large portfolios.

Dozens of other retailers followed suit, as did multiple casual dining chains and hoteliers. In the three years prior to the global pandemic, a long line of household names used a CVA, including Toys R Us, House of Fraser, Mothercare, Carpetright, Arcadia, Debenhams, Jamie's Italian and Byron Burger.

During the pandemic, we have seen a new wave of CVAs, from retailers such as New Look, Clarks and Dune, casual dining businesses such as The Restaurant Group, Wasabi, Pizza Express, Wahaca, Caffè Nero and Leon, and hoteliers such as Travelodge.

This article explains how these pandemic-era CVAs have evolved from those seen before the pandemic and briefly considers what lies ahead as we emerge from lockdown. To put things in context, it begins with a recap of the pre-pandemic position.

Pre-pandemic CVAs

The power of a CVA is its ability to impose a compromise on unsecured creditors who will not compromise consensually. If a CVA proposal is approved by at least 75% by value of all voting unsecured creditors (and not objected to by more than 50% of the unassociated, unsecured creditors whose claims are admitted for voting), the terms proposed will bind all unsecured creditors, irrespective of whether or how they voted.

For leasehold restructurings, the typical approach has been to group leases into different categories of compromise to achieve the CVA company's commercial objectives. Broadly, leases have been categorised along the following lines.

(i) Viable leases: the terms of these leases remain the same, although sometimes the timing of payment dates is moved from quarterly to monthly.

(ii) Leases capable of viability, if varied: these leases are varied to ensure the viability of the leased premises, often by reducing future contractual rent by a fixed percentage for a rent concession period.

Typically landlords in this latter category are offered a new right to terminate the lease by notice within a defined period of the CVA being approved and (in some cases) at other milestones during the life of the CVA. Where the break right is exercised, the landlord is entitled to a share of a compensation fund designed to give it a better return than it would receive in the alternative considered most likely to occur if the CVA is not approved, for example a winding up or administration.

Giving landlords the option to terminate the lease early counters any argument that the landlord is being compelled to accept an unfairly prejudicial long-term rent reduction. This is an important mitigant against the prospects of a successful challenge on the grounds of unfair prejudice. In practical terms, the CVA company must propose modified terms that commercially are fair enough to ensure that enough landlords opt to continue their leases for the company to have a viable business after the CVA has been approved.

(iii) Leases unlikely to be viable or not of strategic

importance, even on varied terms (exit sites): these lease obligations are compromised in full and landlords are invited to 'take back' their property via a surrender, forfeiture or assignment of the lease.

Again, the landlord is typically offered a share of a compensation fund designed to give it more than it would receive in the alternative considered most likely to occur if the CVA is not approved, for example a winding up or administration.

The landlord is not forced to accept a surrender of the lease because that would interfere with the landlord's proprietary rights, which cannot be compromised by a CVA or scheme (*Re Instant Cash Loans Ltd* [2019] EWHC 2795 (Ch)).

Grounds for challenge

In the 28 days after the reporting to court of the outcome of the voting on the CVA, a CVA can be challenged on grounds of material irregularity and/or unfair prejudice.

There is no universal test for judging unfairness – case law has established that it is necessary to consider all the circumstances, including the alternatives available and the practical consequences of a decision to confirm or reject the arrangement (*In re A Debtor* (No 101 of 199) [2001] 1 BCLC 54; *SISU Capital Fund Ltd and others* v. *Tucker and others* [2005] EWHC 2170).

To help with the assessment of fairness, the courts have developed vertical and horizontal comparator tests (*Prudential Assurance Co Ltd* v. *PRG Powerhouse Ltd* [2007] EWHC 1002; *Mourant & Co Trustees Ltd* v. *Sixty UK Ltd (in administration)* [2010] EWHC 1890).

The vertical comparison compares the position that the creditor has under the CVA with its position in the most likely alternative, for example a winding up or administration. Offering compromised landlords a better outcome than in the most likely alternative is key to passing the vertical comparator fairness test.

The horizontal comparison compares the position that the creditor has under the CVA with the position of other creditors or classes of creditors. The fact that a CVA treats certain creditors differently will not necessarily result in a finding of unfair prejudice. Differential treatment may be required to secure the continuation of the company's business, which underpins the company's ability to perform the CVA (*Inland Revenue Commissioners* v. *Wimbledon Football Club Ltd* [2004] EWCA Civ 655; *SISU Capital Fund Ltd and others* v. *Tucker and others* [2005] EWHC 2170).

Wider restructuring

Frequently, the CVA is part of a wider restructuring in which secured creditors and shareholders agree new debt and equity arrangements, conditional on approval of the CVA and it withstanding any challenge in the 28-day challenge period.

Voting dynamics

All unsecured creditors can vote on a CVA proposal, even if their rights are not being compromised under the CVA. This enables the votes of landlords whose rights are not being compromised (or whose rights are being compromised, but on commercially acceptable terms) and the votes of other creditors such as suppliers and pension schemes to outweigh the votes of landlords whose rights are being heavily compromised and who may object to the CVA.

In practice, approval rates for this type of CVA have been very high, often in percentages much greater than the requisite 75% by value threshold. Often the votes in favour of the CVA are not constituted purely by non-landlord creditors – it is not uncommon to see landlords in the first category above vote in favour in very high percentages and for a proportion of landlords in the second category above vote in favour, albeit in lower percentages.

> **"Giving landlords the option to terminate the lease early counters any argument that the landlord is being compelled to accept an unfairly prejudicial long-term rent reduction."**

Pandemic-era trends

Since the pandemic, the typical approach to lease categorisation has remained consistent with that seen before, but with some progression in the terms applied to each category owing to the pandemic.

The five main trends that we have seen in pandemic-era CVAs are: (i) write-offs of rent arrears; (ii) a marked shift towards turnover rents; (iii) more severe future rent reductions; (iv) pre-baked rent holidays/waivers for future lockdown periods; and (v) more unviable sites being exited entirely.

Write-offs of rent arrears

During lockdowns, many businesses have been required to close their doors for extended periods of time. This has significantly impacted income generation at affected premises and tenants' ability to pay rent. The net result is substantial arrears of unpaid rent and service charge. Some estimate the quantum of accumulated arrears across the property industry to exceed £4.5bn already.

Many of the pandemic-era CVAs have incorporated substantial write-downs of arrears of rent and service charge, in an effort to 'wipe the slate clean' and allow future income to service future obligations. Often this was not necessary in pre-pandemic CVAs because rent had to be paid on an ongoing basis before the CVAs were proposed, to avoid landlords taking enforcement action. During the pandemic, tenants have been shielded from landlord enforcement action by temporary government measures such as the moratorium on forfeiture for non-payment of rent and the restrictions on winding-up action.

Turnover rents

We have also seen a marked shift away from fixed contractual rents to rent payable by reference to turnover generated at the leased premises. Sometimes this has been underpinned by a low minimum guaranteed rent fixed at a percentage of the contractual rent.

This has been justified on the basis that future lockdown measures may be imposed with little certainty as to when and for how long. If the rent were to be reduced by a fixed percentage only, this may not be sufficient to ensure the viability of the relevant premises in the face of future trading restrictions.

In most cases, as with pre-pandemic CVAs, the change in rental terms has been for a rent concession period of between two and three years.

We have seen different examples of how rent is to be treated at the end of the concession period. In some cases, such as in the case of Clarks and Leon, the CVA has provided for a return to the contractual rent. In other cases, such as Wasabi, the CVA has provided for rent to revert to the higher of the market rent or a percentage of the contractual rent.

More severe future rent reductions

Where rent has been compromised as a percentage of contractual rent rather than converted to a turnover rent, the percentage discounts have been higher than those seen in pre-pandemic CVAs.

This reflects the tough trading conditions faced by the CVA companies and the level of discount required to achieve viable trading while difficult trading conditions persist.

Rent holidays/waivers

Several pandemic-era CVAs have also included express terms designed to assist the tenant company in the event of mandatory closure of their premises during the concession period. This is particularly helpful for leases not converted to turnover terms.

For example, Leon's CVA provides that, if the company is required to shut its doors, during the period of closure Leon is only obliged to pay 25% of the compromised rent.

Some CVAs, such as Wasabi's CVA, have gone further and fully waived the requirement for rent to be paid during any period of closure imposed by a government lockdown – whether national or local.

More exit sites

We have also seen a slight increase in the number of sites categorised as exit sites. For retail businesses, this is partly linked to the pre-pandemic growth in online sales compared to sales through physical stores, which

CLARKS' CVA – KEY FEATURES

Lease categories	Ten categories • Leases not compromised (85) • Leases partially compromised (177) • Leases fully compromised/exit sites (81)
Arrears of rent (UK leases only)	• Leases not compromised – arrears of rent paid in full (although for a subset of the leases not subject to a future rent compromise, the arrears were fully written off). • Leases partially compromised – arrears of rent fully written off. • Leases fully compromised/exit sites – arrears of rent fully written off (as well as full write-off of future rent).
Future rent compromises during concession period of three years	• For the leases partially compromised, a move to turnover rent of between 4% and 12% of turnover (dependent on categorisation), subject to a minimum base rent in the second and third years of the rent concession period of 85% of the previous year's compromised rent.
Post-concession period	Reversion to pre-CVA contractual terms.

WASABI'S CVA – KEY FEATURES

Lease categories	Four categories • Leases not compromised (16) • Leases partially compromised (28) • Leases fully compromised/exit sites (12)	
Arrears of rent	• Leases not compromised – arrears of rent paid in full. • Leases partially compromised – 90% of arrears of rent written off. • Exit sites – 90% of arrears of rent written off.	
Future rent compromises during concession period of two years	Category B – for each site, the higher of: • Category B Lease MGR (initially 30% of contractual rent and rising to 45%); and • Category B Lease CVA Turnover Rent (which is a % of net sales, where the % is based on the % of FY19 contractual rent to FY19 net sales).	Category C – for each site, the higher of: • Category C Lease MGR (initially 20% of contractual rent and rising to 40%); and • Category C Lease CVA Turnover Rent (9% of net sales).
Post-concession period	Category B - Contractual rent multiplied by the total turnover in the last 12 months of the CVA divided by total FY19 turnover.	Category C - The greater of (i) the amended contractual rent in the 12 months before the end of the rent concession period and (ii) 50% of the contractual rent.

has been accelerated by the pandemic.

For retail, hospitality and leisure businesses, this is probably also attributable to current and anticipated changes in consumer behaviours due to the pandemic – for example less demand in crowded cities and increased demand in suburban locations.

The break-out boxes summarise the specific features of two typical pandemic-era CVAs – Clarks' and Wasabi's CVAs.

How have landlords reacted?

Although approval rates for pandemic-era CVAs have remained high, the landlord community continues to voice concerns about how far the envelope is being pushed.

This can be seen in the British Property Federation's new year statement, which called for the following reforms:

(i) independent scrutiny of large CVAs;
(ii) outlawing the ability of a CVA to make permanent changes to contracts;
(iii) an extension to the notice period given to creditors, from 14 to 28 days, to allow for greater scrutiny of the CVA proposals;
(iv) amendments to the voting rules so that greater weight is given to those creditors directly impacted by the CVA; and
(v) clarification on how rent is factored into voting on CVA proposals, to prevent manipulation of the creditor vote against landlords.

Challenges to CVAs

Landlords have also challenged some recent CVAs, on grounds of unfair prejudice and material irregularity.

On 10 May 2021, the High Court issued its judgement in the challenge to New Look's pandemic-era CVA ([2021] EWHC 1209 (Ch)). The details of this case are outside the scope of this article; suffice to mention that the court rejected all of the grounds of appeal.

On 17 May 2021, the High Court issued its judgement in the challenge to Regis' CVA, a pre-pandemic CVA dating back to October 2018 ([2021] EWHC 1294 (Ch)). The court revoked the CVA on the basis that it unfairly favoured the company's sole shareholder. The court also found that a blanket 75% discount applied to landlords' claims for voting purposes was not justified, but it rejected all of the other grounds of challenge advanced by the landlords.

Both cases highlight the importance of giving landlords termination rights, to counter unfair prejudice arguments. There is also a live challenge to Caffè Nero's CVA, which has yet to be heard.

Restructuring plans as an alternative to a CVA?

We have also started to see some corporates begin to use the new restructuring plan procedure, introduced last year as a new part 26A to the Companies Act 2006, to compromise their lease liabilities on terms similar in substance to the CVAs described above.

Virgin Active was the first out of the blocks, with NCP Car Parks hot on its heels. Despite strong objections from landlords, Virgin Active's plan was sanctioned by the High Court on 12 May 2021 ([2021] EWHC 1246 (Ch)). Although multiple classes of landlord creditors had not approved the plan when voting, the court exercised its discretion to impose a so called 'cross-class cram down' on them. We await the outcome for NCP Car Parks.

Given the continuing pressures on businesses laden with long term lease obligations and the court's recent endorsements of CVAs and restructuring plans, we expect to see more of both over coming years. □

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Facing the future: a survey on policy issues, Covid-19 and working life

Yvonne Joyce and **Eileen Maclean** review the findings of research into the challenges facing the insolvency profession in the policy arena and in practice.

