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Summer 2013

RECOVERY

The insolvency industry

Opinion
Jon Moulton, Shay Lettice and Alan Hudson give a snapshot of the insolvency industry

TUPE Rescue, not liquidation: the courts and confusion

Explaining the complexities of administration

Economic downturn
Is Britain going south?

Adapt and survive
How demand for IP services is evolving

Interview Dr Richard Judge, the new head of The Insolvency Service

Outside looking in
How Whitehall and Westminster see the insolvency profession

New blood
Why young lawyers should think about insolvency practice

Plus Legal update, Smaller Practices Group

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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

Let's not overstrain the front cover analogy, but transplanting some viable businesses into the fertile soil of entrepreneurial ownership is the economic stimulus we need right now in the UK. Insolvency is the natural mechanism to sweep away the moribund corporate shells, worthless shareholdings and submerged debt.

In the real world where politicians fear the short-term impact of unemployment and the feel-bad effect from a reverse in the downward trend of insolvency statistics, the potential long-term benefits of promoting such policies are seen as uncertain and insufficiently attractive.

There used to be a stimulus for rejuvenation – banks clearing out their weak accounts. In the SME sector the banks' current reluctance to see formal insolvencies is exacerbated by interest rate swap mis-selling problems. Not only are the major banks said to have agreed not to use formal insolvency in relation to businesses with interest rate swap claims, The Insolvency Service is said to be considering guidance to IPs. If this encourages action against banks (which could present some perceived threats to IPs' objectivity) it could reduce even further the incidence of viable businesses being recycled through the medium of an insolvency process.

This issue of *RECOVERY* not only considers the economy (Dan Atkinson, p26), a range of views on the future of restructuring and insolvency (Opinion, p4) and a variety of articles on insolvency practice; it also carries our usual in-depth guidance in the Legal Update section (p10) and beyond. TUPE is particularly well covered (pp16 & 36). Finally, not to be missed are interviews with our new president, Liz Bingham (p40) and the Head of The Insolvency Service, Richard Judge (p47).

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

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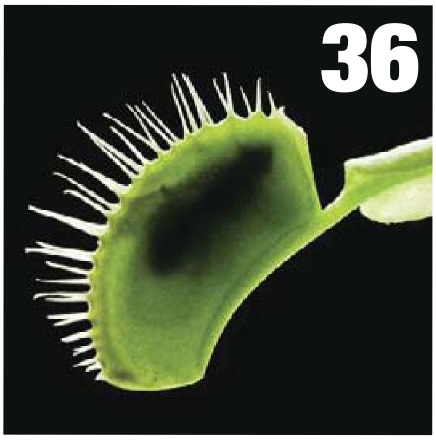

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The view from here…

Jon Moulton, **Shay Lettice** and **Alan Hudson** offer a snapshot of the insolvency industry from their perspective.

RECOVERY editor **Chris Laughton** introduces a three-part opinion piece this edition.

Private equity, regional practice and major restructurings are the backgrounds for our trio of opinions about the future of restructuring and insolvency.

Jon Moulton has strong views on the new European Insolvency Regulation proposals and on the economic inefficiency of rescue and life support at any cost.

Shay Lettice's East of England may not be the only region with more than a glimmer of hope, but are IPs doing more restructuring?

Alan Hudson's perspective of non-traditional lenders driving operational turnaround and performance enhancement leads to a challenging conclusion about evolution.

What do you think?

Jon Moulton examines the future of restructuring and insolvency.

One of the odder ironies is that the restructuring industry is doomed to continuously restructure itself.

The Ancient Greeks had the myth of Sisyphus to illustrate the nature of our task. Sisyphus had a particularly hard task and not just difficult, but boring and meaningless. Throughout eternity he had to roll a huge boulder to the top of a hill. It took Sisyphus all day to do this, toiling up a steep incline and it exhausted him utterly. Each evening, as the stars appeared, Sisyphus would reach the crest of the hill. And then the boulder would plunge back down to the bottom again. Just like repeatedly restructuring a moribund leveraged buy-out attached to too much debt!

I am ageing (and it may be just that) but dealing with European Regulators seems at least as unrewarding as rolling stones. In insolvency I have seen the emphasis in restructuring shift over time from protecting creditors effectively to the other extreme of rescue and life support at any cost.

Unreality check

It's now gone bonkers in Europe where it is clearly the collective belief of the naïve and overpaid Euro establishment that companies are victims if they fail and that they are entitled to unlimited life support from the rest of society.

If you really want to see unreality at its limits I recommend reading the ETUC (Syndicat European Trade Union) views on insolvency. Among their views is one that managers should be personally liable for unpaid workers' claims. The fact that this would lead to managers heading for insolvency earlier to avoid personal liability does not appear to have occurred to them.

More concerning is that it is really hard to have much respect for the authors of the latest proposed changes in the EC Insolvency Regulation. The impact summary at the back thereof is of a quality commonly seen in the cash flow forecasts of businesses on their last legs!

They are actually proposing quite complex and practically very difficult changes, which include adding more regulation to the generally successful pre-insolvency arrangements now available

> “It's now gone bonkers in Europe where it is clearly the collective belief… that companies are victims if they fail.”

and the authors merely show a cost in the impact calculations for their proposals – the idea that regulations should demonstrate benefit is obviously not part of their agenda. Is cost/benefit something we should expect our masters to consider? Companies fail for a short list of main causes:

- Feeble outdated industry. Should be closed as well as possible.
- Too much debt. Needs financial restructure – debt for equity or forgiveness.
- Lousy and/or crooked management. Needs dramatic change, not a sympathetic bail-out.

Many proponents of the 'Rescue Culture' don't see the differences!

Above all, economic efficiency requires that good assets and good people are used in the most productive way available and restructuring should be directed in the correct way to achieve that aim.

Too much forbearance

Europe is in a bad way with the Eurozone in recession, extraordinary youth unemployment and miserable prospects for growth. Oddly, restructuring has declined more than most industries in this downturn as part of that economic problem is too much 'forbearance', insufficient tolerance for the pain of failure and a preservation of low productivity industries. Low interest rates help preserve businesses and managements, which in more normal times would have been 'filtered out'.

I hope that the future is one where well done restructuring helps generate an economic recovery. It's there to be done. We should be busier! □

JON MOULTON is a managing partner at Better Capital and a Fellow of the Institute for Turnaround Professionals.

Shay Lettice on the highs and lows of insolvency practice in the East of England.

If there is one glaring realisation to come out of the past few years of recession, it is this: that the relationship between businesses and their funders is built on confidence and, once this confidence is smashed, the consequences are catastrophic.

The insolvency picture here in the East of England has been little different to the depressive national economic landscape of late. Far too many businesses are on their knees, financial institutions have toppled like dominoes and the concept of risk assessment appears to have been paid little more than lip service by so many.

There is, however, more than a glimmer of hope for the region. Notable is the fact that, even when the national economy was in recession, the East of England still had one of the highest employment rates among the English regions.

Weathering better

Furthermore, figures just published by the Office for National Statistics show that the East of England is responsible for just under nine per cent of the UK's Gross Value Added (GVA), one of the highest of the English regions. It also has the largest expenditure on research and development relative to the size of its economy, with spending equivalent to 3.2 per cent of its regional GVA.

But while the economic foundation for the Eastern region may be weathering better than most, there is, without doubt, a long way to go before we see a return to a former level of economic prosperity.

On the brink of a triple dip recession, the economy appears to be in limbo. Here in East Anglia, insolvency work is gently paced, a general reflection of the country's

> “The East of England appears to be better equipped than most regions to absorb economic setback and turmoil.”

currently falling insolvency rates. There has been a distinct polarisation in the size of jobs that are being processed, falling mostly into large and small projects with very little in the middle.

There are still significant funding issues for SMEs, in particular, and I would expect the work level of local IPs to pick up significantly once the threat of a triple dip recession is surmounted and we move gradually towards recovery.

Banishing bureauracy

In the meantime, R3's Eastern region is calling upon the government to clear up some of the bureaucratic uncertainty surrounding our profession. There are a number of grey areas, which require clarity to facilitate turnaround, an example of which is the question of TUPE exemptions being extended to administrations.

Ultimately though, it is down to all of us – businesses, individuals, professional advisers, opinion formers and bureaucrats – to drive forward recovery. We have to understand that, throughout the regions, we are now part of a truly global economy. There is no longer a single player sizeable enough to lead a global recovery, which means that the necessary economic adjustment is likely to be a stutteringly slow and lengthy process.

Admittedly, the East of England appears to be better equipped than most regions to absorb economic setback and turmoil – it is encouraging that we have a relatively strong infrastructure for growth – but we will never be strong enough to forge ahead if the rest of the country is not in tandem with us. □

»

SHAY LETTICE is R3's Eastern region chairman and a partner at Peters, Elworthy & Moore (PEM).

Alan Hudson considers the changing face of restructuring.

Current market

The current market is characterised by compressed Gross Domestic Product, low demand and low interest rates. While there appears no shortage of capital trying to find a home, access for the large number of companies that need it but are already over-leveraged or effectively owned by their lenders is still limited, and with limited business failure most sectors have over-capacity, further limiting growth opportunities.

For restructuring advisers, against this backdrop we are seeing three key trends emerge – firstly, despite the economic problems and rise of so-called zombie companies' insolvency and in particular, trading insolvency, the related demand on IP firms' skills and resources has reduced. Secondly, the hoped-for market fix of a growing economy refloating companies' fortunes, which underpinned many

> “Most companies can't control who will own their debt.”

financial restructurings, is not there. Simply revisiting the balance sheet for a further round of financial restructuring needs to be replaced by an emphasis on operational restructuring, including board appointments and chief restructuring officers, to drive the change. Thirdly, the increasingly prominent role of funds as stakeholders who may look for more aggressive solutions – including greater debt conversion – means absent a crisis such as a new money need, consensual restructuring can take longer and be harder to achieve. This in turn is leading to a rise in the use of pre-packs and scheme solutions as a means to try and force through the deal.

With circa. €2.5tr of loans that need to be unwound in the coming decade, of which €1tr are expected to be 'non performing', demand for restructuring advice both financial and operational remains, but the nature of it could well change.

Emerging market trends

Portfolio loan sales and stagnation lead to new lenders and focus by companies.

The increasing trend to portfolio loan sales and re-emergence of debt trading, in part driven by Basel III banking regulations, means most companies can't control who will own their debt and could well end up

dealing with new, unfamiliar stakeholders with very different agendas to the traditional UK balance sheet lender. A record €65bn is estimated to have been sold through portfolio transactions in 2012.

As a result companies need to be better equipped to both engage with new debt owners and tackle the market challenges posed by the 'new normal'. This has led to a significant increase in demand for operational restructuring services, as well as an increase in company-side mandates as companies look to take more control of their own destinies with advice not only around cash and working capital, but performance improvement. This includes range rationalisation, reshaping supply chains and procurement, outsourcing and, critically, as you can't keep cutting, driving top-line growth – in addition to financial restructuring advice. This requires restructuring and insolvency professionals to increasingly draw on deep sector expertise, deploy their commercial experience in different ways and draw on broader complementary skills from industry and consulting.

As funds become an increasingly prominent feature in the lending market these non-traditional lenders can be more focused on short-term returns (i.e. make a quick return on a sub-par debt purchase), but often have more of a longer term ownership mindset. Both these approaches impact on the nature of advice and approach required from restructuring professionals. For example advising on how to maximise short-term leverage and issues in documentation to gain advantage and make a turn on a debt trade, through to advising on strategic market opportunities and business transformation coupled with a loan-to-own strategy.

These different approaches bring different challenges and needs from advisers and can also cause challenges in securing consensual solutions for both advisers and other stakeholders. As a result we may also see an increase in use of our insolvency skills for pre-packs, CVAs and schemes of arrangement as a means to deliver a deal where the required level of consensus cannot be attained.

One common theme, however, is that whether as a company, traditional lenders or funds, we see the demand for in-depth sector insight in the adviser increasing. For larger or specialist advisory firms this may be more readily available because of scale but we are also seeing instances of teams of advisers coming together on a proposal, loose alliances or even formal joint ventures, to bring together differing technical skills with sector knowledge and experience to meet the client needs.

What this means for restructuring advisers

Ultimately, in order to stay relevant, restructuring advisers need to be able to meet the changing demands and nature of stakeholders. Companies addressing operational as well as financial challenges, banks delaying action, and funds aligned to short-term gains or longer term ownership and transformation strategies, are all driving different trends in the insolvency and restructuring market.

Notwithstanding these emerging trends, we are seeing that restructuring professionals are still being sought to help stakeholders distinguish between sound

> “Restructuring professionals are still being sought to help stakeholders distinguish between sound and unsound business models.”

and unsound business models and ultimately support decisions around which companies are sustainable and deserve support, as against those that should be left to fail.

Demand for our services remains but is evolving and we must adapt. Restructuring advisers who can bring a combination of deep sector expertise and senior experience will be most relevant to today's stakeholder.

ALAN HUDSON is Head of UK&I Restructuring at Ernst & Young and an R3 Council Member.

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President's column

Liz Bingham opens her year as R3 president.

It was great to see many of you in Cannes for the annual conference. From Andrew Neil's ruminations on global power trends, to clinical psychologist Dr Adrian West's 'profile of a fraudster', as well as a host of strong technical content, the whole event gave me a great deal to think about for the year ahead. I have been very struck by the amount of positive feedback I have received about the event and the quality of the content.

The R3 Presidency sees many different personalities from within the profession taking up the role. I am pleased to become R3's third female president, offering some change in style but not a radical new direction in terms of content.

My background

To fill in some of my insolvency background: as a partner at Ernst & Young I am one of the architects of LASER (Liquidations and Strategic Exit Routes) delivering a high-quality technical and commercial service in relation to all types

> "I see myself more as ambassador than leader."

of liquidations, whether solvent or insolvent. The work is about maximising asset values or tax opportunities through formal insolvency processes and my biggest job to date was on Sea Containers.

I have another role at E&Y, as managing partner for people, and will be shining a light on the composition of our own profession. How is it doing? Well there is good news at entry level, with 41 per cent of JIEB passes this year being female. I am the third female R3 president in six years, fairly unprecedented for a trade body I would say. Furthermore R3's Council is just under 40 per cent female.

However, the main R3 membership clearly hasn't quite caught up yet – currently only 20 per cent are female. Looking forward, I'm not suggesting shoe-horning intricate equality and diversity policies onto small IP firms, but I do think our teams need to modernise and resemble the clients whose business we are pitching for.

Positive choices

My agenda for the year is to show those joining the profession, the rising stars, that they are embarking on a career full of positive choices and great role models, both male and female. I would like the networking offering to be as much aimed at them as everyone else and will be reaching out to them during my term.

However, apart from probably talking a bit less on retail and football, there are a number of ways I will be similar to outgoing president Lee Manning. Like him, I see myself more as ambassador than leader, and look set to continue many of his campaigns that, by definition, last longer than one year.

Challenges ahead

Yet again, we have to challenge ill-thought regulation when we face it. So far there are two challenges we need to get stuck into – on fees and pre-packs. I do hope you all contributed to the questionnaire we issued recently on fees – this information is so important in helping us make the case for why we provide good value.

There is also yet another review of pre-packs, which we will be contributing to. The recent BIS Select Committee report made a number of recommendations to improve transparency and confidence in pre-packs, which R3 supports, such as giving IPs the criteria by which SIP 16 reports are judged. So we hope that the review will use the Select Committee recommendations as a starting point.

One of my more ambitious goals would mean the end of negative press about the profession once and for all.

> "We must convince our stakeholders of the value of practitioner work."

Maybe we can't prevent journalists running negative headlines about us. But we must convince our stakeholders of the value of practitioner work and I hope to be leading that charge from the front.

LIZ BINGHAM is president of R3 and a partner at Ernst & Young.

Fuel and utility costs stifling growth

A third of all businesses feel economically restricted by the cost of fuel and utilities, an R3 survey has revealed. Only five per cent of respondents stated that an inability to secure further credit or a bank loan has hampered business growth, with around a quarter identifying reduced consumer spending as their biggest problem.

Just over 500 business owners and financial directors were surveyed for R3's April 2013 Business Distress Index but despite the fact the number of businesses reporting signs of financial distress has fallen significantly, outgoing R3 president, Lee Manning, has warned against being overly optimistic: 'Business growth is still very hesitant. Although so few businesses said that access to bank lending was a problem, this could also indicate that many businesses are not even bothering to go to banks for funding. While things aren't getting worse, they aren't improving either.'

He also pointed out that decreasing numbers of businesses in distress would not automatically lead to economic growth and despite and increase in the number of mid-sized 'gazelle' businesses – those reporting significant growth over the past three years – there were still too few in comparison to 'zombie' businesses.

You can find out more about the Business Distress Index on the R3 website news pages at **www.r3.org.uk**.

