Spring 2020
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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

I am delighted and honoured to have been asked to fill the very large shoes of Chris Laughton as editor of *RECOVERY*. In future editorials, I will talk more about the publication generally and the specific content of each edition. However, with apologies to the contributors to this edition, it is only fitting in this editorial to concentrate on Chris's contribution to the publication.

Chris has been editor for 19 years and has done a great job in keeping a hard copy publication relevant in an increasingly digital age. Back in 2000/2001, we had the dot com bubble burst, as the ecommerce industry found its feet, and the tragic events of 9/11, which both had their effects on the economy and the work that we do.

Today, we have Brexit and the coronavirus causing their own dampening effects. The reasons change, but the issues do not. Markets oscillate and our skills evolve, but the fundamental remains, how can we best help businesses and individuals in financial distress and ensure the best recovery for creditors through realisations made and claims pursued?

Apt then that, as Chris's tenure as editor comes to an end, after such a sustained period of success, this edition should look at the future of the profession. Leading the vanguard on that issue is an article from Chris himself looking at where we are now and where we might be going forward.

I hope you enjoy this edition, but whether you do or not, please let us know. When I joined the editorial board a couple of years ago, I naively asked what readers' feedback was on the publication. Everyone looked at me and explained that feedback is few and far between. This is your publication so let us know what you want to see in it and what the themes should be. We are always looking for contributions, so if you want to write about anything, let us know. One condition: make it interesting! The email address is: **recovery@r3.org.uk** or **Neil.Smyth@mills-reeve.com**.

Finally, I am sure you will join me in offering immense gratitude to Chris for all his efforts and hard work over the past 19 years. He has offered me his continued counsel and I will definitely be taking him up on that kind offer.

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

Regulars

Legal update

The future of the profession

Features

Dates for your diary

R3 matters

Advertising features

RECOVERY

Editor
Neil Smyth, Mills & Reeve LLP

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

Advertising Jamie Kennedy
Tel: 01491 828900, jamie.kennedy@groupgti.com

Associate director Brendan McGrath

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, 8th Floor, 120 Aldersgate Street, London EC1A 4JQ. Tel: 020 7566 4200, association@r3.org.uk, www.r3.org.uk

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

Published on behalf of R3 by
GTI Media, The Fountain Building, Howbery Park, Benson Lane, Wallingford, Oxon OX10 8BA
www.groupgti.com, Tel: 01491 826262

President's column

Duncan Swift brings his term to a close, reflecting on the issues he has tackled and how he has changed journalists' minds about the work of the profession.

This time last year, I was preparing to take the presidential baton from Stuart Frith. Twelve months later, it's my turn to pass it on. I would like to thank other members of the executive: Colin, Christina, Stuart and Emma; and the council, for their invaluable support throughout my presidential year.

When I took over the presidency, there were three areas I wanted to focus on: the launch and implementation of R3's strategic plan, raising standards in the profession and related agencies, and tackling late payment.

Launching the strategic plan

A month into my presidential term, I stood onstage at R3's 2019 Annual Conference and launched our strategic plan, our roadmap to 2023 and beyond, which was the result of two years of consultations, discussions and debates with members and stakeholders, and sets the foundations for R3's next 30 years.

I've subsequently presented the plan and the progress we have made on our initial objectives at regional seminars, and I expect to have completed visits to all of R3's regions by the time this column is published.

Representing the profession and its expertise

As I've said in past *RECOVERY* columns, representing the profession's work has been a key part of my presidential duties. And one key issue I've been involved with has been the government's plans to make HMRC a preferential creditor in insolvencies.

Alongside meeting MPs, peers and civil servants, I've chaired a stakeholder roundtable event and briefed national journalists about the ramifications this policy proposal will have for businesses, jobs and the economy. R3 has also led the wider opposition to the policy, by coordinating a stakeholder letter, signed by ten business bodies and insolvency experts, calling on the chancellor to rethink this measure.

While the government has listened to R3 and has dropped plans to include tax penalties within HMRC's preferential claim, we continue to press the case with the new chancellor and others. March's budget will reveal whether we have secured any other changes.

Scoping standards for the future

I've also been involved in R3's work on the long-awaited review of the regulatory framework for the insolvency profession. The mood from Westminster when this was announced was a listening one, with the government clear it wants to hear from stakeholders before taking a decision.

We followed its example and ran a survey and members' workshops in London and Manchester over the summer. Thank you again to all who responded – the facts, stats and anecdotes you provided enabled us to give the government valuable evidence and input that will help us further improve the effective framework we already have.

> "It was a huge source of pride for me, therefore, to be involved in working with the Small Business Commissioner to explore and develop solutions to the issue of late payments."

Tackling late payment

This was one issue I was very keen to get involved with when I became president, having witnessed first-hand the impact of late payment particularly in the food production and processing sector.

It was a huge source of pride for me, therefore, to be involved in working with the Small Business Commissioner to explore and develop solutions to the issue. I've met with the Commissioner, worked to provide support in the form of the profession's perspective on the issue and its impacts, and attended a workshop hosted by the Shadow Business Minister, Bill Esterson MP, to explore how this issue can be tackled and, hopefully, eradicated.

I was pleased when it was announced that CICM chief executive Phillip King would take over the Commissioner's role on an interim basis after Paul Uppal stepped down in October. Phillip has worked closely with R3 on payment credit issues over the years, and I look forward to this continuing.

Hitting the headlines

As R3 president, one of the key tasks is to be the organisation's primary spokesperson on issues affecting and involving the profession.

Some opportunities come at short notice – which is how I found myself talking to (among others) *The Times* and BBC News 24 about the Thomas Cook administration, *BBC Radio Four* about venture capitalists and British Steel, and the *FT* about retail CVAs.

I've seen first-hand how journalists' perceptions of our profession can change once they understand more about the nuances of the processes we oversee, and why we take the decisions and actions we do. More than once I've seen an unsympathetic journalist write a balanced piece after we've discussed a particular process or aspect of policy – underlining the importance of R3's work as the voice of the insolvency and restructuring profession.

Change at the top

Many of you will now know that Emma Lovell, R3's CEO, is leaving us in April to take up a new role as chief executive of the Lending Standards Board. I've worked with Emma for several years as a committee member, chair and ExCo member, and her contribution to the association throughout that time has been significant.

As CEO, Emma has been instrumental in overseeing the development of our strategic plan and the first year of its implementation. The work Emma has done developing it and overseeing its initial delivery will bear fruit long after her departure.

To replace Emma, I'm pleased to announce we have appointed Liz Bingham OBE as R3's new chief executive. Liz is a former R3 president (2013–14) and joins us with 30 years' experience in insolvency and restructuring so is well known to you all. I'm really excited about where Liz and Colin Haig, my successor as president, will take R3 from the end of April.

DUNCAN SWIFT is president of R3 and a partner at Moore UK.

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The editor's opinion

After nearly two decades of editing *RECOVERY* **Chris Laughton** offers his thoughts on the forces both within and beyond the profession's control.

On discussing with the *RECOVERY* editorial board that I proposed to step down as editor after 19 years, I was invited to share some opinions with the readership. It has been a privilege for me to edit this journal and I have learned a great deal from its contributors. Neil Smyth, my successor, and his team will maintain the tradition of informing and inspiring you as *RECOVERY* continues to develop, serving R3 members and the wider restructuring and insolvency community.

> In my opinion, many in our profession do communicate well, despite the legislative and regulatory hurdles we are obliged to navigate.

Communication

Communication is an important part of the life of a restructuring and insolvency professional. The growing prevalence of this opinion is evidenced by the profession's engagement with its stakeholders. From R3's Press, Policy & Public Affairs team engaging with influencers, lawmakers and creditor groups to individual practitioners explaining what they are doing and why, we all help to ensure that we are listened to, understood and engaged with.

Is great communication universal within the profession? The lamentable elimination of creditors' meetings (in the main) was a legislative blunder that served only to disengage creditors and hinder the insolvency process. Human interaction is most effective face to face. Virtual meetings and deemed consent are useful tools that should be used when it's in creditors' interests to do so. However, the detailed regulations that surround them have created unnecessary explanatory burdens for all users of our insolvency regime.

Some practitioners communicate poorly too. Passing over those whose use of English is not what it might be, how many of us have seen cases where the IP ignored SIP 16 and didn't report to creditors accordingly? How often has para 52(1) been invoked improperly, depriving creditors of a chance to modify or reject an administrator's proposals? And how often are conflicts of interest disclosed to the court or creditors prior to appointment? These things may not happen every day, but they occur in all sizes of practice and they do the rest of us a disservice.

In my opinion, many in our profession do communicate well, despite the legislative and regulatory hurdles we are obliged to navigate. I hope the quality and content of the writing in *RECOVERY* inspires more of us to communicate even better.

Regulation

One factor that influenced my decision to step down as editor is that from 1 April 2020 my main contribution to the profession outside the day job will be to represent the ICAEW on the Joint Insolvency Committee. You will know that the JIC is responsible for developing and revising the Insolvency Code of Ethics, SIPs and Insolvency Guidance Papers.

In my opinion the insolvency regime would be better served by having a single regulator, but that's neither where we are nor where we may be headed. Nevertheless, over 50% of R3 members responding to last year's survey on the future of insolvency regulation support either a single independent regulator or a single monitoring, complaints and disciplinary process. Regulation of practices as well as individual IPs would strengthen the regulatory framework and, of course, the Official Receiver should be subject to the same regulatory system. Whatever regulatory framework we have, it is vital that the government is not involved in the direct regulation of IPs: it would be a gross conflict of interests.

> It is fundamental that there should not be a tick-box or compliance driven approach to regulation.

Consistency of regulation is reported by R3 to be a concern for members, but this should not be at the expense of qualitative monitoring or a risk-based approach. It is fundamental that there should not be a tick-box or compliance driven approach to regulation. Our regulation needs to improve to remove the 'bad apples' from the profession and to do more to eliminate the occasional ignoring of SIP 16, or failure to comply with the Insolvency Code of Ethics and other such shortcomings.

The Insolvency Code of Ethics has been revised following a consultation exercise. Its publication is an ideal opportunity for practitioners and their staff to remind themselves of its provisions. Compliance with the code is mandatory and it sets out a number of requirements for consideration throughout an insolvency assignment, including the maintenance of written contemporaneous records sufficient to enable a reasonable and informed third party to reach a view on the appropriateness of the IP's actions (why are you deciding to do what you're about to do?). The revised Code of Ethics applies from May 2020.

> "Your existing European cross-border case may not be recognised in the same way (or possibly at all) by creditors, debtors, courts or other stakeholders from outside the EU and the UK."

Conflicts of interest merit particular attention. They are sometimes too readily dismissed. Important points made in the Code of Ethics are that the perception of others may differ from that of the IP; this may be sufficient to make a relationship significant; a significant relationship is one where a threat to the fundamental principles (usually the principle of objectivity) cannot be eliminated or reduced to an acceptable level; and an IP should not take the insolvency appointment in such circumstances. The judge in *Re Comet* [2018] EWHC 1378 (Ch) made clear that even a perceived conflict of interest makes it important that an IP's decisions are made after consideration of all the relevant material and after all proper enquiries have been made, so that it can be seen that decisions have been properly made and fall within the range of decisions that a reasonable IP could make. Failing to take all relevant (and no irrelevant) matters into account in their decision-making would constitute a breach of an IP's fiduciary duty (see *Brewer v. Iqbal* [2019] EWHC 182 (Ch), where I was the expert witness on behalf of the successful claimant liquidators).

European cross-border insolvency and Brexit

In this jurisdiction, the first of these subjects is inseparable from the second for the time being. Since 31 January 2020 and during the transition period the UK and the EU continue to treat each other as if the UK were a member state, but without the UK being involved in the EU's political procedures. For our purposes, the European Insolvency Regulation continues to apply. A point of detail to be aware of is that this treatment may not be recognised by third countries, so your existing European cross-border case may not be recognised in the same way (or possibly at all) by creditors, debtors, courts or other stakeholders from outside the EU and the UK. Although the EU and the UK have asked other countries to act as if the UK continued to be a member state during the transition period, there is no requirement for them to do so.

What next? Your guess is as good as mine. At the time of writing the prime minister and his advisers clearly want us to believe that he will be going for the Australia option (ie 'no deal') if the EU doesn't bow to his demands by June. Will the government really choose to do that much harm? Given the parliamentary majority and the absence of meaningful opposition, it could. But most people would probably prefer the government to concentrate on the coronavirus and its consequences, both social and economic, for the next few months. From 1 January 2021 we could be closely aligned by treaty with the EU, potentially including continuing participation in the European Insolvency Regulation; we could be a third country with no treaty with the EU, which would mean relying on the Cross-Border Insolvency Regulations (the UNCITRAL Model Law), s426 IA 86 and any foreign equivalents and the EU 27's individual provisions for cross-border insolvency with non-member states; or we could be somewhere between those two extremes.

And what about the economic prospects? All the indications are that there will be at least a short term hit from Brexit, but the harder the Brexit, the harder the hit. As markets tumble at the end of February, the governor of the Bank of England is saying that there will be a hit of uncertain magnitude and duration from the coronavirus. As a countercyclical industry, we should find ourselves busier in the coming months.

Restructuring and insolvency

In recent years restructuring (in its broadest sense) has become increasingly important in relation to corporate insolvency. Lenders have become more reluctant to push for insolvency appointments as 'extend and delay', aided by historically low interest rates, has become a popular strategy. Some businesses continue to survive, but only just, adding no real value to the economy; but on the other hand, the inevitable value-hit from a formal insolvency procedure is avoided. If only stressed and distressed businesses sought advice earlier! There is still plenty of money available for good prospects, whether they need work to create profitability or simply relief from a debt burden.

A consequence of this development has been reskilling in the profession. Some, as in my team, are becoming more involved in M&A transactions that might become accelerated, or in identifying and introducing alternative sources of funding. Others have sought to build operational turnaround capabilities.

In a different sphere, however, contentious insolvency has been buoyant, not least because of the enthusiasm behind the growth of litigation funding, especially insolvency-focused litigation funding. Much has been achieved in the last ten years and most IPs are now well used to the mantra that with any claim you should compare funding it yourself or with CFAs/DBAs, creditor funding and third-party funding; and you should compare those routes to recovery with assignment to stakeholders, third parties or the respondent. Some of us have acquired the skills to manage such claims routinely and successfully.

> "As a profession we have a huge amount to offer, using our skills and experience to preserve and realise value."

Trading administrations are now few and far between. Pre-packs are commonplace, although unloved by many outside the industry (please communicate clearly what you're doing and why it's best for the creditors as a whole). I think they're a useful tool, but one that it's important to use properly.

As a profession we have a huge amount to offer, using our skills and experience to preserve and realise value. We can maximise those benefits through working together to encourage our legislators to enhance the legal and regulatory framework within which we operate. □

CHRIS LAUGHTON is a partner at Mercer & Hole and is the former editor of *RECOVERY*.

R3 ANNUAL CONFERENCE

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You're invited to join us for three days of unrivalled and cutting edge technical content, thought leadership and networking.

With over 200 delegates, the R3 Annual Conference is the number one forum for debate and networking in the insolvency, restructuring and turnaround profession.

The conference explores the subjects most relevant to the insolvency and restructuring profession today, providing insights into these key topics through panel discussions, keynote speakers and opportunities for discussion with other delegates.

You don't want to miss out on our key networking opportunity at this year's conference. We have the impressive 'Queen of the Thames'; the largest boat on the Upper Thames for the evening of Wednesday 13th May and as an exclusive early bird offer, the first 150* delegates to book a ticket for the R3 Annual Conference will receive a complimentary River Cruise ticket!

Alternatively, for those who do not join us on the River Cruise, R3 will have a Welcome Dinner at De Vere Beaumont Estate.

Throughout the conference, there will be numerous other networking opportunities such as a Welcome Drinks Reception on Wednesday 13th, plus a Drinks Reception and Gala Dinner on Thursday 14th, and morning Power Jogs with the VP.

We are proud to support Aspire at the R3 Annual Conference. They are a charity that provides practical help to people who have been paralysed by Spinal Cord Injury, supporting them from injury to independence.

If you'd like to support them, join the 20th Anniversary Aspire Sports Quiz Dinner at Lords on 30th April (aspire.org.uk for more info) otherwise we'll have opportunities for donation at the conference!

VISIT WWW.R3.ORG.UK TO BOOK!

The first 150* delegates to purchase a conference ticket will receive a complimentary ticket to join us on a River Cruise on Wednesday 13th May - *BOOK NOW!*

*There are only 150 spaces on the river cruise and this is offered as a first-in, first-served basis. The River Cruise is complimentary and can only be booked in conjunction with a Annual Conference or a Social Event only ticket. Alternatively delegates will be able to enjoy a dinner at the Beaumont Estate, courtesy of R3 (drinks not included).

Conference Packages

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^This enables you to bring your partner or colleague to the social events only and can only be purchased in conjunction with a full conference ticket.

See the R3 website for full details!

