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RECOVERY

Uncertainty

Sanctions: Warning for IPs as airline administration stalls

IP fees: Schedule B1 exceptions pose problem

Insolvency laws still under review as sunset deadline looms

Good Box: Creditor-led plan 'contained holes'

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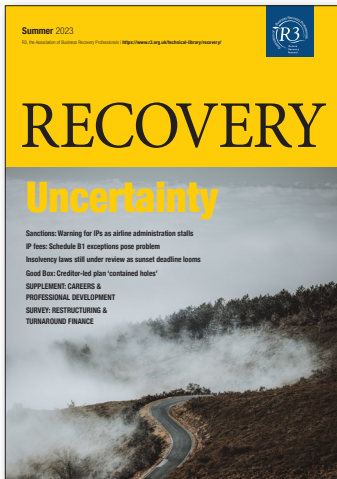


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you think?

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Recovery itself?

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“

This edition's theme is the uncertainty in which we all currently live in. Could there be a better word to describe our industry over the past couple of years? ”

From the editor

Before we get into the content, I would first like to welcome Alexandra Davies of Menzies in Cardiff to the editorial board and to welcome back Alan Bennett, now at Womble Bond Dickinson. Glad to have both of you on board and the South West and Wales is now fully represented!

This edition's theme is the uncertainty in which we all currently live in. Could there be a better word to describe our industry over the past couple of years? All the economic headwinds are in place, but the economy remains resilient. Are things changing and how many times have we said that recently?!

Uncertainty takes many forms. Jo Milner explains the effect of sanctions on her aviation administration, James Morgan KC and Amy Flavell look at uncertainty regarding recovery of fees and Anthony Walters looks at the legal position post EU exit.

Katie Farmer looks at the HSBC and Stanford decision in our Legal Update. Restructuring Plans are gathering pace and many of you will have heard of the Good Box decision. Ashley Armitage and Matthew Maddison review the decision and we hear from the administrator himself, Jeremy Frost, with his views on the matter.

Further afield, Alex Davies and Spencer Vickers look at restructuring developments in the Cayman Islands, whilst, back in the UK, Kate Heaney looks at the provisions of section 216 of the Insolvency Act.

Mark Sands looks at the effect of mental health issues on those that we deal with in our industry and the FCA's approach to vulnerable consumers.

Andrew Williamson tells us about increasing recoveries from unpaid debts in a process and Maria Strong implores greater HMRC engagement in voting on CVLs.

Congratulations to all those who have passed their JIEB and, as is customary at this time of year, we look at careers & professional development.

In line with the theme of uncertainty, the survey for this edition looks at the options available for financing restructurings.

Congratulations also to our new president, Nicky Fisher who opens the publication with her first column and concludes it with her interview.

Let us hope that uncertainty leads to opportunity. Enjoy the read!



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

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Sustainability

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Paving the way for the future of the profession

Nicky Fisher sets out her four priorities as new R3 president, and reflects on the success of the recent Annual Conference, Fraud Conference and Southern Forum

I don't think any R3 President expects their time in office to be quiet. Recent holders of this office have faced Brexit, Covid, political turmoil, and increased interest in the profession from the Government and the media.

My year won't be any different. The Government is consulting on changes to our regulatory and personal insolvency frameworks, and with insolvency numbers rising (at least compared to the last couple of years), public interest in the profession is going to continue to be high.

That's going to shape my plan for my time in office, but before I talk about what I'd like to achieve this year, I would like pay tribute to the person I've taken over from.

Christina Fitzgerald has had a stellar 12 months as President of R3. She's been instrumental in helping rebuild our event programme in the nations and regions, was the driving force behind last year's fantastic conference in Windsor, and has been a first-rate ambassador for the profession.

I am very grateful to be able to draw on her experience and insight as she steps into the past president role, and to be able to count on her support during my presidential year.

Presidential plans

My first priority is to ensure we respond robustly to the Government's proposed regulatory reforms. Any changes the Government brings in are likely to be a significant shift from what we have currently, but they need to be developed with the profession if they're going to deliver the outcomes the Government wants.

The same goes for the personal insolvency framework review. I appreciate not all R3 members will be involved with this aspect of insolvency, but I believe it is vital we and the profession have a strong voice in this area and that R3 continues to influence personal insolvency policy across the Government.

My third priority is to continue to develop our work on diversity, equity and inclusion. The profession will only keep evolving if we ensure our talent pool is as broad and deep as

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The profession has changed hugely over the last five years, and it is vital we continue to evolve our training, technical and representation work so we can support members as effectively as possible”

possible, so I am determined to build on the work R3 is doing with the Insolvency Service to facilitate this.

And my final priority is to ensure we are paving the way for the future of insolvency and restructuring. The profession has changed hugely over the last five years, and it is vital we continue to evolve our training, technical and representation work so we can support members as effectively as possible, and continue to communicate and highlight the value of the profession to the Government, industry and the public.

Back to back conferences

Events and conferences are a key part of R3's offering, and March saw our Southern Forum and the Fraud Conference – the latter of which R3 runs in partnership with the Fraud Advisory Panel and Insol Europe – take place in quick succession.

More than 100 people came together at our Southern Forum to discuss and debate issues that included the future of the UK economy, offshoring, and diversity and inclusion – as well as catching up with old contacts and making new ones.

We also raised more than £2000 for Ben Pavitt's Legacy of Love fund, which raises funds for research into childhood cancers, and was set up by Mike Pavitt, former chair of the Southern and Thames Valley region.

Two days later, we held our joint Fraud Conference, which covered topics that included the future of Companies House,

the difference between different European insolvency jurisdictions, and the story behind the Boris Becker trial.

Return to Europe

May saw R3's Annual Conference take place in Venice. I wholeheartedly believe the decision to head outside the UK for the first time in five years was the right one – more than 220 people from across the profession joined us for two days of content, covering topics like charity restructuring, working with regulated entities, and contentious national and cross-border restructuring, among others.

A personal highlight was our keynote speaker, BBC security correspondent Frank Gardner. Given the wide-ranging effects of the war in Ukraine on economies across Europe, it is clear that international incidents can and will have an impact on the economy in the future.

I was delighted with how this conference came together, and am very grateful to everyone who helped make it a success.

Our vice president Tim Cooper has already started planning next year's conference and I can't wait to find out what he and his conference committee have in store for us...

Looking ahead

The rest of this year shows no signs of slowing down. Over the summer we have a range of regional events and conferences, the R3 Training Academy is set to add to its growing portfolio of courses, and our external affairs team has its hands full with consultation responses, policy papers and two potential Government consultations.

Looks like this year will be another busy one...



Nicky Fisher is a partner at Herron Fisher and R3 president



Annual Conference

1 – 3 May 2024, Fairmont, St Andrews

Save the date!



For more details, please contact the team events@r3.org.uk
www.r3annualconference.com

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Invitational Golf Day,
Birmingham
26 June 2023



R3 South West &
Wales Golf Day,
Bristol
28 June 2023



Restructuring Plans
in the mid-market,
Manchester
29 June 2023



Ladies Summer Lunch,
London
30 June 2023



Scotland Fringe 2023,
Save the date
10 August 2023

To view the full range of R3 networking events and conferences please visit
www.r3.org.uk/events-training

Legal Q&A

Monica Kapur answers your insolvency queries

Q I have been appointed as an insolvency practitioner over an insolvent construction company. How do I determine what claims there may be to ensure that recoveries for creditors will be maximised?

A In order to determine if there are any claims to recover monies from other parties, whilst the insolvency practitioner (IP) carries out their usual investigations, they should, with the help of a quantity surveyor (QS), dedicate some time to investigating what forms of contract the various projects are under. The QS will be able to undertake an audit of the site(s) and gauge the status and financial viability of each individual project.

The QS will, amongst other things, speak to the surveying or commercial director of the insolvent construction company to understand their QS systems, and how the surveying or commercial director financially managed each contract, including with the commissioning client, subcontractors and suppliers. These conversations can be very helpful and efficient as they should have a good deal of background knowledge of each project and their systems, which can save the time of the QS in considering what information is, or will

be, available. During the initial investigation stage, it is important to obtain information as quickly as possible and to eliminate any unmeritorious or unprovable claims. The QS can then seek all contracts and documentation to conduct an analysis.

The analysis will include whether there are any contractual issues which need to be considered, such as termination procedures, and whether there is a repudiatory breach or wrongful termination. In addition, consideration will be given to whether there are any relevant bonds and bond claims, evidence of retentions, and whether there are outstanding works or remedial costs alleged.

Having carried out this analysis, the QS can then support the IP by collating the available information and documentation into the format required for making a claim. As part of this process the QS can further advise on the strength of the evidence available and the likelihood of a claim being successful.

By considering all contracts, abstracting the relevant information relating to time, progress and payment rules, along with engaging appropriately qualified and experienced contractual professionals to assist in the inspection of the costings, the IP can ensure that recovery for creditors will be maximised.

Q What options are available to insolvency practitioners to recover sums owed to insolvent construction companies?

A Insolvency practitioners now have the ability to bring adjudications to recover sums due. This follows the Supreme Court's decision in *Bresco Electrical Services Ltd (in liquidation) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC25 (Bresco), which was significant for the restructuring and insolvency industry.

Prior to Bresco, the case law established that the right to adjudicate was essentially lost when a company entered insolvency. The Bresco decision clarified that the right to refer a dispute to adjudication, which is afforded to all parties to construction contracts, continues after a company goes into administration or liquidation. That said, the enforcement of



an adjudicator's decision is still subject to certain conditions especially if there are other continuing issues between the parties.

Adjudication is incredibly useful as it provides an abridged 28-day dispute resolution process to determine a dispute under a construction contract. This process can resolve payment disputes alongside other matters to include the interpretation of a contract.

In addition to the swift process in determining a dispute, another advantage – unlike litigation – is that the adjudicator cannot award payment of a party's costs. Therefore, each party bears its own costs of an adjudication unless otherwise expressly agreed between the parties.

The adjudicator only has the power to determine which party will pay the adjudicator's fees – usually the losing party. The decision of an adjudicator is binding and valid on the parties unless subsequent arbitration or court proceedings are issued to determine otherwise.

Adjudication is therefore a valuable instrument available to insolvency practitioners to increase the recovery of debts owed to insolvent construction companies.



Monica Kapur is a partner in the restructuring and insolvency team at Harrison Clark Rickerbys

“

The Bresco decision clarified the right to refer a dispute to adjudication, which is afforded to all parties to construction contracts, continues after a company goes into administration or liquidation. Adjudication is incredibly useful as it provides a 28-day dispute resolution process to determine a dispute”

Recent case summaries

The latest insolvency update from **Andrew Brooke** and **Paul Wright**

Re Aartee Bright Bar Ltd (in administration) [2023] EWHC 606 (Ch)

Stakeholders often hold different views as to the proper course to be taken by a company in administration. In this case, the court was presented with two mutually exclusive options: (i) the administrators' plan to sell certain business and assets of the company to a preferred purchaser; and (ii) a rescue plan supported by the majority of the company's creditors – including the applicant (a creditor) – which was said to be dependent upon the court making an order terminating the administrators' appointment. The applicant did not dispute that the statutory purpose of an administration could be achieved by the proposed preferred purchaser sale, but contended that the rescue plan would provide a far better outcome for the company's stakeholders.

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The applicant was required to show that the appointing creditor had an improper motive for making the appointment ”

To obtain such an order under paragraph 81 of schedule B1 to the Insolvency Act 1986, the applicant was required to show that the appointing creditor had an improper motive for making the appointment.

Having reviewed the authorities, the judge held that there was no threshold pre-condition to making a para 81 order: it is sufficient that an allegation of improper motive is made, and that it is made honestly and on reasonable grounds. It is not necessary for the applicant to particularise its case, or to adduce positive evidence, or prove its case on a balance of probabilities. However, if the judge is able to do so on the evidence before the court, they should go on to make a positive finding about whether the appointing person had an improper motive.

As to what improper motive meant, the principle to be derived from the authorities is that “*what is required is conduct which amounts to an improper use or abuse of the administration procedure for some purpose which is inconsistent with, or not in harmony with, the statutory purpose of administration*”.

In *Aartee*, the applicant contended that the only reason for the appointment was to avoid reputational damage to the appointing creditor. The judge accepted this motivated the appointment, but that it was only one factor among many (and probably a minor consideration at that). The appointor was owed substantial sums of money which it could not be certain would be repaid within a short period. Though other finance companies might have given more time to pay, the fact that the appointor did not was not evidence that it was necessarily acting for an improper motive. Nor was the decision to appoint administrators inconsistent with the statutory purpose of administration. The application was dismissed.

Re Listrac Midco Ltd [2023] EWHC 460 (Ch)

This case involved the use of part 26A restructuring plans under the Companies Act 2006. The plans concerned a series of related companies (plan companies) whose business was the provision of care services as part of the Lifeways Group. The aim of the plans was to reduce the liability of the plan companies to their secured creditors. As part of it, the secured creditors were to provide more funding and take a majority stake in most of the companies. The plans would also have modified or compromised the plan companies' liabilities to their unsecured creditors, including landlords.

Mr Justice Johnson sanctioned the plan under sections 901F and 901G of the Companies Act. His judgment contains a useful review of the authorities about the exercise of the court's discretion when sanctioning part 26A. Furthermore, it resolves an interesting point that arose when, in respect of some of the plan companies, the unsecured creditors did not approve the plans by the 75% majority as required under s901F.

The difficulty was that only one unsecured creditor had attended the meetings where the 75% majority had not been reached. The judge held that a ‘meeting’ under part 26A required the attendance of at least two

“

Crucial in this respect was that under the ‘relevant alternatives’ of insolvent administration or liquidation, the unsecured creditors would all have been out of money at any rate ”

creditors. However, that posed no obstacle to the court's exercise of its power under s901G to sanction a plan despite the failure to secure the requisite majority. It was sufficient that a meeting had been ‘summoned’ under s901C and, for whatever reason, an agreement had not been reached. To hold otherwise would allow dissenting creditors to obstruct a restructuring plan by non-attendance alone.

Assuming that the two statutory conditions A and B under s901G have also been satisfied, the court's discretion to sanction a plan under this section was the same as its discretion under s901F, but for two additional factors. The first was that there was no active opposition (as was the case here) to the plan, the second being that the plan represented a fair overall distribution of the benefits of restructuring. Crucial in this respect was that under the ‘relevant alternatives’ of insolvent administration or liquidation, the unsecured creditors would all have been out of money at any rate. Therefore, the plans were not unfair to them by benefitting them far less than they did the secured creditors.

Another illuminating comment by the judge was in response to a concern raised by the plan companies' former CEO about sums owed to the companies' former professional advisers, which when compromised may discourage such advisers from acting for financially struggling businesses. The judge noted that such professionals are aware of the risks attendant upon such engagements.



Andrew Brooke and **Paul Wright** are barristers at 9 Stone Buildings

Company loss is key to breach of duty claims, clarifies court

Pre-insolvency payments of genuine debts that do not end up in directors' pockets are unlikely to be regarded as causing a loss to a company, says **Katie Farmer**

Insolvency practitioners will be interested by the Supreme Court decision in *Stanford International Bank Ltd (in liquidation) v. HSBC Bank PLC* [2022] UKSC 34, where the issue for the court was whether an insolvent company suffers any loss if payments are made out of its bank accounts pre-formal insolvency which discharge a genuine debt owed by that company in an equivalent amount. Similar questions often arise in the context of breach of fiduciary

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It was common ground that the payments could not be challenged as unlawful preferences or otherwise invalid or susceptible to being reopened or reversed, but rather was money that the payees were entitled to receive and entitled to keep”

What is a Quincecare duty?

The Quincecare duty prevents a bank from acting on a payment instruction where it has 'grounds to believe' the instruction is an attempt to misappropriate the account holder's money. While the first successful claim for breach of the duty only incurred in 2019, this is likely to remain in the spotlight.

duty claims against directors in circumstances where a director has caused a company to pay a particular creditor, reducing its cash but also reducing its liabilities, such that the net balance sheet position remains unchanged.

The proceedings concerned the correspondent banking facilities provided by HSBC Bank to Stanford International Bank (SIB) and the extent to which HSBC was subject to a Quincecare duty to refuse to comply with payment instructions from SIB. The Supreme Court was required to consider whether, even if HSBC did owe a relevant duty of care and was in breach of that duty, that breach gave rise to any recoverable loss.

Stanford International Bank Ltd was a company incorporated in Antigua and Barbuda. Until its collapse in February 2009, SIB was beneficially owned by Robert Allen Stanford, who was also a director and the chairman of the board of directors of SIB.

The principal business of SIB was the sale

of certificates of deposit, which were sold as investment products offering a good rate of return. Those who invested in the certificates were led to believe that the funds they deposited would be invested by SIB in a diversified, low-risk portfolio of assets and securities. In fact, SIB was running a Ponzi scheme. When customers requested withdrawals of money from SIB, or when their product supposedly matured, the payment would be made from capital invested by other customers.

In 2008, an increasing number of SIB's customers requested withdrawals and there was a run on the company. In February 2009, the US Securities and Exchange Commission charged Mr Stanford in relation to the fraud and a receiver was appointed in the USA over the Stanford Financial Group. At this point HSBC froze SIB's accounts. In April 2009 liquidators were appointed over SIB by the Antiguan court and that liquidation was subsequently recognised by the English High

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Lady Rose commented that, had HSBC complied with its Quincecare duty, SIB would have had £116 million to its credit, but would not have discharged any of the payments due to its customers”

Court as foreign main proceedings under the Cross Border Insolvency Regulations 2006.

The appeal concerns payments between August 2008 and February 2009 of £80 million paid to customers direct from SIB's accounts with HSBC in redemption payments and interest, and £36 million transferred to accounts held by SIB at the Toronto Dominion Bank and thereafter paid out by the Toronto bank to SIB's customers in redemption payments and interest.

Wrongful preferences

SIB is being wound up in Antigua, where the statutory insolvency regime has no provision for the avoidance of wrongful preferences. Therefore, it was common ground that the payments in question could not be challenged as unlawful preferences or otherwise invalid or susceptible to being reopened or reversed, but rather was money that the payees were entitled to receive and entitled to keep.

On the question of loss, SIB's case was that if HSBC had not wrongly paid out the £116 million from SIB's bank account, then that money would still be in its bank account and SIB would be better off by that amount.

However, in this case, SIB had discharged certain liabilities that it owed to its customers. SIB asserted that if HSBC had not made the payments, those debts would still be owed to the relevant customers, who would have to prove their debts in the liquidation and would be likely to receive a dividend of only a few pence in the pound.

SIB's loss, it asserted, was the loss of the chance of discharging those debts for a few pence in the pound, quantified as the difference between the payment wrongly made by HSBC to the relevant customers (either directly or indirectly through the Toronto Dominion Bank) of 100 pence in the pound, and the dividend they would otherwise have received if they had had to prove in the liquidation.

