R3, the Association of Business Recovery Professionals | **www.r3.org.uk/recovery**

Spring 2016

RECOVERY

Contentious insolvency litigation

After the event a panel of experts discuss how funding will survive post-LASPO exemption

The appetite for funding how will insolvency litigation be funded in 2016?

Life after LASPO litigation funding options for small practices

The moral maze exploding the myths about professional conduct

Diving in at the deep end an in-depth look at the pre-pack pool

Claims and consequences what is the future for claims against insolvency practitioners?

Interview with... Malcolm Weir on what the PPF wants from IPs

Careers and professional development supplement

JIEB 2015 examination results

Career progress – top tips from two 2015 JIEB qualifiers

VISIONblue business solutions

VISIONblue is a software package designed by insolvency experts for use by insolvency professionals.

VISIONblue is designed to deal with the intricate requirements of all corporate and personal appointments from start to finish.

the complete software solution for insolvency practitioners

- **NO** annual site licences
- **NO** costs per user
- **NO** limits on the amount of users
- **NO** annual fixed overheads

reasons to use VISIONblue

- Simple cost model that is charged per appointment and is recoverable from the case as a category 1 disbursement.
- Detailed Diary for all assignment types.
- Comprehensive letter packs and forms that can be customised.
- Post receipts and payments in the Banking Module.
- Enter quick and easy relevant details into the Creditors Module, Debtors Module and Employee Module.
- Manage high volumes easily using VISIONblue's different bulk functionalities.

VISIONblue SOLUTIONS

t: (UK) 0800 072 0092 t: (Intl.) +353 1 685 4128 f: +353 1 685 4042
w: www.visionbluesolutions.co.uk e: info@visionbluesolutions.co.uk

What do you think? Readers' views are welcome. Got 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

Contentious insolvency, insolvency litigation and conditional fee agreements (CFAs) are discussed at some length in this issue, as is litigation funding. But where better to start in relation to CFAs than *Stevensdrake* v. *Hunt* [2016] EWHC 342 (Ch), where in February 2016 the liquidator was found not to be liable for the profit costs of the solicitors who had acted under a CFA? The decision was case specific, but the general learning points are that IPs need to properly understand the nature of their contractual relationships with solicitors in insolvency litigation; and insolvency solicitors have to be careful not to exercise undue influence (by virtue of acting as solicitors) in seeking to agree CFAs with IPs. Precedent suggests that ideally the IP is not the solicitor's client and would not normally therefore be liable for any of the solicitor's charges. It is a subtle but important distinction that the IP, as office-holder, employs the solicitor to act, but is not the client. It has been held that in insolvency litigation in these circumstances the solicitor has no client. But to whom should IPs turn for advice on this difficult and delicate point? If CFAs are to develop as a useful tool for insolvency litigation, there needs – in creditors' interests – to be a good deal more clarity about the legal basis on which solicitors are instructed.

In his President's column on page 4, Phillip Sykes not only sets out the detail of the work undertaken by R3 in seeking to maintain the LASPO exemption, he explores the government's unwillingness to listen to reason and acknowledge the available evidence. While he notes the insolvency minister's acknowledgement of 'the important work that R3 and its members do in quickly and efficiently resolving insolvency situations for the benefit of the UK economy', Phillip recommends proposing new ideas rather than trying to modify something the government has put forward already. Another initiative to seize!

Third-party litigation funding and the principal insolvency litigation funders and brokers are the subjects of Mark Beaumont's helpful analysis on page 16. Since one of the main conclusions of the insolvency litigation funding round table discussion summarised on pages 20-23 is that IPs need to understand the insolvency litigation funding and insolvency claims assignment markets in order to be able properly to realise litigation claims in the best interests of creditors, Mark's data should be invaluable. Interestingly, the round table discussion threw up a distinction between the commercial drivers of the funders and insurers and the professionalism of IPs and lawyers. Whilst funders see risk reduced by common financial interests, IPs and lawyers tend to see risk increasing where there is a lack of professional separation or a dilution of professional focus as a result of financial arrangements that seek to incentivise professionals. IPs who understand all the legal and commercial risks for all the parties in insolvency litigation will be well placed to ensure that the funding arrangements they make are in the best interests of creditors.

Linking litigation and the government is Kathryn Hiddleston's piece on pages 30-31, which explores the tax liabilities that might arise on settling interest rate hedging product redress claims in insolvency situations. Treating the redress as post-insolvency income that is taxable as an insolvency expense, even when the bank applies set-off so that the estate receives no or not enough cash to settle the tax liability, seems iniquitous. The debate continues – perhaps some litigation funding or a CFA is required!

C. Laughton

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

Regulars

1 From the editor
Chris Laughton
IPs need to understand their relationship with solicitors in insolvency litigation.

4 President's column
Phillip Sykes
A look back at a year of big changes in insolvency and positive recognition for R3.

6 News update
Regular round up.

7 R3 Conference
Andrew Tate
The R3 vice-president answers questions on the upcoming conference.

47 Interview with… Malcolm Weir
Matt Jukes talks to the head of restructuring and insolvency at the PPF.

47

Legal update

8 A question of evidence
Joe Bannister
Are schemes of arrangement for overseas companies still a viable option in the English courts?

11 Recent case summaries
Rowena Page
The latest insolvency update.

12 Technical update
Charles Livingstone | Rachel Grant
The Competition and Markets Authority and its role in reviewing or blocking the acquisition of assets.

14 Legal Q&A
Emily Lockhart
Your insolvency questions answered.

Contentious insolvency – litigation

16 The appetite for funding
Mark Beaumont
A guide to insolvency litigation funding and its potential options in 2016.

17 Insolvency express trial pilot
Mr Registrar Briggs
An outline of the new initiative for swift insolvency hearings.

18 Contentious cases
Catherine Newman QC | Tim Calland | Rosanna Foskett
Recent cases and legal changes that have affected the profession.

20 After the event
Various
Funders, IPs, lawyers and insurers participate in a round table to debate how the profession will cope with litigation in the wake of the removal of the LASPO exemption.

24 Swotting up on provisions
John Cullen
A look at how the profession has adopted, or adapted to, the new fees regime.

20

18

24

R3 matters

41 On the frontlines of fraud
Frances Coulson
A look at the work of R3's Fraud Group.

42 R3 events, courses and conferences

43 Life beyond LASPO
Carl Bowles
The impact of the revoked LASPO exemption on smaller firms.

44 R3 contacts

45 Advertisers' index

46 Asset valuers and auctioneers' index

Themes of *RECOVERY* 2016

SUMMER Employment issues
AUTUMN NPL and secondary debt
WINTER New technology

2 Career progress
Rachel Lai | Samantha Steele
Two 2015 JIEB qualifiers share their experiences and offer current and future students their top study tips.

3 Results of the JIEB examinations 2015

Features

27 The moral maze
Duncan Wiggetts
Exploding the myths about matters of professional conduct.

30 Reverse logic in redress
Kathryn Hiddleston | Margaret Corbally
A look at the unpalatable mix of insolvency, interest rate hedging redress and tax.

32 Diving in at the deep end
Duncan Grubb
A peek at how the pre-pack pool came to be.

34

34 The value of knowledge
Ian Maycock
The advantages for IPs of talking to a qualified asset valuer.

36 Claims and consequences
Catherine Shuttleworth
The future of claims against IPs and the need for expert advice.

38 Director Conduct Assessment Service
Gareth Allen
The Insolvency Service talks about an upcoming move to digital for director conduct reporting.

RECOVERY

Editor
Chris Laughton, Mercer & Hole

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

Publishing assistant Naomi Osinnowo
naomi.osinnowo@groupgti.com

Advertising manager Brendan McGrath
Tel: 01491 826262, Fax: 01491 833146
brendan.mcgrath@groupgti.com

Advertising executive Will Nevill
Tel: 01491 828920
william.nevill@groupgti.com

Art director Thomas Gray

Administration Jack Roberts

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

Phillip Sykes reflects on a year of fees, exemptions and recognition for R3.

This is my last column as R3 president. Looking back over the last 12 months, there have been lots of policy debates and legislative changes affecting the insolvency profession. As president, you get a ringside seat at the circus that is the legislative and political decision-making process.

A regular feature of these columns over the past five or six years has been the Legal Aid, Sentencing and Punishment of Offenders Act (2012), known as LASPO, and its impact on insolvencies. Following a prolonged battle with the Ministry of Justice to have insolvency litigation exempted from the Act, we heard just before Christmas that insolvency litigation will finally lose its exemption from April.

We are incredibly disappointed by this decision. At last count, according to University of Wolverhampton research, the exemption helped pursue over £1bn owed to creditors in 2014, with almost £500m being returned to estates last year. Much of this money will be irretrievable after April. Not only that, but the deterrence effect of the exemption will be lost: people and companies will be unlikely to face consequences for withholding money from creditors.

Persuading policy makers

Another concern is the government's unwillingness to listen to reason and acknowledge the available evidence, which firmly supported the exemption's continued existence. For those who believe in evidence-based policy making, this has been a dispiriting process.

However, R3 and the wider insolvency profession have not gone down without a fight. There were over 175 articles in national, local and trade papers, or online, about maintaining the insolvency exemption; we had over 100 meetings with MPs and peers about the exemption (not forgetting the other meetings with civil servants); over 80 MPs signed two House of Commons motions in support of the exemption, many of whom had been contacted by R3 or our members; there were 15 parliamentary questions tabled to ask the government about the exemption following R3 lobbying; and the exemption was raised at least five times by MPs in parliamentary debates or committee meetings.

And after all that, we were able to secure an extra three years for the profession and creditors to go after rogue directors and others on a level playing field.

The Jackson campaign somewhat encapsulates dealing with government. Once ministers and civil servants have decided to do something, very little – not even hard evidence – can get the machinery of government to go in reverse.

The government has been determined to remove any exemption from the LASPO Act regardless of its merits. The government's mantra has been that the Act must be applied consistently: ministers are concerned that once one exemption is granted, it becomes difficult to ignore other 'special cases'. There may be no evidence to show the government's position on the insolvency exemption is a 'good thing' (indeed, there is evidence to show the opposite), but once government has made up its mind, the best outcome is that it can be persuaded to accept modifications to its proposals.

With the LASPO Act, we were able to delay its impact on insolvency litigation for three years, far longer than any other type of litigation save defamation cases. On insolvency fees, the government was equally determined to take action: we were able to persuade them to look at the new fees estimate regime rather than the proposed banning of time-costs; the status quo was never an option. Likewise, the government was determined to remove the option to hold physical creditor meetings; the new '10-10-10' rule, while clunky, is the only way to retain the option to hold a physical meeting.

That's not to say we should never try to change the government's mind: if we don't try, even the compromises we have achieved wouldn't be possible.

If you do want the government to adopt your ideas, it's more likely to do so when you're proposing a new idea rather than trying to modify something the government has put forward already.

Making a difference

Numerous changes have been made to the insolvency regime recently that have been based on policies put forward by R3. Last October, for example, saw the introduction of new DRO limits, a new creditor bankruptcy petition threshold, and the extension of legislation that prevents suppliers from cancelling or changing contracts with companies in administration; all of these changes stemmed from pressure by R3. Similarly, the Football League has now adopted R3 policy proposals relating to unsecured creditors in football insolvencies.

Moreover, the value of the insolvency profession and the role of R3 are recognised in government. In a recent letter, Anna Soubry MP, the insolvency minister, acknowledged 'the important work that R3 and its members do in quickly and efficiently resolving insolvency situations for the benefit of the UK economy'. Similarly, in Scotland, Fergus Ewing referenced R3's Value of the Profession research and hailed the insolvency profession's work at the recent ICAS insolvency conference.

Perhaps the best way of avoiding unwanted government reforms in the first place is ensuring that it's only the profession's good work that politicians want to talk about.

Despite the good work, issues like insolvency fees or pre-packs frequently come up. Indeed, opponents of the exemption from the LASPO Act often brought up insolvency fees when arguing for the exemption to end. Although genuine problems are rarely widespread, it doesn't take many examples of wrongdoing (however unrepresentative or irrelevant) to switch the conversation from positive to negative.

The insolvency profession is generally well regulated and ethical. I'm proud to be an insolvency practitioner. But we are a profession that operates under a spotlight and we need to acknowledge that. Communication, with creditors and other stakeholders, has never been more important. Acting not just within the letter of the law but within the spirit is crucial, too. Where we see wrongdoing elsewhere in the profession, we should make sure the regulators are aware; wrongdoing by one IP hurts the reputation of the rest.

The fewer opportunities the profession gives the wider world to talk about perceived problems, the more opportunities we will have to talk about the changes that we, the profession, want to see. That's fewer pieces of legislation where compromise is needed, and more where the insolvency profession can lead the way.

Next year, it's Andrew Tate's turn to take the presidential 'ringside seat'. I hope his year is as enjoyable – and productive – as I have found mine to be.

PHILLIP SYKES is the president of R3 and the head of London restructuring and recovery at RSM.

BHS on verge of collapse without CVA

Retailer BHS could be unable to trade in its current form beyond 25 March if a company voluntary arrangement (CVA) is not approved, according to KPMG. The once public high street chain has revealed a pensions deficit of more than £200m, which covers 20,000 pensioners, and is also believed to owe landlords around £517m in rent. The company was sold to Retail Acquisitions for £1 by Sir Philip Green last year.

A CVA would allow BHS to seek rent reductions of up to 75 per cent at stores that would otherwise close over the next ten months as well as substantial reductions on various other viable properties. The arrangement will need to be agreed by creditors following a proposal at the High Court.

BHS lost an estimated £85m last year despite desperate moves to save money, including the leasing of its flagship central London store. Directors have promised to keep the store trading in future and to seek a workable solution, but if the business collapses, it is expected to do so owing creditors an estimated £1.3bn.

www.furniturenews.net/news/articles/2016/03/253972260-bhs-announces-proposed-cva

Powa outage

One of the UK's formerly most valuable tech companies fell into administration in February this year. Powa Technologies, an e-commerce group, had employed 311 staff worldwide. Deloitte was appointed to administrate the company and, at the time of writing, two units of Powa have been sold on. The sale has preserved a total of 69 jobs in the UK, although 72 staff were made redundant in February.

The two units sold are PowaWeb, which creates e-commerce websites, acquired by marketing agency Greenlight, and PowaTag, a smartphone payment system, which was sold to a private consortium led by a recently appointed director of Powa Technologies.

Deloitte has commented to the *Financial Times* that the sales do not represent a wrapping up of Powa's businesses. The company was best known for developing a mobile technology that allowed consumers to purchase products by taking pictures of adverts with their smartphones.

Powa was valued at some £1.8bn before its collapse, and was believed to have raised £154m in funding; however, the company failed to pay staff and suppliers last year. Its main benefactor Wellington Management, subsequently pulled its loans out of the company and appointed administrators. Shortly after the administration was announced, four directors, including the founder and CEO, were removed from the board.

http://www.ft.com/cms/s/0/2ee81234-e134-11e5-8d9b-e88a2a889797.html#axzz42F7uqLFE

Environmental power project up in smoke

The consortium behind a project in Norwich that would have seen the creation of a biomass power station has filed for insolvency. Generation Park in Thorpe Hamlet would have included new homes, an education centre, research facilities, roads and cycle paths. Norwich Powerhouse, the group behind the site, had struggled to find investment.

Without a plan to move forward, the group took the advice of an insolvency practitioner and subsequently approved a company voluntary arrangemet (CVA). Creditors are thought to be owed somewhere in the region of £3m, but are expected to retrieve 33p on the pound of their investment.

The power plant would have worked by burning straw pellets brought into the site by rail. The project was met by protests from local campaigners concerned about potential pollution to the surrounding area. Around 250 people had objected to the planning application.

www.bbc.co.uk/news/uk-england-norfolk-35690476

Floating back up

Fairline Yachts, a luxury boat builder rescued from insolvency at the end of last year, resumed business at the beginning of March 2016 by producing its first yacht. The struggling shipyard fell into insolvency in December 2015 after being acquired by a private equity firm. Administrators from FRP Advisory were called in and managed to sell the company's assets to two UK-based businessmen. Around 72 of the 446 staff were kept on to continue running the business, although significant changes have been made to the staff roster since.

www.itv.com/news/anglia/2016-03-03/fairline-builds-first-new-boat-since-company-went-into-administration/

Logistical dream

A Welsh logistics company has been bought out of administration by a major UK pallet delivery business. Joint administrators from Deloitte were appointed for John T Evans Haulage Ltd in February this year. The company and assets were acquired by Palletways, a national freight delivery network, preserving 100 jobs with no redundancies taking place. The acquisition includes John T Evans Haulage sites in Barry and Avonmouth.

www.insidermedia.com/insider/midlands/palletways-rescue-deal-saves-100-jobs

Riding to solvency

A major cycling brand rode to the rescue of a small road cycling and triathlon shop in the North West after it entered administration. Royles in Cheshire fell into insolvency at the end of February 2016. Joint administrators were appointed from Duff & Phelps to manage the company, which is registered under the name Paragon Commerce Ltd. Trek Bicycle Corporation, a US company, acquired all assets and staff, and has agreed to invest in the business in future.

www.insidermedia.com/insider/northwest/road-cycling-and-triathlon-shop-rescued

A gathering of thought leaders

RECOVERY put some of the burning questions about the R3 Annual Conference to **Andrew Tate**, vice-president of R3. The conference is to be held on 18–20 May at the Intercontinental Budapest, Hungary.

What's new and why should professionals and members across the industry attend the conference?

Our world has changed over the last few years in respect of…

- The growth of alternative financing options
- Contentious litigation
- UK legislation and the political landscapes
- New fee regime structures
- The rise of virtual currencies
- Cross-border case implications

Now more than ever, we are all reviewing the landscape and developing strategies to exist and thrive in the 'new normal' across our sector; redefining identities, adapting how we work, finding new markets and changing our core messages.

> Lending to businesses has been turned on its head in the past five years.

What is the 'new normal'? Is it keeping you awake at night?

Good question… and I am equally sure I'm not able to answer this question easily and for everyone.

What I do know is as a practitioner with over 25 years across the sector, I know I am not alone in reviewing some of the current game-changers that may have kept some of us, ok quite a few of us, awake during the night…

Across the sector, many of us are reviewing where we will be in the next 5–10 years – what will the sector look like and how we can influence known factors on the horizon, in particular, the question continues to be 'where do we all want the sector to be?'

One of the upcoming sessions within the conference is entitled "Old ways don't open new doors" and I know it will provide invaluable insights and create a debate for many of the questions we have within the profession.

What are the key conference sessions delegates will find valuable?

We really have too many for me to list! We have a programme that will encourage thought leadership and debate. Sessions include:

- Financing options for restructuring – what has worked, insights into failure rates and how lenders evaluate
- The inevitable restructuring of health & care sectors: The minefield that will be the social care market.
- HR1 and criminal prosecutions: the first criminal prosecutions and the balance between compliance and commercial considerations
- The panel session on upfront fee estimates: how have firms risen to the challenge of producing fee proposals and estimates that are both rules compliant and useful to creditors?
- Economic and political landscape overview – with Emily Maitlis, who will outline the biggest risks ahead and where to look for opportunities.
- Breakout sessions covering key topics
- Restructuring and advisory experts from PWC and Alix Partners
- Future digital trends – entrepreneur case study: with Jamie Murray Wells – founder of Glasses Direct

The conference brochure with the full programme will be available shortly – I hope all RECOVERY readers will take the time to review the fantastic line up and register to attend the conference.

What else can delegates expect to hear at the conference?

Lending in a turnaround or restructuring has been turned on its head in the past five years. We have developed a programme for delegates to hear leading players from within the finance communities discuss their approaches, and examine the opportunities for the business and restructuring professionals who advise them.

The conference takes place in May; one month later the UK will vote in a referendum on whether to leave the European Union. Will the conference cover the Brexit discussion?

There is so much to discuss on the Brexit. We have carefully crafted a session to highlight the implications for the UK restructuring and insolvency market, if the Leave campaign is victorious. If Britain leaves, what will follow will be a period of intense negotiation and significant changes across all areas of UK law, not to mention the cross-border restructuring and insolvency practice.

This session will debate the impact on everyone in the UK, those who attend will receive excellent grounding for whatever the future holds.

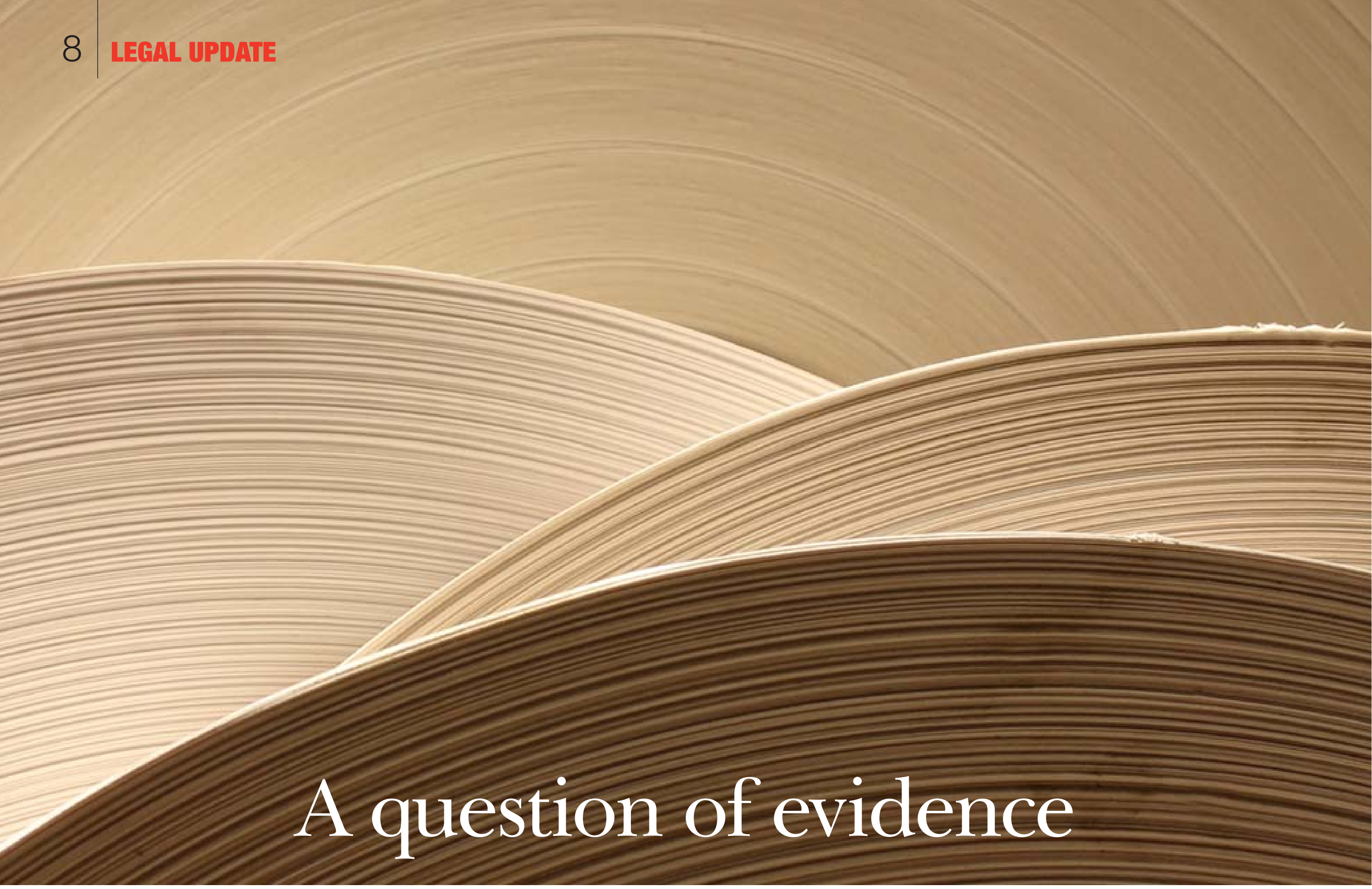
Finally, who should attend the conference?