Conference Programme

R3 reserves the right to change the programme should circumstances dictate

Wednesday 13 May

17:30-18:30	**Welcome Drinks**
18:30-20:30	**Boat Trip or Beaumont Estate Welcome Dinner**

Thursday 14 May

07:30-08:30	**Power Jog with the VP**
09:30-09:40	**President's Opening** **Colin Haig,** R3 President
09:40-09:50	**Main Sponsor: CAPA**
09:50-10:30	**Counselling a Board in Tricky Situations** **Giles Boothman,** Partner, Global Practice Head Restructuring & Special Situations, Ashurst **Michael O'Donnell,** Partner, Ebbtide Partners
10:30-10:40	**Exhibitor Sponsors: 60 Seconds**
10:40-10:50	**R3: What We Are Doing For You And Why?**
10:50-11:20	**Coffee Break**
11:20-12:00	**Breakout Session 1** Attend A B or C
Breakout A	**Sector Focus: Education** **Matthew Atkinson,** Director, Department of Education **Matthew Tait,** Partner, BDO LLP
Breakout B	**Sector Focus: Automotive** **Mark Orton,** Partner, KPMG **Lee Swinerd,** Director, KPMG
Breakout C	**Sector Focus: Social Care** **Peter Holton,** Head of Market Oversight, CQC
12:00-12:05	**Room Changeover Time**
12:05-12:45	**Breakout Session 2** Attend A B or C
Breakout A	**Mental Health and Vunerablity - What Does It Mean To You?** **Facilitator: Christina Fitzgerald,** Partner, Moon Beever **Frances Coulson,** Managing Partner, Moon Beever **Lorna Feeney,** Mental Health Senior Risk Manager, Marsh **Mark Sands,** Partner, Quantuma
Breakout B	**Insolvency and Cyber Security** **Jim Wheeler,** CEO, ReSolve Cyber
Breakout C	**Pensions Issues for Stressed & Distressed Employers** **Malcolm Weir,** Director of Restructuring & Insolvency, Pension Protection Fund
12:45-13:45	**Networking Lunch**
13:45-13:50	**Vice President Open** **Christina Fitzgerald,** R3 Vice President
13:50-14:20	**A Word from The Insolvency Service** **Dean Beale,** Chief Executive, The Insolvency Service (newly appointed)
14:20-14:30	**Sponsor: Marsh**
14:30-15:00	**Finding the Balance of Diversity, Inclusion and Well-Being in the Workplace – Achieving Effective Leadership and Cultural Change** **Liz Bingham OBE**, R3 CEO **Julie Hertzberg,** Managing Director, Alvarez & Marsal and INSOL International President
15:00-15.10	**Litigation Funding War Stories** **Steven Cooklin,** Chief Executive, Manolete Partners plc
15:10-15:40	**Coffee Break**
15:40-16:10	**Talking Heads – R3 Voices for the Next 30 Years** **Facilitator: Tim Cooper,** Restructuring Partner, Addleshaw Goddard LLP **Kirsten Fleming,** Associate Solicitor, Addleshaw Goddard LLP **Kirsty Low,** Manager, RSM Restructuring Advisory LLP **Jamie McIlvride,** Restructuring and Debt Advisory Administrator, French Duncan LLP
16:10-16:50	**Morality of Pre-Packs?** **Tony Groom,** Executive, K2 Business Partners **Stephen Hunt,** Partner, Griffins
16:50-17:20	**The ABL Landscape** **Facilitator: Cathryn Williams,** Partner, Crowell & Moring **Paul Beveridge,** Managing Director, PNC **Mike Deacon,** Chair, NACFB
17:20-17:35	**Aspire – Supporting People With Spinal Injuries** **Brian Carlin,** Chief Executive, Aspire & Honorary Associate Professor, UCL
17:35-17:40	**Wrap-Up Day 1 of Conference**
18:30-19:30	**Drinks Reception**
19:30 - Midnight	**Gala Dinner**

"An excellent mix of relevant, well delivered presentations. Good networking and dinners."

- 2019 Annual Conference

Friday 15 May

07:30-08:30	**Power Jog with the VP**
10:00-10:10	**Deputy Vice President's Opening**
10:10-10:50	**Reach for the Skies** **Mandy Hickson,** Motivational Speaker, Former Fast Jet Pilot
10:50-11:00	**Sponsor: IRS**
11:00-11:45	**Insights from the Judiciary** **Facilitator: Mark Shaw,** Head of Business Restructuring, BDO LLP *Judges Panel to be confirmed*
11:45-12:15	**Coffee Break**
12:15-13:00	**Restructuring from the UKGI Perspective** **Hannah Gray,** Head of Special Situations, UK Government Investments
13:00-13:15	**Policy, Politics and R3** **Nick Cosgrove,** Head of External Relations, R3
13:15-13:25	**R3 App Champions**
13:25-13:30	**Conference Close & Lunch**

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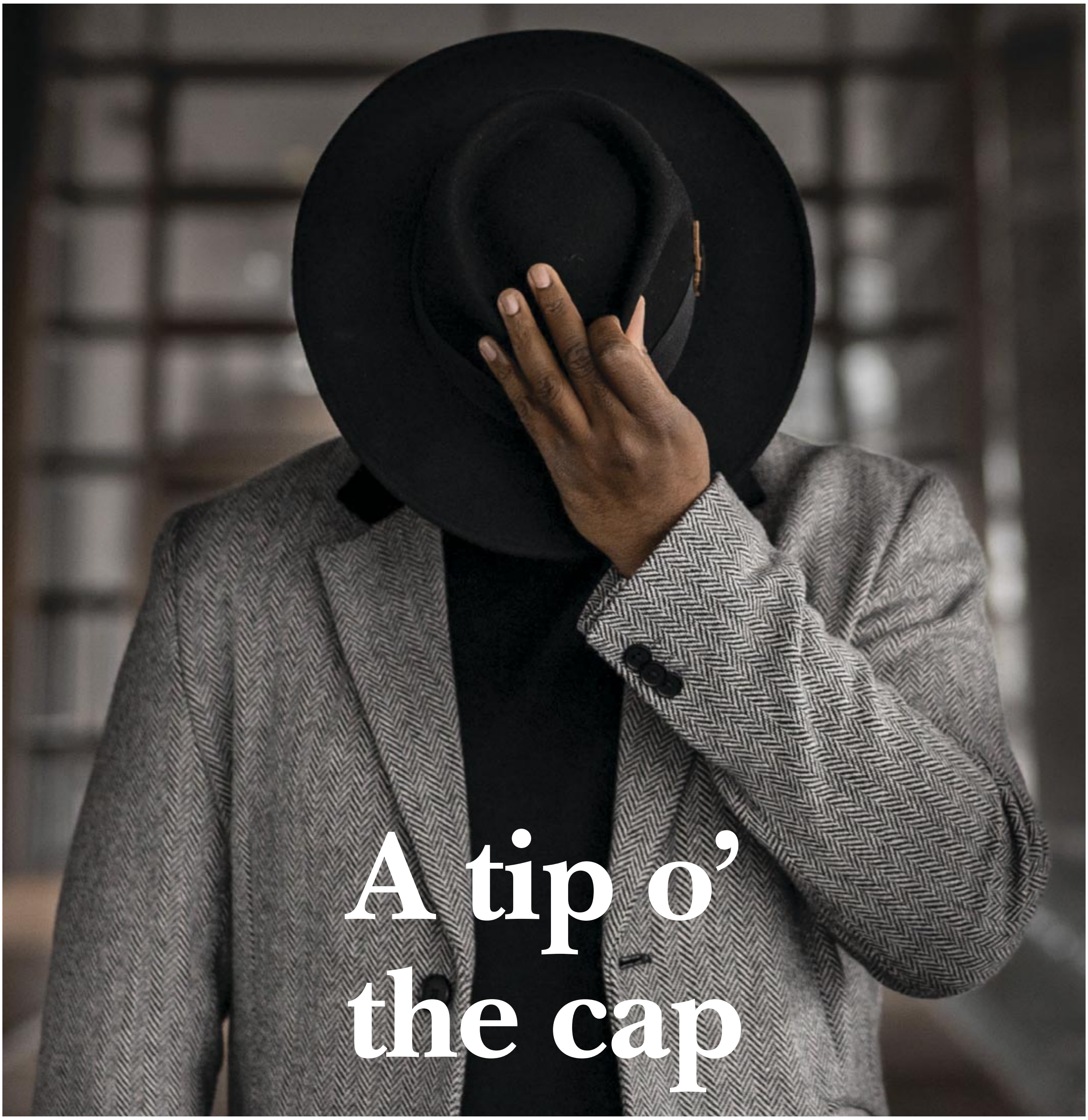

A tip o' the cap

The Arkin Cap and potential repercussions for insolvency firms

Duncan Lockhart and **Andrew Robertson** look at the recent decisions on the limitation of adverse costs and ask: does the cap fit?

The Arkin Cap, a limitation on adverse costs for funders considered by some to be consigned to the dusty bookshelf of history, following the High Court decision of *Davey v. Money*[1], has been revived thanks to a recent High Court decision. *Burnden Holdings*[2] confirmed that there is still a place for funders' costs exposure in litigation to be limited – no doubt a welcome decision for many commercial litigation funders – but insolvency firms providing funding to insolvent estates need to take care that they are not inadvertently held liable for future adverse costs orders.

> "The Arkin Cap was subsequently applied by the court in third-party cost order applications that followed, including *Excalibur Ventures LLC*. However, the application of the cap has not been without criticism."

The judgment in *Burnden* distinguishes from the High Court decision in *Davey*, where Snowden J departed from the principle that a third-party commercial funder's exposure to adverse costs should be limited to the amount it had funded. The High Court decision was dismissed in the Court of Appeal on 25 February 2020 [case ref [2020] EWCA Civ 246].

Evolution of the Arkin Cap

The Court of Appeal in *Arkin*[3] found that it was just to limit the potential costs exposure of the litigation funder to the amount it had funded in the proceedings. This is what has become known as the Arkin Cap. It was established at a time when widespread litigation funding, and the privatisation of access to justice, was still in its relative infancy in the English courts following the enactment of the Access to Justice Act 1999.

The Arkin Cap was subsequently applied by the court in third-party cost order applications that followed, including *Excalibur Ventures LLC*[4]. However, the application of the cap has not been without criticism. In particular, Sir Rupert Jackson in his *Review of Civil Litigation Costs: Final Report (December 2009)*[5] stated his view that:

- there was no evidence that full liability for adverse costs would stifle third-party funding or inhibit access to justice, as litigation funders' business models can encompass full liability for adverse costs;
- it is wrong in principle that a litigation funder, which stands to recover a share of damages in the event of success, should be able to escape part of the liability for costs in the event of defeat; and
- the extent of a funder's liability should be a matter for the discretion of the judge in the individual case and should not be limited by the extent of its investment in the case.

Davey v. *Money*

The claimant failed in her claim for breach of duty and dishonest conduct against the former administrators of the company of which she was shareholder, and she was ordered to pay the defendants' costs on an indemnity basis. The defendants issued an application for a third-party costs order against the claimant's commercial funder. Mr Justice Snowden distinguished the facts of *Davey* from *Arkin* and refused to restrict the funder's costs exposure to the Arkin Cap. Rather, he held the funder liable for the entirety of the defendants' costs on an indemnity basis for the following reasons:

- the funder had approached its involvement throughout as a commercial investment;
- the case was sufficiently out of the norm to warrant an indemnity costs award against the claimant. While the funder had not itself directed the way the case was conducted, it had every opportunity to investigate and form a view as to the nature of the claim and the support for the allegations being made before choosing to fund it;
- it must have been apparent to the funder that the claimant was most unlikely to be able to pay any substantial costs awarded against her;
- the funder had halved its commitment to funding but retained the same potential share of recoveries, which highlighted the funder's close focus on its own self-interest in funding the litigation as a commercial venture; and
- the funder had negotiated to receive a substantial commercial profit that would have taken priority over any compensation payable to the claimant.

The funder recently appealed Snowden J's High Court decision. The grounds for appeal included that: (i) the Arkin Cap was binding authority establishing the correct solution to be applied in respect of commercial funders' costs liability; or alternatively (ii) if the application of the Arkin Cap was discretionary, Snowden J was wrong to refuse to order its application in the circumstances.

The Court of Appeal rejected the funder's arguments and dismissed the appeal in its entirety. It reaffirmed that the court's application of the Arkin Cap was discretionary and would be based on the facts of the particular case. While the court acknowledged that another judge could have reached a different conclusion to Snowden J, his decision to reject the Arkin Cap's application was one that was reasonably open to him and was not founded on irrelevant considerations.

The High Court and Court of Appeal decisions have confirmed that the application of the Arkin Cap is not an automatic rule to be followed in every case involving third-party litigation funders. Rather it is one of several approaches to be taken by the court as part of its wide discretion in relation to funders' potential costs exposure pursuant to s51 of the Senior Courts Act 1981 and what is just in the circumstances.

Burnden Holdings & anor v. *Gary Fielding & anor*

Burnden Holdings (the company) and its liquidator were unsuccessful at trial in their claims against the former directors, including a claim for an alleged unlawful distribution. Following a dismissal of the claims, the claimants were ordered to pay the defendants' costs. The defendants sought to enforce the order by way of a third-party costs application, seeking relief that the liquidator's firm, along with the commercial funder, be jointly and severally liable to pay their outstanding costs (exceeding £3m).

> "*Davey* confirmed that the application of the Arkin Cap is not an automatic rule to be followed in every case involving third-party litigation funders."

Case summary and timeline of IP firm's funding

The company issued proceedings against the directors in October 2013, but the claim was struck out on limitation grounds in November 2014 and the company was ordered to pay the defendants' costs including an interim payment.

The creditors had originally agreed to indemnify the company against adverse costs, but no payment was made. The liquidator appealed the strike out application, but was required to provide security for costs of the appeal and discharge the interim payment of the previous strike out application in order for the proceedings to continue.

The liquidator did not have commercial funding in place at that time so he requested funding from his firm to cover the immediate payment obligations. The firm subsequently provided funding on the basis that it would be repaid the amount funded, plus a further sum equal to its level of funding. This was separate to the liquidator's own fee resolution. »

The company was successful in its appeal and the claim was reinstated in June 2016. The defendants subsequently appealed to the Supreme Court but were ultimately unsuccessful. The liquidator secured litigation funding from a commercial funder in August 2017, however, between commencement of the appeal and the inception of the funding agreement, the firm made payments to cover adverse costs orders, security for costs payments, expert fees and a small proportion of the claimants' solicitors' costs totalling approximately £500,000.

> One of the features that a court will consider in future applications is whether the particular firm providing funding should be classed as a 'commercial funder' or a 'pure funder'.

Decision

Mr Justice Zacaroli rejected the submissions that the firm should be liable for the entirety of the defendants' costs. However, the judge held that the firm was in the position of a commercial funder, and therefore it was appropriate for the court to exercise its power to make a third-party costs order against it.

He ordered that the liquidator's firm should be liable for the defendants' costs for the period it provided funding until August 2017, when external commercial funding was put in place, and limited the liability to the Arkin Cap. Zacaroli J's reasoning for applying the cap was that:

- the funding was for a limited purpose, ie to satisfy security for costs payments, certain adverse costs orders and to maintain the proceedings until commercial funding could be secured;
- during the period of funding, the claimants were successful in the Court of Appeal and Supreme Court hearings; and
- the level of the firm's return on its funding had the underlying claims been successful was reasonable given the credit risk being assumed.

What does *Burnden* mean for IPs?

The confirmation by Zacaroli J of the continued relevance of the Arkin Cap will no doubt be welcome for commercial funders and insolvency firms. Nonetheless, the case highlights the inherent risk that any party that funds an element of, or all of, a party's costs in legal proceedings may be liable for a third-party costs order pursuant to the court's inherent discretion.

The liquidator's firm's submissions against a third-party costs order included the argument that it is common for office-holders' firms to provide particular funding in respect of claims issued by insolvent companies with no funds readily available in the estate. This may include the payment of a court fee for an application under the Insolvency Act and for proceedings under the Civil Procedure Rules, or, in *Burnden*, the payment of adverse costs orders against the insolvent company in interlocutory applications to enable the proceedings to continue. However, Zacaroli J was not prepared to accept that this commercial practice – which benefits the creditors of the insolvent estate – should exempt office-holders or their firms from liability under third-party costs orders.

Following this decision, one of the features that a court will consider in future applications is whether the particular firm providing funding should be classed as a 'commercial funder' (a professional funder with a commercial interest in the transaction), or a 'pure funder' (one whose primary purpose is not for commercial gain, but in order to facilitate access to justice). Zacaroli J found that the liquidator's firm was a commercial funder because it retained a commercial interest in the proceedings (both on the basis of its funding arrangement and the liquidator's separate fee resolution, which the firm was to indirectly benefit from).

The test for whether a party should be considered a pure or commercial funder, and how the court will treat each in the context of third-party costs orders, has previously been considered by the court in *The RBS Rights Issue Litigation* [2017] EWHC 1217 (Ch). Zacaroli J also drew the distinction between a pure and commercial funder as an important factor to consider in *Burnden*. In circumstances where a party is considered to be a pure funder, then it is less likely that the court will exercise its powers and make a third-party costs order against it.

To the extent IP firms have funding arrangements in place in existing proceedings, the following (non-exhaustive) issues might be taken into account in considering whether pure or commercial funding has been supplied:

- whether the firm expects to receive a material benefit from providing the funding, or whether it will simply be reimbursed the amount it funds (in such case the party may be more analogous to a pure funder);
- whether any funding is linked to the IP's fee resolutions as agreed with the company's creditors (in such case the party may be more analogous to a commercial funder);
- the specific purpose of the funding (for example whether a court fee, payment of expert fees or adverse costs orders); and
- whether the firm (separate from the IP) exercises any control over the proceedings in exchange for the funding.

> *Burnden* clarifies that IP firms can be considered commercial funders and therefore subject to third-party costs orders.

Options for firms to mitigate risk

Burnden clarifies that IP firms can be considered commercial funders and therefore subject to third-party costs orders. However, in practical terms, exposure to this risk can be managed by:

- reviewing fee resolutions that set out the commercial benefit being awarded to the firm for providing the funding;
- taking out after-the-event (ATE) insurance to cover any adverse costs orders, making an application against the office-holder's firm far less likely; and
- to the extent ATE insurance is already in place, reviewing the policy and making suitable enquiries to establish whether the level of cover remains sufficient and provides adequate protection in the proceedings.

1 *Davey* v. *Money & anor* [2019] EWHC 997 (Ch).
2 *Burnden Holdings UK Limited (in liquidation) & anor* v. *Gary Fielding & anor* [2019] EWHC 1566 (Ch).
3 *Arkin* v. *Borchard Lines Ltd (Nos 2 and 3)* [2005] 1 WLR 3055.
4 *Excalibur Ventures LLC* v. *Texas Keystone Inc & ors* [2014] EWHC 3436 (Comm).
5 **https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf** (see chapter 11, paragraph 4.1 to 4.7).

DUNCAN LOCKHART (LEFT) is a legal director at Clyde & Co LLP.

ANDREW ROBERTSON (RIGHT) is an associate at Clyde & Co LLP.

Legal Q&A

Emily Davis answers your insolvency queries.

Q I am a director, and want to set up a new company with the name ABC (1) Limited (NewCo). However, I was previously a director of ABC Limited (OldCo), which is in administration. Can I do that?

A It is a criminal offence pursuant to s216 of the Insolvency Act 1986 to use a 'prohibited name'. The name ABC (1) would be prohibited because it is the same as or 'so similar as to suggest an association' with OldCo. If OldCo enters into insolvent liquidation within 12 months of OldCo entering administration, and NewCo has used the name ABC (1) during that time, you could face two years' imprisonment, be fined and/or disqualified as a director and become personally liable for the debts of NewCo.

> If OldCo enters into insolvent liquidation within 12 months of it having entered administration, you could face two years imprisonment, be fined and/or disqualified as a director and become personally liable for the debts of NewCo.

Although OldCo is in administration (not liquidation) and the prohibition in s216 does not currently apply, you do not know if OldCo will enter liquidation within the next 12 months and whether the name will therefore become 'prohibited'.

OldCo might be dissolved (in which case s216 will not apply), but if the administrators move OldCo into liquidation within 12 months, there is a risk of liability. You have no control over what happens to OldCo. Therefore, you should consider whether any of the following exceptions to s216 apply:

(a) Has NewCo actively traded and been known by the prohibited name for a continuous period of 12 months or more? NewCo appears to be newly incorporated and given that the 12-month period is calculated backwards from the date that OldCo enters liquidation (which it might do within the next 12 months) the requirement to have traded and used the 'prohibited name' for a period of 12 months may not be met. Relying on this exception therefore carries a risk.