Treat creditors more fairly

On the loss of chance, in her leading judgment Lady Rose commented that, had

HSBC complied with its *Quincecare* duty, SIB would have had £116 million to its credit, but would not have discharged any of the payments due to its customers (whether those who had received payment prior to liquidation, or those who were unpaid at the commencement of the liquidation).

That would mean that a higher percentage of the debt that was originally owed to each customer will be 'discharged' when the company is dissolved. The chance that is lost to SIB as a result of HSBC's breach is not a chance either to pay more money overall to the pool of indistinguishable customers or a chance to 'discharge' more of their indebtedness. This was a loss of a chance to treat creditors more fairly and not a pecuniary loss to SIB.

Accordingly, Lady Rose found that SIB had not suffered a loss of a chance that has any pecuniary value to it. Lord Leggatt referred to the fact that paying a valid debt does not reduce the payer's wealth, finding that SIB has suffered no net loss.

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It is hard to see how, in the absence of loss to the company or gain to the director, a director who causes a payment to be made to a particular creditor that does not meet the criteria for unlawful preference and which the creditor is entitled to keep, could properly be held liable to repay the money”

Loss to an insolvent company

SIB argued that a payment can cause loss to an insolvent company even though it discharges a debt owed by the company, referring to the decision in *West Mercia Safetywear Limited v. Dodd (1988) 4 BCC 30*, in which, prior to liquidation, the director caused £4000 to be transferred in disregard of the interests of the general creditors towards a liability he guaranteed could be repaid. The court in *Dodd* held that the payment had been an unlawful preference, and that in causing the company to make it, the director was in breach of his fiduciary duty owed to the company.

Considering this, Lady Rose made a distinction between a director in breach of a fiduciary duty for causing a company to use its funds to extinguish an existing liability from which the director derived a personal benefit,

and a tortfeasor's liability for a breach of duty that results in no pecuniary loss being suffered by the relevant company, outlining that the nature of the duty owed by a director to the company when it becomes insolvent is different from the *Quincecare* duty owed in tort by the bank to its customer.

The issue of personal benefit was also key to Lord Leggatt, concluding that it is hard to see how, in the absence of loss to the company or gain to the director, a director who causes a payment to be made to a particular creditor that does not meet the criteria for an unlawful preference and which the creditor is entitled to keep, could properly be held liable to repay the money.

Lord Leggatt specifically rejected the idea that a disposition of a company's assets outside the statutory insolvency regime for unlawful preferences could be treated as a loss to the company if it discharges a liability and so leaves the company's net asset position unchanged.

Breach of duty claims

Both judges also attached importance to the different remedies available to the court on breach of duty claims, considering that even if, upon insolvency, a defaulting fiduciary can be ordered to replace the money when no loss has been caused, that was a particular feature of the insolvency regime whereby transactions can be reversed in furtherance of the policy of redistribution, and did not aid SIB's case seeking damages in tort.

Both Lord Leggatt and Lord Sales (dissenting) gave some consideration to the decision in *BTI 2014 LLC v. Sequana SA [2022] UKSC 25* and whether a company's losses are one and the same as the losses suffered by its creditors.

They separately set out that a company, while a separately legal person, stands for the interests that the corporate personality represents and protects. Nevertheless, Lord Leggatt found that loss suffered by the company and loss suffered by its creditors are different losses.

Key to any breach of duty claim brought against directors of insolvent companies will be the requirement to demonstrate the loss suffered by the company, which is not the same as the loss suffered by its creditors. This decision reinforces the notion that, absent a gain to a director, causing a company to use its funds to extinguish an existing liability is unlikely to be regarded as causing a loss.



Katie Farmer is a partner at Trowers & Hamlin

Sanctions warning as airline administration stalls

With banks unwilling to deal with sanctioned entities and limited access to records, IPs considering appointments with a sanctions dimension should take care, says **Jo Milner**

The Russian invasion of Ukraine has had a massive impact on all aspects of society and has seen European governments take steps with regard to private assets that would have been unthinkable just a few years ago¹. A lesser-known impact has been on companies and individuals connected with Russia, their workforces and customers which, though operating profitably in the UK for years, have now found themselves caught up in the sanctions regime. Some have had no alternative but to turn to the courts and IPs for help, which has resulted in more unforeseen consequences.

Until March 2022, CargoLogicAir Limited (CLA) was the UK's only maindeck freighter airline, which had held a major contract to transport urgent medical supplies to combat Covid-19 and undertook many operations in the humanitarian field. It was an English registered company and a wholly owned subsidiary of Cargo Logic Holding Ltd and had become highly profitable. CLA had a highly skilled workforce of approximately 110 employees – mainly in the UK but also in other European jurisdictions.

Following Russia's invasion of Ukraine in February 2022 and the subsequent imposition of EU and UK restrictions against Russian carriers and their owners, but before CLA became subject to UK sanctions, it became increasingly difficult for it to continue its commercial operations.

Prior to the invasion it leased two B747 aircraft in carrying on its business. In February 2022, the EU refused access to EU airports for Russian carriers and prohibited them from flying over EU airspace. In March 2022, the UK and EU introduced additional measures prohibiting the provision of technical assistance to Russian carriers, effectively grounding the aircraft.

On 16 June 2022, the majority shareholder of the parent company, Mr Alexey Isaykin, who was also the parent company's sole director, was designated as a target of asset-freezing measures pursuant to The Russia (Sanctions) (EU Exit) Regulations 2019. While neither the company nor the parent company were specifically 'designated', funds and economic

resources are to be treated as "owned, held or controlled by a designated person if they are owned held or controlled by a person who is owned, held or controlled directly or indirectly by a designated person". Consequently, the company's assets were frozen.

Was a solvent solution available?

CLA engaged legal advisors DLA Piper in June 2022 to prepare an application to the Office of Financial Sanctions Implementation (OFSI) for a licence enabling it to continue to meet its basic needs and prior obligations payments. While waiting for the licence, the management team explored various options to save the business and alleviate the impact of sanctions on creditors and employees. In early July 2022, CLA applied to OFSI requesting authorisation for its ownership to be transferred to a British-based and registered employee-owned trust (EOT), with control moving from the parent majority shareholder to the company's employees. It was clear that if such a transfer was not effected quickly, the business would be damaged beyond repair, meaning there would no longer be a British-registered cargo-only airline. Senior decision makers at OFSI however refused the EOT licence application.

\$13 million in the bank, but cash flow insolvent

CLA had one operational bank account with Citibank. In June 2022, it informed Citibank promptly about the sanctions and tried to maintain a regular dialogue. However, despite being granted the basic needs licence and providing it to the bank, it faced considerable delays in processing payments, including salaries. On 28 October 2022, the bank gave notice that it intended to close the account on 30 November, leaving the company unable to access its funds, as permitted by the basic needs licence.

CLA was in the unique position of having achieved a profit of c.\$45.4 million (£36 million) in 2020, with over \$13 million in the bank – sufficient to deal with all its liabilities – but was unable to pay creditors as they fell due because of circumstances entirely outside of its control.

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Once the joint administrators are able to establish an operational bank account, they will also be able to commence realising other known assets in the estate for value ”

Sanctions in administration

On 10 October 2022, following OFSI's decision to refuse the EOT licence application, CLA engaged insolvency practitioners to assist with contingency planning and options analysis. Multiple routes were explored, including the possibility of whether the circumstances were 'extraordinary' enough to meet OFSI's guideline for it to authorise a sale of the business and assets to a potential investor to salvage CLA.

The sole director was very conscious of his fiduciary and statutory duties and was very concerned about the prospect of wrongful trading. On 8 November, he applied to the court for the appointment of administrators and an order was made by the court on 16 November.

The judge noted that the closure of the bank account would not lead to funds being divested but only a cessation of activity on that account because the bank would cease to administer it. Indeed, the bank appeared to want to divest itself of the monies sitting in that account, but there was no account to which those funds could be transferred.

Since CLA was subject to sanctions, no alternative commercial bank was willing to do business with it. It was felt that an administration order was the only way CLA could avoid a disorderly wind-down and realise value for its creditors.

Before their appointment, the proposed administrators knew that they needed to engage quickly to find alternative banking providers to hold the company's funds.



Both of Cargo Logic Air's planes had been repossessed by the leasing companies. A claim for the security deposits remains live, but it is difficult for the administrators to assess without full access to records

Access to the bank account

There are presently no provisions in UK legislation for companies with ultimate beneficial owners subject to sanctions to enjoy any sort of partial relief from the sanctions regime. Consequently, banks treat such companies in the same way as any other entity impacted by sanctions and generally steer away from offering any banking facilities – despite, in this case, the administrators applying for a separate licence from OFSI, potentially being personally liable for possible infringements of the sanctions regime and being officers of the court.

The joint administrators could not use the existing company bank account and, despite strenuous efforts, have not been able to identify a UK-based, FCA-registered bank willing to open a new account for a company in administration. OFSI have not been prepared to give permission for the use of a non-UK bank. Prior to their appointment, therefore, the proposed administrators reached out to the Insolvency Service to use the Insolvency Service Account (ISA) as a bank of last resort.

Navigation of sanctions post-appointment

OFSI finally granted the administration licence and an updated basic needs licence on 6 February 2023, some three months after the appointment. Because of these delays the joint administrators reached the disappointing conclusion that achieving a sale of the business and assets of the company was unlikely. The administration strategy has now shifted to achieving a better result for the creditors as a whole with a key focus being on ensuring the employees can be paid as soon as possible. Some of the company's employees have not been paid since the autumn of 2022 and are becoming increasingly desperate for payment as time goes on.

Once the OFSI Licences were granted, the joint administrators worked to liaise with the bank and the Insolvency Service and its bankers to ensure that everything was put in place to effect the transfer of the balance on the bank

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Any IP considering taking such an appointment should carefully understand the context of the company's situation and the effect that sanctions will have on achieving the purposes of administration”
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account. When the administration order was applied for, ISA officials agreed to permit the use of the ISA but once the OFSI licences were obtained objections were then received from the ISA's own bankers because of the sanctions issue and the general reluctance of UK bankers to deal with companies such as CLA. (At the time of writing the approval of the ISA's bankers consent has still not been granted and the issue remains unresolved although developments – even while this article is being drafted – are leading to greater optimism that a solution will shortly be found).

Obtaining full access to the company's books and records has also been fraught with difficulties. Although, notwithstanding head landlord issues, the physical books and records were recovered, the majority of the company's records were stored on online databases and within IT systems and services, some of which the company had lost access to as a result of the sanctions, including Microsoft Outlook (which had been blocked since 18 July 2022) and key databases housing both the technical records for the aircraft and the stock, parts and tooling records – key in dealing with any possible sale of the parts.

An immediate issue faced was the potential recovery of significant security deposits for the leased aircraft, both of which had been repossessed by the leasing companies.

Prior to June 2022, CLA had issued a claim against one of the aircraft lessors seeking to recover the security deposit following the lessor's purported termination of the aircraft lease. The claim remains live at the date of writing, however the joint administrators, in compliance with their statutory duties, need to first assess its merits prior to taking any decision to pursue the claim. This is extremely difficult without full access to records. It is therefore not presently possible to engage meaningfully with after-the-event (ATE) insurers, nor to pay any ATE insurance premium given the lack of access to the company's funds.

Once we are able to establish an operational bank account, we will also be able to commence realising other known assets in the estate for value, such as stock, parts and tooling.

Navigating sanctions in the context of an administration is no easy feat, not least because of the lack of provision in law for situations involving sanctioned individuals, and the approach of banks to businesses affected by sanctions. The statutory requirements of administration, combined with sanctions regime compliance and additional reporting, mean that any IP considering taking such an appointment should carefully understand the context of the company's situation and the effect that sanctions will have on achieving the purposes of administration. Once we get past the stage in relation to the bank account, we will then encounter the question of what we will have to do with the projected surplus arising in a possibly ultimately solvent sanctioned entity.

¹ A longer version of this article first appeared in the International In-house Counsel Journal (IICJ) Vol 16 No 62 2023



Jo Milner is a managing director at Buchler Phillips. She is joint administrator of CargoLogicAir

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Schedule B1 exceptions pose problem for IP remuneration

Clashes between IA86 provisions and IR2016 rules on the approval of administrators' remuneration are giving rise to significant problems in practice, and require the attention of the Insolvency Rules Committee, argue **James Morgan KC** and **Amy Flavell**

There are exceptions to the need for administrators to seek approval of their proposals from creditors under para 52 to schedule B1, IA86. These provisions should operate in harmony with the process for the approval of an administrator's remuneration, in particular pursuant to rule 18.18, of the Insolvency (England and Wales) Rules 2016.

The purpose of para 52(1) is to provide a streamlined process for the deemed approval of the administrator's proposals in circumstances where there is likely to be nothing of substance that creditors could decide. But they are not well drafted, creating difficulties of interpretation, and it is giving rise to significant problems in practice, particularly where preferential and/or secured creditors are repaid post-statement but pre-fixing of the administrator's remuneration.

We set out some of the issues below and suggest possible answers¹. Given the importance to administrators of obtaining valid approval for their remuneration, these are matters of considerable difficulty and a cause of uncertainty to current practice.

Preliminary points

The administrator can only make a statement under para 52(1) of schedule B1 of IA86 if they think that the relevant situation applies. Providing there is some rational basis for them so thinking, the statement should stand and do so regardless of a subsequent change of circumstance.

Consistent with para 52(1), the purpose of r18.18(4) is to provide a process for the determination of remuneration in circumstances where the creditors with the real or substantial economic interest in that issue are the secured and preferential (rather than unsecured) creditors. There is a lacuna in the IR2016 because of the lack of a similar provision to r18.18(4) where the administrator has made a statement under para 52(1)(c). In relation to both situations, the real or substantial economic interest in

remuneration is likely to lie with the secured and preferential creditors.

A court will approach the provisions of schedule B1 and the IR2016 with the aim of producing a coherent, workable and consistent scheme that promotes the purpose behind them. But this should not be equated to giving primacy to what might be thought to be reasonable or commercial – see *Lehman Waterfall I* [2018].

Para 52(1)(b) and/or para 52(1)(c)?

An administrator could, in certain circumstances, rationally think that the situations in both para 52(1)(b) and para 52(1)(c) arose. An example would be where there was a floating charge, there was likely to be a distribution to unsecured creditors through the prescribed part only, but the administrator could not say that there would be a better result for creditors and therefore was pursuing the objective in para 3(1)(c).

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Practically, it may be possible for administrators to avoid paying out preferential creditors in full prior to the fixing of remuneration”

But can an administrator make both statements? In our view there is a good argument that they can and it would promote the purpose of the provisions in the light of the apparent lacuna within the IR2016. In particular:

- If only a para 52(1)(c) statement is made, on the face of it and assuming there is no

Key provisions in IA86 and IR2016

Para 52(1) schedule B1 IA86 provides:

- (1) *Paragraph 51(1) shall not apply where the statement of proposals states that the administrator thinks—*
 - (a) ...
 - (b) *that the company has insufficient property to enable a distribution to be made to unsecured creditors other than by virtue of section 176A(2)(a), or*
 - (c) *that neither of the objectives specified in paragraph 3(1)(a) and (b) can be achieved.*

Rule 18.18 of IR2016 provides:

- (1) *This rule applies to the determination of the officer-holder's remuneration in an administration.*
- (2) ...
- (3) ...
- (4) *Where the administrator has made a statement under paragraph 52(1)(b) of schedule B1...the basis of the administrator's remuneration may be fixed by—*
 - (a) *the consent of each of the secured creditors; or*
 - (b) *if the administrator has made or intends to make a distribution to preferential creditors—*
 - (i) *the consent of each of the secured creditors, and*
 - (ii) *a decision of the preferential creditors in a decision procedure.*

The effect of r15.31(1)(a) of IR2016 is that preferential creditors are entitled to vote in a decision procedure in respect of their claim at the date the company entered into administration “less any payments that have been made after that date...”. This is consistent with r15.11(1) which provides that notice of a decision procedure is not required to be given to those creditors who, subsequent to the company entering administration, have been paid in full.

creditors' committee, r18.18(3) requires the administrator to obtain a decision as to remuneration from the creditors. This is illogical where the unsecured creditors may have little or no economic interest in the level of remuneration and the secured and preferential creditors are likely to hold the more substantial interests;

- Fixed charge realisations have priority over remuneration. Therefore, the administrator will not be able to take remuneration out of such assets without agreement from the charge holder, proof that the salvage principle applies, or an application under paragraph 71(3)(a), schedule B1;
- Although the unsecured creditors could have a more significant interest in a situation within para 52(1)(c) than within para 52(1)(b) (eg where there may be a distribution to them other than (or in addition to) through the prescribed part), r18.18(4) is clearly drafted on the basis that where it is thought that the only distribution to unsecured creditors will be through the prescribed part, they do not have a sufficient interest to decide remuneration;
- If that is the situation then, it does not seem to matter whether the situation in para 52(1)(c) also applies because the difference is irrelevant to the unsecured creditors.

For such an interpretation, para 52(1) has to be read as if there was 'or' between (a) and (b), but 'and/or' between (b) and (c). It is unusual for statutes to use phraseology such as 'and/or' and the use of 'or' does not necessarily denote exclusivity. Although para 52(1) does not say "...the administrator thinks one or more of the following..." neither does it say "...the administrator thinks one of the following..." It is likely that a court would interpret para 52(1) in the wider sense, which allows an administrator in appropriate circumstances to make statements under both (b) and (c).

Para 52(1)(b) statement

Para 52(1)(b) could be interpreted in a number of ways. Our view is that it applies where the administrator thinks there is insufficient property for a non-prescribed part distribution and it does not matter whether or not (i) there is a floating charge and/or (ii) there will be a prescribed part distribution under it.

In particular, the simplest interpretation is that the administrator has to conclude only that there is insufficient property for a non-prescribed part distribution. Although there are the qualifying words "...other than by virtue of section 176A(2)(a)" these are to make it clear that such a distribution (which may or may not be made) does not alter that position. That is consistent with the underlying purpose: if the unsecured creditors' interests are limited to the prescribed part (if any) then they do not have a sufficient interest to be able to determine remuneration.

Further, if as we consider, the administrator is not required to think

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This means that if all preferential creditors had been paid in full by the time that remuneration came to be fixed there would be no such creditors who could fix it ”

that there will be a distribution under the prescribed part, there is no easy basis for applying some other (lower) standard of test (eg, a real chance). It is not obvious why the absence of a floating charge should make any difference: the unsecured creditors have even less of an interest in remuneration if there can be no possibility of a prescribed part.

Although it may be argued that this interpretation is difficult to square with r18.18(4) (which seems to presuppose the existence of at least one secured creditor), this can be addressed by reading into r18.18(4) the words "...secured creditors (if any)" allowing the determination to be made by the preferential creditors.

