Winter 2023

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Retail distress

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> "The economic outlook for the UK remains uncertain as debate continues as to whether a recession will be avoided"

From the editor

As we approach the end of another year, the economic outlook for the UK remains uncertain as debate continues as to whether a recession will be avoided.

However, with Christmas approaching and Black Friday just passed, focus is currently on consumer spending and the effect high inflation and interest rates will have on retailers' profits. This edition therefore focuses on distress in the retail sector.

Tina McKenzie of the Federation of Small Businesses looks at the challenging outlook for small retailers, Ion Fletcher gives the BPF's view on restructuring plans and we hear from Rick Harrison at Interpath on the firm's involvement in the sale of the Tuffnells business.

From the legal perspective, the same litigation saga has spawned a Supreme Court decision on a challenge to a trustee in bankruptcy's actions, reviewed by Joseph Curl KC, and a Court of Appeal decision on the trustees in bankruptcy's discretion, reviewed by Rowena Page at Maitland Chambers and Kathryn Hacking at Gateley. Rhys Williams at Howden also looks at the Supreme Court decision in *PACCAR* and its effect on litigation funding.

The financial recovery unit manager at the ICO, Kerry Smith, tells us how they are using the appointment of IPs to enforce the collection of fines for breach of communications and data protection legislation, and Angela Foyle from the CCAB defends its guidance on money laundering and terrorism finance.

Jennifer Jenkins and William Barnes at Mourant describe the latest developments in the BVI, and Andrew Kelsall reflects on his 40 years dealing with personal insolvencies. Our survey this edition looks at technology and IT services.

I hope you and your families have a great Christmas and New Year.

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

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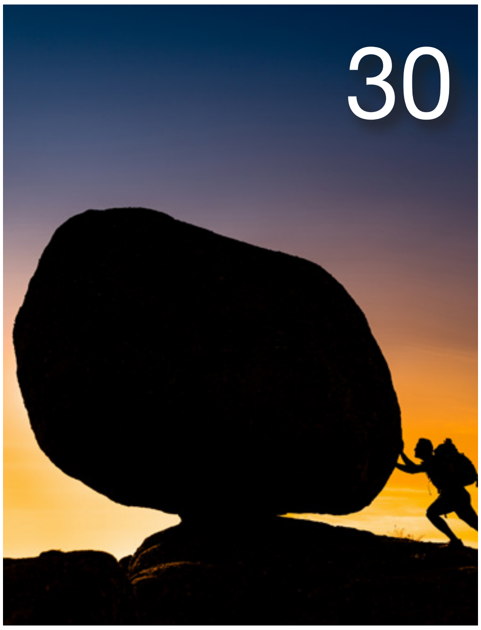

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A critical year for the profession

Heightened scrutiny of the profession by Parliament and press alongside consultations on personal insolvency and regulation will make 2024 crucial, says **Nicky Fisher**

It is hard to believe I'm now in the third quarter of my term as R3 president as I stop to take stock on another whirlwind three months, from Lancaster Gate to Tokyo.

After a long wait the Government finally released its response to the 2022 consultation on the future of insolvency practitioner regulation. R3's verdict is that we now have some much-needed clarity, but questions remain.

I have also been on the road attending a range of R3 events and conferences (more on those later) – and continent hopping as R3's representative at INSOL International's conference in Toyko and INSOL Europe's Annual Congress in Amsterdam.

> **It was a surprise to learn the South African insolvency body is run by just one person!**

The INSOL International Conference provided a fascinating global perspective into areas like cryptocurrency and ESG, as well as the Chinese housing market. Here I took part in a roundtable meeting with other trade bodies from around the world – interestingly, and regardless of jurisdiction, they are all experiencing the same issues as us, and it was a surprise to learn the South African insolvency body is run by just one person!

INSOL Europe's Amsterdam conference provided a great opportunity to meet colleagues from across the channel and learn more about the challenges they face – post-Brexit and more generally. A personal highlight was the networking invitation from David's, a small firm of lawyers who came up with the enterprising idea of bringing small firms together by hosting dinner on a boat built in 1903 – I wonder how many of those it has hosted over the last century…

Events, conferences and fundraising

This year's packed events programme has continued at a pace. Our Eastern and

> **November brought the second of R3's flagship national events: the SPG Forum. This year, more than 200 delegates joined us to hear from speakers that included representatives from HMRC, the Insolvency Service and the Bank of England, and Eddie the Eagle**

Northern Forums brought together more than 130 delegates from across both regions to catch up, network and debate a range of topics that included IP regulation, AI, hotel and franchising sector insolvencies, and the future of the UK and global economy.

The start of October brought the return of the R3 Business Lunch, and more than 500 members of the profession came together in London to network, swap insights and hear from our excellent guest speaker, ICC Judge Catherine Burton.

I was delighted to present Stewart Perry with this year's President's Award for his support for R3's technical and external affairs teams, and his stellar service as chair of the general technical committee.

And I'm equally delighted to be able to tell you we raised more than £7000 for the Children with Cancer Fund, a charity that does fantastic work supporting children and families in East Sussex, Brighton and Hove.

November brought the second of R3's flagship national events: the SPG Forum. This year, more than 200 delegates joined us to hear from speakers that included representatives from HMRC, the Insolvency Service and the Bank of England, and Eddie the Eagle.

Thank you to all the committee members and the team at R3 for all your work in making these events happen.

Committee changes

We have said goodbye to a couple of chairs in the nations and regions since the last issue of *Recovery* as their term of office has come to an end.

Alastair Bacon of AMB Law has stepped down as chair of the Eastern Region and has been replaced by Hayley Williams of McTear Williams & Wood, while in Northern Ireland Ian Leonard of Interpath Advisory has taken over as chair from James Neill of KPMG.

And, in the Southern and Thames Valley region, Garry Lee steps down as chair in December and will be replaced by former R3 Council member Neil Stewart of Manolete.

Thank you to the departing chairs for all your hard work – both during the pandemic and as we rebuilt our events and engagement programmes after it – I look forward to working with those of you who are taking over.

Looking ahead

As the end of this year approaches, the R3 team are busy putting the finishing touches to their plans for the next 12 months. Work is underway on the 2024 Fraud and Annual Conferences, the Training Academy are preparing to launch another series of webinars, in-person and online courses, and our regional events programme is ready to go.

And, with consultations due on the personal insolvency framework, firm regulation, successor appointments and the proposed compensation scheme, as well as the profession coming under increasing scrutiny by parliamentarians and the media, our external affairs team stand ready to continue to give the profession a voice in Westminster, the devolved nations and the media.

It is going to be another critical year for the profession, and for R3. Our membership renewals campaign is well underway, and, if you haven't already, I would urge you to renew by the deadline to ensure you retain all the benefits of R3 membership.

But before 2024 arrives, we have the break over the festive season. Have a good one – and see you in the New Year!

Nicky Fisher is president of R3

Legal Q&A

Lily Pidge and Andrew Robertson answer your insolvency queries

Q What should an IP consider when reviewing a company's accounts in the context of a potential breach of duty claim against the directors?

A To pursue a claim for breach of the so-called 'creditor duty', an IP will need to demonstrate the duty has arisen and has been breached. The creditor duty may arise (in the context of disputed liabilities) where the director is aware of a disputed liability which, if properly accounted for, would render the company balance sheet insolvent.

> IPs will also need to establish that the directors had some form of knowledge of insolvency

This was recently confirmed in the appeal of *Hunt v. Singh*, where the liquidator of Marylebone Warwick Balfour Management Limited pursued claims against the company's former directors for breaches of fiduciary duties and for transactions defrauding creditors.

Having obtained specialist advice, the directors operated a sophisticated tax-avoidance scheme between 2002 to 2010, during which the company paid over £54 million to its head-office staff and avoided PAYE and NIC contributions of £36 million.

Due to a rise in similar schemes, HMRC made a market-wide settlement offer (including to the company) in September 2005 and indicated its intention to litigate test cases. The company rejected that offer.

Overturning the first instance judgment, Justice Zacaroli found that it was not enough for the directors to rely on the tax advice as a justification for not including the liability in the company's accounts. The judge found that the company was clearly insolvent by September 2005, as HMRC's settlement offer symbolised a real prospect of the company's challenge to the disputed tax liability failing. Had the debt been properly accounted for at that time, the company would have been balance-sheet insolvent.

Going forward, IPs will need to be cognisant of identifying the time at which there becomes a real prospect of the disputed liability crystalising, as this is when the creditor duty arises (assuming the company becomes insolvent once the liability is factored into the accounts).

The case suggests that IPs will also need to establish that the directors had some form of knowledge of insolvency (actual or constructive), which is heavily reliant on the availability and accessibility of contemporaneous documents.

Whether the duty has been breached will therefore ultimately depend on the facts.

Q What do I need to demonstrate to succeed in a preference claim?

A As lawyers and IPs will know, successfully making out a preference claim will often turn on proving that the operative decision to effect the transaction was influenced by a 'desire to prefer'. This can be challenging, even with a 'connected' creditor transaction, where the desire to prefer is presumed.

Further complications can arise where the transaction is effected after a series of 'decisions', as recently highlighted in *Darty Holdings SAS v. Carton Kelly*, where the Court of Appeal overturned the first instance decision that repayment of a £115.4 million intercompany loan on the disposal of electrical retailer Comet Group plc, was an unlawful preference.

> IPs will need to be mindful of the court's willingness to adopt a stricter interpretation of what amounts to an operative decision

Comet's shareholder agreed to sell its shares in Comet pursuant to a sale and purchase agreement. The SPA set out a complex financial transaction, including repayment of the loan. Comet was not a party to the SPA, and Comet board approval was not sought until completion of the transaction on 3 February 2012.

The key question for the court was: 'when was the operative decision to effect the transaction made?' The Court of Appeal found that the operative decision to effect the transaction was not made until the board meeting on 3 February 2012. Comet was not party to the SPA, so the board was not bound to effect the transaction. Any of the parties could have terminated the transaction prior to completion. In addition, the SPA expressly provided for a future (operative) decision to be made by Comet, demonstrating the deal had not been finalised.

When pursuing preference claims, IPs will need to be mindful of the court's willingness to adopt a stricter interpretation of what amounts to an operative decision, and that the question of whether the relevant protagonists were influenced by a desire to prefer in entering into the transaction may be considered at a much later stage in the decision-making process.

For more on *Darty Holdings SAS v. Carton Kelly, please see page 9.*

Lily Pidge is an associate and **Andrew Robertson** a senior associate at Clyde and Co

Recent case summaries

The latest insolvency update from Giselle McGowan and Paul Wright

Khan v. Singh-Sall [2023] EWCA Civ 1119

The Court of Appeal considered the extent of the court's discretion to refuse to annul a bankruptcy order where it has determined that the order ought not to have been made.

At first instance, the judge declined to annul a bankruptcy order despite finding that the order ought not to have been made on two grounds (the debt was disputed on substantial grounds and the creditor held security) in circumstances where the debtor was undoubtedly insolvent.

> **The most significant consideration was likely to be the question of the bankrupt's solvency: if there were debts that could be pursued against the bankrupt that they could not meet, there was usually little benefit to granting annulment**

On appeal, the court rejected the argument that, where a debt was disputed (or security had not been disclosed) such that the bankruptcy order ought not to have been made, the court had no jurisdiction to make a bankruptcy order and therefore this should be set aside as of right (or only in exceptional circumstances). While a petition would normally be dismissed if the debt was disputed on substantial grounds because the court would not be able to satisfy itself that the petitioner was entitled to present a petition or that a payable debt was unpaid, this was a matter of practice and not a question of jurisdiction. This was distinguishable from cases where a court had no choice but to annul a bankruptcy order that had been made against a person whose COMI was not in England and Wales. In those cases, the court had no jurisdiction to make the bankruptcy order because the bankrupt was not within its reach. The distinction was between a scenario where a court ought not to exercise its power and one where the court lacked any power.

Secondly, the court rejected the argument that a court's discretion to refuse annulment where a bankruptcy order ought not to have been made was limited to cases where exceptional circumstances were shown. Rather, the discretion was to be exercised having regard to all the circumstances. Usually there must be something of weight to put on the scales to outweigh the fact that the order ought not to have been made, such as to justify the conclusion that annulment should be refused. However, this need not be 'exceptional'. In practice, the most significant consideration was likely to be the question of the bankrupt's solvency: if there were debts that could be pursued against the bankrupt that they could not meet, there was usually little benefit to granting annulment.

In relation to a third ground, which it was unnecessary to determine, the court left open the question of limitation pertaining to whether time continued to run during the period between a bankruptcy order and annulment but indicated that it was not satisfied that the conclusion of the judge on first appeal (that time continued to run) was correct.

Darty Holdings SAS v. Carton-Kelly [2023] EWCA Civ 1135

In November 2011, Kesa Electricals agreed to sell the retailer Comet to OpCapita under a sales and purchase agreement (the SPA). Though not a party to the SPA, the terms required Comet to repay a large intercompany debt on completion.

On 3 February 2012, as envisaged by the SPA, Comet's board of directors was replaced by OpCapita's nominees. The new board approved the proposed sale later that same day.

In Comet's subsequent liquidation, the repayment of the intercompany debt was challenged as a preference under section 239 of the Insolvency Act 1986. At trial, the liquidator argued that Comet decided to make the repayment when its owner, Kesa, entered into the SPA in November 2011, influenced by a desire to prefer the intercompany creditor. It was accepted that the new board was not so influenced in February 2012.

> **Comet might have been expected to approve the sale, but proposing a transaction that is conditional on board approval does not amount to an 'operative' decision**

At first instance, Falk J found it would be a triumph of form over substance to find a decision was only taken when the new board approved the sale: its hands were effectively tied by the SPA. Had the new directors refused to approve the sale, they would have been replaced by directors who would do so.

There was no issue of law to be determined. The statutory question is whether the decision to enter the impugned transaction was influenced by a desire to prefer. Where there are multiple decisions, the court must find the 'operative' decision.

Instead, the Court of Appeal held there was no evidence to support the trial judge's factual inferences.

Comet was not bound by the SPA. Comet might have been expected to approve the sale, but proposing a transaction that is conditional on board approval does not amount to an 'operative' decision.

Even if Comet's new board had little option but to approve the sale in February 2012, that does not mean a decision had already been taken in November 2011. The board minutes indicate it considered alternative sources of financing for Comet before approving the sale.

Though a director of Kesa who had been instrumental in negotiating the terms of the SPA was also a director of Comet at the relevant time, there was no evidence he had made or was authorised to make a decision on behalf of Comet in November 2011. Even if he had, there was no evidence that his decision was communicated to anyone else. As such, it could not have been the 'operative' cause of Comet making the repayment.

Giselle McGowan and **Paul Wright** are barristers at 9 Stone Buildings

Office-holder discretion restored in ‘legal return to common sense’

A surprise decision that threatened to drag TIBs into ‘protracted and hostile’ litigation is overturned in a welcome return to normality, say **Kathryn Hacking** and **Rowena Page**

Type the words ‘Brake’ and ‘Chedington’ into Westlaw and you will be presented with no fewer than 44 reported decisions between the two parties and their privies: the bankrupt Mr and Mrs Brake on the one hand, and their neighbouring adversary the Chedington Court Estate Ltd on the other. A modern-day *Jarndyce v. Jarndyce*, litigation between the parties has gone on for years, with appeals reaching the highest court in the land (See page 12 for the Supreme Court decision).

It was into this arena that the Brakes’ trustees in bankruptcy (TIBs) were invited to step in November 2022 in *Patley Wood Farm LLP v. Kicks*. By that stage judgment had been handed down by the Court of Appeal in one of the Brakes’ ongoing battles: their challenge to their unlawful eviction by Chedington from a property known as ‘the Cottage’. The challenge was successful, and the Court of Appeal had to decide what should happen about possession of the Cottage. The Brakes wished to retake possession. Chedington wished to avoid that outcome and so requested the TIBs to join the Court of Appeal proceedings, post-judgment, to seek a possession order in their own right.