We hope many of you across the sector will attend. This conference will really seek to engage on the key issues – and light the way in thought leadership.

> We are all having to adapt, find new markets and change our messages.

We have an excellent speaker panel and in recognition of the changing environment we offer flexible ticket pricing to suit all budgets as well as truly unrivalled networking opportunities for all professionals across the sector. □

ANDREW TATE is the vice-president of R3 and a partner at Kreston Reeves LLP.



A question of evidence

Joe Bannister looks at *Indah Kiat International Finance Company BV* and overseas companies proposing English schemes of arrangement.

Over the past few months, the steady stream of companies incorporated outside England and Wales (overseas companies) attempting to compromise liabilities through the use of English law schemes of arrangement has continued. The most

> Snowden J's judgment is a clear warning to the proponents of schemes of arrangement for overseas companies of the importance of demonstrating that any proposed scheme is both well thought out and fully explained.

recent examples have included Codere Finance (UK) Limited (CUK) and Van Gansewinkel Groep BV (VGW). In the *Codere*, case, Newey J approved a scheme of arrangement proposed by CUK. Under that scheme, CUK was to issue new notes to existing noteholders The CUK scheme would compromise and discharge the claims of those noteholders against a Spanish company in the Codere group, Codere SA.

The CUK scheme followed a line of cases where an overseas company had taken positive action to obtain the jurisdiction of the English court to propose a scheme of arrangement. Other examples include Magyar Telecom (shift of centre of main interests (COMI) of a Dutch company to create sufficient connection to compromise liabilities under New York law notes) and Metinvest (scheme of arrangement proposed by a Netherlands incorporated company with assets in the Ukraine and creditors based in other EU states). Once again the scheme compromised the claims of noteholders. The notes under which the liabilities arose were governed by English law.

Basic requirements

The attractiveness of the English scheme of arrangement lies first in its being a Companies Act process as against an insolvency regime. Additionally, an overseas company need only satisfy a low jurisdictional threshold in order to propose a scheme of arrangement. The scheme jurisdiction under part 26 of the Companies Act 2006 applies to any company that is 'liable to be wound up' under the Insolvency Act 1986. This in turn includes an 'unregistered company'. The term 'unregistered company' includes an overseas company. It is unnecessary for the proponents of a scheme to demonstrate that the scheme company would *actually* be wound up in the United Kingdom. All that is necessary is:

- 'sufficient connection' with England and Wales
- the scheme is likely to achieve its purpose.

> In making his ruling, Snowden J has laid down a number of guidelines that the court will expect overseas company proponents of schemes of arrangement to follow in the future.

Each of these tests is fact specific. Examples of 'sufficient connection' are companies having moved their COMI to England or English law finance documents – eg Apcoa Parking. When deciding if a scheme will achieve its purpose, the courts will ask whether that scheme would be effective in binding opposing creditors. The English courts will also want to be satisfied that the scheme will achieve some purpose and that they will not be exercising

Editor recovery@r3.org.uk | Recruitment recovery@r3.org.uk/recruitment

their jurisdiction in vain. For example, a court will want to be satisfied that a scheme of arrangement would be recognised in those jurisdictions where creditors would be likely to oppose its operation. Hence in *Magyar Telecom*, Richards J took account of the fact that recognition of the Magyar scheme under chapter 15 of the US Bankruptcy Code was a pre-condition to its effectiveness.

In *Codere Finance* [2015] EWHC 3778 (Ch), Newey J sanctioned the scheme of arrangement proposed by CUK, notwithstanding that CUK had been established for the specific purpose of assuming liabilities under notes issued by its holding company, Codere SA. At the convening hearing stage, however, Nugee J had noted that the scheme structure was 'slightly novel' and that at first blush, a scheme structured in this fashion appeared to be 'quite an extreme form of forum shopping'. Nevertheless, the scheme was sanctioned on the basis, first, of evidence showing there was no viable alternative to formal insolvency. Secondly, the scheme had received the overwhelming support of scheme creditors, with 98.78 per cent in value having voted in favour of the scheme. Additionally, no creditor had opposed the scheme at the sanction stage.

> In January 2016, IKI sought an order from Snowden J that he should convene a single meeting of scheme creditors. That application was supported by witness statements from the sole director of the scheme company, a Mr Smotlak.

Notwithstanding the sanction of the CUK scheme, advisors and commentators on the scheme process were uniformly of the view that, in due course, the courts would be faced with a scheme proposal by an overseas company that at best tested the English courts' jurisdiction to the limit and at worst resulted in a decision seriously compromising the availability of the scheme of arrangement process for overseas companies. This 'check and balance' has in fact come about all too soon. It is contained in Snowden J's convening hearing judgment in the *Indah Kiat International Finance Company BV* (IKI) case [2016] EWHC 246.

It is important to remember that IKI is not a case of the English court *refusing* to convene scheme meetings or indeed to sanction a scheme of arrangement in respect of an overseas company. All Snowden J did was to adjourn the convening hearing for a little under a month in order to give the scheme proponents time to produce additional evidence in support of the scheme process. At the time of writing, the case is due to come back before Snowden J on a date not before 3 March 2016. Nevertheless, Snowden J's reasons for doing so bear close scrutiny. They provide helpful guidance as to the steps that those proposing schemes for overseas companies will need to take if those schemes are to proceed successfully.

The background to IKI

The *IKI* case arose out of the long-running restructuring of the Asia Pulp and Paper (APP) Group. That restructuring had started in 2001, following the Indonesian economic crisis. The scheme company, IKI, was incorporated in Holland as a special purpose vehicle. IKI has issued $350m of notes due in 2002 and 2006. The notes were guaranteed by PT Indah Kiat Pulp & Paper Tbk (PTI). PTI was the sole shareholder of IKI. As a precursor to proposing the scheme, IKI moved its COMI to England from the Netherlands. PTI has no connection whatsoever with England and Wales. Various endeavours to restructure the notes through exchange offerings had failed. Eventually, the Indonesian Supreme Court issued a judgment purporting to invalidate the notes. As the notes were governed by New York law, the validity of that Indonesian judgment was open to question.

In or about March 2015, APP Investment Company LLC (APPIO) had taken an assignment from the note trustee of a portion of rights under a US judgment in relation to PTI notes that APPIO owned beneficially. The result was that APPIO became a judgment creditor of both IKI and PTI. After taking an assignment of rights under this US judgment, APPIO sought to enforce these rights in the United States. That in turn led to IKI proposing the scheme of arrangement.

The scheme's objective is to treat the underlying beneficial owners of the notes as scheme creditors. The scheme purports to release and discharge IKI and PTI from their liabilities in respect of the notes. In return, IKI is to issue scheme creditors with new notes and to make a cash payment of about 13.5 per cent of the face value of the existing notes. The scheme contains a provision under which each scheme creditor would be deemed to authorise IKI to execute and deliver a deed on its behalf waiving, releasing and discharging any claims that the scheme creditor has or might have against PTI.

Application

In January 2016, IKI sought an order from Snowden J that he should convene a single meeting of scheme creditors. That application was supported by witness statements from the sole director of the scheme company, a Mr Smotlak.

APPIO had opposed the scheme. It sought an adjournment of the convening hearing on the ground that IKI had given scheme creditors inadequate notice of that hearing. APPIO submitted that the complex nature of the scheme and the factual background – in particular the absence of any urgent need for the scheme to proceed – meant that inadequate notice and insufficient evidence had been provided to scheme creditors.

> Snowden J's willingness to issue these guidelines as a means of supporting the integrity of the scheme process are a further example of the pragmatic approach taken by the English courts to the ongoing development and appropriate use of the scheme jurisdiction.

Snowden J accepted these submissions. Snowden J also directed that if IKI intended to produce any further evidence, it had to file and serve that evidence on any scheme creditor that had declared its intention to appear at the hearing no less than ten days in advance. That evidence had to include a revised draft explanatory statement and/or fairness opinion.

Adjournment and guidelines

In making his ruling, Snowden J has laid down a number of guidelines that the court will expect overseas company proponents of schemes of arrangement to follow in the future. The writer believes that these guidelines will be helpful to clients and practitioners alike.

Snowden J's willingness to issue these guidelines as a means of supporting the integrity of the scheme process are a further example of the pragmatic approach taken by the English courts to the ongoing development and appropriate use of the scheme jurisdiction. First, Snowden J held that the evidence of Mr Smotlak did not comply with CPR 32PD18.2. This was because Mr Smotlak's witness statement did not give a clear indication of the sources of his information and belief. Snowden J then went on to review the purpose of the convening hearing. In recognising that it should give scheme creditors an effective opportunity to express their views at what was the forum where creditor classes where determined, Snowden J held that 'adequate notice' for this purpose would depend upon the » circumstances of the particular scheme company and its advocates.

Snowden J recognised that the more complex and novel the scheme and the less evidence of 'real urgency', the greater the notice period necessary. Snowden J stressed that in determining notice periods, the court should be careful to recognise and prevent any attempt to 'bounce' scheme creditors into a scheme convening hearing.

> Snowden J did conclude that the absence of satisfactory evidence on the nature and extent of connections between supporting creditors and the scheme proponent could be both a class issue as well as a matter going to the court's discretion at sanction.

Snowden J also held that the giving of notice through the clearing system was inherently uncertain and unlikely to result in notice being received simultaneously or speedily by scheme creditors. The result was that the 14-day notice period was inadequate in these circumstances.

Analysis

The approach taken by Snowden J is consistent with that seen by the writer in the promotion of so-called 'solvent schemes of arrangement' under part 26 of the Companies Act 2006 and its predecessors or equivalents in other common law jurisdictions for the compromise of long-term insurer liabilities and the return of capital to shareholders. Snowden J went on to observe that where a scheme of arrangement sought to guarantee the *pari passu* enforcement of creditors' rights, that scheme needed to be supported by a simultaneous application for a stay of enforcement of judgments in those jurisdictions where creditors were most likely to mount a challenge. In this case, the jurisdiction where such a challenge was likely to be made was New York given the judgments obtained by PTI noteholders in New York.

Snowden J then went on to say that while the convening hearing was not – in contrast to the sanction hearing – the venue where the court would scrutinise the merits and demerits of a scheme, it was nevertheless incorrect for the court to accept at face value unsubstantiated assertions in support of a scheme of arrangement or the proposed composition of creditor classes. Snowden J went on to stress that evidence in support of classes had to be substantiated. Above all, however, there had to be full and frank disclosure of all material facts. This was because the convening hearing was *ex parte*. Full disclosure was necessary, in Snowden J's opinion, to ensure that the scheme procedure could work properly and command international respect. For that to take place, a scheme proponent had to ensure that members or creditors received sufficient information to be able to reach a reasonable judgment upon whether or not the scheme was in their commercial interests.

On classes, Snowden J did not regard those creditors holding US judgments as being in a position that justified placing them into a separate class from other noteholders. Nevertheless, Snowden J did conclude that the absence of satisfactory evidence on the nature and extent of connections between supporting creditors and the scheme proponent could be both a class issue as well as a matter going to the court's discretion at sanction.

Snowden J went on to say that it was 'at least arguable' that if it transpired that PTI or one of its associated companies was the 'true commercial owner' of the supporting notes, it might be inappropriate for those notes to be voted at the same class meeting as the notes held by unconnected creditors.

Snowden J also went on to emphasise the importance of a well formulated scheme proposal thoroughly describing the possible alternatives to the scheme. In particular, Snowden J said that if formal insolvency was the only credible alternative, the scheme proponent should spell that out expressly.

Snowden J then went on to say that the court should address at the sanction hearing the question of whether there was a sufficient connection between England and Wales and an overseas company to justify the use of the scheme of arrangement procedure. Snowden J reached that conclusion on the basis that the convening hearing's purpose is solely to determine the appropriateness of classes as against to review in the round the merits and demerits of a scheme of arrangement.

Conclusions

As stated above, it is important to view the *IKI* ruling in its proper context. It is true that Snowden J's judgment is a clear warning to the proponents of schemes of arrangement for overseas companies of the importance of demonstrating that any proposed scheme is both well thought out and fully explained. The ruling is, however,

> Snowden J went on to stress that evidence in support of classes had to be substantiated.

very far from the sound of the death knell for the use of schemes of arrangement by overseas companies. If anything, Snowden J's ruling is a helpful endorsement of the availability of the scheme procedure for such companies in appropriate – and fully disclosed – circumstances. Hence, the IKI ruling is a judgment to be welcomed as against one to be criticised.

JOE BANNISTER is a partner at Hogan Lovells International LLP.

▶ If you are a lawyer and would like to write for Legal Q&A please contact: **matthew.jukes@groupgti.com.**

Recent case summaries

Latest insolvency update from **Rowena Page**.

PERSONAL INSOLVENCY

Narandas-Girdhar v. Bradstock [2016] EWHC Civ 88 (CA)

On 20 August 2010 the appellant issued proceedings seeking a declaration that a modified individual voluntary arrangement (IVA) in his name should be set aside. He claimed that the modified IVA, agreed on 15 December 1999, should be set aside because: (a) it had been conditional upon the acceptance of a simultaneous IVA proposed by his wife, which was never approved; and (b) it was invalid, as the proxy for HMRC who had voted in favour of the modified agreement had not had authority to do so. The deputy judge at first instance dismissed the appellant's application. The appellant appealed to the Court of Appeal.

Decision

The appeal was dismissed. Delivering the leading judgment of the court, Briggs LJ held that:

- In light of the ambiguity presented by the wording of the modified IVA the deputy judge had been entitled to have regard to both the unmodified and the modified versions in order to ascertain the final version's true meaning. The words of conditionality (present in the first draft, absent from the modified version) had been removed altogether and, upon proper construction, the modified IVA was not conditional on the appellant's wife's proposal also being approved.
- The deputy judge had not erred in finding that HMRC had by its conduct ratified the modified IVA. Citing *Yona International Ltd* v. *La Reunion Francaise SA d'Assurances* [1996] 2 Lloyd's Rep 84, Briggs LJ attached weight to the fact that HMRC was a major creditor and that reports or letters had on at least four occasions been sent to creditors, drawing the reader's attention to the appellant's attempts to detract from or breach the terms of the modified IVA. In view of HMRC's conduct, the deputy judge had been entitled to reach the conclusion that he had, namely that HMRC had kept a keen eye on the progress of the proposal and had consciously and deliberately decided not to object to the unauthorised use of its proxy, impliedly ratifying the acceptance of the modified IVA by its conduct.

The court went on to provide guidance on the correct interpretation of section 262 of the Insolvency Act 1986. The court held that the word 'irregularity' in s262 should be interpreted broadly and should extend to include irregularities that would otherwise have an invalidating effect. Having regard to the 'steer' given in the language of s262(8), Briggs LJ held that s262 *'clearly assumes that a material irregularity might be serious enough to invalidate the IVA otherwise than in pursuance to an application under the section, but for the statutory ban which subsection (8) imposes, coupled with the time limit in subsection (3)'* (at [50]). He attached weight to the fact that a narrow interpretation of s262 would *'deprive the court of the flexible jurisdiction under subsection (4) to make sensible provision in an appropriate case for suspending approval, or summoning a further meeting to consider a revised proposal. It would also remove the discretion given to the court as to how if at all to respond to the challenge, in every case where the irregularity was of the invalidating kind'* (at [51]). Finally, the judge had regard to the fact that if the narrower view were to be adopted, the court would in every case be required to determine whether or not the irregularity was of the invalidating kind, a process likely to be fraught with arcane and old fashioned distinctions.

This decision gives welcome clarity to an area otherwise confused by a series of inconsistent first instance decisions. The narrow approach to interpretation adopted by the court in *Re Plummer* [2004] BPIR 767 has been expressly disapproved and a broad, pragmatic approach promoted in its place.

CORPORATE INSOLVENCY

Re Ralls Builders Ltd (in liquidation) [2016] EWHC 243 (Ch)

Joint liquidators applied for a declaration and contribution under the wrongful trading provisions of s214 Insolvency Act 1986. They alleged that by either 31 July 2010 or 31 August 2010 the directors of the relevant company knew or ought to have known that it would not avoid going into insolvent liquidation. The directors contended that they had attempted to rescue the company, both through continued trade and through their attempts to secure investment from a third party. In the event the third party did not invest and the company went into administration on 13 October 2010.

Decision

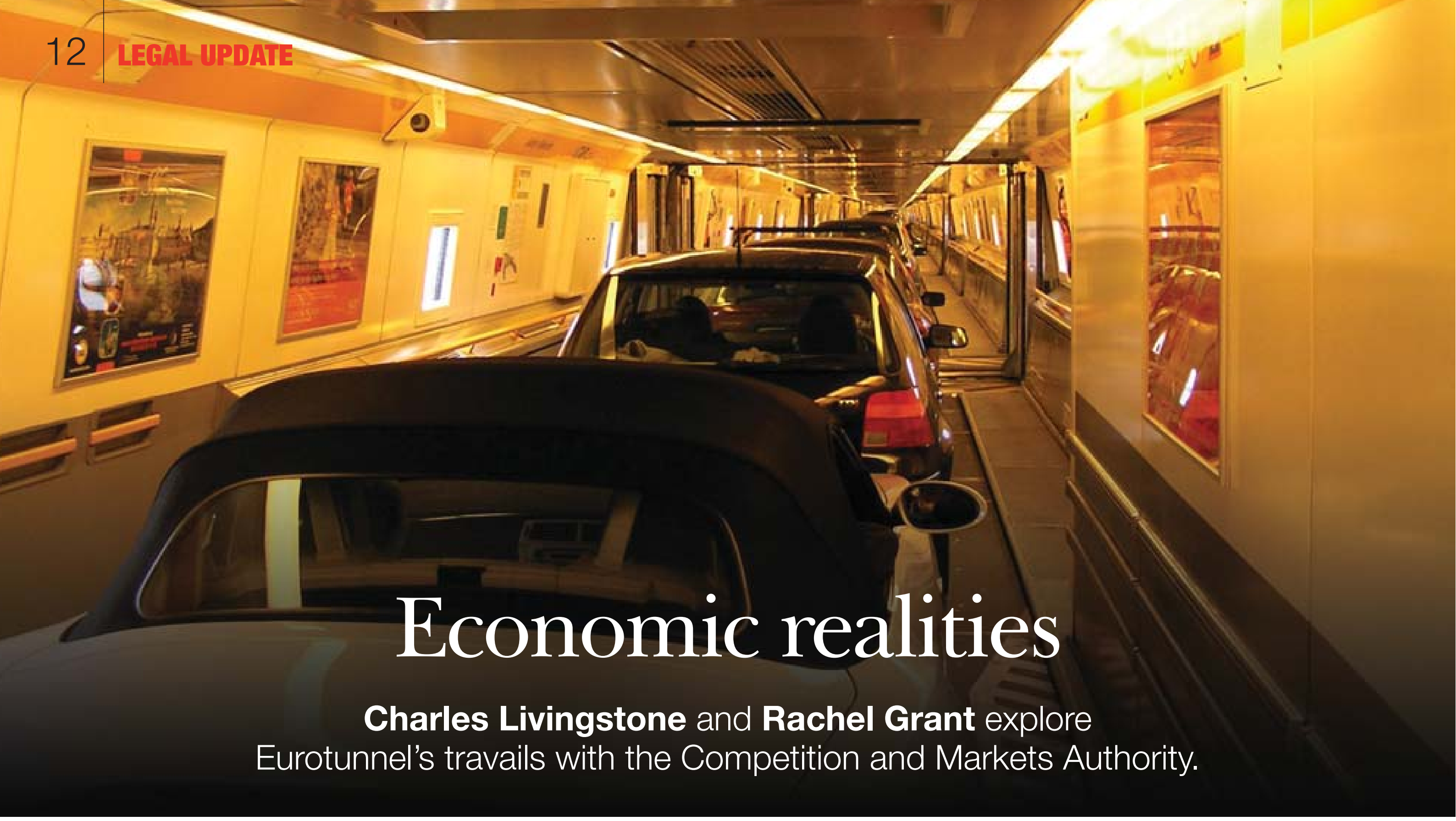
The court refused to make the declaration sought by the joint liquidators and refused to order the directors to make a contribution.

Warning against retrospectively judging the directors *'with the benefit of 20:20 hindsight'*, Snowden J held that the fact that the company was both cash flow and balance sheet insolvent did not necessarily mean that liquidation was unavoidable. The directors had taken expert advice on their position and, as at 31 July 2010, there was a possibility that the third party would indeed invest in the company. However, by 31 August 2010 the directors should have known that third party investment was highly unlikely and could not be relied upon to save the company. By that stage *'a realistic assessment… should have led the Directors to conclude that [the third party] could not be relied upon and that there was no reasonable prospect of the Company avoiding an insolvent liquidation'* (at [216]). The directors ought therefore to have known by 31 August 2010 that an insolvent liquidation was inevitable.

Notwithstanding this, however, Snowden J declined to order the contribution sought by the joint liquidators. He held that in determining whether a director should be required to make a contribution under s214(1) the court should ascertain whether the company had been caused any loss by virtue of the wrongful trading. As a starting point, the court should seek to establish whether there was an increase or a reduction in the net deficiency of the company between the relevant dates. Before any contribution is ordered, a causal connection must be demonstrated between the amount of the contribution and the continuation of trading. Losses that would have been incurred in any event as a consequence of the company going into a formal insolvency process should not, without more, be laid at the door of the company's directors.

In this case Snowden J gives clear guidance as to how the court should approach questions of quantification in s214 cases. He offers a salutary warning against holding directors to an ideal standard with the benefit of hindsight, and recognises that companies can indeed work back from 'the point of no return': a factor that must be borne in mind when assessing a director's liability under the section. ◻

ROWENA PAGE is a barrister at Enterprise Chambers.



