Winter 2022

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RECOVERY

Governance

Insolvency Service widens bounce back loan net

Wrongful trading claims: Dead in the water?

Director misfeasance: How to overwhelm 'auditor defences'

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"In our continuing effort to reflect what is going on in the world at large and how that is reflected in our industry, we look at the topic of governance in this edition"

From the editor

As the economic picture deteriorates and we head towards recession, society is looking not only towards its politicians for better governance (and some might say it could not get any worse!), but also to those who are directors of companies and take executive control of corporate entities. In our continuing effort to reflect what is going on in the world at large and how that is reflected in our industry, we look at the topic of governance in this edition.

Where else to start on that topic than the Supreme Court decision in Sequana. We have two perspectives: one from Christopher Brockman and Philip Gale at Enterprise Chambers; and another from Paul Johnson and Stephanie Williams at Peter & Peters.

In addition on governance, Claire Entwistle gives the Insolvency Service's views on bounce back loan fraud and Robert Rothkopf looks at successfully pursuing an auditor negligence claim.

James Morgan KC and Lauren Kreamer of Radcliffe Chambers look at whether wrongful trading claims – one of the statutory protectors of good governance – have just got harder, and Louise Ager of Clarke Mairs looks at the defences raised to that other protector of governance, misfeasance.

In our legal update, Kunal Gadhvi and Fiona Siddall of Irwin Mitchell look at the decision in Re Houst, and how restructuring plans differ from CVAs and schemes of arrangement.

On other topics, Dave Refault looks at using IP to assist on difficult wind-downs, Lee Manning extols the virtues of the moratorium process and Satinder Gill looks at immigration issues on pre-packs. Ravi Jariwala at NatWest also looks at restructuring finance from the bank's perspective.

We hear from two presidents in this edition, R3's own Christina Fitzgerald, as well as Insol Europe president, Barry Cahir. Thomas Chivers and Amelia Franklin review the SPG conference; Caroline Sumner introduces us to R3's diversity and inclusion champions; and this edition's interview is with R3 President's Award winner and my predecessor as *Recovery* editor, Chris Laughton.

Finally, in addition to our normal range of content, this edition carries our first supplier survey, with 13 pages of in-depth data and comment on third-party litigation funders and brokers currently in the UK market for insolvency-related claims.

Enjoy the party season and, when it finally arrives, I hope you and your families all have an enjoyable and restful Christmas and New Year. Let's see what 2023 has in store!

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

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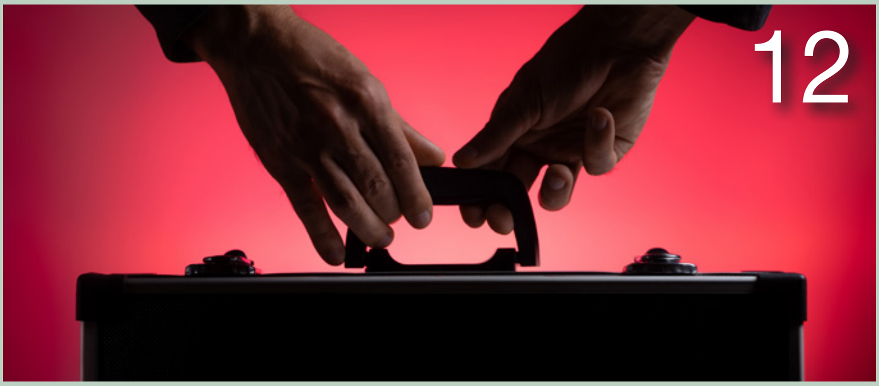
Theme: Governance



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Ending the year on a high

It has been another hectic and fascinating 12 months both for the profession and R3, with 2023 promising to be as demanding as ever, says **Christina Fitzgerald**

It has been another busy quarter for the team at R3. We have had a swathe of events (both regional and national), reintroduced our successful in-person Introduction to Insolvency course, and had a number of new issues to contend with on the policy and media front, as well as new faces in Number 10.

With a busy event calendar in the run up to Christmas, it is going to be a sprint finish to 2022…

Fighting fraud

The change of government has been a key focus for R3's press, policy and public affairs team. New ministers have required briefing, and journalists have as well, as rising insolvency numbers result in an increased call for context, and insight into the profession and the market.

One other key piece of work from the team has been their policy paper around fraud and corporate governance, which contained a number of recommendations for improving the UK's efforts to battle fraud and highlighted the work of the profession in this area.

This paper is available on R3's website, and will form the backbone of the team's public affairs work on the economic crime and corporate transparency bill over the next few months.

Proud to play a part

One project I have taken a keen interest in during my presidential year has been the R3-Insolvency Service Diversity and Inclusion Steering Group, which was formed to help identify and address issues to promote access to the profession.

So, when I heard the group was looking for people to become champions, to act as role models, share experience and best practice, and help promote the profession as a career option, I jumped at the chance – and was delighted to learn I would be joining alongside a number of other R3 luminaries like Frances Coulson (of Wedlake Bell) and Eleanor Temple (of Kings Chambers).

The champions group formally launched in October and you can read more about them on page 56.

> **"October saw the return of R3's Business Lunch event, with an incredible 550 delegates in attendance. This was another great opportunity to bring the profession together to learn more about the challenges and opportunities we face over the next year"**

Back with a bang

One of the best parts of the president's role is the opportunity to meet members from across the country – and I've been doing just that by attending a range of events in the nations and regions.

In September, I attended our Eastern Forum, one of the highlights was Trevor Williams' session about the health and future of the economy.

It was great to hear the views of Mark Shaw (of BDO) and John Forrest (of DLA Piper) on the issues around sanctions in Russia – an area which is still very much a hot topic among R3 members. We also heard about the specific challenges facing firms in this region.

I thoroughly enjoyed attending this year's SPG Forum, the highlight of which was hearing Professor Geoff Thompson speaking about his role in delivering the Birmingham 2022 Commonwealth Games, and in securing the economic, cultural and social legacy for the city.

The 2022 SPG Forum was the first in-person forum since 2019, and it was great to bring the smaller practice community back together, and hear more about the challenges and opportunities faced by different parts of the profession throughout the country.

Coming together

October saw the return of R3's Business Lunch event, with an incredible 550 delegates in attendance. This was another great opportunity to bring the profession together to celebrate the successes of the last 12 months, and learn more about the challenges and opportunities we face over the next year.

It was also a chance to celebrate those who have made an outstanding contribution to insolvency and restructuring through the R3 President's Award. This year, I was proud to present it to Chris Laughton, one of the very first people I met when I started working in the profession 30 years ago.

Chris has spent 40 years helping mould the profession into the modern and forward looking one it is today – and 19 of them were spent as the editor of this magazine, during which he published 76 editions full of first-class content on the issues that have shaped and affected our profession.

Congratulations Chris – and thanks for all your help in the days when I was new to the profession, and in all that time since.

Time to renew

I wanted to end this column with a reminder that now is the time to renew your R3 membership for another year.

It has been another hectic, fascinating 12 months for the profession and for R3, in which we've achieved an enormous amount – from our representation work on the proposals to change the regulatory regime and other policy issues, to an increased training offering, our first-class technical content, and bringing back in-person events and conferences across the country.

We plan to build on this in 2023 – a year which promises to be just as demanding for the profession as the ones that have preceded it. But before then, there is the Christmas break. I hope you enjoy a relaxing and well-deserved break, and I look forward to seeing and meeting as many of you as possible in 2023.

Christina Fitzgerald is a partner at Edwin Coe and R3 president

Editor editor@r3.org.uk

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Restructuring plan double first as HMRC is crammed down

The recent Houst judgment demonstrates the difference between CVAs, restructuring plans and schemes of arrangement, say **Kunal Gadhvi** and **Fiona Siddall**

The restructuring plan for Houst Limited is the first SME restructuring plan to be approved by the High Court and provides a useful tool for future SME businesses who are struggling to cope with the continuing financial impacts of Brexit, Covid-19 and the cost of living crisis.

The Houst restructuring plan is also the first to successfully cram down HMRC, who voted against the plan on policy grounds, but did not actively oppose the plan, submit any evidence in opposition or attend the sanction hearing.

Background

Houst is a short-term and holiday lettings property management business that uses technology to streamline services to customers. Property owners are encouraged to sign up to the company's online platform and, in return, the company receives a share of the amount paid by the customers renting the accommodation.

The company's revenue is seasonal and based on tourist market trends, which was severely impacted by the Covid pandemic.

As a result, Houst was cash-flow insolvent, with total current liabilities at the time of the restructuring of approximately £5.2 million and non-current liabilities of £5.7 million. Consequently, three of its creditors, including HMRC, threatened to wind up the company.

Following discussions with the company's bank, Clydesdale Bank, it was suggested that the company approach its shareholders to seek equity funding or, alternatively, commence an accelerated marketing process to facilitate a sale of the company's business and assets through an administration process.

As part of the options review, the company engaged Begbies Traynor (London) to provide a report on the available options to restructure the business. It was proposed that a restructuring plan process was viable as the shareholders were willing to provide a capital injection into the company, but not under the capital structure of the business at the time.

The restructuring plan

The purpose of the restructuring plan was to return the company to solvency by the end of 2023. The company considered that its creditors and members would receive more in the restructuring plan than in the relevant alternative (which, in this case, was administration).

The proposed classes of creditors and members consisted of Clydesdale Bank, HMRC, various trade creditors, convertible loan note holders, a connected company and the company's members.

The company excluded certain classes of creditors, such as employees and critical suppliers (e.g. contractors, accountants, IT services, booking websites), and the customer liabilities (i.e. deposits paid by guests for future stays or funds held by the company which are due to the property owners) as it would have a significantly negative impact on the reputation of the business, which would in turn result in the company being unable to generate the cash required to continue to trade. Under the restructuring plan:

- The bank agreed to reduce its debt and enter into a new finance agreement. This would result in a dividend to the bank of 27p/£;
- The company would make specified monthly contributions to two funds to make payments to HMRC and to the trade creditors. This would result in a dividend of approximately 20p/£ for HMRC and around 5p/£ for the trade creditors;
- Loanholders would have the option to either convert their debt into pre-dilution equity (in accordance with their existing rights) or participate in the dividend to unsecured creditors;
- The inter-company creditor would receive nothing under the plan.

In the relevant alternative of administration, it was estimated that the bank would have received 8p/£ and HMRC would receive 15p/£. No other creditors would have received a dividend. All stakeholders

> **In this case, HMRC's non-attendance at the sanction hearing was clearly a factor which the court considered when deciding whether to exercise its discretion to sanction the restructuring plan**

therefore would have been significantly worse off in the relevant alternative.

In his judgment, Mr Justice Zacaroli acknowledged that the dividends under the restructuring plan were a clear departure from the order of priority between creditors that would exist in the relevant alternative.

He noted that the reason for the allocation of the 'restructuring surplus' was that the bank would not agree to any further reduction in the dividend that would be paid to it under the restructuring plan and, without the bank's support, the restructuring plan would fail, leaving all creditors (including HMRC) worse off. The restructuring surplus was created principally from the capital injection by the members and the relinquishment of the greater part of the debt by all creditors.

Whilst this was considered a weak basis to deprive HMRC of its priority status, Mr Justice Zacaroli said he considered that it would be undesirable to require the company to start the process again to negotiate with HMRC when it was impossible to know whether anything would be gained and would impose a disproportionate burden on the company as an SME business.

It was noted by Zacaroli J that this was not a case where assets that would have been available in the administration of the company are being applied in a manner inconsistent with the order of priorities applicable in that administration.

> **The judgment confirms that, where creditors or members would receive no payment or have no economic interest in the company in the event of the relevant alternative, little regard is to be paid to their view**

Valuation

The court took a pragmatic approach to the level of valuation evidence that is likely to be required for a SME business and accepted that this would be unlikely to be the same level of sophistication that would be required for large corporates.

No formal valuation of the company's tangible assets or of the goodwill of the business was undertaken. The value ascribed to the tangible assets, which mainly consisted of office furniture and equipment, was based upon the experience of Begbies Traynor as plan administrators of the realisable value of similar assets in previous insolvencies and was a relatively small sum which would have had a minimal effect on potential outcomes. Any sale of the company's business and assets would be progressed on an accelerated basis and, accordingly, this would impact value.

In assessing the business value in the relevant alternative, the plan administrators considered relevant comparable transactions in the market. The closest comparable transaction to consider was the company's acquisition of the distressed business of Hostmaker in February 2020.

Name of court	Business and Property Courts in England and Wales
Date of convening hearing	14 June 2022
Date of sanction hearing	15 July 2022
Judges	Convening: Mr Justice Adam Johnson Sanction: Mr Justice Zacaroli
Solicitors	Irwin Mitchell for the company
Barrister	Marcus Haywood for the company
Applicant	Houst Limited
Plan administrator	Begbies Traynor (London)
Main creditors	Clydesdale Bank (as secured creditor) HM Revenue & Customs Members of company

Key considerations

This case reinforces the warnings in *Smile Telecoms* [2022] EWHC 740 (Ch) that, should a creditor wish to actively oppose a restructuring plan, it should attend hearings and submit evidence. Whether a creditor actively opposes a plan will be a relevant factor as to whether the court exercises its discretion to sanction the plan.

In this case, HMRC's non-attendance at the sanction hearing was clearly a factor which the court considered when deciding whether to exercise its discretion to sanction the restructuring plan. As a result of this case, HMRC may choose to engage more in future restructuring plan cases.

Should HMRC continue to not relinquish their preferential status, then it will be for the company seeking to use the restructuring plan process to seek to negotiate with HMRC at the earliest opportunity, especially if there is any deviation from the order of priority contained in the relevant alternative. The court is likely to consider this a relevant factor as to whether the plan is 'fair'.

The judgment suggests that the court is required to see whether the plan provides for differences in treatment of creditors and, if so, whether the differences are justified. The key will be to look at the treatment of the creditors in the relevant alternative and whether the priority applicable in the relevant alternative is reflected in the distributions under the plan, ensuring there is a fair allocation of the restructuring surplus. Any deviation from the order of priority is not necessarily fatal to the success of the plan (unlike the Chapter 11 proceedings in the US).

In order to work out what is 'fair', the court will look at the source of the benefits received under the plan – whether from assets of the company or from third parties willing to provide support (such as in this case).

This case also demonstrates the difference between CVAs, restructuring plans and schemes of arrangement. In a CVA, HMRC could not have been subject to cram-down as the CVA does not bind secured and preferential creditors without their consent. In a scheme of arrangement, HMRC could have blocked the restructuring, which means the restructuring plan is likely to be more attractive to companies.

The judgment confirms Lord Justice Snowden's view in *Re Virgin Active* [2021] EWHC 1246 (Ch) that, where creditors or members would receive no payment or have no economic interest in the company in the event of the relevant alternative, little regard is to be paid to their view, in particular where they can be excluded from the meeting to consider the plan.

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Legal Q&A

Paul Grundy answers your insolvency queries

Q Is there any type of insurance that covers losses of the company caused by errant directors?

A The answer to this is 'yes, possibly'. A company may have taken out a specific policy to include directors and officers (D&O) cover. This specialist insurance product provides a specified amount of financial cover for claims made against the company's officers, often post-insolvency of the company when an insolvency practitioner is reviewing the company's affairs.

The existence of a valid D&O policy can be of great value to an IP looking to bring claims against the directors because it provides a target (the insurer) with the financial wherewithal to pay.

The liquidator or administrator may bring a myriad of claims against directors – including former directors, de facto and shadow directors – on behalf of the company and in his officeholder capacity. These include breach of duties, wrongful trading, and misfeasance in causing or allowing the company to enter into antecedent transactions.

D&O cover operates in a different way to other insurances in that it is on a 'claims made' basis, providing cover for claims up until the expiry of the policy. Therefore, any lapse in the policy will likely lead to a loss of cover, other than in respect of claims or circumstances notified during the period of insurance. Where circumstances have been notified to and accepted by the insurer, then a claim brought after the policy has expired should still be covered.

Advice to IPs includes:

- Take steps promptly following appointment to make enquiries of the former company officers to ascertain the existence of a D&O policy, who was responsible for maintaining the policy, where the policy documentation is stored and where any communications to the insurer may be stored, either on paper or electronic company files. The company's bank account may reveal premiums being paid to an insurer.
- Ascertain if the policy remains on cover; if premiums have been paid up to date or if they need to be paid to retain cover; which officers and employees benefit from the cover; and any significant exclusions.
- Form a view about whether it is in the interests of the company's creditors to pay a premium or seek 'run-off' cover.
- Take note of time limits for notification of claims or circumstances that may give rise to claims which, if missed, may permit the insurer to avoid the policy.
- Quickly get into the detail of the company's trading and transactions to identify claims or circumstances which you may need to notify to the insurer of before the expiry date.
- Be aware that policy cover may be voided if the director is alleged to have engaged in acts that are tantamount to fraud or dishonesty. Allegations will need to be considered carefully and balanced against the risk of invalidating the cover.

Q What is the role of the evaluator in a pre-pack administration?

A Pre-packaged administrations ('pre-packs') provide a mechanism to preserve the remaining value in an insolvent business by facilitating a pre-negotiated sale of all or some of a company's assets. The sale is concluded by the administrator almost immediately after the company enters administration – this facilitates continuity of the trading business, retains jobs, limits reputational harm and often achieves costs savings compared with insolvent liquidation.

Criticisms of pre-packs include lack of transparency and potential abuse where the open market for the assets may not have been fully tested. 'Phoenixing' is a term to describe a company operated by existing management or a connected party to purchase assets at a distressed valuation, and then continuing to trade with no accountability for the debts of the insolvent company.

Recent regulatory changes have sought to limit the opportunities for abuse and to protect the interests of unsecured creditors and other stakeholders who otherwise have little other control or recourse.

Following introduction of the optional pre-pack pool in 2015, the industry mandated compulsory scrutiny: The Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021 introduced the role of 'independent evaluator' and imposed requirements on disposal of assets to connected persons. Since coming into force on 30 April 2021, an administrator who makes a substantial disposal to a connected person within the first eight weeks of administration must obtain approval of the transaction from creditors (considered largely unworkable in this context) or have received and considered a report from an independent evaluator on the reasonableness of the proposed disposal.

The report is obtained by the connected individual at their own cost – shopping around is permitted, as is obtaining further reports if the first one(s) is/are not favourable; however, prior reports must be disclosed to the subsequent evaluator.

The evaluator can self-certify their relevant knowledge and experience to provide the report, but they must carry professional indemnity insurance and must not be connected to the company or any associated party or have any link which may cause a conflict of interest.

It is sensible to engage an evaluator after heads of terms for the proposed sale have been agreed with the administrator, but not too far in advance of the appointment date in case circumstances change.

The Insolvency Service guidance 'Requirements for independent scrutiny of the disposal of assets in administration, including pre-pack sales' helpfully sets out what the report should include.

The administrator will use the report to inform their own considered opinion as to whether one of the statutory purposes can be met. They are not compelled to agree with the evaluator's negative conclusion, but must justify a decision to proceed in a further report.

Paul Grundy is legal director in the restructuring and insolvency team at Harrison Clark Rickerbys

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Recent case summaries

The latest insolvency update from **Christopher Boardman KC**, **Louis Grandjouan** and **Kate Rogers**

Trustees' indemnities and insolvent trusts – Equity Trust (Jersey) Ltd v. Halabi (Jersey) and ITG Ltd & others v. Fort Trustees Ltd & another (Guernsey) [2022] UKPC 36

Trustees have a right to be indemnified out of trust assets for liabilities they have incurred on behalf of the trust. So what happens when there are multiple trustees claiming against insufficient trust assets? This was the question raised by the Privy Council's recent decision in *Equity Trust (Jersey) Ltd v. Halabi (Jersey)* and *ITG Ltd & others v. Fort Trustees Ltd & another (Guernsey)* [2022] UKPC 36.

> **"A critical factor in that decision was the majority's view of the trust as a common enterprise, in which successive trustees are not to be regarded as competitors"**

Both appeals involved Jersey law trusts, which were insolvent in the sense that the trust assets were inadequate to meet the trust liabilities. The critical question was as to the respective entitlements of the current and former trustees to be indemnified out of the remaining assets. The board held unanimously that a trustee's right of indemnity confers a proprietary interest in the trust property, which is not lost by a transfer of the property to a new trustee. But because this right is *sui generis*, it was open to the board to depart from the general rule as to the priority of equitable interests, which is that they rank in the order of their creation. Ultimately, the only other possibility was that the rights of the successive trustees ranked *pari passu*.

The board held, by a majority of four to three, that they should rank *pari passu*. A critical factor in that decision was the majority's view of the trust as a common enterprise, in which successive trustees are not to be regarded as competitors, so that the insufficiency of the fund to meet all of the trustees' claims is a common misfortune.

Where does this leave practitioners advising trustees of English or Jersey law trusts? Where the trustee has already retired, absent any exceptional circumstances and subject to the precise terms of any deed of resignation, the position is clear: they will share *pari passu* with all other trustees, past or present.

But in the case of a trustee still in office who wants to protect their position in the event of a subsequent insolvency, the position is less clear. In England and Wales, a trustee may want to try and take a charge over the trust assets to secure their right to an indemnity in priority to successor trustees. That may also be possible in Jersey under the Security Interests (Jersey) Law 2012, but not under customary law. Lady Arden suggested, however, that taking a charge may be excluded by the *pari passu* principle altogether. A more substantial part of the fund could also be retained under art 43A(1) of the Trusts (Jersey) Law 1984 to meet potential liabilities.

