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RECOVERY

Professional services

How to survive the tough times… or the best way to move on

Selling a professional practice firm
How to retain value

A CEO's perspective of a professional services firm
What makes – or breaks – a professional services firm

Energy providers: villains or victims?
Look at it my way…

Finding the pensions solution
Are there alternatives to the thorny issue of pensions in restructurings?

Interview with Andy Slaughter MP
His work on the Legal Aid, Sentencing and Punishment of Offenders Bill

Plus
Legal update
Policy Discussion Groups
SPG

What do you think?

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

Please contact me on **recovery@r3.org.uk**.

Editorial

Is it just me or is the world going mad? We are living in times of IMF bailouts, pension time bombs and Beijing bonds. Another Act of an endless Greek tragedy is being played out before our eyes featuring haircuts fashioned by French and German barbers (more Sweeney Todd than Vidal Sassoon). Vying for our attention with that little drama is an Italian economic comic opera and an array of spicy Spanish tapas, highly damaging to one's ear (in the case of the former) and palate (in the case of the latter).

Of course things are much better at home… if one ignores public sector strikes, the continuing foray over bonuses and fat cats, and the fact that I cannot venture far from my office without tripping over an anti-capitalist protestor. Time to emigrate? Iceland perhaps?

It is my pleasure to introduce you to our winter edition. Our theme is the professional services sector. The subject is dear to my heart not only because I am a proud member of the legal profession but also because one of my first cases was acting for a landlord owed a few bob or two by a firm of architects. The case will make it into my book of memoirs (I am currently on chapter 12) by reason of the colourful attire and personality of one of the firm's partners and the fact that neither they nor I (having just come out of law school) knew what we were doing.

Professional services, from the law to medicine, will not escape the cold bite of the economic storms lashing our shores. We have already seen high profile collapses of a law firm and insolvency practitioner practice in recent times. In this edition, we have articles describing the special challenges facing professional services firms and potential solutions when financial pressures come knocking on the door. We also feature other topical subjects such as the sale of bank debt and a review of the legislation for failing financial institutions (very timely in the light of the collapse of MF Global). We finish with an interview with Andy Slaughter MP.

As the year draws to a close, I hope it will not be presumptuous for me to make one prediction for 2012: the world will be a very different place at the end of the year than it will be at the beginning. Time to stock up on the stilton and port, I think. Happy Christmas and New Year to you all.

Michael Rutstein is a partner at Jones Day.

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Regulars

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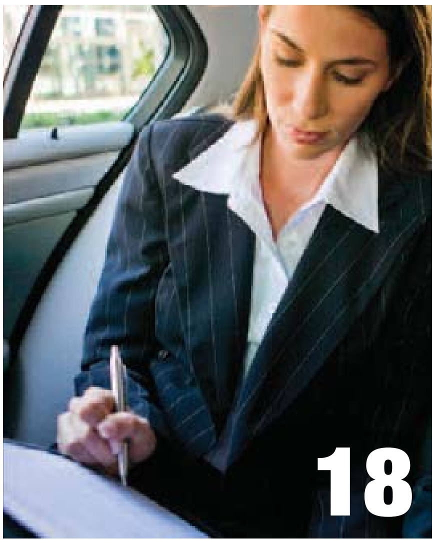

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Extracting value from banks' loan books

Graham Martin examines the reason for the squeeze on banks to extract value from their loan books and their willingness to dispose of it with regard to IPs and restructuring both in the UK and Europe.

The raft of distressed investors that raised funds and chased investment opportunities in the immediate aftermath of the Lehman crash were sorely disappointed. Headlines abounded that distressed investors would be the new masters of the universe as bubble economies, mainly in Western markets, finally burst. History, surely, had taught us that some of the most profitable deals were struck in depressed markets? But the banks too had studied history and did not want to sell off assets on the cheap, only for the buyer to make a substantial return as markets recovered. This was replicated on the insolvency side where banks looked to refinance, agree CVAs or explore other non-operational administration routes to protect precious value.

> "The scale of the debt is such that an asset by asset 'work out' is laborious and banks are therefore assessing the restructuring of whole and groups of loan books."

The scale of the debt is such that an asset by asset 'work out' is laborious and banks are therefore assessing the restructuring of whole and groups of loan books. While banks have certainly been assessing which loans are 'core' for their businesses since 2008, the level of deals' activity has been surprisingly low. What we have seen up until quite recently is an impasse between buyers and sellers. On the sell side, the banks must not be seen to repeat the perceived mistakes of previous recessions and sell at too steep a discount to the super profit of buyers. On the buy side, a dearth of purchasers with sufficient capital has reduced competitive tension.

Time to extract value

However, banks are now faced with the triple-whammy of persistent sovereign debt crises, increased capital requirements and a funding mismatch; which is piling on the pressure to extract value from their loan books. At the same time, there is increasing liquidity on the buy-side, allowing investors to pursue opportunities further.

With around £8 billion of loan portfolio deals closing in the third quarter of 2011 and £17 billion of deals in progress, the market has finally thawed in the UK. In recent weeks we have seen most of the big name banks announce sales of loan books, particularly real estate portfolios. The RBS/Blackstone deal in July set a precedent for how the buyer/seller expectation gap could be bridged. The deal is a bilateral agreement whereby the bank has retained a share in the upside of any future improved performance of the underlying assets, while the buyer has the opportunity to manage the assets out. Importantly, the buyer was able to lever its investment; giving it more scope to improve on price and increasing the return potential. In this way, the transaction has also shown that debt finance can be sourced at competitive and appealing terms for debt portfolio acquisitions. In previous downturns, banks were the traditional buyers of loan books but the deal is a good example of non-bank buyers coming to the fore, increasingly moving up the learning curve and expanding capabilities.

The UK is not the only country that has seen an uptick in deal activity. The same is true in Europe where there are around €30 billion of deals in progress at the moment. Hotspots include Spain, Ireland and Poland. European sovereign debt crises are precipitating distressed sales of loan portfolios and indeed we are still seeing banks fails – the most notable recent example being Dexia in Belgium. The effects of the Eurozone crisis are compounded by rapidly evolving regulatory reform – such as Basel III, Solvency II and the Independent Banking Commission's report in the UK. Accelerated disposals of non-performing and non-core assets will become ever more necessary and prevalent across Europe as deadlines approach for the repayment of support loans.

Regulation prompts change

In the UK, we have seen a cushioned downturn that has allowed banks more time to dispose of assets and loan books. However, regulatory reform – in various guises – is having a highly influential effect. In particular, Basel III puts pressure on banks to think of additional capital they might need to put aside for future losses. With banks looking ahead to how inevitable interest rate rises will affect the performance of their loan books, mandating disposals now may be more profitable than accounting for additional future capital requirements later on.

> "We do expect to see the collaborative trend that has emerged in this downturn – such as the use of CVAs and solvent turnarounds – continuing as administration appointments become the option of last resort."

Certain industries – property, retail and construction in particular – look set for a long and slow recovery. We are now seeing banks take decisive action to 'fix' these issues. This is certainly true on the loan portfolio transactions side, and on the insolvency side we are seeing a busier pipeline in slow recovery sectors; retail being the most prominent example in the run up to Christmas. While we are expecting to see more restructuring activity of individual assets, we do expect to see the collaborative trend that has emerged in this downturn – such as the use of CVAs and solvent turnarounds – continuing as administration appointments become the option of last resort.

Graham Martin is a partner and co-head of the Portfolio Solutions Group at KPMG LLP.

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President's column

Frances Coulson reports on R3's involvement in the party conferences and further action in the media.

Are we getting anywhere? Well I can certainly report we are getting near the senior decision makers. I have had several meetings with The Insolvency Service to try to devise a workable solution to the Consultation on Regulation. R3 would like to see regulation streamlined rather than setting up a fee review body with no track record. At the Insolvency Today conference, I shared a platform with Stephen Speed, head of The Insolvency Service, and seated side by side we found quite a few areas of agreement. I have also spoken at a roundtable meeting in parliament with the insolvency minister Edward Davey and several other well informed MPs.

> I would sum up the conferences as hectic, enlightening, but above all successful. A combination of a meeting programme and fringe events, as well as individual meetings with MPs, gives R3 unrivalled exposure to key decision makers.

R3 at the conferences

Our policy messages to The Insolvency Service have been backed up by questions in the Houses of Parliament from MPs (roughly 20 since the last issue) and putting pressure on the minister to take action. A few weeks ago, I attended the Labour and Tory conferences to find out the current discourse within the political parties and how R3's themes can dovetail with them. At Labour, we focused on personal insolvency with our fringe event entitled 'Britain's debt hangover: how can we protect the financially vulnerable'. Stella Creasey MP, who has been making a name for herself against loan sharks in the Finance Bill and on the streets of Walthamstow, sat on the panel chaired by Martin Lewis from MoneySaving Expert. We had an interesting and lively debate on the regulation of Debt Management Plans and we also discussed the costs of credit and bank lending. We took the opportunity to meet up with more MPs and elicit their support on our various key issues.

At the Tory conference we hosted an event on corporate insolvency, 'Driving growth; bouncing businesses back to profit', chaired by David Wighton, associate editor of business and politics at *The Times*, with David Gauke MP, the Treasury minister. Regulation and HMRC's position on the Jackson reforms were debated in another good discussion.

This was the first time I had attended a party conference and found the processes fascinating. At the end of the day, I would sum up the conferences as hectic, enlightening, but above all successful. A combination of a meeting programme and fringe events as well as individual meetings with MPs, gives R3 unrivalled exposure to key decision makers and with so many other trade bodies and business organisations out in force, it is vital that R3 is out there and shown to be a serious player.

Media appearances

We have not been neglecting the media, and I was delighted to make my R3 debut on Radio 4's *Today* programme at the end of September, speaking about rent quarter days and the retail sector. Lee Manning and I also hosted a journalist workshop for the *Financial Times*, the *Law Society Gazette* and *Credit Today* at R3's offices in October. I have met several journalists one to one from *The Times*, the *Financial Times* and other newspapers, trying to inform and influence their written opinions going forward.

European Account Preservation Orders (EAPOs)

The profession has just secured a significant victory in getting government to opt out of the European Account Preservation Order (EAPO) – seeing off a major threat to our rescue culture. This would have effectively enabled you to freeze someone's assets abroad without the careful checks and balances we have in the UK, and potentially crippling a company's cash at a critical moment and preventing rescue, at least without an expensive application in the creditor's country of origin. The ILA's response dubbed this 'nuclear arms for all' and joined us in submitting concerns to the Ministry of Justice. R3 will keep closely involved with the EAPO developments and advise members of any changes accordingly. (See Technical update on page 12.)

We are due to hear back from The Insolvency Service on regulation between now and January 2012, with a Statutory Instrument on pre-packs perhaps in April 2012 – so we'll see if all this work pays off! At least we have delayed the three-day notice period on pre-packs for the moment. In the meantime, I will be visiting the South West, Yorkshire and Eastern Regions, as well as speaking in London and at the SPG conference, so I'll see many of you around. ◻

Frances Coulson is head of Insolvency & Business Recovery and managing partner at Moon Beever Solicitors.

News update

Jim Luby

INSOL Europe

INSOL Europe held its 30th anniversary conference in September in Venice. Some of the highlights included: the announcement of academic initiatives; consideration of detailed and learned submissions on proposed changes to the European Insolvency Regulation; and notice of strategic and operational developments that are underway at the association, not least in relation to communications.

Chris Laughton, president of INSOL Europe, also launched the European Insolvency Regulation Case Register at **www.insolvencycases.eu**. This is a database of judicial decisions relating to the European Insolvency Regulation from throughout the EU; the website is a final public beta release. Academically moderated English language abstracts of some 30 cases had been uploaded at launch and a network of 40 national correspondents is expected to have completed an initial tranche of 400 abstracts over the next three months.

Chris also introduced Jim Luby, a partner at McStay Luby, who takes over as president.

R3 comments on recent insolvency figures

Although personal insolvency figures are down by 11 per cent to 30,219 during Q3, they hide the fact that IVA and DRO numbers have increased slightly, and do not include the growing number of DMPs or individuals struggling without help.

R3's Business Distress Index has revealed over four in ten businesses (43 per cent) are experiencing decreased profits. Despite this, as yet there has only been a flattening in the number of corporate insolvencies. However, this is largely a result of the value of business assets currently being too low for creditors to pursue – they will not cover the debts they are owed. This means that unprofitable businesses are being allowed to stay afloat albeit as 'zombie' enterprises.

Reductions at The Insolvency Service

The Insolvency Service has begun the process of reshaping the way in which it carries out business and delivers services in the future following an internal consultation process during the summer. Subject to financial considerations, The Service is ultimately looking to reduce the number of offices from 33 to 25 and develop a more flexible centralised structure by moving towards a network of eight Insolvency Service Centres and around 17 Insolvency Service local offices. A public consultation will determine if three offices, Medway and Bournemouth in 2012 and Stockton in 2013, should close. Visit The Insolvency Service website for more information **www.bis.gov.uk/insolvency**.

A team from Chantrey Vellacott DFK recently completed the 4 x 4 Challenge (400 miles cycled in four days) in aid of Sport Relief. The team of Lee De'ath, Richard Toone, Kevin Murphy and Adrian Hyde said that they had, 'never been so thankful to see our offices in Russell Square!'

New technical officer for R3

Jonathan Ausena has recently joined R3 as a technical officer. He has a law degree and previously worked as an administrator in an insolvency practice.

New members of *RECOVERY* editorial board

Ann Nilsson (left), a partner at Mazars LLP, and Samantha Hawkins, a senior insolvency manager at David Excell Associates, have joined the editorial board of *RECOVERY*.

Retailers face £1 billion rise in rates bill

The annual increase in business rates is not due until spring but this is determined by September's RPI inflation figure. As this is over five per cent, the overall business rates bill for England could rise to over £21 billion, up from £20.3 billion this year. The British Retail Consortium and retailers are lobbying the government for reform of the system to reduce the burden on employers.

BROs rise

Figures from The Insolvency Service reveal that in the last year Bankruptcy Restriction Orders (or equivalent undertakings) were obtained against 443 bankrupts because of neglect of their business – a majority of which were alleged to have consistently failed to pay taxes to HMRC.

This was an increase of 21 per cent on last year and concern actions taken against sole traders and partnerships (year ending 31 March).

New ACCA president

Dean Westcott was elected president of the 147,000-strong ACCA (the Association of Chartered Certified Accountants) in September. He was previously finance director at Hinchingbrooke Hospital in Huntingdon.

Letter

Dear Editor,

I refer to the article by Lee Manning in the autumn issue. In 1998, I was involved in the financial reconstruction of Partick Thistle Football Club in Glasgow without utilising any insolvency procedures. Football liabilities were met in full, including a long-term contract for our star player who had a cruciate ligament injury and did not play again. General creditors accepted an informal compromise offer of 40p in the £. I then served on the board of Partick Thistle for twelve years. Following our experiences our board endeavoured to run the club with financial prudence.

The worst thing to happen to us was promotion to the Scottish Premier League. They had a 10,000 seater rule and it cost the club just under £2 million to build a 2,000 seater stand and comply. In 2004, operating sensible financial policies, we finished bottom of the League but none of the clubs in line for promotion complied with the 10,000 seater rule. The Scottish Premier League decided that it would change the rule and altered it to 6,000 seats. We attempted to obtain an interdict from the Court of Session but without success and three clubs in administration were allowed to take part in the vote to eject us from the Scottish Premier League. It seems beyond belief but our appeal to the Scottish Football Association was rejected on the basis that they had no jurisdiction.

Manipulation of finance is a form of cheating. It is unacceptable, and gaining such an unfair advantage in football should be anathema. Non-payment of creditors, HMRC arrears, dropping of football debt, and pre-packs and administration totally distort competition. Honouring of football debts should be a priority to stay in the game. If a golf club was not paid would you be allowed to play? The rules should revert to the historic understanding:

- If you go bust and honour your football debt you should be relegated to the bottom Division.
- If you go bust and you do not pay your football debt you should be thrown out of the League.

Thomas Hughes is an IP at Gerber Landa & Gee and is a former member of ICAS Council.

Richard Turton Award 2011

Richard Turton had a unique role in the formation and management of INSOL Europe, INSOL International, The Insolvency Practitioners Association and R3, the Association of Business Recovery Professionals in the UK. In recognition of his achievements the four organisations jointly created an award in his memory.

The Richard Turton Award is an annual award providing an educational opportunity for a qualifying participant to attend the annual INSOL Europe Conference. In recognition of those aspects in which Richard had a special interest, the award for 2011 was open to applicants who fulfilled all of the following:

- Work in and are a national of a developing or emerging nation;
- Work in or be actively studying insolvency law & practice;
- Be under 35 years of age at the date of the application;
- Have sufficient command of spoken English to benefit from the conference technical programme.

Ieva Baranauskaite

Applicants for the award were invited to write a statement detailing why they should be chosen in less than 200 words. A panel representing the four associations adjudicated the applications. The panel members are as follows: Stephen Adamson, INSOL Europe; Neil Cooper, INSOL International; Patricia Godfrey, R3; and Maurice Moses, the IPA. The committee received numerous applications for the award and it was a very close run decision as the standard of applicants was superb. We are delighted that the award has attracted such enthusiasm and response from the younger members of the profession and know that Richard would also be extremely pleased that there had been such interest.

The Committee is delighted to announce that the winner is Ieva Baranauskaite from Lithuania. Ieva currently works for Swedbank Leasing Ltd as an initiator of bankruptcy proceedings. She gained her master's degree in law at Vilnius University Law Faculty and went on to gain a bachelor degree in law and business from Middlesex University Business School in the UK. She aspires to undertake PhD doctoral research in insolvency.

As part of the award Ieva was invited to attend the INSOL Europe Conference, which was held on 22–25 September 2011 in Venice. She will be writing a paper that will be published in summary in one or more of the Member Associations' journals and in full on their websites. We would like to congratulate Ieva for her excellent application and also thank all the candidates who applied for the award this year. There were many excellent submissions and the judges' task was particularly difficult.

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R3 Association of Business Recovery Professionals — Rescue Recovery Renewal

Attack is not always the best form of defence: credit institutions – what next?

Improvements to legislation to deal with failing credit institutions at a national and international level are ongoing but current cases suffer from the absence of a framework. Adrian Cohen examines the existing process, focusing on major cross-border cases.