Chris Laughton honoured

Chris Laughton, editor of *RECOVERY* and a partner at Mercer & Hole, has been elected to honorary membership of INSOL Europe's Council. The honour is in recognition of Chris's meritorious service to the insolvency profession and outstanding work on behalf of the association as its president in 2010–11 and in relation to *Eurofenix*, the European Insolvency Regulation Case Register and communication. Past R3 presidents Louise Verrill and Patricia Godfrey were also made honorary members. Louise relaunched and was editor of *Eurofenix* from 2002 to 2004. Patricia (who was also of INSOL Europe) was R3 president in 2009-10 and established the association's Lenders' Group.

Peter Cooper appointed partner at Duff & Phelps global restructuring practice

Peter Cooper is to join the firm's London office working in the business consulting team, with a particular focus on providing effective turnaround solutions for the UK's main clearing banks and their clients. He will also be advising on solvent restructuring solutions for underperforming and distressed corporates.

Kodak bankruptcy exit

Eastman Kodak looks set to exit bankruptcy sooner than expected after its UK pension fund agreed a deal to buy its film and printing businesses for £419m. If the plan goes ahead, Kodak's film, photo-kiosks, amusement park souvenir photos and photographic paper would belong to the UK pension fund, leaving the company to focus on selling printing equipment and services to business. Both parts of the business are profitable. Eastman Kodak could exit bankruptcy as early as July provided the US bankruptcy court and creditors approve the plan.

Read more: **www.bbc.co.uk/news**

Baker Tilly appointed administrator to Sealine International

Graham Bushby and Guy Mander of Baker Tilly Restructuring and Recovery have been appointed joint administrators of luxury yacht and boat manufacturers Sealine International Ltd (Sealine).

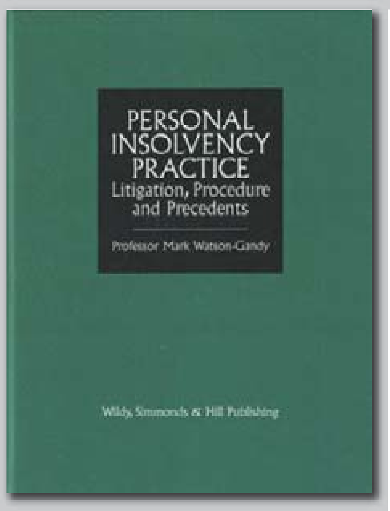
Of the 300 people employed at the Kidderminster-based company, 234 have been served with redundancy notices.

Graham Bushby said he and Mr Mander would be working to maximise recoveries for the company's creditors, including the sale of plant and recovery of monies owed to the business. He added: 'Sealine has been an important employer in the area over a number of years.'

The company, which celebrated 40 years in business last year, was bought by US private equity investors Oxford Investment Group in 2011.

Any parties interested in purchasing the assets of the business should contact Chris Cooke of Baker Tilly on 01908 687800.

Read more: **www.mby.com**



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Personal Insolvency Practice: Litigation, Procedure and Precedents

The publication of this volume, being a companion to Professor Watson-Gandy's *Corporate Insolvency Practice*, is a welcome addition to insolvency practitioners everywhere. While it is aimed at the legal profession, it will nonetheless be useful to insolvency practitioners of whatever discipline, particularly in the way in which it deals with all the usual applications that practitioners will come across in the administration of a personal insolvent estate.

Starting with the first step in bankruptcy (whether it be by way of debtor's petition or a statutory demand initiating a creditor's petition), all applications are covered in a logical manner. Each step is dealt with by reference to the sources of law, the application, the evidence and the order ultimately obtained. Information and advice is dispensed efficiently and in a manner that the reader will find very easily accessible.

It concludes with the toolkit or, 'What every insolvency practitioner needs to know about personal insolvency litigation but was afraid to ask.' The narrative draws attention to the practical information that ought to be readily available (the Chancery Guide) to information that can only be gained by experience (whether or not the advocate needs to be robed or not and when urgent applications are listed – Tuesdays and Thursdays during the legal terms). It is a sensible and valuable contribution: particularly because it emphasises matters that are not usually featured in the other more technical guides to insolvency law but which are, nonetheless, very important to the success or failure of the application.

A great deal of thought has gone into the preparation of the practical examples. The witness statements are produced in a logical form and readable manner (the IP, Mr Giles Grabber is plainly very busy!). Applications and consequent orders themselves provide an excellent checklist such that if anyone experiencing the joys of bankruptcy litigation for the first time, he or she will be able to go into court confident that all the bases that need to be covered have been dealt with.

All in all, any member of the legal profession professing expertise in this important and interesting area of practice should ensure that Professor Watson-Gandy's excellent guide is present on the bookshelf.

STUART FRITH is a partner at Stephenson Harwood LLP.

Making value judgments in liquidation

Adrian Cohen considers the issue of valuation of contingent liabilities in a liquidation.

Insolvency practitioners are entrusted to exercise, and regularly do exercise, their commercial judgment; it is interesting that the issue in this case, namely whether the liquidators were wrong to proceed with the liquidation by valuing the contingent claims, had never been considered by the English courts before. (The only other reported cases on the subject of contingent claims and distributions by liquidators, namely *Tooms and another* v. *Moulinex SA [2004] 2BCLC 397* and *Re RR Realisations Ltd [1980]1 WLR 805* were referred to in the *Danka* case but distinguished as they dealt with whether late claims should be admitted.) The fact that this was a novel issue for the court's consideration is not surprising, given that in most cases, any disagreements between the liquidator and the creditors as to quantum are usually resolved through negotiation. In the *Danka* case, there was a huge gap between the liquidators' estimate and the contingent creditors' claim. The contingent creditors, Ricoh, argued that on the basis the liquidation was a solvent liquidation, an estimate at less than full value of their claim exposed them to an unacceptable risk that had not been bargained for by the parties.

Who bears the risk?

By way of brief background, the contingent creditors' claim arose as a result of a tax indemnity contained in a share sale agreement. The tax liabilities concerned various European subsidiaries in the *Danka* Group. As is usually the case with such liabilities the likely quantum of such claims fluctuated over time; the worst case scenario was that the contingent liabilities could amount to as much as €11m. In this case, another important feature, which the contingent creditors argued distinguished this case from other liquidations, was the fact that it concerned a members' voluntary liquidation (MVL). The estimated surplus appearing in the declaration of solvency was $66m. As such, it is perhaps unsurprising that the contingent creditors felt sufficiently aggrieved to initiate a claim (see key dates summary).

> "For the most part, any disagreements between the liquidator and the creditors are usually resolved through negotiation."

The need for speed

At first instance much of the court's time was taken up looking at the terms of the share sale agreement and how its provisions were to be interpreted: the agreement was governed by Dutch law and relied upon expert evidence. The reason for this was that the liquidators had maintained that the provision for the tax claims relating to the German subsidiary should have been made in the completion accounts and that had such liabilities been included, the total value of the other claims made by the contingent creditors would then have fallen below the threshold that triggered the tax indemnity. The liquidators were of the view that their defence had a 50 per cent likelihood of success and therefore valued the contingent claims at 50 per cent of their full value. While at first instance, the court found against the liquidators in terms of the interpretation of the share sale agreement, it held in their favour in relation to the contingent liabilities valuation issue. On this latter issue, it was held specifically that once an MVL had been commenced, a creditor was able to prove in that liquidation process; in respect of contingent claims, Rule 4.86 is a mandatory rule and its application obliges a liquidator to estimate the value of the claim. The judge's rationale was that the statutory scheme was designed to place a present value on uncertain claims to enable the liquidation process to be brought to a speedy conclusion and unless it could be demonstrated that the liquidators had acted in a manner that no liquidator acting reasonably would have adopted, the court would not interfere with the liquidators' commercial judgment (see table 1).

> "The nature of the indemnity was irrelevant to the liquidators' assessment of the contingency."

Valuation gap narrowed

By the time the case reached the Court of Appeal, the issues in relation to the interpretation of the relevant contractual provisions had been resolved and the difference in financial terms between the parties had diminished considerably (see summary table of contingent claims' valuation in table 2).

A matter of principle

It was therefore a matter of principle whether the liquidators should be entitled to distribute the assets of the company to its creditors and members, without making provision in the form of retention for the worst-case assessment of the relevant tax liabilities. The contingent creditors challenged the existence of an obligation on the part of a liquidator in an MVL to proceed immediately to value the contingent claims and to make distributions to creditors and members on the basis of such a valuation. A further issue was whether, once the contingent claims had been admitted to proof and valued, the liquidator had a residual discretion to delay a final distribution until after the outcome of the contingency had been determined.

No need to reserve for full contingency on MVL

The Court of Appeal decided the matter unanimously in favour of the liquidators. While initially the contingent creditors had threatened to apply for an injunction to restrain the liquidators from proceeding to valuation, no formal application was made in this regard; the relief sought under S112 Insolvency Act 1986 (IA 1986) was for an order requiring the liquidators to retain or ring fence the sum of €11m from any distribution to members until either the contingent claims have crystallised or the period covered by the indemnity had expired. As such, the Court of Appeal did not have to consider whether the decision to serve the notice of an intention to make a distribution to creditors pursuant to Rule 4.182A and to proceed to valuation was 'reasonable' in accordance with the principles established in previous case law. Arguably, these aspects are of more interest in practice, specifically from the perspective of a liquidator in deciding whether to embark upon the distribution at such an early stage given the longtail nature of certain contingent claims. No guidance is given in this regard in the judgment.

The appeal was limited to the operation of the statutory process of valuation and distribution. In this case, clearly from the members' perspective, ensuring a speedy distribution of the $66m anticipated surplus was a key factor in pursuing a solvent liquidation process. The distribution as between creditors and members was the starting point for the Court of Appeal and specifically the provision in S107 IA 1986, which provides for the company's property in a voluntary winding up to be applied in satisfaction of its liabilities and, subject to that application, distributed to members. However, the Court of Appeal observed that this provision does not specify the exact procedures for valuing claims or a specific timetable for distribution but it does clearly establish that the rights of members only arise once the liabilities are satisfied. Therefore, the liquidator in both a solvent and insolvent liquidation must ensure that creditors are adequately provided for.

Liquidators must play by the rules

The procedures for valuation and distribution are contained in the Insolvency Rules. The Court of Appeal held that the extent of liabilities must therefore be determined in accordance with those rules. The key rules for the purposes of the *Danka* case were Rules 4.182A and 4.86: Rule 4.182A triggers the start of the proving process and notifies creditors of the fact that a final dividend is to the paid; Rule 4.86 contains a mandatory rule for liquidators to estimate the value of (among others) any contingent claims.

> "There is now clear authority on how a liquidator must approach the valuation of contingent claims and facilitate a distribution."

'Wait and see' is not the same as valuation

Usefully, the Court of Appeal articulated what is required of a liquidator in his approach to the valuation of contingent claims. Patten LJ states at paragraph 43:

'Any valuation of a contingent liability must be based on a genuine and fair assessment of the chances of the liability occurring… The liquidator must therefore use his own expertise and that of any relevant advisors to make a realistic estimate of the likelihood of the Infotech companies sustaining the tax liabilities… He is not simply to "wait and see". That is the opposite of valuation.'

While the contingent creditors had argued that the indemnity was to operate as a kind of insurance against a prospective loss, from the perspective of the liquidation, the nature of the indemnity »

TABLE 1: Key dates summary

October 2006	Danka enters share sale with Ricoh
January 2007	Share sale completes
February 2009	Danka placed into MVL
March 2009	Liquidator gives notice of intention to make final distribution
April 2009	Ricoh lodges a proof of debt as a contingent creditor
March 2012	first instance hearing
November 2012	Court of Appeal hearing
February 2013	Court of Appeal judgment

TABLE 2: Summary table of contingent claims' valuation

Country	Creditors' proof of claims (Feb 2010)	Liquidators' valuation (Mar 2010)	Assessment at appeal (Nov 2012)
Germany	€3.3m	Nil	Nil
France	€5.1m	€27k	€27k
Italy	€3.2m	€173k	€331k
Spain	€193k	€67k	Nil
Total	**€11,793m**	**€267k**	**€358k**

was irrelevant to the liquidators' assessment of the contingency. The Court of Appeal confirmed that there was nothing in Rule 4.86 requiring a liquidator to guarantee 100 per cent return, as to do so would, in theory, be unfair to other creditors and members. In addition, the Court of Appeal held the valuation provision contained in Rule 4.86 must apply in the same form to both solvent and insolvent situations.

Estimation of contingencies: the same for solvent and insolvent liquidations

The decision by the Court of Appeal is not unexpected. It must be reassuring from a liquidator's perspective, and also for members in a solvent voluntary liquidation process, that there is now clear authority on how a liquidator must approach the valuation of contingent claims and facilitate a distribution. It also serves as a reminder that, when approaching the issue of valuation, a liquidator must act reasonably and in practice, proper assessments and independent valuations may be required. Although in this case the liquidator was appointed in a solvent liquidation, it is useful to note that the case confirms that there is no distinction in the approach to estimating the value of contingencies in either a solvent or an insolvent liquidation. In this respect, it reinforces the view that where there are contingent claims in either solvent or insolvent liquidations, the liquidation process need not be extended to allow for the contingencies to be determined before making a final dividend to creditors or members as appropriate. This allows for liquidations to be concluded on a timely basis.

While the case is not surprising from an insolvency professional's perspective, it may at first appear counter intuitive to those in a general commercial context, who may expect an MVL to provide for all creditors in full, when in fact there is a risk that contingent creditors may get less than 100 per cent once their claims have been estimated by the liquidator. The case illustrates that the Insolvency Rules facilitate a process whereby those contingent liabilities can be estimated before they are determined and that estimate may be at less than full (worst-case assessment) value in the appropriate circumstances. As the facts of this case show, ultimately, the worst-case scenario value for the tax liabilities would have been entirely inappropriate.

> "Those who have the benefit of indemnities should not consider that they are worth less, or worthless, in the context of a liquidation."

However, it is important to note that the implication of this case is not that indemnities can be generally avoided in a liquidation scenario. Those who have the benefit of indemnities should not consider that they are worth less, or worthless, in the context of a liquidation. It may, however, encourage those looking to take advantage of such indemnities to seek further contractual protections to prevent a solvent liquidation being pursued before the end of the indemnity period if they want full protection for any claims that may arise.

Declarations of solvency

While the case does not have any direct impact on the solvency declaration under S89 of IA 1986, it should be remembered that no estimation mechanism is referred to in that particular provision of the insolvency legislation. In such circumstances, absent any clear justification for not providing for contingencies in full, in most cases, the most prudent course for directors would therefore be to provide for the worst-case assessment. It will then be a matter for the liquidator to estimate the value of the claim in accordance with Rule 4.86 for the purposes of any distribution. In the *Danka* case there was no detailed consideration of the declaration by the directors, other than the anticipated surplus of $66m. Given the extent of the surplus, it is hardly surprising that the directors were comfortable in forming the opinion that the company would be able to pay its debts in full within the 12-month period. This case acts as a reminder to directors of their obligations to scrutinise the liabilities of the company very carefully before making the declaration for the purposes of pursuing an MVL.

Insolvency practitioners: business as usual

For liquidators acting in cases where there are contingent liabilities, one could say that it is business as usual; as long as contingent claims are considered in an appropriate and proper manner, liquidators will be justified in making distributions based on estimates pursuant to Rule 4.86. While there is now clear authority that the application of the rule is mandatory, the Court of Appeal recognises that liquidators will still have to decide when to trigger the rules. Although the case underlines the importance of liquidations being carried out in an efficient manner there will of course be certain cases where an early distribution is not possible and where it may be entirely reasonable to delay the start of the proving and valuation process. However, once the decision to start the process has been taken, the liquidator, as this case shows, is under an obligation to proceed in an expeditious manner. This case offers a rare insight into the Court's approach to valuation in the context of liquidation. As mentioned at the start of this article, in most cases provisions for contingent claims will be agreed or negotiated and it is unlikely that this case will change that practice. ◻

Comment

In the same way as creditors in a restructuring are often concerned about being 'left out in the cold' by virtue of an unfavourable valuation, in liquidations too, creditors can be concerned about not receiving their dues. – *Adrian Cohen*

ADRIAN COHEN is a partner in the restructuring and insolvency group at Clifford Chance LLP.

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Recent case summaries

Personal and corporate insolvency update from **Claire Jackson**.

Personal insolvency

***Appleyard* v. *Wewelwala* [2012] EWHC 3302 (Ch)**

Facts: Mrs Wewelwala was made bankrupt on a creditor's petition in April 2011. Her application to appeal was refused on paper. A trustee in bankruptcy was therefore appointed and began discharging his duties as trustee and incurred expenses. An oral application to appeal was made and in December 2011 the appeal allowed and bankruptcy order set aside for reasons not clear to the instant court. No order was made for the trustee's release from office or for payment of his then expenses. The trustee therefore applied to the court for directions in May 2012, by which time he had incurred further expenses.

It was common ground that 'A' should be released from office. The High Court held that it had inherent jurisdiction to deal with a trustee's expenses where a bankruptcy order was set aside on appeal as a necessary consequence of such an order.