Other areas of uncertainty remain, for example, as to the priority between the claims of trustees and trust creditors. It seems likely, therefore, that these issues may reach the board before too long.

Asertis Limited v. (1) Mr Dale Heathcote (2) Servico Contract Upholstery Limited [2022] EWHC 2498 (Ch)

The claimant brought two claims against the former director Mr Heathcote, the first being for two sums of money paid to the benefit of Mr Heathcote pursuant to an employee benefit trust tax avoidance scheme (the EBT scheme), and the second for a sum paid to a connected company as a preference.

The claimant contended that the sums paid to the EBT scheme a) were neither authorised nor justified as remuneration, thus there was no proper basis for them and they were accordingly made in breach of Mr Heathcote's duties as director; b) fell foul of s.423 of the Insolvency Act 1986; or c) were made in breach of the creditors' interests duty.

As to a), it was accepted by all that the court was not precluded from examining the true nature of the payments, whatever label they had been given [19]. The board minutes authorising payment into the EBT scheme specifically recorded that such payments would "not constitute remuneration". The claimant contended that it was not now open to Mr Heathcote to say that it was in fact remuneration. If it was not remuneration, was not a loan and could not be a dividend (Mr Heathcote was not the direct shareholder), then the claimant argued there was no possible lawful basis for the reward to Mr Heathcote. As such, the payments were made in breach of his duties.

The court, however, found that the payments were a bonus for Mr Heathcote's services as director, and thus were remuneration. That remuneration had been authorised – there was no need for formality. Mr Heathcote was the sole director and sole decision maker. The company was solvent at the time of the payments. Consideration had been provided in the form of Mr Heathcote's services. The remuneration was not excessive (and, in any event, the level of remuneration is a matter for the company and not the court). As such, no breach of Mr Heathcote's duties were found.

Owing to the above finding that Mr Heathcote had provided consideration for the sums he had received, by providing his services to the company in return, it followed that the claim pursuant to s.423 Insolvency Act 1986 failed. Further, "Section 423 is only intended to catch those who have the subjective intention required by the section, rather than those who may be foolish and ill-advised but nonetheless genuine" [115].

As to c), taking into account the sum that HMRC had submitted in its proof of debt, the company was not balance sheet insolvent at the time of the payments into the EBT scheme, when taking into account all prospective and contingent liabilities at the time of the payments.

The preference claim however succeeded, with the court reminding us that even if the company had received advice from an insolvency practitioner (which was not accepted), that would not prevent a successful claim.

Christopher Boardman KC, **Louis Grandjouan** and **Kate Rogers** are barristers at Radcliffe Chambers

Bounce back loan scheme fraud: Insolvency Service widens the net

Ongoing communication between IPs and the Insolvency Service is hugely important to help identify the right cases and provide evidence for litigation, says **Claire Entwistle**

The pandemic, its impact on businesses and the launch of various government financial support schemes combined to change the landscape for the Insolvency Service's enforcement work.

We are tackling fraud and misconduct connected to Covid-19 support schemes across all aspects of our investigation and enforcement work: director disqualification, criminal investigations, bankruptcy restrictions and investigations into trading companies.

The majority of this work relates to abuses of the bounce back loan scheme, and this issue accounts for an increasing proportion of our civil and criminal investigations.

> **"Investigations into bounce back loan scheme misconduct initially appeared to be straightforward, but we have learned that this is not always the case"**

It is important to remember the context at the time the bounce back loan scheme was introduced. The rapid spread of Covid required equally rapid action from Government to deal with the predicted public health impacts and the pressures on the NHS. Those decisions required the Government to also provide urgent support to businesses facing potential ruin during tough economic conditions.

Initially, the financial support schemes were aimed at larger businesses, whilst smaller businesses and sole traders were also struggling. That was rectified when the bounce back loan scheme was launched on 4 May 2020.

Available via 29 commercial lenders using a standard application process, businesses were able to apply for a loan of between £2,000 and £50,000 to the value of up to 25% of their turnover (which was self-certified). The repayment period was a maximum of 10 years.

The application process was made as straightforward as possible to ensure funds were issued swiftly. Lenders were required to perform 'know your customer' checks, but not required to check the validity of all information on the application form.

1.5 million loans worth £47 billion[1] were granted to thousands of businesses, providing a vital lifeline as they continued to trade during the pandemic.

However, while the vast majority of applications were legitimate, some claims submitted were not. The Department for Business Energy & Industrial Strategy (BEIS) estimated, at 31 March 2021, £17 billion worth of loans will not be repaid. BEIS also estimates that fraudulent loans total at £4.9 billion.

Rising investigations

With that amount of fraud connected to the Government's financial support, it was inevitable that we would see significant levels of misconduct identified in personal and corporate insolvency cases referred to us by insolvency practitioners for further investigation.

We had already identified abuse of bounce back loans and other Covid support as a priority area for our investigation and enforcement teams through our annual strategic assessment.

In response, we mobilised our teams to concentrate their focus on tackling this abuse, displacing the more traditional areas of misconduct such as crown debts, which had declined due to a reduction in petitions by HMRC.

> **"We are currently seeing an increase in cases where we can pursue compensation orders, especially in investigations connected to abuse of the dissolution process"**

Successful outcomes in relation to bounce back loan abuse continue to increase month on month. At the end of September 2022, we had secured 343 disqualification orders and undertakings, 116 bankruptcy restrictions orders and undertakings, and a two-year jail term – all connected to abuse of Covid support.

Enforcement work in the pipeline

The serious nature of the bounce back loan misconduct seen in our civil investigations has tended to result in medium to higher bracket enforcement results. The level of seriousness of these cases was mirrored in the outcome of our first prosecution case where the judge ordered an immediate custodial sentence.

The Government has made it a priority to tackle bounce back loan fraud and has provided extensive support to the Insolvency Service. We have been helped by the use of data analytics to target cases and have been provided with additional funding as part of the Spending Review settlement.

In addition, at the end of 2021, the Insolvency Service's investigatory powers were extended to cover investigations into dissolved companies under the Ratings (Coronavirus) and Directors Disqualification (Dissolved Companies) Act. These new powers have enabled us to pursue directors who have dissolved companies and walked away from paying their debts, including outstanding bounce back loans.

Unlike the liquidation cases we routinely see, there is no Official Receiver or insolvency practitioner engaging with the directors and taking possession of books and records. Our investigators worked hard to put in place new working procedures and, in a relatively short amount of time, secured the first disqualifications under these powers. Again, we expect to see those numbers grow and not just for cases where there has been bounce back loan abuse.

Thanks to the additional funding, we have been able to increase the number of civil and criminal investigations into bounce back loan scheme misconduct. We also have not stopped at disqualifications or prosecutions. Wherever appropriate, we have pursued restraint and confiscation orders in criminal cases, and compensation orders in civil cases.

Working with insolvency practitioners

Insolvency practitioners, and other insolvency and restructuring professionals, have a vital role to play in tackling bounce back loan scheme abuse and it is very important that we work in close collaboration with them.

Investigations into bounce back loan scheme misconduct initially appeared to be straightforward, but we have learned that this is not always the case. There are many ways to interpret what is an 'economic benefit to the business'; turnover can be estimated in a number of ways, and even determining when a business started trading can be challenging. As with all our investigation work, the earlier that misconduct is identified, the better.

To facilitate early identification of abuse, we improved our Director Conduct Reporting Service by including specific questions on Covid support scheme issues.

Ongoing communication with insolvency practitioners acting on voluntary liquidation and administration cases is hugely important. Not only is this helpful in identifying and targeting the right cases, evidencing the misconduct to support litigation, it is also enormously important in relation to financial recovery.

We will not generally seek compensation orders where an office holder is taking recovery action but, in those cases where this is not happening, we will seek a compensation order against the director whenever appropriate. And we are currently seeing an increase in cases where we can pursue compensation orders, especially in investigations connected to abuse of the dissolution process.

Recovery of misappropriated or misused bounce back loan funds is a key priority for Government in its work to tackle Covid support scheme fraud and is something we are all able to support.

What do you think?

Do you have an opinion on this article? If so, email your thoughts to editor@r3.org.uk to be used either as a letter in the next edition or as an opinion article.

Other stakeholders

We are also working with a number of other stakeholders to tackle Covid support scheme misconduct. Together, we are able to avoid duplicating enforcement activity by agreeing areas of responsibility and undertaking deconfliction checks.

Our ongoing partnership work with BEIS and the Cabinet Office has resulted in the identification of priority cases through the use of data analytics. This data analysis also enables us to contact insolvency practitioners where multiple bounce back loan applications have been made which insolvency practitioners may be unaware of.

Our investigation work is further supported through collaboration with external stakeholders, such as Companies House and the banks, where we have developed streamlined processes for receiving evidence and witness statements. This is all vital in ensuring that we are able to work efficiently and effectively, and that the right outcomes are achieved.

What's next?

We will continue to pursue civil and criminal sanctions and recovery action where possible against those who have abused Covid financial support schemes. Where we can, we will publicise the outcomes to encourage repayment and act as a deterrent to others. Following the launch last year of our director education project, our factsheet on the bounce back loan scheme has been our most accessed document. The project aims to educate and support directors to understand their duties especially when their company becomes insolvent, making them aware of the potential consequences of not acting appropriately. We are planning to publish further resources to support this including a bitesize video to complement the bounce back loan scheme factsheet.

The work being undertaken by the Insolvency Service and the wider insolvency profession to tackle fraud is hugely important. Securing successful enforcement outcomes and recovering as much money as possible for the taxpayer can only be achieved through effective collaboration with insolvency practitioners, stakeholders and other parts of government.

1 NAO report The Bounce Back Loan Scheme: an update – Session 2021-22 3 December 2021 HC 861

Claire Entwistle is assistant director investigation and enforcement at the Insolvency Service

Misfeasance: overwhelming the 'auditor defences'

The legal defences used by directors who have paid themselves too much normally fall into one of our four types. **Louise Ager** explores how to overcome them

The scenario will be a familiar one to insolvency practitioners. The company director has paid themselves regular drawings throughout the year in the hope that their accountant can find a way to legitimise the payments at year-end by declaring dividends. The profits do not materialise, the company enters liquidation, and the accounts and records show an overdrawn director's loan account.

The outstanding loan account is a simple debt owed by the director to the company in liquidation, although they are routinely pursued by office-holders by way of claims in misfeasance and breach of duty under s.212 of the Insolvency Act 1986.

S.212 provides a summary remedy against 'delinquent' directors under which the court can order them to repay the outstanding loan account or such other sum as the court thinks fit.

In most cases, the director faces an uphill struggle in trying to persuade the liquidator, or ultimately the court, that there is some good reason that they should not pay back the outstanding loan. The court has an absolute discretion as to the amount payable (if any) by the malfeasant director, but we rarely see the court come to the aid of directors when dealing with outstanding loan accounts.

The clueless director defence

Liquidators will regularly come across directors, particularly those in smaller owner-managed companies, who have concentrated their efforts on getting the work done and left all financial matters to an accountant to unravel at year-end.

Their defence is one of ignorance; that they had absolutely no idea there was an ever-increasing loan account, they trusted the accountant and signed the accounts put before them without fully understanding what was in them.

While the courts have shown some sympathy for directors in this position, it has rarely come to their aid. The onus is on the director to account for any dealings with the company's funds and they cannot rely upon their own poor record keeping as a defence.

Liquidators should gather as much in the way of documents as they can in seeking to undermine this line of defence. In particular, any draft accounts or correspondence between the accountant and director ahead of the accounts being approved, or any discussions around tax treatment of the loan.

The re-classification defence

It will come as no surprise to the liquidator when they see that the director has declared an annual income of £6000 or so to HMRC, despite working full-time in what would otherwise be a highly paid job.

When the director finds themselves on the receiving end of a substantial misfeasance claim for their overdrawn loan account it often becomes clear that they have given no real thought to the nature of the payments from the company which landed in their bank account every month.

In attempting to defend the claim, directors will often seek to re-classify loan payments as dividends on the basis that the payments were on account of dividends which ought to have been declared or were expected to be declared at year-end. The court has given this argument short shrift. Whether or not there was a dividend is a matter of fact and will therefore come down to the documents; if a dividend was not declared, then there was no dividend and it is not open to the director to later say that payments to them should have been treated as such. In short, the courts have told directors they cannot re-write history.

In other situations, liquidators can be faced with an argument that the director ought to have been paid a salary commensurate with their expertise in their field, and the payments should be re-classified as salary or a salary set off against the loan account. But if there is no service contract including a salary, then there is no such entitlement, and the courts have not entertained claims by directors for an implied or *quantum meruit* salary. The law will not imply remuneration if that contract could only have been put in place by a resolution of the board.

The liquidator should obtain copies of the director's personal tax returns to verify the level of salary which has been declared to HMRC.

The accounts defence

Following an analysis of the financial records, a liquidator might be able to assert a claim for an outstanding loan account which is not shown in the company's accounts. It may be this relates to a period after the last filed accounts or that the accounts are simply not accurate and the loan account has been reconstituted.

When faced with claims of this type, directors will undoubtedly point to the filed accounts to seek to absolve themselves of wrongdoing. They may argue that it is not open to the court or the liquidator to look behind the filed accounts, particularly so if the accounts have been audited.

> **When dealing with breach of duty claims, the courts have found that the usual six-year limitation period will not assist a director where those sums were misappropriated**

The court's approach to this type of defence by directors has not really been tested. The onus will very much be on the liquidator to first establish that the filed accounts are incorrect and it may be that expert evidence from a forensic accountant will be required to show there is an outstanding loan account.

If the liquidator was able to establish a debt under the reconstituted loan account, the director could nevertheless argue that they should not be made to repay it in the circumstances; either on the basis that they had acted honestly and reasonably, and should be excused under s.1157 of the Companies Act 2006, or otherwise that the court should exercise their discretion under s.212(3)(b) of the Insolvency Act 1986 to reduce the amount due. The circumstances in which the court would be willing to excuse the director from their liability are likely to be narrow; for example, if – as a result of no fault of the director – the accounts incorrectly show that their loan account is in credit and they have continued to withdraw further sums.

In assessing the director's defence, the court will no doubt wish to drill down into the reasons that the accounts were inaccurate. They are more likely to find sympathy with an otherwise diligent director who has been the victim of a negligent or sloppy accountant, than a sloppy director with a diligent accountant who has done their best to put together accounts from the bag of loose papers delivered to their office on the eve of the filing deadline. If the accountant or auditor has relied upon inaccurate statements by the director, it seems unlikely the court will exercise any discretion to help the director out when faced with a claim.

The limitation defence

By the time the liquidator comes to assert a claim, the relevant accounts could be more than six years old and the director may seek to rely on limitation as an absolute defence.

In assessing this defence, the first question for the liquidator should be: when does time start to run? It is usually the case that there is no contract or other paperwork for the director's loan account which includes an agreed date of repayment. In the absence of any paperwork or any prior demand from the company, then time will begin to run for the purposes of limitation from the date of demand for repayment by the company or the liquidator.

When dealing with breach of duty claims, the courts have found that the usual six-year limitation period will not assist a director by providing a defence to a claim for repayment where those sums were misappropriated. The funds are classed as trust property on account of the director's breach of their fiduciary duty to the company and the liquidator can therefore rely on s.21 of the Limitation Act 1980, which provides that there is no limitation period for proceedings to recover trust property.

Liquidators should review the potential limitation periods at the earliest opportunity following their appointment and consider making a demand for repayment of the outstanding loan account at an early stage.

> **Insolvency practitioners are likely to see claims and defences becoming more complex to deal with as cases come through which deal with director decisions and company payments throughout the Covid-19 period**

Overview

Misfeasance claims will continue to occupy much of the court's time in the insolvency context. Insolvency practitioners are likely to see claims and defences becoming more complex to deal with as cases come through which deal with director decisions and company payments throughout the Covid-19 period. The use (and abuse) of the bounce back loan scheme will need to be considered when formulating misfeasance claims against directors.

The courts will inevitably have some difficult decisions to make in determining whether the actions of directors throughout such an uncertain period will amount to a breach of their duties to the company and its creditors. Insolvency practitioners may be hesitant to bring misfeasance claims where all of the director conduct in question relates to the Covid period. Whilst there was no formal relaxation of the law relating to misfeasance, there is a risk to claimants that the courts may adopt a more sympathetic approach to defendant directors when assessing whether there has been a breach of duty or otherwise in the exercise of its discretion as to what amount must be repaid.

Liquidators should pre-empt the common defences raised by directors in loan account claims and arm themselves with the relevant documents to evidence the outstanding amount, the intended nature of the payments and the tax treatment of the payments. They should also make early requests of the company's accountants and auditors for relevant records and correspondence, and consider whether the expense of an expert forensic accountant is warranted at an early stage in the case.

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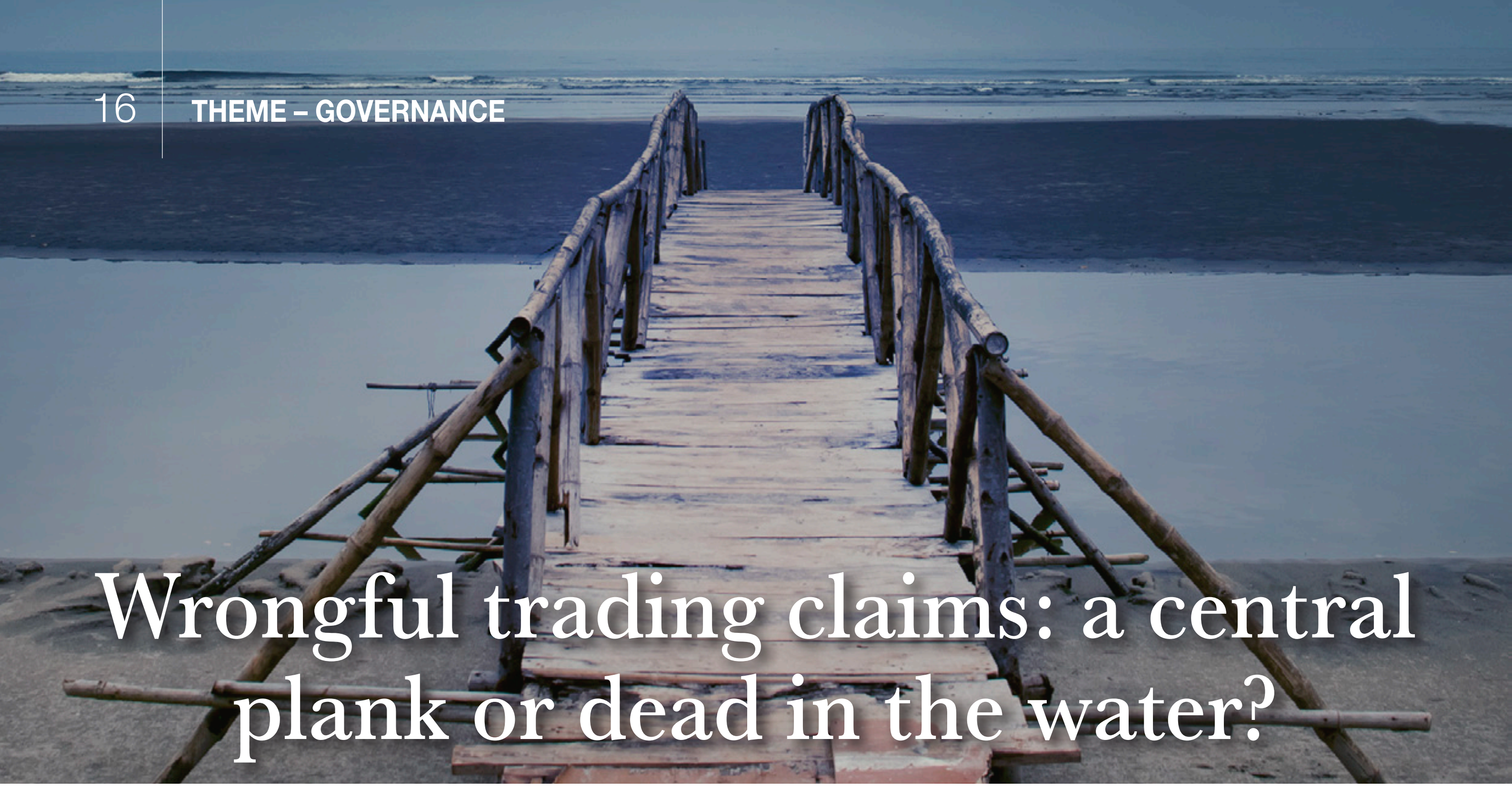


Wrongful trading claims: a central plank or dead in the water?

Section 214 has been described as a 'central plank' in creditor protection laws. But those using it to sue directors should tread carefully, say **James Morgan KC** and **Lauren Kreamer**

In the long-awaited Supreme Court judgment in *BTI 2014 LLC v. Sequana SA* [2022] UKSC 25, at [123], Lord Reed described section 214 of the Insolvency Act 1986 as "a central plank in the statutory scheme of creditor protection" and noted it is to that statutory scheme "which purely judge-made rules or principles must either be accommodated or abandoned". Further, at [238], Lord Hodge suggested that it would only be in "rare circumstances" that the court would need to consider how far section 214 constrained the development of the common law to provide a remedy in circumstances outside those identified in that provision.

