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RECOVERY

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Issues to consider for tenants in administration
The Court of Appeal's decision in *Sunberry*

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Restructuring options in the retail sector

SIP 16: the creditor's view
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Contents

Spring 2009

2

18

7, Supplement

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Forthcoming themes & advertising
www.r3.org.uk/recovery

RECOVERY is the quarterly magazine of R3, the Association of Business Recovery Professionals, 8th Floor, 120 Aldersgate Street, London EC1A 4JQ Tel: 020 7566 4200, association@r3.org.uk, www.r3.org.uk

***RECOVERY* on the web**
RECOVERY is distributed to R3 members as part of their membership benefits. After an issue of the magazine has been sent to members, a PDF of the previous issue is uploaded onto the R3 website. This is so that the information may be disseminated to all the insolvency and restructuring community. **www.r3.org.uk/recovery**

Published on behalf of R3 by
GTI Specialist Publishers, The Barns, Preston Crowmarsh, Wallingford, Oxon OX10 6SL www.groupgti.com, Tel: 01491 826262

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Editorial

So many of our contributors (and news items) in this issue refer to pre-packs that you might think there is little left to say. Worth recognising though is the extent of ill informed comment in the media generally and the prejudice exhibited by ordinary creditors.

Outside the profession there appears to be almost universal belief that pre-packs are wrong and cause loss to creditors. A small number of poorly handled cases make that difficult to refute but we all have a responsibility to get across the message more clearly – and at the earliest possible opportunity – about how insolvency works and that administrators act in creditors' interests.

- Creditors lose money because businesses fail.
- Administrators then get the best possible return for creditors.
- If the directors who cause the loss buy back the business, it is because they are paying more than anyone else would.

Be aware that it is your job to make sure that creditors believe these three points intuitively.

An allied issue is directors' failure properly to market a failing business. It should be evidence of misfeasance if directors have done nothing to market a business prior to insolvency.

And while on the subject of insolvency law reform, can we please ban counterparties from terminating contracts on the grounds the company is in administration? Administration may then be able to be recognised as a genuine moratorium to allow rescue, rather than – as it is now – a euphemism for going bust.

Chris Laughton is editor of *RECOVERY* and a partner at Mercer & Hole.

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TUPE in insolvency: how not to draft legislation

David Pollard asks if lack of joined-up thinking at international level will lead to more litigation over TUPE in insolvency situations.

One of the interesting areas of insolvency law is how it inter-relates with employment law. Often problems arise because the legislation simply does not take into account the employment aspects (in the case of insolvency legislation) or vice versa. So it is rather disappointing that, even where the legislation has the clash between insolvency law and employment law in mind, problems still arise.

In *Oakland* v. *Wellswood (Yorkshire) Ltd* the Employment Appeal Tribunal (EAT) had to consider whether the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) applied to a transfer of employees as part of a business transfer made shortly after the appointment of administrators (as part of a pre-pack administration). The issue was whether or not one of the employees who moved to the purchaser, but was later dismissed, could bring a claim for unfair dismissal. He had less than one year's service with the purchaser and so could only bring his claim if he could count the service with the original company as part of his continuous service. The case proceeded on the basis that the answer to this was dependent on whether or not TUPE applied to the transfer.

The case brings TUPE back to the forefront of discussion by ruling that a pre-pack administration sale did not result in a transfer to which TUPE applied.

TUPE

TUPE derive from the EU Acquired Rights Directive (ARD) and aim to protect employees' rights on a relevant business transfer in the UK. TUPE 2006 followed the ARD and included specific provision dealing with where the transferor has entered an insolvency process.

TUPE and insolvency

TUPE are relevant in insolvency situations because IPs will often decide that it is in the interests of the insolvency proceedings for the existing business of the insolvent employer company to be transferred as a going concern.

Under regulation 8(7) the provisions on transfer and unfair dismissal under TUPE are disapplied for what can be called a 'terminal' proceeding, ie where *'the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings that have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner'.*

This is a straight lift out of the ARD. It begs the question as to which insolvency proceedings are to be treated as terminal and so within regulation 8(7), and which are not. The implication is that having agreed to the revised ARD, the government could not decide how to categorise UK insolvency proceedings in a way that would be compatible with the ARD.

Regulation 8(6) applies in non-terminal insolvency proceedings. Not all employee liabilities transfer where there is a non-terminal insolvency. In addition, changes in employment terms can be agreed with employee representatives.

At the time the new TUPE regulations were issued, R3 complained about the ambiguity. A motion to revoke TUPE 2006 was debated in the House of Lords on 3 May 2006 and narrowly defeated (79 votes to 77). R3 subsequently wrote to the relevant minister commenting on the issues.

> "The case brings TUPE back to the forefront of discussion by ruling that a pre-pack administration sale did not result in a transfer to which TUPE applied."

Guidance issued by the Department for Business Enterprise & Regulatory Reform (BERR) in 2006 is emphatic that administrations do not fall under the scope of regulation 8(7). The guidance states that *'the correct approach is to look at the sole or main purpose of the procedure rather than its outcome in a particular instance. The main purpose of bankruptcy proceedings is to realise assets and expenses amongst all the debtor's creditors. This is not the main purpose of administrations'.*

BERR's guidance is not, of course, legally binding and in *Oakland* v. *Wellswood (Yorkshire) Ltd* the EAT held that a pre-pack administration was a terminal insolvency proceeding under regulation 8(7) and so employees who transferred with the business sale did not transfer under TUPE. In holding that regulation 8(7) applied the judge focused on the purpose for which the joint administrators were appointed. In this case he was satisfied that this was the eventual liquidation of the assets of the company by way of a creditor voluntary liquidation.

The EAT's judgment appears to establish that immediate pre-packs can leave behind employment claims. This will make certain pre-pack administration more attractive to buyers, a significant step for the rescue culture.

Every case is different

However, administrators should be cautious about relying on this case, as each case will be decided on its own facts. Where the administrators continue to trade the business for a period of time the EAT's judgment will be less applicable.

Furthermore, some commentators have taken the view that the EAT's reasoning is incorrect because it focuses on the intentions of the parties at the start of the insolvency procedure rather than the objective purpose of the insolvency process. They argue that BERR's approach could be the correct one. There is the possibility that a later court will not follow the decision in *Oakland* (although employment tribunals will be bound by it, at least if the facts are similar).

The actual result also looks a bit odd in the context of general employment law. The rules on continuity of employment following a transfer of a business are not in TUPE but in s218(2) of the Employment Rights Act 1996 (ERA 1996). S218(2) does not refer to TUPE and arguably this means that continuity is preserved even if TUPE do not apply. Perhaps Mr Oakland did not argue this?

So further litigation on this point looks inevitable, which is unfortunate. Perhaps it is too much to hope that European legislation will be understandable at national level. Having said that, the approach of listing types of national insolvency proceeding has been adopted in the EU cross-border regulations, so why not in the ARD? □

David Pollard is a partner at Freshfields Bruckhaus Deringer LLP.

President's column

Nick O'Reilly describes the uphill battle faced by R3 to balance the negative publicity attached to pre-pack administrations.

SIP 16

As I write these notes in early 2009 it seems that not a day has gone by since Christmas without an article appearing or a radio interview taking place referencing the use of pre-pack sales in administration, especially involving high-profile individuals associated with companies. We at R3 have long been aware of the unease in the minds of creditors and the wider business community about the use of pre-pack sales. With this in mind, some time ago we commissioned research from Dr Sandra Frisby of Nottingham Law School to provide data on the benefits of pre-pack sales especially with regard to return to creditors and job retention levels. In addition, our General Technical Committee put together a first draft of SIP 16 which, through the efforts of the Joint Insolvency Committee, has now resulted in its issue and adoption by all RPBs, and came into effect on 1 January 2009. (See pages 22 and 32.)

> "This additional level of scrutiny by the Insolvency Service might provide an additional reassurance for creditors. R3 is also considering whether insolvency practitioners need to take further action themselves to provide further reassurance."

An imperfect world

In a perfect world there would be no need for pre-pack sales, but unfortunately we do not live in a perfect world. If I could plan an administration it would be one where we are appointed and trade the business for a number of weeks, place adverts in trade press and national newspapers, and receive a number of serious enquiries from competitors, private equity funds and entrepreneurs. We insist on best and final offers as sealed bids by a particular date together with proof of funding. We then accept the highest bid, which is most appropriate in the circumstances, and sell the business to a new owner, independent of the former company management. All jobs are saved and suppliers and customers thank us for our efforts in minimising the disruption caused by the demise of the company.

Sadly a number of factors prevent that from happening. Firstly when we are appointed administrators it is usual for there to be a myriad of lenders over every single asset of the company – hence very few free assets to trade with. The risk attached to an insolvency practitioner trading on is very high unless there are free assets that administrators can use to generate cash to pay wages and overheads. In addition it is very difficult for him or her to commit to paying the rent and salary costs together with the finance costs for using all of the assets unless they are entirely certain that there will be a buyer at the end of it.

This leads on to the next problem, which is the shortage of buyers out there prepared to take the risk of a business with the employees retained while also paying sufficient monies to make the transaction worthwhile to the administrator and the secured creditors.

All of this leaves the insolvency practitioner, when considering an appointment as administrator, with the option of trying to take away most of the risks associated with a trading period and that means discussing a 'plan B' with the existing management and third parties without undertaking a public marketing campaign. Add to this the pressure, sometimes from secured lenders, to try and keep continuity at all costs to protect their assets (which may be in the form of debtors and receivables) and you can see how the rise in pre-packs has occurred.

Given this rise and the heightened sensitivity created by the current economic downturn one can see how there might be plans to legislate in the area of pre-pack administrations to prevent abuse. Having discussed the matter of pre-packs with a large number of our members I did not think that the perceived abuse of the process was as widespread as is reported, nor did I believe negative press comment should drive public policy.

The Insolvency Service will check compliance

However on 28 January the Insolvency Service wrote to all insolvency practitioners stating they will be required to send a copy of the information given to creditors explaining why a pre-pack was considered the best option, so that it can check them for compliance with new industry guidelines (SIP 16). This additional level of scrutiny by the Insolvency Service might provide extra reassurance for creditors. R3 is also considering whether insolvency practitioners need to take further action themselves to provide further reassurance. One option under discussion is whether some of the larger unsecured creditors should be consulted in advance of the pre-pack sale. That said, I'm at pains to point out there has been no evidence to date of systematic abuse of pre-packing and this measure is more about providing comfort for creditors than rooting out wrongdoing.

Creditors who have made poor lending decisions to companies have unrealistic expectations of the amount of money they were ever likely to receive from a failing business. They think they were always going to receive 100 per cent of their debt until the very day the nasty IP sold the business back to the former managers or owners. In most cases where we get called in, the amount of money that creditors may have received by a shut down or a business sale is either a very small percentage of their debt or nothing at all. In those circumstances the IP is an easy target, given the fact that they will be remunerated for their time spent in putting together the pre-pack deal.

R3 is trying to educate the media

We at R3 are committed in supporting the members of our association in trying to promote a balanced view of pre-packs. Whenever negative comment is made in the papers we are making efforts to contact the journalist and either write a piece in response or at least balance the view in their minds during a meeting so that the next time a pre-pack arises they come to us for the industry view. That process is ongoing and I hope that the government and the Insolvency Service do not jump too quickly to try and regulate a commercial matter that I believe works well and is not subject to the widespread abuse you would imagine from reading the press. Sadly the negative stance on pre-packs is the better story for the media at the moment. □

Nick O'Reilly is client partner at Vantis.

Burning platform

Have your shout. If you have comments about articles in *RECOVERY* or concerns about the industry we'd like to hear from you.

Dear Sir,

Over 200 insolvency practitioners (IPs) have been reported to their professional bodies for failing to advise the Pension Protection Fund (PPF) and The Pension Regulator (TPR) about pension schemes of insolvent companies – putting their professional reputation at serious risk. Now that the economic downturn is forcing more businesses into insolvency, this problem is likely to get much worse.

Under the Pensions Act 2004 IPs have two weeks to file an s120 Insolvency Event Notice with TPR, the PPF and the trustees/managers of the scheme following the insolvency appointment or of becoming aware that the employer was sponsor of a company pension scheme, including money purchase arrangements.

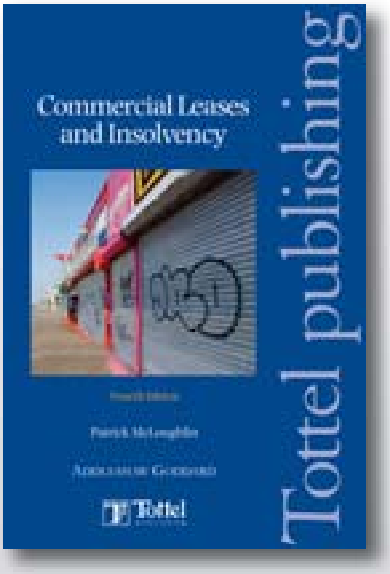
In 2008 the PPF adopted a very strict interpretation of this legislation meaning that any s120 notices received beyond 14 days after the insolvency event for whatever reason, were automatically deemed late and the IP was then reported to their recognised professional body.

So far, we have not been made aware of what action recognised professional bodies intend to take against frequent offending but the possibility of time consuming on-site visits, financial penalties and reputational damage are ever present.

The main problem for IPs is identifying occupational schemes sponsored by an insolvent company that sometimes only come to light months after the initial appointment. TPR currently hold records for all registered company pension schemes but only shares this information directly with the trustees of the scheme, due to the Data Protection Act. Alexander Forbes believes that TPR and the PPF should now sit down with government and work out a better way of identifying company pension schemes where sponsoring employers fall into an insolvency event.

Filing an s120 notice is just the first step that an IP should take to ensure that the pension scheme is dealt with professionally. So enabling an IP to find the pension scheme from day one, would clearly speed up the whole process and be in everyone's best interest. □

Darren Toms, associate director,
Alexander Forbes Trustee Services Limited.



Commercial Leases and Insolvency

Edition: Fourth
Author: Patrick McLoughlin
Publisher: Addleshaw Goddard LLP
ISBN: 978-1-84766-147-0
Price: £68.00

Book review

Commercial Leases and Insolvency is an excellent publication that clearly explains the main issues facing insolvency professionals when dealing with commercial property leases. This fourth edition records changes in the law to August 2008, and includes developments such as the decision in the *PRG Powerhouse* case.

But Patrick McLoughlin does not target his book just at insolvency practitioners. The book is also aimed at lenders, LPA receivers, lawyers, surveyors, and owners and occupiers of commercial property. Now that's a wide constituency. And in many ways the book serves the non-insolvency community even better than it does the IP, since it devotes a fair amount of space to overviews of the various insolvency procedures, disclaimer, antecedent transactions etc, with which the IP will already be familiar. However, since the cross-referencing is excellent, the IP can quickly find the required section.

The book's biggest virtue is that it focuses on issues that arise in the day-to-day work of an insolvency professional, such as liability for rates, the landlord's right to distrain or issues surrounding forfeiture and relief. It is certainly not the dull tome that many of us associate with property law texts from the days of our studies. It is a book that could be read for pleasure. Well maybe that's pushing it. But every insolvency office should certainly have a copy. □

Kevin Murphy is a partner at Chantrey Vellacott.

News update

Queries over pre-packs

The Business and Enterprise Regulatory Reform (BERR) committee is launching an investigation into the way failed businesses are being put into 'pre-pack' – where a buyer is lined up before they go into administration – amid allegations that the practice enables them to escape debts and creditors.

Creditors have voiced concern about the practice, which has been used in high-profile business failures such as Whittard, USC and The Officers' Club recently.

In response, R3's technical committee has issued SIP 16, which has been approved by the Joint Insolvency Committee. This became effective on 1 January 2009 and provides best practice guidance in pre-packaged administrations. SIP 16 will require administrators to reveal to creditors the name of the buyer, any connection the purchaser had with the former directors or shareholders, why they considered a pre-pack would provide the best outcome for the creditors and the price paid for the company. (See article on page 4.)

Darling delays Budget until 22 April

Alistair Darling is to delay his Budget until 22 April, the latest since 1997. The chancellor is buying himself time to see what happens at the G20 world economic summit in London on 2 April and to see what impact his PBR stimulus is having.

Mr Darling has intimated that he will probably go for a second stimulus in April — in addition to giving help to hard-pressed savers — but he has yet to determine the scale of it.

The Budget will also include a sharp downward revision of Mr Darling's economic forecasts. Last November, he predicted the recession would end in the second half of 2009.

Insolvency Services figures: February 2009

Company liquidations[1]
England & Wales (not seasonally adjusted)

Year	Q	Total	Compulsory liquidations	Creditors' voluntary liquidations[2]
2007	–	12,507	5,165	7,342
p 2008	–	15,535	5,494	10,041
2008	Q1	3,262	1,080	2,182
	Q2	3,689	1,410	2,279
	Q3	4,059	1,467	2,592
p	Q4	4,525	1,537	2,988
Percentage change, latest quarter on previous quarter				
2008	Q4	11.5	4.8	15.3
Percentage change, latest quarter on corresponding quarter of previous year				
2008	Q4	54.5	33.9	67.8

p Provisional
[1] Including partnerships
[2] Where the Creditors' Voluntary Liquidation is the first Insolvency procedure entered into

Individual insolvencies
England & Wales (not seasonally adjusted)

Year	Q	Total	Bankruptcy orders	Individual Voluntary Arrangements[1]
2007	–	106,645	64,480	42,165
p 2008	–	106,544	67,428	39,116
2008	Q1	24,619	15,814	8,805
	Q2	25,966	16,373	9,593
	Q3	27,488	17,237	10,251
p	Q4	28,471	18,004	10,467
Percentage change, latest quarter on previous quarter				
2008	Q4	3.6	4.4	2.1
Percentage change, latest quarter on corresponding quarter of previous year				
2008	Q4	19.5	24.6	11.6

p Provisional
[1] Including Deeds of Arrangements

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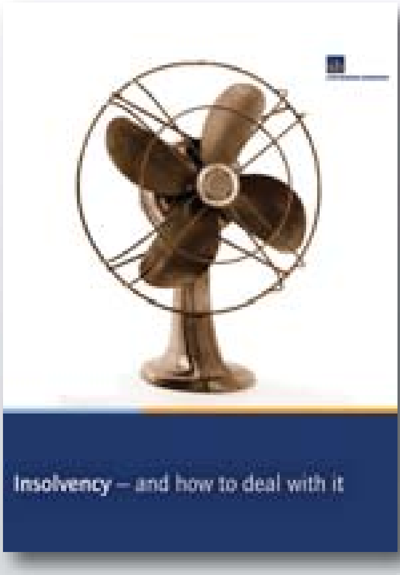

Insolvency – and how to deal with it

Edition: First
Author: David Lacey et al
Publisher: Stephenson Harwood
Price: Free

Book review

The word 'bankrupt' – originally Italian – derives from *banca rota*, or broken bench. When a medieval moneylender could not pay his debts, his bench was broken in two, sometimes over his head.

Things are not quite so physical these days, but – the intentions of the Enterprise Act 2002 notwithstanding – insolvency is still a difficult concept for UK businesses to bear, and many would prefer not to contemplate it until it is too late.

Insolvency – and how to deal with it is a new guide, written in plain English for a general business audience, that strips out the complexities. It provides solid, practical and commercial guidance to all kinds of people and institutions who might be affected by a corporate insolvency – from company directors, banks and suppliers through to landlords and pension trustees – and tells them what they can do to protect their interests when push comes to shove.

It makes the point repeatedly that insolvency does not just affect the insolvent company; it can also affect all the companies that do business with it or have a stake in it. It can mean suppliers not getting paid; customers not receiving goods they have paid for; landlords not receiving rent; pension schemes facing funding crises; and shareholders losing their investment. The guide addresses each of these groups, explaining what can happen and looking at options to deal with the problems that are likely to ensue.