> **“The TIBs were troubled by the impact that Chedington’s funding proposition may have on their independence, effectively allowing it to ‘call the shots’ as to the level and extent of legal advice to be taken”**

In exchange, Chedington offered an adverse costs indemnity and an undertaking to meet the TIBs’ reasonable costs. It also offered to take a licence of the Cottage after possession was reclaimed, paying £3000 per month in exchange.

Having taken legal advice, the TIBs declined to join the Court of Appeal proceedings. Not only was there no prospect of the estates’ creditors being benefitted by them joining (given the level of costs and expenses already incurred, including those of a previous trustee, and the limited amount of the licence fee offered), there was also no money in the estates and the TIBs had concerns at becoming embroiled in protracted, time-consuming and hostile litigation. They were also troubled by the impact that Chedington’s funding proposition may have on their independence, effectively allowing it to ‘call the shots’ as to the level and extent of legal advice to be taken and, potentially, the position to be adopted by them in the proceedings.

Chedington and two creditors (Patley Wood Farm LLP and its principal) sought to challenge the TIBs’ decision via a s303 Insolvency Act 1986 application before the High Court. Anyone familiar with s303 will know what a high bar that provision provides: as recently confirmed by the Court of Appeal in *Re Edengate Homes (Butley Hall) Ltd* [2022] 2 BCLC, the test to be applied in both personal insolvency and its corporate equivalent[1] is one of perversity or bad faith. The court may only interfere if it can be shown that the office-holder has acted in bad faith or so perversely that no office-holder properly advised or properly instructing themself could have acted in that way.

A modern day ‘Jarndyce v. Jarndyce’: litigation between the bankrupts, Mr and Mrs Brake, and the Chedington Court Estate has gone on for years
Pictured: Attorney and client: fortitude and impatience by Phiz for Bleak House, 1853. Scan by George P. Landow for Victorian Web.

The judge's first instance decision came as a surprise to many, lending itself to a suggestion that … not only may an office-holder's powers be hired out to the highest bidder, but the court may interfere if they are *not* so hired out

Despite the high bar, the High Court allowed the Chedington parties' application and directed the TIBs to apply to the Court of Appeal to be joined and to seek a possession order. The first instance judge rejected the TIBs' concerns as 'simply absurd', holding that it was 'difficult to see the downside to the trustees making an application to intervene'[2]. A subsequent decision from the same judge prohibited the TIBs from raising concerns about whether they were even legally entitled to be joined as a party before the Court of Appeal in the proceedings.

The TIBs appealed.

The appeal

The Court of Appeal unanimously overturned the first instance judge's decision. In a judgment handed down just days after the hearing, Lord Justice Arnold (with whom the other Lord Justices agreed) identified four flaws in the judge's reasoning:

1. First, while the judge was correct to say that it was the TIBs' duty to act in the interests of creditors, he failed to recognise the full extent of the trustees' statutory discretion. It was for the TIBs to decide what steps they should take in the bankruptcies and, while they owed a duty to act in the interests of creditors, they were not required to do so *at all costs*.
2. Second, there was no real prospect that creditors would benefit from the TIBs joining the possession proceedings. The £3000 pcm licence fee offered by Chedington would be a 'drop in the ocean' when compared against the deficit faced by the estates.
3. Third, the judge was simply wrong in failing to see any downsides to the TIBs seeking to join the proceedings. The downsides were obvious and had been confirmed by subsequent events (including attempts by Chedington to direct the position that the TIBs were to take in the Court of Appeal proceedings). The TIBs had indeed been forced to become embroiled in protracted, time-consuming and hostile litigation.
4. Fourth, the TIBs were entitled to be concerned at the impact Chedington's funding proposition would have on their independence. This was 'not a straightforward case of third-party funding'; rather, Chedington (which was not a creditor in the bankruptcies and was itself a party to the relevant proceedings) had sought not only to fund the TIBs' application but also to dictate to them what submissions they could make to the court, regardless of the legal advice they had received.

Lord Justice Arnold concluded that the TIBs' decision 'cannot possibly be stigmatised as perverse' and overturned the decision of the lower court.

No office-holder can carry out their role effectively if they are required simultaneously to be looking over their shoulder, fearful of challenge and interference by the court

The significance of the decision

The Court of Appeal's judgment provides a welcome return to normality for the insolvency profession. The judge's first instance decision came as a surprise to many, lending itself to a suggestion that, contrary to previous first instance authority[3], not only may an office-holder's powers be hired out to the highest bidder, but the court may interfere if they are *not* so hired out, provided some financial benefit may result.

Through its judgment the Court of Appeal has sounded a return to common sense and has once again highlighted the importance of judicial deference to office-holder discretion. No office-holder can carry out their role effectively if they are required simultaneously to be looking over their shoulder, fearful of challenge and interference by the court. It is therefore particularly welcome that the court

An office-holder is not required to work for free or to take unreasonable risks, particularly if the eventual outcome may only have a negligible impact on the creditor position

explicitly recognised at [73] that the TIBs were experienced professionals who have a statutorily recognised discretion as to the steps they should take to administer an insolvent estate.

Equally welcome is the indication given by the court that, although office-holders owe a duty to act in the interests of creditors, they are not required to do so at all costs. An office-holder is not required to work for free or to take unreasonable risks, particularly if the eventual outcome may only have a negligible impact on the creditor position. The court also confirmed that office-holders are entitled to consider their own position alongside that of creditors.

Overall, therefore, the Court of Appeal's decision is likely to be welcomed by the insolvency profession as a sensible and pragmatic reminder of the importance of maintaining office-holder discretion in the administration of insolvent estates.

Rowena Page appeared alongside Andrew Westwood KC, instructed by Kathryn Hacking and Richard Healey of Gateley Legal, for the successful trustees in bankruptcy before Lord Justice Lewison, Lady Justice Asplin and Lord Justice Arnold. Kristina Kicks and Blair Nimmo of Interpath Advisory were the trustees. William Day, instructed by Stewarts Law, appeared for the respondent. The hearing was held on 20 July 2023.

Richard Healey contributed to this article.

1 s168 Insolvency Act 1986.
2 First instance decision, *Patley Wood Farm LLP v. Kicks* [2023] BPIR 507.
3 See for example *Re Ng* [1997] BCC 507 and *Trustee in Bankruptcy of Bukhari v. Bukhari* [1999] BPIR 157.

Kathryn Hacking is a partner at Gateley Legal and **Rowena Page** is a barrister at Maitland Chambers

Challenge to trustee conduct hinges on legitimate interest test

The Supreme Court reaffirms that a tangible interest in assets is (almost) always needed to challenge office-holder conduct, says **Joseph Curl KC**

This decision of the Supreme Court concerned the same bankruptcies of Mr and Mrs Brake as did the decision of the Court of Appeal in *Patley Wood Farm LLP v. Kicks* (*Kicks*), which is discussed elsewhere in this edition of *Recovery* (see page 10). Despite that shared factual background however, the two decisions arose from separate applications dealing with distinct aspects of the circumstances in which an office-holder's conduct may be subject to challenge. What the two decisions have in common is that they each represent a restatement of longstanding principle that is likely to be welcomed by licensed insolvency practitioners.

Like the *Kicks* decision, *Brake v. The Chedington Court Estate Ltd* [2023] UKSC 29, [2023] 1 WLR 3035 concerned a property known as 'the Cottage'. In this case, however, Mr and Mrs Brake themselves applied under s303 of the Insolvency Act 1986 for relief arising from the alleged actions of their former trustee in bankruptcy (TIB) in relation to that property.

> **The Supreme Court's decision in *Brake v. Chedington* was focused on the prior question of whether or not a party even has standing to bring such an application [to challenge trustee conduct]**

The Brakes' complaint (in summary) was that the former TIB had hired out his powers to Chedington (a non-creditor) with a view to assisting Chedington in its private dispute with the Brakes. Their application was made against both the former TIB and Chedington. The former TIB did not oppose the Brakes' application and consented to be removed from office.[1] Chedington applied to strike out the application on the ground that the Brakes lacked standing to bring it. As is usual in strike out applications, the case was argued on the hypothesis that the Brakes' factual allegations would come up to proof at trial; in fairness to the former TIB it should be understood that he maintained that his actions were the right ones for the benefit of creditors in two difficult bankruptcies and no finding was made against him.

 Editor editor@r3.org.uk

> **It was not enough that the Brakes' interests might have been 'substantially affected' by the former TIB's conduct; if that were sufficient then any number of strangers to the bankruptcy would be able to establish standing to be heard**

At this point, the distinction between this case and the *Kicks* decision emerges. The *Kicks* case concerned the standard of review that the court will apply when a challenge to a trustee in bankruptcy's conduct is brought. In contrast, the Supreme Court's decision in *Brake v. Chedington* was focused on the prior question of whether or not a party even has standing to bring such an application. Although these points will often arise together (and last year's Court of Appeal decision in *Re Edengate Homes (Butley Hall) Ltd*[2] is a good example of this), they are distinct. Accordingly, *Brake v. Chedington* was not about whether or not trustees in bankruptcy should be left to discharge their duties in accordance with their wide discretion; the strike out proceeded on the assumed hypothesis that the former TIB had acted *outside* his powers and so had no discretion to do as he had done. Rather, *Brake v. Chedington* was about whether the Brakes were sufficiently interested parties to be heard on the point at all.

In a brief *ex tempore* judgment, the first instance judge struck out the Brakes' application,[3] finding that the Brakes did not have 'a legitimate interest in the relief sought', which was the formula laid down by Lord Millett in the frequently cited Privy Council decision *Deloitte & Touche AG v. Johnson.*[4] The Brakes appealed to the Court of Appeal, which unanimously allowed the appeal.[5] Lady Justice Asplin (with whom Lord Justices Floyd and Henderson agreed) decided that, on the assumption that the allegations were true, the Brakes had 'a legitimate and substantial interest in the relief sought sufficient to give them standing' because 'at the very least, their interests were substantially affected by' the alleged actions of the former TIB.[6]

Chedington appealed to the Supreme Court.

The appeal

The Supreme Court unanimously reversed the Court of Appeal and restored the order of the first instance judge. Lord Richards (with whom Lord Briggs, Lord Hamblen, Lord Leggatt and Lady Rose agreed) reviewed the authorities and concluded that standing under s303(1) should be limited to (i) creditors applying in respect of conduct that is adverse to their interests as creditors; (ii) bankrupts applying in respect of conduct that is adverse to their interest in the estate, which necessarily requires a real prospect of a surplus; and (iii) a very small residual category of cases 'which have arisen directly out of provisions which are peculiar to the insolvency regime.' The Court of Appeal's test for standing had been 'far broader than is warranted by any prior authority.'[7]

> **A further useful takeaway point from the Supreme Court's decision is the clear indication that the same approach to standing should apply in both bankruptcy and liquidation**

Lord Millett's reference in *Deloitte v. Johnson* to a party requiring 'a legitimate interest in the relief sought', which had influenced the Court of Appeal, was considered by Lord Richards to have been 'expressed in very general terms' and was 'only the beginning of the enquiry'. What mattered was 'the examination of the factors that give the applicant a legitimate interest in the relief sought.'[8] Lord Richards noted that Lord Millett's ultimate decision in *Deloitte v. Johnson* had been entirely in accordance with prior authority, i.e. that only those interested in the assets of the company (which in *Deloitte v. Johnson* meant only the creditors, as the company was clearly insolvent) would have standing to be heard. It was not enough that the Brakes' interests might have been 'substantially affected' by the former TIB's conduct; if that were sufficient then any number of strangers to the bankruptcy would be able to establish standing to be heard.

The significance of the decisions

The Court of Appeal's decision in *Brake v. Chedington* had been criticised by some practitioners on the grounds that it was not easy either to identify the principled basis for the court's decision to draw the line between standing and non-standing cases where it had, or to reconcile the outcome with previous authority. In allowing Chedington's appeal, the Supreme Court has essentially agreed with those criticisms. Lord Richards' judgment is likely to be regarded by most insolvency practitioners as a welcome restatement of a principle of long-standing, i.e. that in order to be heard in an insolvency a party will almost invariably require both (a) a tangible economic interest in the assets available for distribution; and (b) to be acting in that capacity in bringing the application.

A further useful takeaway point from the Supreme Court's decision is the clear indication that the same approach to standing should apply in both bankruptcy and liquidation.[9] This had probably been evident from the existing authorities but it is nonetheless useful to have a clear statement of principle at the highest level. Following this case, it is submitted that it is likely to remain rare for an 'out-of-the-money' party (such as a bankrupt in a non-surplus case or a shareholder in a liquidation where there will be no distribution to that class) to be able to establish standing to challenge an office-holder's conduct.

Joseph Curl KC of 9 Stone Buildings appeared with Jon Colclough of South Square, instructed by Tanya Seevaratnam of RSW Law, for the respondents in the Supreme Court in *Brake v. Chedington* before Lord Briggs, Lord Hamblen, Lord Leggatt, Lady Rose and Lord Richards. Andrew Sutcliffe KC, William Day and Gretel Scott appeared for the appellant instructed by Stewarts Law. The case was heard on 1 November 2022 and judgment handed down on 10 August 2023.

1 The replacement trustees in bankruptcy were the TIBs involved in the *Kicks* case.

2 [2022] EWCA Civ 626, [2022] 2 BCLC 1, [2022] BPIR 970.

3 [2020] EWHC 537 (Ch), [2020] BPIR 466.

4 [1999] 1 WLR 1605.

5 [2020] EWCA Civ 1491, [2021] BPIR 1. The Brakes' appeal in relation to a connected application made against the liquidators of a partnership was dismissed in the same judgment.

6 [2020] EWCA Civ 1491, [2021] BPIR 1, [85].

7 [2023] UKSC 29, [2023] 1 WLR 3035, [76]-[77], [99].

8 [2023] UKSC 29, [2023] 1 WLR 3035, [96].

9 [2023] UKSC 29, [2023] 1 WLR 3035, [74].

Joseph Curl KC is a barrister at 9 Stone Buildings

‘Make or break’ situation for small retailers

Stifling business rates, poor payment practices and crime create a difficult trading environment, says **Tina McKenzie**

Small retailers are under increasing pressure from squeezed consumer spending power, sky-high rents and snowballing input costs.

The sector is at the frontline of the cost-of-living crisis, impacted by an overall tightening of shoppers’ purse strings, as well as changing customer habits and falling consumer confidence. People are spending less, with figures from the Office for National Statistics showing retail sales volumes fell by 0.9% in September, primarily led by a fall in sales for non-food retailers due to ongoing cost-of-living pressures. The stark impact of this is highlighted in the Federation of Small Businesses’ Index (SBI) for Q3 2023, which shows almost half of small firms (49%) in the retail and wholesale sector experienced a decrease in revenue over the last three months. This compares to 39% among all small firms.

> **Not only are small independent high street shops and other businesses being left reeling by unaffordable bills, the business rate system is almost impossible for many to navigate without the use of expensive lawyers or agents**

The ever-changing landscape of the high street is having an impact too. Many larger chains and department stores have gone into administration, leaving huge swathes of empty premises, meaning less footfall. Add to this numerous bank branch closures, reduced access to cash and expensive town centre parking, and it’s no surprise small retailers repeatedly report a gloomy outlook.

FSB’s SBI for Q3 also showed confidence levels among retail and wholesale businesses are the second lowest of all sectors at -23 points, with only small accommodation and food services businesses rating lower, at -31 points (all sectors: -8 points)[1]. In order to improve confidence and spur economic recovery, policymakers must be putting all small firms, including those in retail, at the top of the agenda.

Rates reform long overdue

Business rates bills continue to be a thorn in the side of many retail businesses, stifling their recovery and growth. Charged on most non-domestic properties and based purely on the value of that property rather than the amount of trade or level of income generated, the tax is outdated and has long needed reform. Not only are small independent high street shops and other businesses being left reeling by unaffordable bills, the business rate system is almost impossible for many to navigate without the use of expensive lawyers or agents. The impact has fortunately been lessened this year due to the SME-focused 75% discount that retail, hospitality and leisure businesses have received.

The tax has long been considered one of the biggest blocks on investment in the UK and small businesses should not be stifled by the looming threat of higher rates bills because they want to improve their premises. If you want to add a new production line to a factory, you’ll pay half again in rates costs over the lifetime of that equipment. The danger of this has been recognised and we were encouraged to see a one-year investment relief being brought in by government through the non-domestic rates bill.