Expensive and unattractive

While it may be that section 214 is a key part of the overall formal structure of insolvency law, in practice, as a result of unfavourable case law and statutory intervention, wrongful trading claims have become expensive and unattractive options for office-holders (or their assignees) to pursue.

As *Re Ralls Builders Ltd* [2016] EWHC 243 (Ch) underlined, if the company cannot be shown to have suffered loss caused by the directors' decision to continue to trade, and that decision cannot be shown to have worsened the position of the creditors as a whole, a contribution under section 214 will not be ordered. That is so even where the company's financial situation was such that the directors should have concluded that insolvent liquidation was inevitable. And even if the continued trading worsened the position of some of those creditors, the general rule is that an increase in the overall net deficiency must be causally linked to the continuing trading.

Further, in a very significant change to insolvency law, the Corporate Insolvency and Governance Act 2020 (CIGA) and the regulations extending its ambit suspended liability for wrongful trading for a significant part of the Covid-19 pandemic. The effect of those provisions is that directors will be assumed not to have been responsible for any worsening of the financial position of a company or its creditors in the periods from 1 March 2020 to 30 September 2020 and/or from 26 November 2020 to 30 June 2021.

For many office-holders currently contemplating bringing proceedings in relation to the period of the pandemic, the CIGA provisions will be an effective bar to any attempt to pursue a director for wrongful trading. There is no need to consider any of the intricacies of the section 214 provisions and their application; CIGA effectively closes the door to any wrongful trading claims in respect of the (almost) 16-month period to which they apply. While technically possible, it would be a brave applicant indeed who attempted to show that the company's net deficiency had worsened during the eight-week lacuna, such that they could maintain a claim in respect of the period not covered by the statutory assumption. The wait for such a case goes on. Further, even if a claim can be made in respect of a period after 30 June 2021, it may be that the resultant increase in net deficiency is insufficiently large

to make its pursuit a sensible commercial proposition.

Difficulties in bringing claims

The difficulties in bringing a wrongful trading claim against a prolonged and complicated factual background are illustrated by the recent decision of the High Court in Chandler v. Wright [2022] EWHC 2205 (Ch). In that case, section 212 and 214 claims were brought against the former directors of BHS group companies on the footing that the relevant date of knowledge was either "by 17 April 2015" or "some later date prior to 25 April 2016", with Part 18 responses identifying five intermediate dates. The claim pleaded only the increase in net deficiency between the two identified dates, a little over a year apart.

Section 214, Insolvency Act 1986: summary

The wrongful trading provisions apply where:

- The company has gone into insolvent liquidation (section 214(2)(a));
- At some point before the commencement of the winding up, a director of the company knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation or entering insolvent administration (section 214(2)(b)).

If those conditions are satisfied:

- The court may declare that the director is liable to make such contribution (if any) to the company's assets as the court thinks proper (section 214(1)); but
- The court shall not make such a declaration with respect to the director if it is satisfied that, after he knew or ought to have concluded as above, he took every step with a view to minimising the potential loss to the company's creditors as he ought to have taken (section 214(3)).

For the purposes of section 214(2) & (3), the facts which a director ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both:

- The general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company; and
- The general knowledge, skill and experience that that director has (section 214(4)).

> **"The decision should nevertheless serve as a… reminder that the date of knowledge must be pleaded with great care and in reliance upon a forensic analysis of the company's losses"**

On appeal from the dismissal at first instance of the directors' application to strike out parts of the claim, Edwin Johnson J held that, when it comes to pleading wrongful trading claims, applicants cannot simply leave the relevant date of knowledge open. While it is permissible to plead alternative dates in wrongful trading claims, the pleading must include a specified date or range of dates, coupled with proper pleas as to causation and loss at each date. The fact that the period of 12 months was "at large" was deemed by the court unfair to respondents who needed to be able to respond to the claims against them.

Cautionary tale

In practical terms, the decision was not, in fact, fatal in that case; the applicant was given the opportunity to consider amending its claim. The decision should nevertheless serve as a cautionary tale to those considering bringing wrongful trading claims, and a reminder that the date of knowledge must be pleaded with great care and in reliance upon a forensic analysis of the company's losses. That analysis must not only show that the losses are connected to the date of knowledge relied upon (as the date when the director knew, or should have known, that insolvency was inevitable), but will also need to prove to the court that the losses were caused by the decision to continue trading, as opposed to the final decision to cease trading.

Returning to *BTI v. Sequana*, the judgment of Lord Reed at [93]-[99] provides something of a refresher on the ambit of section 214, and the differences between it and the common law duty to have regard to the interests to creditors of companies in or bordering insolvency. Reading that summary against the background of the matters set out above, it is not difficult to conclude that, in many cases, breach of fiduciary duty claims will be an easier option than wrongful trading claims.

BTI v. Sequana confirms the common law duty to have regard to the interests of creditors arises at an earlier point in time than when section 214 is engaged. The former duty arises when the company is insolvent or is bordering on insolvency or an insolvent liquidation/administration is probable. The latter is engaged when a reasonably diligent and competent director would know that there was no reasonable prospect of avoiding insolvent liquidation/administration or, put another way, when such insolvency proceedings are inevitable. Further, the remedies are far narrower under section 214, and proceedings can only be brought after the commencement of a formal insolvency process in respect of the company.

Lighthouse in the fog

Lest the recent authorities and legislative schemes give the impression that wrongful trading claims are now practically impossible, *Biscoe v. Milner* [2021] EWHC 763 (Ch) is something of a lighthouse in the fog. The applicant liquidators in that case brought a wrongful trading claim, alongside claims for dishonest assistance and/or knowing receipt, conspiracy, transactions at an undervalue, breach of directors' duties and fraudulent trading, in the context of an investment scheme which had been fraudulent from its inception. The High Court held that one director was indeed liable for wrongful trading, emphasising that there is no requirement in a wrongful trading claim to show that the loss would not have been suffered if the director had complied with his duties, but instead – applying *Re Ralls Builders* – that there was a causative link between the increase in the net deficiency to creditors and the continuation of trading.

Taking the CIGA provisions alongside the existing difficulties in pursuing wrongful trading claims, and the reminder in *Chandler v. Wright* of the importance of a forensic approach to pleading causation and loss, it is easy to see why the big drivers of insolvency cases, namely the litigation funders, are unlikely to be keen on pursuing wrongful trading claims. Indeed, it is difficult to see anything more than a handful of wrongful trading claims being pursued in the coming years.

It may be that wrongful trading claims are not quite dead in the water, but those considering walking this particular 'central plank' would be well-advised to tread very carefully.

James Morgan KC and **Lauren Kreamer** are specialist insolvency barristers at Radcliffe Chambers

‘More case law to come’ after *BTI v. Sequana* judgment

Formal recognition of the creditors’ interest duty in the recent landmark Supreme Court judgment is positive for creditors, say **Paul Johnson** and **Stephanie Williams**

As Lord Reed recognised, the appeal before the Supreme Court on the case of *BTI 2014 LLC v. Sequana S.A. & Others* raised questions of considerable importance for company law. The issue was whether the trigger for the directors’ duty to consider creditors is merely a real risk of – as opposed to a probability of or close proximity to – insolvency.

Background

AWA, a subsidiary of paper manufacturer Sequana S.A., was liable to indemnify BAT for costs arising from the clean-up of a polluted river. AWA’s directors paid two dividends to its parent company, Sequana, namely €443 million in December 2008 and €135 million in May 2009. Lord Briggs explained in his judgment that, while the second dividend in May 2009 was distributed when AWA was solvent, the pollution related liabilities and uncertainty over the value of one of its asset classes created a risk of insolvency[1].

As the assignee of the claims against AWA, BTI (a subsidiary of BAT) initially challenged the dividends on the grounds that (i) they were not lawfully paid in accordance with the provisions of Part 23 of the Companies Act 2006; (ii) alternatively, they were paid in breach of the duty of the directors of AWA to have regard to the interests of its creditors (“should not pay claims”); and (iii) in any event, the payment of the dividends fell within section 423 of the Insolvency Act 1986.

Sequana appealed against the judgment under s.423 and BTI appealed against the dismissal of the “should not pay” claims. The Court of Appeal dismissed Sequana’s appeal under s.423 and dismissed BTI’s appeal about the should not pay claims. Lord Justice Richards gave BTI permission to appeal to the Supreme Court on the issue of the creditors’ interest duty.

The creditors’ interest duty

The unanimous judgments of Lord Reed, Lord Hodge, Lady Arden, and Lord Briggs formally recognise and establish the creditors’ interest duty. This duty previously arose at common law but, since the relevant part of the Companies Act 2006 came into force, it arises under section 172(3) which states: “…the duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company”.

The duty for directors to consider the interests of creditors raises several significant questions.

When does the creditors’ interest duty arise?

Although the Supreme Court agreed the creditors’ interest duty exists, they disagreed as to when it arises. Lord Briggs held that it was not necessary “…to decide whether any other trigger earlier than insolvency itself

> **Is the creditors' interest duty paramount? What are the consequences for breaching it? What is the available relief? None of these questions were specifically addressed by the Supreme Court**

would be sufficient… any trigger earlier than actual insolvency needs clear justification". Lords Briggs, Kitchin and Hodge all agreed that the duty was engaged when either "imminent insolvency (i.e. an insolvency which directors know or ought to know is just round the corner and going to happen) or the probability of an insolvent liquidation (or administration) about which the directors know or ought to know"[2]. Lady Arden held that the Supreme Court should not consider itself bound by its views on the precise trigger for the engagement of the creditors' interest duty until the issue actually arose.

What is the content of the creditors interest duty?

Again, the Supreme Court were not in agreement as to the content of the duty. Lady Arden held that the interests of the creditors could only supplant the interests of the shareholders when the company is irreversibly insolvent making liquidation or administration unavoidable. Lord Reed caveated that since the issue did not need to be determined in this appeal, his views on content were expressed provisionally. He held that the effect is to "…preserve the director's duty to act in the interests of the company, but to modify the sense of the latter expression so that, where the rule applies, the interests of the company are no longer regarded as solely those of its shareholders but are understood as including those of its creditors as a whole"[3]. Lords Briggs, Kitchin and Hodge all agreed that the creditors' interest duty requires the directors to consider and give appropriate weight to the interests of the company's creditors, balanced against any conflicting shareholders' interests.

Is the creditors' interest duty paramount? What are the consequences for breaching it? What is the available relief?

None of these questions were specifically addressed by the Supreme Court, but we can expect to see a great deal of further case law on these issues in the future.

The implications

Directors

S.214 of the Insolvency Act 1986 requires directors to take all reasonable steps to reduce the loss to creditors "where they ought to have recognised that the company had no reasonable prospect of avoiding insolvent liquidation". Any breach of s.214, would then be a breach of the director's fiduciary duty.

Lady Arden emphasised the need for directors to remain informed about the status of the company, take careful notes and maintain up to date accounting information.

Directors will need to be able to discern when the creditors' interest duty arises (imminent insolvency or the probability of an insolvent liquidation), which in practice will be difficult, especially as the change from a business which is a going concern to insolvent is typically abrupt. The judgments of directors will need to be balanced and entrepreneurial.

Directors should ensure that they take both legal and accountancy advice at the earliest opportunity and, if they have any doubts, avoid authorising payments until they have done so. This will provide the best opportunity to not only rescue the distressed company, but also for the directors to avoid liability for breaching the creditors' interest duty.

> **Now, when advising a distressed company, shareholders or creditors, insolvency practitioners will need to consider whether the creditors' interests have been considered sufficiently and timeously**

Auditors

Auditors' financial statements will be very important to help ascertain the risk of imminent insolvency or the probability of an insolvent liquidation. Auditors must be satisfied that their accounts are both true and fair. They may have to provide advice about whether a contingent liability for any breach of the creditors' interest duty will or will not crystallise. Given the increased risk of liability, auditors and accountants should also take legal advice.

Creditors

Ultimately, the formal recognition of the creditors' interest duty is a positive change for creditors, because creditors' interests will be considered earlier and before a company is insolvent, or at the onset of insolvency, making creditors more likely to make recoveries. Creditors may be able to bring causes of action against directors personally for breaching the duty.

However, on the flip side, if directors are more cautious due to the personal liability they owe to creditors, the solvent company may choose not to take calculated risks due to the potential consequences.

Shareholders

The primacy of shareholders' interests in a solvent company is well established. However, when the creditors' interest duty arises, the shareholders' best interests will be considered alongside the company's creditors, inevitably giving rise to conflicts. As the distressed company comes closer to insolvency, greater weight will be given to creditors' interests.

Insolvency practitioners

Lawyers and others advising the solvent company and its directors will have to take creditors' interests into account when providing advice. A potentially risky, albeit lucrative, deal may not be in the best interests of the company's creditors, although it may be in the best interests of the shareholders. Providing advice to the company and dealing with the conflicting interests may prove to be challenging.

Insolvency practitioners are used to considering creditors' interests after the company has reached the point of insolvency. Now, when advising a distressed company, shareholders or creditors, they will need to consider whether the creditors' interests have been considered sufficiently and timeously.

This judgment has been heralded as the most significant ruling in relation to directors' duties and company law for 30 years. This is still a developing area of law and, over the next few years, as more insolvency litigation proceeds through the courts, the law will develop and be refined further.

1 Paragraph 115
2 Paragraph 203
3 Paragraph 79

Paul Johnson is of counsel and **Stephanie Williams** is an associate at Peters & Peters

Sequana: creditors' interest duty, and beyond

The Supreme Court judgment – amongst much else – sends out the message that directors need to stay informed, say **Christopher Brockman** and **Phillip Gale**

The Court of Appeal told us in 2019 that directors owe a duty to consider the interests of creditors "when the directors know or should know that the company is or is likely to become insolvent". Likelihood of insolvency was nice and clear, and formed the basis of misfeasance pleadings thereafter.

The decision of the Supreme Court in *Sequana* was long-awaited. It was heard on 4 and 5 May 2021, and the decision was handed down on 5 October 2022, some 17 months later. It runs to 160 pages and "raises questions of considerable importance for company law", as well as for corporate insolvency.

> "All of the members of the court appeared to support a sliding scale... The more financially distressed a company becomes, the more weight will have to be attached to creditors' interests up until they become paramount"

Whilst discussing wide-ranging and fundamental principles, the actual decision of the Supreme Court is arguably quite narrow. First, it confirms that a duty to consider creditors' interests exists (it had been ambitiously argued by the respondent that there was no duty at all). Second, it confirms that an otherwise lawful dividend (i.e. one which complies with Part 23 of the Companies Act 2006) can nevertheless amount to a breach of duty in appropriate circumstances. Third, and most importantly, it decides that a real risk of becoming insolvent is insufficient to engage the duty to consider creditors' interests.

No longer authoritative

In other words, the Supreme Court decided when the duty did not arise, but did not decide when it did. The Court of Appeal test of likelihood of insolvency is therefore no longer authoritative. Lord Reed explicitly poured cold water on the likelihood trigger (at [89]), but preferred to express no view as to the correct test. Lord Briggs (with whom Lord Kitchin agreed) was only slightly less circumspect, preferring "a formulation in which either imminent insolvency … or the probability of an insolvent liquidation" were sufficient triggers (the conclusion at [203]).

Nevertheless, Lord Briggs observed that he reached "substantially the same conclusions" about timing as Lord Reed. Lord Hodge agreed with both Lord Reed and Lord Briggs. Finally, Lady Arden thought that only "irreversible insolvency" would suffice ([311]), but that was in the context of the duty being one where creditors' interests overrode those of shareholders.

Given the differing treatment of the timing question in the Supreme Court, practitioners could be forgiven for preferring the certainty of the likelihood test. However, the sense that the Supreme Court has taken a step backwards for certainty can be overdone. All of the members of the court appeared to support a sliding scale when talking about the 'content' of the duty. The more financially distressed a company becomes, the more weight will have to be attached to creditors' interests up until they become paramount.

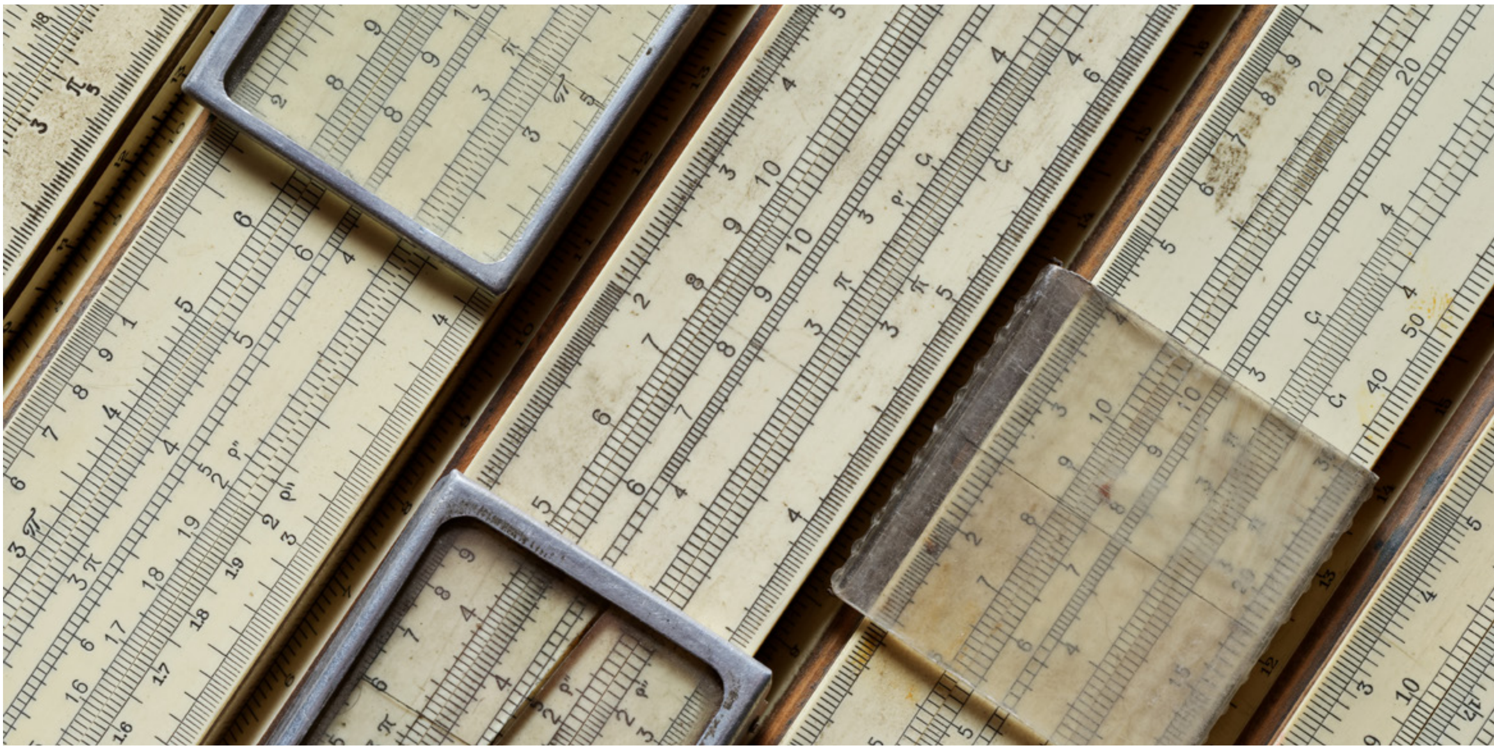
In that sense, the question of a single trigger is inapposite and it is perhaps better to collapse the distinction between trigger and content. This means that when a company is not financially distressed, the interests of creditors and shareholders are aligned. Even when there is a real – as opposed to a remote – risk of insolvency, "the interests of creditors will not require separate consideration", Lord Reed at [83]. After that, creditors' interests do require to be considered as part of the overall duty to promote the success of the company. The weight to be attached to creditors' interests increases as the company's financial position worsens. At a certain point, variously described by the court as "imminent insolvent liquidation", "irreversible insolvency", or there being "no light at the end of the tunnel", creditors' interests would become predominant.

> "At a certain point, variously described by the court as "imminent insolvent liquidation", "irreversible insolvency", or there being "no light at the end of the tunnel", creditors' interests would become predominant"

Proving breach has probably become harder

If this is the best reading of *Sequana*, the range of circumstances in which the duty comes into play has potentially been widened – "financially distressed" appears more expansive than "insolvent or likely to become insolvent". However, proving breach has probably become harder. The Court of Appeal considered that "where the directors know or ought to know that the company is presently and actually insolvent it is hard to see that creditors' interests could be anything but paramount" ([222]). It is clear that the Supreme Court thought that the time when creditors' interests became paramount was much later than actual insolvency

> "Office holders and ATE insurers should review any current cases where they pleaded and relied upon the Court of Appeal's likelihood test"



and, indeed, closer to the wrongful trading standard. Making out breach will be harder still where there is evidence that the directors actually considered creditors' interests before taking the decision in question.

