Summer 2020
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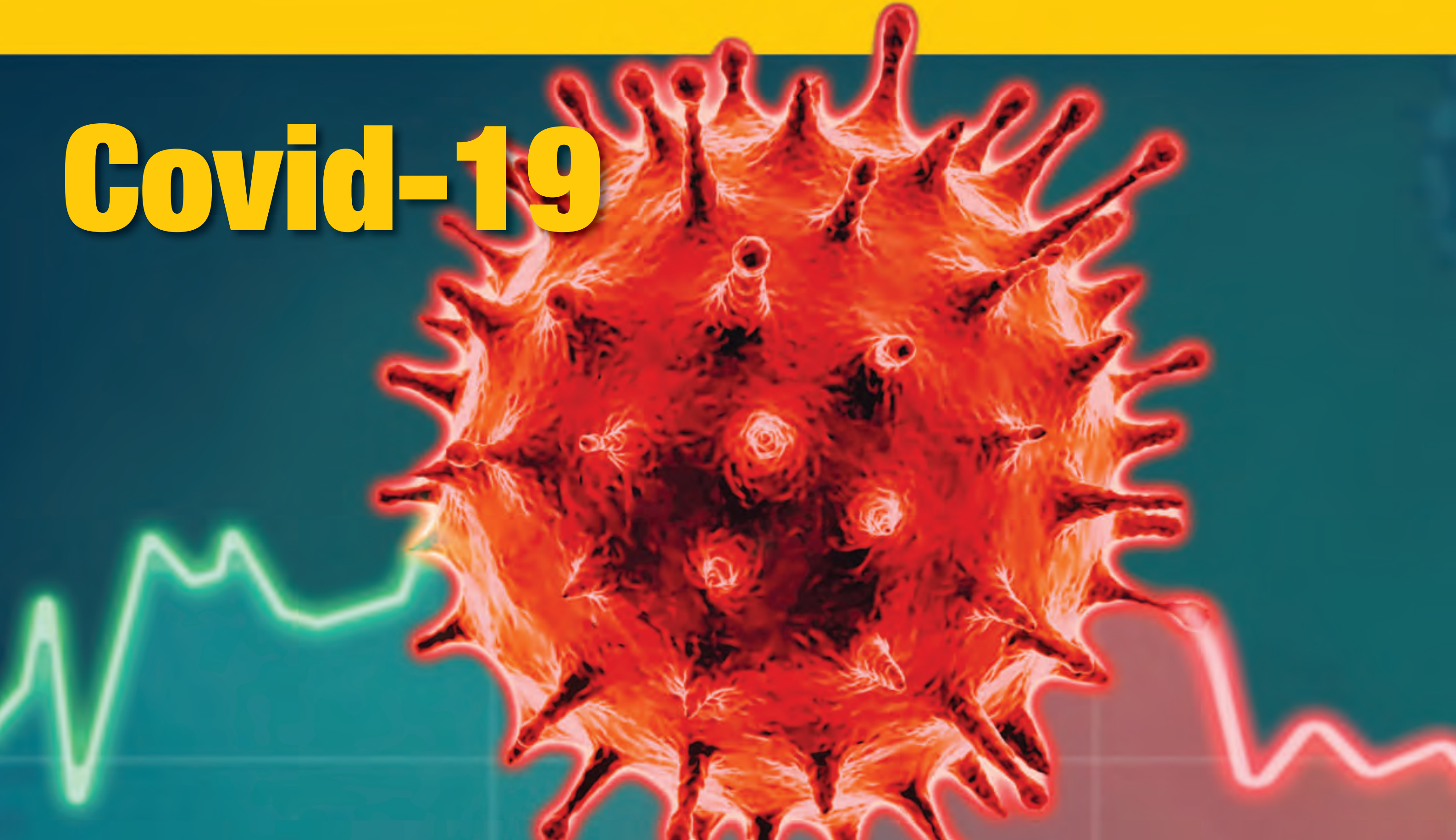
RECOVERY

Covid-19



PI in the pandemic: the old tools are the most reliable
There may be a lull in new instructions, but there are a huge number of individuals expected to require advice post-lockdown

Suspension of wrongful trading
Two lawyers argue the case for and against the government's proposed suspension of wrongful trading

No vaccine for Covid fraud
As if 'staying alert' wasn't enough, fraud continues under Covid-19 and the profession needs to be aware

A brief history of the corporate insolvency reforms
A new bill is before parliament, but how have the atoms of the corporate insolvency reforms been shaped by time?

Lessons and learning from the further education insolvency regime
Following a successful test case, there is now more clarity for future colleges in financial distress

The database marketplace
Are lucrative customer databases a valuable asset or an expensive liability?

Covid-19: frustrating for us, perhaps not for CVAs?
Does a global pandemic pass the test for the law of frustration in litigation involving a CVA?

Profit warnings: a Covid-19 thermometer
The record number of profit warnings this year show the challenges for the future

An interview with… R3 president Colin Haig
The new R3 president arrived just in time for a global lockdown, but he urges everyone to come together

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What do you think? Readers' views are welcome. Have an opinion about a burning issue? Want to comment on articles or *RECOVERY* itself? Please contact me on **recovery@r3.org.uk**.

From the editor

Well the theme could hardly have been anything else, could it? Covid-19 is undoubtedly going to bring about far-reaching change for all areas of our society, as well as our industry.

As Ferris Bueller once said (in the 1986 film) 'Life moves pretty fast. If you don't stop and look around once in a while, you could miss it'.

The editorial board met in mid-March to decide on content for this edition. It was the first day of my working from home and our meeting was replaced by a conference call (which feels very 'last year' in the Zoom era!).

A lot has happened in that intervening two-month period and, notwithstanding the quick pace of change, we have still managed to cover a number of issues that have arisen since we first planned this edition.

Furlough is bound to be one of the defining words of 2020 and we review the *Carluccio's* decision in the case summaries. Next edition, we will look at where the *Debenhams* case lands.

At the time of writing, a first draft of the corporate governance and insolvency bill has just been issued and further updates will follow. From that bill, Stewart Perry and Tim Cooper debate the temporary suspension of the wrongful trading provisions on the insolvency legislation (pages 16 and 17) and James Jeffreys looks at the new corporate restructuring process (page 24).

On Covid-19, Tina Kyriakides looks at the potential frustration effect on CVAs (from page 7), Mark Sands looks at the effect on personal insolvency (page 18), Laurence Raeburn-Smith of the BPF gives us a landlord's view (page 20) and Alan Hudson and Kirsten Tompkins report on the profit warnings issued as a result (page 21).

We are already seeing in the press how the current pandemic is leading to an increase in fraud, a topic considered by Frances Coulson (page 15) and Nigel Nicholson looks at the use of AI in investigations (page 28). Eddie Williams gives a view from the Midlands (page 34) and Emmanuelle Inacio gives us the European perspective (page 35).

Away from Covid, Matthew Atkinson give us an insight into the FE special administration regime on page 26 and Hanh Nguyen and Jonathan McDonald look at tips and pitfalls in transferring databases (page 30).

Congratulations to our new R3 president, Colin Haig, who provides his first president's column and our interview for this edition.

Finally, we have managed, notwithstanding everything that is happening at the moment, to still deliver a hard copy, to the door of your 'new office'! As ever, enjoy and let us have your feedback and contributions.

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

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RECOVERY

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President's column

Colin Haig, the new president, offers his view of the 'new normal' and insights into R3's pandemic and non-pandemic projects.

I've become R3 president at an interesting time. With the coronavirus pandemic affecting every part of our society and economy, none of us know what's around the corner.

However, our profession's work will be crucial during and after this pandemic. Now is the time for us to prepare for the inevitable increase in insolvencies – and to think about how we use all the tools the UK's insolvency and restructuring framework provides as imaginatively as possible to support businesses, jobs and the economy as demand for our skills increases.

Light-touch administration is one example of the profession innovating within the current framework. Although its use will depend on its appropriateness for the case in question, its development highlights how the profession can adapt the existing framework in unprecedented times to better help those we support.

The Covid-19 pandemic has also facilitated the biggest change to the UK's insolvency and restructuring framework in nearly 20 years with the introduction of the corporate insolvency reforms, which are due to be debated in parliament in the coming weeks.

R3 has already ensured the profession's views on these reforms have been heard by government. We will continue this important work as the legislation makes its way through parliament, and we'll provide you with the technical guidance and training you'll need once it reaches the statute book.

> The Covid-19 pandemic has also facilitated the biggest change to the UK's insolvency and restructuring framework in nearly 20 years.

Presidential priorities

R3 has a clear role to play in helping and supporting you at this critical and challenging time, and keeping the association at the heart of the profession – and ensuring everyone fully understands how we support, promote and defend it – is a key priority for me in my presidential year.

I've been an R3 member for a long time. I know how much it's helped me and countless others in our careers, so I want everyone who works in the profession to understand the benefit of being a part of R3 – especially at a time like this.

To that end, we're continuing to facilitate dialogue between the profession and policymakers to ensure that changes to the UK's insolvency and restructuring framework, or policies that affect those who use it, are made with R3 members' views in mind.

Against increasing economic turmoil, and a likely corresponding increase in scrutiny of our profession, we're continuing to engage with officials, parliamentarians, journalists and stakeholders to promote and defend the role and value of the profession's work to the wider economy.

And we're continuing to deliver the training and education you need, ensuring the content is cutting edge and that we can continue to deliver this content online while the current Covid-19 restrictions are in force.

A new approach to membership

As I said earlier, I want to ensure we represent the whole of the profession, and that leads nicely into another area of my presidency I'm excited about pursuing: our corporate membership initiative.

Corporate membership offers firms the option of purchasing multiple memberships at a reduced cost, which, hopefully, will mean more people from across the profession benefit from access to R3's training and networking offerings, and its technical and representational support.

Since we launched it, a number of firms from across the profession have signed up, providing R3 membership to an increased number of their staff. I hope more will join them in future.

(If you or your firm would like more details, get in touch with Gareth Fitzgerald – Gareth.Fitzgerald@R3.org.uk).

A new training offering

We're all expecting corporate membership to bring in an influx of new members to R3. We're keen to make the most of this, and are currently developing a best in class training offering, to support those at the start of their careers and throughout their journey, which we'll be able to tell you more about in future issues of *RECOVERY*.

In memoriam

As I was writing this column, I learned that one of our members, Peter Bache, passed away following a quietly kept battle with cancer.

Peter was a colleague and a close friend of mine. For those of you who didn't know him, he was an agent and valuer with a massive reputation in the market for fair play, coolness under fire and a giant personality. We worked closely together for a very long time – he was exceptional in a crisis and adept at using his wicked sense of humour as an antidote to stress.

Peter will be sorely missed by many on the UK restructuring scene, including me. Our thoughts are with his wife Ann, his children, and his many friends at this very sad time.

> I want everyone who works in the profession to understand the benefit of being a part of R3 – especially at a time like this.

Closing thoughts

It's clear that now more than ever, the R3 community has a critical role to play keeping the wheels of the economy turning, and that R3 has an even more critical role to play in helping you as best we can.

Once the pandemic is over, I look forward to catching up with those of you I know and meeting those of you who I haven't crossed paths with yet.

Until then, stay safe.

COLIN HAIG is the president of R3 and a restructuring partner at BDO.

Association of Business Recovery Professionals

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Covid-19: frustrating for us, perhaps not for CVAs?

Tina Kyriakides examines the law of frustration and how it might be applied in future for companies unable to meet their obligations under a CVA due to the pandemic.

How has Covid-19 affected companies in trading company voluntary arrangements (CVAs)? What are the consequences if they are non-essential businesses and have been forced to close their trading premises, albeit temporarily, by The Health Protection (Coronovirus, Restrictions) (England) Regulations 2020 (the 2020 regulations)? Alternatively, what if they can stay open, but because of government guidance about social distancing, they have had to reduce their workforce or their workforce is much reduced because of sickness or self-isolation? Alternatively, what if for commercial, health and safety or other reasons they have decided temporarily to close their businesses? Whichever scenario applies, such companies may now be unable to meet their obligations under their CVAs. In these circumstances, is it open for anyone to argue that the restrictions on their ability to trade, which have resulted in their failure, have frustrated their CVA?

> "A change in circumstances, that merely causes hardship to one of the contracting parties is not enough."

This article examines this issue, first by summarising the law of frustration and then by considering whether, in light of circumstances flowing from Covid-19, it has any application in relation to CVAs.

Frustration

The doctrine of frustration is concerned with a supervening event that takes place after a contract has been entered into. It has been formulated in the following terms;

'Frustration of a contract takes place where there supervenes an event (without default of either party and for which the contract makes no sufficient provision), which so significantly changes ***the nature*** *(not merely the expense or* ***onerousness*** *[my emphasis]) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances: in such cases, the law declares both parties to be discharged from further performance'* (*National Carriers Ltd* v. *Panalpina (Northern) Ltd* [1981] AC 674,700).

Its essence is encapsulated by the following distilled propositions from the case of *J Lauritzen AS* v. *Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep. 1,8):

- the object of the doctrine is to escape injustice where such would be the result from enforcement of a contract in its literal terms after a significant change in circumstances;
- it operates to bring a contract to an end automatically, and forthwith, upon the intervening event;
- because of its consequences, it operates within very narrow limits;
- its essence is that it should not be due to the act or election of the party seeking to rely on it.

> The 2020 regulations and any binding announcements do not stop a company's ability either to earn money or to use such resources as it has to make payments into its CVA.

Other points to note are:

- frustration is not concerned with a radical change in circumstances, but on whether what is to be performed as a result of the supervening event is radically different from what had been promised. A change in circumstances, that merely causes hardship to one of the contracting parties is not enough.
- where government or another authority intervenes by legislative action, royal prerogative or the exercise of administrative powers so that further performance of the contract is impossible, then it will be discharged by frustration;
- temporary measures imposed by government may not have the effect of frustrating the whole contract, but may lawfully excuse one party of his/her obligation to perform a restricted contractual obligation until the restriction is lifted;

- if the contract itself makes sufficient provision for the 'frustrating event', then the contract will prevail.

The CVA

CVAs are a creature of statute. The Insolvency Act 1986 permits a debtor to reach an out-of-court formal and binding agreement with its creditors in respect of its pre-arrangement debts. If approved, the debtor may satisfy those debts at something less than their full value and, if completed, be released from them. A debtor will put a proposal to its creditors, which, if approved (whether with or without modifications), will be binding on all creditors entitled to vote on the proposal.

In a trading CVA it is normal for a CVA proposal to provide for the company to make regular monthly contributions into the CVA and to incorporate R3's standard terms and conditions for CVAs (standard terms). These ensure that a company is protected against proceedings by creditors and enforcement against its assets. As a CVA is a consensual arrangement between a company and its creditors, its terms and conditions will be construed in the same way as any other contract. In the event that there is a conflict between the terms of the proposal and the standard terms, clause 2 of the standard terms provides that the terms of the proposal will prevail. For the purposes of this article, it has been assumed that there is no such conflict.