The insolvency profession faces almost constant regulatory and statutory change. Present times appear no different, with the return of HMRC to preferential status, potential for a single regulator, and new pre-pack regulations. Coupled with a global pandemic, Brexit and the ensuing increased demand for professional services and heightened media attention, the insolvency profession is working in eventful times. Against this backdrop, researchers at the University of Glasgow and Insolvency Support Services conducted a two-part survey among a representative sample of the insolvency profession in December 2020 (67 respondents) and April 2021 (80 respondents). In this article, Yvonne Joyce and Eileen Maclean summarise and reflect on the key findings.

In our first survey, we looked at current policy issues and challenges.

Corporate insolvencies

According to respondents, the top two triggers for a predicted rise in corporate insolvencies are the phasing out of the furlough scheme and the continuation of Covid-19 restrictions, with 94% and 86% respectively selecting these factors as likely or very likely (figure 1).

Around four in five respondents believe a repayment demand for deferred VAT is likely or very likely to act as a trigger for a rise in corporate insolvencies. It is therefore welcome news that the UK government has introduced a payment scheme for VAT registered traders. All the options set out are seen as more likely than not to increase insolvency numbers, and this includes business leaders' exhaustion. Some respondents comment that the removal of the current, temporary restrictions on the use of statutory demands and winding-up petitions may also trigger a rise in cases.

The two sectors most severely affected by the Covid-19 pandemic so far are hospitality and leisure, and retail, with 90% and 64% of respondents respectively identifying these sectors. Overall, 24 different sectors are identified by respondents, highlighting the wide-reaching consequences of Covid-19 restrictions in the UK.

FIGURE 1 How likely are the following factors to trigger directors to seek assistance and/or creditors to take action?

% respondents

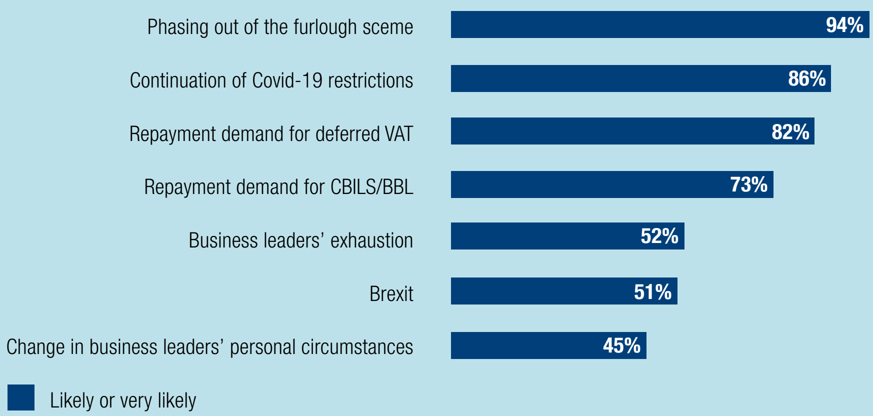
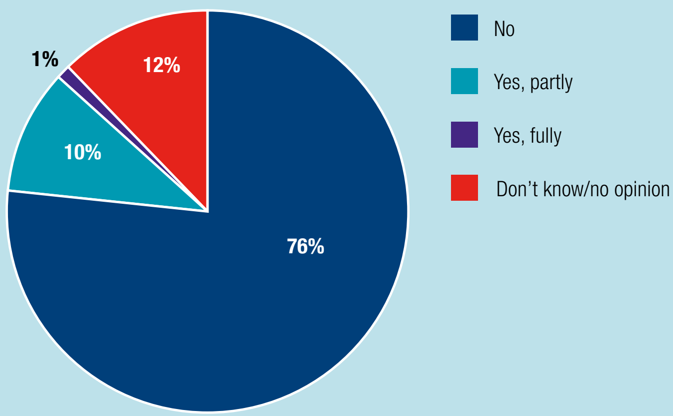


FIGURE 2 Is HMRC adequately prepared for the increased level of engagement with IPs that the return to preferential status will bring?

% respondents (%s do not add to 100% due to rounding)



HMRC's preferential status and rescue

HMRC returned to preferential status in December 2020. Worthy of note is that only 1% of respondents believe HMRC is fully prepared for the increased level of engagement with the insolvency profession expected from being a preferential creditor (figure 2).

Although there is a general consensus that the UK government's continued support measures have helped prevent or stall a significant uplift in insolvency cases, our results suggest major concerns going forward. A majority of 64% of respondents believe that prospects for rescue within formal insolvency will decrease because of HMRC's return to preferential status and that the return to preferential status will

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lead to a reduction in lending facilities and increased use of personal guarantees and fixed charges.

Insolvency regimes play an important role in supporting capital markets, lowering the cost of debt and encouraging enterprise and productivity. Our results may reflect longer-term concerns over the ability of the UK insolvency regime to facilitate the rescue of viable entities and on productivity levels and enterprise more broadly.

FIGURE 3 Do you support the introduction of a single regulator?

% respondents (%s do not add to 100% due to rounding)

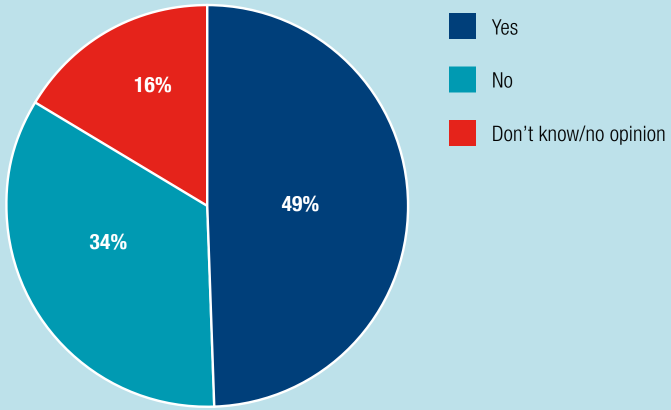
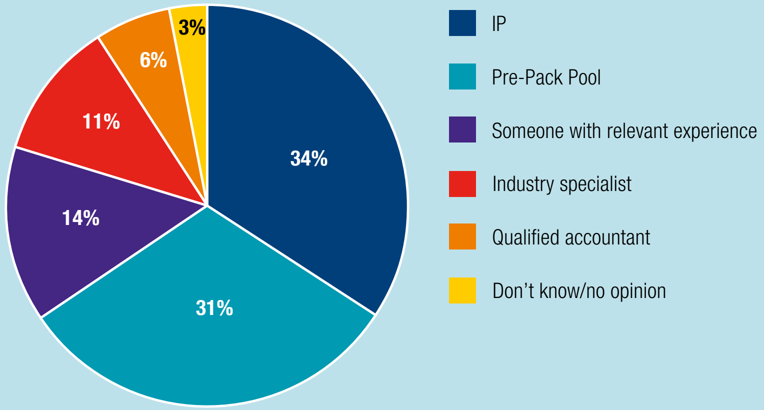


FIGURE 4 If you had to choose just one of these options to act as evaluator, who would it be?

% respondents (%s do not add to 100% due to rounding)



Single regulator

The Small Business, Enterprise and Employment Act 2015 introduced the power of the Secretary of State to create a single insolvency regulator for IPs. This power expires in October 2022. Just under half of our respondents (49%) support a single regulator, 34% do not and 16% either don't know or have no opinion (figure 3). If we exclude the 'don't knows', a majority (59%) support a single regulator, with 41% against. Of those in favour of a single regulator, 50% of respondents would prefer a new entity to be established. Perhaps the pithy view of one respondent that 'the regulatory bodies will never agree which one should be the single regulator' best reflects this finding.

Pre-pack regulations

Now in force as the Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021, we asked participants about the then draft pre-pack regulations, introduced with the purpose of ensuring that all connected-party transactions are subject to the scrutiny of an independent 'evaluator' in the absence of creditor approval. We found support for the regulations to provide a definition of a pre-pack (71% in favour) and a definition of who can act as evaluator (94% agree or strongly agree). The government's reluctance to commit a formal definition to statute does not appear to be shared by the profession.

Opinion on the proposed timescale of eight weeks for a substantial disposal to a connected party to fall within the proposed pre-pack regulations is fairly evenly divided between those who consider it too long (39%) and those who consider it the right amount of time (33%). Of those who feel the eight-week period is too long, all respondents would prefer a timescale of four weeks or less.

Turning to who might be the 'evaluator', the most popular choice is an IP. However, there is also strong support for the Pre-Pack Pool or someone with relevant experience. Respondents would also be prepared to use qualified accountants and industry specialists but to a lesser extent. When asked to choose just one (figure 4), respondents' first choice is evenly split between an IP (34%) and the Pre-Pack Pool (31%).

Perhaps of greater concern is evidence of the 'unintended consequences' of the regulations. A significant majority believe it is likely or very likely that directors will find a solution that does not involve an IP or formal insolvency (88%), or directors will sell the business or assets to a connected party pre-insolvency (75%). What this may indicate is that pre-packs will be conducted through alternative means (the directors themselves) or processes (liquidation), therefore bypassing the intention of the regulations.

In our second survey we examined Covid-19's impact on the UK insolvency profession.

Covid-19 and working hours

Lockdown has had an impact on just over half (55%) of respondents' working hours, with 39% working more hours and 16% working fewer hours than before lockdown (figure 5), with a higher proportion of female respondents (48%) working longer hours compared with male respondents (33%).

For those aged between 18 and 44, an increase in working hours is the most popular response (57%), whereas for those aged 45+, it is for working hours to remain unchanged (47%).

For those working longer hours, the primary reason (indicated by 68% of these respondents) is the additional time taken to complete work remotely (figure 6). Other reasons cited for the increase are difficulties in separating work from personal life (52%); a substitution effect between travel time and work time (48%); an increase in

> **"The top two triggers for a predicted rise in corporate insolvencies are the phasing out of the furlough scheme and the continuation of Covid-19 restrictions."**

FIGURE 5 **Which of the following best describes your working hours since lockdown began in March 2020?**

% respondents

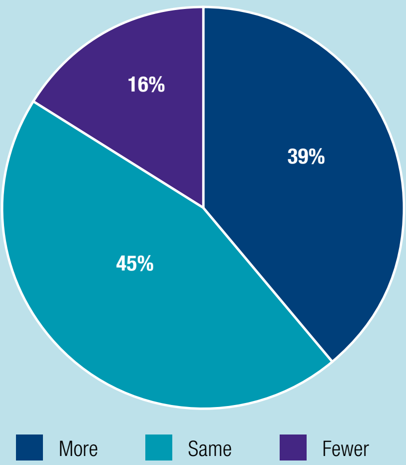
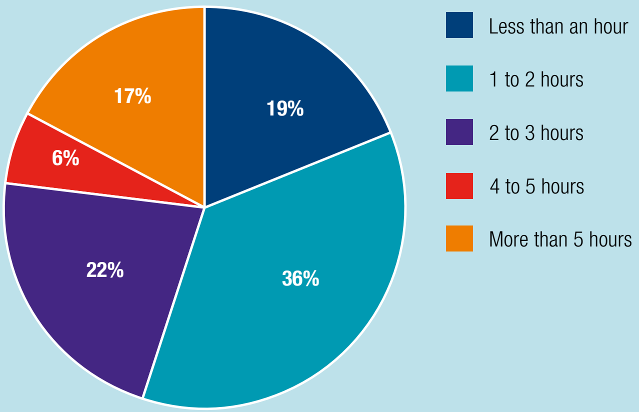


FIGURE 6 **Which of the following explain why you have been working more hours?**

% respondents

FIGURE 7 **On average how much time per day have additional childcare, home-schooling and/or caring responsibilities taken up?**

% respondents with additional childcare, home-schooling and/or caring responsibilities



administrative workload (48%); an increase in case load or new work (35%); and increased responsibilities (19%). Just over one quarter (26%) of respondents face an increased workload due to colleagues being furloughed.

Of those reporting working longer hours, significant differences are cited by female and male respondents. Specifically, 81% of female respondents are taking longer to complete work remotely, compared with 53% of male respondents; 63% of females are facing an increase in administrative work tasks compared with 33% of males; and 69% of females are struggling to separate work and home boundaries, compared with 33% of males.

Of those working fewer hours, the primary reason is a decrease in case load or new work (indicated by 59% of these respondents). Other reasons are a decrease in travel time (41%); increased efficiency due to remote working (29%); and a decrease in administrative tasks (12%). Only 12% of respondents working fewer hours appear to have substituted working hours for childcare, home schooling or caring responsibilities.

Covid-19 and working practices

Overall, employers appear to have responded well. Most (87%) respondents agree or strongly agree that their firm has provided the necessary support, and 77% of respondents are able to undertake their work to the same extent as pre-lockdown, with IT resources and capability supporting home-remote working. Indeed, 71% of respondents agree or strongly agree that the pandemic has accelerated their firm's adoption of digital technology.