The guide also has some useful pointers for directors. As well as setting out their duties, it contains some useful guidance on the value (and limitations) of D&O cover. Conversely, it discusses how to prevent shareholders running off with the company's assets.

Stephenson Harwood has provided a valuable service with this guide. They have demystified insolvency for the lay business person, and provided them with some useful tools to protect themselves. For a free copy of the guide, e-mail insolvency@shlegal.com. ☐

Maggie Mills is a restructuring partner at Ernst & Young.

The key objective of RICS' Recovery and Insolvency Forum is to become the focus for all professionals (accountants, lawyers, surveyors…) with an active interest in corporate recovery and insolvency. Membership benefits include: **Networking Opportunities, Annual Conference, Topical Events, Members Directory and a Weekly News Update.**

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How exceptional must 'exceptional circumstances' be?

Nigel Barnett examines the case law on an exceptional issue.

The issue of what amounts to 'exceptional circumstances' for the purposes of s335(a) and s336 of the Insolvency Act 1986 continues to be a hotly litigated issue. Over the past year there have been two noteworthy cases that have addressed the issue, namely *Turner* v. *Avis & Avis* [2008] BPIR 1143 and, very recently, *Brittain* v. *Haghighat & Anor* [2009] All ER(D) 31. As will be well known to all practitioners, the criteria to be followed by the court when faced with an application for possession of the bankrupt's home is to make such order as it thinks 'just and reasonable' having regard to:

a) the interest of the bankrupt's creditors;
b) the conduct of the spouse or former spouse so far as contributing to the bankruptcy;
c) the needs and financial resources of the spouse or former spouse;
d) the needs of any children; and
e) all the circumstances of the case other than the needs of the bankrupt.

However, where the application is made after the end of the period of one year from the estate first vesting in the trustee, the court will assume that the interests of the creditors outweigh all other considerations 'unless the circumstances of the case are exceptional'.

In determining whether a case falls within the exception, a court is faced with two challenges. First, are the circumstances presented to the court truly 'exceptional'? Secondly, if so, what is the proper order to be made that balances the interests of the bankrupt's creditors and the occupant claiming exceptional circumstances? It is often the latter question that is the more difficult one to answer.

The best summary of the principles derived from the various authorities is that of Lawrence Collins QC (as he then was) in *Harrington* v. *Bennett* [2000] BPIR 630 (although later reprised by him in *Dean* v. *Stout* [2005] BPIR 1113). He summarised the principles as follows:

- The presence of exceptional circumstances is a necessary condition to displace the assumption that the interests of the creditors outweigh all other considerations, but the presence of exceptional circumstances does not debar the court from making an order for sale – see *Re D R Raval* [1996] BPIR 389.

- Typically exceptional circumstances relate to the personal circumstances of one of the joint owners such as a medical or mental condition – see *Judd* v. *Brown, Re Bankrupts Nos 9587 and 9588 of 1994* [1997] BPIR 470.

> "What is the proper order to be made that balances the interests of the bankrupt's creditors and the occupant claiming exceptional circumstances?"

- The categories of exceptional circumstances are not closed and the court will make a value judgment after looking at all the circumstances – see *Claughton* v. *Charalambous* [1998] BPIR 558.
- 'Exceptional' means something outside the usual 'melancholy consequences of debt and improvidence' or otherwise amount to 'compelling reasons, not found in the ordinary run of cases' – see *Re Citro* [1991] CH 142.
- The creditors retain an interest in an order for sale being made even if the whole of the net proceeds will go towards the expenses of the bankruptcy. The mere fact that the costs may be swallowed up in paying those expenses does not amount to an exceptional circumstance – see *Trustee of the Estate of Eric Bowe (a Bankrupt)* v. *Bowe* [1997] BPIR 747.

The saga of *Turner* v. *Avis*

Most cases where the exceptional circumstances argument is deployed relate to some element of physical hardship being visited upon an occupant of the property in question by virtue of the order for possession. In *Turner* v. *Avis* the argument was deployed in a rather more novel way. The bankrupt's marriage had broken down in the early 1980's and following divorce proceedings a consent order had been made that provided for the property to be held by the bankrupt and Mrs Avis on trust for themselves as tenants in common, two-thirds to Mrs Avis and one-third to the bankrupt. It also provided for Mrs Avis to enjoy exclusive possession and for the sale of the property to be postponed until the happening of one of a number of events such as re-marriage or the death of Mrs Avis, subject to her being responsible for the maintenance of the property and the discharge of the mortgage payments. Almost four years later Mr Avis was made bankrupt, a trustee was appointed but duly released in 1993 having taken no steps to secure possession of the property. In 2003 a new trustee was appointed. In 2005 he took steps to secure the possession and sale of the property – some 16 years after the commencement of the bankruptcy and some 21 years after the bankrupt had originally vacated the property.

Resisting the application for possession, Mrs Avis sought to argue that there were exceptional circumstances in the form of:

a) the delay;
b) the existence of the consent order in the divorce proceedings and her reliance upon it (including a suggestion that she had some form of personal

remedy against the former trustee arising out of the consent order); and
c) that old faithful, the rule in *Ex-parte* James.

Her arguments were unsuccessful. While the delay was acknowledged, the application had been made within the transitional period of three years from 1 April 2004. The issue of delay had been addressed first in *Foyle* v. *Turner* [2007] BPIR 43. In that case HHJ Norris QC had held that delay would only be exceptional if both inordinate and materially and disproportionately affected some interest to which the court was directed to have regard. In *Turner* the judge doubted whether it was necessary for the delay to be inordinate if otherwise the delay has 'passed' the second test. In any event, the court found that the interest of Mrs Avis had not been materially or disproportionately effected by the delay. Indeed, the increase in value of the property had far outstripped the expenses incurred.

The judge also held that mere existence of the consent order was not in any way exceptional nor could it be said her reliance on the consent order was exceptional.

The suggestion that there was some form of *Ex-parte* James point was also given short shrift. Given that the principle would only apply if the court concluded that the trustee was acting in some improper way, it would be impossible for the court to conclude that the circumstances were not exceptional but that a trustee should nevertheless be refused an order for possession.

Although Mrs Avis doubtless felt aggrieved at the prospect of an application for an order for sale being made in respect of her property several decades after the original bankruptcy, her argument was doubtless doomed to failure. While the categories of exceptional circumstance may not be closed, it is probable that an argument that does not relate to an occupant's physical or mental condition will be very rare indeed.

Brittain v. *Haghighat*

In *Haghighat* there was little doubt that the circumstances were exceptional and counsel for the trustee, quite fairly, conceded the point. The bankrupt's adult son lived at the property. He was seriously disabled. He had congenital quadriplegic cerebral palsy with learning disabilities and epilepsy, was doubly incontinent, had little speech or comprehension and took little food by mouth receiving the bulk of his fluid intake and nourishment through a percutaneous gastronomy tube. He was in need of continuous care. The marriage of Mr and Mrs Haghighat had broken down and the care for their son fell solely on Mrs Haghighat. She was suffering depression as a result of the toll taken on her physical and mental wellbeing.

The difficult issue that faced the court was what order it should make having found that there were exceptional circumstances. On the one hand, the trustee sought an order for possession deferred for three or six months to enable the Local Authority to re-house the family. On the other hand, Mrs Haghighat contended that the order for possession should be refused absolutely.

> “Plainly the judge sought to come up with a Solomon-like decision that met the concerns of both sides. However, there is a danger that in trying to do justice for both sides, one does not give justice to either.”

The financial picture was not a pretty one. The property was thought to be worth in the region of £375,000. There were secured creditors of some £242,000 and other costs in the bankruptcy of at least £206,000. Therefore, the only parties that would benefit from the sale would be the secured creditors and the trustee in respect of the costs expended by her.

The property itself was not ideal for the Haghighat family as five of them were living in a two-bedroomed flat. However, it seemed to be better than the alternative. Evidence from the Local Authority was to the effect that while the Haghighat family had high priority on the housing register, there was likely to be a six to eight year delay before an offer of suitable accommodation could be made. While not unsympathetic, the Local Authority was not minded to afford the Haghighat family any greater priority than any other equally deserving case. Although acknowledging their statutory obligation to re-house the family if they became unintentionally homeless, the likelihood was that the family would be placed in interim accommodation some considerable distance from their present environment.

So the judge was faced with a dilemma. There were plainly exceptional circumstances but if an order for possession was made, there was a risk that Mrs Haghighat and her seriously disabled son would be left in a materially worse off position. On the other hand, if an order was not made for possession in the near term, the trustee would probably be faced with no alternative but to disclaim the property by virtue of the accruing ground rents and service charges on it.

In balancing the competing interests, the judge made an order for possession but suspended it for a period of three years. His reasoning for so doing was to give a period for the Local Authority to make provision for the re-housing of Mrs Haghighat and her son. In arriving at that decision, the judge recognised that the position was not ideal but he concluded that it was likely that the Local Authority would be able to make a suitable offer of accommodation within that timeframe.

The crafting of an order

The *Haghighat* decision demonstrates just how difficult it is for a court to come up with an order that balances fairly both the interests of the creditors and the interests of the occupant claiming exceptional circumstances. If the intention of the judge in *Haghighat* was to force the Local Authority to afford priority to Mrs Haghighat and her son, he could have just as easily acceded to the submissions of the trustee's counsel to the effect that the order for suspension be suspended for six months only. That would have put pressure on the Local Authority to promote Mrs Haghighat up the housing list. Alternatively he could have concluded that the order for possession should be suspended for eight years, the period projected by the Local Authority for re-housing Mrs Haghighat.

Plainly the judge sought to come up with a Solomon-like decision that met the concerns of both sides. However, there is a danger that in trying to do justice for both sides, one does not give justice to either. Consistency is extraordinarily difficult to achieve. For example, in *Judd* v *Brown*, an application for possession by a trustee in bankruptcy was resisted by the bankrupt's wife on the basis that she was suffering from cancer and would be continuing to receive chemotherapy over the following five or six months. In the circumstances the court declined to make an order for possession suspended for eight months and refused to make any order at all for possession on the basis that her chances of recovery would be damaged by the stress of knowing that she had a possession order hanging over her.

In *Claughton* v. *Charalambous* the court found that there were exceptional circumstances in that the bankrupt's wife was in very poor health, could only walk with great difficulty and were she to be re-housed it could only be to a ground-floor flat or a property with a stairlift. In the circumstances the judge at first instance granted possession but suspended it indefinitely. That decision was upheld on appeal.

In *Martin-Sklan* v. *White* [2006] EWHC 3313 an application was resisted on the basis that the bankrupt lived at the property with his partner and their two children aged 10 and 14. The bankrupt's partner was an alcoholic who frequently left home for days at a time but the children had a substantial support network >>

in the vicinity including neighbours, relatives and a school counsellor. In that case the court suspended the order for possession for seven years.

Are these cases reconcilable? One might say that given the above examples, Mrs Haghighat got something of a raw deal. The trite answer is that each case will, of course, turn on its own facts and there is a value judgment to be undertaken by the judge. However, as was noted in *Claughton v. Charalamabous*, having made that value judgment, it is highly unlikely that any appeal tribunal would gainsay that judgment.

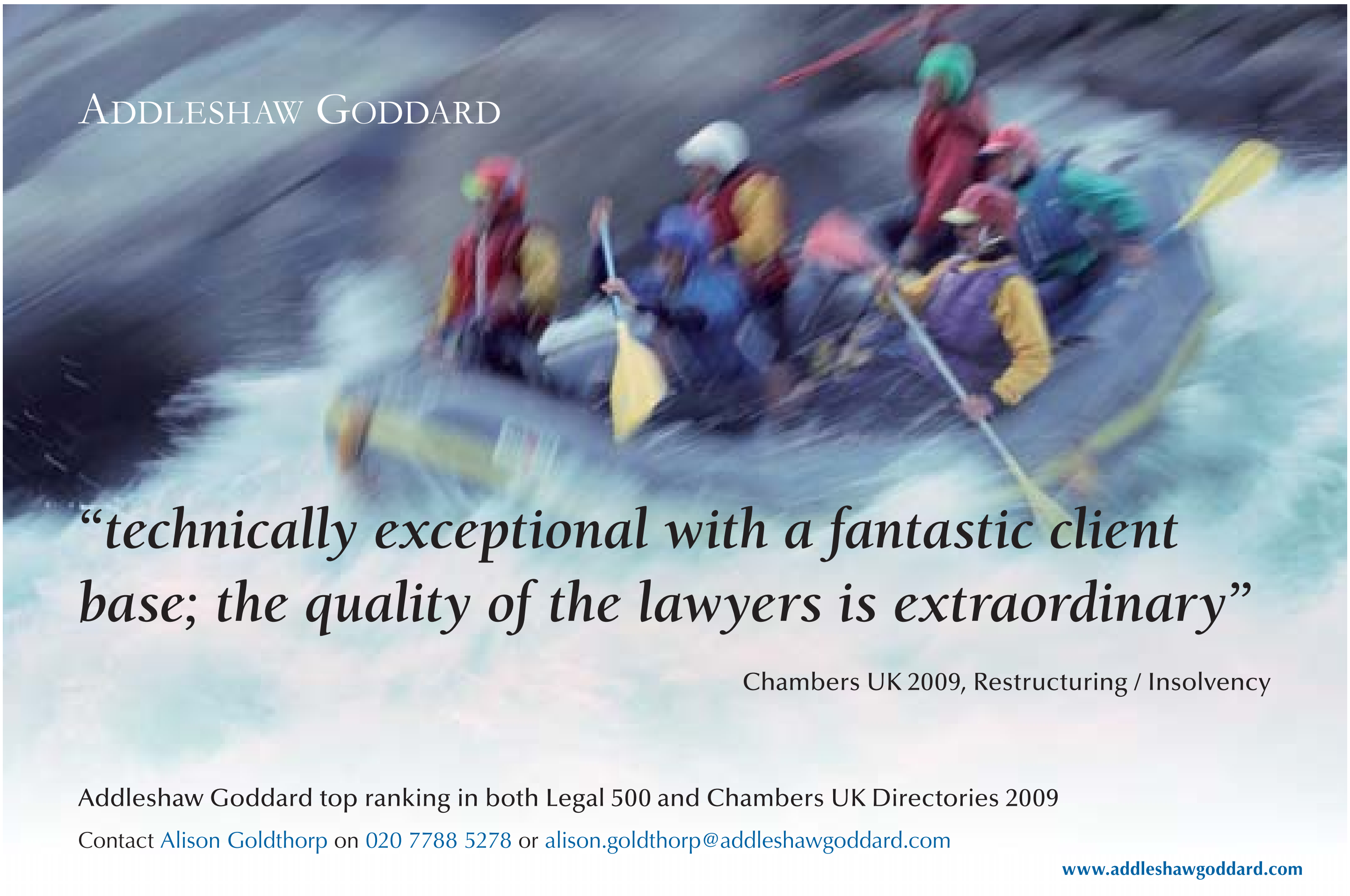
How is the balancing exercise to be approached? An order that purports to recognise the interests of both sides but serves the interests of neither is plainly unsatisfactory. It is suggested that if the court has found exceptional circumstances, its starting point should be first to arrive at an order that addresses comprehensively those exceptional circumstances. If it is also able to accommodate the interests of the creditors within the scope of that order, then it should do so. However, if there is an irreconcilable conflict, the order that best addresses the exceptional circumstances is to be preferred – even if that may lead to a result that extinguishes the creditors' rights.

There also appears to be some judicial fleet footedness as to the weight to be given to the interests of secured creditors or indeed the position if the entire proceeds of sale are applied towards the expenses of the bankruptcy. As noted above, the cases indicate that these are factors to be taken into account when undertaking the balancing exercise. However, the extent to which the court will be flexible is exemplified in *Claughton v. Charalambous*. The first instance judge, declining to order the sale of the property until Mrs Charalambous either vacated the property or died, had noted (and presumably given regard to) the fact that even if the property was sold the trade creditors would get absolutely nothing. That reason was attacked on appeal but the judge was upheld, the appeal judge concluding that the first instance judge had not attached weight to the creditors' interests. He had merely assessed what weight it would be right to attach to them – a distinction that might be lost to the casual reader!

The subject of exceptional circumstances will remain a vexed issue and, perhaps more than any other area, will lead to decisions that may appear inconsistent. ☐

> "If the court has found exceptional circumstances, its starting point should be first to arrive at an order that addresses comprehensively those exceptional circumstances. If it is also able to accommodate the interests of the creditors within the scope of that order, then it should do so."

Nigel Barnett is a partner at Denton Wilde Sapte.



Recent case summaries

Corporate and personal insolvency update from Stefan Ramel.

Corporate insolvency

***Power Builders (Surrey) Ltd; John Power* v. *Petrus Estates* [2008] EWHC 2607 (Ch) (Lewison J)**

Facts: This case involved an attempt by a director to stifle liquidators' claims against him: P, the sole director of Power Builders (the company), bought up the company's debts after a s98 meeting and then sought to argue that a new s98 meeting at which he would have effective voting control should be ordered because the company's major creditor, E (of which P was the managing director), had wrongly been permitted to vote at the original meeting. P had chaired the initial s98 meeting. He had admitted all proofs received from creditors with the exception of E's proof, which was marked as objected to but allowed to vote in full. Almost all creditors (including E) voted for the appointment of joint liquidators, in effect rejecting P's nominee. The joint liquidators subsequently sought repayment from P of sums representing alleged unlawful dividends and an unlawful overdrawn director's loan account. In the meantime, P paid off and took assignments of the debts of many of the creditors, thereby enabling him to allege that voting at any new meeting would result in the appointment of his nominee provided that E's vote was disallowed. On P's application, the registrar declined to disallow E's vote and to summon a new meeting. P appealed to the judge.

Held: P's appeal was dismissed. An appeal under rule 4.70(2) IR 1986 would normally require a determination by the court as to whether, at the date of the meeting, the company was indebted to the creditor, and if so for how much. Here, the judge proceeded by considering whether, assuming E's votes were disallowed, the decision taken at the meeting would have been different. He drew a distinction between the situation (i) where a creditor should have been allowed to vote but was prevented from voting and (ii) where a creditor who should not have been allowed to vote was permitted to vote. In the latter situation, of which this case is an example, the default position would be to have a re-count and not a re-run (even disallowing E's votes, the joint liquidators would still have been appointed at the original meeting). In the former situation, in order to ensure that a creditor's voice that had not been heard could be heard, the default position would be a re-run.

Comment: This case is important because although it is concerned with a challenge to a decision taken at an s98 meeting, it is clear that the judge's reasoning is potentially capable of applying to a challenge of a decision taken at any creditors meeting summoned in an insolvency. It is also noteworthy that the judge was concerned to ensure that the most cost effective solution should be adopted in order to reduce the costs of the insolvency. Moreover, the fact that P's application was driven by a clear ulterior motive (minimising his own liability by being able to choose his own liquidator) was an important factor, which could be and was taken into account. A transparent strategy to buy up debts and stifle a claim was not allowed to succeed.

> "The mechanism devised by the TiB in *Lewis* effectively transferred the risks of realisation to a third party while preserving the possibility of a future payment into the estate after the expiry of the 'use it or lose it' period."

Personal insolvency

***Lewis* v. *Metropolitan Property Realizations Ltd* [2008] EWHC 2760 (Ch) (Proudman J)**

Facts: A discharged bankrupt and his wife were the joint registered owners of a property. On the very last day of the three-year 'use it or lose it' period, the joint trustees in bankruptcy (TiB) entered into a deed of assignment with MPRL (which was the largest creditor in the bankruptcy) under the terms of which MPRL would immediately pay the TiB £1 in return for which the bankrupt's beneficial interest in the property was assigned to MPRL. If the property was later sold by MPRL, it was required to pay 25 per cent of the net proceeds of sale to the TiB. Mr and Mrs Lewis applied for a declaration that Mr Lewis' beneficial interest in the property had revested in him pursuant to s283A(2) of the Insolvency Act 1986. The key issue for decision was the meaning of the word 'realises' in s283A(3)(a).