Frustration and the CVA

In essence, three different groups of cases need to be considered: firstly, those cases where companies cannot trade, at least, on a face-to-face basis with the public, because they are prohibited from doing so under the 2020 regulations or by an act of government, which changes the law;

> In those cases, where the company has the right to continue to trade, but, for commercial or other reasons, has chosen not to do so during the period of the virus, the court may very well hold that any 'frustration' was self-induced.

secondly, those cases where turnover is reduced, because the workforce is reduced; and thirdly, those cases, where companies have voluntarily ceased trading on a temporary basis, pending an improvement in the situation or in order to follow government guidance or in anticipation of legislation that the government proposes to enact.

In all of these cases, for the reasons set out below, the author's view is that the CVA will not be held by a court to have been frustrated if the consequence of what has occurred is that a company can no longer meet its CVA payment obligations, whether in whole or in part.

The effect of the 2020 regulations and of any government announcement, which has effected a change in the law, is not to stop a non-essential shop or public events business from trading altogether, but to limit their trading in two respects: firstly, as to the way that they can carry out their business; and secondly, as to the period of time for which the restrictions will last. Such businesses are forbidden by law to trade in a way that interfaces with the public at large, but not from carrying on their business in another way or, indeed, carrying on a different business altogether[1]. The 2020 regulations and any binding announcements do not stop a company's ability either to earn money or to use such resources as it has to make payments into its CVA. Therefore, while the above measures will undoubtedly cause financial hardship to businesses affected by them and may make a company's obligations under its CVA much more onerous, it cannot be said that at the point that these measures came into force, their effect was immediately to render the company's obligation to make payments into a CVA something radically different from what the company had promised to do.

> **"Indeed, it would be strange, in relation to a restructuring tool designed to benefit creditors as a class, that they should have no say in the matter."**

In this respect the case of *Canary Wharf (BP4) T1 Ltd* v. *European Medicines Agency* [2019] EWHC 255 is instructive. In that case, the defendant was an agency of the European Union (EU) and the tenant of a property in Canary Wharf where its lease was expressed to last, without a break clause, until 2039 and the annual rent payable by it was £13m. After the United Kingdom decided to leave the EU, the defendant announced that it would relocate its headquarters to an EU country, as required by EU Regulation 2018/1718. The court held that no frustrating event had occurred, because the EU had the capacity to make an inter-governmental decision to maintain the defendant's headquarters in a non-EU country under article 341 of the Treaty on the Functioning of the European Union and the defendant itself retained capacity to deal with the property. Therefore, because the EU could have done something, but had not, it could not be said that the EU Regulation 2018/1718 was a supervening illegality that frustrated the lease.

> **"Whether a CVA will be frustrated is as yet untested by any litigation… only the future litigation of this issue will provide the definitive answer."**

As to businesses that do not fall within the 2020 regulations or within any binding government announcement, but which have either closed voluntarily or have reduced their workforces, these cases are even further removed from the doctrine of frustration than those covered by legal measures. In such cases, it cannot be said that Covid-19 is a supervening event that renders the obligation of such companies to make payments into their CVAs as something radically different from what they promised to do. Again, while the virus may have caused hardship in such cases, this is not sufficient. Further, in those cases where the company has the right to continue to trade, but, for commercial or other reasons, has chosen not to do so during the period of the virus, the court may very well hold that any 'frustration' was self-induced.

Of course, it is obvious that it is not only Covid-19 that can seriously affect a company's business. There are many other external factors, outside a company's control that during a company's lifetime may render it unable to comply with its payment obligations, either in whole or in part. Exchange rate fluctuations and recessions are but two examples. However, as far as the author is aware, it has never been held that such external factors are sufficient to frustrate a CVA.

The second reason why it is unlikely that the court will hold that a CVA has been frustrated is because the standard terms cater for what is to happen in the event that payment is not made. As will be seen from below, primarily, it is for the creditors, who are bound the arrangement, to decide what should happen. Indeed, it would be strange, in relation to a restructuring tool designed to benefit creditors as a class, that they should have no say in the matter, which, of course, if frustration applied, would be the case, since the CVA would automatically terminate upon the frustrating event.

The relevant provisions of the standard terms are first, clause 72(1), which provides that a debtor is to be regarded as being in breach of the arrangement if he or she fails to comply with any of his obligations under the arrangement. The failure to comply does not look to the cause of the failure, but merely to the fact of failure itself. Clause 72(2) then provides a procedure with a view to the breach being remedied. If the debtor does not do the things specified in clause 72(2), then the supervisor must call a creditors' meeting to resolve to do one or more of the things specified in clause 72(3), namely: issue a certificate of termination by reason of the breach; present a winding-up petition against the company; vary the terms of the CVA under clause 75; and/or take no action. If the creditors resolve that the supervisor should present a winding-up petition or issue a certificate of termination, then he must do this. If no resolution is passed, then the supervisor has discretion as to what, if anything, to do. In light of the government's wish to secure, in so far as possible, the survival of as many businesses as possible, and, if it appears that the company might be able to survive and re-start or increase its business after the lifting of restrictions, then the more attractive option in the current situation might be for a supervisor either to do nothing or to seek a variation of the CVA.

Conclusion

We live in unprecedented times, where unprecedented legal problems present themselves. Whether a CVA will be frustrated is as yet untested by any litigation. As shown above, the conclusion this author has reached is that the doctrine cannot assist trading CVAs affected by the pandemic. However, only the future litigation of this issue will provide the definitive answer. ◻

[1] Although unlikely, because the nature of the business carried on by the company is usually referred to in the background information in the CVA Proposal, the business to be carried on may be a term of the CVA – in which case, a variation to the CVA will be required if it is proposed to change the business.

TINA KYRIAKIDES is a barrister at Radcliffe Chambers.

Legal Q&A

Dan Geddes and **Anna Larbi** answer your insolvency queries.

Q I am expecting to be appointed as an office-holder of a high street retail business. Are there any specific issues arising from Covid-19 that I need to be aware of?

A 'Light-touch' administrations have taken on new significance since the emergence of Covid-19, with *Debenhams* and *Oasis* being high-profile examples. Paragraph 64 (1) of schedule B1 to the Insolvency Act 1986 (IA86) states that '…an officer of a company may not exercise a management power *without the consent of the administrator*'. In a light-touch administration, the administrators choose to give this consent, meaning that the directors continue to exercise their management powers subject to the administrators' high-level supervision. The Insolvency Lawyers Association and City of London Law Society have circulated a draft protocol for light-touch administrations – the details of which are on R3's website (although R3 and regulatory bodies are urging caution and encouraging IPs not to hand too much unfettered power to directors).

Rent and other protection for tenants

If the business is occupying shop premises under commercial leases, it may benefit from government measures that prevent landlords from taking certain enforcement action. We have touched on this below.

Furlough

Under paragraph 99(5) schedule B1, IA86, any employee whose employment contract is deemed to have been 'adopted' by an administrator will have 'super priority' in the administration, meaning that their salary will rank ahead of other creditors and even the administrators' own costs and expenses. Any administrator wishing, for all the right reasons, to vary employees' employment contracts so that they can benefit from the government's job retention scheme would potentially suffer the consequences of paragraph 99(5).

This was considered by the courts in the matter of *Carluccio's Limited (in administration)* [2020] EWHC 886 (Ch) and *Debenhams Retail Limited (in administration)* [2020] EWCA Civ 600.

In both cases the administrators were held to have adopted furloughed employees' contracts of employment. However, these judgments show that administrators can enable staff to benefit from furloughing without affording them super priority provided that: (a) there is a reasonable likelihood of employees resuming work either for the company or after a sale of the business; and (b) administrators approach the matter in the right way.

Financial support/relief

HMRC has confirmed that it will support a minimum three-month break from CVA (and IVA) contributions from businesses impacted by Covid-19.

Local authorities have been able to grant 100% business rate relief to qualifying businesses in the retail sector since 11 March 2020.

The business may qualify for the government's retail, hospitality and leisure grant (but not if it was already in liquidation or dissolved prior to 11 March 2020).

Q I am a landlord of various high-street retail premises and many of my tenants have been unwilling or unable to pay rent since the Covid-19 lockdown was introduced. What are my options?

A At this time legal enforcement options are limited. While rent and other sums due under leases remain payable, the package of government measures have the effect of delaying the consequences of non-payment for tenants for the time being. As a consequence, the majority of retail tenants have withheld rent in the hopes of negotiating concessions from landlords.

Usually, the range of legal enforcement action available to landlords would include:

- forfeiture: however, under s82 of the Coronavirus Act 2020, commercial tenants are given protection against forfeiture of a lease by their landlord.
- Statutory demands and winding-up petitions: however, although the corporate insolvency and governance bill has yet to become law but has already started to have an impact on landlords. One measure proposed in the bill is to prevent insolvency proceedings being instituted against businesses as a result of Covid-19-related debts. We are aware of a recent High Court injunction being granted to a tenant against a landlord who was seeking to wind up the tenant due to rent arrears on the basis that this would be prohibited by the bill if it comes into effect.
- Commercial rent arrears recovery (CRAR): s2(6) of the Taking Control of Goods and Certification of Enforcement Agent (Amendment) (Coronavirus) Regulations, however, 2020 has been amended to restrict the use of CRAR. Under the new rules, a minimum amount of 90 days' rent has to be outstanding before the landlord can use its rights under CRAR (such as taking control of a tenant's goods).

The only options that do not seem to have been curtailed by government measures are:

- standard debt proceedings through the courts;
- drawing down from rent deposits (where relevant); and
- enforcement of third-party guarantees such as parent company guarantees or authorised guarantee agreements (where relevant).

However, landlords will need to consider the reputational issues associated with taking such steps at this time. The government has called on commercial tenants to continue to pay rent where they can afford it and for landlords to show forbearance.

With many enforcement options off the table, landlords and tenants have been working together to find compromises that both can live with, such as:

- a change in payment terms – eg quarterly to monthly or even to monthly in arrears, to aid cash-flow;
- rent deferrals with repayment over 3–12 months;
- rent reductions;
- rent holidays.

With the majority of retail shops (those deemed non-essential) not being slated for re-opening until 4 July at the earliest, the June quarter day will be the next test for both landlord and tenants. ◻

DAN GEDDES is a legal director at Blake Morgan LLP.

ANNA LARBI is a legal director at Blake Morgan LLP.

The intricacies of advisory

The General Technical Committee issues a reminder to IPs on pre-appointment costs.

While corporate insolvencies may have declined in Q1 of 2020, which is surprising given the circumstances and climate, many members of the profession have seen an increase in directors seeking advice and guidance on the best steps to take to protect their businesses. This advisory work may revolve around a restructuring process with no thought of insolvency in some circumstances. Insolvency advice may not be contemplated until a much later stage for a variety of reasons.

The key question

At the 2019 SPG Forum in Oxfordshire, one of the presentations got the R3 technical team thinking about pre-appointment expenses. The presentation asked the question: 'what pre-appointment costs can be charged as an expense of an administration or liquidation?' This query is more relevant than ever in the current climate.

Members may recall that any work undertaken or services provided to a company, which remain unpaid at the date of insolvency, will rank as an unsecured claim to be paid in accordance with insolvency legislation, with some exceptions.

In administrations, pre-appointment costs incurred by an insolvency practitioner with a view to the company entering administration can be paid as an expense (rule 3.51(2)(i) of the Insolvency (England and Wales) Rules 2016 (IR16) – with requisite creditor approval under rule 3.52 IR16).

In creditors' voluntary liquidations (CVLs), certain costs connected with the preparation of the statement of affairs and with the creditors' decision process can be paid as an expense (with requisite creditor approval where relevant – rule 6.7 IR16).

This article is a reminder to members on the rules applicable to pre-appointment costs in administrations and in CVLs.

Administration

Rule 3.1 IR16 provides the meaning of pre-administration costs:

- **'pre-administration costs'** means fees charged and expenses incurred by the administrator, or another person qualified to act as an insolvency practitioner in relation to the company, before the company entered administration but with a view to it doing so; and
- **'unpaid pre-administration costs'** means pre-administration costs that had not been paid when the company entered administration.

The important part of that phrase to note is: 'with a view to it doing so'. Only those costs directly attributable to the furthering of one of the objectives in paragraph 3(1) of schedule B1 of the Insolvency Act 1986 are recoverable, ie those charged or incurred by the proposed administrator or other qualified IP with a view to the company entering administration, including those of the legal profession (or any other party so instructed by them). This is borne out by rule 3.36(c) IR16 that requires the statement of pre-administration costs in the administrators' proposals to include an explanation of how the work had been intended to further the achievement of an administration objective.

The administrator or other qualified IP could not recover the costs of general advice, such as assisting the company to explore options other than administration. Only those costs incurred following a decision to place the company into administration could be considered as recoverable pre-administration costs. We are aware that this is also the interpretation of certain Recognised Professional Bodies.

CVLs

Rule 6.7 IR16 provides for the payment of certain pre-liquidation costs as an expense of the winding up:

- Any reasonable and necessary expenses of preparing the statement of affairs under section 99 may be paid out of the company's assets, either before or after the commencement of the winding up, as an expense of the winding up.
- Any reasonable and necessary expenses of the decision procedure or deemed consent procedure to seek a decision from the creditors on the nomination of a liquidator under rule 6.14 may be paid out of the company's assets, either before or after the commencement of the winding up as an expense of the winding up.

As members will note, the above fails to mention costs and expenses in relation to pre-appointment advice for convening a general meeting of the company and for assisting the company during the hiatus period. Therefore, costs and expenses incurred in respect of this pre-appointment work cannot be paid from the estate post-appointment even if you have approval, as there is simply no legislative authority for it.

> "Only those costs incurred following a decision to place the company into administration could be considered as recoverable pre-administration costs."

Therefore, it is important to ensure that, when seeking approval for pre-CVL fees, all information issued to creditors clearly states that the fees in question cover only the work related to preparing the statement of affairs, to assisting with the decision procedure or deemed consent procedure and to seeking a decision from creditors on the nomination of the liquidator, and that such proposed fees are reasonable having regard to that scope of work.

This reminder to members has been prepared by R3's technical manager with input of General Technical Committee members Fiona Miller and Michelle Butler.

BEN LUXFORD is technical manager at R3.

Recent case summaries

The latest insolvency update from **Tara Taylor**.

