Spring 2022

R3, the Association of Business Recovery Professionals | **https://www.r3.org.uk/technical-library/recovery/**

RECOVERY

Fraud

The technology behind fraudsters and investigators
Delve into the dangers of handling crypto assets, a forensic accounting focus on fraud and open-source investigations and perusing the dark web for IPs

Restructuring plans
Read about the first use of a restructuring plan for SMEs and see what a group of professionals think about the future for mid-market plans

Legal update
A new arbitration scheme for Covid-19 rent arrears explained

An interview with… David Bryan
The president of the Turnaround Management Association Europe talks about the organisation's work and the possible future for turnaround and restructuring post-Covid-19

What do you think?

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

From the editor

As I write this column, the news is rightly dominated by the appalling and atrocious events happening in Ukraine. Our industry's thoughts and prayers go out to all those affected by this conflict, including those professionals within our organisations within Ukraine with whom we have worked. We are reminded how lucky we are to be where we are and to have the security that we have to do what we do.

With the sanctions that are resulting from Russia's invasion of Ukraine, there is bound to be an increase in investigations of company's and individual's assets, as well as the continued stress on the economy caused by rising costs, inflation and interest rates. One way to alleviate that stress on the public purse is to ensure the recovery of money due from government Covid-19 support schemes.

As we come out of the Covid-19 restrictions, this edition focuses on the theme of fraud, which often goes hand in hand with insolvency. Matt Fritzsche and Raymond Man summarise research providing insights and tips on fraud detection starting on page 14 and Carmel King and Samantha Street look at crypto fraud (trigger warning: there is a picture of a spider!) on pages 18–19 (with a spider on the contents page too).

Mark Wilson, Hannah Drozdz and John Lamb look at the liability of auditors for directors' fraud (pages 20–22), Dr Stephen Hill explains how to detect fraud from a laptop (pages 24–25) and Richard Palmer highlights the role IPs have to recover fraudulent bounce back loans on page 27.

The end of March should see the end of Covid-19 restrictions on landlords, but just before that happens, the new arbitration scheme for rent arrears comes into force. Mathew Ditchburn tells you what you need to know in the legal update on pages 6–8.

Could restructuring plans become more viable for SMEs? Sorca McGeown suggests they can following the case of Amicus Finance (pages 42–43) and Caroline Sumner gets the views of Teneo, Pinsent Masons and Sandton Capital in a round table on the topic on pages 44–46.

Any Derby County fans out there? If you want to know why your club has not been bought out of administration yet, Rebecca Andrews Walker may have the answer on pages 48–49.

As always at this time of year, we publish the JIEB results (pages 29–31). Congratulations to all successful candidates.

A bumper, and informative, edition, which will hopefully provide some light relief from current world events.

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

Regulars

Legal update

Dates for your diary

R3 matters

Theme: Fraud

18

14

Advertising features

JIEB results November 2021

Features

38

RECOVERY

Editor
Neil Smyth, Mills & Reeve LLP

Publishing manager Matt Jukes
Tel: 01491 828939, matthew.jukes@groupgti.com

Advertising Jonathan Nicholl
Tel: 01491 828922, jonathan.nicholl@groupgti.com

Printed by Stephens & George

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

RECOVERY is the quarterly magazine of R3, the Association of Business Recovery Professionals, 3rd Floor (East), Clerkenwell House, 67 Clerkenwell Road, London EC1R 5BL.
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 Futures, The Fountain Building, Howbery Park, Benson Lane, Wallingford, Oxon OX10 8BA
www.groupgti.com, Tel: 01491 826262

President's column

In his final column as R3 president, **Colin Haig** looks back at some of the highlights of his two-year term of office.

When I took over the presidency from Duncan Swift in 2020, R3 was a very different beast. The pandemic meant we had to change. And change we did.

We've become more agile and more innovative, and we moved from our old headquarters to a smaller, more modern office that's more suitable for flexible working.

We've launched the Training Academy, which in its first year offered online courses in everything from an introduction to insolvency through to personal brand development.

We've run five very successful virtual conferences – taking our established events like the Annual Conference and SPG Forum online, and delivering new ones like the Fraud Conference (in partnership with the Fraud Advisory Panel and INSOL Europe) and the Scotland Forum.

And through our Back to Business UK campaign, we've helped educate individuals and directors of businesses about the benefits of early engagement, and partnered with organisations like the Institute of Directors to secure a commitment from the business secretary around HMRC's approach to the tax debts of businesses affected by Covid-19.

"When I took over the presidency from Duncan Swift in 2020, R3 was a very different beast. The pandemic meant we had to change. And change we did."

A foundation for the future

We'll continue to build on the last two years' achievements over the next 12 months.

We'll keep campaigning on the profession's behalf as businesses look to recover from the pandemic and bounce back from the effects of the latest set of restrictions.

We are building on the success of the Training Academy – adding in-person courses to the virtual ones that have worked so well so far.

And we'll keep bringing the community together to discuss the latest issues and trends, and to re-establish old connections and make new ones.

Our conferences are a huge part of that. And we're counting down to this year's Annual Conference – our first in-person conference since the SPG Forum in 2019.

The 2022 Annual Conference will explore areas such as how HMRC's changing approach to restructuring is evolving, the financial future of the education system, and the new commercial rent arrears arbitration scheme.

We've worked hard to bring some top speakers together to discuss the issues the profession will face over the next year, and I'm looking forward to hearing what they have to say and getting the community together again.

Launching R3's new faculties

One thing I, like other R3 presidents, was keen to do when I took office was to broaden the R3 community. And after nearly two years of work behind the scenes, I'm delighted to announce we're launching three new faculties.

The first, the public service faculty, will help us build a better understanding of the world of restructuring in publicly funded organisations, and will be chaired by Malcolm Weir of the Pension Protection Fund.

The second, the restructuring faculty, will help R3 gain deeper insight into the world of restructuring, and will be co-chaired by two big beasts of the restructuring world: Adam Gallagher of Simpson Thacher & Bartlett LLP and Joe O'Connor of AlixPartners.

And the third, the special situations faculty, will give us an insight into the fraternity which, in my view, underpins the new procedures introduced by the Corporate Insolvency and Governance Act 2020. I'm delighted that Matthew Flower of FRP Advisory and Felix Connolly of the Enact Fund have agreed to co-chair it.

Bringing these constituencies closer to R3 and building a dedicated home for them will allow us to tailor our offering for people working in these areas, gain new input in areas of policy we haven't previously had, and build engagement with people who will be at the core of some of the profession's critical areas of work over the next few years.

I'm really looking forward to working with everyone involved and seeing the contribution these new groups make to R3 and its work on the profession's behalf.

"We'll keep campaigning on the profession's behalf as businesses look to recover from the pandemic and bounce back from the effects of the latest set of restrictions."

A new face at the top

This column will have a new author in the next issue: R3's new president, Christina Fitzgerald. Christina and I have worked together on council, and during her many years as chair of R3's London and South East region, and I'm really excited to see where she takes R3 during her presidency.

As for mine, it's been a great ride, folks. Helping to steer R3 through the pandemic has been one of the most challenging and exciting experiences of my career, and I want to thank the R3 staff and my colleagues on the executive committee for their help and support over the last two years.

It's been a challenge, but I've worked with some brilliant people and I think we can be proud of what we achieved for R3 and for you in that time.

But all good things must come to an end. And once I become a past president, I'm going to have a little more time to spend on my hobbies: music, motorbikes and reading.

And to complete my CPD. My current book of choice on that front is *Company Voluntary Arrangements: Law and Practice*, which is co-edited by Elaine Nolan, an old friend of mine, and is well worth a read if you're interested in this particular area of insolvency…

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

Editor membership@r3.org.uk

TOP RANKED

Chambers

Litigation Support

2021

Manolete Partners PLC

Manolete is the only company ranked in Band 1 of Chambers for insolvency litigation funding.

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

Manolete

— PARTNERS PLC —

steven@manolete-partners.com

0203 859 3490

07900 985559

mena@manolete-partners.com

0203 859 3495

07912 466695

Shifting gears on rent arrears

Mathew Ditchburn explains what insolvency practitioners need to know about the new arbitration scheme for Covid-19 rent arrears.

Many commercial landlords and tenants have been unable to reach an agreement on rent arrears that relate to periods of enforced lockdown or restricted trading during the Covid-19 pandemic. To tackle this, in November 2021 the UK government published the draft commercial rent (Coronavirus) bill, which sets out a framework for an unprecedented binding arbitration scheme to deal with certain rent arrears accrued by business tenants during the pandemic.

The backdrop

At the outset of the pandemic in March 2020, parliament quickly intervened with the Coronavirus Act 2020, introducing a series of legislative restrictions designed to protect business tenants defaulting on their rental obligations by restricting the remedies available to landlords: forfeiture and commercial rent arrears recovery (CRAR) were essentially made no longer available for Covid-related arrears.

This was followed in June 2020 with the Corporate Insolvency and Governance Act 2020, curtailing the use of winding-up proceedings to recover debts, and landlords were generally left with the option of either issuing court proceedings or negotiating a compromise solution with the tenant, such as a rent reduction or deferral. The government encouraged such arrangements and in June 2020 issued guidance in the form of 'The code of practice for commercial property relationships during the Covid-19 pandemic' (which was subsequently updated in April 2021).

However, for many, rent arrears have continued to accrue and remain outstanding. In some cases, this may be due to the landlord's stance that a tenant should pay the rent if they can afford it, even if they have been prevented from using the premises for a period of time. Possibly, there may be concerns that deferred rent will never be paid if the tenant subsequently enters an insolvency process. In other cases, the tenant may be reluctant to disclose commercially sensitive financial information to the landlord to support its request for a rent concession. The result is that many arrears positions remain unresolved, and the temporary restrictions on landlords' remedies are due to end later this month as the UK continues to lift out of the pandemic.

What does the scheme mean for arrears?

The new arbitration scheme, expected to come into force on or around 25 March 2022, ringfences certain Covid-19 arrears as 'protected rent debts'. It applies to all business tenants in occupation of relevant premises in England and Wales adversely affected by coronavirus, meaning that they were required to close all or part of their premises or business due to Covid-19 restrictions. Either the landlord or the tenant may refer the case to an arbitrator to consider how to deal with all protected rent arrears arising out of or in connection with a lease. These include rent, service charges, interest, VAT and any sums a tenant is obliged to pay to a landlord to top up a rent deposit, as long as those arrears relate to a 'protected period' and the tenancy was adversely affected by coronavirus.

What is the protected period?

A protected period is the period during which the tenant's premises or business was subject to restrictions as a result of Covid-19. In all cases, the protected period is deemed to start on 21 March 2020 and it lasts until the earlier of (a) 18 July 2021 in England (7 August 2021 in Wales) and (b) the last day on which the tenant's business was subject to restrictions. For non-essential retailers in England, for example, this means that the protected period ended on 12 April 2021. The scheme does not contemplate multiple protected periods, so it seems that tenants who were able to open temporarily without restrictions for a period but were then subject to further restrictions can treat the whole of the period as a protected period.

Protected periods include any time during which any 'specific coronavirus restriction' applied to the business. In the case of hospitality, this will include periods during which venues were allowed to operate but with limits on the numbers attending.

The scheme does not apply to tenants who voluntarily chose to close or restrict their business where they were not required to do so by law.

> **"Many arrears positions remain unresolved, and the temporary restrictions on landlords' remedies are due to end later this month as the UK continues to lift out of the pandemic."**

Is the scheme mandatory?

Business secretary Kwasi Kwarteng has made clear that the government encourages landlords and tenants to 'keep working together to reach their own agreements ahead of the new laws coming into place'. The scheme is intended as a backstop where negotiations have not resulted in any agreed solution.

However, the draft bill imposes a new moratorium on all landlord's remedies for recovering protected rent debts, including court proceedings. Any proceedings that were issued before 10 November 2021 (when the draft bill was published) fall outside the scheme and may continue. Any proceedings issued on or after that date must be stayed if requested by the tenant. The moratorium continues the prohibition on forfeiture and CRAR for protected rent debts. A landlord may also not present a winding-up petition against a tenant or their guarantor on the grounds that they are unable to pay a protected rent debt. This means that a landlord would be entitled to present a petition during the moratorium period based on unpaid rent that falls due outside of the protected period, even if the tenant has referred a protected rent debt to arbitration. No bankruptcy petition can be presented by a landlord based on a demand or debt claim for protected rent served or issued between 10 November 2021 and the end of the moratorium period.

The moratorium also catches rent deposits and prevents a landlord from withdrawing any part of a deposit to satisfy a protected rent debt and then requiring the tenant to top it up again.

The moratorium is effective for six months from when the scheme comes into force, unless a referral to arbitration is made during that period, in which case it applies until the arbitration is concluded. There will be no further protection for tenants who fail to apply for arbitration of protected rent debts during that six-month window.

So, while there is no mandatory requirement to use the scheme, landlords will in all cases continue to see their remedies seriously curtailed potentially for at least six months from the introduction of the scheme, even if no referral to arbitration is made.

Also, the general law of appropriation that allows creditors with multiple debts from the same debtor to apply payments to whichever debt they chose at their discretion (unless the debtor specifies which debt the payment is for) is disapplied under the scheme. Where a tenant makes any unspecified payments to a landlord during the moratorium period, the landlord must first apply those payments towards any unprotected debts which fall outside the scheme before they are applied to any protected rent debt. This anti-avoidance mechanism prevents landlords from deliberately reducing the amount of protected rent debt that could be subject to an award by an arbitrator.

The referral to arbitration

Either the landlord or the tenant may refer a protected rent debt to arbitration during the six-month period starting on the date when the scheme comes into force (although the draft bill includes provision to extend that period beyond six months). The government is setting up a register of arbitrators for the scheme that is expected largely to be populated by accountants and surveyors.

The party wishing to refer the protected rent debt to arbitration must first send a letter of notification to the other with an initial settlement proposal. The scheme envisages that a response and any counter-offer should then be provided within 14 days. There are then a further 14 days for the parties to take stock, after which either party may refer the matter for arbitration. The referral should include the applicant's proposal for settlement and append any supporting evidence. The responding party is then entitled to provide their counter-proposal within 14 days. Both parties may submit final revised proposals within 28 days of their initial proposal.

Where a tenant has already compromised Covid-19 arrears under a company voluntary arrangement (CVA), individual voluntary arrangement (IVA), scheme of arrangement or restructuring plan, it is not entitled to refer those compromised arrears to arbitration. The drafting of the bill appears to suggest that this includes any arrangements implemented prior to the scheme coming into force where any compromises apply to rents during the protected period.

The draft bill only contemplates referrals to arbitration being made by landlords or tenants. Therefore, any tenant's guarantor will not, it seems, be entitled to make a referral. They will, however, benefit from the moratorium on landlords' remedies for protected rent debts, and if the tenant refers the protected rent debt to arbitration and the arbitrator awards a reduced or deferred rent, it appears that the guarantor's liability will be similarly reduced or deferred.

If the parties reach a compromise agreement for a protected rent debt outside of the scheme, ie by agreeing to write off, reduce or defer any protected rents, then they are not entitled to refer the same rent to an arbitrator under the scheme. Arguably, this applies to agreements entered into before the new scheme comes into force, in which case it creates the slightly odd result that protected rent debts cannot be referred to arbitration even where a rent concession was agreed in, say, 2019 for commercial reasons entirely unconnected with Covid-19.

Once a referral is made, the process is legally binding on both parties and the arbitrator's award is final and binding. The grounds for appeal are limited.

The arbitrator's balancing act

Only tenants with viable businesses (or, more accurately, businesses which would be viable but for the arrears of protected rent) are intended to benefit from the arbitration. The first task for any arbitrator will be to assess the viability of the tenant's business.

The draft bill does not define this concept, but a new version of the code of practice, which was published at the same time as the draft bill, provides guidance to arbitrators on the factors to take into account. These include the performance of the business since March 2020, whether financial support has been received by way of government assistance, and expert evidence from accountants. The code recognises that 'if a tenant business has not been able to pay any rent since restrictions were lifted, this may be evidence that the tenant business is not viable' in which case they should not benefit from the scheme. This was no doubt intended to be an incentive for tenants to start paying post-pandemic arrears.

> **While there is no mandatory requirement to use the scheme, landlords will in all cases continue to see their remedies seriously curtailed potentially for at least six months from the introduction of the scheme, even if no referral to arbitration is made.**

What relief is available?

Assuming that the tenant has an otherwise viable business, the starting point for an arbitrator is that the tenant should be required to pay any protected rent in full and without delay. However, the arbitrator may grant relief from the protected rent debt in accordance with the principles of preserving, or restoring and preserving, the viability of the tenant's business while preserving the landlord's solvency. Put another way, the arbitrator cannot grant relief to the tenant if that means forcing the landlord into insolvency.

The arbitrator will be able to write off, reduce or defer the whole or any part of a protected rent debt, although the maximum timeframe in which an arbitrator can order any rent to be paid is 24 months. The tenant's viability is to be judged as at the time of the arbitrator's award, meaning, of course, that there is no guarantee that it will still be viable by the time that any deferred rents come to be paid.

The arbitrator's power to determine which relief is appropriate is exercisable against the final proposals submitted by the parties. If both of those proposals are consistent with the above principles, the arbitrator must follow the proposal which is most consistent. If only one proposal is consistent with the principles, the arbitrator must make the award set out in that proposal. It is only if neither proposal is consistent, or the parties do not submit any proposals, that the arbitrator may determine the relief that they consider to be most appropriate to meet the relevant principles.

After the arbitration award

The draft bill does not provide for any enforcement of an award if the tenant fails to comply with it, leaving the landlord with the prospect of having to enforce it through the courts. There is no ability to reassess the award to consider changes in the circumstances (worsening or improving) of the tenant or the landlord. As the arbitrator has the power to defer payment of rent for a maximum of 24 months, a landlord may find itself facing long deferrals on rental payments and not be able to take any action when faced with a tenant whose financial health continues to deteriorate (as long as they keep up with rent payments).

A tenant cannot propose any CVA, IVA, scheme of arrangement or restructuring plan to compromise the whole or part of any protected rent debt that has been referred to the arbitration scheme for the period from the making of the referral until 12 months after an arbitrator's award or dismissal of the reference. This could produce the unintended result of encouraging more tenants to propose such an arrangement to compromise protected rent debts before any referral arbitration is made.

The award and the arbitrator's reasons for making it must be made publicly available. This could have wider repercussions for the parties, eg in relation to credit insurance, entering into new supply contracts, retaining employees or breaching their financial covenants if the arbitrator makes a finding which throws doubt upon the viability of their business or solvency.

SUMMARY

- Anticipated to come into force on or around 25 March 2022.
- Relief may be available for Covid-19 arrears (writing off, reducing or deferring in whole or in part) if:
  - ✔ Business tenant in England and Wales
  - ✔ Affected by Covid-19 restrictions
  - ✔ Arrears fall in a protected period
  - ✔ Viable business (or would be viable with relief)
  - ✔ Solvent landlord
- Moratorium on landlords' remedies for protected rent debts.
- Six-month deadline to apply for arbitration and there will be no protection if deadline missed.

MATHEW DITCHBURN is a partner at Hogan Lovells and head of the real estate disputes team.

LEGAL VOICE: The nature of the advice given is general and neither *RECOVERY* nor the writers are responsible for any consequential loss arising in connection with information given in this publication.

Legal Q&A

Tim Bignell answers your insolvency queries.

Q What is the regulatory and judicial approach to challenges made in respect of insolvency practitioners' conduct?

A While some commentators consider IP regulation to be more relaxed than comparable professions, the rustlings of a wind of change are stirring.

A report from the All Parliamentary Party Group on Fair Business Banking entitled 'Resolving insolvency: restoring confidence in the system' (the report), published in September 2021, makes for uncomfortable reading for the profession focusing, as it does, on mounting difficulties both in terms of adverse public opinion and complaints against IPs.

The report remarks that over the last ten years 8,000 complaints have resulted in only five IPs losing their licences. It also highlights a number of long-standing concerns around i) perceived secretive pre-administration appointments, ii) conflicts of interest, and iii) a lack of transparency, (particularly in respect of the outcomes of administrations). No one escapes criticism. Controversially, the report goes so far as to assert that 'even the most senior insolvency practitioners, from the most well-regarded firms in the country, will break the rules when large fees are on offer'.

It also addresses complaints made to the profession's regulatory bodies about conflicts of interests. It references with disapproval Grant Thornton's decision to accept appointments as administrators in the Wonga and Greenshill Capital administrations, in circumstances where the firm had previously provided those same companies with restructuring and audit services.

> **The conclusion reached is that the regulatory framework is inadequate and that the court's approach to the conduct of IPs is 'hands-off'.**

Drawing conclusions?

The report also looks at the court's approaches to IPs' (mis)conduct and considers such cases as *Davey* v. *Money* and *Hyde* v. *Ballon*. Both cases involved proceedings against IPs where misfeasance and negligence claims were brought against them as office-holders. In both cases, the claims against the professionals were, however, rejected by the court.

The conclusion reached is that the regulatory framework is inadequate and that the court's approach to the conduct of IPs is 'hands-off'. It maintains that reform is long overdue and makes a number of recommendations which are:

1. a conflict of interest ban where IPs have been involved in pre-appointment work for the interested party for two years before the appointment
2. a single regulatory authority with an ombudsman
3. putting a code of ethics on a statutory footing.
4. establishing a centralised database that records the outcomes of administrations
5. implementing further rule changes to provide greater clarity on procedures.

