Autumn 2021
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RECOVERY

The new rescue environment

Pre-packs
New regulations mean an evaluation process on sales to connected parties – how do they work in practice?

Corporate Insolvency and Governance Act 2020
A slow start for the CIGA moratorium, the landlords' perspective on restructuring plans and a good look at *ipso facto* clauses in practice

Legal Update
Explore the Pension Schemes Act 2021 and what it means for the insolvency profession

Brexit
Lessons from Denmark may provide new insights into the UK's future outside of the EU Insolvency Regulation

An interview with… Caroline Sumner, CEO of R3
R3 is getting the UK Back to Business and strengthening ties that will benefit the profession

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

From the editor

The pingdemic is over and, as at the time of writing, most of the government restrictions and furlough are still due to come to an end on 30 September. Assuming that remains the case, whether you are in the tsunami school of thought or not, the demands for our services are likely to increase as the autumn progresses.

Following on from our last edition where we looked at the restructuring tools available to the industry, in this edition we look at the rescue environment in which those tools can be used, particularly under the Corporate Insolvency and Governance Act 2020 (CIGA).

Pre-packaged administrations will continue to be an option to consider for businesses in financial distress, but, for sales to connected parties, we now have the evaluation process. Stewart Perry looks at the pre-pack regulations on page 7, while Stuart Hopewell of the Pre-Pack Pool looks at the effect of those regulations on pre-packs on page 26.

Pension scheme deficits remain prevalent and the new powers for The Pensions Regulator introduced by the Pensions Schemes Act 2021 are relevant to our industry. Paul Sidle looks at the new legislation starting on page 8.

Georgia Quenby looks at the effect of CIGA on security enforcement (pages 16–18). With the recent use of the restructuring plan in the *Virgin Active* case to compromise landlords' claims, we get the BPF's view from Laurence Raeburn-Smith (page 21).

Restructuring plans are getting some traction, but the moratorium process has had a slow start. Geoff Carton-Kelly explores why and what the future might hold starting on page 22.

CIGA also introduced provisions attempting to limit the effect of *ipso facto* clauses. Neil Golding, Rachel Seeley, Benji Dymant and Matt Smith look at how that worked in practice in the Arcadia group administrations starting on page 24.

Remember Brexit?! Much has been written about the future of European restructurings in the UK post the EC regulations on insolvency proceedings, but this is not a new experience for our Danish friends, with Denmark never having been a party to the regulations in the first place. Preben Jakobsen writes about their experiences starting on page 28.

I am sure you will agree, interesting and varied content to take away your post-summer holiday blues!

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

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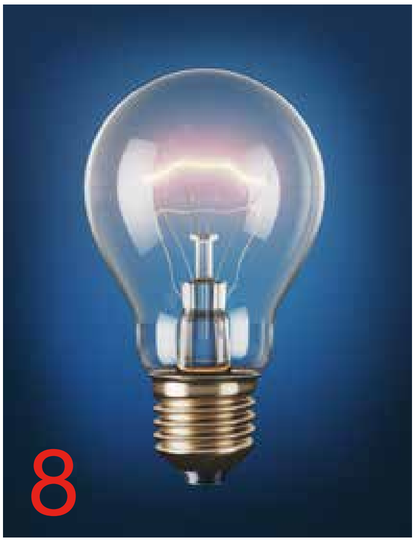

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President's column

Colin Haig explores engagement and virtual events as we move towards a critical time.

Well, folks, it's been another busy couple of months here, and another couple of months where the spotlight has been on the profession.

With an all-party parliamentary group report on regulation in the profession due in September, the government's consultation on the future of insolvency regulation expected before Christmas and a review of the personal insolvency framework also on the horizon, I don't think things will be any quieter anytime soon.

And as government support measures are ending, I think it would be fair to say the business rescue landscape will start to look very different to the last 18 months.

As we hopefully move firmly away from lockdowns and restrictions, and businesses turn to us for support, this is an opportunity for us to show how innovative we can be, to make use of the tools created by the Corporate Insolvency and Governance Act 2020 (CIGA) to help those businesses that are struggling and to help directors find a path to a more secure financial place.

> **"As we hopefully move firmly away from lockdowns and restrictions, and businesses turn to us for support, this is an opportunity for us to show how innovative we can be."**

Engaging and educating directors

Our Back to Business UK campaign continues. Since the last issue of *RECOVERY*, we've launched a new guide for directors and business owners that outlines the signs of financial distress and the options open to them to address them.

This guide is available from our dedicated Back to Business UK website, and has already been promoted by the Confederation of British Industry, the Institute of Directors (IoD) and the Federation of Small Businesses, as well as being mentioned in a number of stories in the regional and specialist press.

We also partnered with the IoD and UK Finance to run a breakfast briefing that looked at how to deal with the challenges of borrowing indebtedness amongst SMEs, and provided company directors with another chance to hear first-hand about how the profession can support them.

More is planned for the Back to Business UK campaign, and I'd like to take this opportunity once again to thank Alison Goldthorp, Mark Phillips QC, Mark Shaw, and Paul Zalkin – and indeed the R3 team – for their continued support for this project.

Engaging with government and opposition

Our press, policy and public affairs team have, as ever, been busy ensuring the profession has a voice on key issues and policies.

They'll provide a full update on their activities in their column, but there are two key activities I'd like to make you aware of.

The first is the letter we received from the business secretary, Kwasi Kwarteng MP, at the end of June in reply to one we wrote jointly with the IoD in which we set out the importance of HMRC taking a more active role in supporting viable restructuring proposals.

In his letter, the business secretary made a number of hugely encouraging points about HMRC's future engagement with the profession, something which we hope will be very positive given the potential volume of restructuring work in the future.

It's great to see someone at the heart of government engaging with R3 and the profession, and that they understand how our recommendations could help the economic recovery.

The second big win for us on the public affairs front came at the second reading of the rating (coronavirus) and directors disqualification (dissolved companies) bill in June when the profession's concerns were raised by two shadow ministers – including a direct mention from the shadow insolvency minister, Seema Malhotra MP.

Following this, Duncan Swift gave evidence at the legislation's public bill committee session on 8 July – which gives us another example of lawmakers listening to and seeking the profession's expertise, and of R3 giving the profession a voice during the legislative process.

A variety of virtual events

Despite the pandemic-related restrictions, our events team has been as busy as ever. We've held a variety of webinars (including another two in our 'Magnificent 7' series) and delivered our first ever Scottish conference, the R3 Scotland Forum.

It was great to see so many familiar and new faces logging in and engaging with the Forum sessions – and to hear the Scottish business minister reference our Value of the Profession report in his address.

> **"It's great to see someone at the heart of government engaging with R3 and the profession, and that they understand how our recommendations could help the economic recovery."**

The next major R3 conference is the SPG Forum, which will take place in November. It'll be held virtually again this year, and I'm looking forward to hearing the latest updates from HMRC and the FCA, and hearing about the future of the economy – and attending the social events.

Government recommendations permitting, we'll be looking to start in-person events again from 8 October, when we'll be hosting our 'Getting Back to Business' lunch, so keep an eye on your inboxes.

Building for the future

Corporate membership has brought in a vast number of new members, many of whom have been new professionals. These people are the future of the profession, and of R3, so I would urge any of them that are interested to get involved in their local New Professionals Committee, and help us shape what we do and how we do it.

Another project I'm determined to progress is the development of our R3 faculties, so the Association continues to represent everyone involved in the modern restructuring and insolvency world, and keeps evolving with it.

As usual, lots is planned for this year, as well as between now and the next issue. Till then, stay safe folks – and make sure you get tested regularly.

COLIN HAIG
is the president of R3 and head of restructuring at Azets.

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Chambers and Partners have released their rankings in their Litigation Support Guide for 2021, recognising that Manolete has, "a superb and specialist team with great experience and expertise in insolvency litigation. Their size, financial backing and reputation mean that introducing them to a case will often bring settlement or success that might not otherwise be achievable".

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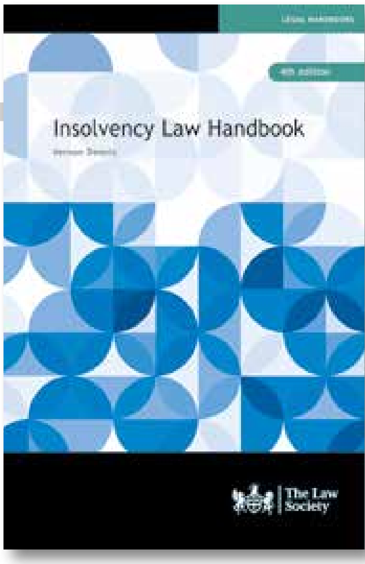

Insolvency Law Handbook

Edition Fourth **Author** Vernon Dennis **Publisher** The Law Society
ISBN 978 1 78446 160 7 **Price** £100

The *Insolvency Law Handbook* is now 16 years old and in its fourth edition. It is aimed at the busy practitioner who requires both a practical introduction to and up-to-date guidance about the complicated world of restructuring and insolvency. The handbook is especially welcome in the midst of the coronavirus pandemic with regard to the economic difficulties that the UK economy is facing.

The handbook is the just the right size at 431 pages, and is divided into three parts and 14 chapters. Part I deals with initial considerations such as statutory demands, which insolvency process to use (such as individual and company voluntary arrangements), bankruptcy, liquidation, administration and receivership. It is practical in that it separates advice into four self-contained chapters, such as what to give clients when they are corporate and individual debtors, and what to give them when they are creditors. This allows the busy practitioner the opportunity to examine the initial legal position from the two opposing viewpoints of debtors and creditors. One good example of this is how voluntary arrangements can be challenged by creditors on the grounds of irregularity or unfair prejudice.

Part II deals with the different types of insolvency processes set out above and their effect. One good example of this is the statutory moratorium, which applies in an administration, prohibiting third parties from commencing legal proceedings or enforcing security without the consent of administrators or the permission of the court; and the factors taken into account by the court if a party seeks such permission. Part II also helpfully sets out the role and function of the office-holder in each type of insolvency process.

“The handbook is especially welcome in the midst of the coronavirus pandemic with regard to the economic difficulties that the UK economy is facing.”

Part III deals with the considerations that apply to debtors and creditors during these corporate and personal insolvency processes. Once again, the handbook is helpful in that it separates into four self-contained chapters the legal position of debtors and creditors as they relate to personal and corporate insolvencies. As regards debtors, the handbook deals with the usual antecedent transactions such as transactions at an undervalue, preferences and transactions defrauding creditors. In the chapter on individual debtors, the handbook also deals with bankruptcy restrictions, orders/undertakings, pensions, the interplay with matrimonial proceedings and annulment. In the chapter on corporate debtors, it then deals with the disqualification of directors. Turning then to creditors, the handbook deals with the quantification of claims, retention of title, those creditors lucky enough to be secured, TUPE and the position of landlords.

The handbook does not stop there but conveniently deals with the recent dramatic changes to insolvency law rushed through by the government in June 2020 under the Corporate Insolvency and Governance Act 2020 (better known as CIGA). In particular:

- The new moratorium procedure to provide a breathing space for eligible companies to seek the rescue of the company as a going concern.
- The new form of restructuring plan which allows the court to override a dissentient class of creditors and order a cross-class cram down.
- The new prohibition on supplier insolvency termination clauses (the so-called *ipso facto* clauses).
- The temporary prohibition on statutory demands and the issue of winding-up petitions except in those limited circumstances where the ‘Covid-19 test’ can be satisfied.
- The temporary prohibition on landlords’ right to forfeit and the use of commercial rent arrears recovery.
- The temporary suspension of wrongful trading.

“The handbook’s real strength is its easy-to-read and concise format. It is not written to be an academic tome but is intended for the busy practitioner who wants to grasp issues quickly.”

Finally, the handbook briefly deals with the impact of Brexit, recognition of insolvency processes here and abroad, and the Administration (Restrictions on Disposal Etc to Connected Persons) Regulations 2021. Since April this year these new regulations have imposed restrictions on the ability of administrators to sell businesses to connected parties either as pre-packs or within the first eight weeks of administration without the approval of creditors or an independent written report from a so-called ‘evaluator’.

The handbook’s real strength is its easy-to-read and concise format. It is not written to be an academic tome but is intended for the busy practitioner who wants to grasp issues quickly. The handbook will therefore be a welcome addition to the office library.

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▶ The opinions expressed in this article are those of the author alone, and not R3 or Fieldfisher LLP.

New pre-pack regulations – the perfect embodiment of 2020/2021

Stewart Perry opines on the government's latest attempt to regulate pre-packs.

On 30 April 2021, the Administration (Restriction on Disposal Etc to Connected Persons) Regulations 2021 (regulations) came in to force. They are misguided. The regulations just add to the costs and timescales of any sale to the detriment of creditors and for no benefit.

What do the regulations say?

If an administrator wishes to make a 'substantial disposal', the administrator must first seek the approval of the company's creditors or obtain a qualifying report (report).

If the creditor approval route is followed, a decision from the company's creditors is needed at the same time as seeking approval of the proposals, even if there would otherwise be none needed (for instance a para 52(i)(b) sch B1 statement has been made). Of course, using this route also means a pre-pack will be impossible given the timescales involved with calling a meeting.

If the more likely report route is used, the administrator needs to have considered and be satisfied that the report meets the requirements set out in the regulations. The report is obtained by the purchaser; is prepared by an unregulated (but insured) 'evaluator'; and contains a statement that the evaluator is either satisfied (or not) that 'the consideration to be provided for the relevant property and the grounds for the substantial disposal are reasonable in the circumstances'. Regardless of the outcome of the evaluator's deliberations, ie, even if the evaluator is 'not satisfied', the administrator can make the substantial disposal.

> **"The regulations just add to the costs and timescales of any sale to the detriment of creditors and for no benefit."**

Why were they implemented?

In an article in *The Times* on 3 July 2020, it was written: *'The pre-pack, a contentious fast-track insolvency process that was likened during the last financial crisis to sustaining "Frankenstein's monsters" and risked turning Britain into the "bankruptcy brothel of the world", has returned.'*

When discussing the draft legislation, Lord Callanan, minister for corporate responsibility, said that the economic downturn made it *'more important now than ever that people have confidence in the insolvency process. This new law will ensure all sales to connected parties are properly scrutinised, protecting the interests of creditors and the general public, as well as the distressed company.'*

While an understandable aim, do these measures help in achieving that? I do not believe they will. In particular:

1. The regulations seem to focus solely on the price and grounds for the substantial disposal (the grounds presumably being that the company is in administration). If the purpose is to ensure someone insured is culpable if the assets are sold at an undervalue, that already exists, as the IP can be sued even if the sale takes place on day one or sometime after the first eight weeks.
2. It is difficult to see how a purchaser can provide the evaluator with sufficient information to assess the value being paid and the process. Only the IP can provide this. It also leads to the possibility that the evaluator states his belief the purchaser is overpaying, leading to a price chip.
3. The evaluator is unregulated and only needs to be, in the administrator's view, sufficiently experienced. It is difficult to see how that could not lead to cronyism, which will not help 'people have confidence in the insolvency process'.
4. The only objectively verifiable requirement is to hold sufficient insurance in respect of 'potential liabilities to the administrator, the connected person, creditors or any other person, as a result of, or arising from, any matter' stated by the evaluator in its report. This implies an ability for the evaluator to be liable for the contents of the report, but given the administrator can sell regardless of the report's conclusion, proving loss would appear very difficult.
5. Depending on the fee for the report, smaller jobs may simply become 'solvent' sales, followed by a liquidation, with the unfunded liquidator being asked to assess whether the value paid was sufficient.

What could have happened instead?

It is always easy to complain and more difficult to suggest better alternatives. If in fact the concern is that administrators may have sold at an undervalue, this could have been dealt with by giving guidance to creditors. A mandatory one-page handout could have been provided to all creditors in administration following a sale that simply stated the administrator's potential liability for selling at an undervalue. Additional protection could have been sought by obliging the IP to obtain a valuation from an insured valuer. Neither of these two requirements would appear to add significantly in cost or time to what already happens, in most instances, in any event.