PERSONAL INSOLVENCY

***Lasytsya v. Koumettou and Anor (trustees in bankruptcy of Ms Lasytsya)* [2020] EWHC 660 (Ch)**

A bankrupt applied, *inter alia*, to set aside two search and seizure orders obtained by her trustees in bankruptcy under s365 Insolvency Act 1986 (IA86) on grounds of misrepresentation, non-disclosure and unfair procedure. The judgment comprehensively addresses (i) the relevant factors to consider when granting a s365 order and (ii) the appropriate safeguards where such an order is made *ex parte*.

Firstly, a warrant for seizure is a remedy of 'last resort' only to be obtained where there is: (i) a real risk that property may otherwise be dissipated or disposed of; (ii) the value of the property is proportionate to the remedy; (iii) a balance will be achieved between protecting the rights of affected third parties and the need to recover property for the bankruptcy.

Secondly, on a without notice application, the applicant bears a duty of full and frank disclosure and fair presentation; the court's attention must be drawn to potential weaknesses in the applicant's case, alternative remedies and matters of fact or law that oppose the making of the order.

> "The judge highlighted that the trustees' failure to fulfil their duty of fair presentation may ultimately result in costs consequences."

Thirdly, the order must incorporate a penal notice and case-specific safeguards, for example: terms ensuring that items are listed and photographed before being seized; the proposed procedure in the event of dispute over seizure; identification of the supervising solicitor who must be present throughout execution; and a provision that the order be served with a note of the hearing.

The judge dismissed the bankrupt's allegations of misrepresentation and non-disclosure but found considerable cause for concern as to procedural fairness including the trustees' failure to do more than identify the merits of their application. The orders also exhibited an almost total absence of safeguards.

Although those factors supported rescinding the orders, the judge refused the application given that: (i) fair presentation would have supported making the s365 order; (ii) the seized items that should have been delivered to the trustees under the bankrupt's statutory duty should be retained pursuant to the trustees' statutory right to keep them; and (iii) the orders had been executed so the real issue was what should happen to the seized property, which could be addressed in a new order. However, the judge highlighted that the trustees' failure to fulfil their duty of fair presentation may ultimately result in costs consequences.

CORPORATE INSOLVENCY

***Carluccio's Ltd (In Administration)* [2020] EWHC 886 (Ch)**

Within 14 days of their appointment, the joint administrators of a restaurant chain wrote to employees offering to retain their employment in the administration but on varied terms such that they would be furloughed under the coronavirus job retention scheme (CJRS), with wages reduced to the maximum amount allowable under the CJRS – ie 80% of their regular salary, up to £2,500 per month, payable only when the company received the government grant. The majority accepted, with the remainder either refusing or failing to respond.

The problem arose that, while compliance with the CJRS requires the employer to pay the full amount received to the employee, those monies are initially to be paid to the employer and treated as income. Any payments received would therefore constitute company assets and *prima facie* fall to be distributed among all creditors pursuant to the payment priority rules under the IA86. The administrators applied for directions regarding how CJRS payments could properly be paid to employees under insolvency legislation.

The relevant legislation is paragraph 99(5) schedule B1 IA86, which (i) gives priority to liabilities arising under employment contracts that have been adopted by the administrators and (ii) provides that no action taken by an administrator within 14 days of his appointment (the period) shall be taken to amount to such adoption.

> "Acceptance of the administrators' offer to place employees in the CJRS constituted a variation but not adoption of the relevant contract"

Neither a failure to terminate an employment contract within the period nor termination following the expiry of the period would, without more, constitute adoption. The administrators thereby avoided having to make those who had not responded to their offer redundant within the period merely to avoid liabilities that would otherwise have arisen. Further, acceptance of the administrators' offer (made within the period) to place employees in the CJRS constituted a variation but not adoption of the relevant contract. This analysis applied to all employees who accepted the variation terms, whether before or after expiry of the period; the date of acceptance did not correlate to the date of adoption of the contract in circumstances where acceptance was not an act of the administrators.

The varied contract would be adopted by administrators when they acted upon it by (i) making an application under the CJRS in respect of the employee or (ii) paying the employee's wages. Adoption meant that the CJRS payments would attract priority under paragraph 99 over the administrators' remuneration and expenses, floating charge creditors and unsecured creditors, allowing super-priority payment of the grant monies to the relevant employees. ◻

TARA TAYLOR is a barrister at Wilberforce Chambers.

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No vaccine for Covid fraud

Frances Coulson explains that the situation may change but the same, nasty little fraudsters are always at work.

The fraud triangle is ever with us. Criminologist Donald R Cressey's famous concept developed in the 1950's to explain why people commit fraud is as true now as ever. According to Cressey, there are three elements present in every fraud: motivation, opportunity and rationalisation (though being American he spelt the last element with a 'z').

Fraud is always with us

Motivation may be need or greed; rationalisation is what fraudsters do to self-justify (I need/deserve it) and then there is opportunity. This is where the victim comes in and where the nastiness lies. Think about the exploitation of romance fraud (conning the lonely into parting with money via pretend romance and the prospect of love) and courier fraud (conning people – usually the elderly and vulnerable – into taking cash out of their bank account and handing it over to criminals posing as couriers or police officers to 'protect it' and catch 'the criminals'). In 2019, £7m was lost to 2,000 elderly people this way, according to City of London Police, an average of £3,500 each; often all their savings. This isn't just money. Victims feel foolish. They are afraid to tell family for fear that they'll think they can't cope. They can be suicidal. There is a huge human cost. This is the nasty, nasty fraud that is always with us.

> Covid-19 is simply another opportunity for these nasty little fraudsters and the serious organised crime groups who use them to spread their tentacles socially and online.

Then there is a long list of other frauds: phishing, mandate fraud, mule accounts, counterfeit cheques, insider fraud and online shopping fraud – the list goes on. Many of us have seen the multitude of investment scams, often following pension release fraud, which the regulators simply fail to tackle effectively. Fraudsters, again often targeting the elderly and desperate, promise higher returns in an era of virtually nil interest rates, playing on the fear of those that are unable to manage on their pensions. It isn't just the elderly either. Money mules are often young people or students in need of cash and naïve enough not to see a gift horse for the bucking bronco it is. Fraudsters use genuine accounts to process illegal payments linked to terrorism, money laundering and other economic crimes and youngsters can ruin their future career prospects succumbing to such frauds.

Leveraging fear

Obviously fraudsters often prey on victims' fears – fear of being alone, fear of being defrauded etc. Aside from its inherent horror, Covid-19 is simply another opportunity for these nasty little fraudsters and the serious organised crime groups who use them to spread their tentacles socially and online. The Covid-19-specific frauds are just as, if not more, nasty – preying on fear and need. Fake or non-existent PPE kits being sold online; fake Coronavirus testing kits; copycat fundraising pages (often using images/content from successful campaigns); and so on. An era of fear is a rich breeding ground for the fraudster, whether an opportunist or organised career criminal organisation.

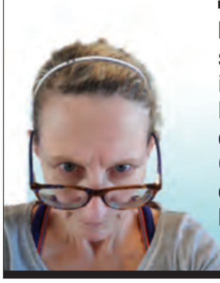
In business we are just as vulnerable. For example, unsecure video conferencing websites – don't we join any invite without thought in our excitement at the new virtual business world? Data breaches associated with home working practices/security. Phishing emails (18.5% of all emails to our compliance officer for legal practice phishing inbox are Covid-related at present). Then there are counterfeit cheques.

Obviously we can all take more steps to protect ourselves and it does take constant vigilance and staff education. It is easy to accidentally click on a phishing email link among the millions of Covid-related messages being pushed. It is easy to accidentally show confidential documents when in a virtual meeting/conference. Even the NHS is a target. Like many businesses, it suffers mandate fraud and CEO fraud, which occurs when someone contacts an NHS organisation with a request to change a direct debit, standing order or bank transfer mandate purporting to be from a genuine supplier or by pretending to be a senior director or NHS Trust CEO. If the member of staff (who often is pressured by pretend 'urgency') or organisation accepts the fraudulent request, the payments are then diverted into the criminal's bank account. It is easy to obtain genuine supplier/director details from a range of sources including corrupt staff, publicly announced contracts/contacts and online data.

Remain vigilant

We need to be vigilant to reduce the incidences of fraud. Whether as consumers, parents, employers or businesspeople, we need to educate: #Takefive* #Telltwo (ie take five minutes to think before you act and tell two other people of any scam you encounter).

In the insolvency profession no doubt we will be unpicking the increase in Covid-19-related fraud for many years to come when our forensic post-mortems pick them up. It would be good if our skills could be better employed to tackle them in the act, disrupt them and deprive the fraudsters and money launderers of their ill-deserved gains and protect more victims more quickly. The swifter and greater the disruption, the more victims are prevented from harm, as fraudsters rarely commit fraud only once. Central and local government need to use more provisional liquidation and interim receiverships, as well as criminal enforcement, and let the profession bolster the resources of the Public Interest Unit of the Insolvency Service, law enforcement agencies and revenue authorities to maximum effect. Perhaps not now, in the eye of the storm, but certainly sooner rather than later. ◻



FRANCES COULSON is senior partner and head of insolvency and litigation at Moon Beever LLP. She is chair of the R3 Fraud Group and board trustee of the Fraud Advisory Panel. *Pictured here in lockdown.*

A beacon against dodgy directors

Stewart Perry makes the argument against the government's suspension of wrongful trading rules.

On 28 March 2020 the business secretary, Alok Sharma, said that he intends to temporarily suspend wrongful trading provisions retrospectively for three months from 1 March 2020 for company directors 'so they can keep their businesses going without the threat of personal liability'.

Save for being a useful sound bite, this proposed amendment to the legislation is misconceived.

Wrongful trading rules are set out in section 214 of the Insolvency Act 1986. They state that any director can be obliged to make such contribution to the company's assets as the court sees fit, if the company has gone into insolvent liquidation or administration, and (1) at some stage before that the director knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation or administration, and (2) he or she failed to take every step with a view to minimising losses to creditors. The quantum of any claim is usually dictated by the increase in creditors' claims from when the director knew or ought to have known the company could not avoid liquidation/administration to when it eventually went into a process. It is presently unclear how these provisions will be 'relaxed'. One can only assume that the increase in creditor claims during this three-month period will be ignored when the court considers how much a director should contribute to the company's assets if the court otherwise believes that the director has wrongfully traded. It is also unclear what should happen to those directors who were wrongfully trading prior to 1 March, and continue to do so for the next few months. Will the liability be frozen at its level on 1 March and accrue again on 1 June?

A director's duties to creditors

This proposed relaxation misses a significant point: directors can still be personally liable for continuing to trade to the detriment of creditors. As readers of *RECOVERY* will be aware, the wrongful trading provisions effectively double up on existing common law duties and those contained in the Companies Act 2006. The Act states that the directors owe a duty to promote the success of 'the company', a definition that is stated to include the interests of various stakeholders, but primarily its members. However, collectively case law and section 172(3) of the Companies Act 2006, change this duty such that the primary duty switches from its shareholders/members to its creditors when it enters into a dangerous financial position. There is no suggestion that this provision will be amended. Therefore, a director can continue to be liable in respect of the various common law and Companies Act obligations that they owe. Simply put, only changing the wrongful trading laws will not limit directors' potential personal liability for continuing to trade during this period.

A misunderstanding of wrongful trading

Even the Commons' paper explaining the changes mis-describes wrongful trading as a way that 'directors can be held personally and legally responsible for continuing to trade while insolvent'. Many companies trade while balance sheet insolvent and continue to do so for many years. It is also possible for directors to lead companies through times of cash flow insolvency to a time of cash flow solvency. It is therefore not an issue of companies trading while the company is insolvent, but the directors (1) continuing to trade and (2) worsening the creditors' position, while the directors do not have a reasonable belief that the company will avoid insolvent liquidation.

Successful wrongful trading claims are rare. In fact, they are notoriously difficult to bring. As someone used to advising on the merits of such claims, it is always much more difficult when the director has sought advice, and taken sensible decisions in light of the information it has been possible to collate. As part of that factual matrix, we have the Chancellor stating on 17 March 2020: 'I want to reassure every British citizen, this government will give you all the tools you need to get through this. We will support jobs, we will support incomes, we will support businesses, and we will help you protect your loved ones. We will do whatever it takes.' In light of this, I believe that any director taking advice at this time, whose business has been badly affected by Covid-19, would have been unlikely to have been sued by any liquidator in any event.

Against that, we have two categories of other directors.

Firstly, there are those who bury their heads in the sand and do not take advice. The potential lessening of personal liability would not likely affect how they operate, so the government's intervention was unnecessary, and in this time of trouble all directors should be persuaded to take advice. If these directors do not seek advice, I do not see why they should not be culpable.

Secondly, there are those who unreasonably believe they can trade out of their insolvent position *and* make the creditors' position worse. I do not believe any claims relating solely to advised directors and Covid-19 insolvencies would have been pursued by a liquidator in any event, but the proposed 'relaxation' is for *all* companies, not just those affected by the pandemic. Any lessening of liability for directors (to the extent it exists in excess of their common law and Companies Act duties) can only come to the detriment of creditors. So, in this case, the government has chosen to back the director who continues to incur creditor debt without a reasonable belief the company will avoid liquidation, and not the suppliers who have continued to supply. Why should there not be protection for those suppliers to ensure the directors are properly considering whether or not they should incur credit and put other companies' livelihoods at risk during this pandemic period?

Conclusion

The government wanted to appear to be assisting directors of companies and made this broad statement without considering what its impact will be, or whether or not it will help anyone. In my view, it does not help anyone, save for those people it should not help. □

STEWART PERRY is a partner at Fieldfisher and is chair of R3's General Technical Committee.

A grim spectre for desperate directors

Tim Cooper makes the argument in favour of the government's suspension of wrongful trading rules.

The primary reason (among many) for supporting the suspension of the law on wrongful trading during the Covid-19 pandemic is to ensure that managers of business can play their part in protecting the economy in hibernation, while we all try to protect the NHS and save lives.

The government's Covid-19 support packages are designed to pause the economy while supporting businesses to keep jobs alive, avoid widespread redundancies, and facilitate the ability to recover as we come out of lockdown and the economy gradually recovers. Directors straightjacketed with wrongful trading laws ought not to be at personal risk for playing their part in steering their ships through the troubled waters caused by a pandemic entirely out of their control, when at the moment we do not have sight of calmer waters to come.

> "Wrongful trading is a vital safeguard in 'normal' conditions, but not in an event beyond any impact seen since the great wars."

Moreover, it behoves the insolvency profession to employ its skills sets to find solutions and support government and the economy in difficult times, and not have to throw into the mix the grim spectre of wrongful trading. Particularly when there remain in place a raft of measures that protect the interests of creditors in the meantime.

Wrongful trading

Section 214 of the Insolvency Act 1986 is headed 'wrongful trading', but nowhere in the section are the words 'wrongful' or 'trading' to be found. A common misunderstanding is that it is illegal to trade a company while insolvent. It is not!