A salutary reminder

Although the report is critical of the court's light-touch approach to claims against IPs, there are occasional exceptions. In the future it is undoubtedly going to become more difficult for IPs, but there are examples here and now of where the courts come down particularly hard for reasons that are not immediately obvious. A case in point is the decision in *Vegas Investors IV LLC* v. *Shinners*, a salutary reminder of the dangers of assuming that the court will always tend towards leniency in dealing with complaints against IPs.

In that case, the court ordered the removal of the administrator from office on the application of an aggrieved creditor in the face of the administrator's open offer to the court to resign. It was held by the court that where investigations were required into a pre-pack sale in order to ascertain whether breaches of duty, by either the directors or the office-holders, had prevented other options being pursued or had resulted in a sale at an under value, that requirement alone was sufficient to necessitate the office-holder's removal. The court did not need to decide one way or another whether any claims against the office-holders actually existed in order to remove them from office.

Vegas Investors is therefore the authority for the proposition that an administrator can be removed from office in certain circumstances even when, ultimately, they did nothing wrong. □

> **A case in point is the decision in *Vegas Investors IV LLC* v. *Shinners*, a salutary reminder of the dangers of assuming that the court will always tend towards leniency in dealing with complaints against IPs.**

TIM BIGNELL is a partner at Howard Kennedy.

MARSH

What Keeps You Awake at Night?

From risks such as liabilities to third parties, to lost or damaged assets, and Health and Safety Executive investigations and prosecutions – Marsh's Restructuring and Recovery Practice can provide you with certainty in uncertain times.

To find out how Marsh supports you, your clients, and your business in identifying, planning for, and responding to these risks, please contact your local Client Service Director on 0121 626 7807 or R&R@marsh.com today.

MARSH & McLENNAN COMPANIES

Recent case summaries

The latest insolvency update from **Josh Lewison**.

***Levi Solicitors LLP* v. *Wilson & JKR Property Development Ltd* [2022] EWHC 24 (Ch)**
A creditor brought an appeal against the admission of another creditor's proof of debt. The applicant, Levi Solicitors LLP, was the major creditor of the company, having a debt in excess of £760,000. That debt had been duly proved and admitted by the supervisor at the time that the company entered into a CVA. Subsequently, JKR Property Development Ltd sought to prove for a debt in excess of £185,000. That proof was also admitted by the supervisor. Levi Solicitors LLP sought to challenge the admission of the debt.

Much of the case is given over to a consideration of the alleged debt, which involved a number of issues arising out of the construction of a JCT contract and the interaction of adjudication under the Housing Grants, Construction and Regeneration Act 1996 with the insolvency regime.

However, the interesting and significant point concerned the burden of proof. Where a proof of debt has been admitted and one of the other creditors is dissatisfied, who bears the burden of proof? Is it the proving creditor, so that they must prove their debt afresh, or is it the dissatisfied creditor, who must prove that the office-holder was wrong to admit the debt? Until this case, there was no authority on the point.

> **"The creditor does not have to show that the office-holder was wrong to make the decision that they did on the evidence that was before them."**

Fancourt J found that the burden of proof was on the proving creditor.

The reasoning turns on the nature of the exercise before the court. In the more common form of application, the office-holder has rejected the proof. The dissatisfied creditor therefore brings an application for the decision to be reversed or varied. Crucially, the hearing before the court is not an appeal against the office-holder's decision. That is, the creditor does not have to show that the office-holder was wrong to make the decision that they did on the evidence that was before them. Rather, the court considers whether the debt has been proved on the basis of all the evidence available at the hearing. The burden of proving the debt is on the creditor.

Fancourt J applied similar reasoning to the less common situation where the application is made by another creditor. Although the party who has brought the application is different, the review mechanism is the same: the court is not hearing an appeal from the office-holder's decision, but is considering the matter from scratch in light of all the evidence made available for the hearing. Since the review procedure is the same, the burden of proof must be the same. It is therefore for the proving creditor to satisfy the court that the debt should be admitted.

***Elser* v. *Sands* [2022] EWHC 32 (Ch)**
This case, too, concerned proofs of debt and the burden of proof, this time in the context of creditors voting to approve an IVA for Mr Rory McCarthy. At the meeting, claims amounting to about £13m were represented. The approval was passed by £10.5m to £2.8m, where the 75% threshold was £9.75m.

One of the creditors was dissatisfied with the decision of the nominee to admit three claims for voting purposes. Those claims were for £4.1m, £2.3m and £3m. If any one of those claims had been excluded from voting, the meeting would not have approved the IVA.

The meeting itself had been contentious. The creditor who later made the application was represented at the meeting by a solicitor, who embarked on a series of questions designed to cast doubt on the validity of the three disputed debts. Having heard the questions and the responses, the nominee admitted the debts for voting purposes and marked them 'objected to'.

On the hearing before Chief ICC Judge Briggs, there was an intense focus on the burden of proof. That was prompted by the sketchy details of the debts that had been provided to the creditor and Mr McCarthy's track record of providing vague statements that often failed to differentiate between himself and corporate vehicles under his control.

> **"The creditor who later made the application was represented at the meeting by a solicitor, who embarked on a series of questions designed to cast doubt on the validity of the three disputed debts."**

The application was framed so as to seek the reversal of the nominee's decision to admit the debts, on the basis that the debts were variously not truly debts but investments or that they were insufficiently evidenced. The court therefore had to consider the burden of proof: was it for the applicant to show that there was a material irregularity in the decision (following the wording of r15.35 of the Insolvency (England and Wales) Rules 2016), or was it for the creditors whose alleged debts underlay the decision to prove those debts to the satisfaction of the court?

For similar reasons to those of Fancourt J, Chief ICC Judge Briggs found that the burden of proof was on the alleged creditors. He held that the question was framed in the wrong way, in that on the facts of the case it was not necessary to show that there was any material irregularity separate from the existence of the debts themselves. Either the debts were owed, in which case there was no irregularity, or they were not owed.

Proving the debt was therefore a matter for the creditors, who were entitled to place such evidence before the court as they saw fit. In the result, the court on this occasion was not satisfied as to all of the debts, so that the decision of the meeting was set aside.

JOSH LEWISON is a barrister at Radcliffe Chambers.

Four forensic focus points for IPs

Matt Fritzsche and **Raymond Man** explore two key pieces of research to provide insights and practical tips for IPs from a forensic accounting perspective.

In the context of an insolvency, forensic accountants are usually called in to support IPs when there is a need to investigate potential fraud or other misconduct that may have contributed to the failure of the company, and/or to trace assets that have been diverted during the process of any such wrongdoing. Forensic accounting, however, incorporates several sub-disciplines, namely investigations, dispute advisory and forensic technology.

In this article, we share some practical insights from each of these sub-disciplines that may be helpful to IPs when it comes to assessing corporate failure or maximising asset recoveries in an insolvency. These include market intelligence from EY's Global Integrity Survey 2022 (**www.ey.com/en_uk/forensic-integrity-services/how-a-focus-on-governance-can-help-reimagine-corporate-integrity**) and Claims and Disputes Survey on 'How Covid-19 has impacted the UK's claims and disputes landscape' (**www.ey.com/en_uk/assurance/how-covid-19-impacts-the-claims-and-disputes-landscape**).

"The Covid-19 pandemic has had a serious impact on integrity standards for companies around the world."

Integrity declined, fraud increased

The Global Integrity Survey included over 4,700 board members, senior managers and employees across the largest organisations and public bodies in 54 countries and territories worldwide. The survey provides insights into the importance of integrity and the significant role the Covid-19 pandemic has played in disrupting ethical business conduct.

Integrity standards and exposure to fraud can have a significant impact on a company's performance and, as we have seen in the news over the last few years, can result in large corporate failures. Some of the key highlights based on the findings, which are linked to the current insolvency landscape, include the following:

A. While 97% of respondents surveyed believe integrity is important, the pandemic has made it more difficult for organisations to act with integrity in business dealings (41%).
B. More than half of the respondents (55%) consider that the standards of integrity have stayed the same or became worse over the last 18 months.
C. The incidence rate of significant fraud shows no downward trend over the last 14 years, spiking in 2020 at the height of the Covid-19 pandemic – see the chart on page 15.
D. The overall surveyed fraud incidence rate was 13% in 2022 and the sectors with the highest fraud incidence rates were financial services (21%), real estate (18%), technology (16%) and energy (16%).
E. The same sector trend continues when it comes to the respondents' willingness to act unethically or even unlawfully. When asked which, if any, wrongdoing the respondent was prepared to do to improve their career progression or remuneration package, the responses from the sectors highlighted above were also consistently higher than the overall rate, as shown in the table on page 15.
F. Further, and somewhat unsurprisingly, the respondents from the same sectors also had higher response rates when asked if they had personally reported issues of misconduct (for example, to management or to a whistleblowing hotline). Their response rates were between 37% and 43% against an average response rate of 35%. Also, when asked if they have had concerns about misconduct that they did not report, their response rates were also above average: between 30% and 39%, against an average response rate of 30%.

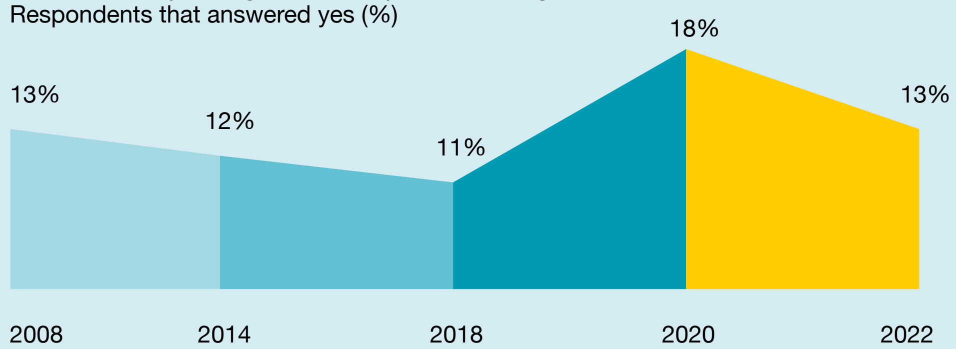
Andrew Gordon, global forensic and integrity service leader at EY commented on the findings, stating that *'the Covid-19 pandemic has had a serious impact on integrity standards for companies around the world. Hybrid working makes it difficult to undertake effective compliance monitoring, and fraud risk factors typically increase at a time of crisis.'*

RESPONDENTS' WILLINGNESS TO ACT UNETHICALLY OR UNLAWFULLY

	Overall	Real estate	Energy	Technology	Financial services
Ignore unethical conduct by your suppliers, distributors or other third parties	10%	14%	11%	13%	12%
Falsify financial records	7%	11%	8%	10%	10%
Mislead external parties such as auditors or regulators	8%	10%	14%	8%	11%
Offer or accept a bribe	8%	9%	10%	11%	9%

RESPONDENTS THAT EXPERIENCED FRAUD

Question: Has your organisation experienced a significant fraud in the last 18 months/two years?
Respondents that answered yes (%)



> An important finding from the Global Integrity Survey 2022 is that it appears senior leadership are more prone to fraud and misconduct than their employees.

The level of fraud risk within an organisation can be evaluated by assessing the company's existing integrity culture and compliance programs. In the context of an insolvency, evaluating these safeguards, along with any specific areas of concern, is an important step in assessing the need for a more comprehensive investigation to identify fraud or other misconduct, which could potentially open avenues for additional recoveries for creditors.

In practical terms, this means considering whether there are any red flags such as findings from reviews undertaken by an external regulator, internal auditors or other independent/external bodies, as well as any whistleblowing reports and how/to what extent the issues reported were investigated and resolved by the organisation and its leaders.

Senior leaders are suspect

Senior leaders are responsible for setting the vision and determining the strategic direction of organisations. Their behaviour and conduct drive not only the success or failure of a company, but also its culture and the way its staff are expected to act, ie the all-important 'tone from the top'.

In this context, an important finding from the Global Integrity Survey 2022 is that it appears senior leadership are more prone to fraud and misconduct than their employees. This is evident from their responses to the survey, which indicate that board members are:

A. almost three times as likely to ignore unethical conduct by third parties as their employees (17% v 6%);
B. five times as likely to falsify financial records (15% v 3%); and
C. six times as likely to mislead external third parties such as auditors (18% v 3%).

The incentive and opportunity for personal gain for senior leaders from potential misconduct tend to be much more significant than at lower levels of organisations. In conjunction with the above findings, it would suggest that in the current environment, much more scrutiny should be placed on the conduct of board members and directors in the events leading to a corporate failure.

Forensic technology can support in such scenarios by securing, recovering and analysing data (eg emails, electronic documents, chat room logs and voice data, etc) in a forensically sound manner to support an investigation or for use as evidence in any subsequent legal proceedings.

Past contract allowances

A company's value chain depends significantly on its interactions with customers, suppliers and other third parties, and in the past two years these relationships have been severely affected by the disruptions caused by Covid-19.

The Claims and Disputes survey conducted in 2021 revealed that, despite the disruption caused by Covid-19, companies have heeded government advice to take a conciliatory approach to counterparties to avoid litigation and potentially forfeited or delayed value recovery. This has undoubtedly been a contributing factor to preventing (or potentially just delaying) the expected wave of significant litigation and insolvencies which might otherwise have developed in the aftermath of the pandemic.

However, where allowances were made by an organisation, such variations should be retrospectively reviewed as they could either expose an organisation to future claims or present an opportunity to recover value that was previously thought to have been relinquished as part of any such allowances given. The latter situation could be of particular interest to IPs, as it could result in additional recoveries for creditors in an insolvency situation, especially where such variations were not formalised contractually.

> Where allowances were made by an organisation, such variations should be retrospectively reviewed as they could either expose an organisation to future claims or present an opportunity to recover value.

Further, there may be similar scope to identify and recover value under contracts with customers, suppliers or other third parties, where the organisation in question has simply 'left value on the table'. This may be the case, for example, in circumstances where a company has inadvertently been underpaid by customers or overpaid for supplies/services. The characteristics of contracts that are particularly susceptible to value loss and therefore may present opportunities for subsequent recoveries are those which:

- are high volume and/or value
- include a complex pricing mechanism
- have been subject to multiple change orders and/or
- have been managed by understaffed or otherwise overstretched departments (eg procurement, commercial, legal), factors that often result in poor contract management.

Key practical considerations before initiating a process to recover lost value under contracts include establishing the company's right to audit and ensuring any potential claim is within the statute of limitations of the jurisdiction relevant to the contract.

Finally, where the failed company has acquired a subsidiary or business shortly prior to its collapse, it may also be worthwhile to establish whether there are any warranties under the sale and purchase agreement (and the warranty period) and, if so, whether there have been any breaches of such warranties. A breach of warranty may have resulted in a loss to the company/its creditors in the form of a diminution in the value of the target compared to the purchase price paid.

New routes to legal claims

Where loss of value under contracts has been identified, any recoveries in such a scenario will involve giving notice to the third parties in question and, if necessary, making a contractual claim which may need to be resolved in some form of legal proceeding. Historically, this would mean additional professional fees and increased uncertainty for creditors. However, there are now a wide range of options available in the market to finance the cost of bringing such legal claims, including in some cases funding the IP's cost of investigating such claims. This could be through contingent fee arrangements directly with solicitors, or through making use of litigation funders who, in return for financing the legal and other fees of the case, take a share of recoveries in the event of a successful claim outcome. In practice, this allows an IP to mitigate some of the downside risk of legal actions for creditors.

> From an IP perspective, it seems that there is value in considering contractual and legal claims as additional avenues for asset recoveries.

Other avenues for additional recoveries may be via existing actions that the organisation may be able to join, for example class action lawsuits, which could potentially yield significant value for creditors. Examples include the ongoing class action against Mastercard.

From an IP perspective, it seems that there is value in considering contractual and legal claims as additional avenues for asset recoveries, and to make full use of legal and forensic accounting support to evaluate the likely success and quantum of such claims.

MATT FRITZSCHE is a partner in the claims and disputes team in EY's forensic integrity and services practice.

RAYMOND MAN is an associate partner in the claims and disputes team in EY's forensic integrity and services practice.

Fraud and cybercrime in a post-Covid-19 world

Adam Loveitt highlights the dangers of phishing and ransomware, and suggests insurance solutions to help fight back.

Fraud and cybercrime have been on the rise since the start of the pandemic. According to the Office for National Statistics, fraud increased by 20% between April 2020 and April 2021, while cybercrime increased by a staggering 91% over the same period. While these high-profile statistics grab the headlines, there is a growing problem of organised cybercrime which impact both an insolvency practitioner's own business and the cases over which they have been appointed.

With businesses pivoting to online sales/distribution models, an adoption of technology in lieu of human capital and more staff working remotely or hybrid working there has been an explosion in targeted cybercrime. This includes spoofing, business email compromise, incidents of invoice hijacking and the biggest issue to organisations in the last 24 months, ransomware! According to the National Cyber Security Centre, ransomware attacks increased threefold during the pandemic. The frequency and severity of ransom demands for unencrypting compromised IT systems are rising at an alarming rate. A few years ago, the typical ransom demanded by cybercriminals was a few thousand pounds; today a £50,000 ransom demand would be a good outcome for a cyber insurance provider.

Why are cyber insurance claims increasing?

With remote working and a greater reliance on technology there are now many more vulnerabilities for cybercriminals to exploit. There are often fewer controls in place where staff are working remotely. These may include the use of insecure local wi-fi networks, personal devices, shared networks and less oversight and process control. As a result, cybercriminals are looking to capitalise on any weaknesses and the sophistication of attacks is increasing.

> **The frequency and severity of ransom demands for unencrypting compromised IT systems are rising at an alarming rate.**

Almost all cyberattacks or incidents of social engineering losses start with a phishing attempt where threat actors gather information that enables them to target their attack. This includes spoofed emails with spurious instructions for colleagues or encouraging the recipient to click on an imbedded link that executes an item of malicious software.

We will have all noticed the increase in incidents of smishing (SMS/text phishing) where spurious text messages are sent with imbedded hyperlinks encouraging readers to follow the link to:

- rearrange parcel delivery
- claim tax rebates
- complete tax returns
- authorise/decline fake card transactions.

Responding or engaging with these phishing attempts can verify that the email/telephone number is valid or active and provide the threat actor with further information such as personally identifying information, system access details that can be used in a subsequent attack.

It's often the simplest attacks that are the most effective. Phishing attacks make up 91% of attacks or breaches reported by large firms and make up 83% of all breaches in total.

Steps you can take to mitigate your risk

- Be aware of the risk. It is not a case of *if*, but rather *when* a business falls victim to a cyber incident.
- Encourage and maintain a 'no blame culture' – encourage and incentivise early notification of potential issues by staff.
- Share best practice and invest in awareness/education – encourage users to be vigilant.
- Prevention by design – check where the weaknesses are in your processes.
- Complete an investigation into your systems – look to remove the low-hanging fruit and have a cyber health check identifying system vulnerabilities – IRS can help you with complementary reports.
- Where cyber insurance is in place, use it.

In addition to risk management, cyber and crime insurance can provide cover for liability to third parties due to a cyber incident and indemnify you for lost/misappropriated funds/assets and any resultant business interruption. The biggest benefit of insurance in the event of any cyber loss/incident is access to a suite of expert breach respondents including forensic IT experts, forensic accountants, legal counsel, and PR & comms support to mitigate any reputational harm.

> **Cyber and crime insurance can provide cover for liability to third parties due to a cyber incident and indemnify you for lost/misappropriated funds/assets and any resultant business interruption.**

Cyber insurance is typically written on a discovery basis, and a policy will respond to any loss that is discovered during the policy period, irrespective as to when the actual breach/compromise may have occurred.

The business over which you have been appointed may have a cyber/crime/fidelity policy in place to respond in the event of an attack. There may be an element of cover in respect of theft, or coercion by employees that may also be provided under a management (directors & officers) liability policy.

In conclusion, the shift in working patterns and the emergence of hybrid working have given cybercriminals an opportunity to exploit unprotected systems and weak processes. A combination of risk management and insurance protection can help protect businesses against this threat. Contact your insurance broker for advice on how best to protect your business.

ADAM LOVEITT is director – insolvency at Insolvency Risk Services.

Crypto fraud, recovery and the fear factor

Carmel King and **Samantha Street** explain how an IP can equip themselves to identify and realise cryptocurrency.

The landscape is volatile, the regulatory terrain has been depicted as lagging and the recovery of crypto assets is seen by many as uncharted territory.

An understanding of the key considerations IPs may face when appointed over a crypto asset-related insolvency, or even how to identify if crypto is a factor in an appointment, can help prevent an asset-rich case turning sour, or see a case with no apparent assets turn into a successful recovery.

Crypto assets are becoming increasingly integrated into everyday life. In 2021 the FCA reported that the estimated number of consumers holding crypto assets rose to 2.3 million, a rise from 3.9% of the population to 4.4%. An IP therefore needs to establish if there are any links to crypto in every appointment. While an IP doesn't need to be an expert in this field, they will need to be familiar with this area in order to manage the regulatory issues and risk that may arise. Many assets have to be treated in a specialised way, from cash transport to paintings to animals. Managing a crypto asset is no different. The consequences for not properly identifying, securely storing, managing and realising a crypto asset could include claims by creditors or disciplinary action by the relevant RPB.