A further protection could be that in each administration where a pre-pack or sale to a connected party occurred, it must exit into liquidation. It would then be possible for the subsequently appointed liquidator to consider the sale and whether or not it was undertaken appropriately. Some may suggest that all this would do is enable administrators to pass liquidation jobs to friends in other firms on the basis they would get some liquidation jobs back. This may be the case, but is still better than providing jobs to 'evaluators' who are not regulated at all. And of course, if sufficient creditors were unhappy, they could force the replacement of the proposed liquidator.

Conclusion

It is not clear what the regulations were hoping to achieve, but it is difficult to see how they can be fit for purpose. They add process and cost to benefit no one and better alternatives are available. However, as has been evident throughout the pandemic, the government is trying to battle through the present situation but in this instance at least with good intentions. □

THE REGULATIONS IN SHORT

The regulations affect all 'substantial disposals', meaning:

(1) a disposal, hiring out or sale of a substantial part of the company's business or assets;

(2) to one or more connected persons (as defined in para 60(A)(3) sch B1); and

(3) during the period of eight weeks beginning with the day on which the company enters administration.

STEWART PERRY is a partner in Fieldfisher's insolvency and restructuring practice.

New power to TPR: the Pension Schemes Act 2021

Paul Sidle examines the Pension Schemes Act 2021, its new offences and the practical points (and potential pitfalls) for IPs.

Among the package of measures aimed at strengthening the powers of The Pensions Regulator (TPR), the Pension Schemes Act 2021 introduces two new criminal offences in relation to defined benefit (DB) pension schemes (see box on page 10). The new offences are intended to address the public concern around the small minority of potential abuses and widely publicised cases dealing with pension issues.

TPR has (at the time of writing) issued draft guidance on when it would look to investigate and prosecute for these offences. It makes clear that the new offences are aimed at enabling TPR to tackle the same sort of behaviour already within the scope of its contribution notice powers. TPR does not therefore expect a change to the kind of behaviour it investigates, but rather notes that the new offences increase the options available to it.

In general, while concerns remain given the drafting of the legislation, TPR's draft guidance is useful in explaining the sort of egregious and reckless conduct that it would look to investigate and prosecute under its new criminal powers. The draft guidance is broadly helpful in identifying how TPR will interpret a person's intention or knowledge. Importantly, it also confirms that the 'no reasonable excuse' element of the offences is something that TPR will itself need to disprove.

However, while the Pension Schemes Act is not expected to drive a fundamental change in behaviour, it does require careful consideration by stakeholders. There are several elements of particular relevance to IPs that we take a look at below.

Giving advice

While the proposed criminal offences are based on existing moral hazard powers to issue contribution notices, the proposed offences are not restricted to connected parties. Instead, they apply much more widely to 'any person'. This could catch advisers and other professionals involved in a restructuring or insolvency.

However, it is important to note that while the draft guidance rightly acknowledges that what amounts to a reasonable excuse will be fact specific, it also makes clear that:

'in most instances, a professional person, acting in accordance with their professional duties, conduct, obligations and ethical standards applicable to the type of the advice being given, is likely to have a reasonable excuse. The applicable duties, obligations and standards will ordinarily depend on the professional discipline and oversight by the appropriate regulatory body.'

While this is draft guidance only, it indicates where TPR will be focusing attention – and where it will not.

There are three key issues for IPs here:

- The Pension Schemes Act carves out from the scope of persons subject to investigation and prosecution under s58A and s58B someone who is appointed as, and acting within their functions as, an 'insolvency practitioner'. This is defined by reference to s388 of the Insolvency Act. As such, a non-administrative receiver will not be covered by this exemption. There is no carve-out for advice given by a person in any other capacity (eg by the practitioner's firm) nor for any other advisers (legal or financial).
- Advice provided by IPs *before* their formal appointment will not fall within scope of the carve-out as it only applies to advice given in the capacity of an IP. The scope of the potential advice that may be given pre-appointment is clearly wide. However, it is difficult to see why TPR would look to investigate pre-appointment advice given by a person qualified to act as an IP where that advice was appropriately given before the company entered a formal insolvency procedure but with a view to it doing so.
- Where a professional adviser has acted in accordance with their duties, conduct, obligations and applicable ethical standards, they would be unlikely to meet the requirements as to intention/knowledge for the criminal offences or not to have a reasonable excuse. Of course, advice that turns out subsequently to have been negligent (or worse – knowingly misleading) could be treated differently and may lead to investigation by TPR, so it remains important to ensure thorough processes are in place such that advice given meets the appropriate standards.

> **"TPR does not therefore expect a change to the kind of behaviour it investigates, but rather notes that the new offences increase the options available to it."**

Raising administration funding

The introduction of the new criminal offences has raised concerns that they could make it harder for companies with DB pension schemes to raise liquidity at times of distress, with lenders unwilling to risk potential criminal liability. There are several uncertainties with the way in which the legislation has been drafted and, while TPR's draft guidance provides some comfort, there are residual concerns that it does not go far enough.

For example, many have criticised TPR's draft guidance for not providing sufficient clarity for lenders on the extent to which TPR will look to second guess a lender's assessment as to whether there was a viable alternative with a less detrimental impact than that occasioned by the action taken by the lender (eg to call in a loan and enforce, rather than agree a waiver). This appears to involve hypothetical counter-factual valuations and/or assessments of the lender's best commercial interests – and whether they were reasonable – which it would be inappropriate for TPR to make. Such concerns will be further heightened where lenders are part of a syndicate with varying interests and risk appetites.

Time will tell what, if any, impact the new Pension Schemes Act regime might have on lending. But it seems clear that lender risk appetite could be a key focal point when, for example, an administrator of a company with a DB pension scheme is looking to raise administration funding – such as a short-term liquidity facility to meet the immediate cash needs of the company in administration. Some lenders may be more cautious lending into a company in administration with a DB pension scheme – eg they may have concerns about possible liability if they subsequently assessed that they should pull the facility.

While it will be for lenders' legal advisers to help address concerns as to potential liability, and the extent of any caution is largely beyond the control of IPs, such unease will be something that administrators need to factor into the insolvency planning stage – particularly if a delay in the ability to obtain administration funding could have consequences for any potential strategy.

RAAs, CVAs and restructuring plans

The draft guidance is silent on the use of regulated apportionment arrangements (RAAs) or CVAs. While it would seem from the wide drafting of the Pension Schemes Act that a person agreeing a RAA or CVA (even with TPR approval) could satisfy the intention/knowledge element of the offences, TPR would likely struggle to bring a criminal proceeding in respect of a RAA for which it has previously given clearance approval (which is a constituent element of agreeing a RAA) as that very clearly should constitute a 'reasonable excuse'.

TPR's draft guidance notes that:

'proposing or acting in accordance with a scheme authorised by a court under part 26A of the Corporate Insolvency and Governance Act 2020 could satisfy the "act" and "intention" elements of either or both of these offences, but we are likely to consider the fact of the court sanction a reasonable excuse.'

As shown by the recent sanctioned plan of *Amicus Finance*, there may be situations where a company in administration might look to propose a part 26A restructuring plan.

However, even so, it seems unlikely that a company in administration would look to deal with its DB pension scheme through use of a part 26A restructuring plan and its cross-class cram down power (which could, in theory, eg impose a compromise of any s75 debt on a dissenting class made up of the Pension Protection Fund (PPF) exercising the scheme trustee's vote). In particular, it is unclear whether a part 26A restructuring plan could render the pension scheme ineligible for PPF entry. There is an exclusion from eligibility if the trustees enter into a 'legally enforceable agreement' reducing the pension debt. While a part 26 scheme of arrangement is expressly excluded from being such an agreement, a part 26A restructuring plan is not (ie it might constitute such an agreement rendering the pension scheme ineligible). A result leaving pension creditors seemingly worse off in a plan than they would be in the 'relevant alternative' (which will be an assessment for the court, ultimately, to make) would fail to satisfy the cross-class cram down conditions and, in any event, would likely be a relevant factor against sanction in the exercise of the court's residual discretion.

Insolvency sales

The draft guidance notes that: 'the stripping of assets from an employer, which resulted in substantial weakening of the support for the scheme' or 'taking steps to bring about the unnecessary insolvency of the scheme employer with the intention of buying the employer's business without the scheme' are the types of behaviour that might be appropriate for TPR to prosecute.

Such comments should not be interpreted generally as bringing within TPR's sights ordinary insolvency sale transactions (pre-pack or otherwise). They also should be considered in the context of the government's statement in its 'Pre-pack sales in administration report' (dated 8 October 2020) that pre-pack sales are 'a valuable part of the insolvency landscape' and 'can be a useful tool to rescue businesses, saving jobs and preserving value'. Pre-packs and insolvency sales are a key part of the UK restructuring and insolvency framework and are already subject to scrutiny and regulation (with the regulations aimed at sales to connected persons having come into force earlier this year).

However, TPR's draft guidance clearly does raise concerns for insolvency sale transactions – particularly when read alongside TPR's Regulatory Intervention Report in *Silentnight*. That report and TPR's statements in its draft guidance indicate that TPR may look carefully at sales that are part of a 'loan to own' strategy where the fulcrum debt has been acquired at a distressed discount. Indeed, the draft guidance suggests that TPR may even take its own view on whether a lender's assessment to call a default – rather than grant a waiver – was a reasonable one. Such an approach would be unhelpful, and it is hoped that greater clarity on the issue of insolvency sales and pre-packs will be provided in the final guidance. It should only be in exceptional circumstances – such as where the business has been sold at a clear undervalue – that such transactions should attract TPR's attention and result in investigation and prosecution.

OFFENCE 1 Avoidance of employer debt (s58A)

Any person commits a criminal offence if they:

- act or engage in a course of conduct that prevents the recovery of a s75 debt, prevents a s75 debt becoming due, compromises or settles a s75 debt, or reduces the amount of a s75 debt that would otherwise become due; and
- intend the act or course of conduct to have such an effect.

OFFENCE 2 Conduct putting at risk accrued scheme benefits (s58B)

Any person commits a criminal offence if they:

- act or engage in a course of conduct that detrimentally affects in a material way the likelihood of accrued scheme benefits being received; and
- knew or ought to have known that the act or course of conduct would have that effect.

For both offences, TPR must show there is no 'reasonable excuse' for the offence. Potential sanction involves an unlimited fine or imprisonment for up to seven years.

> "TPR may look carefully at sales that are part of a 'loan to own' strategy where the fulcrum debt has been acquired at a distressed discount."

Practical tips and action required

So, what can you do as an IP to protect yourself? Your checklist should include the following points – in reality, these would likely already be established best practice:

- Ensure that any pre-insolvency planning takes into account the potential for additional costs and delays, as stakeholders look to familiarise themselves with the new regime and obtain appropriate advice as to their risks as a result of, eg lender reticence or requests for increased protection when providing administration funding or additional due diligence investigations from buyers in an insolvency sale etc.
- Retain advice along with any relevant minutes of decisions – TPR states in the draft guidance that it will only consider the circumstances at the time and not with the benefit of hindsight based on knowledge of what has happened since. While that needs to be treated with some caution, having a contemporaneous paper chain will be highly relevant in establishing your intention or knowledge at the time of a transaction. Where advice has been received, that will go a long way to building your case in having a reasonable excuse.
- Record your reasons for any course of action taken (eg why you decided to carry out a pre-pack sale).
- Record consideration of any alternative courses of action and why they were not pursued.
- When carrying out a pre-pack sale, ensure that due process is carefully followed and relevant parties (particularly management) have the benefit of relevant advice. Also, ensure that you consult appropriately with TPR and the PPF on the sale – such action will already form part of the landscape in an insolvency sale given an administrator's duties, SIP16, the new connected persons' regulations and the PPF's existing 2018 guidance note on pre-packs, but TPR's investigation and prosecution powers clearly underscore the importance of proper consultation.
- Consider whether, on the facts, an application for clearance might be appropriate (noting that in some restructurings, clearance may be a constituent part of getting the deal through, such as reaching a RAA). While s42 of the Pensions Act 2004 only regulates a clearance statement in relation to TPR's contribution notice powers and does not apply to the offences under s58A and s58B of the Pension Schemes Act, it would seem inappropriate for TPR to investigate and prosecute conduct for which it has previously given a clearance statement (unless, eg, TPR had been deliberately misled). Of course, whether to seek clearance will always need to be a decision taken with advice and in light of a fully informed view of the likely impact of the transaction. Getting clearance from TPR may often come at a price.

The Pension Schemes Act contains much uncertainty and TPR's draft guidance – while helpful – could be clearer. However, like any new legislation, it will take time for stakeholders to get comfortable with its navigation. By taking appropriate advice and putting in place thorough compliance and decision-making processes, it is hoped IPs will be able to act effectively in respect of a company with a DB pension scheme. □

PAUL SIDLE is counsel PSL in the restructuring and insolvency group at Linklaters.

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Q How do you satisfy the voting requirements for a scheme of arrangement pursuant to part 26 of the Companies Act 2006 where the company has only one registered shareholder, which itself is a nominee holding the shares on behalf of various beneficial owners?

A A scheme of arrangement requires two tests to be satisfied in relation to the votes of each class:

(1) a majority in number; and
(2) 75% by value.

Where the shareholder is a nominee holding shares on behalf of beneficial owners with opposing views, the conventional approach is that the shareholder provides one vote for and one vote against (which was affirmed in the case of *Re Equitable Life Assurance*). However, this approach will lead to a stalemate where the nominee is the only registered shareholder. As such, a practice has arisen of converting some dematerialised interests into certificated shares, which creates an enlarged head count for the purpose of the numerosity test without affecting the value test.

This approach was considered by the court in the recent *Cardtronics* scheme of arrangement. The company had over 45 million shares traded on the NASDAQ in the form of American depositary receipts (ADRs) with one registered holder (which held the shares on behalf of the ultimate beneficial owners). Two directors of the company each held one share (having converted ADRs into a certified form). Therefore, in total, there were three registered shareholders (with each shareholder having identical rights).

The intention was that if the underlying beneficial owners of the shares approved the scheme then the voting would be three in favour and none against. If some of the beneficial owners voted against the scheme then the result would be three in favour and one against (with the nominee shareholder casting one vote in favour and one vote against the scheme). As such, in each scenario, the numerosity test would be satisfied.

When considering whether to sanction the *Cardtronics* scheme, the court was advised of the value of the underlying interests (both for and against the scheme). The court considered the availability of the certificated shares to all ADR holders, whether the additional certificated shares issued to the directors had a disproportionate influence on the vote and whether the court would agree to rely on the outcome of the shareholders' meeting. The court approved the approach taken in this case.

Another solution in this situation is for the nominee to cast one vote according to the wishes of the majority of the beneficial owners, which was approved in *Re GW Pharmaceuticals Plc*.

> "A practice has arisen of converting some dematerialised interests into certificated shares, which creates an enlarged head count for the purpose of the numerosity test."

Q Can a director of a dissolved company be subject to disqualification proceedings?

A Section 6 of the Company Directors Disqualification Act 1986 (CDDA) currently relates to the duty of the court to disqualify directors of insolvent companies only.

In order for the Insolvency Service to pursue directors of dissolved companies in disqualification proceedings, the company in which such director held office must first be restored to the register.

Restoration itself can be a timely and costly process. Furthermore, once restored, the Insolvency Service must use powers under s447 of the Companies Act 1985 in order to obtain information and documents from the company so that they can investigate director conduct.

Only then can proceedings be commenced against the delinquent director for disqualification under s8 CDDA, on public interest grounds.