The key ingredient is that the company must not only be insolvent (and the directors know or ought to know), but there is 'no *reasonable* prospect' of avoiding insolvent liquidation or administration. Plenty of businesses, probably almost all, at some point encounter technical balance sheet or cash flow insolvency, but are far away from an inevitable demise: it is perfectly proper to trade out in such circumstances. But even when the end is 'inevitable', it is still not illegal to trade. Rather the issue is that, depending on how well or badly insolvent circumstances are managed, personal liability might arise for those directors in control, and potentially an exposure to disqualification.

This spectre of personal liability for the more risk averse, in the twilight zone of uncertainty of recovery prospects, can sometimes convert strong management into 'rabbits in headlights' – unable to lead through a crisis and knee-jerking the company into a premature collapse to avoid the risk of personal exposure, instead of trying to soldier on and achieve something better. It's easy to criticise the former with hindsight, and takes courage to do the latter at the time.

Covid-19 and the 'wrongful trading' test

Here we come to the rub: all business will be affected by Covid-19 and the lockdown measures in place. A minority may experience a temporary increase in demand (food retail, for example). The vast majority will be experiencing a negative impact on their businesses and staff as a result. Many will be 'significantly impacted'.

Let's say a *significantly impacted* business was otherwise a viable business. The impact may fundamentally affect the ability to pay debts as they fall due – insolvency. Does that business have a *'reasonable'* prospect of avoiding insolvent liquidation or administration? Think about how a director could even begin to answer that question when the cause of insolvency is the impact of the pandemic. Think about how a director's professional advisor could possibly hope to give reliable guidance.

The reality is that nobody has a crystal ball. Nobody can say with any certainty when this will be over, when the economy will gradually return to 'normality' and what 'normality' looks like. So, does one take the prudent approach and reverse the question to conclude that it is impossible to be satisfied that there *is* a reasonable prospect of avoiding formal insolvency?

That then takes you to the requirement in s214 that the director takes *'every step that ought to be taken'* to minimise the potential loss to creditors. Well, what are those precisely, in these unprecedented conditions? What would you advise, and with what experience could you be comfortable that your advice is right? Remember, the law of wrongful trading requires 'every' step.

Judges may well have sympathy, but if these high tests to avoid personal liability are left in place, courts have no option but to put sympathy aside and apply the tests as they are written. They should not have to find that a director nevertheless takes personal responsibility for keeping a company going with the interests of creditors and employees at heart, but without the slightest idea (quite reasonably) whether and when we will emerge from this pandemic.

It is a test we simply do not need in these challenging times. Wrongful trading is a vital safeguard in 'normal' conditions (which includes things such as Brexit, recessions, elections, referenda and so on), but not in an event beyond any impact seen since the great wars.

Other creditor protection

We do not need to worry that, without wrongful trading laws, all of a sudden creditors are exposed to poor behaviours and standards among directors. The common law throughout the UK remains consistent: upon becoming insolvent directors' duties are owed with the interests of creditors as a priority. Trading and management take place with the creditors' interests foremost in mind, and directors who fail to do so in due course will be held accountable. The law on standards required of directors remains firmly in place.

Countries such as Germany and Luxembourg have led the way on assisting management to do the right thing with a company experiencing the impact of Covid-19, and supporting them with the ability to keep the boat afloat through troubled waters, instead of scuttling the ship. Applause to the UK government for taking this step too. ◻

TIM COOPER is a partner in the restructuring team at Addleshaw Goddard LLP.

PI in the pandemic: the old tools are the most reliable

Mark Sands discusses the personal finance implications of the Covid-19 crisis and the responsibility of the insolvency profession to provide the best advice.

Almost overnight, the UK went from an economy with record low unemployment, earnings increasing above the rate of inflation and rising consumer and business confidence to an environment of huge personal debt, falling incomes and business distress.

How this affects individuals in debt, and how we as a profession advise and guide them, varies tremendously – as we all know, each personal insolvency statistic represents a real person, with their own story, their own circumstances and their own needs. That is why our profession is so well placed to provide advice – to listen to the needs of our clients and guide them through the options and arrive at the solution which is right for them.

I have looked at those in debt and have tried to group them into three types for the purposes of this short article.

Entrepreneurs

Entrepreneurs are those who run their own business and directors who have given personal guarantees.

For these individuals, there could be much more on the line than their businesses. Many directors have given personal guarantees, which will be called upon as soon as their company goes into liquidation with the lenders unpaid, putting their personal assets at risk.

> Many need advice now so they can plan ahead and consider the impact on their personal exposure of the decisions they make about their businesses.

If the company's business is entering or has entered a period of shut down with a hope of opening again on the other side, most lenders will allow these businesses a brief holiday on payments until things have returned to normal market conditions. The fact remains, however, that lenders could call on personal guarantees at some point, which will undoubtedly be playing on the minds of company directors across the UK, and those who are sole traders or partners, who will remain liable for all of the debts of the business.

Many need advice now so they can plan ahead and consider the impact the decisions they make about their business will have on their personal exposure. In some instances, we can start negotiations with creditors during this high-pressure time that can then be revisited when things begin to normalise.

Consumers

Consumers have entered this meltdown carrying their largest burden ever. Recent statistics show record levels of consumer debt across credit cards and loans, sitting at around £225bn at the end of February. With this in mind, I welcomed the announcement by the FCA whereby lenders would offer a payment freeze on loans, credit cards and car finance of up to three months for those affected by the coronavirus.

While many of us are lucky and have funds left at the end of each month, according to the Resolution Foundation, six million households already barely live within their means. For the latter, being furloughed on 80% of their salaries, assuming that employers do not make up the difference, can immediately tip them into a monthly deficit. These people will either have to fund the shortfall with increased borrowing, cut back on what we would see as essential spending, or stop repaying debt and perhaps seek an insolvency solution.

For those who are self-employed, the funding from the government is very different to that received by employees, but their pressures are the same. As the support continues to be slow in coming through, how will they fund and manage their monthly outgoings until June? With many of them also sharing the traits of those just about making ends meet in employment, the added delay could be catastrophic to their personal finances.

Finally, many people will now be left with no income and no assets and will have no option other than to claim universal credit. That income is, for many, barely enough to live on, and is certainly not sufficient to service any debts. If they also have no assets, either through property, business or savings, then they have nothing to offer their creditors. This may be when they should enter a formal insolvency process, such as a debt relief order (DRO) or bankruptcy.

Again, advice at this stage could be crucial. A payment holiday may be enough, a debt management plan or individual voluntary arrangement (IVA) may be the answer, albeit for many once the future is clearer, but for some a DRO or bankruptcy will be appropriate and they should not delay starting that process.

> According to the Resolution Foundation, six million households already barely live within their means.

Those already in a debt solution

Many thousands of individuals are already in a personal insolvency process and some will be worried about what recent events and the uncertainty will mean for them. The recent events will likely not materially affect those already in a DRO or bankruptcy. However, in the case of IVAs, the monthly payments that usually form the basis of the arrangement may now be a challenge for many people to meet.

Many, but not all, IVAs include provision for a payment holiday of three months. Once this has passed, any further missed payments will mean that the borrower is in default, the IVA may come to an end and the borrower may be faced with bankruptcy, or at least being liable for all of their debts again – unless we deliver a solution.

Supervisors can approach creditors to try to amend the terms to allow payments to be suspended for longer, if that is needed – something that we are seeing an increasing number of our clients look to do as this situation prolongs. An IVA can be formally varied before it ceases to have effect. We have recently seen formal guidance from the IVA Standing Committee taking a pragmatic approach on protocol-compliant IVAs – allowing an additional three months' payment holiday or a reduction in monthly payments of 25% without a formal variation (however in non-protocol cases a formal variation will be needed).

Varying the IVA will not be the solution in all cases – the reasons for default should be examined to see if they are not actually Covid-19-related, or to establish that things will not improve when we come out the other side. An alternative debt solution, such as a DRO or bankruptcy, may now be the more appropriate debt solution.

What this means for the insolvency profession

Many of us are seeing a lull in new instructions. That is worrying but perhaps understandable – the future is uncertain, so many people in debt will not want to make a decision until the future is clearer. The worry is that many potential clients could be taking and acting on advice now and may latterly regret the delay. How we as a profession get that message across is one of the challenges that Covid-19 brings. ◻

MARK SANDS is a partner at business advisory firm Quantuma.

The view from the BPF: partnership is vital to success

Laurence Raeburn-Smith explains that some occupiers are misinterpreting recent government policy and now, more than ever, it is time to get everyone engaged.

In just a matter of weeks much of our already fragile retail sector has shut down and, in response, the commercial property industry has committed to support its customers struggling with their property costs.

However, to ensure the property industry can maximise this support, there needs to be recognition that the burden must be shared across all those parties able to shoulder the costs. Property owners are businesses too, facing significant pressures from suppliers, lenders and investors. Through this crisis the property sector must keep crucial business infrastructure operational and meet obligations to all of our stakeholders, including the communities we are invested in.

Historically, our industry has not elicited much public sympathy, but we are in fact the guardians of the savings and pensions of 45 million people across the UK, and we enable much-needed new investment into the physical fabric that underpins economic and social wellbeing.

All of our futures are bound up in the health of the property industry, so it is unfortunate that recent policy decisions have had a number of unforeseen consequences.

Forfeiture, statutory demands and CRAR

In the past few weeks, the government has banned commercial lease forfeiture and placed severe restrictions on the ability of those in our sector to issue statutory demands or implement commercial rent arrears recovery (CRAR).

No responsible property owner wants to evict a tenant in the midst of a global health pandemic – and who could they re-let the unit to anyway? However, these measures are causing serious repercussions for all parties as some occupiers have interpreted the enforcement ban as government sanction not to meet their contractual obligations, regardless of their ability to do so.

Many of our occupiers are clearly in significant financial distress and the property sector is stepping up to support them where it can. Sadly, a number of occupiers have been so emboldened by their newfound security of tenure that they are not only refusing to pay rent; they are refusing to even engage with their property

owners. Some are also using non-payment of rent obligations essentially as a free overdraft mechanism, ahead of utilising the government support on offer.

With a total quarterly retail rent bill of £2.5bn, the commercial property industry can't simply absorb billions of pounds of lost income and this now severe cash flow problem is, in turn, restricting the extent to which owners can be accommodating to those tenants in genuine need.

Without the means to mitigate rents being run up in arrears, we believe it is vital that the government makes property owners' claims preferential for the period in which the enforcement ban is in place. Otherwise, there will inevitably be a wave of retail insolvency procedures in the autumn devised to wash away these debts completely and, with them, much-needed new investment in our town and city centres.

The new moratorium

It is no surprise that all this turmoil has put insolvency under the spotlight and prompted the government to move ahead with some significant reform. Of particular interest is the long-awaited moratorium procedure, which provides viable businesses with a mechanism through which to get breathing space from their creditors.

In normal circumstances property owners are unlikely to move in aggressively to claim debt from struggling occupiers, especially given the time and costs involved in trying to re-let a retail unit in the digital age. They also appreciate that an effective turnaround plan and new funding cannot usually be found overnight and are therefore not against the intentions behind the moratorium. There are however some serious worries about how it will work in practice.

We fear that some occupiers may use the moratorium as a substitute for vital engagement. There is little by way of safeguards for creditors when it comes to extension and an original proposal that creditors be able to request information has been dropped.

As many IPs will know, it has become standard practice in recent years that firms engage with the BPF on CVAs ahead of launch. Whether that effective engagement continues when the moratorium is in place may well be the litmus test for its success.

What next?

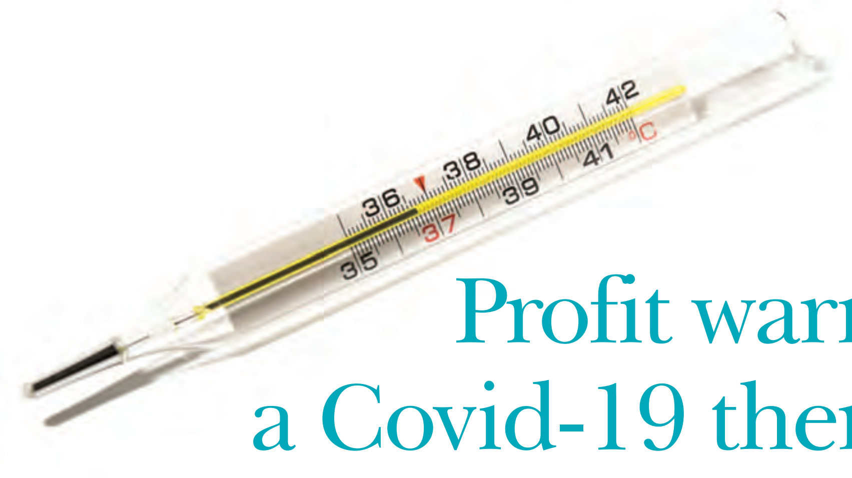
With these sweeping changes to the insolvency regime and the evident need for firms to restructure, it is becoming clear that IPs will be playing a crucial role in the coming months ahead.

They should be aware that the aforementioned concerns about incoming regulation and the recent behaviour of some occupiers have shaken property owners. Reports that some IPs may be willing to leave struggling businesses in the hands of directors through 'light-touch' administration, while probably well intentioned, are also not helping.

If, however, retailers and their IPs do voluntarily engage with property owners effectively, we will be able to build the mature partnership between our sectors needed to revitalise retail post-crisis.

Part of that engagement has to be a recognition that retailers, property owners and their lenders make up a mutually dependent ecosystem. ◻

LAURENCE RAEBURN-SMITH is senior policy officer at the British Property Federation.



Profit warnings: a Covid-19 thermometer?

Alan Hudson and **Kirsten Tompkins** examine the record profit warnings for Q1 2020 to try to build a picture of the future.

UK-quoted companies issued as many profit warnings in the first quarter of 2020 as we'd usually record in a year. The total of 301 warnings smashes all previous records, with 21% of companies warning in the first three months of 2020 compared with the previous high of 8% in Q4 2001, in the wake of 9/11. In fact, a higher percentage of quoted companies issued warnings in Q1 2020 than the whole of 2008.

The biggest challenge, however, lies ahead, with a 'restart' proving tougher for many companies than the lockdown.

No place to hide

EY's data shows that 70% of FTSE travel and leisure companies and 60% of FTSE retailers issued profit warnings in the first quarter. These are truly astonishing numbers and it's obviously the consumer discretionary part of the economy that has been hit hardest and fastest by the lockdown. But, the data shows that the full impact on the economy is broad – and broadening.