At the time of writing this article uncertainty abounds in relation to Greece's position within the Eurozone. The consequences of a potential Greek default are already taking their toll on several credit institutions that have suffered either the wrath of a rating agency downgrade or in the case of one bank, a full-blown rescue.

It is natural, and in many ways inevitable, that the introduction of new legislation to provide a fix will suffer a time delay. It seems that for the past few years the statute books have been playing catch up in relation to credit institutions. At the UK level this has centred around the introduction of the Special Resolution Regime under the Banking Act 2009[1], and more recently a special administration procedure for UK investment firms as implemented by the Investment Bank Special Administration Rules 2011. But while national legislation has been implemented relatively swiftly, cross-border harmonisation has been much slower in its progress to the statute books.

Currently, the only cross-border mechanism that is in place to deal with failing credit institutions is the Credit Institutions (Reorganisation and Winding Up) Regulations 2004/1045 (the Regulations), which implement the European Directive of 4 April 2001 on the reorganisation and winding up of credit institutions (2001/24/EC) (the Directive). The Directive and the Regulations extend to jurisdictions in the European Economic Area (EEA), and therefore credit institutions based in any EEA state may benefit from the legislation.

In 2007, the European Commission launched an initial public consultation looking at the gaps and ambiguities in the Directive and also considered the issues arising in the context of crisis management and resolution for banking groups.[2] In January this year a further consultation was initiated by the European Commission on the technical details of an EU crisis management framework, which considers both prevention and early intervention to bank resolution measures and financing arrangements.[3] Legislative proposals are anticipated to be adopted before the end of the year. In terms of the current market uncertainties, it may be considered that those measures cannot come soon enough. One of the most vexed issues in the context of a failing credit institution is what happens when there are cross-border group interests. In the report published by the Independent Commission on Banking (ICB) in September 2011 it was noted that *'Geography is important, since cross-border issues are a key obstacle to resolution and exposures by all banks to a wide variety of geographies increase the risk of problems in one country spreading to another.'* Further, in order to combat this, it is recognised that *'At international, European and national levels, significant reforms are taking place in order to improve the supervision of banks, especially large, cross-border institutions.'* The ICB Report itself offers little in terms of cross-border solutions. The nature of the reforms has not yet been decided upon, and there has been a division over whether there should be either a full harmonisation of legislation or a deglobilisation of credit institutions so that they fit within national regimes, or some form of co-ordination or co-operation between administrators in different states of multiple proceedings.[4] We are currently awaiting the EU legislative proposals in this regard.

> “One of the most vexed issues in the context of a failing credit institution is what happens when there are cross-border group interests.”

While the legislative process is ongoing, it does not assist current cases. The Court of Session in Scotland has recently considered the cross-border aspects of failure in an international banking group, which arose out of the near collapse of the Icelandic banking industry. In this article we are going to consider how the Regulations have been tested, interpreted and applied in the context of a cross-border failure, focusing on the case of *Joint Administrators of Heritable Bank plc* v. *The Winding Up Board of Landsbanki Islands Hf* [2011] CSIH 61 but also in respect of the two other reported cases. We will then consider whether the current legislative proposals offer a solution to the issues raised in these cases.

Key aspects of the legislation

By way of reminder, the basic premise of the Regulations is to promote the universal application of a single winding up or reorganisation process for a credit institution that takes place in the home member state where the credit institution is regulated. The Regulations achieve this from the UK perspective by effectively prohibiting the UK courts from asserting jurisdiction over EEA credit institutions or their UK branches (see regulation 3). They also provide for automatic recognition of the insolvency proceedings initiated in the EEA state so that they are given effect in England (save for a number of specific exemptions set out in the Regulations – see regulation 5). There are also certain provisions of the Regulations that extend beyond the EEA member states to third countries, but these are limited in their application and essentially relate to notification of proceedings to the relevant EEA regulators.

Courts explore the boundaries and conflicts of laws

Notwithstanding the economic climate and the continuing pressure that financial institutions face in relation to the global debt crisis, there have been relatively few reported English cases that have considered the Regulations. For those that »

have reached the headlines, Iceland has been the common theme. In the first case to come under the English Court's scrutiny, *Jefferies International Limited* v. *Landsbanki Hf* [2009] EWHC 894, consideration was given to whether English proceedings to recover a debt that arose out of an English law governed agreement containing an exclusive jurisdiction clause for the English courts was affected by the Icelandic winding up proceedings of Landsbanki Hf. Originally the case had been pursued on the premise that an automatic stay applicable in the Icelandic winding up proceedings would gain direct effect in England by virtue of the Directive. Ultimately, this argument was not proceeded with so the court did not have to consider the legislation in any detail – the claim was allowed to continue on the basis that the Icelandic winding up regime would similarly permit it to do so.

> Regulations conferred a universal application of reorganisation and insolvency proceedings in relation to a credit institution, but explained that this did not extend to subsidiaries incorporated in another EEA state, who were also subject to winding up proceedings in that other state.

In another case, early this year *Rawlinson & Hunter Trustees SA* v. *Kaupthing Bank Hf* [2011] EWHC 566 (Comm) the Directive was considered once more, this time addressing the fundamental issue of whether the proceedings taking place in Iceland in respect of Kaupthing Bank Hf fell within the definition of an EEA insolvency measure, and whether separate English proceedings initiated by the trustees and based on a claim for fraudulent misrepresentation should be stayed as a result. In that case the initial intervention by the Financial Supervisory Authority of Iceland was not considered to be within the scope of insolvency measures provided for by the Directive. Further, since the English proceedings for misrepresentation had been commenced before a formal winding up order against Kaupthing had been made, they benefited from the exception contained within the Directive in respect of lawsuits already pending (see article 32 of the Directive). This case is pending an appeal in the Court of Appeal.

The crisis highlighted the interconnectedness of large cross-border banking institutions

These cases focused on whether the relevant Icelandic proceedings fell within the ambit of the Directive and the effects of those Icelandic proceedings in England in relation to ordinary civil proceedings. But what happens when there is more than one credit institution involved and each is subject to a separate winding up proceeding in a different jurisdiction? Do the principles of universality apply then? These are the questions that have been addressed most recently by the Court of Session in Scotland. In the case of *Joint Administrators of Heritable Bank plc* v. *The Winding Up Board of Landsbanki Islands Hf* [2011] CSIH 61 the court confirmed that the Regulations conferred a universal application of reorganisation and insolvency proceedings in relation to a credit institution, but explained that this did not extend to subsidiaries incorporated in another EEA state, who were also subject to winding up proceedings in that other state.

The case concerned Landsbanki Islands Hf (Landsbanki) and its wholly owned Scottish subsidiary Heritable Bank plc (Heritable). Administrators were appointed in relation to Heritable on the same day that the Financial Supervisory Authority of Iceland took control of Landsbanki. The interrelationship of the two insolvent credit institutions within the same group, the intragroup debts and the ability for setting off exposures, not to mention the effect that each other's insolvency had on the other's claims, meant that the court had to grapple with issues not previously considered in this context.

The sword

Both entities alleged that the other owed it funds. Heritable's claims against Landsbanki totalled £905 million and Landsbanki claimed to be indebted for well in excess of £1 billion. Heritable's claim against Landsbanki in Iceland was disputed and formally challenged by the winding up board of Landsbanki. The challenge resulted in the administrators withdrawing their claim in the context of the Icelandic winding up proceedings. It should be noted that the withdrawal was based upon Heritable's assertion that it lacked faith in the Icelandic process, which it considered was summary in the extreme and did not allow for expert evidence as to foreign law (English law governed the contract) and therefore was unsuitable for determining such a large and complex claim.

The shield

In the context of Heritable's administration, part of Landsbanki's claim was contingent and valued at zero. In respect of the balance, the administrators sought to apply the principle of balancing accounts in bankruptcy (ie the Scottish equivalent of English set off) so as to extinguish Landsbanki's claim altogether by virtue of Heritable's claim against Landsbanki.

The challenge

Landsbanki sought to argue that the withdrawal of Heritable's claim in Iceland prevented Heritable from being able to rely upon that claim for set off in the context of its own administration. The question for the Scottish court was, did the decision of the Icelandic winding up board bind the Scottish administrators by virtue of the Regulations? The case at first instance held that it did, based upon regulation 5, which gave rise to the administrator's appeal to the Court of Session.

During the course of the appeal it was argued that regulation 5 had no application to reorganisation and winding up proceedings in relation to UK credit institutions, ie Heritable. What it did achieve was recognition of Landsbanki's insolvency in Iceland. At first instance, the judge had interpreted regulation 5 to give effect to the decision of the winding up board in Iceland, which in his view ousted Scot's law in the context of Heritable's administration.

Shield or sword? If the sword is abandoned, the shield can still be relied upon

In disagreeing with the judge at first instance, it was noted that in the lower court no reference had been made to the critical distinction, namely Heritable deploying its claim as a sword by initiating proceedings against Landsbanki in Iceland and deploying it as a shield in defence to proceedings initiated by Landsbanki in the context of the Scottish administration.

Focus for the Court of Session: regulation 5 and 22

The Court of Session took a much narrower approach to regulation 5 than the judge at first instance. While it recognised that the Icelandic winding up measure had effect in Scotland in relation to any branch, property or assets, or debts or liabilities in the UK, this did not mean that Heritable was unable to rely upon being able to set off Landsbanki's claim in the context of its own administration. In this regard the Court of Session held that the Regulations clearly set out that UK law was to govern the winding up of a UK credit institution. The winding up of the UK credit institution was also to benefit from universal effect in accordance with the aims of the Directive. The provisions contained within regulation 22 therefore prevailed in respect of Heritable's administration and the UK law governed (among other things) the conditions under which set off was to be invoked.

> "Until a framework is in place it will be for the national courts to find solutions and… it is by no means an easy task, especially in a group context."

In addition to examining the effects of the Regulations in respect of the particular facts of the case, the Court of Session made some useful general observations. It was recognised that the Regulations and the Directive make no special provision for the subsidiaries of credit institutions located in different states, they are treated as distinct entities just as if there were no legal relationship between them, therefore in this case the Regulations could not be used to reconcile the inconsistent decisions that could arise out of the different insolvency proceedings. There was no framework for dealing with groups of credit institutions, much like the absence of a framework for group companies in the context of the European Insolvency Regulation (EUIR). It was also noted that, unlike the EUIR that provides that there may be more than one process in relation to the same legal entity, the universal and single process applicable to credit institutions meant that there was no race to the court. What it did mean, however, was that in cases such as this where there were competing insolvency proceedings in respect of credit institutions and their subsidiaries, the court was left with the difficult question of how to deal with such inconsistencies. It is not yet clear whether an appeal to the Supreme Court is to be pursued.

It has taken a crisis and the near collapse of the entire industry to promote improvements to the legislation at both national and international level. While in the UK the implementation of the Special Resolution Regime is well advanced, for other jurisdictions and for cross-border cases the solution does not seem imminent. It remains to be seen whether the current steps being taken to prevent, resolve or provide an orderly winding up will offer the complete solution for cross-border cases. Until a framework is in place it will be for the national courts to find solutions and, as the Court of Session has recently shown in the clash between Heritable and Landsbanki, it is by no means an easy task especially in a group context with intragroup exposures and claims, and where there are two sets of proceedings at play, each promoting their universal effect in territories beyond their home state.

With special acknowledgement to my colleague Gabrielle Ruiz for her valuable assistance.

[1] The Banking (Special Provisions) Act 2008 introduced, for the purpose of nationalising Northern Rock, the first special insolvency regime for banks, but this was a temporary measure and was replaced by the Banking Act 2009. The Banking Act 2009 forms part of a wider programme of regulatory reforms that has recently been introduced by the Financial Services Act 2010.

[2] Consultation on reorganisation and winding up of credit institutions (May 2007).

[3] Technical details of a possible EU Framework for Bank Recovery and Resolution (January 2011) and Overview of the Results (May 2011).

[4] See the IMF's Resolution of Cross-border Banks – A Proposed Framework for Enhanced Co-ordination (June 11, 2010); Basel Committee on Banking Supervision's Report and Recommendations of the Cross-border Bank Resolution Group (March 2010) and Resolution Policies and Frameworks – Progress so Far (July 2011); and the Financial Stability Board's consultation on Effective Resolution of Systematically Important Financial Institutions (19 July 2011).

Adrian Cohen is a partner in Insolvency and Restructuring at Clifford Chance.

Technical update

The European Commission's EAPO proposal: good intentions but potentially catastrophic consequences for business rescue culture in the UK had it gone ahead.

Members may have been aware of the European Commission's proposals for a Regulation creating a new debt recovery regime, the European Account Preservation Order (EAPO), which the UK government has just (for now) opted out of. It would have allowed a creditor in one EU state to freeze a sum of money in the account of a debtor in another EU state. R3 had expressed serious concerns with regard to the potential consequences of the EAPO upon the UK business rescue culture, given the magnitude of the fundamental changes suggested and the ambiguity left by the somewhat loose drafting of the Regulation. The issue is still a live one as we don't yet know which other member states are opting in, or if the British government will opt in at some point in the future. R3 will keep closely involved with the EAPO developments and advise members of any changes accordingly.

Potential problems with the EAPO

While we understand the intention behind EAPO is to provide an easier and cheaper mechanism to prevent the concealment or removal of assets by debtors pending the result of debt proceedings, the EAPO in its present form creates more problems than it solves. Article 7(2) of the draft Regulations, set two criteria for applicants to meet, neither of which are particular arduous hurdles to surmount. A claimant would be able to freeze a defendant company's bank account by merely showing that they have a 'well founded claim' and secondly, by establishing that the absence of an EAPO would impede enforcement of a judgment or make it substantially harder. Clearly, if requisite funds have been earmarked and frozen in a particular bank account, enforcement of any judgment will be much easier than where subsequently assets have to be found and realised. These hurdles are likely to be easily satisfied by claimants in the vast majority of cases and therefore there is the risk that EAPOs will be granted in cross-border recovery cases as a matter of course.

Under the existing drafting there is no court discretion as to the award of an EAPO and there would be no warning to the defendant debtor of an impending order. If an applicant were able to meet the criteria specified in article 7(2), a court would have no choice other than to make the order, and the defendant would have no opportunity to dispute the grant of such an order (or even find out that an application has been made) until after it had taken effect and the relevant accounts were frozen. The defendant could apply for a review of the decision within 45 days of the grant of the order, to which the court would have 30 days to respond. Such a lengthy 'freeze' is of itself potentially disastrous.

The nearest equivalent to EAPOs that currently exists in English law is the 'freezing injunction', which requires a high burden of proof to be satisfied by an applicant. For such injunctive relief to be granted, it would need to be shown that there is a ‘real risk’ of asset disposal that includes evidence exhibiting a propensity towards non-compliance, default payments or dishonesty offences. In the instance that a freezing injunction has been wrongly awarded, the applicant would have to pay such damages as the court sees fit (having provided an undertaking to do so when commencing with the application). The grant of an EAPO would require a much lower evidential burden and while the possibility of the payment of a security deposit and compensation are mentioned in the draft regulations this does not appear to be a mandatory requirement in the somewhat vague wording of the current draft. Surely this would be a desirable deterrent to vexatious or frivolous claims?

The construction of the draft EAPO Regulation appears to include an underlying presumption of the legitimacy of an applicant’s claim, paying little or no regard to the consequences of an EAPO upon a defendant debtor with cash-flow issues. A ruling from the court of another EU member country could therefore potentially freeze the accounts of a domestic company, based on the applicant’s putative rights that may still be in dispute. The impact that these proposals could have upon restructuring and the giving of pre-insolvency advice is therefore considerable.

Clarification required

With regard to the funds frozen by an EAPO, it is unclear whether priority over other creditors of the same class is supposed to be conferred upon the applicant. Any such deviation from the concept of *pari passu* within the English insolvency regime would have a drastic effect on one of the key principles of UK insolvency law, and would also be a move away from protecting creditors’ collective interests. A shift in focus towards the interests of the individual creditor over the collective is likely to have an adverse effect upon business rescue attempts designed to benefit the interests of the creditor body as a whole.

Although article 2 provides that the Regulation will not apply to *‘Bankruptcy proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, composition and analogous proceedings’*, this provision is far from unambiguous, and it is unclear whether these exemptions are intended to apply to formal rescue procedures such as administrations and voluntary arrangements. The impact on such procedures is unclear. It is not hard to imagine the difficulties that are likely to arise if an EAPO were granted over a company’s post-appointment bank account in, for example, a trading administration, preventing the payment of rent, wages or other essential outgoings.

“It is our hope that the coalition government heeds our advice and either declines to opt in or recommends wholesale changes to the draft Regulation.”

Due to the gravity of the potential consequences for the UK recovery industry, banking industry and creditors generally, R3 has provided a suitably robust response to the Ministry of Justice’s consultation paper, opposing the EAPO proposals, highlighting the dangers and suggesting extensive modifications. Similarly, many commentators, industry professionals and stakeholders have widely criticised the proposed regulations.

The wide drafting of the regulations would appear to allow use of EAPOs for a variety of reasons, many of which have little to do with the prevention of steps to put assets beyond the reach of a claimant in a cross-border debt recovery action. It is our hope that the coalition government heeds our advice and either declines to opt in or recommends wholesale changes to the draft Regulation, thereby influencing the European Commission to either go back to the drawing board or abandon the initiative altogether.

More on that EU bank resolution regime

Another item firmly on the EU agenda is the harmonisation of bank recovery and insolvency law.

In the summer edition of *RECOVERY* we mentioned the Commission’s consultation on a possible EU framework for bank recovery and resolution. The Commission says it has received 140 responses to the consultation, most of which are in favour of the proposed framework.

This was the subject of discussion by a sub-group of the Commission’s Insolvency Law Group of Experts (ILEG) in April, a note of which is available on the europa website at **http://ec.europa.eu/internal_market/bank/docs/ileg/2011-04-11-summary-meeting_en.pdf.**

The ILEG was set up in July 2010 specifically to address crisis management in the financial sector, and consists of 16 representatives from 12 countries, including the UK. At its April meeting, the sub-group identified a number of issues that need to be looked at when considering the harmonisation of bank insolvency law. However, the sub-group concluded that harmonisation of the whole insolvency law applicable to banks is not a workable option in the short term, preferring instead an incremental approach.