It's not all bad news. The cryptocurrency market as a whole is estimated to be worth more than $3tn (£2.2tn) as of November 2021. Non-fungible token (NFT) transactions alone totalled at least $44.2bn in 2021. The ubiquity of crypto assets could be seen as presenting opportunity for IPs rather than cause for concern. The immutable ledger in blockchain (the system whereby crypto asset transactions are recorded) means that tracing activities can be carried out reliably and in a fraction of the time when compared to fiat currency tracing.

Crypto fraud

Many of us will immediately think of fraud at the mention of crypto, given its well-documented use by criminals and the perception that it is mysterious and impenetrable. While certainly crypto assets are used for illicit purposes, their immutable evidentiary trail arguably puts them ahead of cash, which is still the reigning king in the criminal economy.

Crypto assets have rapidly come to be seen as vehicles used to replicate the more traditional Ponzi schemes, investment scams or boiler room scams in a virtual world. Rug pulls, fake initial coin offerings (ICOs) and exit scams are various types of crypto-specific fraud and, while the names may be new, the techniques will be very familiar to IPs and fraud practitioners. Cryptocurrency is widely used in association with people trafficking and dark web purchases to facilitate the sale of drugs, stolen data and firearms. Financed terrorism uses this asset class, and extortion with ransomware activity has seen a dramatic increase in recent years. Such alarming headlines may well cause apprehension when handling a case with crypto assets.

> **"The consequences for not properly identifying, securely storing, managing and realising a crypto asset could include claims by creditors or disciplinary action by the relevant RPB."**

Money laundering

With cryptocurrency also comes concern over money laundering. Although the immutable underlying technology should render this an unattractive route for fraudsters, a historic lack of understanding or engagement on the part of law enforcement and asset recovery professionals and the pseudo-anonymity aspect has to date meant that fraudsters have used crypto to mask the source of criminal proceeds. As crypto goes mainstream, due diligence, KYC and anti-money laundering processes have increasingly become part of the dialogue.

A growing number of large companies are embracing cryptocurrencies and are now accepting digital currency payments for products and services. Investment banks such as Goldman Sachs, Deutsche Bank and BNY Mellon have now set up cryptocurrency desks, with American company BNY Mellon unveiling a road map for treating digital currencies the same as any other asset. Regulation is constantly developing and being implemented around the world but as ever it can be behind the pace of the innovative criminal. Money laundering in crypto does however follow a similar path to that of money laundering with cash and so the similar techniques will be familiar to IPs.

At the placement stage illegitimate funds can be brought into the ecosystem. While there are other entry points or on-ramps, the vast majority of integration takes place via exchanges. With many exchanges embracing new regulations criminals are still able to utilise exchanges and wallet businesses that don't have such strict regulation or compliance. These are often found in more volatile jurisdictions and see criminals continue further transactions to layer the funds through different cryptocurrencies and transactions. This can be of a greater or lesser degree of complexity – 'hops' from one wallet to another can be in single figures or, more likely, tens or the hundreds.

Brokers and mixing services, also known as tumblers, can see a criminal receive 'clean' cryptocurrency after it has been mixed and sold with other cryptocurrencies. There are also ATMs all of which are costly to use. With reportedly 101 crypto ATM machines available in the

UK in London, Manchester and Birmingham, the numbers are rising. The US is ahead in this with some 26,000 machines. These machines allow cryptocurrencies to be bought with fiat currency. The charges for use of such machines are astronomical. Accordingly, IPs may consider the use of mixers, tumblers and crypto ATMs as potential red flags for money laundering. It is hard to imagine what legitimate reason there could be to employ such a 'mixing' service by any but the most committed to the anonymous nature of this space.

With the pseudo-anonymity that cryptocurrency appears to provide and its global reach to any exchange in the world, what can an IP do to follow the virtual funds trail, secure crypto assets and preserve their value?

> **"Rug pulls, fake initial coin offerings (ICOs) and exit scams are various types of crypto-specific fraud and, while the names may be new, the techniques will be very familiar to IPs and fraud practitioners."**

Freezing and seizing crypto assets

Recent case law demonstrates how the English court system is able to recognise the challenges faced in an ever-evolving landscape and its willingness to help asset recovery professionals obtain the information they need.

In October 2019 in the matter of *AA* v. *Persons Unknown*, the High Court determined that cryptocurrencies can be considered property under English law, and could be the subject of a proprietary injunction. The court granted the injunction to assist an insurance company to recover Bitcoin (BTC) that it had transferred in order to satisfy a malware ransom demand. The case effectively categorised cryptocurrencies as assets and property.

In *Ion Science Ltd* v. *Persons Unknown and others (unreported)*, the Commercial Court granted a proprietary injunction and a worldwide freezing order in respect of BTC that had been dissipated by fraudsters via cryptocurrency exchanges following an alleged ICO fraud. This was the first case that considered the issue of determining the jurisdiction and governing law of the claim.

In *Fetch.AI Limited & Others* v. *Persons Unknown & Others* in July 2021, fraudsters traded $2.6m of the claimants' cryptocurrency to an anonymous third-party buyer without permission. The claimants were granted several forms of relief to assist with asset tracing including a Bankers Trust order and a Norwich Pharmacal order against two Binance entities, a proprietary injunction, a worldwide freezing order and ancillary information disclosure against 'persons unknown' as well as permission to serve the proceedings out of the jurisdiction and by alternative means.

The ability to secure disclosure orders, freezing orders and other such remedies outside the jurisdiction where the application for relief is made further reinforces the narrative that crypto assets are not a viable vehicle for fraudsters.

Handling crypto assets as an IP

Given that this is a nascent market, perhaps the greatest risk to IPs right now is that of overlooking crypto assets in appointments that are not contentious or known to be directly related to this space.

Crypto asset protocols should be built into an IP's case framework, especially for the early stages of a case. An IP should routinely ask about cryptocurrency, wallets, private keys and addresses. If seizing devices, it could be as simple as looking for a wallet or exchange app on a phone or laptop. The examination of books, records and bank statements should be done with knowledge of the key exchanges and players in the crypto space to enable identification of any transaction that could lead to a crypto asset.

From an IP's perspective, crypto is just like any other asset in that it needs to be secured, insured, valued and realised. Rather than attempting to store crypto assets in-house, specialist custodians who are regulated and insured should ideally be instructed as well as experts in securing and realising crypto engaged. There are many war stories about crypto assets being stolen from IPs via hacks or a lack of due care, or even being lost by authorities post-seizure. Such stories can perpetrate a fear that handling a crypto asset is fraught with risk that many IPs may then choose to avoid. Engaging with such specialist custodians and experts should mitigate the risk and associated fear.

> **"Regulation is constantly developing and being implemented around the world but as ever it can be behind the pace of the innovative criminal."**

An IP should also be mindful that failure to ensure that a documented disposal strategy employing adequate due diligence has been implemented can also leave them exposed to criticism by creditors and/or regulators. It is not necessarily an IP's role to speculate over the market, which is extremely volatile. There are multiple options, including cashing out, selling at auction, holding for the duration of the insolvency process or distributing in specie. In a recent case, creditors of the insolvent exchange Mt Gox elected to receive a distribution in bitcoin. Expert advice should be sought as appropriate.

In essence:

- Take custody of the identified crypto assets.
- Engage a specialist regulated, insured custodian.
- Seek advice on the best value and realisation strategy.
- Consider any regulatory/legal ramifications.

A well-prepared IP will have a pre-prepared set of protocols to follow when dealing with crypto assets. As with any asset it should not be one to avoid but one to take on with purpose!

Seize, Secure, and Realise. This and more will be explored in the 'Chasing assets: recovering funds in crypto frauds' session at the Fraud Conference on 30 March.

CARMEL KING is a director at Grant Thornton.

SAMANTHA STREET is an associate director at Grant Thornton.

Auditors or frauditors: who is liable?

Mark Wilson, **Hannah Drozdz** and **John Lamb** explore when auditors are liable for the fraud of directors, and what office-holders can do about it.

When a company fails, people usually ask why, who or what is responsible. There have been several high-profile corporate failures (such as Carillion and Patisserie Valerie) where auditors have faced public criticism for failing to identify financial issues that could have been addressed sooner and losses minimised. With that blame comes the question of financial responsibility.

There is an expectation gap between what people think auditors do, their duties in law and the extent of their duty of care.

Many stakeholders rely on a company's audited accounts, believing that they are a true endorsement of a company's viability, only to be caught out when hindsight shows that the auditor's stamp of approval was wrong and there is no right of recourse to the auditor.

In practice, the auditor's role is neither to warrant that the accounts are free of error, nor to guarantee that there is no fraudulent activity.

This article considers the auditor's role in the context of fraud. We look at the duties of an auditor, their responsibilities and the standards against which they are judged. We then examine, in the context of corporate frauds, where the auditors have been negligent and/or in breach of contract, how an office-holder might bring a successful claim against the auditors for the benefit of the company's creditors. We highlight practical obstacles likely to be encountered when bringing these claims and conclude with some thoughts for the future.

Office-holders have historically been reluctant to sue auditors. It is correct that these claims can be difficult but, with the right advice, those difficulties can be overcome for the benefit of creditors.

> **"There is an expectation gap between what people think auditors do, their duties in law and the extent of their duty of care."**

The duty

An auditor is not liable for 'an indeterminate amount for an indeterminate time to an indeterminate class' (*Ultramares Corporation* v. *Touche (1931)*). Duties to third parties, such as investors, lenders or employees, will only arise where the auditor has assumed responsibility to them by some specific act, such as making direct representations.

Contractually, an auditor's obligations are to the company with co-extensive duties in negligence to both the company and its shareholders 'as a body'.

Any claim would be brought by the company and, in an insolvency context, by the company acting by its agent, the administrator or liquidator.

The auditor's role

All UK companies must undergo an audit – the process of an independent person determining, through tests and procedures, that the company's accounts show a true and fair view – unless exempt from the requirement.

The Financial Reporting Council's description of the auditor's responsibilities sets out that the objective is to obtain 'reasonable assurance about whether the financial statements as a whole are free from material misstatement, whether due to fraud or error'. Fraud in this context is deliberate misstatement.

The scope of the duty and standard of care is determined by compliance with the relevant accounting standards, but an illustrative quote is that an auditor is 'a watchdog and not a bloodhound' (*Kingston Cotton Mills* (1896)).

The International Standard on Auditing (UK) (ISA (UK)) 240 sets out an auditor's responsibilities in relation to fraud. Central to it is the concept of 'professional scepticism'. The task is one of evidence and judgement, requiring the auditor to undertake the task with a questioning mind while being alive to the potential for fraud.

Some of the examples of auditor default on cases in which we have recently advised include: accounting entries showing a $1.2bn (£882m) gold reserve note that had expired by the date of the audit and did not in any event exist (there was no gold), tens of millions of dollars of apparent credit from a Caribbean company that had no discernible assets, multiple round-sum payments to offshore entities connected to the directors, and letters of support for the purposes of going concern (ISA (UK) 570) from entities with no assets.

Bringing a claim

Increasingly, audit firms will seek to oppose requests from office-holders for audit files. The office-holders have delivery and examination powers under s234–236 of the Insolvency Act 1986. Under s234, an office-holder is entitled to delivery of property belonging to the company, which would include the audit files, save for the auditor's working papers, which belong to the auditor. The current approach of the courts is only to exercise discretion under s234–236 to the extent the request is reasonable. This means the office-holder should forensically examine the company's server for relevant documentation and information and begin their investigations (for example by interviewing key employees), before making what should be targeted requests for documentation and information from the company's auditors.

> **"The task is one of evidence and judgement, requiring the auditor to undertake the task with a questioning mind while being alive to the potential for fraud."**

Locating the auditor's engagement letter(s) is the starting point. That will set out the contractual relationship, scope of the audit and any limitation of liability thresholds, and will be relevant for ascertaining the scope of the duty that it is relevant to, among other things, causation and loss. Any limitations of liability will need to have been properly authorised in accordance with the Companies Act 2006.

Data analytics can be useful in identifying unusual transactions, key conspirators and patterns of transactions that might indicate fraud.

We generally consider all the email communication between the auditor and the company, although agreeing key word search terms with the office-holder can help identify key areas of concern. For example, in the construction industry, identifying early or optimistic recognition of income on non-performing contracts can highlight mistakes of auditors and help build a picture.

Ultimately, any particulars of claim will need to identify the auditor's specific duties, relevant ISAs, and how those duties have been breached. Seeking an early opinion from an audit expert with experience of providing evidence in court will help to frame the claim. It also provides an opportunity for an early assessment of liability without incurring significant litigation costs although, as set out below, the main battleground will often be in relation to causation and loss.

Traps

Security for costs applications: this should be anticipated. A court might order that the company, in administration or liquidation, provide security (which could be a bond, guarantee or specific payment into court) to pay the defendant's costs if the claim is unsuccessful.

While a good claim should not be stifled by lack of funding, in practice it is best to avoid this as an issue by securing appropriate after-the-event insurance (ATE) with any avoidance provisions removed. This means that an insurer will still pay out adverse costs liability even if there had been, for example, a non-disclosure to the insurer by the office-holder. So-called 'anti-avoidance provisions' in an ATE policy can negate the need for an additional bond.

> **Recent cases demonstrate that the courts will investigate whether the responsibility for the loss suffered ought to be shared with a company because of management failures and/or dishonesty, reducing the damages that the court awards.**

Causation and loss: demonstrating that the auditor fell short of what is expected might be relatively straightforward and even admitted, but pushback should be anticipated on whether it was the auditor's failures that caused the company's losses. Normally the defence lawyers will say that the more proximate cause of the loss was the directors' and not the auditor's negligence, relying on *Galoo Ltd* v. *Bright Grahame Murray* (1994).

It was generally thought that the company's trading losses incurred after the negligent audit could not be claimed from the auditors, but recent case law, such as *Assetco plc* v. *Grant Thornton UK LLP (2020)* and *Manchester Building Society* v. *Grant Thornton UK LLP (2021)* has favoured the claimant on this point.

Contributory negligence: a common defence is that the damages that the auditor is liable to pay should be reduced on the basis that the loss suffered by the claimant (and claimed from the auditor) is partly (or wholly) the result of the claimant's own fault. The defendant has to demonstrate that the claimant has carried out 'an act or omission… of the kind that was blameworthy, in the sense that it involved a failure to take reasonable care for its own interests and was a contributory cause of… loss' (*MAN* v. *Freightliner Ltd* (2005)). A company is legally responsible for the acts of its directors and employees, even if the acts are fraudulent, where those acts were carried out in the course of their office or employment.

However, an auditor is engaged to protect against the 'very thing' (the fraud) that the company is itself primarily responsible for. Recent cases demonstrate that the courts will investigate whether the responsibility for the loss suffered ought to be shared with a company because of management failures and/or dishonesty, reducing the damages that the court awards. Each case will turn on the facts and the seriousness of the auditor's failings will be relevant but expect a deduction from the damages of 25% to 75% in the event of default.

The counterfactual: this is a hypothetical process of constructing a persuasive narrative as to what would have happened if the breach had not occurred and a competent audit had taken place. It might be the set of circumstances that did occur (albeit too late in the day to stem the loss caused by the auditor's breach) or may require careful thought as to the logical and arguable 'would-have' position. By way of example, had the breach not occurred, could an investigation have been instigated and a restructuring plan put in place so that a better and less costly outcome could have been achieved?

Limitation of liability: the Companies Act 2006 introduced liability limitation agreements where the amount of a liability owed to a company by its auditor may be limited by agreement. These must satisfy certain requirements, including being authorised by the members. They will only be effective where the limit on liability is no less than an amount that is fair and reasonable in the circumstances. Limitation clauses are normally drafted as a multiple of fees with an overall cap. There are no reported cases on limitation of liability agreements and it will be interesting to see how the courts consider these, bearing in mind that losses can be very significant indeed and generally have no correlation to audit fees.

> **We believe there are likely to be a large number of cases in existing liquidations which ought to be investigated.**

Reliance, attribution and illegality: The House of Lords in *Stone & Rolls* v. *Moore Stephens* (2009) struck out a company's claims in negligence against its auditors on the basis that the claims arose out of the company's sole shareholder/director's fraudulent conduct, which was attributed to the company and the company could not rely upon its own wrongdoing to bring a claim. That decision has been criticised in *Bilta* v. *Nazir* (2015) and it is not believed to be authoritative except on its own facts. In *Singularis Holdings (in liquidation)* v. *Daiwa Capital* (2019), Lady Hale agreed with the view that there is *'no principle of law that in any proceedings where the company is suing a third party for breach of duty owed to it by that third party, the fraudulent conduct of a director is to be attributed to the company if it is a one-man company'*. These comments are not legally binding and *Stone & Rolls* remains good law in the context of one-man companies, at least until the issue returns to the Supreme Court.

One approach is to see the issue in terms of reliance. Was there anyone innocent at the company who would have done something differently had they known the accounts were incorrect? Arguably an auditor should not be held liable when the entire shareholder and management body knows that the accounts are wrong because they have been fraudulent. The reality is that the auditors have caused no loss. The dissenting judgment in *Stone & Rolls* stated that discovering fraud was a critical aspect of an auditor's responsibility and that there may be a duty of auditors to the creditors of the company when insolvent.

Three further thoughts

- There is likely to be a significant increase in the number of auditor liability claims brought by office-holders. The availability of litigation funding, appropriate ATE insurance and the fact that auditors are generally adequately insured make them an attractive target when there has been a fraud and the directors have disappeared or sheltered their assets. The primary period of limitation for an audit claim is six years from the breach, generally being the date at which the auditor signed the audit opinion. We believe there are likely to be a large number of cases in existing liquidations which ought to be investigated.
- The view that auditors should owe a duty of care to creditors when a company is insolvent appears sensible to us. It would mean that complicity by shareholders would not prevent a claim being brought by office-holders.
- In terms of auditor protection, liability limitation agreements are still not widely used, because of the shareholder approval requirement. Increasingly, auditors are requiring management and shareholders to validate information provided to the auditors. However this will still not protect an auditor who has not exercised professional scepticism in undertaking its role in relation to the 'very thing' it was instructed to identify. ◻

MARK WILSON is a partner and head of complex and international recovery at Gateley.

HANNAH DROZDZ is a legal director and professional support lawyer at Gateley.

JOHN LAMB is a trainee solicitor at Gateley.

Fraudster vs investigator: OSINT for the IP

Dr Stephen Hill provides a guide to tracking down insolvency fraudsters from the comfort of a laptop.

In today's technologically advanced world fraudsters have been utilising the internet to assist them in a multitude of online frauds including fake accounts, websites or dark-market sites to sell the proceeds of their crime. Cyber-assisted fraud offences reported by victims in the UK are often carried out by a group of people, either working together or operating in less defined groups. In general, these people are either criminals, nation-state actors (ie those involved in espionage), 'hacktivists' or insiders (ie a disgruntled employee). In addition, fraudsters will often use the services of professional money launderers to realise their profits. Cyber-enabled fraudsters have a range of skills and often collaborate on a purely transactional basis, buying and selling stolen data either financial (ie bank or credit card information) or identity information (ie medical records or usernames and passwords). To hide their identity fraudsters will use the internet and the opportunities it provides to reduce the chances of them getting caught.

While the internet provides fraudsters this opportunity to muddy the waters around them, it also offers an investigator the prospect of tracking the digital footprints left behind. Take the case of Maxi Sopo, a 26-year-old criminal in hiding in Mexico, who (along with an associate) falsely obtained more than $200,000 (£148,000) in credit from banks. Sopo not only used his Facebook status to tell the world what a good time he was having while enjoying the proceeds of his crime, but also befriended a US Justice Department official without knowing. In a similar case, an Italian mafia fugitive (Marc Feren Claude Biart) was caught by police in the Dominican Republic after being identified by his tattoos, which were visible in his cooking videos on YouTube. While his face never appeared in the videos, his distinctive tattoos allowed the police to identify him as an alleged member of the 'Ndrangheta, a mafia-like crime syndicate. Both are examples of open-source intelligence (OSINT), which is slowly being accepted as a critical tool to assist and enable key areas of an investigation. OSINT can be extremely effective for those working in insolvency looking to trace intelligence about people, companies and, indeed, assets.

OSINT explained

OSINT refers to a broad array of information and sources that are generally available, including information obtained from the media (newspapers etc), professional and academic records (research papers etc), and public data (government reports etc). According to a declassified paper by CIA analyst Stephen Mercado, open sources often equal or surpass classified information in enabling the monitoring and analysing of issues including terrorism, proliferation, and counterintelligence. For the IP, OSINT provides access to a plethora of intelligence from government reports and documents (including asset declaration forms) to publicly available databases (such as property and corporate databases), which can all be easily located using freely available search engines if one knows where to look and how.

Searching the internet for most people is simply about using a search engine such as Google or its rivals Bing or Yandex to run a phrase search. This type of search is typically referred to as an exploration of the surface or 'clear' web. In simple terms the surface web is a portion or segment of the world wide web that is indexable by a search engine. Surface search engines typically construct a database of the web by using programs called 'spiders' or robots (web crawlers). The spider gets a copy of each page and indexes it, storing useful information that will let the page be quickly retrieved again later.