This will be hugely beneficial for many small firms – for example, a cleaning supplies business that wants to take on new contracts by investing in new manufacturing space, or a pub that has ambitions of serving more punters. We believe that this relief should be pushed further. Extending that relief to over a year period would be a gamechanger for small firms, and this is something FSB will continue to call for.

> **More than half of small businesses now use online platforms, according to FSB research, with seven in 10 saying they are important or very important to their business**

There are currently far too many small businesses trapped in a system that charges them large tax bills before they’ve even made a penny in profit. We need to see tangible change from the government so that so many small firms can survive. Measures like extending targeted business rates reliefs for SMEs and increasing small business rate relief to premises with a rateable value of £25,000, would go some way to helping small retailers to grow and flourish.

Asymmetry of power online

Of course, many small retailers do not have a bricks-and-mortar setting, preferring to sell through an online shop or a mix of both. More than half of small businesses now use online platforms, according to FSB research, with seven in 10 saying they are important or very important to their business. Some are primarily used as marketplaces, allowing buyers to view what is on offer and go on to buy it. Others offer both the goods and delivery to the customer. Despite the obvious benefits to these platforms, our research shows that small businesses believe that they too often find themselves at a disadvantage due to an asymmetry of power between them and the platforms they rely on.

We have come up with numerous recommendations for regulators, platforms and the Government based on our research as to what could be done to resolve or improve many of the difficulties small firms face. We would like platforms to commit to paying small businesses within a maximum of 30 days in line with the prompt payment

The small business community loses £13 billion annually from crimes such as shoplifting

code, which governs standard supplier payments. This should include payments due to third-party sellers, not just those who sell to the platforms themselves. Platforms should invest much more in systems to resolve issues for small businesses, including the provision of dedicated complaint and dispute handling resources where these do not already exist.

Poor payment culture

Sadly, poor and late payments are something that many small businesses are on the receiving end of. Paying small firms late can have devastating consequences, causing financial hardship, stopping them from taking on new staff and stifling growth. Unfortunately, it is still far too common for bigger businesses to use small firms to prop up their cash flow. More than half of all small businesses have experienced late payments in any given three-month period.

> **Access to cash is also having an impact. Bank branches are closing, impacting on footfall, and it's key that we don't lose access to a mix of payment methods for customers**

The story is similar within the retail sector. Sixty-two percent of small retail and wholesale firms are being impacted, with just over a third (33.2%) telling us their late payments have worsened since the previous quarter.

We've seen promising announcements on prompt payments earlier this year, with the

> **Our research shows around 3.8 million cases of traditional crime against small firms every year, costing the small business community nearly £13 billion annually**

Government announcing it will take forward legislation, following a consultation, to extend payment performance reporting obligations. We'd like to see this followed up with more fundamental reform and stronger powers to investigate and prevent poor payment practices. No one should have to wait months on end to receive money they're owed.

Card fees and cash

Access to cash is also having an impact. Bank branches are closing, impacting on footfall, and it's key that we don't lose access to a mix of payment methods for customers. Card fees can place a significant burden on small firms, with card processing companies taking a chunk out of every sale they handle. Because of this, we are part of the Axe the Card Tax coalition, which is calling for actions that will create a payments sector where it costs businesses less to take payments, and they have a competitive market of alternative providers to choose from.

The cost of crime

Small businesses are often less able to absorb the cost of crime. For a small corner shop, for example, the theft of a large number of products from their shelves will have a huge impact both financially and emotionally. Our research shows around 3.8 million cases of traditional crime against small firms, including shoplifting, every year across England and Wales, costing the small business community nearly £13 billion annually. We want to see the police rebuild confidence among business owners, and this could be done by making crime against small businesses a key focus of the policing plans of local police, crime commissioners and local law enforcement activity.

The golden quarter?

It's clear that the retail industry has had it tough and faced numerous challenges this year. We are still in the midst of a difficult trading environment. As we head towards Christmas, a key moment for the sector, small retailers will be hoping that confidence picks up. For many though, it will be make or break. For policymakers, the time to act is now to ensure some festive economic cheer.

1 The FSB's scale determines a point score based on responses to questions. This is explained in the SBI below.

The Small Business Index is a weighted index of the responses to the question: 'Considering your overall business performance, and ignoring any normal seasonal variations at this time of the year, how do you view business prospects over the next three months, compared with the previous three months?' The share of firms reporting are given the following weightings: 'much improved' +2; 'slightly improved' +1; 'approximately the same' 0; 'slightly worse' -1; and 'much worse' -2; the Small Business Index is derived from the sum of these factors.

Tina McKenzie is policy chair at the Federation of Small Businesses (FSB)

Retail's painful transition may be over but RPs still a concern

Restructuring mechanisms need to work in a way that is fair to creditors. RPs do not currently do this. **Ion Fletcher** recommends some changes the Government could make

The economy has not been particularly generous to anyone in the last 12 months, and this includes commercial property owners who have had a bit of a bumpy ride. Most of the turbulence stems from changing interest rates, which have risen sharply from 1.75% in the couple of days before the now-infamous 'mini-Budget' of September 2022 to 5.25% today as the Bank of England tries to curb inflation.

This matters a lot for commercial property, which is often viewed by investors as a bond-like investment with a risk premium attached to reflect the risk of lease income turning sour. As a result, its value is loosely pegged to interest rates and when rates go up, property values come down.

According to data from MSCI, the value of UK commercial property fell by 18% in the year to September 2023. This is of course an average – the office sector has fared the worst, with a 23% drop in value, followed closely by industrial and logistics (20% down), whereas retail property did comparatively better, losing 'only' 14% having already experienced a large fall in values over the past decade.

> **Retail parks are the only type of retail property that has seen more openings than closures this year**

Uncertainty over when interest rates would stop rising (and therefore values stop falling) has resulted in low levels of commercial property being bought and sold as everyone involved waits for property prices to settle. As a result, it looks likely that the total value of transactions will not be that much higher than the recent record low seen in the pandemic year of 2020, prompting redundancies at the investment teams of some of the major property agencies.

Retail property fell just 14%, compared with offices that saw a 23% drop in value

While inflation and interest rates seem to have settled for now, the forward look is not particularly rosy. Geopolitics continue to rock the global economy, while closer to home consumers are still facing a cost-of-living squeeze and job vacancies are ticking down. Some economists are predicting we might have a recession over the coming months, all of which could feed through into the amount of space that businesses are willing to take and the price they are willing to pay for it.

Retail parks perform better

Retail property has not been immune from these strong headwinds. Not all retail property is created equal though, and since the start of the pandemic we have seen retail parks perform much better than town centre retail, driven by comparatively lower rents, larger and more flexible floorplates (the leasable area of a floor) and ease of access for car-users. Indeed, retail parks are the only type of retail property that has seen more openings than closures this year.

> **Headline rents for retail property have started growing in recent months (albeit very modestly indeed), which suggests that the market has – at least in places – found a new equilibrium**

In contrast, shopping centres have struggled the most as the legacy left by the loss of department store and other fashion anchors continues to play itself out. As of July this year, Local Data Company (LDC) stats suggest that 41% of former Debenhams and 50% of former Arcadia units are vacant with no confirmed plans for reoccupation or conversion to other uses.

There are also massive regional disparities – at just over 10%, shop vacancy in Greater London is about half of that in the North East.

> **RPs share some of the more egregious features of 'landlord CVA' practice, such as a lack of meaningful engagement with creditors, restricted access to relevant commercial information and changes to lease agreements that go beyond what is necessary to rescue the business**

There are towns where vacancy is in the single digits and others where one in three shopfronts are boarded up.

As you might expect, it is taking considerably longer to re-let vacant units. Recent BPF/LDC research indicates that while, between 2017 and 2019, 22% of units falling vacant were reoccupied within six months and 54% within a year, the comparable figures for the period 2021-23 were a mere 9% and 37%.

This all sounds very gloomy – is there anything to be cheery about? Well, as suggested by its relatively lower level of capital devaluation over the last year versus other types of property, the retail property sector appears to have turned a corner recently.

'Landlord CVA' practice

Even though there has been a surge in retail and hospitality insolvencies since the middle of 2021, there is a sense among property owners that the retail sector's painful transition over the last decade from bricks and mortar to omnichannel is now largely complete. They consider that retailers and leisure and hospitality operators have largely adapted to changing social and economic demands, and that those sectors are now in a stronger and more certain place than they have been for a while. Indeed, headline rents for retail property have started growing in recent months (albeit very modestly indeed), which suggests that the market has – at least in places – found a new equilibrium.

That is not to suggest that property owners are unconcerned about occupier insolvencies – the demise of high street stalwart Wilko has affected many and is a reminder that corporate failures will always be a risk to consider as part of property investment.

Concerns are also mounting about how restructuring plans (RPs) are playing out, with recent RPs leaving property owners feeling like the process is really CVAs 2.0. Our members report that RPs share some of the more egregious features of 'landlord CVA' practice, such as a lack of meaningful engagement with creditors, restricted access to relevant commercial information and changes to lease agreements that go beyond what is necessary to rescue the business.

Time taken to re-let vacation retail units

Period	July 2017 to July 2019	July 2021 to July 2023
0 to 6 months	22%	9%
6 to 12 months	32%	28%
12 to 18 months	15%	20%
18 to 24 months	9%	12%
24-plus months	22%	31%
Total	100%	100%

Source: BPF/LDC data of 1000 retail locations comprising 124,000 individual shops

Too expensive for most creditors

While RPs theoretically have certain built-in creditor protection mechanisms (e.g. the ability for creditors to challenge in court), this protection is in practice too expensive for most affected creditors. *Virgin Active*, a limited legal case centred largely on information disclosure, cost the challenging creditors approximately £3 million. This is eye-watering for the very biggest commercial property owners in the country, let alone for SMEs or independents seeking application of their rights.

> **They should change the rules to require that the business proposing the RP pay for advisors who would support affected creditors in understanding… the true financial position of the affected company and the viability of the 'relevant alternative'**

Our members support the UK's corporate rescue culture, but restructuring and insolvency mechanisms need to work in a way that is fair to creditors and that encourages and incentivises companies to engage with property owners to find mutually acceptable solutions. RPs do not currently do this and there is a real chance their brand will become as tarnished as CVAs'. Fortunately, there are a couple of changes the Government could make to avert this scenario.

Firstly, they should change the rules to require that the business proposing the RP pay for advisors who would support affected creditors in understanding the relevant financial information, such as the true financial position of the affected company and the viability of the 'relevant alternative'. This would be distinct from paying for legal and other professional advice that creditors might incur in opposing an RP. This should encourage firms to proactively engage and be transparent with affected creditors.

The only certainty is more uncertainty

A similar reform, which could work alongside the above, would see proposing companies – where enough creditors express a desire to take part – being required to set up a 'creditors' committee', which would represent the interests of unsecured creditors. This would work along the lines of the US Chapter 11 model: the committee would engage directly with the proposing company; have access to the company's financial information and be authorised to instruct advisors (whose fees would be payable out of the debtor's estate, subject to court approval). New guidance would need to be developed for judges on how to exercise discretion over such matters.

The only certainty in the next few years is more uncertainty, and we expect some challenging times ahead. The key, as ever, is for property owners to make sure that they are as engaged as possible with their occupiers, so that they understand where any challenges lie, and can work collaboratively with them to head them off before they become insurmountable.

Ion Fletcher is director of policy at the British Property Federation

Last-minute pivot in strategy crucial for parcel firm realisations

Detailed and heavily staffed contingency planning resulted in an eleventh-hour deal to sell Tuffnells' assets, says **Rick Harrison**

Founded in 1914, when Harold Tuffnell bought a horse and cart for the princely sum of £100 and used it to begin delivering goods, Tuffnells Parcels Express Limited had grown over the course of a century to become one of the UK's most recognisable logistics companies.

From its headquarters in Sheffield and its network of 33 depots, Tuffnells provided delivery services to over 4000 businesses across the UK under its iconic 'The Big Green Parcel Machine' brand. The company was principally a distributor of mixed freight and was a specialist in handling items of irregular dimension and weight.

> A complex plan was then put in place over the following four weeks to maximise the return of customer consignments. Returning customer assignments meant we could seek payment for monies owed

From bicycles to garden furniture, and from tyres to farming tools, the privately-owned business delivered both within the UK and internationally, handling the logistics to over 160 destinations worldwide.

Tuffnells returned to private ownership in June 2020 when, after two consecutive years of difficult trading, it was sold by the Connect Group to the investment vehicle, Palm Bidco Limited. A turnaround plan was then put in place to return the company to profitability.

Rocketing cost inflation

The timing proved to be pivotal. The UK was in the throes of the first Covid-19 lockdown and, while total retail sales volumes fell sharply in the wake of the pandemic, online sales of furniture and big-ticket homewares — exactly the kind of items which Tuffnells was a specialist in delivering — saw a boost, as people chose to make home improvements while adapting to home working and life under lockdown.

Nevertheless, headwinds continued to gather. A post-Covid softening of demand and the ensuing cost-of-living crisis led to a marked reduction in online retail sales, with big ticket expenditure being particularly hard hit. Consequently, the company suffered from lower volumes of large and unusual shaped parcels — their core market. At the same time, rocketing cost inflation, including the cost of fuel and labour, hit Tuffnells hard, leaving the business struggling to pass price increases on to customers.

Following a period of reduced profitability and increasing cash flow pressures, the company and its principal funder sought advice in April 2023 to prepare a contingency plan.

While the business' cost base had been significantly reduced since the acquisition by Palm Bidco Limited, revenue was not growing at the rate required to increase profitability, with trading losses accruing in the five-month period to May 2023. These losses were exacerbated by the addition of an extra bank holiday to mark the King's Coronation — a pause in deliveries over the long weekend meant further lost revenue.

Consequently, the directors continued to work towards a solvent restructuring for the business, including Time To Pay (TTP) negotiations with HMRC to settle the company's outstanding tax and VAT liabilities over a sustainable period, and other consensual deals with creditors with the aim of preserving cash.

A TTP was ultimately agreed with HMRC, but the trading performance of the business continued to underperform forecast. Due to the ongoing and significant cash flow pressures faced by the business, a notice of intention to appoint administrators was lodged by the directors on 9 June 2023. On the same date, the directors made the difficult decision to cease operations and addressed staff to explain the financial difficulties the business found itself in.

> In addition to the bicycles, tyres and garden furniture, there was also the challenge of dealing with some rather unusual items that were found within the depots – carpets, home spas and, intriguingly, some sea plankton

Interpath's contingency planning engagement had to overcome a variety of complex issues to plan for a potential insolvency appointment to protect value for creditors, and deal with the situation compassionately. The business handled approximately 160,000 customer consignments per week and employed over 2000 staff in addition to a significant subcontractor driver base who operated a fleet of over 1000 vehicles across 33 depots.

The contingency planners pulled together an 'all hands-on deck' approach, utilising 100 employees of the firm, to ensure a senior presence was on site at each of the 33 depots, from Aberdeen to Plymouth, on day one.

Change to original strategy

Detailed briefings in the days leading up to the appointment meant that each team member was clear on the actions required in the critical first few days — all of which was organised against the backdrop of sale-of-business activity, which took place over the weekend prior to the insolvency appointment, and which ran to the eleventh hour.

The immediate priority following appointment was to address all employees in a timely and sensitive manner, and secure all of the sites and assets, including thousands of customer consignments.

A complex plan was then put in place over the following four weeks to maximise the return of customer consignments. Returning customer assignments meant we could seek

payment for monies owed, which was critical to optimising the collection of the debtor book asset.

Key to this was a pivot from the original base strategy — due to vastly more parcels being left in the network following the appointment than was initially forecast.

Much to the team's surprise, in addition to the bicycles, tyres and garden furniture, there was also the challenge of dealing with some rather unusual items that were found within the depots – carpets, home spas and, intriguingly, some sea plankton.