Held: The judge declined to make the order sought by Mr and Mrs Lewis. She came to the conclusion that *'a sale for a deferred consideration is a realisation provided the TiB has assigned the estate's interest absolutely'* (para. 24).

Comment: *Lewis* is the latest significant judicial instalment on the operation of the three-year 'use it or lose it' period introduced by the Enterprise Act 2002; it is a case that bristles with major issues of policy and principle. The mechanism devised by the TiB in *Lewis* effectively transferred the risks of realisation to a third party while preserving the possibility of a future payment into the estate after the expiry of the 'use it or lose it' period. This might well be attractive in circumstances where a trustee may find himself unable or unwilling to realise the interest himself before the expiry of the period. From the perspective of the bankrupt and his family, it means that the apparent certainty intended to be bestowed by the statutory 'use it or lose it' rule is illusory. The silver lining from their perspective may be that a creditor applying to sell will not be able to rely on the statutory presumptions contained in section 335A of the Act, which a trustee could rely on. The case brings into sharp focus the difficult decisions confronting office-holders in the present economic conditions. It would not be surprising if these issues came to be considered by the court again in the near future and it is understood that an appeal is pending. □

Stefan Ramel is a barrister at Guildhall Chambers.

To get your voice heard in Legal Q&A contact **Sarah Houghton** at GTI (**sarah.houghton@groupgti.com**).

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Legal voice

Legal Q&A

James Levy answers your insolvency queries.

I've been asked to take an appointment in the Isle of Man. Am I required to report on the directors?

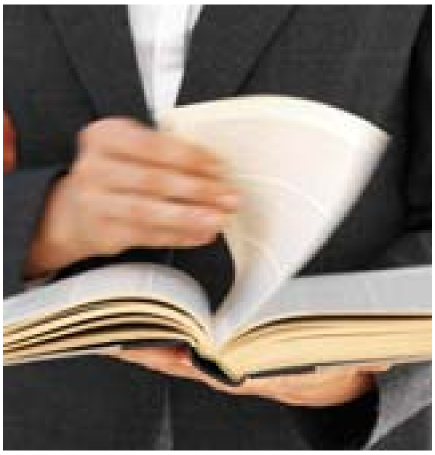
This is an interesting question, which requires a look at the insolvency regime on the Isle of Man. I am not qualified as an Isle of Man lawyer so I would be interested if anyone who is, has a different view to what follows.

It is unclear what kind of appointment you have been asked to take on and this will be relevant to the analysis. The key legislation is the Companies Act 1931 and the Companies (Winding Up) Rules 1934. Under that legislation there are five insolvency practitioner roles, which are: the official receiver, provisional liquidator, liquidator, special manager and the committee of inspection. The Manx Court holds a list of appropriate individuals who might be appointed as either the official receiver or the provisional liquidator. As an English insolvency practitioner my guess is that you are most likely to be appointed as the liquidator in a winding up.

However, as I understand it, only the official receiver is required by Manx law to directly report on directors' conduct. This requirement applies in the following circumstances. First, if an application is made to sanction a compromise or arrangement, the court has a right to receive a report from the official receiver 'as to the terms of the scheme and as to the conduct of the directors and other officers of the company' (rule 56 of the 1934 Rules). Second, the official receiver is required to report to the court, under s176 of the 1931 Act, shortly after their appointment on the conduct of the business. If relevant, the official receiver must comment on whether a fraud has been committed against the company, by persons, including the directors of the company.

The only circumstance where a liquidator may have to comment on directors' conduct is if they are required to provide information in respect of the company's affairs by the Financial Supervisory Commission (the Isle of Man version of the FSA) for the purpose of pursuing an application to disqualify a director under s31 of the Companies Act 1982.

I am an administrative receiver of a company (appointed pursuant to a pre-2003 debenture). The company in receivership owes money to a trading counterparty, which in turn owes money to the company. Can I set off the money we owe against what is owed to us? If I were a liquidator would the answer be any different?



"Legal set off only applies as a procedural defence, meaning it is only relevant if the company in receivership is being pursued for payment through the courts."

Set off is a notoriously tricky area and one which I expect will be paid a lot more attention in the coming months than has been the case for years. In this instance, your right to set off as an administrative receiver depends on whether the company, which is subject to the receivership, is pre- or post-insolvency. Administrative receivership does not constitute an insolvency procedure *per se*; is the company in liquidation or administration?

Where a company is *only* in receivership, the general law of set off applies. The first question is whether there is a relevant contract concerning the monies owed ie a contract which, for example, has no conditions precedent outstanding in relation to the sums to be set off.

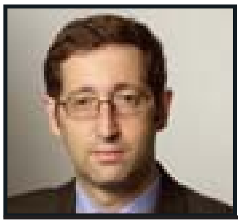
If the contract is effective, your next step is to check it contains a clause governing set off and that this clause a) permits set off (if not, then the possibility of set off is curtailed save for if the company enters an insolvency process); and b) is wide enough in scope to capture the set off you propose.

Where the contract is silent on set off or not drafted widely enough, or there is no written contract, it may be possible to apply the rules of legal or equitable set off. For either to apply there must be mutuality of the debts. For mutuality to exist, three pre-conditions must be met. First, the debts must be between the same parties. Second, the parties must be acting in the same capacity, which means for example, that a debt owed on a joint basis cannot be set off against a debt owed on an individual basis. Finally, the debts must also be capable of being defined in monetary terms.

Legal set off only applies as a procedural defence, meaning it is only relevant if the company in receivership is being pursued for payment through the courts. It also has a wider application than equitable set off, as it may apply to unconnected debts, but it only applies where there are liquidated sums to be set off.

While there has been some debate on this point among legal commentators, the consensus is that equitable set off is a substantive defence to payment. However, for this defence to apply the party requesting set off must show that their counter claim is so closely connected with the transaction that gives rise to the first instance claim, that it would be inequitable for one to be enforced without regard to the other. Normally, if the claims arise from the same transaction this will be sufficient. The main advantage to an administrative receiver of being able to apply for equitable set off, as opposed to legal set off, is that it applies not only to liquidated due and payable damages but also unliquidated damages, which are a 'reasonable assessment of the loss made in good faith' (*The Nanfri* [1978] Lloyds Rep 132 CA) and future or contingent liabilities.

If you were a liquidator, or alternatively the company in receivership was also subject to an insolvency process, your right to set off would be governed by the Insolvency Act 1986. This makes set off mandatory and incapable of variation by contract and you would then need to engage the machinery of rule 4.90 of Insolvency Rules 1986 as amended by section 23 of the Insolvency (Amendment) Rules 2005. □



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Technical update

Richard Heis reviews *The Run on the Rock* and a special resolution regime for banks.

On 14 September 2007, the first bank run in the UK since 1878 got under way when depositors began to queue up to withdraw their money from branches of Northern Rock. The events surrounding the run, and its wider policy implications, were the subject of an inquiry by the House of Commons Treasury Select Committee. Its conclusions were set out in its report, *The Run on the Rock*, which was published on 26 January 2008.

The Run on the Rock

The report was wide ranging, and covered the nature of Northern Rock's business, management failings, the role of the regulatory authorities and the Bank of England, and of central banks generally in times of market turmoil, and deposit protection. Of particular interest to us, however, are the committee's comments in the need for a special regime for dealing with banks that fail, or that show signs of being about to fail.

The committee stressed in its report that it was important that banks should be allowed to fail, in order to preserve market discipline. Belief that the public authorities would always step in to prop up a failing bank would carry an obvious moral hazard risk. On the other hand, as the Governor of the Bank of England commented in his evidence to the committee, 'banks are not like other companies'. This is because the failure, or even the rumoured failure, of a bank poses a wide systemic risk to the whole financial system, and also because the bulk of the population and the companies they work for rely on the efficient operation of banking services for management of their day-to-day financial affairs. Sudden withdrawal of access to essential banking services therefore could cause considerable and widespread hardship, serious economic damage to British industry and harm to the reputation of London as a financial centre. Therefore, it is important that bank failure should be managed in an orderly way, in order to prevent further damage to the economy and the interests of depositors.

> "It is important that bank failure should be managed in an orderly way, in order to prevent further damage to the economy and the interests of depositors."

The Committee noted that the UK was alone among G7 countries in not having a special resolution regime for dealing with distressed banks, relying instead on normal corporate insolvency law. In his evidence, the governor asserted that, 'a special resolution regime is the most important reform now, and it will require legislation'.

Special resolution regime

Provisions for the introduction of a special resolution regime (SRR) have now been included in the Banking Bill. They have been the subject of three successive consultations by the treasury, during which the proposals have been developed and refined. The treasury has also set up an Expert Liaison Group (on which R3 is represented), to advise the government on the practicalities on operating in such a regime, and on drafting the necessary subsidiary legislation.

The statutory objectives of the SRR, as currently proposed, will be:

- to protect and enhance the stability of the financial system of the UK;
- to protect and enhance public confidence in the stability of the banking system;
- to protect depositors;
- to protect public funds; and
- to avoid interfering with property rights in contravention of the Human Rights Act.

The components of the SRR are three 'stabilisation powers', and two bespoke insolvency procedures: a bank insolvency procedure, and a bank administration procedure. The stabilisation powers will be exercised by one of the tripartite Authorities (the FSA, the Bank of England or the Treasury, depending on which power is being exercised), and may only be instituted where specific regulatory or financial thresholds have been crossed, and in accordance with a code of practice setting out how such powers are to be used.

The three stabilisation options are:

- the sale of all or part of the bank's business to a private sector purchaser;
- the transfer of all or part of the bank's business to a bridge bank wholly owned by the Bank of England;
- temporary public ownership.

A bridge bank is a body into which the business of the failed bank can be transferred, and its business managed on a temporary basis, with the eventual aim of a sale on of the bridge bank to the private sector, or other long-term solution.

The bank insolvency procedure is based largely on the existing liquidation procedure, but its principal function is to ensure that depositors have their accounts transferred, or achieve compensation from the Financial Services Compensation Scheme, as quickly as possible. A bank insolvency order may be made by the court on the application of any one of the tripartite Authorities.

The purpose of the special bank administration procedure is to deal with the situation where there is a partial sale or transfer of the bank's business. In these circumstances there will be a residual business (oldco), which is likely to be insolvent. The bank administration procedure is designed to deal with the affairs of the residual company, and its main statutory purpose is to provide the services or the facilities required to enable the purchaser or transferee to operate effectively. Once such support is no longer required, the objectives become the normal administration objectives of either rescuing the company or achieving a better result for creditors than in a liquidation.

The SRR provides for various compensation arrangements

Where any of the stabilisation powers have been exercised, there may be questions about whether the transferors or third parties affected by the transfer have received fair value, or been adversely affected in some way. In order to deal with this, the SRR provides for various compensation arrangements. The provisions are complex, and the manner in which compensation is calculated will depend on the circumstances of each case. Assessment of the financial loss incurred by the various parties is likely to raise complicated valuation issues. Where a bridge bank is sold on to a private sector buyer, the transferor (ie the failed bank) would receive the proceeds of the disposal, which would then be applied in accordance with the ordinary priorities of insolvency.

The fundamental protection for creditors of the residual bank (oldco) is the prospect of a third party compensation order to ensure the objective of 'no creditor worse off' (NCWO). In order to determine whether a creditor is or is not worse off than they would have been in a formal insolvency, it would be necessary for a valuer to derive a 'counterfactual' calculation. This is a hypothetical analysis of what would have happened to creditors had there been an insolvency of the whole bank. This will undoubtedly be a somewhat challenging, but fascinating, task.

>>

Discussions about concerns are ongoing

An issue that has raised particular attention has been the position where there has been a partial sale or transfer of the failed bank's business. Such partial transfers could obviously disrupt set-off and netting arrangements, and adversely affect the position of counterparties, who could find themselves worse off as a result of the partial transfer than they would have been if the whole bank had gone into an insolvency procedure. This could have negative consequences for UK banks and financial markets.

As a result of concerns expressed by respondents on this issue, the treasury issued a further consultation document in November, in which it set out proposals for wide-ranging safeguards of netting and security arrangements, intended to ensure that they would remain unaffected as far as possible. The broad approach was to provide blanket protection for such arrangements, but with certain carve-outs perceived as necessary for policy or practical reasons.

At the time of writing, there are still various details that remain to be resolved and are subject to continuing discussion within the Expert Liaison Group.

Continuity of banking services

The British Bankers Association has argued that the statutory objectives of the SRR should be amended to include a specific objective for maintaining continuity of banking services. The BBA points out that 90 per cent of wages are paid into a bank account, approximately 98 per cent of benefits are paid into a bank or post office account, and over 75 per cent of adults have at least one direct debit. The BBA sees the continuity of essential banking services as key to the maintenance of consumer confidence and financial stability, and argues that it should have a higher priority than making compensation payments through the FSCS.

Technical Bulletin

Technical Bulletin 85 was issued in December 2008. Its contents included:

- Insolvency notices to High Court Enforcement Officers – change of address
- Unoccupied property rates in administrations – Wales
- Prescribed Part – court disallows selective disapplication
- Administration – meaning of 'unfairly harm'
- Bankrupt's home – realisation for a deferred consideration
- Block transfer orders – Court of Appeal decision
- TUPE – guidance on the disclosure of employee information
- Pensions – extension of the Regulator's powers
- Employment Rights Act – increases in limits

The BBA also emphasises the need to be able to obtain clean legal opinions in respect of set-off and netting such arrangements.

The treasury is working to a very tight timetable in order to get this legislation on the statute book as a matter of urgency. Where legislation is produced in such haste there is clearly a risk that it might turn out to have unforeseen deficiencies. This danger appears to have been anticipated, because the Bill as introduced contained a clause that would have allowed the treasury, by Order, to amend any aspect of the Bill with retrospective effect. This power has since been diluted, in order to mitigate the concern that the basis on which a financial contract is made could be undermined by ministerial action.

Since the main purpose of the Bill is to protect and enhance the stability of the UK financial system, these areas of uncertainty are in the process of being resolved in order for the legislation to have its desired effect. ☐

Richard Heis is a partner in KPMG Restructuring.

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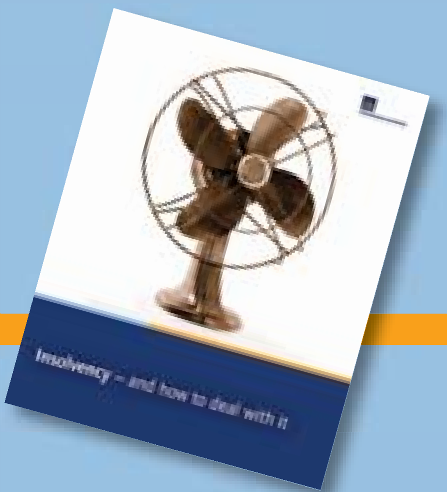

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The state of retail

Stephen Robertson bemoans the state of British retail and urges the government not to handicap it further.

When a television news producer tells you that 'the worst for three years' won't do and unless your new sales figures are the lowest for at least a decade you're not going to get on screen, you know things are bad.

2008 was a long, hard slog for many retailers. Rising costs, sinking consumer confidence and a backdrop of global economic crisis is hardly a recipe for successful trading.

And our figures show it ended with a December – the most important month of the retail year – that was the worst we've recorded in our survey's fourteen-year history, with sales of non-food goods particularly badly hit.

Many retailers are struggling with a triple whammy of falling sales, crushed margins and rising costs. Tens of thousands of retail jobs have already gone since Christmas.

"Many retailers are struggling with a triple whammy of falling sales, crushed margins and rising costs."

Our research shows only 18 per cent of customers believe we'll be out of recession by the end of this year. They're worried about their jobs and more inclined to save than spend – even where they have money available.

Help, don't hinder

As we get into what will be a difficult 2009 I say to politicians at every level, 'Recognise retail really matters and help, don't hinder'.

Retailers employ nearly three million people in the UK, one in ten of the workforce, more than the whole of manufacturing. The government can best ensure we don't lose more of those jobs by changing plans it already has in place to pile on extra burdens.

Business rates bills are due to go up by another £1.6 billion over the next two years starting with a whopping five per cent increase this April. That's despite inflation already being below that and falling. The reason? The increase will be based on last September's RPI inflation, which was a 17-year high. It must be halted.

That is due to be followed in 2010 by more pain as a result of the five-yearly property revaluation. That will be based on rental values in April 2008 – near the peak. It must be postponed until stability returns to the commercial property market.

The government should be easing these pressures not adding to them. It should think again on its planned National Insurance increase – that's simply a tax on jobs.

It must ensure this year's national minimum wage increase is not a penny more than two per cent.

When the costs of new regulations can't be fully justified, they should be dropped. Look at the proposed ombudsman, intended to rule on supermarket/supplier relationships. That can only cost millions of pounds to be paid by retailers and, in turn, customers. The possible ban on alcohol promotions would be another way of pushing up shop prices to no purpose.

What a relief that the BRC persuaded government to accept a substantial, voluntary commitment by retailers to halve carrier bag use by the spring rather than imposing draconian bans or charges.

"What a relief that the BRC persuaded government to accept a substantial, voluntary commitment by retailers to halve carrier bag use by the spring rather than imposing draconian bans or charges."

Government's objectives are often ours too but while legislation is often the easy option it is rarely the right or the most efficient one.

Jam tomorrow

There are reasons for optimism. In time, unprecedented discounting and the dramatic interest rate cuts of recent months could get the economy's heart beating again. Some key costs – oil, gas and food commodities – are also falling, keeping down shop prices and some of the costs of doing business, but signs that any of that is working through yet are very hard to spot. Certainly things are likely to get worse before they get better.

Retailers are more than doing their bit to help customers and revive demand. They should be supported. We don't expect handouts but we can't afford extra handicaps. □

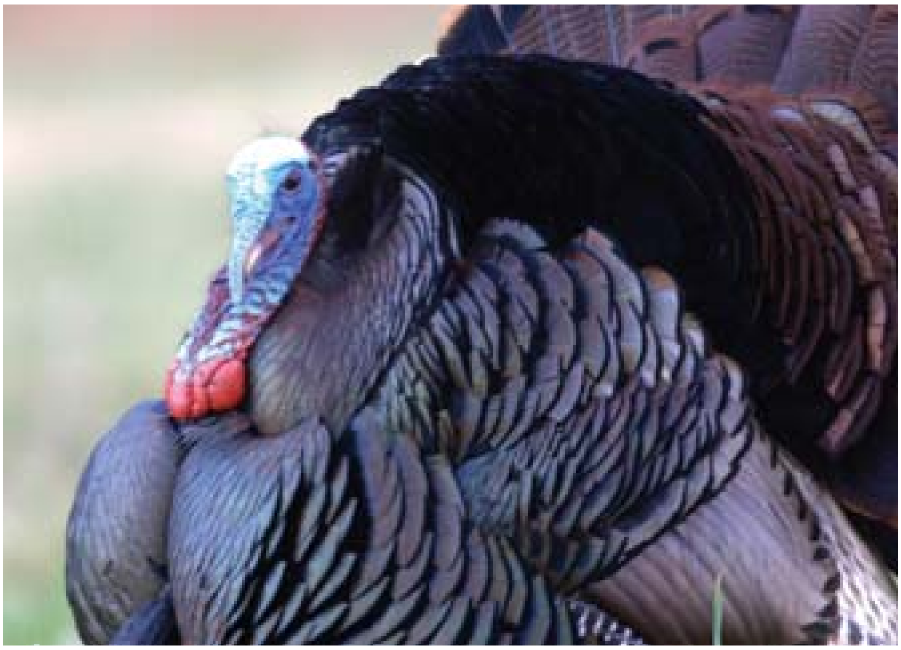
BRC-KPMG like-for-like and total sales growth

Category	Growing/Falling	Ranking		
	Jan 2009	Jan 2009	Jan 2008	Dec 2007
Food & drink	↑	1	2	1
Clothing	↓	5	5	3
Footwear	↓	3	3	2
Furniture & floorcoverings	↓	7	4	6
Other non-food	↓	4	1	4
Home accessories	↑	2	7	5
House textiles	↓	6	6	7

Stephen Robertson is the director general at the British Retail Consortium.