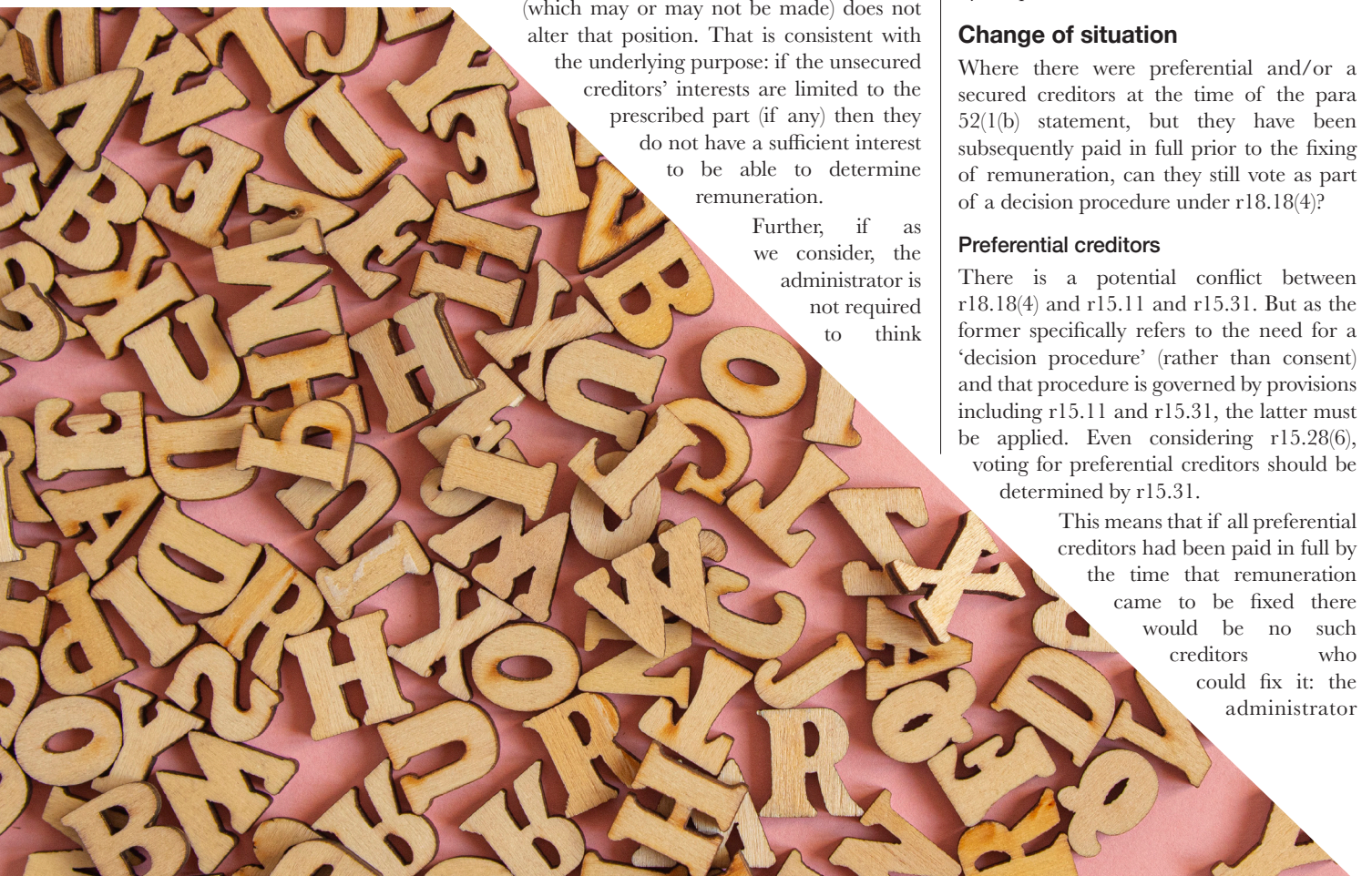
Change of situation

Where there were preferential and/or a secured creditors at the time of the para 52(1)(b) statement, but they have been subsequently paid in full prior to the fixing of remuneration, can they still vote as part of a decision procedure under r18.18(4)?

Preferential creditors

There is a potential conflict between r18.18(4) and r15.11 and r15.31. But as the former specifically refers to the need for a 'decision procedure' (rather than consent) and that procedure is governed by provisions including r15.11 and r15.31, the latter must be applied. Even considering r15.28(6), voting for preferential creditors should be determined by r15.31.

This means that if all preferential creditors had been paid in full by the time that remuneration came to be fixed there would be no such creditors who could fix it: the administrator



would need to apply to court under r18.23, or (if there is a lacuna) under the court's inherent jurisdiction in relation to office-holders: *Donaldson v. O'Sullivan* [2009]. Practically, it may be possible for administrators to avoid paying out preferential creditors in full prior to the fixing of remuneration.

Secured creditors

The intervening payment out of the secured creditor(s) is also problematic. Even where the secured creditor holds a floating charge, fixed charge realisations may have satisfied the debt.

One interpretation of r18.18(4) is that 'secured creditors' should be interpreted as meaning any person who was such at the time of the para 52(1)(b) statement even if paid out prior to remuneration approval. But we are of the view that this is unlikely not least because of the terms of s248(1)(a), IA1986 and because it would contradict the statutory purpose for a secured creditor – that has been paid in full – to have the power to consent to remuneration in which it has no interest. We are of the view that the more likely interpretation is to read the rule as referring to 'secured creditors (if any)'. This also provides the answer to the not uncommon situation where there is no secured creditor, but only preferential creditors.

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There is no solution that fully satisfies language, purpose and practicalities ”

Do the above views in relation to the roles of preferential and secured creditors fit with the terms of r18.30, which deals with the drawing of remuneration in excess of the fee estimate? Under sub-rule (2)(b), the request for such approval must be made '...where the creditors or class of creditors, fixed the basis to the creditors or that class of creditors'.

Although there is some inconsistent wording used in rules 18.29(2)(c) (change of basis of remuneration), 18.30(2)(b) (see above) and 18.32(4)(c) (apportionment of set fees), they should all refer to either (i) the creditors that originally voted (regardless of whether or not they have subsequently been paid) or (ii) only to such of those creditors (if any) that now remain unpaid. The reference in r18.32(5) back to r18.18(4) does not directly address this issue.

As a matter of language, (i) is slightly preferable. That is supported by the fact that if (ii) was correct and the approving creditors have been paid out, it is not easy to see how the administrator could engage these provisions. There is no express comparable default provision to r18.23 allowing recourse to the court. The administrator might have to rely on the general provision in r18.28 that the remuneration was 'insufficient' (although this certainly does not deal with apportionment in r18.32), or perhaps to argue that the reference back to the previous rules, including r18.23, allows the court to step in default, or to rely on the inherent jurisdiction of the court: *Donaldson (supra)*.

On the other hand, if the approving creditors have been paid out, what interest do they have in the process? A part answer is r18.33, which provides that where remuneration has been approved under r18.18(4) and the administrator now thinks that there is likely to be sufficient property to enable a distribution other than by the prescribed part, then a request under r18.29 (change of basis of remuneration), r18.30 (approval for drawing remuneration in excess of estimate) and r18.32 (apportionment of set fees) has to be directed to the creditors' committee or the creditors. That removes the interest of the original approving creditors.

But (i) is still problematic for many reasons. What if the secured (fixed) creditor has since been paid out but the preferential creditors have not? What if the priority creditors (that have been paid out) vote differently from those that have not to the detriment of the latter? How are preferential votes calculated other than by reference to r15.31?

In our view, there is no solution that fully satisfies language, purpose and practicalities. We consider it marginally more likely than not that a court would prefer interpretation (i) in relation to rules 18.26, 18.29, 18.30 and 18.32. The reference to approval by 'the creditors or class of creditors' still means to such that remain as creditors. That produces some measure of harmony with our suggested interpretation of r18.18 and the commercial rationale for the decision to be made by such creditors.

The above provisions are not well drafted and create difficulties of interpretation. While we have set out our views, there is no direct authority of which we are aware. We are aware that the Government's view is that the classification of a creditor is set at the point of entry into administration and that remains so, even if payment in full is subsequently made (First Review of the Insolvency (England and Wales) Rules 2016, 5 April 2022). We do not agree with that view in relation to r18.18(4), but suggest this is an area ripe for consideration by the Insolvency Rules Committee. We note that, notwithstanding the suggestion in the First Review, there has not yet been any amendment to r15.11 (or r15.31(1)(a)).

¹ Our thanks to Interpath who also contributed to this article.



James Morgan KC is a barrister at Radcliffe Chambers and **Amy Flavell** is a partner at Pinsent Masons

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

EU insolvency laws still under review despite deadline U-turn

At least 14 pieces of retained EU law affecting the insolvency profession may be replaced by a statutory instrument, says **Anthony Walters**

The business secretary, Kemi Badenoch made a somewhat unexpected announcement in mid-May that the Government's commitment to revoke EU law in full by the end of the year would be abandoned. Badenoch's announcement indicated more of a change in direction of travel than a final verdict. This remains a highly politically charged bill and, at the time of writing, robust debate across and within parties is ongoing, in private and public arenas.

Despite the lack of complete certainty, Badenoch's announcement puts us in a position of knowing more about the Government's EU law endgame than we did previously. It is perhaps timely to reflect on what this is likely to mean for the insolvency and restructuring profession.

The transition period for leaving the EU ended on 31 January 2020, some 34 months after Theresa May, then the prime minister, triggered Article 52. At this point a category of domestic law referred to as 'retained EU law', was created. Retained EU law comprises pieces of EU legislation that were effectively 'cut and pasted' onto the UK's statute books. This process was enabled by the retained EU law (revocation and reform) bill, currently in the House of Lords before it progresses to a third and final reading. It is expected to receive Royal Assent in the King's speech taking place in the autumn, delayed from May.

We have undertaken some research into the matter and have identified 14 pieces of retained

EU law that will either directly, or indirectly, impact on the work of the profession. These laws range from those explicitly covering insolvency processes, such as the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (recast), to those less explicit such as the Pensions Schemes Act 1993 or sector-specific laws such as those touching on civil aviation and maritime.

What happens next?

Prior to Badenoch's announcement the working assumption was that EU law would fall under the sunset clause, but this was never going to be as straightforward as the soundbites may have had us believe. Technically, under the original plans, all retained EU law would have ceased to apply in the UK from 31 December 2023. Yet there was a means introduced in the Commons through which some EU law could receive a reprieve. Government ministers and devolved authorities were able to seek exemptions from the sunset deadline at the end of this year, which could have delayed the process until mid-2026. Any EU law that still applied into 2024 or beyond would have become assimilated law. Concerns were rightly raised about the amount of retained legislation that needed to be reviewed and dealt with before the deadline, particularly from trade and sector bodies, such as ours.

The retained EU law bill, as it currently stands, will still give both ministers and devolved authorities the power to restate, reproduce, revoke, replace or update EU law by statutory instrument (SI), but the December deadline no longer applies.

The sunset clause will be abandoned. However, this does not include the 600 EU laws already identified for revocation, instead it will only apply to those – around 4400 of them – yet to be reviewed.

What we know

R3 have been in dialogue with the Insolvency Service for some months now. While the exact details of those conversations remain confidential – and we are not privy to discussions between officials and ministers –

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We will continue to seek clarification of any changes that will impact upon the work of the profession and to draw upon the expertise and working knowledge of our membership”

we do know that there is a dedicated team considering which retained laws will need to be assimilated or enacted via SI. We were provided with assurances that all relevant legislation is being carefully considered and any EU law essential to the insolvency regime will be assimilated. We did have concerns about the potential for this task to be executed properly, with due diligence and after meaningful consultation with the profession given the timeframe, which means the abandoning of the sunset clause is most welcome.

R3 will continue to monitor developments in respect of retained EU law very closely. We will also remain in regular contact with the Insolvency Service. While none of the laws we have identified are to be revoked at the end of the year (at least according to the Government's published list in May 2023), we will continue to seek clarification of any changes that will impact upon the work of the profession and to draw upon the expertise and working knowledge of our membership. We will continue to report on this matter in the weeks and months ahead, but in the meantime please do get in touch with any views or concerns that you might have.



Anthony Walters
is head of external affairs at R3

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The retained EU law bill, as it currently stands, will give both ministers and devolved authorities the power to restate, reproduce, revoke, replace or update EU law by statutory instrument”

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Good Box offers creditors chance to counter office-holder proposals

Ashley Armitage and **Matthew Maddison** explain (below) how the first ever creditor-led restructuring plan for an SME was sanctioned without the support of the administrators.

On page 22, one of those administrators, **Jeremy Frost**, gives his view

NGI Systems & Solutions Limited v. The Good Box Co Labs Limited [2023] EWHC 274 (Ch) is the first creditor-led restructuring plan sanctioned by the court.

The case marks a promising step towards wider use of part 26A for SMEs and is notable for the court's use of its power to control its officers by directing the company's administrators to provide the necessary consent.

Good Box is one of only a handful of reported cases in respect of part 26A, which was introduced as part of the Corporate Insolvency and Governance Act 2020 in response to the economic impact of the Covid-19 pandemic.

A consortium of 'rescue funders'

Good Box is an SME that provides bespoke contactless payment terminals to charities and fundraisers, including The British Red Cross, National Portrait Gallery and Church of England. Since its incorporation it has facilitated payment of donations totalling significantly more than £10 million.

The company entered administration in June 2022 after encountering financial difficulties. A restructuring plan was proposed by one of its key suppliers, NGI Systems & Solutions Limited (NGI), which was also a shareholder in and creditor of the company. NGI also provided (via a consortium of 'rescue funders') significant funding to enable the company to continue to trade during administration.

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The administrators voted against the plan in their capacity as an administration expense creditor, and refused to provide consent to the plan on behalf of the company unless so directed by the court”

The plan contained four key classes of stakeholders:

(1) Convertible loan holders (unsecured creditors who participated in the government-backed 'future funding' scheme) – whose debts would be converted into shares equivalent to 14% of the new total equity in the company;

(2) Trade creditors – who would be paid in full within six months of the sanctioning of the plan, subject to adjudication;

(3) Administration expense creditors (creditors whose claims would rank as expense claims in the administration of the company, including the administrators in respect of unpaid remuneration, but excluding the rescue funding) – who would be paid in full within six months of the sanctioning of the plan, subject to adjudication; and

(4) Historic shareholders – whose equity would be diluted to 1% of new total equity in the restructured company pro rata to their previous shareholding.

It was also proposed that *Good Box* would agree to assume liability for the rescue funding (totaling £800,000), which would be converted

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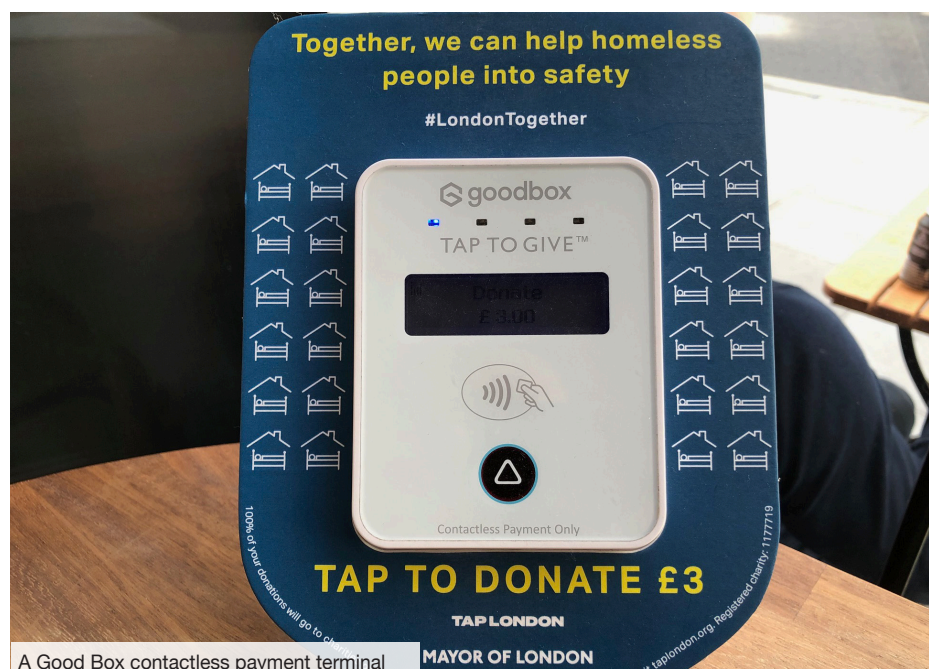
In circumstances where relations between stakeholders and office-holders have become strained, dissatisfied creditors may consider proposing a restructuring plan as an alternative to the office-holders' proposals”

into shares representing 85% of the new total equity in the company.

All classes of stakeholders voted in favour, save for the convertible loan holders, who voted against the plan.

The court was satisfied that the likely relevant alternative to the plan was a sale of the company's business and assets for £375,000.

In determining whether to exercise its



cross-class cram down power to sanction the plan – notwithstanding the dissent of the convertible loan holder class – the court considered that, under the ‘relevant alternative’, the convertible loan holders would get nothing, whereas under the plan they would obtain an equity stake in the company, which would carry a prospect of achieving value if the company continued to trade successfully. The court could not say whether the company would trade successfully, but was satisfied that its prospects of it doing so were greater than the potential for recovery under liquidation.

Undisclosed buyer

Despite expressing to adopt a neutral stance, the company’s administrators were not supportive of the plan. Instead, they applied for directions that they should sell the company’s business and assets to an undisclosed buyer, voted against the plan in their capacity as an administration expense creditor, and refused to provide consent to the plan on behalf of the company (as its office-holders) unless so directed by the court. The court held (following *Re Savoy Hotel Limited* [1981] 1 Ch 351 in respect of schemes of arrangement) that the consent of the company to join in the scheme is a requirement under part 26A, but directed the administrators to provide the necessary consent. Its reasons for doing so included:

(1) The administrators identified all their particular concerns, which all (save for

one possible exception) related to the points relevant to one or more classes of creditor and to whether the plan should be sanctioned. The court did not consider that any of those reasons were such as to prevent it sanctioning the restructuring plan.

(2) The administrators did not identify any other interests of the company above and beyond those of its shareholders and creditors, all of whose interests are protected and considered under the part 26A process. The court was not of the view that there remained any separate company interest that needed protection, which might have justified the administrators refusing to give consent on behalf of the company.

(3) The administrators did not actively oppose the order being sought. Rather, they sought to remain neutral while drawing relevant matters to the court’s attention.