Briggs J commented that the application raised a curious and perhaps surprising lacuna in bankruptcy law. However, he went on to find that there was no reason why the jurisdiction established on an annulment regarding a trustee's expenses should not extend to cases

> "…the application raised a curious and perhaps surprising lacuna."

involving an appeal, given that one ground for annulment was that the bankruptcy order ought not to have been made. Hence the jurisdiction conferred on the court regarding expenses should be the same in each case and should deal with whether the trustee should have his expenses paid and, if so, by whom, or out of what fund.

Held: Briggs J found applying such to the case before him there was no reason in principle why the trustee's expenses should not be paid, to the extent that they had been incurred prior to the date when he had been notified of the setting aside of the bankruptcy order. Until then, he had been simply doing his duty as trustee. The more difficult questions were from whom the expenses should be paid and to when.

It was not fair to order Wewelwala to

pay personally, however, her estate could stand a charge of payment. Having acted entirely properly and innocently the trustee's rights to recover his expenses had to prevail over Wewelwala's right to enjoy to the full her estate upon its re-vesting in her.

The court therefore ordered that Wewelwala's property stood charged with payment of the trustee's reasonable expenses limited to January 2012.

Corporate insolvency

***Hunt* v. *Hosking and others (Re Ovenden Colbert Printers Ltd)* [2013] EWHC 311 (Ch)**

Facts: Ovenden Colbert Printers Ltd entered into administration in April 2006. It later entered into liquidation in March 2009. The instant proceedings followed complaints against the first respondent, a licensed insolvency practitioner, by the liquidator of the company, but which were not relevant to the hearing before the court. The proceedings related to allegations raised by the liquidator pursuant to section 238 of the Insolvency Act 1986.

Prior to the administration of the company and between December 2004 and July 2005 the company made payments of £224,951.11. The liquidator of the company asserted that the payments were made to, or at the direction of, the first respondent and were transactions at an undervalue. The first respondent provided evidence that payments had been made under two fee agreements. Those agreements were not challenged by the liquidator. The first respondent applied for summary judgment or to strike out the claims brought by the liquidator. The issue for consideration by the court was therefore whether the liquidator's claim had a reasonable prospect of success or whether the claim was bound to fail.

The High Court permitted the application for summary judgment against the liquidator to proceed. It then concluded that where the removal of a company's money occurred, it was insufficient simply to assert that there had been dealings on the account where monies

> "It was impossible to see how the company had effected the transactions in question."

had been removed that belonged to the company: as the statute made clear there had to be a transaction at an undervalue which the liquidator sought to avoid.

Held: Peter Smith J found that the liquidator's claim as formulated was bound to fail and/or had no prospect of success. The fundamental difficulty facing the liquidator was that it was impossible to see how the company had effected the transactions in question. It was insufficient simply to say that there were matters which required investigation. On the facts, the company had not entered into a transaction that the liquidator could review. The only transactions it had entered into were the two fee agreements and those were not under challenge. As to the payments, if they had been authorised so as to be transactions, they also could not be challenged unless the agreements were challenged. If the payments had been unauthorised, there was no transaction.

The application was therefore allowed and the transaction at an undervalue proceedings dismissed. □

CLAIRE JACKSON is a barrister at Kings Chambers.

Legal Q&A

Stewart Perry and Andrew Twomey answer your insolvency queries.

I have been appointed as the trustee in bankruptcy of a sole trader who has significant amounts of machinery over which he gave security more than five years ago. Is there anything I can do to set it aside?

You will be aware that normal Insolvency Act claw-back provisions (save for transactions defrauding creditors) will not assist if the charge was granted more than five years before the petition, however, the Bill of Sales Act 1878 and the Bill of Sale Act (1878) Amendment Act 1882 (Acts) may assist. The Acts were introduced primarily to protect third parties who gave credit to a debtor on the strength of the debtor's apparent ownership of chattel assets that were later argued to belong to, or be secured in favour of, someone else. Accordingly, stringent formal requirements were set out in the Acts, including attestation and formal registration procedures, to ensure that third parties could be aware of the claims by the other party. Failure to comply with these requirements would deem the effects of such a bill of sale void against trustees in bankruptcy. As the costs of properly entering a bill of sale are not insignificant, they tend to only be entered into for security granted over valuable paintings or antiques.

> "Stock and other chattel assets may not belong to the company…"

In terms of its application, the Acts apply only to:

(a) *chattel assets* meaning goods, furniture and other articles capable of being transferred by delivery, save for those transferred in the regular course of business (eg stock). It does not apply to land or intangible assets such as insurance policies

(b) *bills of sale* meaning documents which evidence the transfer of one person's property in chattels where the actual possession is not intended to be given immediately (this encompasses both absolute sales and security assignments); and

(c) *natural people* the Acts do not apply to companies or LLPs.

If the bill of sale is caught by the Acts and the formal requirements are not met, the bill of sale is void as against a trustee in bankruptcy in respect of all chattels purportedly assigned and which remain in the *'apparent possession'* of the bankrupt. *'Apparent possession'* means the chattels are, or remain in, any house, building, land or other premises occupied by the bankrupt or are used and enjoyed by him in any place whatsoever.

In this case, therefore, on the basis the formal requirements of the Acts were not complied with, the security is void as against the trustee for any machinery in the bankrupt's apparent possession.

I am advising the foreign purchaser of assets from administrators who are, as usual, giving no warranties as to title to the assets. What risks should I bring to their attention?

A prudent purchaser should always carry out as much due diligence as is possible when purchasing assets from administrators. The purchaser's solicitors should review any security registered against the company at Companies House and ensure that it obtains deeds of release from the relevant charge-holders. Floating charges are not possible in many jurisdictions around the world, so you will have to explain these.

If real property or registered trademarks are part of the assets that the purchaser is acquiring, searches should be made at the Land Registry and trademark register at the Intellectual Property Office so the purchaser can be sure that the assets have been properly registered in the name of the company and not another party that has leased/licensed a right to the company.

If the purchaser is also acquiring assets from premises that are occupied by the company under a lease, a further complication may arise as to whether the assets are 'fixtures' and therefore form part of the landlord's property, meaning of course that the company cannot sell them. Case law has developed a two-fold test known as the 'degree of annexation' and 'purpose of annexation' to decide in borderline cases whether an object is either a fixture (landlord's property) or a chattel (the company's property). Again, these rules can be different overseas and specialist advice and/or the landlord's agreement as to ownership should be obtained if these items are of particular value or importance.

Lastly, stock and other chattel assets may not belong to the company if they are subject to valid retention of title (RoT) clauses or were acquired by the company on hire purchase/lease arrangements. Most jurisdictions have rules akin to RoT, but some purchasers expect there to be comprehensive registration. In most cases it is not practical for the purchaser to carry out a comprehensive review. It may, however, be appropriate for enquiries to be made with the administrators as to any assets of significant value or importance and significant creditors of the company who may have RoT rights, and then limited investigations can be made. This should enable the purchaser to weigh up the potential risks of paying for assets that may not belong to the company.

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ANDREW TWOMEY is a senior associate in the Insolvency and Reorganisation department at Clyde & Co LLP.

Technical update

Transfers of Undertakings: more change on the way?

In January this year the Department for Business Innovation and Skills (BIS) issued a consultation on proposed changes to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (the Regulations). We thought it would be helpful to outline the principal proposed changes insofar as they relate to insolvency proceedings and the response made to them by R3's General Technical Committee.

Some readers may recall that R3 was very unhappy about the way in which the Regulations, which adopted the corresponding European Directive, were drafted. In particular we were concerned about the meaning of 'insolvency proceedings which have been opened in relation to the transferor not with a view to the liquidation of the asset…' (Regulation 8). Were administrations in or out? We sought clarification. We wrote to the government; there was a debate in the House of Lords (resulting in a government majority of one vote) and we wrote again, but to no avail. The drafting remained unchanged.

In the absence of clarification we said there would be extensive litigation. It was not a difficult prediction; had bets been placed the odds are likely to have been very poor. Sure enough 'TUPE Confusion' romped home with a series of cases culminating in the helpful (i.e. decisive) Court of Appeal case, *Key2Law (Surrey) LLP* v. *De'Antiquis*. In that case the court decided that the over-riding purpose of administration was rescue not liquidation and therefore the TUPE exemption did not apply to administrations. It was rumoured that this decision might be subject to appeal but so far as we are aware no appeal is pending.

> “The court decided that the over-riding purpose of administration was rescue, not liquidation.”

So does BIS propose to amend the drafting of Regulation 8? No. It is the government's view that *Key2Law* 'has provided sufficient clarity and that it is not necessary to amend TUPE to give certainty'. This conclusion is understandable; any legislative change might give rise to further uncertainty and litigation. On the other hand someone might decide to take a case to the Supreme Court and, perhaps of greater substance, TUPE will always apply in administrations with the consequent discounting of bids to the detriment of creditors.

BIS does, however, propose a number of changes affecting insolvency proceedings, which we welcome.

Firstly, it is proposed that the transferor should be able to rely upon the transferee's economic, technical and organisational (ETO) reasons in respect of the pre-transfer dismissal of employees. This seems sensible in that it would reduce the inequity of the transferee bearing the cost of an automatically unfair dismissal, which would not have been unfair had it been made following the transfer. It would

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also reduce the absurdity of employees being transferred to the new employer only to be dismissed for ETO reasons the next day; and it might result in improved returns to creditors.

Secondly, it is proposed that steps taken by the transferee to consult employees in connection with collective redundancies before the transfer takes place should count towards the obligation of the transferee to consult on collective redundancies. This would seem to allow a faster, more streamlined process and is therefore to be welcomed.

> "In recent years… there have been at least six consultations on the subject."

Thirdly, BIS proposes that ETO reasons entailing changes in the workforce should include changes in the location of the workforce. Currently it seems that a change in location is automatically unfair where there is a transfer but is capable of being fair where there is no transfer.

At the time of writing the consultation is still open. Whether these changes come to fruition remains to be seen.

R3's response to the consultation can be found at www.r3.org.uk.

Registration of company charges – a new regime at last

A new regime for the registration of company charges came into effect on 6 April 2013. It has been a long time coming. Readers may recall that a new registration system was set out in Part IV of the Companies Act 1989, but this was never brought into effect. In recent years, to the authors' knowledge, there have been at least six consultations on the subject, including three Law Commission papers. The new system is introduced by the Companies Act 2006 (Amendment of Part 25) Regulations 2013 (2013/600), and is not as radical as some of the earlier Law Commission proposals. There is a useful summary on the Companies House website at: **www.companieshouse.gov.uk/pressDesk/news/part25CompaniesAct.shtml**

The principal changes are:

- The new regime applies across the UK. There is no longer a separate regime for Scotland.
- In place of the current list of registrable charges, the new regime applies to all charges created by the company except those excluded as specified in the Companies Act itself or any other legislation.
- At present, the only charges specifically excluded are:
  - a charge in favour of a landlord on a cash deposit given as security in connection with the lease of land, and

  - a charge created by a member of Lloyd's to secure its obligations in connection with its underwriting business.
- The criminal offence for failure to register a charge is removed. However, charges must continue to be registered within 21 days, failing which they will be void against a liquidator, administrator, or creditor.
- The court may extend the period allowed for delivery in specified circumstances.
- The 21 day limit for filing particulars of an existing charge on acquired property is removed.
- On registration, a certified copy of the instrument of charge must be submitted to the registrar. For those who file electronically the copy will need to be in PDF format, with a maximum file size of 10MB. Sensitive information can be redacted.
- A lender authorisation code will be required for electronic filing.
- Unique reference codes will be allocated to each charge registered, to make it easier to link charges to related filings.
- There will be new forms for companies and LLPs. For the first time there will be separate forms for the registration of charges created by an instrument and those created where there is no instrument.

Charges and references

'Charge' is not a term of art in Scots law, but the Act now defines it as including any right in security constituted under the law of Scotland other than a pledge (that is, a security over corporeal moveable property which, in Scots law, must be constituted by actual or constructive delivery). The list of registrable charges contained in the repealed Section 878 is not re-enacted, so that a charge over property not listed there (for example, shares) is registrable under the new provisions, as is a charge constituted under a law other than that of Scotland.

As noted in *Dear IP57*, there will be changes to the forms used to notify the registrar of a receiver's appointment and ceasing to act. Old forms LQ01 and LQ02 are replaced by forms RM01 and RM02, which require similar information. However, if the charge was created before 6 April 2013, the person appointing the receiver or manager needs to provide the date of the creation of the charge, the description of the instrument (if any) creating or evidencing the charge, and the short particulars of the property or undertaking charged. If the charge was created on or after 6 April 2013, the person appointing the receiver or manager needs to provide the unique reference code referred to above and a short description of the property over which the receiver or manager was appointed.

Forms RM01 or RM02 are available from the Companies House website and on the forms section of the R3 website. These changes only apply in England, Wales and Northern Ireland. Notice of the appointment, or cessation, of a receiver in Scotland remains unchanged.

Separate legislation has also been passed to amend the charge registration regime for limited liability partnerships in the same way, See the Limited Liability Partnerships (Application of Companies Act 2006) (Amendment) Regulations 2013 (2013/618).

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No country for faint hearts

Sam Hawkins examines the challenges an independent IP faces.

Developing a viable business from scratch is a daunting task especially when that business operates in a regulated environment, such as law, accountancy or insolvency. It can reasonably be assumed that some of the requirements of setting up as an IP are not exclusive to insolvency but there is an overlap compared with setting up a law firm or accountancy practice. Prior to any marketing or practice as an IP, full attention is needed to the law, to the rules, best practice guidelines and by-laws of the regulatory body. Neglect wider regulatory matters and generic legislation covering fire exit signs and no smoking policies at your peril!

Should have gone to Specsavers

Once the regulatory matters have been dealt with focus needs to move to principles of vision and focus. This is fundamental in any business strategy. Having a clear vision of where the business is going is essential and having the focus to drive that vision is vital in achieving any level of success. It's important to have the ability to effectively communicate your services to your target market. Essentially, this must be coupled with good technical knowledge so that trust and integrity are established at an early stage.

> "Listening to others, who will tell you when you are wrong, is healthy and essential."

Working capital

A small firm may not have the finance or infrastructure for providing a dedicated 'Compliance & Regulatory Team' responsible for overseeing the requirement for bonds and licences etc. Set a budget for initial expenditure. This must cover the appointment taking licence, bond, PII, premises, equipment, marketing, websites, initial disbursements and other expenditure including regulatory matters such as data protection regulation. The budget must be realistic. An awareness of the monthly fixed overheads can assist in assessing net profit.

From a cash-flow perspective, securing appointments early entails fees generated to replenish a diminishing working capital. Funds should be retained to cover inevitable unforeseen expenses.

Assembling a business team

A pro-active approach to marketing and brand building is a must, as is the necessity to surround yourself with people you can trust to give honest and frank advice. Listening to others, who will tell you when you are wrong, is healthy and essential. The insolvency workplace should not be conducive to sycophants.

A successful team should be varied. We all have strengths and weaknesses. Having a team with whom you can brainstorm is a key aspect in success. If someone is not fully committed they are not a useful part of the team in a new business venture.

Good business versus bad business

As with all marketplaces, there are 'good customers' and 'bad customers'. It is important to be on guard for bad customers who will look for loopholes or ways to exploit the business for their own gain. Be instinctive about potential jobs. Going with your gut instinct, and not taking a job, is tough but may be the right decision if it doesn't feel right from the outset.

Think about where your potential work will come from. An IP firm cannot be predicated upon one or two sources of work. Aim to have referrals from a diverse range of professionals and lay people from all areas of the market. Actively review and manage your relationships, stay in touch with contacts and be prepared to invest time.

Competition and dealing with other IPs

Shaking down the tree every now and again is no bad thing. However, do not divert focus from your business by being overly concerned with what other IPs are doing. With the advent of social media, such as Twitter and LinkedIn, it is tempting to 'lurk' on the web to see what's going on. This is time-consuming and distracting. Make it a firm policy not discuss other IPs, unless they are doing something amazing and innovative. If they are, there may be lessons to learn.

> "Make it a firm policy not discuss other IPs, unless they are doing something amazing and innovative."

As with all contentious business environments the marketplace can be hostile. As an IP, this goes with the territory but you can take a robust approach to the market. There is space enough for everyone. Play nice and be polite, you never know when you will meet again.

Unforeseen expenses

To maintain success and momentum, be mindful of what you can't see around the next corner. This could be an unexpected cause of action, bad debts, loss of market share, or change in market conditions. Unless you have contingency the business may not make it through a drought in work.

Control of the IP

Anyone thinking of setting up as an IP needs to consider, that as officers of the court, our commercial decisions are open to challenge. After April 2013, all complaints will be first addressed through a single gateway via The Insolvency Service. This should weed out spurious complaints, which means the IP spends less time dealing with meritless disputes.

Learner driver

Having said all this, setting up any business is a challenge but the rewards can be fantastic. Setting up as an IP is a bit like learning to drive and passing your test. The real challenges occur the first day you start trading!

SAM HAWKINS is principal partner at Hawkins and Company.

Raising awareness of deep distress in debtors

Co-founders **Ian Williamson** and **Peter Harris** explain how CAMIAD is establishing across the UK.