Issues to consider for tenants in administration: talking turkey

The Court of Appeal's decision in *Sunberry* gives landlords pause for thought and provides some helpful guidance for IPs.



The current climate

One of the most visible signs of the credit crunch has been its effect on the high street. The list of well known retail chains that have been forced to enter administration is common to us all and as a result it has become even more important for insolvency practitioners, landlords and their respective advisers to understand how the administration process interacts with landlord and tenant law, both in theory and in practical terms. This should ensure that a sensible deal can be struck to allow the administration to be implemented for the benefit of all stakeholders, while also recognising the rights of landlords.

For insolvency practitioners in particular it is crucial to understand the position prior to their appointment so that they can account for ongoing rent and service charge payments in their cash-flow projections, to ensure that the administration is viable and that the necessary funding is in place.

The recent decision of the Court of Appeal in *Sunberry*[1] provided some useful and timely guidance on two very important issues for insolvency practitioners:

1) the extent of an administrator's obligation to pay post-appointment rent as an expense of the administration; and
2) the ability of a landlord to seek consent to forfeit a lease should the company in administration grant the purchaser of the company's business a licence to occupy, in breach of the terms of the lease.

We therefore thought that it would be helpful to review these two issues in light of the decision in *Sunberry*, to examine the extent to which the law has been clarified by the decision and also to highlight the risks of viewing the decision in isolation.

Facts of the case

The decision in *Sunberry* arose from a company that had entered administration and immediately sold its business to another company. The company in administration was the tenant under a 30-year lease of a large distribution site, which contained frozen and chilled food (including a large number of turkeys). The other company did not wish to take an assignment of the lease but instead was granted a six-month licence by the administrators – in breach of the terms of the lease – under which the purchaser agreed to pay sums equivalent to the passing rent (which was well above the market rent) on a monthly rather than quarterly basis. This was then remitted to the landlord.

> The court was unimpressed by the landlord's submission that it would lose its 'bargaining position' if it was refused permission.

The landlord did not apply for permission to forfeit the lease (it wanted neither possession nor forfeiture) but rather it applied for consent to bring injunctive proceedings to force the termination of the licence to occupy given to the company. The motivation was to force the new company to take an assignment of the existing lease.

The Court of Appeal refused leave. It held that the continued temporary occupation by the new company was significantly assisting the administration by enabling the administrators to continue to collect in the book debts of the old company. The court therefore held that in balancing the interests of the lessor and the interests of other creditors the loss being suffered by the landlord (in this instance the interest that would have been earned if the rent was paid quarterly in advance instead of monthly) was outweighed by the loss that would be suffered by creditors if consent was granted. The court was unimpressed by the landlord's submission that it would lose its 'bargaining position' if it was refused permission.

In analysing the case and extrapolating general principles for other administrations it is not only important to understand what the judgment did state but also to recognise those circumstances where the court may come to a different conclusion.

The case provides an indication of how the court views the grant of a licence by an administrator in breach of the terms of a lease and whether a landlord can challenge the licence to obtain possession.

Challenging a licence

While in the *Sunberry* decision the court was not willing to force the termination of the licence, in analysing the likely attitude of the courts to other administrations involving the granting of a licence we suggest that it is necessary to ask the following questions.

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a. Does the continued occupation of the premises by the new company under the licence do anything to assist the realisation of assets in the administration?

In *Sunberry* it was clear that the occupation under a licence assisted the administrators in realising the stock. Contrast this with a normal pre-pack, where there may be no continuing benefit for the creditors of the old company from the licensee remaining in occupation post the completion of the sale. The administrator may be able to justify a short-term licence arrangement, on the basis it is necessary to maximise the initial sale proceeds. However, the longer the licence remains in place, the harder it is for the administrator to defend the arrangement, and resist an application for consent to forfeit, on the basis that the continued occupation is helping to achieve the purpose of the administration.

> "The decision in *Sunberry* does demonstrate that there is still some uncertainty regarding the obligations of an administrator wishing to trade from a let premises post appointment."

b. Does the landlord genuinely want possession of the premises?

If the landlord wishes to re-let the premises to another party at the same or higher rent then the refusal of consent to forfeit does have the potential to cause significant loss to the landlord. In the current climate, this scenario may be less likely but if the landlord is able to demonstrate real loss (possibly on the basis that he had another tenant in the wings who can provide a stronger covenant) then he may be able to obtain consent to forfeit.

Rent as an administration expense

In his judgment Lord Justice Mummery stated that:

> *'*Sunberry *does not have an absolute legal entitlement to be paid contractual rent and interest as an administration expense. On this point the court has a wide discretion exercisable according to the circumstances of the case.'*

He then later stated:

> *'As regards rent falling due after the administration order* Sunberry *is an unsecured creditor of the Company, and will benefit from the collection of the Company's book debts.'*

It is possible to view these statements out of context and to argue that the Court of Appeal has now held that an administrator, whether or not they are in occupation, does not have an obligation to pay rent as an expense of the administration. We would strongly argue, however, that these statements have to be viewed in light of the facts of the *Sunberry* case, where the landlord was receiving its rent in full, less some interest.

Rather surprisingly there is no other judgment on whether the payment of rent is an 'expense properly incurred by the administrator in performing his functions in the administration of the company'[2] but in the case of *Thomas* v. *Ken Thomas*[3] (which was cited to the court in the *Sunberry* case), Neuberger LJ, in the context of a CVA, held that rent that fell due after the CVA was approved should be paid in full as:

> *'it would seem wrong in principle that a tenant should be able to trade under a CVA for the benefit of past creditors, at the present and future expense of its landlord. If the tenant is to continue occupying the landlord's property for the purpose of trading… he should normally… expect to pay the full rent to which the landlord is contractually entitled.'*

There is, therefore, still a compelling argument to say that if an administrator wishes to continue to trade from premises leased to a company in administration, or to grant a licence of the property to a third party, then while they may be able to insist on paying rents monthly or even weekly, rather than quarterly in advance, the rent should be paid as an administration expense, otherwise the landlord will have a strong case for obtaining permission to commence forfeiture proceedings. It is noteworthy that the Court of Appeal in the *Sunberry* case ordered that the administrators were to continue to pay to the landlord the monthly licence fee equivalent to the rent for the period to the end of the licence.

Practical guidance

The above analysis of the decision in *Sunberry* does demonstrate that there is still some uncertainty regarding the obligations of an administrator wishing to trade from a let premises post appointment and the preferable route is to seek an express agreement with the landlord so that all parties are clear on where they stand from the outset.

In considering the viability of this option it should be noted that the current market conditions have had an unprecedented effect on the balance of power between administrators and landlords. A number of large commercial landlords are facing difficulties across their portfolio and will be extremely keen to avoid a situation where the keys are handed back to them on the company entering administration, leaving the landlord with the task of managing the property and dealing with disgruntled customers and other creditors of the old business.

These factors, together with the difficulty of finding a tenant, mean that on appointment some administrators have begun to request an initial rent-free period from certain landlords, especially if the property in question only has a marginal value to the business. This is on the basis that the landlord expressly waives any right to claim rent as an administration expense. In return the administrator continues to occupy the property and continues to try to find a purchaser for the business and the property.

An alternative approach is for the administrators to avoid having to deal with a large number of enquiries from landlords and their agents by making clear at the outset that they are prepared to discharge rent from the date of their appointment. In this scenario it is important that the extent of the administrators' commitment is clearly defined; with an express right for the administrators to terminate their obligations, either on notice or on the basis that their obligations automatically elapse on a certain date.

From the landlord's perspective, once they discover that their tenant has entered administration then it is advisable for the landlord to contact the administrators and ask them to provide written confirmation of their intentions in respect of the property. The landlord could ask the administrators to confirm whether they are prepared to agree to discharge all rent falling due post their appointment as an expense of the administration and whether the administrators would, if asked, grant permission for the landlord to forfeit the lease. This therefore forces the administrators to carry out the balancing exercise set out in *Atlantic Computers*[4] and, depending upon the response, the landlord can then decide on an informed basis what action to take.

By both administrators and landlord adopting a proactive approach from the outset this should help avoid a situation where the company, post administration, continues to trade from the premises for a number of months, leaving the lawyers to argue over the rights of the respective parties. ☐

1 *Sunberry Properties Ltd* v. *Innovate Logistics Ltd* [2008] All ER(D) 163

2 Rule 2.67(1)(a) of the Insolvency Rule 1986

3 [2007] 1 EGLR 31

4 *Re Atlantic Computer Systems plc* [1992] 1 All ER 476

David Fletcher (far left) is a partner at Farrer & Co and David Holland (left) is a partner at Landmark Chambers.

Retail restructuring

Retail businesses are among the first to suffer in a recession and will continue to be exposed to the downturn. Robert Schneiderman gives his perspective on restructuring options in the retail sector.

Maximising returns from a distressed retail situation can be challenging, but industry expertise and capital can be employed to leverage revenue. Three of the ways in which this can be done are:

- funding the purchase of new stock to augment and maximise the value of retail stock
- considering the strategic value of brands and retail property portfolios
- financing working capital to maximise the effectiveness of a turnaround strategy.

It is nothing new to recommend the assistance of an industry expert, but in the case of a retail restructuring, there are advantages to working with an organisation that is not only able to provide access to a depth of operational expertise but is also able to commit capital and take risks.

Since setting up in the UK in 2000, Hilco has established itself as a major retail restructuring expert, providing retail operational management and implementing store closure programmes. However, when looking to maximise returns and minimise risk in difficult retail situations, the insolvency practitioner (IP) should consider the following other key opportunities to engage with the industry experts in areas such as the acquisition of under-performing businesses or divisions and the purchase of distressed debt positions.

> "Where a shareholder owns both secured and unsecured debt positions, the restructuring specialist could buy both positions for significantly more than could be expected to be realised on insolvency."

Acquisition of under-performing businesses or divisions

If an IP is advising either a lender to, or the stakeholders in, a retail business and they identify an under-performing subsidiary or part of the business, one option would be to sell that part and keep the core business alive. In doing so, the IP would be able to add significant value to the lender or stakeholder, and help the core business to benefit as follows.

- It will lead to improved financial performance of the overall retail business or group. By cutting out the loss-making part, the results of the overall business would improve.
- Senior management can focus on the core business. In a distressed situation, management tends to spend a significant amount of time dealing with the under-performing part of the business and can quickly lose sight of the core. By selling the distressed part, management's efforts can be redirected towards the core business.
- There would be a clean exit from the under-performing division while avoiding insolvency. Placing a company into insolvency is stressful and takes up a lot of management's resources. A clean exit is always preferable.

Prior to a formal appointment, the IP may undertake a distressed M&A sale of the business in order to find a buyer pre-insolvency or to test the market before effecting a pre-pack sale.

While there are a number of funds in the market that would register interest in such a process, the most important criteria for a successful bidder is the availability of cash to fund the purchase and the ability to get comfortable with the limited amount of due diligence that might be practical.

In a distressed situation, the purchaser needs to think outside of the box in order to add value to the IP, as in the following examples.

Opco/Propco structure The retail restructuring specialist joins with a property company to purchase a large and complex business. The deal operates as an 'Opco/Propco' structure – where the restructuring specialist operates the stores and the property company monitors and maintains the property assets.

Purchase of a multi-site retailer If the shareholders of a multi-site retailer are not prepared to fund the ongoing working capital requirements the restructuring specialist buys the shares, invests in the business and subsequently sells the shares to a strategic purchaser once the business has been stabilised.

Store purchases from a multi-site retailer with a geographical problem Where a multi-site retailer has a core business in, for example, England and Scotland but it has some non-core stores in Ireland, the retail restructuring specialist may add value by ring-fencing the Irish stores. This would enable the management to concentrate on the core English and Scottish business.

In each of the above cases, significant value is able to be created in a short timescale.

Purchase distressed debt positions

When a business is distressed, the lender or stakeholder may wish to crystallise its position by selling its security or its unsecured position. When advising on these situations, the IP might want to consider alternative deal structures: those that give a guaranteed return without further risk versus a negotiated upside (dependent upon the ultimate realisation once the position has been finalised).

The insolvency practitioner may approach a restructuring specialist that has the resources to make quick debt purchasing decisions. Examples of transactions could include:

Secured debt purchase This is where a business is severely distressed and the bank is planning to appoint administrators. The bank will estimate its outcome from the insolvency and may consider a sale of its debt to a purchaser who may offer the bank an upside. Ultimately the bank may receive considerably more than the amount it estimated that it would have received from the administration.

Unsecured debt purchase Where a shareholder owns both secured and unsecured debt positions, the restructuring specialist could buy both positions for significantly more than could be expected to be realised on insolvency. They could then restructure both the business and capital structure to enable the core business to continue to trade.

Expert retail operational management and store closure programmes

As insolvency professionals, I am sure that we have all lost count of the number of times that we have heard management teams tell us: 'We can do it ourselves, we don't need any help.'

From experience, there is no substitute for using the correct skill set to restructure

a distressed retailer. An IP seeking to add value should be looking to work with retail specialists with the following skill sets shown in the diagram.

When working on a formal appointment of a multi-site retailer, the IP needs to appoint an agent that has the incentive to maximise recoveries by being results driven. One of the advantages of working with a restructuring specialist is that fees will be based on performance and, in certain instances, the restructuring specialist may guarantee the outcome.

Clearly this approach minimises the risk to the IP in trading a business post appointment and gives a level of certainty as to the outcome.

How Hilco operates

When working with IPs on a formal appointment, we deploy a head office team and a field team. The head office team works alongside the IP's team in controlling the business, dealing with property, creditor, retention of title, IT and general trading issues. The field team comprises a large group of retail managers working in the stores in order to ensure that the business trades to its maximum capacity during the insolvency period.

Usually each of our field managers controls a number of stores. Daily conference calls and secure intranet communication ensure that everyone in the field is aware of issues as they arise.

Taking the risk on new stock

Insolvency practitioners are often cautious when considering the purchase of new stock. We can add significant value by funding the purchase of new stock to enhance the recoveries from the existing stock in the business and help the IP to give a greater return to creditors.

In a multi-site business, in order to achieve the best results, it is often preferable to sell stock in situ rather than move the stock around the estate since this often leads to damage and stock losses. Typically there will be a short period of trading in the insolvency period while a purchaser is sought. Our marketing team prepares store signage to show a level of urgency and excitement. Product discounts need to be carefully considered so that the best value is achieved. Rather than a blanket discount across the business, our sophisticated trading models enable discounts to be controlled by item so that trading income is maximised.

Case studies

Case studies show how Hilco has often assisted insolvency practitioners.

Men's multi-site fashion retailer We were appointed by the administrators to assist in running the business post appointment. Working closely with the administrators' team, we dealt with property issues, trading the business, retention of title, human resources and IT. One of the challenges was to achieve the best value for the stock in the business. Most men wear suits of sizes 38 to 42. However, on appointment, we found the majority of the suits left were sizes 32 to 34 and 48 to 50. Hilco funded the purchase of £5m of new suits in order to stock the stores and achieve the best value from the existing stock.

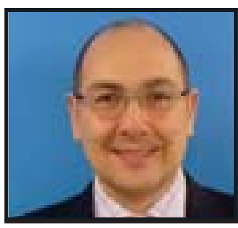
Multi-site furniture business We worked with administrators of a multi-site furniture business in order to close the operation in a controlled manner. One of the major challenges of running a furniture business in administration is dealing with deposits. Members of the public were concerned at the possibility that they may lose their deposits on the appointment of administrators. Working with the administrators' staff, we controlled the situation carefully and defused the situation. In addition, recoveries were maximised by looking at customer orders one by one, taking into account the availability of supply and retention of title.

Multi-site department store group We were appointed by the administrators to assist in running the business post appointment. This was a complex assignment with customer deposits, large stores and significant retention of title risk. Our retail team was tasked with maximising the sales of existing stock in the stores and either preparing the stores for handover to purchasers or closing the stores in a controlled manner. The advertising campaign created by Hilco was so successful that record levels of turnover were recorded. Furthermore, our property team successfully vacated stores at short notice in order to hand them over to purchasers and to enhance recoveries.

Multi-site discount retailer We were appointed by the administrators to assist in running the business post appointment. As well as dealing with post-appointment trading, we bought a significant amount of new stock, assisted with retention of title negotiations and dealt with a number of third parties who claimed to have assets at the stores. This involved key holding services and arranging access to the stores when the third parties wished to visit. Stores, warehouses and offices were cleared to a new broom clean-standard.

In summary, there are numerous ways to obtain value from a distressed retail position. Working with experts who can add lateral thought and a creative outlook will help to increase value for both secured and unsecured creditors. □

[1]Electronic point of sale



Robert Schneiderman is principal at Hilco UK.

Retail turnaround

Without an operational restructuring plan, argues Ian Gray, a pre-pack may not provide the long-term answer to an ailing company.

Historically the solution to a distressed retail situation has been administration, in order to shave debts and liabilities from the business. This has been seen as a way to drop loss-making stores and often walk away from creditors. Uncertainty surrounding the stability of the business has led to an increase of pre-packs over trading administrations. However, the absence of an operational restructuring plan, and thus not resolving some of the fundamental issues within the business, can lead to a second and sometimes a third insolvency process, as we have seen in 2008. In the event of no operational restructuring and leaving the planning too late, or no planning at all, this can lead to a work out with little prospect of the business surviving.

Pre-packs

In the retail sector there have been a number of high-profile pre-pack arrangements recently such as Whittards, USC and The Officers Club.

Pre-packs have been lauded as providing a lifeline to companies that otherwise would be liquidated. They enable customer-facing businesses, where administration could devalue the brand, to continue to trade seamlessly, transferring salvageable assets and staff – whose jobs and rights are protected – to a new corporate vehicle.

But criticism is often levelled at pre-packs, as the impression given is of a company failing one day and then operating the next; with collapsed companies being sold on as new corporate entities, stripped of their liabilities and leaving creditors – such as landlords and suppliers – to suffer financial losses. In many cases anger has erupted because the new businesses are bought by the same management and owners who presided over the company's demise.

Graham Horne, deputy chief executive of the Insolvency Service, underlined the need for new rules as he forecast at least 100 pre-pack administrations every month in 2009. The new SIP 16 rules would be much more prescriptive, he claimed, 'They will demand insolvency practitioners justify what they have done to creditors, and this process will be overseen by our enforcement department who will be watching for directors who have benefited at the detriment of creditors and will be able to use disciplinary, regulatory and even criminal action to punish misconduct.' (See article on page 32.)

> "Overall the business was barely profitable and cash flow negative, surviving on cash injections."

These changes aim to make the process more transparent, with administrators of a pre-pack having to reveal to the creditors information such as how they were appointed and any connection between the purchaser and the directors, shareholders or secured creditors of the company.

The increased compliance work as a result of the above rules will surely make pre-packs a more costly process.

Operational restructuring plan

A well constructed operational restructuring or recovery plan allows a company to improve its cash-flow situation and trade out of difficulties.

The directors of a business may be able to create an action plan themselves, if areas for improvement and cost savings are apparent. But often a pragmatic and cost-effective solution is to employ the services of a specialist turnaround practitioner, who can bring to the table strategies that have been put to effective use in other businesses as well as highlighting other areas for consideration (such as legal implications and tax savings) that may not have been taken into account by the directors. Costs of an operational restructuring plan should be recouped by the additional costs savings that are made.

The operational restructuring plan can then be communicated to the company's stakeholders so that they are kept in the picture, clearing the air and giving the company a new focus.

Case study

Background

In the autumn of 2008, we were approached by the major investor in a family business to advise on restructuring to help it survive the difficult trading conditions ahead. The business, a struggling retailer operating in both the UK and Eire, had a mixture of own stores and concessions. It had grown over the last 20 years from a wholesale business through the addition of sole distribution rights for a number of branded products and through the acquisition of a number of retail stores.