Throwing good money after bad

Whether a creditor-led restructuring plan will be appropriate in other cases will be highly fact sensitive. Given that *Re Savoy Hotel*

Ltd remains applicable in respect of part 26A restructuring plans, a creditor-led restructuring plan in respect of a solvent company will fail unless the creditor is able to procure consent from the company’s directors. Further, in cases where the company is not already in administration, creditors (particularly unsecured creditors) may face difficulty obtaining sufficient financial information to put forward a credible plan, including as to the relevant alternative. Moreover, from a financial perspective, proposing a plan may also be seen as throwing good money after bad. In most cases where the company is in administration, it is likely that any restructuring plan would be proposed by the insolvency office-holder as opposed to creditors. However, where creditor funding is required, it may be a combination of the two. In circumstances where relations between stakeholders and office-holders have become strained, dissatisfied creditors may consider proposing a restructuring plan as an alternative to the office-holders’ proposals.

¹ Matthew Maddison and Ashley Armitage acted for NGL Systems and Solutions as the applicant creditor



Ashley Armitage is a director, restructuring and insolvency at Walker Morris¹ and **Matthew Maddison** is a barrister at Enterprise Chambers

Part 26A restructuring plan cases – a timeline

Previous cases involving a part 26A restructuring plan have typically concerned much larger companies, write *Ashley Armitage and Matthew Maddison*.

Re Virgin Active Holdings Ltd [2021] EWHC 1246 (Ch)

Re Virgin Active Holdings Ltd is perhaps one of the most notable uses of the plan, which was proposed when the group’s health clubs were forced to close during the Covid lockdowns. The Virgin plans involved the capitalisation of c.£185 million of inter-company liabilities and the injection of a new £25 million secured loan. They were supported by a sub-set of secured creditors holding debt totalling approximately £164 million, but opposed by a sub-set of landlords, who extensively challenged the valuation evidence as to the likely ‘relevant alternative’. The court held that the valuations were capable of being relied upon and sanctioned the plan, emphasising that the potential utility of part 26A should not be undermined by lengthy valuation disputes.

Re DeepOcean I UK Ltd [2021] EWHC 138 (Ch)

Re DeepOcean involved three group companies, each with secured debts exceeding £92 million, which provided subsea services to offshore energy industries. None of the plan creditors who voted against approval informed the court of any aspect of the restructuring plans that they contended was unfair or should otherwise cause the court to refuse sanction. The court considered several discretionary

factors and sanctioned the plans, commenting that, where the statutory conditions are met, an applicant company will have a ‘fair wind behind it’ notwithstanding a dissenting class.

Re Hurricane Energy plc [2021] EWHC 1759 (Ch)

Re Hurricane Energy concerned an oil company with bondholders totalling \$230 million (£183 million). The plan was opposed by one of the two largest shareholders, and by a large number of individual shareholders. The court refused to sanction the plan. It was not satisfied that it was likely the new board of directors would adopt the investment strategy as contended by those propounding the plan, and rejected the contention that the relevant alternative would be the near-term insolvent liquidation of the company.

Re Amicus Finance plc [2021] EWHC 3036 (Ch)

Re Amicus Finance plc [2021] EWHC 3036 (Ch) was the first restructuring plan of a company in administration. The company specialised in short-term property finance. It was in turn financed by direct borrowing via a peer-to-peer lending platform and by a consortium of funders who underwrote some loans to borrowers. Its creditors comprised secured creditors (c.£25.9 million), creditors whose claims would be treated

as an expense of the administration (c.£2.8 million), employees (c.£110,000) and unsecured creditors (c.£2.96 million). The court sanctioned the plan notwithstanding the dissent of one of the secured creditors. The court noted that creditors are the best judges of their own interests, but may be expected to act rationally, and held that the scheme was a rational one which was understandably attractive to most creditors.

Re Houst Ltd [2022] EWHC 1941 (Ch)

Re Houst Ltd concerned a holiday/short-term property management company. Its liabilities totalled c.£11 million, including c.£2.8 million secured liability to its bank and £1.8 million unsecured liability to HMRC. The relevant alternative was a pre-pack sale in administration, which was estimated to result in a dividend of 7p/£ to the bank and a dividend of 15p/£ to HMRC. All classes voted in favour of the plan, save for HMRC, which indicated that it was not willing to relinquish its secondary preferential creditor status. HMRC did not attend the hearing to oppose the plan or present any arguments against sanctioning the plan. Further, it failed to adduce any evidence that the company’s valuation evidence was wrong. The court exercised its discretion to sanction the plan noting that, if it refused to do so, the evidence indicated that all creditors, including HMRC, would be worse off.

Creditor-led plan contained material number of holes

Good Box administrator **Jeremy Frost** questions whether £600,000 of professional fees associated with the restructuring plan will benefit creditors as a whole, and the company

The reporting of the *Good Box* case so widely left Patrick Wadsted and I, as the joint administrators, with mixed emotions. Being part of a successful restructuring plan provided a boost. However, we were less pleased at the suggestion that we were on the ‘losing side’.

We should start with the elements of the reporting that we agree with:

- A part 26a restructuring plan can be proposed by a creditor and it does not have to be drafted to the gold standard that an IP would aspire to meet. This at least has the potential to save costs.
- The Leeds High Court is as capable of dealing with an application of this type as its London counterpart.

Benefit to the proposing creditor

As an SME placed into a restructuring plan drafted by a creditor, while under regulatory restrictions, all signs point to the conclusion that *Good Box* will be an outlier when restructuring plan cases are talked about.

Principally, we question whether the £600,000 of professional fees associated with this process was the best use of new funds in terms of benefits to creditors (as a whole) and to the company. It is acknowledged that some creditors are paid in full (less than £400,000) by the plan, but we must not forget that creditors in excess of £13.5 million are crammed down, with their claims being converted to a 14% shareholding.

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We chose to take a neutral stance and to bring the court’s attention the extent of the disquiet among the various creditor groups. This included the largest creditor and Frost Group Limited voting against the plan ”

The plan settles a number of disputes between the plan-proposing creditor (NGI Systems and Solutions), *Good Box* and third parties, resulting in benefit to the proposing creditor in excess of £900,000 (albeit as a shareholding) in addition to the actual funds NGI received during the course of the administration.

It is acknowledged that the proposing creditor had put forward funding to support the plan, however I would expect the potential for conflicts of interest to leave many readers uncomfortable at the thought of signing up to this particular proposal.

Disquiet among creditor groups

As the court confirms in its judgement, had we opposed it, the part 26a plan would not have been sanctioned.

And yet, despite the problems, this plan did provide a benefit to some creditors not likely available in a compulsory liquidation. So how did we provide the court with a factual matrix best described as complex?

We chose to take a neutral stance and to bring the court’s attention the extent of the disquiet among the various creditor groups. This included the largest creditor and Frost Group Limited voting against the plan, taking the view that crystallising a position (albeit with a loss) with the prospect of significant and likely supported future litigation was more valuable than accepting the promise of payment of fees in full after an adjudication process alongside the extinguishing of the potential litigation.

No new clients allowed

A point that has been glossed over is the regulatory requirements, a position little understood by the plan-proposing creditor but made clear by the FCA to the administrators upon appointment. *Good Box* had been allowed to continue trading by the authority from the date of administration, but not to take on new clients.

This fact was reported to the plan-proposing creditor and the company, along with a proposal to enable the company to meet its requirements and return to taking on new clients as soon as practicable – all to begin once the plan was approved. We remain dismayed

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That we failed to convince the Court of the urgency of the matter is frustrating ”

at how little attention has been paid by *Good Box* to resolving what should be a fundamental pillar of the restructuring plan.

No authority to sell

The administration application was odd in that it did not provide the administrator with the ability to cease trading or to sell the business. Patrick and I were left in a position where funding had ceased, and we had a restructuring plan proposed that contained a material number of holes. If the court refused to sanction the plan, we needed to sell immediately yet had no authority to do so. Hence, we made the appropriate application.

That we failed to convince the Court of the urgency of the matter is frustrating.

The final point is slightly esoteric. If the funding identified for this project had been made available to us as administrators, then the likely outcome is that we would have drafted a sensible proposal for a company voluntary arrangement. This would not necessarily have provided a 100% recovery to creditors but would have allowed a managed exit taking into account the wider requirements of a regulated business. The fees and costs would have been considerably lower, but control of the company would have been in the gift of the administrators and supervisor. The plan-proposing creditor would not have been so integral to the process and the outcome and would not have achieved the benefits identified above.



Jeremy Frost is a director of Frost Group

Revamped Cayman Islands restructuring regime takes shape

The new restructuring regime in the Cayman Islands distinguishing between winding-up and recovery gives multinationals another option, say **Alex Davies** and **Spencer Vickers**

Recent amendments to part V of the Cayman Islands Companies Act have updated the domestic restructuring regime and introduced the new role of a court-appointed restructuring officer and a dedicated restructuring petition. The Cayman Islands restructuring officer regime shares certain features with the administration regime in the UK and the Chapter 11 bankruptcy procedure in the US.

As a preliminary (but important) point, the regime now provides a clear distinction between winding-up processes and rescue or recovery paths. Previously, a winding-up petition was required to be presented prior to any application to appoint office-holders (including for the purpose of promoting a restructuring). The filing of a winding-up petition was often the precise act that a distressed company (and/or its stakeholders) was trying to avoid, especially where that event may trigger a public announcement on a stock exchange. Given the global reach of many Cayman Islands companies, it is understandable that stakeholders in other jurisdictions would often have an instinctive negative reaction to terms such as ‘winding-up petition’ and ‘liquidator’, particularly in situations where it was believed that a restructuring could aid in ensuring the distressed company could continue as a going concern. It is now possible to initiate restructuring efforts using a bespoke method with the benefit of a statutory moratorium effective from the time of filing a ‘restructuring petition’ (while avoiding the negative connotations associated with the winding-up petition process).

Key features of the new regime:

- A company may seek the appointment of restructuring officers on the grounds that (i) the company is or is likely to become unable to pay its debts; and (ii) intends to present a compromise or arrangement to its creditors.
- The petition seeking the appointment of a restructuring officer may be presented by the directors of a company: (i) without a shareholder resolution and/or an express power to present a petition in its articles of association; and (ii) without the need to present a winding up

petition (which addresses longstanding issues related to the rule in *Emmadart*).

- The moratorium will arise on presenting the petition seeking the appointment of restructuring officers, rather than from the date of the appointment of office-holders, and it will have extraterritorial effect as a matter of Cayman Islands law.

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Justice Kawaley’s judgment confirms that a company may, in response to a winding-up petition, file its own application to appoint restructuring officers”

- The default position is that this will be an *inter partes* process with adequate notice to be given to all stakeholders.
- The powers of restructuring officers will be flexible and will be defined by the terms of the appointment order made by the Cayman Court. The extent to which the directors will continue to manage the affairs of the relevant company will be defined by the order and will depend on the facts of the particular case.
- During the restructuring proceedings, the company will be able to seek sanction of a scheme of arrangement without the need to initiate separate proceedings under section 86 of the Act.
- Secured creditors with security over the whole or part of the assets of the company will still be entitled to enforce their security without the leave of the court and without reference to

the restructuring officers. Unsecured creditors and other stakeholders must seek leave to initiate proceedings and circumvent the stay.

On 11 November 2022, the first appointment of restructuring officers was made by the Cayman Islands Court, as set out in the judgment of the Honourable Justice Kawaley in *Oriente Group Limited* (unreported, FSD 231 of 2022 (IKJ), 8 December 2022).

The application to appoint restructuring officers was made by Oriente Group Limited following the expiry of statutory demands and the presentation of a creditor’s winding-up petition.

Upon filing the application to appoint restructuring officers, the moratorium immediately came into effect. However, after this date, the petitioners in the Cayman Islands proceedings also filed a winding-up petition in Hong Kong, which the court subsequently determined was in breach of the moratorium.

Justice Kawaley’s judgment confirms that a company may, in response to a winding-up petition, file its own application to appoint restructuring officers. The judgment further confirms the reach of the automatic moratorium upon the making of such an application, which the judge described as ‘turbo-charging’ the degree of protection in contrast with the former process of presenting a winding-up petition for restructuring purposes.

As high interest and inflation rates continue to put companies under increased pressure, the enacting of the new regime is well timed and, while not appropriate for all circumstances, will be a sensible and effective method by which large, multinational groups may seek to restructure their debt obligations and other affairs for the benefit of their stakeholders (together with recognition/assistance in the UK or abroad, as may be necessary).



Alex Davies and **Spencer Vickers** are partners at Conyers

Timing is crucial if directors wish to use trade name lifeline

The three exceptions under IR2016 that allow the reuse of company names post-liquidation are useful, but everything hinges on timescales, writes **Kate Heaney**

The last few years have had a real impact on the survival of lots of businesses. Soaring inflation and interest rates, coupled with a cost of living crisis, is leaving companies facing uncertain futures. Directors are finding they have very few options but to put their companies into liquidation.

Not all is lost when a company moves to liquidation, and a trading style or a company name can have real value. Being able to salvage the remnants of the business and reuse the trading name can provide a valuable lifeline for those directors wanting to continue their businesses through a different company.

This potential lifeline for directors doesn't come easily. Sections 216 and 217 of the Insolvency Act 1986 (the Act) have measures in place to restrict directors of a company from reusing a liquidated company's name. These measures are to prevent directors from misleading their creditors by hiding the fact their company has gone into liquidation. Consequences can be disastrous for a director in contravention of the legislation, who may be ordered to personally pay all the debts of their new companies, without even realising they were breaking the law.

The Act applies to directors and shadow directors who have been involved in the liquidated company for a period of 12 months prior to the liquidation. The restriction lasts for five years from the date of liquidation and prohibits the reuse of the registered name,

plus any names associated with the company in liquidation, including acronyms. Simply being a director of the new company with a similar name will trigger the prohibition, but the Act will also catch anybody involved in the formation and/or management of the new company, even if they are not directors. Sole traders and partnerships are also subject to the prohibition and will not be able to carry on a business under a prohibited name, even if that business is unincorporated.

Criminal sanctions

Liability for breach of the legislation is automatic and it is no defence for a director to claim they were unaware of it. Criminal sanctions can lead to imprisonment, a fine or both. Civil liability only applies where the second entity is an incorporated company. Breach of the legislation can also lead to a director's disqualification.

It is possible to use a prohibited name if one of the three exceptions to the rule applies. The first excepted case stems from rule 22.4 of the Insolvency (England and Wales) Rules 2016 (IR2016). A director can give notice to each creditor of the liquidated company of their intention to reuse the prohibited name, as well as publish the notice in the London Gazette. In order to be able to use this exception, the new company has to purchase the whole or substantially the whole of the business of the liquidated company from the liquidators. However, in order to be able to use this exception, the director cannot already be in breach of the legislation.

The timing is crucial and events must proceed in this fashion:

1. Old company goes into liquidation;
2. Notice is sent to the creditors of that company and published in the Gazette;
3. Both of these must be done before the new company purchases the business of the old company from the liquidator (or within 28 days following the acquisition);
4. Once the notice is deemed served on the creditors and has been advertised in the Gazette, the director is able to trade using the prohibited name.

Protection for up to six weeks

The second excepted case is possible under r22.6 IR2016. The director can apply to court for permission to reuse the prohibited name. Provided the application is made within seven business days from the date of the old company's liquidation, the director will have protection from the date of the liquidation for up to six weeks. The hearing of the application will take place within that six-week period. Applying to the court under this exception means that the new company can continue trade without interruption. However, if the seven-day deadline is missed, this protection won't be available and the director will be in breach.

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Early advice can not only help those directors get the protection they need, but early planning can ensure they are able to do it in the most cost-effective and least disruptive way”

The application is served on the secretary of state at least 14 days' before the hearing. Usually it will write to the court to approve the application, provided they have confirmation of the liquidators' support. If the court is satisfied that there has been no mismanagement on the part of the director in the downfall of the liquidated company, then usually it will grant the director permission to be the director or involved in the formation and management of the new company with a name that would otherwise be prohibited.

The third excepted case under r22.7 IR 2016 applies where there is an established company with the same or similar name that precedes the liquidation, but that company must have been trading for at least 12 months prior to the old company going

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Liability for breach of the legislation is automatic and it is no defence for a director to claim they were unaware of it. Criminal sanctions can lead to imprisonment, a fine or both”

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Often we find that the directors have already established the new business that they want to trade with the same name, but it hasn't traded for long enough to be able to use the third exception”

into liquidation. In practice, it is not often an option for directors looking to circumvent the legislation.

No retrospective permission

The Act and the exceptions to the rule should be at the forefront of a director's mind when they are considering liquidating their company, but want to be able to continue trading with the same or similar name. Retrospective permission cannot be granted. The conversation therefore needs to be had with the director as soon as they seek advice regarding the financial position of the company and their options regarding insolvency. Early advice can not only help those directors get the protection they need, but early planning can ensure they are able to do it in the most cost-effective and least disruptive way to their ongoing business.

Independent valuation

The first excepted case (r22.4) is always going to be the cheapest and quickest option, but it isn't the most straight forward. Often

we find that the directors have already established the new business that they want to trade with the same name, but it hasn't traded for long enough to be able to use the third exception (r22.7). In this scenario, as soon as the old company goes into liquidation the director will be in breach and the first excepted case would not be an option. If the company has a completely different name, the director could use the first excepted case and serve the notice/purchase the business, and once the notices are deemed served and advertised they could then proceed to trade using the old trading name.

Consideration also has to be given to the purchase of the business. It has to be the whole or substantially the whole of the business. An independent valuation needs to be carried out detailing the company's assets, intellectual property and goodwill, the value attributed and the purchase by the new company.

No connection to prohibited name

Practitioners often think that buying the business and serving or advertising the notices is enough, but if the new company is already incorporated with the prohibited name, the only way to utilise the first excepted case would be to change the name of the new company before the liquidation date of the old company, but all websites, social media, bank accounts, etc. would also have to be disabled so there could be no connection to the prohibited name.

If the second excepted case (r22.6) is the option taken, the court can ask for a report from the liquidators as to what led to the insolvency and the extent of the responsibility of the director. A witness statement from the

liquidator in support can help to show the downfall of the liquidated company wasn't as a result of any mismanagement on the part of the director.

Notice to creditors

The purpose behind the legislation was to protect creditors of the business who may be unaware that it had failed and to prevent the deliberate use of the same name to confuse them. Disclosure of the director's intentions and the purchase of the business assets should be given in the notice to creditors provided prior to the liquidation. The director can then demonstrate to the court that the liquidators have been appointed in the knowledge of the director's intentions.

A director looking to put their company into liquidation but wanting to continue to use the brand and trading name they have built over the years going forward may not be aware they will be breaking the law in doing so. It is essential that the question is asked early on in the discussions and directors referred for specialist advice on their options going forward. If carried out properly, the possibility of using one of the excepted cases can be invaluable in allowing the director to continue their business following liquidation and can bring welcome certainty in an ever-changing economy.