A wide range of responses are offered regarding the most challenging aspect of home or remote working. A significant number comment that a key challenge is not having access to printers and scanners or hard-copy case files. Reading large amounts of text on screen, reviewing of work and collating multiple documents present real challenges to insolvency professionals. Thus, despite greater use of electronic platforms generally, the insolvency profession still appears to place value on hard-copy documentation.

Remote supervision and management of staff is a commonly cited challenge. This includes overseeing colleagues' workload to ensure fair sharing, managing pastoral and disciplinary matters, supervising junior staff members and motivating staff. Perhaps linked to this response, a significant number of respondents also note difficulties in delivering online training. One junior respondent suggested that not sharing an office with more senior colleagues resulted in work taking longer for them to complete and potentially discouraged the asking of questions. Unsurprisingly, networking and building relations with new clients are cited as key challenges of remote working.

Childcare, schooling and caring

Nearly half (45%) of respondents have additional childcare, home-schooling or caring responsibilities as a consequence of lockdown. A higher proportion of females report additional responsibilities compared with males. In terms of age, a higher proportion (77%) of those aged between 35–44 report additional responsibilities than other age categories.

For those with additional caring responsibilities, the time consumed by these activities is significant (figure 7) – 81% of respondents are spending more than an hour each day, with 23% spending upwards of four hours per day. Of the female respondents who report additional childcare, home schooling or caring responsibilities, 65% are spending more than two hour per day, compared with only 28% of males.

Coupled with our earlier findings on working hours and practices, lockdown is clearly having a negative and differential impact on work/life balance for many professionals, and females in particular, whether that is in terms of longer working hours, significant time devoted to childcare and caring responsibilities or a combination

FIGURE 8 What are you looking forward to about returning to an office environment?

% respondents who are looking forward to returning to an office environment

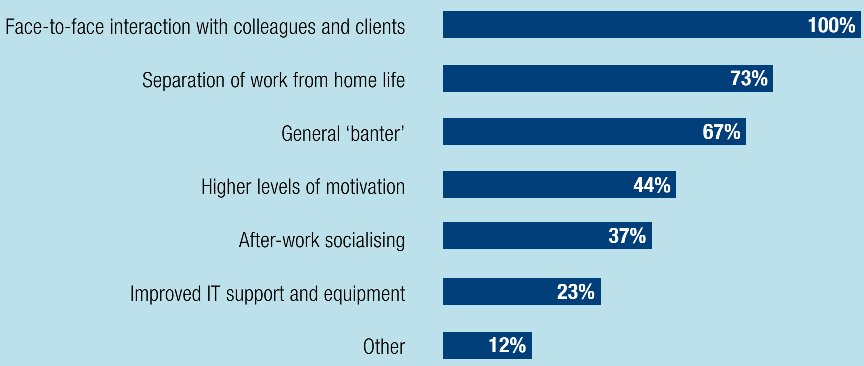
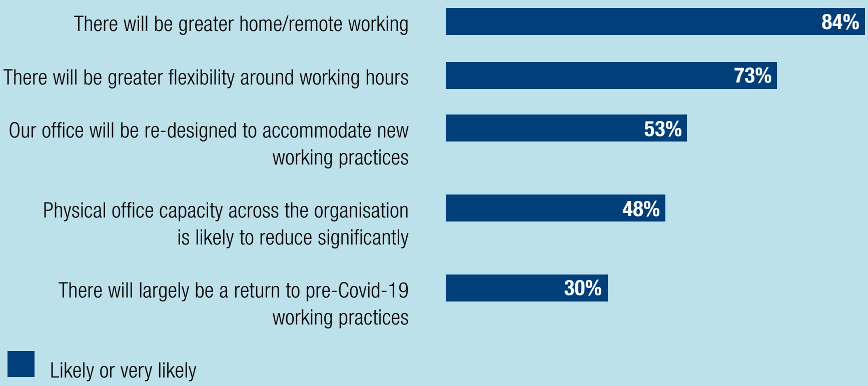


FIGURE 9 To what extent do you agree with the following statements about likely future working practices within your current organisation?

% respondents



of both. We cannot make inferences between our findings on working hours, practices and additional childcare or caring responsibilities and career progression. However, it is interesting to note that one quarter of respondents feel that the pandemic has had a negative impact on their career prospects. More female respondents (27%) report a negative impact than male respondents (18%).

Going back to the office

A significant majority (65%) of respondents say they are looking forward to returning to an office environment, and all of these respondents are looking forward to face-to-face interactions with colleagues and clients (figure 8). Virtual social interaction is no substitute for 'real'. Consolidating this view, 67% of these respondents are looking forward to 'general banter'.

However, the importance of face-to-face interaction is not purely social. Respondents underline the manner in which 'solutions' may be generated from such interaction and the 'ability to bounce ideas around'. As one respondent comments: 'Communication is so much better when it is face to face. In a small office you can hear the problems as they develop rather than finding out they have occurred a number of days, weeks or months later.' Several respondents make reference to the ability to reach a quick resolution of an issue through instant or more timely interactions with colleagues in an office environment and the frustrations of not being able to do this in the current remote working environment.

The majority (73%) of respondents looking forward to a return to the office indicate greater separation of work from personal life as an important factor. A higher proportion (81%) of female respondents selected this option, which ties in with our earlier findings on additional childcare and caring responsibilities. Analysis of our findings by age shows that those under 45 are more likely to select after-work socialising as a reason for returning to the office than their older colleagues.

Interestingly, 1 in 5 respondents (20%) are not looking forward to a return to the office, and 15% do not anticipate returning to the office.

Future working practices

Our survey found a high level of agreement that greater home or remote working (84%) and greater flexibility around working hours (73%) is likely in the future (figure 9). Office re-design (53%) and a reduction in physical office capacity (48%) are likely, with the majority of respondents (70%) indicating it is unlikely there will be a return to pre-Covid working practices.

In terms of which working practices professionals would like to see retained, the most popular is greater use of virtual meetings (79%), closely followed by increased opportunities to work from home or remotely (71%) and greater flexibility around working hours (68%). The majority (64%) of respondents would also like to see less travel time. A higher proportion of women would prefer greater flexibility around working hours to be retained (73% compared with 62% of men).

The market for professional services

Market provision of insolvency services is undergoing a period of structural change, with the separation of insolvency and restructuring service lines from audit, business advisory and tax, and recent merger and acquisition activity.

Some (37%) respondents consider that reduced margins, and 49% that reduced recoveries, will be a significant or very significant threat to the profession in the future. A minority (21%) of respondents indicate that lack of finance is considered a significant or very significant threat to the profession, with one respondent commenting that, 'there is likely to be a delay in the upturn expected in insolvencies until late 2021/March 2022, which may be difficult to manage for boutique firms'.

Our survey findings reflect a view among practitioners that the market for professional services is competitive. Ultimately the effects of consolidation and increasing firm size and capacity on competition in the market is an empirical issue, including the effect on insolvency practitioner fees and other direct costs of insolvency processes. Perhaps that should be survey three! □

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Time for change? Are CVAs still relevant?

Gordon Thomson and **Damian Webb** examine the aftermath of a year of Covid-19 and new legislation to ask the question: are CVAs still a 'good option'?

The past year has been the most turbulent in the UK's history since the end of the second world war. The advent of Covid-19 has seen the government introduce unprecedented movement restrictions via two full lockdowns and various other measures across the period.

The impact on consumer-reliant sectors, including retail, leisure and hospitality (collectively known as the retail sector), has been substantial, with a number of high-profile insolvencies such as Debenhams, Arcadia, Edinburgh Woollen Mill and Paperchase over the past year.

The success of the vaccine rollout is driving a reduction in the restrictions in accordance with the roadmap laid out by the government in late February, but considerable uncertainty remains. A significant number of jobs within the retail sector continue to be supported by the coronavirus job retention scheme and so the economic impact of the pandemic on the sector will only be fully understood when this support is removed over the coming months.

The moratorium preventing landlord (and other creditor) action has been in place since March 2020 and has afforded tenants the opportunity to defer rent payments. In some cases, rent has not been paid during the entire moratorium and many retailers who have not implemented a restructuring process will have accrued a significant debt burden.

The quantum of these arrears and lack of certainty surrounding future trade (including the possibility of a third lockdown) means rapid repayment of these arrears is unlikely. Indeed, brick-and-mortar retailers were struggling with difficult trading conditions in recent years, primarily due to the rise in online shopping, and these have been aggravated by the pandemic.

Strategically, operators in this sector must take steps to mitigate this uncertainty in order to take advantage of the forecast market resurgence as restrictions are lifted. The profound change in retail habits over the past 18 months has led to many retailers believing rents should now be linked to turnover. However, most UK-based landlords' business models (including their funding profile) depend on a consistent level of income. The failure of Intu and the falling share prices of other retail-focused landlords highlights the financial issues they are facing.

Indeed, the dynamic of the relationship between retail tenants and landlords is the key factor that is influencing UK restructuring processes and creating tensions between landlords and retailers. The property industry has recently issued a proposal to restore normal market operation from July, in line with all social distancing measures being lifted by the end of June.

"Strategically, operators in this sector must take steps to mitigate this uncertainty in order to take advantage of the forecast market resurgence as restrictions are lifted."

This proposal ring-fences arrears so that tenants will have until December 2021 to agree deals or longer if both parties have entered independent arbitration. It remains to be seen which elements of this proposal are adopted, including a statutory limit on compromising arrears through insolvency processes, and if lenders will continue to support the tenants.

Restructuring options

Historically, there have been three primary restructuring options that a financially distressed company would have considered when negotiating with its landlords: (a) consensual agreements (b) a company voluntary arrangement (CVA) and (c) administration.

Typically, it has been difficult to negotiate significant amendments on a consensual basis as the approach of institutional landlords varies considerably. Practically, some landlords are willing to compromise, but they are typically unwilling to do so if this merely funds and benefits other intransigent landlords. Landlords will therefore generally wish to see a consistency of approach across the board, which is very difficult to achieve in consensual negotiations.

CVAs – when appropriately constructed – have successfully implemented reductions in arrears and in future contractual rents, when the latter are considered above market value. During the past year, CVAs have tended to focus on aligning rental costs and turnover, given the uncertainty associated with the lockdown.

The majority of professional landlords have developed a realism and understanding that concessions are required with tenants and a number have proactively introduced these outside of a formal process (akin to a reverse CVA). However, landlords have tended to struggle to sanction this approach without prejudicing their personal and professional positions, outside a formal process.

A pre-packaged administration can be used to rapidly restructure a business, after which the company that acquired the business and assets can seek to enter into leases with a lower rent or rent linked to turnover. However, there are considerable risks – a competing bidder may acquire the business and assets and the landlords may refuse to engage – and funding will be required to buy the assets and to provide adequate working capital.

Given the issues associated with consensual negotiations and administration, the CVA has risen to prominence as a tool that can quickly and effectively restructure a business that is fundamentally viable, subject to the compromise of certain debts and reduction of specific running costs.

Crown preference and CVAs

As a result of the Finance Act 2020, HMRC became a secondary preferential creditor on 1 December 2020, in relation to PAYE, VAT, employee NICs and construction industry scheme deductions. Thereafter HMRC would be paid after employees and ahead of any other creditors, eg floating charge holders and ordinary unsecured creditors.

Within a CVA, the HMRC debts noted above can no longer be compromised (reduced) without HMRC's consent. Our experience in negotiating CVAs has shown that most, if not all stakeholders, should take a form of compromise to deliver a balanced solution.

This can constrain the benefit of the CVA as a restructuring option for SMEs, likely requiring additional funding support and increasing the compromises from other creditors, notably landlords. If such funding cannot be obtained at a reasonable cost, companies will have to look to alternative, more final procedures (such as administration or even liquidation).

CVA proposals generally include financial forecasts demonstrating the restructured company's ability to make the required payments into the CVA for the benefit of compromised creditors. The uncertainty introduced to the retail sector by the second lockdown has meant that any nominee would have been unable to sanction forecast trading results within a retail CVA, so the implementation of such procedures has stalled pending the progression of the government's roadmap – and improved clarity regarding future trading.

As a result, it is too early to fully evaluate the impact of the reinstatement of HMRC's preferential status on the prevalence of CVAs. However, noting the level of HMRC liabilities built up by many retailers during the pandemic, preparation of a viable CVA in the absence of a formal HMRC compromise may be difficult.

Challenges

In recent years, the CVA has been the preferred option of retailers and restaurateurs to rationalise their estates and to address contractual terms that were undermining their businesses.

The CVA process has been subject to various high-profile challenges over the past few months. These potentially undermined its use as an effective tool for the swift restructuring of a business that is fundamentally viable.

However, the court rejected the challenges pursued by the landlords in New Look (aka *Lazari Properties 2 Limited*) on all grounds (jurisdiction, material irregularity and unfair prejudice). This outcome is further discussed in the case summaries on page 13 and means that CVAs remain a constructive rescue procedure for the foreseeable.