> **According to a declassified paper by CIA analyst Stephen Mercado, open sources often equal or surpass classified information in monitoring and analysing issues including terrorism, proliferation, and counterintelligence.**

Online investigation toolkit

There are many online tools available to search online, but which are the most effective for the IP conducting an online investigation? This is a difficult question as it depends on many circumstances based on the type of search being carried out. However, the following section explores some of the options available to the online investigator when exploring the world of social media and the dark net.

The main surface search index tools – Google and Bing – both have the ability to filter text, images and video, and offer the investigator the ability to filter by time, location, site or related pages. Both have advanced features and offer the ability to translate (although this is very basic). While both these search engines are good, they do not cover every possible angle of searching that some investigators have come to expect. One weakness is that by default they do not automatically search the vast wilderness of social media including everything from blogs, photos, videos and geo-location data to name but a few, and neither do they allow the exploration of the dark net.

Social media tools to consider

Social media has opened up numerous opportunities and is a key component to profiling the subject of an investigation. Facebook, Twitter, TikTok and LinkedIn have embedded themselves in people's lives – posts, tweets, videos and image updates are emerging as a new trove of intelligence. Social media can reveal the kind of information that, years ago, would have been difficult, if not impossible to find. Examples could include a detailed insight into an individual's contacts and movements and, on some occasions, even their major purchases. But it has to be gathered in a way that will hold up in court. Because social media is such a new source of evidence in investigations, case law is developing rapidly. A forward-thinking investigator would be well advised to stay on top of the latest legislation both locally and internationally.

The specialist search tools below have their own unique strengths for searching social media, whether it is looking at photos, finding user profiles or even establishing geo-social footprints – collectively they are key enablers that can assist an IP in their investigation.

Social Searcher
www.social-searcher.com

Social Searcher is a specialist social media search engine. It allows the user to search for content in social networks in real time and provides deep analytics data. Users can search without logging in for publicly posted information on platforms including Twitter, Facebook, YouTube, Instagram to name a few. Users can also save their searches and set up email alerts.

TweetDeck
tweetdeck.twitter.com

TweetDeck is a dashboard that allows you to view tweet streams based on parameters you select such as usernames, hashtags, keywords and a variety of other built-in features. Typically, an OSINT investigator would use TweetDeck to search Twitter by conducting several searches simultaneously looking for key words or hashtags based on their investigation. Another useful way to use TweetDeck is searching for tweets by location.

Echosec
www.echosec.net

Echosec is a location-based search platform that provides public safety, security, journalism and intelligence professionals with actionable knowledge based on social media and other information. By typing a postcode into the search bar of the online application this site will bring up the location on a digital map and when the user highlights a square of the area, around a building, for example, social media posts and images taken and published in that location start popping up beneath the map. Sites searched include Facebook, Twitter, VK and Instagram.

Dark net search

The dark net has been appearing more in the headlines over the last few years because of its association to nefarious activities and it being 'hidden' from plain sight. The once extremely popular site 'Silk Road' operated under the anonymity of the dark net with thousands of daily visits from people all over the globe and a turnover estimated to be worth about $1.2bn in sales, and $80m in commissions.

Access to the dark net is possible through services such as TOR or I2P. With more and more online users worried about privacy and possible intrusion into their online life, downloads of TOR have increased substantially over the last few years.

The dark net serves as a platform for the fraudster to become anonymous since it not only provides protection from unauthorised users but also in many cases uses encryption to prevent monitoring. TOR (the onion router) is one such anonymous network with access via the TOR browser, which was developed by the US Naval Research Laboratory for communicating online anonymously.

So where would you start when trying to unlock dark net information? The first and most crucial part to understand when conducting an online investigation is how can the investigator go untraced and fall under the radar – in other words how do they hide their *own* digital footprints?

To allow this anonymity the internet investigator should look to disguise their digital footprints by hiding their IP address. The TOR client allows this to happen by routing internet traffic through a worldwide volunteer network of servers hiding the user's information and eluding any activities of monitoring. While TOR provides a high level of privacy it is worth considering running TOR via a virtual private network (VPN). There are many VPNs on the market today each offering the ability to secure your connection for optimal security using enhanced encryption. Using a VPN and TOR together can provide an extra layer of security and mitigate some drawbacks of using either technology exclusively.

The dark net consists of all those websites that cannot be accessed using a normal browser and require a special type of network as described above. Websites use '.onion' appended at the end instead of top-level domains such as '.com' or '.co.uk', so unlike the surface web, the site address is very different. An example includes DuckDuckGo, which is both a surface and dark net search engine. On the dark net the address would be **http://3g2upl4pq6kufc4m.onion** whereas on the surface web it would be **https://www.duckduckgo.com**. Other popular dark net search engines include Ahmia.fi and Torch. Alternatively, there are many 'hidden' wiki sites that provide a catalogue of resources that also include active search engine website addresses.

Go forth and search

There is no right or wrong way to carry out an internet search, but it is a good idea to familiarise yourself with a selection of search engines and specialist sites to use during an online investigation.

Criminals will continue to find new ways to conceal their assets, and IP investigators need to use all the tools at their disposal. Remember information is power and having access to the most accurate, up-to-date, and relevant intelligence is vital to a successful online investigation. ◻

DR STEPHEN HILL is managing director of Hill Bingham Ltd and co-owner of Fraud Training Ltd.

What is Recovery First?

Recovery First works with insolvency professionals to help law firms exit the market

Recovery First offers a positive solution for those who are exiting the legal market due to insolvency and, via our sister brand, R&R Solutions, for those exiting due to retirement, restructuring or voluntary exit.

Our team manage the transfer of files from start to finish; placing case files with an approved law firm to protect the integrity of the client's case, while maximising the value of the work in progress.

Our unique scheme can assist with whole firm closures, individual departments, or specific cohorts of files. The great thing about our process is that it is suitable for both professional advisers and law firms and because each firm is different, is designed to be tailored to meet each firm's individual objectives.

> **"Over the years, we have worked alongside professional service providers to help them create the best outcome for their law firm clients when exiting any area of the legal market."**

How we work alongside insolvency professionals

Sadly, sometimes solicitors find themselves in a position where they have no alternative other than to enter some form of insolvency process; we work closely with professional advisors in these circumstances to ensure that recoveries for creditors are maximised by ensuring the best value is achieved from the work in progress (WIP) asset. Over the years, we have worked alongside professional service providers to help them create the best outcome for their law firm clients when exiting any area of the legal market.

The advisors we assist include:

- Insolvency practitioners
- Accountants
- Merger and acquisition consultants
- Corporate recovery specialists
- Risk and compliance consultants

The formal insolvency process for solicitors can be a lengthy one, and often involves input from the Solicitors Regulation Authority (SRA), as well as insolvency lawyers and insolvency practitioners.

Recovery First works in conjunction with insolvency specialists to complete a structured and compliant run-off of live files. This process mitigates the risks to the buying firms and results in a significantly higher value for the WIP being recovered, while ensuring SRA compliance.

We are an accountancy service provider that has built specialised software and processes to realise the full value a law firm has locked into WIP over time. We monitor case progression to conclusion in real time and account back to our clients for the value realised on an agreed reporting period, either monthly or weekly, thereby de-risking a deferred deal from the seller's perspective.

Our process is highly flexible, and many firms have greatly benefitted from exiting a market using a phased approach or, when merging, to dispose of a caseload within a legal area the merged entity does not wish to continue operating in.

An example of our work with insolvency practitioners

We recently worked alongside Leonard Curtis on a project which involved an RTA firm who were going through an insolvency process. We agreed that the best approach to take on this project was to complete a phased exit out of the RTA market over an 18-month period.

Using this phased approach, the firm was able to maximise the recovery of their WIP asset while managing their costs base in line with a diminishing case load and, at the tail end, close-down, knowing that they would still realise the value of their WIP from the residual cases to be completed via Recovery First.

Andrew Poxon, from Leonard Curtis stated the following:

'We were really pleased with the outcome achieved on a recent project. Using the Recovery First model, we helped a firm to exit the RTA market using a phased approach. The monitoring of all matters by Recovery First and the associated accounting and reporting were of an exceptional standard, resulting in a very smooth administration with maximum recoveries being created for the creditors.'

Why choose Recovery First?

The unique scheme offered by Recovery First is suitable for a range of professional advisors working with law firms in the process of insolvency or corporate recovery. Our services are suitable for all types of legal work.

> **"The unique scheme offered by Recovery First is suitable for a range of professional advisors working with law firms in the process of insolvency or corporate recovery."**

100% confidentiality guaranteed
Speak to us in complete confidence for a bespoke proposal to meet your objectives.

No up-front costs
We deal with legal agreements and file transfers and only get paid when a realisation is achieved.

Seamless transfer ensuring SRA compliance
Seamless client transfer to a specialist lawyer within our panel.

Suitable for all types of legal work
Suitable for all types of legal work, from a small portfolio of cases to large volumes.

Maximise WIP recovery
Maximises the value of your WIP asset, and provides you with your additional entitlement to a success fee.

Simple ongoing process
Simple ongoing process; one monthly payment, discharge of disbursements, transparent breakdown of costs and status reports.

If you would like to find out more about Recovery First's process, feel free to get in touch with David Johnstone today via email david.johnstone@recoveryfirst.co.uk, telephone 07887796989, or fill in the form on our 'Contact Us' page of our website, **www.recoveryfirst.co.uk**, and we will contact you.

DAVID JOHNSTON is managing director at Recovery First.

Covid-19 (fraud) bounces back

Richard Palmer writes that it may be that the ultimate responsibility for bounce back loan fraud falls upon IPs.

Political focus may recently have been on other Covid-19-related 'events', but Lord Agnew's abrupt resignation as minister for efficiency and transformation on the floor of the House of Lords towards the end of January over what he calls 'the government's failure to deal with Covid loan fraud' may force a change in approach from the government with potentially wide ramifications for the insolvency sector.

The scale of fraud

Approximately £47bn was lent by banks in bounce back loans to over 1.5 million companies. Some £5bn of this was initially estimated to have been lost to fraud, but estimates of non-repayment by borrowers takes the potential non-repayment figure up to £26bn.

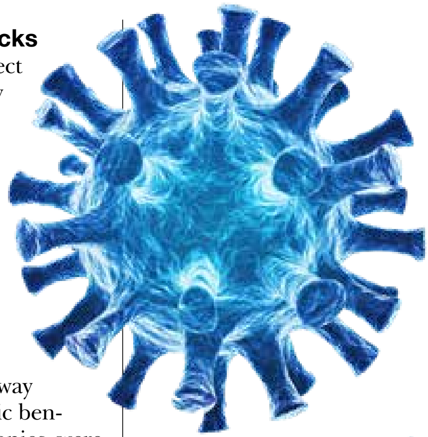
The government has spent approximately £400bn in its pandemic response over the last two years, yet tax receipts declined by approximately £50bn in 2020/21 from 2019/20. Even though Lord Agnew expressed concerns, surely the government will be keen to minimise losses on this scheme.

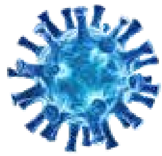
At the same time, IPs are likely to be subject to a radical overhaul in how they are regulated. Following the Small Business, Enterprise and Employment Act 2015 (SBEE Act), and a call for evidence in 2019, the government launched an open consultation in December 2021 (open until 25 March 2022) on the future of insolvency regulation and proposes the creation of a single independent government regulator to sit within the Insolvency Service. As well as regulating office-holders it will regulate firms providing insolvency services.

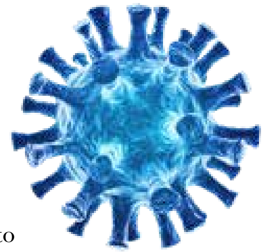
While this will doubtless take some time to come into force, IPs should consider the likely new framework and try and act in a manner consistent with it. The SBEE Act introduced statutory objectives for a new regulator to uphold, which will include 'promoting the maximisation of the value of returns to creditors and promptness in making those returns' and 'protecting and promoting the public interest'. IPs will need to act in accordance with this.

Applied to companies in insolvency processes that took out Covid-19 loans, it has to be in the public interest for IPs to try to recover sums that the government is ultimately liable to lenders for (in the event of non-repayment) under the guarantee they provided.

Misfeasance and bounce backs







IPs can pursue directors in respect of any misfeasance that they may have caused or permitted. Misfeasance covers a wide range of director misconduct and breach of duty to the company: it will cover misapplication or personal retention of company funds. In the simplest cases, bounce back loans may have been paid straight into personal accounts.

Loans were to be used in a way which would provide an economic benefit to the business. If loan monies were misused, permitting this is likely misfeasance by the directors. Liquidators have a summary remedy in respect of misfeasance claims under s212 of the Insolvency Act 1986. Administrators do not but they have the general ability to bring company claims, including seeking relief against directors they suspect of misfeasance in the ordinary way. In nil-asset cases, litigation funding or assignment of claims may well be available.

> "It has to be in the public interest for IPs to try to recover sums that the government is ultimately liable to lenders for (in the event of non-repayment) under the guarantee they provided."

If IPs suspect director misconduct, this should be notified to the Insolvency Service on the mandatory report on director's conduct they send to the Service. The Service can then consider disqualification proceedings, seeking compensation orders or prosecution for various offences such as those in s206–211 of the Insolvency Act, or potential prosecutions for obtaining monies by deception (if, for example, directors lied on the self-certification questionnaires to obtain bounce back loans). In the initial wave of post-pandemic insolvencies there have been a number of stories of directors being disqualified and/or going to prison for abusing the government finance schemes.

Ultimately, in making any decisions on individual cases, the public interest will need to be weighed up against the value of returns to creditors. If an IP suspects a company of misusing a loan or obtaining it fraudulently, and there are real concerns about recoverability, that can be a factor in decisions taken on cases.

We suspect that IPs will be under commercial pressure from relevant creditors to exhaust their investigations. This will be to investigate both the use of funds obtained by companies that subsequently enter insolvency, and to investigate whether funds may be recoverable from directors either in settlements or litigation.

IPs are (generally) not specialist fraud investigators. However, they do have forensic investigation skills and, crucially, wide statutory powers to investigate and require the cooperation of directors and employees. They can ultimately get information from any person the court thinks capable of providing it. These powers, combined with information that can be gleaned from open-source information, registries and social media, should be sufficient to identify claims and enable insolvency practitioners to do their bit to try and mitigate massive losses that are ultimately faced by all of us. ◻

RICHARD PALMER is a partner in the restructuring and insolvency team at Horwich Farrelly Solicitors.

Recruit. Train. Retain. **Careers and professional development**

RECOVERY SUPPLEMENT

R3, the Association of Business Recovery Professionals
Spring 2022 https://www.r3.org.uk/technical-library/recovery/

Joint Insolvency Examination – November 2021

Corporate insolvency pass list

The pass lists are being published in this way because a pass in either the personal or corporate exam will enable a candidate to apply to their RPB for a partial licence in that particular specialism following changes brought in by the Deregulation Act 2015.

Only students who gave consent to appear on this list are shown below.

JIEB 2021 high achievers

First place in corporate insolvency
(awarded to the candidate with the highest mark in the corporate paper)
Joe Gaastra

First place in personal insolvency
(awarded to the candidate with the highest mark in the personal paper)
Grace Jones

Combined top scorer
(awarded to the student achieving the highest combined marks in one sitting)
Gordon Scott Bettany

A

Abraham R, London
Allen J, Preston

B

Ballinger S, London
Bennett C, London
Bettany G, Leeds
Bonner D, Manchester

C

Cameron J, London
Casey J, Edinburgh
Chapman G, London
Cochrane J, Northampton
Corbett S, Huddersfield

E

Easto M, Hook
Elliott J, London

F

Fallon B, Leeds
Forsberg J, Bristol

G

Gaastra J, George Town
Gill R, Yarm

H

Hamill N, London
Harbinson N, London
Harding A, Bedford
Herberts P, Sheffield
Hoad N, Worthing
Hudson C, Stockport
Hudson S, Sunderland

J

Jones G, Norwich

K

King A, Oxford
Kings P, Newcastle Upon Tyne

L

Liddington R, Loughton

M

Mapstone K, Edinburgh
Morris S, London

N

Norton J, Pevensey

O

O'Day N, London

P

Pannozzo D, Banbury
Penrose M, Stockport

R

Reddington J, Pudsey
Russell M, Bradford
Russell R, Sutton

S

Seres A, London
Sharpe O, Newbury
Shepherd S, Dudley
Simcox A, Walsall
Smith S, Aberdeen
Sullivan J, Basildon
Suresh J, New Malden

T

Taylor R, Retford
Thomas J, Leeds

W

Whatcott J, Normanton
Woodcock M, Accrington

Joint Insolvency Examination – November 2021

Personal insolvency pass list

The pass lists are being published in this way because a pass in either the personal or corporate exam will enable a candidate to apply to their RPB for a partial licence in that particular specialism following changes brought in by the Deregulation Act 2015.

Only students who gave consent to appear on this list are shown below.

A

Ablett A, Sidcup

B

Bamforth H, Manchester
Bettany G, Leeds
Booth N, Romford

C

Cameron J, London
Chapman G, London
Corbett S, Huddersfield

D

Duffy K, Stockport

F

Fallon B, Leeds
Forsberg J, Bristol

G

Gill R, Yarm

H

Hamill N, London
Harbinson N, London
Harding A, Bedford
Herberts P, Sheffield
Hoad N, Worthing
Hudson C, Stockport
Hudson S, Sunderland

J

Jones G, Norwich

K

King A, Oxford
Kings P, Newcastle Upon Tyne

L

Liddington R, Loughton
Lightfoot F, Hitchin
Lord K, Accrington

M

McGreevy J, Bristol
Mclaren N, Edinburgh
Morris S, London
Murphy C, Spalding

R

Reddington J, Pudsey

S

Seres A, London
Sharpe O, Newbury
Smith S, Aberdeen
Sullivan J, Basildon
Suresh J, New Malden

W

Whatcott J, Normanton
Woodcock M, Accrington

Analysis of November 2021 results

Papers sat	Papers passed			
	2	1	0	Total
2	28	9	19	56
1	–	23	72	95
Total	28	32	91	151

Explaining the unexplained wealth order

Karl Laird defines unexplained wealth orders and how they are used.

There has been a significant amount of press interest recently in unexplained wealth orders (UWOs). This now seems like an appropriate time to take stock of how this relatively new law enforcement tool has been used since its introduction.

UWOs were introduced by amendments made to the Proceeds of Crime Act 2002 by the Criminal Finances Act 2017. These amendments came into force in January 2018. Applications for UWOs must be made to the High Court and can be made without notice. Only 'enforcement authorities' as defined in section 362A(7) of the Proceeds of Crime Act 2002 can apply for UWOs. This definition is limited to the NCA, HMRC, the FCA, and the SFO.

How to spot a UWO

To make a UWO, the following conditions must be satisfied:

1. there is reasonable cause to believe the respondent holds the property;
2. there is reasonable cause to believe the value of the property is greater than £50,000;
3. there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property; and
4. the respondent is either a politically exposed person, or there are reasonable grounds for suspecting that the respondent is, or has been, involved in serious crime (either in the UK or elsewhere) or a person connected to the respondent has been so involved.

UWOs can only be made against politically exposed persons or individuals for whom there are reasonable grounds to suspect that they have been involved in serious crime. The legislation defines 'politically exposed person' in broad terms. The individual must be someone who is, or has been, entrusted with prominent public functions by an international organisation or by a state other than the UK. The definition encompasses family members and close associates of such individuals. The definition of politically exposed person does not include domestic politicians or government ministers. A UWO will therefore only be obtainable against a domestic politician if there are reasonable grounds to suspect that they have been involved in serious crime.

If the High Court makes a UWO, it must specify the person who is subject to the order and the property to which it applies. UWOs therefore cannot be used to inquire into the origins of a person's assets in a general sense. A UWO must apply to a specific item of property which must be valued at more than £50,000. A UWO will require the respondent to set out the nature and extent of his or her interest in the property in question. The respondent may also be required to explain how he or she obtained the property and, where the property is held by the trustees of a settlement, set out such details of the settlement as may be specified in the order. To make the UWO, the High Court must be satisfied that there is reasonable cause to believe that the respondent *holds* the property. The statute does not require reasonable cause to believe the respondent *owns* the property. UWOs may therefore be particularly useful where complex trust structures have been used to obfuscate the true beneficial ownership of property. This aspect of the regime will be examined in greater detail below.

If the respondent fails to comply with a UWO, or to purport to comply, a rebuttable presumption applies that the property is recoverable and therefore subject to civil recovery. In these circumstances, the burden of proof that usually applies in civil recovery proceedings is reversed, as the enforcement authority will no longer bear the burden of proving that the property represents the proceeds of crime. If the High Court makes a UWO, it has the power also to make an interim freezing order. This is intended to ensure the property in question is not dissipated. However, an interim freezing order can only be made if the court considers it *necessary* to do so for the purposes of ensuring any subsequent civil recovery proceedings are not frustrated. The necessity of granting the interim freezing order must be demonstrated by the applicant. Importantly, the applicant must apply for the interim freezing order at the same time as it applies for the UWO.

How are they used?