Kate Heaney is a senior associate at Darwin Gray



Awareness of vulnerability can help us to be more effective

Those we advise, or come up against, as well as our colleagues and peers, will thank us for taking a more enlightened approach to mental health issues, says **Mark Sands**

I will be astounded if, by now, there are many readers of *Recovery* who are not aware of the increasing concern around mental health issues in our society. Rightly, in my view, awareness is being raised, people are sharing their experiences, and help is being offered and signposted. Mental health issues are being talked about.

From the perspective of the insolvency profession – do these issues matter? In my view it's a resounding and unequivocal yes. In this article I will briefly explain why that is, what we need to be aware of, what we perhaps can do differently (and some of you will be doing this already), and where we can turn for further information and guidance. However, I offer no silver bullet – just some thoughts to raise awareness and some suggestions on where to find help and what we can all do.

The FCA defines a vulnerable consumer, but in my view this can apply to anyone in debt, as "...someone who, due to their personal circumstances, is especially susceptible to harm...". I accept that in many cases that will involve a subjective assessment, especially as there are other varying definitions of vulnerability.

The debtor

Perhaps the most obvious place to start is with an individual in debt, who we may come across for example when acting as a trustee in bankruptcy, when putting in place or supervising an IVA, advising a debtor on their options, or when acting for a spouse of a debtor.

How are you to know if someone is vulnerable or suffering from mental health issues? In some cases, they may simply tell



you, which would be great. In my experience however, life is never as simple as that. Poor health, life events such as job loss or a bereavement, poor financial literacy or digital skills are some drivers of vulnerability and risk indicators, and these are situations and comments we can all be alert to.

It should also be borne in mind that one in seven adults has literacy skills that are expected of a child of 11 or below and that in any given year, one in four adults experiences at least one mental disorder.

The director

Many of us will more often deal with a director of an insolvent company than an individual seeking advice / in bankruptcy. In every corporate insolvency there will be one or more directors, as well as employees, creditors and others affected by the insolvency who are individual people. They are just as likely to be vulnerable or facing mental health issues as individuals in debt.

The insolvency professional

My 35 years of experience as an insolvency practitioner have perhaps left me hardened, with a thicker skin than when I started, and with a degree in cynicism. Even so, I have feelings and care about what is going on around me. Each IP is an individual and each works with a team of individuals. We cannot ignore the impact that our cases have on our colleagues and on ourselves, whether that is as a result of the cases we are working on, or the impact on us of helping, or dealing with, vulnerable individuals.

Many of us will have been subject to abusive calls and emails, which will often leave us feeling bruised and upset, and perhaps angry. Some of us will have dealt with individuals who have told us how bad our actions are making them feel, and in some cases have threatened self-harm or to take their own life. Of course you will be looking for ways to help those individuals. But at the same time we should be mindful of the impact those exchanges can have on us too – members of the insolvency profession, doing a job, and needing support and guidance when faced with stressful situations. Dealing with sensitive or difficult issues can be frightening and demoralising for your team.

Tips on communication

It can help when dealing with vulnerable people to consider changing your

The FCA's four drivers of vulnerability

- Health – health conditions or illnesses that affect ability to carry out day to day tasks
- Life events – such as bereavement, job loss or relationship breakdown
- Resilience – low ability to withstand financial or emotional shocks
- Capability – low knowledge of or confidence in managing financial matters or low literacy or digital skills

The FCA's guidance on risk indicators

- Phrases such as 'I can't understand the letter you sent me', shortness of breath, agitation, asking for repetition, signs of confusion and mention of medication
- Low literacy skills
- Mental health problems
- Disabilities and long-term illnesses
- Change in circumstances, including both financial and relationship, bereavement and the diagnosis of a serious illness
- Lack of English language skills

communication style and approach. My tips in these situations include:

- Consider which form of communication may work best for the person: in-person meeting, video call, telephone call, email, text, and webchat. Everyone is different.
- Plan any calls or meetings at the time which works best for the person. For instance, if someone has to take some medication at a certain time, this can leave an immediate impact on that person's mood, etc.
- Try to identify if the person relies on someone, such as a carer or friend, and ask if the person would like them to join the call or meeting.
- Speak clearly, neither too fast or too slow, and neither too loud or too quietly;
- After you finish explaining each issue or point, pause and give the person plenty of time to absorb it and ask questions to clarify what you have said. Then consider perhaps also summarising the point again before moving on to the next issue.
- Offer to provide a note of the call or meeting.

Court cases

There have been a number of recently reported court cases which have looked at mental health issues. These cases clearly demonstrate that an IP does not simply have to stop doing their job when mental health and vulnerability issues are identified, when a carefully considered approach is taken and explained to the court then, when appropriate, the courts will not only allow IPs to continue with their job, but support them in doing so.

Here are the cases and the key point in each.

- *Re Djurberg (a bankrupt); Hyde and another v Djurberg [2022] EWHC 1534 (Ch)*: A search and seizure order was granted after careful consideration of vulnerability issues. The bankrupt claimed to lack capacity and the court found that he did not, but then had to consider his mental health in the context of the proposed action. The court noted that if the bankrupt cooperated then the actions would not be needed and would not impact on his mental health.
- *Re De Freitas; Revenue and Customs Commissioners v De Freitas [2022] EWHC 1946 (Ch)*: A bankruptcy petition was not dismissed despite the mental health of the debtor, as the petitioner (a public body) had complied with its public sector equality duty;
- *Nihal Mohammed Kamal Brake & Anor v Geoffrey William Guy & Ors [2022] EWHC 2797*: the debtor entered a mental health crisis moratorium. A creditor sought to enforce a third party debt order. The court explored the three tests set out in the regulations: reasonableness, detriment and ensuring that the protection provided by a moratorium was not undermined. The court was satisfied that on the facts of the case the three tests were met and the court would use its discretion to allow enforcement to continue;
- *IV Fund Limited SAC v Frank James Mountain [2021] EWHC 2870 (Ch)*: A mental health crisis moratorium can be cancelled if either there is a material irregularity with the application for the moratorium, or on the grounds of unfair prejudice. A creditor had presented a petition for bankruptcy which

had been expedited on the grounds of the risk of dissipation of assets. The moratorium unfairly prejudiced the creditor and so the moratorium was cancelled;

- *Kaye v Lees [2022] EWHC 3326 (KB)*: A creditor challenge to a mental health crisis moratorium failed as the application was out of time. The court has no discretion, even where the facts of the case may make the barring of a challenge as seeming unfair, as the timings in the regulations are prescriptive.

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As a profession, I believe we should all share experiences, frustrations and, most importantly, solutions, positive outcomes and where we have found help and guidance ”

At the foot of this article are links to sources of guidance and information. There is also a wealth of knowledge and experience among colleagues and contacts. I believe we can all learn from those who have direct experience of these issues and can (when appropriate) turn to them for help.

As a profession, I believe we should all share experiences, frustrations and, most importantly, solutions, positive outcomes and where we have found help and guidance. That way we can help each other, as well as the people we come into contact with who need our help and, on occasion, understanding.

What should we do?

Vulnerability and mental health issues are increasingly at the heart of what we do. Being aware of, and alert to, these issues can help us all do our job in a more effective, and appropriate way. Those we advise, or come up against, as well as our colleagues and peers, will thank us for taking a more enlightened approach. I believe we should take pride in what we do, especially when how we do it makes a difference to a vulnerable person.



Mark Sands is a licensed insolvency practitioner and head of insolvency at Apex Litigation Finance

More information

- FCA – www.fca.org.uk/firms/treating-vulnerable-consumers-fairly
- Citizens Advice – www.citizensadvice.org.uk/about-us/our-work/policy/policy-research-topics/consumer-policy-research/consumer-policy-research/tackling-consumer-vulnerability
- StepChange Debt Charity – www.stepchange.org/debt-info/dealing-with-the-debts-of-vulnerable-people.aspx
- Mental Capacity Act 2005 – <https://www.legislation.gov.uk/ukpga/2005/9/contents>
- R3 are planning to offer a course on mental health first aider training, a discussion forum and a webinar

Hidden potential for creditors in historic invoices

As awareness of the sums available from late payment fees grows, creditors may increasingly apply pressure on IPs to take action, argues **Andrew Williamson**

For insolvency professionals, a client's sales ledger will be high on the list of sources of possible returns for creditors. Recovering amounts owed against unpaid invoices presents an obvious opportunity for cash realisation. But that will be where it ends for many.

What they may not realise is that there is a potentially much greater opportunity hidden among the paid invoices listed in the same sales ledger.

Late payment is one of the biggest issues for UK businesses and is often cited as the single biggest cause of business failure. Estimates are that more than one in four invoices are paid beyond terms. Each of those late paid invoices represents an opportunity to recover compensation and interest.

“

With data showing around 25% of invoices are paid beyond terms, the potential liability is quite staggering”

The Late Payment of Commercial Debts (Interest) Act was introduced in 1998 and has been strengthened several times since. The Act imposed statutory limits on the time organisations could take to pay invoices. This was 30 days from receipt for public bodies, and 60 days for private organisations. It applies to almost all business-to-business (B2B) and business-to-government (B2G) transactions, but it remains a very under-utilised piece of legislation.

Significant opportunity

Despite the Act providing the ability to claim interest at 8% above the Bank of England's base rate and compensation of between £40 and £100 per invoice, trading businesses are often reluctant to levy interest or compensation on their existing customers to avoid risking these relationships. This

hesitancy only serves to generate a significant opportunity when a business enters restructuring or insolvency, as compensation and interest can be claimed up to six years after the invoice was paid.

With an estimated three billion B2B/B2G invoices issued each year in the UK, and data filed under the Reporting on Payment Practices and Performance Regulations by larger UK companies for 2022 showing around 25% of invoices are paid beyond terms, the potential liability is quite staggering.

Public bodies are required to publish their estimated liability under the Act and actual compensation paid. Our research in 2021 showed an admitted total annual liability of £18 million across the one third of English local authorities that had published their reports. Yet these same authorities had paid out just over £16,000 in interest and compensation – less than 0.1% of their acknowledged liability – clearly demonstrating the value of compensation left unclaimed.

In particular, insolvency practitioners should be on the look-out for businesses involved in B2B or B2G commerce and issuing average to higher volumes of invoices. Almost all will have numerous historic invoices which were paid beyond the agreed terms or statutory limits. Even just 10 late invoices (over the previous six years) can generate a claim of more than £1000, and 1000 late invoices could easily result in a claim of upwards of £50,000. Across the business's client base, this could make a significant contribution to the cash assets of a recovering business or the settlements received by an insolvent organisation's creditors.

Invoice and payments data

While we know of claims in some insolvencies that have exceeded £100,000, there are practical problems for IPs wishing to make use of the legislation. Often sales ledger and payments data are not being captured when a company enters insolvency, requiring data to be sourced from their customers and significantly restricting the number and

size of potential claims available. Company directors and staff exiting the business may also be reluctant to share the information. However, the increasing use of cloud-based systems means that such information may also be available from the technology or systems provider, or a banking partner, but this may take more time to realise.

If you are looking to investigate the opportunities in historic invoices, you will need the following:

- Invoice and payments data (ideally over the five or six years prior to insolvency);
- The company's client contacts – ideally the procurement or accounts payable lead at each of the key customers;
- A means to calculate the potential liability – the Office of the Small Business Commissioner has some good resources to support this;
- A good understanding of the Act and related case law – to ensure the robustness of the claim and respond to objections;
- Resources to educate recipients on their obligations, responsibilities and associated liabilities. Understanding of liabilities under the Act is still very low and many of the recipients of claims will never have received one;
- A willingness to escalate matters when necessary. Occasionally there is a requirement to take the matter to the courts for resolution.

As awareness of the sums available from late payments previously made to insolvent companies grows, I believe creditors may increasingly apply pressure on IPs to take action in this area. As a result, where the company has a history of regularly being paid late, IPs will need to ensure they have at least considered whether significant compensation and interest is available from the invoices previously paid.



Andrew Williamson is a director at DELV Limited

SUPPLEMENT:

Careers & professional development



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Stephen Allinson

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‘Specialisation was brought in at the behest of the Insolvency Service and Government. I want to discuss whether that’s working’

JIEB chairman **Stephen Allinson** talks to Sandra Kessell about prizes, pass rates, and a large-scale consultation he is launching. Meanwhile exam prize winners **Matthew Mills** and **Sam Hawkins** reflect on their careers, their recipes for success, and their future goals

It’s always exciting to see the Joint Insolvency Examination (JIE) results,” says Steve Allinson. “Every year we are thrilled for those who pass the examinations and, of course, especially our prize winners, because they really are outstanding in their field. It is a tough examination process, as you are tested on what is required to become an insolvency practitioner. You also have to show practical experience in order to pass, and then it is up to your recognised professional body to assess if you should have a licence.

“Having the JIE qualification is, therefore, an important part of the process and, as chair of the board, I make no apologies for the fact that the exams are challenging because insolvency professionals do a really important job. It’s a role that is very much in the public domain, dealing with very human situations often in the glare of publicity.”

At the time of the summer edition going to publication, Steve said he hoped to soon launch a consultation to analyse and discuss the results, in addition to the annual meeting with tutors. “We usually invite representatives from the recognised professional bodies and senior education team members from the larger firms to join the tutors for an open discussion about the previous year’s exams,” says Steve. “This year that discussion needs

to be broader because we had a lower pass rate in the personal insolvency exam and that disappointed us. The corporate insolvency pass rate was at a level that we’ve been used to.”

In seeking to understand this, Steve suggests that firms’ moving to specialise in corporate rather than personal insolvency as potentially key to this downturn. “Major accountancy firms are often very corporate and transactionally based, and they don’t really major on personal insolvency. Most candidates want to pass both elements, corporate and personal, but since 2015 it has been possible to take one or the other and become part qualified.

“Specialisation was brought in at the behest of the Insolvency Service and Government, but I want to discuss whether that’s working, or if we need to look at different models for our profession. I’d like to invite responses from all firms and interested individuals as to whether we should be diversifying in the approach we are going to take moving forward. I would also be interested in the views of anyone who has passed the exam, or, indeed, took it and did not pass. As an examination board we should be constantly asking questions to ensure we are doing what is required to play a relevant part in the profession.”

Other qualifications within the profession already exist, for example, the Certificate of Proficiency in Insolvency (CPI), overseen by the Insolvency Practitioners Association (IPA), and the ICAEW’s Certificate in Insolvency. Such certificate holders are not allowed to act as insolvency appointment takers, but these qualifications can act as gateway to wanting to study for the JIE qualification.

“Those who go on to pass their JIE have not only demonstrated they have the academic knowledge required for insolvency, but also the practical understanding. It’s a very practical

“

Most, if not all, professional firms will say they are committed to diversity but they need to walk the walk as well as talk the talk. The tradition of only taking on graduates has also been a barrier to progression to those from different backgrounds”

job, but also one dealing with situations that require detailed analysis to navigate through.”

“Many JIE candidates will also be a qualified accountant, and some will be qualified lawyers, but the numbers of lawyers who take the exams are in decline and, from a personal perspective, I would like to see that change,” says Steve.

Candidates also tend to be graduates, though that is not always the case – as demonstrated by one of the current prize winners Matthew Mills, who went into accountancy straight from school and worked his way through his ACCA qualification before passing the JIEB with flying colours.

Steve says that many newly qualified JIE professionals are typically in their early 30s. “They are bright young people, but will have also gained good practical experience and I stress that you need that,” he says.

Steve also wants firms to move forward on the question of diversity. Senior practitioners tend to be white and male, reflecting the

“

The numbers of lawyers who take the exams are in decline and, from a personal perspective, I would like to see that change”

“

I hope we will soon see people who have joined firms on apprenticeships take their joint insolvency examinations. That would be fantastic as far as I am concerned ”

nature of recruitment 20 to 30 years ago and perhaps the levels of support given to maintain a career. Change is happening, but it may still take a while for significant numbers of women and people from minority backgrounds to attain seniority within their firms, he says.

“Most, if not all, professional firms will say they are committed to diversity but they need to walk the walk as well as talk the talk,” says Steve. The tradition of only taking on graduates has also been a barrier to progression to those from different backgrounds.

“The legal profession is moving away from that now and opening up its qualifications, which I am in favour of. I hope we will soon see people who have joined firms on apprenticeships take their joint insolvency examinations. That would be fantastic as far as I am concerned,” says Steve. “The profession



Steve Allinson: ‘A lower pass rate in the personal insolvency exam disappointed us’

should be asking, ‘Do we have the right tools in place to bring on the stars of tomorrow?’ Or possibly ‘Do we need to focus more on practical experience?’ and ‘Is assessing by examination still the right thing?’ I think it is, but it is only part of the bigger picture.”

Steve Allinson is chairman of the JIEB, chairman of the assessment board at the Chartered Institute of Credit Management, and head of legal at Apex Litigation Finance

Matt decided not to go to university. ‘That way I could qualify more quickly,’ he explains

Matthew Mills won not one, but two prizes in the 2022 Joint Insolvency Examinations. The key to his success? There’s no substitute for hard work, he says.

When Matthew Mills was considering prospective careers while at school he hit upon accountancy as a combination of a secure job with a recognised qualification that could take you anywhere. He thought he would find a role in insolvency and restructuring more interesting than one in tax and audit.

“It doesn’t limit you,” he says. “You build up a particular set of skills and can work in different firms, industries and even countries.”

Matt looked at different routes into accountancy and decided not to go to university. “That way I could qualify more quickly, without university debt, while

gaining best practice experience,” Matt explains.

Duff & Phelps (now Kroll) had a small to mid-sized restructuring division when Matt joined straight from school more than a decade ago. As it grew, Matt saw a broad spectrum of insolvency work, both personal and corporate.

“It allowed me to see different engagement types and sizes, engagements across various industries and I was able to be hands-on with all aspects of the case. I wasn’t pigeon-holed into certain types of work or roles,” he says.

As a school leaver Matt faced 14 exams in order to achieve ACCA qualification, taking his last in 2016. Following a break, he set his sights on the JIEB after his seniors described the qualification as a milestone in their career.

Despite not being a natural ‘lark’, Matt arranged to take turns to drive in early each morning to the train station as part of the hour-long commute with a friend working

in the City. Matt admits the 4 am or 5 am alarm was a shock to the system. “It was early, especially during the winter months, because it was dark and miserable and you don’t want to get out of bed,” he says. But his commitment to the lift share helped motivate him and the routine gave him two extra hours in the office to do his studies before work started.

“I think it is more challenging to start studies after a full day of work or try to cut the day a

“

Studying in the mornings allowed me to limit the impact of study on my workload until quite close to the exams ”



Matt Mills: Promoted to senior manager just ahead of discovering he had won two JIEB prizes

little short to start studying. Coming in early and getting the study out of the way first also meant I was able to keep my weekends and evenings free until the last month or so before the exams,” says Matt.

Because most of Matt’s colleagues at Kroll have either taken, or are studying for, professional exams, he felt there was understanding about limiting his workload and engagements as autumn drew in.