After attending the campaign's recent training workshop in Manchester, an insolvency practitioner, with more than 30 years' experience, said that while he and other professionals at the 'coal face' of debt had to make decisions with serious consequences it was crucial to ensure they were made with sensitivity and compassion.

Another attendee, a younger man from the business restructuring division of an international accountants, said that all professionals had a duty to behave 'morally and ethically when dealing with clients who are fragile.'

Their comments are, in effect, a definition of the aims, objectives and rationale of the Campaign for Awareness of Mental Illness Among Debtors (CAMIAD), which held its first training workshop to help IPs and other professionals detect mental health problems, and even suicidal tendencies, among debtors and directors a year ago. Perhaps the key word is awareness: Not for a moment are we suggesting that IPs and others who have direct contact with debtors – typically solicitors, accountants, bankers and lecturers – should become mental health professionals. Nor are we suggesting that IPs should 'go soft' on debtors. But they can benefit from acquiring the skills to recognise if a director or debtor has any serious underlying mental health issues or, at worst, is suicidal, and how to signpost them on for appropriate help and treatment.

> "It is often the elephant in the room and most people will feel a great sense of relief that they have been asked the question."

One-day courses

Clearly, issues of confidentiality make it impossible for IPs to alert a debtor's family or GP if a serious mental issue is identified but we can provide that debtor with the details of organisations and agencies they can contact themselves and which can be a lifeline. Those attending the intensive CAMIAD one-day courses are told simply what and what not to say to debtors and how, where a debtor shows signs of real distress, to raise the question of suicide. It is all about raising awareness. Too often, IPs can forget the mental stress that being in debt creates.

Course leader Nigel Crompton, a senior mental health nurse and Head of Service Development with Cheshire and Wirral Partnership NHS Foundation Trust, makes it clear that IPs dealing with distressed debtors should certainly not be afraid to ask their clients if they had ever felt that suicide was the only way out of their problem.

'It is often the elephant in the room and most people will feel a great sense of relief that they have been asked the question,' he says.

Spreading interest

When the idea for CAMIAD was first conceived a little over two years ago, we could never have predicted that its ideals would be so readily accepted by IPs and other professionals and that interest in it would spread so rapidly across the country. After two courses on NHS premises in Ellesmere Port, Wirral, delegates have attended courses in Manchester and Stoke-on-Trent and others are now in the planning stages for Oxford, Bristol, Bath, Canterbury and London.

There are now plans for a high-profile event in October in conjunction with the School of Applied Social Science at the University of Brighton, which earlier this year published a widely reported research paper showing that irresponsible lending and intimidating debt collectors 'are pushing thousands of people in Britain into depression and suicide.'

The report goes on to press for government action to tackle the problem in respect of intimidating collection tactics and irresponsible lending.

The outline plan is to hold a debt and mental health conference in the morning, with invitations extended to IPs, academics and lenders, and for this to be followed by a CAMIAD training session in the afternoon and early evening.

'CAMIAD is now expanding into so many diverse areas and over such a wide area of the country, it has reached the stage where I am physically unable to undertake all the training course myself and am having to train more trainers,' says Nigel Crompton. 'Its impact and the interest it has aroused has quite taken us all by storm.'

Testimonials

Support for CAMIAD has also come from disparate bodies and organisations both here in the UK and overseas. Maria Nyman, Director of Mental Health Europe, said, 'Increasing understanding among professionals dealing with debtors could help people with mental health problems better access the support they need,' and we have been fortunate in receiving similar testimonials from MIND, the Royal College of Psychiatrists, the British Association of Social Workers and a host of professional and trade bodies, including R3.

> "Irresponsible lending and intimidating debt collectors are pushing thousands of people in Britain into depression and suicide."

For more information about the training courses contact Peter Harris, tel: 01606 334942, 07854 831845 or email: harris@libracom.u-net.com or Andy Hayward at the Cheshire and Wirral Partnership NHS Foundation Trust tel: 01244 397391 or email: andy.hayward@cwp.nhs.uk.

IAN WILLIAMSON is a partner with insolvency practitioners Campbell Crossley and Davis.

PETER HARRIS is a medical journalist and CAMIAD's director of communications.

What value the insolvency industry?

Will Black considers the latest ComRes research and assesses the direct and indirect value insolvency practitioners add to the UK economy.

What does the UK insolvency industry bring to the UK economy? Do IPs actually 'save' jobs? Or, rather, do they merely kick the can down the road with the inevitable fallout at a later date? Doubts have been raised recently about the image of the 'rescuer IP' in light of Sports Direct's closure of 12 stores it had acquired out of the administration of fashion chain Republic just two months earlier. While these closures may represent a small proportion of the 116 stores acquired by Sports Direct, nevertheless the narrative in the media jarred.

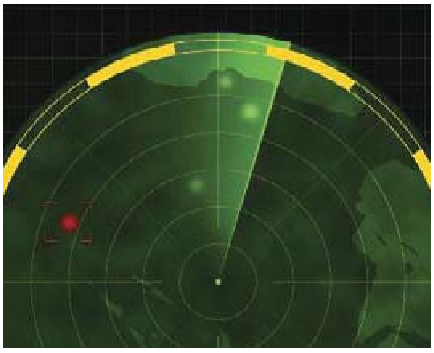
Jobs saved?

Rather than saving these stores and jobs, it was claimed, the insolvency process had provided little more than a stay of execution and arranging for someone else to wield the axe. So what do we mean when we say IPs 'save' jobs? Clearly we cannot make it a condition that these jobs must survive forever more – circumstances change and businesses, as they have ever done, make decisions for themselves about their own future.

> "ComRes estimates the UK insolvency industry has saved more than 750,000 jobs and over 6,000 businesses in 2012."

If IPs cannot be held responsible for decisions over which they have no control, then critics have to concede that this must extend to job losses or store closures even within days of a sale out of administration. IPs can reasonably be said, therefore, to 'save' those jobs that they pass on to the care of others. Just as they do not bear responsibility for the financial difficulties of the businesses they are appointed to, so they cannot be held responsible for the decisions of purchasers, however unfortunate the timing.

As evidenced by new – or rather updated – research by ComRes on behalf of R3, the profession is, indeed, rather good at saving both jobs and businesses. In fact, ComRes estimates the UK insolvency industry has saved more than 750,000 jobs and over 6,000 businesses in 2012.



The research emphatically shows that engaging IPs need not signal the end of a business or the jobs it supports. 'ComRes' analysis found that 45 per cent of businesses IPs advised in some capacity, avoided full closure. Of those that went into formal insolvency, 27 per cent continued in some form.

Under the radar

For this 45 per cent survival bracket, we can show practitioner work involves advising a business pre-insolvency or restructuring, often overlooked and by necessity under the radar, and falling outside formal insolvency work.

These figures come against a background of falling insolvency cases, an 11 per cent decrease from 2009, from 25,432 cases in 2009, down to 22,590 in 2012. This would explain a decrease in the number of jobs saved by IPs from 2007's figure.

ComRes went even further and examined the ONS Input–Output tables from 2010 to work out the direct and indirect contribution of the insolvency industry. They model the insolvency industry as four per cent of the 'accountancy services' sector in terms of employee number estimations.

The direct contribution is the amount the industry actually 'generates' and derives from the ONS Annual Business Inquiry (ABS). The ABS provides a number of high-level indicators of economic activity such as the total value of sales and work completed by businesses, the value of purchases of goods, materials and services, and total employment costs.

Other values

This comes up with a gross value added (GVA) figure representing the amount that individual businesses, industries or sectors contribute to the economy. Broadly, this is measured by the income generated by the business, industry or sector less their intermediate consumption of goods and services used up in order to produce their output. GVA consists of labour costs (for example, wages and salaries) and an operating surplus (or loss). The latter is a good approximation to profits. The cost of capital investment, financial charges and dividends to shareholders are met from the operating surplus.

According to this methodology the insolvency industry added a gross value of £580m in 2010. If that wasn't enough, ComRes have also worked an 'indirect contribution' or 'upstream purchases' – that is, the upstream effect of the insolvency sector buying goods and other services from other industries such as buying consultancy or IT supplies from other sectors. And that comes to £159m for 2010, which combined with the direct contribution makes £739m as the total financial contribution made by the insolvency industry in 2010.

> "According to this methodology the insolvency industry added a gross value of £580m in 2010."

I'm not sure one should bandy these figures around, unless the audience appreciates the context of what other industries contribute. Does this mean anything, or is it just a number?

In a sense it is a very literal answer to the question, 'What is the value of the insolvency industry?'. Perhaps a more enlightening answer would be, 'Our insolvency regime is flexible. With a variety of options to suit any distress situation and high numbers of jobs saved it makes a significant contribution to the UK economy'. Even if it gets a bad press sometimes.

WILL BLACK is communications manager at R3.

Still much obliged

Prav Reddy and **Christopher Boardman** dispel the misconception that IPs have fewer obligations since the introduction of the Enterprise Act reforms.

Since the Enterprise Act reforms introduced out-of-court appointments of administrators and gave them power to make distributions and move directly to dissolution, administrations have become an increasingly popular choice of insolvency process. At the same time, there has also been a common misconception that the requirements for satisfying the statutory test and/or obligations to the court by both the officers and the proposed insolvency practitioner are not as stringent as under the previous law. The recent case of *Re Integeral Limited* [2013] EWHC 164 (ch) (Integeral) made clear that this is not the position. The court gave guidance on the following issues:

1. The obligations of an applicant for an administration order to give an accurate and full account of the company's circumstances.
2. The obligations of the nominee administrator to form an independent and competent view on the evidence and prospects of the purpose of administration being achieved.
3. The circumstances in which it would be appropriate to make an order for indemnity costs against a director where an administration application fails.
4. The circumstances in which it be would be appropriate to grant permission to make an application for a third party costs order against nominees.

The court also outlined a number of factors, including the existence of potential claims against directors and the need for the appointment of an independent office-holder, which are relevant to the court's discretion when deciding whether to make an administration order rather than a winding-up order.

Case summary

In response to a winding-up petition that had been served upon it, the director of Integeral issued an application for an administration order. The petition was based upon the non-payment of a costs order in previously contested proceedings in which, somewhat ironically, Integeral had sought a winding-up order against the petitioner and this had been dismissed as an abuse of process. At the first hearing of the petition, counsel instructed by Integeral sought an adjournment for the stated purposes of settling the petition debt. Despite requests, however, no proposals for settlement were forthcoming.

> "Somewhat ironically, Integeral had sought a winding-up order against the petitioner and this had been dismissed as an abuse of process."

The day before the adjourned hearing of the petition, the director of Integeral issued the administration application. This had the effect of preventing a winding-up order being made upon the petition and indeed staying it pending determination of the administration order application.

The stated purpose of the administration was to achieve a better return for creditors than would be available if Integeral went into liquidation without first entering administration. This was on the basis that Integeral had a legal claim against a client for non-payment of commission in the sum of £15m. The application was supported by evidence from the intended nominee administrator who supported the director's statements, although he had not undertaken any investigation into the alleged claim himself.

The application was opposed by the petitioning creditor, who highlighted numerous misleading statements made by the director in his evidence supporting the application. Following investigation and requests for specific disclosure, it appeared that the director had not given a full and accurate account of Integeral's financial position and the circumstances leading to the making of the administration application. In particular, the director had failed to disclose the existence of a guarantee secured by a floating charge over company's assets and the existence of an agreement pursuant to which the company had agreed to pay out the proceeds of the intended commission litigation to the director and four others. Two days before the administration application was issued, the director and secretary had also incorporated a corporate vehicle that bore all the hallmarks of being a phoenix company.

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The nominee administrator did not investigate the concerns that had been raised by the petitioner in its evidence in opposition. He nevertheless served further evidence endorsing for the second time the director's grounds for seeking an administration order. On the day before the hearing, the nominee then withdrew his consent to act and was replaced by another who served a witness statement endorsing the evidence of the previous nominee. He, too, did not carry out any independent investigation or respond properly to the issues raised in the petitioner's evidence in opposition.

After hearing submissions made in support and against the administration application and winding-up petition, Richard Snowden QC dismissed the administration application and made a winding-up order on the petition. The learned judge was not satisfied that the

> "The applicant for an administration order must give a full, accurate and reliable account of the company's circumstances and his evidence must not be misleading."

making of an administration order was reasonably likely to achieve the statutory purpose of administration. Nor was he satisfied that, as a matter of discretion, this was an appropriate case in which an administration, as opposed to a winding-up order, should be made.

Principles

The written judgment of Richard Snowden QC contains the valuable insight into the requirements of directors in respect of administration order applications and the role of nominee administrators. The following is of particular note.

First, a nominee administrator is under a duty to form an independent and competent view based on the evidence available of the likelihood of the statutory purpose being achieved:

'It is of fundamental importance that any insolvency practitioner who is nominated as a potential administrator – an officer of the court – and who ventures his opinion to the court as to the prospects for an administration order, should do so carefully, with an independent mind, and on the basis of a critical assessment of the position of the company and the proposals put forward.'

In the present case, the court granted leave for the petitioner to apply for a costs order against the nominees personally, on the basis that their evidence 'fell very short of these basic requirements'. This introduces a potential sanction against insolvency practitioners who fail to exercise the required due diligence, competence

and independence expected of an officer of the court. In giving evidence to the court, the nominee does so as an expert and is subject to the provisions of Part 35 of the CPR: *Re Colt Telecom Group plc (No 2)* [2003] BPIR 324.

Secondly, the applicant for an administration order must give a full, accurate and reliable account of the company's circumstances and his evidence must not be misleading. The court approved the following quotation from the judgment of HHJ Simon Barker QC in *Re Bowen Travel Limited* [2012] EWHC 3405 (Ch).

'When a court is asked to exercise its powers under paragraph 13 of Schedule B1 to the Insolvency Act 1986 by making an administration order, it is in my judgment, essential that the evidence presented to the court is reliable. Implicit in the noun 'reliable' in this context is not only that it is accurate evidence and true insofar as it is factual, but also that (1) a clear account is given of all potentially relevant facts and circumstances, and (2) where explanations are given or judgments, estimates or opinions are stated (a) they should be supported by the underlying material, and not contradicted by it, and (b) they should also be credible in the sense of being realistically likely to be true.'

In the present case, the court made an indemnity costs order against the director notwithstanding Insolvency Rule 2.3(1), which provides that if an application is made by the directors, it is treated for all purposes as the application of the company. The court was satisfied that the director's conduct was so out of the ordinary that it would have merited a third party costs order. The costs of an unsuccessful directors' administration application should not be costs in the liquidation even where the directors had acted in good faith: *Re WF Fearman Ltd (No.2)* [1988] 2 BCC 141.

Thirdly, the court identified a number of specific factors relevant to the exercise of its discretion to dismiss the application and not to appoint the director's nominee as administrator :

- The lack of accurate and up-to-date financial information concerning the company.
- The continuation of trading after incurring debts to its employees, which it could not pay.
- The discharge of substantial debts owed to the company by its directors by way of set-off against alleged liabilities owed to them for salaries and other payments.
- The unparticularised assertion of the director that the company remained substantially indebted to him.
- The granting of a guarantee at a time when the company was unable to pay its debts.
- The execution of a deed shortly before presentation of the petition, dividing the net proceeds of the only substantial asset of the company between the director and others in return for no obvious consideration.
- The creation of a new company after presentation of the petition in what might be an attempt by the director to obtain the benefit, without payment, of any goodwill attaching to the company's business.

> "The costs of an unsuccessful directors' administration application should not be costs in the liquidation even where the directors had acted in good faith."

- The existence of potential claims against directors. This may also be relevant not only to the assessment of the basis for the directors nomination for the appointment of an administrator, rather than an independent office-holder.
- The existence of strong grounds for believing that the adjournment of the petition was obtained without any intention on the part of the director to make proposals for payment: *Re Pinstripe Farming Limited* [1996] 2 BCLC 295.

The judgment emphasises the need for care when deciding what advice to give to companies and their directors in financial difficulties. If an administration application is appropriate, the evidence in support of it should be prepared in accordance with the above principles. □

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From law student to insolvency practitioner

In a not so subtle nod and a wink towards insolvency as a career **Dr John Tribe** discusses his role as an informal insolvency recruiter.

Popular authors such as Ian Fleming and John Le Carré, as well as arguably more authoritative sources such as the Cambridge University historian Professor Christopher Andrew, have observed that university academics often played a part in the recruitment of spooks into the Secret Intelligence Service (MI6) and the Security Service (MI5). This recruitment apparently took the form (and might still) of a gentle tap on the shoulder during a tutorial, or some other discussion between undergraduate and tutor. More direct discussions were also had. A suggestion was made, hints were given, and the wheels of recruitment were put in motion for the most able candidates. Most of the time this form of recruitment seems to have worked. On occasion there were disastrous consequences for both of the intelligence services (for example, the Cambridge Five). This form of recruitment may still occur, at least in terms of a subtle prod towards that form of employment. Current employment regulations have probably reduced the direct recruitment from the universities in what we might call the old school manner, but it may still occur on a more informal basis.