Now that the statutory regime has been introduced, how have UWOs been used? Publicly available information reveals that 15 UWOs have been made in four cases. Unsurprisingly, there is very little information in the public domain about many of these cases. There are, however, now several judgments in which the courts have examined the conditions which must be satisfied before a UWO can be granted. The most significant case to date is *NCA* v. *Baker* [2020] EWHC 822 (admin). This case concerned two Kazakhstani politically exposed persons and a professional trustee. Three UWOs were obtained by the NCA in respect of property alleged to have been purchased by a former high-ranking public official in Kazakhstan (Mr R). The respondents informed the NCA that the beneficial

owners of the first and third properties was Mr R's ex-wife and the owner of the second property was their son (Mr N). These properties were held by complex off-shore structures. Two of the three properties were held by separate Panamanian foundations (similar to a trust). Mr Baker, the first respondent, was an English solicitor who was the president of each of the foundations' councils. It was argued that the basis of the NCA's applications for the UWOs was factually incorrect, as the property purchases were unconnected with Mr R. Lang J agreed and discharged all the UWOs on the basis that there was no proper basis for the assumption that Mr R was connected to the foundations which held the properties or provided funds for their purchase. Although the court's analysis was inevitably fact-sensitive, its consideration of the case against Mr Baker has important implications for future cases. As has already been explained, UWOs can be made against both the beneficial and legal owners of property. However, all the requirements for making a UWO must be satisfied in respect of the respondent (in this case Mr Baker), even if the beneficial owner of the property is someone else. If a UWO is sought against a nominee or trustee, the applicant must demonstrate that he or she is a politically exposed person or that reasonable grounds exist for suspecting him or her of involvement in serious crime, as well as showing a mismatch between the respondent's lawful income and the value of the property. What is particularly important for future cases is the court's analysis of whether Mr Baker 'held' the property in question. The court concluded that the property was held by the foundations. Although Mr Baker was the president of these foundations, he was not the legal title holder. Effective control of the property lay with the foundation council, not with Mr Baker personally. The court accepted the argument that the NCA was required first to consider the actual extent of Mr Baker's interest in the property and then ask whether his lawfully obtained income would have been insufficient for the purposes of enabling him to obtain that interest in the property. Since Mr Baker did not hold the property, he had no interest in it. Therefore, this condition was not satisfied as there was no mismatch between his lawful income and his interest in the property. This analysis is of wider interest given that professional trustees will rarely hold an interest of any value in property that is unexplained by their known income.

"The practical consequence of *Baker* is to make it very difficult indeed, if not virtually impossible, for enforcement authorities successfully to apply for UWOs against professional trustees and intermediaries where the true beneficial owner of property is unknown."

The observation was made earlier that UWOs can be useful if complex trust structures have been used to obfuscate the true ownership of property. The practical consequence of *Baker* is to make it very difficult indeed, if not virtually impossible, for enforcement authorities successfully to apply for UWOs against professional trustees and intermediaries where the true beneficial owner of property is unknown.

A tool like any other

In many respects UWOs are no different from the other information gathering tools which are available to enforcement authorities, such as disclosure orders. What makes UWOs so distinct – and useful from an enforcement perspective – are the consequences that follow from non-compliance, ie that the property is presumed to be recoverable property. However, the applicability of this presumption is wholly contingent upon the respondent's failure to comply. If the respondent complies, or purports to comply, this distinct feature is lost and UWOs are no different, practically speaking, from other information gathering tools. The media focus on UWOs overlooks this dimension of the regime, and in doing so also overlooks that there may be good reasons why an enforcement authority may choose not to apply for a UWO. The judgment in *Baker* may mean that UWOs are relied upon even less. At the time of writing, the government has committed to introducing an economic crime bill. It remains to be seen whether it will amend the UWO regime with a view to expanding its applicability. ◻

KARL LAIRD is a barrister at 6KBW College Hill

The post-Brexit cross-border world: Franco-English realities

Georges-Louis Harang and **Stefan Ramel** return to the topic of cross-border insolvency and restructuring cases to bring their original predictions for the legal landscape up to date.

In the winter 2018 edition of *RECOVERY*, we wrote a piece entitled *The post-Brexit cross-border world; a Franco-English comparison* (starting on page 27) in which we set out on a crystal-ball gazing exercise to attempt to map out the likely cross-border restructuring and insolvency landscape in Franco-English insolvency or restructuring cases after Brexit. At the time, we were still living by the phrase 'nothing is agreed until everything is agreed', and Brexit had not happened.

By the time you receive this copy of *RECOVERY* over four years have passed since we first wrote on this topic, Brexit (31 January 2020) is now over two years old and it will soon be two years since the end of the transitional period (31 December 2020). It seemed to us that this would be an appropriate time to attempt to turn our earlier predictions into a more concrete reality, not least since we are aware of a growing number of post-Brexit cross-border restructuring or insolvency cases, and indeed we are involved in some in our own practices.

As we did with our article in 2018, and in a continued European cross-border spirit, we are arranging for this article to be published both in *RECOVERY* magazine and also in *Revue Lamy Droit des Affaires*. We are grateful to the editors of both publications.

Nomenclature: post-Brexit cross-border cases

Although Brexit occurred on 31 January 2020, it was followed by a brief transitional period until 31 December 2020. When we refer to post-Brexit cross-border insolvency cases, we are referring to cases in which the insolvency proceedings began *after* the end of the transitional period.

"A French insolvency practitioner, or a French creditor or a French debtor wishing to seek the court's assistance in the UK is spoilt for choice when it comes to selecting a mechanism to enforce their rights in the UK."

The bilateral treaty which led to the United Kingdom's withdrawal from the EU was the UK-EU Withdrawal Agreement. By article 67(3)(c) of that treaty, Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings continues to apply, in both the UK and the EU, as regards insolvency proceedings (and actions deriving directly from them and closely linked with the insolvency proceedings), but only if the 'main proceedings' were opened before 11.00 pm (UK time) on 31 December 2020.

In those sorts of cases, where the transitional provisions are engaged, the consequences of Brexit can effectively be ignored: the position is quite simply that the Recast Insolvency Regulation (recast regulation), with its extensive armoury of cross-border tools, continues to apply. An English administrator or liquidator is automatically recognised in France as are the relevant underlying proceedings, and *vice versa*. Competing parallel proceedings are effectively prohibited by the jurisdictional rules under the recast regulation, which requires a court to be satisfied that a debtor's COMI is situated in, or alternatively that the debtor has an establishment in, the relevant jurisdiction before proceedings can be opened.

In cases in which the main proceedings were opened *after* the end of the transitional period, the position is as follows.

The UK landscape

A French insolvency practitioner, or a French creditor or a French debtor wishing to seek the court's assistance in the UK is spoilt for choice when it comes to selecting a mechanism to enforce their rights in the UK. The panoply of applicable instruments includes the UNCITRAL Model Law (model law), given effect by the Cross-Border Insolvency Regulations 2006 (CBIR) and the common law (we take the view that s426 of the Insolvency Act 1986 is unlikely to be of any utility in relation to French proceedings).

The CBIR has been in force for well over 15 years now, and there is, as a result, a developed (but of course still developing)

 Editor **membership@r3.org.uk**

jurisprudence interpreting and applying the provisions of the CBIR in cross-border insolvency cases. The CBIR requires a two-stage approach. At the first stage, it is necessary for the foreign office-holder to seek recognition of their proceedings (and they can, also at that stage, seek interim relief; see article 19). If that stage is successfully completed (and in most cases it is, although it is always necessary to check whether any relevant exclusions apply), then the next and second stage is to seek substantive relief (see article 21). The substantive relief that is available is wide-ranging and includes, for example, staying proceedings in England and Wales, providing for the examination of witnesses and entrusting the administration of the debtor's assets located in England and Wales to the foreign office-holder. It is important to note, however, that recognition under the CBIR will only be given where the 'foreign proceedings' are taking place in a jurisdiction in which the debtor had either their centre of main interests or an establishment: articles 2(g) & (h) and 17.

A material point to determine in relation to the national French proceedings in respect of which recognition is sought is whether they qualify as 'foreign proceedings' for the purposes of the model law (see article 2(i)). Such proceedings are defined as:

'… a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation.'

In each case, the stakeholder would be well advised to verify whether the relevant French proceedings meet that definition.

As for the common law of cross-border insolvency, the modern starting point is the decision of the Privy Council in *Cambridge Gas Transport Corp* v. *Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26 [2007] 1 A.C. 508 in which Lord Hoffman endorsed the proposition that the English court would recognise foreign insolvency proceedings, and that such recognition carried with it the 'active assistance of the court'. *Cambridge Gas* was

"The UK insolvency practitioner, or a UK creditor or a UK debtor is forced to take a quasi trip back in time to seek legal assistance."

"France and the UK have not concluded any bilateral conventions governing their common fate on insolvency matters, forcing the UK claimant to refer to rules of international private law to obtain any legal assistance."

followed by the slightly less helpful decisions in *Rubin* v. *Eurofinance* [2012] UKSC 46 [2013] 1 A.C. 236 and *Singularis Holdings Ltd* v. *PricewaterhouseCoopers* [2014] UKPC 36, [2015] AC 1675. In *Singularis*, Lord Sumption endorsed a summary of the common law position which Lord Collins had put forward in *Rubin*, including that '… at common law the court has power to recognise and grant assistance to foreign insolvency proceedings…'.

The outer reaches of that assistance are still being developed. For a recent example, see the decision of the Court of Appeal in *Kireeva* v. *Bedzhamov* [2022] EWCA Civ 35 in which the court had to consider the interaction between assistance to a foreign office-holder in relation to a property in England, and the 'immovables rule' (ie rights in relation to land in England and Wales are governed exclusively by English law). (The model law was not available in *Kireeva* because the bankrupt had neither his COMI nor an establishment in Russia). The assistance does include vesting certain categories of English assets in a foreign office-holder, staying local proceedings or even ordering the remittal of assets to a foreign proceeding. It is plain that the common law power of assistance is not limitless: Lord Sumption made clear in *Singularis* that the power is subject to local law and local public policy. It is readily possible, however, to see how the common law power may be of assistance in relation to French proceedings.

The French landscape

Having to deal with Brexit and its consequences on the French territory (for any proceedings opened after the transition period, as of 1 January 2021), the UK insolvency practitioner, or a UK creditor or a UK debtor (the UK claimant) is forced to take a quasi trip back in time to seek legal assistance. France has not ratified the model law unlike the UK and neither France nor the UK are members of any Hague Convention on Private International Law related to insolvency matters. Moreover, France and the UK have not concluded any bilateral conventions governing their common fate on insolvency matters, forcing the UK claimant to refer to rules of international private law to obtain any legal assistance. As we have said, it is a sort of backward step in having to use complex legal tools whereas, in the past decade and longer, there had been a simplification of legal interactions between states thanks to the insolvency regulation. In line with this, the UK claimant does not benefit anymore from the automatic recognition of the UK insolvency proceedings in all other member states (ie in France) and the automatic effects of such proceedings in each member state.

Therefore, in cross-border insolvency proceedings, the UK claimant will have to adopt a tailored approach to selecting the most effective process to obtain the recognition and the enforcement of its UK decision, which is now no longer guaranteed. Due to the return to the traditional solutions of private international law, according to the rules in force adopted by France, the UK claimant will have to refer to the *exequatur* procedure for foreign judgments[1] for recognition of the insolvency proceedings. Under French case law, without an *exequatur* judgment, the foreign decision pronouncing the opening of an insolvency proceeding cannot have, on French territory, 'any effect' [*Cour de Cassation – 1ère civ., 6 juill. 2016, nº 15-15850*]. Among other consequences for the UK claimant, because she/he is deprived of the possibility of securing their UK insolvency proceedings with automatic recognition in

France, she/he will be in a rush to obtain (however, subject to the procedural deadlines) the *exequatur* in order to avoid any rival proceedings from other creditors. As a matter of fact, the absence of *res judicata* has the effect that the debtor is not considered in France as being divested of his assets and his creditors retain their right to pursue his assets even if they have filed their claims in the bankruptcy initiated abroad. In addition, the absence of *res judicata* of the foreign decision allows the French courts to open proceedings in France if a criterion gives them jurisdiction despite the opening of insolvency proceedings in the UK (if no *exequatur* has been granted).

The UK claimant seeking the *exequatur* of the UK decision is, however, not deprived of any remedies during the process of getting such an *exequatur*. The UK judgment opening the bankruptcy is a jurisdictional fact that the French legal system cannot ignore, so that the foreign judgment constitutes proof of the mandate of the UK insolvency practitioner and allows the office-holder to be granted capacity to act in France on behalf of the debtor company. The UK insolvency practitioner can therefore take legal action in France on behalf of the creditors or the debtor to request the *exequatur* or to file a third party against a French judgment that would open proceedings in France. The UK claimant will be allowed to file a motion to obtain any interim measures in relation to assets/on real estate properties situated in France [*Cour d'appel de Paris, 9 sept. 2005, no 05-280185, 15e ch. B, JCP E 2006, no 1067, note J.-P. DOM*]. As soon as the *exequatur* is granted, the foreign bankruptcy judgment has the effects provided for by the foreign bankruptcy law on the national French territory: divestiture of the debtor, cessation of individual proceedings, stay of enforcement measures, etc. Moreover, the granting of the *exequatur* renders inadmissible any request for the opening of insolvency proceedings in France. Despite the possibility for the UK claimant to obtain interim measures alongside the *exequatur* proceedings, she/he might face rival proceedings based on EU regulations and/or domestic laws giving advantages to a non-UK claimant because of the ease of launching judicial actions on those grounds and also the fact that there is a lower cost.

France will inevitably carry on developing restructuring tools and its insolvency proceedings alongside the other member states of the EU under the impulsion of the EU. Already, with the transposition of the EU Directive on Restructuring and Insolvency[2] as of 1 October 2021, France has reinforced its restructuring tools, especially the safeguard proceedings. This might lead to the prospect of companies seeking EU restructuring tools, such as those provided by the French legal system, instead of relying on the English tools (notably, the scheme of arrangement or the UK restructuring plan). In a cross-border framework, such a competitive aspect is likely to happen as EU restructuring tools will benefit from recognition in other member states, increasing their attractiveness for debtors having interests in both countries, or in other EU states.

After almost two years after Brexit has taken effect, the route to recognition of judicial decisions/to accessing restructuring tools seems clearer, meaning that the claimant is likely to approach with better certainty and sustainability, the methods of handling insolvency cross-border cases.

Under French case law, without an *exequatur* judgment, the foreign decision pronouncing the opening of an insolvency proceeding cannot have, on French territory, 'any effect'

Conclusion

It is likely that Brexit will not only change the way claimants think, but also the way they act. Within the context of insolvency proceedings, French as UK claimants might have to anticipate their legal needs if they are facing cross-border elements involving the UK or France. To avoid competitive insolvency proceedings, the diminution in the value of assets, competitive restructuring tools and important legal costs, a claimant will probably have to assess in advance the pros and cons before launching any recognition/enforcement of its insolvency proceedings either in the UK or in France. Nevertheless, after almost two years after Brexit has taken effect, the route to recognition of judicial decisions/to accessing restructuring tools seems clearer, meaning that the claimant is likely to approach with better certainty and sustainability the methods of handling insolvency cross-border cases.

In any case, it is to be hoped that the UK will be able to sign and then ratify an international convention such as the Lugano Convention or the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, which would mean that a UK claimant will avoid the difficulties and complexities raised by Brexit. ◻

[1] The Cour de Cassation imposes three conditions for getting the *exequatur* of the foreign judgment and being able to enforce such a judgment in France:
(i) the indirect jurisdiction of the foreign court, based on the connection of the dispute with the court seized, (ii) the conformity with international public policy on substance and procedure; and (iii) the absence of fraud. It generally takes six months to get the *exequatur*.
[2] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt.

STEFAN RAMEL is a barrister at Guildhall Chambers.

GEORGES-LOUIS HARANG is an avocat at Addleshaw Goddard (Europe) LLP – Paris office.

Brokers: valuable, economical or costly?

Mark Beaumont weighs up the costs and benefits of using a broker to bring a claim in an insolvency dispute.

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

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

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

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

Maximising returns

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

We could be looking at a single claim for, say, £50,000 that would suit an assignment model, or perhaps a mix of several cases from the same administration that could suit a portfolio solution. Perhaps there's a claim for several hundred thousand pounds that needs a low-cost funding and insurance product, rather than a giving away 30% or more of recoveries to a funder. Cases can need early investment, a small amount of funding for an issue fee, or simply a well-priced and structured ATE solution.

Making an informed choice

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

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

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

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

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

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

The UK's food supply – close to breaking point?

Duncan Swift follows on from *RECOVERY's* supply chain issue with an in-depth look at pressures on the UK food system.

The UK has the most developed food supply system in the world, accounting for 9.4% (£120bn) of its annual Gross Value Added (GVA), according to the Office for National Statistics (ONS).

Since the 1940s, the primary focus of the UK food system has been to maximise the production of cheap, safe food[1]. However, this has had unintended consequences including:

- Retail concentration, with c70% of domestic grocery supplies being accounted for by the top four supermarkets, according to Statista.
- Organised global food supply becoming the second-biggest contributor (after energy) to climate change at c20–30% of greenhouse gas emissions[2]. Agriculture causes 10% of UK emissions[3], while sub-1% GVA, according to the Climate Change Committee 2020.
- DEFRA figures show that the UK's agricultural revolution, needing only a third of the land to produce the same food as in the 1960s, has contributed to 97% wildflower meadow, 50% ancient woodland, 56% heathland and 90% lowland pond losses since 1930.
- Highly processed foods becoming on average three times cheaper per calorie than healthy foods[4].
- 50% of household food purchases being ultra-processed (compared to Germany 46%, France 14% and Italy 13%) – most of it unhealthy, with bad diet now an acute problem among the least affluent[5].
- Increased food waste with over 25% of all food grown not being eaten[6], c30% on-farm, c70% off-farm waste, with consumers responsible for half of it overall.

It is widely recognised that food supply is not so much a chain as a complex network of producers, processors, and retailers. This complexity is amplified by the pre-processing of raw ingredients which are used for second-stage processing.

The UK has c192,000 farms and 4,000 horticultural (fruit and vegetable) businesses supplying c11,000 food manufacturers, 95% of whose outputs go across the buying desks of the top ten supermarkets.

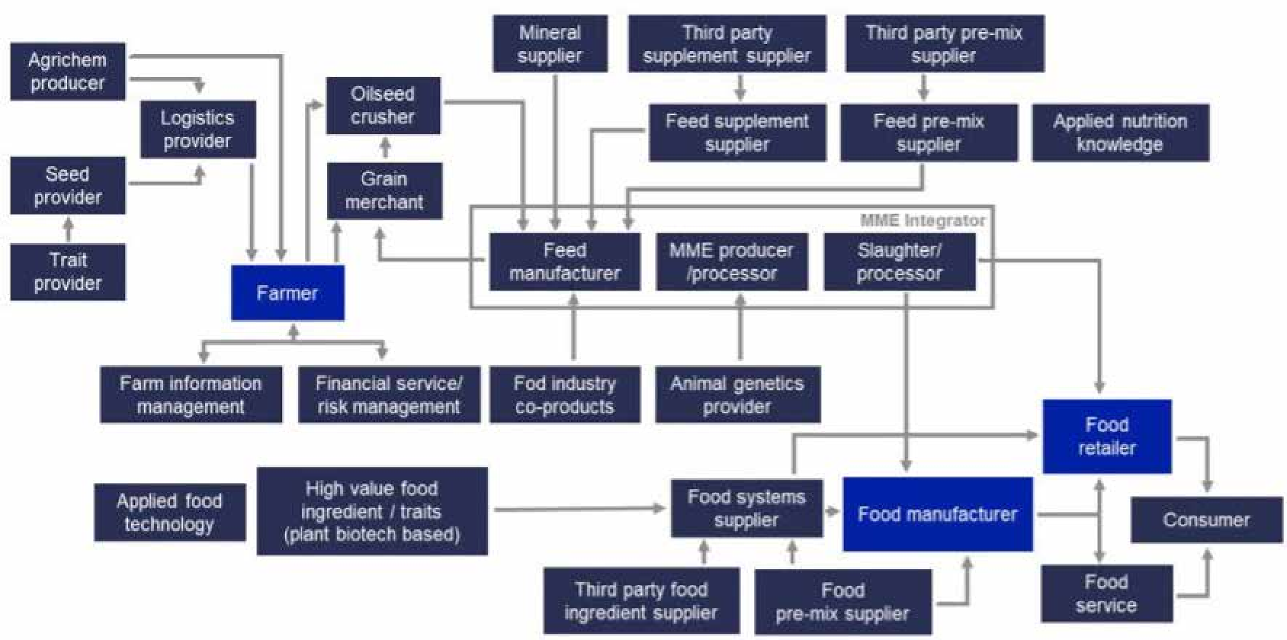
An energy vacuum

The sector is one of the biggest consumers of energy with c30% of global energy consumed by it, according to the Food and Agriculture Organisation of the United Nations. Energy is needed at every stage: the production of agricultural inputs, agricultural production in the field, food processing, transportation, marketing and consumption. Significant increases in energy costs over last year are significantly depressing farmer and food processor margins.