Alternative procedures

The government introduced the restructuring plan via the Corporate Insolvency and Governance Act 2020 in June last year as part of its response to the Covid-19 crisis. It is designed to be similar to the US Chapter 11 process but with a creditor cross-class cram down provision and – like a CVA – leaves the existing directors in office, but with added protection via moratoria and stays of creditor rights.

The use of this procedure and associated case law is limited, but a variety of factors indicate that the restructuring plan could supersede the CVA as the preferred tool of retailers, including:

1. as a court-based process with two hearings, there is a significant level of court supervision and after the final court hearing, there is no challenge risk;
2. the restriction on compromising HMRC (as discussed earlier) is not applicable to the restructuring plan, as HMRC liabilities have the potential to be compromised as part of the cross-class cram down provisions. This is a crucial advantage; and
3. the restructuring plan enables the compromise of the claims of creditors that the court is satisfied have no 'genuine economic interest' in the company, as long as they would be no worse off than in an alternative procedure. These creditors would have no right to participate in the restructuring plan approval process.

By contrast, CVAs require 75% support of all creditors and exclude secured creditors and HMRC from the process, so they

“It is too early to fully evaluate the impact of the reinstatement of HMRC's preferential status on the prevalence of CVAs.”

are not compromised. In order to secure the support for a CVA, most retailers will need the majority of landlords to support and so the terms offered will often be less onerous than those offered via an administration process.

In view of the level of rent arrears and the competitive landscape post-pandemic, many retailers will likely be unable to agree to commercial terms that are acceptable to landlords, either consensually or to secure support for a CVA. Consequently, retailers may choose restructuring procedures that do not require the substantive support of landlords, illustrated by the tranche of administrations in December 2020 and the proposed restructuring plan for Virgin Active.

The recently-approved Virgin Active restructuring plan has allowed the categorisation of landlords/creditors, which is a key element in the development of retail CVAs (and which was unsuccessfully challenged in *Lazari Properties 2 Limited*). This, together with the plan's cram down rules and the absence of a retrospective challenge, may well lead to restructuring plans superseding the CVA as the preferred restructuring tool for retailers in due course.

Conclusion

While it is too early to properly evaluate the impact of HMRC regaining their preferred status on CVAs, restructuring plans are still in their infancy and the associated costs and timing may render them too onerous for mid-market retailers. In the interim, the restructuring plan will not be considered a viable option for most SMEs, when compared to a CVA. It is probable the restructuring plan will be appropriately tailored to ensure it offers a realistic option to mid-market retailers. However, much of this will depend on the route out of the moratorium adopted by the government, which will make for interesting times ahead… ◻

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Is it time for a different approach to asset security?

Damien Frost highlights how an effective security company with a proactive approach can really make a difference.

There is no shortage of security companies working in the insolvency sector today. Faced with such a wide choice of providers, it is tempting to go with the most cost efficient, the most well known or the one you have used before. But does this drive the best value, or the best outcome? We take a look at three key areas you should consider.

Choose a provider who will own your problem

Procuring security services for distressed property is often viewed as a cost play. While this may be true to a certain extent when it comes to physical security, there are many other areas where a proactive approach can really add value.

Damien Frost, director at MEN-SEC, highlights how effective security companies will own problems after just one call. 'Security providers should take on the responsibility and ownership of meeting your broker's insurance requirements, with a focus on proactively mitigating your exposure to risk. If an inspection highlights fly-tipping on site, your security provider should issue an inspection report highlighting the problem. You need someone who will go that step further. We proactively call the client with an outline proposal for removal, detailing costs and timescale. The issue is resolved there and then.'

This proactive approach, coupled with industry expertise, can remove major headaches for IPs and receivers. Damien continues: 'We were tasked to clear and secure the HQ and yard of a very large construction company in the north west that had entered administration. This was a complex compliance project due to the sheer volume of combustible and hazardous material to be cleared. To add intricacy, the client was well past the compliance deadline for insurance. We proactively reached out to the broker to extend the open cover insurance facility. We made sure the insurer and the IP were fully engaged in dialogue over the extensive clearance, giving them confidence that this was being expertly managed. As a result, we acquired two 30-day extensions for the client, keeping them compliant at all times.'

> **Security providers should take on the responsibility and ownership of meeting your broker's insurance requirements, with a focus on proactively mitigating your exposure to risk.**

Genuine expertise in the insolvency sector

Having a presence in the insolvency sector doesn't necessarily mean a company has expertise. For instance, the requirement for securing assets as part of an LPA or fixed charge receivership is fundamentally different to providing ongoing security for building sites or maintaining vacant social housing.

Damien explains why insolvency expertise makes a big difference. 'The risk profile for each recovered asset is unique, and the timescales involved are often critical; your security provider needs to understand the implications of this and be able to accommodate changes to the risk profile as you move through the recovery process. It's beneficial to work with your security provider pre-appointment to get an understanding of holding costs, as this helps avoid unforeseen expenses later. You could need a security provider to work with you through an IBR and provide tangible holding costs. If your security company can't or won't provide these, they probably don't have a robust understanding of the recovery process.'

A site survey with recommendations aligned with the insurer's compliance standards can give a good indication of a security company's insolvency expertise. A security provider with the vast majority of their business protecting long-term vacant pubs, or supplying guards, will make a recommendation based on their experience and typically ignore any security already on site. This does not deliver best value.

Focused on driving the right outcome for you

This may sound like a strange thing to focus on, but many national temporary security companies are owned by private equity firms or investment funds. This drives a sales-led operating model, focused on optimising value for the owners and creating frictionless, repeatable processes to drive efficiencies.

Conversely, MEN-SEC is owner-operated and doesn't have a sales team. Damien explains: 'When developing this business, we wanted organic growth by having a great reputation as a specialist in the insolvency arena. We didn't want to dilute this vision by recruiting a "business development" team with aggressive sales targets – that focuses on short-term, top-line growth, rather than delivering the right outcome for the client. We work hard to maintain a reputation for excellence; our primary focus is to provide expert advice for clients. That may mean telling a client they don't need extra security to be compliant or risk-free, but in my view deploying unnecessary security measures just to get extra revenue is unethical.'

Inter-departmental collaboration within a security provider also plays a significant role in the effectiveness of service delivery. Often requirements identified in the 'sale' aren't clearly communicated to operational teams who deliver the services on site, and the administration functions have no understanding of the site layout. This means things can get lost in multiple layers of internal communication. Damien summarises: 'Effective security providers ensure that everyone involved understands the clients' objectives for each property, across front-line operations and back-office functions. This holistic view means the right client outcome is always delivered.'

DAMIEN FROST has over 15 years' experience in the insolvency sector, working for IPs and receivers throughout their supply chains. Together with his business partners, he has built the MEN-SEC Group to specifically focus on delivering specialist security solutions to the insolvency industry. To find out how MEN-SEC can deliver a different approach to asset security, email Damien at **damienfrost@mensec.co.uk** or call 0330 133 1751.

Can litigation funding or insurance improve settlement chances?

Mark Beaumont writes that not backing down can lead to lucrative returns.

Litigation is usually about achieving the best settlement terms, as soon as possible, and avoiding expensive and drawn-out court battles. The challenge arises when your opponent is very much aware of your financial constraints and they do not believe you will issue a claim against them. In this scenario, how likely are they to settle?

What do you do next? Are you going to issue the claim, drop it completely or let the defendants drag out pre-action correspondence without making any progress towards settlement? If you decide to issue then who will cover the disbursement costs? Will both solicitor and barrister act on full conditional-fee agreements (CFAs)? Do you have a strategy to defeat a security for costs application against you, or provide a cross-undertaking for damages if necessary?

CASE STUDY 1

An IP had been in dialogue with the defendants for some time on a claim for over £200,000 but had only managed to get a rather derisory offer to settle for around £35,000. Only when ATE insurance was secured and the IP stated their intention to issue did the defendants change their tune. Within a week of being informed of the ATE policy, the defendants stated their desire to settle before we issued the claim and within a fortnight it settled for around £135,000. We'd secured large discounts from the insurer for early settlement and so the ATE cover cost only £10,000, despite the cover being significant.

Of course, most IPs are aware of third-party litigation funding and after-the-event (ATE) legal expenses insurance, but there is still a large gap between what a lot of IPs could be doing and what they are doing. The consequence of this is that fees can end up being written off and creditors miss out. The only beneficiaries are the potential defendants that get to walk away with their ill-gotten gains.

For every discussion that happens on the IP side, there is a similar conversation between the defendants and their legal representatives. Both sides will have to weigh up the pros and cons of litigation versus settlement, albeit the claim can only really be pushed forward by the claimant side. From a defendant's perspective, the best policy would be to drag everything out for as long as possible and hope that the claim withers and dies of its own accord. If you were advising a defendant, isn't that what you would suggest? Would you give that same advice to the defendant, if the claimant then secured ATE insurance and funding, or would you recommend settling?

CASE STUDY 2

An IP is handling the administration of a business that appears to have been engaged in tax fraud. The focus for litigation is a £3m claim against a firm of solicitors that provided advice. There are another 55 claims against related businesses and individuals that total just over £1m. The IP cannot justify the time and expense of pursuing these and wants to focus on just the £3m claim. The IP assigns the 55 claims for an upfront fee and a 50/50 share of any recoveries. The IP is now expecting an additional £300,000 to come into the administration via those smaller claims.

> **"Don't let a lack of money hold you back: show your opponent you will not flinch, and drive cases towards better settlements, sooner."**

> **"What we do know is that there are many options now in the market and, often, there's a way to make a case work."**

There are over 20 insurers in the ATE market and dozens of funders, each with their own models of return, attitude to due diligence, preference for CFAs, willingness to fund or acquire cases, appetites for risk, preferences for jurisdiction etc. If only for peace of mind, wouldn't it make sense to ask the question next time a dispute arises? At Annecto Legal we are always happy to discuss a case and provide some pointers, or give an indication of pricing, so that an informed decision can be made. There are numerous ways to structure funding and insurance and no two cases are the same. What we do know is that there are many options now in the market and, often, there's a way to make a case work.

Brokers charge a fee for the work that they do, but that fee is typically paid by the insurers and funders, and the best brokers should be able to access markets (and secure terms) that more than justify any negligible cost incurred. Annecto Legal goes even further: all cases are reviewed by our own experienced team before we 'go to market', thus saving IPs and their lawyers huge amounts of time while massively speeding up the process of securing funding and insurance.

Don't let a lack of money hold you back: show your opponent you will not flinch, and drive cases towards better settlements, sooner. □

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

The future of insolvency is in the cloud

Darren White discusses cloud computing and its potential to disrupt the restructuring and insolvency sector.

Cloud computing has the potential to radically alter the way we work. Just look at how important it has been during the last year when normal working practices were thrown into chaos – online services became essential. But I believe this is only the beginning of what it can do.

With almost limitless possibilities, cloud computing is set to become a disruptive force within the insolvency and restructuring sector – revolutionising the day-to-day work of IPs in the process.

From collaboration to cash flow

What do we mean when talking about cloud computing? It's a good question to answer up front because it's a broad field. Essentially, it covers any computing services delivered over the internet, also known as 'the cloud'. This can include anything from servers and storage to databases, software, analytics and much more.

Chances are you've used some form of cloud computing service before, whether it's Microsoft Teams for collaboration, Dropbox for file storage or Xero for accounting. These popular services are all accessed online. And, because they exist in the cloud, they can offer flexible resources, ease of access and economies of scale that would be unthinkable with traditional alternatives. Plus, they simplify the logistics of team projects, so progress happens faster – and at a higher standard.

These types of cloud services are already changing how companies work across most industries. But when it comes to an insolvency practice, the opportunities for innovation are remarkable.

Imagine a more agile IP

What can cloud computing offer the IP? In one word: flexibility.

If the last year has taught us anything, it's that nobody can guess what the future holds. Businesses can be turned upside down overnight. As an industry, it's crucial that we can adapt at speed to keep doing what we do best. Cloud computing gives us the flexibility to do just that, in a number of ways.

Let's start with scale. With online services, there are no space constraints – so the IP benefits from access to services that would never be feasible in the office. For example, the pandemic has shown what can be achieved through remote working. The virtual office allows for much bigger teams than the real office. So, you can hire more people without the same practical challenges. And you can access processing power beyond anything your in-house servers could ever manage, without giving up valuable floor space in the actual office.

> "With almost limitless possibilities, cloud computing is set to become a disruptive force within the insolvency and restructuring sector."

With remote working comes the fruits of focused collaboration through real-time tools like Microsoft Teams. Improving the way your team works together can lead to more creativity, efficient processes and better communication. The always-on nature of the cloud means staff can access mission critical software from any location, using any device.

Not to mention, the cloud democratises access to vital emerging technology and innovation that once would only have been available to the largest firms with big IT departments and even bigger budgets. Equally, cloud computing services are designed to be user friendly, so there is no steep learning curve – meaning non-technical workforces can take advantage of more efficient and inventive tools without needing the support of technical experts.