So, to use a worn out phrase, every case turns on its facts. What this does mean is that office holders and ATE insurers should review any current cases where they pleaded and relied upon the Court of Appeal's likelihood test. Whilst – as noted by Lord Justice David Richards in the Court of Appeal – in reality, actual insolvency has been proven in all cases decided up until then, the likelihood test is frequently pleaded, often as an alternative head of claim. There had been no decision in any English authority which is clearly based on the proposition that the creditors' interest duty is triggered by anything short of actual insolvency and that the director either knew or should have known that the Company was insolvent. It follows that the Supreme Court's judgment is unlikely to have a huge impact on current cases, but that does not mean they should not be reviewed. A sliding scale also is sensible, as it means the creditors' interest will intrude in a director's decision-making process to a greater extent as the financial situation worsens; the creditors' interest duty has never been a one size fits all.

Another point that the Supreme Court addressed was the requirement of directors to keep themselves sufficiently informed about the company's business to enable them to carry out their duties. The message which the judgment sends out is that directors should stay informed. As Lady Arden emphasised (at [304]), directors should always have access to reasonably reliable information about the company's financial position. The company is responsible for maintaining up to date accounting information itself, though it may instruct others to do so on its behalf. Directors can and should require the communication to them of warnings if the cash reserves or asset base of the company have been eroded so that creditors may or will not get paid when due. It will not help to resign if they remain shadow directors.

> **"It is now clear that a director cannot escape liability by saying they did not know; they will have to establish that they took all reasonable steps to keep themselves informed and that they could not have discovered the fraud"**

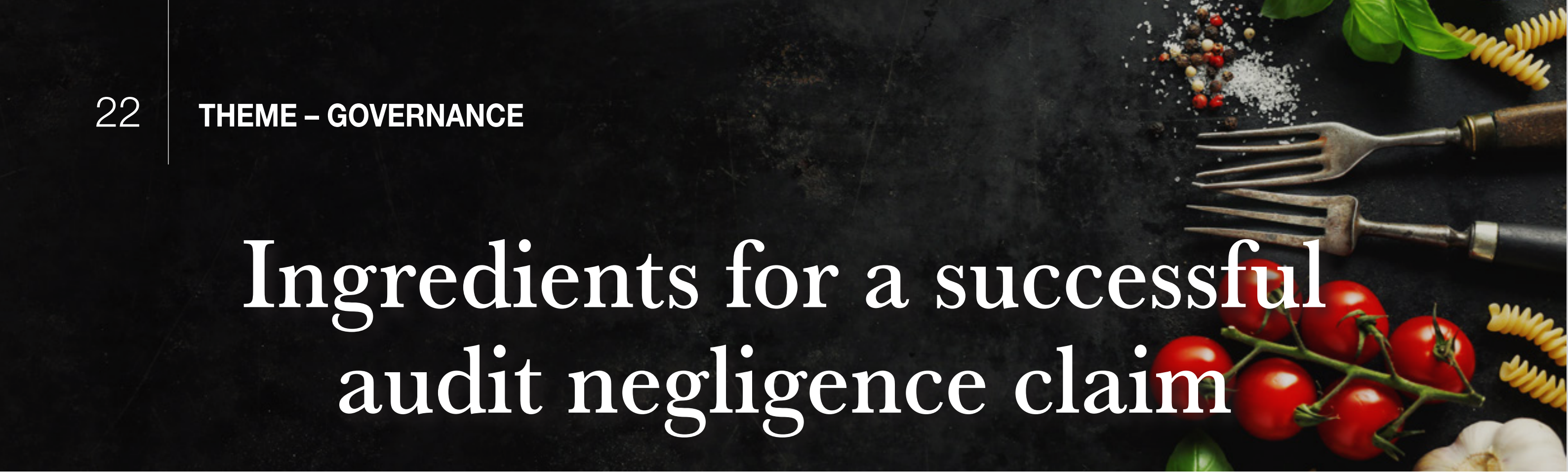
Interestingly, Lady Hale also indicated that self-education about the role of a director is a factor the court may consider, saying: "In addition, directors can these days without much difficulty undertake appropriate training about their responsibilities, and about the penalties if they disregard them."

At [208] Lady Hale also addressed the question of knowledge where the insolvency was caused by outside factors, such as fraud. In that situation, she said that if a director contends that they were not aware of the fraud then the onus should be on them to show that they should be excused. This shifts the onus onto the director to show why they should not be held liable where they were unaware of a fraud.

So, in cases where the fraud was external, it is likely to be easier to escape liability than where the cause was internal. Whilst this has been a developing area of law, it is now clear that a director cannot escape liability by saying they did not know; they will have to establish that they took all reasonable steps to keep themselves informed and that they could not have discovered the fraud.

Ignorance of the law has never been a defence. *Sequana* makes it clear that a director's ignorance of either a company's financial position or of the extent of their duties is not a defence either.

Christopher Brockman and **Phillip Gale** are barristers at Enterprise Chambers



Ingredients for a successful audit negligence claim

With the UK's long-awaited audit reforms still not in sight, **Robert Rothkopf** shares his recipe for how IPs can successfully claim against a negligent audit firm

Auditors continue to find themselves under pressure following accounting scandals at Carillion, Patisserie Valerie, NMC Health and Wirecard, to name but a few. Not only is there an increasingly muscular response from the UK's Financial Reporting Council in its investigations and the fines it issues, but also an uptick in litigation against audit firms for damages caused to businesses by negligent audit practice. Claims usually arise from the auditors' failure to identify fraudulent activity within, or affecting, the business.

In this article, I share five key ingredients for a successful audit negligence claim, although – like a Jamie Oliver '5 ingredient recipe' – you might argue there are more than five ingredients here because we assume you already have the basic seasoning, such as a creditworthy defendant audit firm.

Evidence of negligence

Whilst this may seem obvious, it helps to have a preliminary view from an audit expert (an ex-auditor themselves versed in audit standards) on whether the audit was negligent, by comparing what the auditors did against what a reasonable auditor should have done. Inevitably, there is information asymmetry at early stages of litigation before disclosure of the audit files makes this difficult. However, an FRC investigation, independent reviews by other accounting firms and investigative journalism can each provide helpful information. Glaring omissions, such as a failure to issue bank confirmation letters to independently confirm cash balances (as has been reported in the Wirecard scandal), are encouraging starting points.

Large quantum of loss that can withstand contributory negligence discounts

Showing negligence alone is not enough. These cases are only proportionate to the legal budgets they require if you can prove significant damages caused to the business by the negligence. This requires large headline numbers that can withstand prudent discounts arising from: (i) contributory negligence (some percentage of the loss will be discounted to reflect the fault of the directors themselves); and (ii) other causation uncertainty.

It is important to understand what loss is being claimed. Dividends that would not have been authorised and distributed if the true position had been known are generally the most robust losses as they are readily quantifiable and subject to established accounting rules around distributable cash. If you are claiming the loss of business value itself, then this prompts further key questions. Was the business doomed to fail anyway, or would it have pivoted to save itself if the audit had been done properly and the directors knew the real picture? How will this be proven? Which factual and expert witnesses? Which documents? How will you reconstitute what the actual financial statements should have shown?

Innocent and effective directors to support the counterfactual

Overlapping with the points above, quantum and causation stand or fall on the counterfactual – what would have happened if the true position of the financial controls and the financial statements had been reported at the time to those charged with governance of the company?

For these cases to work, we need to understand the roles of the company directors other than the fraudsters. You need innocent and effective directors during the relevant period who can credibly show what they would have done if the auditors had given them the real picture, or at least spotted the red flags and drawn them to their attention. What changes to trading plans would they have executed? To what extent are the acts of third parties relevant? Their witness evidence and credibility will be crucial.

Without innocent and effective directors, the case on causation will be hard to make and the hit from contributory negligence will be large.

Lawyers with stamina and the ability to work to a budget

Audit negligence cases are complex and likely to run long. Defendants will inevitably deploy tactics that cause delay, and put pressure on claimant legal teams and funding budgets. Funders and claimant legal teams need the experience, stamina, and budget contingencies to cover the twists and turns of high stakes litigation. Whilst not essential, if all parties take some of their fees on risk there can be better alignment between the funder, the liquidators and the legal teams.

Efficient audit and quantum experts with a clearly defined remit

Audit and quantum experts have a difficult job in these claims. They may have to work with deficient or unreliable records, and still try to rebuild what a proper audit would have revealed or what the true value of the business would have been if the issues had been uncovered promptly. These are complex forensic exercises on limited information, particularly if a defendant audit firm does not volunteer, or is not compelled to provide, its audit files at an early stage.

This is where it helps to have a counsel and solicitor team who can clearly define for the expert the questions they need to opine on and the evidentiary standard they need to meet, bearing in mind the dual challenges of discharging their duties to the court, and working within reasonable time and financial constraints.

Many hope that there will be effective (and long-awaited) audit reforms in the UK and elsewhere given their foundational importance to financial markets. It remains to be seen whether the recent spate of audit-related business failures, robust regulatory response and the ensuing litigation for audit negligence to return cash to creditors will usher in a new era of improved audit practice.

Robert Rothkopf is managing partner at Balance Legal Capital

Practical uses of moratoriums – from a converted sceptic

If used in the right circumstances – and with a clear end in mind – moratoriums can be an efficient and inexpensive restructuring tool for SMEs, says **Lee Manning**

It was almost a year ago when Jeff Roberts, insolvency practitioner and partner at Collyer Bristow, approached me about taking part in a webinar discussion that was going to focus on the impact of the introduction of the Corporate Insolvency Governance Act, in particular the effectiveness of one of its permanent features – the moratorium process – as a restructuring tool for SMEs.

The webinar was eventually held in late January this year, by which time I had been allocated the role of the restructuring professional who was to give the process a big thumbs down and to argue my case against a vociferous, but eloquent, challenge from Colin Haig (head of restructuring at Azets and former R3 president), as an advocate.

Long winded and expensive

I thought I acquitted myself pretty well on the day, arguing that the process – ideally needing to be aligned to a detailed restructuring plan – was too long winded and expensive for the vast majority of SMEs to undertake, and that a standalone moratorium was not without material risk to the directors who put it in place. In addition, the burden on the appointed IP monitor of overseeing the payment of those liabilities described (not particularly clearly) by the legislation as moratorium debts, left the IP exposed to considerable personal risk if those debts were not met in due course by the company if the moratorium was terminated (for example, because the restructuring plan was never delivered or was rejected by creditors), and the company then failed to meet those liabilities as an expense of the ensuing insolvency process.

The webinar had been such a resounding success – at least that is what all the panel members thought – that four months later we decided to hold a follow up debate to see what, if anything, had changed after more 'willing participants' had jumped onto the moratorium bandwagon.

The challenge I faced was that I could no longer act as a 'dissenter' as I had stumbled

> Nevertheless, I am still to be convinced that a moratorium that is put in place before considerable thought and preparation for a restructuring plan has been formulated is a viable and cost-efficient tool for an SME

over an effective use of the process when dealing with a series of CVAs for a group of serviced office companies.

Villains of the piece

The circumstances which drove me to implement 10 separate moratoriums on this group were driven by the need to protect the companies' key trading assets from creditors who were either in the process of seizing those assets, or there was a realistic prospect of them doing so, before the respective CVA proposals could be voted on. In this case, the villains of the piece were the enforcement agents instructed by some of the local authorities to enforce the liability orders they had obtained against the companies for unpaid business rates.

I do not propose to debate the merits of the local authorities instructing these agents at a time when it was clear that these companies were still suffering the effects of Covid-19 lockdowns on occupancy rates. But the fact was that, once instructed, the enforcement agents were like a dog with a bone and had zero regard for the fact that a CVA was being prepared or even that CVA proposals had already been sent to creditors. They were there to get paid, or uplift whatever they could get their hands on, which would have been fatal to the business and reputation of the serviced office companies.

A means to an end

So the moratoriums were put in place (by way of a straightforward filing of a notice at court and with the Registrar of Companies) in the knowledge that the CVA proposals were already at an advanced stage of drafting or had been sent out, and that consultations were at an advanced stage with significant creditors. Therefore, the appointed monitors could take comfort in the fact that these moratoriums represented a means to an end that had already been formulated, was not speculative and where the moratorium liabilities could be readily calculated (and with funds available to meet them).

Delays in getting a common sense solution from HMRC to its (invariable) last minute rejection of the CVA proposals meant that the moratoriums had to be extended for some of the companies, much to the dismay of the enforcement officers who turned up a day early to try and uplift goods in the hope that the moratorium had ended. In some of the companies, the moratorium was automatically extended to the date of the CVA meeting once the proposals had been sent out.

Winding forward to late August – and now a 'convert' to the effective use of moratoriums – I again stumbled on another set of circumstances where the process fitted neatly.

Music ticketing agency

We had been advising a large international musical event ticketing agency which was in financial distress and which was clinging onto continuing to operate by the skin of its teeth, whilst it was engaged in advanced negotiations with a trade buyer that was willing to purchase its equity for a nominal sum, but which would pay all creditor obligations (which were in excess of £20 million) in full.

As negotiations reached a crucial stage the company was faced with an *ex-parte* freezing order over £4.7 million of the c. £5.6 million in its bank account, severely impacting its ability to trade whilst the share deal was consummated. Faced with this, and the threat of winding up petitions from other creditors – and taking into account that the share deal presented a realistic prospect to rescue the company and was vastly preferable to any outcome that the creditors could expect from an administration – a moratorium was filed to protect the company's business and assets whilst a very short window of 14 days was given to the purchaser to conclude the sale.

> The recent decision in Houst Limited – where HMRC were crammed down – reflects what should be possible in a CVA set of proposals, but which still requires HMRC's consent and a sensible commercial approach by them when voting

Kept informed

We were again confident that there were sufficient funds in place to satisfy the monitors that the moratorium liabilities could be met and most of these were duly paid over the ensuing 14 days. This does not in any way reduce the need for the monitors to be comfortable with the short term cashflow and trading forecasts for the expected moratorium period. In addition, both the floating charge holder and the *ex-parte* applicant were kept informed about the process and its objectives.

However, as soon as it became clear that the purchaser was dragging its feet and the board (and the monitors) considered that there was no reasonable prospect of avoiding formal insolvency, the moratorium was brought to an end and a notice of intention to appoint administrators filed.

In summary, a moratorium that is used in the right circumstances with a clear end in mind and that is not just used as a 'barrier' until someone comes up with a solution, can be an efficient and inexpensive restructuring tool for SMEs. Nevertheless, I am still to be convinced that a moratorium that is put in place before considerable thought and preparation for a restructuring plan has been formulated is a viable and cost-efficient tool for an SME and a realistic alternative to a CVA.

Letter of the law

So, restructuring advisers for SMEs should not give up on promoting a CVA as a realistic option, but they should also be aware of the fact that HMRC is likely to insist on the 'letter of the law' being applied, such that all preferential creditors are paid in full (in the CVA) before any monies can be made available to the unsecured creditors, regardless of what HMRC would have received by way of a comparative process, which is usually an administration.

The recent decision in Houst Limited (see page 7) – where HMRC were crammed down as a creditor class in a restructuring plan which was upheld by the court (after being rejected by HMRC) – reflects what should be possible in a CVA set of proposals, but which still requires HMRC's consent and the adoption of a sensible commercial approach by them when voting on CVA proposals. So, don't hold your breath.

Lee Manning is a partner at ReSolve

Losses are vanity, impairments are sanity, and capital is reality

Loans to distressed companies in workout situations are vast consumers of banks' tier one capital. **Ravi Jariwala** explains the reasons why

When restructuring/workout bankers say one of their lends has a 'high cost of capital', 'weighs heavy on their balance sheet' or 'doesn't work from a capital perspective', what do they exactly mean? How do capital considerations intersect with what banks term as 'provisions' or 'impairments'? And why may a bank sell their debt at a significant discount despite the potential for a long-term recovery in value?

This article[1] attempts to address these sometimes esoteric points in what is hopefully a simple and easy to understand way[2]. Please note that credit risk and capital are only some facets of risk management that a bank and its restructuring team will consider. Banks need to balance all risks and considerations, including conduct and reputational risk, when making decisions. Whilst this article focuses on the capital risk element of decision making, these other important considerations should not be ignored.

What is capital?

In its most basic form, a bank continually balances 'use of funds' with 'sources of funds'.

> **This explains why a distressed asset can weigh 'heavily' on a bank's balance sheet – the weight is representative of the capital being set aside to absorb potential losses**

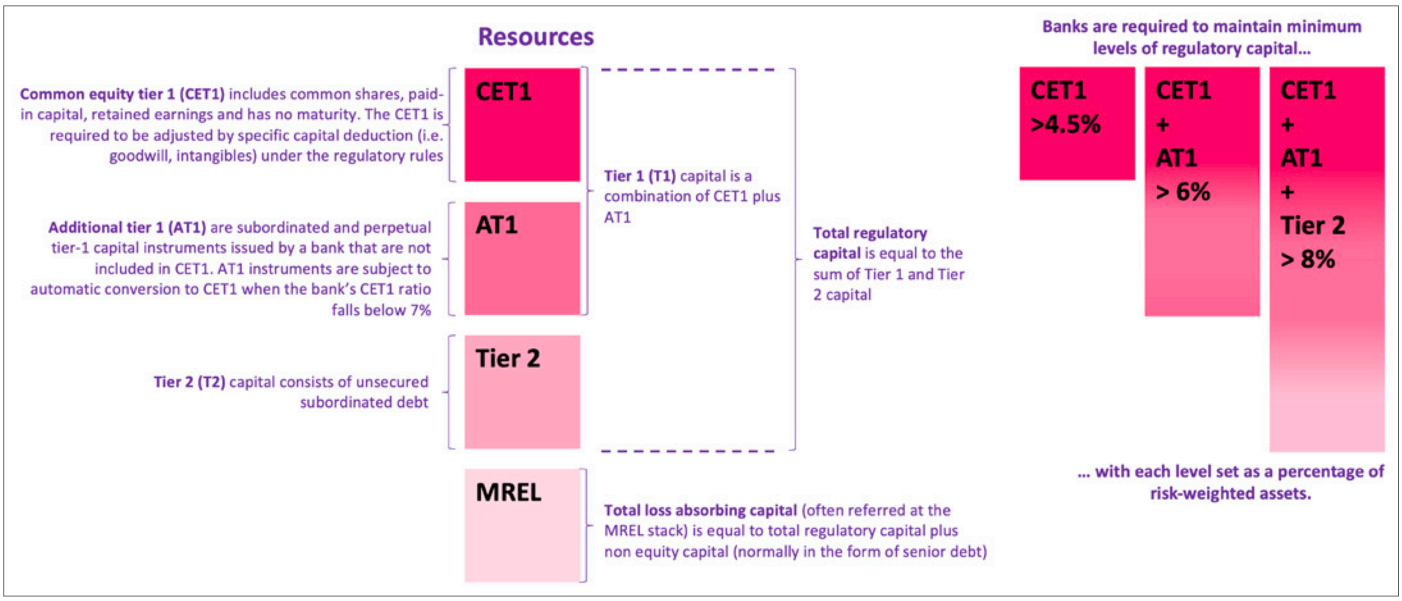
'Use of funds' comprise loans, overdrafts, mortgages, etc. – in other words, products that banks provide to customers. In this article, we refer to these products as 'assets' of the bank.

'Source of funds' may comprise: i) customer deposits; ii) wholesale funding; and iii) capital. The capital itself can consist of a mixture of the bank's share capital, retained earnings and other sources, such as convertible bonds. A key purpose of capital is to drive investment and growth, as well as acting as a 'capital cushion' to protect the bank's depositors and creditors from credit losses.

In the 2008 financial crisis, many banks' assets were subject to significant credit losses as banks materially underestimated the risks associated with specific assets, such as sub-prime residential mortgage loans, commercial property loans and mortgage backed securities. This resulted in the aforementioned capital cushions being too low to absorb the associated losses. Given access to wholesale funding was limited due to unprecedented market conditions, customer deposits were put at risk, thereby jeopardising the banking system.

In response, reforms were introduced. This included those by the Basel Committee on Banking Supervision, which formulated a set of international standards to review and monitor banks' 'capital adequacy', and resulted in regulatory and legal requirements to maintain appropriate capital buffers to withstand future economic shocks. In simple terms, banks are now required to hold more capital than prior to the 2008 financial crisis.

The regulatory framework divides capital into multiple tiers, as shown in the below diagram, with each having different loss absorbing qualities. Common equity tier one (CET1) capital is the best form of capital due to its loss absorbing qualities and is a



'The Basel Committee on Banking Supervision: international standards to monitor banks' capital adequacy'

key market indicator of the financial stability of a bank. The UK's largest banks and building societies are regularly stress tested by the Bank of England to assess how they would cope with severe economic downturn scenarios, as the amount of capital buffers a bank has is an important metric to evidence resilience to such stress testing.

> Banks are therefore obliged to delicately balance the deployment of capital for investment and growth, and retaining it to shore up their balance sheet

Banks are therefore obliged to delicately balance the deployment of capital for investment and growth, and retaining it to shore up their balance sheet.

Distressed assets (i.e. assets that are objectively not performing in line with the bank's standard lending criteria) are vast consumers of this capital, for reasons we shall come to see.

Basel defaults

When a bank talks about a default, they may often be referring to 'Basel defaults' as opposed to contractual defaults in say a loan facility agreement with a customer. Banks have stringent rules on when to recognise Basel defaults on their assets, as this will drive a need for impairment/provision analysis and more significant capital allocation (see later). A Basel default may not necessarily occur when a contractual default occurs. For example, a customer failing to provide management information for a month may be a contractual default, but this does not in itself indicate financial distress. On the other hand, a customer failing to meet interest and/or principal payments is likely to be serious enough to warrant qualifying as a Basel default. Where 'defaults' are referred to below, these refer to Basel defaults.