Economic realities

Charles Livingstone and **Rachel Grant** explore Eurotunnel's travails with the Competition and Markets Authority.

The UK Supreme Court has decided that Groupe Eurotunnel's purchase of various assets of SeaFrance was subject to the UK merger control regime, despite SeaFrance having gone into liquidation more than six months prior to the purchase. This was the final stage of a long-running dispute about whether or not a business in liquidation can still be an 'enterprise' for merger control purposes.

The decision could have significant consequences for insolvency practitioners, and in particular for businesses looking to buy assets from a liquidator, who will need to factor in the risk of merger control, which can add significant time and cost to a deal or perhaps even block it altogether.

The background

SeaFrance, which operated cross-channel ferries, went into administration in April 2010 and was subsequently put into liquidation by a French court order in January 2012. Most of its employees were dismissed. The Société Coopérative de Production SeaFrance SA (SCOP) was formed as a workers cooperative to secure employment for those former employees.

In July 2012, Groupe Eurotunnel (which operates the Channel Tunnel) acquired all of SeaFrance's assets, including three vessels and various IP rights, on the basis that SCOP would provide crews and shore staff (with a generous incentive payment from SeaFrance's parent company SNCF for each former SeaFrance employee taken on). The ferry services began operating in August 2012, crewed almost entirely by former SeaFrance workers.

Under the Enterprise Act 2002, one of the conditions governing whether the UK competition authorities have jurisdiction over a deal is that two or more 'enterprises' must cease to be distinct (the other tests that must be met are the target having a UK turnover of at least £70m or the deal giving the buyer at least a 25 per cent share of any market). An 'enterprise' is defined as 'the activities, or part of the activities, of a business'. The present case concerned whether Eurotunnel had acquired the SeaFrance 'enterprise', or merely a collection of assets that used to belong to SeaFrance.

> "Businesses and insolvency professionals will need to consider the economic reality of a deal, rather than just its form, in order to assess the risk of the CMA reviewing or even blocking the acquisition."

The history

When the deal was first investigated, the Competition Commission decided that despite SeaFrance having ceased to trade more than seven months previously, the activities of its business had been continued by Eurotunnel. This was due to, among other factors, the ease and speed with which the vessels were put back into operation and the fact that the staff largely consisted of former SeaFrance employees, in line with the agreed incentive scheme. The Commission then decided that the acquisition could be expected to result in a substantial lessening of competition between the Channel Tunnel and cross-channel ferry services, and so restricted the operations of Eurotunnel's ferry service (including a ten-year ban on using the SeaFrance vessels as ferry services from Dover).

Following a tortuous procedure involving two Competition Appeal Tribunal (CAT) hearings and a remittal to the Competition and Markets Authority (CMA – which had by then replaced the Commission), the case found its way to the Court of Appeal. A majority there reversed the CMA and the CAT decisions, deciding that Eurotunnel had not acquired an 'enterprise' but had instead acquired assets in order to construct a new business. The merger control regime would only apply if there were a transfer of a business 'as a going concern'. SeaFrance ceasing operations and dismissing its employees meant the activities of the company had finally and irreversibly been brought to an end, and the maintenance of the vessels to enable a more beneficial sale was irrelevant to that outcome.

The outcome

On 16 December 2015, the Supreme Court unanimously overturned the Court of Appeal decision, holding that UK merger control is not limited to deals involving the acquisition of a business as a going concern. It stated that a hiatus in the activities of the business will be relevant but not decisive, with its importance varying from case to case. An enterprise will therefore continue to exist, and merger control will be capable of applying to it, as long as there is still the capacity to perform activities as part of the same business.

The court set out the following test:

- whether the purchaser, in acquiring the assets, is obtaining more than he might have acquired by going to the market and buying equipment, recruiting new staff etc; and
- whether this 'extra' is attributable to the fact that the assets were previously

employed in combination in the activities of another enterprise.

The court noted that these criteria are less likely to be satisfied the more time that has passed since the other enterprise ceased trading. The question is ultimately likely to turn on the concept of 'economic continuity', and whether the whole of the acquisition is greater than the sum of its parts.

In this case, the acquired vessels were specifically designed for the relevant route and had been maintained in a condition that allowed the service to resume more quickly and at lower cost (and risk) than if ships had been acquired elsewhere. Furthermore, although SeaFrance's employees had been made redundant, the incentive payments created a link between the ships and the personnel, and Eurotunnel's arrangement with SCOP allowed the service to be resumed with substantially the same staff (again providing significant efficiency advantages).

The court therefore agreed with the CMA that there had been 'considerable continuity and momentum' between the activities carried out by SeaFrance before its liquidation in January 2012 and those carried on by Eurotunnel after July 2012, and that what the CAT had called the 'embers of an enterprise' remained even after the liquidation.

> "The Competition Commission decided that despite SeaFrance having ceased to trade more than seven months previously, the activities of its business had been continued by Eurotunnel."

The Eurotunnel decision confirms that buying assets from a liquidator will in some circumstances require UK merger clearance. The case also tells us that the status of employees – ie will they transfer to the new buyer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)? – may be a significant (though not necessarily definitive) indicator that an 'enterprise' is being purchased.

Businesses and insolvency professionals will need to consider the economic reality of a deal, rather than just its form, in order to assess the risk of the CMA reviewing or even blocking the acquisition. Eurotunnel abandoned its plans to run freight-only ferry services immediately following the judgment, having already offloaded its two passenger ferries earlier last year, demonstrating the potential seriousness of an adverse CMA decision.

CHARLES LIVINGSTONE is a partner in the public law and regulatory team at Brodies LLP.

RACHEL GRANT is a partner in the restructuring and insolvency team at Brodies LLP.

Legal Q&A

Emily Lockhart answers your insolvency queries.

Q I am an administrator of a company and was appointed by a qualifying floating charge holder. Since taking office it has transpired that the floating charge under which I was appointed, which was expressed to be a deed, had been signed by the director in the presence of a witness but not dated until four months later, at which point the director had resigned. Is my appointment still valid?

A Under paragraph 14 of schedule B1 of the Insolvency Act (IA), the holder of a qualifying floating charge may appoint administrators.

For a charge to be a 'qualifying floating charge' it must be created by an instrument that:

(1) states that paragraph 14 Schedule B1 IA applies to the floating charge;
(2) purports to empower the holder of the floating charge to appoint an administrator or an administrative receiver of the company.

> There is a rebuttable presumption that a document executed as a deed is delivered on execution.

The charge must also have been validly executed in accordance with section 44 of the Companies Act 2006 (CA).

In accordance with section 44 CA, a document is validly executed as a deed by a company by either:

- affixing the common seal of the company to the document; or
- signing the document on behalf of the company by either:
  - two directors or one director and the company secretary; or
  - a director of the company in the presence of a witness who attests the signature.

Although a deed does not take effect until delivery, there is a rebuttable presumption that a document executed as a deed is delivered on execution (section 46(2) CA).

In the case of *Re Armstrong Brands Ltd (In Administration) [2015] EWHC 3303 (Ch)*, Judge Purle QC held that a debenture that had been executed as a deed and signed by a director and secretary but not dated until three months later had been validly executed in accordance with section 44 CA.

The court considered that it was enough that the debenture had been signed by a person who was a director at the time it was signed. In this case, the court was satisfied that contrary intention regarding delivery had been proved pursuant to section 46(2) CA. All that was required was board authority for the later delivery of the debenture.

If you cannot establish that board authority to later delivery was given so as to rebut the presumption that execution and delivery are simultaneous, you may wish to seek a declaration from the court that your appointment as administrator is valid notwithstanding the anomaly between the execution and delivery of the charge.

Q A notice of intention has been filed by the directors at court, but a winding-up petition has subsequently been issued. Can they proceed to file a notice of appointment?

A On 26 May 2015, the Deregulation Act 2015 brought into force a new paragraph, 25A of Schedule B1 of the Insolvency Act 1986 (IA).

The new paragraph 25A provides as follows:

- *25A(1) paragraph 25 (A) does not prevent the appointment of an administrator of a company if the petition for the winding up of the company was presented after the person proposing to make the appointment filed the notice of intention to appoint with the court under paragraph 27.*
- *25A(2) But sub-paragraph (1) does not apply if the petition was presented under a provision mentioned in paragraph 42(4).*

This new paragraph 25A has clarified the position and confirmed that the appointment of an administrator pursuant to paragraph 22 of Schedule B1 IA (ie an appointment by a company or its directors out of court) is not prevented in circumstances where there is a winding-up petition presented at court after a notice of intention (NOI) has been filed. This is on

> From the moment the NOI has been filed, the interim moratorium pursuant to paragraph 44 of Schedule B1 of the IA comes into force.

the basis that, from the moment the NOI has been filed, the interim moratorium pursuant to paragraph 44 of Schedule B1 of the IA comes into force and a subsequent petition should not have been presented. The exception to this is set out in paragraph 25A(2), which carves out those petitions that are presented on public interest grounds, in respect of a Societas Europaea or by the FCA or PRA, despite the interim moratorium.

In answer, the directors can proceed to file a notice of appointment. ◻

EMILY LOCKHART is a business support and restructuring associate at Addleshaw Goddard.

Editor recovery@r3.org.uk | Recruitment recovery@r3.org.uk/recruitment

Risk Solutions for Insolvency Practitioners

Together, We Unlock Potential

We are a leading provider of insurance and risk management solutions to the insolvency and restructuring industry.

Our client's rely on us for innovation and sector knowledge; developing market-leading services enabling our client's to maximise upside and achieve their realisation strategies.

Our services include:

Credebt Protect + The only product of its kind providing bad debt protection for ledger books of insolvency appointments.

Price Match Service Experience the benefits of our open cover insurance scheme whilst removing disputes with tenants over changes to insurance costs.

Open Cover Schemes – UK and Republic of Ireland Providing immediate insurance solutions in both territories and deferred premium payment.

Advisory Services Supporting a range of restructuring and insurance solutions including risk management.

Insurance Review Full review of insurance requirements including pre-appointment and general market comparisons.

Contact Us

Mark Sanderson, Managing Director
T: +44(0)7771 678571
E: Mark.Sanderson@willistowerswatson.com

Samantha Taylor, Deputy Managing Director
T: +44(0)7956 661162
E: Samantha.Taylor@willistowerswatson.com

Damien Frost, Sales Director
T: +44(0)7342 089761
E: Damien.Frost@willistowerswatson.com

Sadie Easdown, Client Service Director – North, Scotland & NI
T: +44(0)7943 825923
E: Sadie.Easdown@willistowerswatson.com

Andrew McIntosh, Client Service Director – South & Midlands
T: +44(0)7944 918542
E: Andrew.Mcintosh@willistowerswatson.com

willistowerswatson.com

Willis Towers Watson

FP1999/15250/02/16

The appetite for funding

Mark Beaumont explores the options for funding insolvency litigation in 2016.

In early 2013, before the Jackson reforms came into force, I recall senior people at litigation funders telling me that my firm was wasting time exploring the insolvency sector: that there was simply no appetite among IPs for litigation funding. This seemed strange to me, and as we spoke to more and more IPs a different truth emerged.

The reality for many IPs is that the concept of funding is attractive (if the price is right) but that in practice it has been nigh on impossible for them to secure funding for a specific action: funders wanted cases over £10m in damages; they wanted forensic reports; asset tracing reports; an opinion on merits from a QC…

For many IPs, the reason they needed funding was actually to move forward and get a QC's opinion, or to do the asset tracing or other investigative work. There was clearly a major disconnect between the expectations of funders and the majority of IPs.

Who funds insolvency litigation?

There are around twenty third-party litigation funding firms active in the UK market (and a dozen or so after-the-event (ATE) insurance providers) and most have an appetite for funding insolvency litigation. In fact most funders prefer to work with IPs because they are perceived as being more commercially sensible and less emotional than some other litigants. However, having an appetite for funding litigation and being a specialist are two very different things. Not all funders are specialists in insolvency, and often need educating about the nuances. This can include the need to support IPs' fees during litigation – something that funders of other commercial cases are not used to, as they would never be expected to fund a client ordinarily.

Names to know

There is a growing number of serious players in the insolvency space, which means that the good news is that this is driving genuine innovation. The list below is not exhaustive, but shows some measure of that innovation.

Perhaps the most well-known brand for acquiring claims from IPs and then pursuing them to conclusion within the insolvency space is Manolete Partners PLC. Manolete can also fund litigation without purchasing outright and they stress their ability to take over the day-to-day management of the cases.

The Association of Litigation Funders (ALF) lists seven funders as members and some will be familiar names within the insolvency world, including Redress Solutions PLC, Harbour Litigation Funding Ltd and Burford Capital LLC. Across the ALF membership there's a mixed bag of experience within insolvency litigation, as well as different appetites towards case sizes, international elements and investor returns.

> "Brokers have an important role to play in this process, but only if they genuinely work with the full market and only if they understand the particular needs of IPs."

Aside from Manolete and the ALF members, there are a number of other funders operating in (or trying to operate in) the UK insolvency arena, including Orchard Global Asset Management, Cavendish IP Solutions, Bentham Europe Ltd and Augusta Ventures LLP.

What can litigation funding actually do?

Funding insolvency litigation a few years ago was nothing like funding now. Over the last three years enormous hard work has been put into developing funding solutions that actually match the needs of the insolvency sector. For example, it's now possible to:

- draw down pre-issue funding for IPs to do further investigation work;
- fund WIP across a contentious insolvency practice;
- use staged funding agreements to maximise returns to creditors;
- fund actions without an immediate pay-off (recovering property or patents etc);
- fund one-off cases with recoveries of just £100,000;
- sell individual claims or bulk claims.

There are many ways that risk management tools such as third-party litigation funding and ATE insurance can be used to pursue claims. When used in conjunction with conditional fee agreements (CFAs), discounted CFAs, fixed fees or other retainers such as damages-based agreements (DBAs) the options are vast.

The consequence of this is that there should be very few circumstances now where a claim that is proportionate and has merits can not be pursued, so long as there is some degree of confidence that a recovery can be made from the defendants. With this is mind, it is important for contentious insolvency practitioners (and their solicitors) to have:

- up-to-date knowledge of the market for funding and ATE;
- access to the most appropriate products for any particular case;
- the ability to differentiate between providers;
- an understanding of how to pitch cases to particular funders and underwriters;
- the confidence that they have fully tested the market in order to achieve best outcomes for stakeholders.

My own view is that brokers have an important role to play in this process, but only if they genuinely work with the full market and only if they understand the particular needs of IPs. There are a number of brokers operating in funding and/or ATE insurance and they include AJ Gallaghers, Annecto Legal Ltd, JLT, Maxima, The Judge, ULP and others.

For more on the litigation debate turn to page 20.

What is third-party litigation funding?

Litigation funding is not a loan, it is non-recourse finance: any funding provided is only paid back if a claim is successful. If a case fails then the funder loses their money. Funders often work in conjunction with ATE legal expenses insurers, were the funder carries the upfront costs of litigation and the ATE covers the risk of an adverse costs award. Commonly, a funder will take on 100 per cent of the litigation costs in return for between 10 per cent and 30 per cent of the funds recovered in successful litigation.

In order to be a successful litigation funder it makes sense to run a large and diversified portfolio of claims in order to spread risk. Running lots of litigation obviously means having deep pockets, and so funders are usually hedge funds, wealth managers, private equity houses or listed businesses.

Alongside case funding there is also a growing market for the acquisition of claims by third parties, given the legislative changes in October 2015. Some third-party funders are moving into this market, but there are also distressed debt specialists and other well-financed entities operating in this space.

MARK BEAUMONT is co-founder of Annecto Legal Ltd.

Insolvency express trial pilot

Mr Registrar Briggs outlines a new initiative for swift insolvency hearings.

The Chancery Division is the largest unit for handling business and property cases in England and Wales. In December 2012 Lord Justice Briggs began a modernisation review and asked whether the available skills and experience of those exercising judicial functions were properly deployed. In the final report of the Chancery Modernisation Review (CMR) he concluded that:

'the registrars currently provide a national centre of excellence. They are the only judges in the country who work full time in insolvency and company matters. They are recognised as experts, and cases are transferred to the High Court with that in mind… Their work on major company reconstructions and schemes has both national and international importance, and involves assets worth enormous sums.'

The CMR noted that the registrars had recently increased the concurrent trial lists from two to three, recommended transferring certain work to the Central London County Court (CLCC) and taking more of the insolvency and company work, which was then the preserve of the High Court judges. The registrars (supported by the Bankruptcy & Companies Court User Committee, and the Chancellor) have been implementing these recommendations and modernising in other ways since the final report was published on 13 December 2013 (more about this to come in future articles).

Case and costs management

There has been disquiet about costs and the time taken to resolve legal disputes since Roman times. After the Second World War a committee chaired by Sir Raymond Evershed MR recommended that judges *'should pursue a more active and dominant course in the interests of the litigant'*. In his report on the English and Welsh legal system Lord Woolf concluded that reform was required:

'Without effective judicial control… the adversarial process is likely to encourage an adversarial culture and to degenerate into an environment in which the litigation process is too often seen as a battlefield where no rules apply. In this environment, questions of expense, delay, compromise and fairness may have only low priority. The consequence is that expense is often excessive, disproportionate and unpredictable; and delay is frequently unreasonable.'

In an impressively researched paper by Chief Justice Allsop of the Federal Court of Australia, he explains that delay and costs are not to be regarded as close relatives. He considered the relationship between the two in America, Canada, England and Wales, and Australia. The RAND Corporation's Institute for Civil Justice was mandated by statute to consider the effect of case management in several US federal district courts. Their report was published in 1996. The controlled experiment *'designated ten pilot district courts, which were required to adopt certain case management principles, while ten others (what we might call the "control" districts) were not so required'*. The experiment found that early case management resulted in a reduction in the time a case took to reach its conclusion but additional costs were incurred as a result. The RAND findings have been questioned by some, but Chief Justice Allsop wrote that it would be unwise to dismiss the RAND findings as somehow inapplicable or irrelevant. His wise warning has substance. He observed that the Woolf reforms had not been a total success. Professors John Peysner and Mary Seneviratne produced a report on behalf of the Department of Constitutional Affairs based on interviews with practitioners, judges and court officials. The report found:

'case management… is effective in cutting delay but it is ineffective in cutting costs or, indeed, may increase costs. Lord Woolf's aspiration that case management would achieve his aims in relation to costs has not been achieved.'

In December 2009 Lord Justice Jackson reported on the costs of civil litigation. His report has been described as magisterial, but the introduction of costs management in the civil procedure rules has (on anecdotal evidence) not been a total success. Chief Justice Allsop commented on this initiative:

'There is a particularly bitter irony where case management undertaken specifically to curb costs in fact adds to them. It has been suggested that the requirement to file costs budgets and attend cost management conferences under the Jackson reforms in the UK actually increases the length and cost of litigation. One is presented with the macabre spectacle of lawyers running up costs negotiating, preparing and filing costs budgets, and then running up more costs arguing about those budgets before a judge.'

In his masterful interim report on civil courts structure Lord Justice Briggs observed that costs management was under continual review by the Civil Procedure Rules Committee.

Express trial initiative

Chief Justice Allsop warned his audience that danger lurked behind delay and a failure to control costs; the danger that users will view the legal system as irrelevant and useless. He called upon those interested to think about *'court rules, procedures, trial processes and all aspects of litigation by reference'* to case management, costs and delay. He asked *'how can a substitute procedure be put in place that will achieve the valid end in question, without feeding process-driven costs?'*

The drive to reduce delay and costs in the Chancery Division has acted as a spur for the registrars to introduce an initiative. The insolvency express trial (IET) pilot will begin on 1 April 2016 and be maintained for a period of two years. During this period the registrars will collect time and costs data to determine its success or failure. The features of the initiative face the challenge made by Chief Justice Allsop and accept at face value the American and English studies that demonstrate that case management has the potential to increase litigation costs.

I shall not set out the practice direction, which is about to be published, but bring to your attention some of the key features of the IET. Having in mind what I have said above, the procedure is intended to reduce preparation time, reduce costs and provide a swift hearing. It is designed to enable litigants of the Bankruptcy and Companies Courts to elect for a streamlined procedure with reduced case management, limited disclosure, an early hearing and a fast decision.

The IET will (at least initially) be limited to cases lasting two days or less and be most suitable for cases with limited issues. The procedure facilitates the resolution of a dispute arising between the parties as to whether an IET is appropriate. Accordingly, there will be little to lose for an applicant or claimant selecting the IET where appropriate.

The costs ceiling will initially be set at £75,000. That is not a target and it may be revised during the course of the pilot. There will be no costs budgeting.

The registrars hope that this initiative will be well received by users. Once introduced, I would welcome feedback (good or bad), which can be used to improve the procedure over the course of the pilot.

MR REGISTRAR BRIGGS is Bankruptcy Registrar of the High Court sitting in the Bankruptcy and Companies Court in the Rolls Building.

Contentious cases

A look at the legal landmarks that have affected the profession recently and how they'll affect insolvency in 2016.

Bilta (UK) Ltd v. *Nazir* (No 2) [2016] 1 AC 1

Bilta is the most significant recent case on attribution of knowledge/acts of individuals to a company and the illegality defence in an insolvency context and the territorial scope of the fraudulent trading section (s213) of the Insolvency Act 1986.

Bilta and its liquidators sued various defendants after Bilta's directors (one of whom was the sole shareholder) caused it to enter into transactions generating a VAT liability of over £38m, which it could never satisfy.

> "From April 2016 CFA uplifts and ATE insurance premiums cannot be recovered from defendants in insolvency litigation."

Two non-director defendants (to dishonest assistance and conspiracy claims) applied to strike out the proceedings, arguing that the illegality defence defeated Bilta's claim because Bilta could not found a claim on the illegal scheme run by the directors.

The Supreme Court held that where the company is the victim of wrongdoing by its directors, then that wrongdoing cannot be attributed to the company as a defence to a claim brought by the company's liquidator (on behalf of its creditors) against the directors, even where the directors were the only directors and shareholders of the company.

Attribution was the key issue discussed, but the Supreme Court indicated that the illegality defence needed consideration by a seven- or nine-panel court '*as soon as appropriately possible*'. Accordingly, practitioners should be aware that the proper scope of the illegality defence is a complicated and uncertain area. One can readily imagine insolvency situations where the defence might be raised (especially when liquidators are appointed over companies with a sole director/shareholder who commits fraud through the company). It may well be that the future case to which the court alluded will be an insolvency one.

Re Hampton Capital Ltd [2015] EWHC 1905 (Ch)

The administrators of Hampton Capital claimed to recover gratuitous dispositions from the company under the TUV provisions of the IA 1986 (s238) and restitution on the ground of unjust enrichment.

The dispositions had been ordered by an apparently plausible con-man. He did not have authority to act on behalf of the company but had instructed a director of the company to make the payments.