The sub-group agreed that the first areas of harmonisation should coincide with the recovery and resolution framework that the Commission intends to propose. The group suggested that a second stage should involve the harmonisation of some key substantive rules necessary for the purpose of building an orderly and predictable bank insolvency framework. These might include: the ranking of creditors; effects on collateral and netting arrangements; clawback rules; and depositor protection. There appears to have been a detailed and far-ranging discussion about the relationship between insolvency regimes as applied to banks and resolution regimes, but how this will affect the Commission’s next set of proposals is not clear at this stage. The Commission is due to issue a report in 2012 on the next stage of its crisis management work-plan, and its further proposals for harmonisation are eagerly awaited.

Technical Bulletin

Technical Bulletin 97 was issued in November. Its contents included:

- Invalid administration appointments – further guidance from the High Court
- Transfers of undertakings – automatic transfer mechanism deemed to apply in the case of pre-pack sales
- Liquidation – guidance on prohibited names
- E-mail exchange capable of creating a binding contract
- The Pensions Regulator and contribution notices – *Bonas* case
- IVA – Court of Appeal guidance on material irregularity
- Distributions of capital outside formal winding up – withdrawal of Treasury Solicitor’s concession on *bona vacantia.*

Giles Frampton (left) is a partner at Richard J Smith & Co and John Francis (right) is the technical director at R3.

Recent case summaries

Corporate and personal insolvency update from Carly Sandbach.

Corporate insolvency

***Belmont Park Investments PTY Ltd* v. *BNY Corporate Trustee Services Ltd* [2011] UKSC 38**

Facts: The decision considered the validity of termination rights linked to a counterparty's insolvency. The appeal arose out of the Lehman insolvency. A Lehman secured note programme contained 'flip' provisions. The effect of the provisions were that for so long as the swap counterparty was not in default, realisations would be paid to the swap counterparty in priority to noteholders, but that if an event of default occurred in respect of the swap counterparty, including the insolvency of the swap counterparty or its parent guarantor, the order of priority would change, in that realisations would be paid to the noteholders in priority to the swap counterparty. The provisions were challenged as offending the 'anti-deprivation' principle.

Held and comment: At first instance it was held that there was no breach of the anti-deprivation principle. This decision was upheld by the Court of Appeal. On appeal to the Supreme Court the decision of the Court of Appeal was unanimously upheld. The decision is a welcome one and suggests apparent limits on the extent to which the anti-deprivation will intervene to upset the agreements of contracting parties.

Importantly, complex financial transactions, entered into in good faith, should not generally infringe the anti-deprivation principle. A *'deliberate intention to evade the insolvency laws'* is required so as not to catch ordinary commercial transactions carried out in good faith. The anti-deprivation principle should be given a *'common sense application'* and will not apply to *'bona fide commercial transactions which do not have as their predominant purpose, or one of their main purposes, the deprivation of the property of one of the parties on bankruptcy'*.

Further, the anti-deprivation principle does not apply if the trigger is an event other then the insolvency, and moreover, the source of the asset is an important factor in the determination of the applicability of the principle.

Without further legislation, the established and finely balanced distinction between the grant of a limited interest that can be terminated on insolvency, which generally will not breach the principle, and a contractual provision under which a party has an outright interest that can be terminated on insolvency, which may therefore breach the principle, remains in place.

The decision has not unequivocally defined the outer reaches of the anti-deprivation principle, but it has provided helpful guidance as to the mischief at which the principle is aimed.

Some comfort will be taken by, in particular, parties to complex financial agreements, that unless such arrangements are a plain and clear attempt at subverting the usual consequences of insolvency, the courts will not lightly interfere with the contractual terms to which the parties have bound themselves.

Personal insolvency

***Paymex Limited* v. *The Commissioners for Her Majesty's Revenue and Customs* [2011] UKFTT 350**

Facts: B was a debt management company. Its services to its debtor clients included the provision of advice, fact finding and information gathering, drafting the IVA proposal and other essential documents, acting as an intermediary between the debtor and his creditors, holding and chairing a meeting to approve the proposal and any modifications, supervising the implementation of the proposal, collecting payments from the debtor and making distributions to the creditors, monitoring compliance by the debtor and proposing modifications in the event of changes of circumstance. The Commissioners determined these were standard-rated taxable supplies for VAT purposes. P, a representative member of a VAT group to which B belonged, appealed contending that the services supplied by B were each exempt from VAT.

Held and comment: The appeal was granted. Supplies of services, primarily negotiations concerning debt, in connection with the establishment and supervision of consumer individual voluntary arrangements were exempt from VAT since they amounted to exempt supplies of financial services under the Value Added Tax Act 1994, sch9, part II, group 5 and directive 2006/112 art135(1).

While the decision was made following a detailed consideration of the particular practices of B, it seems extremely likely that the same result would apply to other businesses in the sector operating a similar model. Accordingly, the practical effects of the decision on nominees' and supervisors' fees in consumer IVAs is profound. In practical terms this means, IPs' firms are likely to stop charging VAT on invoices for fees and disbursements, and further that IPs are going to need to consider making claims for refunds in respect of VAT previously erroneously charged.

> "IPs are going to need to consider making claims for refunds in respect of VAT previously erroneously charged."

Appropriate advice should be sought by IPs as to the necessary course of action in relation to the business models they employ in the provision of IVA services and their treatment of closed, current and future cases.

Carly Sandbach is a barrister at Exchange Chambers.

Are you an R3 member? Could you write the Legal Q&A column? If you have advice you could usefully share with your fellow professionals please contact **Sarah Houghton** at GTI (**sarah.houghton@groupgti.com**).

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

Legal Q&A

Dan Geddes answers your insolvency queries.

I am administrator of a company that granted a 'temporary' licence to occupy leasehold premises to a buyer of the company's business and assets without the landlord's agreement. The landlord has now sought my consent to forfeit the lease but the buyer wants more time?

I assume that the landlord can forfeit the lease on the basis that there are covenant breaches that have not been waived. In this respect, it is likely that the very fact of the company's administration and the unauthorised licence will be sufficient.

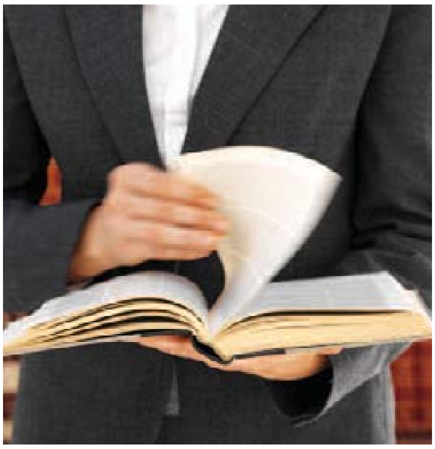
If there is a breach that would allow the landlord to forfeit, the next question is how you exercise your discretion in response to the landlord's request: whether to commence court proceedings or to re-enter peaceably (which acts would otherwise be prohibited in the absence of a court order by the statutory moratorium in paragraph 43 schedule B1 Insolvency Act 1986).

As an officer of the court you must properly consider the landlord's request, applying appropriate criteria; in particular the company (and therefore its licensee) can only retain possession if you can show that this would promote the legitimate purposes of the administration. If you don't apply the correct criteria you may have to compensate the landlord and the court may not allow you an indemnity from the company's assets (*Barclays Mercantile Business Finance Ltd* v. *Sibec Developments Ltd* [1992] 1 WLR 1253).

> "If you don't apply the correct criteria you may have to compensate the landlord and the court may not allow you an indemnity from the company's assets."

If you do not give consent then the landlord can apply to the court for permission therefore, in considering the request, you must be mindful of the approach of the court; in particular the principles that were laid down by the Court of Appeal in *Re Atlantic Computer Systems plc* [1992] Ch 505.

Applying these principles to the present case, the starting point is whether



forfeiture would impede the purpose of the administration. Given that you have already sold the business and assets, arguably this purpose has already been achieved (as was the case in *Metro Nominees (Wandsworth) (No 1) Ltd* v. *Rayment* [2008] BCC40). Accordingly, you should consent to forfeiture unless the buyer's continued occupation as the tenant company's licensee under the continuing lease is clearly of benefit to the administration. This might be the case if the buyer's occupation will secure the payment of deferred consideration or the collection of book debts (in the latter case, see *Sunberry Properties Ltd* v. *Innovate Logistics Ltd* (in administration) [2009] 1 BCLC 145).

If you conclude that forfeiture could impede the administration, you must then undertake a balancing exercise between the interests of the landlord and those of the other creditors. If the landlord is likely to suffer significant loss by your refusal (eg a lost opportunity to re-let at a much higher rent), consent ought normally to be given. Conversely, it should normally be refused if the loss to the other creditors would be disproportionate, especially if the landlord's position can be protected (eg by payment of ongoing rent as an administration expense). Where possible, you should make enquiries of the landlord as to its objectives for seeking forfeiture.

If you do decide to refuse consent, and the landlord applies to court for permission to forfeit, the court will consider the circumstances in which the request was first made to you, as well as other relevant factors such as your willingness to pay rent as an expense, your proposals for the administration and the conduct of the parties generally. It is therefore particularly important to have a full record of all communications with landlords so that you can demonstrate that you dealt with any request in a timely and appropriate manner.

I am a liquidator who has just managed to settle a claim by the company against a former director. When I applied to the Secretary of State for sanction to compromise the claim I was told that sanction is no longer required. Please can you clarify the situation?

It depends on when the liquidation commenced as The Legislative Reform (Insolvency) (Miscellaneous Provisions) Order 2010 changed the law applicable to liquidations that commence on or after 6 April 2010.

In particular, schedule 4 Insolvency Act 1986 has been amended; the exercise of any power listed in part I requiring sanction (whether it is a compulsory or voluntary liquidation).

Under the old regime, part I included a power *'to make any compromise or arrangement with creditors'*.

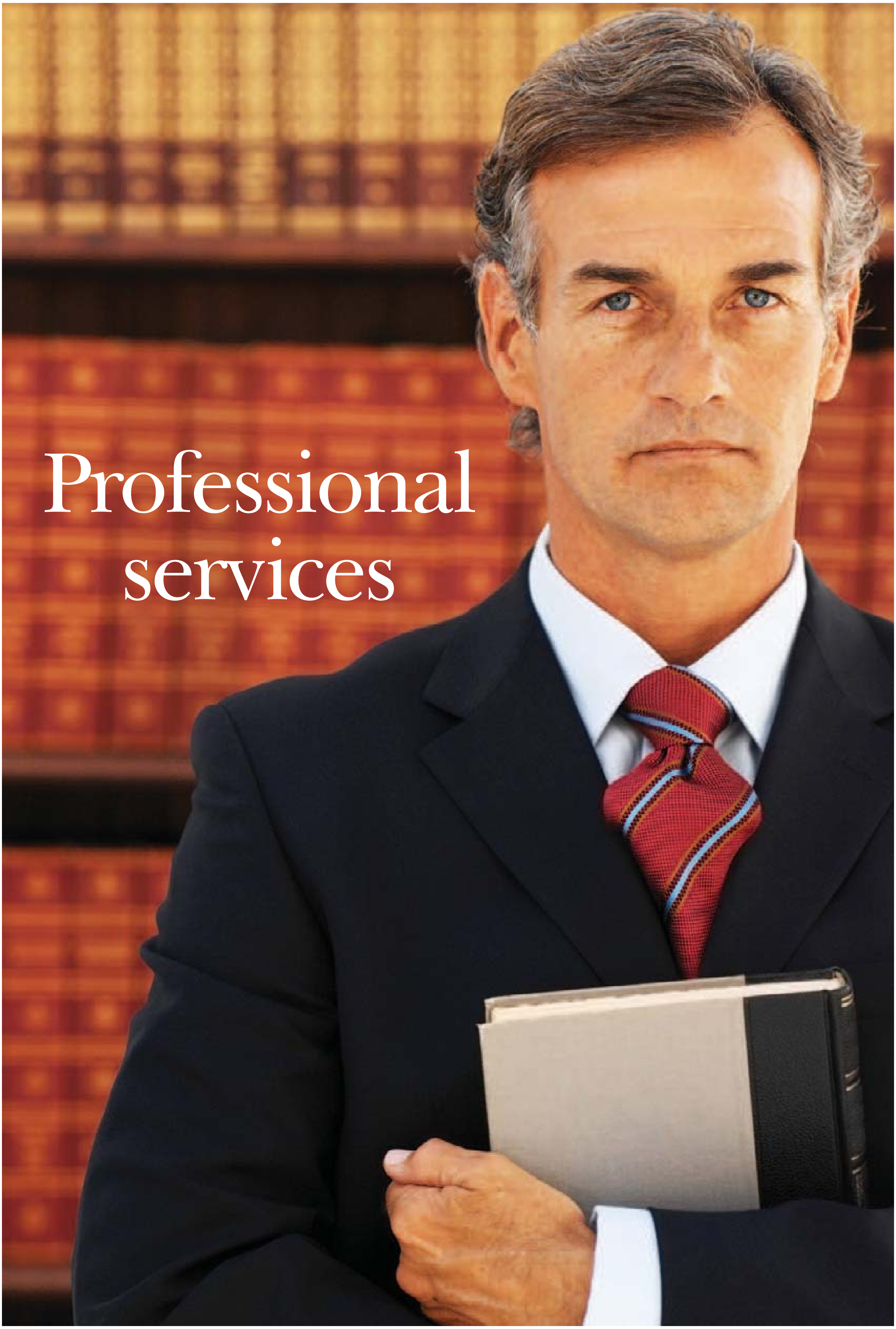
However, it also included a separate power *'to compromise, on such terms as may be agreed… all claims… between the company and a contributory… or other debtor or person'* and this power has now been moved (except in relation to liquidations in Scotland) to part III, being the list of powers where sanction is not required.

The effect of these changes is that, for liquidators in England and Wales, sanction is now only required to make a compromise with creditors and not other third parties. However, this relaxation in the rules is not retrospective as the transitional provisions make it clear that they only apply to liquidations that commenced on or after 6 April 2010.

So the answer to your question will depend on when the liquidation commenced and I assume from the response that you have received from the Secretary of State that this was after 6 April 2010. □

Dan Geddes is a senior solicitor at Blake Lapthorn.

Professional services



Will it be a Happy New Year for professional practices?

Alison Goldthorp suggests things to watch out for when restructuring professional practices.

Professional practices are much talked of in the restructuring world at present, and are, as a sector, suffering in the current downturn. Public spending cuts, reduced M&A activity, fewer real estate sales and increasingly large professional indemnity premiums have put pressure on firms of solicitors, surveyors, architects and accountants alike.

A further cash crunch looms in January 2012, when we anticipate that a number of professional practices will be struggling to make payments due to HMRC on account of their members' tax. The reluctance of HMRC to negotiate in the event that time to pay agreements are not adhered to has made things worse.

The advent of the LLP as the vehicle of choice for professional practices and the dwindling number of old-fashioned partnerships raises a number of interesting legal and practical issues relating to the solvent and insolvent restructuring of professional practices.

Funding of professional services practices

Historically, professional practices were partnerships governed by the Partnership Act 1890 and any partnership agreement, and they were funded by capital put into the business by the partners themselves. Funding of LLPs has evolved with individual partners or members often taking out bank loans to fund their capital contributions to the LLP.

In addition the practice itself will often borrow from financial institutions. It is increasingly common for financial institutions to seek debentures from LLPs – including a floating charge over the business and assets of the LLP. In a restructuring scenario, taking a debenture is an option open to a financial institution to improve its security position and likely recoveries in the event of insolvency.

This raises interesting issues as to whether the insistence of the financial institution in taking a debenture demotivates the individual members from contributing to the professional practice. Historically, the funding of professional practices has often been very much an area of 'gentleman's agreement', with little due diligence by the financial institutions concerned and reliance on the professional reputation of the partners themselves to repay any amounts advanced. Lenders were encouraged by the 'carrot' of partner or member personal account business that might result from maintaining good relations with the professional practice itself. As professional practices have merged and grown in size, this has become less viable for the financial institutions, which are themselves under increasing pressure to ensure that they are adequately protected in the event of things going wrong.

> "The advent of the LLP as the vehicle of choice for professional practices and the dwindling number of old-fashioned partnerships raises a number of interesting legal and practical issues relating to the solvent and insolvent restructuring of professional practices."

The wording of the LLP Deed

The starting point in understanding how any LLP works for lenders (and, indeed, new members), is to read the LLP Deed itself. The duties and obligations of the LLP and its members are set out in the LLP Deed. The LLP Deed can be amended by its members, and the weight of votes required for amendments to all or particular issues is also provided for in the LLP Deed in the same way as in any shareholders agreement.

The LLP Deed also usually sets out and prescribes the time at which profits are declared, when they can be drawn, and when they are repayable to the LLP. Lenders are beginning to scrutinise these provisions when consideration is given to restructuring an LLP. Lenders may propose amendments to limit drawings to seek to keep money in the business, but that could be at the expense of the value of the business if the work-winning partners then leave. As in any restructuring, the key is to find a balance that works for the members, the LLP and the various stakeholders.