How a bank measures its capital absorption for distressed debt

Banks have regulatory requirements to hold sufficient capital to cover the risks associated with lending. The mechanism to assess these risks (and by extension the capital absorption) is by way of risk-based models. These models are based on guidance and requirements set by the regulators, and are therefore consistent across all banks. At their heart, the models are designed to estimate the riskiness of assets through the assessment of the probability of, as well as the extent of, credit losses at any given point.

Simplistically, these risk-based models will principally comprise four main components:

i) **'Probability of default'**– this is the likelihood an asset (for example, a loan or revolving credit facility) will go into default and is measured by undertaking periodic credit analysis of a borrowing counterparty.

ii) **'Loss given default'** – this is an estimate of the loss that would be incurred should that asset default. Estimates are made based on the bank's observable history of losses on similar counterparties or assets defaulting, and should represent losses in a downside scenario.

iii) **'Exposure at default'** – an estimate of what the credit exposure is likely to be at the point of default. The larger the exposure, the higher the risk associated with the asset.

iv) **'Maturity'** – the period within which the bank is expecting to be repaid in full (interest and principal). The longer the maturity period, the higher the risk associated with the asset.

Cases in restructuring or workout situations will either have a higher probability of default, or already be defaulted (where the probability is 100%). Correspondingly, at the distressed end of the scale, significantly more capital is required to safeguard banks against potential losses. This explains why a distressed asset can weigh 'heavily' on a bank's balance sheet – the weight is representative of the capital being set aside to absorb potential losses.

Cost of capital

While capital is being set aside to absorb potential losses, it is incapable of being deployed by the bank for new lending or otherwise be returned to shareholders. We have already seen from the above that distressed assets are significantly more capital intensive, particularly compared with their non-distressed counterparts. For example, a small, distressed asset can consume just as much capital as its larger non-distressed brethren.

The absorption of capital during a workout therefore needs to be justified in the context of the returns it could otherwise earn in new lending, or be returned to shareholders through dividends or share buybacks. For workouts, the capital absorption is therefore, in a sense, an opportunity cost of use of that capital.

> **Marking provisions is a mandatory regulatory requirement for banks in circumstances where a loss is likely or certain**

This also illustrates why workout lenders may, in certain circumstances need to charge a greater interest margin on their debt to cover costs in supporting a high-risk asset. The increased margins are there to mirror the returns that the quantum of capital that is held to cover the risk of not being repaid on the distressed asset could otherwise earn if it were redeployed in the 'good book' while the turnaround is being effected. Of course, banks also need to take into consideration customer conduct and the ability of the customer to afford the loan repayments, which will also be an important factor in their decision making.

The above also explains why a bank may have a preference to take a material discount to their debt. The value of the debt to a bank is not solely a pence in the pound (p/£) recovery rate on the asset, but also the capital that can be released to be redeployed. This is also compounded by the fact that repayment of distressed debt may take considerable time, and hence the time value of such future proceeds needs to support both the repayment of debt (which remains at heightened risk of further losses) and the aforementioned opportunity cost of the capital over the intervening period.

Provisions/impairments

Marking provisions[3] (sometimes known as impairments) is a mandatory regulatory requirement for banks in circumstances where a loss is likely or certain. They are a 'point in time' estimate of forecast losses and are based on discrete analysis undertaken, which is why workout bankers will be well acquainted with them. They are governed by accounting regulations (i.e. IFRS).

Provisions are continually assessed and updated periodically (at least quarterly), and will fluctuate depending on the ebb and flow of a workout. However, the permanent loss of capital related to a provision will not crystallise until it is written off. Write-offs are only likely to occur once it is reasonably certain that there is no likelihood of repayment of that portion of the asset (usually in an insolvency scenario). This is why capital considerations are important throughout that restructuring journey.

Example

- Assume a bank provides a £100 million facility to a borrower that is now undergoing financial distress.
- The bank's **'loss given default'** models assume losses of 50% if it were to Basel default.
- As the counterparty becomes increasingly distressed, its **'probability of default'** increases until such time it becomes apparent that redemption of the debt at par is now highly unlikely.
- A **Basel default** is marked – this means that probability of default is now 100% and the bank is required to set aside £50 million (£100 million x 50% x 100%) of regulatory capital.
- Note, this regulatory capital could otherwise be used to fund non-distressed exposure (which has a far lower probability of default).
- The bank undertakes a **'provisions/impairment'** analysis, which suggests across multiple scenario analysis the recovery is expected to be 70p/£ (impairment of £30 million), but the turnaround is expected to take three-five years.
- The opportunity cost of setting aside £50 million of capital for up to five years would ideally be covered by increased margins on the facility. Given the bank is looking to be supportive of this customer and cashflows indicate that any enhanced margin cannot be met, this is not a possibility here.
- The bank receives a proposal to refinance the debt for 60p/£. This is significantly below what is likely to be achieved in a workout (70p/£), but greater than the capital being consumed by the transaction (50p/£). Given the bank will also not increase margins during the extended turnaround timeframe, the NPV value to the bank in achieving the workout recovery of 70p/£ is lower and carries ongoing risks in the interim.
- As a result, the bank accepts the bid, increases its provision from £30 million to £40 million and writes it off using £40 million of the capital cushion.
- The residual £10 million capital cushion is redeployed by the bank on Day 1.

The above is provided for illustrative purposes only with simplified details.

Conclusion

The 2008 financial crisis heralded a new dawn, where banks' balance sheets came into stark focus. This brought capital – the bank's 'proverbial ballast' in those balance sheets – into the limelight.

All lending provided by banks absorbs capital, with the amount being sized by each bank's respective risk models associated with its assets. As an asset goes up the distressed curve, the capital absorption increases due to the increased likelihood that it will ultimately be required as a cushion for potential losses. A workout banker can more accurately estimate the loss than a model driven assessment, with these estimates of losses fluctuating over time depending on an asset's journey during a restructuring process. These potential losses are assessed as a provision/impairment. While that restructure is being implemented, the capital being set aside cannot be deployed by being lent out to non-distressed counterparties earning normalised returns (or returned to shareholders). Ideally, the opportunity cost of not earning those returns should be compensated, but this may not always be possible due to i) the fact that required returns can be significant (given that more capital is consumed by distressed assets); ii) the affordability (i.e. the borrowers' ability to repay the borrowing and interest); and iii) customer conduct considerations.

All of the above explains the further dimension to how a workout banker may consider a distressed asset as one that is more nuanced than a p/£ recovery of debt. It can be said that beyond being 'loss reducers', workout bankers are also 'capital allocators', calling to mind a paraphrase of another idiom: 'losses are vanity, impairments are sanity, and capital is reality'.

1 This article is published for information purposes only and should not be regarded as providing any specific advice. No member of the NatWest group of companies accepts any responsibility or liability for any loss or damage arising in any way from any use made of, or reliance placed on, the same

2 Please note that credit risk and capital are only one facet of risk management that a bank and its restructuring team will consider. Banks need to balance all risks, including credit, conduct and reputational risk, when making decisions. Whilst this article focuses on the capital risk element of decision making, these other important considerations should not be ignored

3 When banks faces an expectation of a loss, banks "mark a provision" or "mark an impairment" – i.e. a loss is recognised on the P&L/balance sheet

Ravi Jariwala is senior director – complex & international restructuring at National Westminster Bank

Timely solution to pre-sale immigration headaches

IPs must act before appointment if they wish to preserve the immigration status of migrant workers due to be transferred in a pre-pack sale, says **Satinder Gill**

It is a little known fact that the number of UK companies that are Home Office licensed immigration sponsors is now at a record high, with the number of employers applying for and holding a sponsor licence at over 42,000 (a year-on-year increase of 26% from 2021). Further, the number of skilled worker visas has doubled to over 216,000 since Brexit.

All of this therefore increases the chances of IPs encountering business immigration issues in the current economic cycle. What does an IP need to watch out for in a pre-pack sale of a distressed company that holds a sponsor licence and has sponsored migrant workers?

Scenario

Take the following scenario. Oldco is a data analysis company that is in distress. A key and viable part of Oldco is its medical data team, with several migrant software engineers on time-limited work visas sponsored by Oldco, including some whose visas are to shortly expire.

A pre-pack is being negotiated with an external buyer, Newco, who sees the medical data team as holding the key value in the sale.

What should an IP do to ensure a smooth pre-pack sale and avoid any potential claims/liability in connection with the business immigration aspects of the sale?

The starting point is to understand that Oldco is a Home Office licensed sponsor and that its sponsor licence is not transferable to Newco. From Newco's perspective, it must either apply to the Home Office for a sponsor licence within 20 days of the sale or, if it is already a licensee, it will need to add the sponsored workers to its licence.

What should the IP look out for? What is the position if Newco requires warranties as to the prior operation of the sponsor licence and that the sponsored workers were properly sponsored?

The risk is that if the sponsored workers are not properly sponsored, their current or future immigration status may be at risk. For Oldco's sponsored workers this could mean that future immigration applications might be refused, existing immigration permission may be curtailed or, in the worst case, revoked with little or no notice. In that situation, Newco may consider taking action against the IP.

Home Office guidance

The system of sponsorship imposes a number of sponsor duties on licensed employers. These are set out in detailed guidance published by the Home Office[1]. This guidance effectively contains the rules employers must comply with when operating a sponsor licence. A breach of the rules may adversely impact sponsored workers, the sponsor and any purchaser to whom the sponsored workers transfer their employment.

The good news is the status of sponsored workers who are to transfer to Newco can usually be preserved, but the IP will need to take a number of steps before their appointment as administrator and the pre-pack sale. These are:

1. Get access to the sponsor management system (SMS) through which Oldco operates its sponsor licence.

2. If the access details are not available (e.g. if key personnel in Oldco have left the business), then urgent steps will need to be taken before the pre-pack to add the administrator as one of the key personnel on the licence.

3. The IP should check if any of the sponsored workers need to make an imminent immigration application to extend their stay in the UK. If so, Oldco will be unable to sponsor them as soon as the pre-pack sale has completed and urgent advice on what to do will need to be taken. This may impact the date of the appointment and sale.

> **"The IP should check if any of the sponsored workers need to make an imminent immigration application to extend their stay in the UK"**

4. On administration, the IP will need to report the pre-pack sale to the Home Office using the SMS and the details of the sponsor workers who are to be transferred to Newco under TUPE.

5. The details will be the names, nationality, DOBs, contact details, certificates of sponsorship numbers and current visas/residence permits of the relevant sponsored workers.

If warranties are to be given, then an IP will almost certainly wish to obtain specialist advice on whether sponsored workers were properly sponsored. What information will be required to obtain such advice speedily?

- The current and past visas/immigration permits of each sponsored worker
- Copies of the certificates of sponsorship used to sponsor each worker
- The relevant contracts of employment, job description(s) and payslips
- Evidence of the recruitment processes followed by Oldco for each skilled worker or tier 2 (migrant) worker recruited before 1 December 2020.

Timely preparation and quick action is key for an IP on a pre-pack sale of a licensed sponsor.

1 https://www.gov.uk/government/collections/sponsorship-information-for-employers-and-educators

Satinder Gill is a barrister at Five Paper

Reducing the pain in challenging wind-down scenarios

Technology usually underpins most businesses. Systems need to be carefully unpicked and managed in order to decommission them in a structured way, says **Dave Refault**

The past few years have been 'interesting' to say the least. With the fallout from the coronavirus pandemic and now, sadly, the war in Ukraine, confidence across the globe is at an all time low and businesses have been placed under enormous pressure. While the rate of companies becoming insolvent within the UK is increasing, unemployment is low at just 3.5% (Q3 2022), so businesses will be struggling to retain talent, particularly administrators attempting to retain key staff in companies they are winding down.

This can be particularly troubling for businesses that are technology led. However, even for non-digital businesses, there is always a technology backbone that is required for back-office functions. When staff leave, keeping critical infrastructure running and secured is far harder.

So how should technology be managed for companies that are in administration?

Knowledge drain

Technology usually underpins most businesses. Complex algorithms, sprawling infrastructure and dispersed geographical entities can create a major headache. Staff begin to leave, the knowledge drain occurs and information is lost. It rapidly becomes apparent that documentation, processes and procedures have not been correctly implemented or followed. A task of carefully 'un-picking' the systems is required to discover, maintain and, ultimately, decommission in a structured way.

So, administrators need people with the right skills, and with the right attitude and approach to the work. The hours may start to become quite unsociable for the remaining staff (the same systems to support but with fewer people). Therefore, creating a smaller team of dedicated and enthusiastic individuals is crucial.

Generally, the following areas should be monitored and controlled closely to manage risk.

- **Cyber security.** A wind-down is a critical period in regards to securing customer and commercial data. The business could become a target for attack and the morale of the staff might be low. So a 'security first' principle to change is essential. Keep a close eye on proactive patching and monitoring of the systems alongside regular log checks to ensure the exposure to risk is low.
- **Infrastructure.** Businesses generally grow their technology organically and this can lead to the infrastructure sprawling to overly complex levels. There can be a multitude of servers located in various rooms and across cloud vendors. It is important to document and fully understand what each server does – this is critical to avoid unforeseen outages and loss of important data.
- **Networking.** Connectivity becomes even more important where the business operates in multiple regions. Changes in one geographical location can badly affect others, so it is important to plan ahead and fully understand how the wide area network (WAN) interconnects, particularly during decommissioning where remote sites are shutdown ahead of the main HQ (which is typically last). You should be looking for detailed networking diagrams showing how each site is connected internally and externally.
- **Databases.** There will inevitably be large data warehouses with critical intellectual property (that potentially will be a part of an asset sale) that will need maintenance and an expert database administrator (DBA) who can extract data when required. The quantities of data involved can often be vast and need handling carefully.
- **Software engineering.** If the business is digital with a software product at the core, then there will be a development team that will need retaining to ensure the product is continually developed and maintained. Again, proper documentation is key to keeping systems operating effectively. There should be change logs/tracking and the code should be narrated correctly. Ensuring effective handovers take place is important should staff leave.

Where is the tech located?

If there are datacentres in use, be prepared for considerable planning for decommissioning. Obtaining contracts and understanding clauses for closeout early on will prevent painful negotiations with hosting companies. You should obtain a datacentre 'map' which shows how many racks, servers and related

infrastructures are installed, and their locations within the datacentre. If the documentation is poor, dispatch an appropriately skilled individual to commence the documentation in earnest.

Technical planning

The planning of technology change is also important. There will be interlinks between services that will not be apparent without carefully analysing the in-scope services and structuring the tasks accordingly. A lot of these tasks are unfortunately linear due to interdependence. Planning will also ensure that staff know what is required from them and the approximate duration, and will avoid resource clashes later on.

Getting these things right with the proper focus will reduce the overall pain of a challenging wind-down scenario.

Dave Refault is CEO of Beyond Migration

Litigation funding:
Survey

Survey sponsored by:
Manolete

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Key questions for IPs to ask funders

Third-party litigation funding should be front and centre when looking at contentious assignments, argues **Paul Johnson**

The monthly insolvency statistics for October (published by the Insolvency Service in November) show that corporate insolvencies have risen 38% from the same month in the previous year and are 32% higher than pre-pandemic. Insolvency practitioners, lawyers and advisers are therefore gearing up for further rises in insolvencies as the economic climate is expected to worsen, thereby fuelling insolvency litigation, fraud and asset-tracing disputes.

In this context, the third-party litigation funding market is developing fast, and funders will undoubtedly be focused on insolvency estates in the expectation that related claims will generate profitable and speedy returns on their investment.

So, how are the current market conditions likely to prove fruitful for third-party litigation funders? In which circumstances might insolvency practitioners, lawyers and advisers seek a third-party litigation funder; and what key questions should they ask when looking for a funding partner?

Inherent tensions

By its very nature, an insolvent estate is usually impecunious and, while many have strong claims and good prospects of enforcement, lack of funding can become a real obstacle in pursuing those claims. In this setting, a tension can often arise between the lack of available funding to pursue litigation and the insolvency practitioner's duty to act in the best interests of the creditors, which may well be to pursue the estate's claims. In wrestling with that tension, it is incumbent on insolvency practitioners, their lawyers and advisers to carefully explore third-party litigation funding options.

> **"Timing is also a key factor, given funders are typically looking for a quick return, and so is enforcement risk, particularly where there are overseas targets, assets, or potential insolvent defendants"**

Considering insolvency appointments are expected to continue to rise significantly and with more third-party litigation funders than ever coming to market, this exploration becomes more necessary. The possibility of considering third-party litigation funding should no longer be on the periphery and reserved for the largest of cases, but should be front and centre when looking at all contentious insolvency assignments.

While early engagement with third-party funders is recommended, it can also be considered for cases that are not in their infancy, particularly where the litigation has been long-running and funds are starting to dry up, which may hinder a fully effective enforcement strategy in the event of success.

It is important when approaching third-party funders to have a firm eye – aside from the merits of the case – on the economics, as the funder will be most attracted to cases where the difference between the claim value and the funding committed by the funder is largest. Timing is also a key factor, given that funders are typically looking for a quick return, and so is enforcement risk, particularly where there are overseas targets, assets or potential insolvent defendants.

Benefits

The process itself can really assist with providing additional strategic input into the litigation and offers a further independent review of the merits. The funding itself, of course, also assists with risk reduction for the professional stakeholders in play, reduces the burden of unpaid work in progress and allows insolvent estates to pursue claims that might not have otherwise been brought.

Finding the right funder

Third-party litigation funding can enable insolvency practitioners and their lawyers to bring more claims for insolvent estates and achieve more for them by capitalising on the third-party funding options available. With a growing number of players in the market, finding the right funder is important. Some of the key questions insolvency practitioners and their lawyers should ask when considering a funding partner are:

- Is the funder likely to fit in and work well with you and your team?
- Do they have dependable access to capital and how open are they to providing further funding if that became necessary?
- Do they add value beyond putting up capital?
- Have they successfully funded similar cases?
- Do they have any unique terms in their funding arrangements that others do not?
- Is the funding non-recourse regarding the insolvent estate? (i.e. there is no obligation to repay the funder if there is no recovery made from the dispute.)
- How do they deal with adverse costs and issues surrounding security for costs?

Outlook

With the economic outlook bleak and the rise in insolvencies inevitable, we can expect to see an increase in insolvency, fraud and asset-tracing claims generally, and widespread uncertainty means insolvent companies are likely to have fewer resources than ever to pursue litigation.

We can therefore expect to see more cases than ever being supported by third-party litigation funding and, while some readers would undoubtedly prefer not to share any upside with third-party funders, the prospect seems unavoidable in many cases.

Paul Johnson is of counsel at Peters & Peters

Get best value for creditors with market-wide view of providers

Recovery's supplier survey will help IPs better understand the full range of funders and brokers in the UK insolvency claims market, says **Rupert Darrington**

Welcome to our exclusive survey of third-party funders of insolvency-related litigation operating in the UK, together with profiles of brokers who can help facilitate such deals. Compiled by the *Recovery* magazine publishing team, in the 10 pages of detailed tables that follow, 22 of the most important funders in the market are profiled, with the vast majority of them providing answers to a series of questions we put to them about their business activities, funding capacity and their range of services for IPs. In addition, we have included brief profiles of 11 of the major brokers in the market, where we have invited them to give an overview of the services they provide to help IPs and their solicitors seeking finance for litigation claims.

What is clear on reviewing the funders' data (pages 38-47), is the sheer range of different providers that have entered the market since the Jackson Reforms came into force in 2013.

The average number of years funders have been providing insolvency-related third-party funding (including in overseas markets, where relevant) is 9.6 years, with the longest established funder being the Australia-listed plc Omni Bridgeway at 36 years. The newest player in the market is West28th Street at just 1.5 years.

Balance sheets and other capital

One of the first questions we asked funders was to state the balance sheet capital (net assets/equity) of their top/parent company (in their group) at the end of their last reporting period, as well as at the end of their previous reporting period for comparison, plus the amount of other capital they have available to draw down to fund cases. The combined totals give one picture of the financial size of the players in the market (see table above right). Nevertheless, care needs to be taken here, since other relevant factors also have to be taken into account, particularly the fact that some firms have extensive litigation funding operations overseas, which are also included in these figures. For example, only 19% of the cases that LCM funds are related to insolvency cases for IPs based in the UK. Meanwhile, Omni Bridgeway – by far the largest funder in the UK market reporting numbers on this measure – has not disclosed how much of their business is with UK-based IPs.

Cases funded

We also asked companies for the approximate total value of all their live insolvency-related cases that they are currently funding globally, if all of them were to be successful. The below table shows the largest funders on this measure. (This data is based on those funders that supplied this information.)

> Of those funders that ask for an exclusivity period, the company with the shortest maximum number of working days for this period was Balance Legal Capital with 21 days

Assignment of cases

One differentiator between the funders is the extent to which they take cases on an assignment basis. We asked them if they 'always', 'sometimes', or 'never' took assignments and, if so, what percentage of the cases they fund are on this basis. Only three companies who answered the question said they 'never' take assignments (Apex Litigation Finance, Escalate and Sparkle Capital), one (West28th Street) said they 'always' do, with the rest saying they 'sometimes' do. Notably, the firms that said they almost always (with a 90% frequency) take cases on an assignment basis are Henderson & Jones, Manolete Partners and West28th Street.