(b) If NewCo has or intends to purchase the whole or substantially the whole of the business of Oldco, then you can use the name ABC (1) provided that notice is given to creditors and placed in the *London Gazette* no later than 28 days after the business is acquired.

If neither of these apply, then your only option is to apply to the court for permission to use the name. That application can only be made within seven business days of OldCo entering liquidation. The risk is that there is no guarantee that the court will give permission and you may not be aware that OldCo has entered liquidation in sufficient time to make the application. If you do not obtain a court order, by that point you will have already acted in contravention of s216.

Q I have been appointed to advise a struggling energy company. What additional matters should I take into consideration?

A Energy companies operate under supply licences granted by Ofgem.

Administration (usually) commences when a notice of appointment of administrators (NOA) is filed with the court. In the case of an energy supplier, its licence will provide that appointment cannot take effect until 14 days have elapsed after service of the NOA on Ofgem, consequently delaying the start of the administration process.

In an insolvency situation, Ofgem will either:

(a) direct any gas or electricity supply licensee to take over responsibility for a failed supplier's customers and become a supplier of last resort (SoLR) to ensure that supply is uninterrupted; or

(b) appoint an energy supply company administrator.

The latter is rarely used and will only be available where a SoLR process is not practicable. A SoLR can either volunteer or be directed to step in by Ofgem.

An energy company therefore cannot enter administration without giving Ofgem and the Secretary of State 14 days' notice following filing the NOA at court (the notice period).

The administration appointment does not take effect until the end of the notice period when Ofgem revokes the supply licence and appoints a SoLR. This notice period creates uncertainty and delay in the administration process.

> Involving Ofgem and agreeing a strategy together is key to achieving a smooth transition and will need to be factored into the process.

To address this, one option is for the energy supplier to apply to the court for a declaration that it is unable to pay its debts as they fall due. If obtained, the declaration enables Ofgem to revoke the supply licence upon 24 hours' notice. The advantage of this is that this application can be made before the NOA is filed, enabling Ofgem to revoke the supply licence and appoint the SoLR without having to wait for the notice period to expire. This will ensure a smoother transition into administration because the court application can be timed to coincide with the filing of an NOA. Involving Ofgem and agreeing a strategy together is key to achieving a smooth transition and will need to be factored into the process. ◻

EMILY DAVIS is a trainee solicitor in the restructuring and insolvency team at Squire Patton Boggs.

Recent case summaries

The latest insolvency update from **Bobby Friedman**.

CORPORATE INSOLVENCY

***Hunt* v. *Michie* [2020] EWHC 54 (Ch)**

In this case, the court considered the extent to which a director's general duties under ss170–177 Companies Act 2006 (CA 06) survive the start of a formal insolvency process.

The company had been placed into administration, which later was converted into a CVL. The company was later dissolved (before being restored).

There were four heads of claim brought. Three of these were against the former director, Mr Michie, and two of those related to the extent to which his duties under CA 06 continued during the insolvency process: (1) the purchase by Mr Michie of a company property at an undervalue at a time when Mr Michie

The court therefore concluded that the 'general duties' remained, and that the start of the insolvency process imposes a series of additional, specific duties.

remained a director of the company but after the insolvency process had commenced – the purchase was said to be a breach of Mr Michie's duties under ss171 to 175 CA 06, including his fiduciary duty to act in the best interests of the company's creditors as a whole from the time at which the company was insolvent; and (2) causing or allowing payments to be made to certain creditors shortly after the commencement of administration, which was said to be a breach of Mr Michie's duties under s171, 172 and 174 CA 06 (such that Mr Michie was guilty of misfeasance under s212 Insolvency Act 1986 (IA 86)).

It was common ground that Mr Michie remained a director of the company notwithstanding that it had entered into administration and thereafter voluntary liquidation. A director of a company in administration may not exercise a management power without the consent of the administrator, except as provided for by s114 IA 86. On a company's entry into creditors' voluntary liquidation, all the powers of the director cease, save to the extent that the liquidation committee (or absent that, the creditors) sanction their continuance.

What was the impact of the insolvency process on the 'general duties' at ss170-177 CA 06? It was argued by the respondents that once a company enters into administration or CVL, the 'general duties' only survive in respect of any exercise by that director of powers, qua director, preserved by or permitted in accordance with IA 86.

The court rejected this argument:

- Firstly, the 'general duties' extend beyond the exercise of powers as director. A director is, for example, required to avoid conflicts of interests, which is not dependent on the exercise of a given power qua director.
- Secondly, considering CA 06 as a whole, when provisions are intended not to apply in administration, compulsory liquidation or CVL, it is stated in terms.
- Thirdly, a director's duties are based on common law rules and equitable principles, and should be interpreted and applied in the same way. Such rules and principles are themselves sufficiently flexible to extend beyond the start of the insolvency process.
- Fourthly, s172(3) expressly preserves the duties of a director in certain circumstances 'to consider or act in the interests of creditors of the company'.
- Fifthly, the judge relied on the common ground that directors remain in office once the formal insolvency process is underway.

The court therefore concluded that the 'general duties' remained, and that the start of the insolvency process imposes a series of additional, specific duties.

The judge found that the property had been transferred in breach of duty. The payments to creditors were also in breach of duty.

PERSONAL INSOLVENCY

***Carter* v. *Hewitt* [2019] EWHC 3729 (Ch)**

This was an appeal from a deputy district judge's decision to refuse to grant an order for possession and sale of the home of the bankrupt, Mr Hewitt.

The bankruptcy order was made in 2018 following a creditor's petition. The only substantial asset of the estate was Mr Hewitt's house, of which he was the sole owner and which had equity of around £160,000 against debts totalling £114,100. Mr Hewitt refused to engage with the trustees, which led to their application for an order for possession and sale of the property.

The lower court had wrongly considered that s335A IA 86 was engaged. This section relates to *'rights under trusts of land'* and in particular to an application by a trustee under s14 TOLATA 1996. The deputy district judge had applied that section and refused to make the order sought on the basis that he did not have sufficient information in front of him and that a further application could be made.

In fact, as the property was owned by Mr Hewitt outright, there was no trust over the property. The property vested in the trustees under ss283 and 306 IA 86, and it was only in cases where the bankrupt himself had not owned the property outright that there was a question of a trust arising. The lower court had therefore been wrong to consider that s335A applied at all.

It was only in cases where the bankrupt himself had not owned the property outright that there was a question of a trust arising.

Under s283A(4) IA 86, the lower court's dismissal of the application for sale meant that the property had re-vested in Mr Hewitt (since the court had not ordered otherwise). This meant that the judge was also wrong to consider that a further application for possession and sale could be made, since this was barred and the effect of his order was that the trustee in bankruptcy could have no further recourse to the property.

Applying the correct principles, the application by the trustees fell to be considered under s363 IA 86. However, the court applied the criteria at s335A(2), which set out the matters to have regard to when an order is sought in a s14 TOLATA case – by parity of reasoning. On the facts, an order for possession and sale was made.

BOBBY FRIEDMAN
is a barrister at Wilberforce Chambers

A Few Good Practitioners…

Ben Luxford storyboards the uneasy journey of the Insolvency Ethics Code from inception to its upcoming public debut.

The profession uses words like "integrity", "objectivity", "professional competence and due care", "confidentiality" and "professional behaviour". The profession uses these words as the backbone of a life spent defending something. Others use them as a punchline.'

The above quote was taken from the fictional upcoming movie *A Few Good Practitioners*. I am unsure whether it will attract the headlines such a movie deserves; meanwhile, the revised Insolvency Code of Ethics (the code) will probably still draw an audience after languishing in what filmmakers would call 'development hell' since 2017.

Announcement

The Joint Insolvency Committee (JIC) issued a revised draft of the code for consultation in May 2017. Among other things, the code attempted to tackle the disconnect between an IP and a firm, while reflecting different ways of working. The code focused on the obtainment of specialist advice or services, the IP being an employee of a firm, and whether there should be different applications of the code for personal and corporate appointments.

Production

The consultation ended in July 2017 and the JIC has since been considering revisions to include IPs who work on consultancy agreements, and widen the scope for obtaining specialist advice, services, advertising and marketing activities. The idea of a different application of the code for personal and corporate appointments was dropped.

While the review process was underway, the International Ethics Standards Board for Accountants (IESBA) released a revision to its own code of ethics in 2017, including major reforms to its framework to help identify, evaluate and address threats to compliance. As a result, national accountancy bodies were required to update their own codes, and it was anticipated these updates would impact on the revised UK insolvency code. Consequently, production was stalled until the release of the IESBA code. It was not desirable to introduce a revised code, which would then need to be replaced to reflect the amended structure and revised safeguard provisions under IESBA.

Post-production

The fundamental principles of the code have not altered, but its size has increased.

> "The fundamental principles of the code have not altered, but its size has increased."

The code is now split into two parts to help provide clarity on situations for IPs. Part one of the code establishes the fundamental principles of professional ethics, while part two describes how the ethical framework applies in certain situations, together with examples.

Release

Based on the new IESBA code, the accountancy bodies introduced respective updates to their codes in January 2020 and the revised Insolvency Ethics Code is also due to be released in early 2020. The question is: 'does the code reflect current times?'. It has certainly been a long while since the announcement in 2017. Some of the key points to note are as follows:

R and A

Requirements (R) and application material (A) are new additions to the code. They are to be read and applied with the objective of complying with the fundamental principles and applying the conceptual framework of the code. Requirements impose an obligation on an IP to comply with a specific provision with the use of the word *shall*. Application material seeks to help an IP understand how to apply the conceptual framework of the code to a set of circumstances.

Conflicts of interest

There is a greater focus on an IP who has had multiple appointments with the same director or directors. In this situation, there will be an increased risk of a conflict of interest arising, which would need to be considered when accepting a new appointment.

Referral fees and commissions

'Associates' are now included in the section of the code covering referral fees and commissions, which now states that 'an IP, the firm or an associate shall not make or offer to make any payment or commission for the introduction of an insolvency appointment'. Another key addition to note is if there is a benefit of contractual terms from suppliers or goods (eg volume or settlement discounts), the benefit shall be received in full by the insolvent estate.

Advertising, marketing and promotion

An IP shall be honest and truthful and not make exaggerated claims about their services, or disparaging references to the works of others.

The spirit of the code

There is a direct reference to upholding the 'spirit' of the code: 'Insolvency practitioners shall be guided not merely by the terms but also by the spirit of the code.' Similar to the absence of the term 'code red' in the Marine corps' *Recruit training manual*, IPs should not act in a way that is detrimental to the spirit of the code.

Documentation: an obligation

The code now imposes an obligation on an IP. It states that an IP *shall* document the facts, consider the courses of actions, the judgements made and the decisions that were taken, among other matters.

The IP as an employee

An IP will need to consider whether they should accept an offer of employment or resign if they are unable to address a threat to compliance with the code.

Critics' views

It remains to be seen whether the code captures the current age; only time will tell. It does, however, provide clarity for IPs with the introduction of R and A, and an expansion of examples.

The code also comes at a time when the insolvency profession is undoubtedly in the public spotlight, and it is important that the profession continues to demonstrate the highest standards of professional conduct. IPs need to illustrate the importance of the work that they undertake, while still promoting the UK as a global centre for resolving financial distress. To support this, it will be essential for IPs and practices to put in place appropriate and robust processes to ensure compliance.

The Code of Ethics was published on 2 March 2020 with an effective date of 1 May 2020 to allow IPs (and professionals) to adjust to the new look of the code. The code is available on the new R3 website. ◻

BEN LUXFORD is technical manager at R3.

Made to order: the compensation order

Keith Owen reports back on a successful case where a compensation order was used and how it could enable future recoveries.

As the Insolvency Service's director of investigation and enforcement services I am proud of our work; tackling directors whose damaging behaviours have caused economic harm and taken money out of the pockets of the public.

As 2019 ended, I was delighted that we secured our first compensation order against a disqualified director. This landmark ruling is a powerful progression in the powers we can use to act in the best interest of the public.

Background to the orders

Compensation orders were introduced on 1 October 2015 by the Small Business, Enterprise and Employment Act 2015, which updated the Company Directors Disqualification Act 1986.

Their purpose is to make directors personally responsible for their misconduct, stripping away the protection of limited liability for those directors whose actions are found to be wanting.

Ignoble actions

Kevin William Eagling caused the misappropriation of funds totalling £559,484 from Noble Vintners Limited between 2 November 2015 and 18 October 2016. Subsequently, on 22 June 2017, he instructed Nedim Ailyan, of Abbott Fielding, trading as Griffins, to enter the company into CVL with an estimated deficiency of £1.6m.

Noble Vintners traded as a wine brokerage firm, buying from wine producers and merchants, selling wine to members of the public for investment purposes and re-selling on their behalf.

The director's conduct report rightly highlighted that Eagling had 'failed to safeguard customer monies'.

Our investigation determined he paid funds of more than half a million pounds from Noble Vintner's bank account to Eagling Partners Limited. This was virtually all the company's income during the period, money that was paid by customers for goods and services that were not supplied.

Mr Eagling was the sole shareholder/director of Eagling Partners Limited and provided no evidence to justify the commercial purpose of these payments.

At an uncontested hearing on 14 May 2019 Insolvency and Companies Court Judge Prentis ordered that Mr Eagling be disqualified for the maximum period of 15 years. The judge adjourned the application for the compensation order, giving directions that further information be provided on the implementation of the new legislation.

At the adjourned hearing the court ordered Mr Eagling to pay back the sum of £460,067 to 28 of the company's creditors, and £99,417 payable pro rata to the general body of the company's creditors, all victims of Mr Eagling's misconduct.

The judgment addressed the contention that compensation legislation caused in the insolvency profession. Judge Prentis referenced *Mithani: Directors' Disqualification*, which raised concerns about the relationship between compensation orders and recovery methods contained within the Insolvency Act 1986; that the new legislation could disrupt the principle of *pari passu* in distributing funds to creditors.

> "The purpose of a compensation order is to make directors personally responsible for their misconduct, stripping away the protection of limited liability."

The campaign for compensation

Chief investigator, David Brooks, worked with our appointed solicitors, Shepherd and Wedderburn LLP, providing further information to the court, including documents detailing the origins of the legislation and the government's intention behind its introduction.

Judge Prentis noted that Mr Ailyan did not have sufficient funds to seek recovery action against Mr Eagling, particularly as Mr Eagling had relocated to Northern Cyprus.

Following the implementation of the legislation the Insolvency Service's view was that applications for a compensation order would be unlikely in cases where:

- an IP has taken or is going to take civil recovery action against the director, or
- the director has made a contribution to the assets of the company.

Furthermore, we considered the following points in calculating the value of the compensation:

- whether the disqualification conduct caused an identifiable loss to one or more creditors
- the nature of the creditors and whether they have other forms of redress
- the ability to readily identify the creditors affected and quantify the loss to each creditor, or class of creditors
- whether through the insolvency process there has been or is predicted to be a material repayment to those creditors.

Hitting where it hurts

We were confident that seeking this order was appropriate, but obviously we're pleased with the outcome and welcome the clarity provided by the judgment, that; *'Concerns that the double regimes will permit double recovery for what is factually, if not legally, the same wrong are, in my view, misplaced'* and that compensation orders deter director misconduct.

Insolvency Service investigators will continue to consider whether cases are suitable for compensation orders. When investigators work in partnership with IPs it is clear that often cases have not met the criteria, ie that seeking recovery through tried and tested methods is the right approach.

The recovery of assets for the benefit of an insolvent company's creditors is a principle embedded into our working culture. Until now, this has primarily meant that we have alerted IPs to undisclosed or concealed assets uncovered during our investigations. Now, with the introduction of compensation orders, where the circumstances of a case mean IPs are unable to make recovery, we have a new tool to bring about financial redress to creditors, and to hit aberrant directors where it hurts most: their pockets. ◻

KEITH OWEN is director of investigation and enforcement services at the Insolvency Service.

The insolvency express trials pilot – an endangered resource?

Stephen Baister writes that there is an option for swift, cost-effective justice – you just need to use it.

In his *Essay of Judicature*, written in 1597, Francis Bacon said that delay in giving justice made it sour. Speedy justice has been an ideal to which the judiciary, the government and those involved in court administration have been aspiring for many years. The tension between speed and justice is not, however, always easy to resolve.

Swift and economical

It is almost four years since the introduction of the pilot for Insolvency Express Trials (the IET regime). The aim of the pilot was to provide litigants in the Bankruptcy and Companies Court (now the Companies and Insolvency List in the Business and Property Courts) with a speedy, streamlined procedure, and an early date for the trial or disposal of simple applications by the bankruptcy registrars (now the ICC judges), with the aim of saving costs for all concerned.

> The advantages of the scheme are obvious: swift and economic disposal of short, simple cases.

The pilot was introduced on 1 April 2016 by Practice Direction 51P – Pilot for Insolvency Express Trials (see generally 'Insolvency Express trial pilot – Mr Registrar Briggs outlines a new initiative for swift insolvency hearings', RECOVERY, Spring 2016, p17). It was originally to end on 6 April 2018, but was extended, and at the time of writing remains in force until 6 April 2020. It is, however, in danger of lapsing as a result of insufficient use.

The main features of the IET regime are:

- Use of the regime is voluntary: applicants can decide which cases (if any) should proceed under the scheme; and there is provision for the respondent to object and for the court to remove an application from the IET list if it thinks fit.
- The costs management provisions of the CPR do not apply, but each party's costs are capped at £75,000.

- The regime only applies to simple applications, which require limited directions and disclosure (only one directions hearing is envisaged) and can be disposed of finally in no more than two days.
- The trial date given is a fixture and is not capable of being vacated by consent; an adjournment will only be granted in exceptional circumstances.
- If sufficient time has been allowed in the time estimate, judgment will usually be given immediately. If judgment has to be reserved, it will generally be handed down within four weeks of the trial.
- Costs will either be assessed summarily, or detailed assessment may be ordered.

The advantages of the scheme are obvious: swift and economic disposal of short, simple cases (of which there are many in the insolvency jurisdiction). The relatively modest uptake is, therefore, hard to explain. Indeed, the list seems to have become the preserve of a few firms of solicitors.

Use for *any* proceedings

One explanation for the lack of uptake may be a misapprehension on the part of practitioners that the scheme only applies to full trials. In fact that is not the case. This is clear from paragraph 1.1 of the Practice Direction, which refers to 'proceedings before the bankruptcy registrars' before going on to make clear that the 'IET is designed to deal with simple applications made to a bankruptcy registrar'. The use of the words 'proceedings' and 'applications' contemplates that the list can be used for any kind of application capable of being heard by the ICC judges. The procedure has, on that basis, been used to accommodate applications under ss236 and 336 of the Insolvency Act 1986, as well as more conventional short trials for the recovery of assets and the like. A more imaginative use of the procedure on the part of practitioners for a wide range of relief should to be one way of increasing use of the procedure.