We recorded profit warnings from 39 of the 42 FTSE sectors we track. The impact of global measures to stem the spread of Covid-19 have spread through supply chain disruption, corporate cash conservation – including delayed rent payments and falling spending in advertising and recruitment – and the consequences of a dramatic fall in global economic activity, which has triggered falls in trade, transportation and the oil price. Falls in oil industry capex have significant ramifications for many industrial sectors, as we saw in 2014–16. Broad based falls in economic activity are also generating increased profit warnings in financial sectors.

One of the big lessons we learned from 2008, is that the economy has interconnections that we don't always understand until a vital link is severed.

A difficult transition

What does this mean for the next stage and the move from lockdown to recovery? We know from previous crises that one of the biggest tests comes when weakened companies and stressed management teams need to reflate balance sheets, restock inventory, restart operations and depend on supply chains that have been similarly tested. There were more insolvencies in 2009 than 2008, with numbers barely falling until the middle of the next decade.

This time the restart-challenge is considerably larger. Government support has been more extensive this time and focused on trying to minimise the structural damage, but there is a limit to its capacity and duration. A quarter of UK businesses stopped trading during lockdown, and these will need to mobilise from a standing start with weakened balance sheets, no certainty over what demand awaits them and how well other companies in their supply chains have held up.

Moreover, businesses will need to do all this while re-engaging staff and implementing social-distancing measures that could fundamentally test the feasibility of their business. Restarts will be particularly complex in businesses that cross national – and even sub-national – borders since the regulations and pace of recovery could differ and require different approaches.

Managing cash and safeguarding business continuity and the health of employees and customers will be evolving and ongoing challenges as the regulations change. Getting the timing right on when and how to start up and invest will be crucial given the uncertainty of the outlook. Companies will need to maintain some flexibility in the event of a second wave.

The bigger picture

In 2019, profit warnings hit exceptional 2008-like levels, reflecting the high economic and structural stresses on the economy. By the end of January 2020, warning levels were up 43% year-on-year. Covid-19 has added new pressures, but in many ways, these have exacerbated existing issues and accelerated prevailing trends.

Most of the sectors that were under significant structural pressure in 2019 – restaurants, retailers, airlines etc – are those where we're seeing the most restructuring activity. But, deep restructuring in one area often triggers significant reshaping in others, for example in real estate and airports. Delays in corporate discretionary spending will also have wide ranging implications across several sectors reliant on business-to-business spending. There could also be significant variation within sectors: for example, the difference in fortunes between food and drink companies that supply supermarkets and those whose main customers are restaurants and pubs.

Very few companies will be totally immune from the wider fall out and potential disruption. Transparent and open communication is vital between companies, their lenders and other stakeholders. Companies that can flex and adapt their products and supply lines to new customers and new priorities are likely to fair better. Not least because the drivers of sector reshaping will include new norms in societal priorities, with this shift in values creating permanent changes in behavioural and values.

We don't know when life will return to normal – or what that normal will be. But we expect to see a renewed focus on corporate purpose, long-term value and the interconnectivity between business and society – after all, we are all in this together. ◻

ALAN HUDSON is UK&I restructuring leader at EY.

KIRSTEN TOMPKINS is transaction advisory services senior manager at EY.

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There are always options

Mark Beaumont has been out getting feedback from the profession on the handling of insolvency disputes.

Back in the good old days of leaving the house, I did a couple of presentations in Leeds and London for R3 to an audience of IPs. It proved to be a good opportunity to take questions and hear feedback from a wide range of the profession and to understand some of the challenges faced by delegates.

It became clear that insolvency disputes are an area that people have mixed experiences with, and that by no means do all disputes proceed in the most efficient way, or even at all. I heard that there can be issues with getting solicitors and barristers to take on cases against other professionals, or that insurance or funding options only seemed to be for the largest of cases. I even heard that conditional fee agreements (CFAs) were ended by the Jackson reforms: they were not, although the success fee element of a CFA is no longer recoverable *inter partes*. We still see a lot of cases run on full CFAs for both counsel and solicitor, although there are also many cases now where funding is used to support the legal team's work in progress (WIP) as well as cases where the IP is also funded.

> "The main takeaway was that there are vast differences in what people understand to be the options for insolvency dispute resolution."

I suppose the main takeaway was that there are vast differences in what people understand to be the options for insolvency dispute resolution, whether in relation to the legal team, their retainers, after-the-event (ATE) legal expenses, insurance, disbursements funding and of course full case funding.

Endless options

In the seven-plus years since Sally Dunscombe and I established Annecto Legal we've seen the funding and insurance world adapt and evolve so that it's now possible to provide options for even the smallest of claims. We've seen multiple funders step in to acquire assignments, and insurers adapt their policies to handle a wider array of outcomes and provide sensibly priced 'security for costs' cover. The funding market has developed to a point where it's now possible to get a whole range of different options on the same case, from just the funding of a court fee through to the funding of multi-million-pound budgets for both legal team and IP.

We've witnessed first-hand an industry trying out ideas and coming up with new solutions on a regular basis and, looking back now, it seems incredible how far and how fast the insurance and funding space has adapted to the needs of IPs. I now feel it's time for the profession to do a bit of keeping up and really understand what options are out there now.

In this context, it's easy to understand how it's possible for some practitioners (not you!) to become quite disconnected from the reality of insolvency disputes and the best ways to deliver value to creditors. We hear of cases that just get filed as too tricky, and I am sure some of them are, but I imagine many just need the right home. I also hear of funders taking huge shares of recoveries, which seems extraordinary in a competitive market, and makes me wonder just how sophisticated the buyers of these services are. Do IPs and solicitors really know the appropriate pricing for litigation funding deals? Perhaps some do, but I find it hard to understand how simply going to three expensive funders achieves the best outcome!

Extracting value

There are many ways to extract value from a potential dispute, some of which are incredibly straightforward, and none of which take enormous time to understand. What we've tried to do at Annecto is to make it easy for practitioners to find a sensible solution for any of these disputes, whether through finding the right legal team, getting the best price for an assignment or indeed giving a range of options around funding and insurance.

> "There are many ways to extract value from a potential dispute, some of which are incredibly straightforward, and none of which take enormous time to understand."

Many of the cases we handle have a legal team in place, with a legal budget and plan of action, but we also get enquiries where it's necessary to get the right team in place prior to sourcing funding. We're happy to discuss disputes of all sizes and natures to try to ensure that as few as possible ends up being discarded, with more claims pursued, more IPs paid and more returns to creditors.

So, whether you need assistance in getting the right ATE policy for your needs or want to explore the types of funding options available to you, or you need help getting a solicitor and/or barrister on board, please feel free to make contact. We are happy to utilise our experience and contacts to assist IPs in getting the best possible deal from the market. It's what we do every day. ◻

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

A brief history of the corporate insolvency framework reforms

James Jeffreys undertakes a complete study of the corporate insolvency framework reforms from combustive origins to unified theory.

The title of this article is a reference to Stephen Hawking's opus, *A Brief History of Time*, which explains the origins and development of the universe over the last 14 billion years or so. It has sometimes felt that the government's corporate insolvency framework reforms, due to be introduced at the time of writing, have undergone a similarly lengthy and complicated journey to completion.

While the reforms will be covered in depth in the next issue of *RECOVERY*, we thought it would be helpful to set out the background to these reforms, provide some context as to why it has taken so long for the government to bring them to fruition, and outline some of R3's work on them over the last few years.

In the beginning…

The roots of this package of reforms stretches back as far as 2014, when a proposal for a moratorium – or 'stay' – was included in a European Commission recommendation on business failure and insolvency. Under the Commission's proposals, the proposed stay would have lasted for a maximum of 12 months (and a minimum of four) and would have prevented creditors from taking enforcement action against companies putting together a business rescue plan. These proposals then led to the Restructuring and Second Chance Directive, which was adopted by the EU in June 2019.

It was against the backdrop of the Commission's interest in the matter that R3, and the government shortly after, first put forward suggestions for the UK's own moratorium.

In April 2016, R3 published its own recommendation for a business rescue moratorium in a paper entitled *A Moratorium for Businesses: Improving Business & Job Rescue in the UK*. In contrast to the Commission's proposal, R3 called for a 21-day moratorium that could be extended either with the issue of a CVA proposal or by applying to court for a 21-day extension.

> "It's safe to say that the response from the insolvency and restructuring profession (and indeed the wider business stakeholder community) to the consultation was chilly."

Only a month later, the government published its Review of the Corporate Insolvency Framework, which set out the first iteration of the government's plan for reform. The consultation looked at four broad areas for reform to improve the efficiency of the rescue and restructuring tools available to companies in the UK:

- introducing a moratorium for distressed businesses to benefit from protection against legal action while considering their options for rescue;
- widening the definition of essential supplies, with appropriate safeguards for suppliers, to assist distressed businesses;
- developing a new restructuring plan to increase the options available to rescue businesses; and
- increasing the availability of rescue finance.

The consultation sought views on *'whether the UK's regime needs updating in light of international principles developed by the World Bank and the United Nations Commission on International Trade Law (UNCITRAL), recent large corporate failures and an increasing European focus on providing businesses with the tools to facilitate company rescue.'*

The Brexit big bang

That final point proved to be a supreme irony, when the UK voted to leave the European Union before the consultation closed. Notwithstanding this point, R3's response to the consultation was not particularly positive, with member feedback suggesting that the proposals would be *'unworkable or unused in many situations and, worse still, could harm creditors and trust and confidence in the UK's insolvency* *regime. They could also lead to an increased risk to lenders, which would be a deterrent to increased availability of funding for businesses in need of rescue funding.'*

With the vote for Brexit driving a coach and horses through the government both in terms of composition (with David Cameron's government making way for Theresa May's) and bandwidth, and EU negotiations diverting policymaking attention away from anything deemed non-essential, the consultation was left firmly on the shelf.

That was even despite the opportunity to provide an update on the government's thinking in March 2018 when, following a spate of high-profile insolvencies (think BHS, Monarch, and Carillion) and growing public pressure for 'something to be done' about perceived inequities within the UK's corporate governance framework, the government published its 'Insolvency and corporate governance' consultation, which set out recommendations for substantial changes to the UK's corporate governance framework both pre- and post-insolvency. Examples of these recommendations included extending director liability so that a director could be held liable for an insolvent subsidiary after it had been sold, and rules to stop rescues/investment from being structured in such a way that the investor/rescue vehicle was protected from losses in an insolvency at the expense of other creditors.

Endothermic reaction

It's safe to say that the response from the insolvency and restructuring profession (and indeed the wider business stakeholder community) to the consultation was chilly, with R3 calling on the government to improve the tools already provided by the insolvency framework to deal with corporate governance issues, rather than adding a new set of (conceptually faulty) measures. Perhaps most glaringly, the consultation made no reference to the 2016 corporate insolvency reform proposals.

It wasn't until the August 2018 Bank Holiday weekend that the government published a consultation response confirming its intention to proceed with the corporate insolvency reforms, revised from what was announced in 2016, 'legislating for them as parliamentary time permits'.

R3 member feedback to these revised corporate insolvency reform proposals was mixed: many of the government's revisions to its original proposals were welcomed, although some serious concerns remained. One of the key issues was the practicality of the proposed moratorium, with *in*solvent businesses barred from being able to take advantage of the measure.

Following this announcement, the reforms returned to their place on the shelf, with Brexit, government reshuffles, new prime ministers and other political preoccupations depriving the government of the opportunity to legislate.

R3: the catalyst

All this is not to say, however, that waiting is all R3 has done since 2016. We've written to, and met, parliamentarians about the issue; parliamentary questions have been tabled as a result of our efforts, putting pressure on the government to make progress; we have briefed a number of journalists; and we have continued our ongoing dialogue with officials throughout. We also responded to both of these significant consultations – bringing together views from across the profession and engaging with stakeholders to build consensus, too.

> "Many of the government's revisions to its original proposals were welcomed, although some serious concerns remained. One of the key issues was the practicality of the proposed moratorium."

And then there was light

On 28 March 2020, the Business, Energy and Industrial Strategy (BEIS) secretary, Alok Sharma, announced that, to help support businesses through the economic impact of Covid-19, the government 'will amend insolvency law to give companies breathing space and keep trading while they explore options for rescue'. Under the plans, the government aimed to fast-track the package of reforms first published in 2016.

The minister also announced that the government planned to temporarily suspend the wrongful trading provisions, to give company directors *'greater confidence to use their best endeavours to continue to trade during this pandemic emergency, without the threat of personal liability should the company ultimately fall into insolvency'*. However, existing laws for fraudulent trading and the threat of director disqualification will remain unaffected in order to act as a deterrent against director misconduct.

String theory predictions

Although the final details of the policies are yet to be confirmed, they will look similar to the proposals as updated in 2018. Over recent weeks R3 has been calling for some further changes to ensure that these proposals are effective, but as per the 2018 consultation, we can expect the following:

Business rescue moratorium: the moratorium will last for 28 days initially, but can be extended by a further 28 days upon approval from the monitor; any further extension must be supported by more than 50% of secured and unsecured creditors. An IP will be appointed as a 'monitor' to oversee the process.

Restructuring tool: the new restructuring tool will adopt some of the principles of the 'Chapter 11' procedure, but actually will most closely resemble the current English 'scheme of arrangement'. The new tool will allow a company to bind all its creditors to a restructuring plan, including groups of dissenting creditors.

Restructuring proposals will be subject to the scrutiny of the courts and to a creditor vote. Creditors will be allowed to put forward alternative proposals. The final agreement will be signed off by the court.

Prohibition of 'termination clauses' in insolvency (essential supplies): as part of the government's reforms, legislation will be introduced to prevent the enforcement of 'termination clauses' by a supplier of goods or services, where the clause allows a contract to be terminated on the grounds that one of the parties to the contract has entered a formal insolvency procedure.

However, suppliers will retain the ability to terminate contracts on any other grounds covered by the contract, and they will not be compelled to renew or extend contracts upon their expiry. Certain types of financial products and services will also be exempt, as well as licences issued by public authorities.