> **In dealing with a business of this scale, with thousands of employees spread across multiple locations, a key takeaway was just how crucial it was to undertake detailed forward planning**

In handling the repatriation of goods to customers, a methodical approach was required. Tuffnells' large retail customers had parcels located at depots all over the country. In order to return them to the customer in as efficient a manner as possible, the team – with the support of those employees who were retained to assist with the process – consolidated all parcels relating to specific customers at a central depot before arranging for them to be returned.

Not only did this reduce the logistical burden on customers but it had the added benefit of protecting the debtor book.

Another critical task which was key to the team being able to collect the debtor book in short order was capturing all relevant data – for example, proof of deliveries – via the company's various systems and IT platforms.

Intellectual property deal

Dealing with customer queries and the return of parcels in an efficient and expedient manner was also vital in helping to preserve value in the Tuffnells brand — something which proved to be key in the successful realisation of the company's assets.

Firstly, an intellectual property deal concluded within two weeks of appointment, which saw Shift, a fast-growing UK-based logistics platform, acquire the Tuffnells brand, IP (including website domains and access to their IT systems) and other assets.

While the initial priority was to surrender leases to minimise cost, the team quickly pivoted to a depot retention strategy — in part to enable us to successfully complete the repatriation of goods to customers, but also so that i) we could realise the assets therein, including fuel and fixtures and fittings, and ii) we had time to generate competitive tension in the leasehold assets.

Tuffnells Parcels Express Limited had grown over the course of a century to become one of the UK's most recognised logistics companies

This led to separate property deals being concluded with two parties.

DX (Group) plc, the Slough-based provider of delivery solutions, including parcel freight, secure courier, and logistics services, agreed to take on 15 Tuffnells sites, including the outright purchase of the freehold of one site.

In addition, DX recruited hundreds of former Tuffnells employees, and also engaged with former customers of Tuffnells to provide continuity in delivery solutions.

Meanwhile, Shift bolstered their acquisition of the Tuffnells intellectual property by reaching an agreement to take on a further nine sites, which also enabled them to rehire a significant number of workers.

Combined, these deals significantly improved realisations for the benefit of creditors, alongside maximising the potential for re-employment for former employees.

A secondary benefit of the time taken to negotiate lease-to-own agreements was that other lower-value assets, such as fuel, fixtures and fittings and certain lower value trailers, could be recovered with a benefit to the estate, which otherwise would have been abandoned.

Shift issued a statement in June 2023 that it intended to relaunch the Tuffnells brand and planned to open 25 depots, building on the nine it agreed to take on as a result of the administration. DX had opened 13 of the 15 sites that it acquired for its own services as of the end of October 2023.

The Tuffnells strategy required effective teamwork across a core team of 12, a wider team of over 100 people, an advisor network and a secured lender.

In dealing with a business of this scale, with thousands of employees spread across multiple locations, a key takeaway was just how crucial it was to undertake detailed forward planning, ensuring that teams could be deployed to each and every site. This not only meant that employees were dealt with compassionately, but it enabled vital information to be captured that was crucial to protecting the debtor book.

Rick Harrison is a managing director at Interpath Advisory

Lower returns for creditors loom as funding options shrink

Higher multiples for funders are now a possibility – at least in the short term – after the Supreme Court ruling in *PACCAR*, says **Rhys Williams**

In what is often described as a nascent industry, 26 July 2023 will go down as a date to remember for litigation funding in the UK. In the case of *R (on the application of PACCAR Inc and others) v. Competition Appeal Tribunal and others [2023] UKSC 28*) the Supreme Court held by a four-to-one majority that litigation funding agreements in which funders are entitled to a percentage share of damages fall within the statutory definition of damages-based agreements.

In those circumstances, should an LFA fall foul of the requirements for a valid DBA, as detailed in section 58AA of the Courts and Legal Services Act 1990 and the Damages Based Regulations 2013, they will be unenforceable.

The implications of the decision are still not truly clear, with market commentators and players at odds as to the ramifications. What is clear is that funded deals in the UK are still being concluded.

Both funders and funded parties have been working behind the scenes to review existing LFAs as well as LFAs that are close to being signed that are or were at risk of being unenforceable – and these funded parties, of course, include IPs.

> **“There is clearly a very commercial driver for both funded IPs and litigation funders to rectify any potential issues in existing LFAs to ensure monies can still be drawn”**

In the context of the considerations applicable to insolvency, I believe it prudent to consider the past (concluded LFAs), the present (existing LFAs) and the future (LFAs that are being negotiated or on matters being considered for funding).

The question of enforceability arose in the context of applications for collective proceedings orders (CPO) of two claimants, UK Trucks Claim Ltd (UTCL) and the Road Haulage Association (RHA). To obtain the relevant CPO, the applicants had to show that they had adequate funding arrangements in place; they chose to do so by relying on LFAs in which the maximum return to the funder was calculated as a percentage of the damages ultimately recovered from the litigation. The truck manufacturers, who were the respondents in the underlying competition claim, contended that the funding agreements could not be accepted as the LFAs were DBAs under section 58AA (3) of the Courts and Legal Services Act. They further asserted that, as the LFAs did not meet the regulatory requirements for DBAs, they were unenforceable. Both UTCL and the RHA conceded that the LFAs did not satisfy the requirements and the argument turned on whether LFAs, as drafted in this case, were to be construed as DBAs.

The central issue in the appeal heard by the Supreme Court focused on whether litigation funders as capital providers offered ‘claims management services’.

With reference to statute, the Supreme Court ultimately concluded that the role of a litigation funder does constitute a ‘claims management service’ given the reference to providing ‘financial services or assistance’ even when not directly involved with the management of a claim. Therefore, by extension, LFAs as drafted in the present case would be unenforceable.

The Supreme Court case on LFAs arose from a competition tribunal brought against truck manufacturers by hauliers

The LFAs

Litigation funding in the UK has been prevalent for over a decade. The relationship between funder and funded party has been governed by LFAs throughout. The pricing methodology utilised during that period primarily falls within three categories: (1) basing it on a multiple of the invested capital; (2) taking a direct percentage of damages; and (3) a combination of both, known as a 'greater-of' model.

The Courts and Legal Services Act refers to 'claims management services' being paid by 'reference to the amount of financial benefit obtained,' so pricing an investment based off the multiple of the invested capital alone would seem to fall outside of the scope of the definition.

> **The ramifications of *PACCAR* are still largely unclear. It is perhaps unsurprising that many believe the judgment of the Supreme Court simply prompted more questions than it ultimately answered**

This conclusion has now been given further support following the granting of a CPO in the case of *Alex Neill Class Representative Ltd v. Sony Interactive Entertainment Europe Ltd* [2023] CAT 73. Here the Competition Appeal Tribunal rejected arguments that a revised LFA following negotiations post *PACCAR* was still unenforceable despite it including a multiple of the invested amount as the success fee. Interestingly, the tribunal also allowed a contingent success fee based on a percentage of damages 'only to the extent enforceable and permitted by applicable law'. While a positive development, IPs must appreciate there is risk of appeal and that this decision is in relation to opt-out collective proceedings in the Competition Appeal Tribunal.

The past

IPs will be familiar with the statutory right to assign a cause of action, including the proceeds received. In this context, the assignment transaction is primarily governed by a purchase agreement rather than LFAs, where the purchaser becomes the claimant/applicant and therefore would seem to fall outside of the scope of *PACCAR*. The conversation therefore turns to those funded insolvency claims that are governed by LFAs.

As a consequence of the decision, it will be prudent, as I am sure many IPs have done already, to take legal advice on what action, if any, should be taken with respect to LFAs that have historically concluded. The quandary, perhaps, will be between the moral and the professional. From a professional standpoint, IPs will be considering their duties as officers of the court in obtaining the best possible returns to creditors. Can it be said in instances where a percentage of damages or a greater-of model was applied in calculating the returns – meaning those returns would be less than if a multiple of the invested capital was used – that the best possible return was achieved? Could IPs be in the firing line from creditors if restitution seeking to recover the difference is not sought?

In terms of the moral consideration, the recoveries made in many instances would not have been possible without the involvement of a litigation funder. With respect to business integrity, while the offending LFAs have been found to be unenforceable, they are still in principle valid contracts. Funders voluntarily complied with the terms of the contract, provided capital and allowed for the relevant recoveries to be made. IPs will need to carefully consider the advice received, as funders will certainly look to strongly defend their position.

Such defence has manifested itself in *Therium Litigation Funding A IC v. Bugsby Property LLC [2023] EWHC 2627 (Comm)*. Therium applied for an asset freezing/preservation order over monies received by Bugsby following settlement of a piece of litigation that Therium and another funder, Omni Bridgeway, had funded. Therium argued that their LFA remained enforceable despite providing for both a multiple of the invested capital and a percentage of damages. They did so on the basis that the whole LFA did not constitute a DBA, instead only the percentage of damage returns should be construed as such, per *Zuberi v Lexlaw Ltd [2021] EWCA Civ 16*. Further, and in any event, the percentage return element of the LFAs could be severed. Bugsby argued that there was no serious issue to be tried as the LFA was unenforceable because of *PACCAR* and therefore it owed the funders nothing.

Justice Jacobs agreed with Therium insofar that judicial precedent afforded a principled argument and therefore constituted a serious issue to be tried. The judge also agreed that there were points to consider with respect to the law of severance.

Litigation funders will likely take some solace from the judgment. While not conclusive, it does give merit to the arguments they are likely to raise in defending their position. The judge, however, made it clear that he was not expressing a view as to the better argument, simply conveying the issues serious enough to be tried. The judge therefore granted the asset freezing/preservation order pending conclusion of the arbitration of the substantive dispute.

The present

There is clearly a very commercial driver for both funded IPs and litigation funders to rectify any potential issues in existing LFAs to ensure monies can still be drawn down and recoveries can be made for the benefit of creditors. It is therefore imperative to ensure a line of communication between the parties to remedy the situation.

As touched upon in the *Bugsby* judgment,

> **It is likely funders will simply deploy a multiple of invested capital calculation as the basis of their returns. In the short term, it would not be unsurprising if the multiple attached is higher than historic agreements**

one avenue that had been viewed as a potential solution is to simply rely on the severability clauses contained in many LFAs. This should be applicable to LFAs where a greater-of model had been agreed and would see the percentage of damages calculation severed from the agreement, with the multiple of invested capital remaining.

In *Zuberi* the Court of Appeal determined that in accordance with common law principles, severance is permissible. The court further noted that the DBA was not the entire contract, but only those provisions that dealt with the percentage-based payment.

However, more recently in *Diag Human v. Volterra [2023] EWCA Civ 1107*, the Court of Appeal found that part of an unenforceable conditional-fee agreement with section 58 of the Courts and Legal Services Act cannot be severed (i) on the basis it would change the character of the contract as a whole; and/or (ii) for public policy reasons. While the latter judgment is fact specific and arises in the context of CFAs, it does perhaps form the basis of arguments that parties may make against offending LFAs. It certainly poses the question: what is the purpose of severability clauses, if not exactly for scenarios such as these?

While one can appreciate the inability to rely on a severability clause should the proposed terms that are being 'severed' from the contract be vital to its performance,

A defence to *PACCAR* was tested in a hearing for an application for an asset preservation order. The application was like by the funder, Therium, against Bugsby property for its refusal to pay Therium following a damages award from a dispute over the London Olympia.

> **From an IP's perspective, the assignment model is still very much an option. However, limiting the options for IPs who are considering pursuing a claim is not in the best interests of the creditors with whom they ultimately act**

removing the application of the greater-of calculation to the multiple of investment does not however detract from either party's ability to comply with the underlying terms. Of course, price plays a vital role in the consideration of any contract, and reverting to a multiple on the investment, if anything, gives clarity to the contracting parties on price.

Interestingly, in the case of *Bugsby*, Jacobs J did not consider the arguments based on *Diag Human* to be so persuasive as to preclude there being a serious issue to be tried on severance. The judge acknowledged that a non-compliant CFA may well present a more difficult case for severance than an LFA that includes a DBA as '*[…] That will include the central question of whether the character of the agreement would be changed by the severance*.' In practical terms however, it may be more sensible to simply amend and reinstate the LFA with the offending clauses removed provided the parties are willing to do so.

The future

The ramifications of *PACCAR* are still largely unclear. It is perhaps unsurprising that many believe the judgment of the Supreme Court simply prompted more questions than it ultimately answered. While the consensus from the profession is that the decision only impacts LFAs that include a reference to an entitlement to a percentage of damages rather than a multiple of the deployed capital or total investment amount, debate still ensues as to whether that position is correct. It is hoped we will get clarity shortly.

In the meantime, for IPs considering an LFA, it is likely funders will simply deploy a multiple of invested capital calculation as the basis of their returns. In the short term, it would not be unsurprising if the multiple attached is higher than historic agreements. Litigation funders have sought capital investment from investors on the basis of structured returns. Doing away with a percentage of damages return and greater-of model will of course detract from those returns, and higher multiples, at least in the short term, would be one way they may choose to mitigate that issue.

It is important to remember that the decision in *PACCAR* is in part due to the UK Government not introducing the draft Damages Based Agreements Regulations 2019. These draft regulations expressly provided that an LFA is not a DBA. Lobbying by the Association of Litigation Funders and funders themselves will be essential in bringing about much-needed legislative clarity, and is certainly having some effect. Following the Department for Business and Trade's acknowledgment of the issue, we have recently seen rushed Government proposals for amendment to the digital markets, compensation and consumers bill. While a step in the right direction, the proposed changes only seem to address issues in relation to opt-out collective proceedings. This does however usher in some hope that the much needed clarity for other forums and case types, including insolvency matters, will come shortly.

Clearly from an IP's perspective, the assignment model is still very much an option. However, limiting the options for IPs who are considering pursuing a claim is not in the best interests of the creditors with whom they ultimately act. Options mean competition, and competition means downward pressure on pricing, increasing the returns to creditors.

It is an interesting time for the litigation funding industry in the UK. Litigation funding plays an important role in unlocking claims for insolvent estates. It will be for prudent IPs to keep an eye on how this area of law develops and take the appropriate steps, where necessary, once clarity is provided either by primary legislation or by the courts.

Rhys Williams is an associate director at Howden

We will pursue fine evaders by replacing IPs if necessary

The data regulator can help IPs with evidence and documentation, but in turn expects timely and professional communication, says **Kerry Smith**

The Information Commissioner's Office (ICO) covers a range of legislation and regulations, including data protection law, freedom of information and electronic marketing rules.

We provide guidance, advice and regulatory certainty to organisations on how to handle people's information appropriately while responding to more than 40,000 complaints every year from those who come to us to uphold their information rights.

Most businesses want to do the right thing and innovate while looking after their customers' personal information. But companies that choose to ignore our advice, or target and exploit vulnerable people, could find themselves on the receiving end of our enforcement tools, including fines.

Through our enforcement of the Privacy and Electronic Communications Regulations 2003 (PECR), we have issued more than £3.3 million in fines since April 2022 to companies that flouted the law.

Penalties of up to £17.5m

Under PECR, we can fine an organisation or its directors up to £500,000 for making unlawful marketing calls or texts. The proposals in the current data protection and digital information bill, and proposed modifications to the Data Protection Act 2018, will allow us to issue penalties to organisations or their directors and officers for breaches of the regulations that apply to nuisance calls and messages, with the capped amount being brought in line with the UK GDPR penalty of up to £17.5 million.

Recently, we issued fines totalling £590,000 to five companies for collectively making 1.9 million unwanted marketing calls that targeted the elderly and people with vulnerabilities, despite them being registered with the UK's free 'do-not-call' register – known as the Telephone Preference Service. We also fined another organisation £130,000 for sending millions of spam emails to people without their consent.

While large fines usually make the headlines, our broader enforcement work in bringing companies to account certainly does not stop once we have issued a fine.

> **Since 2017, more than 39 directors have been disqualified as a result of our work with the Insolvency Service to protect the public from nuisance marketers**

Through the work of our financial recovery unit, we have a robust but fair approach when it comes to recovering our fines. We ensure that companies are handled in a professional way by our experienced financial recovery staff when making payments to the ICO. We also provide payment plans where debtors are in genuine financial hardship.

However, we will pursue formal recovery action if we identify organisations that have the means to pay but will not.