Costs ought not to be a factor – £75,000 should to be ample to cover the costs of a simple two-day case in which disclosure is limited and there is little to no need for interlocutory relief. The majority of cases should to be capable of disposal for considerably less, given that the £75,000 cap was introduced when conditional fee agreements were widely used, and so was designed to accommodate what might have been a substantial mark up on the base costs of an action.

> Practitioners will need to act before the current extended pilot period comes to an end.

It may be that the present two-day limit is too restrictive. Consideration should now be given to increasing the time limit on trials from two to three days. Some further increase in the costs cap would, perhaps, have to follow: £100,000 should suffice for the majority of cases, although some practitioners would advocate an increase to £150,000.

Act now

But whether the pilot is to continue in its present form or in some extended form, practitioners will need to act before the current extended pilot period comes to an end. Send your views to R3's technical director, Caroline Sumner, at **caroline.sumner@r3.org.uk**.

STEPHEN BAISTER is a consultant at Moon Beever.

SPG Technical Reviews

Leeds *(Hilton Leeds)*
3 March

London *(Crowne Plaza - The City)*
12 March

Warwick *(Chesford Grange)*
2 April

Exeter *(Sandy Park)*
9 June

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Insolvency in a changing world

We asked two relatively new professionals to give their views on the state of the profession, the challenges it faces and their feelings about the future.

THE VIEW FROM

England

Lee Benmore offers his view as an insolvency practitioner in England.

The most exciting thing about working in insolvency at the moment is, quite simply, being able to rescue failing businesses and save jobs! Insolvency practitioners play a huge role in keeping UK Plc operating, whether you can preserve a company as a going concern or separate and sell a business unit to maximise realisations and minimise creditor claims. While no two businesses, directors or IPs are the same, being able to find different ways of working on a daily basis to provide the most value for an insolvent estate is continually rewarding.

Businesses face some unique challenges now and the profession will be busy in the coming months. Global economic disruption due to COVID-19 is with us, but of uncertain severity and duration. The consequences of Brexit, for many businesses and its impact on the UK economy are similarly uncertain. A no-deal Brexit would mean cross-border insolvency cases becoming much harder to resolve and is likely to add additional costs to any case where a UK IP needs to initiate additional proceedings in other jurisdictions to deal with, for example, assets or employees situated outside the UK.

Technology

Another challenge is going to be keeping up with technological advances in the wider business world. We have seen the impact of disruption on sectors such as video rental and retail, and it seems the financial sector is also facing its own challenges with the emergence of fintech, regtech and insurtech enterprises challenging their traditional counterparts. The profession needs to keep pace with these changes if we are to continue to add value during times of distress.

Cryptocurrency

The rise, fall and rise of cryptoassets such as bitcoin create a lot of interesting new issues for IPs, and how to secure, preserve and realise such assets isn't necessarily as straightforward as dealing with other asset classes. I was privileged to host a discussion group in relation to cryptocurrency at an R3 New Professionals event recently, which discussed a lot of these challenges and how we can resolve such issues in insolvent estates.

HMRC's preferential treatment

Finally, HMRC's involuntary taxes are set to become preferential from April this year in possibly the most significant change to the distribution waterfall since the Enterprise Act 2002. This may be seen by some to be a retrograde step, but it is something the profession needs to adapt to. There will undoubtedly be knock-on effects such as a reduction in unsecured distributions from insolvent estates, and the complications caused by this may mean more restructuring advice is needed in the supply chain, as well as unforeseen consequences in the lending markets.

> "In a world where we see technological advances on a daily basis, the insolvency profession can often be behind the curve in progressing automation."

The biggest opportunities

There are a couple of areas in which I would like to see the profession changed. The first of these is the promotion of success in the profession. Where jobs and business are rescued or value is preserved from distressed situations, it can be difficult to celebrate such success. Being able to communicate 'good news' stories as an industry would better reflect the skill and hard work of the profession.

Secondly, to have the ability to work openly with creditors and other stakeholders, without creating an increased threat to the business – perhaps during a pre-insolvency moratorium – in order to maximise the benefits for all parties, would be beneficial.

Stop the box ticking

I personally feel that tick-box compliance within the profession adds little to no value to creditors or shareholders. However, the time it takes does add unnecessary costs to any process. In a world where we see technological advances on a daily basis, the insolvency profession can often be behind the curve in progressing automation.

The streamlining of such compliance tasks would allow IPs to apply problem solving, project management and communication skills more effectively to maximise realisations for the creditors or shareholders.

Insolvency as a career

If you are a pragmatic problem solver, a career in insolvency is ideal. Each case forces you to think in a different way dependent on what you are trying to achieve. This is a career where you get out what you put in. The harder you work and the more you are willing to learn, the more opportunities you will have to progress your career. I believe that a career in insolvency is challenging, rewarding and stimulating (although not necessarily easy!) and for the right person is a very attractive option.

LEE BENMORE is a senior administrator at Mercer & Hole and is a member of R3's New Professionals Committee.

THE VIEW FROM

Scotland

Ailie McGowan offers her view as a solicitor in Scotland.

It's an exciting time to be a young professional in the Scottish insolvency sector. From the perspective of this millennial, it's a fascinating area of law that is fast-paced, varied and technical, and often presents opportunities to be involved in the strategic elements of insolvency litigation.

My responsibilities cover diverse matters. One day I may be petitioning the court to wind up a company, the next assisting IPs with the process of investigating and litigating for the recovery of assets, challenging gratuitous alienations and unfair preferences.

> "From the perspective of this millennial, it's a fascinating area of law that is fast-paced, varied and technical, and often presents opportunities."

Currently, there are acute challenges and opportunities within my area of law. In part they are a result of the uncertainties presented by Brexit. Insolvency litigators must also consider the envisaged increase in the use of litigation funding (as a direct result of the anticipated introduction of class actions and damages-based agreements in Scotland) and, in the face of new technology (including artificial intelligence), be prepared to continually adapt and evolve our working practices.

Brexit

Last year, potentially influenced by the swirling mists of Brexit, corporate and personal insolvencies in Scotland were reported to have risen to a seven-year high. Brexit has also cast its shadow over the insolvency process, and in particular in relation to UK–EU cross-border insolvencies.

The current status quo for UK–EU cross border insolvencies will be preserved during the transition period. This is due to end on 31 December 2020 and until then few practical changes are anticipated.

However, what will transpire after the next ten months is less clear and will depend in part on whether a deal to confine the application of EU insolvency regulations is achieved. If no such deal can be reached, it's assumed there will be an added layer of complexity for litigators to consider when advising on UK–EU cross-border insolvencies.

Indeed, the insolvency profession in Scotland is currently preparing for the end of the (Brexit) transition period. On behalf of its members, R3 has been relentlessly helping to present their views to politicians. Personally, I am optimistic that the can-do attitude of my profession will ensure that the insolvency regime in the UK will continue to be preserved and upheld as one of the best regarded in the world.

Litigation funding and Scotland

In England and Wales, as a result of the changes to litigation funding, there appears to have been a renewed enthusiasm for insolvency litigation over the past few years. Notably, litigation funding is currently less popular in Scottish insolvency practice. This is partly down to litigation being cheaper in Scotland, including in terms of court dues.

Significantly, the limited use of litigation funding also reflects that Scots law currently prohibits class actions and damages-based agreements. However, in this respect change is afoot, since the Civil Litigation (Expenses and Group Proceedings) Act received royal assent in 2018. The substantive provisions of this act are not yet in force, although secondary legislation is anticipated this year. Once it is competent for class actions to be raised in Scotland and for damages-based agreements to be entered into, I expect that the Scottish insolvency profession will see a rise in the use of litigation funding. In turn, this is likely to result in a similar appetite and enthusiasm for insolvency litigation in Scotland as is currently seen in England and Wales.

The future of insolvency

In the year ahead, I also anticipate that my firm's increasing willingness to embrace agile working practices and technology will have a further influence on how I work. Indeed, the insolvency profession has adapted its working practices to meet both the changing nature of business and the desire of millennials like me to be able to work from anywhere in the world. As a profession, we are also seeing an increase in the practical application of AI and I envisage that its application in our legal sphere will only continue to rise. This will reduce the number of purely administrative functions for litigation lawyers and ultimately help to reduce the cost of insolvency litigation.

The above are all insights into why I believe it's a very rewarding time to be a young lawyer within Scotland's insolvency sector. The profession is undoubtedly rising to the challenges and opportunities posed by Brexit, the potential increase in the use of litigation funding and the need to embrace new technologies and adapt working practices.

> "The working environment is one where young litigation lawyers can make a difference and help to shape both our own futures and that of our profession."

I am proud to be part of a close-knit Scottish insolvency profession that offers millennials the chance to be part of a fast-paced collaborative working environment. It's one where young litigation lawyers can make a difference and help to shape both our own futures and that of our profession. □

AILIE MCGOWAN is a litigation lawyer at Shoosmiths in Edinburgh and is a member of R3's Scottish Next Gen Committee.

Experts, data and application: the path to AI for IPs

Andy Wallace explains the steps that any firm needs to go through in order to adopt AI.

Many vertical markets and clients have become more interested in artificial intelligence and the ability of this powerful technology to drive better business insights and decision making, which in turn can increase margins or reduce fraud. However, the biggest challenge for many businesses and industries is identifying both the benefit of applying AI and, more importantly, the heavy lifting that needs to be undertaken to get to base camp on AI and machine learning.

Creating the space for AI

Many businesses are unable to create the breathing space to allow subject matter experts and senior management to focus on AI. Utilising robotic process automation (RPA) to automate some of the operational heavy lifting could provide space to allow a focus on the next stage of implementing AI. Attempting to deliver an AI-enabled set of business functions will need to be empowered by engaged stakeholders as well as the business knowledge normally ensconced in key operational roles. This business intelligence asset needs to be freed from the day to day completely. The final stage will be to review and severely cut your current list of prioritised projects leaving the AI and compliance/regulatory ones only. Many companies will fall at the first hurdle as competing plans and stakeholders refuse to drop their key, sometimes critical, revenue-attracting projects.

Structuring your data

There are a number of key and critical steps that you'll need to focus on as a priority to deliver useable and effective AI functions. A key one is to ensure that all of your historical data and definitions are agreed across the organisation. This will give the business a shared lexicon of data definitions and will allow a quicker move to the more exciting 'ideas' on applying the technology and identifying the benefits and business cases required to build momentum. Much of your current data knowledge will be within disparate areas of your business, and creating a group of motivated, excited and cross-functional resources is key to success and quick adoption.

Attracting the talent

There's no getting away from the human investment that you'll require in creating or enhancing your current data science capability. Many universities have been slow to identify and develop this key skill, and many of the skilled practitioners of data science are drawn to financial services with the promise of high salaries, good technical infrastructure and exciting potential projects. Competing for talent within this landscape is incredibly tough and will lead many companies to 'outsource' this key deliverable. This outsourcing will mean that the key steps that need to be made prior are even more critical. Attempting to outsource in an environment where you are unable to free up the key subject-matter experts and/or have no clear data structure will lead to either a big delay or a key failure (and loss of enthusiasm for a key function for your businesses future). Developing a strategy around recruitment of these key positions should include a recruitment programme targeting university towns where there is a good course in data analysis but few big businesses. This may mean creating a separately located department but look for incentives from regional bodies to help.

Once you have a good technical recruit, build an internal group of analytical resources that are able to be moved. This has the benefit of motivating some loyal employees while building the business knowledge and influence into the programme. Utilise interns and create an environment that will allow you to be first in the queue for recruitment post-degree.

Apply the technology appropriately

Once the above steps have been successfully achieved, the biggest hurdle by far is to create a cultural environment where AI decisions are prioritised. There are a number of types of projects in this space that range from a low-risk 'shadowing' of the business through to creating AI to take on many of the business decisions on fraud or customer attainment.

Shadow AI

If projects shadow current business decision logic, a business will slowly move from traditional, risk aware decision making by creating a separate AI-enabled decision process. By running both the traditional decision making and AI-enabled processes in parallel, it is possible to show the differences in decisions, explain the rationale for that decision and then slowly change the traditional process.

Symbiotic AI delivery

Symbiotic AI delivery will seek to deliver a process that will both help your current customers while improving your business. One real-world example is of one of our clients, who has extrapolated out historical data on the attributes of a tenant and the behaviour they exhibit prior to being unable to pay their rent. By predicting and automating messaging earlier, the client has been able to both reduce the arrears suffered but, more importantly, has also been able to identify and reduce tenant stress by offering help earlier in the process.

Full bore AI

Full bore AI is used by Facebook, as well as policing and other invasive technologies. This is considered high risk but potentially high reward. Many corporates, quite rightly, have shied away from this type of implementation as regulation and compliance processes lag in explanation of what is and isn't ethical.

The timescale for AI

Timelines are long for businesses that don't have either the skills set or the data structure in place to implement AI; however, if delivered symbiotically, this technology will be key for the insolvency market. Expect to see AI intrude on the front-end process of targeting and attaining customers first, then on identifying potential fraud and finally delivering both business and customer benefits in tandem! □

ANDY WALLACE is CEO of The Robot Exchange Limited.

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Bargain Hunt – CVAs and the future of corporate rescue

Peter Walton and **Christopher Umfreville** revisit their 2018 report into CVAs to see whether the current and future regimes will surpass the valuation or fail to meet the reserve price.

As many readers will be aware, the BBC broadcasts a programme called *Bargain Hunt*. The premise of the programme is that motivated amateurs, under the guidance of experts, make various acquisition decisions hoping that they have an eye for a bargain. The contestants have only a very limited amount of time to make their decisions. Subsequently, the experts, who are provided with further time, make decisions for themselves without the same urgency. The experts, with the benefit of their knowledge and experience, and more time, invariably make better decisions than the contestants. The items purchased are then sold at auction. The auctioneer, a totally independent party, often has a scathingly negative opinion of the decisions of the contestants (and experts).

Bargain Hunt has fewer successes than failures. Another programme, *Flog It!* involves members of the public selling their own goods at auction for what they hope will be a profit. Sometimes it goes well; often it does not. In this article, we loosely suggest that company voluntary arrangements (CVAs) might be viewed as the insolvency equivalent of *Bargain Hunt*, while connected party pre-packs might bear some comparison with *Flog It!* Both have their places but neither can match the relative successes of *Antiques Road Trip*, where experts, who have plenty of time to consider their purchases, travel around buying and selling goods. *Antiques Road Trip* might be viewed as the equivalent of a trading administration.

We intend to explain in outline terms the main findings and recommendations we made in 2018 when we, along with our colleague, Dr Lezelle Jacobs, conducted a wide-ranging research project on behalf of R3 (with the sponsorship of ICAEW and the support of the Insolvency Service) looking at how successful CVAs were in practice, and during which we examined over 500 CVAs. The full report is available on the R3 website. We shall also consider recent and prospective developments in the law and practice relating to CVAs.

> “CVAs with the benefit of a moratorium, and which therefore had the benefit of more time to plan the CVA proposal, appeared to be more likely to be completed.”

Is a CVA a bargain?

Around two thirds of CVAs examined were terminated early. Although that headline figure does not sound very promising, one third were implemented or still trading after more than four years and we found that in many terminated CVAs a dividend was still paid. Such dividends, although less than that promised by the CVA, were likely to be more than might have been paid if the company had entered into a connected party pre-pack administration instead of the CVA. There was something to be said for company participators who were trying to rescue their companies, and trying to pay a reasonable dividend to their creditors.

CVAs with the benefit of a moratorium, and which therefore had the benefit of more time to plan the CVA proposal, appeared to be more likely to be completed than cases where no moratorium was used.

Many stakeholders were not convinced that the opinion of the nominee IP as to the likely feasibility of the CVA was entirely reliable, especially in cases where the nominee had been significantly involved in the drafting of the CVA proposal.

CVAs are often found to have been unrealistic. Creditors, usually led by HMRC, required an unrealistically high dividend for unsecured creditors (such as 100%). Often the consequence of this requirement led to an overly long CVA duration of up to five years. Many companies found it impossible to trade successfully while subject to a CVA for such a long period of time.

Landlords and CVAs

Although our empirical study did not include any large-scale retail CVAs, it was clear from the interviews we conducted that a number of landlords found the operation of CVAs to be lacking in clarity as far as their rights were concerned, and often felt that the results were unfair. Our report found that although landlords were not always happy with the terms of a CVA, they were generally willing to accept a reduced rent rather than take back the property, as any prospective tenant would be unlikely to offer more rent than offered in the CVA.

> Any potential restriction on connected party sales could make a CVA an increasingly viable option.

In *Discovery (Northampton) Ltd* v. *Debenhams Retail Ltd* [2019] EWHC 2441 (Ch), the court considered whether the terms of the Debenhams CVA were unfairly prejudicial to some of its landlords. The court explained its approach was to consider the particular facts of each case in deciding whether a CVA is fair or not. The *Debenhams* case involved the common type of retail CVA, where the CVA's terms create different classes of landlords of retail units and treat those classes differently from other unsecured creditors, as well as differently *inter se*. The problem faced by many retailers is that long term leases often provide for upwards only rent reviews without any break clauses. This type of lease has led to many retail units being 'over rented', that is, where the rent payable under the lease is greater than the market value of the unit.

Under the *Debenhams* CVA those units that were financially sustainable at the contract rate remained largely unaffected by the CVA, with full rent continuing to be paid during the CVA. Those units that were shown not to be sustainable at the contract rate had their respective rents reduced to a level which made them financially sustainable. The reduction in rent payable for the duration of the CVA was not lower than the market rent available at the time of the CVA. All landlords were given the right to terminate their leases if they did not wish to accept the lower rent. The court looked at the 'basic fairness' of the CVA and judged it fair in the round. The court was satisfied that the differential treatment of the landlords was justified on the facts to secure continuation of the business.

You can read more about CVAs on page 34 and more about the ***Debenhams*** *decision on page 32.*

Recommendations and prospective reforms

The positive outcomes of CVAs following a moratorium suggest companies would benefit from wider use of this breathing space. The existing options, under schedule A1 of the Insolvency Act 1986 for small companies or administration under schedule B1, are rarely encountered in practice due to the onerous provisions, costs and other challenges they present. A new pre-insolvency moratorium is desirable. A flexible moratorium would allow fuller scrutiny of any CVA proposals free from immediate creditor pressure. This scrutiny could include the feasibility of the proposed length of CVA. With a typical CVA proposed for five years, but a quarter of users being less than four years old at commencement, it is not surprising that the majority are terminated early.

The previous government had committed to introduce a pre-insolvency moratorium and a repeal of the underused schedule A1 process. It remains to be seen if the new government will proceed with these plans. Should it do so, its success will depend in part on engagement and education of directors to ensure its effective, and timely, use. The high level of early CVA terminations suggests insufficient engagement.