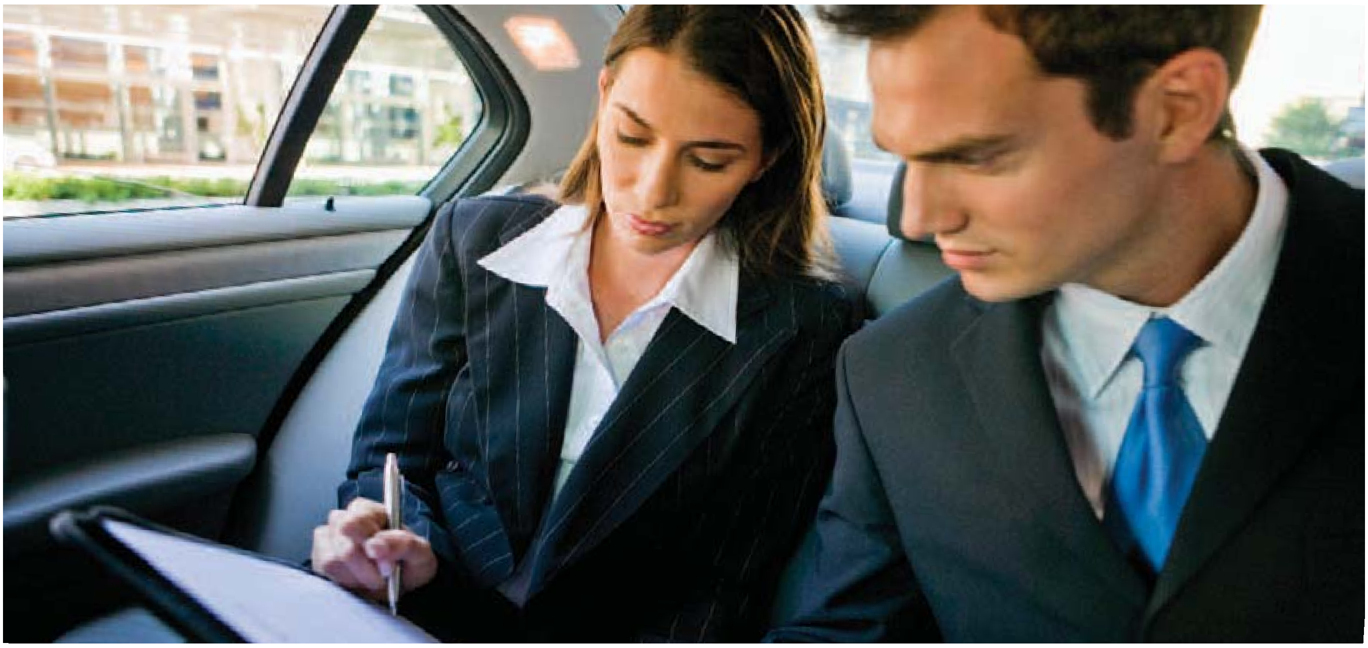
A review of any 'lock in provisions' is therefore essential. The members and their ability to win work are, after all, the real value in a professional practice. These are also key to the ability of the board of the LLP to keep the members working together in troubled times. Often LLP Deeds provide for a maximum number of members to leave in any one year, which limits the damage to the business if members were disgruntled by, for example, pressure on the size of their drawings. A carefully drafted lock in provision would allow the management team some time to seek to restore lender and member confidence and to successfully restructure the business.

A longer version of this article will appear on the R3 website under the *RECOVERY* section.

Top tips for dealing with the restructuring of professional practices

- Act quickly and early, as time may be short.
- Identify the precise legal entity to be restructured. Is it an LLP or an 'old-fashioned' partnership?
- Understand the way in which the professional practice is funded, and the mechanics behind injections of capital from the individual members and borrowings of the practice itself.
- Review the LLP Deed or partnership agreement thoroughly and understand the way in which the mechanisms for declaring profits and paying drawings work.
- Review the provisions of the LLP Deed or partnership agreement to consider how individual members can leave and how many can leave in any particular year. Lock in provisions are potential key tools to achieving a successful restructuring, to make sure the members do not exit and devalue the business.
- Review the restructuring options available to the partners or members and stakeholders, and the likely outcome for those parties, in the event that the practice were to fail.
- When appropriate, speak to the relevant professional services regulator – their role in a restructuring is likely to be key in deciding timetable and structure.

Alison Goldthorp is a partner at Addleshaw Goddard LLP.



Selling a professional practice firm

Retaining value when disposing of a professional practice needs careful thought and preparation. Justin Zatouroff and Ian Brown outline the considerations.

It is well known that the key value drivers for 'asset lite' businesses such as professional practice firms typically revolve around the people and the brand, but other factors that need to be considered include the number and loyalty of clients, the length of engagements, the predictability of revenues and the culture (and hence churn of staff). Professional practice firms typically also have an accreditation or are regulated for the services they provide (eg with the Law Society, ICAEW, FSA, RICS), with the accreditation or approval required being seen as a prerequisite or a barrier to entry rather than a key value driver.

People

Given that people are typically the key asset in professional practice, the measures taken to protect that asset are continually evolving. Replacing lost 'rainmakers' is time consuming and expensive – not only do attractive incentivisation terms need to be offered, but the team needs to be funded during a start-up phase (which can be anything between 6 to 18 months) while it establishes itself, and it needs a marketing budget. All these investments are made before it can reasonably be expected to show meaningful financial returns, and all with the risks and compatibility issues associated with any recruitment decision.

Add to that any element of change or distress in the business, which is unsettling for employees and often signals the start of a job search while competitors (not to mention headhunters) target the best people/teams and it is easy to see how the value in a professional practice firm can quickly be eroded by rumours of a sale or distress.

There is a variety of protection measures available to businesses with the most obvious being non-compete/non-circumvention restrictions in employment contracts. However, these restraints of trade are difficult to enforce for any length of time, particularly in the EU. A growing practice to extend the protection these restrictions can provide is to pay an extra year's salary as gardening leave to further lengthen the enforcement period.

That restriction may work within a specified region, but may be difficult to argue as enforceable globally – opening the opportunity for an employee to look at regions outside of the restricted zone for employment. The potential risk of this circumvention varies with the type of professional service – eg a fund manager may be restricted from working in the EU, but they may be able to temporarily relocate to offices in New York or Singapore with a new employer while the EU restriction is in force.

Therefore some purchasers also use earn outs, and the hardening in market conditions may have facilitated an increase in the element of deferred consideration and gearing towards long-term performance, which has accounted for up to 40 to 60 per cent of the consideration in some recent deals in the financial services sector. These measures are likely to be mirrored with incentivisation packages aimed at key employees to mitigate the risk associated with key individuals. Purchaser terms are becoming increasingly aggressive, for instance certain deals in the financial services sectors have seen (i) an increase in the length of lock-in periods for key individuals (up from three years to four to six years), (ii) deferred consideration being held in an escrow account (to be released in a single bullet at the end of period, not even staged payments), and

> "Brand is very sensitive in professional practice firms, relying on good will/trust in the marketplace. A current example of the importance of protecting brand is the actions UBS is undertaking… in light of the activities of its single rogue trader."

(iii) an expanding list of conditions (not restricted to the traditional bad leaver conditions) under which claw-back provisions can be exercised.

Whether or not these developments in the financial services sector will spread across other professional service industries remains to be seen.

Brand

The other key asset for a purchaser is the brand, which in professional practice firms is very sensitive, relying on good will/trust in the marketplace. An obvious current example of the importance of protecting brand in the market is the actions UBS is undertaking to protect its core business of managing wealth in light of the activities of its single rogue trader. In other less high-profile cases it is easy to understand how issues of fraud or misconduct can damage not only businesses that handle client monies, but can also damage the client's perception of advisory businesses such as lawyers, accountants and IPs, which are subject to higher standards of care. Combining that with a competitive marketplace and (relative) ease for clients to change advisers indicates how ensuring the brand is kept safe is critical.

> "If the business is in distress and considering an insolvency event, the value of debtors will also need to be carefully considered against… deliverability risks."

Accreditation and regulators

The involvement and importance of accreditation and regulatory bodies vary across industries, with one of the most active and high-profile regulators being the FSA.

Sanctions by regulators against individuals, particularly in the case of the FSA, are growing (in their financial year ending 2011 the FSA reported that it made five criminal convictions for insider dealing with sentences ranging from 12 months to three years and four months, enforced 15 penalties levied for market abuse, totalling around £8.3 million; and that at the end of the year 13 defendants were awaiting trial for insider-dealing offences). In the current year, the highest fine against a firm (excluding the fines against the banks for mis-selling payment insurance products) currently totals circa £8 million, with the highest fines against an individual being against a CEO and CFO of a hedge fund for £2.1 million, with another individual being fined £150,000 and banned from performing corporate finance business for three years.

Although not all regulatory bodies may be as active or enforce similar penalties as the FSA, from today's perspective it is difficult to see tomorrow's world comprising less regulation.

Therefore businesses must demonstrate they are fit and proper. With an increasing focus on regulation a purchaser cannot simply assume this test will be passed, as the extreme event of a loss of a licence or accreditation could stop all or part of the business' activities while licences are re-applied for, which would have an obvious drastic effect on current – and future – business.

Purchasers should therefore look at how good the processes, checks and capabilities are that the business has in place. These measures should include analysing its internal regulatory and compliance measures, understanding whether CPD is required for individuals within the business and how the business currently meets those requirements, what training and skills capability are already in place (for instance corporate finance services to quoted businesses are likely to need to show the frequency with which they provide particular types of advice to retain their FSA authorisation), and being prepared to implement procedures to provide some measure of check and balance as appropriate.

Finally, communication should be established at an early stage to understand the position of the regulator and their likely stance to any acquisition. Their requirements may be quickly evolving in certain services – for example living wills may now become requirements for banks and insurers.

In cases of dealing with insolvent businesses, even when misconduct may be apparent, regulators have sometimes taken a pragmatic approach and want to know how matters will be resolved. They may look to be punitive to specific individuals if misconduct or similar issues have arisen, but will take a pragmatic approach to ensure workable solutions are found and client interests protected.

Ownership and value of assets

A purchaser also needs to look at who owns the assets – both legally and practically. Typically the current assets of the business comprise mainly of WIP and debtors; WIP is likely to be active cases or projects requiring specific skills, or even specific individuals, to deliver. Therefore a purchaser needs to consider the practicalities of how cases/contracts can be completed if key individuals walk.

If the business is in distress and considering an insolvency event, the value of debtors will also need to be carefully considered against these deliverability risks. The response of clients to current or outstanding invoices for cases or projects that may no longer be completed is unlikely to be agreeable.

Purchasers must also look in detail at the partnership deed or equivalent to understand what it says in relation to ownership of assets. Further due diligence may also be required, particularly for older partnerships, to establish which names have been used on key contracts (such as property leases).

Other considerations

There may be specific tax and legal considerations driven by the type of entity used, although these are likely to be much less important than the ownership, incentivisation and management structures in place.

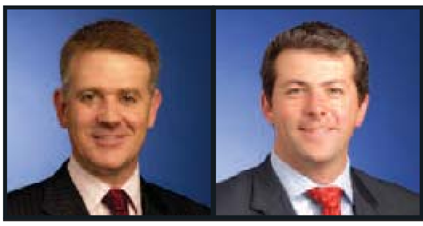
Consideration should also be given to PI cover post completion and the appropriate run-off period, together with who will be responsible for managing ongoing and new claims, as well as who will pay.

Summary

Professional practice firms trade on their brand and their people. The measures available to firms to protect both of those are continually evolving with lock in and incentivisation structures becoming more creative as the game of cat and mouse continues facilitated by technology and globalisation of trade allowing for more creative 'side steps'. This makes preparation even more key to ensuring maximum value is obtained through a sale process.

The landscape for regulated professional services, particularly in the financial sector, is changing as regulators respond to an increase in criticism for failures in their sector by requiring increasing levels of compliance and taking an increased interest in regulated businesses – particularly when an event occurs that brings them into the spotlight. Therefore a purchaser should ensure it enters early dialogue with a regulator when appropriate and is prepared in the event of an increased level of scrutiny from the regulator.

Although there are many considerations that can act to reduce the purchase price payable for a professional services firm, with proper preparation many of these apparent 'issues' can be turned into real value drivers.



Justin Zatouroff is a partner and Ian Brown is a senior manager at KPMG.

A CEO's perspective of a professional services firm

Colin Wiseman offers some insight on what makes – or breaks – a professional services firm.

They all think they own the place – and, of course, they do!

That single statement explains the reason for most of the unique challenges that confront a CEO or managing partner of any professional practice.

Having been both the finance director of a fully listed plc (albeit a small one!) and the managing partner of Wilkins Kennedy it is very clear to me that a professional practice is a very different animal! We are all aware that shareholders hold sway in any organisation ultimately but only in professional practices do they all work in such physical proximity to their management. This can bring a noticeable increase in difficulty of day-to-day management. It also means that there is no hiding from anybody who has been on the end of what they consider to be an unjust decision of the CEO because such an injured party is very possibly in the room next door. At least one cannot see remote shareholders!

> "Shareholders hold sway in any organisation ultimately but only in professional practices do they all work in such physical proximity to their management."

How professional practices operate

Most practices have far more frequent requirements for general meetings compared with companies and, while communication is always good the administrative burden is obviously increased. It is fair to say that, in my experience, the constant communication with partners has very largely been constructive and useful but is, clearly, time consuming. One of the major difficulties in managing a practice is ensuring good communication between the management committee or board and the rest of the partners as it is human nature just to get on with what has been decided without actually telling one's constituents, no matter how unintentionally. If not dealt with correctly major frictions may develop unnecessarily.

Professional practices are service businesses and this is probably the breeding ground for the main theme in any discussion in managing partners' peer groups. Those evil words, lock up. Necessarily, as part of a close professional relationship that delivers good, partner-led service, a partner or member of a professional practice will become quite close in a business sense to the client and this can often lead to a feeling that billing and collecting debts is rather uncomfortable. It is human nature not to enjoy giving bad news to people, so a continous emphasis has to be maintained on such matters. It is a constant challenge to ensure that bills are raised and sent out and getting across the message that there really is no difference between sending a fee note for work done to somebody you know well and raising an invoice for product to some unknown retailer or wholesaler. They both pay the bills when settled. There can be a resistance, initially, to a credit controller contacting a client regarding an unpaid bill and as long as a liaison partner is kept informed (and encouraged to help obtain settlement) we have not found it a problem. As in any other business, there may well be the very large client who needs to be dealt with differently by the liaison partner and one is always striving to ensure that such cases do not become too numerous.

In a professional practice the client often pays after the work has been performed. If you think of it simply, you don't get a shirt (for that is the business I was in!) and pay for it when it's worn out, that is, after it has fulfilled its purpose.

> "Clients have stepped forward to offer their advice on how we should change or be managed and, while not all comments are heeded, it is a uniquely direct form of consumer survey!"

There is, therefore, far less encouragement for a client to pay his accountant or lawyer than there is for the purchaser of goods. By way of confession, when I was the finance director in the plc I used to receive a six-monthly call to arrange an interim or final audit (for it was half-yearly reporting). The date would be fixed and the liaison partner would then sheepishly tell me that he was precluded from starting until the previous bill was settled. As reporting to the London Stock Exchange is not voluntary, only then did we pay. It made cash planning simple though! That sort of bargaining position is, however, unusual for most practices as it only really works with listed clients.

While good stock control, whether it is physical stock or hours worked, is obviously paramount in all businesses and essential for any business' viability, there is usually some period of credit on physical stock – but I have never heard of employees giving 30 or 60 days credit! Consequently, prompt billing and collection has a proportionately greater effect on the cash flow of a professional practice than many (or most) other businesses.

Consistency and compliance

It is not uncommon for professional practices to be in many more than one location. This is the case at Wilkins Kennedy and maintaining consistency of approach, standards and philosophy is a priority and a constant effort. The production units of other businesses are often on a single site. We produce from many sites and the additional administration involved in that is not required in many non-professional environments. This is especially the case with Wilkins Kennedy's Falkland Islands office!

Compliance is a major additional burden on the administration of a practice. Outside of the regular statutory compliance like health and safety and employment laws there is, of course, a plethora of professional compliance requirements. While undoubtedly necessary in building and retaining the confidence of the public in any profession it is another time consumption that is much more rarely found outside the professions and therefore reduces time available for day-to-day management and strategic planning. In a manufacturing environment, there is no need for quite the same number of internal committees and meetings to ensure compliance in so many ways. Certainly, in a chartered accountancy practice there are any number of regulators of practice assurance, audit, insolvency, financial services and more and, as I write this, the sheer number is frightening me! This puts pressure on all areas of practice, not least the non-productive use of hours but is a necessary part of practice management. I suspect such multiple monitoring is common in other professional practices because the 'general practice' in any sphere incorporates many specialisms by definition.

What are the good bits?

There are many but I set out a few of the main positive differences below. The nature of the professions dictates that the final user/client is closer to management than is the case in most businesses. Client seminars and social get togethers for clients are unusual in other sectors and, more than once, clients have stepped forward to offer their advice on how Wilkins Kennedy should change or be managed and, while not all comments are heeded, it is a uniquely direct form of consumer survey! A compliment from a client is a cherished moment, but it does happen.

All striving for the greater good of the practice will often give a warm feeling within the operation. It is exactly because of my opening statement that, despite obvious disagreements (I defy anybody to keep a family of 50 together without some disagreements!) it is in everybody's interest to increase profits since such profits are all shared among the people responsible for earning them day-to-day (subject to a hefty donation to reducing this country's deficit).

People are the biggest asset

There is one great similarity between professional practices and other businesses and that is the people within them. Be they principals or staff, the only difference is that professions sell their time and most other businesses don't. The essence is the same. The people in any business are its foundation and strength. We all understand the vital importance of good staff and history is littered with professional practices that have imploded and in the majority of cases it is the principals themselves that are responsible. If we call them partners for a moment, good partners make practices and some partners can wreck them. It is vitally important that everybody's view is listened to and debated and acted upon if appropriate because factions must be avoided and if that challenge is achieved the practice should work in one direction and flourish, as I would modestly suggest we have.

I cannot speak for other practices, of course, and we have all heard stories of the implosion of professional firms, but at Wilkins Kennedy and other practices of which I have been a partner a real collegiate philosophy has always existed and I think such a working atmosphere is unique to professional practices. One for all and all for one may not exist in some huge professional practices but in my experience, in the middle tier it is a comforting fact of life.

The personal satisfaction of 'hands-on' management

In summary, there are unique challenges and differences in running a professional services practice. A greater mix of tact, diplomacy and, at times, strong will is required and obtaining the respect of all the other stakeholders in the business is of paramount importance. It is a very difficult mix to achieve because nobody becomes a principal in a firm without having a strong personality and managing a large number of such strong minded individuals is a great challenge. Personally, I have thoroughly enjoyed all of these challenges and, probably a great deal more because of the different challenges, some of which I have outlined above. There is a sense of safety in most businesses whereas in practice it is all head on, because, as I said: 'they all think they own the place…'

This may be unique to me, but the personal responsibility of having to manage the livelihoods of 50 families (and in the case of a partnership, their assets) feels far more real than the responsibility of managing a company with remote shareholders.

In my opinion, it is therefore no coincidence that so many of the top 25 accountancy practices have an insolvency professional at the helm! ◻

Colin Wiseman is former managing partner at Wilkins Kennedy.