Top 5: Funders with largest portfolios of live cases[3]

Company	Amount in GBP equivalent[4]
Henderson & Jones	£1,549,000,000
Omni Bridgeway	£540,000,000
Bench Walk Advisors	£500,000,000
Balance Legal Capital	£300,000,000
West28th Street	£61,975,000

Top 5: Funders with largest declared combined capital[1]

Company	Amount in GBP equivalent[2]
Omni Bridgeway	£1,213,000,000
LCM	£412,529,057
Balance Legal Capital	£250,000,000
Asertis	£202,089,283
West28th Street	£102,000,000

Exclusivity periods

For buyers of litigation finance, if a funder asks for an exclusivity period while the funder does its due diligence, this can be problematic for the buyer, as this makes it more difficult for buyers to look into offerings from other providers, given the often tight timescales involved. We therefore asked all funders whether they ask for an exclusivity period and, if so, the average and maximum number of working days. Of the funders who answered the first question, eight (47%) said they 'never' have an exclusivity period. These were: Apex Litigation Finance, Burford Capital, Escalate, Henderson & Jones, LionFish Litigation Finance, Manolete Partners, Sparkle Capital and West28th Street. Five companies (29%) said they 'sometimes' have an exclusivity period and the remainder said they 'always' do. Of those funders that 'sometimes' or 'always' ask for an exclusivity period, the company with the shortest maximum number of working days for this period was Balance Legal Capital with 21 days, with an average, they said, of just seven working days.

Payouts to funders

We also asked all funders the question of what is and/or will be the average percentage payout to them from damages awarded if all claims succeed in all the cases they have funded over the past 12 months. Some funders told us privately they did not wish to answer this question because it was too sensitive, while one told us that this was "not a metric we report on nor is it relied upon when assessing claims". Nevertheless, full credit should be given to the

> **Full credit should be given to the firms willing to be transparent on the question of payouts to themselves from damages awarded**

following firms willing to be transparent on the question of payouts to themselves from damages: Apex Litigation Finance, Balance Legal Capital, Champerty, Escalate, Harbour Litigation Funding, Henderson & Jones, LCM, Manolete Partners, Sparkle Capital, and West28th Street.

Some care also needs to be taken with the percentages paid out to funders from damages, since the risk and reward profile of the typical cases taken on by funders varies enormously. For instance, Manolete Partners reported the highest payout percentage to itself from damages awarded (67%), but it also has the second lowest minimum claim size amount of £20,000; its reported median average claim size is also one of the lowest; and it almost always carries a high risk on each case because they are taken on an assignment basis.

Minimum claim sizes

Looking at claim sizes, minimum claim sizes range from £10,000 by Escalate, right up to £30 million by Burford Capital. The companies most willing to look at the smallest cases are listed below.

Timescales

We also asked funders to state the maximum number of days in which they make a firm offer to a client to fund a case after they have been given all the information they have requested. The funders with the shortest timescales to make an offer are listed in the table on the right.

The funder with the longest reported timescale for making an offer is Burford Capital, with a maximum of 60 working days and a reported average (median) timescale of 40 working days. Again though, one has to be careful with these numbers. For example, Burford Capital specialises in taking on high value, complex cases.

Top 5: Funders willing to look at small cases

Company	Minimum claim size[4]
Escalate	£10,000
Manolete Partners	£20,000
Henderson & Jones	£22,000
West28th Street	£25,000
Apex Litigation Finance	£50,000

Choice of solicitors

We asked funders to say if they always use the IP's choice of solicitors. All funders who took part in the survey chose to answer this question, with 65% of respondents saying they 'always' use the IP's solicitor and 35% saying they 'sometimes' do. None said they 'never' do. One told us privately: "It's in our interest to use the IP's choice of solicitor because a lot of our business comes that way. But we do seek to agree costs [with that solicitor] for each stage of the work."

Conclusion

A survey such as this can clearly never provide all the information that an IP and solicitor would need to know before deciding which funding firm to partner with, as the limitations of space do not always give funders an opportunity to provide important detail or nuance.

For instance, in relation to the question 'How often do you pay for the legal costs of the funded party in their entirety?' (where the possible answers were 'sometimes', 'always' or 'never'), the founder of one funding firm told us: "The answer is more often that it depends. If the law firm is on a partial CFA, then we're not required to pay the fees in their entirety. We also play a costs control function in helping monitor the legal spend. In reality, we always pay the legal costs we're contractually required to pay."

Nevertheless, we hope that this major survey in *Recovery* – the first of many other supplier surveys that we plan to regularly publish in future editions of the magazine – will help IPs to better understand the full range of providers active in the UK market, and that it will serve as a useful starting point when they start to scour the market, before then doing their own due diligence on their shortlist of firms.

Top 5: Funders fastest to make an offer[5]

Company	Maximum no. of working days
West28th Street	4
Balance Legal Capital	5
Manolete Partners	5
Bench Walk Advisors	7
Escalate	7

1 Total of declared equity/net assets of funders' top/parent company in latest reporting period, plus other capital the funders said they have available to deploy, or are already deploying, to fund live insolvency-related cases
2 GBP equivalent using HMRC rate for November 2022
3 Approximate total value of all of the funder's live insolvency-related cases that they are currently funding globally, if all of the cases were to be successful
4 In GBP equivalent as estimated by the funder
5 Maximum number of days funders take to make an offer after they have received all of the information they have requested

The views stated in this article are the author's and not necessarily those of R3 or the Recovery editorial board

Rupert Darrington is managing editor of *Recovery*

Creditor Estates Receive between 50% and 90% of Net Returns

The Manolete model aligns the interests of the IPs and their lawyers to maximise returns for the Insolvent Estate.

There are no hidden costs.

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We have invested in **over 750 UK insolvency cases**

Case values range from **£20k to over £70m**

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Litigation funding: Survey results

About this survey

Please note that all information in this section has been supplied by the companies concerned, unless indicated otherwise. Please see key below.

Funders: Basic information

Trading name of business	Trading address	Website	Top/parent company in group	Country of registration of top/parent company	Company registration number of top/parent company	No. of years providing/advising on third-party funding of insolvency litigation	Name of regulator and, if appropriate, parts of business regulated
Apex Litigation Finance Limited	20-22 Wenlock Road, London N1 7GU	www.apexlitigationfinance.com	Apex Litigation Finance Limited	UK	11664128	3	None
Asertis Ltd	100 Barbirolli Square, Manchester M2 3AB	www.asertis.co.uk	Asertis Ltd	UK	11269006	3	None
Augusta Ventures Ltd	3rd Floor, 123 Victoria Street, London SW1E 6DE	www.augustaventures.com	Augusta Ventures Holdings Ltd	UK	12617566	13	None
Balance Legal Capital LLP	25 Southampton Buildings, London WC2A 1AL	www.balancelegalcapital.com	Balance Legal Capital LLP	UK	OC401304	7	UK's Financial Conduct Authority (FCA); The Australian Securities and Investment Commission (ASIC); funder member of the Association of Litigation Funders of England and Wales (ALF); funder member of the Association of Litigation Funders of Australia (ALFA); funder member of the International Legal Finance Association (ILFA)
Bench Walk Advisors LLC	Octagon Point, 5 Cheapside, London EC2V 6AA	www.benchwalk.com	Bench Walk Advisors LLC	US	6083215	5	State of Delaware, Division of Corporations; The U.S. Securities and Exchange Commission
Burford Capital	Oak House, Hirzel Street, St Peter Port, Guernsey GY1 2NP	www.burfordcapital.com	Burford Capital	Guernsey	*n/s*	13	Securities Exchange Commission
Champerty Limited	184 Shepherds Bush Rd, London W6 7NL	www.axiafunder.com	N/A	UK	N/A	3	Champerty Ltd is an appointed representative of ShareIn Ltd, which is authorised and regulated by the Financial Conduct Authority
Deminor Recovery Services (Luxembourg) SA	Rue Jean-Pierre Brasseur 1, L-1258 Luxembourg	https://drs.deminor.com/en	Deminor Recovery Services (Luxembourg) SA	Luxembourg	B175299	3	TBC
Erso Capital	*Erso Limited, 90 Fenchurch Street, London EC3M 4ST*	*www.ersocap.com*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*
Escalate	Exchange Station, Tithebarn Street, Liverpool L2 2QP	www.escalatedisputes.co.uk	Escalate Law Ltd	UK	10381993	6	Authorised and regulated by the Solicitors Regulation Authority – Escalate Law Limited (No: 650666)

Key: £ = GBP equivalent N/A = not applicable *n/s* = not supplied Text in regular font = text supplied by the profiled company
Text in italic font = text supplied by the Recovery publishing team based on publicly available information

Funders: Basic information continued							
Trading name of business	**Trading address**	**Website**	**Top/parent company in group**	**Country of registration of top/ parent company**	**Company registration number of top/parent company**	**No. of years providing/ advising on third-party funding of insolvency litigation**	**Name of regulator and, if appropriate, parts of business regulated**
Harbour Litigation Funding	8 Waterloo Place, London	www.harbourlf.com	N/A	Cayman Islands	N/A	15	SRA
Henderson & Jones	4th Floor Cannon Place, 78 Cannon Street, London EC4N 6HL	www.hendersonandjones.com	BREAL Capital Limited	UK	09147981	6	All qualified members of staff are regulated either by Solicitors Regulation Authority or Institute of Chartered Accountants England and Wales
LCM	Bridge House, 181 Queen Victoria Street, London EC4V 4EG	www.lcmfinance.com	LCM Ltd	Australia	ACN: 608 667 509	24	Australian Securities and Investments Commission; admitted to the London Stock Exchange
LionFish Litigation Finance Ltd	9-13 St Andrew St, London EC4A 3AF	www.lflf.co.uk	RBG Holdings plc	UK	11189598	2	N/A
Manolete Partners PLC	21 Gloucester Place, London W1U 8HR	www.manolete-partners.com	Manolete Partners PLC	UK	07660874	13	None
Omni Bridgeway	5 Chancery Ln, London WC2A 1LG	www.omnibridgeway.com	Omni Bridgeway Ltd	Australia	067 298 088	36	Australia: Australian Securities Exchange (ASX:OBL), Australian Securities and Investment Commission as a holder of Australian Financial Services License (AFSL) and authorised to operate litigation funding schemes*
Redress Solutions	*Coopers' Hall, 13 Devonshire Square, London EC2M 4TH*	*n/s*	*Redress Solutions PLC*	*UK*	*09079980*	*n/s*	*Association of Litigation Funders*
Sparkle Capital	4 Station Road, Cheadle Hulme, Stockport SK8 5AE	www.sparklecapital.co.uk	N/A	UK	N/A	7	In-house solicitors are regulated by SRA. Sparkle Capital is not regulated
Therium Capital Management Ltd	*11 Staple Inn, London WC1V 7QH*	*www.therium.com*	*n/s*	*Jersey*	*116955*	*n/s*	*Association of Litigation Funders*
Vannin Capital PCC	*2nd Floor Sir Walter Raleigh House, 48-50 Esplanade, St. Helier JE2 3QB, Jersey*	*www.vannin.com*	*n/s*	*n/s*	*n/s*	*n/s*	*Association of Litigation Funders*
West28th Street Ltd	124 City Road, London EC1V 2NX	www.west28th.co.uk	West28th Street Ltd	UK	13231491	1.5	N/A
Woodsford	8 Bloomsbury Street, London WC1B 3SR	www.woodsford.com	Woodsford Group Limited	UK	07327885	12	Association of Litigation Funders – UK business; Australian Securities and Investments Commission (ASIC) – Australian business

*Additional information supplied by Omni Bridgeway for 'Name of regulator and, if appropriate, parts of business regulated': US: Regulated by Securities and Exchange Commission (SEC) as a registered investment adviser. Industry association memberships: Association of Litigation Funders of England and Wales, European Litigation Funding Association (ELFA), and ILFA (International Legal Finance Association)

Key: £ = GBP equivalent N/A = not applicable *n/s* = not supplied Text in regular font = text supplied by the profiled company
Text in italic font = text supplied by the Recovery publishing team based on publicly available information

Funders: Funding details (1)

Trading name of business	Net assets/ equity of top company at year end in last reporting period	End date of last reporting period	Net assets/ equity of top company at year end in previous reporting period	How much other capital do you have access to that you can use and/or are already deploying to fund live insolvency-related cases should the need arise?	Who provides this funding, how is it provided, and how long does it take to draw down?	If external funding providers are used, how are those providers audited?	Approximate no. of live insolvency-related cases currently funded globally	Approximate value of those claims if all of them were to be successful	% of the total value of cases funded that are for IPs in UK
Apex Litigation Finance Limited	*n/s*	*n/s*	*n/s*	£20,000,000	The funding is provided through an offshore SPV (co-owned by Apex) which, at all times, holds the full committed capital of all funded cases. Drawdown is a simple process that takes up to five days to complete following receipt of a correctly presented request	N/A	N/A	N/A	N/A
Asertis Ltd	GBP 2,089,283	31/12/2022	GBP 788,462	£200,000,000	We are funded by Arrow Credit Opportunities SCSp (and related investing entities) and by funds managed by AB CarVal via a £200 million committed revolving credit facility	*n/s*	*n/s*	*n/s*	100%
Augusta Ventures Ltd	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*
Balance Legal Capital LLP	*n/s*	*n/s*	*n/s*	£250,000,000*	Balance Legal Capital LLP manages multiple private funds. The funds pool capital from a group of institutional investors in the UK, US, Australia and Europe. Balance ensures it has sufficient capital on hand to meet requirements and draws down from investors on 14 day terms	N/A	5	£300,000,000	10%
Bench Walk Advisors LLC	*n/s*	*n/s*	*n/s*	*n/s*	Bench Walk is structured as a GP/LLP, accordingly we have no published accounts. Institutional investors. 30-day drawdown	N/A	7	£500,000,000	40%
Burford Capital	USD 1,550,410	30/06/2022	USD 1,551,790	*n/s*	Burford provides funding from our balance sheet and other sources of capital. Capital is provided in cash. Once our investment committee has signed, funding can be almost instant	N/A	*n/s*	*n/s*	*n/s*
Champerty Limited	GBP 609,196	31/12/2021	GBP 221,432	£0	Capital is sourced from a large number of professional, high net worth and sophisticated investors. The fundraising can take up to four weeks, with additional one-two days required to process the drawdown	We perform KYC checks on investors/ companies at onboarding	0	£0	0%
Deminor Recovery Services (Luxembourg) SA	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*
Erso Capital	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*
Escalate	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	100%
Harbour Litigation Funding	*n/s*	*n/s*	*n/s*	*n/s*	Endowments and pension funds	N/A	20	*n/s*	*n/s*
Henderson & Jones	GBP 27,792,557	31/12/2021	GBP 17,996,420	*n/s*	We have the ability to draw on multiple large cash resources as needed	N/A	104	£1,549,000, 000	95%

table continued overleaf

*Additional information supplied by Balance Legal Capital LLP for 'How much other capital do you have access to that you can use and/or are already deploying to fund live insolvency-related cases should the need arise?': >£250 million

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ASERTIS

CREATING OPPORTUNITIES.

We have an unparalleled understanding of funding complex insolvency disputes.

Our combination of litigation, insolvency and investigatory expertise means we robustly and efficiently pursue litigation.

ELIMINATING RISK, LEVELLING THE PLAYING FIELD.

We pay all the legal fees and disbursements over the duration of the claim.

If the claim does not succeed our investment is written off, as we bear the risk.

MAXIMISING VALUE.

Cost and risk-free solution.

Return on claims without the hassle and drain on resources.

When the claim succeeds and damages are recovered, Asertis receives a pre-agreed share of the amount recovered and pay the balance to the insolvent estate.

SPECIALIST INSOLVENCY FUNDING

Our specialist insolvency funding covers all types of corporate and personal insolvency claims including:

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COMMERCIAL DISPUTES FUNDING

We can fund various types of commercial disputes including:

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- Competition Litigation
- Group Litigation
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Funders: Funding details (1) continued

Trading name of business	Net assets/ equity of top company at year end in last reporting period	End date of last reporting period	Net assets/ equity of top company at year end in previous reporting period	How much other capital do you have access to that you can use and/or are already deploying to fund live insolvency-related cases should the need arise?	Who provides this funding, how is it provided, and how long does it take to draw down?	If external funding providers are used, how are those providers audited?	Approximate no. of live insolvency-related cases currently funding globally	Approximate value of those claims if all of them were to be successful	% of the total value of cases funded that are for IPs in the UK
LCM	AUD 94,006,000	30/06/2022	AUD 88,891,000	£360,000,000	Balance sheet capital from equity investors via LCM's stock exchange listing, plus third-party investors (as publicly disclosed pursuant to LCM's listing). Typically, drawdown takes less than four weeks	Investors are large institutional investors. These institutions are audited by independent, recognised audit professionals and their firms	15	*n/s*	19%
LionFish Litigation Finance Ltd	GBP 60,800,000	31/12/2021	GBP 47,000,000	£20,000,000	We are a principal investor where the funds come from our own balance sheet. It is provided following an assessment process undertaken by LionFish. The first drawdowns are immediate and there are monthly drawdown cycles, with requests made mid-month and drawdown typically on the last business day of the month	By the plc	*n/s*	*n/s*	100%
Manolete Partners PLC	GBP 42,200,000	31/03/2022	GBP 38,900,000	£35,000,000	Other capital that we have access to – £35 million HSBC loan facility; HSBC, immediate drawdown for £25 million available, further application required for the additional £10 million. IPO in December 2018 raised net proceeds of £14.6 million	No external finance providers used	264	£59,000,000	100%
Omni Bridgeway	GBP 420,000,000	30/06/2022	GBP 433,000,000	£793,000,000	The debt facility has been provided by funds managed by Northleaf Capital Partners and Pacific Equity Partners. Unable to disclose drawdown length	Unable to disclose	*n/s*	£540,000,000	*n/s*
Redress Solutions	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*
Sparkle Capital	GBP 840,348	31/08/2021	GBP 253,771	£50,000,000	Sparkle is a privately owned litigation fund, owned by the family of Fred Done, the Betfred billionaire. There is presently no limit on the amount Sparkle can borrow. Funding is accessible on 24 hours notice	Each matter is considered and priced on its merits, factoring in litigation risk, but returns are typically fixed interest, increasing in yearly increments	4	£4,000,000	100%
Therium Capital Management Ltd	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*
Vannin Capital PCC	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*
West28th Street Ltd	GBP 2,000,000	31/03/2022	GBP 2,000,000	£100,000,000	Institutional investors. Agreed facility. Four days to draw down	N/A	971	£61,975,000	80%
Woodsford	*n/s*	*n/s*	*n/s*	*n/s*	We are a family office and all matters are funded from our own balance sheet. Generally, funding is provided in tranches as and when funding notices are provided by the instructed solicitors	*n/s*	*n/s*	*n/s*	*n/s*

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Funders: Funding details (2)						
Trading name of business	**Is the funding you provide for insolvency cases non-recourse?**	**How often in insolvency cases do you pay for the legal costs of the funded party in their entirety?**	**Do you fund the other party's costs if the funded party is ordered to do so in insolvency cases?**	**Do you provide funding for security for costs and cross undertakings for damages in insolvency cases?**	**Do you take an assignment of a case in insolvency cases?**	**What approximate % of your insolvency cases are funded on an assignment basis?**
Apex Litigation Finance Limited	Always	Sometimes	Never	Sometimes	Never	N/A
Asertis Ltd	Always	Always	Always	Always	Sometimes	*n/s*
Augusta Ventures Ltd	Always	Always	Always	Always	Sometimes	*n/s*
Balance Legal Capital LLP	Always	Always	Always	Always	Sometimes	0%
Bench Walk Advisors LLC	Sometimes	Sometimes	Sometimes	Sometimes	Sometimes	<5%
Burford Capital	Always	Always	Always	Sometimes	Sometimes	*n/s*
Champerty Limited	Always	Sometimes	Sometimes	Sometimes	Sometimes	*n/s*
Deminor Recovery Services (Luxembourg) SA	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*
Erso Capital	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*
Escalate	Always	Always	Always	Always	Never	N/A
Harbour Litigation Funding	Always	Sometimes	Always	Sometimes	Sometimes	5%
Henderson & Jones	Always	Sometimes	Always	Sometimes	Sometimes	90%
LCM	Always	Always	Never	Always	Sometimes	0%
LionFish Litigation Finance Ltd	Always	Sometimes	Sometimes	Sometimes	Sometimes	*n/s*
Manolete Partners PLC	Always	Always	Always	Always	Sometimes	90%
Omni Bridgeway	Always	Always	Always	Always	Sometimes	25%
Redress Solutions	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*
Sparkle Capital	Always	Sometimes	Sometimes	Sometimes	Never	N/A
Therium Capital Management Ltd	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*
Vannin Capital PCC	*n/s*	*n/s*	*n/s*	*n/s*	*Sometimes*	*n/s*
West28th Street Ltd	Always	Always	Always	Always	Always	90
Woodsford	Always	Always	Sometimes	Sometimes	Sometimes	*n/s*