The cloud is also helping businesses significantly lower their carbon footprint – thanks to a reduction in individual data centres. In fact, a study by Microsoft found that cloud storage can be between 79–93% more energy efficient than a traditional on-premises data centre. As organisations become more conscious of their impact on the environment, this is a major incentive to consider using cloud-based solutions over traditional infrastructure. This approach to hardware means that you spend less on IT, and enjoy access to the best services on the market.

Embracing cloud security

With all that flexibility comes more efficient ways of working. Cloud computing services streamline and optimise everything from security to task automation.

For many IPs, security is a big concern. The idea of placing business critical and client data in the hands of a third party once seemed unthinkable. GDPR and data protection laws have only made it a more pressing issue.

There's no denying that moving data to the cloud exposes businesses to new risks. But when you compare the sophisticated encryption systems used by cloud services with ageing on-premises security, it becomes a no-brainer. These services are designed to swat away threats of malware, phishing and ransomware attacks. And they are continually updated to protect against emerging threats before you even know they exist.

The key is choosing a cloud partner you trust, making sure they have the necessary security accreditations to give you confidence that your data will be safe.

Automate simple tasks

For IPs that are considering a move to cloud services, one of the key benefits is access to emerging technology. The trailblazers of the insolvency industry will look to adopt new technology that gives them a competitive edge – advancements such as robotic process automation (RPA).

These virtual 'robots' are software scripts that can learn most of the tasks and processes that you would normally pay a human to do. They can't make complex decisions, but they will complete repetitive, labour-intensive tasks faster and to a more reliable standard than a person who can become tired or distracted.

For example, you can automate simple processes that need to be repeated for each case, like checking Companies House or updating your case management system. Once taught the required actions, the robot can perform these tasks up to 20 times faster than a human while recording evidence for each step.

By modern standards, many of the processes of an IP are manual and inefficient. But it doesn't need to be this way. Multiple areas of day-to-day work are ripe for the benefits of automation, including payments, creditor claim management, bank reconciliations, progress reports and invoicing.

These robot scripts perform the same task in exactly the same way every time and can run 24/7 – freeing your team up to handle more valuable tasks.

The AI future

Again, this is only the start of what is possible. Artificial intelligence (AI) could assist the IP with more detailed tasks such as fraud detection. You can set the process, showing an AI robot how an IP would investigate. This would likely include scanning the accounts and bank statements of a company. By applying rules and decisions based on the results, the AI learns as it processes more and can eventually help with more complicated tasks. You might not be able to fully automate these tasks, but can use the AI's work as a baseline to highlight areas that can all too often be overlooked.

Of course, we all know that an IP's value is in their experience and how they can apply their knowledge to a given situation. I'm not suggesting for a second that a robot can replace this – it's simply another tool to support an IP and let them make better use of their valuable time.

Insights from data

Ultimately, using cloud computing is all about protecting the future of your practice in a changing world. One of the central ways it does this is by helping you harness the power of data.

With the exponential rise in cloud adoption, the amount of data that is on the internet is phenomenal. In practically every industry, data is now central to how the leading organisation makes decisions. But making sense of all this information is an enormous challenge.

This is where data analytic tools can help the insolvency sector. By examining datasets to extract valuable insights, these tools can help you boost efficiency in areas such as planning and benchmarking.

By analysing a user's behaviour on cloud systems, you can identify training requirements and see how staff are dealing with their existing case load. This will assist in planning for future growth, especially when combined with publicly available data on trends and expected insolvency volume.

You can also use data analytics for benchmarking, internally and externally. Setting KPIs and allowing the IP to measure their performance against those KPIs at the individual, team and firm level is critical. You can easily compare your firm's performance to that of a similar firm to benchmark against averages and drive cost-effective services.

Disrupt or be disrupted

It's highly likely there will be a huge upturn in insolvency work sometime soon. Firms with manual processes could struggle to cope with this sudden increase and need to incur the expense of recruiting in a limited market. Is your firm prepared?

On the other hand, some boutique firms and practices are already leveraging this emerging technology to be more productive. This means they can really drive down their costs to be more competitive in a fee-sensitive market.

And what about the next generation of IPs? They have grown up with technology at their fingertips. These young graduates and aspiring professionals do not expect to be stuffing envelopes and dealing with the manual drudge that's commonplace in many firms. The best and the brightest will be attracted to those firms adopting digital transformation programmes. Fail to keep up and you could miss out on the top talent.

Join the cloud now

The pandemic has led many IPs to take a step back and look seriously at their own digital transformation journey. And while many are yet to be fully convinced of its merits, we have seen the possibilities of how we might work differently.

Cloud computing is here to stay. IPs should consider it as a real alternative to traditional infrastructure – it will completely transform the industry and revolutionise the way we all work for the better. ◻

DARREN WHITE is global head of product at Turnkey.

Call of duties: administrators' duties and court challenges

From London skyscrapers to F1 racing, **Tim Evans** explores the key issues administrators face when discharging their duties in a sale situation.

In the distressed sale space, administrators walk a tightrope between maintaining asset value through a quick sale and performing sufficient marketing to achieve a true market value.

This article will explore three key legal decisions over the past three years that illustrate the dangers facing administrators and provide some key learnings.

However, before turning to these learnings, it is helpful to briefly summarise the cases in chronological order.

Davey v. *Money and another; Dunbar Assets Plc v. Davey* [2018] EWHC 766

Administrators were appointed by a secured creditor (Dunbar Assets PLC) over a property development in London's Docklands. The administrators pursued the third administration purpose (to realise property to make a distribution to secured or preferential creditors). The administrators appointed property agents recommended by Dunbar to market the property. Following unsuccessful efforts by the administrators to explore development opportunities for the site, the property was sold. The sale proceeds were insufficient to meet the liabilities due to Dunbar. Dunbar therefore sought the shortfall from the development company's sole shareholder (Mrs Davey) pursuant to a personal guarantee.

Mrs Davey unsuccessfully claimed against the administrators for misfeasance. Mrs Davey alleged that the administrators had: (1) breached their duties by failing to exercise independent judgment and focusing excessively on Dunbar's interest; (2) failed to involve her, which, if done, may have resulted in successful refinancing; and (3) sold the property at an undervalue due to reliance on an unsuitable agent.

PJSC Uralkali v. *Rowley* [2020] EWHC 3442

Administrators were appointed over the Force India F1 team with a view to rescuing it as a going concern. Following a sale process, there were two lead bids. The administrators accepted the bid that offered to rescue the company as a going concern on the condition that, if that was not possible, the administrators would then sell the business and assets for £90m. The administrators rejected the alternative bid that solely offered to purchase the business and assets, albeit for £101.5m.

Following the sale, the unsuccessful bidder claimed against the administrators alleging the sales process was conducted in an unfair and improper manner and that the administrators misrepresented how bids would be assessed. The claim was dismissed.

Re One Blackfriars Ltd (in liquidation) [2021] EWHC 684

Administrators were appointed by the secured creditor of a joint venture that owned a development site overlooking the River Thames. Upon appointment, the administrators enlisted CBRE to consider what enhancements could be achieved within the site's current planning permission to increase its value. CBRE (who had previously advised the secured creditor) then conducted a sale and marketing process resulting in a £77.4m sale.

Liquidators were subsequently appointed over the joint venture and unsuccessfully claimed against the administrators. The liquidators alleged that the administrators had sold the property at some £37m undervalue and that, if the administrators had performed their duties, they would have sourced financing of circa £350–400m to complete the development. Failure to do so had resulted in losses of circa £250m.

The above sections contain the facts and outcomes of three unsuccessful attempts to bring claims against administrators, but what key messages can we take from these decisions?

Secured creditors

The cases demonstrate that stakeholders will often criticise administrators for having too close a relationship with secured creditors, especially where there is a qualifying floating charge holder appointment.

So, how close is too close? In short, it depends. The default position is that administrators owe a fiduciary duty to all creditors equally. However, this position changes where the administrators are pursuing the third administration purpose (realising property to make a distribution to secured or preferential creditors). The *One Blackfriars* decision confirms that when the third purpose is pursued, the fiduciary duty shifts to the secured creditors (and preferential creditors – if applicable), provided that the administrators' actions do not cause 'unnecessary harm' to the remaining creditors.

Documenting decisions

Administrators have a duty to document their decisions. Section 13 of the Insolvency Practitioners Regulations 2005 confirms they must keep records. But how extensive is that duty? In *Rowley*, the judge held that while the administrators' records '[did] not set out all the minutiae' of their decision making, the combination of emails, letters and counsel's opinions were sufficient to demonstrate and explain the administrators' decision-making. This judgment provides some comfort to administrators managing a multitude of communications in a fast-changing environment, but confirms the need for some form of contemporaneous written record of decisions made and the reasons for those decisions.

Sales agents

Administrators will regularly utilise agents for the sale and marketing of the business. As the cases highlight, this can be a contentious issue for stakeholders.

The *One Blackfriars* decision confirms that administrators are entitled to delegate the marketing and sale activities to 'apparently competent' professionals in the required field. If the sales agents prove to be negligent, that is a claim that the administrators can bring against the agents.

Administrators often feel obliged to use a large, established player when selecting a sale agent. In *Davey*, the judge referred to this risk adverse approach as the 'IBM factor'. The judge then confirmed that administrators do not have to use one of the 'big boys' and that '*it seems to me that as a matter of principle, it cannot be the case that the established "big boys" have a monopoly on competence or relevant local knowledge so that it is necessarily negligent not to instruct them*'.

Getting the best price

The sale price is often the most contentious issue for stakeholders. Administrators are under considerable pressure to achieve a quick sale while achieving the best possible price. The *One Blackfriars* decision provides some helpful guidance on what is expected. The judge confirmed that achieving the best sale price falls under the administrator's general duty to act with reasonable care and skill.

The threshold that administrators will therefore need to overcome is that, in exercising reasonable care and skill, they achieve the best sale price that they believe is possible as the circumstances permit. The focus is on how the administrators perceive the circumstances surrounding the sale and this perception will only be challenged if the administrators were unreasonable in reaching their perception.[1] It is not enough simply for that perception to be wrong.

> **"The cases demonstrate that stakeholders will often criticise administrators for having too close a relationship with secured creditors"**

How much to market

A frequent criticism from stakeholders is that the business was inappropriately or insufficiently marketed. The *Davey* decision confirms that:

'There is no doubt that many of the cases on sales by insolvency office-holders refer to a requirement that assets to be sold should be properly exposed to the market, that public advertisement is accepted to be the normal means by which that might be achieved, and that inadequate advertisement might lead to liability. But I do not think that there is any special rule requiring advertisement by administrators or other insolvency office-holders.'

The judge further confirmed that much depends on the nature of the asset and the relevant market. Administrators should therefore consult sales agents with appropriate knowledge of the relevant market to ascertain to what extent public marketing is suitable, if any.

Relationship with shareholders and directors

Upon appointment, the administrators will need to be in close contact with the company's directors to develop an understanding of the company's business, assets and liabilities. If the administrators are looking to achieve the first purpose (rescue as a going concern), they may well also need support from the shareholders.

The *One Blackfriars* decision clarifies that there is no duty to consult the company's directors and shareholders, let alone to share all information garnered by the administrators from third parties and creditors. The administrators' role is to bring independent judgment and manage the company in the creditors' interest.

Duty of care to prospective bidders

The recent decisions demonstrate the appetite of unsuccessful bidders to litigate the administrators' decision making. More worryingly still, the unsuccessful bidder in *Rowley* even tried to establish that the administrators owed them a duty of care.

The judge was robust in dismissing this. He found that a duty of care owed to bidders would be harmful to the administrators' duty to the company in administration and its creditors and that such a duty would paralyse the administrators' actions as every communication to stakeholders would be pored over by the administrators' lawyers. The judge confirmed that it is highly unlikely administrators would owe a third party a duty of care unless they detrimentally do 'something out of the ordinary'.

The *Rowley* decision also considered the liability of the 'joint' administrator for the 'lead' administrator's actions. In that case, the judge concluded that given the 'lead' was 'a seasoned professional backed by . . . an experienced legal team' the 'joint' had 'no reason to suppose [the 'lead'] . . . was acting carelessly or improperly' and 'the case against [the 'joint'] in negligence is therefore without foundation'.

The position for the 'joint' administrator seems clear: as long as the 'lead' administrator is sufficiently experienced and supported, it seems unlikely that an aggrieved third party will establish a duty of care against the 'joint'.

Third time lucky (picking the right purpose)

The *Rowley* decision is a helpful reminder that administrators need to be agile in their decision making. The court accepted that administrators may change the administration's purpose, explaining that 'the administrator has to exercise his judgment and may have to change strategy as circumstances develop'.

Similarly, the *Davey* decision confirms that:

'An administrator's decision not to pursue the first objective will only be open to challenge if it was made in bad faith or was clearly perverse in the sense that no reasonable administrator could have thought that it was not reasonably practicable to rescue the company as a going concern.'

These decisions provide comfort that, firstly, administrators are permitted to change the administration's purpose and, secondly, there is a relatively high threshold for such decisions to be successfully challenged.

Where now?