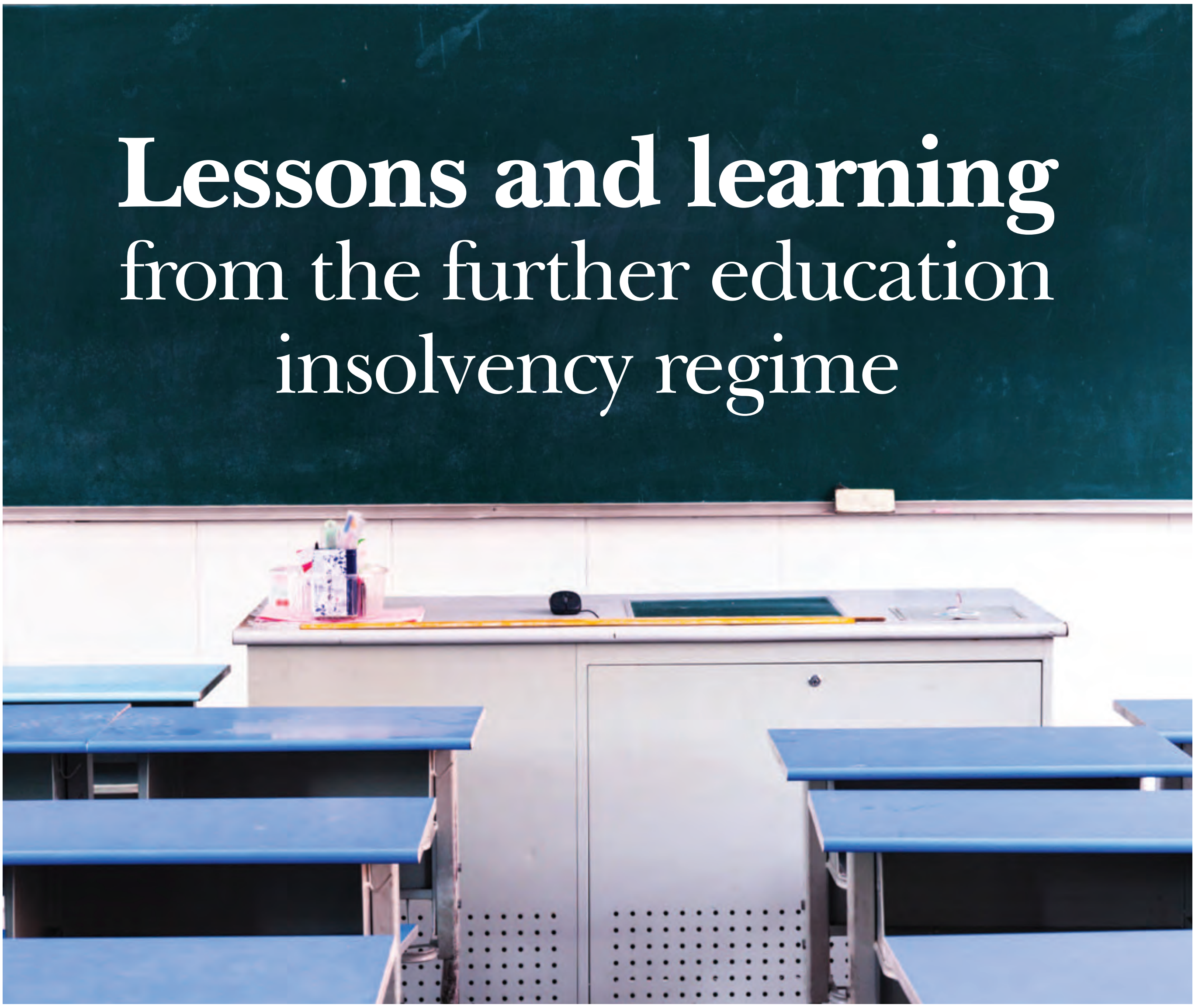
R3's theory of relativity

In our comments to the press following the business secretary's March announcement, we set out that while the UK has a world-leading insolvency and restructuring framework, the new restructuring tools will give the profession more options to help businesses navigate Covid-19 disruption. We've also been pleased the government has listened to the profession's feedback and has focused on making these tools accessible for the businesses that need them.

The details of how exactly these tools will work are still to confirmed, but we are hopeful that when the corporate insolvency and governance bill reaches Parliament shortly, the government will have addressed many of the concerns the profession has expressed about the reforms since they were first announced in 2016.

JAMES JEFFREYS is senior press, policy and public affairs manager at R3.

Lessons and learning from the further education insolvency regime



Matthew Atkinson explains how the FE insolvency regime has been used in practice and what IPs need to know about future cases.

It would be impossible to write this article without the significant caveat that we work in extraordinary times at the moment and some of the ordinary rules might not apply until we can navigate our way through the Covid-19 pandemic fallout.

As I write, in order to avoid a second Covid-19 peak, we are not likely to get back to normal educational delivery until the next academic year.

I would like to pay tribute to many of the further education (FE) colleges who are running great online learning facilities for learners during the Covid-19 pandemic. The Association of Colleges reported that 95% of colleges are reporting that all or a majority of students are continuing their learning remotely.

The secretary of state and his ministers are committed to FE and believe colleges are crucial to economic recovery and can be the key driver of social mobility if they engage well with employers and guide young people and adults in work.

> "The court was clear that CVA is available to the education administrators."

Education administration

Via the Technical and Further Education Act, the FE insolvency regime came into force at the end of January 2019.

Due to the restructuring facility[1], which was in force until 31 March 2019, with a number of deals targeting completion on that date, there was understanding that the FE insolvency regime would be used from 1 April 2019.

It was, and also remains, our intention to use the regime sparingly and as a last resort to protect learners and where appropriate achieve structural change. FE administrations could become a vital tool in FE reform work being led by colleagues in the Department for Education (DfE).

The regime can be used when the secretary of state (or his proxy) applies to the High Court for an order on the grounds that the college in question cannot pay its debts as they fall due. At a hearing the judge can make the order, which requires the education administrator to treat the continuation of provision for existing learners as the first objective of the administration. This overrides the normal administration objectives.

I am not able to go into detail on the work and outcomes of the two FE administrations (Hadlow College and West Kent College) due to ongoing transactions, exit and investigations into the events and conduct of individuals. However, I am pleased to say that one transaction has completed with the transfer of the Ashford sites, formerly part of the West Kent College, transferring to East Kent College Group. I wish the staff and learners at Ashford, as well as Graham Razey OBE (chief executive officer at East Kent College Group) and his excellent team, well with the integration.

The decision to appoint

Before the two colleges became insolvent, both colleges were continuing with financial support from government and were working with both interim and prospective administrators to understand the finances. During this period, it had become clear that there was significant creditor pressure on one of the colleges in particular.

> The regime can be used when the secretary of state (or his proxy) applies to the High Court for an order on the grounds that the college in question cannot pay its debts as they fall due.

The legacy debts and inability to service ongoing obligations meant that the protection afforded by education administration and the prospect of putting the institution into safe hands while a solution was sought, was compelling. Using legislation for the first time is daunting but the DfE must show it is prepared to take decisive action where it is deemed necessary.

I am a qualified insolvency practitioner, but it had been a while since I had been to an administration hearing, in fact I think it was only my third hearing for an appointment since 2003. Chief Insolvency and Companies Court Judge, Nicholas Briggs, who led the hearing, delivered a helpful judgement that also made it clear he was unconvinced of the need for multiple special administration regimes.

Trading

While a huge amount of thought and planning goes into these decisions, there is always some anxiety about the reaction of staff, learners and creditors. I am happy to say that trading at the colleges has been largely unaffected, which is credit to both the interim leadership put in place prior to appointment and the work of the administrators. Both the colleges have been through the start of an academic year and recruitment has held up. There has also been an OfSTED monitoring visit[2], which was successfully negotiated.

Banks

The banking market for FE colleges has changed markedly over the last four years. The pending arrival of the insolvency regime and a general feeling that the sector did not have the right banking products for a private sector institution was causing the banks to reassess and restructure their lending products and security. We have throughout worked closely with the main lenders to the sector whose combined debt is c £1.4bn.

FE colleges are not corporate entities and as such they cannot grant a debenture. Valuing the bank's security is a challenge, as often there is limited alternative use for land and buildings, which are the only real source of bank security. In order to achieve the primary purpose, in these cases, the education administrators have a limited pool of buyers to market the buildings to. We continue to work closely with the lenders as maintaining a market to which they are prepared to lend is important.

Company voluntary arrangement

While a company voluntary arrangement (CVA) may not be used as a means of exit in the first education administration, it has been a serious consideration and our legislation was unclear as to whether it was possible for the education administrators to propose a CVA as an exit route. The education administrators recently went to court for direction on this – as it was just after the Covid-19 lockdown it was held as a telephone hearing – and the court was clear that CVA is available to the education administrators. This has the effect of increasing our options, so we are delighted with the outcome.

> Having an insolvency regime that is used efficiently can be a very effective tool in improving the overall health of the sector.

Transactions

In order to achieve the primary purpose, the education administrators are reliant on the support of the FE Commissioner, who carries out an assessment of local provision. This was carried out within a 30-mile radius for Hadlow and West Kent Colleges. As noted above, the Ashford campus has already transferred, and we are in advanced discussions with another college to take on the other two major sites at Hadlow and Tonbridge.

In the future, we will seek to avoid situations where the limited pool of 'buyers' causes delay to the resolution and exit from administration. The 'buyer' college assumes some liabilities, such as the education administration college's share of the Local Government Pension Scheme (the sector's largest creditor at c £3–4bn) deficit, and our primary focus is the affordability of the capital structure of the combined entity going forward. This will vary deal by deal but, despite the stress in the FE sector, a number of colleges are in strong financial positions and are expected to contribute to the recovery of the entity exiting administration. This is both because it is right and fair (in many cases they will take on significant unencumbered assets) and that we properly protect taxpayers' money.

> In the future, we will seek to avoid situations where the limited pool of 'buyers' causes delay to the resolution and exit from administration.

FE reform

My provider oversight directorate continues to work closely with DfE, stressing the need for financially robust and sustainable institutions and for reductions in overlap and inefficient competition, both between FE colleges and other providers in FE college catchments.

I am passionate about FE and I want to see colleges succeed. I consider them to be the most exciting area of education and the area that can deliver the most productivity to the economy. Having an insolvency regime that is used efficiently can be a very effective tool in improving the overall health of the sector and can be used to facilitate structural solutions that perhaps would not otherwise occur.

1 www.gov.uk/government/publications/post-16-education-and-training-institutions-apply-for-financial-support-for-area-reviews
2 www.gov.uk/guidance/inspecting-further-education-and-skills-guide-for-providers

MATTHEW ATKINSON is director of provider market oversight at the Education and Skills Funding Agency.

AI: the digital detective in asset recovery

Nigel Nicholson predicts the impact of AI on the recovery of assets in insolvencies and money laundering.

As a professional who has worked in financial asset tracing for decades, I deeply admire the community of IPs, forensic accountants, lawyers, regulators, law enforcement agencies and business intelligence professionals who have developed great skills in financial asset recovery and identifying money-laundering schemes. For many it is an art form, where individuals navigate a maze containing an ever-expanding quantity of information, both written and digital, using the tools and mechanisms at their disposal. At any point it is possible to end up at a dead end because of lack of disclosure or laws designed to protect the assets of the righteous prove just as protective of the criminal. Everyone is chasing favourable outcomes for their clients, but these outcomes can often take years to materialise.

The time, cost and complexity of these processes have long been both significant and unpredictable. IPs often embark on hunting for assets knowing that they are extremely unlikely to recover all the monies owing and that the resources that need to be deployed could be disproportionate. Any technique that can promote an early 'win' or speed the process has to be welcome.

> **The use of artificial intelligence (AI) tools has the potential to be transformational.**

The good news is that the sector continues to benefit from advances in technology. The use of artificial intelligence (AI) tools has the potential to be transformational. Using sophisticated algorithms, it is now possible to achieve far better outcomes in terms of speed, cost and accuracy, while also removing much of the complexity, secrecy and unpredictability historically associated with locating undisclosed assets and, in particular, hidden bank accounts.

Artificial intelligence

There are several AI platforms launching into the international asset recovery industry and it is an area of rapid technological change. But there is still a long way to go. We can see from some of the issues challenging the litigation funding industry, for example, that the time and resources required to bring many cases to conclusion is simply prohibitive; too many asset recovery cases end up in the sidings because the funding runs out before all of a person's hidden assets around the world can be located. This is certainly true in insolvencies where funds are limited.

What AI offers is the potential to transform asset recovery from an artform to a science, and to deploy the power of computers and algorithms to take on these

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challenges. As criminals get smarter, this looks like the only way forward – any national law enforcement agency will tell you that, as fraudsters use more and more institutions in more and more jurisdictions to hide their assets, the cross-border task is growing exponentially. While the UK's Serious Fraud Office might be able to find monies hidden in the UK fairly easily, once the assets cross borders the challenge gets tough. Criminals are getting more and more adept at using privacy and banking secrecy laws to help them conceal and hold on to assets, leaving the industry with a big task on its hands.

AI is, however, rising to the challenge. Investigators can now establish within just a few weeks, totally legally, whether there has ever been any contact between the email address, or addresses, of a person of interest and the 200,000+ banks in the world. Other AI techniques can scrape information from the web, regulatory databases and social media accounts to fit together the pieces of a jigsaw puzzle and predict the images of the missing pieces when the investigator doesn't necessarily know what the full picture looks like.

In cases of money laundering, AI can identify connections of the suspects with sanctioned and blacklisted banks or otherwise 'respectable' banks that criminals use to transfer or hold funds. AI can also establish communications patterns among such groups of individuals.

How AI works

There are two broad types of AI technology currently being deployed in the asset tracing industry. The first follows the strict dictionary definition of doing by machine what could be done by a person, including sweeping the entire web for visible and direct evidence of communication between two or more parties. This can mean mining social media or trawling websites, but it is an activity that an individual, given long enough, could do. However, given the vast amount of data that now exists, and in multiple languages, an individual could take many months and years to investigate even a single case. The process can often be completed in a matter of minutes by machine, allowing the individual to evaluate the output and prioritise the areas that can fruitfully be investigated further.

> "Other AI techniques can scrape information from the web, regulatory databases and social media accounts to fit together the pieces of a jigsaw puzzle."

The second type of AI goes further and involves technology capable of doing more than any human could. For example, converting the email address of a person of interest into a piece of code – the interaction of such code with a bank's spam filters can then be tracked and measured in milliseconds, at the same time adjusting for the highly variable speed and functionality of the global internet. There is no way that an individual equipped with a digital stopwatch could ever invade cyberspace to do this.

One of the reasons such a process is feasible is because, despite the ongoing evolution of communications technology, the banking industry is still heavily reliant on the use of something relatively old-fashioned: an individual's email address. Banks, for regulatory and operational purposes rely on hierarchies to filter incoming email communications and know whether those email addresses belong to customers or not.

> "The toolkit available to the global asset recovery industry is getting far more sophisticated, and this is something we should all embrace and harness with increasing pace and urgency."

AI in action

Technology means it now takes only a few seconds of processing time to prove conclusively and legally whether any two email addresses have ever communicated with each other. Deployed as a software product, it is possible to establish within a few weeks every bank in the world in which an individual, or any of that individual's proxies, has a bank account. Both these capabilities have significant utility for the insolvency investigator. Money moves fast and the ability to track those funds and uncover their eventual destination is like gold dust. Equally, while an individual can manipulate the banking system and move their ownership of financial and other assets, it is common for accomplices to be involved. This is where tracking communication can be vital. If there are documents involved, while they can be transferred via platforms such as Dropbox or Whatsapp, email is still the most universally used medium to do so.