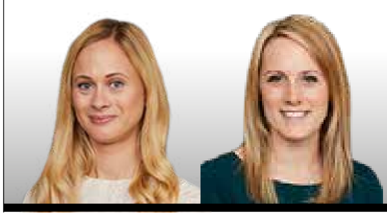
However, under the new draft rating (coronavirus) and directors disqualification (dissolved companies) bill, the CDDA is to be amended such that s6 will be expanded in scope to include directors of dissolved companies. It will become possible for proceedings to be brought against a director in a court which at the time the company was dissolved had jurisdiction to wind it up but, except with leave of the court, only for a period of three years after the company was dissolved.

The draft bill extends to persons who have been a director of a company which has at any time been dissolved without becoming insolvent (whether while the person was a director or subsequently). The draft bill also provides a power to investigate the conduct and actions of directors of dissolved companies through a requirement for information and documents.

Whilst the bill has not yet reached a third reading in the House of Commons, and is therefore some way off receiving royal assent (at the time of writing), if it were to come into force, it may see a raft of disqualification proceedings brought against directors who have dissolved companies in a bid to avoid liabilities (such as bounce back loans). Such directors may find themselves subject to compensatory orders under the CDDA.

Of note is the retrospective effect of the bill, meaning directors of companies which have been dissolved prior to the bill receiving royal assent could find themselves subject to disqualification proceedings. ◻

> "Directors of companies which have been dissolved prior to the bill receiving royal assent could find themselves subject to disqualification proceedings."



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The latest insolvency update from **Celine Honey** and **Nicola Allsop**.

CORPORATE INSOLVENCY

Mitchell* v. *Al Jaber

The Court of Appeal in *Mitchell* v. *Al Jaber* [2021] EWCA Civ 1190 reversed the decision of Joanna Smith J [2021] EWHC 912 (Ch) in holding that statements made by an examinee under s236 of the Insolvency Act 1986 (IA86) enjoyed protection of immunity from suit.

Joanna Smith J had decided that immunity from suit did not apply because s236 examinations did not constitute judicial proceedings in which witnesses gave evidence; they were an 'investigative process' to assist the liquidator in carrying out their statutory functions and, when contrasted with an ordinary civil trial, there were simply too many important characteristics missing to regard them as judicial proceedings. In this respect, the judge relied heavily on Lord Diplock's comments in *Trapp* v. *Mackie* [1979] 1 WLR 377.

The Court of Appeal found that the judge had approached the matter 'too narrowly' without paying due regard to the wider (judicial) context in which such examinations take place. A s236 examination was not to be seen as a standalone procedure considered against the *Trapp* v. *Mackie* indicia, but was to be viewed in the context of 'the wider compulsory winding-up proceedings in which it arises, which are commenced by an order of the court and which it is intended to facilitate' [81]. Additionally, it would be a rather curious position if both the judge and the liquidator enjoyed immunity from suit for statements made in such examinations, while the examinee were to be left exposed.

Considering all those factors, the Court of Appeal determined that s236 examinations were the kind of judicial proceedings to which all participants were entitled to immunity. This conclusion was not undermined by the fact that such examinations did not bear all of the hallmarks of a civil trial or meet all of the indicia set out in *Trapp* v. *Mackie*.

The court were fortified in their conclusion by relevant policy considerations. It was said that affording immunity to statements made by the examinee might encourage frankness, thereby facilitating the liquidator in obtaining the information necessary to progress the winding up. Further, although the s236 examination could not itself give rise to action, the immunity would not protect an examinee from an action based on non-disclosure in breach of those duties to provide information.

The judgment provides important clarification on the protection afforded to statements made in a s236 examination. However, it may be that this ruling is of limited effect in practice given a liquidator's ability to rely on other provisions, such as ss235, 237(1) and 433 IA86.

> **"The Court of Appeal determined that s236 examinations were the kind of judicial proceedings to which all participants were entitled to immunity."**

***Lakatamia Shipping Company Limited* v. *Hsin Chi Su* [2021] EWHC 1866 (Ch)**

Where a debtor's centre of main interests is not in England and Wales, and s263I(1)(b) is not satisfied, the insolvency adjudicator may make a bankruptcy order on a debtor's position if (as provided for in s263I(2)(b) IA86):

'(a) the debtor is domiciled in England and Wales, or (b) at any time in the period of three years ending with the day on which the application is made to the adjudicator, the debtor- (i) has been ordinarily resident, or has had a place of residence, in England and Wales, or (ii) has carried on business in England and Wales.'

The appeal in *Lakatamia* v. *Su* concerned the proper interpretation of the phrase 'has had a place of residence.'

On 8 July 2020, a bankruptcy order was made by the insolvency adjudicator on Mr Su's application. Lakatamia applied to annul that order on the basis that the insolvency adjudicator lacked jurisdiction.

Mr Su had been continuously present in England and Wales since 10 January 2019 but such presence was involuntary, as a result of various court orders restraining him from leaving and committal orders leading to his imprisonment in HMP Pentonville from March 2019 to April 2020.

At first instance, ICC judge Passfield held that Mr Su was in England and Wales involuntarily and was not therefore ordinarily resident in the jurisdiction, but that he had a place of residence in England and Wales during the relevant period.

Bacon J reversed that decision. In doing so, she rejected Mr Su's argument that 'has had a place of residence' should be interpreted to mean no more than an address that was capable of being described as a place of residence of someone, whether or not the residence was of the debtor. She stated it was relevant to ask whether the place was, for the debtor, a settled or usual place of abode or home, taking into account the statement of Lewison J approved by the Court of Appeal in *Grace* v. *HMRC* [2009] EWCA Civ 1082 that residence 'connotes some degree of permanence, some degree of continuity or some expectation of continuity'.

Mr Su's presence at various addresses was, in respect of each of them, temporary and transient with no degree of permanence or expectation of continuity, and, therefore he could not be described as having had a place of residence.

The decision provides welcome clarification and is likely to apply with equal force to the court's jurisdiction to make a bankruptcy order on a creditor's petition pursuant to s265(2)(b)(i) IA86.

> **"The appeal in *Lakatamia* v. *Su* concerned the proper interpretation of the phrase 'has had a place of residence.'"**

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CELINE HONEY is a barrister at Quadrant Chambers.

Back to the future – old legal techniques for modern transactions

Georgia Quenby looks to the past to answer modern questions about the capability of English law to handle security in different forms under the latest insolvency and finance legislation.

This article examines firstly the different outcomes between a receivables purchase arrangement and revolving credit facilities with security over receivables in the context of the Corporate Insolvency and Governance Act 2020 (CIGA), and secondly the use of more traditional forms of security (pledges and chattel mortgages) instead of, or alongside, floating charges, to structure financings in the context both of the CIGA and the Finance Act 2020.

Sweeping changes

As we know, the CIGA has been widely heralded as introducing the most sweeping changes to UK insolvency law for a generation (see *RECOVERY Autumn 2020, Corporate insolvency: bringing balance to the force*, page 9). In addition, the Finance Act 2020 reintroduced Crown preference in respect of certain tax liabilities where the company in effect collects taxes on behalf of the UK government (such as PAYE and VAT), which has created potentially very large liabilities to HMRC which will now rank ahead of recoveries to floating charge creditors in any insolvency after 1 December 2020.

The characterisation of charges as fixed or floating has therefore assumed an even greater significance than before and there is likely to be litigation to resolve some of the areas of ambiguity in the distinction, particularly as it relates to charges over receivables. English law also has more 'old-fashioned' forms of security that can produce a different result from the ubiquitous floating charge for certain classes of collateral.

Receivables as collateral

A lot of working capital financing is provided to companies in the UK that use receivables (also known as book debts) as collateral. Sometimes these transactions are structured as receivables purchase arrangements that use an assignment to transfer rights to the funder (a receivables purchase transaction) and sometimes they are structured as a revolving loan backed by security over the pool of receivables (a secured receivables finance transaction). One of the reasons there is some interest in reforming English security law is that the legal form of a transaction (like a receivables purchase transaction) having the same commercial effect as another legal form of transaction (like a secured receivables finance transaction) can produce different legal effects. A prime example of this is that a receivables purchase transaction is not registrable at Companies House and so is invisible to other creditors or interested parties other than those with actual notice whereas the security for a secured receivables finance transaction must be registered at Companies House within 21 days after creation otherwise the security is void against a liquidator.

Now with the CIGA we have additional contrasting outcomes for the two types of receivables transaction, despite the fact that both types of transaction constitute 'financial services contracts' under the new law. For the purposes of this article, we are assuming that the lender under the secured receivables finance transaction has purported to take a fixed charge over receivables and controls the bank account into which the receivables are paid in a spectrum-plus compliant way.

CIGA moratorium *Ipso facto* clause preventing termination of supply	**Receivables purchase transaction outcome** N/A – it is a financial services contract	**Secured receivables finance transaction outcome** N/A – it is a financial services contract
Acceleration	Amounts due to the receivables purchaser are no longer superpriority under a post-moratorium administration	Amounts due to the secured receivables lender are no longer superpriority under a post-moratorium administration
Stop funding	Permitted, without losing superpriority status for accrued debt	Permitted, without losing superpriority status for accrued debt
Use of receivables by a company in a moratorium to fund their business without consent	Not if sold to a receivables purchaser	Not if subject to a fixed charge but see recharacterisation risk table below. If recharacterised to a floating charge then the company can use the receivables without consent
Collect receivables to reduce exposure	Not restricted as it is not a step to enforce security	Restricted because it is a step to enforce security. It is even arguable that retaining the receipts for subsequent application is restricted but the law is unclear
Recharacterisation as a floating charge	Very limited risk	High risk unless the spectrum-plus tests are clearly met
Priority position to HMRC's 'secondary preference' under the Finance Act 2020	Not affected	Not affected if subject to a fixed charge but see recharacterisation risk table below. If recharacterised to a floating charge then HMRC ranks ahead of recoveries

If we follow on from there we should look at recharacterisation risk and the implications for secured receivables finance transactions that are intended to be loans on fixed security over receivables but the spectrum-plus tests are failed for factual reasons:

> **"The characterisation of charges as fixed or floating has assumed an even greater significance than before."**

Use of receivables by a company in a moratorium to fund their business without lender consent	**Fixed Charge** No	**Floating Charge** Yes
Collect receivables to reduce exposure	Restricted because it is a step to enforce security, but not available to the company	No: available to company to spend, any purported crystallisation has no effect
Priority position to HMRC's 'secondary preference' under the Finance Act 2020	Ranks ahead of HMRC	Ranks behind HMRC

Back to the future

If we look back into the long history of English commercial law there are many forms of security which can be used for various classes of asset. Once the floating charge to provide flexible security for lenders and borrowers hovered into view in the 19th century, a creature of the English commercial courts, it gained traction as a desirable form of quasi-security, floating over a pool of assets, and crystallising on insolvency. In the Insolvency Act 1986 the legislature put a stop to the rights of a floating charge holder to prime all other creditors by providing that a charge is fixed or floating as created when the company enters insolvency. Bit by bit the recoveries of the floating charge holder have been eaten away, with the expense of funding an insolvency process ranking ahead of floating charge recoveries, the prescribed part for unsecured creditors in the Enterprise Act 2002, and now HMRC's secondary preference for VAT, PAYE and certain other taxes under the Finance Act 2020. As noted above there are differing outcomes for transactions of equivalent commercial effect both under the CIGA and the Finance Act 2020, both with respect to receivables purchase versus loans on security of receivables, and with respect to different forms of security.

Traditional methods

So, what options are there in a world where a lender would like to take security over tangible personal property with limited recharacterisation risk?

English courts are reluctant to recharacterise security other than to dig into whether a charge is fixed or floating: in that case the courts regard it as their duty to carry out a characterisation exercise based on the conduct of the parties after the grant of the security, which is highly unusual as a matter of contract construction under English law. This generally disregards post-contractual conduct in the assessment of the true meaning of a contract.

Of course the 'all-assets debenture' is ubiquitous, with its laundry list of fixed charge assets, most of which will not stand up to recharacterisation risk because the accompanying facility agreement contains permissions to deal with or otherwise dispose of some or all of those assets, and with its 'qualifying floating charge' which, again, may not leave the holder in the position they expect to be because of sponsor-driven carve-outs of excluded assets. Sometimes the lenders even purport to take a fixed charge over inventory/stock in trade despite the fact that such a charge is certainly correctly characterised as a floating charge because of the chargor's express and implied rights to deal with their inventory to run their business.

However, we can consider the use of more traditional forms of security (pledges and chattel mortgages) instead of, or alongside, floating charges, to structure financings in the context both of the CIGA and the Finance Act 2020. These forms of security apply to tangible personal property, which constitute a chattel. Chattels are defined in the Bills of Sale Act 1878 as 'goods, furniture and other articles capable of complete transfer by delivery and include documents of title such as bills of lading'. Goods attached to real property, financial instruments, cash and choses in

action are specifically excluded from the definition of chattels.

The traditional way of granting security over tangible movable property is by way of a chattel mortgage or a pledge. While under an all-assets debenture, chattels are usually swept up under the floating charge or, sometimes, a fixed charge, separate chattel mortgages remain a valid and effective way of creating security over identifiable assets that are not sold or dealt with in the ordinary course of business. And so, for example, where a business has construction equipment or equipment used to transport inventory, this equipment could readily be secured using a legal or equitable chattel mortgage. Under a chattel mortgage, the owner (the mortgagor) assigns its legal and beneficial ownership in the property at issue to the lender (the mortgagee). Although ownership transfers to the mortgagee, the mortgagor typically retains the right to possess the item for its own use.

A chattel mortgage is different from an outright sale because the assignment of ownership is on the condition, which may be either expressed or implied, that the legal and beneficial ownership in the

> **With the CIGA we have additional contrasting outcomes for the two types of receivables transaction, despite the fact that both types of transaction constitute 'financial services contracts' under the new law.**

property will be transferred back to the mortgagor upon payment or discharge of the amount secured. If the mortgagor defaults on its obligations to the mortgagee, the mortgagee may take possession and, following notice to the mortgagor, sell the subject property and apply any proceeds against the underlying obligation.

In addition to a chattel mortgage, security can be created over tangible movable property using a pledge. Under a pledge, the debtor transfers possession of the property to the secured party but the debtor retains ownership in the property. Pledged property can either be delivered actually or constructively. If the debtor defaults on the obligation which is secured by the pledge, the security holder can, following adequate notice to the debtor, sell the asset and apply the proceeds to discharge the debt. The pledge over the property will end as soon as the pledged property is returned to the debtor. A pledge is perfected upon either actual or constructive delivery of the asset to the secured party.

A pledge does not constitute a registrable security interest at Companies House. Registration is considered not to be necessary because the pledgee's position is protected by its possession of the underlying collateral, and removal of the asset from the debtor's possession protects third parties because the security interest is (arguably) sufficiently transparent.

As a result, the mortgaged or pledged asset can be used as security for lending and the security interest is not a floating charge with the vulnerabilities mentioned above in relation to other claims (such as expenses and the Crown preference) ranking ahead of the secured party. In the case of both a pledge and a chattel mortgage, an administration moratorium or a CIGA moratorium would prevent enforcement of the security without the consent of the monitor, administrator or the court, and the usual *Re Atlantic Computers* balancing test would apply to such requests for consent, but the assets would not be available to the company in the moratorium to fund its moratorium or the administration and recoveries would not be primed by expenses and HMRC.

> **Bit by bit the recoveries of the floating charge holder have been eaten away.**

One final point, noting the benefits of being able to appoint an administrator as the holder of a qualifying floating charge, nothing would prevent the lender from taking a floating charge over the other (non-funded) assets of the business and, following the 12-month vulnerability period, being able to appoint an administrator while maintaining the secured creditor rights under the pledge or chattel mortgage.

Reforms

Inevitably this is a nuanced area and one which the government may look at addressing with anti-avoidance measures if it thinks these forms of security are being used to avoid the negative consequences of a floating charge, but in the absence of full reform of the laws relating to secured transactions under English law it seems likely to the writer that the courts will uphold the form of security expressed to be used by the parties to a consensual commercial transaction.