Considerations when dealing with a failing legal practice

Legal practices are facing an increasingly challenging environment. Steve Billot and Christina Fitzgerald look at the specific issues you should consider when advising on these cases.

In October 2010, we saw the introduction of the Legal Services Act and, as has been widely reported, 'supermarkets can now sell legal services'! The reality is somewhat different as the structures and regulatory regimes have yet to be finalised but a potential revolution in the way in which consumers will be able to buy legal services is on the way.

We have also seen the arrival of 'QualitySolicitors', with their Legal Access points in WH Smith outlets, attract institutional investment and even some interesting publicity from Amanda Holden on morning TV.

When combined with public spending constraints on the £2 billion legal aid budget and the continuing poor state of the economy the stress levels are building and we are now seeing legal firms failing in increasing numbers.

While we will talk about 'the firm' we recognise this may be a sole trader, a partnership, an LLP or a limited company and of course each will require the appropriate additional considerations applicable to the entity. However, many of the issues facing the firm will be common. Our recent experiences have highlighted a number of issues that we will consider.

Intervention

The Solicitors Regulation Authority (SRA) (which has an article on page 26) has the power to appoint intervention agents to take control of the client matters in a practice to protect those clients' affairs. The intervention agent, however, has no interest in the financial affairs of the firm and will not be accountable to those creditors. The costs of intervention are a personal liability of the proprietors of the firm so will include members of LLPs and officers in a limited company. Many lawyers seem unaware of this. The costs will be substantial as they will include the storage of all client files, sorting out client account issues and then the long-term storage and confidential destruction of the books and records.

This is an important point for the IP to note. Records must be preserved and available to clients for 6, 10 or 12 years and then confidentially destroyed. For a firm of any size the volume of documents is a real issue and one often overlooked.

Intervention is not an inevitable consequence of a failed law firm. Indeed the SRA will only want to intervene when it is necessary. This will be quickly if clients' funds or affairs are at risk but, in our experience, they will not act precipitately when told about the financial distress the firm is facing. Solicitors have a positive duty to report financial difficulties to the SRA and new guidance has recently been issued in that regard. The clear message is to talk to the SRA as soon as possible.

> "This is an important point for the IP to note. Records must be preserved and available to clients for 6, 10 or 12 years and then confidentially destroyed."

Who wants to be the successor practice?

In order to preserve value and avoid intervention, you will probably need to find someone brave enough to want to take over the entire firm and hence become the 'successor practice'.

By doing so they will adopt all of the potential professional indemnity issues from the troubled firm, and financially troubled firms often have an increased claims record so this is a challenge. In addition it will be difficult to avoid TUPE and the successor will have to be aware of the pitfalls of the SRA Accounts Rules 2011 (the Rules).

These provide firstly, that interest that accrues on clients' accounts must be available for them when the funds are repaid. This seems obvious but monies held on a general client account (as opposed to designated funds held specifically for clients on an individually identified account) include monies from a large number of clients. The interest earned on that money is paid into the office account and not to the clients, until transferred or when the clients have their money paid to them. This can result in interest accruing over time (and always in the last quarter), which has not been paid over. If the client account is large or client balances have been held for a long time, such as on a long-contested probate matter, the accrued interest can be substantial.

A successor will have to make good any deficit but the interest earned may have been used to run the business or reduce the overdraft. This will become a bone of contention between the parties and we have seen it be the deal breaker in at least one case that prevented a merger from taking place.

In addition, the Rules require payments received for disbursements incurred to be paid over to the third party (expert witness, counsel etc) within 48 hours if received into a client account and within 14 days if received into an office account. Again, failure to pay over is a disciplinary breach and probably a liability for the successor. What happens if some large receipts including disbursements have been banked in the 14 days before insolvency and not paid over? This is not uncommon, so when advising a firm in trouble you need to keep a close eye on the operation of the office and client accounts in the period prior to insolvency to avoid such problems arising.

Clients have rights too

You cannot transfer clients to a new firm without their consent! They are not 'customers' in the ordinary sense and they should have advanced notice before they are moved to any new firm as they might want to move their matters elsewhere.

Failure to give this notice is a breach of the solicitors duty, which can result in disciplinary action being taken against the relevant solicitor.

Challenges with the Legal Services Commission (LSC)

It has again been widely reported in the legal press that the LSC has a number of operating issues that have resulted in a slowing down of the monthly receipts that legal aid firms rely on. Historically we saw examples where the LSC had overpaid firms on their legal aid contracts. However, in the last few years it has recognised those overpayments and has been seeking to recover them, usually by reducing the monthly income paid to the firm. This recoupment, when combined with a general slowing down in the speed of payments on the contract, has had a material effect on the cash flows of many small legal aid providers.

Abandonment of firms

We have seen an increasing number of small firms just closing the doors. In the absence of a successor, with personal liability for the run off costs and the intervention issues as well smaller firms, particularly sole practitioners, have just decided to ceased trading. This will usually result in an intervention and the probable bankruptcy of the debtor.

Trading on of law firms in administration

The view of the SRA is that in any trading on scenario, one of the appointment takers must be a solicitor in order to ensure that client confidentiality is preserved as non-solicitors cannot manage legal firms. However, there is the real risk to the appointed solicitor IP that they will become liable for any regulatory breaches that may have been committed. At the outset, these may not be apparent, so the solicitor IP takes office with a considerable contingent threat in place.

As a consequence we have not yet seen any legal firms traded in administration, albeit some have been CVA/PVA's approved.

> “As it is difficult to practically trade on a legal firm we will face the prospect of seeking to ‘pre-pack’ them in order to preserve value... but the SIP16 requirements and the associated media criticism… will require the IP to ensure that all angles and options are covered.”

So if it is difficult to practically trade on a legal firm we will face the prospect of seeking to ‘pre-pack’ them in order to preserve value. However, we all know that the SIP16 requirements and the associated media criticism of such a process will require the IP to ensure that all angles and options are covered. One solution may be the use of a court appointment to ratify the transaction in order to avoid criticism but this carries with it substantially increased costs that may not be proportionate to the assets in a small case.

Survival of the financially least weak

We now face a set of circumstances where it is about the survival of the financially least weak (not the fittest!) not the survival of the ‘best’. We would expect to see more deeply distressed firms needing advice on the options that they face. An understanding of the myriad technical issues that face a law firm together with a positive interaction with the SRA will be as important as dealing with the creditors if you are to achieve the best outcome for all the interested parties. □

Steve Billot (far left) is a director at RSM Tenon Recovery and Christina Fitzgerald (left) is a partner and head of Professional Practices at Matthew Arnold & Baldwin LLP.

Big bang or big nothing? Alternative business structures and changes to the legal profession

Private investment in law firms has been heralded as bringing about revolutionary changes to the legal profession, but others are unconvinced. Jonathan Haley and Patrick Tolhurst look at the current legal market and likely trends over the coming years.

In the calendar of many legal professionals, 6 October 2011 had been marked as the date that the provision of legal services in England and Wales would change profoundly. From this date, Alternative Business Structures (ABSs) (following the implementation of the Legal Services Act 2007 (LSA)) were to become available and, for the first time, non-lawyers would be permitted to own or manage law firms on a basis that could lead to the radical restructuring of the law firm business model.

Broadly speaking, commentators identified three market-related effects to this change:

- Law firms could raise capital or sell interests in their firms to non-lawyers, possibly for the purpose of exiting from the firm, investing to poach teams from rival firms, implementing significant investment plans or, more radically, floating on the stock market;
- It would be possible for law firms to develop into multidisciplinary practices (MDPs) offering services such as accountancy, estate agency and consultancy all through the same entity; and
- The so-called 'super brand' entities such as the Co-op, Tesco or the AA would provide legal services under their brands to low-end consumers (hence the expression 'Tesco Law' despite the fact that Tesco continues to maintain it has no imminent plans to enter the market).

Much debate has passed as to the real impact of the LSA, but as 2011 moved forward, it became increasingly clear that the Solicitors Regulatory Authority (SRA) would not be ready to accept applications for ABSs before the October deadline. This was due to two technical points, which required referral to parliament for its further consideration. At the time of going to press, the best estimate for the revised deadline is some time in January or February 2012, depending on the speed at which parliament can resolve the outstanding issues.

Irrespective of this delay, many observers and managers of law firms have proffered opinions (a) that it is unlikely that law firms would require external investment capital as banks have, even in the financial crisis, generally been fairly willing to lend to law firms; (b) law firms are not interested in expensive money from private equity or other investors; and (c) in relation to MDPs, this had been tried before, particularly by accountants, without success. Given these opinions, many law firms have viewed the changes and the arrival of 'Tesco Law' to be, primarily, a concern for high street solicitors (whose decline has been happening for some time, regardless of the LSA). In short, in the eyes of many, the revolutionary development might prove to be more of a big nothing, than a big bang.

The current climate

So, with the ABS regime delayed, are we struggling to give an accurate prediction as to which way the legal market is moving? Well, no, not completely.

There are some things that are certain to change, either because they are already happening or because we are aware of detailed plans, which will be executed as soon as the law permits. In most cases, what we appear to be seeing is the forthcoming implementation of the LSA not as a cause in itself, but as the catalyst for change.

Take the increasing trend for outsourcing as an example. Offshoring, onshoring, northshoring, the Mexican wave – whatever form it takes (and whatever snappy title it is given) – the motivation behind it is the lowering of the cost of delivery of the 'product', ie professional services.

Outsourcing is not new. Firms, including our own, have been outsourcing a variety of support functions for decades. Having outsourced 'non-core' parts of the business to those who can do it better or at more competitive rates, it is a logical, indeed inevitable, step to look at your other business units and consider what else might be done.

There are multiple examples of firms, large and comparatively small, outsourcing significant parts of their business as they look to the regional, national and international markets for efficiencies. The need for those efficiencies is nothing to do with the LSA. It comes from the present economic climate, fee pressure from clients, and general competition in the marketplace, meaning that once one firm has done it, others will follow. What may be seen as new though is the outsourcing of 'real' fee-earning work, rather than just support services. Yet this is only another logical extrapolation. As firms, and indeed whole sectors, become more experienced, what was once cutting-edge legal work has become commoditisable. Combine this commoditisable work with the technology that can integrate it into your systems and you have a basic recipe for huge efficiencies. Furthermore, with a global market for law firm support that is both low in cost and improving in quality, the inevitable conclusion is that outsourcing is here to stay.

> "As firms, and indeed whole sectors, become more experienced, what was once cutting-edge legal work has become commoditisable… combined with systems integrating technology… you have a recipe for huge efficiencies."

Another trend in recent times is an increase in mergers and acquisitions among professional firms. M&A is not new as professional firms have been merging, acquiring and demerging ever since partnerships existed. Today, however, the legal press is awash with speculation as to between whom the next tie-up will be. One can almost guarantee that the same article will then go on to speculate (with some journalists being better informed than others) on the drivers for the merger, the

packages being offered to partners, and which party will be the dominant partner (because, whatever they tell you, there always is one!).

Reasons for mergers or acquisitions vary from firm to firm. Size, of itself, is rarely a good reason for merging (though that is not to say that it has not driven some). Other traditional motives include gaining geographic spread, taking on additional expertise and increasing market share. In recent years, however, mergers have been driven often by necessity and opportunity, with firms at risk of insolvency being taken over by larger or more profitable firms who see the opportunity to pick up a bargain.

The current taxation climate is also conducive to partners wishing to sell their stakes in firms. Reduced pension allowances combined with reduced earnings from the boom times and a top income tax rate of 50 per cent compared with capital gains of 18 per cent, or even 10 per cent with the benefit of Entrepreneurs Relief, make a capital realisation very appealing.

Traditionally, a merger or take-over of a professional firm would simply involve the transfer of the business of one firm (usually the smaller) to the other, followed by an introduction of the acquired firm's partners into the equity of the acquirer. In recent years, we have seen an increase of 'for cash' mergers, which are essentially the purchase of one firm by another, coupled with the introduction of the acquired firm's partners to the business, often not as equity partners but as employees having relinquished their rights to manage the business, in exchange for a (sometimes very significant) cash sum.

The purchase of professional practices for cash will not be anything new to those in non-law sectors. For lawyers, however, it is, and when the market is opened up to new capital, there will be businesses interested in acquiring law firms and law firms with newly acquired treasure chests of outside investment looking for ways in which to fulfil their strategies, which may well mean swallowing up some of the competition.

> "The purchase of professional practices for cash will not be anything new to those in non-law sectors. For lawyers, however, it is, and when the market is opened up to new capital there will be businesses interested in acquiring law firms."

A perfect storm

These are just a couple of examples of recent trends, which, together with other changes to the legal profession, such as the accession of larger numbers of partners to a firm, the emergence of LLPs and globalisation more generally, have changed the profession dramatically over recent decades. As can be seen, this change continues at some pace and in many ways, we are currently witnessing a 'perfect storm' of factors that will bring further significant change to the way legal services are delivered, including:

A global economic slowdown: this has had two significant effects of (a) cost pressures being exerted on law firms by their clients and law firms having to find ways of providing legal services at cheaper levels; and (b) the rise of consolidation and mergers in the legal market.

The rise of superbrands: there are entities in the market such as the AA and Co-op that have the brand presence and financial strength to be able to move substantially and quickly into the consumer level of the legal market.

Technological development: technology has developed to such a level that cheaper solutions to the provision of legal services, such as outsourced operations, better document review technology, remote access, shared offices and cloud document management systems, are being developed continuously and increasingly used.

Taxation climate: the difference between capital gains tax and income tax at the present time makes a sale to a third party an enticing prospect.

The availability of alternative business structures: as capital becomes available, investors will be interested in finding ways to make money out of the substantial legal services market.

It might be that, at the outset, we will not see a huge flux of applications for law firms to become ABSs. Even if this is the case, however, the availability of ABSs will be a significant catalyst at all levels of the market, as businesses strive to deliver better legal services at a lower cost. In time this will have an impact on all parts of the profession as technology and cost reductions filter through and the market adjusts accordingly.

As Sir David Clementi recommended in his report prior to the LSA: *'Competition brings consumers lower prices, more choices and new services… there remain numerous restrictions on competition in the professions. Apart from those shown to be necessary for economic efficiency and consumer benefits, restrictions on competition should go.'* One of the most significant restrictions, namely non-lawyer ownership of law firms, is about to be removed. It is likely that the competition will find it difficult to resist entering a market that is so ripe and ready with opportunity; to many in the legal profession it would appear that the barbarians are finally at the gate.

Jonathan Haley (left) and Patrick Tolhurst (right) are members of the Professional Practices Group at Farrer & Co LLP.

The SRA: working with firms facing financial difficulties

Against a background of significant modernisation of the legal services framework, October 2011 saw another significant milestone reached in the Solicitors Regulation Authority's transformation journey. Avni Finnegan charts the progress.

The Solicitors Regulation Authority (SRA) is the regulatory body for solicitors and firms in England and Wales and sets the requirements for the protection of consumers of legal services. Where a solicitor or firm does not achieve the required outcomes we also take regulatory or disciplinary action in line with our enforcement strategy, which can be found at **www.sra.org.uk/sra/strategy/sub-strategies/sra-enforcement-strategy.page**. This policy outlines that we will take enforcement action to act as a credible deterrent.

Outcomes-focused regulation

On 6 October 2011 the SRA introduced outcomes-focused regulation (OFR), underpinned by a new handbook of regulatory requirements, constructive engagement with the profession and targetted enforcement action.

We ran two pilots across different sectors of the profession to test, define and develop our approach to constructive engagement: relationship management, a dedicated, close and continuous supervisory approach; and desk-based/visit-based supervision. As part of the supervision pilot we worked with firms facing financial difficulties. This article details our experience of working with these firms. We continue to explore ways of working with those that face financial challenges, including signposting them to professionals with experience in business recovery.

To deliver OFR we introduced a new handbook of regulatory requirements, and emphasised our three key functions in the internal structure of the SRA namely:

- authorisation
- supervision
- enforcement.

OFR changes our relationship with the regulated community and the way in which we regulate. It places an emphasis on those we regulate acting in accordance with mandatory principles and achieving the specified outcomes for clients and third parties in the new handbook rather than compliance with details' rules.

The delivery of OFR

The delivery of OFR is underpinned by the SRA becoming a risk-based regulator. This means that we target our resources on regulated entities that pose a high risk to consumers of legal services, the public as a whole and the regulatory objectives contained in the Legal Services Act 2007.

The aim of the supervision function is constructively and proactively to engage with firms to encourage and support them in identifying and managing their own risks, improving standards and achieving the required outcomes for clients.

Supervision is responsible for the oversight of the entire regulated community. Our engagement with firms is based on a risk assessment of events and themes that we have identified. An event can typically be defined as a report of misconduct about an individual or a firm. A theme can cover a specific area of work, such as financial difficulties or first-tier complaints' handling.

Supervision's emphasis is on immediate and constructive engagement with a firm. Therefore, much of our desk-based work is initiated with a telephone call or by email. When necessary, we will also visit a firm to discuss with them the risks they face and explore their internal systems to address and manage those risks down. Where we consider the risks to the public cannot be mitigated or there is serious misconduct we will take targeted and proportionate enforcement action.

> "OFR changes the SRA's relationship with the regulated community and the way in which we regulate."

Orderly closure of solicitors' practices

During our pilot we worked with solicitors that needed to achieve an orderly closure of their practices. We found that in many of these cases solicitors were forced to close their practice due to financial difficulties, the causes of which included a lack of effective financial and managerial controls. In some cases, solicitors were unable to achieve an orderly closure of their firm on the basis of medical grounds, or their financial difficulties became so serious that they were adjudged bankrupt. We therefore took the protective regulatory step of intervening in the solicitor's practice.

From our assessment of these firms it was evident that in some circumstances the closure of their practice and/or an intervention could have been avoided had they sought assistance sooner. When we receive information that can make a significant difference, much depends on the firm advising us at the earliest opportunity of the difficulties they face and their willingness thereafter to work with us to put things right. This is underpinned by Chapter 10 of the new Code and Rule 8 of the new Authorisation Rules, which set out the circumstances in which notifications must be made by firms and individuals.

Building trust

We realise that a large part of the success of OFR is dependent on trust between those we regulate and the SRA, and we are actively working on building this trust. We are therefore looking at ways in which we can work with firms to give those we regulate the confidence to seek information on their options, be it business recovery or an informed decision to close their practice. To that end, we encourage professionals who are able to advise and work with firms who are facing financial difficulties to contact me at the SRA to discuss how they are able to assist such firms.