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The business operated though a combination of wholly owned companies and joint ventures each of which had grown in an environment based on expanding the number of retail outlets. The resulting effect was that the different businesses within the group had separate management structures.

Overall the business was barely profitable and cash flow negative, surviving on cash injections. Since late summer the organisation had experienced a slowdown in sales, trading down some 25 per cent like for like. This prompted our invitation to advise the company.

Recovery plan

We produced a recovery plan that identified the issues and explained why the business had been in continual need of new money to continue to trade. The major points of this plan are summarised below.

Lack of understanding of captured profitability The business focused on statutory entity profit, looking at the wholesale and retail operations separately rather than taking a group view of end-to-end profitability delivered by each outlet.

Non-profitable outlets By looking at the total contribution that each store delivered to the group across wholesale and retail operations, a better assessment of their value was derived, showing that some parts of the business were not viable and that the number of statutory entities through which the group traded added cost for no benefit.

Exit the Irish outlets As a result of the downturn in the Irish economy, the relative strength of the euro and the VAT rate differential between Eire and the UK, savvy customers were motivated to travel to the UK to purchase large-ticket items.

Muddle of inter-company charging Overheads were not necessarily allocated in accordance with activity, leading to misconceptions about the profitability of certain parts of the business.

Indirect overheads At over 12 per cent of group sales, indirect overheads were too great for a business of this size and a new corporate template was produced. This showed the areas that would need to be changed to make the business viable. One example of the changes required was in the number of area managers; in retail you would expect area managers to look after between 20 and 30 stores. In this organisation area managers had been hired to look after geographic territories, which resulted in five area managers and one head of retail, when only one person was required.

Cash With cash calls on EBITDA to fund the group's debt amounting to almost four per cent of group sales all efforts to release cash within the business were considered such as:

- working capital employed in both loss-making and profitable outlets and in the wholesale business, where some of the brands required bulk quantities of stock to be shipped in a single order rather than being able to match supply with demand
- levels of interest charged by the bank, financial investors and the group's trade finance facility
- loan repayments scheduled to be made in the forthcoming year.

Action plan

Having identified the issues with management, we agreed how they could be dealt with and focused on the following areas.

1) Downsizing the number of retail outlets – the full contribution to both the retail and wholesale business from each of the retail outlets was examined in detail. From this study we could focus attention onto which own stores and concessions were failing to deliver profit to the group. Options for exiting own stores and concessions were identified including:
   a. rent negotiations – the ability of the business to renegotiate rents with landlords, including rent-free periods, reduced rents, monthly payments and reduced minimum fees under concession agreements
   b. Eire – the downturn in the Irish economy exacerbated by the relative strength of the euro and VAT rate differential between Eire and the UK
   c. own buy – the likely impact on converting the concession sales volume to retailer own buy.
2) Rationalising the management structure, including:
   a. reductions in the number of area managers
   b. lowering payroll costs both by reducing head count and by pay cuts
   c. reducing the number of statutory entities to eliminate overhead costs
   d. the directors' remuneration in the face of a slimmed organisation was out of proportion and they agreed to take pay cuts as a more palatable alternative to reducing the number of directors.
3) Reducing the working capital employed – covering:
   a. the impact of store closures and the conversion of concessions to retailer own buy
   b. reductions in stock levels at stores that were to continue to trade
   c. negotiating changes to supplier logistics to permit lower order quantities
   d. renegotiation of credit terms with suppliers
4) Reviewing the operation of the wholesale business – including:
   a. working capital requirement and therefore the warehouse capacity
   b. distribution costs.
5) In respect of the financing of the group:
   a. the bank agreed to reschedule loan repayments, postponing repayments for 12 months
   b. the financial investors agreed to convert debt to equity, reduce interest rates and reschedule loan repayments
   c. the cost of the funding from the group's trade finance facility was renegotiated with the interest cost significantly reduced
   d. loans provided to the group and subsidiaries were streamlined and, with, the input of new money, were securitised.

Outcome

The result of the actions to date:

- reduction in overheads of £800K
- reduction in interest of £100K
- reduction in rents £50K
- reduction in working capital £750K
- rescheduled loans £300K

"Why was this so successful? It is our belief that this was due to the timing of our intervention, planning and the limited number of key stakeholders."

Turning a cash shortfall of £600K (on a turnover of £23m) into a cash surplus of £100K (on a turnover of £19m).

The group has been reshaped into a more compact and more profitable business better able to weather the storm. The contraction of the group has refocused the management with the directors reverting to adopt a hands-on role in the group's management.

This was all achieved without an insolvency process, in an entirely consensual way with management buy-in and ownership of their own plan. Why was this so successful? It is our belief that this was due to the timing of our intervention, planning and the limited number of key stakeholders. However, with the complexities often found in larger companies and shorter timescales this solution may not be as effective, in these instances a more innovative approach would be required.

There is a future for retail restructuring that does not rely solely on an insolvency process. ☐

Ian Gray is a director at Baronsmead Consulting Limited.

The retail sector: Ethel Austin, MFI and the high street – a tale of increasing woe

Philip Duffy describes the downturn in the retail sector and uses the cases of Ethel Austin and MFI to illustrate different outcomes.

The wall of liquidity over the last ten years has fuelled a massive, property-led consumer boom. And, although it has been a long time coming, the recession is officially here with a vengeance. The fall in GDP of one and a half per cent in Q4 2008 was the worst quarter-on-quarter fall since the 1980s.

The scale of the problems will take time to unwind. Credit is greatly constricted and consumers, fearful of unemployment and nervous of the collapse in property values, are spending less, especially on high-value discretionary items. Predictably, long-overvalued sterling has now overshot on the downside. The pound is at a 24-year low against the dollar and at its weakest ever level against the euro, making imports much more expensive.

The state of the retail sector is truly shocking at present and that pressure is felt all the way along the supply chain. The roll call of the fallen includes many familiar names with some forecasters stating ten per cent of all stores may close in 2009. Since 1955, recessions have generally lasted three quarters, but on three occasions they have lasted for five. Assuming this one is worse, lasting until sometime in 2010 and takes five years to wash right out of the system, then the retail sector is facing a painful period of re-adjustment.

> "The state of the retail sector is truly shocking at present and that pressure is felt all the way along the supply chain."

Two cases that MCR Corporate Restructuring has dealt with recently illustrate the widely differing scenarios that can occur when a business gets into trouble. Both cases had many common features associated with large retail operations: a combined total of 4,000 staff, over 400 stores with multiple landlords, key creditors and suppliers, in particular the merchant service (credit card) providers.

MFI

MFI was the well known retailer of kitchens, bathrooms and bedroom furniture. A chequered recent history saw the company emerge from administration in October 2008 into the severely depressed retail market with an insufficiency of working capital. It passed into administration again in late November with 111 stores, 1,441 staff and critically some 45,000 customers many of whom had paid deposits in full against unfulfilled orders.

The directors of MFI appointed MCR. Although efforts were made to seek a buyer for the business, the process was ultimately dominated by the need to best protect the value in the assets of the business.

Despite considerable effort, given the creditor fatigue from the recent previous administration and the current very low demand for high-value consumer purchases, there was no plausible interest in acquiring MFI as a going concern. The leasehold status was also extremely complex following the last administration and therefore we oversaw a rapid sale of in-store stock together with the fixtures and fittings in order to leave all the stores empty and tidy as soon as possible. The closure of MFI was unavoidable but MCR used stock from the four distribution centres to fulfil orders wherever possible and negotiated with the merchant services provider, who withheld £30m of deposits, to enable the process of refunding all eligible customers to start.

Ethel Austin

Ethel Austin was a long-established value clothing retailer, which, despite a series of recent re-financings, was unable to withstand nearly £10m of recent losses and the consequently fatal creditor pressure in April 2008.

The secured creditor appointed us as administrator. Ethel Austin had unencumbered stock valued at about £10m, so we traded the business for a month, and achieved a considerable trading profit, while seeking a purchaser in order to sell it as a going concern.

MCR entered into multiple negotiations to improve the attractiveness of the business to a purchaser. Foreign suppliers agreed to provide £10m of future supplies at 50p/£ and the vast majority of landlords of the 303 stores agreed rent reductions. The business was sold to a newco as a going concern for £8m.

We expect the secured and preferential creditors to be repaid in full from trading profits and asset realisations. Importantly, 90 per cent of the employees transferred to the new business.

Key actions for lenders

Financiers cannot eradicate all risk of retail sector failure without slashing lending portfolios and, in the presently constrained market, it is extremely difficult to manage away troubled borrowers. That said, lenders can minimise the risk of financial loss by enforcing the right initiatives now.

- Keep abreast of news on retailers. Despite the continuous negative outpouring from our press, there are still some blue chip retailers out there, but you should always monitor clients with high retail debtor concentrations closely. Reduced demand is painful to absorb, as are lower prices, but the insolvency of a retailer upon whom a supplier is heavily reliant will almost certainly be fatal and could leave its financier irrecoverably overexposed.
- Identify key retail debtor exposures and review their funding limits regularly. Trade credit insurers are adopting a predictably cautious approach to the retail risk in their portfolios, so if credit insurance exists, maintain a close dialogue with the insurer.
- Step up control procedures on clients with high retail sector dependence and avoid backlogs. Reviewing the adequacy and experience of operations and risk resources is a must. Investment in those areas now could pay dividends through the minimisation of losses.
- Make sure that required information on receivables and inventory is submitted promptly at the month end, reviewed on receipt and any adverse indications are dealt with promptly.
- Tighten retail-related audit cycles and keep valuations up to date. Rising creditor pressure is a major warning sign. If facilities are fully drawn and creditor payments are being stretched, then critical rent payments may be missed. There is success to be had in negotiating with key suppliers, landlords and HMRC, particularly on the high-profile retail cases.
- Watch out for fraud, which is on the increase. Review ledger statistics regularly and thoroughly investigate any unusual trends. Use telephone debt verifications to confirm debtor balances. Monitor inventory levels against management accounts and forecasts.
- Ensure monthly management accounts are sent in on time. The best companies are likely to be those with accurate and timely management information, especially in retail. Late submission should be regarded as bad news and funding is likely to be restricted for non-compliance. Encourage financiers to discuss significant variances with their clients and to escalate any new concerns swiftly. Overly optimistic forecast assumptions about recovery in the high street should be challenged vigorously.

Retailers and their suppliers will eventually emerge from this deep trough and their financiers will be at the vanguard of the recovery. However, if warning signs appear, then companies should involve external advisers quickly as delay will almost certainly create or increase loss. ☐

Facts to remember

- The boom was consumer-led and so is the bust.
- Domestic and commercial property values are continuing to fall.
- The weakness of sterling is being felt all the way along the supply chain.
- Retail is experiencing a painful two-year adjustment.
- Retail insolvencies are at a peak. Credit insurers are understandably nervous.
- Keep financials, returns, audits and reviews up to date and make sure they are thoroughly assessed.
- Insist on independent advice early.
- Avoid sudden collapses. Well planned insolvencies are always best.

Philip Duffy is a partner at MCR Corporate Restructuring.

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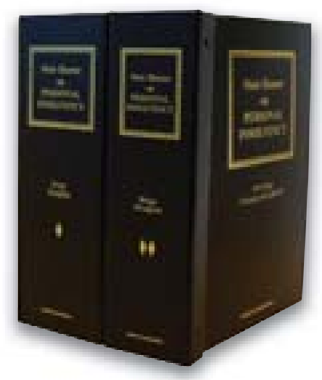

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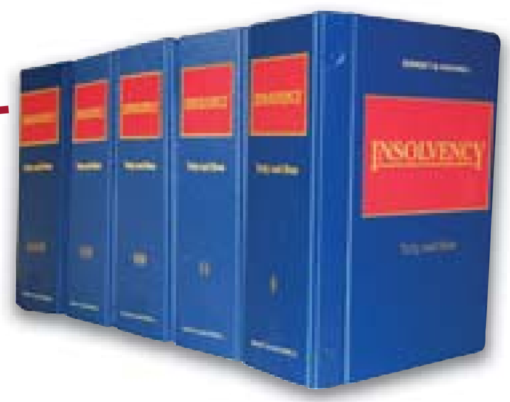

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Tax planning in difficult economic conditions

Restructuring involves complex transactions so practical experience in dealing with imperfect information and negotiating with HMRC can be important.

In these turbulent economic times, the restructuring industry is at its fore and tax has more prominence in restructurings than in previous downturns, largely for the following reasons.

More complex tax-driven structures

Years of private equity investment on a global scale has resulted in many complex tax-driven international structures being established and sophisticated tax planning has been implemented, including transfer pricing. Since these structures were tax driven on creation without consideration for future restructuring, unwinding these structures without obtaining tax advice can result in unforeseen and material tax leakage.

Ranking of tax

In the UK, the ranking of tax changed following amendments to the Insolvency Rules 1986 and provisions introduced in the Finance Act 2003, and tax liabilities arising after the commencement of a Schedule B1 Administration are now an expense of the administration. Tax has therefore become a key consideration. The position differs by jurisdiction.

> "Tax has become increasingly important in terms of creating value or minimising cash leakage across the spectrum of restructuring work, from performing businesses to insolvencies, particularly in regimes such as the UK where tax ranks as an expense of the administration or liquidation."

Interaction of the tax and insolvency law

Insolvency law and tax law are not always compatible and this creates uncertainty. The issues can be complex to work through with some unexpected outcomes, for example, even the question as to whether pre-appointment liabilities are secured or unsecured is not consistent across countries and often it is not easy to find a clear answer. Some regimes are more sophisticated than others in dealing with insolvency and the approach of tax authorities differs widely.

Often there is no clear-cut answer, and being able to assemble facts quickly and negotiate with the tax authorities can be critical in agreeing a fair and reasonable treatment. Tax has become increasingly important in terms of creating value or minimising cash leakage across the spectrum of restructuring work, from performing businesses to insolvencies, particularly in regimes such as the UK where tax ranks as an expense of the administration or liquidation.

What can be done in good times to make life easier if things go wrong?

Given the current financial and economic crisis, even when a business is performing well there is no certainty that it will continue to do so. Businesses have taken this on board and are planning ahead so the unwinding of structures, if necessary, may be undertaken in a tax-efficient manner. These are some of the steps we have seen companies undertake.

Legal entity rationalisation

Following years of M&A activity, groups have often been left with unwieldy global structures. We are seeing an increasing trend for global groups to rationalise these structures, as the reduction of companies can significantly reduce ongoing compliance costs and risk. Solvent liquidations can be an effective way for groups to eliminate dormant companies. However, planning may be required to ensure that tax attributes are preserved or created and tax leakage is minimised.

Tidying up inter-company balances

Either to facilitate the rationalisation of group structures or to minimise risk (eg transfer pricing), many companies are reviewing and tidying up the inter-company balances they have accumulated over time. This will also assist in the event of the appointment of an administrator or a liquidator, as this can impact on the way loan relationship rules apply between group companies. In some circumstances, the release of an inter-company balance may result in taxable income arising in the debtor company without a tax-deductible expense arising in the creditor.

Capital gains planning

In times of financial difficulty, assets may have to be disposed of to generate cash. To the extent that taxable gains arise, the funds ultimately available to creditors and shareholders alike will be reduced. Businesses can mitigate this risk when preparing for exit. For example, in a downturn when value is low, it may be possible to move assets offshore and utilise losses, which otherwise may have little value. The sale of assets may be structured to minimise proceeds (eg where debt reduces value).

What can companies in financial distress do to ease the tax burden?

There are a number of planning techniques that businesses can use from a tax perspective to ease cash flow in times of financial distress.

Tax modelling

Businesses may be paying too much tax in the current downturn eg by way of tax instalments. Tax forecasts should be reviewed to reflect expected results for the business and to determine whether payments may be reduced. In a number of countries, payments can be reduced through notification or agreement with the tax authorities.

Tax refunds

Where businesses have historically performed well but have now moved to a loss-making position, it may be possible to negotiate with tax authorities to make an early claim to carry back losses to recover tax paid in prior periods and therefore deliver an immediate cash advantage to the business.

VAT payments

Many businesses consider VAT to be an unavoidable cash outlay; one which they can do nothing either to minimise or delay without incurring severe penalties. When a business begins to struggle one of its largest problems is often meeting its VAT contributions. However, distressed businesses may be able to negotiate repayment plans with tax authorities for VAT liabilities that they are failing to meet.

VAT recovery

Delays in recovery of VAT often arise due to extensive processes or inefficiencies in a business' accounts-payable department, identifying and dealing with these can result in a significant cash flow benefit. Businesses may be able to agree input tax accruals with tax authorities to ensure that businesses recover VAT on their costs at the earliest possible time. In addition, VAT bad debt relief claims can be submitted where a business has accounted for VAT to tax authorities but customers have failed to pay the required due VAT. This is often not monitored and the benefits can be material.

Formal insolvency procedures

Deciding whether or not to enter an insolvency process is typically a commercial decision; however, tax advice should be sought prior to appointment as there are a number of tax consequences that need to be considered.

- Tax arising in the period of administration is an expense of the administration, which will reduce the funds available for distribution, whereas any pre-administration tax liabilities are unsecured claims. The same is true for liquidations. However, in a receivership, any funds received can generally be distributed to the charge-holder with tax liabilities remaining with the company. Therefore consideration should be given to which process could give the best result for creditors. For instance, if the majority of the value of a company rests in a fixed asset on which a substantial chargeable gain could arise on its disposal, a fixed charge receivership may produce better results than say an administration. (See articles on pages 30 and 31.)
- On entering administration or liquidation, tax groups may be broken and the surrender of losses may no longer be available. This will depend on which companies in the group are in a process, therefore planning may be required to maximise loss utilisation. This may drive the decision as to which companies are placed into a process.
- The commencement of administration or liquidation, or ceasing to trade, may result in the end of an accounting period for tax purposes. Gains may only be sheltered by trading losses arising in the same period, therefore the timing of disposals is key in ensuring the optimal utilisation of losses and minimising the risk of leaving gains unsheltered.

Pre-pack insolvencies

Pre-pack insolvencies are becoming increasingly common. Broadly, the purpose of a pre-pack is to facilitate the fast and efficient sale of a business and/or assets, frequently separating under- or over-performing businesses into separate structures.

On a practical basis, we have seen companies respond with the increased use of hive-downs and debt waivers together with the use of pre-pack insolvency as a mechanism to achieve a swift restructure. However, in facilitating these, there are numerous tax pitfalls that the unsuspecting can fall into, which can result in unnecessary tax charges and expenses. Careful planning must be considered at an early stage to minimise the risk of adverse tax consequences. Given the recent case of *Johnston Publishing (North) Ltd* v. *HM Revenue & Customs (HMRC)*, exit charges may arise on disposal of a sub-group where assets have been transferred intra-group between sister companies within the last six years. Also, there may be stamp duty or stamp duty land tax to pay on some transfers, and where no duty is paid due to group relief, there are rules that may claw back this relief if proper planning is not undertaken. In addition, consideration should be given to whether secondary liabilities could arise in respect of corporation tax, or whether a company disposed of was historically part of the vendor's VAT group where each of the members is jointly and severally liable for the VAT liabilities of the entire group. Therefore it is critical to get tax advice prior to implementing any restructuring or disposal to save any nasty surprises arising later that could easily have been avoided by careful planning.

What can a tax accountant do to help?

Historically, tax has not been a priority in the restructuring market. However, due to the prevalence of international tax-driven structures implemented in recent years, it can no longer be ignored as unwinding structures can result in tax leakage where tax planning has not been considered. Tax is also increasingly seen as a means for adding value through the creation or preservation of tax assets or releasing cash from a business as part of a turnaround.

Restructuring typically involves complex, unusual, one-off transactions and practical experience in dealing with imperfect information and negotiating with the tax authorities is key to obtaining an optimal outcome. Therefore, getting specialist tax advice is invaluable as there is very often no standard response from the tax authorities to these situations, and negotiation and a thorough understanding of tax authority practice is essential. Also it is worthwhile obtaining specialist assistance to secure early tax clearance for post-administration periods that allows periods to be closed without delay. In addition, VAT experts can assist in quickly agreeing with tax authorities repayment plans, input tax accruals or submitting VAT bad debt relief – all of which will give an immediate cash flow benefit to the company.