It is worth adding that the Law Commission reported on proposed root-and-branch reform of English security law in its 2005 Company Security Interests Report with a view to addressing some of the sorts of divergent results you get with commercially identical transactions using different forms (of the types laid out in this article). There are current moves to advocate for such reform again, but there are significant impediments to reform including the need to determine who funds insolvencies if it is not (in effect) the floating charge holder, and a lack of desire to recharacterise receivables sales as loans against security, not to mention the rather thorny issue of how to deal with ROT in a reformed single security interest regime.

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Editor recovery@r3.org.uk

The rise of settlement agreements from Covid-19

Michael Dunleavy offers insights and solutions to the rise in settlement agreements during Covid-19.

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Ford Motor Company Limited (2020)

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Retailer (2020)

As employment law experts, we've seen an increase in the usage of settlement agreements during the pandemic. Due to the impact of Covid-19, many organisations were forced to reconsider their business objectives and whether a workforce restructure was necessary. This has led to an increase in the use of settlement agreements as a means to terminate employment.

What is a settlement agreement?

A settlement agreement is a legally binding voluntary agreement between an employer and an employee. The agreement states that the parties will end their relationship, with the employee waiving the right to make any future claim in an employment tribunal, usually in return for a payment. It's a legal requirement for employees to take independent legal advice before signing a settlement agreement.

When can settlement agreements be used?

Settlement agreements can be used in multiple situations such as redundancy, disciplinary issues and solving issues experienced at work. In the current economic climate, and as the furlough scheme comes to a close, we've seen examples of employers using settlement agreements across groups of employees to reduce the workforce. If all other negotiations fail, and job cuts become inevitable, settlement agreements can be an alternative to a voluntary or statutory redundancy process.

As redundancy rates in the UK have risen during the pandemic, our data indicates a significant rise in the use of settlement agreements in 2020, an 86% increase compared to 2019.

Since many businesses have been hit hard financially during the pandemic, it's no surprise that the use of settlement agreements has grown to avoid the risk of litigation, should an employee raise a claim for circumstances such as unfair dismissal or discrimination following their redundancy.

What does a settlement agreement process involve?

In most circumstances, the employer will be prepared to pay a contribution towards the independent advice to be given by a lawyer to their affected employees receiving a settlement agreement.

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MICHAEL DUNLEAVY is commercial development manager at Slater and Gordon.

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CVAs on speed? The property owners' view of restructuring plans

Laurence Raeburn-Smith provides a look at the new restructuring plans from the property sector's perspective.

Property owners are referring to the new part 26A restructuring plans as 'CVAs on speed'. Restructuring plans are, after all, front-loaded court procedures without much recourse available for appeal, they're over within weeks and have some significant restructuring firepower.

There's a lot of speculation that, with cross-class cram down, we will see an 'onslaught' of restructuring plans used in the spring to wash away landlord Covid-19 debt arrears with impunity.

Some elements of this new process are, however, quite welcome. Restructuring plans could even right some of the wrongs we see in CVAs – the property sector's traditional insolvency bugbear – if the creditor protections within them are strengthened.

Restructuring plans vs CVAs

The recent New Look and Regis CVA challenges demonstrate how long it can take to challenge a CVA in court and how, even after a judgment is delivered, little final clarity might be gained.

In our view, CVAs, as a firm-led, out-of-court insolvency tool, are open to abuse. Property owners should be treated as crucial long-term partners in a restructuring, and IPs should not take a 'rubber stamp approach' by allowing the firm to dictate terms. Despite requirements in SIP3.2. that nominees state a CVA is not 'manifestly unfair' and that it has a 'reasonable prospect of being approved and implemented', there is a perception in the landlord community that where CVAs will be difficult to challenge, for instance where new money is made conditional on no challenge being made, these requirements are very light touch safeguards.

The up-front involvement of the court in a restructuring plan ensures that, at least in theory, these contentious issues are avoided.

What's more, restructuring plans, unlike CVAs, might even work. One of the key reasons that CVAs fail is that they do not enforce the overall cost saving needed to secure long-term survival. Restructuring plans on the other hand allow for a more holistic restructuring, with secured creditors also in the line of fire.

The precedent so far

Some of the first restructuring plans do however cause some serious concern.

One of the chief issues is the jaw-dropping cost and time constraints creditors face when seeking to get their legislative protections applied.

The typical cost of challenging a high-street restructuring plan so far has been approximately £3m. Similar numbers have also been totted up by creditors resisting plans that haven't even made it that far. Those wanting to contest must also organise themselves, appoint financial advisors, solicitors and a qualified QC, all within a three-week window between launch and the first court hearing.

Restructuring plans are also extremely expensive for the issuing firm to undertake and as a result are a restructuring tool only really available to the largest firms in the country.

Regardless of cost, there are some gaping holes within the creditor protections in the legislation itself.

It seems that so long as a firm can prove via simple desktop valuations that administration is the 'next relevant alternative' at the time of the court hearing, egregious terms can be imposed on unsecured creditors without check. This is especially an issue where a plan is being used to alter the rental model, which has little to do with viability and can only successfully be achieved in partnership.

Further, there appears to be no check on the participation of connected creditors in the voting rules as exists in CVAs and little that encourages engagement with creditors that are expected to be crammed down.

What needs to change?

At a time when positive, collaborative landlord–tenant relationships are more important than ever, we fear restructuring plans risk driving a larger wedge between the two parties.

Government needs to implement a more cost-effective means of oversight than the courts – either through the appointment of an independent restructuring officer charged with combing through proposals to ensure creditors interests are protected, as in Germany, or by an expansion of the Pre-Pack Pool.

We suggest that any legal costs incurred by creditors through information requests or engagement, deemed justified by a judge, should be made payable by the issuing firm before cross-class cram down can apply. This should encourage firms to proactively engage and be transparent with affected creditors. The idea here is not to shift the cost onto the firm, but to encourage thorough and transparent engagement. After all, so long as the firm is transparent, creditors will not be burdened by increasing costs for trying to seek information and won't need to ask the court to enforce this.

There should also be a '50% connected-creditor test' introduced, as exists in CVAs, which must apply before a restructuring plan is sanctioned.

Given that many of these issues are not landlord specific, or indeed creditor specific, but a matter for the viability and credibility of restructuring plans as a business rescue tool, we hope that the IP community will join with us in seeking these changes. □

LAURENCE RAEBURN-SMITH is head of retail policy at the British Property Federation.

The rescue stakes – why is the CIGA moratorium lagging behind?

Geoff Carton-Kelly commentates on the draw for the new rescue measures and suggests how the CIGA moratorium might be able to gain ground.

The four main runners in this long race, which started in the first half of 2020, comprise of the winding-up moratorium and the protection from forfeiture (with additional government support via extensions provided mid-race) pulling well ahead of the Corporate Insolvency and Governance Act (CIGA) moratorium, with the part 26 restructuring plan (RP) being left to support the more monied stables.

The CIGA moratorium may wonder what it has done wrong. Right place, wrong time? A solution for a problem that doesn't (yet) exist? Hoping for a spark to light all those burning platforms?

Initial commentary after the moratorium was enacted centred on several anomalies and inequities (some suggested rushed drafting), which is usually a signal to our profession to find a way to make a process work. To date, however, there has been only modest take up.

Are there other reasons why the moratorium process may not be enjoying a high level of popularity and support? Unlike its stablemate the RP, the moratorium hasn't had the benefit of high-profile cases, regular academic debate and, perhaps most usefully, long and reasoned judgments. Perhaps that is to be expected as the RP requires court approval and is likely to be used by larger entities (with multiple classes of creditors and their own legal and professional advisers) than those most obviously suited to a moratorium. That said, though, there have been about the same number of RPs as moratoria.

The wider creditor community of (non IP) professional advisers and business-owner managers seem to be largely unaware of the benefits this process brings. It prompts the question as to whether the moratorium process needs tweaking. There have been very few publicised cases if any, and not many more actual cases, so we don't have much to go on.

Why the long face?

It is certainly true that the various government support initiatives, most notably the other moratoria in this race, have extinguished (for now) many of the usual burning platforms. When combined with the high level of forbearance exhibited by the clearing banks and HMRC, these have served to provide much more time for companies in the SME space to get matters under control even as debt continues to build.

Arguably, there is no real need for a moratorium at present, except in increasingly limited circumstances, because historic liabilities are currently being managed under the various standstill schemes. Indeed, it is an inability to pay current liabilities combined with precipitate action taken by one or more creditors that is the scenario the moratorium is designed to protect companies from. However, that relatively rare scenario is seemingly being managed via the 'notice of intention' process pre-administration. Is this because the profession feels more comfortable with this option and knows where it stands?

The emergence of some formality around 'light touch' administrations has also taken centre stage over the CIGA moratorium, and there have been some of those cases where the company has been rescued and returned to its shareholders.

When might the ground improve?

When the other moratorium runners in this race are eventually withdrawn by their government owners, will the CIGA moratorium make the finish line?

Fundamental issues remain, such as:

1 The need for funder (QFCH or otherwise) support to meet moratorium period obligations is a challenge.
  - Assuming a prior request for extended facilities has been turned down – what is going to be different during the moratorium? It is unlikely that more security would be available.
  - If demand for repayment can be accelerated by a funder, then a moratorium would be unable to work.
  - We have no history of DIP funding in the UK, so are funders nervous about extending facilities to companies with boards still in control after any insolvency acknowledgement? The monitor cannot provide any comfort.

2 Is 20 or 40 days in practice long enough (acknowledging further extensions may be sought) to put a workable and robust rescue plan together or to complete a sale or refinance process?

3 The risk for the monitor making the rescue declaration without the certainty of knowing the accuracy of the information they have been given, or the power to check, or sufficient controls to ensure the board don't commit to expenses that can't be met. Trust must be built quickly but what assurances can be sought from the directors that would provide any element of certainty?

4 The risk for the monitor in approving major decisions on the same basis particularly if, say, promised funding doesn't materialise or an unknown/unforeseen issue arises.

5 The fees pose a challenge to the monitor – with some suggesting that there is less support from the courts to officers then as previously seen.

Will attempting to address these issues make the process more expensive and out of reach for the corporate community the moratorium was intended to serve?

What might help?

1 Early engagement with funders and the development of a protocol on managing this process.

2 Involvement of CROs (with executive power) to provide the monitor with an element of certainty through the groundwork preparation on the mechanism to achieve a rescue as a going concern and the moratorium trading period, which should be more cost-efficient.

3 Build in planning time while you can – early engagement with advisers is still low outside of professional boards – do we still need a mindset change or greater personal liability risk for not doing so?

4 Monitors being allowed (and paid) to undertake a sufficiently detailed review of the business, its forecasts/MI and the proposals that underpin the moratorium purpose of rescue to, for example, an IBR standard, and the board signing it off as accurate.

5 An agreed (perhaps by R3) set of hurdles – not a pun – to be overcome for the monitor to be content to certify the rescue statement. Perhaps also a standard checklist that should be given to creditors and key stakeholders to evidence the process undertaken.

6 Allow for a plan B realisation option, for example a 'better outcome' than a liquidation to avoid the need for administration and the additional cost challenge.

These suggestions may require further legislation or best practice guidance as well as further debate, but we too have some time to play with to improve the chances of the CIGA moratorium in this race.

When might they work?

There are some circumstances where the moratorium stands a better chance of being used:

- the presence of professionals on the board;
- high standard of MI;
- a relatively small group of creditors;
- clear prospect of the completion of an equity transaction or a refinance;
- within terms/covenant funding arrangements;
- a one-off/seismic issue affecting cash flow;
- for larger entities in the SME space who can afford the costs needed to address some of the issues listed above, particularly those faced by the monitor.

> "Unlike its stablemate the RP, the moratorium hasn't had the benefit of high-profile cases, regular academic debate and, perhaps most usefully, long and reasoned judgments."

The end of the race…

As a profession, we could say that we have not yet had the opportunity of looking at enough candidates where the rescue of the company as a going concern was feasible in this current environment.

Certifying that the company can meet its moratorium obligations and that a rescue is feasible remains challenging and requires a significant amount of upfront work to get comfortable.

Given the cost associated with getting into that position, is the CIGA moratorium a solution designed for the mid-market as opposed to SMEs?

There is an argument that markets find their own equilibrium and the CIGA moratorium process will come into its own as a bridge to a refinance or a full-scale (not just single creditor class) CVA if the intention is to avoid a more formal process. However, it is unlikely that it will become a 'single gateway' even with the modest restrictions now in place for pre-packs.

A time will come when there will be aggressive creditors threatening action and protection will be needed but, for now, the burning platforms aren't even smouldering.

Time is the luxury we now have alongside the largely supportive approaches of the lender community and HMRC. Combine this with the high level of capital waiting to be deployed in distressed/special sits funds, we will get busier as a profession but as much in an advisory capacity as in formal appointments.

However, it is incumbent on us as a profession to lobby for change where we think it is needed to help government develop the right tools to support business rescue and to improve awareness and consideration of the process. There are some tweaks which could make the process more usable allowing it to finish the moratorium stakes in first place – it's not yet time for the blue tarpaulin. □

Views are the author's own. Thank you to David Hudson and Phil Reynolds who contributed to this article.

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A protective shield? *Ipso facto* clauses and lessons from Arcadia

Neil Golding, **Rachel Seeley**, **Benji Dymant** and **Matt Smith** explore the new options under CIGA that can help defend against ransom creditors.

On 30 November 2020, 27 companies in the Arcadia group entered administration, with individuals from Teneo appointed administrators.

The administrations commenced on Cyber Monday immediately following the Black Friday weekend, in the crucial pre-Christmas trading period. It was vital that the group could continue to trade as normal, fulfilling online orders that had been taken over the weekend in order to maintain consumer confidence, third-party partner relationships, preserve cash flow and protect the value of the brands, which would be marketed for sale.

The Arcadia administrations were among the first large trading administrations to attempt to rely on new protections for insolvent companies introduced by the UK government under the Corporate Insolvency and Governance Act 2020 (CIGA), which had entered into force a few months previously, on 26 June 2020.

> **The Arcadia administrations were among the first large trading administrations to attempt to rely on new protections for insolvent companies under CIGA.**

Administration and ransom creditors

Traditionally, UK legislation has not sought to interfere with the use of *ipso facto* clauses in contracts, which provide for the ability of a counterparty to terminate the contract or take certain other actions in the event of the other party's insolvency. This has led to substantial negotiating leverage for 'ransom creditors', where suppliers that are crucial to an insolvent company's ability to continue trading can hold it to ransom by requiring additional payments – either payment in full (or part) of pre-insolvency arrears or increased costs – in order to continue to supply it.

The Insolvency Act 1986 introduced protections in respect of essential supplies, essentially gas, electricity, water and public communications. The categories of essential supplies were widened in 2015 by the

> **Traditionally, UK legislation has not sought to interfere with the use of *ipso facto* clauses in contracts.**

Insolvency (Protection of Essential Supplies) Order to cover all communications services (including broadband and email services) and information technology supplies, such computer hardware and software.

However, outside of the statutorily defined 'essential supplies', insolvent companies have been required to negotiate with other key creditors in order to continue to receive supplies that are essential for their own businesses.

New legal protections

CIGA was enacted as part of the government's response to the Covid-19 pandemic. It includes restrictions on the use of termination clauses in contracts for the supply of goods or services where the customer enters into certain specified insolvency processes, including administration. These provisions are a substantial widening to protections for insolvent companies as they do not look to a statutorily defined list of 'essential services' but apply across the board. The provisions are intended to enable companies subject to insolvency proceedings to continue trading without the loss of the key suppliers.