The judge held that the restitution claim succeeded. However, he found the application under s238 'difficult' because of questions as to the proper meaning of the term 'transaction' (defined in s436 IA 1986 as including a '*gift, agreement or arrangement*').

On the evidence, the director had never intended to make a gift when he authorised the gratuitous transfer (on instructions from the con-man). The judge said that the mere transmission of money without (i) any form of dealing or arrangement between the company and the recipient and (ii) any intention to make a gift could not constitute a 'transaction' within the section.

This is a surprising decision, given the broad terms of s238 and 436 and the range of circumstances in the Act in which the term 'transaction' is used. However, as the only recent decision on the meaning of 'transaction', it is important. Practitioners should be aware of it because it may make s238 applications less attractive in certain factual circumstances: restitution may be the preferred route to recovery.

> "Section 236 is an important tool for office-holders. It allows them to ask the court to order those with information about a company's affairs to appear before the court and be examined."

Oraki v. *Bramston* [2015] EWHC 2046

This was an unusual claim where bankruptcy orders against a husband and wife had been annulled subject to conditions on the ground that they should not have been made. The Orakis claimed that the erstwhile trustee in bankruptcy had mismanaged their estates; they said he owed them a common law duty of care that extended beyond the statutory duty to the estates (s304 IA 1986), in a situation where it was obvious that there was going to be a surplus and readily available cash. The court concluded that the trustee did not owe them a duty of care and that, even if he did, any claim in negligence would have expired when the trustee got his release under s299 IA 1986.

The case is a rare example of the court scrutinising the duties owed by trustees to bankrupts; it is now under appeal and so is one to watch for in the coming year.

Vizcaya Partners Limited v. *Picard* [2016] UKPC 5

In this Gibraltarian appeal the Privy Council considered the rule that a foreign default judgment is enforceable against a judgment debtor who has made a prior submission to the foreign court's jurisdiction, and particularly whether that submission had to be express or implied. The relevant foreign court was the New York Bankruptcy Court: a jurisdiction not amenable to the Brussels or Hague Convention regimes. The board decided that the question of whether there has been a submission to the jurisdiction of the foreign court for the purpose of enforcement of foreign judgments depends on English law. That required an agreement to submit that could arise by implication. There was no evidence that the law of the contract, namely New York law, could lead the Gibraltar court to the conclusion that the term of the customer agreement relied upon by Mr Picard, the Madoff trustee, could apply to insolvency proceedings.

> "There was no evidence that the law of the contract, namely New York law, could lead the Gibraltar court to the conclusion that the term of the customer agreement relied upon by Mr Picard, the Madoff trustee, could apply to insolvency proceedings."

This case, although of general application, decides an important question for multi-jurisdictional insolvencies; it is relevant not just to Gibraltar but also to many other offshore jurisdictions.

Gabriel v. *BPE Solicitors* [2015] AC 1663

When a bankrupt has been in litigation, the trustee in bankruptcy may wish to appeal the decision that has gone against the debtor and, indeed, the bankrupt may urge him to continue the fight that he has lost. Until now, there has been a powerful incentive against doing so.

When a trustee is appointed, the bankrupt's estate vests in the trustee, including the right to conduct or appeal litigation. Where a trustee conducts litigation, he does so in his own name, even though it is for the benefit of the bankrupt's estate; he is therefore personally liable to pay any costs order made against him. Ordinarily he can recoup that liability from the estate but only if there are assets.

Until this decision, if he adopted litigation that was already afoot, he became potentially liable for all of the opponent's costs, *even those incurred before the bankruptcy order was made*.

This rule feels unfair because the trustee is at risk of paying costs that he had no part in incurring. But it came about before the court could make third-party costs orders and when costs orders were not provable unless made before the bankruptcy.

The Supreme Court decided that this rule no longer stands now that costs liabilities are provable. But it stressed that there was still a discretion to order the trustee to pay the pre-bankruptcy costs. No guidance was given on this discretion but common sense suggests there would need to be circumstances that would ordinarily justify a third-party costs order. With this change in the law, it may be more viable for trustees to appeal judgments against bankrupts.

The extraterritorial effect of s236, Insolvency Act 1986

Section 236 is an important tool for office-holders. It allows them to ask the court to order those with information about a company's affairs to appear before the court and be examined. It also allows the court to order them to submit an account of their dealings with the company, together with supporting documents.

Last year there were two decisions on whether this power can be exercised against respondents resident abroad. In *Re MF Global UK Ltd* [2015] BCC 891, special administrators sought information from a French company. The respondent contested the court's jurisdiction. David Richards J sympathised with the view that s236 had extraterritorial effect but ultimately decided he was bound by a decision made under the old Bankruptcy Act 1914: he concluded that it does not.

Shortly afterwards, HHJ Hodge QC had to decide the same issue in *Re Omni Trustees Ltd* (No.2) [2015] BCC 906. Here the official receiver, as liquidator, sought an account of dealings and supporting documents from an entity resident in Hong Kong. He argued that *MF Global* failed to take account of the differences between s236 and the Bankruptcy Act, and also a decision on a related issue by the Court of Appeal. Judge Hodge was persuaded to depart from the earlier decision. He concluded that, while there might be no power to order someone from outside the jurisdiction to attend for examination, he could order such a person to produce an account of their dealings with the company.

> "The trustee did not owe them a duty of care and, even if he did, any claim in negligence would have expired when the trustee got his release under s299 IA 1986."

Office-holders will prefer the wider decision in *Omni Trustees* but only time will tell which of the two will become established.

End of the LASPO insolvency exemption

In December, the Ministry of Justice announced that the insolvency exemption would not be renewed. From April 2016 CFA uplifts and ATE insurance premiums cannot be recovered from defendants in insolvency litigation.

The consequences are significant. While CFAs and ATE insurance will remain available in appropriate cases, if the uplift and premium cannot be recovered from defendants, they must be paid from sums recovered. CFA funding will probably cease to be viable for all but high-value cases. Ultimately creditors will lose out.

In some cases it may be possible to persuade creditors to fund and indemnify claims. In others litigation funders may fill the gap. But it seems likely that many claims otherwise available to 'insolvent insolvencies' will simply not be pursued. Perversely, this may provide an incentive to directors who are only moderately misfeasant to empty their companies of assets before the start of an insolvency process in order to stifle claims against them. ◻

From left to right: **CATHERINE NEWMAN QC**, **TIM CALLAND** and **ROSANNA FOSKETT** are barristers at Maitland Chambers.

After the event

In the wake of the government's repeal of the LASPO insolvency exemption, *RECOVERY* brought together experts in the field to ask 'Where next?' when it comes to insolvency litigation funding.

At the end of 2015, with a flourish of his magic wand, Justice Minister Lord Faulks announced that the insolvency exemption under the Legal Aid, Sentencing and Punishment of Criminal Offenders Act (LASPO) will cease to exist in April 2016. This ends IPs' ability to recover conditional fee agreement (CFA) uplifts and after-the-event (ATE) insurance premiums from unsuccessful defendants.

However, insolvency litigation will continue, stimulated by a market for litigation funding and associated products that continues to expand and adapt. To provide some clarity about the options available, and how they will function in a changing environment, editor of *RECOVERY* and partner at Mercer & Hole, Chris Laughton called together a group of professionals in a round table debate to examine how best to extract value from insolvency litigation, even in impecunious estates.

The discussion documented below covers some of the burning issues around litigation funding: what does the loss of the LASPO exemption mean? How will funding evolve to meet the needs of insolvency litigation and what will this do to the legal marketplace? How can IPs and lawyers engage with ATE insurers to ensure that all parties are happy? Will selling on claims become more common, and what ethical considerations does this trigger?

An end to LASPO, an end to litigation?

Unlike their counterparts in other areas of commercial litigation, potentially funded by the deep pockets of wealthy litigants, insolvency cases have traditionally relied on CFA uplifts and ATE premiums being fully recoverable from the defendants on success to see a case to its end. Chris asked how the market might now develop to encourage IPs considering litigation to engage with litigation funders (third-party or otherwise) and with related or third party assignees in order to identify the solution most aligned with creditors' interests.

> "In reality 95 per cent of cases never get to trial; they get resolved by settlement or discussion and you get what you can out of the defendant for the benefit of the creditors. Crucially, the quicker the case settles, the lower the costs."

On the front line dealing with the government's reforms is senior partner at Moon Beever and chair of R3's Fraud Group, Frances Coulson. Frances has been at the forefront of the profession's engagement with parliamentarians, stakeholders and the press. The LASPO announcement at the end of last year by no means marks the end of the lobbying for a different deal for the insolvency profession.

'Lord Jackson talked about a level playing field, but I think that's a mistaken argument; it's not a level playing field when the directors have taken or lost all of the money. It's an uneven playing field, and what funding or CFAs do is level the playing field back,' says Frances. 'But, without the ability to recover success fees, you're handing the 'stick' you can use to chase down a rogue director to the other side. Someone will be given the stick – litigation is an adversarial, not investigative, process – and we definitely don't want to narrow the field of the sort of people willing to take this work on.'

One of the key issues surrounding the LASPO exemption for insolvency cases is incentive, argues Adrian Hyde, even if the case never sees the inside of a courtroom. Adrian was an insolvency solicitor for many years before moving to become a licensed IP. He is regularly involved with litigation.

'The situation we're in is that we're looking after the interests of the creditors and we've been left with either minimal or no assets, but the person we're going after is the person responsible for creditors' losses,' says Adrian. 'The way a dishonest director sees this is "the worse a position the company's in the better it is for me. If I leave them a little bit of money, they'll use it to catch me, but if I spend everything then they've got nothing." What the exemption meant was an incentive. Dishonest directors had this cloud hanging over them that says if this does go to trial they will face the "stick".'

'It looks horrendous on paper. You do all this to go to trial and the defendant has to go to trial and get kicked twice and pay double costs,' he adds. 'But in reality 95 per cent of cases never get to trial; they get resolved by settlement or discussion and you get what you can out of the defendant for the benefit of the creditors. Crucially, the quicker the case settles, the lower the costs.'

A lot of press coverage has been given to the voices of the insolvency profession against the removal of the LASPO exemption. But one of the areas that may get off relatively unharmed by the change is ATE insurance, suggests Ed Brittain, head of restructuring and recovery risk management at solutions specialist JLT.

'If you want to talk about LASPO and the end of the exemption, I don't think that's necessarily going to have an effect on the ATE market. I think the original Jackson reforms have had a massive effect on what's happened to it,' says Ed. 'In terms of funding [litigation], if you said to

> Volume litigation using CFAs has increasingly been the preserve of a decreasing number of specialists.

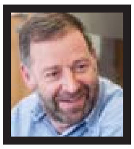
the ATE insurers that they haven't been part of funding they'd be quite offended. In fact they defer all their premiums and if they lose the case they pay the costs and the premiums themselves because that's the way their mathematical model works.'

'They're pretty much on the side of IPs allowing them to pursue their objectives. There's obviously a clear requirement, if they can end a case sooner and come off risk, to do so. Their time on risk is their cost of capital so they benefit coming off sooner, but they don't ever really talk about that and tend to do what the IP wishes on the case,' adds Ed.

LASPO has the scope to generate some fierce opinions, but the round table agreed that, while insolvency may be falling in line with other areas of litigation, the incentive for the other party to settle or deal is knowing that the creditors, IPs and lawyers are not going to let a case go because they've run out of cash. There are products in the market that will fund insolvency litigation, but one of the key issues for IPs who may not litigate often is education. What are these products, how could litigation work or how can the existing methods of progressing litigation be used to the advantage of an IP?

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

FRANCES COULSON is head of insolvency and litigation at Moon Beever Solicitors and chair of the R3 Fraud Group.



ADRIAN HYDE is a partner at CVR Global LLP and is deputy vice-president of R3.

A changing model for funding

'Prior to the CFA/ATE model of funding litigation, much of the decision making and responsibility for taking forward claims rested with creditors,' explains Vernon Dennis, head of business recovery and restructuring at Howard Kennedy. He suggests that the CFA model may not be the way forward.

'In the past, if there were insufficient resources within the estate the IP would come to an agreement with his lawyers, and potentially with creditors who had the prime economic interest. This involved banks, or even HMRC, assisting in the funding of a claim going forward,' says Vernon. 'While the CFA model has been embraced and adopted by the insolvency industry, that this has, to some extent, distorted litigation risk; it has allowed creditors who will benefit to push the risk of litigation onto the professionals and the lawyers. I'm not sure that's the best way of conducting cases.'

'My further concern with the CFA model is that to do this type of work you have to do volume, and this means a lot of capital exposure,' adds Vernon. 'You need a lot of support within your firm to take forward that model. As a result volume litigation using CFAs has increasingly been the preserve of a decreasing number of specialists. The general litigator will only take on a small number of CFAs. There is understandably a high degree of picking and choosing the cases to go forward; any decision strongly influenced by the economic interests of the professionals. The insolvency profession needs to be innovative and embrace alternatives to the CFA model.'

United funding

If CFAs have distorted litigation, this is a natural process of evolution, argues Mark Beaumont, co-founder of Annecto Legal, a broker of various litigation funding solutions.

'The real topic here is risk, and the way all parties will have to adapt to changes in the rewards mechanism, such as success fees. Change is healthy when it leads to innovation and I'm sure that's what we'll see in the way insolvency litigation is pursued.' says Mark. 'Hopefully this will lead to a more open dialogue about the levels of risk and investment that all parties are comfortable with, whether they be creditors, IPs, lawyers, funders or insurers. Rewards typically follow the risk and so all stakeholders should understand both their contribution and their likely return on that investment. I'm sure we'll see greater diversity in the funding models utilised, and perhaps even entirely new business models that allow the interests of IPs, funders, insurers and lawyers to truly align.'

In order for such a model to function, every party needs to agree to share the risk, no matter the outcome. This can mean a financial blow to the funder, who will expect a contribution from the IPs and lawyers. While logical, these views are controversial (deliberately so, admits Mark), representing the clash between common commercial incentives and the separation of professional duties and interests. Jeunesse Edwards, director of strategic engagement at Augusta Ventures, recalled one of the first steps the firm took into insolvency litigation funding.

> The real topic here is risk, and the way all parties will have to adapt to changes in the rewards mechanism, such as success fees.

'Our first loss at Augusta was an insolvency matter. The solicitor came to us on a full CFA with what seemed like a strong case.' says Jeunesse. But things changed. Suddenly the prospects died – they went into mediation. The other party said drop hands and we were left light £53,000. We had funded the disbursements and the ATE premium. We learnt our lessons that way. Now, our business model is all about sharing the risk; ideally we want a contribution from the parties involved of around 40 per cent and then we pick up the disbursements.'

Professional firms cannot fund the millions of pounds over several years that might be required in larger cases, where third-party funding for insolvency litigation is necessary, claims Adrian. Third-party funding allows IPs to continue chasing a large reward for creditors. But in addition, claims Steven Cooklin, chief executive of Manolete Partners PLC, litigation funding can alleviate the pressure to 'under settle', and put the thumbscrews on the other side. A funded IP is in a strong position to fight the director who stole the company's money. »

'Time and time again when we have a discussion with the office-holder to see what has worked, the same things come out. The first thing is credibility. The fact that a funder has put their balance sheet and their backing on display is, in the minds of the other side, a real hallmark that this is serious stuff,' says Steven.

'The other point is then security. I was talking to an office-holder recently, who said that when litigation is going on for a long time, the solicitor and barrister are building up WIP and the office-holder is

> **Litigation funding can alleviate the pressure to 'under settle', and put the thumbscrews on the other side. A funded IP is in a strong position to fight the director who stole the company's money.**

building up WIP. If the other side is making an offer that gives a decent rate of return on the pound on the WIP there's a lot of incentive on the claimant to settle. Once you've got a funder who's been picking it up as you go along, the WIP has been paid for. The only pressure that remains is how good a deal you can get for the creditor. Only once all that is taken care of do we as funders collect a share.'

This works for mega cases where a significant investment can yield a significant return, but it's not always fitting for a smaller firm or a lone IP.

'In smaller value cases, the funding model doesn't work so well because of costs, which can amount to a large proportion of the recovery,' says Vernon. 'The IP starts from a zero knowledge base and has to spend time and money investigating, often finding deficiencies in the company's information, on top of normal litigation costs.'

To read more about how the LASPO exemption is likely to affect the smaller practitioner, and the options available, turn to page 43.

ED BRITTAIN is head of restructuring and recovery risk management at JLT.

VERNON DENNIS is head of business recovery and restructuring at Howard Kennedy.

MARK BEAUMONT is co-founder of Annecto Legal Ltd.

In order for funding to be useful, he adds, IPs need to be familiar with the various models, be able to compare them and identify how to achieve the best result for creditors.

In Scotland, adds Mark, there are already examples of firms that have branched out from practice into funding. As well as having 'XYZ law firm', there will now be a 'XYZ funders' offering investment in litigation. How this would play with regulators and professional ethics in the insolvency arena is another matter.

'It's a great idea everyone being in the same room but as the saying goes "a lawyer who has himself as a client is a fool", and that's exactly what you'd have with that situation,' says Adrian Hyde. 'You have one partner who is the participant in the room and another who cannot advise dispassionately on the case. There's a conflict issue with that.'

How a single entity would be licensed may also be a large question mark in the England and Wales market. One potential suggestion is that it could be licensed as an alternative business structure. Alternative business structures (ABSs) were heralded as the downfall of the traditional law firm when the SRA relaxed rules related to the Legal Services Act 2007 allowing non-lawyers to operate legal services. This was quickly dubbed the 'Tesco law' reforms by the press for its potential to allow supermarkets or banks to enter the legal landscape. This model could allow for a large capital-backed organisation to fund litigation under a different guise, but would this work as a potential source of funding?

'The reason for the objection would be that the service provider would be billing his services back into the fund,' explains Mark Beaumont. 'It's all about separation, or you have competing interests and profits.'

Insure your litigation as you would your house

At the other end of the scale is a universal catch-all plan for insuring every possible case that comes to your firm. ATE insurers want to be the people to do this, but IPs, who have to justify the cost of every penny, may currently find it difficult to shoulder the burden of insurance for a single case where costs need to be explained. Part of the problem, suggests Ed, is that IPs don't view ATE in the right way.

'I have a feeling that every IP would insure their own house, yet the risk of their house burning down is much, much lower than the risk of litigation, but they're less likely to insure their litigation. So it's a strange thing about risk. If an IP were to say to an insurer "I'll insure everything" when it gets to this point, their rate and their charge would be lower' says Ed.

'People often talk about something called adverse selection. An IP will say one case is definitely going to settle, so it won't be in this little group that's sharing the risk of insolvency litigation. However, another case we might have a problem with, so we need someone to take the risk, and that someone is the ATE insurer. You can see the problem. A firm asking to insure all their litigation, as opposed to one individual with a case, is viewed as a better risk. An IP knocking on the door worried about one case might be seen by insurers as a strange concept.

However, IPs may not necessarily want to insure every case, and have to justify costs to the firm, or other interested parties. Before practitioners could take on 'across the board' ATE insurance, a set of rules would have to be agreed. Could the IP buy a unique insurance as an overhead for the firm for all litigation, effectively creating 'before the event' (BTE) insurance? Or would this just create a further set of problems and draw the ire of the regulators?

'I'm not sure it'll ever work in insolvency,' adds Ed. 'If you're undertaking lots of litigation and spend £1m every year, the premium is going to be £1m plus the underwriters' costs, because that's the cost they will incur. If you then say we're going to do "BTE" that pays the lawyers' fees, but you've got predictable costs, it would not hedge risk. For householders, it works because you can get an unexpected large cost for legal fees. For predictable costs it doesn't work; it can only work in the case of managing the exceptional cost as it is based on what your average spend is.'

> **I have a feeling that every IP would insure their own house, yet the risk of their house burning down is much, much lower than the risk of litigation.**

Much of the problem with such situations could be resolved if the parties involved in funding a litigation agreed to work as a single unit, suggests Mark. Until now insurance and funding has been viewed in the wrong way: as a service.

'You just want a relationship. You don't want a transactional basis to the relationship – you want more of a partnership,' says Mark. 'It might not be halcyon with everyone in the room, but this might be a joint venture in its truest sense.'

Why the UK is good for fraud (but not levies to fund your insolvency)

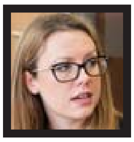
In Gibraltar, Adrian points out, if you are a regulated director of a fund, you are required to have directors' and officers' liability insurance. Each director is charged £1,000 for a £1m global liability limit for the company. The indemnity is then used to settle any liability that comes into the company.

'The idea of a levy on directors to create a fund or insurance to cover litigation cases has been raised with the government in the past, but the potential for such a levy to create a "barrier to entrepreneurship" created too much of a concern for the government to agree,' says Frances. Even a simple charge of £50 was rejected.

The panel agreed that much of the rest of the world has stricter legal requirements when it comes to covering the cost of litigation in such cases. The number of companies in the UK is increasing every year but, as Frances explains, as the number of companies increases, so does the risk of fraud.

'You have to provide your ID to open a bank account, but you don't need to provide your ID to get limited liability. The government should balance the cost of gaining all these new entrepreneurs with how much they lose in fraud,' says Frances.

Without a solid handle on who is in control of a company, recoverability can become a problem. It's one thing to tackle a UK PLC and trace the assets, but insurers and funders are unlikely to fund a case with no apparent assets, or at least none apparent in the jurisdiction..



JEUNESSE EDWARDS is director of strategic engagement at Augusta Ventures LLP.

STEVEN COOKLIN is chief executive of Manolete Partners PLC.

Cutting costs, saving time

Delaying the onset of litigation, and a hearing, is perhaps the most defining tactic of a defendant in insolvency litigation. Speed, the panel agreed, is key to both sides. A pragmatic IP seeks a resolution as quickly as possible to keep all parties happy. Likewise, the opposing side is very aware that the longer something can be delayed, the more likely they are to get away with something. One of the more surprising suggestions for tackling a stalling director is something that Justice Secretaries past and present dream of every night – a truly efficient courts service.

'One of the most constructive examples of how to do insolvency litigation that I've come across was actually in a case last year. The judge sat down and said "This is going to be a six week trial starting in October 2016",' explains Adrian. 'I've three days in February April and June for direction and we know, come the date in October, that everything needs to be finished. The time has really focused everybody's minds. It was the pressure from the efficient courts service that really drove the case.'

Limiting time restricts the potential for a case to drag out for years, exhausting the funding that could be used to pursue a dishonest party. New proposals for insolvency coming up could also aid with smaller litigation.

'An early trial date is probably one of the biggest things that would cut costs. Mr Registrar Briggs is bringing in a fast track service starting on 6 April for smaller cases and that's great. You often have application and evidence stages with a trial looming in the future, but many things can happen to fill in that extra time,' suggests Frances. 'However, for the crooks it's in their interest to delay, and they will not connect to a fast-track system.'

You can read more about the pilot Insolvency Express Trial scheme on page 17.

Passing the buck?