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Funders: Funding details (3)							
Trading name of business	**Do you ask for an exclusivity period while you do your due diligence before making a firm offer to fund an insolvency case?**	**Maximum no. of working days of your exclusivity period (if applicable)**	**Average (median) no. of working days of exclusivity period (if applicable)**	**How are you typically paid for an insolvency-related case (i.e. the payment structures you typically offer IPs)?**	**Of all cases you have funded over past 12 months, what is/will be approximate average % payout to your firm from damages awarded if all claims succeed?**	**Maximum no. of working days in which you make a firm offer after you have received all information**	**Average (median) no. of working days in which you make a firm offer after you have received all information**
Apex Litigation Finance Limited	Never	N/A	N/A	Each case is assessed independently and 'priced' according to the risk presented. Typically, upon success, Apex would receive back the amount drawn down, plus a success fee equal to either a small multiple of the amount deployed or a pre-agreed percentage of the award/settlement	N/A	10	7
Asertis Ltd	Always	*n/s*	*n/s*	Considering each client's case carefully on its own merits, we take individual circumstances into account and create bespoke terms on a case by case basis	*n/s*	*n/s*	*n/s*
Augusta Ventures Ltd	Sometimes	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*
Balance Legal Capital LLP	Sometimes	21	7	We fund part or all of the insolvency practitioner fees if the quantum of the case justifies including those fees in the funding budget. Some insolvency practitioners act on partial risk with fees to be paid on success from the proceeds waterfall	30%	5	3
Bench Walk Advisors LLC	Sometimes	*n/s*	*n/s*	Percentage of damages, and/or multiple of invested capital, and/or IRR	*n/s*	7	5
Burford Capital	Never	N/A	N/A	Capital is provided on a non-recourse basis, meaning that Burford assumes downside risk, and earns its investment back and a return only in the event of the successful resolution of the dispute(s)	*n/s*	60	40
Champerty Limited	Always	28	28	AxiaFunder charges an upfront fee which is typically c. 10% of the amount raised and (only if the case resolves successfully) a success fee which is a share (typically c. 20%) of the contractual return to the partnership	0%	28	28
Deminor Recovery Services (Luxembourg) SA	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*
Erso Capital	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*
Escalate	Never	N/A	N/A	The Escalate all-in-one packaged solution provides built-in legal expertise, case funding and full cost protection against case loss – all for a capped fee (of 30%) that is only payable upon successful resolution, and which guarantees the IP and creditors will be the main beneficiaries	30%	7	3
Harbour Litigation Funding	Sometimes	42	42	Share of the proceeds	35%	14	14
Henderson & Jones	Never	N/A	N/A	We only get paid on successful conclusion of our claim. We pay insolvency practitioners up front and/or with a share of net proceeds, which we share	40%	15	7
LCM	Sometimes	60	30	Funding structure typically (i) capital back plus (ii) a rising risk-weighted multiple of capital deployed, rising as a function of time from the date of the agreement to the date of recovery	21%	30	10
LionFish Litigation Finance Ltd	Never	N/A	N/A	We typically charge a multiple that steps up annually. However, each transaction is looked at separately and structured to the needs of the case	*n/s*	15	10
Manolete Partners PLC	Never	N/A	N/A	We pay significant upfront cash consideration into the insolvent estate. Manolete's costs are reimbursed from gross realisations and the net proceeds are split, with the estate receiving 50-90% on a ratchet basis. We can also pay a simple one-off cash payment for 100% ownership of the case	67%	5	5
Omni Bridgeway	Always	60	45	Investment back and higher of multiple of investment or percentage of recovery. Omni Bridgeway can also fund historic costs and seed funding	*n/s*	45	30
Redress Solutions	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*

table continued overleaf

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Funders: Funding details (3) continued

Trading name of business	Do you ask for an exclusivity period while you do your due diligence before making a firm offer to fund an insolvency case?	Maximum no. of working days of your exclusivity period (if applicable)	Average (median) no. of working days of exclusivity period (if applicable)	How are you typically paid for an insolvency-related case (i.e. the payment structures you typically offer IPs)?	Of all cases you have funded over past 12 months, what is/will be the approximate average % payout to your firm from damages awarded if all claims succeed?	Maximum no. of working days in which you make a firm offer after you have received all information	Average (median) no. of working days in which you make a firm offer after you have received all information
Sparkle Capital	Never	N/A	N/A	Each matter is considered and priced on its merits, factoring in litigation risk, but returns are typically fixed interest increasing in yearly increments	10%	14	7
Therium Capital Management Ltd	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*
Vannin Capital PCC	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*
West28th Street Ltd	Never	N/A	N/A	We make an upfront payment and a percentage payment on recoveries	40%	4	2
Woodsford	Always	*n/s*	*n/s*	Percentage of damages. Multiple of investment	*n/s*	*n/s*	*n/s*

Funders: Funding details (4)

Trading name of business	Minimum claim size	Average (median) claim size	Do you reserve any rights to approve the way an insolvency case is settled?	Do you use the IP's choice of solicitors?	How are you different to most other funders of insolvency-related litigation?
Apex Litigation Finance Limited	£50,000	N/A	Never	Always	We are the only UK litigation funder focused on providing non-recourse funding for lower/mid-size insolvency-related claims, enabling the IP to maintain control of the case and settlement strategy
Asertis Ltd	*n/s*	*n/s*	Always	Always	Our philosophy is personal, yet commercial. Taking each case carefully on its merits, we create a unique relationship with our clients based on trust, professionalism and mutual understanding
Augusta Ventures Ltd	*n/s*	*n/s*	Never	Always	*n/s*
Balance Legal Capital LLP	£8,000,000	*n/s*	Sometimes	Always	Unlike others, Balance is an independent funder with full discretion over its investment decisions. We are also known for seed funding, speed, litigation expertise and a collaborative approach
Bench Walk Advisors LLC	£15,000,000	£50,000,000	Never	Sometimes	We are renowned for our ability to making fast decisions and operating flexibly. Each of our clients deal directly with a highly experienced, deal-oriented decision maker throughout the process
Burford Capital	£30,000,000	*n/s*	Never	Always	Burford is dual listed with $5.5 billion committed to the legal market, and has an in-house asset recovery team, and a wholly owned insurer to address enforcement and recovery challenges and adverse costs
Champerty Limited	£1,000,000	£2,000,000	Never	Sometimes	AxiaFunder provides flexible funding solutions: 1) Flexible funding amount (e.g. funding claims under £1 million). 2) Flexible use of funds. 3) Flexible case selection (e.g. funding higher risk cases)
Deminor Recovery Services (Luxembourg) SA	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*
Erso Capital	*n/s*	*n/s*	*n/s*	*n/s*	*Our group is unique in the range of financing and litigation risk management solutions it offers. Our affiliate team at TheJudge (ranked Tier 1 by Chambers and Partners) has over 20 years' experience*
Escalate	£10,000	£200,000	Sometimes	Always	Unique packaged solution for resolving an IP's wide range of disputes. Funding for all case costs. 100% cost protection – own side and adverse costs. A fixed price that's known from the start
Harbour Litigation Funding	£10,000,000	£60,000,000	Never	Always	We have an incredibly wide mandate which gives us the ability to be creative with everything from substantial seed funding and investigative funding through to the funding of cases
Henderson & Jones	£22,000	£10,500,000	Sometimes	Sometimes	The founders are experienced insolvency and litigation professionals. Don't need application packs. Assignment model allows us to take on greater risks and generate excellent outcomes

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Funders: Funding details (4) continued					
Trading name of business	**Minimum claim size**	**Average (median) claim size**	**Do you reserve any rights to approve the way an insolvency case is settled?**	**Do you use the IP's choice of solicitors?**	**How are you different to most other funders of insolvency-related litigation?**
LCM	*n/s*	*n/s*	Never	Always	Capital access: flexible pricing and commercial terms due to direct access to significant permanent, stable capital. Experience: public about funding significant, complex contentious IP-led claims
LionFish Litigation Finance Ltd	£2,500,000	£10,000,000	Sometimes	Always	Focus on larger claim values which IPs often do not seek to assign away. In comparison to funders in that space, we price competitively and move quickly
Manolete Partners PLC	£20,000	£223,000	Never	Always	AIM listed. Unlimited and uncapped indemnity – we don't use CFAs or ATE. We usually settle claims within 12 months using ADR. Insolvent estate gets minimum of 50% of recovered net proceeds
Omni Bridgeway	£5,000,000		Always	Sometimes	Funding since 1986. Global footprint, 21 offices. Civil and common law expertise. Internal asset trace for early case viability at no cost to IP. ATE included at fraction of market rate
Redress Solutions	*n/s*	*n/s*	*n/s*	*n/s*	*1. You'll know in two working days whether we'd like to take on your case. 2. We are one of Europe's longest-established litigation funders. 3. We fund small claims that larger companies turn away*
Sparkle Capital	£200,000	£2,000,000	Sometimes	Always	As Sparkle is a privately owned litigation fund, we can be both flexible and extremely cost-effective in terms of the needs of the claim, looking at every matter on a truly bespoke basis
Therium Capital Management Ltd	*n/s*	*n/s*	*n/s*	*n/s*	*Therium is one of the world's largest litigation funding firms. We have funded claims with a total value of circa $100 billion across the world*
Vannin Capital PCC	*n/s*	*n/s*	*n/s*	*n/s*	*Vannin has significant experience in providing funding facilities to liquidators to conduct large scale claims. We also provide seed funding for investigation costs*
West28th Street Ltd	£25,000	£150,000	Sometimes	Sometimes	At our own expense, W28 use data analysis technology to forensically interrogate documents and emails to successfully uncover assets, smoking guns, incriminating documents, and new additional claims
Woodsford	*n/s*	*n/s*	Sometimes	Sometimes	We fund matters from our own balance sheet. We are a UK onshore limited company

Brokers: Basic Information							
Trading name of business	**Trading address**	**Website**	**Top/parent company in group**	**Country of registration of top/ parent company**	**Company registration number of top/parent company**	**No. of years providing/ advising on third-party funding insolvency litigation**	**Name of regulator and, if appropriate, parts of business regulated**
Annecto Legal Ltd	106 Kennedy Building, Murray Street, Manchester M4 6HS	www.annecto legal.co.uk	Annecto Legal Ltd	UK	08370254	10	Annecto Legal Limited is authorised and regulated by the Financial Conduct Authority FRN: 707558 as an Appointed Representative of 2direct Limited, authorised and regulated by the Financial Conduct Authority FRN: 306117
Clarendon Associates	1 Suffolk Road, London	*n/s*	N/A	UK	N/A	15	None
Exton Advisors	*46 Gresham Street, London EC2V 7AY*	*www.exton advisors.com*	*n/s*	*n/s*	*n/s*	*n/s*	*Exton Advisors Limited is an appointed representative of Momentum Broker Solutions Limited, which is authorised and regulated by the Financial Conduct Authority*
Factor Risk Management	Dawson House, 5 Jewry St, London EC3N 2EX	www.factor-risk. com	Factor Risk Management Limited	UK	12650248	2	Authorised and regulated by the Financial Conduct Authority (FCA)
Howden Insurance Brokers Limited	1 Creechurch Place, London EC3A 5AF	www.howden group.com/ uk-en	Howden Group Holdings Limited	UK	2937398	3	FCA for insurance-related products only

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Brokers: Basic Information continued

Trading name of business	Trading address	Website	Top/parent company in group	Country of registration of top/parent company	Company registration number of top/parent company	No. of years providing/advising on third-party funding insolvency litigation	Name of regulator and, if appropriate, parts of business regulated
Litigation Funding Consultancy Ltd	2th Floor, 21-22 Great Castle Street, London W1G OHZ	www.litigationfc.com	N/A	UK	N/A	3	N/A
Marsh	1 Tower Place West, Tower Place, London EC3R 5BU	www.marsh.com	MMC Group	US	N/A	3	FCA
Maxima	Blakenhall Business Park, 4A The Hayloft, Bar Lane, Barton under Needwood DE13 9RE	www.maximagroup.org	Maxima Litigation Finance Limited	UK	10987867	17	Maxima Litigation Finance Limited is not regulated (third-party funding services). Maxima Litigation Solutions Limited is regulated by FCA (after the event insurance and general insurance regulated activities – members of BIBA)
QLP Limited	124 City Road, London EC1V 2NX	www.qlp.ltd.uk	QLP Limited	UK	3236030	10	Financial Conduct Authority
Sentry Funding	5 Chancery Lane, London EC4A 1BL	www.sentryfunding.co.uk	Sentry Funding Limited	UK	08257351	3	Financial Conduct Authority – Arranging Insurance; Association of Litigation Funders – Associate Member; Law Society – Working With Partner
Willis Towers Watson (WTW)	51 Lime Street, London EC3M 7DQ	www.wtwco.com	Willis Limited	UK	181116	6	Authorised and regulated by the Financial Conduct Authority

Brokers: Details

Trading name of business	Services	% of turnover of your business group that is related to third-party funding for insolvency-related litigation	No. of third-party litigation funders you have access to for insolvency-related claims	Minimum claim size	Average (median) claim size	How are you typically paid for arranging third-party insolvency-related funding?	No. of full time equivalent employees	How are you different to most other litigation finance brokers in the UK market?
Annecto Legal Ltd	Access to after the event (ATE) legal expense insurance, third-party litigation funding, assignment of claims, and other related insurance and funding products	50%	25	£25,000	£500,000	Either by the funder/insurer upon conclusion of the claim or by the client as a share of their recoveries	4	We are transparent in everything we do and always take a long-term view when it comes to relationships and commercial decisions. We share our wealth of experience to save our clients time and money. We guide them through the application and negotiation process to make fully informed choices
Clarendon Associates	Clive Petty is well-known in the industry. He has been active as a funding and ATE insurance broker for many years. Clive is recognised as Band 1 in Chambers for 2022 for litigation support/funding	50%	10	£250,000	£10,000,000	Deferred and contingent fees agreed with the litigation funder	1	More experienced than most. Being a specialist, Clive spends time to fully understand the case metrics and assist on advising on the optimum structure to maximise creditor returns
Exton Advisors	*Assessment of the availability of specialist litigation finance across a broad network of capital sources, advice on the preparation of proposals, price and structure comparisons, negotiation of the terms on which finance will be provided, and advice on the structure of finance agreements*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*No other advisors focus on joining the dots between the worlds of funding, insurance and wider advisory and support like we do. We're 100% focused on bridging those gaps to offer the right outcome*

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Brokers: Details continued								
Trading name of business	**Services**	**% of turnover of your business group that is related to third-party funding of insolvency-related litigation**	**No. of third-party litigation funders you have access to for insolvency-related claims**	**Minimum claim size**	**Average (median) claim size**	**How are you typically paid for arranging third-party insolvency-related funding?**	**No. of full time equivalent employees**	**How are you different to most other litigation finance brokers in the UK market?**
Factor Risk Management	Independent advisors and brokers of litigation insurance and finance: funding, assignment of claims, legal expenses insurance, anti-avoidance endorsements, cross undertakings in damages insurance	28%	25	£250,000	£4,000,000	Introducer fee paid by the funder, typically a percentage of profit. Commission paid by insurer	3	Funding and insurance are equal offerings. Fully independent with access to the global market. Not affected by client conflicts that may affect others. Knowhow and connections to create bespoke solutions. Performance driven – remuneration is dependent on finding a solution. Alignment of interest
Howden Insurance Brokers Limited	Our specialist team works exclusively on developing solutions to the problems presented to clients when undertaking litigation or arbitration through the application of funding and insurance	25%	10	£250,000	£500,000	We are remunerated by the funder who will pay us a percentage of their return, in the event of the case being successful	5	We draw upon our experience from legal, funding and insurance backgrounds, which enables us to take an advisory approach in implementing bespoke arrangements to mitigate the risks and costs associated with litigation
Litigation Funding Consultancy Ltd	LFC is a consultancy for legal funding. We provide a comprehensive selection of solutions for claimants and professionals alike. The funding is non-recourse and risk free to the claimant	15%	3	£700,000	£2,000,000	We receive a percentage of the success fee	N/A	We are able to self-fund
Marsh	We provide a full advisory service. We provide financial modelling to show all of the different ways a claim can be funded and then arrange the chosen solution	15%	30	£100,000	*n/s*	We get paid in respect of any insurance, but we help our clients with funding at no cost	5	Aside from funding, we advise fully on all of the insurance options available that can be used as an alternative to funding. The financial modelling we provide clients is unlike anything other brokers produce. We also don't receive any remuneration for funding so we are focused on the clients' needs
Maxima	We procure third-party funding and legal expenses insurance for IP's claims, whether they lend better to be purchased or litigated upon, providing the best terms for the creditors across the market	70%	14	£500,000	£700,000, 000	We are usually paid a success fee out of the funder's success fee and sometimes a placement fee	3	We work with insolvency practitioners and their lawyers to meet the needs of the case. This may require helping them with early case funding or cases that have run out of funds midway but have good merits. We do not just submit random applications, we look at the best solutions and the best partners
QLP Limited	Full broking service for after the event insurance, and litigation funding to support an insolvency claim, the IP and solicitor. QLP remains involved until the claim has concluded	35%	30	£10,000	£250,000	Commission from the funder	2	Detailed consultancy, preparation of a claim for funders, negotiate the structure, funding and fully supportive until conclusion
Sentry Funding	Sentry Funding is not a broker, but a lawtech portal that offers solicitors free access to the UK's largest panel of litigation funders and ATE providers	0%	17	£50,000	*n/s*	We are paid via the funder	12	We are not a traditional broker. We speed up the litigation funding and ATE process using market-leading technology, meaning solicitors can acquire funding in just 15 days from approval to drawdown. We are also the only litigation funding business that is an approved partner of the Law Society
Willis Towers Watson (WTW)	Willis Towers Watson is a leading broker of after the event insurance (ATE) and litigation financing solutions	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*	*n/s*

Key: £ = GBP equivalent N/A = not applicable *n/s* = not supplied Text in regular font = text supplied by the profiled company
Text in italic font = text supplied by the Recovery publishing team based on publicly available information

'There is no strength without unity'

With insolvency numbers rising, the ability of the profession to work together will result in better outcomes for creditors, says **Barry Cahir**

"We have checked out, but we have not left." This was the phrase coined by Lord Justice Snowden at our recent Insol Europe Annual Congress in Dubrovnik. For those, like me, who greatly value the work done and relationships built with our friends and colleagues in R3 over many years, this was a very reassuring sentiment.

It has been a persistent concern of ours post-Brexit to ensure that you all know we want and need you now more than ever. It was greatly appreciated, and not lost on us, that your president Christina Fitzgerald came straight to Dubrovnik from an R3 event the day before to join the Richard Turton Award presentation (a joint award between Insol Europe, R3, IPA and Insol International).

In terms of our ongoing good relations, it is a great honour to be invited to write this, my first external publication as president of Insol Europe.

Uncitral model laws

I am committed to doing my very best to continue to find and promote collaborative projects and networking opportunities, both general and specific, for the benefit of both organisations and our members. For example, given that the Uncitral model laws will become increasingly important to cross-border cases involving the jurisdictions of the UK, it is a subject on which both organisations may have a common interest project.

I am lucky to have started my year as president of Insol Europe at a time when the worst of the pandemic appears to be behind us. I know from following R3's active social media accounts that you have been enjoying the benefits of getting together in person again. It is the lifting of pandemic restrictions which allowed Insol Europe to hold two sell-out conferences this year. And what a wonderful conference we just had in Dubrovnik.

The multiple benefits of meeting together in person gives truth to the old Irish saying 'Ní neart go cur le chéile' (there is no strength without unity), which emphasises the importance of meeting and working together.

At the time of writing, on 25 October, the political volatility in Westminster appears to be steadying. However, as I read R3's response to the September 2022 insolvency statistics, and hear anecdotally about the UK's upswing in restructuring and insolvency, the ability for us all to work together will undoubtedly result in better outcomes for creditors, which will in turn reflect well on the profession.

That ability to work well together is forged and strengthened greatly by meeting in person at conferences and events. I look forward to many such opportunities over the next 12 months and beyond.

Barry Cahir is president of Insol Europe

 Editor editor@r3.org.uk

Making and shaping the news

Stuart McBride and **Pim Ungphakorn** give a roundup of the work of R3's press, policy and public affairs team on behalf of the profession

Since the last issue of the magazine went to press, we have had three prime ministers, three chancellors of the exchequer and a whole swathe of new ministers. But Westminster is not the only place where new faces have been seen. There is a new face heading up our team: Anthony Walters, who has joined R3 as our new head of external affairs.

Anthony, who replaced James Jeffreys, joins us from the ACCA, where he built and ran its global public affairs function. He has had a sprint start to his new role here, and tells us he has had a blast getting to grips with R3 and the fascinating world of insolvency and restructuring.

Despite the national and local changes, the core issues we have been working on remain the same: the economic crime and corporate transparency bill which is now going through Parliament; our response to the personal insolvency framework consultation; the Government's next move on the regulation reforms; and briefing journalists on the profession and its work.

Companies House reform

In September, we published a policy paper, *Insolvency and the Fight Against Fraud*, which details our recommendations for strengthening the UK's corporate governance framework, ahead of the publication of the economic crime and corporate transparency bill.

Our recommendations focused on reforming Companies House's automatic strike-off process and highlighting the ways in which the Government, law enforcement and other public sector bodies can better use the skillset of the profession to support their work in fighting fraud.

We have written to a range of parliamentarians – including the insolvency minister Lord Callanan and the new minister for security Tom Tugendhat – to promote our proposals, which we believe will support government departments and law enforcement agencies in the fight against fraud, while also providing the profession with more tools to carry out its own anti-fraud work more effectively.