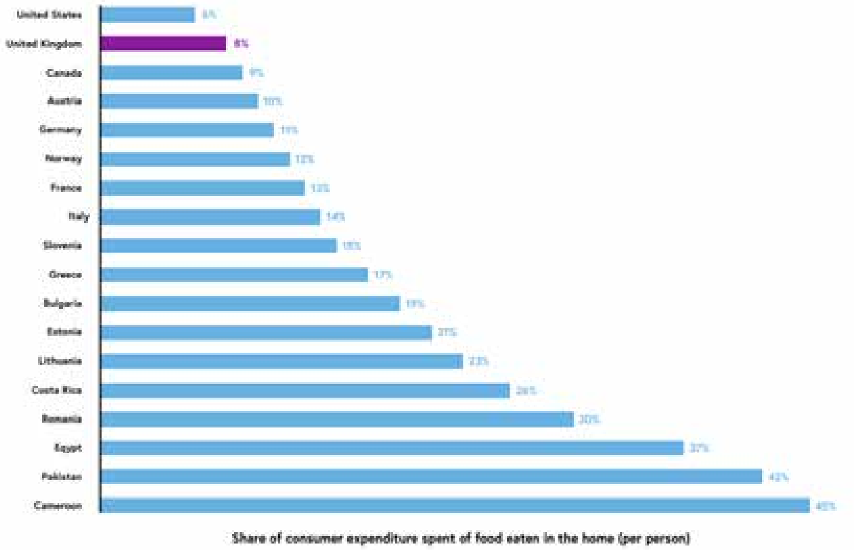
Notably, ultra-processed foods offered to consumers require significant energy inputs to mechanically refine, soften and blend base ingredients so as to produce attractive looking, tasty food items.

The UK has the highest per head consumption of ultra-processed food in the

Lloyd's evolving risks in global food supply 2019



Our World in Data 2017. Share of consumer expenditure on food. USDA



> **The UK has the highest per head consumption of ultra-processed food in the world, currently running at 51% of national calorific intake.**

world, currently running at 51% of national calorific intake[7], contributing to more than half of over-45s living with diet-related health conditions, which increasingly represents an equivalent 'big-tobacco' class-action litigation risk for major food manufacturers.

Most consumers make their food purchasing decisions based upon product price, followed by appearance and weight. Accordingly, most supermarkets historically based their growth strategies on lowest cost and convenience. Food safety standards applied in the Western world, in terms of the immediate health consequences, are taken as a given and are of little concern to consumers unless a contamination issue comes to their attention (eg the horse meat scandal of 2013).

Supermarket business strategies predicated on achieving the lowest price feature a sustained squeezing of supplier margins – allied with supermarket buyers readily substituting suppliers, supply lines, and foodstuffs according to product availability and the economic value of the supply relationship from the buyer's perspective.

The easy substitution of suppliers gives the supply chain great flexibility and resilience from the supermarkets' and consumers' perspective, though the economic consequences for individual suppliers can be significantly adverse.

This retailer–buyer dominance of the supply chain has caused long periods of food price deflation over the last 70 years.

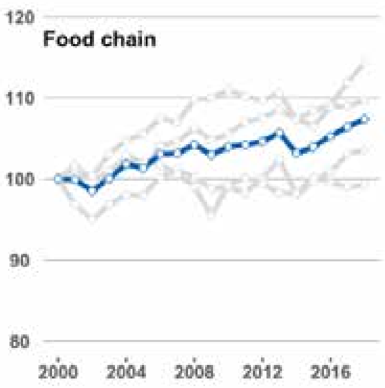
Consequently, over this period the average family's grocery spend as a percentage of take-home pay dropped from more than 30% in the 1950s to less than 10% today[8].

Customer/supplier imbalance

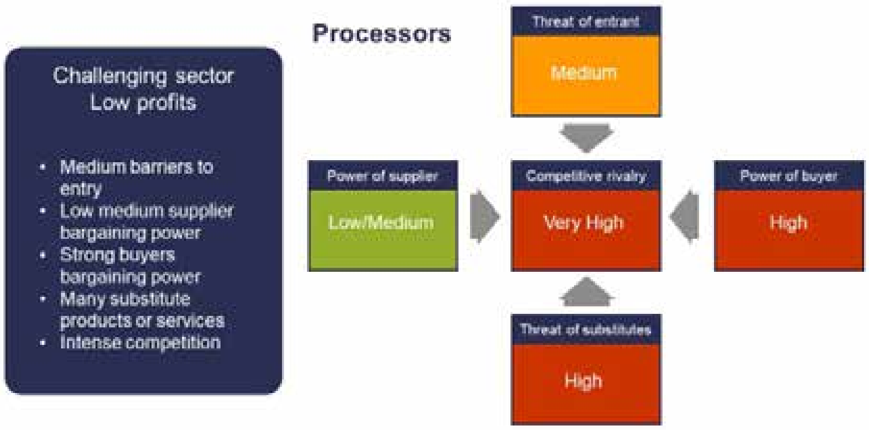
Producers and processors have sought to live with the gross margin squeeze that this represents through increased productivity in the form of agricultural yield gains and volume efficiencies.

It has caused supplier consolidation; whether voluntarily through M&A; cooper-

ONS Food Statistics in your pocket November 2020 – total factor productivity of the UK food sector



Lloyd's evolving risks in global food supply 2019



ative JV's and orderly market withdrawals; or involuntarily through supplier failures, to create fewer, larger suppliers that reduce the relationship costs supermarkets bear in relation to the product category being supplied, arguably to detriment of consumer choice.

Dominant supermarket buyers have been able, over the past 30 years, increasingly to place the risk of supply upon their direct suppliers in the form of one-sided contract terms; short-notice order variations and cancellations; exclusive supply requirements (factory facilities dedicated to service one supermarket are not uncommon); extended payment terms (60–120 days is not unusual); short notice delisting of product lines and/or entire ranges; shortage, recall and other contribution (supplier income) deductions from supplier accounts.

The customer/supplier power imbalance is perhaps best illustrated by food manufacturers (even those with £100m+ annual turnovers) not having guaranteed order books beyond the next 7–10 days.

The Competition Commission moved in 2008 to seek to curb the worst supermarket buyer power excesses with the Groceries Supply Code of Practice 2010, overseen by the Groceries Code Adjudicator since 2013.

However, the business-critical threat of wholesale delisting remains. Hence, it remains the negotiating weapon of choice applied by supermarket buyers in their efforts to keep suppliers' prices low. The adjudicator has cautioned supermarkets that there should be 'no automatic delists or fixed delist notice periods following CPI negotiations'.

Of course, Brexit

UK food supply has also been buffeted by Brexit events since 2016, increasingly so over the last two years of practical implementation overlain by pandemic. There are, and remain, pockets of significant supply chain disruption through labour shortages in picking and packing, meat processing and distribution work that used to be undertaken by migrant labour from Eastern Europe.

> **"Dominant supermarket buyers have been able, over the past 30 years, increasingly to place the risk of supply upon their direct suppliers."**

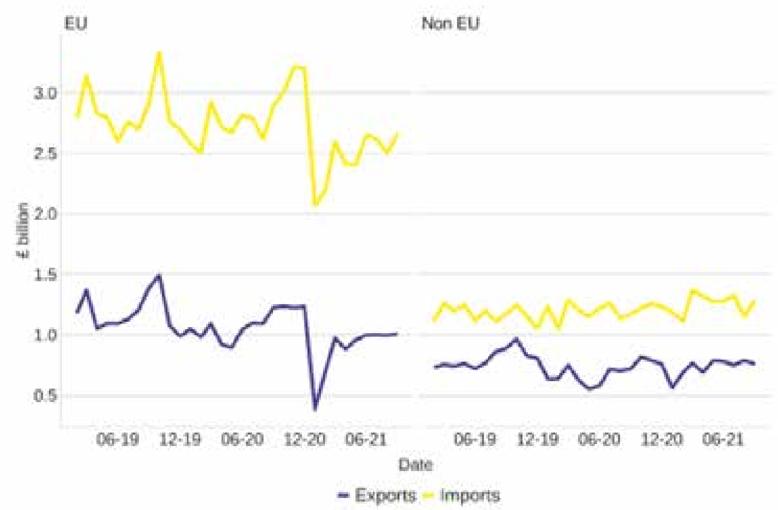
It is difficult to distinguish as to what extent these shortages have been caused by Brexit or the pandemic. Howsoever caused, the ONS has released figures that show the UK workforce is now much smaller than it once was with fewer women, fewer older workers, and fewer EU nationals. In November 2021 there were c460,000 fewer workers than in December 2019 (according to Statista).

UK food exports and imports significantly dipped when the UK left the EU single market and customs union on 31 December 2020 with food suppliers in both the EU and domestically blaming Brexit bureaucracy, congestion at British ports and driver shortages.

Since January 2021 UK food imports and exports require additional customs declarations, product safety certificates, food inspections and rules-of-origin checks, the costs of which erode profit margins. This has rendered small batch, marginal volume and/or highly perishable food movements uneconomic and consequently these have largely ceased.

While the Department for Environment, Food and Rural Affairs says that trade levels are 'largely back to levels seen in previous years', food imports from the EU will be further impacted by checks being imposed in July 2022. This triple-whammy of increased labour, certification and energy

DEFRA – UK Food Security Report 16 December 2021



Perversely, with inflation now front of mind for consumers, supermarkets have the opportunity to relax price wars that have ratcheted up over the last 30 years.

costs is causing significant and sustained input price inflation impacting all farmers, horticulturalists, and food processors.

Perversely, with inflation now front of mind for consumers, supermarkets have the opportunity to relax price wars that have ratcheted up over the last 30 years to improve their own profit margins.

However, many farmers', horticulturalists' and food processors' medium-term outlook is bleaker:

- High energy prices may cause fertiliser and CO2 shortages with attendant price spikes impacting farmers and processors respectively.
- The situation in Ukraine will also adversely impact global energy and fertiliser supplies and prices. It will likely cause grain shortages and price volatility increasing starvation incidences in the third world.
- Instances of UK crops being left to rot due to insufficient labour to harvest will increase, particularly as 75% of the UK's 2021 seasonal agricultural workers were from Ukraine (67%) or Russia (8%).
- More processing capacity hiccups will occur, causing back-ups on farms, potentially making the finished livestock journey from the farm-gate uneconomic – particularly for high-volume large carcass enterprises, notably pork at 0.2 million carcasses per week, according to DEFRA monthly statistics.
- There is likely to be increased wastage before food gets to consumers through forced-culling, wasted crops and unsold products beyond use by date.
- There are likely to be fewer farmers operating larger farms. Brexit ended UK participation in the EU Common Agricultural Policy, and this has started reducing the basic farm subsidies many farms rely on to make a net return and introducing incentive payments to encourage older farmers to retire.
- There is likely to be an increase in insolvencies occasioned by delisting and/or accumulated trading losses through inability to pass on input price increases to customers.
- We may see pressure to reduce ingredient quality in processed foods to maintain, if not reduce unit production costs.
- More food fraud at every level, with input ingredients and output contents mislabelled, as suppliers seek to survive. □

THE PROCESSED FOOD TAKEAWAYS FOR IPS

Factors restructuring and insolvency practitioners should consider in seeking to support businesses in the food chain include:

Producers

Most farm and many horticultural enterprises are unincorporated, sole trader or partnership businesses, family owned and operated.

Agricultural mortgages and property charges are usual forms of lender security, which if enforced see the appointment of Agricultural Receivers or Law of Property Act Receivers respectively. Difficulties arise through old law (the Agricultural Credits Act 1928 and the Law of Property Act 1925) and, emotion with the family home usually at stake.

Specialist legal advice is vital to confirm charge holder and office-holder rights, any property tenancy or licensing arrangements, what assets are charged and any ability to continue trading.

Good animal welfare is critical as is an understanding of seasonality and the farming year. Engaging a farm manager in the assignment to advise and assist is highly recommended.

Additional credit from lenders and key trade suppliers is a must-have for a successful restructuring or turnround.

New Corporate Insolvency and Governance Act 2020 (CIGA) tools will be of little relevance. Tenanted farms are unlikely to benefit from suspension of landlord enforcement rights as 'trading' is unlikely to have ceased at any time.

Processors

These are typically incorporated businesses with lenders holding qualifying floating charge security.

There is a need to understand all of the key trade terms with major supermarket customers, particularly retrospective rebates and any required supplier 'contributions', which are often not detailed in day-to-day trade terms.

Early meetings with major customer supermarket customers are essential to agree the account position and basis of any ongoing trade. Such customers will often want to vet potential purchasers of the business whether the sale is conducted in or outside of an insolvency process.

If a processor has suffered a major supermarket delisting and/or contamination event, managed closure with the sale of turn-key facilities may be best recovery strategy. Securing appropriate cleansing of machinery pre-closure is critical to achieve it.

If processor has not suffered delisting and/or a contamination event, a CIGA moratorium may be a useful tool to obtain time to engage all stakeholders required to achieve a turnaround or fund-raising.

Meeting food hygiene standards is paramount if production and trading is to continue. Do not make the employee who is responsible for this redundant even if there is another apparently capable of fulfilling the role – it will unsettle customers and product liability insurers. If there is doubt that hygiene standards can be maintained, managed closure will be the lowest-risk recovery option.

Securing proofs of delivery is essential for successful debt collection. Beware third-party haulage and warehousing arrangements: these frequently give rise to duress payments to secure PODs and finished goods stock.

High volume, short shelf-life products produced on a just-in-time basis means the potential for supply disruption is acute. Identify and retain staff responsible for customer account management and, production/order forecasts accessed via customer online systems, to avoid penalties arising against debts owed.

[1] The National Food Strategy: The Plan – July 2021
[2] Garnett, T. et al. 2016. Food systems and greenhouse gas emissions. Food Climate Research Network. And, Food and Agriculture Organisation of the United Nations, 2022
[3] Climate Change Committee 2020. Sixth carbon budget
[4] Access to Nutrition Initiative. U.K. Product Profile 2019
[5] Food Foundation. The Broken Plate 2020
[6] WRAP. Food surplus and waste arisings in the UK 2021. And, Bajzelj, B. et al. Food waste in primary production in the UK 2019
[7] Monteiro, C. et al. 2018. Household availability of ultra-processed foods and obesity in nineteen European countries. Public Health Nutrition.
[8] USDA Our World in Data, 2017. Share of consumer expenditure on food. And, Which Magazine – See how food prices compare to 30 years ago and you might be surprised, November 2019

DUNCAN SWIFT is an R&I partner at Azets and R3's immediate past president.

Amicus Finance – a proven route to SME rescue

Sorca McGeown writes that plans for SMEs may well be the future following Amicus Finance.

As Covid-19 restrictions begin to ease, the full scale of the impact on businesses caused by the pandemic will come sharply into focus during the next 12–24 months as governments around the world phase out their support measures. At this turning point, a vast swathe of UK businesses, mostly small and medium-sized businesses (SMEs), are fighting for survival as they contend with high levels of debt, rising input costs and uncertain economic prospects.

SMEs form the backbone of the British economy and are a major source of employment. Even if the headline numbers do not necessarily materialise, there is a lot at stake. Fortunately for restructuring professionals there is an alternative and valuable tool at their disposal that can help mitigate some of the damage to the UK's corporate landscape.

A revolutionary procedure

Galvanised by the pandemic, in June 2020 the UK government accelerated the introduction of restructuring plans, something on which it had consulted and planned since an initial announcement in 2018. Restructuring plans introduce some revolutionary approaches to restructuring and insolvency work. Based on my involvement in the restructuring plan for Amicus Finance Plc, the process is proven to work for mid-sized companies as well as for large ones.

The Corporate Insolvency and Governance Act 2020 introduced, by way of an insertion of a new part 26A to the Companies Act 2006, a court-supervised restructuring process that offers an alternative to company voluntary arrangements (CVAs) or schemes of arrangement. One key feature is that it enables a court to overrule classes of creditors objecting to a proposed restructuring plan in a 'cram down'. Naturally, certain conditions need to be met for the court to sanction a plan, namely that it provides for a better return to creditors than they may reasonably expect to receive in an alternative scenario (often, but not always, an insolvency process) – the 'no worse off' test. Further hurdles are required if the court is to cram down dissenting creditors; most critically that there is at least one creditor class with a financial interest in the alternative scenario that is supportive of the plan – the 'economic interest' test. The UK led the wave of adoption of this approach in Europe, subsequently followed by France, Germany, the Netherlands and various other countries.

> **Restructuring plans have distinct advantages over CVAs, where secured creditors are not bound to the process and there is no moratorium from actions against the debtor.**

Restructuring plans put debtors in the driving seat of the process. This means a company's management can remain in place and run the business. To qualify, a company is required to demonstrate that it has or will encounter financial difficulties affecting its ability to continue as a going concern. The restructuring plan provides scope for a company to change its shareholder structure by cramming down existing shareholders to

Editor membership@r3.org.uk

allow the recapitalisation of the company by new shareholders.

Cross-class cram downs

Support for a plan requires a minimum of 75% approval by value in each voting class of creditor. If one or more creditor classes oppose the plan, the court will consider the cross-class cram down, subject to the 'no worse off' and 'economic interest' tests.

Importantly, for the first time the court is allowed to cram down secured creditors. Again, this means restructuring plans have distinct advantages over CVAs, where secured creditors are not bound to the process and there is no moratorium from actions against the debtor. This is the most powerful feature of the new process for professionals working in the restructuring and recovery industry. It is particularly relevant for rescuing mid-sized companies, for whom schemes of arrangement are unviable, mainly for cost reasons, and CVAs have become more challenging (as explored below).

A number of large companies applied to courts to sanction restructuring plans since the adoption of the new legislation. They include Virgin Atlantic, Pizza Express, Virgin Active, Deep Ocean, Gate Group, Premier Oil and Smile Telecoms. For them, the process was a more efficient and less expensive route to restructure than a scheme of arrangement.

Amicus Finance

This brings me now to how restructuring plans can come to the rescue of mid-market companies in difficulty, based on our experience with Amicus Finance, a provider of short-term finance, mainly to property companies. In August last year, the High Court sanctioned a restructuring plan for

> **The courts will look favourably on plans that benefit all classes of creditors and are likely to approve them against the wishes of an objecting class of creditor, if it presents the best outcome.**

Amicus Finance, which entered administration in December 2018.

The High Court's sanction of the plan was significant because it was a test case for the new restructuring plan rules on a number of counts. Firstly, it was the first time a plan was submitted to a court in the UK by an incumbent administrator. Secondly, it involved a mid-market company and thirdly the High Court sanctioned the cram down of the dissenting secured creditor who was seeking a liquidation of Amicus, after it was satisfied that it would be no worse off under the plan.

The judge, Sir Alastair Norris, released his detailed judgment of the sanctioned Amicus Finance Restructuring Plan in late November, setting out a pragmatic and considered framework for examining future restructuring plan applications. A key takeaway is that the courts will look favourably on plans that benefit all classes of creditors and are likely to approve them against the wishes of an objecting class of creditor, if it presents the best outcome.

Our work on the Amicus Finance plan also threw up some additional practical lessons, notably that creditors or other members do not gain a free rein under the process to delve into the day-to-day details of the company's affairs. We encountered this with one creditor, and its approach was unequivocally rejected by the court. Neither is the process open to abuse by a plan's sponsor in denying creditors and other stakeholders necessary information. It behoves the debtor or the administrator to provide adequate details so creditors can make an informed decision when it comes to voting on the plan. This requires the sponsor to communicate clearly on a rescue plan that is robust and credible from the very start of the process.

CVAs lose their lustre

For medium-sized companies, what are the alternative options for a rescue in terms of rescue processes? A scheme of arrangement is prohibitively expensive and procedurally heavy. CVAs have certainly lost their appeal since HMRC regained its status as a preferential creditor in insolvency proceedings. Since HMRC is now at or near the front of the line of priority creditors, this has significantly altered the CVA dynamic. HMRC will need to be paid in full if a CVA is to obtain its support. Tax deferrals contained in the pandemic support measures for companies mean HMRC is likely to be a sizeable creditor to companies in financial difficulty and experience tells us that struggling companies tend to allow their HMRC debts to accumulate through non-payment.

When the legislation was issued, there was a concern that due to the high costs involved given the significant court involvement, they would be applicable to only large corporates. Costs will generally be higher than those associated with a CVA but lower than scheme costs. It is expected that costs will start to reduce over time as the process becomes more standardised.

Amicus Finance's restructuring plan sets a clear roadmap for restructuring professionals to aid mid-sized companies already in difficulty or where the management anticipates financial problems affecting the long-term viability of their businesses. The unwinding of pandemic support measures and the uncertain economic outlook mean this year and next will be a true test for this new corporate rescue process, so the process offers the potential to save hundreds of companies and the livelihoods of thousands of people.

LESSONS FROM AMICUS FOR RESTRUCTURING PLANS

- Restructuring plans are a proven method for exiting administration.
- Proportionate supply of information is now the norm (Amicus and Virgin – eg objecting landlords).
- All stakeholders can take comfort that experienced judges are supporting plans that are well prepared, canvassed and in the best interests of creditors.
- They can be helpful where trustees of bond holders or other agencies may not themselves have authority to compromise debts.
- Bespoke proposals can be put forward for all classes of debts, including HMRC with their preferential status.
- To protect a company from enforcement action, a formal moratorium (as used by the directors of Corbin & King) could be implemented while a plan is prepared.
- The plan, once implemented, can in some scenarios be concluded within six to nine months.

SORCA MCGEOWN is a partner at Begbies Traynor.

When, not if: restructuring plans in the mid-market

Find out the results of a roundtable discussion designed to dig into the possibilities of restructuring plans for SMEs.