Avni Finnegan is a supervisor at the Solicitors Regulation Authority.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Finding the pensions solution

The issue of pensions is often a thorny one in many restructurings. Chris Martin and Martine Trouard-Riolle explain how thinking 'outside the box' can provide interesting alternatives.

There have been a number of innovative restructurings in the last six months, which show that even in the most difficult of circumstances, and with potential insolvency on the horizon, a more optimal solution can be found with willing participants, some creative thinking and a lot of hard work. Uniq and HMV are two such cases where we have helped to find a solution.

Uniq

As a result of various corporate sales in the 1980s Unigate plc had become Uniq, a company with a market cap of about £6 million. However, it found itself in the unenviable position of supporting £1 billion of pension fund liabilities with a deficit estimated to be in the region of £400 million. As the scale of the problem dawned on shareholders, suppliers and customers, the position of Uniq became more precarious. The big challenge for management and the trustee was how to construct a solution that allowed the company to gain strength and increase its earnings. There was no point in the trustee squeezing whatever cash it could out of the business in the short term. That would have just led to a strangled three- to five-year death for the company. The solution involved a pension deficit for equity swap with the pension fund owning Uniq. The trustee agreed to forgo all future claims against its former parent in return for a 90.2 per cent equity stake in the company. Once the company was free from the pension burden it was much easier to find a buyer.

The deal was accepted by virtually all shareholders and it is hoped that it will result in the scheme being funded to a level which, while not providing full benefits to members, will mean that it provides a higher level of benefits than the Pension Protection Fund. The minority shareholders will also receive about £10 million, which is considerably more than they would have got on insolvency.

HMV

Discussions between the pension scheme and HMV over poor trading results and a falling share price formed the backdrop to ITS being appointed to supplement the skills of the existing trustee board of the HMV pension scheme. Two of the trustee directors had to step back due to potential conflicts of interest. In this case the proposal was a sale of the company's book store subsidiary, Waterstone's. All parties – the banks, the company and the scheme – had strong cards to play. In order for the deal to complete the trustee had to agree to an apportionment of the pension liabilities so as to leave Waterstone's free of all pension debt. In doing this the trustee had a legal requirement to be reasonably satisfied that the remaining group could support the liability.

> "The deal was accepted by virtually all shareholders and it is hoped that it will… provide a higher level of benefits than the Pension Protection Fund."

The trustee was able to secure a package of support from the company (with the agreement of its lenders) that will help the trustee meet its objective for funding the scheme over the longer term. The £60 million package comprises cash contributions over a ten-year period, security and an initial contribution from the sale proceeds of Waterstone's. This package was significantly better than the first offer put forward to the trustee. Recognition by each of the three major stakeholders – lender, company and trustee – of the others' position allowed a successful solution for all three to be reached.

Although the Uniq and HMV deals were very different in terms of problems and solution, there were a number of key similarities. In each case:

- The problem was identified at an early stage and the pension scheme trustees were brought in to the discussion before thinking was fixed.
- At the same time an independent trustee with transactional/restructuring experience was appointed.
- All parties were willing to think 'outside of the box' and consider all options.
- The Pensions Regulator was kept up to date and informed as the negotiations progressed. (The way the team at the Pensions Regulator behaved was really important in terms of achieving the final outcome.)
- Through dialogue and negotiation each stakeholder had a clear view of where the other parties were coming from. Discussions were always frank and at times uncomfortable. There was no cosy co-existence but there was respect on all sides and the determination to find the best possible solution for all in trying circumstances.

Chris Martin (left) is MD and Martine Trouard-Riolle (right) is a director at Independent Trustee Services Limited.

Energy providers: villains or victims?

Energy providers have long been perceived as the villains of the piece in insolvency cases. Stuart McNeill, brave solicitor to one such anonymous n'er do well, puts forward the case from their perspective.

Against the backdrop of R3's current campaign to bring an end to 'Holding Rescue to Ransom' and with wholesale prices dictating increases in customer tariffs, energy suppliers are finding themselves increasingly under the spotlight. But insolvency cases are not of their making. Are their demands reasonable and could there be extenuating circumstances?

Terms of supply

It is important to distinguish between the physical supply of electricity and the terms on which supply occurs. Physical supply takes place when a customer switches on a light and draws electricity from the grid. The terms of supply meanwhile are set out in a negotiated contract, often a written one, supplemented by standard terms, failing which the Electricity Act 1989 steps in to impose a deemed contract where a supply takes place. In both cases the standard terms will be freely available, usually on a supplier's website.

The tariffs in a negotiated contract will often be well below a supplier's standard rates that apply to deemed contracts, the latter being similar to the full 'rack rates' for hotel rooms. That is only fair; in a negotiated contract the supplier can assess the customer's risk profile and set the tariff having regard to the credit risk, availability of security deposits or personal guarantees and the duration of any fixed price. Deemed contracts often arise where occupiers change and there is invariably no advance notice of who is coming in, or for how long, so suppliers assume the worst.

Obligation to supply

Electricity suppliers must supply an occupier or owner of premises until circumstances exist for disconnection under the Electricity Act, essentially for non-payment of 'charges' after a set period of time. The Insolvency Act goes further, prohibiting the supplier from insisting on payment of arrears as a condition of future supply in any formal insolvency. In return, an insolvency practitioner (IP) may be required to give a personal guarantee for that supply.

Conversely, in an insolvency situation trade suppliers can stop supplies thereby quickly cutting their losses, or withhold future supplies until arrears are paid. Unlike with the utility providers, it will be a rare case where the scenario in *Land Rover Group Ltd* v. *UPF (UK) Ltd (in receivership)* applies, and an IP can compel future supply under a mandatory injunction to stop what it perceives is a ransom payment.

So what is the problem?

An energy company is an essential supplier to most businesses in the UK, but let us not forget that they are commercial entities. They must assume the risk of some customer failure and price that risk accordingly, having regard to a variety of factors such as market forces and the customer's past and (likely) future behaviour. Ongoing supply to a customer in a formal insolvency, including the terms on which supply will take place, involves similar considerations.

Energy companies do, however, have a statutory process to follow before they can disconnect and must, at least initially, supply an insolvent business. One of their few commercial options in an insolvency is to terminate supply contracts, reverting to a deemed contract and deemed contract rates. This severs the existing legal contract, while maintaining physical supply. Yes, tariffs often increase, but remember wholesale prices have steadily increased in recent years and deemed tariffs reflect this. It was also not the energy company that breached the contract terms in the first place.

Such a commercial act should not automatically label the supplier as a villain. Treated properly, an energy company will act rationally and will want to find a sensible solution. The deemed rates are legally enforceable, but engage constructively and early, and you maximise the chance of a compromise tariff and other supply terms being agreed.

> "The deemed rates are legally enforceable, but engage constructively and early, and you maximise the chance of a compromise tariff and other supply terms being agreed."

Do also remember that the business may not have been honest about its ability to pay and destroyed trust with the energy supplier's account manager. A typical (but not hypothetical) day for that manager might have entailed:

- facing down accusations of animal cruelty for disconnecting a fish farm that has been drawing free electricity;
- trying, and failing, to persuade the IPs appointed over a large DIY chain to allow access for meter readings;
- being threatened with being sued for the emotional distress to methadone users, following the disconnection of a pharmacy, in a (novel to say the least) claim by the pharmacy owners;
- being asked to supply the same director, of the same type of business, for the third time in three years following a pre-pack administration.

Spare some thought for them, energy suppliers are victims in insolvency too.

Tips for dealing with energy suppliers

DO

- ☑ treat the utility as you would any other essential supplier
- ☑ respond promptly to requests for deposits or personal guarantees
- ☑ maintain contact from early on
- ☑ allow access for meter readings
- ☑ be sympathetic to perceived 'phoenix' cases.

DON'T

- ☒ ignore reasonable deposit requests; they are 'charges' for arrears purposes and provided for in the Insolvency Act
- ☒ assume that disconnection will not take place on an estimated reading
- ☒ assume past electricity bills are a guide to the future ones.

Stuart McNeill is a partner in Litigation & Dispute Resolution at McGrigors LLP.

Alkor-Venilia GmbH: a true cross-border insolvency

Chris Laughton reports on the complexities of co-ordinating the liquidation of a pan-European insolvent business.

On 20 June 2011, the Munich District Court appointed a temporary administrator to this €100 million turnover plastic and paper decor manufacturer. As is typical in German insolvencies, the administrator had no prior knowledge of the company and so over the next two days he prepared a short report to the court concluding that the company was indeed illiquid and insolvent and that full insolvency proceedings would be effective.

With liquid assets in the estate of 71 cents and establishments – all in the same company – in seven European jurisdictions (and insolvent subsidiaries in two others), the German main administrator quickly decided to seek the appointment of secondary administrators[1] in the UK, France, Spain, Italy and Belgium.

I was contacted from the steps of the court immediately after the initial report had been presented and asked to advise on and act in UK insolvency proceedings as part of a multinational team (see Box 1). While there was a clear preferred strategy – the Europe-wide sale of the company's business and assets to a single trade or strategic buyer – how such a sale might be achieved was less obvious.

Aside from the unfolding company-specific issues (see Box 2), everyone involved had to grapple with the conceptual, legal and practical challenges of running six parallel insolvency proceedings in the same company. Although some of the administrators were more experienced than others in cross-border matters and only two of the six had worked together before, we are all familiar with the European Insolvency Regulation and, most importantly, we are almost all enthusiastic supporters of the communication and co-operation principles derived from the Regulation and promoted in INSOL Europe's CoCo Guidelines.[2]

> “We had to tread carefully on the rationale for administration, since it was constrained by the requirements of the Regulation to be an administration for the purpose of winding-up.”

My first hurdle in the UK was to gather enough information about the UK establishment to enable the main administrator to produce a witness statement to support his application for my appointment – cue early site visit and rapid local management discussions. Although my fact-finding was readily funded by the secured creditor, it took several days for the German administrator to agree the funding he required to make the five secondary proceedings applications, partly due to the different nature of relationship that appears to exist between administrators and secured creditors in Germany.

There was an urgency to opening UK proceedings because of the employees being in limbo. They were not being paid but their employment was continuing, so they could not claim Jobseekers' Allowance; and they did not want to walk out and risk damaging their redundancy claims. Fortunately, these circumstances persuaded the High Court that an expedited hearing was appropriate.

While the application was relatively straightforward as the German insolvency order meant the English court did not have to satisfy itself of the company's insolvency, we had to tread carefully on the rationale for administration, since it was constrained by the requirements of the Regulation to be an administration for the purpose of winding-up.

Conceptual difficulties

The toughest point to get across to all involved, including creditors, has been that each estate is separate as far as its assets are concerned; but that (save for slight differences between the dates of opening the different proceedings) the creditors are the same. All creditors can claim in each estate. It will be for the various administrators in due course to avoid double counting of claims. That is the mechanism applied by the Regulation.

Some estates may have preferential creditors, and security rights are likely to be different in each jurisdiction, but those are only differences in priority. Each creditor is still a creditor in each estate.

We are a long way from making any distributions but, particularly in jurisdictions such as the UK where we have obligations to notify and report to creditors, it is important both to be clear that each administrator is responsible to all the creditors and to be proportionate and cost-effective in complying with local communication requirements. As I write, I am working with the other administrators to finalise a protocol to avoid unnecessary multiple communications to creditors while ensuring that individual administrators' reporting obligations are met.

Legal difficulties

There are a number of points of law that have not yet been resolved, but the best illustration is the claim of the secured creditor, which is based on an English-language, German law loan document, supported by a suite of security documents in each jurisdiction. A moment's thought about the instructions one might give in seeking advice on the validity of the security reveals the complexity of the situation. In the UK, we have reached an agreement with the secured creditor that is without prejudice to its rights elsewhere and which has avoided the need for detailed multi-jurisdictional advice.

Practical problems

Dealing with 1,700 creditors, most of whom had no direct connection with the UK establishment, meant minimising bulky mailings (such as the administrators' proposals) by using a website for creditors' documents. Care is needed though when communicating between administrators, because some jurisdictions make less information available to creditors than others. For example, although creditors usually have the right to apply to see the court file, it can sometimes be redacted. Documents from such a source in another jurisdiction may need to be withheld more than an administrator might normally expect.

> "Care is needed though when communicating between administrators, because some jurisdictions make less information available to creditors than others."

Communication and co-operation

From the start of the administration, there have been regular conference calls between the administrators. This was particularly helpful while a Europe-wide sale of the businesses and assets was being sought. Although that objective proved unattainable – frankly, the company filed for insolvency several months too late – the communication and co-operation between the administrators has continued. At the time of writing, most of us have just met in Munich for the creditors' meeting in the main proceedings. Although it was conducted in court under the control of specialist court staff (and the judge slipped in quietly at the back), much of what went on was the administrator explaining to creditors the conduct of the administration to date.

Discussing the meeting with administrators from Spain and Italy, whose procedures are somewhat different again, it became clear that despite procedural differences, we do all do pretty much the same things. We just have to recognise that the way we achieve similar realisations and distributions to creditors will be different.

The case is not likely to close quickly – creditors have up to three years to submit claims in Italy, for example – and there are many other areas in which the administrators will need to co-operate before it does. Fortunately, that aspect of the administration (among others!) is going well.

For me the case has been a reminder that we are each experts in our own jurisdiction, and to get things done in another jurisdiction we must first find a local expert we can trust. That this view is recognised is shown by the two emails I have had from UK IPs during the 24 hours I have been in Munich, each asking me to recommend someone from another jurisdiction to help them somewhere in Europe. I was delighted to oblige.

Alkor-Venilia GmbH: administrators

Main proceedings

Axel Bierbach, Müller-Heydenreich Beutler & Kollegen, Munich

Secondary proceedings

Chris Laughton & Steve Smith, Mercer & Hole, London
Marc Senechal, SCP Berechet-Thierry-Senechal-Gorrias, Paris
Patrizia De Cesari, Milan
Juan Ferré, Pluta, Barcelona
Jean-Louis de Chaffoy de Courcelles, Brussels.

Alkor-Venilia GmbH: company-specific issues

- Frequent shareholding and management changes during last two years
- Five subsidiaries from different European countries merged into the company two years before insolvency
- Despite the legal merger, almost nothing was done to integrate the operations
- The company was operating four different accounting systems and had limited centralised information or management
- Various refinancing efforts appeared to generate no funds for the manufacturing establishments (including the UK)
- The final refinancing in late 2010 involved security being taken in February 2011
- Cash had dried up and operations stopped in April 2011, so most employees had not been paid for two months or more when insolvency proceedings were opened
- Although the company filed for its own insolvency on 20 June 2011, there had been no preparation or planning.

[1] I use the term administrator for the various officeholders because that is the term we use between ourselves, even though the Regulation talks about liquidators.

[2] European Communication and Co-operation Guidelines for Cross-border Insolvency.

Chris Laughton is a partner at Mercer & Hole.

ERAC hits a century

The Employment Rights Act Committee (ERAC) celebrates its 100th meeting at the end of this year. Diane Smith explains more about the background to forming this committee.

ERAC was founded 25 years ago in London by a number of staff specialising in employee matters on behalf of various insolvency practitioner firms. Two of the founder members, Desmond Winchester of Grant Thornton and Peter Smith of PwC, still sit on the committee.

The committee today comprises around 30 members from around the UK representing IP firms of all sizes, and also includes a number of ERA sub-contractors.

The group initially met to talk through issues they were encountering when dealing with the staff of an insolvent employer. This naturally included the administration of employee claims being processed through the Department of Employment (now the Redundancy Payments Service (RPS)). At that time, claim monies were paid direct to the IP with them making net payments to employees and paying tax and NIC deductions to HMRC.

Over the years, ERAC has become highly influential with the governmental agencies dealing with employees in insolvent businesses. ERAC often meets with representatives from the RPS to discuss operational and policy matters. Members have previously assisted the RPS with reviews of publications and

development of the forms given to employees made redundant by an insolvent business. More recently meetings with the RPS have involved discussions on its new CHAMP (Claims Handling and Making Payments) computer system (see opposite page).

Other external guests to ERAC have included HMRC whose most recent visit covered discussions on its forthcoming 'real time information' system, which is being piloted from April 2012.

Following the launch of its rapid response team to address larger scale redundancy events, Jobcentre Plus has also met with ERAC to provide information on how it helps to guide redundant employees in the various options for employment and skills learning.

As recognition of its pivotal role in the handling of the claims of former employees of insolvent businesses, ERAC was represented in May 2011 at the re-signing of the Memorandum of Understanding, a three-way initiative between Jobcentre Plus, R3 and The Insolvency Service, designed to provide an accord on assistance to redundant employees in an insolvent situation.

ERAC celebrated its 100th meeting on 30 November 2011, and was pleased to see many past members at this special event.

If you would like to become a member of ERAC, please contact Jane Harley at jharley@deloitte.co.uk.

Diane Smith is chair of ERAC and an ERA manager at PwC.

Memorandum of Understanding

R3 would like to encourage all members to utilise the Memorandum of Understanding between R3, Jobcentre Plus (JCP) and The Insolvency Service.

This voluntary initiative enables IPs to warn JCP of potential redundancies, in confidence, so that JCP can act quickly and discreetly to support individuals affected by redundancy. JCP responds by providing written information or on-site support to help those affected to re-train, access benefits or identify new job opportunities. The partnership plays to the strengths of both parties – JCP can help those facing redundancy, while IPs can concentrate on dealing with the struggling business.

If you are aware that a company is likely to make 20 or more redundancies you should strive to contact JCP at the earliest opportunity.

National Jobcentre Plus contacts:
Sarah Cole 07855 319288,
sarah.cole1@jobcentreplus.gsi.gov.uk
and Anne O'Riordan 01494 552505,
anne.o'riordan@jobcentreplus.gsi.gov.uk.

Re-signing the Memorandum of Understanding with Insolvency Minister Ed Davey.

Redundancy Payments Service launches new payments system

Electronic processing of the redundancy payments system will bring advantages to all, reports Jane Young.