“Studying in the mornings allowed me to limit the impact of study on my workload until quite close to the exams. My employers then gave me around a month to six weeks off for study and the exams, which included revision courses, and then a number of days per exam to study from home,” says Matt.

The strategy paid off: Matt was promoted to senior manager just ahead of discovering he had won two JIEB prizes.

“It has been a nice few weeks,” he says, with understatement. “I wasn’t expecting to have done so well and, even the night before the results, I was not sure I had passed. When I saw I had, I thought, ‘Massive relief!’. But the scores don’t give you any other indication of success. Then one of my colleagues phoned and said she had more news for me, because I hadn’t thought to look at the prize winners’ names.”

Matt acknowledges the support of seniors in his firm from the time he started work through to now. He names Kroll senior director Lauren Wentworth, and managing directors Geoff Bouchier and Paul Williams, for their career and work advice. “That’s not just me. If you show aptitude, and a willingness to learn and put the work in, they are supportive to everyone,” he says.

Matt plans to continue developing his career, so the early morning starts look set to stay. “The exams are by no means the end. To get to managing director level, you have to have a good client base as well as the ability to do the job, so that’s the next stage,” he says.

Matthew Mills is a senior manager at Kroll. He won two JIEB prizes: one for the candidate with highest mark in the corporate insolvency exam and the other for the highest combined mark in one sitting

Juggling studies, home life and work would be time pressure enough for many, but Sam is also a town and district councillor

Sam Hawkins’ strategy of studying over weekends and foregoing fun in the year ahead of his JIE paid off when he heard he had been awarded joint first prize in the personal insolvency paper.

Sam Hawkins admits the need to study got him out of at least one weekend of garden stone picking after he and his wife moved house.

“I have to thank my in-laws for stepping in,” he says, smiling. “And my wife Rebecca for being so supportive and understanding when there were jobs that needed doing. I kept telling her, ‘It’ll be worth it,’ as I settled down to study.”

Sam’s career in insolvency came after a shift of mindset when he was graduating from the University of the West of England after studying for a degree in management.

“I’d always planned to go into retail management but I had a particularly bad day and thought, what else can I use my degree for?” he explains. “I knew I didn’t want to go into pure accountancy, then I spotted a job in insolvency and thought it sounded interesting.”

His first role in 2011 at Bishop Fleming was as a restructuring advisor. The firm supported

him through his chartered accountancy exams, and he gained Certificate of Proficiency in Insolvency along the way.

“You definitely need experience alongside book knowledge. Though in theory it might be possible to get through the exams without it, in practice, you need to be able to reflect on what you have seen or done before, to best manage a situation,” he says. “You need that background.”

Juggling studies, home life and work would be time pressure enough for many people, but Sam is also a councillor for his area, near Exeter, roles he became involved in after completing his accountancy exams.

“I wanted to keep myself busy and use my knowledge to help my community and I didn’t want to get sucked into the comfort of evenings in front of the television. It was a little hard to attend council meetings as my JIE came up, but everyone understood why,” says Sam.

The theme of supportive family, colleagues and acquaintances goes side by side with Sam’s exam success. Over the course of more than a decade studying, his firm, Bishop Fleming, along with his seniors and mentors, have consistently provided their backing and

“

His tips for success are to ring-fence your study time, refuse invitations to socialise, improve your exam technique and answer questions in the way that examiners are looking for”

support, and produced a celebratory bottle when they heard about his exam successes.

More than 10 years into the insolvency profession, Sam says that taking up a graduate role in a mid-sized firm, out of London has allowed him to experience and learn from a very broad range of personal and corporate insolvency cases as he was training. “I’ve also liked being based in Exeter. Yes, you get paid less for being outside the City, but we have the moors and the seaside close by,” he says.

His tips for those wanting to emulate his success are to ring-fence your study time,

Analysis of November 2022 results

Papers sat	Papers passed			Total
	2	1	0	
2	12	23	14	49
1	-	33	71	104
Total	12	56	85	153

better manage invitations to socialise in the short-term, improve your exam technique and answer questions in the way that examiners are looking for.

Sam's name might cause some longer standing members of R3 to look twice, since

there is, surprisingly given how few IPs there are in the south-west, another R3 member close by who also has the name Sam Hawkins.

What's next on the horizon for this Sam Hawkins? He plans to celebrate properly once the official graduation ceremony has taken place. Then, far from taking a rest, he suspects he will have to tick off some of those "to-do" jobs that come with a new house, and from which he can no longer escape citing study as a watertight excuse.

Sam Hawkins is a restructuring manager at Bishop Fleming. He achieved joint first prize in the JIE personal insolvency paper, awarded to the candidate with the highest mark.



Sam Hawkins: 'I've also liked being based in Exeter. Yes, you get paid less, but we have the moors and the seaside close by'

Joint Insolvency Examination – November 2022

The pass lists are being published in this way because a pass in either the personal or corporate exam will enable a candidate to apply to their RPB for a partial licence in that particular specialism following changes brought in by the Deregulation Act 2015. Only students who gave consent to appear on this list are shown below.

Corporate insolvency pass list

A
Atkinson C, Harpenden

B
Baker S, Altrincham
Berridge G, Eastleigh
Birch C, Altrincham
Broeders A, Southampton
Broughton J, Birmingham

C
Carter C, London
Chadwick C, London
Charlitos S, Larnaca

E
Erceg J, London

F
Fox J, Sheffield
Fuller S, London

G
Grant R, Edinburgh

H
Harber E, Kingston Upon Thames
Hargreaves P, Doncaster
Hart R, Stockport
Hawkins S, Exeter
Hewitt S, Littlehampton
Higgins P, Manchester

I
Iqbal R, Loughton

J
Jarman A, Coulsdon

K
Kelly I, Glasgow
King C, St Marnocks Bay
Knight K, Upminster
Knight S, Milton Keynes

L
Lightfoot F, Hitchin
Lord K, Accrington
Loughran Y, Dungannon
Lowden-Brown A, Sandbach

M
Maguire C, Enniskillen
Malde S, London
Marron E, London
Martin C, Glasgow
McErlane M, Luton
McNeill C, Belfast
Mills M, West Malling
Morgan J, Wallasey

O
Ouriach S, London
Owens M, Chelmsford

P
Parish T, Beckenham
Patel P, London
Patel R, Rickmansworth

R
Raikundalia S, Borehamwood
Ranby-Gorwood A, Market
Rasen Rayfield T, London
Riordan T, Ossett

Robinson C, Leeds
Romagnoli V, Bristol

S
Smith S, Haywards Heath
Smolievski C, Beckenham

T
Taylor L, Barnet
Thomson J, Glasgow

V
Vipond C, Tunbridge Wells
Vivace F, Altrincham

W
Weekes M, Stockport
Williams J, Salford
Williams J, King's Lynn

Personal insolvency pass list

A
Abraham R, London

B
Berridge G, Eastleigh
Broughton J, Birmingham

C
Cassidy A, Billingham
Chadwick C, London

G
Gilbert J, Reading

H
Harber E, Kingston Upon Thames
Hawkins S, Exeter

J
Jarman A, Coulsdon

K
Kelly I, Glasgow

M
Mills M, West Malling
Morgan J, Wallasey

N
Noble G, Hertford

O
Oliver E, Beloe

P
Pearson C, Oxford

R
Reid T, Southampton
Robinson C, Eastleigh
Robinson C, Leeds

W
Weekes M, Stockport

High achievers

First place in corporate insolvency (awarded to the candidate with the highest mark in the corporate paper): Matthew Mills

Joint first place in personal insolvency (awarded to the candidate with the highest mark in the personal paper):

George Berridge, Sam Hawkins

Combined top scorer (awarded to the student achieving the highest combined marks in one sitting): Matthew Mills

R3 Training Academy



R3 Boot Camp Series

The R3 Boot Camp series deliver topical subjects coherent with changes in the professional climate, and in a timely fashion to keep professionals prepared for challenging responsibilities.

Each online session consists of best practice training, using case studies to demonstrate practical application of new knowledge and skills for authentic learning experiences.

Insolvency Boot Camp (22 Cpd Hours)

9 live sessions cover:

- Overview and Comparative Analysis of Insolvency Procedures
- The Advice Process - to Directors and Individuals
- Decision Procedures and How to Apply in Practice
- Personal Insolvency
- Accelerated M & A and Pre-packs
- Employee Claims and Making Staff Redundant
- Officeholder's Investigations and Antecedent Transactions
- Creditors' Claims for Voting and Dividend Purposes
- Statement of Affairs and Estimated Outcome Statements



Restructuring Boot Camp (18 Cpd Hours)

7 live sessions cover:

- Directors Duties
- Independent Business Reviews
- Restructuring Options
- Contingency Planning
- Engaging/Managing Creditors and Stakeholders
- Part 26A Restructuring Plans
- Key Tax Issues in Restructuring

"Really enjoyed the course as a knowledge refresher and build-on. The sessions are always well set up, with a presentation/learning section at the beginning, followed by interactive case examples, which were considered in smaller breakout rooms..."

Restructuring Boot Camp Delegate

"It was good to do virtually as it means at least I can go back to sessions and hear them again. I met a few new people whom I have connected with on LinkedIn..."

Insolvency Boot Camp Delegate

"I liked that it is a virtual course, and I can continue to access the resources afterwards..."

Restructuring Boot Camp Delegate

"Excellent course with experienced trainers. The 'go to' provider of training in the Insolvency and Restructuring world."

Insolvency Boot Camp Delegate

To find out more about the R3 boot camp series and other available courses go to **www.r3training.org.uk**

SURVEY:

Restructuring & turnaround finance

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Andrew Dalton

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New funders in market is good news for advisers and clients

While increased costs and HMRC's hard line on Crown preference have often made arranging funding more challenging, **Andrew Dalton** explains how more competition also means restructuring professionals can offer a better range of solutions

Investors and lenders in the distressed arena have to cram a huge amount of analysis, negotiation and stakeholder management into a short period of time; all against the backdrop of a business firefighting cash, operational issues and a myriad of other matters. How do they do it? Why do they do it? How can we utilise these funders to deliver the best result for our clients during a restructuring process?

The 'why?' follows the age-old premise that higher risk equals higher return. The 'how?' depends on the lender or investor in play but, aside from hard work and long hours, most will insist on an almost 'open book' policy from the seller – this is not the time to be coy. In terms of restructuring advisers supporting the process, it is about educating clients on what to expect from the first meeting and follow up due diligence, and managing expectations on the sensitive topic of pricing. We should also be mindful of the various restructuring options available to the lender or investor on the way into

a transaction. Do they want to lend or invest into a 'clean' company? Are there problematic contracts or leases that need to be exited before the business can return to viability? If so, what is the best formal process to use in the circumstances; CVA or pre-pack administration; or perhaps a part 26A restructuring plan?

“

Many of the new opportunities in the market are not ones fit for distressed lenders or investors, being either 'too far gone' or so loaded with debt on the balance sheet that there is little that can be done”

Diamonds in the rough

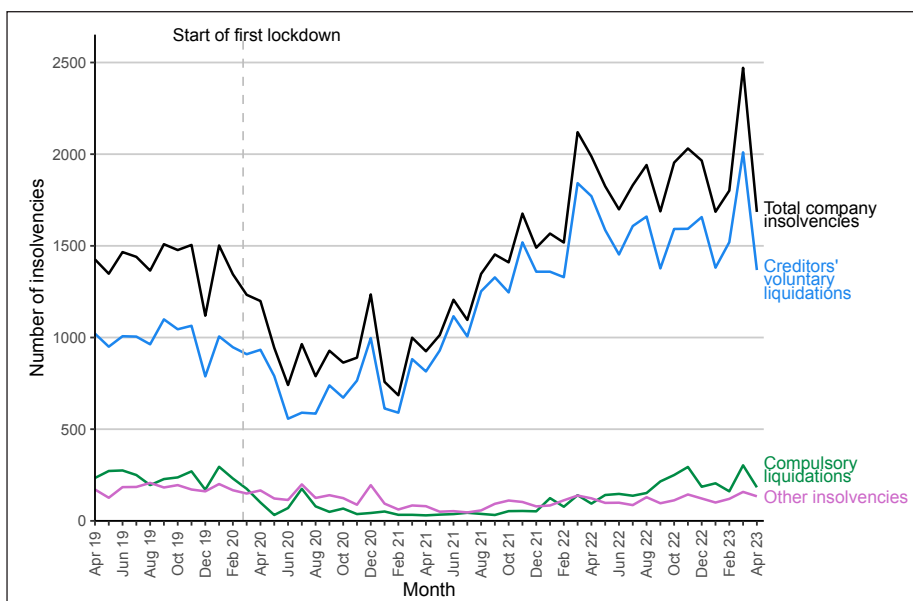
The rise in insolvencies has led to a marked increase in the number of distressed lending and investing opportunities available in the market. However, and while this is difficult to pinpoint, anecdotally the ratio of 'good to bad' opportunities appears unchanged. Many of the opportunities are not ones fit for distressed lenders or investors, being either 'too far gone' or so loaded with debt on the balance sheet (Covid legacy loans in many instances) that there is little that can be done. The reintroduction of Crown preference (especially when considering legacy pandemic-related HMRC debt), and what seems to be a hardening attitude toward time to pay arrangements from HMRC often makes any restructuring challenging. The distressed lending/investing market therefore continues to be focused on finding the diamonds in the rough; assessing a multitude of opportunities to find those that are suitable.

The current economic downturn has been fairly well signalled for some time, and there are many new entrants to the distressed lending or investing market, with competition for the better-quality assets remaining high. From our perspective as restructuring professionals, this is good news as we can offer our clients a better range of solutions coupled with formal processes such as a part 26A restructuring plan.

How useful are restructuring plans?

The restructuring plan (RP), brought in as an amendment to the Companies Act 2006, is a powerful and versatile tool. There have been various discussions surrounding its potential use by distressed lenders or investors as a means to optimise deal structure either on the way into an investment or in relation to a portfolio company.

For the most part, use of the RP has been constrained to large businesses, with only a handful in the mid-market/SME space (*Amicus*, *Houst* and *Good Box*) sanctioned. Our office has dealt with two of these three cases, and was also heavily involved in the *Nasmyth* case, which was not sanctioned as a result of a perceived 'blot' on the plan (the subsidiary entities had not agreed a time to pay



Data from the Insolvency Service (May 2023, at the time of drafting) had been showing a trend of increasing insolvencies from approximately March 2020. Despite a 15% decrease in corporate insolvencies in April 2023 vs. April 2022, corporate insolvencies remain higher than pre-pandemic levels. Sources: Insolvency Service (compulsory liquidations only); Companies House (all other insolvency types).

“

HMRC have taken a more direct stance against restructuring plans as a point of principle. This initially appears to be at odds with the government's desire to see more RPs”

arrangement with HMRC). Key takeaways from these experiences are:

1. **Timings:** Typically a minimum of four months elapses between the date the plan is launched and the date of the sanction hearing. This provides a challenge for a business in financial difficulty; although legacy creditor issues can often be ‘parked’ while the RP process plays out.
2. **Certainty of outcome:** While the convening hearing is useful to allow creditor grievances to be aired, and for the judge to give a steer on what they see as the good and the bad of a plan, there is no certainty until the end of the sanction hearing. There is, accordingly, a significant period in which management have to keep operational plates spinning without any certainty to provide to stakeholders (lenders in particular).
3. **Cost:** While each case is different, given the substantial court time in RP, there is an inevitable cost. This increases significantly if the RP is subject to challenge given (i) disclosure obligations, (ii) the need to engage counsel for two to three-day hearings and (iii) the risk of a cost order(s) against the client, even with a successful sanction.
4. **Value-break and supporting evidence:** A pragmatic approach has been taken thus far in SME plans, but all cases heard thus far have had special circumstances, and none have had competing valuation evidence filed. The recent case of *Adler*, where valuation issues were cross examined in court, provides helpful guidance for value in larger cases, but repeating that level of analysis in the SME/mid-market space will not be cost effective. Advisers will need to carefully consider what steps are best taken to provide the creditors and the court with sufficient comfort on the relevant alternative to the RP, and the value-break in such a scenario. The pitfalls of providing insufficient information (even when the dissenting parties do not submit their own expert evidence) have been demonstrated in the recent decision by Mr Justice Johnson in re: *Great Annual Savings Company Ltd*, where the judge did not agree with the conclusions reached on value break in the relevant alternative.

Engaging with distressed lenders and investors

In my experience, the following points assist me in engaging with distressed lenders and investors.

Debt or equity opportunity?

Can the security on offer support the required cash need? For instance, is there a debtor ledger with headroom, or could a new lender take a different risk view, for example by lending against work in progress, or relaxing concentration limits and raising advance rates? If so, an asset-based lender or a debt funder with a higher risk appetite may be sufficient to fill the need. The benefit with a debt option is that one is not asking shareholders to dilute their position to accommodate a new equity provider (although equity-style rates of return can be expected by the lender).

What type of opportunity will interest a distressed lender or investor?

One of the most interesting opportunities for a distressed lender or investor will be a historically profitable business and/or one with a clear path to recovery. Certain sectors are unpopular (such as tech and early-stage businesses), but central to the prospect of generating any interest will be the quality of management. A base of tangible security is critical to allow lenders/investors to protect their investment if all does not go to plan.

Is there a likely insolvency process?

If the answer here is yes, then the incoming lender or investor is likely to look to you, as the restructuring adviser, for initial outline guidance in the ‘art of the possible’ within an insolvency process (eg are there any obvious road-blocks, for example a major customer that is looking for a reason to walk away).

Clear process

To provide clarity to potential lenders/investors it is important to have a clear process in place and be up front with them in terms of (i) how much time is available and (ii) what type of process you are running. For example, a distressed investor will want to know that more vanilla corporate finance options are ruled out, or whether there is a possibility of an existing lender or shareholder having a change of heart.

Information flow

There is no point generating initial interest with a teaser and then not having the backup data to follow on. It is critical that the team running the process have, with the input of management, been able to pull together a serviceable pack of information (often there is not time for a shiny investment memorandum) to allow lenders or investors to undertake a level of analysis.

Management meetings

As noted previously, one of the critical factors in any decision by a lender or investor will be the quality of the management team. Access to the management team may be restricted to the second phase of a process, and making progression to the second phase dependant on a solid offer is a good way to build competitive tension and limit the call on management time (although timing can be tight). When preparing the management team it is important they are aware of the thrust of questioning from the lender or investor to date; are they set on retaining the brand? Do they see a bolt-on opportunity with an existing portfolio business? They will also look to you for guidance.