Insolvency cases can be long and arduous, which is why we have an experienced in-house team that holds ICAEW certificates in insolvency, as well as legal and advanced investigative practice qualifications – we understand the procedures involved and our status as a creditor. We also have a panel of liquidators and insolvency professionals with whom we work to recover money from fines.

Requisitions for decisions

That means we can assist insolvency professionals with the appropriate evidence and documentation, and even support court proceedings via witness testimony. In turn, we expect timely and professional communication from IPs such as acknowledgements of correspondence within 48 hours. If they are not able to provide a response in full, then we would expect them to advise as to when they will be able to do so. We also expect notification of insolvency events and meetings, and responses to requisitions for decisions.

Recently, we petitioned for the winding-up of a company involved in accident claims after it failed to pay the £200,000 fine issued for nuisance marketing calls. We have now successfully nominated IPs who have started their enquiries into what will likely lead to contentious insolvency matters.

ICO panel liquidators – appointed through a procurement process – have also recently been appointed in three other cases following ICO petitions, including a company responsible for predatory marketing calls in relation to white goods insurance.

Exercise full creditor rights

We have also seen cases where directors seek to avoid payment by liquidating their businesses. In these cases, we exercise our full rights as a creditor, and where it is feasible will seek to remove and replace the appointed liquidator with one from our panel. Our panel of insolvency practitioners has extensive experience of contentious insolvencies and have built up extensive knowledge of the PECR legislation and telecoms industry, particularly around how direct marketing works in practice. Their experience provides reassurance that the insolvency will be managed and investigated for the benefit of the entire creditor body.

We also work very closely with the Insolvency Service. Since 2017, more than 39 directors have been disqualified as a result of our work with them to protect the public from nuisance marketers.

By disrupting the activities of these companies and directors, we can help ensure they cannot easily resurface under a different name and continue to cause further harm to people.

Kerry Smith will be speaking at the R3 Fraud Conference on 29 February 2024 and will participate in an upcoming episode of the R3 podcast.

Kerry Smith is the financial recovery unit manager at the Information Commissioner's Office

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AML compliance not optional: you can be criminally charged

Angela Foyle counters claims that the CCAB's guidance on money laundering and terrorism finance contains questionable recommendations

As insolvency professionals, a key part of your work is protecting the financial eco-system. We must be sure of where funds have come from and where they are going, and when we are not sure we must ask questions – and alert the authorities as appropriate.

So, following discussion of AML guidance for IPs in the last issue of *Recovery (CCAB's guidance contains questionable recommendations, p26)*, I thought it would be useful to outline the requirements in this area and the Consultative Committee of Accountancy Bodies' (CCAB) approach in response.

AML compliance is not an optional extra; an IP is obliged to comply with AML requirements, and it is an important part of an IP's work. As part of these obligations, an IP must also alert law enforcement to anything suspicious. This is not a box-ticking set of rules; done properly, there is a value and benefit to wider society in addition to being part of your legal obligations. At the CCAB, we issued guidance on AML procedures for IPs because we knew it was vitally important that practitioners get this right. This guidance is not arbitrary and has not materialised from thin air; it is based on laws and regulations designed to prevent money laundering and counter terrorism and proliferation financing. These are not abstract concepts; consider the very real impacts of people trafficking, modern slavery and organised crime, and it is clear why it matters that IPs get this right. To ensure a common approach, the supplementary AML guidance for IPs was drafted by the five bodies that comprise the CCAB – ACCA, CAI, ICAEW, ICAS as well as R3, the IPA and the Insolvency Service. The guidance has been approved and adopted by all 13 of the AML accountancy supervisory authorities. Moreover, it has been approved by HM Treasury and so represents the Government view on the important application of these regulations.

> **Ignoring government-approved professional guidance is very unwise, and we would urge anyone who remains unsure to consider what the consequences could be**

> **IPs should understand the business relationship, its transactions and the identity of the directors behind the company, so that they know the assets are not tainted and that a SAR is raised if needed**

From the very first page, the CCAB guidance explains that IPs and accountants are key gatekeepers to the financial system, facilitating vital transactions that underpin the UK economy. As a result, the profession has a significant role to play to ensure that services are not used to further a criminal purpose. With effective due diligence, IPs can spot situations that could involve the proceeds of crime, and then submit a suspicious activity report (SAR) to the National Crime Agency. Just as due diligence is ongoing, so SARs can be submitted at any time to reflect the emerging picture as the insolvency progresses.

For the avoidance of any doubt, let us stress that compliance with money laundering regulations is not optional. Furthermore, ignoring government-approved professional guidance is very unwise, and we would urge anyone who remains unsure to consider what the consequences could be.

Ask yourself: what if an IP decides that they do not need to perform client due diligence at the start of their engagement but, subsequently, after handling and distributing funds, it is discovered that the funds are tainted? The fact that the firm did not comply with regulations at commencement could make them more vulnerable to charges.

> **Without the proper checks, IPs could find themselves shutting down businesses that were up to mischief, with no real scrutiny**

Of course, by their very definition, IPs become involved with companies and individuals at a difficult time. With pressure from creditors, employees and other stakeholders, it is vital that IPs understand the funds and assets they are handling, so they can determine whether they risk handling the proceeds of crime and, if so, make the appropriate reports to the National Crime Agency. Client due diligence should be an ongoing process, but it needs to start at the beginning.

Those who remain unconvinced may say that while of course client due diligence is important as a general principle, the legislation talks of a business relationship, not a client. There is clearly a business relationship with the insolvent company or the debtor; after all, the IP is taking control of their assets and using them to pay creditors. Rather than being hung up on who the client is, IPs should understand the business relationship, its transactions and the identity of the directors behind the company, so that they know the assets are not tainted and that a SAR is raised if needed.

Arguably the customer in business terms might not necessarily be the debtor, but the bottom line is that the IP must consider the money laundering risks associated with their engagement. The IP will need to assess whether the debtor has been involved in money laundering and whether the IP therefore risks handling and distributing assets that are the proceeds of crime. To do this effectively the IP should understand who the controller is, as they will be the ultimate beneficial owner. Where directors are not the owners, the regulations prescribe verification of these individuals using a risk-based approach.

In cases where IPs need to move quickly and delays in getting DAMLs approved can prove challenging, ICAEW has negotiated a fast-track process for IPs to engage with the NCA, for example with payroll.

Members' voluntary liquidations

Members' voluntary liquidations are a long-standing way of returning assets to a company's members when its trading life is over. In such scenarios, there is no responsibility on the liquidator to investigate the company's history, so this process can be used by the unscrupulous to launder money. And given that in many cases the IP will be distributing significant cash balances to the members, for IPs these engagements can be very high risk from an AML perspective.

So how should the IP proceed? Firstly, before accepting all but the simplest of insolvency cases it is wise to do an internet search of the names of the directors and shareholders. Doing so can highlight some obvious red flags; we have seen this highlight directors and shareholders who have been jailed for fraud both in the UK and overseas, and others connected to territories that themselves may raise red flags. This kind of search is simple and if it brings up adverse media, the risk of accepting a particular appointment is elevated.

> **Professional scepticism is important when dealing with so many aspects of insolvency work but could be critical when dealing with high-value MVLs. We would urge IPs to ensure that the declaration of solvency makes sense when taken into context with previous years' accounts**

In the case of an MVL, IPs are unlikely to look behind the books and records that support the declaration of solvency, which could also leave them exposed. For example, what if the company had ceased trading some time back and its recent accounts show little by the way of assets, but the draft declaration of solvency figures you are presented with show a large cash balance to be distributed to the members? Would you identify this as a risk? Would you look back at previous accounts? And if not, how could you even know to ask about the source of the funds? Failing to identify a scenario like this could leave you at risk of complicity in enabling money laundering if there do turn out to be legitimate concerns over the origin of the funds.

There is an AML risk in that, without due diligence, the IP could distribute funds to the fraudster because they are the shareholder. Without the proper checks, IPs could find themselves shutting down businesses that were up to mischief, with no real scrutiny.

Appropriate enquiries

Professional scepticism is important when dealing with so many aspects of insolvency work but could be critical when dealing with high-value MVLs. We would urge IPs to ensure that the declaration of solvency makes sense when taken into context with previous years' accounts.

Before accepting the appointment, you should understand where any large cash balance has come from – has it built up gradually over time? Can you see if it has arisen from asset sales, or has it just appeared in the company's account? Understanding this, making appropriate enquiries and reviewing relevant documentation could be vital if you want to ensure you are not being unwittingly involved in an MVL that may have been engineered to facilitate money laundering.

It should not need repeating that AML compliance is not optional but let us stress it again. This is the law and IPs must comply with it. If your supervisor comes in, checks your work and you have not complied, it is on you. And if you are handling the proceeds of crime, it's not just your supervisor who will see this as a problem, it is law enforcement too – and you can be charged with facilitating money laundering.

Client due diligence can be done at any time, and it should be refreshed and reconsidered as new facts come to light, to feed into the AML risk on an ongoing basis. Accordingly, a SAR can be reported at any time as the scenario – or your professional assessment of it – changes.

As trusted professionals, it is incumbent on accountants, lawyers, IPs and those who handle money that it is not tainted and that we stand by our ethical principles to keep dirty funds out of the UK economy. Due diligence is vital; do not ignore it.

Angela Foyle
is chair of the CCAB's crime panel

Rules tightened on company restorations in legal overhaul

The changes are likely to impact UK practitioners and creditors targeting assets held through BVI entities, say **Jennifer Jenkins** and **William Barnes**

This year has been one of change in the British Virgin Islands, as the territory welcomed in significant changes to the BVI Business Companies Act, 2004 (BCA) and the Eastern Caribbean Supreme Court Civil Procedure Rules (CPR).

In this article, we look at some of the key changes that will be of interest to UK insolvency practitioners and solicitors dealing with BVI registered entities.

Changes to the BCA

The amendments to the BCA came into effect on 1 January 2023 and are designed to ensure that the BVI's business companies legislation continues to meet international standards and best practice as a leading offshore financial centre. Key changes that are relevant to UK practitioners are outlined below.

Director names are now publicly available. The BVI Registrar of Corporate Affairs will make available, upon request (and the payment of a small fee), a list of directors contained in a company's register of directors filed with the registrar. This information is available to users of the online VIRRGIN system (the BVI's registration and regulation information system), meaning that UK practitioners will need to undertake the search through a contact in the BVI.

The rules on company restorations have been tightened. Under the previous regime, a BVI company struck off the register of companies survived in a 'struck off' state for up to seven years. Under the new rules, BVI companies will have 90 days' notice to regularise their status/obligations before they are dissolved but there is no longer any transitionary period whereby a company is 'struck off' prior to its dissolution. Under the new rules, there are two methods for restoring a dissolved company: via an administrative application to the BVI Registrar of Companies; or via an application to the court. The former is simpler and more cost effective than the latter, but is only available if certain criteria is met, for example the company must have been carrying on business or in operation as of the date of its dissolution. Whichever route is followed, the application must be issued within five years from the date of dissolution.

A mandatory requirement to prepare annual financial returns has been introduced. Previously, BVI companies were required only to maintain financial records and underlying documentation that show and explain their transactions, such that the company's financial position could be determined with reasonable accuracy at any time. Under the new rules, (almost all) BVI companies are required to produce annual financial returns that must be filed with the registered agent within nine months of the end of the company's financial year and retained for at least five years. These returns are likely to be limited to a simple unaudited profit and loss account and balance sheet, but they may still provide a starting point (which wasn't previously available) to IPs tasked with investigating the company's financial affairs.

> "Where joint liquidators are appointed, only one of them needs to be resident in the BVI. Therefore, local liquidators, who may provide language or time zone benefits, may continue to act jointly with a BVI resident liquidator"

There is now a BVI residency requirement for liquidators handling solvent liquidations. The definition of 'voluntary liquidator' in relation to solvent liquidations has been narrowed to mean a person who is resident in the BVI for at least 180 days, continuously or in aggregate, prior to their appointment. There are also newly introduced eligibility criteria for voluntary liquidator appointments concerning their experience, competency and professional qualifications. Where joint liquidators are appointed, only one of them needs to be resident in the BVI. Therefore, local liquidators, who may provide language or time zone benefits, may continue to act jointly with a BVI resident liquidator.

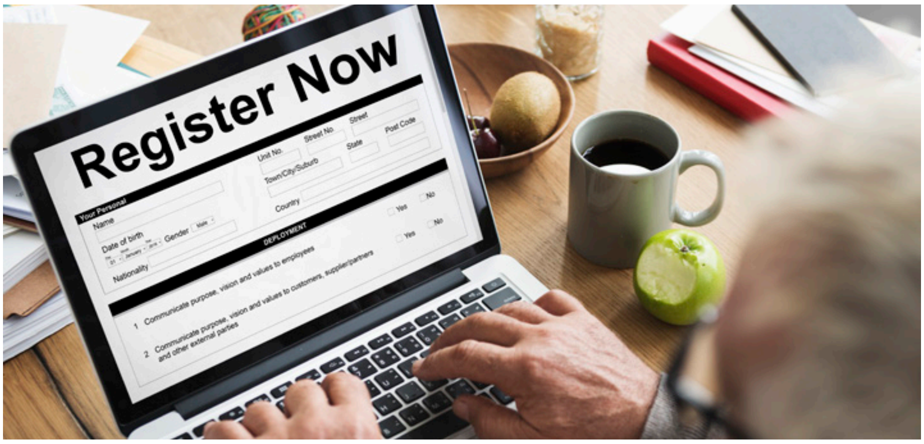
> **If a party fails to attend or participate in a judicial settlement conference, then they may be ordered to pay the costs of the conference**

Plans for a publicly accessible register of beneficial ownership remain on hold. The BVI government previously made a commitment to introduce a publicly accessible beneficial ownership register in relation to BVI companies by the end of 2023, subject to various qualifications, including a caveat that this would happen only if such registers were to become an international standard. Provisions have been introduced to the BCA so that the BVI government may in future regulations set out the requirements for registers of 'persons with significant control' (not dissimilar to the UK regime). However, it remains to be seen when (or if) a PSC register is implemented, particularly given the stance taken by the European Court of Justice in November 2022, where it found that public access to beneficial ownership registers constitutes a serious interference with the rights to respect for private life and to the protection of personal data.

Changes to the CPR

The new CPR came into effect on 31 July 2023 and apply to all proceedings commenced after that date. The previous rules continue to govern proceedings commenced before 31 July 2023 where a trial date has been fixed (unless it is adjourned) or, if no trial date has been fixed, the new rules will apply from the date of the case management conference. Changes that are relevant to UK practitioners are outlined below.

The procedure for service out of the jurisdiction has been streamlined. Under the previous rules, permission of the court was always required for service out of the jurisdiction. The new rules recast this provision so that the court may set aside service out (rather than grant it) if the proceedings do not fall within one or more of the gateways listed in the rules. This removes a layer of cost in unchallenged cases as a preliminary *ex*



parte hearing (encompassing the usual duties of full and frank disclosure) on service can be avoided.

There is an increased emphasis on alternative dispute resolution. Under the new rules, a judge may order the convening of a settlement conference, whereby the judge acts as facilitator to settlement. Judicial involvement in the settlement process may occur during the case management conference and the stages leading up to trial or the hearing of an appeal or, if the parties consent, during the trial itself. If a party fails to attend or participate in a judicial settlement conference, then they may be ordered to pay the costs of the conference. Additionally, the judge conducting the judicial settlement conference may refer the conduct of a party during a conference to the docketed judge assigned to the proceedings. This marks a departure from the previous regime where parties were entitled to proceed, full steam ahead, to litigation without any consideration of ADR.

Timeframes for appeals are increased. The time for applying for leave to appeal has been increased from 14 days to 21 days of the order being appealed. This timeframe has also been extended to applications for leave to appeal from the Court of Appeal. This is more generous than the previous rules whereby a party would only have seven days to apply if leave to appeal had already been refused from the court below.

Many of the changes to the BCA and CPR introduced in 2023 are likely to impact UK insolvency and legal practitioners that deal with BVI entities.