Redundancy can be an incredibly difficult and stressful time. It is a situation that could be made worse if the employer is declared insolvent and is unable to pay money owed to former employees. During the last financial year the Redundancy Payments Service (RPS), a division of The Insolvency Service (the IS) processed more than 116,000 redundancy claims. However, changes to the way redundancy payments are processed to improve efficiency are being introduced.

IP Upload is part of CHAMP

Insolvency professionals now have access to two new routes to process redundancy claims. One is a web-based application known to the profession as IP Upload, which is part of CHAMP (Claims Handling and Making Payments), the new web-based redundancy payments processing system developed by the IS. The other is a set of forms with intelligent character recognition (ICR).

IP Upload allows the insolvency professional to submit redundancy data using pre-designed spreadsheets. The pre-designed spreadsheets mirror the information contained on the redundancy forms. Once complete the spreadsheets are converted into an XML file, which is then submitted via the redundancy payments website where the data is extracted and loaded directly into CHAMP where it automatically creates the case.

RP14 and RP14a forms

An alternative to the web-based system is the new ICR-enabled RP14 and RP14a forms. ICR technology allows the information contained on claim forms to be scanned so that the data can be automatically extracted and uploaded into CHAMP.

The thinking behind the change

The IS has been looking at ways to improve the efficiency of the service it delivers to ensure people who have been made redundant, through no fault of their own, receive the correct payment promptly and efficiently and to reduce the cost of the service to the taxpayer.

> “Both IP Upload and the new ICR-enabled forms provide much more information about the employee and the insolvent company.”

IP Upload is particularly useful as it removes the need to send information by post and will also help to reduce any manual errors, improve efficiency and increase the speed at which payments are made thereby improving the delivery of the service the IS provides. Before the introduction of the new system, the IS processed 78 per cent of redundancy claims received within three weeks and 92 per cent in six weeks; this has recently increased to 80 per cent and 93 per cent respectively and the IS expect CHAMP to enable it to increase this further.

An interesting development of the IP Upload process has been the opportunity for the IS to work with IT providers within the sector to develop a means of creating the XML file for IP Upload via a schema directly from the IPs own system. This XML file can then be uploaded into the website effectively avoiding the requirement to complete the spreadsheet.

As with the new IP Upload, the new ICR-enabled forms provide much more information about the employee and the insolvent company. Once the forms have been scanned the data is extracted into the system removing the need to re-type or manually enter any data. The new ICR forms will eventually replace the existing forms and will be used to process all forms of redundancy payment claims.

Work to roll out the new systems of both the forms and IP Upload, the web-based application, has already begun with the Watford and Birmingham offices. Both systems will be introduced in Edinburgh in the new year. The IS decided on a staged approach in order to identify and resolve any areas of concern before the system is rolled out across the country. From those who have already used IP Upload the IS has had some encouraging feedback.

Sarah Portman, ERA Solutions: ‘We found the new CHAMP system really quick and easy to use. I believe it will make a massive difference to employees who have been made redundant, as well as enabling insolvency practitioners and ERA service companies to be more efficient.’

Peter Smith, PwC: ‘Following extensive testing, the live CHAMP system has now been up and running for two months; inevitably, there have been a few hitches in the first few weeks, but I am confident that it will work smoothly in the future when everyone gets used to the new system.’

Hints and tips

IP Upload – spreadsheet

The spreadsheet has a number of validation fields:

- Don’t delete these fields or add more rows (as both of these actions will cause the submission to fail)
- Ensure the spreadsheet is saved in XML format before uploading
- Provide details of the email address that you want Employment Rights Act correspondence to be sent to
- Do not use hyphens or symbols in user name fields.

ICR forms for RP14 and RP14a

- These forms request an email contact address. This will be used by the system to generate any automatic communications including details of the name and contact for the case officer allocated to the case.
- For both these forms, please include the IP name and registration number. These details will ensure that the correct IP address, as registered at the Insolvency Practitioner Unit, is uploaded into the system.

Ultimately both routes will provide the insolvency profession with quick and effective ways to submit information and with non-ICR forms not being accepted in the future now is the time to become familiar with the systems.

Jane Young is the deputy director of RPS at The Insolvency Service.

Maximising disposal values of distressed buy-to-let portfolios

Faced with a property portfolio to dispose of lenders, IPs or LPA receivers need to ensure the best returns they can. Stephen Ludlow explains how a specialist agent can help.

Banks with exposure to distressed residential property are taking a bigger discount than necessary when selling the underlying security because their disposal strategy is too heavily weighted towards a quick sale. By putting a small amount of resource into improving the performance of the portfolio, they can extract a better sale price for their security by improving its cash flow and maximising yields first.

Outsourcing the management of the portfolio to an estate agent that specialises in letting, management and buy-to-let for just a short period can make a significant difference to the disposal options of the bank or their borrower and the exit value they achieve. It's an important option for banks and their appointed insolvency practitioners and LPA receivers.

The scale of the problem

Some banks and other lenders have very large exposures to buy-to-let property portfolios where the borrower is struggling to make repayments. Many of these underperforming loans were made to amateurs or semi-professionals who thought they could make a quick profit on a new-build development during the housing boom. As property prices have fallen, those lenders are now nursing considerable paper losses.

The problem starts to hit home for the bank when falling asset values impact loan-to-value ratios. As a growing number of these borrowers are starting to breach their covenants, the lender is stepping in and asking for a quick sale of the portfolio. This is already happening on a large scale and, as interest rates rise, many more banks will also be forced to take over their security on the assets.

There is a further reason why more residential property portfolios are likely to fall into distress soon. Investors in new build that are currently only just able to service their interest payments could find that they cannot afford to make improvements. Many of the new-build properties that characterise this market were built with low-quality fittings. While initially those fittings retain their lustre, after five years or so tenants start to demand that they are replaced. If the investor cannot afford the capital required to keep the properties updated, tenants will leave and the investor will find it hard to replace them, making it all the more likely that they will no longer be able to service their debt.

Improving the asset value prior to a sale

Appointing and working with a specialist in residential buy-to-let from the outset to review the portfolio's performance prior to a sale can be a cost-effective option for banks and administrators facing this problem. An agent may be well positioned to improve cash flow rapidly and increase yields, meaning the lender can achieve a much better sale price on its security or help the borrower to meet their repayment schedule. This approach is particularly effective if the borrower is an inexperienced investor, as they are likely to make mistakes that, once corrected, can lead to a rapid improvement in the portfolio's cash flow.

Insolvency practitioners and LPA receivers who are appointed in these situations seek to improve the performance of the property portfolio to maximise returns from a sale. By bringing additional expertise to bear on this problem, improvements can be accelerated and this may be a crucial element in achieving an enhanced performance from the portfolio.

Advantages of outsourcing residential portfolio management

Using the services of a specialist estate agent has a number of advantages. They will be able to manage the performance of a residential property portfolio more cost effectively because they already have the business infrastructure in place to manage the tenancy. They can also assess rapidly whether a property is let at the correct market value and process the legal formalities of a tenancy, including gas safety certificates, tenancy deposit scheme certificates and the tenancy agreement itself.

If the portfolio is underlet because existing tenants have left or have not had a rent review for some time, the property can be swiftly marketed and vacant units can be let at market rates. With rents rising by more than ten per cent in some areas in the last year, many properties may well be currently underlet. Often the original investor will have become disillusioned with their portfolio and not promoted the units effectively, or even at all.

Crucially, a buy-to-let specialist will be able to chase up arrears from any existing tenants. With distressed residential portfolios such as these, tenant arrears tend to be a big problem because tenants recognise that the property owner is in distress and take advantage of this by failing to pay their rent. Once arrears are brought under control short-term cash flow for the portfolio can be improved rapidly.

Outsourcing the portfolio management to a sector specialist will therefore have two major benefits to the lender, insolvency practitioner or LPA receiver.

There will be an immediate improvement to the portfolio's cash flow, and that makes it easier to find time to achieve a better sales price.

Successful portfolio management will also push up the portfolio's yield, making the investment more attractive to potential buyers.

Discretion for the lender

As long as an estate agent is in charge of day-to-day marketing of the portfolio there are no indications to the market that the asset is in distress, which can be advantageous.

Smaller lenders with exposure to underperforming residential property might not want the market to know that those kinds of exposure exist. That can make it difficult for them to recover value from the asset once banking covenants have been breached. Traditional routes to a sale might notify the market of the exposure, putting pressure on the banks' business.

A further advantage is that potential buyers do not see the asset as distressed, which can result in higher offers from them. A potential buyer that knows that a bank is trying to dispose of a residential property portfolio in the current market is likely to make an offer significantly under the actual asset value but may be less inclined to do so if the property is offered via a specialist agent.

“With distressed residential portfolios such as these, tenant arrears tend to be a big problem because tenants recognise that the property owner is in distress and take advantage of this by failing to pay their rent. Once arrears are brought under control short-term cash flow for the portfolio can be improved rapidly.”

Bespoke advice on exit strategies

An agent will also be able to provide bespoke advice in respect of disposal options for the portfolio in question. For example, new-build residential blocks are usually structured so that the owner has an unbroken freehold of the building, meaning that they have complete ownership of both the land and the building on it. An unbroken freehold is often a requirement for major institutional buyers who could represent one exit strategy. However, there are occasions when assigning each property an individual lease of 125 years will be advantageous for the net position of the portfolio.

It can be attractive to move each property onto a 125 year lease and then assign those leases to a special purpose freehold company holding the leases. This means that the SPV can be sold, raising much-needed capital for the lender, who will still retain the long leases.

Another option is to sell individual units within the new-build block, which are attracting a high price, while continuing to let the other units. This way, individual sales can be made at market-topping values. It might be possible to work through the entire portfolio by making individual sales while maintaining interest payments from rental income from those properties that have not been sold.

The main disadvantage to this approach, which is the reason it will only be fit for certain scenarios, is that it might put off some buy-to-let investors or property investment companies who will only invest if there is an unbroken freehold.

Swift, commercial solutions sought

Most borrowers whose portfolios are now distressed have not usually conducted any kind of fraud. The majority of the distressed residential property portfolios are misjudged purchases that are then mismanaged by inexperienced individuals who invested when the market was overheating. In the struggle to service their debt over the past two to three years, they have cut all expenditure and failed to maximise occupancy rates and returns, thereby allowing their portfolio to underperform. Partly that is down to their own inexperience and lack of professionalism; partly it is the result of letting standards slide in the face of what seems to be an insurmountable debt burden.

The banks recognise that their clients normally have a market problem so will not necessarily go after the borrower's personal liabilities. They are looking for a commercial solution and a quick resolution.

The nature of how these portfolios became distressed means that it's often possible to improve dramatically their cash flow and attractiveness to an investor – and to do so relatively rapidly. Outsourcing the management of a distressed residential portfolio can be an extremely cost-effective way to maximise exit value on residential property collateral.

Stephen Ludlow is the executive chairman at ludlowthompson Asset Management.

Editor recovery@r3.org.uk | Recruitment recovery@r3.org.uk/recruitment

Consultations galore: a snapshot of R3's work on policy issues

Victoria Jonson explains how R3 is continuing to work with government, parliamentarians and the media to tackle key issues affecting the insolvency profession.

In November 2009, Lord Justice Jackson proposed changes to ban the recoverability of success fees and after the event insurance premiums. R3 is extremely concerned about the impact these changes will have on insolvency litigation and is calling for a carve-out for insolvency.

R3 has worked closely with the shadow justice minister Andy Slaughter MP (see interview on page 48) and as a result R3's president, Frances Coulson, was called as an expert witness to the Bill Committee in July. It has also been briefing MPs and Lords on the issue, who have in turn expressed their concerns to the minister, Jonathan Djanogly MP, through parliamentary questions and letters.

The Bill had its third reading in the House of Commons on 2 November and is expected to reach the Lords at the end of November. R3 hopes to work with a cross-party group of peers to table an amendment to the Bill in the House of Lords.

European asset freezing measure – UK 'opt out' secured

In September 2011 the Ministry of Justice (MoJ) consulted on whether the UK should 'opt in' to European Commission plans for a European Account Preservation Order (EAPO). The plans were set to give courts anywhere in the EU power to freeze funds in UK businesses' bank accounts, without warning.

What did R3 do?

- R3 submitted a response to the consultation, advising the government to opt out because the plans would negatively impact on business rescue.
- It liaised closely with officials at the MoJ and The Insolvency Service (IS).
- It worked with stakeholders: the banks, the RPBs, accountancy firms and the legal community to form a consensus that while helping creditors is a laudable objective, the details of the plans were deeply flawed.
- R3 worked with a number of MPs to highlight the negative implications of the plans.

> "R3 is committed to defending and promoting the insolvency profession, so it is proud to have played a critical role in averting the introduction of EAPOs and the threat they presented to the profession's ability to rescue businesses."

Positive results

On 31 October, the Ministry of Justice decided to opt out of the Regulation citing concerns about business rescue. To opt out of EU Regulations is very unusual – it is a bold move, not undertaken lightly by governments. R3 is committed to defending and promoting the insolvency profession, so it is proud to have played a critical role in averting the introduction of EAPOs and the threat they presented to the profession's ability to rescue businesses.

Regulatory reform

In February 2011, the IS launched a consultation on a range of possible reforms to the regulation of IPs. R3 has been working hard to ensure that any changes are proportionate and sensible. It is awaiting the official response from the government, which is expected later this year. In the meantime, R3 has been liaising with the RPBs. If some sensible changes can be agreed on making the regulatory regime more visibly consistent, transparent and independent, change could be achieved without regulation; and in a quicker time frame, and at less cost to creditors and practitioners.

Administration expenses

The rising cost of administrations is a key issue for insolvency practitioners. R3 has pointed to the merits of clearly defining administration expenses in statute with MPs and journalists. It has been asked by the government for further evidence of the problems caused by administration expenses and will work with members to submit the evidence required.

Pre-packs

Following the consultation on pre-pack reforms launched in May 2010, the government announcement of the '3 day' proposals in March 2011 and the subsequent official delay announced in August 2011, R3 has been working hard to suggest a solution that preserves the value of pre-packs but addresses the perception issues of sales to connected parties. The Insolvency Service is currently working on a revised statutory instrument and R3 is liaising with stakeholders such as the British Property Federation to discuss options, to address the concerns of all parties in a balanced, fair way.

Debt management plans

R3 has several concerns about the debt management plan market and those recently publicised instances of bad practice in that industry. Its policy group briefed a cross-party gathering of MPs on its concerns; and several parliamentary questions have been laid in the House of Commons to draw attention to the issue.

In October, the Business, Innovation and Skills Select Committee announced an inquiry into debt management. The inquiry will predominantly focus on the government's response to the Call for Evidence into Personal Insolvency and it is expected it will look closely at the debt management plan market. R3 is submitting evidence to the Select Committee and will meet with the committee chair, Adrian Bailey MP, to discuss its policies on debt management and personal insolvency, and it has discussed its concerns directly with the OFT. ◻

Victoria Jonson is the director of communications at R3.

R3 Council: more than just directors!

As professionals engaged in the insolvency industry, Graham Rumney urges R3 members to get involved in Council to help shape the way in which you will work in the future.

Council membership

R3's Council is the very heart of R3, shaping R3's activities and, by extension, the development of the insolvency profession. Words often used to describe Council are 'interesting' and 'challenging', and rightly so. Council meetings are open forums where members are encouraged to throw ideas into the ring and where decisions are formed on how R3 responds to the big issues of the day, such as the future regulation of the profession.

There is no one type of person on Council. It is truly representative of the membership: geographically, by age, gender and professional discipline, specialism and size of firm in which they work. The one common factor is a desire to contribute to the industry, putting something back by way of a 'thank you' for their career to date and a desire to invest in the industry's and R3's future.

Anyone who is a full member can stand for Council. The elections take place annually; the next nominations will be due in February with votes being counted in April 2012. Terms are for three years. Next year all ten regional representatives on Council become vacant, and three national places are up for election.

Council meets three times a year. The national committee chairmen and EXCO (comprising the president, vice-president, and deputy vice-president plus the CEO) also meet in advance of Council. When added to national committee work and attendance at their home regional events this represents a significant commitment personally and by the supporting firms.

In return, Council members are given many opportunities to meet a large number of members and other stakeholders and opinion makers, such as journalists and politicians at both national and local levels. When promoting the industry – via media interviews, meeting politicians and other trade bodies – Council members are given briefings and support as well as full media training. They in turn provide insight, case studies and information to the R3 staff; and many also act as speakers at R3 events, conferences and courses.

R3 EXCO members

The executive management of R3 is directed by Frances Coulson (president), with Lee Manning (vice-president), Elizabeth Bingham (deputy vice-president) and Graham Rumney (CEO).

The Wider Executive

This comprises EXCO and the heads of the national committees: Education, Courses and Conferences (ECC): Jane Moriarty; Membership and Member Services (MMS): Lee Manning currently, to pass the mantle to Matt Dunham next February; General Technical Committee (GTC): Giles Frampton; Regional Communications Committee (RCC): Chris Williams; Smaller Practices Group (SPG): Liz Pywowarczuk and Policy Group: Mark Andrews.

The regional representatives on Council

The ten regions' individual representatives on Council have a particularly important role to play as they are a direct link to the members locally. They are also members of their sponsoring regional committee and work closely with the local chairman and are encouraged to participate at local events so that they are accessible to their 'constituents'. The RCC meets three times a year.

National Council members

The 18 national members on Council, one of whom is the immediate past president, populate the national committees and some are also on local regional committees.

Media and public affairs work

The past three years has seen a major increase in the work R3 does to promote the industry. That has meant we have had to draw upon the talents and experience of a wider pool of people than was previously the case, when such work fell mainly on the president. The current scope and volume of work undertaken now would be impossible were we not able to call upon Council members (and on occasion regional chairmen in addition to their regional press and public affairs work).

Meeting MPs, peers and journalists can be daunting, but to assist and prepare Council members for this we provide training with Trinity, a specialist firm. The communications team supports Council by drafting articles, letters and presentations, preparing briefing notes and accompanying members at meetings.

Regulatory body, trade body and government agency liaison

Council includes many people who have or currently hold senior positions in other parallel insolvency bodies: ICAEW, IPA, ACCA, ICAS, the Law Society, the Solicitors Regulation Authority, the Law Society of Scotland, ICAI, The Insolvency Service Steering Board, NARA, INSOL International, INSOL Europe, the Bar Association and the Insolvency Lawyers Association.