Under the Small Business, Enterprise and Employment Act 2015, some Insolvency Act claims can be sold on to various third parties. As the market changes, the panel wondered, would selling on claims prove a better return for creditors?

'I think there's a very real risk of professional negligence claims emerging here,' suggests Mark. 'It will be important for any IP to show they've gone to the full market, or employed an appropriate firm to do that for them.'

This moral and professional ethical issue could have serious knock-on effects, but weighing this against the potential boons is tricky. Chris says that an initial assessment and the prospect of litigation would need to be thoroughly assessed before a claim was 'put out' to market at the very least.

'Selling claims in a totally unregulated market is a giant reputation kick,' says Ed. 'If it ends up in the hands of some famous crime family that has huge issues around it. We're appointing a practitioner to do a good job, and all of a sudden you can fling this out to a pack of wolves.'

Big changes ahead

Chris Laughton summed up what the next steps might be for the profession. 'The options are, essentially, to litigate or to assign. If you decide to litigate, how do you fund it; and if you assign, to whom and at what price? It is imperative to consider all the options and determine what is best for the creditors.'

Are there good solutions to be derived from aligning the commercial interests of the various participants in insolvency litigation? 'The 'all in the same room' model is fraught with difficulty,' says Chris. 'A solicitor-advocate-IP practising in a heavily capitalised firm able to represent, fund and even insure himself is a much higher risk model (and is therefore much higher cost and much less aligned with creditors' interests) than independent specialists collaborating and avoiding concentration risk.'

'The funder-IP or insurer-IP relationship or portfolio model is also limiting from the creditors' perspective,' he adds. 'Regulatorily IPs are presumed to be equally capable of handling litigation and for an IP to be restricted to a particular funding or insurance arrangement for all cases may not be in the interests of a particular estate's creditors.'

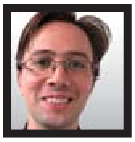
'Funders and insurers will not unnaturally want to share risk with others (reducing their own), but the reality is that IPs, lawyers and experts all bring independent professional skills and duties

> "Ultimately, insolvency litigation is a bespoke exercise, whether taken forward by assignment or as a result of funding. IPs will have to understand the particular asset and the options for its realisation, and they will have to act in the creditors' interests."

to the table, as distinct from the actual or contingent money provided by funders and insurers. Ultimately, insolvency litigation is a bespoke exercise, whether taken forward by assignment or as a result of funding. IPs will have to understand the particular asset and the options for its realisation, and they will have to act in the creditors' interests.'

Conclusion

If IPs are truly without a stick with which to chase down rogue directors through litigation then it's clear that the funding model will have to change. Just as the government pulled a magic trick at the end of last year, this year will see the profession working its own magic to find a system that works. This round table discussion did not instantly devise a solution to the problem created by the removal of the LASPO exemption, but rather offered suggestions that lawyers, IPs, funders and the contributors to *RECOVERY* will be debating long after April. ◻



MATT JUKES is publishing manager for *RECOVERY* and served as rapporteur for the meeting.

Swotting up on provisions

John Cullen examines how the profession has adopted, or adapted to, the new fees regime.

The profession received new fee provisions that came into force in October 2014. They have been a few years in the making and arguably stemmed from a report entitled 'The market for corporate insolvency practitioners: a market study' that the Office of Fair Trading undertook in 2010. The report concluded that unsecured creditors had relatively weak bargaining power in insolvency situations and this could lead to detriment.

> In practice, what we have seen so far is an element of the profession being cautious, obtaining their appointment and then sending out their fees estimate subsequent to the meeting of creditors.

Along came Professor Elaine Kempson in 2013, with a report of her own that was arguably better researched on the basis that it was focused on fees. Professor Kempson said: 'There is clear evidence… where the control of the IP's remuneration and disbursements lie in the hands of unsecured creditors… the current provisions… are not working as intended.' She came up with a number of different recommendations, but what we have in relation to fees is the new fee provisions that were published under the Insolvency [Amendment] Rules 2015 (the Rules).
So how are they working?

The Rules

As a brief reminder, which I am sure you do not need, the Rules introduced a 'fees estimate', which is essentially a cap on office-holder fees that IPs have to produce if they wish to take their fees on the basis of time properly spent. They left the percentage of property basis and fixed cost basis relatively untouched. They also introduced the estimates for disbursements together with a reporting mechanism to creditors and the reporting requirements should IPs wish to increase their fees estimate at any stage.

They also introduced transitional provisions. It does appear that either intentionally or not, there are no transitional provisions for liquidators appointed to compulsory liquidations by the Secretary of State under section 137 of the Insolvency Act, but 'Dear IP 68' sets out what to do in those circumstances.

> It seems that most IPs whose reports I have read have systemised the process of fees estimates already and that is a good thing, so long as the procedure is only the start of the fees estimate rather than the end.

Of more difficulty, the Rules refer to the office-holder being the person to construct and send out the fees estimate. The problem here is meetings convened under section 98 of the Insolvency Act. Both The Insolvency Service and the revised Statement of Insolvency Practice 9 (SIP9) say that it is fine for prospective liquidators to issue fees estimates in contemplation of their appointment.

This is not what the legislation calls for, however. In practice, what we have seen so far is an element of the profession being cautious, obtaining their appointment and then sending out their fees estimate subsequent to the meeting of creditors. There are others who are prepared to rely on the pronouncements of the service and SIP9, and send the estimates out with the notice to creditors.

Certainly, the former method allows the office-holder to contemplate the asset position. Often, as office-holders, we do not fully understand the estate we are dealing with on first instruction, despite our best efforts. By the time the creditors' meeting comes to pass, we have a better hope of being able to construct a fees estimate that may cover alleged antecedent transactions raised by creditors.

> The profession has always been able to adapt to reasonable legislative changes, and that should come as no surprise as it is rated globally in the top ten of all insolvency regimes.

The disadvantage here is primarily that by the time the creditors receive the second batch of correspondence from the IP, they are no longer engaged sufficiently to respond. In addition, while the purpose of the Rules was to try and ensure that IP costs were transparent, this extra layer of burden post meeting is a cost to creditors if the office-holder is seeking to recover it through the fees estimate, and that is not a positive message.

The latter method gets the information in the hands of creditors when they are at their most engaged. Often, however, at this stage there is a rush to get the notices out the door and anything that could delay that process, such as the construction of a fees estimate, is not welcome. In addition, the IP runs the risk that a court may determine that their fee resolution is invalid. It seems to me that the risk of this is small, but if the matter is contested, only the court will decide it.

Furthermore, this latter method could encourage 'sticker shock' in creditors who are uncertain as to why the winding up of a failed company should cost so much. It cannot be a positive experience for them to find out that they have lost a significant amount of money and immediately discover that the assets of the company will be depleted by the office-holder's costs to

try and sort out the problem. Better that than find out two years hence, though.

There is also the issue of successor appointments under the new Rules. These are not covered in detail and I suspect most IPs will presume that they should deal with them in a similar fashion to appointments under section 137 of the Insolvency Act, in that the new Rules will need to be applied on such appointments but it would be good to have a steer here.

What's happening in practice

I am pleased to see more IPs using fixed fees or percentage basis in some instances. It does decrease the overall time the IP spends dealing with the case, as the increased reporting requirements of reporting actual to estimate fall away. I am also pleased to see that some IPs are using a variety of methods to mix and match the manner in which they take their fees, depending as to what they are doing in the estate at hand.

Of course, if Lord Jackson's vision of how he sees the legal profession operating in the future comes to pass for insolvency, fixed fees may become the norm. However, the difference in detail that I have seen in fees estimates so far has been surprising. There are some IPs who have embraced the Rules, and the Dear IP and SIP, and mapped out the future as best as they can in the estate using the fees estimate. There are others who have described more generically what has to be done in any insolvent estate and put a number to it. I fear for these practitioners.

It seems that most IPs whose reports I have read have systemised the process of fees estimates already and that is a good thing, so long as the procedure is only the start of the fees estimate rather than the end. SIP9 talks about narrative explanations provided to support any numerical information and that such information should be provided in such a way that 'facilitates clarity of understanding'. An unchanged generic procedure is not going to comply, in my opinion.

> Often, as office-holders, we do not fully understand the estate we are dealing with on first instruction, despite our best efforts.

Not to be ignored is paragraph 9(c) of SIP9. It says that a key issue of concern to those who have a financial interest in the level of payments from the insolvency estate will commonly be whether it is anticipated that the work will provide a financial benefit to creditors, and if so what anticipated benefit, or if the work provides no direct financial benefit, but is required by statute. If you do not describe the benefit of your work to creditors, or your reasons for having to do it anyway, you may find yourself having to justify to your regulator why, in that particular estate, creditors did not care. This is an uphill battle if ever there is one.

The future

It is 'watch this space'. The profession has always been able to adapt to reasonable legislative changes, and that should come as no surprise as it is rated globally in the top ten of all insolvency regimes. I suspect there will be some issues regarding the revision of the fees estimates in the first year, but that should be no revelation as long as such revisions are reasonable. We may find that office-holders take more advantage of providing the fees estimate to a particular time, say the first year. If we do, we must try and be as transparent as possible with creditors as to why we cannot estimate further.

JOHN CULLEN is a partner and insolvency practitioner at Menzies LLP.

It's the extras that make the difference

Property Valuation Service	√	Bonds Online system	√
Benchmarking Service	√	Regional office presence	√
Health & Safety Service	√	Dedicated Relationship managers	√
Fire Risk Assessment Service	√	In house Claims settlement	√
Property Portfolio facilities	√	Site visits	√

irs

For more details of IRS services please contact your local Client Service Executive/Manager or visit our website at **www.insolvencyrs.com**

Insolvency Risk Services is a trading name of AUA Insolvency Risk Services Limited which is authorised and regulated by the Financial Conduct Authority under reference number 471561. Registered in England no 06273355. Registered office: The Leadenhall Building, 122 Leadenhall Street, London, EC3V 4AG.

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

2 Career progress – Two 2015 JIEB qualifiers share their experiences and offer current and future students their top study tips

3 Results of the JIEB examinations – November 2015

RECOVERY SUPPLEMENT

R3, the Association of Business Recovery Professionals
Spring 2016 www.r3.org.uk/recovery

Sponsored by

Insolvency Practitioners Association

Career progress

Two 2015 JIEB qualifiers share their experiences and offer current and future students their top study tips.

Rachel Lai

Since attaining her JIEB qualification last year, Rachel, a senior manager at Menzies LLP, has set her sights on excelling at her work and becoming respected in her field. She won both the ACCA prize (awarded to the ACCA member with the highest marks) and the PwC prize for second place overall.

What work are you doing at the moment?
The main focus of my work is on investigation and litigation issues within a portfolio of cases, and I work with solicitors, barristers and other experts to achieve value for creditors. There are no quick wins, and I have been working on many of my cases for years, but it makes all the effort worthwhile when we make a significant recovery. I also look after the technical aspects of the department together with a couple of colleagues, ensuring that our procedures are up to date and compliant and dealing with day-to-day queries from the team.

How significant were the JIEB exams in building your career?
My job itself hasn't changed since I qualified this year, but I am now in a position to draw on the experiences of a much wider range of colleagues. Additionally, studying for the exams helped to fill some of the gaps in my experience, and being able to say that I am an insolvency practitioner gives me a degree of credibility among those who know what it means.

How did you revise for the exams?
The face-to-face courses I attended were great in that the tutors highlighted the most important areas to study and also explained the techniques you need to adopt to pass the exams. I studied as much as I could in between work and other commitments.

What advice do you have for future students?
Accept that, unless you are an amazingly fast writer, you are not going to be able to answer every question as you would like to answer it. You don't need 100 per cent to pass and you need to focus on gaining marks rather than providing a wonderful answer that could be framed.

How did you celebrate winning the PwC and ACCA awards?
I'd taken the day off work as I knew I wouldn't be able to concentrate, so I was out having lunch with my husband. I didn't even realise I'd won any awards until I had a couple of messages from my colleagues congratulating me. I attended the awards ceremony in June, which was a great event, and I headed out for drinks afterwards.

Samantha Steele

Since passing the JIEB exams last year, Samantha has been promoted to senior manager at Quantuma LLP and looks forward to eventually obtaining her licence and taking appointments.

What work you are doing at the moment and how is it supported by your qualification?
I manage a portfolio of cases, both personal and corporate, and including some large and very complex matters. Studying for the exams gave me a much greater insight into various issues and has boosted my confidence in dealing with anything (however unusual) that may crop up in any particular case. Following qualification I was promoted to senior manager at Quantuma LLP, which has continued to encourage and support me in my professional development.

How did you juggle studying and other commitments?
I'd thought about taking the exams earlier in my career but wanted to get more experience under my belt, and then I had a couple of children so decided to wait a short while. Having two young children, I relied heavily on the support of my husband and my mum, who, along with the kids, were incredibly supportive and encouraging throughout. I had to be very organised, so I started studying early in the year and made up quizzes that my friends and family could test me on to make sure I had key facts at my finger tips and that everyone was involved. As gruelling as it can appear to be, you have to make time for the things that make you happy. I had at least one weekend day off every week to focus on having fun with the family.

What one piece of advice would you offer current and future students?
Studying isn't one size fits all and it's better to use your time as efficiently as possible. Take some time to work out how you study most effectively and what works for you. Don't leave it until the last minute, and make the most of the past papers to get a feel for how the exam works and how to make the most of the time you'll have in the examination room.

What other professional objectives are you working towards?
I'm continuing to develop a wealth of experience and look forward to getting my licence and taking appointments in due course.

Joint Insolvency Examination – November 2015

Congratulations to all the successful candidates.

JIEB 2015 prize winners

Insolvency Practitioners Association Prize for First Place
Richard Hough

PricewaterhouseCoopers Prize for Second Place
Yasmin Bhikha

Leonard Curtis Prize for Third Place
Andrew Goodson

Association of Chartered Certified Accountants' Prize (awarded to the ACCA member with the highest mark)
Richard Hough

ICAEW Prize (awarded to the ICAEW member with the highest mark)
Yasmin Bhikha

BPP Prize (awarded to the candidate with the highest mark in the Personal paper)
Richard Hough

R3 Smaller Practices Group Prize (awarded to the candidate with the highest mark from a smaller practice)
Rachel Foster

A
Ackers D (8136) Leeds
Aspin K (8110) Stockport

B
Bhikha Y (8181) Leicester
Brierley N (8125) Bury
Busby S (8140) Leeds

C
Camp A (8008) Glasgow
Carruthers P (8063) Haywards Heath
Carter M (8093) Sutton Coldfield
Colley J (8049) Surrey
Cowie R.J (8046) London
Currid P (8903) Belfast

D
Davison C (8103) Rochdale
Deere A (8099) Birmingham
Dymant B (8084) London

E
Ellis D (8055) Basildon
Ellis E (8159) Petersfield
Everist J (8105) Stoke-On-Trent

F
Fisher G (8045) High Wycombe
Foster R (8018) Belfast

G
Goodson A (8050) Colchester

H
Hirst C (8141) Liversedge
Hough R (8112) Stockport
Hunt G (8122) Rochdale
Hutton R (8030) Harpenden

J
Jenkin D (8066) London

L
Lippmann L (8171) Cambridge
Lorimer Y (8005) Glasgow

M
Maak A (8010) Larbert
McCarthy R (8902) Sutton Coldfield
McIlroy R (8074) London
Morris A (8060) Hertford

N
Nower P (8067) Haywards Heath

P
Parsk N (8085) Tadworth
Partridge I (8079) London
Patel U (8083) Watford

R
Ridgley C (8090) Rugby
Rodriguez S (8072) London

S
Seaman H (8080) London
Segen N (8069) London
Stewart J (8002) Cupar
Straw T (8042) London

V
Vuceljic M (8043) Bracknell

W
Wells C.J.M (8185) London

Analysis of November 2015 results

Papers sat	Papers passed				
	3	2	1	0	Total
3	20	20	17	10	67
2	–	13	19	19	51
1	–	–	35	30	65
Grand total	20	33	71	59	183

Specialist insolvency qualifications (JIE/CPI/CPPI/CPCI)

The principal recognised professional qualification for people wishing to specialise in insolvency and act as a licence holder is the Joint Insolvency Examination (JIE). A pass in its three papers is a prerequisite to becoming a licensed insolvency practitioner.

Joint Insolvency Examination (JIE)

To sit the JIE, you need to be a member of the Insolvency Practitioners Association (IPA) or registered with another Recognised Professional Body (RPB) or the Secretary of State for Business, Innovation & Skills. The examination consists of three papers:

- Paper 1 – Liquidations
- Paper 2 – Administrations, Company Voluntary Arrangements and Receiverships
- Paper 3 – Personal Insolvency

Each paper is 3.5 hours in length (including reading time) and is set at degree level. It consists of a mixture of written and numerical questions on practical insolvency issues. The examination is on an open-book basis, and is held in November each year. The deadline for applications will normally be the middle of September.

Certificate of Proficiency in Insolvency (CPI)
Certificate of Proficiency in Personal Insolvency (CPPI)
Certificate of Proficiency in Corporate Insolvency (CPCI)

The IPA offers established intermediate examinations, the CPI, CPPI and a new CPCI, for those specialising in insolvency. They are ideal preparation for the JIE, with their combination of multiple-choice and short form exam questions, as well as longer essay-style and computational questions, and are used by many as a stepping-stone to the higher qualification. The examinations are a test of competence in insolvency, and the CPI is widely recognised by employers as an established mark of achievement. It covers both personal and corporate insolvency.

The CPI can lead to membership of the IPA and to entitlement to use its designatory letters MIPA. CPPI and CPCI cover personal- and corporate-only insolvency issues respectively but are set at the same standard. They are ideal for those specialising in the personal or corporate insolvency sectors.

The CPI, CPPI and CPCI are designed for individuals working in or who have an interest in insolvency, who may or may not intend to become licensed insolvency practitioners. The examinations are held in June and December (CPCI in June only) each year with results issued in the following month. These papers each take 3 hours. They are run exclusively by the IPA.

Contact the IPA

JIE tuition and courses are supplied by various providers, details of which can be found on the IPA website. Entry forms for the JIE, CPI, CPPI and CPCI can be downloaded from the IPA website http://www.insolvency-practitioners.org.uk/. The IPA values its students, as the next generation of insolvency experts. It is the only examiner and regulator specialising in insolvency. That is one reason why more students sit their JIE through the IPA than through any of the other RPBs.

The moral maze

Duncan Wiggetts explodes the myths behind professional conduct and complaints.

The advert for the role of ICAEW director of professional conduct asked for applications from specialist investigation lawyers with some exposure to accountancy. I thought I was a pretty good fit. After all, are there any other lawyers out there who understand accountants so well they make films about them? (I'll explain later.) Aside from over eight years working in PwC's Office of General Counsel, defending high-value litigation claims in EMEA and then working as senior counsel to the European assurance practice, I have worked closely during my time in legal private practice with forensic accountants on major litigation cases and with insolvency practitioners. Indeed, at one point in 1999, I found myself at the centre of a challenge to an IVA proposed by Mark Goldberg, the then chairman of Crystal Palace FC, which ended with a bankruptcy order being made.

> We believe there are sufficient safeguards built into our processes to defend against any criticism that complaints are not thoroughly investigated.

Reshaping professional conduct

The two years since I took charge of the ICAEW professional conduct department (PCD) have flown by due to the work involved in re-shaping the PCD and in completing a number of high-profile investigations, including several insolvency matters. It was an insolvency complaint that led to the highest fine ever imposed by our investigation committee in the *Wind Hellas* case. This case was also significant because we brought a complaint against the firm as a result of the failure of its policies and processes around the acceptance of the insolvency appointment as well as a complaint against the IP. Indeed, as in that case, we will look in the future, not just at the actions of the IP in determining whether he or she can take the appointment but also at whether firms' policies and processes were properly designed and operated. Have your firm's processes been configured to identify audit relationships during the last three years with the company intended to be the subject of an administration order? Do they identify all significant professional relationships as defined in the insolvency code of ethics? Have the independent partners appointed to approve high-risk engagements had no connection to the intended engagement and have they discharged their responsibilities? From what I have seen in other cases, the *Wind Hellas* case may not be the only example of a failure of processes and policies to identify impediments peculiar under the insolvency code of ethics. Compliance departments beware!

> The *Wind Hellas* case may not be the only example of a failure of processes and policies to identify impediments peculiar under the insolvency code of ethics. Compliance departments beware!

Dealing with insolvency practitioners

Insolvency is also an area that produces some of the most complex and intellectually challenging issues for PCD » case managers and tribunals. We have just this month presented a complaint to a tribunal which had to determine whether an IP could be found guilty of bringing the profession into disrepute even when his action had been completely in compliance with the law. It is a welcome reminder to IPs that the insolvency code of ethics imposes wider duties and obligations on IPs, which they must bear in mind when taking decisions to exercise their legal powers. Another interesting live issue is the extent of liability/culpability of a joint administrator who takes no active part in the administration work but where misconduct complaints are brought against the active administrators.

In the course of the last 12 months, we have seen the introduction of new provisions in the Insolvency Act through the passing of the Small Business Enterprise and Employment Act (SBEE). ICAEW, like all of the other recognised professional bodies (RPBs), now has a set of regulatory objectives against which our performance will be measured and a series of sanctions that can be levied if we fail to live up to expectations. Given the positive inspection reports we have received in recent years, and the improvements we have made to our processes and team, we are confident we can meet these objectives.

Working with The Insolvency Service

The Secretary of State has also acquired new powers to investigate directly public interest complaints and to apply to court to impose sanctions on IPs it considers guilty of misconduct. It remains to be seen whether, and when, these powers will be used. We hope the powers will be used sparingly as we believe all complaints against ICAEW licensed insolvency practitioners should be investigated by our PCD case managers. An important aspect of my role is to ensure we have a strong relationship with The Insolvency Service. Senior officials at the Service have welcomed some of the changes I have made to the way we handle complaints and the improvements to the quality of our insolvency investigation team, which is now led by Justine Carruthers, a former senior manager at PwC. Justine is supported by experienced insolvency professionals who have joined us from RSM, BDO and David Rubin & Partners.

> “I have been trying to dispel the myth that PCD case managers spend their time trying to dream up as many ways as possible to investigate and fine members.”

We have also briefed the Service on the recent significant changes we have made to the governance of our regulatory function and to operation of our disciplinary processes. A new regulatory board with parity between ICAEW and lay members now governs our regulatory and disciplinary processes. And, since 1 January this year, our investigation committee has also had parity between ICAEW and lay members and our disciplinary tribunals and appeal panels have operated with lay majorities. These historic changes bring us completely in line with the constitution of decision-making bodies within our other oversight regulators.