Insolvency – an excellent profession

For a number of years I have been aping this recruitment behaviour. The beneficiaries of my activity have not, however, been the intelligence services but insolvency practitioner firms. There are a number of reasons why I have been engaging in this activity and the editorial board of *RECOVERY* have invited me to share my thoughts on the process and why I consider insolvency to be an excellent profession for my undergraduates to progress into. Before I embark on that exposition it is probably a useful starting point to explain who it is I am attempting to recruit into the ranks of the insolvency profession. I will then explain why I have engaged in the prodding activity.

> "The majority of insolvency academics, unlike other law subjects, have had some form of sponsorship link with a firm of practitioners in the past."

Since my own graduation twelve years ago I have been an academic at a UK university teaching on the Bachelor of Laws (LLB) and Master of Laws (LLM) degrees. The LLB degree is made up of, *inter alia*, what are known as the seven core: criminal law, European law, equity and trusts, English legal system, land law, public law, and tort law. These core modules are supplemented by optional modules that are usually taken at third-year level, for example, company law, insolvency law, intellectual property law and family law. After this demanding three-year period of study the law student graduates with a solid liberal degree with a useful body of knowledge but perhaps also more critically that graduate has been inculcated with a passion for learning, a capacity for hard work and a capacity for critical thinking. These are the individuals, or the 'product', that I am pushing towards the insolvency profession as a career. In addition to the critical thinking skills, the substantive knowledge a law student learns in modules such as equity and trusts – constructive trusts, resulting trusts – arms them well for issues that may come up in practice. There are a number of LLB graduates in the profession (and not just as a result of my activity!) such as Samantha Hawkins of Hawkins & Co. My own recent graduates who have gone into the profession include Vaughan Tyrell (KPMG) and Tajuddin Sallamuddin (Atherton Bailey).

So why might a student be encouraged to think about insolvency as a career choice?

Synergies and links

As noted above, elements of the LLB degree lend themselves to the practice of insolvency. Insolvency as a subject in its own right has also been taught within the universities for well over 40 years. While more recently this has taken the shape of specific insolvency courses, for many years the subject of corporate insolvency made up the final phases of most LLB company law courses. Academics who commenced their teaching careers in the 1970s and before such as Professor David Milman (Lancaster), Professor Andrew Keay (Leeds), Professor Vanessa Finch (LSE) and Professor Ian Fletcher QC (UCL), have been delivering the subject in some shape or form long before the JIEB qualification was introduced by the famous Cork Committee (1982) and the subsequent Insolvency Act 1986. Indeed, evidence was provided to the committee by academics on the education side of the subject and perhaps the most famous academic commercial lawyer of all time, Professor Sir Roy Goode QC, was on the committee.

As well as delivery of the subject in lectures and tutorials academics have been writing on the subject for many years. In America and the UK this engagement with the subject goes back as far as the 1920s and before. This academic discussion features both practical discussion (the operation of a preference law, for example) but also theoretical discussion (Jackson and Warren on the nature and function of an insolvency law and policy). My own article output has taken two forms. The first is sole authorship. This tends to focus on the history of our subject, that is, an exposition of 17th century debtor treatment, or an exposition of 19th century insolvency practitioners and their experiences of reform of the insolvency system during that time period. The other set of outputs is co-authored. This co-authorship relates to modern insolvency (generally) and is always undertaken with a practitioner. Sometimes this is a lawyer, but in the main I try to write with IPs. The reason is that IPs are at the coal-face of practice. They are familiar with the nuances and minutiae of practice, in the majority of cases more so than lawyers, who in English practice tend to play an adjunct advisory role. This form of co-authorship is essential, in my view, for validity. Without this practical input the discussion pieces would simply lack credibility. The ivory tower argument that observes that academics are cut off from the real world can more easily be deployed in insolvency. Co-authorship with an IP is an essential safeguard against the egregious charge that such and such would not happen in practice.

“I sometimes refer to IPs as the corporate law equivalent of paratroopers.”

This practitioner link has been taken to its logical conclusion at Kingston University. KPMG have been involved with my lectureship for nearly seven years. As it happens, the majority of insolvency academics, unlike other law subjects, have had some form of sponsorship link with a firm of solicitors in the past: Milman with CMS Cameron McKenna; Walters with Geldards; Fletcher with Herbert Smith; Frisby with Baker & McKenzie, and finally, Goode with Norton Rose. As can be seen, these links have however tended to be with lawyers whereas the KPMG link is arguably the first link between an academic lawyer and a firm of accountants. The reason for forging this link within the realms of insolvency is obvious. IP accountants are the heart of insolvency practice. The ideas and issues that they face on a day-to-day basis provide a fruitful source for discussion and critique. What we have termed ‘Thought leadership’ as part of the KPMG link has led to a series of public lectures, an Insolvency Service reform discussion evening, and numerous published papers. Without this link it is arguable that these outputs may never have come to fruition.

So the first point for the aspirant IP law undergraduate to consider is the idea that they have already been exposed to subject matter that equips them well for a career as an IP. In addition to this, their tutors have established and fruitful links with the profession – potential employers.

The challenge

For the reasons pointed out in the above section readers of this periodical are better placed to state the following than me, although they may of course disagree but, through my vicarious experience insolvency as a profession seems to be challenging, varied, rewarding and enjoyable. The subject certainly has all of these qualities from an academic perspective. It seems to me from contact with IP friends and acquaintances that the same can be said of the practical side of the subject. It is for this reason that I recommend the subject to my undergraduates. I sometimes refer to IPs as the corporate law equivalent of paratroopers. Whereas the military equivalent drop into troubled war zones, IPs drop into troubled companies or personal affairs, and come up with a solution. This constantly changing and challenging environment makes for a rewarding career and is the second main reason I point out the IP route as a valuable one for consideration. It is a happy aside that the professional is reasonably well paid to boot. This is the third reason I provide.

Alternatives

It is a misnomer to say that traditionally law students have gone on to qualify as lawyers, i.e. solicitors, following completion of the Legal Practice Course (LPC), or barristers following completion of the Bar Professional Training Course (BPTC). A good number do go down this rather expensive and incredibly competitive route, but a significant number also go on to work in allied and sometimes completely non-associated fields. The key selling point of the IP career route in my view is the idea that the qualification process incurs much less expense than the lawyer route, or at least expense for the candidate in their personal capacity. This is the fourth reason I provide to my undergraduates, namely, that the on-the-job nature of the training and qualification is a much better route than the more risky and expensive lawyer training route. In terms of the role of lawyers as previously noted, this is only an adjunct role as I have argued. If the student wants to be truly engaged in insolvency practice they must become an IP to get at the real coal-face of practice.

“If the student wants to be truly engaged in insolvency practice they must become an IP to get at the real coal-face of practice.”

A valuable and interesting option

For the above reasons, and others I have not yet thought of, I will continue to sell the IP career route as a valuable and interesting option to my undergraduate law students. I am hopeful that readers of this periodical will be keen to take these well-trained and interesting candidates on for further training. This continued flow of law graduates into the profession has a happy corollary in research terms. I now have my own spies in the profession!

DR JOHN TRIBE is a KPMG principal lecturer in restructuring and director of undergraduate programmes at Kingston University.

Going south?

Dan Atkinson examines Britain's economic future.

Since I can remember, since my seventies childhood, the notion has floated in the background and, occasionally, in the foreground that Britain is turning into a Third World country. No-one is ever quite sure what is meant by this but, as with the music lover who doesn't know much about the subject but 'I know what I like', there has always been an instinctive understanding of what Third World status involves.

Last year, Larry Elliott and I published a book the subtitle of which is: *'Why Britain Will Have A Third World Economy By 2014.'* It is fair to say that there is not much overlap between our definition of a developing – or in Britain's case, an un-developing – country and that of the public at large. We had little to say about railway strikes, political sleaze or the use of pavements by dog owners as an al fresco animal lavatory, all among the most common pieces of evidence presented round the kitchen table or the saloon bar for Britain's supposed Third World status.

> "The public sector resembles an archipelago of self-contained and unaccountable baronies."

Our case is, we hope, more forensic and more objective. This, in turn, makes it, we believe, more relevant for the readers of this publication, people whose profession is intimately bound up with notions of law, of custom and of the proper ownership and disposal of valuable assets.

More of that later.

Confusion dispelled

Since *Going South* was published, we have encountered some criticism along the lines of our obvious ignorance of what a Third World country really looks like. Let, these critics say, Elliott and Atkinson visit a clinic in rural Nigeria, or see flooding at first hand in the low-lying parts of

1

There is the constant search for charismatic political leadership, at least among the political classes, opinion formers and others inside the 'Westminster village'. In the past two decades, Tony Blair, David Cameron and Nick Clegg have been, on occasions, hailed as destined to play this part.

By contrast, those felt lacking in this department have faced denigration beyond all reason. Just look at the vitriol heaped by the media and others on Gordon Brown and Sir Menzies Campbell, with Ed Miliband now possibly being measured for the drop.

2

The apparent requirement for a supposedly all-encompassing political philosophy to be espoused by the charismatic leader. In recent years, these 'visions' have included the 'Third Way' of Tony Blair, the 'Work of Change' espoused by Gordon Brown and David Cameron's 'Big Society'. Intriguingly, this last, with its emphasis on people taking charge of public services in an endearingly do-it-yourself sort of way, echoes the 'self-management' and 'power to the people' doctrines seen in the past in such diverse developing countries as Libya, Tanzania and China.

3

The state itself has an over-arching ideology, un-named in Britain's case, that stresses the harmonious nature of the national society and the enormous strength that it draws from its diverse parts. The official philosophy of pancasila, under which Indonesia was governed during the long reign of President Suharto, is a classic example of this sort of compulsory feel-good doctrine.

4

There are extensive tax and regulatory inducements to banks and multinational corporations to locate in the country concerned. Corporation tax, the one levy paid exclusively by limited-liability entities, seems in danger of dwindling away. It was reduced to 50 per cent on budget day in March 1984. By the end of 2011, it stood at just 28 per cent and was due to be reduced over the next three years to 24 per cent.

5

The public sector resembles an archipelago of self-contained and unaccountable baronies. Across police, education and health, the workforces concerned refuse to perform their duties without large additional payments on top of their salaries, either in cash or kind: police overtime, 'teacher workload reduction', the notorious GP contracts.

Not that the public employees concerned are remotely abashed by this. On the contrary, they – or at least, their representatives – are hugely sensitive to any criticism and consider themselves to be martyrs to their vocations, if not actually saints.

6

A vast pseudo-private sector, controlling railways, water, gas and electricity, seems permanently engaged, apparently in cahoots with ministers, in conspiracies against the public. Energy prices head ever-upwards, and rail companies have even levied huge 'fines' on people who have alighted from trains before the end of the journeys for which they have paid.

Bangladesh. Then let them tell us Britain is becoming a Third World country!

But this line of attack confuses a Third World economy with a poor country. We believe a Third World economy displays certain features that are almost independent of its current gross domestic product per head compared with other countries. Of course *over time* a de-developing country will prove less wealthy than either it could have been or than other countries have proved to be, but that is a different matter.

So below, rather more briefly than in the book, are our dozen tell-tale signs of an un-developing economy.

Tax, entitlement and the law

Where does this leave the professional in the insolvency or recovery field?

In, I would suggest, a perilous place.

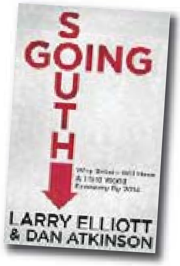
Even an outsider such as myself knows that this is an area of activity that depends absolutely on the one thing that a Third World economy cannot deliver: operational certainty. There are so many variables in a restructuring, rescue or administration in terms of claimants, the ranking of creditors, possible outcomes and potential buyers that the other side of the equation – the legal framework, custom and practice, the attitude of the courts and an absence of political interference – needs to be rock solid.

> "Rail companies have even levied huge fines on people who have alighted from trains before the end of the journeys for which they have paid."

But how long before these start to go by the board? After all, we have recently seen capricious changes to the North Sea tax regime, to the planned path of inheritance tax and to the rules on tax-deductible gifts, to name but three. At least one senior banker felt obliged to waive his legally entitled bonus after political criticism. The 'court of public opinion', to use Harriet Harman's phrase, is becoming more and more important.

From law and certainty to caprice and administrative whim, from real courts to 'the court of public opinion'. It is not progress, but I fear you will need to get used to it. ◻

Going South: Why Britain Will Have A Third World Economy By 2014 by Larry Elliott and Dan Atkinson, is published by Palgrave Macmillan.



DAN ATKINSON is a writer and commentator who has worked for *The Mail on Sunday* and *the Guardian*.

7

The real private sector contains a dense undergrowth of businesses engaged in dubious or downright worthless activities, such as helping people avoid their debts on a legal technicality, cold-calling individuals to sell them flaky 'investments', managing insurance claims in the interests of one party against the other and supplying various 'opportunities' to go into business as a franchisee.

All this before we examine the City, and its endless 'churning' of corporate assets through mergers and acquisitions that, overall, have been proved to subtract rather than add to shareholder value, quite apart from the damage they may do to the wider community.

8

A fondness for dubious politicised statistics and 'science'. March 23, 2012 saw David Cameron propose a minimum unit price for alcohol on the ground that: 'Binge drinking isn't some fringe issue, it accounts for half of all alcohol consumed in this country' – a meaningless statistic.

Meanwhile, David Cameron was trying, in the manner of Big Men leaders across the developing world, to make his people 'happy'. In April 2011, the Office for National Statistics began research to ask people to rate their own wellbeing as part of a groundbreaking scheme to measure the nation's 'happiness'.

9

As with many emerging nations and sub-nations there are legal and practical doubts as to the extent of Britain's self-government and national independence. Submission to the European Union in many key areas, and to the European Court of Human Rights, echo the limited self-government awarded many British and French territories in the immediate post-war period and still obtaining in those remaining European possessions. In true Third World fashion, British politicians' attitudes to external authority alternate between truculence and subservience.

10

The state's own enforcers are treated with the greatest suspicion, from the police through council officials and social workers to 'community support officers' and even the pseudo-official 'traffic marshalls' in evidence near large construction sites. Their rules of engagement with the public that they are supposed to serve are highly uncertain. The police kill people and are then exonerated at 'independent' hearings.

Unsurprisingly, many prefer to give officialdom in general a wide berth.

11

Political leaders routinely invoke a 'real' citizenry that is being held down by a parasitical middle class, and they promise a great upheaval in the distribution of jobs, opportunity and university places to remedy this ancient wrong. The supposedly put-upon are to be the elite's great allies against the independent bourgeoisie. This is quite routine across the Third World, from the 'Africanisation' of civil service and other public sector jobs in the post-colonial era (currently known as 'nationalising' posts in Nigeria) to Malaysia's 'bumiputra' system of discrimination in favour of ethnic Malays.

12

And finally, the economy – and society as a whole – is increasingly becoming less a community of law and increasingly a community of trust. In other words, more and more business and personal activity is taking place 'off the radar'. The 'nudge and the wink' economy is booming.

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View from the bridge: the JIEB examination

Peter Windatt and **Alan Katz** give an insight into what it takes to pass the JIEB.

Passing the JIEB examination is a very significant event in the career of anyone who, since the late 1980s, has wished to become a licensed insolvency practitioner. Many congratulations to those who have passed. This is not an easy examination, typically taken by candidates in their 30s who do not have recent experience of taking examinations and who, at that stage in their life, may also have substantial work and family commitments. Passing is a real achievement.

The board's expectations of candidates to achieve a pass are set out in the notes to candidates and syllabus, which we will not repeat here. However, we would emphasise the overall standard – to assess whether candidates have sufficient knowledge of insolvency law and practice to enable them to carry out the functions of an insolvency practitioner with an emphasis on practical application as well as knowledge of insolvency law and other relevant law and regulations.

Clearing the hurdle

In determining the pass standard, we are mindful that examination conditions do not equate with normal work conditions where practitioners may consult with colleagues, take advice or take more time to research and resolve an issue. We are also aware that the marginal candidate may be just sufficient rather than good or excellent, so we do not exclude candidates who may make adequate rather than high flying IPs. That said, because a pass clears a hurdle en route to securing a licence, we also have the weighty responsibility of not allowing through those who do not have sufficient knowledge and, importantly, the ability to apply their knowledge to practical situations. Essentially, at the margin, we are trying to assess whether it will be safe to allow a candidate through. What this means for candidates and their firms, is that they should ensure that their practical experience and pre-examination training takes them well clear of marginal territory – in other words to aim high having gained some practical experience and had good tuition across the syllabus. Obviously it is much safer for candidates, and makes easier the process of deciding which side of the line you fall, if you are not right on the margin.

Although the published pass marks are scaled* to 45 per cent, the underlying or 'raw' pass marks can and do vary

between years, as does the pass rate. There is no fixed pass mark because it is not possible to set examinations that will be pass-worthy at exactly the same mark each year. There is no fixed pass rate because the clear policy of the board is to grant a pass to as many or as few candidates as merit a pass in each year. Pass mark setting is therefore ultimately a matter of

> "The examinations are eminently passable by those who are adequately prepared and trained."

judgment based on extensive review and moderation (re-marking) of scripts around a range of provisional pass marks. That said, the examining team aim to set the papers and marking plans such that the pass mark will be in the 40 to 50 per cent range – in other words reasonably close to the scaled pass mark.