No-one likes the unexpected. In the world of insolvency tax, specialist tax planning and advice can avoid some of the more serious issues that may arise and should be considered as an integral part of the insolvency process. ☐

> "Given the recent case of *Johnson Publishing (North) Ltd* v. *HM Revenue & Customs (HMRC)*, exit charges may arise on disposal of a sub-group where assets have been transferred intra-group between sister companies in the last six years."

Bridget Walsh (far left) is a partner, corporate tax and Suwin Lee (left) is a director, corporate tax, at Ernst & Young LLP.

LPA receiver or administration appointment? The case for administration

Situations are sometimes complicated and require the added power of an administration.

The Law of Property Act 1925, as its name indicates, has been part of our legal framework for decades. But can such an aged piece of legislation be as relevant today as it was over eighty years ago? And how effectively does it allow LPA receivers to do their jobs in today's testing economic climate? Often, an administration appointment is far more appropriate.

Property build-out

A Law of Property Act appointment can be a cost-effective process for straightforward property recovery cases. However, many situations are far from straightforward.

Picture the scene: a part-built property, directors in conflict, employees displaced all over the site, cement mixers, materials, diggers subject to finance, a railway track backing onto the building with scaffolding hanging off ready to fall onto the tracks and mischievous youths trying to use the site as a playground. In such a scenario, are the powers to trade under the charge document sufficient for an LPA receiver to handle these issues?

The complexities surrounding such a build-out require a combination of a property skill base and the powers afforded to the administrator. With this dual requirement, the administrator will often employ an agent who can deal with the property aspects, securely backed up by the powers of administration.

The administrator has the power to hire and dismiss the employees and directors, deal with the company's affairs, obtain documents directly from third parties, deal with retention of title creditors, and stand a better chance of preventing finance companies taking away plant and machinery. These additional powers can speed up any build-outs and deal with some of the obstacles commonly put in the way of practitioners in all types of recovery situation. The wide-ranging powers afforded to the administrator are given by the law. As a result, the secured lender and property agent can be assured that they have distanced themselves from many of the risks involved.

Moratorium

You cannot mention administration without mentioning moratorium. The LPA receiver does not have the same protection from hire purchase, rental, or retention of title creditors.

By way of example, two days before Christmas we were appointed over a company where one of the creditors owned the steel props holding up a part-built underground car parking facility. The creditor had threatened to take these props away. The consequences of this would have rendered the car park insecure and diminished the value of the property.

The moratorium was actioned and the props are still in place! Such power also buys time to assess the situation and consider all options without the pressure of creditors dictating the next course of action.

It is not uncommon for chattels to be vital to the property sale, but often the lender's fixed charge does not cover them. The administrator deals with all of the company's affairs, and is not restricted to dealing with just the assets covered under the charge document.

In addition, in *Innovate Logistics Ltd (in Administration)* v. *Sunberry Properties Ltd* the courts have recently re-enforced the principle laid down in *Re Atlantic Computer Systems plc* (1992) ie where the benefit in retaining the use of an asset is for the purpose of administration then they are likely to support the administrator.

Business rates and creditor action

The fact that LPA receivers are generally not liable for business rates is an advantage, but it can also be a hazard. Councils are increasingly equipping themselves to recover any monies they can. They continue to pursue the company, often resulting in a summons. The directors are then pushed into a corner where they have no alternative but to consider an insolvency process to deal with the company. If they place the company into liquidation, or a creditor issues a winding-up petition, the LPA receiver is in danger of losing his agency.

VAT

When planning in advance, it is important to remember the issue of VAT recovery. Administrators can recover VAT. LPA receivers cannot reclaim these monies – the responsibility falls on the company. Unfortunately not all directors cooperate. The importance of effective VAT recovery is highlighted in the example in the box.

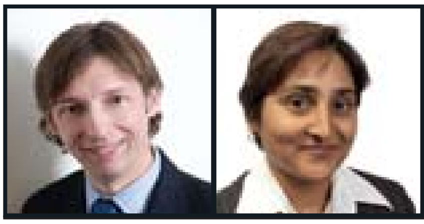
Secured lender debt	£1,950,000
Property sold for	£2,350,000
Agents and professional costs (£400,000 +VAT (60,000))	£ (460,000)
Recovery to secured lender:	
LPA receiver	£1,890,000
Administration	£1,950,000 (full recovery)

Unco-operative mortgagor or liquidator

An unco-operative floating charge holder or liquidator can have a potentially destructive effect. If the chattels or a going-concern business do not form part of the security and accordingly the assets over which the LPA receiver has control, the effectiveness of the receivership can be substantially undermined.

Final thoughts

To secured lenders and LPA receivers we ask: is the risk of acting beyond your powers, thereby not distancing yourself, versus the extra costs of administration a risk worth taking? Indeed, is it time for the restrictions on the statutory powers of LPA receivers to be amended? Quite simply, many property cases are best suited to administration. □



Mark Wilson (far left) is a partner and Hina Patel (left) is a manager at Baker Tilly Restructuring and Recovery LLP.

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LPA receiver or administration appointment? The case for LPA receiver

If lenders understand the benefits that both an LPA receiver and an administrator can offer it will help them to decide between them – and it will maximise returns for creditors.

Imagine the scenario. A property consultant (PC) is sat alongside their best banking client and their best IP client discussing a property investment vehicle that is on the edge, and the question asked of the PC is: LPA receiver or administration?

The conundrum

What goes through their head? Accept the job and possibly leave the IP with a liquidation they don't really want, or keep the IP happy, recommend an administration in the knowledge that you will get the job and probably secure future jobs as well. You and the IP must give the bank the best most cost-effective advice.

The fact is, some IPs still do not like property consultants taking receivership appointments under the Law of Property Act. And this is something I can sympathise with. But my reasons are different.

Circumstances have changed

Ten years ago IPs were protective of their marketplace, and the few LPA appointments that went to PCs represented good fees. Indeed, two or three years ago, I was frequently returning a surplus to the bank's customer. This has its own difficulties.

But the collapse in the property market has meant many PCs and agents have 're-sprayed' themselves as recovery experts, with no real qualifications or experience, so if an experienced IP is discarded in the interest of a cheap alternative they will feel aggrieved. Thankfully the banks are experienced enough to know those in the market who know how to deal with all the complex issues that can arise, so this scenario seldom arises. It's still horses for courses.

As all IPs will tell you, if you had spent your time getting to know those bankers who deal with risk when times were quiet, and you have since sold your wares well, they will know who the right professional for the job is.

What bankers focuses on

In order to make this decision they will focus on:

Cost Invariably a PC is cheaper, and if the bank's security is represented by a single property where the skills required to realise the property might not extend beyond a property sale, it's a simple decision, and there will be no duplication of costs between IP and PC. Not only is it cheaper but the ease and speed with which an appointment can be made is of huge importance if there is something that requires urgent attention, for example systematic vandalism when the bank is not sure that the property is insured.

Fraud But what if the valuation you are provided with in preparation for the case looks questionable? Perhaps this is symptomatic of a larger situation where there has been some serious skulduggery and, if access is required to the company's books and records, then an LPA receiver who has limited powers might not achieve what is required for a successful assignment.

Powers If wide powers are needed to deal with the assets, for example a property company with sales team employees, building contracts and subcontracts where the build-out might require a continuation of the business, this is also within the realms of administration. It may be that an LPA would better deal with individual ring-fenced properties but, as part of a larger enterprise, an administrator has more powers available to control a property company and save the business. The LPA receiver is seldom in a position to rescue businesses as intended by the Enterprise Act.

Powers v. flexibility

But if you are going to use the administrators' greater powers to rescue a property company (and hopefully add a premium value to the individual assets) you will adopt a greater liability: this might mean tax, business rates and TUPE obligations. The administrator has duties to all the creditors of a company as intended by the Enterprise Act, yet an LPA receiver's primary function is to recover secured indebtedness to their appointing bank.

The LPA receiver does not pay rates if the business or individual who owns the property is not in liquidation or bankrupt. However, local authorities are looking harder at rateable occupation by banks, IPs and PCs as LPA receivers and we may hear more about rates in the future.

However, an LPA receiver cannot act alongside an administrator without their leave. I'm uncomfortable about this. I see far too many administrations that should be liquidations where an LPA receiver can act. I see some (not many) where the administrator seems too close to the directors of the company; and an administrator, who should be a liquidator, can determine how a property is sold when they should not be in a position to. The LPA receiver is powerless in these situations and the bank knows it, which is why, if a clearing bank is involved, they should make sure that their own representative is at the helm as administrator.

The counter argument to this is the agency. An LPA receiver is appointed by a lender but acts as an agent for the borrower who still retains the liabilities attaching to the property. If the borrower goes bankrupt or enters into liquidation the agency might fall upon the receiver or their appointer. Does this cause a problem in practice? Not in all the 15 years I have been taking appointments, although it is important if the appointment is over contaminated land or where there is litigation, for example possession proceedings. Administration avoids this predicament.

It is invariably the lender's call. Most of my banking clients are experienced enough to understand the benefits of LPA v. administration. But there are a lot of smaller lenders who have been asked to recover what they have lent and it's these newcomers to the property recovery market who will benefit from this article. ☐

Andrew Rodger is a director in the Corporate Recovery Team at GVA Grimley.

SIP 16: the creditor's view

The introduction of SIP 16 on 1 January 2009 is being welcomed by RPBs. Philip King argues that increased clarity and better communications should help to reassure creditors that pre-packs can be beneficial.

Pre-packs have developed a poor reputation. Recent cases involving members of the British Printing Industries Federation, for example, which allowed businesses to write off huge debts leaving their creditors without a penny have not helped, especially when the owners of the new company are the same as the firm being made insolvent. There are also examples of administrators brazenly helping to sell a business back to its original owners, debt free, again without a thought of the misery left behind.

SIP 16

But now there is a momentum building that might change the perception that 'all pre-packs are bad'. R3, the Association of Business Recovery Professionals has issued the statement of insolvency practice 16 (SIP 16), commissioned and approved by the Joint Insolvency Committee (JIC) (see page 4). Having taken effect on 1 January 2009, it aims to provide best practice guidance in pre-packaged administrations and remind administrators of their duty to act in the interests of the creditors.

SIP 16 has been widely adopted by all the recognised professional bodies, although the strategy has caused controversy among certain stakeholders in insolvency. The Institute of Credit Management (ICM) welcomes the proposals, as it believes it will lead to more transparency with pre-pack administrations, allow credit professionals to make more informed decisions and reduce the risk of trading with companies in trouble.

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There is a section among the credit professionals that believes pre-packs are always bad news, but this is not always the case. The real value of the disclosure of information, through SIP 16, is that it will enable credit professionals to make a more informed decision about whether to trade with the new company or not. This will not only help in identifying the relationships of those involved in the transaction, but should also allow for unfounded rumours to be dispelled.

Statistics released by The Insolvency Service showed a rise in liquidations in the third quarter of 2008, an increase of 26.3 per cent from the same period in 2007. More than three times the number of receiverships and twice the number of administrations were also recorded. And they are only likely to increase.

> The Insolvency Service predicts at least 100 pre-pack administrations every month in 2009, and we believe something needs to change.

Pre-pack administrations are usually used where commercial pressures require urgent action. The principal objective of the pre-pack is to ensure book debt collections are carried out as efficiently as possible and help to preserve the business of the failed company, potentially saving jobs.

What needs to be made clear

When a pre-pack is put into practice, SIP 16 states the following should be made clear:

- how the creditor became involved with the insolvent company
- the date of the transaction
- the commercial reasons leading to the company pre-packing its business
- negotiations with other major creditors
- any conditions of sale
- who has purchased the business and any connection they have with the insolvent company
- any assets that have already been transferred
- the directors of the company being wound up and those involved in the new company being created.

Some in the credit industry argue that the new rules governing pre-pack insolvencies are ineffective, with 80 per cent of UK suppliers having to write off unpaid debt. They are calling for the government to introduce legislation that will give suppliers the ability to seek a remedy before the deal is done.

At present, administrators are not obliged to involve suppliers of the failed business in negotiations with creditors, regardless of how much is owed. The Insolvency Service predicts at least 100 pre-pack administrations every month in 2009, and we believe something needs to change.

Although the new guidelines introduced at the beginning of the year will help creditors understand who is involved and the nature of the difficulties the business was facing, suppliers are not closely involved enough.

Suppliers in turn have their own suppliers who will be directly affected by the lack of communication and cash making its way down the chain. This will have a knock-on effect and could cause even more businesses to go under.

Credit insurance can keep cash flowing

Of course one answer is credit insurance, which pays out in the event of bad debt from insolvency. The insured are able to recoup their losses from pre-pack arrangements; larger credit insurers insuring multiple suppliers to the same failed business also carry further weight in creditor meetings, and can make representations on their behalf. This could be of significant advantage. There could not be a more important time for companies to consider credit insurance if they do not already have cover. The uncertainty in the current climate means suppliers cannot be sure if they are going to be paid on time and it is vital that cash is kept flowing to avoid more businesses going into administration. □

Philip King is the director general of the Institute of Credit Management.

2009 is shaping up as another difficult year for the US economy

If 2008 was an *annus horribilis* for the US, what will 2009 hold?

Predictions in late 2007 of a recession in the US triggered by the subprime mortgage meltdown and resulting credit crunch came true in 2008. What's more, it proved to be global rather than American. Anyone stalwart enough to follow the positively depressing financial and economic news stories of 2008 received a crash course on subprime loans, mortgage-backed securities, naked short selling, Ponzi schemes and the $62 trillion global credit default swaps market. In addition, they received frightening insight into the intricacies of executive compensation and the financial condition of US automobile and parts manufacturers, banks, brokerage houses, homebuilders, airlines and retailers.

Where did it all go?

A record $7.3 trillion of US stock market value was obliterated in 2008. Commodity prices both soared and crashed during the year, spurring outrage directed at unscrupulous speculators accused of driving up prices. The price of light sweet crude oil peaked at $147 a barrel on July 11 and plummeted to $34 a barrel on December 21. The average price of a gallon of regular unleaded gasoline in the US reached $4.11 on July 17 (the highest ever), only to finish the year at approximately $1.67. Globally, food prices continued to soar during 2008.

2008 was also the year in the US of the 'economic stimulus' package and government bailouts of financial services companies, banks, at least one major insurance company and the beleaguered US auto industry. On a worldwide basis, relief packages consumed over $2 trillion in taxpayer assets as of the end of 2008, with little prospect of abating anytime soon.

2008 was a banner year for commercial bankruptcies, bank and brokerage house failures in the US. 136 public companies filed for bankruptcy protection in 2008, compared to 78 public company filings in 2007. Private companies, particularly private equity companies, fared equally poorly, with no fewer than 49 leveraged buy-out-backed bankruptcies in 2008. Hardest hit among private equity-backed companies in 2008 were the automotive and retail sectors, airlines, media properties, consumer products vendors and restaurant chains. All told, there were 64,318 business bankruptcy filings in calendar year 2008, compared to 28,322 in calendar year 2007. 10,084 chapter 11 cases were filed in 2008, compared to only 6,200 in 2007.

No less than 25 federally insured US banks failed in 2008, pushing the Federal Deposit Insurance Company to the wall to cover $373.6 billion in insured deposits. The Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, which own or guarantee nearly half of the US's $12 trillion mortgage market and which back nearly $5.2 trillion of debt securities held by investors worldwide, were essentially nationalized by the US government due to liquidity concerns related to the subprime crisis. Failures of other US financial giants were averted in 2008 only because the government stepped in with taxpayer dollars to provide emergency assistance.

> "All told, there were 64,318 business bankruptcy filings in calendar year 2008, compared to 28,322 in calendar year 2007."

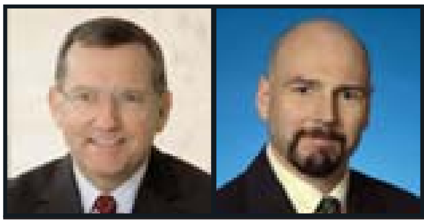
No fewer than 25 names were added to the US public company billion-dollar bankruptcy club in 2008, including the two largest bankruptcy filings ever in US history – Lehman Brothers Holdings, Inc. and Washington Mutual, Inc. Seven of the companies on the US Top 10 List for 2008 were involved in the banking or financial services business, all direct casualties of the subprime mortgage and credit crises.

What will 2009 hold?

The prognosis for 2009 is unclear, but given trends firmly established in 2008, yet another surge in corporate bankruptcies is likely, as companies across all sectors react to the global economic crisis. Companies in the automotive and retail industries top the list of markets impaired by the credit crunch and constriction of consumer spending, supplanting the homebuilding sector, which was generally regarded among industry professionals and watchdogs as the most troubled industry for 2008. US retailers are especially vulnerable, given a lackluster 2008 holiday shopping season that prompted retailers to slash 66,000 jobs in December, capping the worst year for US retail employees since 1939, and what would appear to be an enduring retrenchment in consumer spending. Other industries that are not likely to fare well due to the unavailability of credit and a decrease in discretionary spending include the media, entertainment and restaurant sectors. Commercial real estate is also likely to be hard hit due to escalating vacancy rates and the resulting difficulties in meeting debt service demands.

The fundamental strategy of US commercial bankruptcies may also change in 2009. This is likely in the light of enduring difficulties in lining up debtor-in-possession and exit financing as well as the more abbreviated 'drop dead' dates built into the Bankruptcy Code for a debtor: (i) exclusively to propose and solicit acceptances for a chapter 11 plan; and (ii) to assume or reject unexpired leases of non-residential real property.

This means that more US companies may resort to bankruptcy protection in 2009 to effect an orderly liquidation, rather than to reorganize, or to effect expeditious cash-generating asset sales under section 363 of the Bankruptcy Code. This year may also see a greater volume of pre-packaged chapter 11 cases, a trend that began in late 2005 after the new deadlines were implemented. ☐



Charles M. Oellermann (left) is a partner and Mark G. Douglas (right) is the communications co-ordinator in the Business Restructuring and Reorganization Practice of Jones Day.

The future of restructuring is online

Andrew Pearson looks at the increasing role of technology in insolvency situations.

Bankruptcy and restructuring are words that strike fear in the hearts of CEOs everywhere. But as the British economy continues to contract at a rapid pace and consumer demand weakens, the terms are predicted to become ubiquitous with record numbers of companies forced into administration in 2009, according to recent figures from The Insolvency Service.

The rise in insolvency and the increasing complexity of those proceedings has led to more widespread use of technology to facilitate the exchange of critical information throughout the various phases of the process. Online workspaces (also known as virtual data rooms or VDRs), a technology traditionally associated with mergers and acquisitions, are playing a larger role in managing the organisation and flow of information between the various parties involved in restructuring.

Centralised control of information

An online workspace can function as a central repository that allows the company's critical information to be exchanged with ease among all the parties involved in the restructuring process. The workspace acts as a unifying place of record in what is often a chaotic undertaking. It provides unmatched organisation, security and control.

Restructuring or reorganisation often includes the sale of assets, in or out of court. Any company forced to consider such an option must decide how best to manage the process. Resource-intensive, complicated administration procedures require a transparent account of all company assets and associated data, for relevant parties to consult and share.

In the past, organisations relied on paper-based processes or older technology solutions for asset sales and for general communication during restructurings. These older solutions required staff to research, gather, collate, print and mail, fax or digitise and e-mail a series of legal and financial documents to all involved: advisers, creditors, accountants, solicitors, judges and outside consultants.

The challenge of the old way

During bankruptcy proceedings, the management team of the company in crisis and its legal and financial advisers and other outside experts have to get up to speed quickly and efficiently to develop an effective plan. Hundreds of creditors or select groups that have been designated to represent the creditors and their many advisers must be kept in the loop. These groups must also communicate among themselves in their own separate, secure environment.