The connections they have with these bodies helps us to understand their positions on the wide range of overlapping areas of interest, complementing the direct liaison undertaken by the EXCO members.

We are also in regular contact with The Insolvency Service (on the OR's rota and other policy issues such as directors' disqualification), HMRC (the Paymex VAT matter and separate policy meetings), Jobcentre Plus, the CBI, British Chambers of Commerce, the Federation of Small Businesses, the Association of British Insurers, the BBA, the British Property Federation, the FLA and ABFA. Council members play a key role in this liaison by attending meetings and sharing their experience.

Government consultations

During the last couple of years there has been a flood of consultations that have a direct or indirect bearing on our members and their work. Council, as a body but also individually, serves as a sounding board for views, ideas and case studies that inform our thinking. This helps with the structuring of arguments for or against specific proposals that are advanced and, increasingly importantly, now contributes to the review and analysis of impact assessments.

The commitment

Being on Council is a commitment for both the individual and the supporting firm. But the benefit goes two ways; individuals and firms benefit from increased exposure in the media and exposure to key decision makers and formers, politicians, and stakeholders. As a representative on R3's Council, members are given the opportunity to help develop the insolvency profession and give it the profile and reputation it deserves.

Graham Rumney is CEO at R3.

R3's Technical department and General Technical Committee

The GTC plays a key role in the work of R3 and its provision of information to members.

John Francis, R3's technical director, has just celebrated 20 years at R3, which provides an excellent opportunity to write about R3's technical resources and support for its members.

The full-time team comprises John Francis and Jonathan Ausena, R3's technical officer. John is a licensed IP, and is well known to members for his breath-taking knowledge and wealth of experience. Jonathan who has a law degree, joined R3 in October from a London-based insolvency practice where he worked as an administrator but with a particular interest in matters technical.

In addition to the full timers, a team of volunteers makes up R3's General Technical Committee (GTC), currently chaired by Giles Frampton. The GTC is a 'broad church'. Members include Big 4, medium- and small-firm insolvency practitioners, solicitors and barristers. A typical meeting has been described as quietly efficient, ploughing through a very extensive agenda.

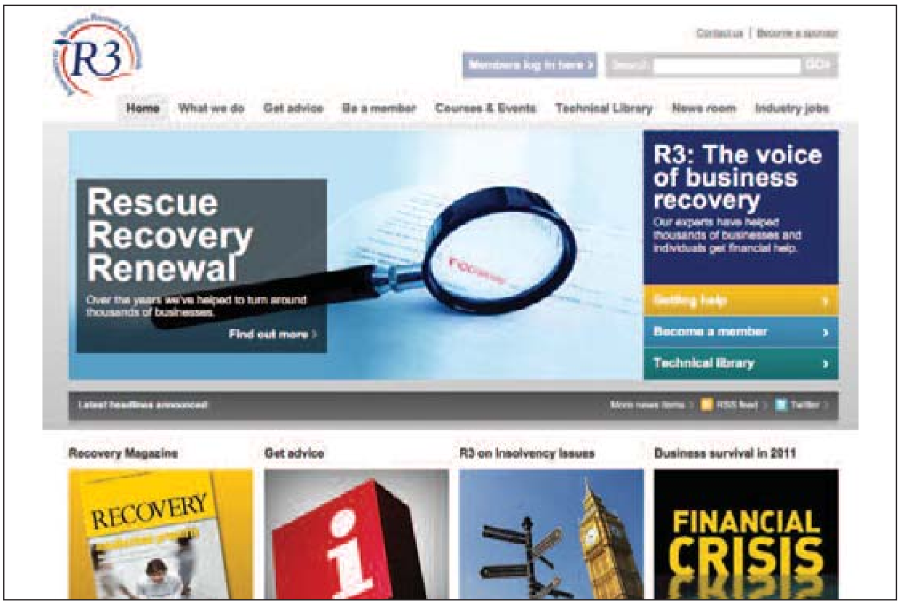
> "GTC committee provides the silent engine behind R3's technical output and guidance – an absolutely key component for R3's membership."

Little is known in the outside world about the mysterious workings of GTC, yet collectively the committee provides the silent engine behind R3's technical output and guidance – an invaluable resource for R3 members.

The work of the GTC

The GTC's output takes various forms: members will be most familiar with the regular Technical Bulletins and the occasional 'alert' that provide technical and specialist information within the sector and help to keep the insolvency professional up to speed. But this is by no means GTC's sole output. Government consultations and proposals, such as the draft statutory instrument on pre-packs, require a response and the GTC, led by John, drafts R3's technical replies.

And then there are Statements of Insolvency Practice (SIPs). These are issued to licensed insolvency practitioners with a view to maintaining standards by setting out required practice and harmonising practitioners' approaches to particular aspects of insolvency. They perform a vital role in reinforcing the principle of self-regulation and holding the profession to account. They are agreed between the insolvency regulatory authorities acting through the Joint Insolvency Committee (JIC).



For example, SIP 16 was drafted to provide guidance on how an IP should keep a detailed record of the reasoning behind the decision to undertake a pre-packaged sale, and should be able to explain and justify why such a course of action was considered appropriate. Compliance with SIP 16 was featured heavily in the media earlier this year and in 2010 as unsecured creditor dissatisfaction simmered away against pre-packs. The SIP in this case became a safeguard in providing reassurance that pre-packs were being carried out in an ordered and transparent way. SIPs are drafted by the JIC but the GTC considers and comments upon those drafts and provides guidance notes for the benefit of the users where such notes are necessary.

The GTC also produces special technical notes for members; currently notes on privilege and electronic records, neither of which are straightforward subjects, are in the course of production and the Individual Voluntary Arrangement Standard Terms and Conditions are being updated.

The STC deals with matters in Scotland

There is also a Scottish Technical Committee, based in Edinburgh, chaired by Rachel Grant of Brodies, which

> "SIPs are drafted by the JIC but the GTC considers and comments upon those drafts and provides guidance notes for the benefit of the users where such notes are necessary."

performs a similar function North of the Border, and which has been particularly busy dealing with recent changes to Scottish insolvency law and procedures.

The GTC on the R3 website

Mention should also be made of the website. Insolvency forms are now available for download: there are Guidesheets and Technical Bulletins, and SIPs readily available.

Will Black is the communications manager at R3.

R3 Smaller Practices Group

Knowledge and networking for practitioners in smaller practices.

Panel debate discussing recovery of transactions at an undervalue at a recent R3 Personal Insolvency course in London.

As the principal of a smaller practice in the South West, I know first-hand the issues that smaller practices can face in choosing training courses. I am sure that we have all felt the pinch in recent years and the constraints on training and marketing budgets have no doubt increased for us all. Nevertheless, the need for ongoing training and CPD is a given for all practices.

R3 courses

I find that the range of courses offered by R3 is relevant to the work I do and offers value for money in terms of the depth of technical knowledge and information provided to the different members of my staff who can benefit from the courses. As a leading provider of education and training for the insolvency, restructuring and business recovery profession, R3 offers a full calendar of events and courses throughout the UK, in full- or half-day programmes, aimed at all levels of experience. From introductory courses aimed at training junior members of staff through to courses for experienced practitioners on personal insolvency, liquidations, trading insolvencies and litigation, to name but a few.

Tailor-made SPG events

R3 also offers courses and conferences aimed specifically at its smaller practices membership, including the SPG Technical Review and the annual SPG Forum. The Forum is unique as it is a conference arranged by the R3 SPG Committee specifically for its own smaller firm constituency, thereby requiring speakers to focus their content on the key technical and legal information and practical experiences that will assist smaller firms. My own practice does not have a full compliance team so I rely, among other things, on R3's technical output at such events to assist me. I have previously been course director for the Forum and enjoyed co-directing the event. Before I became so involved with R3, I really didn't imagine that a request for particular course content from a smaller practice would have any bearing on the courses offered. But it does. R3's SPG Committee is made up of smaller firm practitioners and some lawyers so any suggestions that we pass to R3's Education, Courses and Conferences Committee are very focused on the needs of smaller firms. Similarly, the fact that the Forum and SPG Technical Review are arranged by the SPG Committee means that you can have a real say in the content for such events. (Incidentally, for those of you who missed the recent Forum, there will be an update in the next issue of *RECOVERY*.)

> "The SPG Committee is made up of smaller firm practitioners… so any suggestions we pass to R3's Education, Courses and Conferences Committee are very focused on the needs of smaller firms."

Your voice counts

It is worth remembering that R3 is a not-for-profit association and as such, it is 'owned' by us as R3 members. Money generated by R3 courses assists in supporting R3's other activities and in providing more membership benefits for all of us. It is important that members feed back the reasons they choose to attend a course run by another provider rather than an R3 course so that R3 can tailor future courses to meet your specific needs. So please get in contact with the SPG Committee or R3 (Emma.Lovell@r3.org.uk) if there is a particular area that you would like to see covered in future courses, the Forum or the SPG Technical Review.

Events offer networking opportunities

In addition to courses and conferences, local regional R3 events can be a useful marketing tool. I often invite a couple of my contacts along, which provides a very cost effective way of accessing a well organised event, giving them a better feel for the job that IPs do and some of the complexities that we face on a daily basis. Attending such meetings is also beneficial for my contacts. For example, if I take a local accountant along, I often find that they in turn are keen to speak to local lawyers or bankers. Of course, there is always a danger that you are introducing your contact to your competition, but increasingly I find that accountants already have a list of two or three IPs in mind and will make referrals based on the size or nature of a case. In my experience, bringing my contacts to regional meetings cements our working relationships, despite the presence of potential competitors!

Both the regional and national events are also a great way to meet other IPs and professionals in a non-confrontational environment. Cross referrals are an important part of my own practice and these events open up the opportunity to develop relationships with other IPs. In my own experience, I have managed to retain appointments either by getting creditor support via the IPs with whom I have good working relations or, in some cases, via bank support from a panel firm IP – very valuable indeed!

I might have just given away some of my best marketing secrets but I hope that sharing my experiences with you will encourage you, as a fellow smaller firm practitioner, to come along and experience the varied networking and training opportunities offered by R3. I look forward to meeting you there.

Find out what's on

- R3 regional meetings
- Courses
- Events

www.r3.org.uk/courses & events

Alison Byrne is principal of Byrne Associates and a member of the R3 SPG Committee.

R3 events, courses and conferences

Date	Event title	Venue
December		
1	Directors' Duties	Grange City Hotel, London
1	Employee Issues and Pensions	Grange City Hotel, London
5	Eastern Region Wine Tasting Event	St John's College, Cambridge
6	Maximising Recoveries in the Construction Industry	Cedar Court Hotel, Bradford
6	Mediation for Insolvency Professionals	Cedar Court Hotel, Bradford
6	Introduction to Partnership Insolvency	Deloitte LLP, Birmingham
6	Introduction to Partnership Insolvency	Irwin Mitchell Solicitors, Leeds
6	Introduction to Partnership Insolvency	Prospero House, London
6	South West & Wales AGM & Christmas Dinner	Dynasty Chinese Restaurant, Bristol
15	Yorkshire Women's Group Wine Tasting Evening	The Lounge Bar & Grill, Leeds
January		
23	Eastern Regional Meeting	Ravenwood Hall, Bury-St-Edmunds
February		
2	Trading Insolvencies	Crowne Plaza, Birmingham
7	Introductory Programme – Introduction to Insolvency	etc venues, London
7	Introductory Programme – Introduction to Insolvency	Irwin Mitchell LLP, Leeds
8	Introductory Programme – Introduction to Insolvency	Deloitte LLP, Birmingham
9	Liquidations	Hilton, Manchester
23	Trading Insolvencies	Holiday Inn Bloomsbury, London
28	Insolvency Day	Hilton, Leeds

regional events **R3 events**

For further information on R3 courses and conferences, please visit the R3 website **www.r3.org.uk**, where you can download the full 2011 programme. Alternatively, call the Courses team on 020 7566 4234 to request a programme by post.

22nd R3 Annual Conference
16–18 May 2012, Barcelona

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South West & Wales .... Andrew Sheridan 0117 945 2000
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Women's Group .... see www.r3.org.uk/womensgroup

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North East .... Jim James 0191 204 4000
North West .... David Gray 0161 831 8243
Northern Ireland .... Joan Houston 02890 443500
Scotland .... John Hall 0131 466 2877
Southern .... Julie Palmer 01202 786 560
South West & Wales .... Richard Hill 0117 905 4069
Yorkshire .... Robert Brown 0113 244 3121

Other Council Members

Mark Andrews, Elizabeth Bingham, Louise Brittain, Alison Byrne, Malcolm Cohen, Matt Dunham, Antony Fanshawe, Giles Frampton, Brian Hamblin, Alan Hudson, Steven Law, Gareth Limb, Jane Moriarty, Elizabeth Pywowarczuk, Phillip Sykes, Cathryn Williams.

R3 membership categories

We continually strive to improve benefits for all members. Membership benefits across categories include:

- A copy of *RECOVERY* every quarter
- Attendance at regional meetings
- Priority bookings for R3 courses and most of its conferences
- Technical bulletins and releases
- Access to the members' section of the R3 website
- An invitation to the R3 annual conference
- Continuing professional education at discounted rates

Please see below for details of the different categories of membership:

Full members are invited to contribute to the development of insolvency, business recovery and turnaround professions at both local and national levels. Benefits include: use of the designatory letters MABRP and a certificate of membership, inclusion in the *R3 Directory* and a copy of it, membership of INSOL International.

Associate members are individuals who do not meet the requirements for full membership but work significantly within the business recovery sector.

New Professional (Student) members are individuals preparing to take the examination of the Joint Insolvency Examination Board (JIEB) or Certificate of Proficiency in Insolvency (CPI). Pass students of these exams are eligible to apply for full R3 membership.

New Professional (Networking) members are individuals who have recently joined their firm, and/or are new to the business recovery sector and wish to network with R3 members. This category receives electronic copies only via access to the R3 website.

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Interview with Andy Slaughter MP

Laura Harvey interviews Andy Slaughter MP about his work on the Legal Aid, Sentencing and Punishment of Offenders Bill.

The Legal Aid, Sentencing and Punishment of Offenders Bill is expected to reach the House of Lords in November. The Bill contains the controversial reforms to conditional fee arrangements (CFA) and after the event (ATE) insurance first proposed by Lord Justice Jackson in 2009. Andy Slaughter, the shadow justice minister, has been leading the campaign in parliament to exempt insolvency litigation from these proposals.

You were a barrister before starting your political career. Is it important for politicians to have experience of the 'outside world' before entering politics?
Yes, I do think it is useful for most people, but not essential. I had nearly 25 years' experience in many different jobs, which helped me. What is essential is to have a varied group of people as MPs, and we don't have that yet.

As shadow justice minister what are your key priorities at the moment?
Opposing the Legal Aid and Sentencing Bill, which is the biggest attack on access to justice since legal aid began 70 years ago, developing policy for Labour through our review process, and finally holding the government to account on the unprecedented cuts in the Ministry of Justice, which make its proposals for sentencing reform unworkable.

The government seems to be adopting a 'one size fits all' approach to the Bill. What do you think of this strategy?
They have started with a few slogans – 'compensation culture', 'rehabilitation revolution.' These are meaningless in terms of the legislation because they are picking the wrong targets – victims rather than wrongdoers – and their 23 per cent cut in budget won't allow them to do anything positive.

The government reforms to CFAs and ATE insurance will mean success fees and insurance premiums are no longer recoverable from the losing side. The key justification behind these changes seems to be an overhaul of the UK's 'compensation culture' – do you think this is a real or perceived problem.
It's a slogan to hide the attack on meritorious claimants and protect insurers and big corporations from being held to account for their mistakes. There are abuses like rogue claim management companies and referral fees, fraud and sale of personal data, but the government is not tackling these.

Andy Slaughter

A former barrister and local councillor, Andy Slaughter was first elected to the House of Commons in 2005 as Labour MP for Ealing Acton and Shepherds Bush. In 2010 he held off a Conservative challenge to hold the newly created Hammersmith seat and was promoted to shadow justice minister, under Ed Miliband's leadership. His brief includes responsibility for the courts, tribunals, criminal law and the controversial Legal Aid, Sentencing and Punishment of Offenders Bill, currently going through parliament.

What is your overall view of the Legal Aid, Sentencing and Punishment of Offenders Bill and what would Labour do differently?
We would not have made the cuts to social welfare legal aid in part 1 and would instead have continued with our policy of looking for economies in criminal legal aid. We would have abolished referral fees and tackled abuses and inflated costs (by claimants and defendants) rather than scrap the CFA/ATE system. We support a lot of the changes in part 3 that cover sentencing and punishment of offenders, but unfortunately they are set up to fail, given the level of cuts.

R3 is calling for insolvency to be exempted from the changes to CFAs and ATE insurance, why do you think the government is so reluctant to do this?
They are being obtuse. The public purse, via HMRC, will be one of the biggest losers if insolvency litigation is not given a carve out.

The Bill aims to rebalance the relationship between defendant and plaintiff – do you think this is necessary?
The Bill aims to tip the balance in favour of corporate entities, from government departments and multinationals to media conglomerates and insurance companies. It is regressive.

If the Bill is passed without an exemption for insolvency litigation, what impact do you think this may have?
More fraudulent directors getting away with it and more cost to the public purse and business community. This will mean less justice and recompense for honest creditors.

So is Lord Justice Jackson to blame for all of this?
No, he did a thorough job in presenting a range of solutions. The government has ignored much that was good in his report – retaining legal aid, banning abuses like referral fees, and cherry-picking the bits the insurance industry like.

Do you think the House of Lords will prove to be a key battle ground in securing important amendments to the Bill?
Yes, because there is a high level of expertise in all the issues the Bill covers and far less power for the government whips.

It has been a year since Ed Miliband's election as leader – what do you think his key achievements have been so far?
I think Ed is setting a whole new agenda for politics, which his conference speech summed up. It is about rebalancing society in favour of those who put in against those who take out unfairly. The exact opposite of what the Legal Aid Bill does.

Do you agree with Ed Balls... is it time for a Plan B to help tackle the economic situation?
I think even Cameron and Osborne do now – hence phase two of quantitative easing – but they won't admit it. The austerity package has killed growth and is dragging the country back into recession.

Laura Harvey is the public affairs officer at R3.

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