Pass rates

Explaining differences in the pass rates between years is more difficult; these have ranged, as a percentage, in recent years between the 40s and the 70s. Historically they have been in the teens. Pass rates will depend on factors including the overall quality of the examination cohort including their relevant training and experience. What is striking, however, is that some sub-groups of the cohort – individual firms or recognised professional bodies (RPBs) – report consistently very high pass rates. This provides additional overall comfort to the board and the examination team each year that the setting and marking processes are reasonable and that the examinations are eminently passable by those who are adequately prepared and trained.

That said, we are not complacent and are constantly looking to improve our processes and procedures. Steps that we have taken in recent years to enhance the fairness of the process, and to help distinguish the marginal candidates, include all compulsory and equal mark questions (so that everyone is taking the same examination); adoption of a learning outcomes (practical and results oriented) syllabus; single question marking (to help eliminate inconsistencies); holistic marks (to provide two different assessments that can be considered separately and together); consultation and analysis of results with internal and external educational consultants; more extensive and consultative moderation procedures and oversight of the marking (a process that will be facilitated by the intended introduction of scanning scripts for electronic marking and oversight, over the course of the next two years). There has also been increased and more substantive contact between the board, examining team, insolvency firms and training providers, which is intended to improve understanding of the process and of the results themselves. The board welcomes any input from students and firms on how the process can be improved. ◻

* Scaling is the process whereby if, for example the raw pass mark is 42, each candidate's marks will be uplifted, or scaled, by +3 so that the published pass mark is 45 and each candidate's mark is their raw mark +3.

Peter Windatt is the Association of Chartered Certified Accountants' (ACCA) representative board member on the JIEB and the current chairman. He is the first chairman of the board to have qualified as an IP, sitting the JIE in 1992.

Alan Katz is a Research Fellow in Insolvency at Lancaster University and is retired from general insolvency practice.

PETER WINDATT is a practising IP with BRI Business Recovery and Insolvency.

ALAN KATZ is the current senior moderator of the JIE.

Jackson reforms: your views are vital

Dr Peter Walton on assessing the effect of the Jackson reforms on insolvency litigation.

'Survey fatigue' is a rather modern-day condition. One is constantly asked for consumer and professional data and it is not always readily apparent what the benefits of providing this information are to one's own wellbeing. I must therefore immediately apologise to members of R3 (and others) for being the author of one more survey. The difference with this one is that the results are potentially extremely relevant to the profession.

R3, with the support of ICAEW, IPA, ACCA, Moon Beever and Moore Stephens, has commissioned me to conduct independent research into the likely impact on insolvency litigation of the Jackson reforms, brought in by Part 2 of the Legal Aid, Sentencing and Punishment of

"No reliable data exists from which an assessment of the changes can be made."

Offenders Act 2012 (LASPO). LASPO, among other things, prevents successful claimants recovering a conditional fee agreement (CFA) uplift and the premium for after-the-event (ATE) insurance from a losing party. In future, where a claimant is successful, any CFA uplift or ATE insurance premium will be deductible from any money recovered, with the concomitant effect that less money will be available to creditors.

Fully informed decisions

The government has granted a two-year delay in the implementation of LASPO for insolvency litigation. This temporary exemption runs until April 2015.

One significant characteristic of the promulgation of LASPO is that the government's impact assessment of the new law fails to consider its effect on insolvency litigation. It is usual for a governmental impact assessment to 'monetise' the impact of any change in law. This has not happened in relation to insolvency litigation, partly because the focus of LASPO has been on personal injury actions and partly because no reliable data exists from which an assessment of the changes can be made.

This research project is intended to quantify, as far as possible, realisations brought into insolvent estates by the use of

CFAs and ATE insurance and the impact the forthcoming changes will have on returns to creditors. If it can be shown that CFA-backed insolvency litigation brings significant financial benefits to unsecured creditors, including public authorities such as HMRC, this would go some way to 'monetise' the current position.

The financial benefits under the current system would be reduced under LASPO for two principal reasons. Firstly, the CFA uplift and ATE insurance premium would come off the top prior to any distribution to creditors and perhaps more significantly, it is possible that fewer cases would be brought and that fewer would settle prior to any hearing. In addition to financial benefits, it is not clear what effect, if any, LASPO might have on the deterrence, or investigation, of culpable behaviour by debtors and company participants. If the evidence suggests that LASPO would have a negative impact on these benefits, the government may re-consider its policy.

The survey

The survey mentioned above, which has been emailed to all R3 members (among others), asks for information in relation to insolvency litigation commenced during 2009, 2010 and 2011. The date when the insolvency litigation commenced or when a sanction (from the Secretary of State, the court or creditors) was requested is the relevant date for the survey not the date of the commencement of the bankruptcy, administration or liquidation. The reasons for selecting these dates are essentially two-fold: firstly, a three-year period was considered a sufficient period of time to show a genuine pattern as regards types of action and results; and secondly, by mid-2013, it is likely that most of the relevant litigation will have run its course enabling it to be quantified.

The purpose of the survey is to gather information *generally* about the extent and usefulness of CFA-backed insolvency litigation and also to ask for details relating to *specific* cases where CFAs have been successful. In an attempt not to overburden respondents the survey asks for detailed information about three CFA-backed cases (but I would welcome as many case studies as respondents feel able to provide). It is vital that we collate sufficient data and case examples to make our research valid and robust.

I fully understand that practitioners are extremely busy and fully appreciate their time and assistance with completion of the survey. Without wishing to push my

"All information and data received will be treated in the strictest confidence and the research findings will be completely anonymised."

luck too far, I am also very keen to conduct relatively short, structured interviews with practitioners (either in person or on the telephone) to gather further qualitative data.

All information and data received will be treated in the strictest confidence and the research findings will be completely anonymised. No respondent will be identified unless he or she specifically requests attribution.

If you would be willing to talk to me or if you have any queries or suggestions please do let me know at **R3researchproject@wlv.ac.uk**. ◻

DR PETER WALTON is co-director of the Law Research Centre at the University of Wolverhampton.

The perception of the insolvency profession in Westminster

John Lehal explores the current environment for engagement and the opportunities for informing and influencing perceptions about insolvency practitioners.

While big corporate failures all too frequently attract the parliamentary spotlight onto IPs, more often they deserve the limelight for the many businesses across the country that they save, both large and small. That truth, however, usually fails to capture the public imagination or news agenda and thus parliamentary interest, while the wide-ranging nature of their responsibilities means ministers have overflowing in-trays with a knock-on detrimental effect on the amount of time they can spend on each policy area: insolvency, unfortunately, included. Meanwhile, having to compete for political and policy attention with well-resourced corporate beasts does not make achieving the 'cut through' and profile that the insolvency profession deserves in Westminster, Whitehall or indeed back in constituencies, any easier.

R3 is certainly proactive in its approach to informing government, having made clear representations recently

> "This could help dispel the myth that the IP's primary role is to manage the liquidation of poorly performing companies."

to Dr Vince Cable, secretary of state for business, innovation and skills (BIS), on the need for a responsible attitude towards advancing the core message that businesses in difficulty should seek advice from a licensed IP at the very earliest opportunity. If acted upon, this could help dispel the myth that the IP's primary role is to manage the liquidation of poorly performing companies.

Time to engage

More understanding of the vital role that IPs play in business rescue, recovery and renewal as well as jobs preservation is needed. This lack of understanding is very apparent at a local level. Parliamentarians are charged with representing the interests of their constituents, and at times do so passionately when a local company gets into difficulties. All too often that blinds them to any balanced understanding of what the profession contributes at large to supporting good company governance and stability. In my view, IPs should try to engage more with local politicians during insolvencies to ensure that their commentary is better informed and less inflammatory.

Back in Westminster, Conservative MP Bob Blackman spoke in the house on director disqualification in December 2012. This is an issue that R3 has been championing, in an effort to strengthen

> "An effort to strengthen The Insolvency Service's resolve on disqualifying blameworthy directors of failed enterprises… would appear to be gaining momentum."

The Insolvency Service's resolve on disqualifying blameworthy directors of failed enterprises to prevent them from putting other companies, investors and the public at future risk. This worthy agenda would appear to be gaining momentum, spurred on perhaps by the challenging trading environment currently. The government has also recently announced a mandate for the continuation of essential supplies during insolvency, thereby boosting the likelihood of successful rescues.

Flux and change

The importance of broadening engagement cannot be overstated. R3's approach to engaging HM Treasury, BIS, and Insolvency Service officials at a policy level to inform and advise on important issues is effective positioning. We know that political flux and personnel changes are always present at the top, but the insolvency brief has seen more than its fair share of ownership changes in recent years, with Ed Davey being succeeded by Norman Lamb, himself replaced by the incumbent minister, Jo Swinson. Despite this flux, a positive relationship has been built with Jo Swinson since she took up the brief last September. A flexible, proactive and collaborative approach to informing and delivering on the core departmental agenda, at the level of both officials and ministers, really is the best way to become viewed as a trusted source of information – R3 is striking this balance.

A tripartite agenda

Opposition engagement is not to be neglected, especially given the increasing likelihood that we will see a different political constellation in government following the 2015 general election. R3 is currently engaging with Labour's shadow small business minister, Toby Perkins, to provide perspectives on the current policy review, in the hope that some ideas might make it into the party's manifesto. At a federal level, the Liberal Democrats have been very receptive to some of R3's arguments and it is hoped that this productive dialogue can be maintained. Aiming to work with the Conservative policy team to inform their manifesto pledges for the 2015 general election will therefore be key in terms of attempting to shape a truly tripartite agenda on insolvency issues at a time in the economic cycle when they could scarcely be more relevant. The value R3 can add is credibility, by vocalising and embedding the front-line experience and practical advice of its membership.

Ultimately, the aspiration for the insolvency profession and R3 should be to increase the appetite of those in Westminster and Whitehall to understand the sector. Individual IPs also have something very valuable to add too through engagement with MPs in the constituencies where their own businesses are based. Ultimately there is no mystery to effective parliamentary engagement, which relies on identifying a broad base of potential advocates and helping them to stay interested, informed, engaged and active.

JOHN LEHAL is managing director of Insight Public Affairs.

The appropriation remedy

Richard Hodgson examines the appropriation of shares in private limited companies and asks, is it a realistic alternative to traditional enforcement measures?

The remedy of appropriation was introduced into English law by the Financial Collateral Arrangements (No.2) Regulations 2003 (the FCRs), implementing the Financial Collateral Directive 2002/47/EC (the Directive). The Directive was adopted on 6 June 2002 with the purpose of harmonising and simplifying the process of taking and enforcing security over financial collateral across the EU and was implemented in the UK through the FCRs from 26 December 2003.

The Directive and the FCRs were both primarily directed towards the OTC derivatives market but their effective scope is much wider and they may, in practice, apply to a wide variety of finance transactions. Appropriation was designed to provide for a speedy and court-free self-help remedy of enforcement over financial collateral (broadly defined as cash, shares and other financial instruments and credit claims) and has recently caught the attention of collateral takers and certain investors in distressed debt opportunities where the relevant security package includes shares in private limited companies.

> "Appropriation was designed to provide for a speedy and court-free self-help remedy of enforcement over financial collateral."

What is appropriation?

Lord Walker in *Alfa Telecom Turkey Limited* v. *Cukurova Finance International Limited [2009] UKPC 19* stated: *'appropriation is much closer to sale than it is to foreclosure. It is in effect a sale by the collateral-taker to himself, at a price determined by an agreed valuation process.'*

As readers will be well aware, a collateral taker may typically enforce its security by selling the secured assets, appointing a receiver (or an administrator), taking possession of the secured assets or obtaining a court order for foreclosure. The FCRs introduced an additional remedy in respect of financial collateral – appropriation of the secured assets without a court order for foreclosure. It allows the holder of a security interest that constitutes a 'financial collateral arrangement' to: (i) close out the equity of redemption (being the right of the collateral provider to get the collateral back after the discharge of the secured obligations) with few formalities – no formal sale and no court order required; and (ii) retain the secured asset as absolute owner (in the case of an equitable mortgage, equitable title only) in place of the debt.

If the parties agree to this self-help remedy in the relevant security document, Regulation 18 of the FCRs simply requires that the collateral taker 'must value the financial collateral in accordance with the terms of the arrangement and in any event in a commercially reasonable manner'. Once valued, the collateral provider or taker, as applicable, must account for any difference in value between the secured liabilities and the financial collateral. Appropriation is therefore potentially a powerful tool in the hands of the collateral taker – one which gives rise to important practical and legal considerations as to its application in respect of shares in a private limited company.

Lord Millet (*Alfa Telecom*) stated: *'appropriation gives the collateral taker an indefeasible interest in the collateral, free from any right on the part of the collateral provider, who is relegated to a right to be paid the amount, if any, by which the value of the collateral exceeds the amount of the debt.'*

Practical and legal considerations

- **Motivation of the collateral taker**
  In line with being a self-help remedy, there is no judicial process or sale process required and there are few formalities, meaning that at first blush appropriation appeals to collateral takers. One of the key questions will be what does the collateral taker want to achieve? Does he/she wish to appropriate to hold the asset or appropriate to redeem or sell the asset? In the *Cukurova* case[1], the Privy Council held that if a lender is entitled to and does enforce its security so as to satisfy a debt, the law will be slow to void enforcement on the grounds of bad faith or improper purpose where the collateral taker is motivated by more than just seeking repayment of the secured obligations. In *Cukurova* it made no difference that Alfa's real motive was to obtain ultimate control of Cukurova's subsidiary. This is significant as clearly investors in distressed debt opportunities who may be seeking to take advantage of a security package that includes the right of appropriation may be motivated by a desire to take control of the asset rather than just to seek repayment of the debt. Of course, 'slow to void enforcement' is not the same as 'will not void', so care should still be taken.

> "Appropriation is therefore potentially a powerful tool in the hands of the collateral taker."

- **Valuation**
  The collateral taker may obtain direct control of the collateral quickly and may value the collateral after the act of appropriation. Subject to the terms of the arrangement, the collateral taker may have discretion to determine how the collateral is to be valued (subject to

an overriding statutory duty to act in a commercially reasonable manner). This could mean as little as one valuation carried out by a single firm. However, given that any valuation may be subject to challenge, it may (depending on the circumstances) be prudent to obtain more than one independent valuation.

- **How to account for any difference?**
No cash or other consideration is payable by the collateral taker in order to appropriate the collateral, except to the extent that value exceeds the secured indebtedness. Neither the FCRs or the Directive expressly state that the collateral taker must account to the collateral provider in cash or whether some other form of valuable consideration would be permissible. However, the prevailing (and certainly prudent) view seems to be that cash (or at most an 'equivalent' form of consideration that can easily be turned into cash) is necessary. The less liquid the consideration is, the more open to challenge it could be.

> "…the collateral taker may have discretion to determine how the collateral is to be valued."

- **Scope of appropriation**
Subject to the obligation to account for any difference, if the value of the collateral exceeds the indebtedness, then the collateral taker may need to determine whether the collateral is of a type that may be partially appropriated and if so how much to appropriate. As appropriation is a new and largely untested enforcement procedure, it is unclear whether one could challenge the appropriation of all of the collateral, for example, where the appropriation of a portion (ie. the shares in subsidiaries 'a' and 'b', but not 'c') would satisfy the indebtedness.
- **Operational issues**
There may also be operational issues to consider, as the collateral taker would need to ensure that there are no operational problems caused by appropriating only a portion of the collateral. For example, where the collateral taker is appropriating shares in an operating company, it would need to determine whether (assuming it is able to do so) it should also appropriate the shares of any other relevant subsidiaries, such as management/service companies.
- **Legal vs. equitable charges**
Does the security package include a legal charge or an equitable charge over the relevant collateral? Appropriation of an equitable title in the collateral (with the chargor continuing to hold legal title as bare trustee) may result in recognition difficulties such as having the directors update the relevant shareholder registers. Accordingly, elevating any equitable charge to a legal charge prior to appropriation would probably be a sensible step to take.
- **Specific litigation risks – *ultra vires* and injunctive relief**
In addition to the litigation risks around valuation and the scope of appropriation, some concerns have been expressed regarding the FCRs being *ultra vires* the Directive. When the Directive was introduced into English law by way of the FCRs, certain differences came to light, such as that in the FCRs it is not necessary for one of the parties (who must both be 'non-natural persons') to be a specified type of institution (as is required under the Directive). Also, the FCRs include unlisted shares as 'Financial Instruments', whereas they may (subject to interpretation) not fall within the same definition in the Directive.
- Finally, and most recently, after five years of litigation, the risk of an injunction has been raised following the recent Privy Council decision in the *Cukurova* case. In *Cukurova*, the Privy Council held that there is nothing in the Directive or the FCRs precluding the court from granting equitable relief against forfeiture after the appropriation of financial collateral. In essence, the decision means that a court could restore ownership in financial collateral to a collateral provider, after its appropriation by the collateral taker, provided it pays the debt and interest and complies with any other terms of relief imposed by the court. Given the requirement to value the financial collateral and return any excess to the chargor, this does pose the question as to why the equitable remedy of relief from forfeiture should be available on appropriation particularly since, while sharing similarities with foreclosure, as Lord Walker said in the same case it is 'much closer' to a sale? The difficulty with the decision is that it is driven off the back of 'unusual features which are most unlikely to be repeated', but this has brought into question just how useful the remedy of appropriation really is – at least in respect of shares in a private company.