In particular, the CIGA provisions include:

- Contractual termination clauses that are triggered due to entry into the insolvency process (also referred to as '*ipso facto* clauses') are unenforceable.
- Provisions that allow the supplier to 'do any other thing' due to entry into that process are also unenforceable. CIGA does not explain this further but it is generally understood that this captures, for example, the variation of payment terms.
- Any supplier termination right arising but not exercised prior to entry into the process (eg general insolvency triggers, non-payments or any other defaults/triggers) is suspended for the duration of the insolvency period.

Crucially, under CIGA, suppliers cannot make their continued supply of goods or services during an insolvency process conditional upon the company paying its pre-insolvency debts.

Reliance on CIGA protections in practice

The key suppliers that the Arcadia group relied upon, particularly in the immediate term following the administrations, included logistics and delivery companies (to deliver online clothing orders to customers), intellectual property licences, temporary labour, cleaning, and other outsourcing companies and internet-based services providers.

Some suppliers, particularly large sophisticated counterparties, continued to supply the group without attempting to terminate or demanding additional 'ransom' payments of arrears or increased prices. Others withdrew any threats to cease provision or demands for payments of arrears as conditions of continued supply, upon a reminder by the administrators of the new provisions. Arcadia benefitted from its significant scale, which meant many suppliers valued the continuity of supply – even to a company in administration – more highly than seeking to withhold services pending some payment of arrears. Those suppliers also understood that large-scale demands for payments of arrears may have meant that the administrators may be unable to continue trading the business. Administrators of smaller businesses may well find that their bargaining power is not as strong, and suffer behaviour more generally as described below.

However, there were two main groupings of suppliers where the administrators found that the CIGA provisions did not provide protection in practice against ransom demands.

First, as with many corporate groups, there were a number of suppliers with whom the group did not have definitive written contractual arrangements. Some contracts had not been executed, some had expired, and others remained at heads of terms stage – but both parties had continued to operate under them under a course of dealings. With these suppliers, the administrators reached the view that any court application for an order for specific performance to require the continued supply may not be successful given the lack of evidence as to the exact contractual terms being relied upon. In addition, some supply, such as stock (key to trading a retailer), was on the basis of pricing agreements, so no contractual requirement to make supply at all, and the CIGA provisions were therefore redundant to the extent such a supplier refused to supply going forward.

Second, although the vast majority of suppliers complied with the CIGA provisions, there were a handful who despite clear contractual arrangements refused to acknowledge or comply with the Act. Instead, that small number stopped or threatened to stop their supply until their demands for payments were met. The administrators clearly had the better argument in those cases and would have been willing to go to court to seek specific performance. However, the cost of such an application, delay in securing an outcome and the impact of a dispute on the future supply relationship, which was not only key to ongoing trading but could also be key to the value attributed by any purchaser, meant that in a number of cases, making modest ransom payments was more cost-effective and speedier than litigating. The administrators were working on an urgent basis to stabilise the group and fulfil orders, meaning it was imperative to recommence receiving the supplies from the relevant counterparties as quickly as possible.

> **Although the vast majority of suppliers complied with the CIGA provisions, there were a handful who despite clear contractual arrangements refused to acknowledge or comply with the Act.**

Lessons learned

The experience of the Arcadia administrators is likely to be replicated in other trading administrations. Any large group of companies is likely to have some supply contracts that are not perfectly executed, or which fall short of compelling the supplier to continue to supply goods or services at agreed prices. There will always be suppliers which seek to take advantage of commercial urgency and imperatives for the administrators to obtain ransom payments despite the prohibition of this under CIGA.

As the CIGA provisions become more widely used, it may be that suppliers become more accustomed to complying with them. However, administrators should not assume that there will be wholesale compliance, and it would be wise to budget for ransom payments where the supplier is particularly essential and there is a timing imperative for their continued supply.

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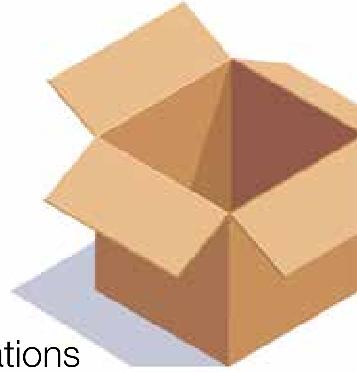
Unpacking the pre-pack regulations



Stuart Hopewell provides insights into how the new regulations have changed the operation of pre-packs to date.

The new regulations regarding connected party sales, the Administration (Restrictions on Disposals Etc To Connected Persons) Regulations 2021, (the regulations), came into force on 30 April 2021. The regulations stipulate that *all* such disposals must now be referred for independent scrutiny. Such scrutiny is to be provided by an evaluator, a new concept in the regulatory regime.

Alongside the regulations, the Insolvency Service has published its guidance notes: *'Requirements for independent scrutiny of the disposal of assets in administration, including pre-pack sales'* (guidance). In this article, we take a closer look at the impact of the new regulations.

The new role of the evaluator

As mentioned above, the evaluator role is a new concept and now forms a major part of the regulations and guidance. The qualifications to be an evaluator in both the regulations and guidance are still relatively brief but add to the original 'self-certification' and independence requirements to hold professional indemnity (PI) insurance.

Hopefully, this will be seen as a positive move given that it will narrow the field of potential providers to those from the professions.

It could also be seen as a barrier to entry into the market given the recent increases in premiums for PI cover in the insolvency market (some providers have hiked premiums by as much as 200% recently).

There is also a responsibility placed on the ultimate administrator to be satisfied as to the suitability of an evaluator to provide a report, so the role is not without some professional scrutiny.

Report requirements

The list of requirements in the guidance, that 'may be needed' is 30 items long, those that 'must be included' drops to 16 and represents a major shift from the old opinion-based regime. Space precludes a full list but of the latter 16 bullet points, two stand out:

1. Where previous reports have been provided, the evaluator should illustrate 'what steps have been taken to obtain them' or provide 'a statement that no previous reports have been obtained' (perhaps a reaction to adverse comments about 'opinion shopping'?). If the applicant chooses not to disclose any previous reports, can the evaluator be held liable if they subsequently appear, particularly if they contradict the resulting report?
2. A more onerous requirement is to provide a full summary of the information relied upon in compiling the report and reasons to support the statement (judgment) given. In practice, if the applicant provides good, detailed information then any subsequent report should be able to cover off this requirement satisfactorily.

> **"The evaluator role is a new concept and now forms a major part of the regulations and guidance."**

Administrators' interactions with the evaluator

The evaluator may ask for additional information and if the recipient is unsure about this or does not have it, they are advised to approach the IP for it. Equally the evaluator is effectively encouraged to approach the IP directly if they feel that they may have the additional information they seek.

In our experience at the Pre-Pack Pool to date, this has proved very useful as we still receive applications with very little background. In more than one case all that was received was the acquirer's offer document (although to be fair, one was in duplicate!).

We have had positive contributions from administrators where the information supplied by the applicant has been less than detailed. Having seen such cooperation work successfully, perhaps transparency will further improve as a result?

Note that all information received from applicants, administrators or other sources is kept strictly confidential and not circulated to the other parties without consent.

Report outcomes

Only two statements are now prescribed; that the grounds for the pre-pack and the consideration to be provided are reasonable in the circumstances, or not.

To date on only one occasion has a negative report been issued by our evaluator, but this was quickly acted upon by the administrator and a corrected set of documents was issued in response. Subsequently, a positive report was issued and the negative report rescinded. Given the speed with which the administrators acted there was no additional cost to the applicant.

Numbers to date

Against a background of government support schemes during the Covid-19 pandemic, insolvencies, particularly administrations, have been severely reduced in 2021. Total administration numbers have tumbled from 75 in April to just 39 in June.

The Pool can't claim to have seen all sales governed by the new regulations, but of those we have seen (20 in the first three months since the regulations came into effect), a broad spectrum of business has been represented. Sectors include engineering, financial services, construction, broadcasting and power provision.

The size of deals has also had a broad spread with values ranging from £6m at the high end of the scale, to just £30,000 at the lower end.

Conclusions

It would appear that the regulations are working, although with overall insolvency numbers being suppressed by government assistance at present it is hard to draw definite conclusions. Also, my perspective is restricted to the cases coming to the Pool, which is not the only provider of an evaluation service.

It is also pleasing to see that despite some very negative responses initially to the mandatory principal of 'third party' involvement, the majority of practitioners have been keen to make the new system work. ◻

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Embracing technology to educate

Lloyd Hinton explains how the insolvency exams have evolved from humble beginnings to an entirely online future.

The 1982 Cork Report, the subsequent Insolvency Act and the introduction of a myriad of personal and corporate insolvency processes all made significant changes to the insolvency profession in a relatively short period. Just as it was a time for change then, insolvency education and qualifications have gone through their own evolution of late as well.

CVAs, MVLs, IVAs and other personal insolvency solutions, as well as recent developments such as breathing space… the list goes on. Ours is a profession with many technical aspects to it. There is also the need for robust regulation to ensure that the profession continues to serve the commercial and consumer worlds, as well as the wider public interest – a recent and important addition to the code of ethics.

Education and career development in insolvency are therefore essential. Accordingly, the joint insolvency examination (JIE) syllabus and, for example, the IPA's range of exams have evolved over time to reflect new working areas and practices.

History of the exams

The IPA first launched an insolvency exam in 1981. At the time, accountancy bodies were removing insolvency papers from their exams. In 1989, the insolvency exam became the basis of the JIE.

In 1995, the IPA then brought out the certificate of proficiency in insolvency (CPI), recognising the study and qualification gap for those involved in case administration and insolvency-related work. It was 2016's introduction of partial licensing for personal and corporate insolvency, and the then recent growth of personal insolvency with an increasing range of personal debt solutions that saw the respective introduction of the certificate of proficiency in corporate insolvency (CPCI) and the certificate of proficiency in personal insolvency (CPPI).

The exams are vital for teams to empower their members with knowledge in the context of succession planning and business needs, so that firms can react to the shifting landscape quickly. They also give team members the valuable sense of belonging within a firm, with the tools they need to flourish and make their mark on the profession. Clients are also assured that they are served to a high standard, with reputational benefit another factor in having qualified personnel.

"Ours is a profession with many technical aspects to it. There is also the need for robust regulation to ensure that the profession continues to serve the commercial and consumer worlds."

Widening access with tech

Access to exams is an important consideration, and one that has become increasingly an issue during the Covid-19 pandemic. In 2020, we were faced with zero chance of safely running exams, and so alternative formats had to be considered. It was then decided to run the exams online, in partnership with the Chartered Governance Institute (ICSA), which administers exams on our behalf.

The timing of the pandemic meant that a new format had to be adopted much quicker than we would have normally done so. Moving exams to this setting does, as you can imagine, present challenges. For example, how can hundreds of candidates, both in the UK and internationally, be properly invigilated without another individual in the room?

To sit the IPA's exams online, candidates now have to use modern PCs/laptops and associated technology. The majority of modern laptops, particularly those provided by an employer, feature a built-in webcam and microphone. To tackle proper invigilation, a secondary camera is also required, by way of the candidate's phone, which provides an image of the candidate from another angle to provide a complete view of the individual while taking their exam. The candidate must also show the invigilator – who is able to observe candidates via an online interface – the room that they are in and the desk that they are using, plus all items on their desk. Peripheral microphones and cameras can be connected to PCs that don't have the built-in functionality.

Tech crises

In order to reduce the opportunity for unwelcome technical surprises when taking the exam, testing links are sent out to each student so that they can familiarise themselves with the software in good time before the big day. Clear communication with candidates is key in the run-up to the exam, so that this technology can be leveraged properly.

IPA student members recently sat the second online iteration of IPA exams. After a first sitting that saw some unfortunate and unavoidable teething issues (which were swiftly addressed), we were pleased to note that the latest sitting passed off with no issues. The IPA has now taken the leap to make all exams online on a permanent basis.

Moving to online exams so quickly may well be a blessing in disguise; we are confident in this format, and we feel that it has catalysed what was seen by many as the inevitable road to 100% online exams. The convenience that this will bring to future students is clear – particularly those sitting the exams internationally, who will no longer need spend considerable time travelling. ◻

LLOYD HINTON is an IPA past president and current board member and examinations committee chair, and a director at Insolve Plus.

Out in the cold?

The view from Denmark – opting out of the EU Insolvency Regulation

Preben Jakobsen writes on Denmark's experiences outside the purview of European insolvency legislation.

Denmark has opted out of the EU Insolvency Regulation – the only member state to do so. This was the result of a national referendum held in 1993. Since then, Denmark has experienced both legal and practical challenges in regards to cases concerning insolvency proceedings with cross-border elements. This article aims to briefly illustrate our lessons learned as more and more insolvency proceedings contain various cross-border elements.

Historical background

On 2 June 1992, a narrow majority of the Danes (50.7%) rejected the Maastricht Treaty. In May 1993, a new referendum was held resulting in the Treaty being accepted, though with important 'opt-outs' in four areas: the Monetary Union, Common Security and Defence Policy, citizenship of the European Union, and Justice and Home Affairs (JHA). Opting out of the JHA area has resulted in Denmark not being a part of EU's cooperation on border control, immigration policy, police, criminal and civil law, which also results in Denmark not being bound by or subject to the EU Insolvency Regulation.

The first EU Insolvency Regulation entered into force in May 2000. In 2001, Denmark requested the European Commission to be a part of the regulation on an intergovernmental level via a parallel agreement. The application was rejected by the Commission.

In December 2015, a new referendum on the JHA opt-out was held in order to change it into an 'opt-in'. The opt-in system would have resulted in Denmark joining the EU Insolvency Regulation and prior to the referendum several leading professors and law practitioners expressed their desire to vote for an opt-in system. The opt-in system was rejected by the Danes (53.1% voting no).

> **"Denmark has experienced both legal and practical challenges in regards to cases concerning insolvency proceedings with cross-border elements."**

The Nordic Bankruptcy Convention

In 1935, the Nordic Bankruptcy Convention entered into force covering 'the Nordics' (Finland, Sweden, Iceland, Norway, and Denmark). The Nordic Bankruptcy Convention is based on the principle of universality, implying that bankruptcy proceedings opened in one Nordic country comprise all assets and liabilities that the debtor possesses in all Nordic countries and the bankruptcy administrator is authorised to dispose of all the assets of the bankruptcy estate, regardless of in which Nordic country the assets are situated. Apart from a few exceptions, the applicable law is always *lex concursus*. The Convention though, is only applicable in bankruptcy cases; restructuring proceedings or personal debt reliefs are not governed by the Convention. As a result, case law regarding inter-Nordic bankruptcies is almost non-existing, which many law practitioners consider a sign of the Convention being a success.

Besides the Nordic Bankruptcy Convention, Danish insolvency law is regulated by the Danish Bankruptcy Act from 1977. The Act contains an *ordre public* clause, whereby the minister of justice may lay down regulations on Danish recognition of foreign insolvency proceedings. However, the clause has not been used, and as a result, the main rule is that Denmark does not recognise foreign insolvency proceedings (except for the Nordics).

Thoughts on legal and practical challenges

Danish case law regarding recognition of foreign insolvency proceedings is quite scarce. The existing case law illustrates, however, that Denmark pursues a rather 'recognition-cautious line', with an outset from 1929, where the Danish Eastern High Court ruled that a Danish creditor was able to levy attachment for its claim against a Dutch company in bankruptcy. Later on, the Danish Supreme Court ruled that the legal position in Denmark was that foreign bankruptcy proceedings did not prevent creditors in Denmark from initiating individual creditor proceedings against the debtor's assets as long as the assets were located in Denmark. Some of the most recent case law is from 1987, 2000 and 2014.