Following the decisions in these three cases, administrators can feel confident that the court will continue to respect and support their commercial judgment and experience. However, the cases also show that such claims are becoming more prevalent. Hopefully, the themes raised in this article will therefore help administrators to mitigate risk and, ideally, avoid claims altogether.

[1] *Re Charnley Davies* (No.2) [1990] BCLC 760

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Pensions in the world of Covid-19 and new legislation

Malcolm Weir reviews the current defined benefit pension scheme landscape and shares his insight on the various issues facing trustees.

It's still early days in the post-Covid-19 economic recovery, with the positive effect of the government support to businesses through the pandemic still in place. Trustees of defined benefit (DB) pension schemes will inevitably be questioning the strength of their sponsoring employer as we emerge from this challenging period.

Where a sponsoring employer is facing genuine difficulties, especially in these uncertain times, early engagement between all parties is essential to explore restructuring options that will protect the interests of members of any associated DB pension schemes and the Pension Protection Fund (PPF).

The current DB landscape

The number of ongoing DB pension schemes decreased from over 7,800 in 2006 to some 5,300 by March 2020. This decline has been much slower than many commentators predicted when the PPF was created, although interestingly, as shown in figure 1, more schemes have closed to new members and then to any future accrual.

Figure 2 shows that the funding level of schemes on a full buy-out basis has slowly improved over time, while the s179 measure of funding on the PPF basis has been less directional, with schemes being 94.4% funded at 31 March 2020, a decline from 99.2% the previous year. This decline has primarily been driven by lower-gilt yields driving up liability values by more than the corresponding increase in asset values. In the subsequent 12 months to 31 March 2021, the aggregate s179 funding level improved to a slight surplus position. However, the overall position remains that despite employers continually paying into schemes through deficit reduction contributions, the funding gap remains. This causes schemes to be an ever-present concern to stakeholders when strategic decisions, including restructuring options, are being considered.

Covid-19 and scheme affordability

Against the background of persistent scheme deficits, the Covid-19 pandemic was feared by many to herald a corporate liquidity crisis with pressure on schemes to suspend or reduce contributions. A major increase in employer insolvencies and schemes entering a PPF assessment period was also predicted. So far, the reality has turned out to be quite different although the medium/long-term outlook remains highly uncertain and we're not complacent to future claims.

Rapid government action from March 2020 had the effect of addressing corporate liquidity issues for many businesses that would otherwise have fallen into insolvency. For larger corporates, the debt market remained open with huge amounts of cash looking for a credible proposition. Relaxations in wrongful trading rules and restrictions on winding-up petitions and corporate lease forfeiture have resulted in a benign environment for financially challenged businesses.

In 2020, 12,557 company insolvencies took place – a 27% drop in comparison to 2019. This exceptionally low number means that there could be more than 4,000 companies that would have been expected to enter a procedure but have been kept going by the government's support measures. This number is expected to increase throughout 2021 while the support continues, and there is a risk that many of these companies are likely to fail when the support is turned off.

Is this a problem for DB pension schemes and the PPF? The answer is probably not. The majority of the companies expected to fail when the government's support measures end are likely to have been recently established and are unlikely to have an associated DB scheme. Companies with DB schemes tend to be more mature and, through past experience, have learned how to adapt and should have safeguards in place to help survive a financial crisis. Also, the number of schemes entering our PPF assessment period has continued to drop in recent years, with just 31 in the past financial year, and less than 60 a year prior to the outbreak of the pandemic. This compares with more than 100 schemes each year prior to 2013. While the number of schemes entering our assessment has continued to decline, we've seen a number of high-profile claims from employers including: Kodak, British Steel, Carillion, Debenhams and Arcadia. Claims from notable employers like these can be substantial, though we are well prepared for these and they will continue to be a factor in the review of our funding strategy.

Another reason why DB schemes may not need to be overly alarmed is that employers can still access substantial sources of cash, both as debt and equity. We've seen recent examples where both sources of finance have been provided to employers with substantial pension schemes without a detrimental effect.

However, trustees and their advisers must be ever watchful of the covenant provided by their employer during Covid-19, most importantly as the economy starts to recover and pressure mounts on working capital alongside the cessation of the support measures. Schemes may have agreed to a deferral of deficit reduction contributions and it's essential that these are recovered and normal contributions resume. Where employers are facing genuine difficulties,

FIGURE 1 Number of DB schemes

Source: https://www.ppf.co.uk/purple-book

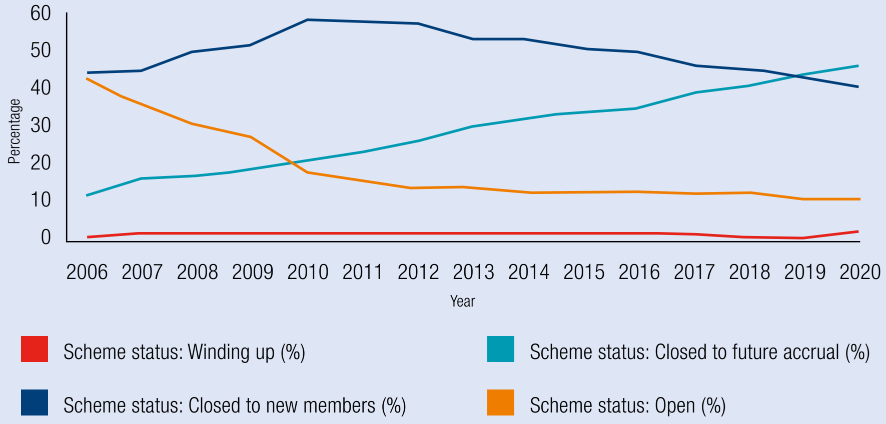
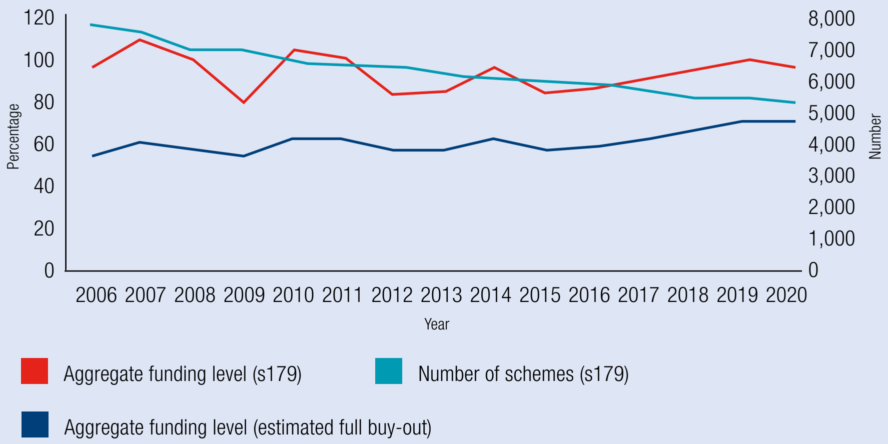


FIGURE 2 Funding levels over time

Source: https://www.ppf.co.uk/purple-book



they must engage with trustees as early as possible as there is likely to be a much wider range of options to resolve the situation at this stage, which may have a better outcome for all stakeholders.

At the PPF we encourage this level of proactive engagement and we're open to considering proposals, so long as they meet our published restructuring principles.[1] Recent deals where early engagement has benefited all sides include Archant Publishing and the Budenberg Gauge Company. Both involved the use of a company voluntary arrangement (CVA), which allowed significantly better realisations for the schemes than what an alternative insolvency procedure could deliver, and provided us with an equity stake in both restructured businesses.

In the case of Budenberg, we now have an 80% equity stake in the business, which reflects where the economic value break was when the restructuring was proposed. While we don't usually take such high stakes, it was appropriate in this case due to the business having a stable profit and cash flow stream and the fact that it was self-financing apart from the pension scheme, which was dragging it into insolvency. It was important that most of the future value came to us due to the fact that we were taking the economic risk of the scheme with, unusually, other creditors being unaffected.

The new restructuring procedures

CVAs are and remain a tried and tested way to deliver a solution involving one or more creditors while allowing an intrusive insolvency process to be avoided and certain other creditors to remain whole where appropriate. This has been taken a stage further with the restructuring plans (RP) under the Corporate Insolvency and Governance Act 2020.

We're supportive of any process that assists viable businesses to continue and meet their obligations to their occupational pension schemes. RPs have the attraction of providing certainty more quickly than

> **"The number of schemes entering our PPF assessment period has continued to drop in recent years with just 31 in the past financial year."**

CVAs, where in recent years there have been challenges that have taken many months to resolve through the courts. That said, the court's role in an RP means that it's likely to be a more expensive process and delays may occur if RPs become widely used and courts do not have the capacity to consider them.

It's our understanding that it was not the government's intention for RPs to restructure pension commitments. In fact, any compromise of the pension scheme's debt may make it ineligible for entry into the PPF, which would clearly have a material adverse effect on its members. It should also be remembered that RPs and associated refinancings have the potential to cause 'material detriment' to the pension scheme, notwithstanding the scheme itself is not affected.

As of 30 April 2021, we've not seen any examples of either the new moratorium or an RP being used where a pension scheme is affected. There has been limited exposure to companies that are sponsoring employers to DB schemes. However, in the cases we've seen, we've been disappointed that some of the directors have not, in our view, complied with the requirement of the law in providing proper notification and information. Thankfully these cases have not required any detailed pension consideration but IPs and directors must ensure that they engage at the correct time, especially as there is an obligation for the PPF to consult with the scheme trustees under the Act. Guidance on our approach is published on our website.[2]

New criminal provisions

The Pension Schemes Act 2021 introduces a wide range of new measures including the significant strengthening of the toolkit available to The Pensions Regulator (TPR) to enforce the 'moral hazard' regime. More than ever, it is critical that pension schemes are given full and proper consideration early on in the restructuring process as a failure to act properly can have even more severe implications.

Many of the techniques that have been used in the past to remove or distance support from a pension scheme may now fall foul of the new legislation, which has a wider remit to seek contributions from related parties. Stakeholders still seem surprised about how far the pension legislation can pierce the corporate veil, despite the fact that this has actually been the case since 2005. Alongside TPR, we've always been on guard to prevent pensions dumping but such activities can now attract the harshest of penalties – ultimately a seven-year prison sentence.

Should this worry restructuring and insolvency professionals? Technically, appointed IPs are exempt from penalties when carrying out their duties, but this doesn't extend to any other related work, in particular pre-insolvency advice. However, this shouldn't be an issue provided that professionals are cognisant and compliant with the requirements of pension legislation.

In bringing any action, TPR always has to act reasonably and experience suggests that they're very careful in deciding when to exercise any of their powers. The severity of the penalties is designed to make people think about what they are doing to ensure that all stakeholders are treated in the proper manner according to the law. The existing TPR moral hazard powers have only been used sparingly since 2005 but their very existence has improved compliance with legislation. Certain exceptions have arisen and these have led to this tightening of the regime, but fundamental principles of fair treatment for the pension scheme remain the same. By ensuring that they act at all times with this in mind and applying best practice, restructuring and insolvency practitioners can be confident in giving advice. ☐

[1] **https://www.ppf.co.uk/sites/default/files/2019-01/guidance_on_the_ppfs_approach_to_employer_restructuring.pdf**
[2] **https://www.ppf.co.uk/sites/default/files/2021-02/CIGA_2020_Guidance.pdf**

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Rapid innovations in digital finance

Dávid Oršula, **José Carles** and **Laurent Le Pajolec** highlight the key points of the EC's new digital finance strategy in response to the Covid-19 pandemic.

The overall use of financial applications in Europe almost doubled in one week when the pandemic started. You can now open a bank account without visiting a physical branch, and payments for purchases have moved to the digital sphere or become wireless.

The people in Brussels have understood that the impact of the lockdowns and various restrictions are boosting the courage of businesses and consumers to go digital. Consequently, the European Commission (EC) has proposed a new digital finance strategy for the EU. This article sums up the key points.

Trendy innovation

Digital data and IT infrastructure have become key factors for development in digital finance. Data and infrastructure exist in the cloud, thus being flexible and available, but vulnerable to data protection leaks or attacks. Speed of innovation in digital finance has become even more of a factor. Life cycles of products and solutions are getting shorter and shorter.

The EC envisages embracing the trendy innovations and the opportunities of the digital revolution, which will boost financial product innovation and development, thus making funding to businesses more available. Another positive impact of embracing digital finance is the support of post-pandemic economic recovery, mobilising funding in connection with the EU's green deal and the new industrial strategy. An open strategic autonomy in financial services will be reinforced by a strong and dynamic digital financial sector. Lastly, the EU's Economic and Monetary Union will benefit from an enhanced financial markets integration in the Banking and Capital Markets Union.

Based on the positive voice collected in the public consultation, the EU will pursue four priorities:

Defragmentation

'The financial services digital single market must undergo de-fragmentation. Consumers must access cross-border services more easily and cross-border scale-up of digital operations must be simplified.'