There are also proposals to introduce a new cross-class cramdown process in addition, rather than as an amendment, to the CVA. In reality, this will be suited to large companies with complex capital structures. CVAs will continue to offer a 'relatively low-cost restructuring option' for small companies – its main user group at present. With most CVAs supervised by practitioners undertaking just one or two per year, it would be beneficial to provide assistance to these advisers. A form of standard terms or a checklist could be used to frame the CVA, ensuring a degree of consistency and best practice.

These reform proposals are of increasing significance in light of the current review of the Graham Review reforms. Presently pre-packs are often pursued in preference to a CVA. However, any potential restriction on connected party sales could make a CVA an increasingly viable option. To make this option more successful, the framework needs strengthening.

The role of HMRC as an unsecured creditor was also identified as a hindrance to the success of CVAs, often resulting in unrealistic terms and dividends being proposed. The elevation of HMRC to preferential status may result in more realistic terms being offered, as proposals will legitimately be able to discriminate in favour of HMRC ahead of unsecured creditors. This will, however, depend on there being sufficient funds available after payment to HMRC to put an appealing proposal to the remaining unsecured creditors. This reform may not prove to be such a bargain for the general body of creditors.

Conclusion

Contestants on *Bargain Hunt* rarely make profitable decisions. Time is short. Expertise has only a limited input into decisions. Where experts are given more time, better decisions are made. If the contestants were given more time and were properly advised by one expert, with the additional input of the ultimate auctioneer, it is likely their quest would be more successful.

> CVAs are often a success, even if terminated early. They may be more successful more often, if time, advice and independent adjudication were available.

If restrictions on connected party pre-packs are introduced, the CVA regime may need to be strengthened. It could be improved in a number of ways: the introduction of a workable pre-insolvency moratorium; time to consider genuine financial and operational changes to a business; creditors, especially public sector creditors such as HMRC, could be more willing to compromise their debt over a shorter period of time; standard form provisions or a checklist dealing with, for example, the position of landlords, could be made freely available; and more generally all stakeholders could have full confidence that the proposal was independently assessed. CVAs are often a success, even if terminated early. They may be more successful more often, if time, advice and independent adjudication were available.

PETER WALTON (LEFT) is a professor of insolvency law at the University of Wolverhampton.

CHRISTOPHER UMFREVILLE (RIGHT) is a lecturer in law at Aston University.

What is the future for insolvency disputes?

Mark Beaumont tries to unravel the profession's approach to pursuing claims and lists his hopes for the future.

Before we imagine the future for resolving insolvency disputes, are we able to visualise the present? We could try, but an entire profession's approach to dispute resolution would surely be too diverse to summarise – at the very least there would be a long list of questions for which we'd first need to seek answers.

We'd have to decide where to begin: would it be with the investigation and identification of possible claims; with claims that are issued; or would the natural starting place be at some point in between?

> Insight could certainly be gained through a greater understanding of how decisions are made to proceed with litigation.

There could be much to learn from how decisions on which claims are to be pursued are made by different people and at different times, and what factors were most prominent in any one decision: the legal merits; quantum of claim; enforcement challenges; likelihood of recovery; willingness of a particular solicitor to act on a CFA; other workload and resource challenges; or not properly exploring whether a litigation funding or assignment option might be available.

Unfortunately, I'm not sure having all the answers to these questions would necessarily be that informative: I suspect it might paint something of a messy picture with little in the way of consistency (which is not to say that *you*, the reader, are not consistent, just that I imagine there is a lack of consistency across the profession as a whole).

What impact does the choice of funding make?

The nature of retainers, funding and insurance has a direct impact on how cases are progressed, as this will influence attitudes of both claimant and defendant. It could also remove some of the tactical weapons from defendants, such as security for costs applications or dragging out litigation to exhaust funds. Issuing alone usually focuses minds, and several funders and insurers now offer products that enable cases to be issued and settled for fixed fees or low cost. I wonder how many more defendants might settle quickly if a claim was issued against them?

Who decides what to pursue and the terms of engagement?

Insight could certainly be gained through a greater understanding of how decisions are made to proceed with litigation and the terms that accompany such a decision: how are hourly rates agreed upon? Will there be ATE insurance, disbursement funding, third-party litigation funding, WIP insurance or any other form of risk-sharing, financing or hedging? Who is weighing up the options and making the right choices? And what criteria are they judging this against?

The future for insolvency litigation

If it wasn't before, it's now clear just what a challenging task it is to summarise the approach of the entire profession to litigation.

Instead I'll focus on what I *hope* is the future for this space:

- Maximum value delivered from all potential claims, reducing both the number of creditors that lose out and the number of defendants walking away with their ill-gotten gains. Given the range of options around funding, insurance, retainers, assignment and hybrid offerings, there are more and more ways to extract value.
- Best practice being developed and implemented around insolvency litigation funding (including retainers and insurance) with the aim of ensuring that more cases get the support needed and that the products used are appropriate. This will also be useful should such decisions be challenged later.

In summary, the current opacity and general lack of knowledge around retainers, funding and insurance have created an inefficient market for insolvency dispute resolution. In an environment of asymmetric information, any commercial agreement is odds-on to favour those with knowledge, which in this scenario is often the litigation funders.

> The current opacity and general lack of knowledge around retainers, funding and insurance have created an inefficient market for insolvency dispute resolution.

On the flip side, inefficient markets deliver opportunities that an efficient market could never provide. Any IP or solicitor that can get a competitive edge has a massive opportunity before the sector gradually improves efficiency over time.

It is certainly worth learning at least a little about the many options available, and it is probably wise to have a real expert in these issues on hand, either within your business or externally, because getting this right can have huge positive impacts on both profitability and returns to creditors.

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 insolvency litigation and arbitration claims. Annecto is happy to assist with smaller claims, as well as mid-market, large-scale and complex cases. Contact Annecto Legal on 0800 612 6587 or Mark Beaumont directly on mark.beaumont@annectolegal.co.uk or 07730 217 643.

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Career progress

Ben Jones, winner of the first-place award in personal insolvency for the November 2018 JIEB exams, shares his experience of examination and life after qualification.

Ben is a director in the restructuring advisory team at FRP. Despite winning the personal insolvency prize, Ben has predominantly been working on corporate restructuring for the past three years. Prior to his move to FRP, he spent eight years with a smaller insolvency-focused firm.

Could you tell us a little bit about the work you are doing at the moment?

I have very recently obtained my appointment-taking licence. My work has been wide-ranging, including options/contingency planning, AMAs and formal appointments. I do enjoy personal insolvency work and have continued to deal with some more contentious matters.

How significant were the JIEB exams in building your career?

I had ambitions to progress into an appointment-taking role, so the JIEB exams were obviously key in that process. In terms of personal progression and momentum, I was keen to complete my JIEB exams at a time that was right both for me and FRP. I'm obviously grateful to the firm for supporting me through the exams and continuing to support me since.

> "I vaguely recall a brief round of applause from a few colleagues, followed by a strong demand for me to provide them with cakes."

How did you juggle studying and other commitments?

While I tried to 'keep up' with my studies early on it was challenging. I never really felt like I was up to speed. The reality was that priorities changed as the year went on and I ended up with an incredibly intense month or two leading into the exams.

How did you revise for the exams?

Throughout all of my previous academic and professional exams, I've focused on learning and understanding the syllabus before moving on to question practice during the last week or two. For the JIEB exams, I did adapt and accept that there was a point (and it should have been sooner) that question practice should become the priority.

What advice do you have for future students?

Start your revision early and try not to be too daunted by the volume. Question practice is crucial so the sooner you move to this phase, the better.

How did you celebrate winning the personal insolvency prize?

I think the results came out around lunchtime on a Friday afternoon. I vaguely recall a brief round of applause from a few colleagues, followed by a strong demand for me to provide them with cakes. In all honesty, it was a relief to get through both exams without issue, so the personal prize was just a nice bonus.

What other professional objectives are you working towards for the future?

I've not set any tangible targets at the moment. It's really just a case of continuing to develop. I'm particularly lucky with the support and range of expertise within the partner group at my firm. It's great to have the opportunity to deliver my own assignments and also continue to assist on other matters in parallel. ◻

> "For the JIEB exams, I did adapt and accept that there was a point (and it should have been sooner) that question practice should become the priority."

Evolving the exams

Andrew Kelsall shares his insights into how the JIEB examinations have become more focused and technologically evolved over the years.

Regulation and licensing of insolvency practitioners (IPs) is carried out by the Recognised Professional Bodies (RPBs).

Prior to 1986 and the introduction of the relevant legislation there were no licensing arrangements for IPs. Indeed, when the 1986 licensing of insolvency practitioners commenced there were transitional provisions to turn those with experience, or those already acting as office-holders, into 'grandfathers' for the profession. Theoretically it is still within the gift of the RPBs to grant a licence to a person who has not passed the Joint Insolvency Examination Board (JIEB) examinations; however, while there have been a number of requests to the various RPBs, all of the requests to date have been rejected.

> "From commencement the examinations have been open book… this in part reflects the desire and attempt of the examinations to be practically based and as near to replicating office situations as you can in an exam."

Post-1986 to present

From the introduction of the JIEB examinations in 1990 – for those looking to be appointment takers with post-1986 experience only – the RPBs have only granted insolvency licences to those applicants who have passed the JIEB examinations.

Currently candidates are required to register with an RPB and it is to the RPB that candidates will make the application to sit the exams.

Up until 2018, there were three examinations of three hours and 30 minutes duration each, to include 30 minutes for reading and planning. The three papers tested personal insolvency, liquidations and administrations, and company voluntary arrangements and receiverships. There was a convoluted set of rules about how and when candidates achieved the goal of passing all three papers and therefore the examination as a whole. Generally, all three papers were attempted in the same sitting and candidates either passed all three examinations, failed one of the three and were referred in the third paper or failed two or more papers and were required to sit all three papers again. Just to mention my own personal experience of the examinations – my first attempt was marked as 46, 47 and 63 and so, with a pass mark of 50 in each paper, I had to take all three examinations again!

Personal and corporate intertwined

From commencement the examinations have been open book in that a copy of *Butterworths Insolvency Law Handbook* was initially provided, but now candidates provide their own unmarked version; this in part reflects the desire and attempt of the the examinations to be practically based and as near to replicating office situations as you can in an exam.

Currently the exams comprise two papers – corporate insolvency and personal insolvency – and this change was in direct response to newly introduced legislation allowing practitioners to hold separate licences in personal or corporate insolvency. Both papers still provide candidates with three hours and 30 minutes, to include 30 minutes for reading and planning.

In reducing the examination papers to two there has been consideration of practical solutions. While the personal insolvency paper relates to personal insolvency, an awareness of corporate insolvency will be tested, and vice versa with the corporate insolvency paper requiring a knowledge of personal insolvency. For example, the not uncommon situations of company directors with personal debts, or a winding-up order being made against a partnership.

The age of technology

A further change that took effect from the 2018 examinations was the way in which the examinations are now sat, in that the papers are no longer written but are computer based. Guidance and practice software are available on the JIEB website.

At the same time as the examinations became computer based the format of the examinations changed from four questions of 25 marks each to three questions of 20 marks each and a more in-depth 'case study' type question of 40 marks. This enables the examination team to test a number of areas of knowledge within one question, replicating real-life scenarios as much as possible.

The JIEB syllabus is available on the JIEB website and will change to reflect legislation and practice, and to continue the very real attempt of the examinations to be a practical test of the candidates' knowledge and experience. Changes in legislation etc are only tested if in force by 30 April preceding the November examinations.

The skills that make an IP

Being an IP requires an awareness of a wide range of areas, not just detailed technical and legal knowledge. Skills such as being able to produce a cash flow forecast where ongoing trading is a consideration, or understanding that taxation considerations may make one procedure more favourable to another, are things that IPs will need in real life. These and others have been tested in past JIEB examinations and will continue to be so in the future.

> "Being an IP requires an awareness of a wide range of areas, not just detailed technical and legal knowledge."

My tip for the 2020 examinations is that they will continue to be practically based, and the best preparation will include getting as much practical experience as possible, studying comprehensively and an abundance of question practice.

ANDREW KELSALL is a licensed insolvency practitioner and partner at MHA Larking Gowen, and is a director of the Joint Insolvency Examination Board.

Joint Insolvency Examination – November 2019

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 2019 high achievers

First Place in Corporate Insolvency	First Place in Personal Insolvency	Combined Top Scorer
Scott Mackenzie	Jack Plunkett	Jack Plunkett

B

Bebbington S, Exeter
Beverley S, Sheffield
Bickley-May N, Hemel Hempstead
Brown L, Ramsgate
Bullock L, London
Byrne L, London

C

Cockerill C, Leeds
Collins Z, Mirfield
Cordina D, Fleet
Crawford C, Birmingham

D

Davison I, Bangor
Donovan Z, Cardiff

E

Ewing M, London
Eyre W, Bexley

F

Farr S, Stockport

G

Godfrey A, London

H

Henshilwood B, Knebworth

K

Keegan K, Southampton

L

Leach R, Leeds
Longhurst J, Tunbridge Wells

M

Mackenzie S, London
Majupuria B, Stockton-On-Tees
McGonigle G, Hillsborough

O

Oddy R, Leeds

P

Parkin R, Rotherham
Pirie J, Jersey
Plunkett J, Watford
Portwood J, Nottingham
Probert A, Leeds

S

Smith M, Guernsey
Stagg W, London
Stone M, Purley
Stronach J, Wetherby
Symington L, London

W

Wall S, Walsall
Walsh D, Westcliff-On-Sea
Walshe L.A, Manchester
Whiley J, Cheltenham
Whitfield W, Carlisle
Wilkinson S, Wakefield
Woodhead J, Leeds

Y

Yarwood P, Manchester

Editor recovery@r3.org.uk

Joint Insolvency Examination – November 2019

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.

B

Beake J, London
Bebbington S, Exeter
Beverley S, Sheffield
Bickley-May N, Hemel Hempstead
Blackmore E, Leicester
Bullock L, London
Butt M, Long Eaton
Byrne L, London

C

Cockerill C, Leeds
Cooper J, Glasgow
Cordina D, Fleet
Crawford C, Birmingham

D

Davison I, Bangor
Denny Z, Cheltenham
Donovan Z, Cardiff

E

Ewing M, London
Eyre W, Bexley

F

Fryer P, London

G

Gleghorne A, Belfast
Griffin L, Glasgow

H

Harris T, Leicester
Hook A, Alton
Horan A, Altrincham
Huartson C, Woodford Green

L

Longhurst J, Tunbridge Wells
Low K, Edinburgh
Lyttle A, Airdrie

M

Mackenzie S, London
Majupuria B, Stockton-On-Tees
McGonigle G, Hillsborough
McLean C, Belfast
Meldrum D, Glasgow

O

Oddy R, Leeds

P

Pannozzo D, Banbury
Parkin R, Rotherham
Plunkett J, Watford
Portwood J, Nottingham

R

Ramsey A, Leigh-On-Sea
Ransley G, Southampton

S

Scullion M, Ballymoney
Seymour A, Letchworth Garden City
Simcox A, Walsall
Smith M, Guernsey
Stagg W, London
Stone M, Purley
Stronach J, Wetherby
Symington L, London

V

Vivace F, Altrincham

W

Whiley J, Cheltenham
Whitfield W, Carlisle
Wilkinson S, Wakefield

Analysis of November 2019 results

Papers sat	Papers passed			
	2	1	0	Total
2	29	12	13	54
1	–	28	60	88
Grand total	29	40	73	142

A solicitor and the JIEB: a successful climb

Solicitor **Rebecca Andrews-Walker** decided to see if the JIEB summit looked any better through the eyes of a legal eagle.

I am a senior associate in the dispute resolution team at Penningtons Manches, specialising in insolvency and recoveries, particularly advising insolvency practitioners in contentious bankruptcy proceedings. I passed the JIEB in November 2018.

Why scale the JIEB mountain?

Relatively few solicitors take the JIEB qualification, and (I am told) even fewer pass it. What on earth possessed me to start scaling this particular mountain?

The answer is twofold. First and foremost, I am a bookworm. I love to study and there was an academic itch I longed to scratch.

> The market is increasingly requiring lawyers to do more than 'just' provide legal advice; to demonstrate the added value we offer.

Secondly, the market is increasingly requiring lawyers to do more than 'just' provide legal advice; to demonstrate the added value we offer. What more effective way of doing that than taking the one qualification that shows your insolvency practitioner clients that you understand their world? It also demonstrates that you may be made of steel – no bad thing. And, of course, the knowledge I have gained has made me a vastly better insolvency lawyer. It is much more than a 'business development tool'.

Is JIEB really a challenging summit?

In short – yes; the JIEB is a very difficult course, as the low pass rates of those sitting it for the first time every year demonstrates. It is difficult enough for those already working in the insolvency industry; it requires you to sacrifice 12 months of your life to what tutors refer to as 'the journey'. There are no shortcuts, and the only way to do well is to work hard, consistently, for those 12 months, as though the rest of life has ceased to exist.

If you are a lawyer taking the JIEB, however, the rules of engagement are very different. The course assumes you are already working in an insolvency practitioner firm. It presupposes a base knowledge of day-to-day case work, commercial decision-making processes, basic insolvency accounting and compliance matters. As a lawyer, I knew much of the law, but was less familiar with these. In order to get to base camp, I had to scramble through these foothills as well as learn the course content, while also managing my fee-earning caseload.

My journey involved studying at 6.00 am before a fee-earning day, then again after work, sometimes until the early hours. It meant sacrificing every weekend. I run half marathons, and even that time was utilised by creating and listening to revision audio files. I ate a well-known supermarket chain out of chocolate covered rice cakes and drank a terrifying amount of coffee.

I now understand why so few lawyers attempt the qualification; it is akin to roller skating up a mountain. I do not say this to deter any lawyer wanting to do the JIEB, but only to prepare them for the demands they will face. If you get to the top of the mountain, mind you, the view is worth the climb.

How were the changes to the exam structure?

Challenging. The electronic exam format encountered many hiccups, which caused chaos on exam day. I suspect this was inevitable in the first year, but I hope that no future years have to deal with those problems as they were very off-putting. As a positive, the spreadsheet format for the accountancy elements was a lifesaver; I cannot imagine having to handwrite accounts in an exam!

Personally, I found the merger of the administrations and liquidations paper into one corporate paper to be unsatisfying. The syllabus is so wide that the merged paper means you are only examined on a tiny sliver of what you have worked so hard to learn.

Reaching the pinnacle

Waiting for the results is tortuous; they come out in March, which feels like an age away when the exams are in November. They arrive by text alert in the afternoon, and I remember trying not to stare at my phone constantly for hours (clearly, I failed miserably). That message with my pass marks was one of the proudest moments of my professional career. It was an arduous climb, but worth the effort and energy it took to reach the summit successfully.