At an R3 South West Regional meeting in November last year the audience listened to an excellent presentation delivered by Matt Mawhinney, Matt Roe and Simon Hanks, all from Teneo, detailing how the Virgin Active restructuring plan had been put together and the many complex considerations involved along the way. This was followed by R3's CEO Caroline Sumner who put it to a slightly incredulous audience that it had always been R3's position that the moratorium and the restructuring plan could be used for SMEs – the cases to date, and in particular the Virgin Active case, having set out a suite of principles which could be applied to a SME case. Needless to say, the audience were not entirely convinced. For the benefit of the sceptics, the Q&A below revisits the topic to explore the possibilities of mid-market plans and the role of the IP in their hypothetical future.

STEVEN COTTEE is a partner at Pinsent Masons.

ANDREW ROBERTSON is a partner at Pinsent Masons.

MATT MAWHINNEY is a senior managing director at Teneo.

STUART MORRIS is an associate director at Teneo.

MATT MEEHAN is a partner at Sandton Capital.

Q A plan is very similar to a scheme of arrangement, which is used for larger complex businesses. We have also so far seen the plan be used predominantly by larger complex businesses in the UK. Why do you believe it is right for use in the mid-market?

When the plan was introduced by the UK government as part of the Corporate Insolvency and Governance Act 2020 (CIGA), it was clear that the intention was that it would become a widely used tool, with 50–100 plans a year, growing annually beyond that. The Insolvency Service has made it clear that it wants the UK insolvency framework to be more rescue led, and to provide directors with more tools to try and restructure and rescue companies outside of a formal insolvency process.

In addition, the judiciary has so far shown its willingness to support a wider roll out of well constituted plans, with Lord Justice Snowden stating at the R3 Annual Conference last year that there is no reason why plans cannot be used in the mid-market, and there is an onus on the profession to streamline the documentation and processes involved, in order to make this happen.

Ultimately, a plan can be a powerful and flexible tool for businesses at the top end of the market and in the SME market, if the right factors are there to support a financial and operational restructuring.

Q The plan process is lawyer led, involves two court hearings and a large amount of documentation. Can it really be a cost-effective tool in the mid-market?

Yes, we believe it can. We were able to streamline the documentation for the practice statement letter, explanatory statement and plan documentation significantly as part of our successful implementation of the *Amicus Finance Plc* plan. This was the first mid-market plan and the first to be proposed by an office-holder, with the plan being proposed by Begbies Traynor as administrators, as a tool to exit administration, rescue the company as a going concern and return it to the original shareholders.

We are also aware that R3 is looking to produce template documentation, which will be a useful starting point for advisors looking at the potential of a plan in the mid-market.

Q What are the main advantages to using a plan compared with a CVA or administration?

Compared to administration, the advantages of a plan are fairly clear – it is a debtor-led process, preserves the legal entity and avoids the stigma and collateral damage sometimes seen in administration processes.

This can be particularly important when dealing with regulated businesses in certain sectors, such as care homes or other Care Quality Commission-regulated businesses, professional practices and Financial Conduct Authority-regulated firms. Insolvency can often trigger a risk of termination of the necessary licences to trade, or a requirement for a purchaser to obtain a new licence. This can add costs, delay and uncertainty to the deliverability of a transaction designed to save some or all of the insolvent business. In a plan, the entity remains whole, and so such issues are much less likely to arise.

CVAs have been under significant recent scrutiny, with the New Look, Regis and Caffè Nero landlord challenges adding considerable cost, uncertainty and delay to the successful implementation of the proposed restructurings in those cases. With a plan, there should be no 'tail', as any objections by creditors will be dealt with at either hearing. It is also the case with a CVA that you cannot compromise secured lenders or HMRC (for their secondary preferential debts, following the re-introduction of crown preference). This creates significant financial hurdles to the successful implementation of a CVA.

The ability to include secured creditors and HMRC within a plan enables you to deliver a holistic restructuring through a single process, without the additional cost and uncertainty of drawn-out litigation following its implementation.

Q What role does an insolvency practitioner have to play in a plan? What potential positions could they fill?

It has been said that plans are a lawyer-led process that leave IPs redundant. This could not be further from the truth!

"Ultimately, a plan can be a powerful and flexible tool for businesses at the top end of the market and in the SME market, if the right factors are there to support a financial and operational restructuring."

There are multiple potential roles for an IP advising on a plan:

- Directors will need assistance on the way in, in order to manage the cash flow and put together the valuation evidence and relevant alternative analysis, showing the potential outcomes in an administration or liquidation (most likely alternatives in the mid-market).
- Directors should, in parallel, undertake contingency planning as to what happens if the plan is not sanctioned, as it is likely the company will need to go into an insolvency process.
- If the plan is sanctioned, the IP could undertake the role of plan administrator, dealing with the admission and acceptance of creditor claims in the plan (similar to a CVA supervisor).
- An IP could take the role of monitor, if a moratorium is used in conjunction with the launch of a plan.

It is also possible for the company to enter into administration first, and then use a plan as the method to end the administration, satisfying the primary purpose of administrations, which is to rescue the company as a going concern (which we understand the government is keen to see more of and which is rarely achieved currently). This was the case on *Amicus Finance*.

Q You mentioned the moratorium in your previous answer. How does that fit in with the plan process and how does an IP get comfortable with signing off on the prospect of rescuing the company?

It is fair to say that the moratorium has not been widely used yet, largely due to the measures introduced by the government to support businesses during the pandemic, but also because of the nervousness amongst IPs to sign off on the 'likelihood' of rescuing the business.

We believe that the number of moratoriums will increase as seen recently in Corbin & King, as the government protections fully fall away from the end of March 2022 and businesses start to come under more immediate creditor pressure. If directors take advice early, it is possible for the moratorium to be used to provide a runway to implementation of a plan, and the moratorium can be easily extended to the sanction hearing, once launched. As long as the period of the moratorium is fully funded, it should be easier for an IP to sign off on the statement on the likelihood of rescuing the business as a going concern.

We have been looking at moratorium funding and plan funding and see it as a real growth area in the UK market, and definitely applicable to the mid-market as well as larger corporates. With a US background, I am used to the concept of 'DiP' funding in the US market and with Chapter 11 processes. Moratorium funding, with the downside protection of super-priority status in a subsequent insolvency if the plan fails, can provide a genuine option for directors looking to fund a moratorium through to implementation of a plan, which restructures the balance sheet, allows them to retain control and ensures the company avoids an insolvency and secures investment over the longer term.

Q How essential is it for a director to recognise the signs of financial distress in order for a plan to be an option for the company?

It is clear from the legislation that a plan should only be used by companies in financial distress. The case law to date has shown that there does need to be a genuine 'burning platform' and that a risk of insolvency in, say, 6–12 months' time is unlikely to be sufficient for a court to sanction a plan (see *Hurricane Energy*).

Significant financial distress will also be an important factor in determining the relevant alternative, which we believe in most mid-market scenarios will be administration or liquidation.

"It has been said that plans are a lawyer-led process that leave IPs redundant. This could not be further from the truth!"

Q As the directors remain in situ throughout a plan process, how do creditors get comfort that any potential claims against directors are properly investigated in the way they would be in a formal insolvency?

The plan doesn't have a formal office-holder, therefore there aren't the same investigatory powers that an IP would have in administration. However, claims could still be made against directors for breach of duties under the Companies Act. Creditors are able to bring forward challenges to the plan at either of the court hearings providing an opportunity to raise any potential claims that may be known that should prevent the plan from being sanctioned.

Q How do you see the role of plans evolving over the next 12–18 months?

I think we all agree that the use of plans is going to start to increase significantly across the mid-market as well as larger corporates. That is certainly the wish of the Insolvency Service, and as we see more precedents set by the courts, we should start to see more confidence and certainty as to how this powerful tool can be used.

As businesses begin to emerge from a post-Covid-19 world with higher leverage, Crown debts and higher levels of creditor stretch, plans should prove a valuable tool to save many viable businesses, in the mid-market as well as the higher end of the market, that have managed to stumble through the last 24 months.

The key for me is the continued streamlining of the documentation and process to make it cost effective and accessible to mid-market businesses.

We are already exploring a number of cases where funding may be required to support a plan, and where the company's existing secured lenders may not be able to provide further monies to fund a plan, but are willing to support a consensual restructuring if alternative investment can be secured.

Q Are there any changes the panel would make to the moratorium/plan structure that make it both more accessible; better public policy? That is, if you were The Insolvency Service, what changes would you make?

I think it is too early to give a definitive answer on this regarding the moratorium. Sanction of a plan is ultimately at the discretion of the court, which provides robust scrutiny of the overall fairness and merits of the proposal. The key for me is the continued streamlining of the documentation and process to make it cost effective and accessible to mid-market businesses.

Q Finally, do you see any downside risks for directors pursuing plan vs CVA or pre-pack?

The key factors for directors are likely to be (1) taking advice early enough so that there is sufficient time to propose and implement an plan; (2) ensuring that they have a good handle on the cash flow requirements of the business during that period to ensure that the company has adequate funding in place to launch and implement a plan without the risk of exposing themselves to potential wrongful trading claims; and (3) engaging with key stakeholders such as secured lenders who are most likely to hold the economic interest in the plan (and the relevant alternative) to garner their support.

I do not think that plans will replace administrations, and the use of pre-packs remains a valuable part of the administration process. Ultimately, the plan is another tool available to directors of businesses where the right factors exist to support a restructuring outside of a formal process. Given the level of financial distress required, directors should still ensure they are taking appropriate professional advice in respect of their duties, and engage in contingency planning in the event the plan is not sanctioned.

CAROLINE SUMNER
is CEO of R3.

Editor membership@r3.org.uk

The new landscape of European restructuring and insolvency law

Tomáš Richter presents an overview of the papers presented at the INSOL Europe Academic Forum.

The INSOL Europe Academic Forum met in Dublin at the beginning of March 2022 for its return to a live-event format after a Covid-induced break of more than two years. The forum's last in-person conference was in Copenhagen in October 2019. The topic for its 2022 return was the emerging new landscape of European restructuring and insolvency law.

The call for papers for the Dublin conference resulted in the submission of some 30 papers from Europe and beyond, and the academic forum board was impressed with the quality of the research submitted. After a difficult selection process, the authors of 16 papers were invited to present to the Dublin audience. Theme-wise, the majority of the presentations focused on corporate restructuring and insolvency, followed by general design and cross-border issues in restructuring and insolvency law, as well as consumer/individual insolvency law.

Corporate papers

In panels focusing on corporate topics, papers presented included reports of implementation of the EU Preventive Restructuring Directive 2019/1023 in France (S Pople), the Czech Republic (T Richter) and Spain (JC Gonzales Vazquez), as well as protection of non-controlling unsecured creditors (D Cardinaels), new and interim financing (F Motu, A Deli-Diaconescu) and the valuation of crypto assets in insolvency (T Kostoula). Panels on design and cross-border issues featured papers on sustainable liquidations (J Pool), cross-border issues in preventive restructurings (I Bazinas, S Madaus), harmonisation of restructuring frameworks

> “The call for papers for the Dublin conference resulted in the submission of some 30 papers from Europe and beyond.”

(D Ehmke, E Vaccari), state aid claims in preventive restructurings (W Nijnens) and the recognitions of UK schemes in Switzerland (R Rodriguez).

Personal insolvency papers

The panel focusing on individual insolvencies consisted of presentations on a unified discharge regime for consumers and entrepreneurs (G Vandenbosche), the Portuguese transposition of the consumer insolvency provisions of the EU Restructuring Directive (AF Conceição, C Frade and F Jesus), and the position of vulnerable and involuntary stakeholders in insolvency and restructuring (JLL Gant). The Edwin Coe Practitioner's Forum, which closed the whole conference, focused on the prospect of harmonisation of avoidance rules in the EU (the model law having been presented by R Bork and M Veder, who led the multi-jurisdictional team working on the research buttressing the proposal of the model law, and debated by C Fitzgerald and F Garcimartin). The Gabriel Moss Memorial Lecture on the first night of the conference was delivered by I Lynch Fannon on the topic of cross-border recognition of corporate restructuring arrangements.

In due course, the papers will be available in the proceedings of the conference which, unlike in the past, will be published electronically.

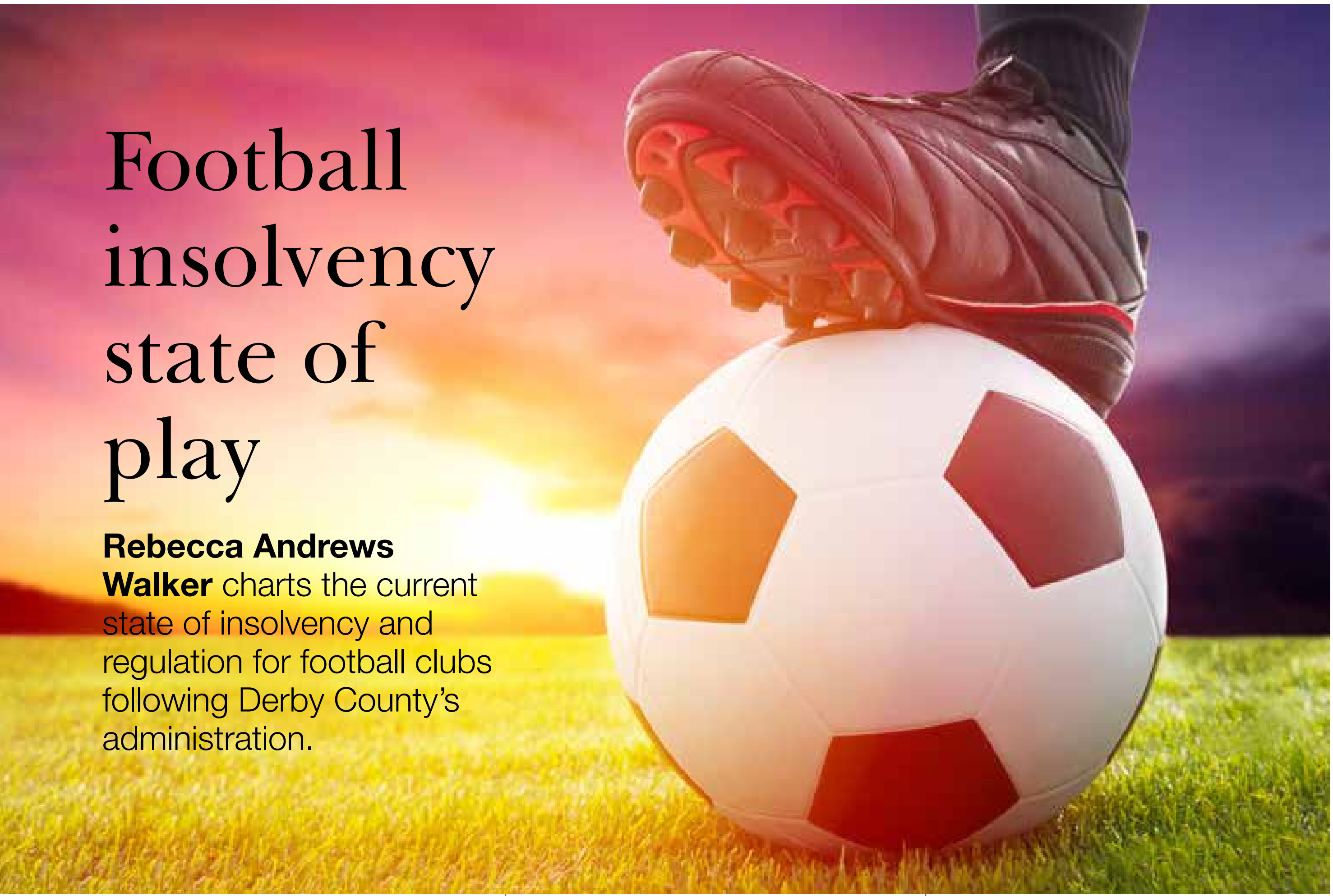
Academic future

The conference programme has clearly shown that the INSOL Europe Academic Forum is a place where cutting-edge insolvency and restructuring research is presented and debated in Europe in a way that is of interest to both researchers and practitioners involved in the field. We are very thankful to all those who submitted paper proposals to the Dublin conference and to those who attended the event.

We are already looking forward to our next conference, which will take place in October 2022 in Dubrovnik. The call for papers for the next conference will be issued in the spring of 2022 and we are looking forward to meeting R3 members and readers there. We would like to point out that thanks to the sponsorship of Edwin Coe LLP, the Academic Forum is able to offer travel grants to junior researchers whose papers have been selected to be presented in our conferences.

If you would like to make sure that you are informed about the next call for papers and about further activities of the INSOL Europe Academic Forum, we suggest that you sign up to our mailing list via our webpages at **www.insol-europe.org/academic-forum-events**. □

TOMÁŠ RICHTER is the INSOL Europe Academic Forum chair.



Football insolvency state of play

Rebecca Andrews Walker charts the current state of insolvency and regulation for football clubs following Derby County's administration.

The results of football seasons are increasingly decided in the offices of English Football League (EFL) regulators and IPs, say some fans. This article examines the priority of creditors in football insolvencies, and whether the regulation of clubs could better prevent those insolvencies from arising – looking at the EFL's approach against the backdrop of the ongoing search for a buyer for crisis-struck Derby County.

Financial fair play

The expulsion of Bury FC from the EFL in November 2020 cast a long, dark shadow. Since November 2020 the club has existed in limbo, with no players and no staff. This debacle led to an investigation into Bury Football Club's CVA to uncover how this happened.

In summer 2021, Derby County FC were made subject to a transfer embargo due to breaches of financial fair play. This left manager Wayne Rooney with a squad of just nine players. The club went into administration on 22 September 2021, with Quantuma Advisory Limited as administrators.

Upon administration Derby County were deducted 12 points. Another nine points were deducted for breach of the EFL's accounting rules. A further three points for breach of the profitability and sustainability rules were suspended. On 17 January 2022, the EFL gave Derby County until 1 February 2022 to put fresh funding in place. A one-month delay has been agreed by the administrators Quantuma and the EFL.

Quantuma appealed the automatic 12-point deduction following legal advice. The appeal hearing was adjourned.

Derby's creditors

The administrators' statement of proposals provides that after preference creditors (ie the Crown preference) are paid, £37,677,108 was estimated to be left for distribution to general unsecured creditors.

Derby and its group companies owed over £29m to HMRC. In addition, there was a £20,471,158 secured debt in favour of MSD holdings, secured over Pride Park Stadium. There is approximately £15m owed to other football and trade creditors, including in connection with the signing of Polish defender Krystian Bielik.

The Crown preference

Prior to the Enterprise Act 2002, Crown preference operated so that certain Crown debts such as PAYE, national insurance and VAT would be secondary preferential debts and paid in priority to other unsecured creditors.

> "The new Crown preference seems to have allowed HMRC to get their own back against the EFL."

After 2003, this preference was abolished. However, its partial reintroduction from 1 December 2020 coincided with the Covid-19 pandemic and related deferrals, time to pay arrangements, etc, not to mention the uncertainty surrounding Brexit, and the increased prescribed part reserved for unsecured creditors.

There is controversy as to how the re-introduction of Crown preference impacts football insolvencies in particular.

The prescribed part

The prescribed part was increased in 2020 from £600,000 to £800,000. This is calculated as 50% of the first £10,000 and 20% thereafter. The objective is that the increase in the prescribed part would generate increased return to unsecured creditors and so soften the blow, albeit reducing the return to floating charge holders in doing so. HMRC, as partially preferred creditor, however, will see far more of that prescribed part than the general body of unsecured creditors because they are paid in preference.

The importance of secured lending has increased, but the security coverage of floating charges remains questionable given the increased prescribed part carve-out. Given the usually high level of HMRC debt in football insolvencies, football will feel these changes deeply.

If Derby County were to be liquidated, to what extent would other, often independent, local businesses fall under as a result of the HMRC's £25m debt being paid in full while the return to unsecured creditors was measly?

The new Crown preference seems to have allowed HMRC to get their own back against the EFL. They have had grievances historically with the so-called football creditor rule and the chancellor has helped them equalise and pull ahead. But at what cost to other creditors?

The football creditor rule

The football creditor rule applies on a liquidation of a football club in the EFL. The rule provides that the EFL may prevent a club that enters an insolvency event playing again unless all 'football creditors' are paid. It provides football creditors with super-preferential status.

Football creditors include agents, players and other clubs. The rule is justified by its supporters on policy grounds: football clubs are a community of businesses that support and rely on smaller football-related businesses, and a collapsing club could cause the collapse of companies that other clubs rely on, triggering a domino effect.

Critics argue that important community creditors such as the St John Ambulance (themselves a creditor of Derby County) lose out while highly paid players may get 100 pence in the pound for their money.

In 2002, when Bradford City collapsed, 36 workers in the club shop were sacked, and St John Ambulance went unpaid, while Benito Carbone, Bradford's striker, who was paid £40,000 a week, was to be paid in full. Carbone later revealed that he gave up £3.2m: he did not want to be the player who killed Bradford City.

HMRC 2–1 football creditors

When Crystal Palace entered administration in 2010, football creditors were paid in full while unsecured creditors received just 1.95p in the pound. In Plymouth Argyle's administration in 2011, football creditors were paid in full. Unsecured creditors received 0.77 pence for every pound they were owed.

The rule was challenged in *Inland Revenue Commissioners* v. *The Wimbledon Football Club Ltd* [2005] and was upheld by the Court of Appeal on the basis that a payment to a football creditor was not an unfair preference, because it was a necessary step to secure the continuation of the business.