What is needed for the remedy of appropriation to be available – a quick summary

- A security interest is created or arises under a security financial collateral arrangement.
- The terms of the arrangement must include a power to appropriate.
- The collateral taker may appropriate in accordance with the terms of the arrangement.
- There is no need for a court order.
- Upon appropriation, all legal and beneficial interest in the collateral vests in the collateral taker.
- The collateral taker must value the collateral in accordance with the terms of the arrangement and subject to an overriding duty to do so in a commercially reasonable manner. Some arrangements are prescriptive as to the applicable valuation process, others are more open-ended and give discretion to the collateral taker (subject to the duty referenced above).
- The collateral provider remains liable to the collateral taker for any shortfall; or the collateral taker must account to the collateral provider for any excess.

A final thought: what does appropriation mean for the IP?

Appropriation is an option that collateral takers are becoming increasingly aware of and have shown some interest in exploring, albeit there is little evidence to show that it has been used in the context of shares in private limited companies to date. That said, given that appropriation is a self-help remedy with no court involvement (other than where a challenge has been brought) and no other public record of it having taken place, it is not possible to assess how often it has been used in practice.

> "There is little evidence to show that it [appropriation] has been used in the context of shares in private limited companies to date."

Given the practical and legal constraints discussed above, appropriation is unlikely to present significant 'competition' to the tried and tested enforcement options of receivership or a pre-pack sale in the context of shares in a private limited company. However, appropriation remains an effective enforcement remedy and it may be a viable option in the right circumstances, albeit one to be exercised with caution.

It is also worth noting that enforcement of an FCR security interest falls outside the scope of the administration moratorium, so an administrator may not be able to block any appropriation of shares in valuable subsidiaries, and paras. 70 and 71 of Schedule B1 are also disapplied for the purposes of the FCRs. ◻

[1] *Cukurova* v *Alfa Telecom Turkey Ltd* [2013] UKPC 2

RICHARD HODGSON is a partner in the restructuring & insolvency group at Linklaters.

Beware the TUPE trap

Sarah Rushton explains the basics in this complex area of employment law

The Transfer of Undertakings (Protection of Employment) Regulations, 2006 (TUPE) is generally regarded as one of the more complex areas of employment law. Its provisions are highly technical and while it aims to protect employees on the sale or transfer of a business or part of a business, it has many traps for the unwary.

On a TUPE transfer:

- Employees automatically transfer on the same terms and conditions with all liabilities and obligations in relation to them, to the transferee.
- There is an obligation to inform and consult with representatives of the affected employees; and
- There is enhanced unfair dismissal protection.

The effects of TUPE are specifically modified on insolvency. The extent of those modifications depends upon the type of insolvency.

- In non-terminal insolvency proceedings:
  - Employees automatically transfer to the transferee under TUPE and receive unfair dismissal protection; but
  - Some of the debts associated with the employees (but not all) are taken on by the secretary of state; and
  - There is more scope (in theory at least) to vary the employees' terms and conditions.
- On terminal insolvency proceedings employees do not automatically transfer and dismissals by reason of the transfer will not be automatically unfair.

Further uncertainty

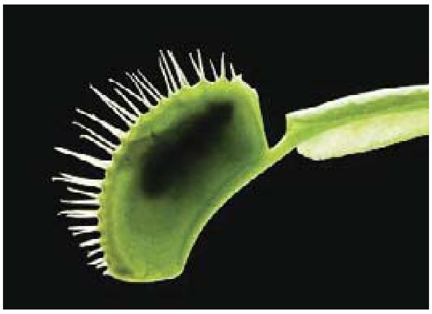
When a business transfer is coupled with redundancies there can be further uncertainty:

- There is an obligation to consult with employee representatives under TUPE as the redundancies amount to a 'measure'; and
- There may be a separate obligation to inform and consult under TULRCA (The Trade Union and Labour Relations (Consolidation) Act 1992) depending on the number and timing of redundancies; and
- The transferor in making pre-transfer dismissals cannot rely on the motives or intentions of the transferee to justify those dismissals.

Although certain TUPE rules are modified on insolvency (as set out above) there are areas which are not:

- The obligation to inform and consult with employee representatives and in default employees themselves; and
- The obligation to provide employee liability information under Reg 11.

There is also no exemption on an insolvency in relation to consulting on redundancies under TULRCA although insolvency may count as a 'special circumstances' defence when assessing compensation.



> "Failure to inform and consult… carries a penalty of up to 13 weeks' gross pay per employee."

This is important.

- A failure to inform and consult under TUPE carries a penalty of up to 13 weeks' gross pay per employee;
- A failure to provide employee liability information entitles the transferee to apply for compensation which shall be not less than £500 per employee; and
- A failure to consult under TULRCA can carry an award of up to 90 days' pay.

As set out above, the transferor cannot rely on the transferee's reasons when making redundancies pre-transfer. Moreover as the transferee is not the employer pre-transfer it is questionable whether consultations done pre-transfer in relation to post-transfer redundancies count towards the compulsory consultation periods under TULRCA.

TUPE also causes other potential problems. Under Reg 4(9) where a transfer involves a substantial change in working conditions to the detriment of the employee whose contract is being transferred the employee may treat the contract as having been terminated. This is treated as a dismissal and unless there is an economic technical or organisational reason necessitating a change in the workforce (ETO reason) then the dismissal is likely to be automatically unfair. Sometimes changes are inevitable e.g. the location of the business has to change.

On January 2013, the government issued a consultation paper in relation to proposed amendments to TUPE. There is no intention currently to change the position on insolvency nor is there an intention to clarify which type of insolvency proceedings are regarded as terminal or non-terminal as the government considers that this has now been resolved by case law.

Potentially relevant proposals

There are, however, proposals within the paper that are potentially relevant.

- There is a proposal to remove the requirement to provide employee liability information and to replace it with a requirement that the transferor should disclose information where it is necessary for the transferor and transferee to meet their obligations to inform and consult.
- The government is considering whether smaller employers will be able to inform and consult about a TUPE transfer directly with employees, as opposed to having to go through a process of arranging representative elections.
- There is a proposal to ensure that consultations by the transferee on collective redundancies with staff who are about to transfer, count for the obligations to consult on collective redundancies thus making it potentially quicker to make redundancies.
- There is a proposal that where a transfer would involve the employees moving to a different location, this would count as an ETO reason. The effect of this would be that a change in location would no longer give rise to an automatic unfair dismissal claim, although normal unfair dismissal rules would still apply.
- The government is seeking views on whether the transferor should be able to rely on the transferee's ETO reasons when carrying out pre-transfer redundancies to reduce the scope for those redundancies amounting to unfair dismissals.

Take specialist advice

If the changes go ahead then the government plans to introduce them later this year. It has acknowledged that its ability to change TUPE is limited by the Acquired Rights Directive (from which TUPE is derived). It hopes to address this by ensuring that the regulations are more closely aligned to the actual wording of the directive and by amending domestic law where possible. Although the proposals are helpful, they address only some of the practical issues TUPE throws up so the advice remains: take specialist advice and take it quickly.

SARAH RUSHTON is an employment partner at Moon Beever.

The phoenix phenomenon Part 2

In Part 1 of this series in *RECOVERY* Spring 2013, **Simon Duncan** looked at whether a liquidator had sufficient standing to bring a claim pursuant to Section 217 of the Insolvency Act. Here, he considers whether a liquidator could act as a representative of the creditors for this purpose.

Civil Procedure Rule 19.6 and representative actions – *Re Prestige* again

Rule 19.6 states as follows:

19.6(1) where more than one person has the *same interest* in a claim:

a) The claim may be begun; or

b) The court may order that the claim be continued,

by or against one or more of the persons who have the *same interest* as representatives of any other persons who have that interest. (My emphasis.)

It was argued at the trial that both the liquidator and each creditor had a common interest in establishing that Mr Yardley was disqualified, and that Mr Hill knew this but permitted him to act as he did. However, Judge Norris did not consider that these common factual elements would allow him to make the liquidator the creditors' representative for the purposes of s15 CDDA (an analogous provision as regards the standing of a liquidator explored in Part 1).

Each creditor has a direct statutory right of action in respect of the whole debt against the disqualified director, whereas the liquidator has only a right to claim a contribution where the general law so allows. Accordingly, the judge did not consider that the liquidator and the creditors could be said to have 'the same interest' as required by CPR 19.6 for a representative action to be sustained.

> "The judge did not consider that the liquidator and the creditors could be said to have the same interest."

Even where the liquidator was acting as a creditors' representative, the liquidator can have no interest in any monies recovered from the disqualified director. The repayment of the relevant debts will not form part of the liquidation estate. They will be held on trust for the creditors. By contrast, each creditor can pursue a claim against the disqualified director for his own benefit. The same difficulty with regard to a contribution claim will also apply in these circumstances.

A second difficulty with a representative action was identified. The creditors' claim is immediate and unconditional whereas the liquidator's claim is for a contribution. Can they therefore be described as 'in the same interest?'

Counsel for the liquidator referred to the case of *Wolmershausen* v. *Gullick* [1893] 2 Ch 514 as authority for the proposition that a surety is entitled to a declaration of his right to a contribution from his co-surety if the creditor has obtained judgment or something equivalent to a judgment against him.

He then cited paragraph 14-011 from Goff and Jones: *The Law of Restitution* (6th edn. 2004) where the writers endorsed this authority and added:

'There are indications in this decision that the principle is wider, and that judgment, or its equivalent, is unnecessary if the creditor has a right to immediate payment from the surety.'

Judge Norris held that this was indeed a correct statement of the law.

Furthermore, had the liquidator admitted a proof of debt, that would have been sufficient to create a right of immediate payment for the purpose of enabling the liquidator to apply for the declaration of the sort mooted in *Wolmershausen*. Counsel for the liquidator argued that since the right to claim the contribution already existed, notwithstanding the absence of payment, then the creditors' claim to payment and the liquidator's claim to contribution could be described as 'in the same interest.'

> "The liquidator can have no interest in any monies recovered from the disqualified director."

Unfortunately for the liquidator, there was no evidence that any of the relevant debts had been admitted to proof. Nor was there any evidence that the liquidator was likely to be paying anything out in respect of the relevant debts because the company had no assets.

A way forward?

In a nil asset liquidation, there may be claims pursuant to ss216 and 217 and s15 of the CDDA. The claims are conferred by statute on the creditors but the creditors may not want to issue proceedings.

The liquidator has a right of contribution but because there are no assets, there has been no payment of any relevant debts sufficient to support a claim for a contribution against the former or disqualified directors. There is also an issue as regards a claim for a contribution from the former or disqualified directors against the company, as discussed in Part I, which could negate any recovery by way of circularity (though any claim against the company would be an unsecured creditor claim).

A representative action brought by the liquidator on behalf of the creditors faces the difficulty of establishing the 'same interest' which must be established in order to persuade the court to make a representative order. Of the two 'groups' of objections cited in *Prestige Grindings*, the second group may be easier to avoid.

Where a proof of debt (for a relevant debt) has been admitted by the liquidator, then it would be possible to argue that the right to a contribution exists such that the creditors' claim to payment and the liquidator's claim to contribution could be described as 'in the same interest'; the authority for this argument being *Wolmershausen* and *Prestige Grindings*, by analysis.

The first 'group' of objections is harder to vitiate. The creditor claims for himself, the liquidator's contribution claim is for the liquidation estate. These interests are not the same. If it were possible for the liquidator to act as a representative of the creditors, to pursue an action in furtherance of the creditors' claim against the former or disqualified directors (the directors) then any recovery would be held in trust for those creditors. However, this could give rise to a contribution claim by the directors against the company's estate. This will defeat the liquidator's own contribution claim, though it will not defeat the claims in the representative action. The directors have this right of contribution because they and the company are co-debtors. The fact that the creditors have recovered from the directors entitles the directors to seek a contribution from the company. That the liquidator, acting as a representative, holds the recovered funds for the creditors on trust, will prevent any recovery of the same funds by the directors. However, it does not prevent the directors from claiming a contribution from the liquidation estate, as unsecured creditors.

In practical terms, the liquidator may not be concerned that his contribution claim against the directors may be defeated in such circumstances. This is because he has recovered on behalf of the creditors, not on the part of the company, and he may not be claiming any contribution. However, if he has assets in the liquidation and he has made a payment for which he claims a contribution, then his success on behalf of the creditors may well, in effect, defeat the company's contribution claim (because the company will be liable for a contribution to the directors). In these circumstances the liquidator would need to make a suitable arrangement with the creditors so that the position of the company was not prejudiced.

In any event, as was pointed out in *Prestige Grindings*:

'The liquidator is not an agent for the creditors, let alone one particular group. A voluntary liquidator is more rightly described as the agent of the company, an agent who has cast upon her by statute and otherwise special duties which include the duty of applying the company's assets in paying creditors and distributing the surplus among the shareholders, see Knowles v. *Scott [1891] 1 Ch 717 at p722*' (cited with approval).

Accordingly, even if it were possible for a liquidator to act as an agent of the creditors for the purpose of issuing a claim that statute confers on those creditors, and notwithstanding the difficulty that this could produce both in terms of defeating any claim for a contribution from the liquidator and causing a claim for a contribution to lie against the company (while the liquidator's recoveries as agent of the creditors is held in trust) there is an obvious conflict between the liquidator's statutory duties and any role as 'agent' of the creditors.

> "The directors have this right of contribution because they and the company are co-debtors."

Conclusion

Creditors should be encouraged to pursue any strong claim that is conferred on them in their own right. The difficulty for many insolvency practitioners is that in a nil asset case where the creditors are reluctant to stand on their rights, how should they proceed? One possibility would be to encourage creditors with a strong claim to instruct solicitors to pursue the relevant debts, retaining the insolvency practitioners' staff to assist in the case preparation work. This would ensure that those who have acted unlawfully are brought to account.

This article is a synopsis of Part 2 of a two-part article by the same writer that appeared in the *New Law Journal* at NLJ (2012) vol. 162 No. 7531 pages 1211–1212. It is reproduced here with the kind permission of the *New Law Journal*.

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is a solicitor at
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Interview with…

Liz Bingham

Will Black talks to the new R3 president **Liz Bingham** on her year ahead and the challenges for the industry.

You have taken over as president at a time when the profession is facing further scrutiny over fees and pre-packs. How do you see R3 responding to these reviews?
We are on the front foot, as previous presidents have been. We know the value of pre-packs, and have nothing to apologise for on fees. There are concerns and the review should address both.

We are already engaging as much as we can with Dr Elaine Kempson on her fees review and hope many of our members completed the survey, which will inform her next announcements. It's so important our members participate in order to help R3.

Similarly on pre-packs, we have met with Lord Mitchell, who tabled the amendment that triggered this latest review and we are re-drafting our policy papers in anticipation.

Tell us something of the day job and your insolvency expertise – for instance what is LASER (Liquidations and Strategic Exit Routes) at Ernst & Young?
In the last 12 or 15 years what became apparent within Ernst & Young was that we needed to properly focus on our non-bank work. I was one of the architects of LASER, and that's a practice of 50 people in London focusing on all non-bank, non-administration trading type opportunities.

> "It's a fabulous profession, one that I was lucky enough to fall into."

I now get involved with very complex legal entity rationalisation projects. These tend to be solvent projects, very much about helping clients redesign their corporate structures and using traditional insolvency practitioner skills in a different way. At the heart of our success is that we are commercial insolvency practitioners. Some of my biggest assignments at the moment include the winding-up of Sea Containers Group, following the emergence from Chapter 11, on the insolvent side, and on the solvent side working for some of the Fortune 50 organisations.

Do you believe there is now a reduced capacity for turnaround, and does that make liquidation the 'new norm'?
I think liquidation will always have a role to play, particularly in the UK and other Commonwealth, Westminster rules jurisdictions. It's very necessary given the powers of a liquidator – but I don't see it replacing other business rescue procedures.

Lee Manning was very focused on retail. What other areas of practitioner work would you wish to emphasise during your term?
Areas around maximising asset values. Ensuring, in the context of payment of fair tax, that tax opportunities can be maximised through formal processes. I see opportunities for helping organisations exit from non-core businesses, using the UK insolvency process to facilitate that.

What made you want to become R3 president? What are you looking forward to in your role of president?
Ernst & Young has a very long and very proud association with R3, and I will be their fourth R3 president. But equally it is

the culmination of my insolvency career, being elected by my peers to Council and then to have the support of the profession to take over president.

It's a fabulous profession, one that I was lucky enough to fall into, with that mix of finance, legal and general business common sense.