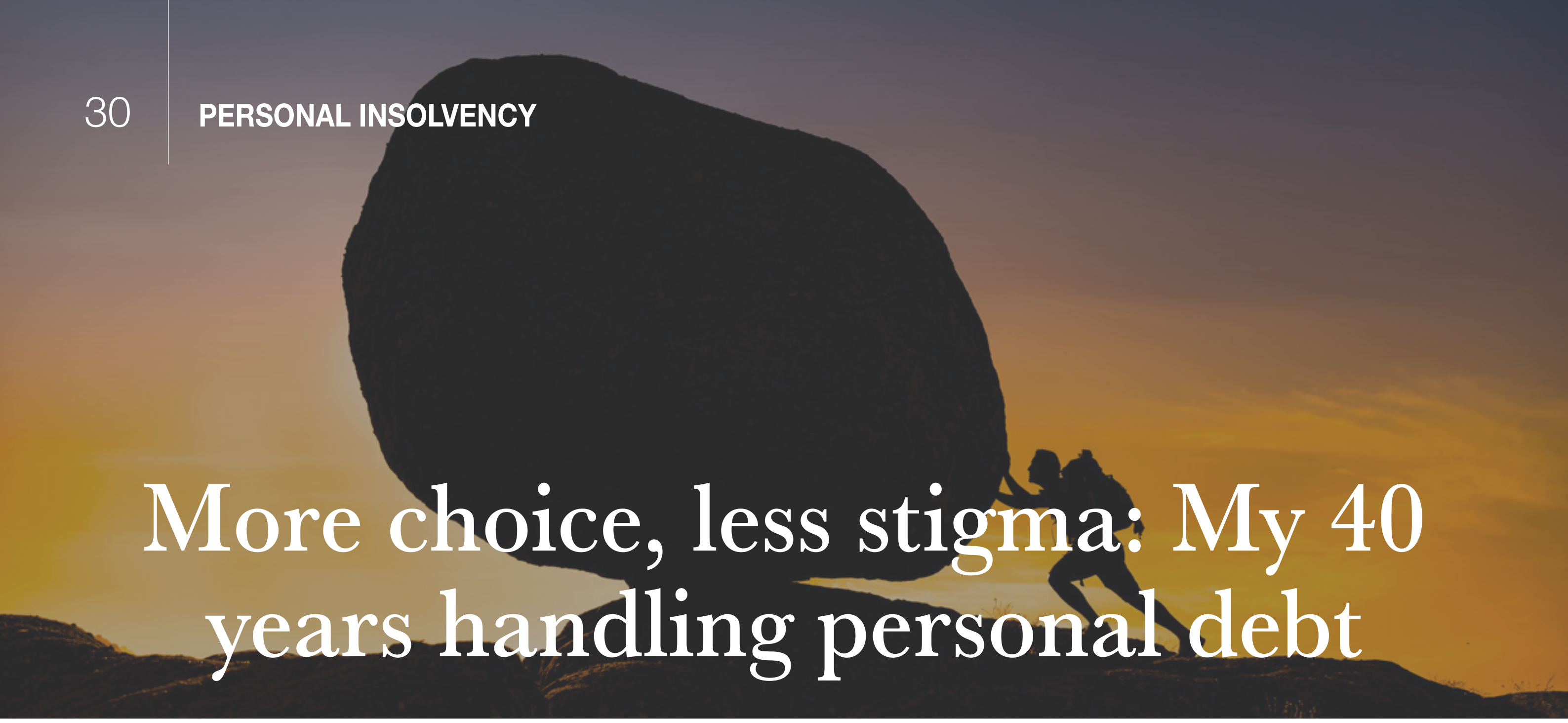
> **UK practitioners considering or engaging in legal proceedings in the BVI should be aware of the streamlined procedure for service out of the jurisdiction, the increased role of ADR and the changes to the timescales for appeals**

UK practitioners will no doubt appreciate the increased visibility on the makeup of boards of directors of BVI companies, and IPs taking joint appointments over BVI companies should have the benefit of inspecting their financial returns. The changes to BVI company restorations will likely impact on UK creditors (or their liquidators) targeting assets held through dissolved BVI entities and/or insolvency practitioners poised to take office if a restoration strategy is successful.

For solvent BVI liquidations, UK practitioners are not excluded from the market but will need to take up appointments jointly with a BVI resident/licenced liquidator.

Turning to the procedural changes in the CPR, UK practitioners considering or engaging in legal proceedings in the BVI should be aware of the streamlined procedure for service out of the jurisdiction, the increased role of ADR and the changes to the timescales for appeals.

Jennifer Jenkins is a partner at Mourant and **William Barnes** is an associate at Mourant



More choice, less stigma: My 40 years handling personal debt

Andrew Kelsall reflects on the use of personal debt solutions from his first meeting with a debtor in 1983 to present-day use and reform

Having just achieved 40 years engaged in full-time insolvency work, I thought it might be interesting to reflect on how personal insolvency has evolved over the last four decades.

An individual facing personal insolvency in the 1980s had relatively limited options. Debt management plans were not available until the early 1990s. Individual voluntary arrangements were introduced in 1986 and debt relief orders only arrived in 2009.

Unless an informal arrangement with creditors was possible then personal insolvency options pre-1986 were restricted to bankruptcy or a scheme of arrangement. The legislation was predominantly designed for businesses or traders, and did not cater particularly well for 'domestic' non-trading personal insolvencies.

In the early 1980s, the main body of personal insolvency legislation was contained in the Bankruptcy Act 1914 and the Insolvency Rules 1952. Much of this legislation centred around the involvement of the court throughout the entire process. Acts of bankruptcy and receiving orders were all part of this process that could lead to a bankruptcy order being made or a scheme of arrangement being approved.

> "The earlier position of the Insolvency Service, generally not accepting what the debtor had said unless also evidenced, appears to have been replaced by an acceptance of debtor explanations unless contrary information is available"

The practical aspects of bankruptcy at the time were also quite invasive. All debtors whether domestic or traders were interviewed in person, perhaps on several occasions. Generally, the 'interview' included an inspection of the personal domestic residence as well as any business/trading premises, together with the listing of contents. Discharge from bankruptcy was not automatic but generally involved a court-based review and an Official Receiver's report some five years after the bankruptcy order was made.

Interviews and home inspection

The very first bankruptcy case that I dealt with back in 1983 involved a 20-year-old married man with a child living in local authority housing. The debtor was unemployed and it was a debtor-petition bankruptcy. Liabilities were just under £10,000 with no realisable assets. He faced two office-based interviews with me alongside an inspection of the domestic home, including listing of the house contents and a court-based public examination. Additionally, there was the advertisement of the bankruptcy order in the local press (as opposed solely to a listing in *The Gazette*). Probably quite a daunting process.

At the time it was normal for an advertisement of bankruptcy orders to be made in the relevant local and, if appropriate, national press. While this was originally intended to ensure all creditors were notified of the bankruptcy proceedings, it did not assist with the level of stigma relating to personal bankruptcy, particularly in domestic cases.

> "Current practice is that an adjudicator may refuse to make a bankruptcy order where an application is made and the debtor has a pension/fund that can be accessed"

During the 1970s and 1980s, personal credit and loans for domestic purposes were more readily available and increasingly being used. The Insolvency Service recognised this and understood that consequently there were likely to be more domestic insolvencies. It was clear that revised legislation was required to manage the predicted increase in personal insolvencies and, when it arrived, the 1986 Insolvency Act provided a more appropriate framework to deal with these aspects.

The 1986 Act introduced a number of new concepts to earlier legislation including automatic discharges from bankruptcy after two or three years and the opportunity to propose an IVA as an alternative to bankruptcy. The IVA offered an option that would generally not require court involvement – a trend that continued in personal insolvency when most bankruptcy orders fell under the purview of the Adjudicator's Office in 2016. This further removed court involvement in debtor-petition bankruptcies.

The adjudicator process is only available online. The debtor completes an online questionnaire and, provided that it is sufficiently completed and self-explanatory, the Insolvency Service is likely to have minimal contact with the debtor. Certainly, it would be very unusual for a domestic debtor bankrupt to be interviewed in person and even less likely that any form of home inspection would be undertaken. Most bankruptcy discharges now occur automatically 12 months after the original order.

The introduction of IVAs certainly appeared to reduce the stigma of personal insolvency, helped by the shift to phone calls rather than home visits in bankruptcies. The decreased court involvement also meant less embarrassment for the debtor as bankruptcies were not published as frequently in the local and national press. While in the first full year of availability in 1987 there were 434 IVAs (compared to 6994 bankruptcy orders), this soon changed and by 2010 IVAs totalled 50,693, with bankruptcies still slightly ahead at 59,172.

In 2009 the debt relief order was introduced. The DRO provided both debt relief and debt forgiveness but had no provision for asset/income realisations. In order to qualify, the debtor would have little spare income and their property or assets would fall beneath a certain value threshold. Initially DROs were limited to liabilities of no more than £20,000 and access to the process was only granted via an authorised debt advisor. With the cost set at £90, the DRO compared very favourably with other options. Little surprise then that in 2010, one year after its introduction, the number of DROs reached 25,179.

While legislation has changed and a greater range of personal debt solutions are now available, the involvement of the Insolvency Service has also changed to meet the demand from different stakeholders. The earlier position of the Insolvency Service, generally not accepting what a debtor had said unless evidenced, appears to have been replaced by an acceptance of debtor explanations unless contrary information is available.

Seeking to abuse the process

Pensions have always been an interesting topic in personal insolvency. If a bankruptcy order was made prior to 29 May 2000, non-state pensions were included in the pool of available bankruptcy assets. Post-29 May 2000, pensions were generally exempt from inclusion in bankruptcy proceedings. It appears that current practice is that an adjudicator may refuse to make a bankruptcy order where an application is made and the debtor has a pension/fund that can be accessed. The rationale for this is that the debtor has the potential ability to access funds with which to 'settle' liabilities. The position is different if the debtor is bankrupted by a creditor, where it appears that the debtor's pension will be excluded as an asset in the bankruptcy.

Clearly there are those that will seek to take advantage or abuse the insolvency process and there remain powerful sections of legislation to deal with such situations. I am currently dealing with an uncooperative creditor-petition bankruptcy where the bankruptcy discharge is about to be suspended to allow further time for the debtor to cooperate.

Bankruptcies comparison 1960–1983

A review of the number of personal insolvencies reveals that from 1960 to 1983 the number of bankruptcy orders more than doubled.

	Total	Bankruptcy	Deeds of arrangement
1960	3220	2944	276
1983 Total	7032	6981	51

Different personal insolvencies 1960–2022

Personal insolvencies, particularly those involving domestic non-traders, have increased significantly (2022 statistics below) although the vast majority are dominated by IVAs and DROs, with bankruptcies making up less than 6% of the numbers. *Andrew Kelsall*

	Total	Bankruptcy	Deeds of arrangement	(IVAs)	(DROs)
1960	3220	2944	276		
1983 Total	7032	6981	51		
2022 Total	118,859	6678		87,963	24,218

> **“A reduction in the number of IVAs, combined with the high time cost and compliance requirements for those not undertaking large volumes has meant that some practitioners no longer offer IVAs to potential clients”**

Currently, with a significant reduction in the number of bankruptcy orders being made and a great many of the IVAs being processed by so-called IVA factories, there is a lack of opportunity for IPs and their teams to gain practical experience. A reduction in the number of IVAs combined with the high time cost and compliance requirements for those not undertaking large volumes – particularly in relation to smaller IVAs – has meant that some practitioners no longer offer IVAs to potential clients.

During 2022, the Insolvency Service issued a call for evidence to review the personal insolvency framework, with a summary of the responses and findings published recently[1]. The broad objective of the Insolvency Service is to ensure that the personal insolvency framework aligns with the needs of 21st century stakeholders. Main considerations are barriers and access to appropriate solutions, dealing with those who are reckless and fraudulent, and the interaction between the various options.

Increasing use of breathing space

As to my final thoughts on this topic, I wonder what the future of personal debt relief options will look like. Will the DRO criteria be amended so that most debtor-petition bankruptcies can be included? The IVA market has developed beyond all expectations, but are some of the more modest arrangements meeting the needs of both the debtor and creditor? Increasing numbers of debtors are seeking protection under the breathing space provisions. In the 12 months after its introduction in May 2021, there were 69,613 total breathing space registrations made. This rose to 91,841 in the 12 months to October 2023 (from Insolvency Service figures). The question is, what happens to these debtors after the 60-day protection period expires?

One thing is certain – the personal insolvency options available to debtors today, and hopefully in the future, are far greater and more appropriate than they were 40 years ago. Stigma relating to the use of one or other of the options has been considerably reduced thanks to virtually no court involvement, but will it ever be eliminated?

1 www.gov.uk/government/calls-for-evidence/call-for-evidence-review-of-the-personal-insolvency-framework/outcome/review-of-the-personal-insolvency-framework-summary-of-responses-and-next-steps

Andrew Kelsall is head of the insolvency team at Larking Gowen

Compensation scheme could pose existential threat to smaller firms

A potential PPI-style claims industry could undermine the UK's reputation for an effective insolvency framework, says **Anthony Walters**

The Government's long-awaited plans for the future of insolvency regulation, published in September in response to a call for evidence two years ago, was positive in many ways. That plans for a single government regulator will not be progressed was a key win for the profession and R3, and something we campaigned hard for, so this was a welcome result. We were also pleased that some of our concerns around the lack of progression in bonding reform were alleviated by the Government's decision to progress this.

However, some big questions remain, as the Government has decided to move forward with the insolvency compensation scheme, which remains a major concern for us and our members. We also have reservation in respect of the move towards standard setting ultimately sitting with the Secretary of State for Business.

Clarification needed: firm regulation

The regulation of firms offering 'insolvency services' was another proposal carried over from the initial consultation document from 2021 and, while we understand the motivation behind it, our initial reaction and that of many of our members is that we would like to see more detail around the proposed changes.

In principle, we are not opposed to the idea. When we surveyed our members on this last year, the majority said they believed its introduction would improve professional standards, but we need more detail on how this major change to the framework will work in practice.

We had hoped for a full consultation on this aspect of the reforms, but we will work with the Government and the Insolvency Service to ensure the profession's views and concerns are heard at every opportunity as it begins its journey from drafting to statute book.

Work needed: compensation scheme

One area of the Government's proposed reforms that did cause us concern was the idea of a compensation scheme for the insolvency profession.

While we understand the rationale behind the desire to introduce it, we are very concerned it could result in a large number of unwelcome, unsubstantiated claims, and potentially lead to the creation of a PPI-style claims management industry. Such consequences would place an unwanted and potentially unmanageable burden on smaller practices within the profession and potentially compromise the profession's ability to deliver for clients and creditors. To be blunt, a blanket and disproportionate application of a compensation scheme could pose an existential threat to smaller firms, reducing both supply and competition in the market.

It could also undermine the UK's national and international reputation for having an effective insolvency framework and profession, and seriously undermine the Government's rationale for introducing these reforms and its desire to further boost public confidence in the framework and the UK's insolvency regime.

> **It would appear that future progress depends very much on the parliamentary calendar, and it is increasingly unlikely that the time required will not come before the general election**

The Government has acknowledged that any future compensation system would need to take account the nature of the work undertaken by the profession and find a way around the issue of spurious or high-volume claims, but it still wants to explore the proposal in more detail. We know that this is something Kevin Hollinrake MP, the parliamentary under secretary of state for enterprise and markets — with insolvency in his brief — has spoken about with enthusiasm.

We will continue to highlight concerns and work with Government to ensure whatever is introduced is workable for the profession and its stakeholders. Once the promised consultation is released, we will be ready to respond.

Detail needed: bonding reform

In many ways, the Government's announcement on the future of the bonding regime was positive. R3 had long called for a number of proposed changes, including IP security and bonds for successor IPs, so we are pleased that we have been listened to. We will work with the Government on the next steps and keep members updated on progress.

In the meantime we would like to see more detail on the proposals for these areas, as the initial details were lacking the information needed to form a clear opinion or provide constructive feedback.

Given the scope of the changes the Government was proposing to introduce, there is no surprise that its response to this consultation was mixed. Proposals to introduce a Government regulator appear to have been dropped, but the response leaves the door ajar with the line that the Government will retain the power to introduce a single regulator should the current RPB model be deemed ineffective.