Challenging a decision

We also believe there are sufficient safeguards built into our processes to defend against any criticism that complaints are not thoroughly investigated. Complainants can challenge decisions made by PCD case managers where there is either no matter to investigate or, following an investigation, a conclusion that there is insufficient evidence to take a complaint to the investigation committee. In both cases, complainants can force the case manager's decision to be reviewed by the investigation committee. In addition, complainants can ask for complaints rejected by our investigation committee to be reviewed by an independent reviewer of complaints, approved by The Insolvency Service. I have also had the opportunity to observe our investigation committee and disciplinary tribunals in action on a number of occasions and have been impressed with the quality of their analysis and insight. I have noted our ICAEW member volunteers are just as willing to find a *prima facie* case against a fellow member as our lay members. Indeed, it is often the ICAEW members who argue for a more severe sanction as a result of their disappointment at anyone whose conduct has damaged the reputation of the profession.

> “Contrary to rumours, there is no bell outside my room that case managers ring when we land a sizeable fine on a member or member firm.”

False Assurance will be the first drama film from the ICAEW

I have also been impressed by the robust way in which members of our insolvency licensing committee, both ICAEW and lay members, deal with IPs who are found to be failing in the standards of work revealed by a quality inspection. While every effort is made to understand the context around the failings and to listen to remedial steps that the IP has either already taken or promised to take, the committee does not shrink from using its powers to impose onerous conditions or even to withdraw a licence if it considers that it is necessary to do so to uphold the reputation of the profession and to protect the public.

Working with the regulators

SBEE brought in a reserve power to introduce a single regulator, albeit with a sunset clause. We do not believe that such a development will be necessary when all RPBs are working hard to ensure consistency in our approach. We are working closely with the Service and other RPBs on a project to create greater consistency in the application of the common sanctions guidance and to refine the guidance so that sanctions match more precisely the nature of complaints. The

RPBs have also agreed to use a common pool of reviewers of complaints and we are working together on a couple of complaints with other RPBs where the IPs who are the subject of a complaint are licensed by more than one body.

Having become very familiar with audit methodology and terminology while working at PwC, I have been on a steep learning curve to understand how IPs operate and the context within which they need to take decisions on whether they can take on engagements or appointments. I also understand the complexities of pre-pack administrations now so much better after advising fellow director, Bob Pinder, on legal issues associated with the creation of the pre-pack pool as well as drafting the contractual framework. I have also become very familiar with certain key paragraphs in the insolvency code of ethics and even quoted one paragraph from memory the other day, which, I know, is quite sad. But however familiar I have become with the work of IPs, I cannot yet claim to have any understanding of how an estimated outcome statement works no matter how many times it is explained to me!

> “SBEE brought in a reserve power to introduce a single regulator, albeit with a sunset clause. We do not believe that such a development will be necessary when all RPBs are working hard to ensure consistency in our approach.”

Returning to my wider remit with the PCD, I have had a particular ambition to change the external image of the department in the eyes of our members. I have been trying to dispel the myth that PCD case managers spend their time trying to dream up as many ways as possible to investigate and fine members. Contrary to rumours, there is no bell outside my room that case managers ring when we land a sizeable fine on a member or member firm. Bonuses are not paid based on fine revenue. In fact, most of the time spent by my case managers is on the investigation of complaints that are ultimately closed rather than laid before the investigation committee. This is due either to an assessment that the member's conduct has not brought the profession into disrepute or because of a lack of evidence. Over 90 per cent of all complaints received by the PCD are closed without going to a committee and we have over 1,000 complaints open at any one time. Given the complexity of many insolvency complaints, this amounts to a lot of work being completed by case managers that members never see.

Of course, we need to ensure that our judgments are in line with those expected by investigation committee members who carry out delegated powers' inspections and by our oversight regulators, both of whom visit us once a year to review sample cases. I am pleased to say that we have a pretty good recent track record on this.

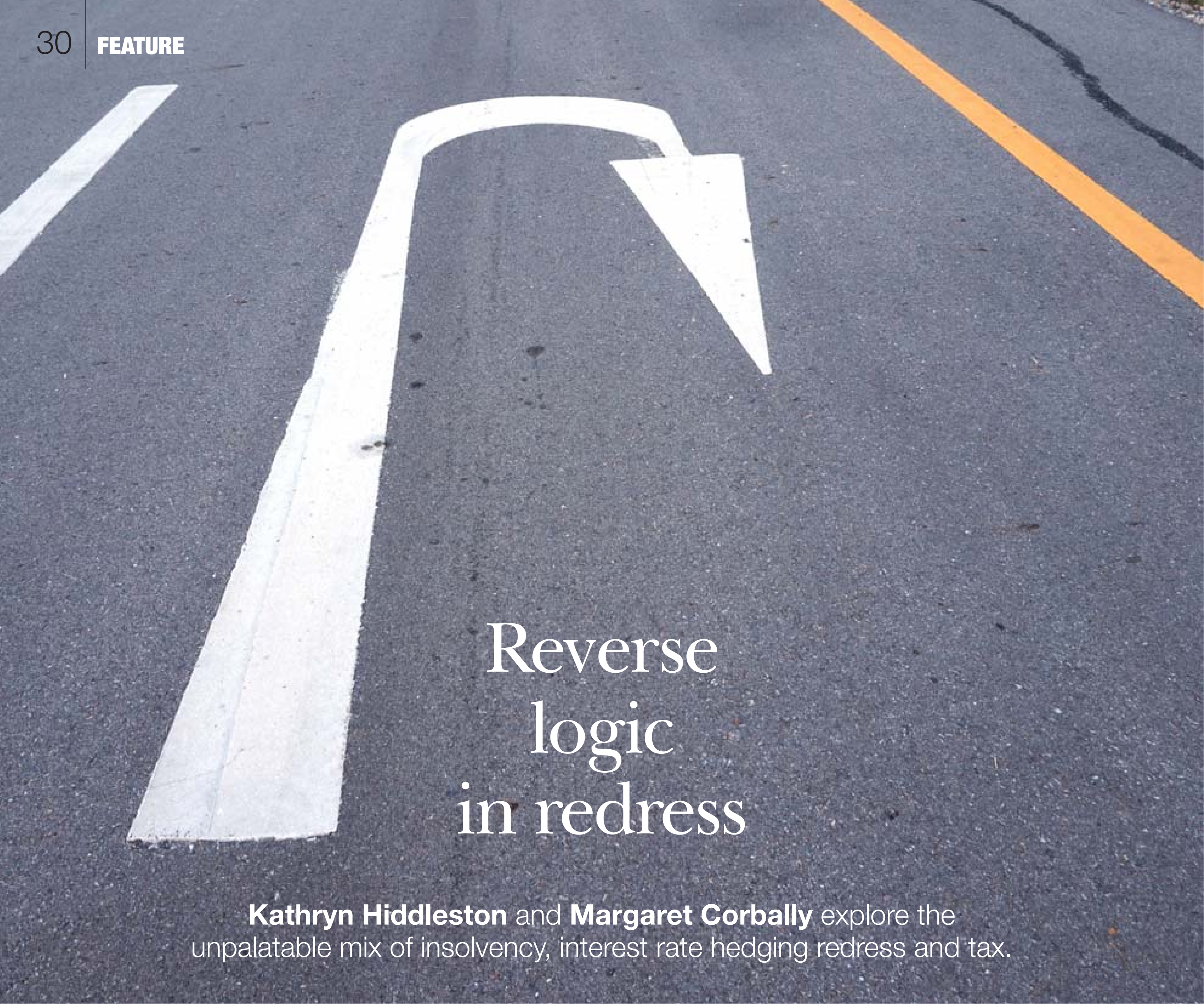
A film is worth a thousand words

I did mention at the start my unusual passion for making films about accountants. And this passion is linked to another more ambitious project to change the PCD's image with the creation and launch of *False Assurance*, ICAEW's first ever drama film, to try to discourage members from taking the easy way out of difficult dilemmas. *False Assurance* is a 38-minute film featuring well-known UK film and TV actors, which shows two turbulent years in the history of a fictitious company and the commercial and ethical dilemmas faced both by the company's directors and its auditors. This is the fifth film I have written since 2005 when, as a partner in PwC's European assurance risk management team, I came up with a mad idea to make a drama film to highlight the consequences for an auditor of signing a clean audit opinion where key assurances had not been provided by management. After a second film at PwC, I made two more films back in legal private practice, focusing more on the conduct of directors. My fourth film, *A Price Worth Paying*, was featured in an article on the front page of the *Wall Street Journal* in July 2013. The success of these previous films led to ICAEW's management team agreeing to sponsor the creation of a fifth film, which could be offered as an innovative training tool both to members in private practice and in business. And it seems to have caught the imagination. Since the official launch at the end of October, we have been inundated with requests from firms for licences to use the film in their training programmes. While *False Assurance* does not feature IPs acting badly, I know that some of our licensees are considering the use of the film across all business lines given the universal application of the ethical dilemmas – so IPs may still get to see it. We also intend to develop training programmes for board directors and senior management teams for launch this year.

> “I have also been impressed by the robust way in which members of our insolvency licensing committee, both ICAEW and lay members, deal with IPs who are found to be failing in the standards of work revealed by a quality inspection.”

You can view the trailer at **icaew.com/falseassurance**. I understand that the film will be reviewed in the next issue of *RECOVERY* so watch this space…

DUNCAN WIGGETTS is the ICAEW's director of professional conduct.



Reverse logic in redress

Kathryn Hiddleston and **Margaret Corbally** explore the unpalatable mix of insolvency, interest rate hedging redress and tax.

The mis-selling of interest rate hedging products (IRHP) is old news, it has been in the press for ages and yet the issue still rumbles on. In the winter edition of *RECOVERY*, Mark Beaumont suggested that insolvency practitioners (IPs) may wish to look to make claims to bring value to an estate. However, while receiving redress for a mis-sold product can be a welcome bonus, it brings with it tax implications and obligations. In this article we will outline the key tax issues that arise and what R3 has been doing to lobby HMRC on behalf of its members. HMRC's current stance means that, bizarrely, agreeing a redress settlement could be detrimental to both an IP and the insolvent estate.

> "Redress is taxed when it is paid, and it currently appears that HMRC's interpretation of 'paid' includes the passing of consideration."

History

Back in 2012 the Financial Conduct Authority (or the Financial Services Authority as it was then), declared that it had found poor practices in the sale of IRHPs to customers. As a result, an agreement was entered into with nine of the major banks whereby they would review their client book and offer redress to those unsophisticated clients who were sold such a product. It is beyond the scope of this article to consider the knotty problem of how customers were to be deemed to be sophisticated or unsophisticated but, suffice to say, at the time of writing it is understood that certain challenges are being made by some of those deemed to be sophisticated and therefore ineligible for the current review scheme.

For an unsophisticated client, there are various components to the calculation of redress:

- the basic redress, to reimburse customers for the difference between the payments made under the original policy and those payments that they might have made with a suitable replacement policy (if there were such a product)

> "In some cases, receiving redress could put the creditors in a worse position."

- a set eight per cent compensatory payment to provide redress for lost interest as well as other basic costs of the customer and
- the more complicated consequential loss ad hoc claims that customers can make. These include claims for loss of profits, costs incurred in agreeing the claim and tax redress to cover the difference between the tax the customer will have

to pay on the basic redress and the tax relief that had been enjoyed by the customer on interest payments previously made.

This article is confined to consideration of the tax treatment of the first category of basic redress.

What are the key issues in receiving redress in an insolvency?

There are two major areas to consider, firstly the status of any tax due on basic redress, is it a pre-appointment unsecured debt, or a post-appointment expense? Secondly, whether redress is still taxable even if no monies are received, for example where the bank has applied offset against its debt.

In July 2014 HMRC issued guidance to taxpayers stating that the redress would be taxable in the accounting period in which it was received, although it does admit that there may be circumstances in which the tax treatment may be different. We believe that insolvency is one of those circumstances and, as a result, R3 has been liaising with HMRC in relation to the tax position of the redress and the interaction of tax and insolvency law.

> "While receiving redress for a mis-sold product can be a welcome bonus, it brings with it tax implications and obligations."

Tax generally follows accounting principles and under UK GAAP there may be circumstances in an insolvency where, were a set of accounts to be prepared for periods prior to the insolvency, the IRHP redress would have been recognised in those accounts. In these circumstances, the tax point would be pre-insolvency and therefore any tax arising on the basic redress should be an unsecured claim. However, the important point is not only whether or not, in preparing contemporaneous accounts, a redress figure would or could have been calculated and provided for in the accounts, but rather whether the redress is either an actual or contingent asset at the date of insolvency. If so, any tax on the basic redress must be a pre-appointment provable debt.

R3 considers that if the redress is an actual asset then both it and any associated tax liability should have appeared in pre-insolvency accounts had the issue been spotted. If the redress is a contingency, then, in accordance with the principles set out by the Supreme Court in the *Nortel* case, the associated tax liability was a contingent liability and a provable debt (applying Rules 12.3 and 13.12 of the Insolvency Rules 1986). In either case, the tax would not be an expense of the insolvency.

> "Will cases have to be held open until this matter has been settled with HMRC?"

The taxman

Currently HMRC has indicated that it does not agree with the above analysis and believes that the redress is post-insolvency income and therefore subject to tax in the period in which it is received. HMRC has taken a while to provide a response and R3 is in the process of seeking formal clarification as to why HMRC is taking that stance so that a detailed R3 response can be compiled.

The second issue, set-off, could have an even greater impact for insolvencies. FCA guidance refers to the ability of banks to offset, but this reference is not made in an insolvency context. Current information suggests that the majority of banks are generally not applying insolvency set-off however, some banks are applying set-off in liquidation; the position with regard to administrations is not clear.

Where set-off is applied, any redress is first set against the bank's debt before the surplus (if any) is paid to the customer. However, it appears to be HMRC's current view that a tax charge arises on the full redress regardless of whether any cash is received, ie tax charges will still arise where a redress offer is made and has been accepted by the IP, despite the fact that the bank applies offset. This is consistent with its general views that redress is taxed when it is paid, and it currently appears that HMRC's interpretation of 'paid' includes the passing of consideration.

It is important to highlight that if HMRC's interpretation were to prevail, in accordance with Rule 4.218, an IP would need to pay the tax charge calculated on the redress as an expense ranking before their own fees and/or to the detriment of all unsecured creditors.

R3 has raised the issue of set-off with HMRC and in its initial informal response, reference was made to the infamous case of *Re Toshoku Finance UK PLC (Re Toshoku)*. In this case a liquidator was required to pay tax on interest income accrued post liquidation, even though the interest was never received. However, in that case HMRC recognised the unfairness of the decision and subsequently changed the tax rules to remedy this unfairness. Given its position in relation to the decision in *Re Toshoku*, for HMRC to now quote the case as an argument in its favour is surprising. Again, R3 is awaiting further clarification on this matter from HMRC but, in the meantime IPs have the dilemmas of:

- Should a redress offer be accepted or rejected where the lender will apply offset?
- Should the cost of calculating consequential loss claims for possible tax mismatch be borne now in case the claim is taxable post appointment? If not, should steps be taken to ensure that the lender does not close its file?
- Will it be necessary to keep all cases with a mis-selling claim open until this matter has been settled with HMRC?

> "HMRC's current stance means that, bizarrely, agreeing a redress settlement could be detrimental to both an IP and the insolvent estate."

Conclusion

The whole purpose of IRHP redress was to compensate customers for any loss suffered and put them back in the position they would have been in had the right product been taken out. As highlighted in this article, the tax position means that this may not be the case for those in an insolvency process and in some cases, receiving redress could put the creditors in a worse position; a case of reverse logic if ever there was one. Discussions with HMRC on how to remedy this are on-going, and the scenarios set out above are correct at the time of writing, but they may be subject to change, so watch out for further updates.

KATHRYN HIDDLESTON
is a partner at Grant Thornton UK LLP and chair of R3's tax committee.

MARGARET CORBALLY
is a restructuring tax manager at Grant Thornton UK LLP.

Diving in at the deep end

Duncan Grubb offers an in-depth look at the pre-pack pool.

Corporate insolvencies generate a range of emotions depending on whether one is directly affected or not; whether it be fear and uncertainty from the staff who are wondering if they will be retained or how they will cope if they are not (and I speak from experience here), or frustration from customers who want to know if their paid-for goods will materialise, to anger from creditors' credit controllers, who have to face telling their bosses that a bit more of the booked income will have to go into bad debts (I speak from experience here as well!). However, apart from the aforementioned and now bonus-free credit controllers, most of us will probably view any insolvency with a degree of sympathy for those affected, even if the company concerned has brought it all upon themselves.

Pre-pack administrations involving connected parties are a different animal, however, and are often viewed as a cynical attempt to subvert the administration process, allowing bad businessmen to hold on to the fruits of their labours while, at the same time, forcing the creditors to pay for their mistakes. This may only be the case in a minority of situations, but the ability to manipulate the system in this way certainly exists. As a former head of credit for a retail landlord, I can think of more than one example where a national chain has placed a subsidiary into administration (having stripped out the assets by way of management charges) only for the holding company to buy the profitable parts of that business back by way of a pre-pack. This allowed the business to leave behind unwanted assets – including underperforming shop leases – for a liquidator to disclaim further down the road. Strategic insolvencies are therefore not an insignificant issue, particularly for landlords who often feature highly on creditor lists.

> "It should be remembered that the government has already reserved the right to ban connected party pre-packs outright within the term of this parliament if the voluntary regime proves ineffectual."

The Graham Report

Increasing noise in the creditor community surrounding such connected party pre-packs resulted in Vince Cable, the then Business Secretary, asking Teresa Graham CBE, a senior civil servant and director of the British Business Bank, to:

a) conduct an investigation into the effectiveness of connected party pre-packs and their perception in the marketplace;
b) produce a report for widespread circulation; and
c) include recommendations for increasing creditor confidence in this type of corporate rescue.

In the run up to her report Teresa consulted with a number of institutions and creditor groups including the British Property Federation, which has its own insolvency committee made up of landlord representatives, lawyers and insolvency practitioners, and which I had the privilege of chairing at the time – hence my involvement in the outcome.

The report (published in June 2014) was balanced, and found that although pre-packs were a valuable recovery tool – particularly in niche businesses where there are only a limited number of players – there was a clear disparity between the survival rate of a newco operated by a connected party following a pre-pack, and that of a newco with no connection to the failed company. The former often did not last a full year, whereas the latter generally fared much better. The report also considered that more needed to be done to bolster confidence in the pre-pack process as a whole, which had certainly got a bit of a bad name in the eyes of creditors.

The report also made two key recommendations; firstly, that a viability study should be carried out on the business model being proposed by the owners of the newco where there is a connection to the oldco (and this can be either an individual or corporate connection) and, secondly, that there should be a pool of unconnected, impartial and experienced business people to scrutinise and consider the appropriateness of the pre-pack on the table – ideally giving a declaration that it contains nothing untoward or adversely prejudicial to creditors. In layman's terms I suppose this could be referred to as a 'this is not a stitch up' certificate! An application for scrutiny by the pool will be made voluntarily by the connected party proposing the pre-pack (not the administrator, and I'll come back to that later), who will pay a fee for the service, and the pool member will then examine the proposal in some detail and within 24 hours give one of three prescribed opinions:

- not unreasonable to proceed
- not unreasonable to proceed but with minor limitations in evidence (with a list of omissions attached)
- case not made.

The pool member will be paid a fixed fee for his time funded by the application fee.

> Most of us will probably view any insolvency with a degree of sympathy for those affected, even if the company concerned has brought it all upon themselves.

The pool member's opinion will then be included in the recently redrafted SIP16 report, with the aim of giving creditors additional confidence that the proposals are a genuine attempt to rescue a distressed business, and not a strategic manipulation of the process.

The pre-pack pool was therefore born – or rather the idea was - putting it all together took a little bit longer.

Pool structure

A steering committee was quickly assembled composed of senior figures from the institutions involved in the initial consultations, including the CICM, R3, ICAEW, IPA, ACCA, BPF, ICAS, CARB, BPIF, IOD and Teresa herself. The first issue was a legal basis for the pool, as there had to be an administrator and a beneficial owner of the pool bank account. This is where I volunteered to take on the role of administrator, as none of the above organisations felt they were in a position to provide sufficient full-time resources, and I was shortly to take early retirement from my existing day job and work as a consultant, so it all fell into place.

We decided to form a limited company (cleverly named Pre Pack Pool Ltd), with three directors: me, my colleague from the steering committee and CICM vice president Stuart Hopewell, and Teresa Graham herself. Teresa was only to remain in position until the launch date in order to avoid any accusations of conflict of interest.

Pool members

The recruitment process for pool members commenced in spring 2015, and applicants were required to submit a full CV and a covering statement outlining the skills they felt they could bring to the pool. Following ads in various trade publications we were soon oversubscribed. A register of 20 members was regarded as an optimum number, and at present this looks to be about right. The applications were analysed by the steering group, not only for commitment and suitability, but also to provide as broad a background of experience as possible. Applications from retired IPs were accepted, but practising ones were excluded to avoid possible accusations of conflict and tribalism.

Pool website

The next step was to provide an online portal through which all this could happen. Mole Productions were brought in to construct the website, having been recommended by a member of the steering group. This part of the process probably took the longest, as notwithstanding the computer geek side of the set up, we needed to agree on the specific information required by people applying to the pool for an opinion, turnaround time limits and practicalities (48 hours was agreed due to the time-critical nature of pre-packs, and this has worked well so far), an extensive Q&A section, and finally guidance notes not only for the applicants, but for the pool members as well. Test pre-pack scenarios were circulated to the pool members to help familiarise them with the application format and the information they were likely to receive, and also to highlight any inconsistencies in the opinions.

Pool launch

Given that this entire project is by its very nature reactive, in that it relies not only on the willingness of potential buyers of distressed businesses to engage with the pool, but also on the wider economic climate, it was anybody's guess how popular the pool would be, and how much media attention it would receive following the 2 November 2015 launch. Notwithstanding an endorsement by Minister for Small Business, Industry and Enterprise, Anna Soubry, it's fair to say that press coverage was unspectacular – with more than one publication mistakenly claiming that the pool is there to scrutinise the actions of the IP. Most, however, were generally supportive if a little sceptical about what is, after all, a voluntary procedure.

I'd like to respond formally on both these points: firstly to answer the question 'if all this is voluntary, why should anyone bother?' Well, apart from providing comfort to oldco creditors (who might otherwise restrict supply to the newco), it should be remembered that the government has already reserved the right to ban connected party pre-packs outright within the term of this parliament if the voluntary regime proves ineffectual. That would remove a valuable recovery tool from everyone – not just the rogues – so it's up to everybody to make this scheme work. Secondly, the pool does not exist to scrutinise or comment on the professional decisions made by IPs, whose role remains to get the best deal possible for the creditors of the oldco. The pool is there to examine the appropriateness of the proposal made by the prospective buyer of the business, and only after the opinion is given is the IP informed. At no point is his work scrutinised or commented on.

> The pre-pack pool was born – or rather the idea was – putting it all together took a little bit longer.