Which of your predecessor Lee Manning's longer term campaign areas are you keenest to continue with?

For all of us, the admin expenses debate will have a huge impact, and the judgment is due out this year. Obviously it's important from an Ernst & Young perspective as well.

I was absolutely thrilled with the work the team did under Lee with 'Holding Rescue to Ransom', which should be coming onto our statute books this year. I think the work we are embarking on with Jackson and the focus we put on fraud during the conference showcase beautifully what R3 can do – not only for the profession, but for UK businesses more generally.

> We have to be able to reflect the society we serve.

Did Lee Manning give you any advice from his time as president?

He said to make sure I enjoyed it as the time would go incredibly quickly, and to lean heavily on the R3 team who were supportive to him. Also to work with the team to help prioritise!

Who or what helped you rise through the ranks in the insolvency profession? Did it make any difference not having a university degree?

I got into the profession completely by accident. I had decided not to go to university, in part because I had no idea what I wanted to do with my life. BDO Stoy Hayward had a pretty forward-looking school leaver programme, this was back in 1981. They offered me a role in their insolvency department.

There were three partners there – Peter Copp, George Auger and Ray Hocking – and I learnt from them, particularly Ray Hocking. Then at Ernst & Young I worked with the likes of past R3 presidents Nigel Hamilton and of course, Alan Bloom, who were very influential on my career.

Do you think there is a 'lowering of the barriers' in terms of entering the profession? What about the composition of the profession? This year, JIEB passed 41 per cent female and 59 per cent male. Current full members (including fellows and honorary) comprise 20 per cent female and 80 per cent male. What's your reaction to these figures?

I wouldn't advocate lowering the barriers if that meant lowering the quality. But being a bit more overt about this great profession and how broad it can be in terms of application, I think is important to encourage more people into the profession at a younger age.

I was really surprised by the low representation of female members of R3, and given we are not far off half the JIEB passes going to female students, then we should be proactively encouraging our female members. However, I am the third female president in six years, and I know the Council has a near 40 per cent female representation so things are better in these high-profile slots.

How do you see yourself offering encouragement to those who have recently joined the profession?

I'm really keen we see more of the next generation of IPs and business recovery professionals – that is as important an aspect of diversity as the gender aspect. We have to be able to reflect the society we serve.

As graduate jobs become harder to find we will see younger and younger entrepreneurs in this country and there is a higher risk of failure for these businesses, some might say. So we need a profession that can relate to the business owners we will be serving.

In a year's time, on your last day as R3 president, what would you like to have achieved?

In an ideal world, we would have put, once and for all, the bad press associated with insolvency practitioners to bed! And that we finally got stakeholders to understand the value of what we do.

I would like to see some of the reforms we talked about firmly embedded, Jackson and so on. Also, less regulation in order to help the profession do what it does best. I would like to see us all with a bit of a spring in our step about the quality of the work we do.

Your interest in equality and diversity issues at Ernst & Young is well known, how do you see that dimension featuring in your year as R3 president?

It's a passion of mine and a business priority at Ernst & Young but it isn't my intention to force anything onto R3 and its membership. I do believe we should be thinking about the changing face of the society that we serve. There is a really good business case for it and I think the profession would benefit from thinking carefully about it.But I don't want to make a big issue of it for R3 because there are many more important areas I need to be focused on.

> Make sure you are not just hiring people who look and think like you...

How can we make equality and diversity campaigns, traditionally the preserve of larger firms, relevant to smaller and mid-size insolvency firms?

It's a good challenge, in some respects it's easier for big firms to take on the mantle around diversity and inclusion. Having said that, if you think about diversity in the broadest sense, diversity also means diversity of background, diversity of experience as well as the more obvious ones such as gender and ethnicity. Whatever size firm you are, make sure you are not just hiring people who look and think like you.

> I would like to see us all with a bit of a spring in our step about the quality of the work we do.

Looking and thinking differently to you is diversity and that's a good thing. That's not especially burdensome.

Against a backdrop of restricted income, how can additional costs associated with this work be justified for IP firms in an era of cost cutting?

I don't think it should require additional costs – in fact it could be of benefit. If you can attract and retain employees from a broader pool of talent, they will deliver better creative and innovative solutions. It certainly shouldn't cost any more to think and behave in that way.

How easy is it to make the business case for establishing good diversity and equality practices?

In terms of a monetary value, we have done some research at Ernst & Young that connects diversity with employee engagement and strength of brand in the market. There is a direct correlation in our world and I don't see why this should be any different in smaller firms.

A workforce is better engaged when they feel able to be themselves at work, feel respected, and if their voices are heard. Clients are more attracted to working with you than competitors, you find there are fewer fee disputes, fewer conflicts, fewer requests for proposal – clients want you because you have the best teams.

What do you like doing in your spare time?

I love film, I am a member of the boutique cinema chain Everyman. I also love theatre, friends, fine food and walking my dogs. □

WILL BLACK is communications manager at R3.

SAVE THE DATE

11–12 September
R3 Insolvency Conference
Hilton, Reading

17–18 October
R3 SPG Forum
Hilton Metropole, Birmingham

R3 events, courses and conferences

	Date	Event	Venue
June	3	North West Regional Meeting	JMW LLP, Manchester
June	4	SPG Technical Review	Holiday Inn Bloomsbury, London
June	10	Southern Regional Meeting	PwC LLP, Southampton
June	13	Tax and Insolvency	Crowne Plaza, Birmingham
June	13	Pension Issues	Crowne Plaza, Birmingham
June	13	South West & Wales Black Tie Dinner	Thistle Hotel, Bristol
June	18	North West Golf Day	Clitheroe Golf Club
June	21	North West Ladies Lunch	Lowry Hotel, Manchester
June	21	Yorkshire Ladies Lunch	Queens Hotel, Leeds
June	25	Insolvency Day	Squire Sanders (UK) LLP, London
June	27	London & South East Strictly Event	Hilton Park Lane, London
July	4	East Midlands Summer BBQ	Playhouse, Nottingham
July	9	Introductory Series – Rescue 2 and Rescue 3	Prospero House, London
July	9	Introductory Series – Rescue 2 and Rescue 3	Irwin Mitchell Solicitors, Leeds
July	10	Introductory Series – Rescue 2 and Rescue 3	Deloitte LLP, Birmingham
July	11	Tax and Insolvency	Hilton Tower Bridge, London
July	11	Pension Issues	Hilton Tower Bridge, London
July	16	Insolvency Day	Squire Sanders (UK) LLP, Manchester

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 full 2013 programme. Alternatively, call the Courses team on 020 7566 4234 to request a programme by post.

INSOL International & smaller practices: the world is your oyster…

Hans Klopper on the ways in which small practices can promote their firms, grow their business and maximise the benefits of INSOL membership.

As an international association of insolvency and turnaround professionals, INSOL has over 9,000 members around the world. INSOL recognises that approximately a third of its members would self-classify their firms as small practices. INSOL recognises the importance of this membership and strives to provide dedicated member services for small practices. I would emphasise, however, that as with all memberships, you get as much reward out of a membership as you put in. With an open mind to new possibilities the world is your oyster.

What does the future hold?

Marketing and business development plays a key role in the establishment and growth of small practices especially as the current economic climate has seen the marketplace become increasingly global and competitive. Smaller firms often neglect these areas due to limited resources or financial pressures but many practitioners have to invest more resource in marketing and business development activities to maintain or grow their businesses.

INSOL International is conducting a short survey on this topic to take the pulse and provide its membership with an overview on the ways small practitioners are developing, evolving or enhancing their marketing. The Small Practice Committee of INSOL International encourages members to contribute to the survey when it is sent out.

The Small Practice Committee is also working to provide an international glossary of terms to assist when working with professionals in other countries.

We are also hoping to use a video call to find out what subject areas are of key importance to R3 SPG members to determine any new projects we can work together on in the future.

Smaller Practice member services: a potted history

So what has INSOL done for small practitioners already?

In 2001 INSOL produced a Consumer Debt Report. INSOL went on to form the Smaller Practice Issues Committee in 2002. A self-selecting survey of members was carried out and the results were published in *INSOL World* first quarter issue 2003.

The key requests were:

- to promote local expertise via the website; and

- to provide a consumer debt study by country.

INSOL created a smaller practice website, which has developed over the years to include a forum for discussion and a network of members on the site, including a short profile for each.

With regard to meetings specifically for smaller practitioners, INSOL then held a small practice ancillary meeting in 2005 at the Quadrennial Congress in Sydney. In more recent years the members determined that they would prefer to have a dedicated stream of technical sessions in the main programme rather than a separate meeting.

In 2007 at INSOL Cape Town we therefore started a three-tier programme, which provided six breakout meetings on smaller practice issues. Increasingly the Smaller Practice Committee found that the subjects of interest to them are of similar interest in the main to larger firms and it became increasingly difficult to put a full programme together of purely small practice issues, so we now provide one or two dedicated small practice sessions at the conferences with the main programmes covering areas of interest to practitioners from all sizes of firms.

In the second quarter edition of *INSOL World* in 2009 we introduced a dedicated section for smaller practitioners and a number of interesting articles have appeared on various cases since then. We are always looking for volunteers willing to write for *INSOL World* and if you have any ideas for articles please send them to Jelena Sisko at jelena@insol.ision.co.uk.

In 2011 INSOL published a book on *Creditors Rights in Insolvency Proceedings – A Practical Guide for Smaller Practices* and published a revised Consumer Debt Report, which includes country-by-country reviews and information on those countries that have no consumer legislation.

In 2011 we also launched a dedicated technical series covering smaller practice issues. We have produced seven papers to date in this series. The website forum is also on-going as is the network of members at www.insol.org.

At all INSOL Annual Conferences an open committee takes place for all those with an interest to attend and a small practice dinner is organised on one of the free nights.

The Smaller Practice Issues Committee also initiated open quarterly calls as a means to involve smaller practitioners in INSOL – this, and working with the association on projects of interest to you and your colleagues, are ways to make membership count.

Suggestions on future technical research work that can be undertaken by the committee on behalf of small practitioners are welcome. We are planning a web meeting to discuss the work of the committee and get more members involved. Let Heather Callow know heather@insol.ision.co.uk if you are interested in taking part – talking and sharing experiences allow us to help each other.

Smaller practices don't have multi-million pound marketing budgets or teams of people dedicated to brand and PR. These roles are fitted in around our everyday working professional lives. It is difficult to balance the different roles but being open to getting new business and making new business contacts to work with in the future is what INSOL can help provide if you want to take advantage of its resources.

Our executive director will be attending the R3 SPG Forum in October in Birmingham and that will give you the opportunity to directly consider what else we can work on together to benefit our sector of the profession. The world really is your oyster – you just have to make a little effort and shuck the shell.

HANS KLOPPER, from Independent Trustees (Pty) Ltd, South Africa, is chairman of the INSOL International Small Practice Issues Committee.

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Matthew Tait, 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 certificate of 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.

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Summer edition 2013

Interview with…

Dr Richard Judge

As the chief executive completes his first year in the role, he talks to **Chris Laughton** about strategies, skills and taking The Insolvency Service forward.

How does it feel to take on the role of chief executive in a specialist area where you have little or no previous experience, or did you, prior to being appointed, have any contact with disqualification or insolvency matters more generally?

I've had more than ten years' experience as a director and chief executive. I've led a variety of organisations in the public and private sectors, taking them through change, improving performance and generally making them more robust. It's a generic and transferable skill set. I've always worked in environments with professionally skilled people where high quality standards are expected. I'm a chartered director, and the qualifications for this helped me understand the role of directors, corporate governance and something about insolvency. The bit that's missing is the detail of insolvency but I have plenty of expertise around me here in The Insolvency Service. Part of the fun of a new role is that you learn about something completely different. I'm enjoying it.

> "I've been reshaping some of the senior teams, injecting some fresh thinking and preparing to take forward the strategy."

What did your predecessor pass on to you by way of first-day advice?

The thing that came across most strongly was Stephen's huge pride in The Insolvency Service and its fantastic people – a really committed workforce. A message he hammered home to me was how fundamentally important insolvency is for the economy and how important it is that it should be done well. I get that.

As a new chief executive what were your immediate objectives and what is your aim over the next three to five years?

My first few months were spent learning, visiting our offices, and getting a feel for what's going on. Having to prepare myself rapidly for the BIS Select Committee hearing in October was a helpful prod to understanding things quickly. I've been developing a high-level strategy and getting the team in place to deliver it. Reshaping my director team has injected fresh thinking alongside in-house expertise. With the team now in place, I can focus on getting out and about even more.

Over the next three to five years we've got a lot of good things to build on. There are also legacy issues to tackle if we are to strengthen The Insolvency Service. As we do this, we must keep our customer service levels high and provide clear leadership across the sector. That means even more collaboration and doing things differently: for example by making more use of digital services. It's important that we continue to invest in our people, not just in their professional skills but also in the tools that they use every day to deliver our services.

IPs take D reports seriously and have a statutory duty to complete them, so they feel frustrated when they have expressed a considered professional opinion and the response from The Insolvency Service is a bare 'No Further Investigation'. How can this frustration best be resolved and what can IPs and The Insolvency Service do to ensure that more of the delinquent directors IPs encounter are disqualified?

> "We want to make sure that there is confidence in the insolvency and enforcement regime."

We want to make sure that there is confidence in the insolvency and enforcement regime. Disqualification is an important part of this. Building confidence is also about communication. I'm not sure that people understand how much is already happening. For example, we took over 2000 enforcement actions last year – averaging almost ten a day – that resulted »

Dr Richard Judge, inspector general & chief executive, The Insolvency Service

2007–2012	Chief executive of Cefas (Centre for Environment, Fisheries and Aquaculture Science). An executive agency of Defra, Cefas is an internationally renowned aquatic scientific research and consultancy centre.
2005–2007	Self-employed interim director
2003–2005	Group director AEA Environment
2000–2003	Managing director AEA Rail BV, Utrecht, Netherlands
1984–1987	PhD, Engineering, University of Durham
1981–1984	BSc, Engineering, University of Durham

in restrictions of one form or other on bankrupts, directors and companies. In addition, another 160 companies that were abusing the system were wound up in the public interest. It's important that we get that message across.

So far as IPs' D reports are concerned, they have to pass an evidential test: is there a better than 50 per cent chance of a disqualification order? That said, there is probably even more that we could do to

> "...every D1 report gets looked at, every concern is registered..."

explain to IPs why specific cases are not taken forward. There is another really important message to get out to IPs though – every D1 report gets looked at, every concern is registered and we value that intelligence because it reveals patterns of behaviour. The disqualification process is not about submitting a form – it is fundamentally about IPs and The Insolvency Service working together to understand where there may be issues. We can then put the resource in place to deal with these. To do that we need evidence and some of the best evidence comes from IPs.

We are working closely with IPs in various groups to simplify the disqualification regime, especially the issue of D reports. We recently issued revised guidance on D reports. We have also established the Disqualification Stakeholder Group, which brings together members of the profession to discuss best practice.

How will you ensure that IP regulation works effectively both to eliminate, as far as possible, any shortcomings in IPs' conduct and to give the public comfort in the knowledge that IP regulation is robust, fair and effective?

I come from a background where the regulatory environment was very different so I have lots to learn about the system and how it works Having talked to a range of stakeholders, I know that there is a wide range of views. Whether or not we would choose to start with the system we have at the moment, it is the one we have and there should be enough in there to make it work. It makes sense for all of us to show that we are able to work together and to respond to the clear messages about the expectations society has. We in The Insolvency Service need to enable this. There are positive developments. For example, a single complaints gateway will help and we have had good support from Recognised Professional Bodies in taking this forward. It goes live this spring.

We need also to take our role of oversight regulator further. For example, if we consider Statement of Insolvency Practice 16 and pre-packs – identifying minor disclosure compliance issues in SIP16 reports is not what we are talking about (although we do need to deal with those too). It means digging deeper so we can say with confidence, and with evidence, that we've looked at the issues that concern people and that we're comfortable. It all comes back to providing confidence in the insolvency system.

You have just arrived on Twitter –- but how do you communicate the value of The Insolvency Service, and by extension, the insolvency profession, to the wider public who are likely to have limited or prejudicial views on all our work?

We have to communicate to do our job – so people know their rights and options, to highlight enforcement action, and to hear views on (and inform) insolvency activities. To do so we use a variety of communications channels. We welcome ideas about how we might be even more effective. There is an absolute willingness to find ways of working together across the sector to help improve this. The Insolvency Service Twitter account is @insolvencygovuk.

For what would you like to be remembered from your time in this role?

Seeing The Insolvency Service through this period of change, building confidence and making it resilient and responsive in a rapidly changing world. That includes making the most of our wealth of talents, so that we play our part to the full, make a difference across the insolvency sector and support economic growth.

> "We want to communicate to generate confidence in our service."

Is there anyone you admire who has worked in a public service role (past or present)?

To me this is not one person. There are many fantastic examples of organisations across the public service who are innovating and delivering great things. We can draw on their experience. There's a place for The Insolvency Service amongst them. □

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