With the words 'when Parliamentary time allows' appearing 14 times in the response document, it would appear that future progress depends very much on the parliamentary calendar, and it is increasingly unlikely that the time required will come before the general election.

Rest assured that when progress is made, we will be prepared to respond and highlight any concerns the profession has about the future of its regulatory regime. The Government and the profession want the same thing: a regulatory regime that works for everyone and bolsters the reputation of the profession and delivers for the public and wider economy.

Anthony Walters is head of external affairs at R3

Clive Emson

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IPs ideally placed to benefit from old debts paid beyond terms

Where there is a chance of a company continuing to trade, an LPC asset may be a useful bargaining chip in gaining support from secured creditors, argues **David Baber**

Insolvency practitioners know about late payment compensation (LPC), but very few appreciate the potentially large sums that it could bring to creditors when a company enters insolvency.

Little research appears to have been undertaken as to why the rate of IPs applying LPC has been so poor, especially as there are considerable powers available to assist LPC creditors. The key to these powers is utilising current legislation, namely The Late Payment of Commercial Debts (Interest) Act 1998; The Late Payment of Commercial Debts Regulations 2002 and The Late Payment of Commercial Debts Regulations 2013, (as amended, extended and re-enacted subsequently).

Most business suppliers have a reasonable trading relationship with their B2B customers, so it is understandable that they would not wish to endanger goodwill by making a LPC claim, even if invoices are regularly paid late. However, it is very different when that relationship goes sour and preservation of goodwill is no longer of importance. We know of several small businesses who were seriously endangered by a major customer withdrawing business without notice. Three of these SMEs would have collapsed without the LPC sums of several hundreds of thousands of pounds to keep them going as viable businesses. For two of these businesses, the LPC claims were each over £500,000 and out-of-court settlements were obtained for both.

Enough to pay off secured debt

Unless an IP is working towards selling the company as a going concern, loss of goodwill is not an issue. So, in most cases, the full LPC value is claimable. Where there is a chance of the company continuing to trade, the LPC asset may be a useful bargaining chip in gaining support from secured creditors as they would have no previous knowledge of this unrealised asset. Indeed, even a partial LPC claim may be enough to pay-off the whole secured debt.

Under current legislation, UK businesses have the right to claim interest and compensation from other UK businesses and public bodies that have paid invoices even one day late. Where no terms had been agreed, legislation automatically sets this to 30 days from date of invoice. There is no lower limit for the value of invoices. Business creditors can claim statutory interest on the late payment of commercial debt at 8% over the prevailing Bank of England rate; therefore, when this article is published, it is likely to be 13% per annum applied for every day an invoice has been paid late.

> “It is important to emphasise that unpaid invoices owed to the insolvent company are entirely separate from LPC claims, which most IPs have never handled”

In addition to interest, compensation is payable from the late payers. For each overdue invoice (not the outstanding balance) the levels are as follows: £40 for invoices less than £1000, (no matter how small the amount); £70 for those less than £10,000 and £100 for invoices exceeding £10,000.

Both interest and compensation can be retrospectively claimed for late-paid invoices for a period of six years in England, Wales and Northern Ireland (it is five years in Scotland) from the date that an invoice became overdue.

IPs, whose primary concern is to make returns to creditors of insolvent businesses, are in an ideal position to utilise LPC legislation. It is vital that either the insolvent company's sales ledger is analysed immediately upon the IP being appointed or a copy of the latest accounts backup is taken. When examined over the previous six years, an analysis will show the exact compensation and interest due on every single invoice. The vast majority of LPC debtors have never been charged LPC before and initially find it hard to believe that they must settle; indeed, they only pay after the legislation is fully explained in writing together with a detailed statement itemising invoice dates, due dates and payment dates.

It is important to emphasise that unpaid invoices owed to the insolvent company are entirely separate from LPC claims, which most IPs have never handled. Current invoices yet to be settled are likely less than 12 months old, so, generally, the IP's debt recovery activities will extend only to cover that.

Average claim of £750,000

My company has been applying late payment compensation and interest to principal debts since 1992. We recently calculated the LPC claimable on 64 SME clients' sales ledgers in the pre-covid era of 28 March 2018 to 16 March 2020. In accordance with clients' instructions, only a small fraction of claims were instructed for recovery due to goodwill concerns. These clients' sales ledgers showed the average payment period to be 45 days beyond terms and the average total potential late payment compensation including interest amounted to £49,254,493. This is an average potential claim of £769,602 per LPC client. Bearing in mind that IPs may deal with insolvent companies that have raised invoices in high volume, it is probable that the above figures would be substantially exceeded – the higher the volume of invoices, the higher claim value. Plus, the majority of the LPC claims would be processed, not just a selective few.

Will more IPs be bold enough to dip a toe in the LPC water? It remains to be seen, but let the hesitant ones remember the old adage: 'The early bird catches the worm'.

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Evaluator reports have value beyond connected party rules

As the number of pre-packs start to rise again, an independent report can help protect against aggrieved creditors and future litigation, says **Kevin Murphy**

A qualifying report from an independent evaluator is an essential requirement for an IP wishing to sell the assets of a company in administration to connected persons but, in my experience acting as an evaluator, it also provides IPs with a valuable tool to manage the potential risks of the legislation.

The Administration (Restriction on Disposal etc to Connected Persons) Regulations 2021 created the concept of a *substantial disposal* — the sale, hiring out or disposal of all or a substantial part of a company's assets to a connected person within eight weeks of a company entering administration. The regulations mandate that an administrator must not make a substantial disposal unless a qualifying report has been obtained, or that creditor approval has been obtained.

The provisions are currently untested in the courts, but avoiding a challenge to the validity of an administration sale from an aggrieved party or regulator will certainly be a priority for any IP and the regulations can be tricky to navigate, especially when dealing with the definition of connected persons. This definition is instrumental in determining whether the legislation applies to the matter in hand. The connection between individuals and the purchasing entity may not immediately be apparent or seem remote, but often the benefit of seeking a report (at the buyer's cost) from an independent evaluator far outweighs the potential risk to the administrator of failing to correctly apply the regulation.

> **"I have seen an increase in the number of instructions from connected persons, and expect to see this continue for the foreseeable future"**

The evaluator's job is to form an independent opinion about whether the case has been made for the substantial disposal (i.e. that they are satisfied that the consideration provided for the relevant property, and the grounds for the substantial disposal are reasonable in the circumstances). This is known as a qualifying report and complies with the wider requirements of the regulations to reach either a 'case made' or 'case not made' opinion.

Lack of definition in legislation

While a 'case not made' opinion is not theoretically fatal to the process, an IP may be reluctant to proceed in circumstances where the evaluator has formed this view.

A controversial aspect of the regulations has seemingly been the lack of definition of the qualifications for an evaluator within the legislation. Theoretically, an evaluator can self-certify in their report that they possess the relevant skills and experience, a stark contrast to the IP's position.

Responsibility for making the application for an evaluator's report lies with the connected person(s), but information provided by the applicant is simply the starting point. Obtaining accurate and quality information from both the applicant and the IP are critical elements to form an opinion.

Commercially sensitive negotiation

The IP can support the role of the evaluator by providing timely and accurate information directly to the connected person (for example, some IP firms provide the buyer with an information pack that can be presented to the evaluator), and/or by liaising directly with the evaluator.

Pre-packs are often high value, subject to commercially sensitive negotiation and reactive decision making from the administrator, and an evaluator needs to maintain confidentiality as the situation progresses. IPs are often reluctant to share commercially sensitive information with an evaluator — the evaluator, after all, is engaged by the connected-party purchaser when the deal has not yet been (and cannot by definition be) completed prior to the receipt of the evaluator's report. It may even be necessary or desirable for an evaluator to sign an NDA to access the required information to properly form an opinion. An evaluator releasing commercially sensitive information to the connected person in the report prior to the deal being formally concluded could lead to a renegotiation of the position between the connected person and the IP.

Seeking the report of an independent evaluator can be beneficial to IPs even in situations where the regulations may not strictly apply, for example where an administrator is conducting a sale with previously unconnected persons identified through a marketing process, but the circumstances are potentially contentious (in that oldco directors may become directors and/or shareholders in the purchaser), the report of an independent evaluator maybe a useful tool at the IP's disposal in the event of a later challenge by an aggrieved creditor.

Given the rise in the number of reported corporate insolvencies this year, I have seen an increase in the number of instructions from connected persons, and expect to see this continue for the foreseeable future.

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Transactions that cheat creditors could be caught by software

Where material provided by directors or the banks may omit pages containing claims, software could create an accurate report on day one, says **Lee Angus**

Release from debt is an idea thousands of years old. It has allowed commerce to take risks and expand in ways that would never have happened without the opportunity to draw a line under failure, but many forget the social benefits of our industry.

Some individuals support debtors' interests most strongly in this process, others favour creditors', but the common ground is the agreement that transactions designed to cheat creditors must not be allowed. They offend our senses of fairness and morals, yet plague insolvency.

> **"The market has made it clear for years that the existing software was not fit for its task"**

The IP's role in this is a difficult one. An officer of the court, entrusted to act fairly to both debtor and creditor, under the additional commercial pressure to find the most cost-effective way to conclude the file. It is hard to come to an estate as a stranger, know its normal course of business and identify the irregularities that require court challenge.

Misleading transfers

I am pleased to say that, after a long career in insolvency, I have been part of a team that has developed a system to identify the issues that weigh on the shoulders of our profession — odd payments, often to associates or undisclosed accounts, that not only must be answered, but also reported under SIP 2 and director conduct reporting requirements.

The old accountant's adage that 'cash is a fact, profit is an opinion' belies the fact that people can misrepresent the true nature of any payment in an account when written up. While this can be done with misleading narratives in bank transfers, we know of no better way to reach the truth than obtaining and analysing all the banking data to digest it and show the true flows as visible to the company's banker.

The industry standard to date has been to analyse whatever material has been provided, whether by the directors or the bank. Experience shows that not only do directors deliberately remove evidence that exposes misconduct, but banks also often unintentionally fail to hand the odd page (or many) to the liquidator. Pages that might contain a claim or defence to one. Only by making sure every page is received can a comprehensive analysis begin, but most products designed to assist on cases do not even identify this preliminary step as the IP is presented with thousands of pages and limited resources to meet time costs.

Worse still, many IPs who do attempt to apply a digital solution are left with complex and unwieldy software — made by outsiders to the industry who do not understand the pressures or duties placed upon a practitioner and who do not know the shape of the tool needed to do the task. This leaves their customers with software that, while functioning to its own specification, cannot be used by the staff tasked to work it to achieve their own obligations.

The market has made it clear for years that the existing software was not fit for its task by the fact it was only ever used on a very small portion of the sector. Correctly priced and geared software, freeing up valuable staff, should be something useable on every file.

Billions of calculations

The only way to properly create such a tool is by years of consultation with IPs who report and litigate cases, their lawyers, and even the barristers who would argue in court as to what the best shape of any analysis should look like. It should be a detailed report that can be seen on day one of an appointment, instead of a report created by a single joint expert shortly before a court hearing for tens of thousands of pounds.

> **"Intelligent interpretation of the facts remains the responsibility of experienced staff, but the basic repetitive tasks can now be sorted by technology"**

At several billion calculations per second, a computer server can achieve in 24 hours what no human could match in a month of soul-destroying work. Its main value, beyond the basic extraction of data, is replication of the iterative analysis that trained staff normally spend thousands of hours a year on across the industry. Intelligent interpretation of the facts remains the responsibility of experienced staff, but the basic repetitive tasks that no one enjoys can now be sorted by technology.

Who will be the beneficiaries of this? The people saved from the labour, for sure, and the regulators who need to see that analysis was done. But beyond that there will be many new claims uncovered benefitting creditors, lawyers and the whole industry that supports litigation, whether funding, purchasing or insuring claimants.

Lee Angus is a director of Prism 339
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www.prism339.com

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Other
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Company details						
Trading name	**Contact details for IPs**	**Website**	**Address**	**Top/parent company in group, Reg country | Reg No**	**Quality and security accreditations and certifications**	**No of years providing products/ services to UK insolvency professionals**
Aryza ■	Elliott Green, elliott.green@aryza.com 0113 389 3939	www.aryza.com	Bridgewater Place, Water Lane, Leeds LS11 5DR	Aryza UK Services Ltd, England | 10810071	ISO 27001	21
Beyond Migration ■	Dave Refault, dave.refault@ beyondmigration.com 07590 577 750	www.beyondmigration. com	37th Floor, One Canada Square, Canary Wharf, London E14 5AA	Beyond Migration Limited, England | 8923024	We are ISO 9001/27001 certified.	10
Bluebird Software Ltd ■	*n/s*, *n/s*, 020 8346 4714	www.bluebirdsoftware. co.uk	8 Finchley Way, N3 1AG	Bluebird Software Ltd, England | 7056288	*n/s*	10
Docusoft Limited ■	Zac Hurle, zac.hurle@docusoft.net, 07877 949 648	www.docusoft.net	30 Craven Court, Glebeland Road Camberley, Surrey GU15 3BS	Docusoft Limited, England | 04856441	*n/s*	*n/s*
ESA Risk ■	Mike Wright, mike.wright@esarisk.com, 07970 049 497	www.esarisk.com	49-51 Bedford Row, London WC1V 6RQ	Esa Risk Ltd, England | 08405809	ISO 27001	10
GSI Associates ■	Andrew Stuart, andrew.stuart@gsiassociates. com, 020 3151 6848	https://gsiassociates. com	167-169 Great Portland Street Fifth Floor, London W1W 5PF	GSI Associates Limited, England | 09283980	We are currently consolidating our systems to achieve ISO 9001 accreditation across all the GSI companies in UK, Malta, Kosovo, North Macedonia and Romania, within the next three months.	10
MD5 Ltd ■	Gaynor McNiff, gaynor.mcniff@md5.uk.com, 01924 220 999	www.md5.uk.com	PO Box 96, Normanton WF6 1WY	MD5 Ltd, England | 04895973	Cyber Essentials Plus. Policies and procedures are ACPO and ISO 27001 compliant. ISO 17025 accredited (9359 schedule).	20
Pelstar Computing Ltd & Insolvency Data Solutions ■	Alan Brown, alanb@pelstar.co.uk, 020 7624 6880	www. insolvencydatasolutions. co.uk	Kinetic Business Centre, Theobald Street, Borehamwood WD6 4PJ	Pelstar Computing Ltd, England | 02920810	*n/s*	29
Prism 339 ■	Lee Angus, lee.angus@prism339.com, 07811 100 616	www.prism339.com	1 Spinningfields, Manchester	Prism 339 Ltd, England | 10339481	ISO27001	1
Taylor Investigations ■	Charlotte Notley, charlotte@ taylorinvestigations.co.uk, 01603 904 031	www. taylorinvestigations. co.uk	40 Rose Lane, Norwich, Norfolk NR1 1PN	Taylor Investigations Limited, England | 10025693	*n/s*	7
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■ = Provides software solution/service for IPs and/or insolvency lawyers
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Turnkey ■	Kenny Doole – Commercial Director, enquiries@turnkey-ips.com, 0141 644 5444	https://turnkey-ips.com	Thornton Lodge, East Kilbride Road, Glasgow G76 9HW	Turnkey Computer Technology Limited, Scotland | SC072426	Turnkey is the UK market leader for corporate insolvency software and are ISO 27001 certified. Our team boasts over 200 years' of industry experience and proudly supports firms of all sizes globally.	43

IT and technology services

Trading name	Services offered to insolvency professionals	How are you different to other technology service providers?
Aryza ■	*n/s*	*n/s*
Beyond Migration ■	Beyonds services are increasingly utilised to provide assistance to teams that are struggling to continue 'business as usual' and deliver technical services to maintain digital platforms and the infrastructure that underpins them.	Our five step methodology ensures that business as usual is maintained whilst the company administration process continues. When the time is right – we commence the orderly wind down of all the technical services providing documentation as required
ESA Risk ■	We support IPs and their legal teams when trying to uncover evidence of fraudulent behaviour and misappropriation of assets. The technical tools that we use are part of a collaborative approach to ensure that different team members can focus on specific areas and enhance the results.	Our dedicated insolvency investigation support team specialise in the forensic analysis of non financial data, utilising humint, covint, and specific technical tools that allow us to identify assets, patterns of behaviour and links between debtors, their families and associates.
GSI Associates ■	We provide integrated financial and IT support to insolvency practitioners, for director conduct reviews and company investigations, embracing data recovery, accounting, asset tracing, due diligence and forensic analysis in UK and internationally.	A unique blend of advanced tech and an integrated team of professionals offering IT, financial, forensic, legal and translation services, along with other business support services including outsourcing, translations, digitalisation of the workplace.
MD5 Ltd ■	MD5 specialise in e-disclosure and digital forensics and we call this our eForensics service. With our user-friendly platform that can be accessed 24/7 from any device via internet, it sorts through relevant and non-relevant data to reduce the dataset. We aim to reduce the data by 90-95%, only leaving relevant data.	MD5 allocates an account manager to help guide you through the process and advise on any queries. We aim to deal with all enquiries within the hour. MD5 lab offers full digital forensic work on most phones and laptops including Apple and Android.
Pelstar Computing Ltd & Insolvency Data Solutions ■	A fully integrated web portal for creditor information which is customised for each client and is also fully customisable for specialist insolvency situations.	Ease of upload together with the way in which it is customised so as to fully represent the client.
Prism 339 Ltd ■	Prism takes banking data and analyses it in various ways useful to insolvency compliance and litigation.	Our services do not merely extract data like competitors – we correct it, without a cap on data analysed, then also provide the analysis needed for onward litigation/compliance.
Taylor Investigations ■	Taylor Investigations provide process serving, asset tracing, person tracing and digital forensics to insolvency professionals nationwide and globally.	*n/s*
TenIntelligence ■	We carry out forensic analysis, imaging and examination, and evidence preservation.	Our team have a working understanding of the legalities, best practice and methodologies used in digital forensics. We apply best-in-class evidence continuity, covering seizure, exhibit handling, data collection and preservation.