Would I recommend dual qualification to other lawyers?

Glutton for punishment that I am, I would do it all again in a heartbeat. Yes, it is very difficult, but ultimately incredibly rewarding. But do it with your eyes wide open, understand what will be required of you and ensure that your employers do too.

> It is very difficult, but ultimately incredibly rewarding. But do it with your eyes wide open, understand what will be required of you and ensure that your employers do too.

Choose the right tutor; BPP, for me, was fantastic. As long as you are well prepared for the challenge and have a good support team in place (I am so very grateful to my partner, father and friends (and boss) for tolerating and supporting me), then I absolutely recommend it.

If only for the view at the top of the mountain.

REBECCA ANDREWS-WALKER is a senior associate in the dispute resolution team at Pennington Manches.

WHEN TO TAKE YOUR CAREER FORWARD

Scott Lowes provides thinking points to maximise your job satisfaction and professional development.

Staying in a comfortable yet repetitive position can seem much easier than looking for a new role, but a change can often give you the motivation to increase your efforts and develop your experience.

Lack of progression

As you develop within a firm you may reach a ceiling where future progression can become very difficult.

A lack of progression is usually because of one of two things: either there is no room to be promoted or the type and level of work will no longer differ from what you have already done, meaning that your professional development can stagnate.

Professional development ceiling

It's easy to fall into a routine of working on the same old cases. If you're looking to challenge yourself and want to develop your career, you won't achieve this by undertaking the same work repeatedly. Look for opportunities that are going to stretch your abilities and establish what the role would involve longer term.

> "If you're looking to challenge yourself and want to develop your career, you won't achieve this by undertaking the same work repeatedly."

Seeking a more challenging role may limit your options in the job market, however it's important to find the right opportunity that will allow you to achieve your career aspirations.

Workplace culture

The culture and office environment can differ greatly between firms and locations. This might seem like a trivial reason to look for a new job but, considering how much time you spend at work, you should be able to enjoy the environment you work in.

Perhaps you're a dynamic, outgoing type working in an old-fashioned firm that's stuck in its ways. You may feel that your ideas are slightly more progressive than your current employer.

Work/life balance (or lack of it!)

Life and circumstances can change over the course of your career, which may impact how flexible you can be with your working hours. Things change in life that may need you to redirect some of your attention elsewhere. You may have fallen in love, had a child or simply undertaken a refocus of your life/career aspirations.

Finding a good balance between work and home life is necessary not just for your personal relationships, but for your mental health too.

Having a fair work/life balance does not mean you are work-shy!

Not being fairly rewarded

It's important to be paid fairly for your level of experience and the position you hold in comparison to your peers. It is worth noting that salaries from firm to firm can differ by a couple of thousand pounds for the same position. A difference of £1,000–£3,000 shouldn't really be a deal-breaker.

However, if you feel you are being significantly underpaid, then it may be wise to explore your options in the market.

I consider salary to be the biggest risk when making a career move. For example, you could earn less in the long run if you move for an extra £3,000, it is entirely possible that the role will not offer you the chance to develop your experience or progress your career.

Other things worth considering are your overall package and holiday entitlement. Benefits can differ greatly within the industry; some benefits packages can be worth as much as £5,000 in monetary terms. Additionally, some firms will only provide 20 days of holidays while others as many as 27 days.

Is it time to start looking?

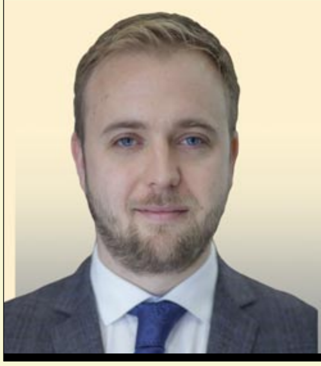
The above are only a few of the things to consider when changing job. If you are unhappy or feel unfulfilled in your current role then it's probably time to do something about it.

That said, I advise you take a step back to evaluate why you are unhappy or what the issue is. The first port of call should be to assess whether it can be resolved without the need to move jobs.

> "Once you understand your ideal role it will become easier to identify suitable job opportunities."

If not, establish what a role would need in order to be better than the one you are currently in. Once you understand your ideal role it will become easier to identify suitable job opportunities.

The main thing to remember when searching for a new job is that you should make sure this new role will be beneficial to your short, medium and long-term career and personal aspirations. You may be able to solve one of the issues above by moving jobs but be careful not to sacrifice one of the others in doing so. It can be tempting to choose a job because it has a higher salary but if the level of work is a step backwards or you must work 12-hour days, you may find yourself looking for another role in the not too distant future.



SCOTT LOWES is a director at Levitate Recruitment, specialists in placing practice-trained accountants and insolvency professionals across the UK. For advice about your career options, speak to Scott by contacting slowes@levitaterecruitment.com and find the right role to suit your ambitions.

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- Insolvency Case Manager
- Insolvency Director
- Restructuring Director
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Taking (up an) offence: how an office-holder can turn prosecutor

Cory Bebb and **Lee Adams** explore the world of private prosecutions as they relate to insolvency.

While the insolvency regime is primarily concerned with realising assets for the benefit of creditors, it also gives rise to separate regimes that have the objective of protecting the public and punishing wrongdoing in the form of criminal prosecutions.

Criminal offences in insolvency

The most commonly prosecuted criminal offences found in the Companies Act 2006 (CA 2006) and Insolvency Act (IA 1986) include (a) the offence of fraudulent trading (s993 of CA 2006), (b) false representation or fraud for the purposes of obtaining creditors' approval (s262A of IA 1986) and (c) bankruptcy offences including non-disclosure and false statements (ss353–62 of IA 1986). While company directors risk criminal prosecution for failing to file company accounts on time, official statistics show that civil fines are the preferred route, as opposed to criminal proceedings.

> The growing trend in private prosecutions can in part be attributed to the funding cuts to the Police, Serious Fraud Office and CPS.

IA 1986 offences are helpfully listed in schedules, being schedule 3 to the Insolvency (England and Wales) Rules 2016 and schedule 10 to IA 1986. In addition, an office-holder may come across other offences during his or her office, such as Fraud Act 2006 offences. Sections 7A (CVA), 262B (IVA), 218(3) (compulsory liquidation) and 218(4) (CVL) of IA 1986 contain specific statutory duties to report potential criminal offences to the Secretary of State or the Official Receiver, in the case of compulsory liquidations.

Criminal prosecutions relating to breaches of insolvency and company law are brought by the Insolvency Service's criminal enforcement team whereas other offences (such as Fraud Act offences) are

brought by the Director of Public Prosecutions (DPP) or CPS.

A person who acts in contravention of company and/or insolvency law is liable to criminal prosecution. Criminal prosecutions for failing to preserve company accounting records (ss387–89 of CA 2006), fraudulent trading (s993 of CA 2006), acting as a director while disqualified (in breach of s13 CDDA 1986), false representation or fraud for the purposes of obtaining creditors' approval (s262A of IA 1986), failing to disclose property to the Official Receiver or trustee (s353 of IA 1986) and making a false statement (s356 of IA 1986) are not uncommon.

Availability of private prosecutions

The right to bring a private prosecution is enshrined in the Prosecution of Offences Act 1985 (POA 1985), which protects any person's right to bring or conduct criminal proceedings.

This right is subject to three limitations: (i) all magistrates have a discretion to refuse to issue the summons or warrant; (ii) the DPP can intervene at any stage with a view to continuing or abandoning the prosecution; (iii) certain offences require permission from the DPP or Attorney General to prosecute.

Enforcement agencies have limited resources that are under increasing pressure, particularly on complex fraud matters, and so the regime can offer a remedy to those who have been affected by criminal conduct, not just in the form of justice and redress but also in the form of compensation.

The growing trend in private prosecutions can in part be attributed to the funding cuts to the Police, Serious Fraud Office and CPS. The principal appeal of bringing a private prosecution is that, if successful, justice can be achieved in the same way as if the case has been brought by a public prosecutor, but in less time and with more control.

While a successful private prosecution will punish the criminal, deter future criminal conduct and protect the public, the possibility of compensation for the victim is an outcome that will be of interest to office-holders, in particular where there are issues which may preclude a civil claim such as establishing jurisdiction in the UK or where a limitation period has expired. However, there will be very few cases where a criminal prosecution will be more advantageous than civil proceedings in the recovery of funds for the insolvent estate and so criminal proceedings should only be seriously considered where the primary purpose is to punish blatant criminal conduct that has caused creditors' loss, with the recovery of compensation as a secondary or equal objective. Criminal

> Criminal prosecutions do however have an advantage over civil proceedings in the sense that costs may be recoverable win or lose.

prosecutions do however have an advantage over civil proceedings in the sense that costs may be recoverable win or lose, which we discuss further below.

Office-holders would appear to have the express power to bring and conduct criminal proceedings under IA 1986 although a trustee would have to demonstrate that such action relates to the property comprised in the bankrupt's estate – schedule B1, paragraph 60(1) and schedule 1, paragraph 5 (administration); section 165 and schedule 4, paragraph 4 (CVL); section 167 and schedule 4, paragraph 4 (compulsory winding-up); section 314 and schedule 5, paragraph 2 (bankruptcy).

Although it is usual for the 'victim' to bring a private prosecution, anyone can bring a private prosecution in relation to a criminal offence even if they are not a victim, and so the option is open to any creditor where they are not – or are not considered to be – a victim. This may well be an attractive option for a disgruntled (and well resourced) creditor who is unhappy with the traditional civil legal processes.

The writers are currently advising a trustee in bankruptcy, being the former supervisor of an IVA, in relation to a possible private prosecution against a debtor who has fled to Australia. The debtor proposed an IVA to creditors that required the debtor to pay income from his dental practice partnership into the IVA for the benefit of creditors. Unknown to the nominee, the debtor was selling his share in the partnership, a process that took place prior to, during and after the IVA being approved. The debtor fled to Australia with proceeds of £275,000. The Insolvency Service has declined to pursue criminal proceedings citing 'insufficient evidence' and so a private prosecution is a possibility under s262A (false representations etc) of IA 1986. However, before taking such steps it is intended that an attempt is made to persuade the Insolvency Service to change its position, failing which creditors will be canvassed if a private prosecution is desirable.

> Office-holders will be delighted to know that a private prosecutor can usually recover the legal costs of the private prosecution from central funds whether or not a defendant is convicted.

Financial recoveries

In cases where loss or damage has resulted from the offence, the court is under a statutory duty to consider making a compensation order in favour of the victim of the criminal conduct, although if it is to make an order it must be satisfied that the defendant has the ability to pay.

The private prosecutor may apply for a confiscation order under the Proceeds of Crime Act 2002, deploying various powers such as disclosure orders, restraint orders and witness summonses in order to obtain information relevant to the confiscation proceedings. The purposefully draconian nature of confiscation orders can even place the onus on offenders to hand over assets that they have hidden in other jurisdictions.

Some powers – such as a search warrant – are reserved to specified officers such as those working for the police, the National Crime Agency or HMRC. A private prosecutor may seek assistance from such officers or instruct an accredited financial investigator who could similarly seek the assistance of a law enforcement agency, and then apply for these reserved orders.

Costs and funding

Office-holders will be delighted to know that a private prosecutor can usually recover the legal costs of the private prosecution from central funds whether or not a defendant is convicted, the sum recoverable being whatever is reasonably sufficient to compensate the prosecutor for any legal costs properly incurred in the proceedings. Such an order should be made unless there is good reason for not doing so, such as misconduct by the private prosecutor. However, these costs do not extend to the investigation element of the case.

A convicted defendant may be ordered to pay the private prosecutor's costs (both investigation and prosecution costs), but only if the court is satisfied that the costs are 'just and reasonable'. A defendant may seek to recover costs from a private prosecutor on the basis that the defendant has incurred costs as a result of an unnecessary or improper act or omission.

Procedural issues

One of the most important issues when exploring a private prosecution is retaining the right lawyers – the lawyers should act in the same way as any prosecutor appointed by the state, a fairly onerous (and costly) burden which requires such lawyers to follow the CPS' *Code for Crown Prosecutors*.

Additional complexities arise where parallel civil proceedings are afoot, with very close scrutiny on the criminal proceedings being deployed as leverage in the civil proceedings, which could lead to the private prosecution being stayed as an abuse of process, with adverse costs consequences.

It should be borne in mind that the DPP has the power to discontinue any private prosecution at any stage of the proceedings. There is no requirement to notify the CPS of a private prosecution but the DPP may find out about the prosecution, for example if the defendant asks the CPS to intervene.

The CPS will intervene if the CPS' code is not being met by the retained lawyers, and may intervene where the code is being met but there are other reasons to intervene and discontinue. If not, the DPP will review whether the prosecution should be adopted and pursued by the CPS or allowed to continue as a private prosecution. The CPS is less likely to intervene if a private prosecutor can demonstrate that they have properly investigated and prepared a case and have been candid with the court.

Summary and conclusions

Creditors understandably may be frustrated by the lack of accountability of those involved in the demise of a business, especially where criminal offences have been committed which have led to creditor losses, such as fraud.

Private prosecutions provide an additional weapon in the armoury of the office-holder, which can be deployed in place of or alongside civil proceedings. Many in the legal profession consider that the Police, Serious Fraud Office and CPS are failing to investigate and ultimately prosecute complex fraud cases due to budget cuts and, as a result, it is anticipated that the trend in private prosecutions will continue to rise.

> Private prosecutions provide an additional weapon in the armoury of the office-holder, which can be deployed in place of or alongside civil proceedings.

While financial recoveries are possible as a consequence of a criminal prosecution, punishment of the offender is most likely to be the main motivating factor for any criminal prosecution and it is for this reason that any such action should be expressly approved by a majority of creditors.

Given the uncertainty surrounding financial recoveries following a private prosecution, the funding of such an action is likely to be an issue most likely resolved by a creditor or creditors providing funding on terms that they will be reimbursed if and to the extent to which funds are recovered by the office-holder from central funds, rather than estate funds being used.

CORY BEBB (LEFT) is a partner in the corporate recovery and insolvency team at JMW Solicitors LLP.

LEE ADAMS (RIGHT) is a partner in the business crime and regulation team at JMW Solicitors LLP.

WHOA!

A new Dutch scheme is coming

Alice van der Schee explains what is so special about the new WHOA bill, which seeks to create an attractive Dutch scheme in line with European legislation.

It has long been felt by the Netherlands' restructuring community that the Dutch Bankruptcy Act (*Faillissementswet*) does not provide an adequate restructuring tool outside of regular insolvency proceedings. This has resulted in an informal out-of-court restructuring culture in the Netherlands, with quite a bit of uncertainty as to whether a restructuring will succeed, a possible delay in its implementation and an imbalance between regular creditors and shareholders – the latter often being better informed and protected by management. This will change for the better with the implementation of the bill on *Wet Homologatie Onderhands Akkoord* (WHOA or 'the Act on the Confirmation of Private Plans'). This bill introduces a procedure for a restructuring plan to be voted upon outside of insolvency proceedings – in short, a Dutch scheme. The bill is going through parliament right now and is expected to come in to force by the end of 2020.

> "It is expected that the WHOA will become the first procedure in the EU to effectively implement the preventive restructuring framework envisaged by the EU."

Futureproof insolvency processes

This bill is part of a programme to overhaul the Dutch Bankruptcy Act. The Act was originally introduced in 1893 and has withstood the test of time quite well. However, the overhaul, of which the WHOA is part, focuses on making the Bankruptcy Act futureproof. Two bills have already been implemented: one strengthened the position of IPs faced with fraudulent acts, the other modernised insolvency proceedings in general.

WHOA is now in parliament and has been amended to comply with the EU Restructuring Directive (EU 2019/1023), which has recently come into force. It is expected that the WHOA will become the first procedure in the EU to effectively implement the preventive restructuring framework envisaged by the EU. Dutch legislators were inspired by the UK's scheme of arrangement and the US' Chapter 11 – the result is generally seen as the best of both worlds.

The main aim of the WHOA is to ensure the restructuring of problematic

Editor recovery@r3.org.uk

debt at an early moment by putting a restructuring plan to vote. Of course, there can be discussion about what 'an early moment' is, and at which such a procedure can be started. The bill states that the restructuring plan can be initiated when the debtor is, or can reasonably be expected to become, insolvent. There is no fixed time, just the expectation that not all obligations can be met in the future. This means that the plan can be started as much as a year ahead of the moment the company is expected to become insolvent.

> In small or medium-sized enterprises the plan proposed by the restructuring expert will need the approval of the debtor.

Who can propose a plan?

The debtor and/or a so-called restructuring expert are allowed to propose a plan. A shareholder, creditor (banks, for example) or works council may request the appointment of a restructuring expert by the court. However, the debtor remains in possession and control of the company. If a restructuring expert is appointed, the debtor will have to work in cooperation with them. As the restructuring expert is only developing the plan, and not running the company, it is envisaged that the debtor will have to assist the expert when it comes to putting the plan together. In small or medium-sized enterprises the plan proposed by the restructuring expert will need the approval of the debtor. This seems logical; I doubt that a plan developed by a restructuring expert without the approval of the debtor would have a chance of being adopted or, if adopted, would result in an effective restructuring.

Contents of the plan

The way the restructuring plan can be formulated is quite flexible – a reduction of debt, debt for equity swap, sale of assets and a controlled wind-down are all possible and could help the company survive. The proposed bill further states that the restructuring plan does not necessarily need to affect all creditors – it can be aimed at a certain category of creditors and/or shareholders for maximum flexibility. In a country where taxes have preferential status, it is well noted that the plan can also bind preferential and secured creditors, or subsets of these. This increases the chances of the plan being successful. One category of obligations cannot be touched, which is those resulting from employment agreements.

Intra-class cramdown and cross-class cramdown?

Another important element of the bill is the fact that a majority can bind the minority within a class, and that the court can effectively impose the restructuring plan on those classes that do not agree with it. Classes are determined by the similarity of new and existing rights. The voting within a class is decided by two-thirds of those participating (and appearing) within a class (intra-class cramdown), so no head count takes place. If all classes have accepted the plan, then a dissenting creditor may not receive less than this creditor could expect to receive in liquidation. This is an important test, but also one where I expect quite a bit of discussion to arise because it is not always clear what the exact outcome of a liquidation will be. Then there are rules about cross-class cramdown. The first rule applicable to a cross-class cramdown is that at least one 'in the money' class must have accepted the plan. Next, in the case of a small or medium-sized enterprise, the debtor needs to consent to the plan. Most importantly though is that there is a right for the creditor in the dissenting class to get out. This is structured by a right of the creditors in the dissenting class to take either a distribution in the form of cash equal to the distribution they would get in a liquidation or the distribution they would get if the plan was approved.