5. **Disclosure obligations:** Clients will need to be mindful that the level of disclosure in RP proceedings is significantly higher than in (for example) a pre-pack sale via administration. Additionally, multiple disclosures at different times through the process can be challenging to manage with a ‘live’ trading business in distress.
6. **The restructuring surplus:** The court will consider the fairness of the distribution of the upside created by the sanction of the RP, focusing principally on those creditors ‘in the money’. The recent judgements in *Adler*, *Nasmyth*, and *Great Annual Savings Ltd* reinforce this view. Those ‘in-the-money’ creditors receiving a greater share of the restructuring surplus are expected to be contributing more than those that are receiving a lesser share (for example, the introduction of new money should entitle one to a greater share of any restructuring surplus).
7. **HMRC stance:** Following *Houst*, HMRC have taken a more direct stance against RPs as a point of principle, culminating in the

Great Annual Savings judgments. This initially appears to be at odds with the government’s desire to see more RPs, and the lack of a defined policy from HMRC does not assist advisers when considering the structure of a plan. However, we now have some helpful cases that start to set some parameters for dealing with HMRC in RPs.

While I continue to believe that RPs have a place in the SME/mid-market space, their use will continue to be highly selective until steps are taken to refine the process, or a sufficient body of case law builds. Where the profession has to wait for the latter, my concern is that RPs will go the way of schemes; reserved for use by large corporates only.



Andrew Dalton is a partner at BTG Advisory

‘The outcomes of RP sanction hearings seem to be a lottery’

Three of the largest distressed funders discuss with **Andrew Dalton** the value of what they do, and give differing views on the potential uses of restructuring plans

Q How do you see the market in 2023, and what are the key themes you are expecting?

MH: The market has started to heat up with larger turnaround opportunities coming to market across all consumer sectors we operate in, and we only see this continuing given ongoing inflationary uncertainty in the short- to medium-term, together with various stakeholder pressure.

CC: We expect to see a busy year ahead, driven by a perfect storm of issues, but with the main themes being a hangover of Covid debt, reduced and changing patterns of consumer spending and a continuation of corporate carve outs of non-core and distressed assets.

FC: The market forecasts an increased volume of special situations transactions in 2023, driven by corporates experiencing cash flow difficulties driven by multiple macro-economic headwinds, for example, (1) rapid inflation squeezing margins; (2) increased



Chris Campbell,
partner at RCapital

“Investing in distressed and turnaround situations can often focus on the negatives but the sector has a long track record of job creation and developing skills which has a positive economic impact”

borrowing costs from interest rate rises; and (3) suppressed demand, particularly from those serving directly into consumer markets.

We have seen the Competitions and Markets Authority taking an increasingly active role in disposal of assets and an increase in non-core carve outs. We expect activity to continue, driven by a tightening of credit markets, with the UK and US elections being key to the macro-economic backdrop.

Q How can distressed funds add value to the economy during this period of wider uncertainty?

MH: Given the limited risk appetite of traditional lenders for new credits in this space, alongside tightening of liquidity where existing exposures exist, this will create a large gap in the market where distressed funds can provide a credible solution. We are also increasingly seeing more opportunities where existing, more traditional, vanilla funds wish to reduce their exposure or sale processes/value expectations are not being achieved, which makes distressed funds a viable alternative solution.

CC: Distressed funds and special situation investors play a key role in the economy by investing in, and rescuing, businesses that have a reason to exist but would otherwise fail because they do not fit the criteria of traditional lenders and investors. Investing in distressed and turnaround situations can often focus on the negatives but the sector has a long track record of job creation and developing skills which has a positive economic impact.

FC: Special situation funds invest in businesses facing stress and uncertainty, bringing clarity of thought and strategic direction to companies that may otherwise go out of business. We are entering a period where management teams may not have the experience of dealing with the challenges of a downturn, or in trading in a flatlining economy, and may require support in



Matthew Holt,
investment director
at Hilco Capital

“One of the benefits of the restructuring plan from an investor’s perspective is that it allows different classes of creditor to be treated differently. This process is still new, but the signs are encouraging, and we expect wider adoption as businesses unwind their balance sheet issues”

navigating businesses through uncertain times. The experience of special situations funds can be valuable in supporting management teams in implementing appropriate controls and tools to mitigate the challenges ahead, bringing the certainty and stability required and ultimately preserving jobs and employment.

Q Do you consider RPs a useful tool for investment professionals when considering distressed investments (either on the way in or for use in the portfolio)?

MH: During the past few years, businesses across all sectors have materially increased their trade arrears and debt burden, whether this be through extensions to existing



Felix Connelly,
investment director
at Endless/Enact
Fund

“

While an RP theoretically provides a neat mechanism for structuring a solution, the cost and timeline of this process remains prohibitive for most UK mid-market businesses”

facilities or through Government-supported Covid schemes. One of the benefits of the restructuring plan from an investor's

perspective is that it allows different classes of creditor to be treated differently, thus increasing flexibility and ensuring value can be applied where it is needed. This process is still new, but the signs are encouraging, and we expect wider adoption as businesses unwind their balance sheet issues.

CC: I don't think RPs have any future in the UK mid-market. They are well intentioned and, in principle, promote a collaborative rescue culture. However, the timetable to implement them, the high cost and the uncertainty mean they are restrictive for a mid-market trading business, and they are better suited for dealing with more complex capital structures.

There is also an apparent juxtaposition where on the one hand the government seems to be pushing rescue culture, while [on the other] HMRC seems intent on protecting their preferential position. The outcomes of sanction hearings effectively seems to be a lottery and other restructuring tools provide investors and management teams more certainty of outcomes.

FC: The reintroduction of Crown preference in 2020 does present a challenge in delivering transactions as a high proportion of the opportunities introduced often have significant HMRC arrears, built up during the pandemic. This can make it challenging to structure solvent transactions to fully repay HMRC arrears.

While an RP theoretically provides a neat mechanism for structuring a solution, the cost and timeline of this process remains prohibitive for most UK mid-market businesses. HMRC is, understandably, taking an active role in challenging RPs that it feels are not equitable to its position. Only time will tell on their effectiveness as a credible solution.



Andrew Dalton is
a partner at BTG
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A WORTH Group Company

Who's who					
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Agathos Management LLP ■	Charles Oakshett, charles@agathos.com, 020 3752 6856	www.agathos.com	5 Albany Courtyard, London W1J 0HF	Good businesses encounter complex situations for reasons, including stakeholder conflict, sudden market dislocations, or balance sheet distress. The Agathos partners have over 25 years of combined experience of special situations investing in the UK.	
Alchemy Partners ■	Tony Westcott, 020 7240 9596	www.alchemypartners.co.uk	25 Bedford Street, London WC2E 9ES	Alchemy specialises in debt and equity special situations. Distressed debt purchase. Debt-for-equity and debt-for-debt restructuring. Minority buy-out financing.	FCA
Aurelius Equity Opportunities ■	Tristan Nagler, tristan.nagler@aureliusinvest.co.uk, 020 7440 0480		6th Floor, 33 Glasshouse Street, London W1B 5DG	We seek control equity investment opportunities in under-performing businesses with development potential requiring financial or operational improvement or turnaround. We concentrate primarily on the IT and business services, industrials and chemicals, and lifestyle and consumer goods segments. Investment criteria: revenues between £25m-1bn; Ebitda margin from negative to +15%; and equity investment requirements of up to £100m.	
Bantry Bay Capital Limited ■	contact@bantrybay.co.uk, 020 3011 4030	www.bantrybay.co.uk	8-12 York Gate, London NW1 4QG	We are prepared to lend into the following situations: restructurings, turnarounds, administrations, CVAs, distressed secured bridge loans, 'newcos' arising out of pre-packs, and restructuring plans. The types of assets willing to lend against include: accounts receivables, IP, plant and machinery, real estate, stock and inventory and transport assets. Provide own funds.	
Better Capital PCC ■	becapteam-GG@ocorian.com, 01481 742 742	www.bettercapital.gg	PO Box 286, Floor 2, Trafalgar Court, Les Banques, St Peter Port, Guernsey GY1 4LY	Better Capital PCC is a limited liability, closed ended investment company. There are currently two protected cells, both of which have the investment objective of generating attractive total returns from investing in a portfolio of distressed businesses.	The Better Capital funds are limited partnerships registered in Guernsey with the GFSC
Blandford Capital ■	reception@blandfordcap.com	https://blandfordcap.com	22 Cross Keys Close, London W1U 2DW	Preferred deal sizes: up to £30m. Preferred turnover of investee companies: £10-200m. Blandford Capital is a sector-agnostic, transformative investor supporting companies to navigate special situations through equity and debt solutions.	
Blazehill Capital ■	Blake Hyman, jake@blazehill.com, 07896 434 851	https://blazehill.com	24 Old Bond Street, London W1S 4AW	We have supported businesses through a range of situations, including turnaround and restructuring. Bespoke loan facilities from £5m to £50m, delivering a range of structures for borrowers. Size: typical revenues >£10m. We are sector agnostic, with a leaning towards businesses that offer a strong asset base (e.g. receivables, inventory, equipment, property, brand/IP) or recurring revenues.	
Breal Zeta CF I ■	Robert Wakeford, rwakeford@bzcf.co.uk	www.bzcf.co.uk	78 Cannon Street, London EC4N 6HL	BZ offers structured, multi-jurisdictional ABL and cashflow facilities that deliver working capital and transactional finance, up to £150m, to support businesses that are not able to access traditional sources of capital. We are sector and asset agnostic.	
CIC London (Crédit Industriel et Commercial, London Branch) ■	Jacob Poot, 020 3618 9600	www.ciclondon.com	Finsbury Circus House, 15 Finsbury Circus, London EC2M 7EB	Asset-based lender against receivables and/or other collateral classes (including inventory and plant & machinery) for companies undertaking a turnaround or who require restructuring of existing funding arrangements.	Autorité de Contrôle Prudentiel et de Résolution
Davenham Asset Finance ■	Paul Burke, enquiries@davenham.co.uk, 0161 832 8484	www.davenhamassetfinance.co.uk	55 King Street, Manchester M2 4L	Our Davenham management team has been instrumental in helping a number of companies get back on track after suffering a setback in performance with our turnaround finance services. Turnaround finance can involve the restructure of a financially challenged company that can, as part of a structured plan, be freed from burdensome debt. Advances range from £7000 to £500,000.	FCA

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- = Provide other types of finance for entities involved in restructurings and/or turnarounds not included in either of the above

Who's who					
Company name	Contact details for IPs	Website	Address	Areas of activity	Regulator
Endless LLP ■	Tom Jack, tom.jack@endlessllp.com, 0113 210 4001	www.endlessllp.com	Ground Floor, 12 King Street, Leeds LS1 2HL	Our SME fund, Enact, invests in businesses with revenues between £10m and £50m. The Endless Funds invest in businesses with revenue between £50m and £1bn. Over the past three years, we have invested £321m in turnaround and restructuring situations in the UK, and we have access to £390m in capital that could be invested in these situations. We have committed capital from external investors and the Endless team. Endless selects and approves the opportunities which the funds invest in. Our investor base comprises global blue chip institutions and high net worth individuals. We have a proven track record and are backed by leading global investors. We are hands-on, carrying out our own due diligence and deploying our own team to drive value. We have an extensive network and a strong reputation as a responsible investor.	FCA
Fidera Ltd ■	020 3814 5200	www.fidera.eu	25-28 Old Burlington Street, London W1S 3AN	Fidera is an independent investment management firm. Our extensive network and thorough research enable us to identify high quality assets that typically face a combination of liquidity challenges and significant legal, regulatory and/or process uncertainties.	
Fresh Thinking Capital ■	0113 8314480	www.freshthinkingcapital.com	Park House, Park Square West, Leeds LS1 2PW	Short-term restructuring finance, short-term pre-pack administration finance, CVA and IVA funding.	FCA
Gordon Brothers Capital ■ ■	Nimit Shah, nshah@gordonbrothers.com, 020 7647 5120	www.gordonbrothers.com/services/financing-investment	3rd Floor, 13 Hanover Square, London W1S 1HN	Gordon Brothers Capital lends or invests directly in brands, real estate, inventory, receivables, machinery, equipment and more. We partner with management teams, private equity sponsors, strategic buyers and asset-based lenders globally who invite us into special situations. Our tailor-made solutions provide clients with additional capital alongside traditional debt and equity.	
Greybull Capital ■	info@greybull.eu, 020 7965 4557	www.greybull.eu	32 Sloane Street, London SW1X 9NR	Our entrepreneurial approach enables us to navigate complex situations that many traditional investors avoid.	FCA
Hilco Capital (a division of Hilco Global) ■	Matthew Holt, matthew.holt@hilcocapital.com, 020 7317 2050	www.hilcocapital.com	84 Grosvenor Street, London W1K 3JZ	Specialists in dealing with under-performing and distressed businesses, or non-core subsidiaries. Typical deal sizes (funds out) are £1-50m+, and are situation specific, rather than sector specific.	
HTB / Hampshire Trust Bank ■	assetfinance@htb.co.uk, 020 7862 6262	www.htb.co.uk	55 Bishopsgate, London EC2N 3AS	We deliver deal structures to tight timeframes and support businesses in acquisition, refinancing, cash-out and turnaround scenarios. Up to 80% LTV; and we accept property as additional security. Lending from £150k-5m, and facilities from 12-84 months.	
Independent Growth Finance / IGF ■	Jamie O'Neill, jamie.oneill@igfgroup.com, 07484 097 125	www.igfgroup.com	20 Farringdon Street, London EC4A 4AB	Asset based lender. Provides funding for event-driven scenarios such as a turnaround. IGF lends to businesses with a turnover between £3m and £200m. Centred around the core asset of trade debtors, funding can also be leveraged against company assets such as inventory, plant & machinery, and property.	
Meridian Structured Finance Ltd ■	Howard Atkinson, hatkinson@meridianequity.co.uk, 07427 619 361	https://meridianequity.co.uk	97 Kingsley Way, London N2 0EL	Sectors: automotive, business services, financial services, manufacturing/industrials, transportation and storage. What makes us different: speed of execution; personal money; empathy with management; experience. Unlike traditional private equity houses, the partners at Meridian Equity fund all of our own deals. Accordingly, we have no external pressure placed upon us to exit an investment within a specific period of time.	
NatWest Bank ■	Martin Noakes, martin.noakes@natwest.com	www.natwest.com/corporates/financing/specialist-finance/asset-based-lending.html	250 Bishopsgate, London EC2M 4AA	Asset based lending solutions against receivables and/or other collateral classes (inventory, plant and machinery, and property) on a bilateral and syndicated basis for transactions that include working capital, acquisitions, re-financings, turnaround and restructuring. Sector agnostic.	

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PNC Bank / The PNC Financial Services Group, Inc / PNC Business Credit ■				Asset-based lending for refinancing, recapitalisation, restructuring, growth, turnaround, mergers, acquisitions and management buy outs/buy ins. Lends to mid-sized companies and private equity firms looking to secure working capital and term financings, ranging from £5 million to £250 million.	
Primary Finance Group / PFG ■	Phil Betts, phil.betts@primaryassetfinance.co.uk, 01763 299 475	www.primaryfinancegroup.co.uk/services/business-turnaround	5 The Courtyard, Alswick, Buntingford, Herts	Lends to businesses that are restructuring or in turnaround. Will also look at funding pre-packs and CVA situations.	
Rcapital Partners ■	Chris Campbell, chris@rcapital.co.uk, 020 8323 5888	https://rcapital.co.uk	4th Floor, 24 Old Bond Street, London W1S 4AW	We see potential in difficult situations. Preferred turnover of investee companies: £10-150m. Investment: up to £20m (core £2-15m).	FCA
Retail Realisation ■ ■	Joseph Price, joe@retailrealisation.com, 07973 838 215	https://retailrealisation.com	Ground Floor, Egerton House, Baker Street, Weybridge, Surrey KT13 8AL	Retail Realisation is a consultancy focusing on retail businesses facing significant challenges. We offer support to businesses facing liquidity issues or those with unprofitable stores which need to be closed efficiently. We quickly find a suitable lender to provide cash in the form of a loan secured against assets. We have an extensive network of participating lenders providing loan facilities varying in size from £2m to £250m. We also directly invest into retail businesses by deploying our own capital and taking secured debt positions.	
RIADA Capital Partners ■	Neil Adair, neil@riadacapital.com, 07768 790 302	https://riadacapital.com	3rd Floor, Great Victoria Street, Belfast BT2 7BA		
Ridgeway Capital ■	Ari Stavropoulis, astavropoulos@ridgewaycapital.co.uk, 020 3865 8813 / 07906 705 862	www.ridgewaycapital.co.uk		Our investment range is typically between £500,000 and £5 million per transaction. We specialise in investing in complex business situations, which may include stressed and turnaround situations, such as a business which has under-performed or is over-leveraged. Ridgeway Capital investments are funded by high net-worth individuals, including the partners of Ridgeway Capital.	FCA
RoundShield Partners ■	Kevin Buckett, info@roundshield.com, 020 3597 5113	www.roundshield.com	2 Foubert's Place, London W1F 7PA	Sectors: mid-sized real estate, infrastructure, hard assets and financial asset markets. RoundShield manages approximately \$3.6 billion of discretionary capital, and has over 45 professionals with extensive portfolio management, restructuring and investment experience.	FCA
Rutland Partners ■	Nick Morrill, nick.morrill@rutlandpartners.com, 020 7451 0700	www.rutlandpartners.com	Thomas House, 84 Eccleston Square, London SW1V 1PX	Deal sizes: businesses worth £20-150m and needing £10-50m of equity. Sector agnostic. We often invest in special situations where a business has great potential but is trapped in negative thinking or has the wrong ownership structure.	FCA
Sandton Capital Partners ■	Matt Meehan, mmeehan@sandtoncapital.com, 07747 015 396	www.sandtoncapital.com	83B Baker Street, London W1U 6AG	Historic deal sizes: £4-120m. Target sectors: manufacturing; traditional media; agriculture; healthcare; energy.	SEC
Secure Trust Bank plc ■	Tony Young, tonyyoung@securetrustbank.co.uk, 0345 111 7092 / 0161 819 3040	www.securetrustbank.com		We offer funding of between £3-50m to cover situations including restructuring and turnarounds, management buyouts and buy-ins, and mergers and acquisitions.	
Shawbrook Bank Limited ■	bfcustomer services@shawbrook.co.uk, 0345 266 6611 / 0345 604 0970	www.shawbrook.co.uk	Lutea House, Warley Hill Business Park, The Drive, Great Warley, Brentwood, Essex CM13 3BE	We offer asset based lending, leveraged finance and hybrid senior debt solutions, enabling funding of acquisitions, management buy-outs, and restructuring and turnarounds.	PRA, FCA
Siemens Financial Services / SFS ■	01753 980 078	https://new.siemens.com/uk/en/products/financing/asset-based-lending.html	Sir William Siemens House, Princess Road, Manchester M20 2UR	Asset based lending for restructuring and turnaround situations, including bankruptcy and acquisitions.	