Key:
■ = Provides software solution/service for IPs and/or insolvency lawyers
■ = Provides other IT and technology-related services for IPs and/or insolvency lawyers
■ = Both of the above

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Text in regular font = text supplied by the profiled company

Software products & solutions (Table 1)				
Product name	**Provider**	**Product benefits**	**Product features**	**How is it different to other in market?**
Aryza	**Aryza** ■	Aryza Insolvency case management software builds on our experience of systems, software, and best practice within the insolvency sector to deliver a truly global insolvency software product.	Simple user interface. Automated support for IPs to find the best route for the customer. Self-serve platform. Built in packs following industry standards. Two way electronic communication with creditors. Includes payment processing and distribution.	Aryza has over 20 years' experience in the insolvency and debt management sector, and it was one of the pioneers of introducing automation to the sector.
CloudFiler	**Docusoft Limited** ■	Our CloudFiler solution helps to keep case matter in a structured cloud filing system, making it easy for a firm to collaborate on documents internally as well as pass externally for quick e-signature.	Structured cloud filing. Internal document workflow. Secure portal for E-signing. Pre-appointment pack splitter. Audit trail. Bank analysis. Integrates with IPS, Aryza and Microsoft. External form-filler. Integrates with Veriphy AML. Cloud.	The only true cloud document management system that is recognised by insolvency firms. All-in-one solution covering external signing, document management and a long list of features in one system.
IPS Cloud	**Turnkey** ■	IPS Cloud is a multijurisdictional case management system. It has been designed with the client in mind and allows users to manage personal and corporate cases from pre-appointment to closure and effectively integrates with other key systems.	IPS Cloud has everything you need to effectively and efficiently run a case. From transaction processing, reporting, time recording, billing, and document creation to creditor interaction through our bespoke creditor portal, IPS Cloud has it all.	IPS Cloud is specifically designed for the insolvency industry, by industry professionals. Being cloud-based you can easily access case data from anywhere without worrying about infrastructure, updates, backups, or security – we take care of it all.
IPTime	**Bluebird Software Ltd** ■	Saves time, money and reduces staff costs. Bluebird Software time recording software (IPTime) was developed specifically for insolvency practitioners to make it easy to record time spent on numerous cases and to produce SIP9 and many other reports.	Fee earners record their own time, disbursements and non-chargeable activities. Includes IP cost estimates and client invoices. Standard reports including SIP9 are available instantly. Cloud or local server based. Customisable to suit your company.	With IPTime, staff can work from home or away from the office. Data can be backed up to the cloud. We can transfer existing client data to the new system. 1-2-1 support and group training available. All reports can be produced in Excel if required.
Prism	**Prism 339 Ltd** ■	Prism extracts banking data into Excel, corrects it, then runs the analyses needed to identify antecedent transactions/report on SIP 2 and DCRS.	Prism algorithmically digests an account's data similar to the analyses that would be performed by an expert for a court hearing, but at a fraction of the cost (£200 plus VAT per account).	Prism goes well beyond the standard PDF extraction software, by correcting the input, identifying duplication and omissions/ contamination, before running complex analysis that would normally cost tens of thousands of pounds.
The Admin System	**Pelstar Computing Ltd & Insolvency Data Solutions** ■	The admin system is an end-to-end insolvency case, time and document management system built to help you stay compliant. Seamless integration with HMRC, Companies House and more, it speeds up the journey, while our web services allow you to connect and share data with your creditors. All our products are competitively priced and have a great support structure.	Fully compliant case management system dealing with all UK insolvency types. Case accounting, including integration with electronic banking. Integrated letter and email production. Integrated time recording and invoicing/billing. Outlook add-in which processes incoming emails, allowing automated case allocation features. An integrated creditor portal.	Easily customisable with an ability to react swiftly to rapidly changing situations and client requests. Qualified key personnel with in depth knowledge and experience of both accounting and insolvency procedures. Cutting edge case management tool. The system is hybrid with all data stored on client's own servers giving you complete control of your data, with some sections of the software available with an optional cloud-based interface.
VFC	**MD5 Ltd** ■	VFC "Virtual Forensic Computing" is a fast, safe, flexible, reliable and capable virtualisation tool. Help save an organisation money and time with triage in the field or back at the office prioritising devices.	VFC has many features which make it one of the most powerful tools in the industry that an insolvency/digital/ cyber/incident response forensic investigator can use. VFC can create standalone copies for investigations, interviews or at court. Used in the field or in the office.	VFC has over 15 years' experience, it assists corporate, legal, law enforcement and government agencies government world-wide. VFC is a cost-effective solution to accessing computer devices in a forensically sound manner without switching on the original machine.

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Software products & solutions (Table 2)				
Product name	**Total costs**	**Minimum subscription period**	**Notice period to terminate**	**Guarantees offered re future costs**
Aryza	*n/s*	*n/s*	*n/s*	*n/s*
CloudFiler	Bespoke pricing dependent on the size of the company. Starts at £50 per user per month. Set-up and training: £795. Migration from existing DMS solution: £995. Offer code REC23OFF. 30% discount per user. (20-plus users get bespoke discount and match/beat L4L DMS). Free setu-p and training. Free migration from another DMS. Price for life – no yearly price hikes.	12 months contract then one month rolling contract thereafter.	One month	Lock price in for life. No yearly increases. The only price increase is adding more users at the agreed per-user charge
IPS Cloud	Several factors influence subscription costs including the total number of named users, functionality tier, choice of annual or monthly payment and level of access required (full or light use). Discounts are available for an extended-term commitment.	12 months	The termination notice period is dependent upon the contract terms entered into.	Whilst annual price increases will still apply, if and when they are charged, clients who have signed extended contracts will receive a percentage reduction in the annual price and any increases for the term of their contract.
IPTime	Cost of IP time recording software (using shared server storage): £2500. Azure SQL Server Version (works from any location): £3000. Import of existing data from another system: from £250. Three months free 1-to-1 support and training. Annual maintenance and support if required: £1200 pa. Azure SQL server charges: around £10-£15 per month.	No subscription or termination fees.	No subscription or termination fees.	*n/s*
Prism	There is no commitment. Every project receives it own Cat 1 invoice rechargeable to a file if not paid for by a director before appointment. There is a flat fee of £200 plus VAT, regardless of the page count. No continuing obligations or misleading billing structure.	There is no subscription fee or period for Prism. All founders have a background in the insolvency market and recognise that this does not suit the sector.	People can immediately cease using Prism with no cost.	There is no guarantee that our price will never increase.
The Admin System	Highly competitively priced on a case volume basis. Prices available on application.	One year	Three months	Prices held static for a minimum of two years per client.
VFC	VFC standalone service is £850 per device. A full 12-month VFC licence can be purchased for £1550.	The standalone is a one off a fee, however a VFC license is a 12-month subscription for which you receive full support, maintenance and dongle.	Once the standalone has been created then this is the customer's property.	N/A

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Software products & solutions (Table 3)						
Product name	**Desktop software needed for optimum experience**	**Third party systems/ software the product interacts with**	**Training & support offered that is part of cost of purchase/ subscription**	**Data security certification**	**2FA or MFA for login offered?**	**Which/ how many jurisdictions can product be used in?**
Aryza	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*
CloudFiler	Works with any browser and any device. Need an internet connection. (Optimum speed is 15mbps per user). Our desktop apps and add-ins take up about 600Gb of space on laptop/PC.	Turnkey IPS. Aryza. Microsoft 365. Most accounting software. Veriphy. Postworks. Adobe Pro. Open API.	Normal charges for set-up and training are £795, but can offer this for free as part of the offer. Live training, training videos, and ongoing training support all come as part of this.	Duo Security for FTP, SQL, RDP. ESET anti-virus and anti-malware. RDP Guard for host-based intrusion prevention. AES data encryption.	Two-factor authentication with the Google Authenticator app is included for internal users and external portal users.	Worldwide
IPS Cloud	IPS Cloud can be used with any modern internet browser, although Google Chrome is recommended. It does require a Microsoft 365 business licence and Microsoft Sharepoint.	Virtual Cabinet, Banks, Gazette, HMRC, RPS, Companies House, Insolvency Service, Postworks and more.	Our Turnkey Academy is a library of written guidance, videos and training courses. We also have built-in interactive guidance that helps users navigate IPS Cloud from within and a fully trained helpdesk and monthly training webinars. All for free.	Turnkey as a firm and the data centre hosting provider we use are ISO 27001 certified. Turnkey is also Cyber Essentials Plus certified.	Yes, both 2FA and MFA are offered as well as single sign-on through the user's Microsoft 365 account.	Turnkey operate in 17 jurisdictions from England & Wales, Scotland, NI and ROI to Australia, New Zealand and Hong Kong.
IPTime	The system is designed to work with networked users who use Microsoft Office. The system is based on MS Access using SQL Server for offsite work.	MS Word, MS Excel.	A step-by-step manual, one day's training and three months free 1-to-1 support and training are included. Annual maintenance and support if required at £1200 pa.	*n/s*	*n/s*	Great Britain
Prism	Clients need only open a Microsoft Excel file and allow macros to work for the full experience of our software. No installation of anything is required.	Prism can be exported into other products in the same way other data can be exported from Excel.	Free training and support is provided for all users, without restriction. However, our output is so intuitive that support calls are almost non-existent.	We hold ISO 27001 standard security and above.	MFA is available but an option.	There is no restriction on usage of our products in any jurisdiction.
The Admin System	Windows 7 and above. Microsoft Office. PDF viewer. Microsoft Edge or Chrome.	Companies House. HMRC. Alph4. RBS CAM system.	Two days on site training included with set-up. Unlimited online and phone support.	*n/s*	Web products use MFA where applicable.	England, Northern Ireland, Scotland and Wales
VFC	Windows 10 and above.	VMWare may be required.	We offer free live webinars, also free on site training.	VFC is used by law enforcement and government agencies worldwide and is built on 16 years of R&D adhering to digital forensic practices. VFC is built to comply with ISO 17025 standards.	N/A	Worldwide

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Just 536 days after close of the consultation: regulation details

The R3 external affairs team is making national news with its robust responses to government on oversight and personal insolvency, says **Thomas Chivers**

The long-awaited announcements on the future of the insolvency regulation framework, and the personal insolvency framework, coupled with continued media interest in the profession and its work, plans for a new policy paper and our roundtable programme has made for a busy summer for R3's external affairs team.

Regulation reaction

The Government's announcement on the future of the regulatory framework has been the main policy issue for our team over the last three months. We cover the details of the Government's announcement in the article on page 32, but we were pleased to learn that the proposals for a single regulator won't be progressed – which was a win for R3 and for the profession – and have more clarity on its intentions for the future.

Once the announcement was made, some 536 days after the consultation closed, we swung into action with a robust multi-channel response, which saw our media comments featured in stories in The Times, Financial Times, City A.M, and a range of trade publications.

Although we have clarification on an outline of how the Government will progress its plans, we still need more detail on a number of areas and will be working with the Government and the profession to seek clarity on these, updating members accordingly.

Personal insolvency progress

Government consultation responses are similar to London buses, with the IP regulation response in September following hotly on the heels of their response to the personal insolvency framework call for evidence, which was released in August. The Insolvency Service has promised a fresh consultation in the new year and we look forward to working with them and other stakeholders to shape the proposals and feed in our members' views.

As part of our work in this area, we will be publishing a policy paper on personal insolvency that will allow us to update parliamentarians on developments in the profession and remind them of the work it does to support people in financial difficulty. Thank you to all the members who filled out our personal insolvency member survey – the fantastic responses we received provides us with a great mandate to push for any necessary reforms.

> **“The team has been working hard to build on our recent successes to ensure that we have strong relationships with all of the main political parties”**

MP and MSP engagement ramps up

As politicians returned from the summer recess there have been increasing opportunities for parliamentarian engagement. One such opportunity was the invitation to give evidence to the Scottish Parliament's Economy and Fair Work Committee — following on from written evidence provided by the Scottish technical committee on the Bankruptcy and Diligence (Scotland) Bill.

Katie McLachlan represented R3 and gave valuable technical evidence to the committee, drawing on her experience in the profession to explain the practicalities of the proposals and their impact.

We're broadly supportive of the proposals in the bill itself, in particular the proposed mental health moratorium, and will continue to monitor the passage of the bill and provide technical guidance wherever necessary.

With the prospect of a general election looming large, the team has been working hard to build on our recent successes to ensure that we have strong relationships with all of the main political parties. We'll be reviewing the materials and content from party conference season to try and identify policy ideas that may make it into their general election manifestos — the earlier we can engage with these policies, the better chance we have of being able to shape them.

On the horizon

Following on from the successful summer series of member roundtables, the team has been devising more – including one on ESG in the profession and its relevance to insolvency.

As ever, if you have ideas for roundtable subjects or would like to take part in future ones, please get in touch with the external affairs team.

R3 in the media

With insolvency figures rising, it is unsurprising that insolvency and restructuring continues to be of interest to the media. Our commentary on the monthly and quarterly insolvency statistics continues to be well-received by national, trade and regional publications, with our responses to the August and September statistics being quoted in *The Guardian, The Sun, Credit Connect, Greater Birmingham Business Chambers*, and *Business News Wales.*

Our regional media profile continues to grow through our work with CreditSafe, with an R3 press release on start-ups in Yorkshire and Humberside featured in articles in the *Yorkshire Times, Insider* and the *Craven Herald*, and stories on a variety of business trends including late payment and insolvency-related activities featuring in outlets such as the South's *Daily Echo*, *The Journal* in Newcastle, and *East Anglian Daily Times*.

With the winter season coming and a full political agenda, it promises to be another busy few months for our team. We'll keep you updated on our key milestones throughout – as well as in the next edition of this magazine.

Thomas Chivers is public affairs and policy officer at R3

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This eLearning training is aimed at insolvency professionals who have basic experience of insolvency, but have not administered CVLs previously and as a refresher for staff and IPs who are returning to deal with CVLs.

Creditors Voluntary Liquidations (CVL) represent the vast majority of corporate insolvencies, though the nature of these voluntary liquidations is often misunderstood. Join Julia McKay on this eLearning series as we explore CVLs from initial consultation to completion.

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