The decisions from 1987 and 2000 continued the 'cautious' line. In both decisions, the court ruled that the Danish creditors were entitled to seek satisfaction on an individual basis in spite of the fact that the debtors were under insolvency proceedings in the US (Chapter 11 protec-

> **"Case law regarding inter-Nordic bankruptcies is almost non-existing, which many law-practitioners consider a sign of the Convention being a success."**

tion and a debt restructuring process respectively). However, in the 2014 decision a German bankruptcy estate commenced legal actions in Denmark against a Danish investor for potential voidable transactions. The bankruptcy estate argued that German law should govern the question of avoidance, and that the requirements for avoidance under German law were met. In the opposite direction, the Danish investor argued that Danish law should govern the question of avoidance. The parties agreed that, in case the question should be governed by Danish law, the Danish requirements on avoidance were not met. The Danish Supreme Court ruled in favour of the German bankruptcy estate and found that German insolvency law should govern the question of avoidance and that the German requirements were met. The Supreme Court found that *'particularly the consideration of an equal treatment of the creditors implies that the law of the bankrupt estate must apply'*.

The Danish investor did not plead that the German bankruptcy should not be recognised in Denmark. Surprisingly, some would say, as recognition of the German bankruptcy proceedings would be a prerequisite for the German bankruptcy estate to be successful in a claim for avoidance before the Danish courts. In this light, the Danish Supreme Court did not directly take a position on the question of recognition of the German bankruptcy, just as the Supreme Court did not take a position as to the question of whether a foreign bankruptcy prevents individual proceedings being initiated in Denmark. However, some leading Danish scholars are of the opinion that the decision constitutes a shift towards more openness and recognition of foreign bankruptcies. The legal position is, however, still unclarified.

> **All things considered, the Danish position brings some practical challenges, costs, time constraints and to some extent risks in respect of outcomes in different jurisdictions.**

Another recurrent challenge we encounter is the question of foreign countries' recognition of Danish insolvency proceedings. Recognition depends on the country in matter, as the law of some countries is subject to a principle of reciprocity. Other countries have adopted a principle of full universality. In recent years, we have for example been challenged from time to time when handling subsidiaries abroad to Danish bankrupt companies. Due to lack of recognition – or a time- and cost-consuming recognition procedure – other options are often explored than simply just involve the subsidiaries in the Danish bankruptcy procedure. Such being, for example, to initiate parallel processes of either bankruptcy or restructuring, however, appreciating that the alternative measures are more costly and time-consuming than what would have been the case if general recognition was available. All things considered, the Danish position brings some practical challenges, costs, time constraints and to some extent risks in respect of outcomes in different jurisdictions. Acknowledging that an exhaustive list is not possible, issues related to the handling of foreign subsidiaries, handling of employees working abroad, fast hedging of valuable assets situated outside of Denmark are often causing some concern, and we have examples of Danish administrators being 'forced' to surrender assets outside of Denmark because of the lack of recognition of the Danish insolvency; simply because the costs incidental exceed the value of the assets. This is a dilemma often causing some frustration.

> **We have examples of Danish administrators being 'forced' to surrender assets outside of Denmark because of the lack of recognition of the Danish insolvency.**

This is also the case as Denmark – contrary to the UK – has not enacted the UNCITRAL Model Law on Cross-Border Insolvency, just as there is no Danish case law on INSOL's insolvency guidelines.

With regards to Denmark, and without taking a political stand, our lessons learned are that Denmark being outside of the EU Insolvency Regulation is a disadvantage in many respects – not only for insolvency practitioners and creditors, but also for the Danish international trade at a higher level, as the competitive strength by a natural process is somewhat weakened due to some unpredictability and asymmetry. □

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Keeping out of trouble following *Kids Company*

Tim Evans, **Philip Reynolds** and **Robert Ferne** provide a guide to charity insolvency following the *Kids Company* decision.

Though the directors disqualification proceedings brought by the Official Receiver were ultimately unsuccessful, the high profile *Kids Company* decision provides an important reminder to charity trustees regarding their duties, how their conduct will be assessed and the scope of potential personal liability.

The decision also provides useful guidance for IPs and lawyers alike when advising charity trustees in circumstances where a charity is facing financial distress. This article will consider some key legal and commercial learnings in the context of providing professional advice to charity trustees.

The first step when advising a charity trustee is to determine the organisation's legal status as this will determine if directors disqualification proceedings can be brought against the charity's trustees.

Incorporated and certain unincorporated charities

In the case of Kids Company, the charity was an incorporated company limited by guarantee, which meant that the Companies Act 2006 (Companies Act), the Insolvency Act 1986 (the Act) and the Company Directors Disqualification Act 1986 (CDDA) all applied.

In the case of charitable incorporated organisations, the insolvency legislation is largely implemented in the same way as for a company.

The position with unincorporated charities is more nuanced. Unincorporated charities incorporated by Royal Charter or an Act of Parliament and unincorporated associations can be wound up as an 'unregistered company' under the Act, which means that the provisions of the Act and the CDDA will apply.

In our experience, charity trustees do not fully appreciate that their role is akin to that of a company director and that they are subject to both charity and company law, attracting the same level of responsibility and duties as their corporate counterparts, despite the role not being 'commercial' in nature, and carried out for altruistic reasons.

Unincorporated charities – trusts and associations

Neither a charitable trust nor a charitable association has a legal personality, and so the trustees themselves enter into contracts on behalf of their charity, and are therefore personally liable for the liabilities of their charity. Charitable trusts therefore cannot be wound up as an 'unregistered company' under the Act.

When the charity has insufficient assets, the trustees have potentially unlimited liability for any of the charity's liabilities that remain unpaid, and can face personal insolvency (similar to the position of the partners of unincorporated partnerships) for any deficit to the charity's creditors.

For this reason, directors disqualification and claims against directors under the Act (such as for wrongful trading) are not applicable where an unincorporated charity structured as a trust or association becomes insolvent.

> **"In our experience, charity trustees do not fully appreciate that their role is akin to that of a company director and that they are subject to both charity and company law."**

Governing principles during financial distress

Once it has been determined that the CDDA can apply to the charity, the next step is to consider what the trustees' duties are and whether they have been breached. In a financial distress situation, these duties derive from both charity law and the Act.

Although day-to-day management of a charity is sometimes delegated to a chief executive and or a management team, charity trustees continue to have ultimate responsibility for the charity's management. However, in many cases relating to smaller charities, the trustee board are effectively the management team, and can be supported by a general manager.

Both the management team and trustee board have a duty to act in the interests of their charity and its beneficiaries and to protect and safeguard the assets of the charity, while acting with reasonable care and skill. This extends to understanding and effectively managing the charity's financial health.

The Charity Commission has published useful guidance (**https://www.gov.uk/government/publications/managing-financial-difficulties-insolvency-in-charities-cc12/managing-financial-difficulties-insolvency-in-charities#introduction**) on what trustees need to consider when facing financial difficulties or an 'insolvency' scenario.

The guidance provides a (non-statutory) yardstick for IPs in determining whether charity trustees have fulfilled their duties, including:

- recognising that charities can (and do) fail and enter insolvency, which means that adequate contingency plans need to be prepared to plan for the wind-down of the charity's operations, while also considering the impact on its beneficiaries, staff and assets;
- recognising at an early stage when the charity is facing financial difficulties – in particular, whether their charity is a 'going concern';
- regularly receiving and considering up-to-date and reliable financial management information (including all of the primary financial statements);
- reviewing the contractual position regarding future long- and short-term sources of income, and whether the cost base of the charity supports this level of revenue;
- monitoring the restricted/unrestricted reserve position to ensure that ring-fenced monies are not being used for general purposes;

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- taking prompt action when it becomes apparent the charity may be insolvent, getting professional advice; and
- recognising that once the charity has reached the stage of liquidation or winding up, their primary duty is to the charity's creditors and to avoid a disorderly orderly wind-down.

In the 'twilight period' where solvency is uncertain, a charity trustee's responsibility moves away from the beneficiaries of the charity to the protection of the charity's creditors. Every step necessary to minimise the potential loss to the charity's creditors should be taken, including cutting back or stopping the charity's activities. This will seek to mitigate the potential exposure of wrongful trading criticism (regardless of the temporary suspension of the wrongful trading provisions earlier this year).

Paying professional fees for advice obtained is justifiable if incurred with a view to ensuring the best outcome for the charity's creditors.

Management vs trustees: who's in charge?

A further consideration for IPs and lawyers will be to advise the charity on (i) which of its management team are vulnerable to being considered 'directors' for the purposes of the CDDA; and (ii) what steps can be taken to minimise that risk.

The CDDA covers both appointed directors and *de facto* directors (being someone who is not an actual director, but acts as if they were). Under the Companies Act and Act, de facto directors and 'shadow' directors are dealt with in the same way as actual directors and can be personally liable for their actions and the actions of the other directors, even though they are not directors themselves. Therefore, it is not just the charity's trustees who should be concerned with directors disqualification.

The *Kids Company* decision focused on that charity's management structure as the Official Receiver, on behalf of the Secretary of State, sought to argue that Ms Batmanghelidjh, as CEO, was a de facto director.

With Kids Company, though executive power and decisions rested with the trustees, like many charities, the charity employed a CEO and a management team to run the charity day to day. However, with many smaller charities, the trustee board are effectively the management team, potentially supported by a general manager.

The court refused to accept that Ms Batmanghelidjh was a de facto director. However, the case does highlight the lack of structure to decision making often found in charities. When charities enter financial distress, it is often seen that the management team increasingly makes the executive decisions on running the charity and simply ask the trustees, who sometimes consider themselves to be 'non-executive', to rubber-stamp what the management team propose. This approach risks:

i. the ultimate decision makers (the charity's trustees) being held personally liable for the executive decisions made when they did not consider themselves to be the decision makers, and
ii. the management team being held to be de facto directors and personally liable for their actions as such, when they believed that they were not the ultimate decision makers.

> "The role of a charity trustee is that of a balancing act between being a cheerleader promoting the aims and objectives of the charity and acting as gatekeeper: tempering the enthusiasm of the management team."

Practically, IPs and lawyers advising a charity in financial distress should be stressing the following:

1. The charity should have a robust risk register and clear management structure and hierarchy in which everyone understands the decision making process and interaction between the trustees and chief executive/management in this process.
2. In respect of longer-term strategic planning, there should be a clear succession plan and only individuals with relevant and demonstrable experience (such as the skills required by a treasurer) should be appointed to carry out that specific role.
3. Regular trustees' meetings should be held where the current financial position of the charity is presented, and the operational decisions made are informed in light of this information and documented appropriately.
4. Trustees should ensure that they are cognisant of their reserves policies and any use of restricted reserves for other, general purposes may attract criticism and personal liability.
5. The trustees, as final decision makers, understand the extent of their duties and potential personal liability.
6. The trustees should take professional advice (be it legal and/or accountancy), which may help the trustees defend any claim of misfeasance, wrongful trading or challenge of antecedent transactions.

A fine balance

In summary, the role of a charity trustee is that of a balancing act between being a cheerleader promoting the aims and objectives of the charity and acting as gatekeeper: tempering the enthusiasm of the management team/other trustees when making strategic and financial decisions that may impact the longer-term viability of the charity.

Ultimately, IPs and lawyers should be stressing to charity trustees that they do not need to panic and 'run for the hills' at the first sight of financial difficulties.

The courts, when assessing conduct, have clearly taken into account the wider public benefit that the charity sector provides to the health of the country and the detrimental impact if volunteers were dissuaded from providing their services as trustees, which provides additional comfort to trustees dealing with insolvency issues. The courts also clearly recognise that there was no personal financial incentive involved when assessing misconduct.

As long as the 'early warning signs' have been noticed and there is a sufficient runway for trustees to analyse the options available (with professional assistance) a disorderly cessation of trade can be avoided with proper planning, which will mitigate the impact of an insolvency (or avoid it all together).

While the Kids Company decision ultimately favoured the trustees, it should still serve as a wake-up call to charities to get their houses in order. ◻

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Flybe: navigating administration and pandemic

Ned Swifte and **Linh Nguyen** explore the story of the first rescue of an airline out of administration and the lessons that can be learned from the success.

At 2.30am on 5 March 2020, Flybe's directors appointed Simon Edel, Alan Hudson, Joanne Robinson and Lucy Winterborne from EY-Parthenon as administrators. Fifteen months later, despite the unparalleled impact and challenges of the Covid-19 pandemic, the administrators had achieved the first rescue of an airline out of administration in the UK.

This article looks at the key events in the Flybe administration, the unique challenges faced by the team, and the critical steps they took to preserve value and enable the rescue of the airline as a going concern.

Pre-pandemic stresses

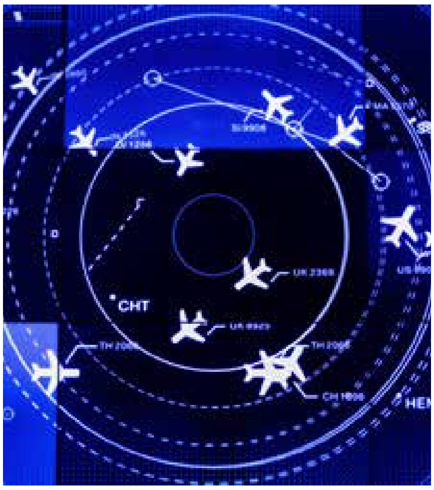
At its peak, Flybe was one of the UK's largest regional airlines, employing 2,200 staff and operating 38% of all UK domestic flights and transporting eight million passengers per year. The airline connected key regional hubs throughout the UK and selected destinations across western Europe, as well as being a valuable contributor to the Exeter economy and many regional airports.

Flybe had been navigating solvency and restructuring concerns for several years, even before the pandemic. Despite a recapitalisation in early 2019, solvency concerns re-emerged in January 2020, due to a material build-up of unpaid air passenger duty, customs excise duty payments and soft credit pressures – in particular from increased credit card collateralisation – something we are seeing increasingly across the travel sector as the impact of Covid-19 continues. In February 2020, the government and Flybe's shareholders put an 11th-hour deal in place to support the airline, but then Covid-19 struck. Bookings fell dramatically and, by early March 2020, with critical funding no longer available, the directors took the decision to appoint administrators.

Rapid deployment, stabilisation – and a critical step

Answering the call at around 4.30pm on 4 March 2020, the administrators deployed a team to Flybe's Exeter head office to urgently prepare and plan the necessary steps to effect and communicate an administration early the next day.

Setting up a process to immediately cascade key communications to Flybe's 2,200-person workforce, 20,000+ passengers, UK and European slot coordinators, regulators, suppliers and other stakeholders was paramount. The immediate objective was to notify employees, communicate the safe grounding of the fleet and reach out to all affected customers to ensure that they did not travel to airports. Working through the night with the Civil Aviation Authority (CAA) and management, administrators were able to send teams to all 26 of Flybe's airport locations to intercept and support those customers who didn't receive the news.



> **Working through the night with the Civil Aviation Authority (CAA) and management, administrators were able to send teams to all 26 of Flybe's airport locations to intercept and support those customers who didn't receive the news.**

The CAA received Flybe's strategic request to voluntarily suspend its air operator certificate (AOC) and maintenance licences once they had safely grounded the fleet during the evening of 4 March 2020. As we'll see, this step was ultimately one of the main reasons why it was possible to complete a business sale, some 15 months later, thus preserving a vital component of UK regional connectivity.

Making remote administration a reality

An airline administration was never going to be an easy prospect amid a global pandemic that has arguably hit the aviation industry hardest of any sector. Passenger air traffic all but stopped in March 2020 and volumes fell 60% below their pre-Covid-19 peak across the year, barely recovering in 2021.

The impact of the pandemic not only hastened Flybe's failure, it also significantly complicated the challenge of selling the business and its assets. Airlines, funds and other potential buyers had their own capital constraints and were far more focused on sorting out their own issues than looking to strategically acquire another business in a distressed situation. Falling aviation asset values also limited bidder appetite.

Moreover, the team almost immediately faced the prospect of performing a remote administration from home. We were on-site for less than two weeks before the full UK lockdown, which required the Flybe and administration teams to adapt working practices to ensure necessary support on-the-ground for critical maintenance, security, access to systems and records, and conducting multiple sales processes. We preserved and secured the business and assets dispersed across Europe and North America, while navigating stakeholders through an accelerated sales programme and planning an operational restructure to make Flybe a viable and attractive business proposition.