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SKG Capital Partners ■	Chris Althorp-Gormley, info@skg.co.uk, 020 7743 6100	https://skg.co.uk	23 Berkeley Square, London W1J 6EJ	SKG Capital Partners is a private family office, focusing on consumer facing businesses and adjacent markets including supply chain services, manufacturing and technology. Special situations: our goal is to identify companies that have unrealised potential, and who can benefit from measured investment, and operational expertise.	
Soho Square Capital Group ■	Walid Fakhry, wkf@soho-sq.com, 020 4551 8999	www.soho-sq.com	Hend House (2nd Floor), 233 Shaftesbury Avenue, London WC2H 8EE	Target investment size: £15-40m.	FCA
Tern Capital ■	020 3488 5085, investments@terncapital.com	www.terncapital.com	207 Regent Street, London W1B 3HH	We typically invest in B2B technology businesses with 50%+ recurring or repeat revenue. Investment criteria for special situations: £2m+ revenue; no ebitda requirement; distressed, turnaround, event-driven. We can close deals in under four weeks from signing a LOI. More than three-quarters of our transactions have completed in under a month.	
Tnui Capital ■	Bryan Green, bryan.green@tnuicapital.co.uk, 020 7148 7180			Tnui invests in complex and non-complex situations. Tnui looks to support buyouts, non-core acquisitions or financial restructurings. We deploy £250,000-50m to effect a turnaround. TnuiCapital has strong relationships with other investment funds where larger sums are required to effect the necessary changes.	
Wells Fargo Capital Finance ■	Neil Kerridge, neil.kerridge@wellsfargo.com, 07740 699 108	www.wellsfargocapitalfinance.co.uk	33 King William Street, London EC4R 9AT	Agented and syndicated asset-based financing. We can underwrite loans that are outside the typical lending criteria of most traditional financing relationships. Businesses of varying sizes and circumstances turn to Wells Fargo Capital Finance to expand their borrowing capacity, including those in turnaround situations and restructuring.	
White Oak UK ■	01244 527 300	https://whiteoakeurope.com	2nd Floor, 58 Nicholas Street, Chester CH1 2NP	Our ABL offering can be used to access cash for turnaround and restructuring scenarios. Eligibility: turnover between £10m and £250m. Borrow from £5m to £100m. Up to 95% advance rates. Fund against receivables, inventory, equipment and property.	FCA
Zed Capital ■	Harry Lees-Buckley, hlees-buckley@zed.capital, 07557 288 036	https://zed.capital	78 Pall Mall, London SW1Y 5ES	We are not fazed by challenging circumstances – we will work with management to identify the root of issues, find workable solutions and build robust plans for sustainable value growth where others will not. Investment size: £10-30m.	

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HMRC should vote more often to cut unnecessary court costs

Creditors lose out because HMRC has a policy of not engaging in small company CVLs, says **Maria Strong** who calls for IPs to help R3 take action to change this

Small to medium-sized creditor voluntary liquidations are the focus of many small practices. Typically, these CVLs will have few creditors and low-value assets. All liquidators are required to undertake certain statutory and administrative tasks, regardless of the size of the estate. They work hard to wind up the companies' affairs in an orderly way. Liquidators must act diligently, with integrity, objectivity, professional competence and due care, confidentiality and professionalism.

The liquidator would like to be paid for this work. When and how they are paid is prescribed by the Insolvency (England and Wales) Rules 2016 (IR16).

The IR16 state that any reasonable and necessary expenses of preparing the statement of affairs and convening the decision procedure or deemed consent procedure to seek a decision from the creditors on the nomination of a liquidator may be paid out of the company's assets, as an expense of the winding-up (the pre-appointment fee). If the pre-appointment fee is paid before appointment, it is up to the directors to approve the amount. If it is paid post-appointment, approval is required following the same process for seeking approval of the bases of post-appointment fees described below.

Trade creditors not interested

It is for the liquidation committee (if there is one) to determine on which basis, or combination of bases, the fees are to be fixed. If there is no committee, or the committee does not make the requisite determination, the liquidator's fees may be fixed by a resolution of a meeting of creditors.

If the fees are not fixed by the committee or creditors they will be fixed by the court on application by the liquidator, but the liquidator may not make such an application unless they have first tried to get their fees fixed by the committee or creditors and in any case not later than 18 months after their appointment.

You might be thinking that this is old news at this point. This procedure has been in place since 2016. However, it is often challenging

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Liquidators are left with no option but to make an application to court for approval of remuneration. This not only inundates courts with unnecessary applications but increases the costs and expenses of the CVL, in my experience, by £2500 to £5000”

for a small practice to obtain the necessary approval of a committee or creditors.

Trade creditors (if there are any) and banks are, in my experience, no longer interested in engaging with liquidators because it is highly unlikely they will receive a dividend due to the level of HMRC's secondary preferential claim.

If the Redundancy Payment Office has a claim in the CVL they are very good at engaging, and they vote. But it is where there are no employees that problems arise.

However, my experience getting HMRC's involvement (and most banks) to engage in the approval process has proved difficult. HMRC's Enforcement and Insolvency Service Department (EIS) have advised me that they only vote on fees in CVLs where: 1) they are the only creditor; and 2) they have received a dividend, or a confirmed amount is just about to be paid.

Approving liquidators' fees

HMRC are rarely the only creditor, but they are often the majority creditor. Liquidators are not always in a position to declare a dividend, and when they are, HMRC are likely to be the only creditor to receive one. Most banks have similar policies, or just do not vote at all.

Without engagement from HMRC or the banks, liquidators (and especially those at a small practice) are left with no option but to

make an application to court for approval of remuneration. This not only inundates courts with unnecessary applications but increases the costs and expenses of the CVL, in my experience, by £2500 to £5000. This increase in costs is to the detriment of creditors, as it reduces any dividend that may be payable.

Due to the policies on voting on fees adopted by HMRC and some banks, approving liquidators' fees in cases with few creditors, significant secondary preferential claims, or insufficient asset realisation to declare a dividend, becomes burdensome.

Liquidators must convene a decision to seek approval of remuneration from the liquidation committee or creditors, even if it is unlikely that any votes will be received. An application to the court for approval cannot be made until such a decision is sought. It takes time to prepare court documents, which in turn increases the costs and expenses of the liquidation.

In my opinion, HMRC should be more active as it is frequently a creditor and often the only creditor who will receive a distribution and/or is owed the largest sum of money. However, given the current restrictions on department spending, HMRC is having to prioritise cases where there is evidence of potential dishonesty or fraud by the directors. If HMRC were to adopt a similar procedure and approach that the RPO has adopted, then in time the costs of voting could be covered, in part if not in full, by the increased dividends received.

R3 have passed on small practices' voting concerns to R3's HMRC liaison officer. If you are encountering similar problems in obtaining approval of your remuneration, please email Moira Fitzpatrick moira.fitzpatrick@r3.org.uk at R3 so that we can collate evidence to demonstrate the need for change.



Maria Strong is a director at Strong Anderson and vice chair of R3's smaller practices group committee

Clive Emson

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Building relationships in Westminster

Amelia Franklin gives a roundup of recent press, public affairs and policy work by R3's newly-renamed external affairs team

Spring is upon us but, as the seasons change, the year continues to move at pace and the calendar remains busy. Since the last issue of the magazine, we have hosted and presented at a series of events and continued to give the profession a voice in Parliament and the media on a range of key issues.

We have also undergone a rebrand and are now known as the External Affairs team – a name which we feel better reflects the breadth and depth of work we carry out for members and the profession.

Flagship event

March saw our team hold its annual President's Lunch in Westminster.

This is the External Affairs team's flagship event and provides an opportunity to build relationships with parliamentarians and help improve understanding of the insolvency profession and its work.

This year's event was a great success, with 14 MPs and peers joining senior members of R3 to discuss a range of issues including regulation and the future of personal insolvency.

We were also joined by BBC Newsnight's economics editor Ben Chu, who provided an insight into the trends behind the current economic picture, and outlined his thoughts for improving productivity and boosting UK economic growth.

Since the beginning of the year, we have been working with our members to build a picture of views from the profession on a number of policy issues.

In February, we held our quarterly policy group meeting, where we discussed ESG, Government support for the high street, and insolvency and cryptocurrency assets.

Round tables on crypto and MVLs

The discussion on the latter topic helped refine our response to the Government's consultation on cryptocurrency, which was being finalised as this column was being drafted, and helped shape the content for our round table on cryptocurrency in April.

This event saw us discuss issues such as jurisdiction, volatility of the market, and the time, costs and risks involved for IPs when

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We remain concerned that without changes to the company dissolution process in Economic Crime and Corporate Transparency bill, it will continue to be hard to investigate and prosecute director misconduct”

handling crypto asset cases, all of which further helped shape our policy position for the consultation response.

We also hosted a round table on MVLs and their place within the insolvency landscape at the end of March, which identified a number of regulatory and stakeholder engagement issues that will inform our policy work on this process over the course of this year.

Presenting to the profession

The event calendar has been full for our team since the last edition of the magazine.

In February, head of external affairs Anthony Walters was invited to join an expert panel at a half-day diversity and inclusion conference led by the IPA, where he outlined some of the work we have been doing with the Insolvency Service around this issue.

The following month saw Anthony present as part of panel discussion at the Southern Forum 2023, held in Reading, where he outlined some of our achievements in 2022, talked about how we work with members to develop robust policy positions which are relevant to the profession, and our plans for the next year.

2023 is set to be a landmark year for new legislation that will have an impact on our profession, and we stand ready to represent it as we navigate the legislative calendar.

Continuing economic crime debate

As the economic crime and corporate transparency (ECCT) bill enters the House of Lords stage of its parliamentary journey,

we are currently briefing and engaging with peers.

While there are many positives to the draft legislation, we remain concerned that without changes to the company dissolution process, it will continue to be hard to investigate and prosecute director misconduct.

The bill represents a once-in-a-generation opportunity to close this loophole which attracts abuse from unscrupulous directors – a point we will continue to raise as the bill completes its journey onto the statute book and we will keep you updated about the new legislation once it is introduced.

Making the news

Since the start of the year, R3 spokespeople have appeared in a number of newspapers, magazines and websites discussing trends in insolvency and business distress, as well as a number of key policy issues.

Our comments on the monthly and quarterly insolvency statistics continue to be well-received, with our response to the 2022 annual figures featuring in more than 200 stories in publications that included the *Daily Telegraph*, *Guardian* and *Financial Times*.

And in the nations and regions, our commentary on the business and business distress data provided by Creditsafe continues to feature in a range of media outlets, including *The Daily Echo*, *Yorkshire Post* and *Scottish Business News*.

R3 also returned to the airwaves earlier this year, with vice president Nicky Fisher appearing on BBC Radio 5Live, president Christina Fitzgerald being interviewed by BBC News about current and future insolvency trends, and north east chair Chris Ferguson speaking to BBC Radio Newcastle about personal insolvency issues.



Amelia Franklin is communications officer at R3

My hopes for the profession – and why golf, not tennis, is the perfect stress buster

An interview with... new R3 president **Nicky Fisher**

Nicky Fisher's professional biography on her firm Herron Fisher's site states she's a licensed insolvency practitioner with more than 30 years' experience, *writes Sandra Kessell*. But that's not quite the whole story. She had been so sure she wanted to go into accountancy from the time she was a small child that around the age of 13 she started spending her school holidays working in her father's firm.

"My dad was a chartered accountant, so I wanted to be a chartered accountant, though I had no idea what a chartered accountant was," she says. After completing a Business Education Council national diploma (BEC) in business studies, the equivalent of A Levels, Nicky opted not to go to university.

"I went to a grammar school, so it was expected you would go to university, but I knew what I wanted to do, and I did that," she says. "Even when I went to college, I still planned to be an accountant but because all my friends thought I could just walk into a job, I thought 'I won't do that then' and I went off and worked in a law firm for three years instead."

Her first role was in probate and conveyancing, but she did not go on to take her solicitors' qualifications. But in the early 1980s in Eastbourne, her home town, law was not a particularly female-friendly profession, she found, so she left the firm.

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If there has ever been a hint of misogyny over her last 30 years in insolvency, Nicky has shrugged it off. 'It hasn't been a real issue for a very long time. You come across the odd person, but I just ignore it. I think the younger generation won't take it'”

"So Dad said, 'Come and work for me,' and I said, 'I'll come temporarily' and 13 years later..."

Nicky decided to help the firm manage its data by setting up what she calls "whizzy" spreadsheets. (There was no Excel back then.) "I was already a member of the Association of Accounting Technicians (AAT) and was ready to become a chartered accountant, but I had to ask so many questions about insolvency to set up the spreadsheets that instead of doing my chartered accountancy exams I decided to do my insolvency exams and I swapped into the insolvency department," says Nicky.

Easier role

In 2000, after her father retired and sold his firm, Nicky decided to seek work elsewhere. "It was either Brighton or London and I chose London to gain greater experience," says Nicky. "I took an easier role because it was a five-hour round commute and I'd recently divorced. It was a nice job without any of the responsibility I'd had before."

A shift to Croydon followed but after her first firm Levy Gee, and then her second, Begbies Traynor, both closed their offices in the town, she and a fellow partner decided to set up on their own, starting Herron Fisher in 2006.

"We were forced into it, really, but I knew we could do it because Chris and I had been winning work for years," she explains.

If there has ever been a hint of misogyny over her last 30 years in insolvency, Nicky has shrugged it off. "It hasn't been a real issue for a very long time. You come across the odd person, but I just ignore it. I think the younger generation won't take it," she says. "It got me into the profession, because I left that law firm, but other than that I have never felt any disadvantage being a woman and it's defeatist to make it an issue in the 21st Century," she says, going on to point out that Liz Bingham, Frances Coulson and Patricia Godfrey have all served as R3 presidents [in 2013/14, 2011/12, and 2007/8 respectively], and Christina Fitzgerald is the outgoing president.

“

We have enviable regulation in this country in insolvency. Other countries look at it and think it is great, yet the Government seems to think it isn't”

Distraction from work

In her free time (such as it is) Nicky used to play tennis, initially to give her son practice, but he became better than her by the time he was aged seven. He still plays tennis, but Nicky now concentrates on golf, which she finds is a great distraction from work.

"For me, when you are on a golf course, you can't think about anything else or the ball is not going anywhere – or at least it's not going anywhere you want it to, for sure. It is a complete break from work, and because you can't think about work, I don't. I have completely different friends at golf, nothing to do with my working life," she says.

Thinking ahead about the challenges that will come with being R3 President, Nicky has a few goals she would like to see achieved, though she knows the year will pass quickly and some of the problems she would like to tackle are perennial.

Compensation culture

She starts with the thorny issue of Government plans for a single regulator, which it wants to be part of the Insolvency Service, combined with additional regulatory responsibilities.

Nicky feels the proposed plans seem designed to foster a compensation culture where no harm exists. "We have enviable regulation in this country in insolvency. Other countries look at it and think it is great, yet the Government seems to think it isn't," she says.

Tied up with that is the subject of IPs' fees and mainstream media perpetuating myths about how much they get paid based on what happens when huge, high-profile companies get into trouble.

Small IP firms will close

"The public does not see how much good small IPs do, how many people we help and how we change lives. I'm not saying millions of pounds of fees is wrong in those big cases, but I don't think I have ever had a job that took £1 million – we don't take £1 million across all the jobs we do in a year," she says.

She warns that small IP firms will close if the proposed plans for regulation are brought in, because they will make their model untenable. "We already do so much work for free," says Nicky.

Which brings up another of Nicky's goals: to change the way IPs are paid on smaller cases. She is not optimistic of success on that score. Put simply, she would like a fixed fee for smaller cases which would halt the current waste of precious court time when they don't get creditors to engage.

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You are either insolvent or rescuable when you walk through our door. Crossing our threshold doesn't change those facts, and nor does standing outside ”

Apathetic creditors

"We have to get permission from the creditors to get paid, which is only right and proper, but the Official Receiver can get paid around £10,000 without approval from anybody. We can have dozens of little jobs and may only be paid less than £5000 for each and then only with creditor approval. I would like to see IPs get a de minimis figure without an approval process, like the OR. Let's say around £6000. If it were £6000 and a penny, then we would need approval," she says.

Even working for a percentage would not be practical for a very small case, she points out, because of the additional work involved in sharing miniscule sums with creditors.

A recurring theme within the profession features encouraging directors whose businesses are in financial trouble to seek help from IPs when difficulties first manifest. Improving IPs' image and getting rid of

scaremongering headlines would make that first step easier, she believes.

"Small and medium-sized businesses in our towns don't seem to realise that you can change the situation when you are in trouble, and we can turn the business around. They just don't come early enough. There can be two reasons for that: they are either too proud or they don't know we exist," she says. "You are either heading for closure or you are rescuable when you walk through our door. Crossing our threshold doesn't change those facts, and nor does standing outside. People think, 'If I come to see you, I will go bust', but that's not true at all. The situation already exists and we are there to help."

Joined up thinking

Nicky also wants to raise the profile of the profession among young people and give them reasons to consider it a career option. "You are helping people and every day is different. It's a privilege to be entrusted with the future of a business," she says.

For Nicky, key attributes for success as an insolvency practitioner are joined up thinking and a good memory for everything – not just for figures, but for what people tell you.

She does not believe that you have to be a graduate to make a good IP, pointing out that among her firm's current staff, there is only one graduate and the rest are either school leavers or mothers with new careers after having children.

"You don't need to have an accountancy qualification, you learn on the job," says Nicky.

Motto

With more than 30 years in insolvency, Nicky believes she uses her skills to improve life for the people she encounters across her community and profession.

"My motto is, 'people come in crying and go out smiling' and what I mean by that is, no matter what the news is, or what they need to do, once we have explained to them how they do that, it isn't as bad as it seems. Even if it is difficult, it is not as bad as how all the sleepless nights make it feel," she says.

That theme of using her skills to make life better for the people she encounters is clearly something she shares with her late father, who died in March this year, just ahead of this interview. "I've always taken a view that we should help people and do the right thing. I had a phone call the other day from a woman who recalled how Dad had helped her when she was 21.

"She had gone bankrupt and she had no money. On the day she came to see him, it was her daughter's second birthday and he put his hand in his pocket and gave her

a £10 note to buy her daughter a present. That was his kindness. The woman said: 'I've never forgotten it, and I've never been in debt since.'

"Although I wouldn't know what people [will say] about me once I'm gone, I think that would be a good legacy," says Nicky.

Nicky Fisher biography

Age: 59



Lives: Warlingham

Education:

School: Eastbourne Grammar & High School, 1975-1980

College: Eastbourne College of Further Education, BEC national diploma in business studies, 1980-1982

Career:

1982-1985: Hart Reade & Co

1985-2000: Bradshaws. She passed her AAT exams in 1987 and then took the JIEB, gaining her insolvency licence in 1998

2000-2001: Rothman Pantall & Co

2001-2004: Levy Gee

2004-2006: Begbies Traynor

2006-present: Herron Fisher

2017-2018: President of the Association of Accounting Technicians (AAT)

2020-2023: President of the Eastbourne & District Chamber of Commerce

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