Furthermore we are hearing that certain banks are building applications to the pre-pack pool into their procedure requirements for lending to connected party newcos, so the project is clearly gaining traction.

Outlook

It's still early days, but so far the pool has examined a number of proposed pre-packs including one national chain, and the pool members have provided their opinions professionally and within the required deadlines. Clearly we don't ultimately want to see more companies fail, but where it is unavoidable and a pre-pack to a connected party is one of the solutions, we would obviously like to see IPs encouraging prospective connected party purchasers to engage with the pool.

Finally, in a House of Lords debate immediately following the pool launch, one of the participants (a retail director) stated that pre-packs were very valuable as they are the only way for companies to get rid of long leases they don't want anymore! Clearly then we still have much to do.

DUNCAN GRUBB is the director of Duncan Grubb Consultants Ltd.

The value of knowledge

Ian Maycock explains why IPs will be at an advantage if they employ qualified valuers.

In most cases, where an insolvency practitioner is engaged, there are assets associated with the business that require valuing. The question then is: does the insolvency practitioner instruct a valuer with the relevant experience who is qualified and competent to provide such advice?

The background

Firstly, would an insolvency practitioner instruct an unqualified solicitor to prepare a sales contract, an unqualified accountant to prepare a statement of affairs or an unqualified surveyor to prepare a valuation of a property? The answer to all is most definitely no!

However, when it comes to requiring a valuation of machinery, chattels and intangible assets, there does not appear to be the same consideration. Many insolvency practitioners choose to use firms to provide valuations and advice, which are not regulated by professional bodies and therefore cannot provide valuation reports and advice that comply with any accepted standards.

With the advent of the Graham Review into pre-pack administration, on the issues concerning valuation, recommendation five states that a valuation should be carried out by a valuer who holds professional indemnity insurance (PII).

> "When it comes to requiring a valuation of machinery, chattels and intangible assets, there does not appear to be the same consideration."

Under SIP16 (V3), effective from 1 November 2015, it states that where a pre-pack administration is concerned and a valuation of the business and assets is prepared, the name and qualifications of any valuer and/or advisor is provided, together with confirmation of their independence and that they carry adequate PII. SIP16 goes on to be quite explicit in what other information is required. If an insolvency practitioner were to use a valuer and/or an advisor who does not meet the criteria, the reasons for doing so should be explained. Furthermore, when goodwill has been valued, an explanation and basis of the value must be given. It is also a requirement to provide a summary of the basis of valuation adopted by the valuer, the rationale for the basis of valuation adopted and, where a sale of the assets is concluded, an explanation of the realisations and how these compared with the valuations or advice previously provided.

If we were to consider the issue of PII, SIP16 states 'adequate PII for the valuation performed' is required. Within the Graham Review it was considered that those who issue PII place their own stringent checks on those who apply for cover. It was felt that creditors of insolvent companies could be reassured that a valuation had been executed by someone who held such cover and that this would therefore represent a fair value for the business and its assets.

The importance of PII

PII should allow a person or company that has instructed a professional advisor to make a claim against that advisor in the event of the advice given being found to be negligent. An advisor may hold PII, but is it adequate? Does it actually insure their valuation opinions?

If it is found that the advisor was not qualified to provide such valuation advice, it would be very easy for the insurer to avoid liability. The advisor may hold PII but it would be very difficult to pursue a claim when an insurer refuses to satisfy that claim on the grounds that the insured was not qualified to give the advice for which the cover was provided.

The Graham Review suggests that PII should only be adequate; it does not state that it needs to be relevant to the service provided and potentially places the onus for regulating standards onto insurers.

It could therefore be seen that for PII to be valid and robust enough to withstand a claim, the advice given should be provided by a qualified valuation professional.

> "Regardless of the specialist knowledge of such industry experts or dealers, creditors will always be able to question their independence and potential conflict of interest."

Quite often insolvency practitioners will consult with many different firms offering valuation advice. These firms may be experienced and, in some cases, experts in their field, and may include specialist trade dealers or agents. The advice given by such firms may be equal to that given by a qualified valuer for the assets to which their knowledge extends. However, other assets that need to be considered, and that are outside their sphere of experience, are often overlooked and, at worst, ignored. These may include intellectual property such as websites, domain names, trademarks, patents, copyright, the customer database and a host of other intangible considerations. This may also extend to fluctuating assets such as work in progress, contracts, order book and retentions.

Crucially, regardless of the specialist knowledge of such industry experts or dealers, creditors will always be able to question their independence and potential conflict of interest, for which the insolvency practitioner will have little, if any, defence.

Under SIP16 it is a requirement to ensure that appropriate persons are used when preparing advice in respect of valuations, when considering a pre-pack

administration. Should this be the only time an insolvency practitioner has such concerns? I would suggest not! In any insolvency procedure, the same considerations should apply – in the same way that other professional services, such as legal and accounting, are provided by suitably qualified advisors, then the services of the professionally qualified valuer should also be a prerequisite.

The role of the RICS registered valuer

There are a number of professional bodies that are recognised in the area of valuation, the principal body being the Royal Institution of Chartered Surveyors (RICS). To obtain professional membership of the RICS, a rigorous period of study and practical experience is required prior to examinations, dissertations and peer review. Only then can a member carry the designated qualification MRICS. This is not dissimilar to the rigorous qualification processes undertaken by solicitors, accountants and insolvency practitioners.

Under RICS regulations, in order to provide valuation advice in situations such as insolvency and collateralised lending, a further RICS designation of registered valuer is required. Only a RICS registered valuer is able to provide regulated purpose valuations. Valuations provided against real estate or chattel assets for an insolvency practitioner are deemed to be regulated purpose valuations. This ensures that all valuation advice provided is to the highest possible standard.

A valuation report provided by a registered valuer will be prepared using internationally recognised definitions of value such as market value. Other bases of value commonly referred to, which are not recognised under international standards, have been 'liquidation value', 'going concern value', 'realisable amount', 'estimated realisation price' and many other similar descriptions of value. None of these bases are recognised and they have no foundation that underpins them.

Furthermore, where 50 per cent or more of the directors of a firm of surveyors hold RICS membership, it is a requirement for that firm to be registered with the RICS. This carries with it further regulation, including that the firm, if holding clients' money, holds a designated clients' account. Such accounts and advice provided are regularly audited by the RICS, thus providing clients with an added protection over funds held on their behalf together with the quality, and fundamental impartiality, of their advice. Additionally, clients' accounts are insured, providing further security.

By using a RICS registered valuer, an insolvency practitioner is receiving the same level of impartial professional advice and accountability from their valuers as that provided by their solicitors and accountants, which unqualified advisors are unlikely to be able to provide.

There are requirements for members of the RICS to undertake 20 hours or more of continued professional development per annum. It is therefore likely that your RICS valuer will be up to date with recent developments in the field in which they practice.

> "There are a number of professional bodies that are recognised in the area of valuation."

Due to the extensive study and the continuous experience gained by RICS qualified valuers, the level of added-value service provided is also tangible. Such qualified valuers are very often able to provide advice on issues such as distraint, landlords, third-party assets, intellectual property and goodwill, fixed and floating charges, thus providing insolvency practitioners with a holistic view of the assets and the business being valued.

The use of suitably qualified valuation advice provided by a RICS registered firm cannot be underestimated. Firstly, the requirements under SIP16 are covered in full; secondly, any further advice can be relied upon as impartial; and, thirdly, any funds held on behalf of an insolvency practitioner are fully protected.

IAN MAYCOCK is director and RICS registered valuer at Charterfields Limited.

Claims and consequences

Catherine Shuttleworth explains the future of claims against IPs and the need for expert advice.

It is no surprise that as more businesses faced financial pressures following the economic downturn in 2007, the incidence of insolvency events increased. Recent press coverage has reported that fewer companies went into insolvency in the UK in 2015 than at any time since 1989 and that the number of people going into bankruptcy has dropped sharply by 29 per cent to just under 80,000.

> All claims against IPs give rise to a complex mix of statutory obligations and negligence informed also by the regulatory framework governing the conduct of insolvency.

However, given the long tail for claims to be pursued against professionals, it may be several years before the incidence of claims against insolvency practitioners (IPs) follows the same trend. This factor, coupled with tighter regulation of IPs by the various professional bodies and the fact that IPs (as the office-holder where a company is in administration or liquidation) now have the power to assign a right of action (including the proceeds of an action) arising under section 213 of the Insolvency Act 1986 (fraudulent trading, section 214 (wrongful trading), section 238 (transaction under at an undervalue), section 239 (preferences) and section 244 (extortionate credit transactions) leads us to conclude that the trend we have witnessed for increasing numbers of claims against IP professionals is unlikely to change very soon.

Understanding the law

All claims against IPs give rise to a complex mix of statutory obligations and negligence informed also by the regulatory framework governing the conduct of insolvency. Whatever the category of case, it is necessary to have an understanding of both the statutory obligations prescribed in the Insolvency Act 1986 and the Insolvency Rules 1986 and an understanding of how the common law duties in negligence overlap and supplement the statutory obligations.

Few true specialist claimant lawyers have emerged as yet to pursue these claims and the complex nature of the duties owed quite often means that claims are badly presented and confused. This offers both opportunities and hazards in defending claims. On the one hand a lack of experience can give the adept defence lawyer the upper hand in defending claims but equally a lack of experience can lead to the claimant firm incurring very high costs and having unrealistic expectations, making the claim harder to resolve. One thing is clear: claims against IPs give rise to high legal costs.

We have seen a wide range of claims against IPs and it is fair to say they are varied and offer limited guidance on trends. Examples include: (a) a claim against an administrator who failed to ensure that a property owned by the business was secured in accordance with the warranty in its buildings insurance. Following fire the buildings insurers avoided cover for breach of warranty leading to a loss; (b) claims by creditors of a company for alleged misfeasance in administration in failing to act properly in pursuing claims on behalf of the company and in failing to realise assets at proper value; (c) in a pre-pack administration, a failure to make proper enquiry as to the assets of the business to ensure that the

> It is clear that claims against IPs are here to stay.

price paid for the business was reasonable; (d) a claim against a trustee in bankruptcy by the bankrupt for wrongly admitting some claims and failing to pursue others.

Case study

However, the circumstances of one claim arising from a members' voluntary liquidation (MVL) deserve special note and a word of warning for practitioners who may be inclined, under time or other pressure, to circumvent the procedural framework prescribed in the Insolvency Rules.

The claim concerned the MVL of a UK subsidiary where the liquidators were asked to conduct a 'day one' distribution to its parent company. The liquidators were aware of a piece of litigation being pursued against the parent company relating to the activities of the subsidiary but were assured by the directors that it had a nuisance value. The liquidators were also comforted by the existence of a declaration of solvency from the directors and indemnities provided by the parent. They duly effected the day one distribution of assets, electing not to follow the statutory regime by giving notice of an intention to make the distribution and inviting proofs from creditors.

Regrettably it transpired that the litigation had very sharp teeth and in due course the subsidiary became liable to a judgment for damages of c. £3m for which the company had inadequate reserves.

> "A lack of experience can give the adept defence lawyer the upper hand in defending claims but equally a lack of experience can lead to the claimant firm incurring very high costs and having unrealistic expectations."

The creditor pursued a claim against the company and new liquidators were appointed leading to creditors' voluntary liquidation and a claim against the original liquidators followed. The claim was pursued as a negligent failure to comply with duties to investigate the contingent liability and maintain adequate reserves. The liquidators were unwitting pawns in what appears ultimately to have been a larger scheme to defraud a creditor. They ended up paying a heavy price although thankfully had adequate professional indemnity insurance to meet the liability. However, the claim could so easily have been avoided if the liquidator had followed

the statutory regime. Significantly, if the liquidator had given notice of its intention to make the distribution to creditors and/or invite the litigant to submit a proof of debt, in the event that he failed to do so, the liquidator would have had protection in relation to any claim submitted after the date for proving had passed. Even more significantly, the fact that the liquidators did not follow the statutory regime could potentially have exposed them to a strict liability claim for the loss. The fact that the claim was presented as a claim in negligence fortuitously offered scope for a negotiation.

MVLs and causes for concern

The facts of this case are particularly topical given that MVLs have recently come under close scrutiny by HMRC, which has issued a '*consultation paper addressing the use of MVLs as schemes for tax-avoidance*'. The consultation period closed on 3 February 2016 and it remains to be seen what the outcome will be but the paper cited concerns that existing legislation was proving an incentive to shareholders to carry out transactions in such a way that, in effect, they were converting income into capital for tax reasons and to consider whether an imbalance needed to be redressed. Three areas of concern cited around MVLs were:

- 'Moneyboxing' – by which shareholders of a company retain profits in excess of the company's commercial needs and so receive these profits as capital when the company is eventually in liquidation;
- 'Phoenixism' – whereby a company enters into an MVL and a new company is set up to carry out the same or substantially the same activities but capital is released to the shareholder;
- 'Special purpose companies' – where operations of a business are capable of being split among separate companies, each undertaking a specific project. When that project comes to an end, the company is liquidated and the profits from the project are realised as capital rather than in income form.

> "There is clearly scope for HMRC to scrutinise such company arrangements, with such scrutiny giving rise to claims, including claims against the liquidators."

It is clear that claims against IPs are here to stay. While claims like this one are rare they exemplify how serious the consequences can be if practitioners stray away from the statutory regime. Given the present interest of HMRC in MVLs there is clearly scope for HMRC to scrutinise such company arrangements, with such scrutiny giving rise to claims, including claims against the liquidators.

Where claims do arise it is important to ensure that you get the best advice possible to respond to them.

CATHERINE SHUTTLEWORTH
is a partner at Kennedys Law LLP.

Director Conduct Assessment Service

Gareth Allen explains The Insolvency Service's upcoming move to digital around director conduct reporting.

From 6 April 2016, the way office-holders report to the Secretary of State on the conduct of the directors of insolvent companies is changing. A new online process will replace the old paper-based system of D1s and D2s and I am sure that many of you, like me, will welcome this change. It forms an important part of The Insolvency Service's move to deliver services digitally in an efficient and convenient manner for its users and represents a significant modernisation of what had become an outmoded system.

The Insolvent Companies (Reports on Conduct of Directors) (England and Wales) Rules 2016[1] were laid out on 22 February 2016 and come into effect from 6 April 2016. The old Rules will apply to all those companies whose date of insolvency is pre-6 April 2016. That means between April and September 2016 there will be a transition period to allow for the receipt of the last D1s/D2s on those companies that failed before 6 April 2016.

The Insolvency Service's business intelligence project has been working to implement the change and I will spell out here some useful background to assist prospective users with what to expect. I do not propose to go over in detail here the Small Business Enterprise and Employment Act changes to the Company Directors Disqualification Act but for office-holders it means:

> "A key benefit for The Insolvency Service will be an improved capture of information across all companies that become formally insolvent."

- removal of the requirement for a fitted/unfitted opinion;
- earlier reporting by three months;
- a more structured, quicker and easier to complete conduct report;
- no unnecessary duplicate reporting (eg where a company moves from administration to CVL and nothing else changes); and
- no unnecessary provision of information available elsewhere.

The changes also affect compulsory liquidations and a key benefit for The Insolvency Service will be an improved capture of information across all companies that become formally insolvent. This will allow for greater consistency and improved decision-making across The Insolvency Service's investigation and enforcement activity.

To use the new system, all office-holders will need to register using an email address that is unique to them. We wrote to all IPs on 4 February and asked them to check the email address that we held for them and to update us if necessary. Nearer the commencement date we will use those details to provide a link to the office-holders to start the registration process.

We anticipate that – as it is now – IPs' staff will be heavily involved in the reporting process so, once an IP has registered, they will be able to allow access for their staff. We will also provide functionality for IPs to allocate 'super users' from among their staff who will be able to control staff access in the larger firms. Only the office-holder, using their unique ID, will be able to click 'submit', but staff will be able to enter and save data.

Once logged into the system, users will be presented with a dashboard of all their cases where we are expecting a conduct report to be submitted. This dashboard has been through many iterations, informed by user research with volunteer IPs and their staff, but will clearly display the status of each case using a 'traffic light system'. Submitted cases will still be accessible in a separate area.

The conduct report itself will be an online questionnaire that primarily uses a system of yes/no questions with additional questions being asked depending on the answer given. This more structured approach will allow for the development of a rules engine to perform an initial bulk sift of cases. The rules engine will not decide which cases are to be targeted for investigation but will notify office-holders of the sift decision. A separate targeting decision will be made by The Insolvency Service's insolvent targeting

> "This development is an ongoing process and we continue to refine and develop the system in response to continuous user input."

team who, if more information is needed, will contact the person named on the conduct report to deal with any enquiries.

The business intelligence project will issue further communications and more detailed guidance in the weeks and months ahead. This will be supplemented by ongoing demonstrations of the current prototype to individual firms and at regional and national events.

I would like to take this opportunity to thank all of the IP firms who have participated and volunteered their time to assist with user research and to contribute to the development of the new system. I should add that this development is an ongoing process and we continue to refine and develop the system in response to continuous user input. Hence our schedule of user research is ongoing and will continue after April. Please contact **DCAS@insolvency.gsi.gov.uk** if you or your firm wish to be involved.

[1] See **www.legislation.gov.uk/uksi/2016/180/contents/made**. The Insolvent Companies (Reports on Conduct of Directors) (Scotland) Rules 2016 were laid out on the same day — see **www.legislation.gov.uk/uksi/2016/185/contents/made**

GARETH ALLEN
is the intelligence and enforcement lead in The Insolvency Service.

9.5
CPD Hours

R3 26TH ANNUAL CONFERENCE

FUTURE OF THE MARKET

A GATHERING OF THOUGHT LEADERS

18-20 MAY 2016 INTERCONTINENTAL BUDAPEST HUNGARY

Join senior restructuring and insolvency professionals to discuss the key issues of the day, the challenges faced and the future of the profession.

Programme highlights include:

- Economic update with journalist Emily Maitlis
- The future of UK businesses under a Conservative government
- Restructuring finance and advisory service sessions
- Virtual currencies: how real is the money laundering threat?
- Technical and legal insolvency updates
- The application of restructuring skills in the health and care sector
- Future digital trends and how they will impact different business sectors
- The view from the SFO

WELCOME RECEPTION SPONSOR BREALGROUP

GALA RECEPTION SPONSOR Radcliffe Chambers

PROMOTIONAL SPONSOR encompass the full picture, fast

REGISTER TODAY

courses@r3.org.uk | www.r3.org.uk

On the frontlines of fraud

Frances Coulson highlights the work of the R3 Fraud Group.

Fraud is a staggeringly expensive problem in the UK, which compounded with budget cuts in anti-fraud agencies is leaving businesses and individuals increasingly out of pocket. The cost of fraud to the UK, across the public, private and charity sectors and individual victims runs into the billions.

The expertise and wide-ranging powers that insolvency practitioners have to investigate and prosecute fraudulent activities civilly, is not sufficiently appreciated or utilised in the UK.

R3's Fraud Group was established in 2012 to promote, to the profession and external stakeholders, the use of insolvency procedures as a tool to tackle fraud. Since its inception the group has developed and proposed a number of policy lines and suggestions for reform, which would improve the ability of government, law enforcement and the profession to disrupt, deter and prevent fraudulent activities.

> "The Fraud Group also works with a number of key public and private agencies to educate them."

Calling for change

The principal output of the Group to date is 'The Fraud Landscape' paper, which was launched in February of last year. Included in the report were a number of recommendations for ways that insolvency professionals could provide the much-needed extra capacity to combat fraud. The implementation of additional processes would boost the fight by allowing us to take on cases that otherwise are unlikely to be resolved through conventional anti-fraud means.

Among the paper's proposals was a call to re-introduce criminal bankruptcy, allowing all of an individual's assets to be realised to repay victims following certain levels of criminal conviction, and making overseas assets easier to retrieve. While we currently have numerous powers to investigate fraud and find redress for victims, these powers are limited to certain situations. Extending the powers of the profession would allow us to pursue cases that government agencies increasingly can't afford to because of spending and resource cuts.

Other suggestions in the paper include allowing the Secretary of State for Business, Innovation & Skills to make an individual bankrupt in the public interest, and that directors of companies wound up in the public interest should face automatic petitions for their bankruptcy and/or disqualification from acting as a director.

We also believe there are a number of simple and practical changes that Companies House can implement that would deter fraudulent activities. These include requiring directors to produce identification when registering a company, a requirement for companies to state the name of all directors 'however described' on their annual return, and the inclusion of a 'health warning' on annual forms reminding directors of the consequences of breaching or assisting in breaches of disqualification orders or undertakings.

The report was launched at a round table event with interested stakeholders from the government, business community and fraud groups. Participants included representatives from the Federation of Small Businesses, Fraud Advisory Panel, Financial Conduct Authority, HMRC and Home Office.

It was a good opportunity to discuss our proposals with key stakeholders and to demonstrate the skills and powers at a practitioner's disposal to retrieve funds for creditors. The suggestions in the paper were widely welcomed by those in attendance, and there was particular support for the recommendations around reform of Companies House and introducing the ability to make an individual bankrupt in the public's interest.

Fight fraud with insolvency

The Fraud Group also works with a number of key public and private agencies to educate them on the effectiveness of insolvency as a tool for fighting fraud. In recent months we've met with a number of such agencies including the City of London Police. They were briefed on the extensive powers the profession has, such as the ability to interview under compulsion, search and seizure of property associated with fraud and obtaining freezing orders against assets of those involved. It's important that those involved in combating fraud are aware of the role we can play. We are working with government counter-fraud groups to ensure that effective use of insolvency practitioners is in every public sector manual on tackling fraud.

Many cases sitting in the public and private sector are not taken forward due to limited resources or because they seem unsuitable for criminal prosecution, but they can be tackled through the use of insolvency. After all, fraudsters regularly use limited liability to buffer themselves from action; we should be using that opportunity to better aid victims. By increasing the amount and types of fraud cases tackled we can increase the results for victims and reduce the benefits for fraudsters.

> "There's no doubt that the scale of fraudulent activity in the UK is astounding, and unfortunately it's increasing."

It's good to see the revival of the Annual Fraud Indicator this year, which hasn't been published since 2013, and will show the true scale of fraud in this country. We also recently met with those involved in its preparation to discuss the findings and the part our profession can play in counter-fraud.

There's no doubt that the scale of fraudulent activity in the UK is astounding, and unfortunately it's increasing. Perpetrators are more enterprising, innovative and professional than ever, but this only makes the fight against it all the more important. □

FRANCES COULSON is chair of R3's Fraud Group.