Despite these challenges, the initial worldwide M&A process still resulted in interest from over 200 parties, including over 20 non-binding offers.

In addition to the going concern sale itself, some of the ancillary assets offered as part of the M&A process held key strategic relevance to certain regional communities. This included the share sale of a solvent subsidiary called Flybe Aviation Services in June 2020, a subsidiary which held the strategically important maintenance contract for RAF Brize Norton, and also the sale of the airline's training academy in Exeter, which will now be a hub for tertiary-level skills training run by Exeter College.

Licence to sell

Much of the ability to present a compelling proposition rested on the carefully considered pre-administration step to preserve critical licences and certifications. Without Flybe requesting the voluntary suspension of its AOC and maintenance licences, prior to the appointment of administrators, the airline's insolvency would likely have triggered a revocation of both.

In addition, we also ensured that the necessary Flybe post-holder employees, linked to the licences and certifications, were retained once the administration appointment happened.

An automatic revocation of the AOC would mean that the operating licence (OL) would have also been forfeited (you can't have an OL without an AOC) and consequential loss of Flybe's valuable airport slots, which were a crucial element of the going concern sale strategy.

Restoring the maintenance licences would have been especially challenging after appointment. But our proactive action meant that the CAA restored Flybe's maintenance licences on 10 March 2020, just five days after the appointment – rather than a period of months, which we've seen in other cases.

Separately, the CAA commenced steps to revoke Flybe's OL, but an appeal of this decision was made by the administrators on the basis that the M&A process provided for a realistic prospect of the survival of Flybe as a going concern. The OL appeal process(es) by the administrators, supported by specialist and experienced aviation and insolvency legal advisers, came to an end only after we completed the going concern sale.

Why were these licences so critical?

- The maintenance licence allowed us to operate Flybe's maintenance and repair profitably, and overhaul operations division (MRO), which was crucial to maintain Flybe's 65-strong fleet of leased and financed aircraft and engines. This preserved value and generated liquidity for the estate through trading income, creating another source of recovery for the senior secured creditors and extending the period available to conduct the sales process.
- Flybe retained its airport landing slots in the UK and Europe and these were necessary in order to support the future airline business plan (for any going concern sale) and any prospective recovery for the administration. The ability to retain and then transfer airport slots with the business was reliant on Flybe holding a valid AOC and OL. The suspension but not revocation of Flybe's AOC and OL (note: the OL was not suspended, but operations were subject to an undertaking) – and the administrators' appeal against any OL revocation during the administration meant that Flybe ultimately retained its airport landing slots and transferred them to the purchaser as part of a going concern. This ability to transfer the slots was also aided by successfully being granted grandfathering rights to certain airport slots by the European Commission in August 2020.

In the absence of the liquidity generated by the administrators' actions (and other non-core asset sales), it is very likely that Flybe would have shut down, leading to the redundancy of the remaining workforce and the cessation of the going concern sale. In fact, retaining these licences enabled us to extend the M&A process, without eroding creditor value. It also gave us additional time to vet offers and find the right buyer and structure for the business.

During this extended period, the administrators and Flybe management were able to reshape the business plan for the post-pandemic market, focusing on the most profitable routes and streamlining the key operational, commercial, regulatory and financial requirements. This demonstrated that a relaunch of Flybe under a different operating model made commercial and financial sense.

Finally, when determining how to structure the going concern sale, we needed to be conscious of the ultimate transaction structure. Broadly speaking, we considered either:

i. A sale of the shares of a reconstituted Flybe limited company which held the AOC and OL via an in-court procedure (such as a restructuring plan or scheme); or
ii. A sale of the business and assets (and airport slots) via a going concern business and asset sale by the administrators to a third party who also held a valid AOC and OL.

The latter structure above was ultimately agreed alongside the purchaser and, also, in consultation with European and UK slot coordinators who needed to satisfy themselves that the proposed transaction structure was permissible under their own slot coordination regulations.

Flybe 2.0

By summer 2020 an organisation affiliated with one of the shareholders had emerged as the successful purchaser. The purchaser successfully applied for its own AOC and OL and acquired Flybe's business and assets (including the airport slots) as part of a going concern sale.

The transaction completed in April 2021 and the new owners plan to launch a new Flybe later this year.

The airline sector's recovery from the pandemic is likely to be a non-linear path, slower to arrive than hoped and the shape of the industry will change significantly as the economy adapts to reduced business travel, the continued rise in importance of technology, the transition to sustainable aviation fuel and the road to net zero. All of these points will see a continued squeeze on capital so further distress is likely.

There are important lessons we can take from the Flybe administration, where key decisions at the right time preserved significant value and allowed the sale of the business as a going concern against the odds. □

KEY TAKEAWAYS

Safe entry on administration filing: planning done alongside legal advisers and Flybe management limited operational risk by grounding flights and preserving CAA licences.

Robust initial communications plan: delivering a comprehensive communications cascade within the first 24 hours of appointment in cooperation with Flybe management and the CAA – over 20,000 customers and 2,200 employees addressed.

Protect licences and slots to enable a sale as a going concern and provide optionality: proactive steps taken pre- and post-appointment enabled us to successfully protect Flybe's licences, business and landing slots. It also provided us with the opportunity to generate liquidity/income (profitably) via the MRO business.

Focus on the exit – develop a business plan for a new Flybe: this ensured that any interested parties had a head start in understanding what a reshaped Flybe could look like, kept management and retained staff focused and engaged, and therefore avoided staff departures.

Building the right team: a well-rounded mix of legal and restructuring professionals bringing sector, regulatory, legal, and strong insolvency experience was essential.

Multidisciplinary approach: drawing on the expertise within the team which included specialisations such as insolvency, M&A, modelling, operational capability teams, aviation specialists, government and tax expertise.

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Do brokers add value, save money or increase overall costs?

Mark Beaumont examines the value of brokers in a busy marketplace for litigation funding.

The obvious answer to the above question is that it will depend on who the broker is, who the client is and what the case is: there could well be instances where an IP or their lawyer might have all the requisite market knowledge to find the best solutions for claims under £100,000, massive international disputes and everything in between.

However, few IPs or their lawyers are likely to know more than a handful of players in the market. They are unlikely to be familiar with over 50 different litigation funders and after-the-event (ATE) legal expenses insurers to enable them to identify the best options. They may also lack the deeper knowledge of who is interested in exactly what type of case, and on what terms.

There may also be those IPs who genuinely believe funders when they promise to offer the best terms direct, without the IP needing to explore the wider market. I can see the benefit for funders in pushing this message, but I'm not sure how an IP justifies this approach to the creditors? Perhaps I'm missing something, but isn't there a real risk to IPs if they can't show to creditors that they made a genuine effort to secure the best terms from the market (rather than from just one party)?

Each claim is different

If a funder really does believe that their pricing is competitive, wouldn't they embrace having their terms compared to others? Surely this would only serve to prove them right.

As a broker for a whole range of funding and insurance solutions, Annecto Legal's role is about much more than just sending papers out to a whole raft of funders and insurers. The starting point is to understand the claim, but also the needs of the IP and the legal team, with a view to suggesting appropriate retainers, funding and insurance models that reduce risk and maximise returns to creditors.

We could be looking at a single claim for, say, £50,000 that would suit an assignment model, or perhaps a mix of several

If a funder really does believe that their pricing is competitive, wouldn't they embrace having their terms compared to others? Surely this would only serve to prove them right.

cases from the same administration that could suit a portfolio solution. Perhaps there's a claim for several hundred thousand pounds that needs a low-cost funding and insurance product, rather than a giving away 30% or more of recoveries to a funder. Cases can need early investment, a small amount of funding for an issue fee, or simply a well-priced and structured ATE solution.

Know your options

An IP that understands the options available can make an informed choice. At the very least, there are benefits in putting a case to a broker so that the IP can have an insight into the options that might be available. That way, informed choices can be made as well as justified to the creditors. Your broker should be able to assess the different offers and explain the differences, as well as giving insight into the market and how funders or insurers operate.

Consider whether your practice might benefit from being able to run cases past an independent, regulated broker that can give helpful insight and feedback, as well as saving your team the time of dealing with multiple funders and insurers directly. Alternatively, consider what training and processes you need to put in place to ensure your team is exploring the market and can justify the approach taken, if necessary, to creditors and regulators.

One measure of a good business partner is whether they are adding more value than it costs to use their service. The advantage of using a broker is that you can access the service for free, and only need to commit once offers are on the table. Brokers are typically paid by the funders or insurers upon successful conclusion of the claim, and their fees will be included in any terms presented, so comparisons should be simple. Whether or not the decision is made to move forward, the IP is now in position to make an informed decision and to show that they've made proper attempts to get the best terms from the market.

As it stands, there are simply too many potential claims that wither on the vine, either because the options are not explored at all, or because claims are unattractive for one funder and no other options are considered. Creditors, IPs, lawyers and all parties involved would benefit from proper assessment of cases and the options available to take them forward. □

An IP that understands the options available can make an informed choice.

MARK BEAUMONT is co-founder of Annecto Legal Ltd, a national broker of after-the-event (ATE) legal expenses insurance and a wide range of funding for litigation and arbitration claims. Annecto is happy to assist with smaller claims under £100k as well as mid-market, large-scale and complex cases. Contact Annecto Legal on 0800 612 6587 or Mark Beaumont on **mark.beaumont@annectolegal.co.uk** or 07730 217 643.

Ready to time travel beyond Covid-19?

Emmanuelle Inacio invites you to a host of INSOL Europe events that will tackle the pandemic's impact on the EU, utilising a distinctly familiar theme…

Since the start of the Covid-19 pandemic, technology has made it possible for a lot of our work to be done remotely. Zoom started off as a video-conferencing platform and has evolved into a part of everyday life for us. Therefore, the INSOL Europe Autumn Conference of 7 and 21 October 2021 titled 'Back to the future' will be held online. But now that the vaccination programme is progressing well in Europe, most of us are back to offices, travel or at least have the desire to do one of the two. We are a sociable species; we delight in the company of other people and we delight in shared experiences. Thus, our INSOL Europe Annual Congress in Dublin will continue to delight 'in real life' if you set your DeLorean to 4 and 5 March 2022. The main theme of our 2022 Congress will be 'Back to the future 2'!

Directive trapped in time

The idea that the pandemic will change everything about our future is only partly true. Indeed, what will our world look like post-pandemic? To reference the title of a classic 1980s science-fiction film, it may take us 'back to the future', but emerging from the pandemic can also lead to us to build a better future.

Indeed, the EU member states were required to implement the EU Directive on Restructuring and Insolvency (the directive), which was adopted on 20 June 2019, to be included in national legislation by 17 July 2021 – with an extension up to 17 July 2022 if they encounter particular difficulties in transposing it. The directive contains several key measures, the most important being that debtors will have access to a preventive restructuring framework that enables them to restructure with a view to preventing insolvency and ensuring their viability, thereby protecting jobs and business activity. However, the pandemic has indeed disrupted the transposition race. Very few member states have already transposed the directive for use as a tool to prevent insolvency related to the pandemic and most of them have already notified the European Commission that they will make use of the extension option. These national choices will necessarily impact the harmonisation of a rescue culture in the EU, the future of restructuring and insolvency professions, annex A of the European Insolvency Regulation and hence the use of prevention in cross-border restructuring. Our 2021 Autumn Online Conference and our 2022 Dublin Congress will be the opportunity to discuss and assess the practical consequences of the national choices made.

Although the UK has exited the EU before the implementation deadline of the EU Directive on Restructuring and Insolvency, the UK undoubtedly remains in the race with its reforms to its own restructuring and insolvency regime – in line with the directive and the need to maintain the attractiveness of its cross-border restructuring in the post-Brexit era. Following Brexit, if automatic recognition of insolvency judgements between the UK and the EU has become a thing of the past, other tools offer an interesting solution for recognition and enforcement. A further topic for our Conference and Congress to address.

> "Traffic may not return to 2019 levels for some time, but Ireland has shown that it is possible, in certain circumstances, for its examinership regime be used to restructure airline groups."

Obstacles to travel

The pandemic has devastated the airline sector but has not stopped it. Traffic may not return to 2019 levels for some time, but Ireland has shown that it is possible, in certain circumstances, for its examinership regime be used to restructure airline groups provided that one or more group companies is registered in and has its COMI in Ireland. Recent restructuring cases using the examinership, which in the current format complies with many requirements under the directive, also will be explored during our 2022 Dublin Congress.

While the majority of EU member states still have to implement the directive, the European Commission intends to submit a proposal for the harmonisation of insolvency law whose issues will be analysed.

We should warn our future delegates that some horror is coming their way. Indeed, it may be a 'little shop of horrors', since IPs cannot escape the European General Data Protection Regulation, which has created new duties and responsibilities.

As our future is also digital, insolvency practice will face necessary challenges around the question of protecting and recovering digital assets. The INSOL Europe Insolvency Tech & Digital Assets Group and the INSOL Europe Anti-Fraud Forum will join forces and present an update on the treatment and valuation of digital assets as well as the latest cases related to the insolvency of cryptocurrency exchanges, ICOs and miners.

Finally, the Conference and Congress will both also examine the myriad of issues of the real estate industry, consumer bankruptcies and non-performing loans. □

We look forward to seeing you all online on 7 and 21 October 2021 and in Dublin on 4 and 5 March 2022 for what will be a truly memorable travel through time!

EMMANUELLE INACIO is INSOL Europe's Chief Technical Officer.

A look ahead to the 2021 SPG Forum

R3 interviews the SPG Forum 2021 co-directors to find out more about the community's biggest event.

Ahead of this year's SPG Forum on 2–4 November, we sat down with the Forum's co-directors, Antoniya Mercer of TLT LLP and Chris Herron of Herron Fisher, to find out more about the programme and the content.

Why did you decide to hold the Forum virtually again this year?

Chris Herron (CH): Last year's virtual Forum was incredibly successful, and meant we were able to bring as many of the members of the SPG community together as possible in a way that was affordable and that enabled them to come together to learn, connect and influence stakeholders.

We were conscious this has been a very difficult year for members and that some would be wary of large-scale gatherings, but we didn't want to miss out on something that has always been a key part of the SPG community's calendar. It made sense to repeat last year's approach and hold the Forum virtually again.

Who would you like to see at the Forum in November?

Antoniya Mercer (AM): As many people from all parts of the profession as possible! We want this to be an open environment for people from all levels and all branches of the profession to hear from and engage with key stakeholders, catch up with legal and practical developments from the last 12 months, and to meet and share their knowledge and experience.

Tell us more about the programme…

CH: As usual, we have invited representatives from the Insolvency Service, HMRC and the RPBs. This year, we will also hear from the FCA after they issued guidance on engagement with the profession in relation to firms that they regulate.

We also felt it was important to offer members the opportunity to hear from representatives of the financial services industry about their experiences over the last 12 months and on the trends they are seeing as the economy gears up for recovery. We hope this will provide members with an insight into the sectors and businesses that are most likely to experience distress and failure, as well as helpful practical pointers on engagement on assignments.

The legal update will return as a live session this year and will include a whistle-stop tour of the key corporate and personal insolvency decisions as well as decisions under the Company Directors Disqualification Act.

> **"We were conscious this has been a very difficult year for members, but we didn't want to miss out on something that has always been a key part of the SPG community's calendar."**

On day three we're also hosting three interactive workshops, each exploring a different case study. A panel of colleagues will discuss issues that arise in a real estate-related insolvency, the restructuring of a leisure/hospitality business and an insolvency litigation.

The social aspect of the SPG Forum has always been a key part of it. How are you replicating that this year?

AM: On the first two days we have planned working lunches hosted by our sponsors, which will allow delegates to meet and chat in an informal setting.

At the end of day one we have arranged for a virtual Mediterranean cheese and wine tasting session, and on day two, we have planned a virtual pub night with Siren Craft Brew. We also hope delegates will stay behind at the end of day three for an informal chat once the conference has finished.