The fact that AI algorithms know no borders is another key element. Tracing assets in Japan, Ecuador or North Korea becomes no more difficult than tracing them domestically, because the technology is tracing communications, which cuts through any and all physical and legal barriers. So, it becomes less relevant to the tracing process whether any two countries have cooperation agreements. This may not, of course, apply to the recovery process. We are all familiar with cases that involve a company established in an initial jurisdiction that becomes a director and shareholder of a company in a second jurisdiction, with that company in turn becoming a director and shareholder of another company until the ownership of the asset or of the bank account has travelled through 30 companies in 30 countries, many of which still have secrecy rules at some level or another.

It is company 30 that has the bank account where the money resides, and using conventional asset recovery techniques to find that money would require following a very complex ownership chain. The good news is that other AI programs can help to reconstruct that ownership chain.

In one recent case, three individuals had been the subject of a detailed investigation into the alleged laundering of more than $4bn (£3.2bn) in drug money. Using AI, it took us just six weeks to identify 11 banks in eight countries that these individuals had links to, several of which the agency doing the work was unaware of.

The critical thing for investigators is certainty: by deploying AI technology, accurate information can be delivered in a fixed time and at a fixed cost with all the results arrive simultaneously.

Transforming the insolvency industry

The current insolvency industry is experienced and effective but constrained by a slow and frustrating investigation process. AI has the potential to speed up many different elements of the recovery process. It is inevitable that the future will mean more automation, more technology and more electronic investigation, because our world is becoming more cyber driven and pieces of paper no longer exist.

Human beings will continue to have a critical role to play, introducing common sense, insight and experience to the process. The toolkit available to the global asset recovery industry is getting far more sophisticated, and this is something we should all embrace and harness with increasing pace and urgency. ◻

NIGEL NICHOLSON is CEO of GreyList Trace.

The database marketplace

In the wake of an FCA warning, **Hanh Nguyen** and **Jonathan McDonald** explore whether the transfer of databases is the selling of an asset or an imminent liability for both buyer and seller.

It has long been recognised that the data a business holds on its customers can be one of its most valuable assets. Many commentators in the consumer sector, for example, believe that we are advancing beyond a service economy to what is described as an 'experience economy', in which the most successful businesses will not simply sell goods and services, but engage with their customers to offer a tailored experience based on the data they hold. In light of this, it is unsurprising that IPs often find that an insolvent business' customer/client databases and related marketing databases are important and sought-after assets.

However, the sale of a database in which individuals may be identified (which invariably includes customer and marketing lists) is governed by data protection law. As such, the rules governing their sale can be complex and the implications of infringing those rules serious. Illustrating this point, in February 2020, the Financial Conduct Authority (FCA), the Information Commissioner's Office (ICO) and the Financial Services Compensation Scheme (FSCS) published a joint statement to IPs and authorised firms warning them that the practice of some IPs and FCA-authorised firms of attempting to sell clients' personal data to claims management companies was unlawful and that these practices, along with other breaches of data protection law, would be taken seriously.

In this article, we examine the rules around transferring customer and marketing databases in order to help IPs and others to identify the material risks and stay on the right side of the law.

> IPs are consistently held to act as agents of the insolvent business, rather than the data 'controller' in respect of the business' data assets. As such, they may ultimately feel shielded from liability.

Why is this important now?

The ICO's previous data sharing code of practice, published in 2011 (pre-GDPR), included a helpful statement under the heading 'mergers and takeovers' that: *'Where an organisation is taken over, merged, abolished or loses responsibility for carrying out a particular function, personal data might need to be shared in a way that was not originally envisaged by the organisation or individuals themselves. The DPA does not prevent organisations sharing data in these circumstances.'*

The updated draft data sharing code of practice, which we will likely see enter into force in late 2020/early 2021, includes no such statement, instead taking a more equivocal tone: *'if merger or acquisition or other change in organisational structure means that you have to transfer data to a different or additional controller, you must take care.'* This, of itself, is not determinative (the ICO's codes of practice are not even binding law (although, as the foreword to the data sharing code states, if you fail to follow it, you may find it more difficult to demonstrate compliance with the law), but it shows a clear direction of travel. The law has been tightened up in this area and, as the post-GDPR legal regime matures, practices that were formerly widely followed may no longer be valid.

In some respects, the IP may initially think that this is not their concern. It is true to say that IPs are consistently held to act as agents of the insolvent business, rather than the data 'controller' in respect of the business' data assets. As such, they may ultimately feel shielded from liability. Moreover, IPs may feel that contractual protections (relevant warranties and indemnities granted in their favour by the buyer) in their asset purchase agreements also offer appropriate protection. However, as the FCA/ICO/FSCS letter demonstrates, the regulators are prepared to use their powers and resources to sanction anyone who acts unlawfully and it remains an enduring theme of data protection law that a party does not abrogate responsibility for data protection compliance by simply passing the data to another controller. In any event, no IP wants a reputation for being cavalier with their legal responsibilities.

> No IP wants a reputation for being cavalier with their legal responsibilities.

What does the law say?

The GDPR and Data Protection Act 2018's requirements are wide ranging. However, we focus here on the two key questions an IP should consider when deciding whether to market and ultimately sell a customer database. Firstly, was the data collected lawfully in a manner that would enable its sale? Secondly, post-transfer, will the buyer be entitled to lawfully use the database?

The most important factor to determine in order to answer the questions above is what is the lawful basis for processing the data? As detailed in the very first recital of the GDPR, under EU law, the protection of personal data is a fundamental right. Any interference with that right must be justified by a lawful basis. As such, an IP should be able to identify the lawful basis relied upon by the now-insolvent company in respect of which they are appointed to collect the relevant customer and marketing list data in the first place, and must be able to identify a lawful basis for selling the lists to a third party. There is a closed list of lawful grounds justifying the processing of personal data set out in article 6 of the GDPR.

Marketing lists

In the case of a marketing list, only two lawful bases are feasible. Firstly, the opt-in consent of the data subject (ie granted via some form of clear positive action and not simply implied). Secondly, the legitimate interests of a data controller, including those of a controller to which the personal data may be disclosed, or of a third party. However, in the case of a marketing list collected for the purpose of sending emails and text messages to consumers, an additional rule (contained in the Privacy and Electronic Communications Regulations 2003) states that email and text messaging direct marketing may only be sent with the opt-in consent of the individual. In other words, the controller's legitimate interests may not be relied upon.

So, for the IP looking to transfer a marketing list, they should determine which of these two lawful bases were relied upon when the data was originally collected, and whether such reliance was valid.

In the case of consumer email marketing lists, the analysis is straightforward – the relevant consent mechanism should be reviewed. However, one difficulty with consent (which was well publicised in the run up to the GDPR entering into force) is that, under the GDPR, it must be 'freely given, specific, informed and unambiguous' – a very high standard. The ICO has stated in its draft direct marketing code of practice (see above for background on code of practices) that to be specific and informed the name of the controller who wants to rely on the consent must be provided. This is clearly unachievable vis-à-vis a third party who wishes to buy a marketing list in an insolvency context as the potential buyer of the marketing list will not be known to the company when the relevant consent was obtained. As such, a degree of legal risk, which should be assessed in light of the nature of the business and any available risk mitigation measures, will need to be considered.

> Neither an IP nor a prospective buyer should consider the sale of a customer or marketing database lightly.

In the case of B2B or hard-copy marketing lists, the analysis should also consider whether legitimate interests were relied upon (noting that certain businesses may have relied on consent for B2B or hard-copy marketing irrespective of the availability of legitimate interests, given the notion that consent places real control in the hands of the relevant individual)? If so, what did this look like? Was it explained to the individual at the time and was there an expectation that the data may be transferred to a third party?

As mentioned above, this is not just something for the buyer to worry about. The direct marketing code of practice states that the definition of direct marketing applies beyond the simple sending of direct marketing communications – it includes all processing activities leading up to, enabling or supporting the relevant campaign, which could encompass the collection and any transfer of the relevant database.

Customer lists

In the case of customer lists, the rules are slightly easier to comply with, but still worth considering. As well as the lawful bases of consent and legitimate interests set out above, the IP (and the buyer) may be able to rely on the lawful basis that the transfer is necessary for the performance of a contract with the relevant customer.

This could justifiably be relied upon in, for example, circumstances under which a customer makes a booking or commences the use of a service, but the relevant service supplier enters insolvency before the booking or service is completed. Alternatively, in a scenario where the company is in a 'trading' administration and is still taking customer orders during that period. In that case it is unsurprising that data protection law would not prevent an IP from taking steps to ensure a contract may be transferred (or novated), subject of course to wider contractual rules and considerations. The key question here will be: is it genuinely the case that the service is ongoing?

Conclusion

In conclusion, neither an IP nor a prospective buyer should consider the sale of a customer or marketing database lightly. As discussed, without some analysis and proper structuring, the transfer may be unlawful, exposing on the one hand the seller/IP and on the other hand the buyer to regulatory scrutiny (and worse). Even if the parties avoid such scrutiny, it may be that the parties find they have gone to the effort and expense of transferring an asset that the buyer is not entitled to use.

For the IP, this raises the obvious question around the validity of selling an ostensibly unusable asset and, for the buyer, whether the dataset they are considering purchasing (which may still be hacked, lost or stolen even if it cannot be lawfully used) is actually a liability rather than an asset.

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VIEW FROM THE REGIONS

A crisis unlike any other

Eddie Williams writes about the effects of the Covid-19 pandemic in the Midlands and the wider knock-on impact for insolvency professionals.

On 15 March 2020, as we made the decision to cancel the R3 Midlands regional meeting due to take place that week, I don't think we appreciated just how the following weeks would unfold for the UK and the restructuring profession. At time of writing we are all fully under lockdown, with working from home, video conference calls and daily updates on the progression of the pandemic becoming the new normal, with the Midlands a hotspot for cases outside of London. We will perhaps reflect in future that it was the worst of times – illness, distress, hardship and disruption significantly impacting individuals – but with incredible stories of support, ingenuity and bravery that reminded us of the best of humanity.

> The sense from the Midands market is that there are more challenges ahead as the lockdown eases and that it is likely to feel different to previous crises or recessions.

The role of the profession

So what was and will be the role of restructuring and insolvency professionals in response to this crisis, and how challenging will the economic impact be in comparison to other periods?

In the initial stages of the pandemic an incredible number of questions from individuals and businesses about possible support began arising at the same time as complex existing projects and appointments became more logistically challenging. Early announcements around HMRC deferrals and the furlough scheme provided vital self-help, practical liquidity solutions and guidance for businesses. Funder-underwritten support was available, but funders were being asked to make lending decisions while the scheme infrastructure was established.

Restructuring professionals were designated as key workers with an expectation of increasing activity levels taking place. Logistical challenges again increased, such as childcare due to school closures and the reality that colleagues who showed symptoms would need to prioritise and focus on their own health for many weeks.

Calls to contacts revealed spikes of activities as a number of high-profile collapses, particularly in retail and leisure, highlighted the eyewatering number of jobs at risk. In any other week it would be front-page news and yet the pandemic, furlough scheme and media confusion about the exact timing or role of IPs gave these announcements an unusual quality, perhaps with a sense that worse was to come. How long could a business or sector 'hold its breath' without permanent and irreparable damage?

Alongside our sector and technical expertise, our situational experience is perhaps the skill that underpins our best work as a profession. In times of stress and distress, we bring perspective and an ability to see through complexity and focus on key milestones, make decisions and implement them in a professional and empathic manner. As advisers we were no longer providing views one step removed from the situation – we were experiencing its challenges first hand. Through necessity, most businesses in the UK have faced those decisions and had to implement them at speed without the benefit of that experience for the last month. Our role has become one of providing additional support and insight, largely through technology.

So what for the future?

'You will be busy' is a regular comment from colleagues that is often heard during recessions and has always proven true, with careers in restructuring often made in these times. While we are fortunate that our unique skills place us in good stead, I have always felt it preferable to have a stronger economy for all where restructuring would focus on the truly unviable.

The sense from the Midands market is that there are more challenges ahead as the lockdown eases and that it is likely to feel different to previous crises or recessions.

The automotive and manufacturing sector, which was already going through challenges around electrification and ownership models, has been largely hibernated with limited insight into the shape of demand in 2020 and beyond. Defined benefit pension schemes have experienced massive market adjustments, with employer covenants and previously agreed funding arrangements needing to be revisited over time.

Business owners and boards will need to work hard to repay borrowed government and bank funding to recover enterprise value over many years, with the hanging question that the support provided will have to be repaid with a potential impact on future taxation. Broken supply chains and funding requirements for working capital as businesses ramp up activity will create unique challenges to which the funders of viable business will have to support to ensure we rebound as quickly as possible.

We have seen how the concept of light-touch administrations, CVAs and pre-packs are being debated as possible restructuring tools where their use is likely to be scrutinised

> I do believe that the profession will adapt, respond and provide the support to those that need it in times of stress – it's what we do.

It is what we do

There will be casualties, but there will also be once-in-a-generation opportunities for businesses to restructure and acquire market share through growth or acquisition, with the chance to emerge stronger and fitter over time. Many professionals have commented that these conditions can accelerate underlying changes that would normally take place over years in certain sectors and industries. With time, a returning sense of confidence in the future will be vital to any economic bounce back.

While we don't know exactly what this will look like, I do believe that the profession will adapt, respond and provide the support to those that need it in times of stress – it's what we do. ◻

EDDIE WILLIAMS is a partner at Grant Thornton and is the Midlands regional chair for R3.

Legislating out of lockdown

Emmanuelle Inacio shares some of the work and resources around insolvency and pre-insolvency law that INSOL Europe has been pitting against the economic strife of Covid-19.

At the time of writing, most European countries are slowly emerging or envisaging to emerge from long and massive nationwide Covid-19 lockdowns to restart their economies, which are in an induced coma.

Reform and rescue

After adopting aid packages to save businesses affected by Covid-19-related economic crises, most European countries have adopted new provisions amending or impacting their respective insolvency laws. These temporary national reforms affect mostly insolvency proceedings and the rights of creditors; however, the functioning of the insolvency courts and the action of IPs have been limited due to the national lockdowns. In most of the countries, the national insolvency reforms are those of a declared state of emergency and mainly suspend the duty to file for insolvency, extend the time limits of insolvency proceedings or grant the debtor a moratorium.

In this regard, INSOL Europe is collaborating with LexisNexis on a tracker of insolvency reforms[1], which is regularly updated and already covers more than 30 jurisdictions in Europe and beyond. Moreover, INSOL Europe in partnership with LexisNexis is organising weekly 20-minute webinars[2] for members and non-members of INSOL Europe. In these webinars, contributors to the tracker of insolvency reforms are invited to share experiences and views on the current crisis and highlight the restructuring and insolvency law reforms in their jurisdictions.