Involvement of the court

No formal insolvency proceedings will be opened under WHOA, and the court's involvement is quite minimal. There is no evaluation of the plan by the court before it is put to creditors, and no creditor meetings as we know them from regular insolvency proceedings. There is electronic voting on the plan (as soon as eight days after the proposal), a confirmation hearing two weeks after the vote and a confirmation decision as soon as possible thereafter (a few weeks). In a perfect world this means that a plan can be approved within three to five weeks. Also, there is no possibility of an appeal, so the pressure to get it approved right away is quite high. Furthermore, it has been decided that the judges who decide on the proposed plans are to be part of a specialised team in order to have all of the necessary knowledge on the bench.

> It has been decided that the judges who decide on the proposed plans are to be part of a specialised team in order to have all of the necessary knowledge on the bench.

Other factors to know

These are just the basic principles in the new WHOA. Other measures to help a company survive are included, such as a stay or the possibility to reject contracts, which are then converted into damages claims that can be restructured in the plan. As a restructuring process itself can have an important impact on the viability of a company, the bill provides for a confidential variant next to the public variant. There is a difference between the public and confidential variants when it comes to the European Insolvency Regulation (EIR). The public variant is placed on list A of the EIR, while the confidential variant falls outside of the EIR. This means that the public plan is automatically recognised in the EU, whereas the confidential variant is not. The upside of the latter is that COMI rules of the EIR do not apply, thus the debtor does not need to have his centre of main interest in the Netherlands in order to be able to propose a restructuring plan and get it approved.

> The proof of the pudding is in the eating, so whether the new Dutch scheme truly will be a first-rate international restructuring tool will remain to be seen.

Expectations

The new Dutch scheme is very flexible, and many Dutch insolvency experts have high hopes of this new instrument encouraging debtors from the EU and further abroad to start restructuring in the Netherlands. Many experts also assume that the new Dutch scheme is particularly appealing for larger global companies or those operating in multiple jurisdictions. As always though, the proof of the pudding is in the eating, so whether the new Dutch scheme truly will be a first-rate international restructuring tool will remain to be seen. ◻

ALICE VAN DER SCHEE is a partner at Van Benthem & Keulen BV.

Keeping the shutters up: retail CVAs and property rights following *Debenhams*

Zachary Kell examines the high-profile judgment on CVAs to see what it means for businesses and IPs.

The landmark case of *Discovery (Northampton) Ltd* v. *Debenhams Retail Ltd* [2019] EWHC 2441 (Ch) has provided clear guidance on the position of landlords and the intersection between their rights as creditors and their proprietary rights under the leases they have granted. Six landlords applied to challenge the CVA of major UK retailer Debenhams. Norris J had to reconcile the following issues:[1]

- Could a CVA capture a tenant's obligation to pay rent in the future?
- If a CVA reduces future rent will that inevitably render it prejudicial to a landlord-creditor?
- Can a CVA vary a landlord's right of re-entry under a lease?

This article will address these three areas and consider the effect it has on retailers seeking protection under a CVA as balanced against the rights of landlord-creditors. This will include practical guidance as to what options a retailer may have when facing a CVA under threat by forfeiture of their main commercial outlets.

Future rent

In one of the first cases looking at future rent in the context of a CVA, HHJ Roger Cooke explained that:

'In terms of defining a creditor there is a difference between a right to be paid something that has accrued due and has become a debt and a right in respect of something that is an obligation […] relating to and arising out of property.' [2]

The judge arrived at the conclusion that a debt or liability is an obligation fully crystallised and cannot be dependent on future executory matters such as a property right. While Norris J did not undermine this analysis in *Debenhams*, he did not consider it a restriction to the CVA capturing the obligation as a contingent debt:

'"Future rent" is at least a pecuniary liability to which the company may become subject in the future by reason of an existing obligation. That is clearly so in the case of a tenant whose landlord insists (by refusal to accept a surrender or exercise a right of re-entry) that the lease remain in being and that the tenant continue to be exposed to performance of the covenant for rent, under which as time passes rent will accrue due, payable as a debt.'

> 'Future rent' is at least a pecuniary liability to which the company may become subject in the future by reason of an existing obligation.

Therefore s1(1) of the Insolvency Act 1986 (the Act) and its use of the terms 'debts' and 'creditors' should be viewed through a broader lens such that it is capable of capturing future rent. While future rent may not be capable of proof in a liquidation (and the difficulty here is unsurprising for the same reasons that HHJ Roger Cooke discussed) it follows that the CVA procedure has greater flexibility, as envisaged by Sir Kenneth Cork's Report.[3] If such contingent debts fell outwith, that flexibility would surely be lost.

Norris J was careful to point out that satisfaction of the 'vertical comparator' (ie the other creditors in the class) does not of itself mean that the CVA must be fair.

Rent reduction

The landlords in *Debenhams* subsequently asked the court whether it renders a CVA automatically unfairly prejudicial under s6(1)(a) of the Act, or whether there was any jurisdiction for a CVA to operate to reduce rent payable under leases. As to the first point, Norris J looked at the CVA in the context of Debenhams' different creditors:

'Normally, it would seem wrong in principle that a tenant should be able to trade under a CVA for the benefit of past creditors at the present and future expense of its landlord. But suppose the past creditors consisted of suppliers who provided goods under "one-off" contracts or "short-term supply" deals that would naturally reflect the current market price for such supplies: and suppose the landlord could, under the lease, charge a rent fixed at an historic high or which automatically escalated by a fixed percentage unrelated to the value of money or the state of the market, so that what was actually chargeable very substantially exceeded the market rent (say by 100%). Would it not be "unfair" for the suppliers to be unable to receive the market price for their goods in order that the landlord should receive a 100% premium over the market price for his supply? What would be "unfair" about a scheme the object of which was to ensure that everybody got the market price for what they supplied? As a matter of principle I would not have thought it "unfair" that a landlord might receive less than his contracted-for rent in such circumstances.'

Fairness is not necessarily a question of an individual creditor claiming they have been shut out of their contractual or proprietary rights. Instead it will involve a balancing exercise to consider if it is fair that the entire class of creditors has the ability to recover the market rate for their services or supplies. Nevertheless, Norris J was careful to point out that satisfaction of the 'vertical comparator' (ie the other creditors in the class) does not of itself mean that the CVA must be fair. Instead the court will consider the CVA in the round.

As to the question of jurisdiction under the Act, the landlords submitted that the Debenhams CVA was creating a new obligation and therefore fell outwith s1. Norris J rejected this argument and held the CVA was proposing a variation of an existing obligation binding the company and its creditor.

Forfeiture

The CVA contained a stipulation that any provisions of Debenhams' leases that provide a right of early termination, forfeiture or 'irritancy' as a result of the terms or effects of the CVA are automatically waived by the landlords (apart from certain break rights). The landlords submitted that a right of re-entry was a proprietary right incapable of being altered by a CVA. Norris J agreed with this contention and held that:

'[…] a CVA cannot vary a right of re-entry. The right of re-entry is property belonging to the landlord (not a security right created by the tenant over his own property). It arises out of the relationship of landlord and tenant because (i) it defines the estate which the landlord has granted in creating the term of years and (ii) neither its existence nor its exercise is dependent upon any state of indebtedness as between landlord and tenants. A tenant who has paid all his rent to date but faces insolvency may still have his lease forfeit.'

The landlords submitted that the Debenhams CVA was creating a new obligation and therefore fell outwith s1. Norris J rejected this argument.

While this may be legally the correct analysis, it does provide a lacuna in the protection for a retailer/commercial tenant trying to seek debt relief under the CVA process. In cases where a landlord is a minority creditor for the purposes of CVA proposals, the landlord can still have a major bearing on the success of the scheme should they decide to forfeit the lease of the company's main outlets. This gives a salutary reminder to debtors who may seek the protection of a trading CVA, hoping to restructure over a number of years and return to solvency, that such a scheme may still be seriously undermined should any landlord seek to exercise their right of re-entry. In those circumstances it may be advisable to consider entering into administration (even if the purposes of the same are to return to trade) because of the more concrete protection provided by the statutory moratorium.[4]

Conclusion

As one commentator has put it, the *Debenhams* judgment is a 'major comfort' to companies in financial distress.[5] However, it should also provide some much-needed clarity to landlord-creditors in that the CVA process is one within which future rental liabilities should be considered. Ultimately, if debtors and creditors can engage with the CVA process to ensure the former has relief from dire financial straits and the latter recovers at least a substantial amount more than it would from liquidation or administration then its statutory aim is achieved.[6] Of course, if that is not possible then a debtor needs to consider any future alternatives such as administration before having to face the inevitable should a winding-up petition be presented. ◻

It should also provide some much-needed clarity to landlord-creditors in that the CVA process is one within which future rental liabilities should be considered.

[1] Other points of challenge included the question of whether the applicants are treated less favourably than other unsecured creditors as per s.6(1)(b) of the Act and whether the CVA failed to comply with the content requirements of the Insolvency Rules 1986 Pt 2 (2) r.2.3(1). However, this article is focused on these three key legal issues which have helped clarify the difference between a creditor's rights in the insolvency context as against their property rights.

[2] *Burford Midland Properties Ltd* v. *Marley Extrusions Ltd* [1994] B.C.C. 604 at 610.

[3] Report of the Review Committee on Insolvency Law and Practice (1982) (Cmnd 8558).

[4] See paragraph 43 of schedule B1 to the Act. For the ways in which a party may successfully apply to bring proceedings despite the moratorium see *Re Atlantic Computer Systems Plc* [1992] Ch 505 at 535 to 540 (per Nicholls LJ).

[5] 'Debenhams' CVA upheld in major test case' (2019) 6 CRI 207

[6] Bearing in mind that challenges to CVAs remain very rare see also (2019) 6 CRI 207.

ZACHARY KELL is a barrister at Five Paper.

Lease and persist: assessing claims in preparation for a CVA

Mark Ingram outlines what a chartered surveyor needs to go through when assessing a claim for voting purposes within a CVA.

In recent years CVAs have been primarily targeted at the restructuring of large retail portfolios, where leases are subject to significant variation. Such changes generally include reductions in rents, changes to monthly payments, rights to break and compromises of historic dilapidations liabilities.

> Central to this feeling of unfairness is the treatment of landlord claims in the CVA approval process by comparison to other creditor groups.

If a CVA is approved, this effectively imposes a deed of variation on a landlord or, in some cases, the termination of the entire lease. This may ultimately be the best outcome for the majority of landlords, however many will feel unfairly targeted, as other groups of creditors are left relatively unscathed.

Compromised creditors

Central to this feeling of unfairness is the treatment of landlord claims in the CVA approval process by comparison to other creditor groups. The majority of trade creditors will be able to vote in full on the basis of known indebtedness. Landlords, by contrast, will have minimal arrears owing to them at the date of the creditors' meeting; however there will be significant future liabilities.

The company will have entered into long term lease contracts with landlords that run many years into the future, covering rents and other leasehold obligations. As future debts, these are uncertain or unliquidated, and can be valued at £1, unless the chair chooses to place a higher value upon them. If strictly interpreted, the landlord community may be the only compromised group of creditors, but with no influence on the outcome of the CVA.

CVAs can be challenged on the grounds of unfair prejudice or material irregularity; hence such a draconian approach is not usually adopted. In the absence of any statutory or regulatory guidance, an accepted practice has evolved.

> The 75% discount has become standard practice and is a source of grievance within the landlord community, but is likely to remain until tested in the courts, which may be the case in the coming months.

In essence, the landlord's future cash flow from the actual lease is compared to that if the property were empty and the lease terminated, mimicking the likely position in liquidation. The calculation will be the differential between:

- the cash flow from the current lease, reflecting future rents and compliance with other leasehold obligations; and

- the cash flow if vacant, reflecting the likely void period, followed by a letting at market rental following a rent-free period.

The resultant differential will then be subject to a net present value calculation, and a seemingly arbitrary 75% discount as a future debt. The 75% discount has become standard practice and is a source of grievance within the landlord community, but is likely to remain until tested in the courts, which may be the case in the coming months.

The role of the surveyor

In the preparation of a CVA, there is a role for an independent chartered surveyor in assessing market rentals, incentives and likely voids to assess the likely cash flow if a property is empty. It is probable that the company will have in-house property staff and retained agents who will work with the company in assessing each property against trading performance and landlord motivations. This process is a sensible and valuable exercise that will feed into the overall strategy, but it is not necessarily independent.

> The surveyor will have a detailed knowledge of the particular property sector, usually retail or food and beverage in this context, and will form their own view on likely estimated rental values, void periods and market incentives.

For the purposes of assessing votes for CVA purposes, there is a role for an objective third-party chartered surveyor with no stake in the outcome of the CVA or extent of lease compromise. Creditors can then have confidence that the data behind the voting calculations is fully 'arm's length'. Such assessments should also be free of conflicts with the landlords, as the surveyor may be placed in a position where they must defend a voting calculation, which may be problematic if, for example, they also act as a property or portfolio manager on a particular building.

An independent surveyor is likely to have limited time to undertake their review, and consequently it is likely to be on a high-level desk-top basis. To ensure the veracity of this process, it is important that reliable information is provided. This will typically be a detailed tenancy schedule containing material leasehold terms and floor areas, with access to a property director to discuss property-specific detail. If limited or unreliable information is available, the ability to undertake such an exercise will be compromised, delays will be experienced, and costs will increase.

Expertise and concerns

In some cases, the surveyor will have concerns as to the quality of the information and will raise concerns in these instances so further instructions can be obtained. This is most likely to relate to tenancy schedules, but could include information on floor areas.

The surveyor will have a detailed knowledge of the particular property sector, usually retail or food and beverage in this context, and will form their own view on likely estimated rental values, void periods and market incentives. This will be based on their understanding of the market in a particular location, including recent transactions, active requirements, rating assessments, market sentiment and general market intelligence.

This will be married together with information provided on floor areas, lease terms and property-specific information not available in the public domain. This could include recent rent review negotiations, feedback from any marketing and intelligence on any property-specific constraints and opportunities. An independent judgement will then be made on the information required.

Dilapidations

Guidance is also provided on potential dilapidations claims for the purposes of voting. Dilapidations claims are very property specific, and will depend on detailed lease terms, the state of repair, alterations undertaken and the landlord's intention at lease expiry. In respect of landlord intentions – in simple terms – a landlord is not able to make a claim for losses that have not actually been suffered. In an extreme example, a landlord looking to redevelop a property may have suffered no loss due to tenant non-compliance with repairing obligations, so the dilapidations claim could be nil.

In reality, a proper assessment can therefore only be made by individually inspecting all properties and preparing costed schedules of works. This is not possible within the swift timeframes and limited budgets available, and is still dependent on a number of assumptions as highlighted.

A more cost effective and generic approach therefore has to be adopted, which is usually based on an average dilapidations rate per square foot, applied on the basis of experience and perhaps adjusted for particular categories of property or generic repairing covenants.

The estimated rental values, voids, rent-free periods and dilapidations derived are then incorporated by the company and their advisers into their chosen model for assessing landlord claims for the purposes of voting on the approval of the CVA.

Not an exact science

It is important to note there is not an exact science to the conclusions reached from the reviews above, but it can be presented to creditors as an unbiased professional opinion in which they should have confidence. This can be stated as such within the CVA proposal, but it should be ensured that the role is not overstated or conclusions reached misrepresented.

This is increasingly important in the light of the recent case of *Discovery (Northampton) Ltd and others* v. *Debenhams Retail Ltd and others* [2019] EWHC 2441 (Ch), which suggested there may be unfair prejudice if landlords were expected to accept rent reductions below market value. Please see page 32 for more on the *Discover* case.

> Creditors can then have confidence that the data behind the voting calculations is fully 'arm's length'.

CVAs will continue to be a source of contention within the landlord community, which has become more vocal and organised in its challenges, with the British Property Federation taking a particularly active role. Although much of this challenge will focus on the rationale for a CVA, likely trading performance and ability to share in future profits, the calculation of landlord claims is likely to come under continued scrutiny. While this may be in the form of questioning the 75% discount, the risks associated with the actual calculation of landlord claims can largely be mitigated by the involvement of independent third-party chartered surveyors in providing the supporting market information.

MARK INGRAM is an associate director within Avison Young's national restructuring solutions team.

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Early warning systems in Denmark and Europe

Morten Møller and **Piya Mukherjee** provide an overview of the advisory programme in Denmark, which has been rolled out in a number of EU member states.

Early Warning Denmark (EWD) is a system providing impartial and confidential assistance to businesses in distress and heading towards insolvency, at no cost. The early warning mechanism has been operational in Denmark since 2007 and has assisted close to 6,000 businesses in distress.

Volunteer wardens

The backbone of the system, managed by the regional business hubs in Denmark, is a group of highly qualified volunteer advisers with a deep understanding of the relevant business sectors and a coverage of all relevant disciplines, such as law, accountancy, management, strategic planning, marketing, logistics, etc.

Over these 12 years, the implementation team has learned a number of important lessons. Among these is the fact that the number of businesses needing assistance in times of hardship is relatively constant regardless of the ups and downs across specific sectors or the whole economy.

Despite awareness-raising and visibility campaigning, many business owners approach EWD very late, at a time when problems and debt have become unmanageable and the options for a successful turnaround are limited. Recurrent features at this stage include denial of the actual state of the business, blame on others for the problems affecting the business and a feeling of intense stress or apathy when faced with difficult decisions and the need to make changes.

Early warning Europe

The experience gained in EWD has benefitted a number of other European countries through the Early Warning Europe (EWE) project, which ran from 2016 to 2019. Funded by the EU programme for the Competitiveness of Enterprises and SMEs (COSME) of the European Commission, and led by the central Denmark business hub, the project set up fully operational early warning mechanisms in four member states, with six more to launch theirs this year.

In order to make the early warning mechanism successful in new countries, much work has gone into the adaptation of the legislative, cultural and institutional contexts of these countries. Operator models, public-private partnerships and phased roll-outs with pilot regions have all been tested.

Reaching the businesses in distress and their owners has been a challenge, requiring a sustained effort across various communication channels, including traditional media outreach, political championing at all levels, social media campaigns, newsletters, company databases and a long series of local meetings in municipalities and associations where company owners meet. Testimonials from entrepreneurs who have been through distress, bankruptcy and second starts have proven particularly fruitful, possibly due to their identification effect among the viewers and readers.

> "The number of businesses needing assistance in times of hardship is relatively constant regardless of the ups and downs across specific sectors."

Early warning and INSOL Europe

EWE arranged a series of expert network meetings and INSOL Europe representatives have attended these meetings.

Rita Gismondi attended the meeting in Turin, Italy, on 25 January 2019. The meeting focused on early warning tools, the process of establishing the early warning mechanism, success factors and lessons learned during the implementation in the pilot countries Greece, Italy, Poland and Spain.