Crucially, debt restructuring, asset sales, exit financing and the other phases of a restructuring process require multiple parties to examine and collaborate on a vast array of documents. These processes require immense resources, in terms of manpower and money. All parties, including the company's legal team, advisers, banks, creditors and the court, must inspect and approve restructuring plans. With so many parties involved, it is imperative to have an efficient process in place.

Physical data rooms and traditional methods of information distribution have limitations in terms of speed, transparency and security. An online workspace addresses all of these issues.

Speed

Documents can be updated or added in an instant and accessed from anywhere around the world, so timely, often court-mandated review for all relevant parties can be followed. Creditors, potential investors and the restructuring team can source the materials they need, like financial agreements, motions and important records, when they need them. Participants who join during the process can quickly and easily get all of the information they need to get up to speed right away.

Transparency

Usage reports of activity within the workspace show what information has been reviewed and by whom. This helps a company gain insight into bidder and investor behaviour and form a strategy accordingly. Additionally, the reporting functionality of an online workspace can be used to help keep debtor or creditor teams on task. As all user activity in the workspace is tracked, including who had permission to view which documents – regardless of whether they were accessed – so complaints about non-disclosure can be investigated and quickly laid to rest.

Security

Each user is given a specified level of access, allowing them to view the information relevant to them. In addition, there are levels of controls on the documents stored online, which determine whether they can be printed, downloaded or watermarked. The workspace manager has full control over the information in the workspace to ensure the highest level of security around the documents and the identity of those accessing the system.

> “Each user is given a specified level of access, allowing them to view the information relevant to them.”

Reducing costs and streamlining processes

Online, workspaces deliver many efficiencies eliminating the need to print and ship documents, reducing travel costs, accelerating cycle times and providing graphical reports of workspace activity for more effective management and oversight of the process. The many improvements in efficiency result in considerable savings in associated costs, at a time when the bottom line is under intense scrutiny. There is a more subtle advantage this technology brings to the restructuring process.

Online workspaces enhance communication channels during complex negotiations. For asset sales that arise from the restructuring process, it is important to expedite the flow of information between debtors, bidders and their advisers. Due diligence of distressed assets is even more in-depth than a typical asset sale, resulting in more questions from bidders and more back and forth among advisers and the debtor, so staying organised is a must.

At the end of the day, bankruptcy and restructuring are never easy, but at IntraLinks our services make the process a good deal less painful. □

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Making the most of invisible assets

The sale of intellectual property can unlock a significant store of value, and may result in a new technology reaching the market.

Administrators and liquidators tell us that they tend to focus on the visible assets – such as buildings, machinery and stock – when they first look at a company's value. For Woolworths this is a legitimate approach, because a large portion of the company's value is in inventory and property. But what about technology businesses, like software houses or biotech companies, where the real value of the business is in copyright, trademarks and or patented technology? How do you value something you can't see? And what do you need to do immediately to make sure you preserve the value?

In the case of technology businesses, like those Isis Innovation deals with every day, over 90 per cent of the value of a business may be in intangibles: patents, software, trademarks, or even locked up in people's heads. Missing these can mean a substantial difference to the outcome for creditors.

What does invisible value look like?

The start of the process of managing intellectual property assets is an audit – although this is often not as straightforward as an audit of tangible assets. Patents are unlikely to appear on the company's statutory accounts or balance sheet. The process can be particularly challenging if a company has downsized, and the employees who managed the patents have left. The first thing to do is a full inventory of intangible assets using a range of public and proprietary databases, and to identify and gain access to key individuals such as inventors.

Patent agents and trademark attorneys can be contracted to do searches, but an additional level of expertise is needed to assess very quickly which of the assets have value and are worth re-selling. Therefore it is essential to bring a very commercial knowledge of the marketplace to bear when sorting out the wheat from the chaff.

Speed is of the essence

Maintaining intellectual property, which can cost money, while at the same time looking for a customer, can be a juggling act. The key to success is a detailed global network across all industries, among multinationals and investors, who can give quick feedback on their interest in the asset.

The successful sale of intellectual property can give a valuable asset a second chance. It can unlock a significant store of value, and also allow a new technology to reach the market. In the case of a drug or medical device, this can have a real benefit to society.

Isis Innovation, a subsidiary of the University of Oxford, is a company specialising in extracting the value of intellectual assets. Isis provides consulting services in intellectual property management to businesses worldwide. Over the past 20 years, Isis has concluded more than 800 commercial agreements and created over 60 companies, six of which are AIM listed. ☐

David Baghurst is head of Isis Enterprise at Isis Innovation Ltd.

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Isis Innovation Limited is the University of Oxford's technology transfer company.

We offer consulting expertise and advice in technology transfer to clients from the public and private sectors, in the UK and internationally. Technology transfer includes the management of intellectual property and its transfer from corporate or university research to commercialisation.

Our activities:

- **Auditing Intangible Assets (Patents, Trademarks, Software, Copyright etc)**
- **Developing Asset Management Strategy**
- **Valuing Innovative Technology**
- **Searching for Commercial Partners**
- **Presenting to Businesses and Investors**
- **Negotiating the Sale of Intellectual Assets**

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Economic snapshot: London & South East Region

Over the coming months *RECOVERY* will be running a series of economic snapshots of the R3 regions. Alison Goldthorp gives us the first picture.

London & South East region has been in the eye of the current financial storm, following the collapse of Lehmans and the crisis in the banking sector. At present, the increases in corporate insolvencies are more apparent in the South East than the rest of the UK.

The increase in work began with the problems with Northern Rock, Lehmans, Bradford & Bingley and the collapse of Landsbanki and Kaupthing, followed by the financial pressures on all of the major banks in the City of London. This has resulted in significant amounts of work for restructuring professionals in London.

The resulting problems with liquidity have, as we all know, had a very significant impact on the economy throughout the country. The key sector under pressure in the run up to Christmas was retail, which resulted in increased work levels for insolvency practitioners everywhere. The collapse of big name retailers such as Woolworths, Entertainment UK, Land of Leather, MFI, Whittards, The Officers Club, Viyella, Adams and others has become an almost daily news item. As a result restructuring professionals in all areas have been transferring staff into their restructuring teams from other areas of the business that are quieter, and the need for retraining staff in basic insolvency concepts is ongoing and one that R3 is seeking to address by putting on refresher courses to assist its members at this time.

The position following the next rent quarter day on 25 March will be closely monitored by restructuring professionals throughout the country, and there seems general agreement that this will result in a further round of failures and increasing corporate insolvencies and personal insolvencies throughout the country. The eye of the storm is therefore moving away from the financial institutions in the City of London to cover much more of the country as a whole.

> "The key sector under pressure in the run up to Christmas was retail, which resulted in increased work levels for insolvency practitioners everywhere."

Educating the media about the role of IPs in the recession

The media is increasingly profiling what one might call the 'celebrity insolvency practitioners', who are enjoying (or not) the increased media attention focused upon them through the high-profile retail administrations mentioned above. These practitioners are largely London based. Attention will only increase as the year progresses with more discussion on the role insolvency practitioners play and their ability to deal with a number of large cases at any one time.

As with any issue, the more the coverage, the greater the polarisation of opinion as the media struggles to decide if they are 'good' or 'bad'. Battening down the hatches might seem like good advice, but not for R3's London constituency, as they will have a vital role in setting the record straight and explaining why the insolvency practitioner's role is key to achieving the best results for creditors.

In media terms, the London & South East region overlaps with R3's national PR work. The regional press, such as the *Evening Standard, Metro, The London Paper* and *London Lite* are in regular contact with R3's head office at 120 Aldersgate Street, and no regional PR provider exists as in other regions. With strong representation of council members and executives in London, there are ample spokespeople ready to maximise broadcasting opportunities that exist in London. In 2008, R3 put members up for interviews with BBC's Working Lunch, BBC Breakfast News, Channel Four News, BBC World Service, BBC 5 Live, BBC Wake Up to Money, GMTV's the Sunday Programme and even Al-Jazeera.

Alison Goldthorp is the new chair for the region

On 1 January 2009, I took over the regional chair from Nick Edwards of Deloitte, and am pleased to be able to report on the ongoing steps being made to use the current intensive press coverage of insolvency to increase understanding on the value added to the restructuring and insolvency process by IPs. This is a key challenge for R3 in London. One of my key aims is for London & South East to work with R3's national PR specialists to try to correct as much of the misunderstanding of the process as we can, particularly regarding pre-packs and their ability to deliver the best solution in many cases for the creditors and the employees of a business.

When speaking to IPs in London & South East over recent weeks, it is very clear that we are all getting busier. The volume of enquiries is increasing for all sizes of firms as the credit crunch bites further into all sectors; and not just the banking sector in the City of London.

The region has a busy events schedule this year. We plan several technical updates, the first one dealing with the new reporting requirements in SIP 16 and the new code of ethics for insolvency practitioners. A networking drinks event at the Royal Exchange will take place in September followed by the Ladies Lunch in November.

Our key objectives are to keep members up to date with technical issues, and to provide opportunities to network with other members at this busy time. □

Alison Goldthorp is a partner at Addleshaw Goddard LLP and chair of the London & South East Region of R3.

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R3 membership benefits

We are constantly striving to provide value for money for all our members. Benefits for full members currently include:

- full voting rights
- eligibility for Council and Committee membership
- technical bulletins and releases
- continuing professional education at discounted rates
- a network of regional meetings
- an invitation to the R3 annual conference
- a copy of *RECOVERY* every quarter
- the use of the designatory letters MABRP and a certificate of membership
- inclusion in the *R3 Directory* and a copy of it
- membership of INSOL International
- access to the members' section of the R3 website.

Subscriber membership is open to people who are not insolvency practitioners, lawyers or students but who have an interest in the world of business recovery. Benefits include:

- a copy of *RECOVERY* every quarter
- attendance at regional meetings
- priority bookings for R3 courses and most of its conferences
- technical bulletins and releases
- access to the members' section of the R3 website
- a copy of the *R3 Directory*.

For more information on R3 membership, please call 020 7566 4238 or e-mail **membership@r3.org.uk**.


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Industry announcements

Smith & Williamson

Smith & Williamson expands turnaround team with another new appointment

Smith & Williamson is delighted to announce the appointment of David Blenkarn as a director in the Restructuring and Recovery Services department. David specialises in turnaround services and his appointment boosts the firm's offering to businesses struggling to survive the recession.

Recently David has worked in London and across Europe on major corporate restructuring projects, in the entertainment, technology and media sectors, as well as assignments in the European steel, energy and chemicals industries.

In recent months, the Smith & Williamson turnaround team has grown with the addition of five experts.

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KPMG have announced the appointment of Philip Davidson as European Head of Restructuring, effective from 1 January 2009.

Philip Davidson is a member of The Institute of Chartered Accountants in England and Wales ('ICAEW'), and founder member, fellow and the Chairman of the Institute of Turnaround. Philip is currently head of KPMG's Restructuring Advisory practice. He joined KPMG in 1986 and become a partner in 1997. His experience includes, working with large groups of lenders to solve issues with underperforming loans, helping stressed companies stay in control of their situation, and helping multi-national companies to optimise the value of their businesses.

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AUDIT ▪ TAX ▪ ADVISORY

New Director hires into Baker Tilly Restructuring and Recovery group

Matt Haw is a valuable addition to our London team, having worked in corporate restructuring since 1996. Matt will take formal insolvency appointments as well as undertake business reviews in connection with our restructuring team. He has a specific focus on our banking relationships and also strengthens our Asset Based Lending Services offering with his proven experience in the invoice discounting market.

We also strengthen our Bristol team with the appointment of Richard Lewis. Richard has spent over 12 years in corporate recovery and his work to date includes both independent reviews and formal insolvency appointments. He also joins from Grant Thornton and has Big 4 experience.

Tracey Callaghan, National Managing Partner, Baker Tilly Restructuring and Recovery LLP, welcomes them to the team:

"It's very exciting to have Matt and Richard join us – they both have excellent credentials which will be of great benefit to our clients at a time when they most need proven experience. Our investment in the best people lies at the heart of our service quality and client commitment."

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KPMG have announced the appointment of Richard Fleming as UK Head of Restructuring, effective from 1 January 2009.

Richard Fleming is a member of the ICAEW and the Insolvency Practitioners Association, and is currently Head of KPMG's Restructuring practice in the North, based in Leeds. He joined KPMG in 2003, and previously was a partner at Arthur Andersen and Ernst & Young. He has 22 years restructuring experience specialising in advising lenders and other stakeholders in stressed companies and various forms of insolvency for underperforming companies. Richard has extensive overseas experience which includes assignments in Europe, Australia and the US, and his industry experience includes retail, property and construction, aviation, manufacturing and football clubs.

Richard Fleming
KPMG LLP
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Industry announcements
continued

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We are delighted to announce that **David Butler**, former Partner at Nunn Hayward Chartered Accountants, and his Insolvency team are now part of the Hillier Hopkins Group. As of the 1st January 2009 the insolvency practice will operate through newly formed group company Hillier Hopkins Corporate Recovery LLP (HHCR), of which David is Principal.

David qualified as a Licensed Insolvency Practitioner in May 1995 and has many years experience of all types of business recovery and insolvency procedures.

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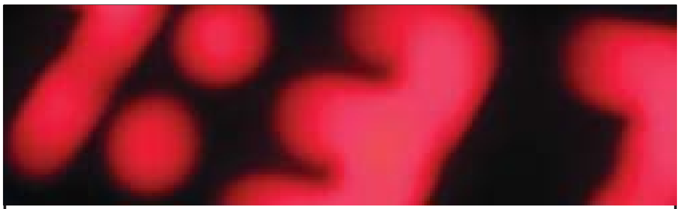

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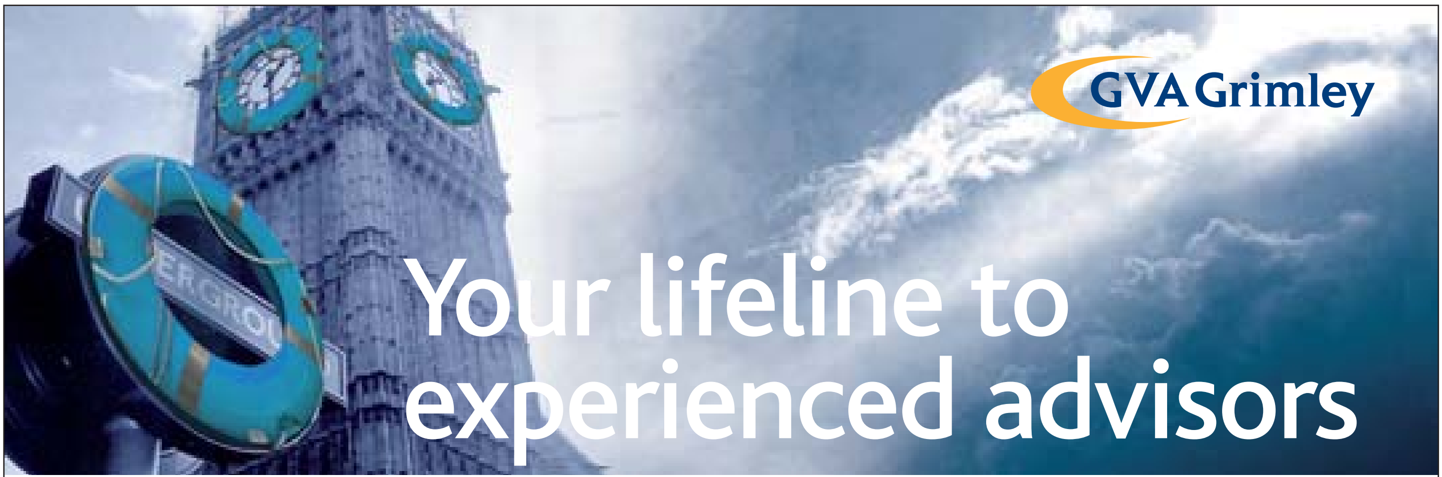

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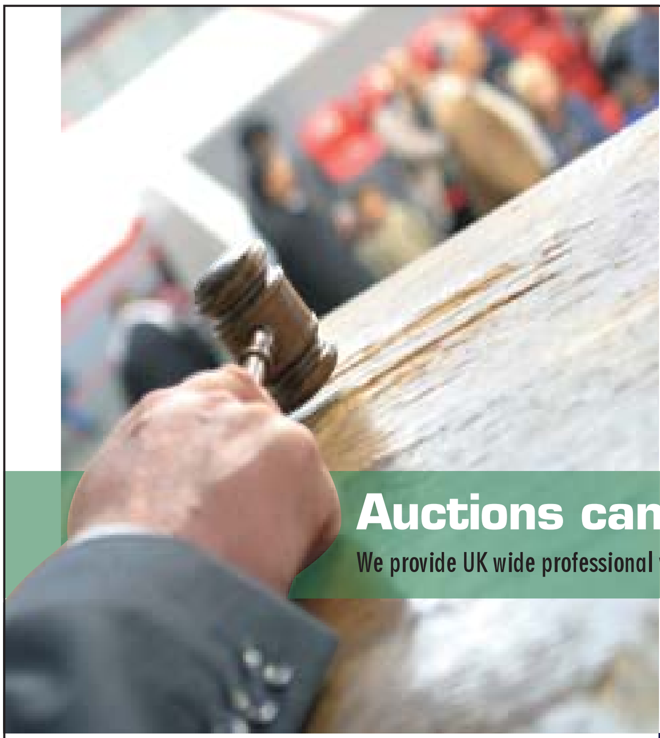

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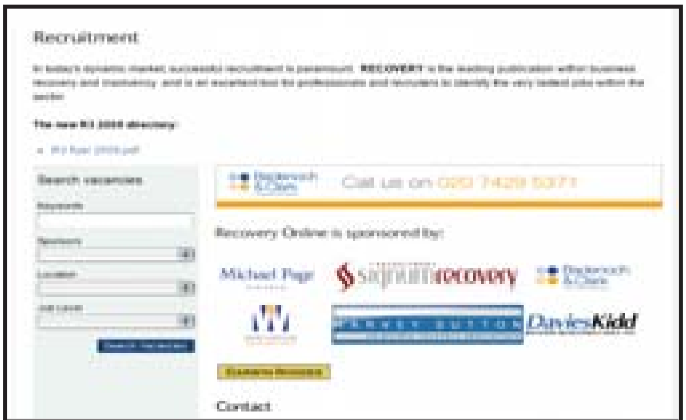

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Through major recession, boom times and, more recently, a credit crunch the field of Corporate Recovery, Restructuring and Insolvency has continued to offer a challenging and rewarding career path to candidates at various levels and with varied backgrounds.

Whilst we deal with all levels of vacancies from Administrator through to Partner, we are particularly experienced in handling senior level appointments at Senior Manager, Director and Partner level, including teams and practice mergers, where we fully appreciate the need for tact and discretion in the close-knit world of the Insolvency Practitioner. We are also highly skilled at providing a bespoke search service on behalf of the candidate, often introducing them to organisations where vacancies may not be overtly advertised.

We provide full coverage of the UK mainland market as well as offering international experience, having made successful introductions throughout England, Wales and Scotland as well as overseas in locations as diverse as Germany, Australia, Hong Kong and Kenya. In addition to being long term regular advertisers in quality journals such as R3 we are also able to maximize global coverage through our unique website, **www.big4careers.com**

Much of our success at Davies Kidd has been based on repeat and referred work, both from a client and candidate perspective so whether you are a prospective job seeker looking for a career move or an employer seeking additional staff please feel free to contact one of our Partners on **020 7812 6688**
or e-mail **chris@davies-kidd.co.uk** or **jeff@davies-kidd.co.uk**
Alternatively, log on to **www.big4careers.com** for more information.

All enquiries will be treated in the strictest of confidence.

Recruiting For Staff?