An interoperable digital identity enabling new customers access to financial services will be implemented. AML rules need to be more harmonised, while the new rules will benefit from an updated e-IDAS regulation. Know your customer (KYC) procedures must be evaluated and data protection aspects will not be missed. A part of the new rules will define which ID documents will be necessary and which technology can be used for a person's identity verification purposes. The e-IDAS regulation's application should be extended to the private sector and promote trusted digital identities for all EU citizens (finally!).

Passporting will enable consumers and businesses to access to cross-border services. This will be introduced for various crowdfunding services, while the crypto-assets rules currently proposed by the EC should enable passporting for crypto-assets issuers and service providers.

Facilitate distributed ledger technology

The upsides of crypto-assets and blockchains are cheap and fast payments, new funding possibilities and more efficient capital markets. Therefore, the EC has presented a legislative proposal for a regulation on markets in crypto-assets and a regulation on a pilot regime for market infrastructures based on distributed ledger technology, thus proposing an oversight framework for critical third-party ICT providers and the launch of a European cloud services marketplace. Future cloud services could be certified by the EU cybersecurity agency.

A common European financial data space

Enhanced data sharing rules require financial firms to publish comprehensive financial and non-financial information on their operations and products. A new strategy for reporting and supervision should impose rules on supervisory reporting requirements. The structure of the reports will be in machine-readable electronic formats and easy to process and combine.

Open finance – the use and sharing of customer data by banks and third-party providers, which has been enabled under the revised Payment Services Directive – supports better financial products, better targeted advice, and greater efficiency in B2B transactions. The EC will come up with a legislation proposal on a more open finance framework.

Risks and challenges

The 'same activity, same risk, same rules' principle will maintain the rules among market participants.

Large technology companies will become a part of the financial services ecosystem. Naturally, risks will evolve, affecting global financial stability, competition and customers. New legislative initiatives will be introduced in order to address potential risks stemming from large financial services operations. Consumers will benefit from improved protection under the revised legislative framework.

A three-year plan?

To conclude, the reader may have the impression that within three years, the driving force of innovation and legislative updates triggered by the coronavirus will result in a more modern, flexible and digital-but-safe world of finance. We hope that the positive approach and enthusiasm of the Brussels officials will keep on, even if they have to work from their home office for several more months or maybe years. Who knows? □

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Back in conference – but virtually!

R3's Annual Conference returns – in online form. **Freddie Webster** looks at some of the highlights.

After a year's hiatus, the R3 Annual Conference returned this May. More than 500 delegates joined us for four days of live and on-demand virtual content that combined the traditional R3 conference programme with sessions from the R3 nations and regions. The event covered everything from SME regulatory changes to the challenges of cross-border asset recovery in Europe.

Jointly hosted by R3 president Colin Haig and vice president Christina Fitzgerald, the Annual Conference 2021 set out to show how R3 was 'Backing the Future' and used immersive technology to bring a virtual experience to life.

Co-hosts and celebrities

The conference began with a welcome from the event's co-hosts. R3 president Colin Haig looked back on the challenges and successes of 2020, highlighted the key findings from R3's *Value of the Profession* report and gave an outline of the 2021 conference agenda.

He then handed over to R3's vice president Christina Fitzgerald, who announced that Liz Bingham would be stepping down as CEO, to be replaced by R3's head of technical, training and education, Caroline Sumner.

The welcome concluded with a message from Nathaniel Parker, better known as inspector Thomas Lynley from the *Inspector Lynley Mysteries* TV series.

Better together

The Insolvency Service is a key stakeholder for R3 and the profession, and an organisation that we work closely with, so we were delighted to welcome Dean Beale, the organisation's CEO, as our speaker for the first session of the 2021 Annual Conference.

Dean shared his insights into the Service – gained from nearly 18 years of working there – and the major challenges he thinks it and the profession will face in the months and years ahead.

He was keen to highlight that, in his view, the profession and the Service work best when they work together – music to the ears of everyone in the audience,

> "The profession and the Insolvency Service work best when they work together."

Dean Beale, CEO, the Insolvency Service.

especially as the role of the Service continues to evolve with government policy, and as we emerge from the Covid-19 pandemic.

Helping the UK get back to business

The afternoon of day one kicked off with a panel session that looked at R3's 'Back to Business UK' campaign.

R3's CEO-designate Caroline Sumner began by outlining the campaign's two pillars: ensuring the profession has the tools to fully support economic recovery, and that directors and business owners understand the need to seek advice as early as possible.

This was followed by Alison Goldthorp outlining some of the work of the campaign to engage government and industry. The next stage of the campaign, Alison said, included training for directors and the profession on the new insolvency processes the Corporate Insolvency and Governance Act 2020 (CIGA) had created, and the launch of new guidance for company directors on their statutory duties and insolvency and restructuring options.

New professionals and the new normal

'Modern times, modern thinking, modern working' was the stand-out quote from day two's new professional panel as representatives from across the profession talked about their experiences of working during the pandemic, and going from being in the office to being at home 24/7.

It seems everyone faced the same challenges: the speed of change, the challenge of working from home, isolation, difficulty in establishing working relationships across a computer screen, trying to keep motivated and missing the energy that comes from working with others.

However, it seems there were also a lot of positives: how quickly everyone adapted to the new situation, that small changes can make a big difference and how everyone found better, more efficient ways of working.

Unpicking pre-packs

Day two's penultimate session, chaired by R3 president Colin Haig, was on pre-packs and the new government legislation around connected-party sales.

The panellists agreed pre-packs are still a critical part of the restructuring landscape, as they are often the most effective tool for certain sectors and situations where great speed is needed.

Asked whether the ever-increasing scrutiny of pre-packs will raise the cost of the process, a session poll saw 90% of attendees respond 'yes', while 80% felt the question of sales to connected parties would still be relevant, even if the frequency of pre-packs decreases.

Reaching for the skies

Day three of the conference saw keynote speaker Mandy Hickson taking to the virtual stage to share her experience flying in a front-line Tornado squadron.

With strong parallels drawn to the corporate skills set, Mandy demonstrated how her ethos of 'dream it, believe it, do it' led to a successful career as a fast jet pilot in a squadron otherwise dominated by men, and how some of the toughest lessons were learned through failure and extreme pressure.

Heading north of the border

Mandy Hickson's keynote address was followed by a session dedicated to restructuring in Scotland, with a particular focus on the SME market and CVAs.

Over the last 30 years, CVAs have evolved from their original purpose of being a restructuring tool for SMEs into something more commonly used by larger firms, and are much less of a feature in Scotland's SME-dominated business landscape than in England and Wales.

The reason? The perceived costs, complexity and completion rates, the session concluded, although there were some cases where CVAs had been used successfully.

Post-pandemic, it'll be interesting to see whether that changes – and whether R3's new CVA protocol can help this useful restructuring tool gain further traction in Scotland.

CIGA – then, now and future

The final day of the conference opened with an update on CIGA and business interruption insurance claims, with a panel of experts, chaired by Guildhall Chambers' Stefan Ramell, sharing their experiences of the Act's test cases.

While government support has meant a number of the tools introduced in the Act remain untested, it's clear the restructuring plan will be a critical tool for businesses of all sizes as government measures wind down – and will play a vital part in achieving the government's aims of rescuing businesses and jobs, and recovering as much of the Covid-19 support loans as possible.

Nations, regions and the new normal

On day four, R3's regional and national chairs came together to discuss the ever-changing rules around the reopening of the economy and the challenges posed by the change in the UK's relationship with the EU.

Across the UK, the total cost of the pandemic to business is yet to be fully understood although hope remains for a gradual return to business as usual.

While activity levels for IPs are likely to increase as the government's initiatives are withdrawn, the profession is operating in unchartered waters; pre-pandemic there was a more common pathway for recovery.

The session's Q&A addressed the question of attracting the right people to the profession and whether there is capacity to cope with a sudden uptick in work.

Promoting the positive impact of the profession's work is a key driver to attracting talent, the panel concluded, with R3 Midlands Chair Eddie Williams noting that: 'this profession is a calling to those that want to make a difference'.

Crossing borders, recovering assets

The conference's final panel session looked at the current and future outlook for cross-border asset recovery in Europe in light of Brexit.

Insolvency and Companies Court Judge Catherine Burton kicked off the session, explaining that while the UK can no longer rely on automatic recognition in the EU, the UK is in the rare position of having specialist judges who can consider recognition applications as a matter of urgency if needed. Anecdotally, there seems to have been a rise in recognition applications, but this is not necessarily due to Brexit as some of these concern countries outside of the EU.

> **Pre-packs are still a critical part of the restructuring landscape, as they are often the most effective tool for certain sectors and situations where great speed is needed.**
>
> Pre-packs panel.

While Brexit will have some impact on the practicalities involved in cross-border cases, the impact may not be as significant as has sometimes been suggested. Daniel Lewis of Wilberforce Chambers explained that English courts will be able to grant freezing orders over foreign assets if the foreign jurisdiction refuses to recognise the receiver, although recognition as a safeguard is desirable.

Professor Christoph Polus from South Square offered a German perspective to the discussion and likened Brexit to a divorce, with the UK as the leaving party. The importance of building judicial and professional relationships was also noted as a key takeaway from the session by Frances Coulson, R3 Fraud Group chair and partner at Moon Beever, and Kristina Kicks, managing director at Interpath Advisory, who chaired the discussion.

Drawing to a close

The conference concluded with co-hosts Colin Haig and Christina Fitzgerald delivering their closing remarks, looking back at a year that has brought about many challenges and many triumphs.

With that, the 2021 R3 Annual Conference was over. Thank you to everyone who attended, our speakers and our conference sponsors:

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Watch again or catch up

If you attended this year's Annual Conference but missed out on some of our conference sessions, you can view them until September by visiting the On Demand Library within the Annual Conference virtual platform. The Conference will also be available for purchase via the R3 website soon. □

FREDDIE WEBSTER
is a membership engagement executive at R3.

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One year on from lockdown

The press, policy and public affairs (PPP) team is tackling post-pandemic challenges head on, from pensions to pre-packs.

A year on from the UK first entering lockdown, restrictions are now hopefully beginning to lift for good, but new challenges lie ahead for businesses and the economy. At the start of the year, and in advance of the winding down of the various pandemic support measures, the PPP team wrote to the chancellor ahead of his budget statement. Our letter outlined our key recommendations for mitigating widespread failures and supporting the profession's work in rescuing viable businesses.

Meanwhile, we have been working to help educate directors about insolvency and how to find appropriate, regulated advice.

Since the last edition of *RECOVERY*, we also responded to the new pre-pack regulations and a consultation from The Pensions Regulator (TPR). And we have continued to liaise with parliamentarians, journalists and other stakeholders on key issues of concern to the profession.

Pre-pack reforms come into force

New regulations requiring independent scrutiny of pre-pack administration sales came into force at the end of April. We recognised the rationale behind the government's reforms – to improve stakeholder confidence in pre-packs – but raised significant concerns around the scope of the reforms and the criteria of the evaluator.

These concerns, and our recommendation that the government maintain a central list of approved evaluators, were raised in the House of Lords during a debate on the regulations by Lord Foulkes and Lord Lennie.

We are conscious that the new regulations are not perfect, and we will be welcoming views from members over the next few months on how they are working in practice. We will continue to liaise with the RPBs and the Insolvency Service to help ensure the regulations work as best they can – so that stakeholder confidence in pre-packs can be improved rather than diminished.

Recommendations supporting business rescue

March kicked off with the chancellor, Rishi Sunak MP, giving his annual budget statement. We wrote to the chancellor ahead of his speech to outline the key policy recommendations that we believe will help to mitigate widespread failures and support the rescue of viable businesses in the aftermath of Covid-19.

One of these recommendations was for the government to implement a policy across all departments to support restructuring proposals where a business was viable pre-Covid-19 – and would still be viable, were it not for the pandemic.

Our letter also advocated for HMRC to adopt a more engaged and supportive role as a creditor in insolvency and restructuring processes. With HMRC having gained an even more significant role as a creditor as a result of the reintroduction of Crown preference in December last year, we have stressed that its approach to voting on procedures should be reconsidered, and that its staff should be adequately trained to understand the importance of the organisation's role in determining the success of insolvency and restructuring processes.

We will continue to campaign on these points in the months ahead, to ensure the profession can carry out its work in an environment that is as conducive as possible to business rescue.

> **We will continue to liaise with the RPBs and the Insolvency Service to help ensure the regulations work as best they can.**

TPR's approach to new criminal offences

Also in March, TPR published a consultation on its proposed approach to the investigation and prosecution of the new criminal offences introduced through the Pension Schemes Act 2021.

When the Act was debated in parliament last year, we raised concerns that the legislation could expose insolvency practitioners and other professional advisers to civil and criminal liability, and that some of the changes would make it more difficult for directors to seek expert, regulated advice.

While TPR's draft guidance goes some way to assuage concerns about the likelihood of this activity being caught by the new offences, we would still welcome further clarity on several issues, particularly around the precise scope of the carve out for insolvency practitioners.

R3 in the media

On the media front, the PPP team has been busy responding to requests and arranging interviews for various outlets including the *Sunday Times*, *The Times* and *Global Turnaround*.