Why should members attend?

CH: We've kept the format of the Forum and the sessions that we know members value the same, but this year we've added a different, more interactive dimension – one that enables members to share their experiences of the last 18 months. By doing this, we believe we'll provide our speakers and the audience with a unique perspective and will, we hope, start a dialogue on the key issues for our community.

We are really pleased with the hard work R3 have put in to create opportunities for members to actively engage with us before the Forum has begun, as well as before and during the sessions in the programme with their thoughts on the topics we have chosen.

AM: I'm really looking forward to the workshops on day three. They are designed to offer practical tips for dealing with some of the legal, commercial and regulatory issues that may crop up in typical assignments with which the SPG community deals. We have chosen an anonymised format for engagement with the audience, which will mean members can take part without feeling like they have been put on the spot.

We'll be sharing more information about the Forum in the coming weeks. The SPG Committee and R3 will be posting about the programme and the speakers on LinkedIn under #R3SPG21 and inviting members to share their thoughts with us on the topics we have chosen. □

Tickets for the R3 SPG Forum 2021 are available now, with an early bird offer running till 30 September. To find out more, visit ***www.R3SPG.co.uk****.*

> **"We've kept the format of the Forum and the sessions that we know members value the same, but this year we've added a different, more interactive dimension."**

ANTONIYA MERCER is an associate at TLT LLP.

CHRIS HERRON is a partner at Herron Fisher.

Promoting the value of the profession, post-pandemic

The R3 press, policy and public affairs team have been busy getting the profession's success noticed and helping directors get back to business.

As we reached the middle of this year, the press, policy and public affairs (PPP) team launched two major R3 reports to highlight the important role that the insolvency and restructuring profession plays in supporting the UK's economy.

Our Value of the Profession report was published in May, while in June, we launched our guide to help directors get 'back to business', together with R3's technical team. Both reports have been promoted to members, stakeholders, parliamentarians and the media. At R3's Scotland Forum in June, the Scottish insolvency minister referred to the Value of the Profession report's findings – explaining how the profession rescued 7,200 businesses, returned an estimated £1.82bn to creditors, saved an estimated 297,000 jobs, and advised over 60,000 businesses and 144,000 individuals in 2019. And as we set out below, our Back to Business guide for directors has been promoted to tens of thousands of business owners.

Meanwhile, we have continued to be busy responding to government insolvency and restructuring-related policy announcements and consultations, including a bill aimed at clamping down on directors who have fraudulently dissolved companies.

Helping directors get back to business

Alongside educating directors on the importance of seeking early, qualified advice, R3's Back to Business UK campaign has involved campaigning to ensure the profession can carry out its work in an environment that promotes business rescue.

At the end of June, we launched our new guide for directors and business owners, outlining the options open to them to address any financial difficulties their businesses have faced.

Since the guide's launch, it's been shared by a range of business bodies including the Institute of Directors (IOD), the Confederation of British Industry, and the Federation of Small Businesses, as well as being mentioned in several stories across regional and specialist media outlets. The guide is available for free on our dedicated website **backtobusinessuk.com** and we encourage all members to promote this resource through their own channels.

The secretary of state for business, Kwasi Kwarteng MP, also responded very positively to a joint letter we had written with the IOD, calling for his support ensuring that HMRC takes a more engaged and supportive approach as a key creditor in business rescue efforts.

Closing the 'dissolved companies loophole'

In May, the government announced that the Insolvency Service would be granted new powers to investigate directors of dissolved companies through the rating (coronavirus) and directors disqualification (dissolved companies) bill.

While we welcomed this move, we have concerns around whether the Service will have sufficient resource to deal with an increase in cases, as well as around the government's approach to prosecuting culpable directors and dealing with dissolved companies.

We highlighted these concerns in a briefing to MPs, liaising closely with shadow insolvency minister Seema Malhotra MP. During the debates on the bill in the House of Commons, Malhotra referred extensively to R3 and our views on the legislation.

We were also invited to give evidence to the House of Commons' Public Bill Committee on the legislation, with our past president Duncan Swift representing R3 at the session.

As the bill continues to progress through parliament, we will keep highlighting members' concerns to help ensure that this part of the UK's corporate governance framework is improved effectively.

Consultations on Insolvency Rules and corporate governance

The past two months have also seen the PPP team respond to two important consultations. At the end of June, we responded to the government's call for evidence on the Insolvency (England and Wales) Rules 2016, with our response stating that some areas of the rules have hindered the UK's insolvency framework due to issues around clarity and consistency, the lack of flexibility around decision-making procedures for IPs and damage to creditor engagement.

R3 also responded to the government's consultation on restoring trust in audit and corporate governance. We based our comments on two key themes that were lacking in the government's proposals: an emphasis on encouraging greater awareness of directors' duties and supporting directors to fulfil them; and the need to adopt a more comprehensive approach to improving the integrity of the UK's corporate governance framework.

R3 in the media

Since the last edition of *RECOVERY*, R3 spokespeople have been quoted in various national, regional and specialist media outlets. Our comments on the government's decision in June to extend the ban on winding-up petitions and statutory demands were picked up by the *Sunday Express*, among other outlets.

R3 commentary on the England and Wales insolvency statistics was covered by *The Telegraph*, the *Daily Express*, *The Independent*, and *Dow Jones*.

Meanwhile, our Value of the Profession report was well received by the trade press, including *Credit Strategy* and *CCR Magazine*, and our statement welcoming the new breathing space scheme was picked up by a range of titles, from the *Cornish Times* to *The Shields Gazette*.

The PPP team has also briefed journalists from a number of media outlets on issues that include future insolvency trends, the ending of government support, and CVAs.

Looking ahead

The PPP team will be using the summer to prepare for the launch of the government's consultation on insolvency practitioner regulation, expected this autumn. Once the government's proposals are published, we will look to gather member views on this highly important consultation for the profession.

Over the coming months we will also be looking at the next steps of our joint diversity and inclusion project with the Insolvency Service. Many thanks to those who took part in our survey in July.

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is public affairs and policy officer at R3.

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Advertisers' index

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An interview with… Caroline Sumner, CEO of R3

R3's incoming CEO talks about getting the UK back to business and the future for insolvency professionals.

Caroline Sumner biography

- Caroline Sumner was one of those rare people that knew they wanted to go into insolvency work from an early age. After finishing her accounting degree and looking at career options, she was tempted by a PwC pamphlet on their insolvency and restructuring practice. Following three years of 'purgatory' in a Black Country audit and accounting accountancy practice she found her first insolvency posting at Haines Watts in Birmingham.

- On her first day 'on the job' she was left in the office of a barge building company with strict instructions 'not to open the door to anybody'. Despite this inauspicious start, she was grateful for the role, which eventually led to her progression to Ernst and Young (as it then was) to undertake the JIEB exams.

- Caroline went on to take a career break from the rough and tumble of insolvency work to spend more time with family. She changed her work focus to edit textbooks for professional courses provider BPP until she felt ready to return to the world of insolvency.

- She later joined the IPA monitoring team – an excellent position in which to become reacquainted with the profession. Wanting to continue her career in the technical and education side of the profession, she later went on to join another of its mainstays , R3, in the post of technical director in 2016 before being appointed CEO on 1 June 2021.

Q What do you want to achieve as R3 chief executive in terms of wider membership?

A I see R3 as being the trade association for everyone in the insolvency and restructuring profession. We've done a lot of work over the last year to attract more new professional members: developing value for them in terms of training, setting up a new professional committee and developing opportunities to get involved. We had some great new professionals who took part in our annual conference for instance – they are fantastic, talented people who really stood out – and I want to make sure that we continue to provide opportunities for them to engage with us. It is really great to see R3 still being the first choice for IPs but also appealing to people at the very start of their career in restructuring and to a large number of professionals that do vital work preserving value in distress but are not (and have no intention of ever becoming) IPs.

The Corporate Insolvency and Governance Act 2020 (CIGA) has given us an opportunity to work a lot more closely with our restructuring and advisory members. It is going to be imperative for the wider economy that restructuring and advisory professionals work a lot closer with IPs in rescuing businesses and applying the tools provided by CIGA. I think R3 has got a key role to play in bringing both sides of the profession together in that regard.

Q You've also been engaging with a number of professional bodies outside of the profession. When we interviewed HMRC last edition, they spoke about having a dedicated professional specifically for R3. What is the plan for R3's engagement with other stakeholders?

A It's really important that we maintain and develop the strong relationships we already have, not only to make sure we're up to date, but that we are actively engaging in the conversations that are being had about the future of the profession and can change the direction that some of those conversations take. I meet regularly with the Insolvency Service about policy and legislation setting. We also meet regularly with all of the RPBs in terms of regulation and it's vital that we work with them in making sure

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It is going to be imperative for the wider economy that restructuring and advisory professionals work a lot closer with IPs in rescuing businesses and applying the tools provided by CIGA.

that the regulatory framework is fit for purpose and works for our members.

Only good can come from building on the cordial relationship we have with our colleagues in IFT. CIGA is an exciting development, it has the potential to provide a framework where all the various skills in the restructuring world can pool intellectual property to deliver more imaginative solutions.

We've also worked closely with the Institute of Directors and the Federation of small Businesses in providing training to their members, helping to demystify insolvency, and encouraging directors and business owners to get early advice.

HMRC is a key stakeholder for us; we've developed a really good working relationship via Lee Bruce. We know that service standards aren't quite where our members would like them to be and we are working really closely with HMRC to help them to identify and address those issues.

Q Regulation is up for review this year and we've had articles about the nature of a single regulator in *RECOVERY* before. What is happening in terms of consultation responses?

A This is such a key consultation for the profession and a real opportunity for everybody to shape the future that we want going forward. It's really important for me that we don't just hear from licenced IPs and senior members of the profession; we need to hear from younger people as well. What we will be aiming for is to ensure that we have a regulatory process that is fair, transparent and effective. Without having yet seen the details, it's hard to comment, but we know from past surveys of members that there is a divergence of opinion. It will be good to finally know what the direction of travel is and the extent of the consultation. Then we can really listen to what our members have to say and report back to the Insolvency Service.

Q What other reviews are on the horizon?

A There is going to be a review by the Insolvency Service of the personal insolvency landscape. There seems to be a perception that R3 doesn't involve ourself with personal insolvency, but we really do! It's an integral part of the profession. We've been calling for a review of the personal insolvency options for a long time and it's great to see it formalised. We've been involved at an early stage, which is good too.

Q You've already mentioned that you've looked at issues of concern to members, how are you going to ensure that you can continue talking to members and ensure that they are heard?

A With the pandemic that has been one of the key challenges for us. We had to cancel all of our planned face-to-face events and move to a virtual platform: all of our training, our conferences and even our committee meetings. That has worked really well in terms of getting information out to our members, but it's so much harder to have a two-way conversation without those in-person meetings and discussions. So, we are looking at reintroducing our regional committee meetings and regional membership meetings, as well as discussion groups and member forums in the autumn so that R3 can get out there and meet people face to face. It's been great to be able to engage virtually with all our committees – our touch points for the voice and issues of the wider profession – but we hope to have face-to-face meetings again before Christmas.

It's really important for me that we don't just hear from licenced IPs and senior members of the profession; we need to hear from younger people as well.

Q It does feel like we're emerging from the pandemic, but no one quite seems to know what the future holds yet. What do you think will happen as we head towards 2022 in terms of work in insolvency?

A There is definitely going to be change ahead. There has been a change of approach for IPs, partly thanks to government policies that have provided a real push towards rescue rather than insolvency, but I think there is also a change of people's mindsets in terms of where they want to work and how they want to work. We're all going to have to embrace technology and hybrid working – we are a profession that is known for being innovative. The profession is going to continue to develop and grow, as will R3. We also need to attract the right people into the profession, which is where our diversity and inclusion projects comes in.

Q Can you tell us a little more about the diversity and inclusion initiative?

A We launched the diversity and inclusion project jointly with the Insolvency Service in March of this year. We have just undertaken a survey of all of our members to gain an understanding of where the profession is today and whether the general perception that the profession isn't diverse is actually true. If you look at the range of people joining the profession it would seem to be quite diverse, but that changes as you move up towards the more senior end of the profession and look at licence holders and partners. We need to understand why that is, what the barriers are to joining and progressing in the profession today, and take steps to remove those barriers so we continue to attract the right people into the profession. This is very much going to be a long-term project, some of the issues aren't ones that you can solve overnight.

Q We saw R3's strategic review back in 2019, and you're now moving towards a corporate governance review. What can we expect to see happening?

A The corporate governance review is a really important piece of work for R3. We did a lot of work to understand who our members are and what was needed from us as an organisation in the strategic review. Reviewing our corporate governance and how we operate as an organisation is the key piece of the jigsaw for R3. It's about ensuring we are an agile, modern and reactive organisation going forward.

We've appointed an external consultant to assist us and we'll be looking at the makeup of our council and our committees, making sure that we are attracting the right people to our council, and that we have the right processes in place to ensure we deliver what our members want and need from us. It's about a six-month process to undertake the review, though of course implementation may well take a little bit longer.

Q We've seen huge mention in *RECOVERY* of R3's Back to business UK campaign this year, could you tell us a little bit about what this involves?

A The Back to Business UK campaign is what R3 stands for really. At this time, with businesses coming out of the pandemic with additional debt that they've never had previously, they need professional advice more than ever. One part of the campaign is about education – for our members in how to use the new tools introduced by CIGA, but also for business owners and directors in showing that these options are available and the benefits to be had from seeking not just early advice, but the right advice.

Another part is about liaising with those

> **The profession is going to continue to develop and grow, as will R3.**

people who make the legislation and the policies to ensure that they are fit for purpose and can be applied in practice. We've worked with a vast array of different stakeholders that we never have before – it has brought us together as an organisation and given us a real focus on what our members need, right now. The reach of the campaign has been huge; we've seen it picked up and promoted by the IoD, the FSB and ICAEW who have shared it with their members.

The ultimate goal is to drive all these business people who need advice to one of our members, where we know they'll get the professional, regulated advice that they can rely on. We've had over 9,000 searches on our member search so far since the launch. Not all of them will lead to an appointment, but it does mean that somebody is now getting advice from a proper source that they may not have been before, and that's brilliant.

Q What has been your proudest achievement at R3?

A I would say that the way that the teams at R3 have approached the many challenges arising from the pandemic has been great. We haven't just survived; in many ways we've thrived.

I think for me, seeing the training academy become a reality has also been a major achievement – as technical director, education was very much part of my role. To see it grow from the seed of an idea into a fully fledged Academy delivering really high quality courses has been very satisfying.

Q What would you like R3 members to know about R3?

A I think, mainly, the fact that we're a small team but we deliver massively with the sheer breadth, depth and volume of work that we do. I'd been a member of R3 for years before I joined the team, but despite being very engaged with the Association, I was amazed at the sheer breadth, depth and volume of work done by its staff that I didn't know about.

I think that's still true today – there are lots of things we can't talk about because it's about legislative changes that are coming up, but we also aren't very good at shouting about what we do sometimes. That's why I like the Back to Business UK campaign, it showcases everything that we do from lobbying and technical guidance through to training and everything else.

I want to remind people that we are there for all of our members – just come and have a conversation with us, pick up the phone and say hello. We're ready to talk about anything.

Q And finally, what has surprised you most since you became CEO?

A The number of people who have got in touch since I was announced in the role – including a diverse range of stakeholders and many who I knew from my time working in the regulatory side.

Many of them have said to me how great it is R3 has another CEO who has come from the profession, with an understanding of the wider pressures facing IPs and others working in insolvency and restructuring – and it's reinforced to me just how important R3 is to them. □

> **Reviewing our corporate governance and how we operate as an organisation is the key piece of the jigsaw for R3. It's about ensuring we are an agile, modern and reactive organisation going forward.**