If you are recruiting for staff at any level in the Restructuring, Recovery and Insolvency fields why not register your vacancy with us to see if we can help. We will happily advertise it for free on our own recruitment website **www.big4careers.com** which attracts candidates looking for career moves both to and from the 'big 4' as well as among non 'Big 4' firms. With nearly 20 years Senior level recruitment experience behind us we are also highly skilled and discrete in handling opportunities at Senior Manager, Director and Partner level.

Partner & Director Search

If you are a Partner or Director or a Team considering a career move then feel free to consult us for advice. With more than 15 years senior level recruitment experience in the Restructuring, Recovery and Insolvency markets we fully understand the 'close' nature of the market and the need for tact and discretion. We currently have Director and Partner search assignments throughout the UK and are in regular contact with a number of firms who are keen to talk to senior professionals with proven business generation skills who can add value to a Recovery practice.

Practice Mergers and Acquisitions

Looking to merge or acquire a Restructuring or Recovery team? Whether you are a sole practitioner or a team seeking a move or a firm looking to acquire a practice call us for a confidential discussion. Current assignments in London, Birmingham, Leeds, Manchester, South West, Glasgow, Belfast.

Head of Corporate Recovery
Senior Manager / Partner / Director

Cayman $US Negotiable

Unique opportunity for an experienced Corporate Recovery specialist to assist in the setting up and leading of a Recovery practice for a prestigious, recognised international firm. Working closely with and supported by local Partners you will be a qualified accountant and / or licensed insolvency practitioner with several years' all-round corporate experience. You will need good marketing and management skills with the ability to establish, maintain and develop contacts within a closeknit business community.

Insolvency Administrators

West Yorkshire £Flexible

Well-established, niche, independent Insolvency practice seeks Insolvency Administrators with at least 2 years experience to work on a mix of corporate and personal cases.

Insolvency Senior Administrator

Bucks £Flexible

Great opportunity in a medium sized firm for an Insolvency Administrator with at least 3 years' Insolvency casework experience, particularly in Liquidations and Bankruptcies. The role will involve a mix of corporate and personal casework and could equally suit someone qualified, part-qualified or looking to qualify (full training and study support will be given).

'Big 4' London
Managers / ADs & Directors

£Competitive

This 'unique' climate has opened up a number of 'unique' career opportunities for dedicated Recovery specialists in the London City office of this 'Big 4' firm. There has rarely been a better time to gain exposure to a fascinating range of distressed situations, some often well-publicised and high profile. Despite the demand for services entry criteria are strict – you will need a strong profile of academic and professional achievement with a proven track record of handling Corporate Recovery assignments. Ideal candidates will be ACA, ACCA and / or JIEB qualified with at least 1-3 years (Managers) and 5- 10 years+ (Assistant Directors and Directors) relevant experience, gained in a leading professional services firm or boutique. Your skills should encompass case management, project management, staff management and marketing. Successful applicants will be heavily involved in providing an extremely varied range of services to stakeholders of underperforming businesses including investigations, reviews, restructuring / turnaround planning and insolvency procedures.

Corporate Recovery Administrator

Surrey £Competitive

Excellent career opportunity in a leading national practice for a Corporate Recovery Administrator with at least 2-3 years experience of receivership, liquidations and administration work. The role would suit someone CPI qualified or equivalent.

Recovery Executive & Manager

Northern Home Counties £Competitive

Leading national / international practice with a strong Corporate Recovery coverage seeks an Executive and a Manager to join its growing team in the Northern Home Counties region. Successful applicants will benefit from a great range of experience. You will need a professional qualification (ACA, ACCA, JIEB or equivalent), with relevant experience of Corporate Recovery assignments. The Manager will also need previous Managerial experience.

Recovery Partners / Directors
Individuals or Teams

London - City
£Competitive Base, Equity, Profit Share, Benefits

Leading independent firm seeks Partners or Directors who will be qualified accountants and / or JIEB with several years' all-round corporate experience. You will be proven business generators with strong marketing and team management skills. As key members of the national Recovery practice your overall objectives will be to produce profitable business and build the firm's profile in this area. You will be given the responsibility and support to develop the practice and will be rewarded with a generous compensation package including a competitive base salary, equity, benefits and a transparent, performance-related profit share with no upper limits. First year salary guarantees will also be available for existing Partners. Individuals or teams will be considered.

Davies Kidd UK and International Recovery Recruitment Specialists

For a confidential discussion on the market or any of these positions contact:
Jeff Davies on 020 7812 6688 or email jeff@davies-kidd.co.uk
Christopher Kidd on 020 7812 6688 or email chris@davies-kidd.co.uk

Restructuring Senior Managers
Cayman $US 105-130,000 Tax Beneficial

This International firm offers challenging work experience, career progression and lots of sunshine to two Managers / Senior Managers who are likely to be qualified accountants with at least 5 years post qualification experience in Restructuring / Corporate Insolvency procedures, ideally gained in an internationally recognised firm. The roles will suit personable candidates with good commercial, technical and client relationship skills.

Corporate Recovery Manager
Birmingham £Competitive

Excellent career opportunity for an established Manager to join a leading Recovery team. You will benefit from exposure to a wide range of Corporate Recovery assignments and a busy, friendly professional environment. The ideal candidate will be a qualified accountant or JIEB with good all-round Recovery skills including previous exposure to Bank work and marketing activities.

Restructuring Managers / ADs
Sydney / Melbourne AUS$ Competitive

Exciting opportunities for Chartered Accountants to join a leading international Corporate Restructuring team. You will be responsible for analysing the financial and operational influence of underperforming businesses and establishing valuable strategies to recover and re-establish successful company performance. The role is likely to suit a Chartered Accountants with a sound knowledge of Corporate Restructuring in a strategic advisory manner.

Corporate Restructuring & Recovery Managers, Senior Managers, Directors
Australia $AUS Competitive

Excellent opportunities for qualified Chartered Accountants or equivalent with Corporate Recovery / Restructuring experience to join a leading international Restructuring practice in Australia. Openings exist from Manager through to Director level throughout their Australian network including Sydney, Melbourne, Brisbane, Perth and other locations. Previous Recovery / Restructuring experience in an internationally recognised professional services firm will be desirable.

Corporate Recovery Senior Manager
Bristol £Negotiable

First class career opportunity in a top Recovery firm awaits a qualified accountant with at least 5 years post qualification experience in Corporate Recovery work which should include exposure to Strategic and Independent Business Reviews, Marketing activities and Management.

Corporate Recovery Assistant Director
M4 Corridor £Negotiable

Fantastic career opportunity in an international firm for a qualified accountant and / or JIEB with broad and deep experience of handling mid market Corporate Recovery assignments including Liquidations and Administrations. The role could suit interested candidates living anywhere between South Wales and the Thames Valley. Great chance to become a key part of a growing team for someone who enjoys a fully involved role including casework, marketing and management.

Corporate Recovery Associate Director
North London £Negotiable

Challenging and rewarding career opportunity in a multi-office, multi-disciplinary firm for a qualified accountant and / or JIEB with a proven background in Corporate Insolvency and Recovery work. Ideal candidates will have strong relationship management skills with work referrers and should be looking to develop their career in the North London and Northern Home Counties region.

Corporate Recovery Director
Southern England £Negotiable

Outstanding 'Big 4' opportunity for an ambitious Restructuring / Recovery specialist to 'make a name' for themselves in a 'Big 4' office in the South of England. You are likely to be a qualified accountant and JIEB with at least 7 years post qualification experience and a specialist background in Recovery and Restructuring work, particularly for mid-market clients. You will need a strong history of successful delivery and a proven business development record. This role represents a great opportunity to be part of a growing national team.

CR Assistant Manager / Manager
M4 Corridor £Flexible

Expanding Corporate Recovery team of a leading professional firm is able to offer a challenging and rewarding career opportunity to an Assistant Manager or Manager with between 2-5 years Recovery experience gained in the Mid-Market sector. Based in a local office on the M4 corridor between South Wales and the Thames Valley ideal candidates will be ACA / ACCA and / or JIEB qualified and keen to contribute to and benefit from a stimulating work environment.

Partners / Directors / Teams
Dublin Euros Competitive Packages

This leading UK practice already has a strong Recovery presence in the UK and is now looking to expand operations in Ireland by setting up a Recovery practice in its existing Dublin office. They are seeking established Partners or Directors with proven business generation skills and strong local contacts. Ideal candidates will currently be working with a 'Big 4' or other international practice or recognised local player. Individuals or teams will be considered. Packages will reflect experience and are expected to at least match existing packages via a competitive base salary, equity and an open ended performance related profit share, together with usual compensation benefits.

Banking Advisory Specialists
Leeds £Negotiable

This international firm is keen to recruit qualified accountants with good all-round Corporate Restructuring and Recovery skills to include practical experience of Bank-led Advisory work in the form of Investigations, Strategic and Independent Business Reviews. Your experience is likely to have been gained in the Restructuring department of a medium to large accounting firm or specialist boutique and applications are welcomed from newly / recently qualified level through to experienced Management levels.

Corporate Recovery Professionals
London £Competitive

This leading international boutique is expanding its Recovery and Corporate Insolvency team and is keen to recruit additional professionals with strong relevant experience gained in a 'Big 4', leading mid-tier or specialist Insolvency practice. Suitable candidates are likely to be qualified accountants and / or JIEB with 3-10 years Corporate Insolvency experience.

Working Capital Management Assistant Directors and Directors
London £6 Figure Packages

Outstanding career opportunities in a growth area of a 'Big 4' firm for experienced professionals with Senior Manager or Director level experience in leading Working Capital and Cash Management initiatives for multinational companies. You will need previous relevant experience gained in a leading Financial Consulting or Strategy House or from within a large professional services Restructuring team. With a strong international emphasis fluency in other major European languages would also be a considerable asset.

Partners / Directors / Teams
Belfast £Competitive Packages

Great opportunity for existing Partners or Directors seeking a new challenge. This top independent firm already has a strong Recovery presence in the UK mainland and is now looking to build a presence in Northern Ireland by establishing a Corporate Recovery team in its existing Belfast office. They are seeking established Partners or Directors with proven business generation skills and strong local contacts. Ideal candidates will currently be working with a 'Big 4' or other international / national practice or recognised local player. Individuals or teams will be considered. Packages will reflect experience and are expected to at least match existing packages via a competitive base salary, equity and an open ended performance related profit share, together with usual compensation benefits.

Recovery Partners / Directors / Teams
South / South West £Competitive Packages

Leading independent firm seeks established Partners or Directors with proven business generation skills to set up a Recovery practice in an existing office covering the South and South West of England. The firm already has a strong London and South East presence in the Recovery market. Ideal candidates will currently be working with a 'Big 4' or other national or international practice or leading specialist. Individuals or teams will be considered. Packages will reflect experience and are expected to at least match existing packages via a competitive base salary, equity and an open ended performance related profit share, together with usual Director / Partner compensation benefits.

Senior Insolvency Administrator
Central London £30-40,000

Excellent opportunity for a part or fully qualified CPI or ACCA with at least 3 years Corporate Recovery experience to join a leading non 'Big 4' practice in Central London. You should be able to handle cases with minimal supervision. The successful candidate will benefit from a good range of Corporate experience in a friendly, supportive team environment with good ongoing career prospects.

'Big 4' Recovery Opportunities Assistant Manager to Director Level
London / South East £45,000 – 6 Figures

As a result of the well documented economic conditions our client, a 'Big 4' firm, is experiencing significant growth in its Recovery practice and is consequently looking to make a number of key appointments to its team in London and the South East. They are interested in talking to dedicated specialists at all levels from Assistant Manager to Director. Suitable candidates will be qualified accountants, JIEBs or equivalent with a strong experience in Insolvency, contingency planning and independent and pre-lending business review work.

Corporate Recovery Executives
'Big 4' London £40-46,000

'Big 4' City based recovery team seeks experienced Administrators for their thriving recovery department. You should have between 2-4 years varied corporate experience gained with a leading practice and excellent interpersonal skills. A market leading benefits package, a structured career path as well as an interesting and varied case load can be expected. Ideally you should hold an accountancy qualification or be studying towards one.

Business Recovery Manager
London £Negotiable

This growing, niche Recovery boutique offers an exciting opportunity to a qualified accountant with at least 2 years post qualification experience in IBRs and Admins in the mid-markets sector. Great opportunity to grow with the firm for someone who enjoys responsibility and is able to think on their feet. The role may well suit someone coming from a larger firm who is seeking more direct involvement in the shaping of a practice.

Notices of Intention to Appoint: room for abuse?

Roger Elford examines a number of issues that arise in everyday practice relating to the filing of Notices of Intention to Appoint an administrator where there does not appear to be clear guidance in Schedule B1 of the Insolvency Act 1986.

There has been a surprisingly small amount of case law based on cases where the perceived drafting inadequacies of the out-of-court appointment procedure under Schedule B1 of the Insolvency Act 1986 have been tested.

Filing a Notice of Intention to Appoint

One question that often arises is the ability of the directors of a company to file a Notice of Intention to Appoint (NIA) at court, in circumstances where there is no holder of a qualifying floating charge.

Opinion is heavily divided on this point and the relevant provisions in Schedule B1, and the accompanying Insolvency Rules do not assist in the determination of how this question should be approached. One line of thinking is that the sole purpose of the directors having to give such notice is to provide the holder of a qualifying floating charge with the ability to veto the directors' choice of administrator and to appoint an administrator of their choosing, in circumstances where, for whatever reason, they are not content to allow the directors' choice to prevail. The logical consequence of this line of argument is that if there is no qualifying floating charge-holder, then there is no need for directors to give notice and they should proceed to appoint immediately.

There is nothing in Schedule B1 though that expressly prohibits the filing of an NIA in circumstances where there is no qualifying floating charge-holder. The directors of a company facing extreme creditor pressure will often seek the counsel of an IP and may require an immediate remedy to obtain breathing space from the company's creditors in circumstances where they are not quite ready to proceed to appoint an administrator. The filing of an NIA may achieve this, but at what expense to an enterprising creditor who takes the initiative, in circumstances where a board of directors who have resolved to appoint an administrator could later resolve not to proceed with the appointment following the expiry of the interim moratorium?

The statutory declaration in the NIA does not require the director to swear that he or she will take all steps possible to ensure the company enters administration. So, in principle, it would appear open to a board of directors to resolve later not to proceed with the appointment (subject to their fiduciary duties to creditors in circumstances where the company is or is likely to become insolvent).

Can a creditor challenge the directors' action?

The extent to which a creditor may be able to challenge such pre-emptive action by the directors will depend on the proper interpretation of Schedule B1 and also on the merits of the argument that such action by directors in the absence of a qualifying floating charge-holder constitutes an abuse of process. In the most extreme case, the directors of a company could file an NIA purely to thwart the attempts of a landlord, for example, to levy distress in full knowledge that they may have already decided not to proceed to file a notice of appointment within the 10 business day period permitted by Schedule B1.

This presupposes an element of dishonesty or bad faith on the part of such directors. But most practitioners encounter situations where the directors of companies are genuinely seeking to raise emergency finance through private equity firms etc, and where it may be possible to rescue the business as a going concern without the need for it to go into administration – but only if finance can be obtained and creditors kept at bay.

Some will argue that this is exactly what the interim moratorium provisions in relation to small company voluntary arrangements are designed for (under Schedule A1 of the Insolvency Act 1986). The fact that these provisions were not expressly introduced in relation to administrations is perhaps a strong indicator that parliament did not intend directors to be able to take advantage of the interim moratorium in circumstances where there was no qualifying floating charge-holder.

On the question of NIAs generally, insolvency lawyers are often asked to advise on the appropriateness of directors of companies who are seeking to line up pre-packaged sales of the business prior to its formal entry into administration, to file successive NIAs in circumstances where negotiations have not been concluded prior to the expiry of the initial interim moratorium. Again, there is nothing in the legislation prohibiting the directors from doing this but as the interim moratorium provided by Schedule B1 only lasts for ten business days, it is possible that an aggrieved creditor may argue that the successive filings of notices by directors amounts to an abuse of process and goes beyond the scope of that intended by the legislature.

The consequence of protracted negotiations

Notwithstanding the fact that a company's bank may be content for the directors' choice of administrator to be appointed, the parties will often be in close contact with the bank prior to the appointment to ensure it runs smoothly and to seek the bank's blessing for the terms of any pre-pack sale (in order to ensure that the administrator can sell free from the bank's floating charge upon the company's entry into administration). It is relatively common that communications with banks in this regard can be quite protracted and it is often not possible to obtain the bank's 'sign-off' prior to the expiry of the ten business day interim moratorium. In such circumstances, it is common for directors to file a second NIA to preserve the status quo. Such practice, while not ideal, enables negotiations to be completed prior to the company's entry into administration, thus reducing the inherent risk of trading to the administrator and preserving the integrity of the business. Creditors will argue that to permit the filing of successive notices amounts to a further erosion of their rights and remedies.

The best advice to directors must be that if they choose to file an NIA in circumstances where there is no qualifying floating charge-holder, or to serve subsequent or successive notices, there must be a risk that a disgruntled creditor may challenge such action as being an abuse of process. Whether such a claim will succeed remains to be seen, but in the current economic climate it is perhaps only a matter of time before we do. ☐

Roger Elford is a solicitor at Charles Russell LLP and the joint head of its Property Insolvency Group.

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Ward Simpson is an executive search firm that specialises in opportunities within Corporate Recovery and Restructuring. Our expertise and network of contacts is based upon first hand knowledge of working within the Public Practice sector, combined with extensive recruitment experience gained over the last 18 years.

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Restructuring Senior Associate
London
£65-95,000 + excellent bonus + benefits

This Top-tier Restructuring department provides solutions to under-performing businesses on both debtor and creditor led assignments. You will be providing a range of strategic options from advisory assignments and turnarounds to debt restructuring and recovery. You will be ACA/ACCA qualified with exceptional commercial acumen, analytical skills, verbal and written communication skills, and strong understanding of this exciting and challenging sector. IBR or business review skills are essential in addition to experience of managing of assignments. Excellent career potential.

Partner
London
£££ Highly Negotiable

Our client is a niche Insolvency Practice with a dedicated and enthusiastic team of insolvency specialists and support staff. They wish to speak to existing Partners or Directors/Senior Managers with the ambition and ability to join their team and help it grow. You will be comfortable with business development and demonstrate a track record of fee generation. If your current position or firm is holding you back, this is an excellent opportunity to develop your career at a critical time in the current economic climate. Package negotiable and can include equity.

Restructuring & Turnaround
London & Europe
£ Highly Competitive + Bonus

This leading international Consultancy offers a challenging and fast track career to ambitious Restructuring professionals with three years minimum pqe. You are likely to be a Manager or Senior Manager with a Top 4 firm who is keen to develop their operational restructuring expertise through dealing with a range of major Corporates who are in distressed situations. Joining an already impressive team your progression to Director level will be rapid and your learning curve steep. Candidates who have first hand experience of distressed turnarounds within commerce will also be welcomed.

Corporate Recovery Manager
London
£45-70,000

Specialist Recovery Practice with strong links to the banking and ABL sector is recruiting a corporate insolvency manager/assistant manager to join its growing team. Work includes advisory and review work in addition to formal assignments including trading. Due to the size and nature of the practice there are excellent career opportunities with Partnership a very real prospect. You will have a minimum of 3 years corporate insolvency experience. Formal qualifications an advantage but not a necessity-full training and development provided.

Financial Restructuring AD
Investment Bank
£ Market leading

This highly regarded team is offering a talented restructuring professional the opportunity to work on an impressive range of high profile financial restructuring assignments whilst progressing rapidly to Director level. You are likely to have an impressive academic and professional background gained either within a Top 4 firm or already with a leading bank or boutique. Contacts in, and an understanding of, private equity is expected as your role will include business development responsibilities. A generous salary package is offered plus a sizeable bonus potential.

For a totally confidential consultation please contact;
Simon Haynes on 020 7499 2744 email; shaynes@wardsimpson.co.uk or
Peter Lockhart on 020 7499 2751 email; plockhart@wardsimpson.co.uk

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