Three meetings took place in Brussels on 5 March 2019, 4 April 2019 and 6 June 2019 which Bart de Moor and Marine Callebaut attended. These meetings focused on:

- mapping best practices, existing initiatives and measures on early warning by introducing institutions that take care of early restructuring for entrepreneurs across Europe;
- discussing the Directive on Pre-insolvency Restructuring from the perspective of small and medium-sized enterprises, in particular as regards article 3 and early warning tools; and
- the obstacles entrepreneurs can experience along the way and sharing good practices on breaking through the stigma associated with failure and embracing the lessons learned from it.

Ángel Alonso attended the expert network meeting in Barcelona on 5 September 2019 where two European regional projects aimed at helping SMEs in financial and economic difficulty were presented: the DanubeChance 2.0 and the 'Programa Renace (REBORN)'.

Piya Mukherjee attended the final conference for EWE, held in Brussels on 14 November 2019. This conference, under the heading 'Looking back, moving forward', marked the conclusion of the three-year project.

At this conference, Morten Møller summed up the tangible results of the EWE:

- 3,500 businesses assisted since 2016 across Europe;
- 55% of the businesses assisted were saved;
- 25% went bankrupt;
- 20% closed down as solvent or reduce operations to less than one full-time employee;

The results of the early warning programmes affirm that offering impartial and confidential assistance to businesses at no cost is a definite win-win for society.

Going forward, the permanent network of EWE partners will continue expanding the circle of countries with early warning mechanisms, lobbying, mentoring and providing policy recommendations.

MORTEN MØLLER is the coordinator of Early Warning Europe.

PIYA MUKHERJEE is president of INSOL Europe.

Editor recovery@r3.org.uk

2020: a year for change?

R3's Press, Policy and Public Affairs team had barely finished their New Year beverages before preferential status and personal liability decided to crash the party.

December's general election result meant the UK moved onto its third administration in 12 months. That may seem extreme, but the fact that all three have been a consistent political colour has meant that policy direction hasn't undergone too radical a change.

The new government has a healthy working majority and, coupled with the UK's movement into a post-Brexit 'transition' phase, this suggests that politicians' attentions will soon return to domestic policy. The legislative cogs will start to turn again properly for the first in almost four years and policy ideas gathering dust on the shelf will be cleaned off and could start heading towards the statute book.

The budget

An early political highlight this year will be the March budget. At the time of writing, we're expecting two key things for the insolvency and restructuring profession to look out for: news on the government's plans to resurrect HMRC's preferential status in insolvency procedures; and news on the government's plans to make directors (and others) personally liable for corporate tax debts where HMRC suspects insolvency procedures are being used to avoid tax.

Pushing back against the return preferential status has been one of our priorities since the policy was first announced – without consultation – back in 2018. It's a short-sighted step: it will help HMRC in the near-term, but at the cost of significant damage to other unsecured creditors, businesses, jobs and access to finance in the UK.

Matthew Davis of UK Finance wrote in the last edition of *RECOVERY* (Schrödinger's VAT, page 26) that the UK's financial services trade association estimates preferential status could hit lending by up to £1.5bn (although they note it is difficult to come up with an accurate estimate). By contrast, the government expects the policy to boost HMRC's coffers by just under £200m – at most – per year. But, with business growth and rescue damaged by the policy, a less successful UK Plc will mean lower value business tax receipts for HMRC across the board. We don't think the government has taken these losses into account.

Already this year, we've worked with R3's regional committee chairs to write to every newly elected, and re-elected MP to flag our concerns. A number of meetings have been arranged a result. On top of this, February saw us hold our annual 'President's Lunch' in Westminster, bringing together MPs, peers and senior members of our profession. HMRC's preferential status was high on the agenda. We were also pleased to see that R3's criticisms of the policy were included, in some detail, in the official House of Commons Library briefing paper on the issue.

Looking at the 'liability' policy, we understand the issue that HMRC is seeking to address, but we are concerned that, without strict guidance to accompany the legislation, there is a risk that it may be applied much more widely than originally intended. Some R3 members have expressed concern that the proposals could see turnaround professionals and others caught up by the policy, purely on the basis that they have a track record of working with a number of insolvent businesses. Officials have been in listening mode and we expect our concerns to be addressed in guidance – we're yet to see what this guidance looks like.

> "R3's criticisms of the policy were included, in some detail, in the official House of Commons Library briefing paper on the issue of preferential status."

If the policies are included in the budget and are unchanged from last summer's *Draft* finance bill, we'd expect them to be included in the post-budget finance bill proper. It'll be a tight squeeze to get this through parliament between the budget and the start of the new financial year though (the budget was originally planned for December), so if the budget policies *are* different from the draft bill then their introduction may not happen this year: new drafting will need to be prepared and put to consultation, and that can take time.

Our work on these policies will continue post-budget, and we'll be following the finance bill closely.

Clearing the backlog

The next few years could see a return to 'business as usual'. In some areas, this can't come soon enough: the government's corporate insolvency framework reform proposals were first announced in May 2016, but efforts to introduce them since then have been stymied by both Brexit and the lack of a solid government majority.

It's not just action on corporate insolvency framework reform we're expecting – there's a lot more in the pipeline. Key things to look out for include a ministerial decision on whether or not asset or business sales to connected parties via administration should be banned (a measure that will have a significant impact on pre-packs). The government's power to do this expires in May, so an announcement is needed soon. There will also be legislation on airline insolvencies (as announced in the Queen's Speech), consultations on IP regulation and, possibly, bonding, while we expect further work on a 2019 consultation to expand the powers of Companies House. A pensions bill that will have an impact on the insolvency and restructuring profession is already making its way through parliament.

Building on 2019

One of R3's big projects in 2020 will be to launch our latest 'Value of the Profession' research. We want to demonstrate to politicians, journalists and others exactly what the profession delivers for the economy, and we need members' help. Please do look out for this!

Finally, our team is very proud of the fact that we've been nominated for two industry awards in the past few months: Team of the Year at the PRCA Public Affairs Awards, and Team of the Year at the PRmoment Awards. We work hard to act as the voice of our members, and it's good to see that this voice is heard.

JAMES JEFFREYS (LEFT) is public affairs manager at R3.

STUART MCBRIDE (RIGHT) is communications manager at R3.

R3 contacts

R3, 8th Floor,
120 Aldersgate Street,
London EC1A 4JQ

T: 020 7566 4200
F: 020 7566 4224
www.r3.org.uk

R3 Executive

President
Duncan Swift, duncan.swift@mooresouth.co.uk

Vice-president
Colin Haig, colin.haig@bdo.co.uk

Chief Executive Officer
Emma Lovell, emma.lovell@r3.org.uk

Deputy Vice President
Christina Fitzgerald,
cfitzgerald@moonbeever.com

Administration

Executive Assistant
Agnes Nagyistok, agnes.nagyistok@r3.org.uk

Finance

Finance Manager
Harvinder Kular, harvinder.kular@r3.org.uk

Office Administration & Accounts Assistant
Annetta Charczuk, annetta.charczuk@r3.org.uk

Finance Assistant
Zuzana Kyselova, zuzana.kyselova@r3.org.uk

Business development

Business Development & Relationships Manager
Gareth Fitzgerald, gareth.fitzgerald@r3.org.uk

Business Development & Marketing Executive
April Robinson, april.robinson@r3.org.uk

Membership Officer
Shemin Varma, shemin.varma@r3.org.uk

Membership Engagement Executive,
Freddie Webster,
freddie.webster@r3.org.uk

Membership & Marketing
membership@r3.org.uk, 020 7566 4238

Communications, Public Affairs and Policy

Head of External Relations
Nick Cosgrove, nick.cosgrove@r3.org.uk

Communications Manager
Stuart McBride, stuart.mcbride@r3.org.uk

Communications Officer
Jo Tacon, jo.tacon@r3.org.uk

Public Affairs Manager
James Jeffreys, james.jeffreys@r3.org.uk

Education, Courses, Conferences and Events

Events Team Manager
Veronica Zaghloul,
veronica.zaghloul@r3.org.uk

Events Organisers
Omi Adjekukor,
omi.adjekukor@r3.org.uk
Natasha Dullaway,
natasha.dullaway@r3.org.uk
Teresa Popoola,
teresa.popoola@r3.org.uk

Events Marketing Executive
Nicole Musson,
nicole.musson@r3.org.uk

Regional Events
events@r3.org.uk
T: 020 7566 4234

Courses & Events
events@r3.org.uk
T: 020 7566 4234

Technical

Technical & Education Director
Caroline Sumner, caroline.sumner@r3.org.uk

Technical Manager
Ben Luxford, ben.luxford@r3.org.uk

Committee Chairs

Education, Courses & Conferences
Charles Turner, 020 3794 8720
Cathryn Williams, 020 7655 1189

Fraud Group
Frances Coulson, 020 7400 7770

General Technical Committee
Stewart Perry, 020 7861 4281

Membership Committee
Richard Wolff, 0345 872 6666

Personal Insolvency Committee
Mark Sands, 020 7488 8142

Policy Group
Andrew Tate, 01634 899 800

Regional Communications Committee
James Martin

Scottish Technical Committee
Eileen Blackburn, 0131 225 6366

Smaller Practices Group
Simeon Gilchrist, 020 7691 4166

Regional Chairs

Eastern
Mark Upton, 01223 420 721

London & South East
Alejandro Worthington, 0203 675 7567

Midlands
Eddie Williams, 0121 212 4000

North East
Alexandra Withers, 0191 232 0283

North West
Allan Cadman, 0161 228 3028

Northern Ireland
James Neill, 02890 278 100

Southern & Thames Valley
Garry Lee, 02380 827 600

South West & Wales
Philip Winterborne, 0117 325 2101

Yorkshire
Eleanor Temple, 0345 034 3444

Regional Representatives on the R3 Council

Eastern
John Bradshaw, 01473 611 211

London & South East
Joe Curl, 020 7404 5055

Midlands
James Martin

North East
Kelly Jordan, 0191 211 7904

North West
Richard Wolff, 0345 872 6666

Northern Ireland
Michael Neill, 028 9031 4466

Scotland
Tim Cooper, 0131 222 9817

Southern & Thames Valley
Neil Stewart, 0239 2981000

South West & Wales
Richard Clark, 0333 006 0000

Yorkshire
William Ballmann, 0113 218 2470

Other Council Members

Eileen Blackburn, Matt Dunham, Nicky Fisher, Christina Fitzgerald, Simeon Gilchrist, Rachel Grant, Simon Kirkhope, Joan Houston, Graham McPhie, Joe O'Connor, Stewart Perry, Nick Pike, Mike Pink, Charles Turner, Cathryn Williams, Frances Coulson (Observer), Adrian Hyde (Observer), Andrew Tate (Observer).

Editor recovery@r3.org.uk

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An interview with…

Samantha Barrass

Samantha Barrass, CEO of the newly formed Business Banking Resolution Service, explains what it is and why it is needed in the UK's business landscape.

Q What is the BBRS?

A The Business Banking Resolution Service (BBRS) is a new, independent service set up to resolve disputes between eligible small and medium-sized businesses and participating banks. Once we are fully launched, eligible businesses will have access to a service where they can have disputes with their bank independently reviewed. The aim is to be very flexible in the approach offering both formal and informal mediation opportunities throughout the process before the need for adjudication.

We are still very new and are currently in a live pilot phase. We recently appointed the Centre for Effective Dispute Resolution (CEDR) to review eligible historical and current cases submitted by customers.

In addition to the interest we have received in some of the historical dispute cases, a strong focus on current cases is an important part of the work of the BBRS. It is one I expect to make a lasting contribution to business confidence.

Q What was it that drew you to the BBRS post?

A I saw the CEO vacancy at the BBRS and it was too good an opportunity to miss: to do something that required a different skills set and to build an alternative dispute resolution system that fills a gap in the market. We are setting up this service for the long term – our aim is for it to inspire confidence and trust and be an essential part of the infrastructure that helps UK businesses to thrive.

When you talk about a good system of protection for businesses and consumers in financial services, you're talking about three pillars: regulation, compensation and dispute resolution. My career to date has been in the regulatory pillar, so it is really exciting to get into the pillar of dispute resolution with the BBRS.

We have strong dispute resolution in place with the Financial Ombudsman Service (FOS) for consumers and eligible businesses, but there is a need to fill the gap in the market for larger SMEs. This role is an opportunity to develop something agile, straightforward and bespoke, using a variety of dispute resolution approaches.

SMEs are essential to the UK economy. They employ hundreds of thousands of people, and the BBRS will be part of the ecosystem of available support designed to give them the confidence to grow. Offering these businesses a new, independent and transparent service was an attractive prospect for me coming into the role.

Q It's interesting that you mention SMEs, because SMEs are obviously going to be more in focus thanks to current Brexit discussions.

A Yes, SMEs drive our economy and are incredibly important in the post-Brexit landscape. I think there is going to be a lot of interest elsewhere in the world about the approach the BBRS is taking.

The UK tends to be innovative when it comes to policy and regulation, and we needed to provide a service for businesses to give them the confidence that disputes would be resolved fairly and in a straightforward manner – particularly for those businesses that are not eligible for the FOS, or those that cannot afford to take cases through the court system. »

Samantha Barrass biography

- Samantha grew up in New Zealand in the 70s and 80s, where the over-regulated economy was undergoing a period of significant economic transformation. She worked as a monetary policy economist at the Reserve Bank of New Zealand before moving to the UK in 1993 to pursue a masters in economics at LSE.
- Degree in hand, and with a healthy interest in regulation, Samantha joined the early stages of the Financial Services Authority to work on the cost-benefit analysis of new regulation. It was here that she honed her sense of what makes a fair financial environment for both businesses and consumers. She went on to work in regulation at the Solicitors Regulation Authority (SRA) before taking her first posting as CEO of the Gibraltar Financial Services Commission in 2014.
- In December 2019, while contemplating a break from keeping various world economies running smoothly, she joined the BBRS as CEO.

Q When is the live pilot due to end?

A The live pilot is planned to conclude in the first half of 2020. We opened a registration of interest in the BBRS in November last year and asked businesses if they would be willing to take part in the live pilot. We were really encouraged by the response and started contacting customers in January. This will continue on a rolling basis over the coming weeks.

Q How will the process work once a case has been selected?

A There will be three components to the process: first, a business customer will be assigned a customer champion, who will support the customer to articulate their case before it goes into the assessment process. We are putting a big emphasis on supportive and empathetic staff who can help them pull that case together. The second element will be the transparency of information that is considered during the process, and the third point is proposing approaches to resolve their dispute.

There isn't a mandatory approach to our dispute resolution process: instead we will try to find something that can bring people together by looking at a variety of ways of achieving closure or resolution to the complaint. The most important thing is that we focus on achieving the right and fair outcome.

Q What have been the challenges of establishing the BBRS or those that you've noticed from the pilot?

A We're lucky to have so many stakeholders with an interest in the BBRS, both supporters of the service and potential customers. But it is really important that we make sure that all of these stakeholders, whether they are an SME representative or a bank, have some ownership of what we're doing and feel confident in the process. It's an inclusive process as we want to see the BBRS become a permanent fixture in the SME ecosystem.

Q What do you mean by being part of the ecosystem?

A If I were setting up a business, making some quite brave decisions to expand – perhaps taking out a collateral loan or expanding a micro-enterprise – it would be important to me, if I was not happy with my bank, to know that disputes could be resolved without necessarily having to go to court. It would be important to know that, after going through the bank's complaints process, I could go through an independent, transparent and pain-free process to get a fair and reasonable outcome.

We sometimes forget that those running businesses are people. They have a domestic life, and they know when they're opening a bank account in a personal capacity that they have access to the FOS, but they need to know that as a business they have the same sort of protection.

Q What does success look like for the BBRS?

A In the short term, to become fully operational. Then it is being recognised as a gold standard for dispute resolution – trusted and established. I would say that it is bringing a sense of calm and confidence for anyone bringing a dispute to the BBRS.

> “We want to see the BBRS become a permanent fixture in the SME ecosystem.”

Q Which is the exact opposite of what you'd feel when bringing a court case?

A Yes, taking a dispute through a court process can be expensive and take an emotional toll. You can't overstate how challenging it is, and not just on the side of businesses, being in a dispute. Funding your costs can be expensive and there can be wear and tear on your personal life. What I want is to make sure is that we deliver that sense of calm and a feeling of 'how much easier this is now the BBRS is here!'

Q How will the BBRS interact with IPs?

A In the live pilot, we are not looking at insolvent businesses. *RECOVERY*'s readers will appreciate that there are a lot of issues that we need to work through when looking at how we deal with a business in insolvency. We need to make sure that our approach works within the law and in a way that doesn't disadvantage creditors.

We do envisage that IPs will be involved in the full process. For example, they may be involved themselves as interested parties in the resolution of a dispute. The big question is if a sum is awarded around direct loss or distress and inconvenience: is it fair? Including the question of fairness to creditors, many of whom will also be SMEs. And how can we make sure that in the end, we are working within the law?

We've got lots of people burning brainpower working it through. If a former director or shareholder in the company that has become insolvent claims the bank's actions led to the insolvency, it's clearly a difficult area to resolve, including making sure that we work within the law and that solutions do not disadvantage creditors.

Q How is the BBRS different to the FOS or even the FCA?

A The Financial Conduct Authority (FCA) is a regulator, so it sets the rules of the game. We have a good relationship with the FCA and one of the things we will be looking to do is to take thematic learnings from the cases we are looking at and feed them back to interested parties, including the banks, the FCA, and other public interest bodies.

The FOS deals with cases brought by smaller businesses but it is primarily for consumers. They are a larger organisation and focus on investigative adjudication. The BBRS is for eligible businesses that are too large for the FOS. We will do investigative adjudication, but we will also offer formal and informal dispute resolution of various kinds. We are smaller and have a strong ability to be very bespoke.

Q We're facing Brexit and a possible new recession. Litigation and dispute resolution work tends to increase in such circumstances. Is there any chance that you could become inundated with cases?

A Alexandra Marks, our chief adjudicator, is the ultimate decision maker in choosing the cases – within our eligibility criteria. My role is to make sure we can operationally manage and scale up and scale down. At this point, we particularly need to be able to scale up, and the February announcement of the appointment of CEDR as our partner to review cases gives us access to the flexible expert resources we need. Theoretically, working with CEDR, there could be a point at which we may have so many cases that it is harder to be bespoke. In practice, working with CEDR, I think that's quite unlikely.

MATT JUKES is publishing manager of *RECOVERY* magazine.

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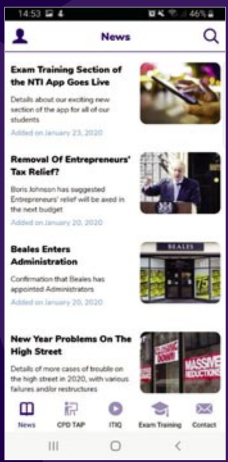

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