Save the dates

18–20 May 2016
R3 Annual Conference
InterContinental Budapest, Hungary

16–18 November 2016
R3 SPG Forum
Chesford Grange Hotel, Warwick

R3 events, courses and conferences

	Date	Event	Venue
April	14	**Beginners Guide to Independent Business Reviews**	Mercure Manchester Piccadilly
April	21-22	**Northern Conference**	Crewe Hall, Crewe
April	22	**R3 & INSOL Europe International Restructuring Conference**	Hilton Tower Bridge, London
April	26	**SPG Technical Review**	Hyatt Regency, Birmingham
May	5	**Social Media Issues in Insolvency**	Crowne Plaza, City Centre, Manchester
May	5	**Employees in Insolvency – A Legal and Practical Guide**	Crowne Plaza, City Centre, Manchester
May	11	**North East Regional Meeting**	Muckle LLP, Newcastle
May	18-20	**R3 Annual Conference**	InterContinental Budapest, Hungary
May	26	**Charities and Community Interest Companies**	Copthorne Tara Kensington, London
May	26	**Partnership Insolvency**	Copthorne Tara Kensington, London
May	26	**West Midlands Spring Ball**	Botanical Gardens, Birmingham
June	9	**South West & Wales Black Tie Dinner**	Marriott Hotel, Bristol
June	9	**Restructuring Day**	Holiday Inn Regents Park, London
June	10	**London & South East Women's Group Afternoon Tea**	Mandarin Oriental Hotel, London
June	16	**Scotland Golf Day**	Renaissance Club, North Berwick
June	17	**North West Women's Group Ladies Lunch**	Lowry Hotel, Manchester
June	21	**SPG Technical Review**	Hilton Deansgate, Manchester
June	24	**Yorkshire Women's Group Ladies Lunch**	Aspire, Leeds

Regional events (light blue): Northern Conference; North East Regional Meeting; West Midlands Spring Ball; South West & Wales Black Tie Dinner; London & South East Women's Group Afternoon Tea; Scotland Golf Day; North West Women's Group Ladies Lunch; Yorkshire Women's Group Ladies Lunch
R3 events (dark blue): all others

Regional events
R3 events

For further information on R3 courses and conferences, please visit the R3 website **www.r3.org.uk**, where you can download the 2016 Spring–Summer programme.

Alternatively, call the Courses team on 020 7566 4234 to request further details.

Life beyond LASPO

Carl Bowles looks at how the impact can be managed for smaller firms.

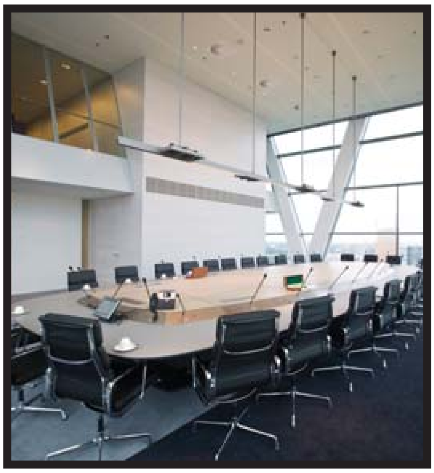
As most of you will already be aware, the 2012 Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act reformed the UK's civil litigation and funding regime by banning recovery of the uplift from CFAs and ATE premiums from a losing party. As of 1 April 2016, these changes will apply to all civil litigation (including insolvency litigation), meaning that CFA uplifts and ATE insurance will now come from any damages awarded. This will have two obvious results in insolvency claims: the amount available for creditors will be reduced and, given that the threat of litigation costs being borne by the defendant has been removed, there will likely be a reduction in the number of cases settling.

The impact on smaller firms

While the full effect of these changes is difficult to predict, arguably there may be limited impact on the ability of IP firms (small and large) to pursue larger claims, due to their higher 'costs to damages' ratio and the availability of third-party funding and/or CFAs where there's a reasonable chance the uplift and any deferred ATE premium will be paid in full.

However, although the majority of larger claims may not be hugely affected by the end of the insolvency carve out, a large proportion of claims still fall into the £25,000 to £100,000 bracket, usually in estates with minimum assets to fund any litigation. In these cases, the level of damages awarded may not cover the costs of the CFA uplift, ATE and, of course, the IP's costs. As a result, it is arguably the SPG community who will be the most affected by the Jackson reforms, because they will be unable to pursue these claims unless they find an alternative source of funding. While it is possible that the impact of the loss of the 'Jackson exemption' on SPG firms can be managed through the use of such alternatives, the extent to which they will 'pick up the slack' left by the loss of the exemption remains to be seen. SPG firms may wish to explore the following options:

Assignment of claims: administrators and liquidators have the power to assign the following types of claim: preferences, transactions at undervalue, wrongful trading, fraudulent trading and extortionate credit transaction. The ability to assign wrongful and fraudulent trading claims was granted under the Small Business, Enterprise and Employment Act 2015, the relevant provisions of which came into force on 1 October 2015. This is likely to be a growth area, particularly for the smaller claims seen by SPG members.



> “The extent of the gap left by the loss of the Jackson exemption will need to be determined on a case-by-case basis.”

Nevertheless, members should be aware that once the claim has been assigned, unless he/she has no future upside in the claim, it is possible that he/she could continue to have an adverse costs risk. There is also the duty to ensure that the assignment route is the best route given all the circumstances.

Compensation orders: the government recently introduced these orders in the Small Business Enterprise and Employment Act 2015. It is an effective way of bringing justice to bear on cases that have proved hard to fund. Compensation orders give the courts the power to proportionately penalise the wrongdoer without any of the costs of litigation.

Creditor funding: encouraging creditors to fund the smaller claim litigation could also be a solution. In Australia, under s564 of the Corporations Act 2001 the Court can elevate the funding creditor's unsecured claim in priority to other creditors in consideration of the risk assumed by that creditor. Here in the UK, a proportionate funding agreement may be entered into with a creditor/s.

Damages-based agreements (DBAs): the Damages-based Agreements Regulations 2013 came into force on 1 April 2013. A DBA provides for payment of solicitors' fees, counsel's fees and VAT by a client under a DBA, and is dependent on achieving defined success criteria based on a percentage of the sum recovered from the losing defendant. There are a few DBAs being written, but they have not had the level of support that was initially expected. This is partly because of uncertainty around the regulations, but more because solicitors can't 'mix' the comfort of a CFA with the attraction of a DBA.

Litigation funding: the cost of money has been very cheap in recent years and capital has moved into a growing litigation funding market. This has led several funders to be attracted to the insolvency litigation sector, typically funding expert reports, solicitor base costs and IP forensic analysis work. However, to have a reasonable prospect of attracting a funder the basic requirement is to have a circa 10:1 ratio between damages and the funding requirement, so this may have limited application to smaller claims.

SPG members may be interested to read more on this issue on pages 20–23, where you can find a useful summary of a round table discussion (involving funders, insurers, lawyers and accountants) on the pros and cons of the various options.

Conclusion

The most pronounced impact of the changes to the recoverability regime for CFAs and ATE premiums is likely to be seen in the short term, as most IPs will seek to push through litigation cases before the deadline. Thereafter, the extent of the gap left by the loss of the Jackson exemption will need to be determined on a case-by-case basis, with reference to the increasing number of funding alternatives. According to Clive Petty of JLT, *'the funding market is extremely innovative whereby the greater freedom and willingness for IPs to 'sell' smaller claims will spawn new players in this area and this will have the effect of pushing up prices paid to the benefit of creditors'*. SPG members and their legal teams will therefore need to have access to good advice about the increasing range of tools available in litigation, in order to take advantage of this evolving landscape. □

CARL BOWLES is a partner at Carter Backer Winter LLP and a member of the R3 SPG Committee.

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
Phillip Sykes, phillip.sykes@rsmuk.com

Vice-president
Andrew Tate, andrew.tate@krestonreeves.com

Deputy Vice-president
Adrian Hyde, ahyde@cvr.global

Administration

Chief Executive Officer
Graham Rumney, grumney@r3.org.uk

Assistant Office Manager
Tasneem Choudhury, tchoudhury@r3.org.uk

Smaller Practices Group; Personal Insolvency Committee; Regional Communications Committee and R3 Regional Network

R3 Director
Emma Hobson, ehobson@r3.org.uk

Finance

Finance Manager
Ryan Porter, rporter@r3.org.uk

Assistant Finance Manager
Alex Coles, acoles@r3.org.uk

Membership & Marketing

Head of Marketing & Member Services
Cynthia Matthews, cmatthews@r3.org.uk

Marketing Executives
Fareeha Afghan, fafghan@r3.org.uk
Deborah Smith, dsmith@r3.org.uk
Marek Nusl, mnusl@r3.org.uk

Membership Officer
Shemin Karim, skarim@r3.org.uk

IT Manager
Samit Vadgama, svadgama@r3.org.uk

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

Communications, Public Affairs and Policy

Director of Communications & Public Affairs
Victoria Jonson, vjonson@r3.org.uk

Senior Communications Manager
Nick Cosgrove, ncosgrove@r3.org.uk

Communications Officer
Orla Hennessy, ohennessy@r3.org.uk

Senior Public Affairs & Policy Manager
Georgina Waite, gwaite@r3.org.uk

Public Affairs & Policy Officer
James Jeffreys, jjeffreys@r3.org.uk

Education, Courses & Conferences

Senior Courses & Conferences Manager
Natalie Harvey, nharvey@r3.org.uk

Courses & Conferences Organiser
Catherine O'Mara, co'mara@r3.org.uk

Senior Courses & Conferences Marketing Executive
Kirsten Scully, kscully@r3.org.uk

Courses Administrator
Maggie Dean, mdean@r3.org.uk

Senior Regional Events Co-ordinator
Sara Calvert, scalvert@r3.org.uk

Course Bookings
courses@r3.org.uk
T: 020 7566 4234
F: 020 7566 4225

Technical

Technical Director
John Francis, jfrancis@r3.org.uk

Technical Officer
Jonathan Ausena, jausena@r3.org.uk

Committee Chairs

Education, Courses & Conferences
Adrian Hyde, 020 3794 8750

General Technical Committee
Mike Pink, 0207 311 1000

Membership & Member Services
Matt Dunham, 0161 837 1870

Personal Insolvency Committee
Stuart Frith, 0207 809 2379

Policy Group
Giles Frampton, 01752 690101

Regional Communications Committee
James Martin, 0121 543 1900

Scottish Technical Committee
Eileen Blackburn, 0131 225 6366

Smaller Practices Group
Simeon Gilchrist, 0207 691 4166

R3 in Scotland

Chair & Representative on the R3 Council
Tim Cooper, 0131 222 9817

Regional Chairs

Eastern
Frank Brumby, 01603 611370

London & South East
Nick O'Reilly, 020 7186 1144

Midlands
Chris Radford, 0115 983 8200

North East
Neil Harrold, 0191 2328345

North West
Richard Wolff, 0161 828 1990

Northern Ireland
Michael Neill, 028 9031 4466

Southern
Andrew Watling, 023 8033 6464

South West & Wales
Alan Bennett, 01392 337000

Yorkshire
Adrian Berry, 0113 243 9021

Regional Representatives on the R3 Council

Eastern
Andrew Turner, 01502 563921

London & South East
Stuart Frith, 020 7329 4422

Midlands
James Martin, 0121 543 1900

North East
Kelly Jordan, 0191 211 7904

North West
Richard Wolff, 0161 828 1990

Northern Ireland
Joan Houston, 07799 581 528

Southern
Duncan Swift, 023 8033 0116

South West & Wales
Richard Clark, 0117 939 2000

Yorkshire
William Ballmann, 0845 437 4660

Other Council Members

Alison Byrne, Eileen Blackburn, Louise Brittain, Frances Coulson, Matt Dunham, Christina Fitzgerald, Giles Frampton, Simeon Gilchrist, Adrian Hyde, Jamie Leader, Gareth Limb, Mike Pink, Liz Pywowarczuk, Matthew Tait, Andrew Tate, Laurence Weeks, Cathryn Williams.

R3 membership categories

We continually strive to improve benefits for all members. Membership benefits across categories include:

- A copy of *RECOVERY* every quarter
- Attendance at regional meetings
- Priority bookings for R3 courses and most of its conferences
- Technical bulletins and releases
- Access to the members' section of the R3 website
- An invitation to the R3 annual conference
- Continuing professional education at discounted rates.

Please see below for details of the different categories of membership:

- **Full members** are invited to contribute to the development of insolvency, business recovery and turnaround professions at both local and national levels.
- **Benefits include:** use of the designatory letters MABRP and a certificateof membership, inclusion in the R3 Directory and a copy of it, membership of INSOL International.
- **Associate members** are individuals who do not meet the requirements for full membership but work significantly within the business recovery sector.
- **New Professional (Student) members** are individuals preparing to take the Joint Insolvency Examination Board (JIEB), Certificate of Proficiency in Insolvency (CPI) or Certificate in Insolvency (ICAEW) qualifications. Pass students of the JIEB are eligible to apply for full R3 membership.
- **New Professional (Networking) members** are individuals who have recently joined their firm, and/or are new to the business recovery sector and wish to network with R3 members. This category receives electronic copies only via access to the R3 website.

Advertisers' index

Annecto Legal Limited ....IBC
Insolvency Risk Services...................................3, 26
IPA..Supplement OBC
JPS Chartered Surveyors 45
Manolete Partners PLC 5
Neil Taylor Insolvency ....OBC
R3 Annual Conference....................................1, 40
Smith & Williamson LLP 45
Visionblue Solutions..IFC
Willis Towers Watson 3, 15

Asset valuers & auctioneers

The Institution of Commercial & Business Agents (ICBA) 46
John Pye Auctions 46
MGR Appraisals..46
Pugh Auctions 46

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

Interview with...

Malcolm Weir

Matt Jukes talks to Malcolm Weir, the head of restructuring and insolvency at the Pensions Protection Fund (PPF).

Malcolm Weir biography

- Malcolm Weir began his insolvency career in 1986 at KMG Thompson McLintock, which later was subsumed into behemoth KPMG Peat Marwick McLintock.
- In 1990 he joined Touche Ross (now Deloitte) and was seconded to the Pensions Regulator in 1997. Deciding it was time for a change, he joined Barclays' business support team as a restructuring director before heading up its corporate insolvency team. Here he found himself handling a series of high-profile cases that suffered insolvency due to the aftermath of the 2008 financial crisis.
- Malcolm became head of restructuring and insolvency at the Pension Protection Fund in 2013.

Q What is your perception of the profession?

A We know the profession well and we're able to work well together overall. We're clear what the professionals are trying to achieve and hopefully they understand our objectives. My team has exactly the same pedigree in that we've all spent time in recovery sections of banks and worked for professional firms.

Q How would you evaluate IPs' performance in dealing with pension funds?

A It can be quite mixed. The top six or seven firms have experienced specialist pensions teams and we don't have issues with them. What has surprised me since assuming this role in 2013 is how many smaller practitioners get involved in companies that have got defined benefit (DB) pensions schemes. That is where we sometimes find the problems.

> "Please phone us. We have four experienced IPs and we understand what other IPs are talking about."

This is predominantly because they don't have the experience of dealing with the PPF and don't know what we're trying to achieve and what we expect from them. We are keen to ensure people are fully aware of what is expected of them, so we're giving a series of breakfast briefings with R3 to get the message out. We're also trying to improve communication by releasing revised guidance and disseminating a series of guidance notes for specific areas of concern.

Q Can you comment on the PPF's role in business rescue?

A The government talks about a 'rescue culture' and 'preserving businesses', but that's not part of our remit. We're governed by the Pensions Act and our powers only start on an insolvency event. We don't have any powers *per se* to get involved in restructuring, and when we do we're relying on a catch-all provision in the Act that says the PPF can do so to further its ultimate goals.

Our levy payers raise around £600m annually, and we have a duty to ensure we minimise that call. I'm not going to get involved in restructuring unless it's inevitable that the business is about to become insolvent. The reason for this is that we could be creating an enormous competitive distortion.

> "Like a bank, we are often by far the largest creditor and in the same way we don't like surprises. Keep us informed and take us on the journey."

Imagine two identical companies, each with a DB pension scheme; if we let one of these companies put its pension scheme into the PPF and avoid its pension liability and ongoing cost, it would get an enormous advantage over the other company that is honouring its pensions scheme, which may end up paying a bigger levy, because we've taken on the liability of its competitor. We have to be sure that we're not distorting the market in that way; we have to be sure insolvency is inevitable so that the scheme is coming our way no matter what happens. In those circumstances we would get involved in the business rescue and would endeavor to get a much better deal on rescue and restructure than if we'd just let the business fall into insolvency and get our dividend out of the insolvency process.

Q It's a judgement call. Isn't that quite tough on you, the man at the top?

A I have a widely delegated authority, but I discuss these situations more widely within the organisation. When I joined the PPF, I changed the way we work so that there is a formal procedure to escalate things right up to the chief executive. When looking at the cash on offer on deals, our guidance stipulates that we expect to get a significantly better result than would come from insolvency. »

We deliberately don't define what significantly better means. It's based on the facts of that case and every case is different. There is no formula to deal with it.

Q What are the PPF's insolvency priorities for 2016?

A To a certain extent we're reactive. We currently have a much lower hit rate to our balance sheet than we'd been forecasting in terms of numbers of insolvencies. This allows us to focus on more education of our various stakeholders and we have been speaking to R3, accountants, lawyers and actuaries talking about our plans and objectives and how to work effectively with the PPF.

> "We have to be sure that we're not distorting the market; we have to be sure insolvency is inevitable so that the scheme is coming our way no matter what happens."

My team's other priority is to liaise with IPs to progress long-standing cases. Once something is over a year old there is a risk that it gets pushed onto the back burner, and one thing we haven't been active on previously is case progression. We will shortly be getting a new system that will allow much closer and proactive monitoring.

Q How can IPs better communicate with you? Can the PPF do more?

A Please phone us. We disclose our direct dials much more now and they're on the website. We have four experienced IPs and we understand what other IPs are talking about.

Like a bank, we are often by far the largest creditor and in the same way we don't like surprises. Keep us informed and take us on the journey. This is particularly important when looking at pre-pack administrations. This is a potential danger area, because it's an opportunity for an employer to dump its DB pension schemes, especially when the business is sold back to a connected party.

Back when I started in insolvency in 1986, the jobs I worked on were mainly 'administrative receiverships' and of course the administrative receiver couldn't become the liquidator. There's a good reason for that; the first thing the liquidator did was to check the administrative receiver had done his job properly. Today, you can move from being an administrator to being the liquidator and there's no check and balance there. Accordingly, if we haven't been taken on the journey to understand why a pre-pack is necessary, at the meeting of the creditors we will propose an alternative IP to act as liquidator and look at what an administrator has been doing in office. If you've kept us informed from the beginning and we understand why the pre-pack is necessary, there will be no need to do that.

This is why talking to us is crucial. We've seen these things and have dealt with them as IPs in the past. Sometimes we can even offer good ideas as well.

Q What are your views on the fees reforms?

A We published our own guidance on this and we were inundated with people who were complying with SIP9 with grids of numbers. They were great grids, but pretty meaningless. The grids did not demonstrate what value the IP was adding for the work that was being done. We used to send out a copy of an article that was in *RECOVERY* (Why transparency matters, Autumn 2012), which succinctly described what IPs should be doing to show that they added value.

It's early days for the fees reform and some IPs are struggling with the idea of estimates. I like the estimates but I don't think they should be the be-all and end-all. We're doing more of a mix and match for jobs – you know capped or set fees for a certain element of a job where it's easy to predict and more time/cost base or a percentage base for the higher risk, contentious or difficult areas where the value is being added. We look at each case on a case-by-case basis and discuss with each IP how they're being remunerated.

Q What are your views on IP regulation?

A My personal view, not the PPF's, is that the regulators can be a mixed bunch, and there is a risk that it can become almost a trade body rather than a regulator. There is a good case for a single overarching regulator: you'd be able to recruit the best quality staff and have much more consistency as a profession.

Q How easy is it to engage in the insolvency process as an unsecured creditor?

A We're normally 90 per cent of the unsecured creditor body, which makes it easy for us; for other creditors, probably less so. I do question how many of them actually want to get involved in the day-to-day insolvency process – they're probably more focused on recouping their cash. I was criticised for disenfranchising creditors because I said we didn't like creditors' committees. My counter-argument is that we're putting an X in the voting box like anyone else. The engagement my team has with IPs allows us to have the sway that often gets significant reductions in fees and continually drives value. We're totally aligned with the creditors in wanting to maximise returns. Only by maximising returns can a pension scheme going through assessment have a chance of avoiding coming into the PPF and therefore members getting a better pension.

> "Only by maximising returns can a pension scheme going through assessment have a chance of avoiding coming into the PPF and therefore members getting a better pension."

Q Assuming there are limited funds available in an estate, what do you want to get out of an insolvency process?

A We aim for maximum returns. We understand that an IP may wish to continue or commence claims or litigation. We've just introduced new guidelines that say we're quite prepared to examine situations and let the trustees fund litigation if it meets the criteria. However, everything is dealt with on a case-by-case basis. We don't want to see IPs doing things that are outside their remit or with a remote possibility of success; we do look out for that.

Q What would you like to say to the profession reading this piece?

A We are prepared to have 'no names' conversations on matters that can help a situation. If people have ideas, they can sound us out and nothing is binding because no names are given. Additionally, I'd like to, again, urge IPs to call us; we might be able to help. ◻

MATT JUKES is publishing manager of *RECOVERY* magazine.

NEW DOCUMENT PACKS

Drafted *By* Insolvency Practitioners *For* Insolvency Practitioners

New, Comprehensive, Up-To-Date, Great Value Document Packs

- COMPREHENSIVE, FULLY COMPLIANT, CONSTANTLY UPDATED, CLEAR ENGLISH, IPS COMPATIBLE
  Saves You Hours Writing Something From Scratch
- Our Newly Written And Completely Fresh Document Packs For All Procedures Will Make Your Business MORE EFFICIENT And SAVE YOU MONEY
- COMPREHENSIVE Means COMPREHENSIVE; Typically, Our Pack For Bankruptcy Contains MORE THAN 320 Documents
  We Provide You With The Relevant Ones You Need For YOUR Cases…Not Just Extraneous Materials Which Waste Your Valuable Time
- The Packs COVER ALL EVENTUALITIES In A Case. We Have Documents That Deal With All Issues To Save You Having To Seek Advice
- MORE EFFICIENT AND COST EFFECTIVE; Technical Issues Can Be Dealt With By An Administrator Not A Manager
- ALL ASPECTS OF A CASE DEALT WITH … No Need To Go To Agents
- All Documents And Letters Are Jargon-Free, And USER-FRIENDLY … And Easily Understood By Insolvency Practitioners
- FROM £1,000 PER PACK With FREQUENT UPDATES

IPS Easy To Use Improved Efficiency Clear Up-To-date By IPs For IPs Value Comprehensive

NEIL TAYLOR INSOLVENCY IS NOW OFFERING A FULL COMPLIANCE AND HEALTH CHECK SERVICE FROM THE BEGINNING OF 2016

enquiries@ntinsolvency.com

01962 77 21 81 www.ntinsolvency.com

NEIL TAYLOR INSOLVENCY
INSPIRATIONAL TRAINING SINCE 1990