Lifting the lockdowns

The national lockdowns are slowly being lifted, but declared states of emergency are being extended, and correlatively so are the national provisions amending or impacting restructuring and insolvency law. Indeed, after being at the trough of the wave, businesses hit hard by Covid-19-related economic peril will need time to recover.

Even if it is too early to assess the consequences of national reforms on restructuring and insolvency law, which are not coordinated, massive numbers of insolvencies are expected. The question of how to deal with these huge number of insolvencies will be raised. National legislations will need to be adapted and convergences will arise. Simplified liquidation proceedings (to liquidate the insolvent businesses that are not viable) and more flexible restructuring proceedings inspired by preventive frameworks (to save insolvent yet still viable businesses) will be necessary.

> “Simplified liquidation proceedings and more flexible restructuring proceedings inspired by preventive frameworks will be necessary.”

Very few legislatures have adopted temporary reforms encouraging preventive treatment of businesses' difficulties in the light of the EU Restructuring Directive 2019/1023 on Restructuring and Insolvency. Again, it is too early to assess the effectiveness of the temporary measures in encouraging preventive proceedings.

However, it is urgent to implement a rescue culture in all member states – adapted to prevent insolvency related to the Covid-19 outbreak[3]. Preventive restructuring frameworks must be available for debtors to enable them to address their financial difficulties when it appears likely that their insolvency can be prevented and the viability of the business can be ensured. In order to enable the debtor to continue his business operations and preserve the value of his business during the pending negotiations on a restructuring plan, a general stay of individual enforcement actions should automatically be granted and majority-driven restructurings via pre-insolvency proceedings should also be facilitated. New financing and interim financing should always be protected if its aim is to prevent liquidity problems resulting from the Covid-19 pandemic.

Action from INSOL Europe

INSOL Europe will publish several guidance notes on the implementation of the EU Restructuring Directive on Restructuring and Insolvency[4] with the aim of assisting EU member states with: (i) putting the restructuring frameworks mandated by the directive in place as soon as possible, where no similar restructuring frameworks exist and in a manner that will be useful to other markets under strain from Covid-19; or (ii) where equivalent restructuring frameworks do already exist, refining and adapting them to the directive.

In April 2020, INSOL Europe published its first guidance note on the key points of classification of claims, voting and confirmation of restructuring plans, including by way of a cross-class cram-down.

The second guidance note was published in May 2020 and deals with the stay of individual enforcement actions to be enacted pursuant to articles 6 and 7 of the directive.

Over the course of 2020, INSOL Europe plans to publish more guidance notes, which will offer technical insights and policy considerations relevant to the implementation of the EU Directive on Restructuring and Insolvency.

Faced with the Covid-19 effects on businesses' health, countries must seize the opportunity to give not only an effective insolvency, but also an effective pre-insolvency, response. ◻

EMMANUELLE INACIO is INSOL Europe's conference, technical and training course director.

[1] The LexisNexis PSL/INSOL Europe tracker of insolvency reforms is available at: **www.insol-europe.org/technical-content/covid19**

[2] The INSOL Europe Webinars are available at: **www.insol-europe.org/publications/web-series**

[3] See E. Inacio, A closer look at… The impact of COVID-19 on (pre-)insolvency in Eurofenix, 2020 Spring Edition, available at: **www.insol-europe.org/publications/about-eurofenix**

[4] The guidance note on the implementation of the EU Restructuring Directive 2019/1023 on Restructuring and Insolvency is available at: **www.insol-europe.org/publications/guidance-notes**

Campaigning and communicating in a very different world

The R3 Press, Policy and Public Affairs team has established a Covid-19 taskforce to talk to government during the pandemic.

Since the last issue of *RECOVERY*, the Covid-19 pandemic has changed the government's legislative priorities and agenda drastically. In a situation like this, there's always a risk legislation is passed that is at best unexpected and at worse unhelpful to those it affects.

As a result, the Press, Policy and Public Affairs team has been working hard to ensure that your views and concerns on key Covid-19 and non-Covid-19 insolvency and restructuring issues are heard by government, that you're kept up to date with the latest policy developments and that the profession and its work is understood by politicians, stakeholders and the general public.

Supporting the profession during the pandemic

At the start of the pandemic, we formed an R3 Covid-19 taskforce – a specialist committee to provide insight into the profession's views on the government's emergency measures and impact of the pandemic on the profession, alongside the input we receive from our technical, policy and personal insolvency committees.

This enabled us to respond to government announcements about Covid-19 that could affect consumer finances, business health and business rescue in our work with parliamentarians, journalists and stakeholders, and to publish updates and analysis of policy announcements via our blogs, and public affairs and policy emails.

As well as the increased political activity, the pandemic has also led to a renewed interest in insolvency and restructuring issues in national media. Since the lockdown began on 24 March, R3 spokespeople have briefed at least two national journalists per week on a variety of issues.

These briefings have meant we've been quoted in pieces in national newspapers such as the *Daily Express*, *The Times* and the *Financial Times* (to name just a few) and a number of the journalists we have spoken to have come back for further discussions.

Movement on corporate insolvency framework reform

For the best part of five years we've been calling for progress on the proposals to reform the corporate insolvency framework. Consultations were published in 2016 and 2018, but any further action was stalled by the government's focus on exiting the EU.

That changed on 28 March, when the business secretary announced plans to introduce these long-awaited reforms – as well as a plan to temporarily suspend wrongful trading provisions for three months – as soon as possible.

Naturally, we welcomed the progress on the reforms, but were keen that the final version helped the profession's efforts to rescue businesses and preserve jobs, as well as ensuring that the concerns raised by the profession about aspects of the proposals were taken on board by the government.

Given our work engaging with officials over recent weeks, we remain hopeful that their willingness to listen translates into a set of reforms that help the profession and the UK's world-renowned insolvency and restructuring framework.

Continuing to oppose Crown preference plans

In the chancellor's 11 March budget statement, just two weeks before the lockdown began, the government confirmed its intention to progress with plans to make HMRC a preferential creditor in insolvencies.

Before the budget, R3 had organised a letter to the chancellor from a number of business bodies that opposed this policy. This letter was subsequently published in the *Daily Telegraph* ahead of the budget, while a separate R3 interview calling on the government to scrap the proposal also made it into the paper. Our response to the news that the government would progress with the proposals was also featured in a story on the *Daily Telegraph* website.

Post-budget, we have continued to campaign against the proposals, briefing

> "Since the lockdown began on 24 March, R3 spokespeople have briefed at least two national journalists per week on a variety of issues."

MPs, journalists and stakeholders about our concerns around the policy. And when the bill had its second reading in the House of Commons, R3 was mentioned in the debate and the profession's concerns highlighted to ministers by SNP Treasury spokesperson Alison Thewliss MP.

The bill still has a number of stages to complete before it receives royal assent so the fight is not over. We will keep campaigning against the proposals and highlighting the consequences they will have for businesses, jobs and the economy if they are allowed to enter the statute book in their current form.

Post-lockdown priorities

Once normality returns, there are a number of legislative and policy issues that we expect to face. These include changes to the framework for dealing with airline insolvencies – something that might become more urgent very quickly – a further consultation on how the profession is regulated and an important discussion on the future of cross-border restructuring and insolvency in and between the UK and EU in a post-Brexit world.

Until then, we'll keep supporting and promoting the profession and its interests at a time when its skills and abilities are going to be under increased demand – and when it will be under an even brighter spotlight than normal.

JAMES JEFFREYS (LEFT) is senior press, policy and public affairs manager at R3.

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An interview with… R3 president Colin Haig

Colin Haig talks about how instrumental the insolvency profession will be in handling the effects of the pandemic and its economic aftermath.

Q How did you become involved with R3 and why?

A I have been involved with R3 more or less all throughout my career. From day one, what I liked about it was the fact that members of so many competitive organisations would sit around a table together and gladly set aside 'party politics' to share their intellectual property in the interest of making R3 better, making the profession better and making the market a better place to work. That culture has stayed strong throughout the time I've been a member and is stronger now than it's ever been.

As a result, from the time I was senior enough to convince my employers that I was worthy of attending the R3 conference, I made sure I was there. I can remember some of my very early conferences really quite well – in fact, I met my wife at one!

I also sat on the R3 Council about ten years ago. Before this, I'd already been involved in the Insolvency Practitioners Association, which is a similar body with different aims and objectives, so I knew something, but not much, about the work R3 does. Sitting on the council really hammered home the breadth and depth of stuff we look at and how much we do for the profession – and I've been a keen supporter ever since.

Q How have you been working in the role of president with the social distancing measures in place? R3 often arranges a lot of meetings with politicians, journalists and members; are these still happening?

A Yes, but without the physical meetings. R3 is held in high esteem by the government – we are one of their go-to organisations to comment on all kinds of insolvency and restructuring issues – and we're doing that now via Zoom and video conferencing. Given the challenges that I think our members are going to face in the next year, that role and the work we do in that area is absolutely critical.

And it's critical because our members are going to be right on the front line when it comes to keeping people in jobs. The more we can encourage their natural

Colin Haig biography

- Colin Haig joined the Official Receiver's department at the age of 19, inspired by a conversation with a former Royal Air Force colleague of his father's who had worked as an assistant official receiver. He took a job in the companies winding up department, working in Atlantic House two floors below his father, who worked in Revenue and Customs in the same building. Colin was regularly spot-checked on the Companies Act 1948, the de facto route to qualification at the time, perfecting his knowledge just in time for the introduction of the Insolvency Act in 1986.
- Colin moved from public sector to private shortly afterwards with Stoy Hayward, where he joined a team working on trading receiverships (the forerunner to administration). It was here that He garnered a lot of his insolvency experience – covering everything from chain businesses in Southampton and Portsmouth to hotel chains in Wales and even further afield in Europe – before receiving his license in 1989.
- Colin then moved to Neville Russell in the Luton office to help build the firm into a bigger business, before joining Baker Tilly to help build its restructuring business out of Watford. He later became head of restructuring at the firm, handling high-profile bankruptcies such as that of disgraced Cabinet minister Jonathan Aitken and historian and Holocaust-denier David Irving, alongside his corporate work.
- It was while at Baker Tilly that he received a call from PriceWaterhouseCoopers to assist in building its middle market team for approximately six years before undertaking another six at KPMG. He returned to Stoy Hayward, now called BDO, in March 2017 as a partner in restructuring.

> What I liked about R3 was the fact that members of so many competitive organisations would sit around a table together and gladly set aside 'party politics' to share their intellectual property.

instinct to deploy imaginative and innovative solutions, the better. There are lots of management teams engaging with member firms and generally seeking advice around options at the moment, and it's more of an advisory environment than an influx of applications for administrations.

Going forward, a lot of the work our members are going to be involved with won't just be insolvency – it will be around consensual restructuring techniques to, hopefully, avoid an insolvency process. As the lockdown starts to relax and the UK starts to return to some sort of semblance of routine working patterns, our members are going to be in the spotlight, and the more we at R3 can minimise unfounded criticism from external parties, the better.

Our members have invaluable experience, which puts them in a unique place, but a lot of the situational challenges will never have had a precedent before. We have never had viable, functional corporates with competent management teams all of a sudden seeing their viability threatened by a virus. We've got to be informed by our experience and our judgement of what works but, at the same time, we've got to be innovative and imaginative. And I think there is no finer set of people on earth to do that than R3 members (although I am slightly biased).

Q Does it feel a bit unfair that coronavirus has sort of 'taken away' your opportunity to focus on the issues that you feel are important in your year as president?

A There are only so many things you can reasonably juggle in the space of 12 months. What I would say is that, at any one time, there's an executive committee at R3, which comprises the immediate past president, the current president, the vice president and the deputy vice president. This means you've always got four years to build continuity between what you do this year, what your successor does next year and what your colleagues did in the previous years. When something like Covid-19 happens, though, you know you've got to give that the priority and the resource that it requires – and we have and we will.

But it isn't just about being reactive. One of the things that's happening at R3 is that we've introduced corporate membership, which has bought in approximately 560 new members in its first few weeks. The reason that's good is because typically we're in danger of having a membership comprised of those that are well-established in their careers. We want to do everything we can attract people as early as possible in their careers – as well as those who work in restructuring and want to be a part of R3, but don't, for instance, work at an accountancy firm. This includes people such as those who work in various government departments with a restructuring focus – not just the Insolvency Service but the Pension Protection Fund, the Pensions Regulator and the Care Quality Commission.

Another thing I'm keen to look at in my year as president is how we engage with people at different stages of their careers, and we're currently looking at developing a best-in-class training offering for those who are in the early stages of their time in the profession – and I look forward to talking about it in future editions of *RECOVERY*.

> Nothing I could think of would give me the same amount of fun that I've had doing this job.

Q What have been the biggest challenges you've encountered so far that have been created by Covid-19?

A The challenge is the obvious one, which is that it doesn't matter what business you're contemplating or analysing, no business can tolerate an uncertain and extended period of lockdown. At some stage, even the soundest business is going to have to make some adjustments to its cost base to be able to survive. However, there are going to be some businesses for whom no amount of planning is going to solve the problem, particularly with the extent to which they've had to take on government loans to meet their short-term cash needs, as, at some point, those loans are going to have to be dealt with, paid back and serviced. That's going to present management teams with a problem, and that sort of problem may require a bespoke solution based upon a company's particular circumstances. As I said earlier, I think we are going to see a lot of issues for which there is no clear precedent in future.

Q And is this where the profession comes in?

A Exactly! I made the point earlier about us needing to combine experience and innovation during and after this pandemic, and the need to balance established practices with embracing new ways of working, but we also need to collaborate. The more we join forces, the better results we get.

And the profession is a community. I've seen that since I became R3 president, as I've had LinkedIn messages from people I've not spoken to for ten years. I would urge anyone in *RECOVERY's* readership that wants to get involved in our own community at R3 to send me an email or text, or write to the editor. Every president says this, but I really believe that, now more than ever, if you've got something to contribute or something to say, please get in touch. You can contact me at Colin.Haig@bdo.co.uk.

Q We like to finish on a bit of a lighter note and, like the rest of the country, probably stop talking about the pandemic. If you weren't under lockdown, what would you be doing outside of work?

A I'm an amateur musician and play in a four-piece covers band, mostly jazz or light jazz. I used to play in the same band as a number of R3 past presidents for years and years. Music is a big thing in my life. We play at a lot of pubs, which my wife gets a bit tired of, but we enjoy it.

Q What would you have done if you'd not become an insolvency practitioner?

A I've been thinking about this a lot and nothing I could think of would give me the same amount of fun that I've had doing this job. ◻

MATT JUKES is publishing manager of *RECOVERY* magazine.

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