> **"As a result, R3 was mentioned by Kate Green MP during the debate, who cited our concerns regarding the current automatic strike-off process, and our recommendations that this process should be reformed"**

A voice in Westminster

In October, ahead of the start of the passage of the economic crime and corporate transparency bill through Parliament with a second reading in the House of Commons, we briefed a number of MPs on our recommendations.

As a result, R3 was mentioned by Kate Green MP (Labour) during the debate, who cited our concerns regarding the current automatic strike-off process, and our recommendations that this process should be reformed so that companies failing to comply with their obligations are instead placed into compulsory liquidation, and that the restoration of a company should be an administrative process.

Margaret Ferrier MP (independent, formerly of the SNP) also quoted directly from our briefing, noting that companies are often struck-off the register before they can be assessed for fraud, and asked: "Will the minister commit to putting such companies through an insolvency process to ensure that returns to creditors can be made?". She also raised our concerns around resourcing for the Companies House registrar's new power to proactively query misinformation on the register.

While it is great to have been mentioned this early in the bill's legislative journey, it is important to remember that the second reading stage of a bill is usually for MPs to discuss its principles, rather than delving into individual clauses or technical detail, so the work has only just started for us on this piece of legislation.

Personal insolvency proposals

This summer, the Government announced a call-for-evidence on its review of the personal insolvency framework. To best understand the profession's views, we ran a member-wide survey on the personal insolvency framework.

Thank you to all of those who responded to it. Your input was invaluable as we completed our response (submitted at the end of October), as was the support we received from the members of our Personal Insolvency Committee when the document was in its draft stages.

We'll keep you all informed of our next steps with this. The Government intends this review to help inform future policy recommendations, so watch this space.

R3 in demand

Despite the fact the news has been dominated by the change of government and the economic turbulence the UK is experiencing, R3 has continued to make the headlines.

Our CEO Caroline Sumner was interviewed on BBC Radio Four as part of a piece on personal insolvency options, while our comments on the quarterly and monthly England and Wales insolvency statistics featured in a number of national, regional and trade media stories, including in pieces in *The Times*, the *FT*, *Evening Standard*, *Bloomberg* and *City AM*.

Our analysis of local business trends continues to be popular with the regional media, appearing in stories in a range of publications, including the *Southern Daily Echo*, *Yorkshire Post* and *East Anglian Daily Times*.

Stuart McBride is senior communications manager and
Pim Ungphakorn is public affairs manager at R3

SPG Forum back in person

November saw R3's first face-to-face SPG Forum since 2019. **Thomas Chivers** and **Amelia Franklin** explores some of the key takeaways

Hosted at the Belfry Hotel & Resort in Birmingham, November's SPG Forum – the first since 2019 – brought together more than 200 delegates from across the UK, and explored a whole host of trending insolvency and restructuring topics, from firm regulation to cryptocurrency, with talks from prominent figures in and connected to the insolvency profession.

Keynote address: professor Geoff Thompson

One of the highlights of this year's forum was our keynote speaker: former five times world karate champion professor Geoff Thompson MBE FRSA DL, who was deputy chair of the Birmingham 2022 Commonwealth Games Board.

> **The presentation emphasised that you do not need to know the ins and outs of blockchain technology to realise crypto assets and distribute the proceeds to creditors**

Professor Thompson highlighted some of the achievements that came from the games, which brought together 180 nationalities and awarded 877 medals – including a Commonwealth Games record haul of 176 for team England.

This year's games had more paralympic sport than ever before at a Commonwealth Games, and more medal events for women than men for the first time ever at a major multi-sport event.

Turning to the games' legacy, professor Thompson outlined the benefits the £778 million investment in the region to stage the games will have for its residents and how it will support people who do not think exercise is for them to be more active.

Insights from the Insolvency Service

After the keynote speech, Justin Dionne and Paul Bannister from the Insolvency Service

delivered an update on key technical and policy issues affecting small practices.

Both speakers expressed their desire to engage with the profession on a range of issues and were especially keen to hear the voice of smaller practices on several areas.

Of particular importance were Paul Bannister's comments on the BEIS IP Regulation Consultation, where he recognised that the profession was unanimously against the idea of a single regulator being based within the Insolvency Service.

Looking forward, Paul noted that we can expect to see a government response to the IP regulation consultation by early next year.

Regulating firms

After the break, representatives from the FCA discussed their interaction with the insolvency and restructuring profession, in particular the shared aim in reducing harm in firm failure.

The 'phoenixing' of firms was highlighted as an area where the expertise of IPs could complement the work of the FCA. The representatives also wanted to make the audience aware of the new insolvency process, the PESAR, which can be entered into by payment and electronic money institutions.

Getting technical

R3's head of technical Ben Luxford delivered a thorough update on the work the technical team have been done over the last 11 months.

A key area of discussion was around work with HMRC, with the team and the R3 tax working group having raised a number of ongoing member frustrations including HMRC and the application of Crown set-off, tax clearance, payment of VAT Refunds without a clear reference or VAT number, issues setting up an EPA Scheme, VAT deregistration and dropbox cut off times.

Ben also gave an overview of the proposed reforms laid out in the economic crime and corporate transparency bill which seeks to strengthen the UK's corporate governance framework.

One key takeaway from this discussion was around IPs being liable for failure to comply with the provisions introduced by the bill as there is a real possibility that an administrator and/or liquidator may be at risk due to the lack of an express carve-out in the bill to exclude IPs from liability.

Working with HMRC

After a lunch, members were treated to a panel discussion on how HMRC and insolvency professionals work together to recover assets in cases of tax fraud with representatives from HMRC, the IPA and the profession.

The key takeaway from this was that information sharing could mutually reduce costs and maximise returns in cases of fraud, and during the Q&A there was a healthy exchange of views on how IPs can support HMRC in pursuing fraudsters without sacrificing commercial considerations.

Impact of Sequana

As well as addressing some of the key themes and cases from the past six months, the legal update session from Gatehouse Chambers explored the long-awaited *Sequana* Supreme Court judgement which has provided some clarity around director duties of company's facing financial difficulties.

The case argues that the directors' duties to prioritise the interests of creditors ought to apply where a company is at a real (as opposed to remote) risk of insolvency.

While this decision recognises that shareholders retain a valid economic interest prior to insolvency becoming inevitable, for creditors this ruling may feel concerning, as the trigger point for when their interests must be considered is pushed back, creating uncertainty around when they must become the priority.

Breaking down crypto

On the final day of the forum, delegates split into three breakout sessions, including a presentation on how to recover crypto as an asset class in an insolvency procedure.

The presentation emphasised that you do not need to know the ins and outs of blockchain technology to realise crypto assets and distribute the proceeds to creditors.

Another key point was the importance of moving fast to seize crypto assets using existing insolvency powers, as the faster you can take control of these assets, the easier it is to track them down and realise them.

Avoiding regulatory pitfalls

This year's SPG Forum closed with a session led by representatives from the ICAEW and the IPA.

In the session, delegates were encouraged to review the effectiveness of their anti-money laundering policies and procedures, including recording SAR considerations, staff training on suspicious activity, CDD steps and exit plans for non-compliance prior to appointment.

The discussion also covered SIP 11, which requires IPs to conduct annual reviews of their financial controls and tips to help IPs avoid regulatory penalties for breaches.

Over – for this year

Thanks to everyone who attended the 2022 SPG Forum – delegates, speakers and sponsors. We have already started work on next year's event and the bar has, once again, been set very high.

Thomas Chivers is public affairs and policy officer and
Amelia Franklin is communications officer at R3

Meet the Insolvency Service-R3 diversity and inclusion champions

Caroline Sumner introduces the first group of 19 Insolvency Service-R3 diversity and inclusion champions

In 2021, R3 and the Insolvency Service established a jointly led diversity and inclusion steering group with the aim of bringing together professionals within, and connected to, the insolvency and restructuring profession, to discuss, understand, and take action to address barriers to diversity and inclusion within the sector.

As part of those efforts, the steering group set out to recruit a number of enthusiastic individuals from across the profession to become diversity and inclusion champions, working alongside the steering group to share best practice, boost awareness, and inspire and lead change that will make a difference to employers and their talented teams.

We are proud to announce that 19 insolvency and restructuring professionals have been confirmed as the first group of diversity and inclusion champions.

Improving understanding

The champions, who come from a range of organisations across the profession, will be volunteering their time to share and identify best practice, start discussions about diversity and inclusion issues firms and individuals might be facing, and improve understanding among graduates and school leavers about the profession as an attractive career option.

Caroline Sumner is chief executive at R3 and co-chair of the R3 and the Insolvency Service diversity and inclusion steering group

Along with Frances Coulson, partner and head of insolvency & restructuring at Wedlake Bell, the champions are…

Rehan Ahmed

Rehan Ahmed is managing director at Quantuma, providing advice to distressed companies on their formal and informal options whilst implementing strategies to assist with restructuring, turnaround and insolvency. Rehan heads up Quantuma's Leeds office and is a licensed insolvency practitioner in both England and Wales, and the UAE.

Hannah Aynsley

Hannah Aynsley is a director at Interpath Advisory where she advises lenders, HMG and corporates in complex distressed situations on business and cash flow reviews, forecasting, sensitivity analysis, options analysis and contingency planning.

Charlotte Cooke

Charlotte Cooke is a barrister at South Square. She specialises in domestic and cross-border insolvency and restructuring. In recent years she has appeared in many high profile cases at all levels up to and including the Supreme Court.

David Ampaw

David is a partner at DLA Piper's global restructuring practice with 19-plus years' experience advising on cross-border restructuring and insolvency assignments. He is partner co-sponsor of his firm's UK race and ethnicity network and a director of PRIME, the leading social mobility charity focusing on legal work experience opportunities for under-represented groups.

Heather Childs-Potter

Heather Childs-Potter is a regulation assistant and the diversity and inclusion champion at the IPA. She is passionate about challenging traditional mindsets and encouraging new and diverse talent into the insolvency sector.

Fiona Coyle

Fiona Coyle is the head of case operations at the Accountant in Bankruptcy. She has responsibility for the debtor bankruptcy application process, in-house case management, the supervision of trustee bankruptcy administration, including trustee accounts and the bankruptcy restrictions order process.

Christina Fitzgerald

Christina Fitzgerald is the president of R3, the restructuring and insolvency trade body, and a partner at Edwin Coe LLP based in Lincoln's Inn in London. Christina is both a qualified solicitor and a qualified insolvency practitioner and specialises in both corporate and personal insolvency.

Megan Kemp

Megan Kemp joined Quantuma Business Advisory (Yorkshire) Limited (formerly Chamberlain & Co) as an insolvency administrator after graduating from the University of Leeds in 2020, having read mathematics and economics. Megan is passionate about raising awareness of and promoting the insolvency profession both on a local and national level.

Anthony Simmons

Anthony is a director at FRP Advisory in their restructuring advisory team, and specialises in working with management teams, lenders and investors in all aspects of advisory and executory restructuring work across a wide variety of sectors.

Kirran Gibson

Kirran Gibson is an insolvency administrator at Begbies Traynor in Leeds. He administers a wide-ranging portfolio of both corporate and personal insolvency matters from engagement through to conclusion. Outside of work, he is a keen amateur photographer.

Emma Mealiff

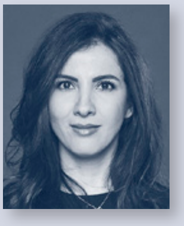
Emma Mealiff is an assistant manager in the London restructuring advisory team at FRP Advisory. She is excited to join and work with the other champions to help promote diversity and inclusion across the insolvency and restructuring profession.

Eleanor Temple

Eleanor Temple is a barrister at Kings Chambers. Eleanor is chair of R3 (Yorkshire Region), chair of the NECCBA, a member of R3 Council and sits regularly as a recorder and a deputy district judge on the North Eastern Circuit.

Luke Hoare

Luke Hoare is an associate director within UK restructuring at Grant Thornton. He specialises within insolvency and financial restructurings, with extensive experience of working with various industries and businesses to develop and execute appropriate solutions.



Roya Panahi

Roya Panahi is a senior associate in DLA Piper's restructuring team, specialising in cross-border insolvencies, having worked on a number of high profile cases. With first-hand experience, she is determined to achieve diversity within the profession.

Ali Walji

Ali Walji is an associate director of turnaround and restructuring strategy with EY-Parthenon and an active member of the Ethnic Minority Network for many years, looking to create a strong sense of belonging for all and address issues of entry and progression within the profession.

Asma Iqbal

Asma Iqbal is a multi award winning solicitor and partner in the litigation and insolvency department at Chadwick Lawrence Solicitors. Asma sits on a number of boards and assists organisations to promote diversity and inclusion to implement meaningful lasting change.

Stewart Perry

Stewart Perry is a restructuring and insolvency partner at Fieldfisher based in London. His clients are mostly directors, insolvency practitioners and secured creditors. He enjoys working with people to get the best outcome possible.

Michelle Westmerland

Michelle Westmerland is national practice manager at professional services business Leonard Curtis, operating across 21 locations in the UK and Channel Islands. She works towards excellence across the group, liaising with the team on quality, procedures and best practice.

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Advertisers' index

'It's that middle ground I worry about because those people are really what drive the profession'

If the economy continues into recession and insolvency rates rise, firms will find it difficult to cope with the number of new cases, forecasts Chris Laughton

The annual R3 President's Award – established to celebrate someone who has made an outstanding contribution to the insolvency and restructuring profession – was this year given to Chris Laughton who, after 40 years in the profession, has just stepped down as partner at Mercer & Hole to take a part time consultancy role with the firm.

Chris' long list of achievements include being president of Insol Europe in 2010-2011, making a significant contribution to the future shape of the profession through a vast number of published articles and his participation in live debates on issues as varied as European cross-border insolvency, IPs' fees and the importance of communication skills in insolvency practice. He was also the editor of Recovery magazine for 19 years (signing off his last edition in December 2019).

Giving him the award at R3's Business Lunch in October, R3 president Christina Fitzgerald described Chris "as a stalwart in the profession as long as I can remember, who has worked tirelessly and selflessly in shaping the modern, forward-looking profession that we see in front of us today". Rupert Darrington caught up with Chris to invite him to look back over his career, and share his thoughts about the challenges and opportunities facing insolvency professionals today.

Chris says he joined the profession 'by accident' after one of the partners in his firm at the time – Spicer and Pegler in the early 1980s – came into the room where he was working as a trainee accountant and said "boy, you're not doing anything, come with me". The partner then took him out to a receivership of the then importer of Kickers shoes, based in a warehouse off the Wandsworth Bridge Road in London. His job was to answer the phones and "deal with things in the warehouse".

He particularly remembers one day when a woman came in wanting her child's school shoes that had been sent in for repair. "Well, one of the features of the warehouse was a pile about 12 feet high of shoes that had been sent in for repair. Because the company had been failing, they had not been able to do anything with these repairs, and so I invited her to look through the pile and find little Johnny's shoes.

> **Chris believes one of the profession's biggest challenges is to better communicate the value that the IP brings to society**

"Of course, she found a pair of shoes that she said were little Johnny's, and whether they were or not I have no idea, but she went away as happy as she could have been in the circumstances. So that was my introduction, and I thought 'wow, this is so much more fun than ticking computer print outs on bank audits.' And so, I took it from there." He then transferred into the insolvency team and never looked back.

"One of the things that's always appealed to me about insolvency is that it's a combination of different things. You have to be numerate to be able to look at the finances; you need to be interested in the law, because there is a lot of detailed and very specialist law in insolvency; and you've got to have superb communication skills and be comfortable with people, because you're invariably dealing with people who are facing difficult circumstances."

Future regulation

For Chris, the two biggest issues in the profession at the moment are its future regulation and "having the right people at the right level to deal with the work that has to be done".

Of the proposal floated last year by the Government to bring the regulation of the profession in-house to the Insolvency Service, he did not hold back: "I just think it's madness, frankly. I don't want to be too critical of the Insolvency Service, because there are a lot of people there working hard to do the jobs they

Chris Laughton biography

Age: 64

Lives: South-East London

Education:

School: Christ's Hospital, 1969-1976

University: Durham, BSc in Chemistry, 1977-1980

Career:

1980-1992: Spicer & Pegler / Deloitte. After joining as a trainee, he qualified as a chartered accountant, and gained his insolvency licence in 1987

1994-1998: Binder Hamlyn / Arthur Andersen

1994-2004: Levy Gee (which later became Numerica after it listed)

2004-present: Mercer & Hole. On joining, he became their first insolvency partner in London. He stepped back into a part time consultant role in October 2022

2001-2019: Editor, *Recovery* magazine

2010-2011: President, Insol Europe,

2018-present: Member of the Academy of Experts

> **A perception that IPs' fees are a big problem has led to ridiculous requirements for detailed disclosure of fee-related information in every case, when in very many cases it just doesn't help anybody and costs time and money to pull together**

have been given to do, but it strikes me that the approach the service has been taking in insolvency regulation is a classic example of red tape regulation that could be done away with, if that's what government policy is.

"The idea of, at this time, throwing a lot of new red tape onto a small profession that is already highly regulated, and saying 'we, the Government, are now going to regulate you and we're going to do it like this' seems bananas. It does not fit with any of the current themes of how government seems to want to work, to the extent that one can discern that. And whilst there are problems with insolvency regulation, I think many of them could be solved much more simply. I think if there was greater engagement with people who really understand how the profession works, there are opportunities to come up with better solutions."

His other big worry is that government subsidies to businesses during the pandemic period led to reduced workloads for insolvency practitioners, which has contributed to a current shortage of people with the right skills in the middle of the profession. "It's that middle ground that I worry about because those people are really what drive the profession … You need to have skilled managers managing the cases."

Too busy

He forecasts that if the economy continues into recession and insolvency rates rise, firms will find it difficult to cope with the number of new cases. "There may be individual firms that find themselves resource constrained and, ultimately, [this] could lead to them saying 'no, we are too busy, we can't take this appointment'.

"I don't think the profession is going to cease to function in any way. But I do think that some firms will find it very difficult to deliver what they are trying to deliver. You won't have 'good people doing good things well', which is how the best insolvency practices work."

I asked him about the issue of IPs' fees – a topic on which he has commented on frequently over the years. Chris believes one of the profession's biggest challenges is to better communicate the value that the IP brings to society. "I think that in the main IPs charge fair fees for doing a proper job. I think there are a lot of concerns and issues about fees that could have been significantly helped by better and clearer communication. I don't think as a profession we are as good as we should be at explaining what we are doing, why we are doing it and how much it's cost."

Ridiculous requirements

"I think we have an unfortunate regulatory burden around fees and disclosure because regulators have reacted badly to concern expressed more broadly by the public, by creditors and by commentators. A perception that IPs' fees are a big problem has led to ridiculous requirements for detailed disclosure of fee-related information in every case, when in very many cases it just doesn't help anybody, and costs time and money to pull together."

Chris does not believe that the solution to the fees issue lies in IPs taking a great deal more of their fees on a fixed fee basis, or on a contingency basis.

"Everyone has to understand what all the interests are. Creditors will have had the benefit of dealing with the insolvent company, usually for some reasonable period, and know something about it. The insolvency practitioner typically doesn't. We are brought fresh into the situation. We have to find out what's going on. There is an awful lot of understanding that needs to go into there in the first place," he says.

Blindfolded

He compares the situation to being asked to build a house, but not knowing how big the house is going to be, what the land looks like or what other problems there may be. "I am blindfolded … It's part of what makes it difficult for [insolvency practitioners] always to be able to say, 'yeah, OK, we'll charge X', or 'we'll share in whatever comes out of this.'

> **Chris feels strongly that more UK-based insolvency professionals should consider what he says is 'a huge opportunity' provided by developing relationships with insolvency colleagues across Europe**

"I have no dispute at all with the general principle of aligning the interests of creditors with those of the insolvency practitioner, but when different creditors have divergent interests there cannot be universal alignment. And where we don't have the information or the knowledge to make a sensible judgement about what the outcome might be, it's something that we have to explain.

"We probably also have to explain how frequently we don't get paid for everything we do. It is pretty common in insolvency not to fully recover your recorded costs of doing a particular case."

As a parting shot, Chris feels strongly that more UK-based insolvency professionals should consider the 'huge opportunity' provided by developing relationships with insolvency colleagues across Europe "both in terms of servicing their own needs there, and in terms of helping Europeans to operate here".

After Brexit (which was in effect a 'no deal' Brexit for the insolvency profession), the issue of how to get an insolvency recognised in a European jurisdiction is a question Chris says that could face "any insolvency practitioner when they get a new appointment that has some assets or something going on in an EU member state".

Double return for IPs

Knowing someone in the relevant jurisdiction will be crucial "because it is all about using that member state's local law, if it can, to recognise your authority. There is no longer any form of automatic recognition".

Business coming back the other way offers a double return on the relationship, because "if you know people in those jurisdictions, they know who to come to when they have to get recognition in the UK".

Outside of insolvency, Chris is married with two daughters in their 20s, and he says his biggest personal driver for a long time has been his family. "As far as I am concerned my family comes first." Now that he is semi-retired, he also wants to travel a lot more. Asked about his other interests, he says he enjoys "relaxing at home", especially in the garden. "I am not a rabid horticulturalist, but I enjoy making the garden work for us." And, as a lapsed musician (organist and chorister), he is looking forward to "polishing up my keyboard skills".

Rupert Darrington is managing editor of *Recovery*

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