The rule was challenged again in *The Commissioners for HMRC* v. *The Football League Ltd and The Football Association Premier League Ltd* [2012]. The High Court rejected HMRC's contention that the rule breached the *pari passu* principle. They found that the rule was not a deliberate evasion of insolvency law. Whether the rule is a good one or not was not relevant.

While the rule has received the reluctant backing of the judiciary, the EFL has been encouraged to rethink the rule and perhaps limit its effect. However, with the reintroduction of Crown preference, it is hard to see how the EFL will consider any further limitations to be a fair compromise between football creditors and HMRC.

Who will buy?

The administrators' stated aim of saving Derby County's business as a going concern will rely on their ability to raise funds. Football clubs have limited capability to raise funds; the January transfer window is a key opportunity. At the time of writing, Derby County have not offloaded any players but they are in negotiations to sell Jason Knight for a reported £8m fee.

Bolton Wanderers was saved from possible liquidation in 2019. Like Bury and like Bolton, Derby have been asked by the EFL to confirm that they are able to complete the season. The primary goal of the administrators will therefore be a sale of the business, which is being delayed as a result of legal action being taken against Derby by other Championship and League 1 clubs Middlesbrough and Wycombe Wanderers.

Quantuma have not yet named a preferred bidder, but bidders are currently unwilling to buy the club while the claims from Middlesbrough and Wycombe are subsisting. The situation is so desperate that former owner Mel Morris has invited the two clubs to sue him personally in the High Court to allow a takeover.

EFL regulations

One particular point of regulatory controversy in the EFL's regulations is the *owners' and directors' test*. A banner unfurled by Crystal Palace fans when they were visited by Newcastle United shortly after Newcastle were taken over led to a policy investigation. The provocative banner sought to draw attention to the links between the Magpies' new owners and the Saudi regime, which human rights campaigners accuse of abuses against LGBTQ+ groups.

Fans are concerned that the primary interest of the regulators is ensuring that the buyers have the cash. However, other factors can have financial implications. Former Reading owner Anton Zingarevich was approved by the EFL in 2012 despite suggestions that his primary income stream was his father. Shortly after, Zingarevich left the UK in mysterious circumstances. When Reading's funding dried up, they struggled

“Unless the EFL rethink financial fair play, insolvencies will continue to occur – somewhat of an own goal.”

with a wage bill that caused financial difficulties from which they have not recovered.

Reading's brief stint in the Premier League brought in TV money and 'parachute payments' for clubs relegated to the Championship. However, a failure to control spending or achieve promotion since then has left the club unprofitable, which in turn led to a six point deduction. This has left the club struggling for survival in the Championship.

Pay to win

The EFL's regulatory regime punishes clubs who operate at a loss. Therefore, fines are linked to profitability. This is intended to prevent clubs running in an unsustainable manner. However, given the luck involved, this leads not to sustainable management, but to an all-or-nothing, high-risk approach.

Clubs who overspend but achieve promotion are rarely punished, thanks to the profits associated with the Premier League. Meanwhile, clubs who fail to achieve promotion are subject to fines. Reading is a key example of a club who spent to reach the Premier League and failed to achieve their goal, meaning that they are now in financial and regulatory trouble.

If the goal is to prevent teams spending disproportionate sums funded by investors seeking the rush of the gamble, the EFL's regulations should focus more on spending in comparison to the average expenditure of the clubs in that division, rather than the operating loss at the end of the season.

Derby fans argue they are being unfairly targeted by the EFL (which on 17 January 2022 was forced to clarify that 'the EFL has no vendetta against any of its member clubs'). The EFL will consider that they are within their rights to demand full repayment of the football creditors. Derby's financial problems may have been self-inflicted, but the EFL does not have clean hands; there has also been a failure of regulation.

Unless the EFL rethink financial fair play, insolvencies will continue to occur – somewhat of an own goal. ◻

REBECCA ANDREWS WALKER is a partner and insolvency practitioner at Penningtons Manches Cooper.

2022: the focus on regulation

R3's head of external affairs **James Jeffreys** provides an update on the work of the Press, Policy and Public Affairs Team.

The key policy issue for the Press, Policy and Public Affairs Team this year is the government's consultation into the future of insolvency regulation. Since the proposals for the new regulatory framework were announced in December, we've been working to ensure that the profession's voice is heard by those shaping the government's plans, and those reporting on them.

When this consultation was first announced before Christmas, we were quick to respond, highlighting the need for the new regulator to be truly independent in a statement that was covered by *The Times* and *City AM*. Since then, we've consulted with a number of our standing committees about the government's proposals and taken soundings about their initial concerns.

But it won't just be those committees that are involved in shaping our response. Throughout February and March, we'll be visiting every region and nation in the UK to consult with members on the proposals for the new regulatory framework, so we can understand your views, concerns and ideas on what the government is proposing.

These regional discussions, and the results of our member survey, will provide the foundation for our consultation response, in which we'll highlight how the government's proposals could be modified, or indeed overhauled, based on the feedback you provide.

The government has been clear that it is keen to engage with the profession and listen to its ideas on the future of the regulatory framework, so our discussions with them will continue both before and after the consultation has closed – not to mention throughout the proposals' eventual journey through parliament.

> **"Throughout February and March, we'll be visiting every region and nation in the UK to consult with members on the proposals for the new regulatory framework."**

R3 in debate and dispatch

A key area of policy for the team over the last year has been The Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Act.

The Act went through the final stage of its legislative journey before gaining Royal Assent in December, with its report stage debate in the House of Lords taking place on 1 December.

Ahead of this debate, we engaged extensively with a number of peers – a process which included a virtual briefing to talk through in detail the profession's concerns with the legislation. During the debate, Lord Leigh thanked R3 for our help on the bill and cited evidence we had provided to him and to Lord Fox on repeat frauds by directors and members' reports on serious cases of fraud going unreported by the Insolvency Service.

When responding to these points, the minister, Lord Callanan, paid 'tribute to the excellent work of insolvency practitioners, who provide the conduct returns to the Insolvency Service, and who in many cases continue to assist with the investigative effort beyond that initial assessment'.

Now the Act has come into force, we'll continue to ensure the Insolvency Service and the government are aware of the profession's view of how it is helping efforts to tackle director misconduct.

Tackling misperceptions around fees

As this article was being written, the team was putting the final touches to a paper addressing the most common misconceptions about insolvency fees. This paper will explain how insolvency fees are charged, regulated and approved, and crucially how the headline-grabbing amount charged more often than not bears little resemblance to the amount IPs will actually be paid at the end of the day.

Once published, the paper will be made available to R3 members, sent to parliamentarians, journalists and stakeholders to provide context around the issue of IP fees, and used in R3's ongoing digital, public affairs and media work.

Addressing D&I issues

Work continues on our joint project with the Insolvency Service to identify and address issues around diversity and inclusion within the insolvency and restructuring profession.

Just before Christmas, we published our action plan for 2022, which outlines the key priorities and projects for the steering group over the next 12 months, and we've begun the process of recruiting our initial group of 'champions' – people who will support the group's work, share best practice and take part in outreach work and campaigns.

> **"Lord Callanan, paid 'tribute to the excellent work of insolvency practitioners, who provide the conduct returns to the Insolvency Service, and who in many cases continue to assist with the investigative effort beyond that initial assessment'."**

Shaping the headlines

Our commentary on the monthly and quarterly insolvency statistics continues to be popular. R3's views on the trends and the drivers of corporate and personal insolvencies have featured in a range of international, national, regional and specialist media outlets over the last three months.

In addition to our coverage on the launch of the regulation consultation, we also secured the publication of a letter from Nicky Fisher, R3's deputy vice-president in the *Financial Times*, in response to an article it published on insolvency regulation.

We've also seen healthy coverage in regional and national media outlets of the appointments of R3's new regional and national chairs, and briefed journalists from *Accountancy Age*, *The Independent*, *AccountingWeb* and the *Daily Telegraph* on a range of policy issues and insolvency processes.

JAMES JEFFREYS is head of external affairs at R3.

Introduction to Insolvency Certification Series

Association of Business Recovery Professionals R3
Rescue Recovery Renewal

This 21-chapter eLearning series is aimed at junior members of staff within the insolvency and legal professions. This series will provide an introduction to all aspects of insolvency and related legislation.

This course will equip your staff with practical knowledge and an understanding of all insolvency procedures from how to identify when a company or individual is in distress, to the options available for dealing with financial distress, and the legislative guidance which governs the work of an insolvency practitioner. The course is delivered in a format which is accessible to all and at the attendee's own pace.

On completion of this certification your staff will be R3 recognised as having a Principles level of understanding in the Insolvency profession.

BOOK NOW ON OUR WEBSITE!

ALL R3 MEMBERS
£1000
+VAT (WHOLE COURSE)

NON-MEMBERS
£1500
+VAT (WHOLE COURSE)

16 CPD HOURS

WWW.R3TRAINING.CO.UK

Restructuring Boot Camp Series

18 CPD HOURS

7 LIVE SESSIONS FROM 31 MARCH - 12 MAY

Over seven weekly live sessions, this Boot Camp series will explore specialist topics within the restructuring profession and is perfect for intermediate-level professionals with around five years of experience in restructuring.

The Boot Camp series will delve into topical subjects and will be delivered by experts within the profession, to keep professionals prepared and experienced for challenging and demanding responsibilities. Each session will consist of best practice training, a case study, and an open discussion.

ALL R3 MEMBERS
£350
+VAT (WHOLE COURSE)

NON-MEMBERS
£450
+VAT (WHOLE COURSE)

BOOK FIVE OR MORE STAFF ON THE ABOVE COURSES TO GET A DISCOUNTED RATE, EMAIL US AT TRAINING@R3.ORG.UK TO FIND OUT MORE.

R3 contacts

Executive

Caroline Sumner Chief Executive Officer
T 020 7566 4207
E caroline.sumner@r3.org.uk

Technical

Ben Luxford Head of Technical
T 020 7566 4218
E ben.luxford@r3.org.uk

Training Academy

Robert Beer Head of Training
T 020 7566 4215
E robert.beer@r3.org.uk

Press, Policy & Public Affairs

James Jeffreys Head of External Affairs
T 020 7566 4220
E james.jeffreys@r3.org.uk

Stuart McBride Senior Communications Manager
T 020 7566 4214
E stuart.mcbride@r3.org.uk

Giorgio Buttironi Public Affairs Manager
T 020 7566 4227
E giorgio.buttironi@r3.org.uk

Pim Ungphakorn Senior Public Affairs and Policy Officer
T 020 7566 4202
E pim.ungphakorn@r3.org.uk

Amelia Franklin Communications Officer
T 020 7566 4203
E amelia.franklin@r3.org.uk

Membership

Gareth Fitzgerald Head of Commercial
T 07917 829049
E gareth.fitzgerald@r3.org.uk

Freddie Webster Member Engagement Executive
T 020 7566 4230
E freddie.webster@r3.org.uk

Shemin Varma Membership Officer
T 020 7566 4211
E shemin.varma@r3.org.uk

Events

Michael Smith Senior Events Manager
T 020 7566 4210
E michael.smith@r3.org.uk

Mercedes Lopez Events Organiser
T 020 7566 4236
E mercedes.lopez@r3.org.uk

Laura Piu Events Organiser
T 020 7566 4212
E laura.piu@r3.org.uk

Marketing

Neill Howard Marketing Manager
T 020 7566 4219
E neill.howard@r3.org.uk

Dea Manaj Marketing Executive
T 020 7566 4209
E dea.manaj@r3.org.uk

Office

Harvinder Kular Head of Finance & Operations
T 020 7566 4213
E harvinder.kular@r3.org.uk

Zuzana Kyselova Accounts Assistant
T 020 7566 4226
E zuzana.kyselova@r3.org.uk

Agnes Nagyistok Operations Manager
T 020 7566 4228
E agnes.nagyistok@r3.org.uk

R3 Association of Business Recovery Professionals

3rd Floor (East),
Clerkenwell House,
67 Clerkenwell Road,
London EC1R 5BL
E association@r3.org.uk
T 020 7566 4200
www.r3.org.uk

Advertisers' index

IBC: inside back cover
IFC: inside front cover
OBC: outside back cover

An interview with… David Bryan, president of TMA Europe

The president of the Turnaround Management Association Europe talks about working with chapters around the world and the possible future for turnaround and restructuring post-2022.

David Bryan biography

- David Bryan qualified as a chartered accountant but almost immediately left the profession to work in industry. Having trained up at a regional firm, he leaped to the opposite end of the scale to join United Technologies, a huge American multinational company where he attained his first finance director job at the age of 28.

- He went on to study an MBA at Cranfield School of Management before joining a fledgling public limited company called The Mayflower Corporation. While David was there, the company went from revenues of £13m to £700m in just ten years. For much of his time there he was the founding member of the acquisitions and post-acquisition integration team often dealing with buying assets from businesses in insolvency. It was here that he started to become familiar with the processes behind insolvency, turnaround and restructuring. He also spent several years as CFO of Mayflower's US operations, living with his family in America. After the ten years of breakneck growth, Mayflower found itself on a three-year decline into administration, allowing David to experience the process from the inside. He would later join the European arm of US turnaround firm Glass and Associates, which put him in good stead to become one of the founding members of turnaround firm BM&T, where he is currently CEO.

Q Could you tell us a little bit about TMA Europe?

A The TMA started in the US over 30 years ago in Charlotte, North Carolina, but it is now headquartered in Chicago and has around 10,000 members worldwide. There are over 50 chapters worldwide and the next biggest region after North America is Europe, with one of the largest chapters in the world being Australia. There are new chapters forming in Africa, Latin America and the Far East.

It's different from what I would think of as the narrower trade association-type organisations. The TMA always set out to be a broad church to include anybody who's involved in turnaround or restructuring work, so we've got members who are turnaround practitioners, IPs or insolvency administrators in Europe, bankers, private equity capital providers, auctioneers, valuers and more. It's a different kind of organisation as a result and the events are probably a bit less technical.

TMA Europe is not a chapter, it has no members and is more an umbrella for the different chapters to help organise pan-European events, facilitate chapter connectivity and help new chapters form. We have 13 chapters at present in Europe. We organise a big annual European Conference, which will take place in Madrid in June this year and moves around the major European cities. We also have an East European event and other smaller ones.

> "Europe is generally drifting towards the US model and we are seeing more turnarounds and restructurings rather than insolvencies where possible."

I've been president of TMA Europe for over two and a half years and I was treasurer before that. We have not been able to host events in person for the last couple of years, which is frustrating, but it has been interesting to run some alternative activities virtually. We have held our main conference virtually and have facilitated 'power hours', where members of different chapters in Europe and in North America get together and, after a brief introduction, are randomly put into a virtual room for 20 minutes to talk, three times over. It has been fantastic for getting chapter members who would not normally talk to each other to interact.

Q It's interesting to talk about a turnaround association that started in the US, when there appears to be a shift towards a more US-style approach to turnaround culture in Europe. Does it feel like things are heading that way to you?

A I think that is what is happening – Europe is generally drifting towards the US model and we are seeing more turnarounds and restructurings rather than insolvencies where possible. It is happening more with the legal side as the EU restructuring directive is pushing people in that direction. It's interesting to draw on the US experience at times as it is an experienced actor in the space. The major downside of the Chapter 11 process is that it is very lawyer heavy and has become so expensive that it really is only for the larger companies. However, the new Subchapter 5 [to Chapter 11], which I'm not sure how many people over this side of the world are aware of, is an interesting addition. It is designed for small businesses to try to come up with a restructuring plan – even an imperfect one – quickly, within three months. I suspect the UK may move faster than continental Europe in the direction of the US, but some of the more nimble countries may be coming up with their own processes as well. There is talk of France and Italy putting something on the statute book around business rescue and smaller business rescue too. This is why organisations such as the TMA are of such value. When you've got something with an international element, you know who you can pick up the phone to. I think we'd all prefer a warm recommendation to a cold Google search.

Q And that recommendation is easier with the TMA?

A Just to go back to that idea of picking up the phone and meeting other professionals, we have something called TMA connect where you can enter your background details and professional interests and it tries to match you up with people with similar needs and interests. You get a one-to-one introduction via the system. We're looking at making the algorithm a bit more supportive of Europe and expanding its use around the European membership base.

Q What else does the association do in Europe?

A TMA has long backed a US-originated qualification, the certified turnaround professional qualification (CTP). It functions in Europe as the European Association of Certified Turnaround Professionals (EACTP). This was formed a few years back, but has taken a while to get everything in place with an exam structure and qualification. It's challenging to get a framework in place that works throughout Europe. We have our first students going through at the moment, with the exam side of the syllabus handled by Leiden University in the Netherlands.

We also have a junior qualification called certified turnaround associate (CTA), which is aimed at the younger generation wanting to get into the profession. It gives them a grounding in turnaround and restructuring and brings them into the TMA to hopefully meet people and get their careers going.

> When you've got something with an international element, you know who you can pick up the phone to. I think we'd all prefer a warm recommendation to a cold Google search.

Q The EACTP sounds interesting. Is there a scenario where this might be opted for over something like the JIEB or other 'traditional' insolvency exams or is this a completely different skills set?

A It's more for those who want to be involved in consensual turnaround or restructuring. Insolvency is a fairly surgical tool to achieve something through a well-defined process, but this is much broader. I don't think it has to be either/or, but there's certainly a gap for those who want to know about restructuring but don't necessarily want to be an IP or its equivalent in other countries.

Q How has turnaround work been affected since the UK's withdrawal from the EU and has the dynamic changed between colleagues in different countries?

A I haven't detected a lot of impact, but then, like all of us, I haven't really had the opportunity to meet people in person to have that conversation for a long time.

We all know there's quite a bit of jurisdictional competition particularly thanks to some new, attractive Dutch laws. For some, it may be that the Netherlands is a more interesting alternative to going to London. The overall impression I get is that London is still going to be very strong for turnaround and restructuring work because its legal system is just so well tried and tested. The UK and Germany are the two biggest chapters of the TMA in Europe, and some in the German chapter have told me: 'Our new laws will probably work to some extent here in Germany, but I don't think they'll be attractive enough to pull work here rather than go to London.' Every country is implementing the EU directive in its own way, even the UK despite Brexit, but it's not just the laws that make the difference – it's how well they are implemented and whether the judiciary is up to it. It's going to be very interesting to see how some of these things work out.

Q It has been a rough couple of years and the spotlight has been solidly pointed at restructuring and turnaround professionals. What have been the biggest challenges for your members over the last two years and what new ones are on the horizon?

A The whole profession has adapted to working remotely. If you've worked on a turnaround over the last couple of years, you may never have seen the company. That would have been unthinkable a couple of years back. I think that shows what phenomenally adaptable creatures human beings are.

Most people I have talked to say the same thing: every country has had government support of one sort or another, which has suppressed the insolvency numbers. We are going to see a busy period in future as those measures lift but we haven't seen a lot of restructuring and turnaround work so far. We have seen more transactional work – distressed assets being bought – banks will sell out of a loan quite quickly at the first signs of distress. The private equity firms are awash with cash, which has led to huge amounts of transactional work despite Covid-19.

We're all waiting to see what the next few months bring. There is a potential question about whether we're going to be able to cope. I recall an article almost two years ago stating there are only some 1,250 IPs taking appointments in the UK and quoting an estimate that no more than 10%–20% had the skills set and experience to undertake a turnaround. I think most of Europe is similar. It could get quite difficult in future.

A lot of the new legislation in the UK and Europe is also only really impacting very large companies. They have the size and scale that they can afford millions of pounds in advisory fees for a scheme or restructuring plan. Your average business cannot afford that. Somewhere down the line we are going to see a shift towards something for mid-sized firms – essentially advisory work that makes it quick to come up with a plan and get it agreed by creditors and the courts. If it's done right, there should be minimal risk to the creditors. I don't know how it will happen, but if we do see that level of distress coming through it's going to have to happen.

> Somewhere down the line we are going to see a shift towards something for mid-sized firms – essentially advisory work that makes it quick to come up with a plan and get it agreed by creditors and the courts.

Q What do you get up to when you're not rescuing businesses?

A My main sport these days is clay pigeon shooting. I'm a good club-level shooter and have been going for 30-plus years. I'm also a big rugby fan and enjoy motorsport and fast cars.

auctions@cliveemson.co.uk
cliveemson.co.uk
0345 8500333

Clive Emson
LAND AND PROPERTY AUCTIONEERS

EXPERIENCE an Exciting Way to Sell (and Buy) Land & Property

Upcoming Auctions

23 March

Catalogue out: Friday 4 March

5 May

Closing Date for entries: Monday 11 April

16 June

Closing Date for entries: Tuesday 24 May

Inviting Entries

We are continually inviting entries for our auctions which are scheduled throughout the year.

We are only an email, call, or click away

- **auctions@cliveemson.co.uk**
- **cliveemson.co.uk**
- **0345 8500333**

If you would like to arrange a no obligation auction appraisal please do not hesitate to contact us or complete our online form at **www.cliveemson.co.uk/selling/**

Suitable Entries Include

- **Projects**
  Building plots, development sites and conversions.
- **Vacant Premises**
  Houses, flats, bungalows and cottages for improvement, renovation restoration, refurbishment and/or repair (inc. fire damaged premises).
- **Investments**
  Tenanted properties (both commercial and residential).
- **Unique Properties**
  Martello towers, nuclear bunkers, car parking spaces, churches and more.
- **Land**
  Farms and smallholdings, woodland, grazing and leisure land (including ponds, rivers and fishing lakes).