R3 commentary on the England and Wales insolvency statistics was covered by *Reuters*, the *Dow Jones*, the *Press Association*, the *i*, *MailOnline*, *This Is Money* and *Accountancy Age*, while our comments on Scotland's insolvency statistics featured on the *BBC News* website and in the *Herald*.

Meanwhile, our response to parliament approving the pre-pack regulations was covered by *The Times* and other outlets. R3's comments on the chancellor's budget announcement also received good pick up in the regional and trade press.

Looking ahead

In May we'll be launching our *Value of the Profession* report to parliamentarians, journalists, national and regional stakeholders and our members. The report illustrates the scale and importance of the profession's work to the UK economy, and reflects the crucial role it will continue to play in supporting businesses and individuals throughout the Covid crisis and beyond.

The PPP team, together with R3's technical team, as part of R3's Back to Business UK campaign, is also working to produce a new resource for directors, which will include digestible information on insolvency and restructuring, how the profession can help and the importance of seeking early advice. We're hoping to launch this resource at the start of June – keep your eyes peeled!

The last year has been unprecedented, and the UK's recovery from Covid is still uncertain, but we will continue to support and promote the profession as it works to help businesses and individuals in the challenging times ahead.

JAMES JEFFREYS is head of press, policy and public affairs at R3.

STUART McBRIDE is communications manager at R3.

Scotland's restructuring professionals look beyond Covid-19

R3 Scotland provides an event to tackle the biggest issues facing the country in the wake of the pandemic.

During a year of change, the R3 Scotland Committee decided to do something different too. Responding to the Covid-19 pandemic and its impact on Scottish businesses and the economy felt imperative. The R3 Scotland Committee felt that 2021 was the right time to launch its first virtual forum so that these significant issues could be aired, discussed and debated in a timely manner among Scotland's business leaders and restructuring professionals. With many feeling that the economic changes have only just begun, our industry could well be key in helping businesses across Scotland and in multiple sectors face and get through the challenges ahead.

This inaugural forum will be held over two days on 9 and 10 June 2021. Scotland, like all other parts of the UK and the rest of the world, has been through one of the biggest challenges to society and its economy in its history. As Scotland moves through this period, we face the new challenge of how our society and businesses emerge from the impact of the last year. How we move into the new business order, and the supportive role the Scottish insolvency and restructuring profession has to play, will be among the key questions that this forum will address.

> “Our industry could well be key in helping businesses across Scotland and in multiple sectors face and get through the challenges ahead.”

Tackling the post-pandemic issues

Day one will start with a keynote panel discussion covering the economic outlook and how Scotland will be impacted into the future following the events of 2020. After this, there will be a lively panel debate led by restructuring professionals, but relevant to all businesses, to consider which processes in their restructuring toolkits will be best equipped to tackle the challenges ahead. Day one will be rounded off with a session looking to the 'next normal' and will ask: 'what is the outlook for Scottish businesses?' It will bring insight and perspective from leaders in Scottish government, Scottish industry, the Scottish economy and HMRC. It will explore the role of Scottish lenders for businesses, discuss how recovery loan schemes might be utilised by businesses going forward and what challenges and opportunities Scotland will face as we move through 2021, steering ourselves out of the Covid-19 pandemic and into the new business order. It will also discuss current business and sector confidence and highlight the stress points now and in the medium to long term. It will explore how the Scottish government and HMRC will support Scottish businesses as we move to the 'next normal'.

Day two opens with a session covering the fraudulent access to government support schemes. It will look at the work being done by the special unit set up by HMRC to combat furlough fraud. It will provide guidance as to what to look out for as well as finding out what we as a profession can do to help HMRC recoup public funds deemed to have been misused. We will hear from the chair of the R3 Fraud Group on the steps being taken by R3 to work with all agencies and stakeholders coming up against fraud and provide some top tips on how to deal with it properly and effectively.

The next two sessions of day two will move to focus on specific sectors affected by the Covid-19 pandemic.

Oil services

Our first sector focus will be the oil services sector, which has had a tumultuous past year. The industry has had to deal with a brutal downturn as it tackled the challenges of an oil supply and demand shock while dealing with the operational adversity posed by a global pandemic. This downturn followed in the wake of the 2014 oil price crash, with many oil services companies still struggling to fully recover. We look at how businesses in this sector are trying to adapt to 'build back better' in the face of an energy transition towards a lower carbon future and the impact that may have on restructuring in the sector.

Our final session to round up our inaugural forum will be a hospitality and leisure focus. Scotland has a route map out of lockdown but what will that look like for the Scottish hospitality and leisure sector after a year of dormancy? And how will consumers respond? By necessity, our habits have changed over the last year and the sector will need to respond to this. It is anticipated that, as restrictions ease, some businesses in this sector will need restructuring advice, while others will thrive like never before. This will be a live panel presentation, drawing in sector experts.

Weaved into the forum, there will be a meeting hub, on-demand sessions and a virtual exhibition.

A legendary challenge

On the social and networking front, the forum will include the West of Scotland Insolvency Forum Quiz (WOSIF Quiz), to be held virtually for the first time in its long history on 10 June 2021 at 7.00 pm. The WOSIF Quiz has legendary status within the Scottish insolvency profession as the quiz to end all quizzes and is not to be missed. It will also give attendees a great opportunity to connect and network with other colleagues from across Scotland, some of whom, even virtually, they may not have seen for a while. ◻

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An interview with... HMRC

Chris Mullan, HMRC's head of debt strategy, talks to *RECOVERY* about Crown preference, Covid-19 and a year of changes and adaptations.

Chris Mullan biography

- Chris Mullan graduated in 2008 at the height of the global financial crisis. Like many of his peers, he was driven to the Job Centre to sign on for jobseekers' allowance and look for work, only to be offered a position on the other side of the desk working for the Department for Work and Pensions.
- He moved from the DWP to become a contract manager for the Department for Communities and Local Government, working on contracts for EU funding, before obtaining his first posting in Whitehall working directly for a minister in the Department for Education.
- He took a brief break from the public sector to work in strategy and communications for a Housing Association, before returning to take up a post at HMRC in 2014. He progressed through the organisation to become head of debt strategy.

Q What impact has the pandemic had on HMRC as an organisation, with changes in legislation and with working from home?

A From the debt management side, we saw a whole mindset shift. That shift was about an activity that we do anyway – prioritising the support of businesses – but making it more explicit. That has fed through to pretty much everything we do, including debt management. The obvious examples are the schemes that were announced: the furlough scheme, the self-employment income support (SEIS) scheme and so on.

On a practical level, it means that most of the people who work in debt management have spent at least some time during the pandemic working on other stuff, particularly taking calls from customers who are claiming through those support schemes. Rather than collecting money from people, they've literally been the ones handing it out. We've definitely noticed a change in our understanding of customer situations and circumstances – not that there wasn't empathy before, particularly where people are in difficult positions – and we're starting to see that in the conversations we're having with debtors as they transition back into classic debt collection conversations.

We've definitely seen that time-to-pay arrangements have been a really, really useful lever for this, as has deferring taxes on a case-by-case basis. The policies always allowed deferring of taxes, but it was quite rare before the pandemic, so I think that's a testament to how our people are thinking differently.

Q Do you think that time-to-pays will be much more a part of the toolkit now or at least closer to the front of your colleagues' minds?

A It is hard to tell, because the reason those deferral periods were put in at the start of a time-to-pay arrangement is largely because there was so much uncertainty early on in the pandemic. Neither us nor the customer were well informed enough to know what was going to happen in the next few months. The customer quite legitimately couldn't say 'I can commit to this much a month over the next few months'. I don't think it will necessarily lead to it happening on the same scale, because hopefully that uncertainty won't persist, but it does show that where that uncertainty does exist our people realise that this is a tool they can use to help.

Q So how does HMRC see itself working to support a rescue culture, particularly in light of the new preferential status? And how does HMRC see its position in respect to voluntary arrangements?

A In rescue culture, we think our time-to-pay policy and approach is the biggest example of how we support businesses. We have billions of pounds a year in time-to-pay arrangements and they're very successful. Over nine out of ten of them complete successfully. The average length of those payment plans has really grown. We've proven that we are being genuinely supportive, so that businesses don't topple over unnecessarily.

On voluntary arrangements and preferential status, we did review and update something we have online about working with IPs and our posture towards voluntary arrangements and all types of financial arrangements. What I have said to stakeholders before, particularly during technical consultations and when talking to people at roundtables, is that we don't think this changes our posture at all on voluntary arrangements in terms of what we consider to be a good one. The economics of insolvency don't change for us when preferential creditor status takes effect – we don't suddenly make a profit out of insolvency. We still make losses. The losses are a bit smaller than before, but the economics of that bit of our business don't change because of this. We do recognise there's a greater expectation on the role we play in the process and there's a bit of stepping up we need to do to honour that position. For example, voting on fees, which we haven't had to do a lot of before. We need to step up to that and make sure that we don't slow things down in processes because we're higher up that chain.

> **"We've definitely seen that time-to-pay arrangements have been a really, really useful lever."**

Q Has there been any internal changes, such as a new sub group or sub team dedicated to preferential creditor status?

A It's not a huge operational change for us. There was time spent on getting our systems as automated as possible, which is all completed now. Is there a high volume of work for us to do in that area now? We think there is, but we've got a few more people working on it. We've been having conversations internally about making sure we always have resource to submit our claims where we're not petitioning, or to vote and make sure we're an active participant. I think this will need to be tested but we haven't reached that stage yet. It's too early to say.

> "The economics of insolvency don't change for us when preferential creditor status takes effect – we don't suddenly make a profit out of insolvency."

Q R3 have said they've seen instances where HMRC has abstained from voting. Could you tell us a little bit about that?

A Sometimes we abstain but, when we have an interest, we do vote. If that's not happening and people feel they are not getting engagement on a particular case, we'd be keen to hear about that from the individuals affected. So far, there has been quite a lot of work around the policy and the change to preferential creditor status, but it is just too early to know what the move requires us to change.

Q Have you adequately prepared for an increased level of engagement with IPs, which the return to preferential status is going to bring?

A This is something we do feel quite confident about. We have made a few changes already. And I know that, through interacting with R3 in particular, we're getting the message out and reaching people, but we're also trying a few new things. We're getting better at building drop boxes and central email inboxes – making it simpler for IPs to interact with us. That's something we're really keen to improve on. I think we've made really big strides in the insolvency community. We have a dedicated person for the relationship with R3. We've got an insolvency profession now in place, which has started to make a difference to how we work in this area. It's still relatively early days, and big changes have come in, but we're going to get better and better at it.

Q Is there an action plan for getting towards the end of the year? Are you expecting an influx of extra work that you're going to have to deal with when the support measures come to an end?

A We don't know how much debt is going to go through to insolvencies. Who knows that? We're always going to be loath to forecast levels of insolvencies in the UK; we're not an economic department. But we will ask our colleagues in wider government what they think to get a steer.

The simple answer is yes, there is an action plan, but the more useful answer is that we've got a plan in place to increase or decrease resources as needed to make sure that our claims unit is always resourced sufficiently. We know exactly where we would take people and put them if needed. The new work will be when we start petitioning. And that's the bit no one can do at the moment.

Q Do you think that there will be a tsunami of petitions, or do you think it will be more of a trickle effect?

A No, capacity will be a constraint. The other two classes we need to be thinking about are banks and landlords; we don't know what they're going to do. It will be inevitable that HMRC pursues some insolvencies this year, because there are insolvency cases that we petition that other creditors would never do. The market will correct itself to an extent. The deeper question is whether the country's economy is reliant on HMRC to fix a problem once the moratorium lifts? I would argue no.

> "We've got an insolvency profession now in place, which has started to make a difference to how we how we work in this area."

Q There are currently significant delays in recovering VAT, and processing returns and queries in insolvency cases, which in certain instances risks insolvencies needing to be extended as a result of unresolved VAT reclaims or queries. Does HMRC have any plans to increase resources in this area?

A This came up at a conference actually. This is a problem. The root cause is that we are moving to a more digital solution that can handle things automatically, but it's not in place yet. It's very manual at the moment. It has been a challenge connected to the pandemic but we do have a plan in place. In eight to ten weeks we're hoping to be back on track. The answer is a simple one: it is just a case of bringing in some resourcing for it. As we're getting more people back onto debt work and we're getting less of a demand from the CJRS scheme and others, we have the option to do that now.

Q How does HMRC intend to work with the profession to address Covid-19 related frauds – in particular in relation to the pandemic support measures that are in place (furlough, bounce back loans, etc)?

A Obviously, HMRC does have responsibility for addressing that as a tax issue. If another department in HMRC tackles those cases, those people have to repay money to us and they'll be sent a bill. If they don't pay on time, then it becomes a debt and becomes our concern. ◻


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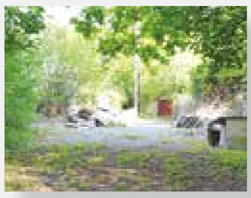

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