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

Spring 2019

RECOVERY

Uncertainty

Navigating the rough seas of uncertainty
Learn to spot the key indicators of uncertainty and find out how you can keep the impact minimal

A protective shield for restructuring: insolvency proceedings in Germany
Is the EU's biggest GDP generator as good with its legislation as it is with the economy?

Post-Brexit cross-border insolvency law bingo: what will still apply?
Have the Insolvency (Amendment) (EU Exit) Regulations 2019 provided the clarity we all badly need?

Common ground: the Insolvency (Scotland) Rules 2018
Scotland finally gets its new rules, with more than a little influence from its neighbours to the south

The *NJM* decisions: a tricky 'tense' situation
How one tiny wording change to the Insolvency Rules led to three legal cases in one year

Argue now, pay later?
Victory House has clarified the treatment of adjudication within a winding-up procedure

An interview with… Stephen Cave, PwC partner and R3's Northern Ireland chair
From property crashes to Brexit, few places have seen the same uncertainty as Northern Ireland. Read how the region has fared from someone at the heart of its insolvency work

Careers development
Recent qualifiers relay their experience of the examinations and how the first years of professional life have treated them

Whispers, greed and mistrust: why the uncertainty over IVAs?
An opinion examining the dramatic increase in IVAs and what can be done to restore confidence in providers and processes

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

From the editor

UK Plc's future is uncertain. It's not insolvent, but there has been a series of profit warnings. It will probably survive, although one or two of its four main divisions might move to de-merge. It could thrive, but not in investors' lifetimes unless the CEO adopts a new strategic plan (and even then many think it unlikely). Currently the plan is to agree a new deal with the consortium to which the CEO gave notice of the group's withdrawal and which is the group's major trading partner. The supervisory board has twice rejected the plan (resoundingly) and it will shortly be brought back to them again. There is some support for it from the board of directors, but even they warn that things will inevitably get worse before they get better. Time is running out, but apparently time might now be extended – if every single consortium member agrees.

There are two important points about this deal that many shareholders don't appreciate. Firstly, the deal is not really a deal at all. It is an exercise in extending uncertainty. It merely takes UK Plc into an irreversible transition period, which will need to last much longer than the 21 months it mentions, while the detail of the future relationship is agreed. During that time there would be no mechanism for UK Plc to either leave or stay in the consortium, but it would be bound by the consortium's rules. Secondly, 'no deal' doesn't mean that things stay as they are. It means that every arrangement UK Plc had with the consortium or with other entities via the consortium, which means almost all its external arrangements, come to an end overnight. You may know this, but many shareholders don't.

How did this all come about? The courts have found that the non-binding EGM resolution nearly three years ago, on which the CEO's personal decision to withdraw was solely based, was corrupted and would have been void if it had been binding. However, at court the CEO admitted knowing about that corruption, but insisted on going ahead anyway! You couldn't make it up. But in the strange world of UK Plc's CEO it would be 'a betrayal of democracy' to call another EGM to approve the plan or otherwise!

The turnaround adage 'if you can't change the management, change the management' undoubtedly applies here, but there are no good, well-placed candidates. And how could it be achieved anyway, given the group's unique and largely uncodified constitution?

In theory the supervisory board has the ultimate power to deal with the position of extreme and damaging uncertainty in which the group finds itself. However, the supervisory board is a disparate group, riven with factions. Many of its members forget that their primary individual duty is to all shareholders, and they favour instead those who appointed them and might appoint them again (a bit like administrators, one or two of whom forget that their primary duty is to all creditors); worse still, many blindly follow their group leaders. Still, it's the system the shareholders are lumbered with, so, for them, shareholder activism and lobbying supervisory board members remains the way to effect change, along with another march on the board room to demand an EGM!

Can anyone identify a restructuring solution to the group's potentially existential problems?

If only it were a fairy tale.

C. Laughton

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

Regulars

41

Legal update

Uncertainty

22

24

Features

32

Dates for your diary

R3 matters

Advertising features

Themes of *RECOVERY* 2019

SUMMER	Sub-contracting and insolvency
AUTUMN	Regulation and risk
WINTER	TBC

We do the best we can to keep you up to date with the main issues that affect the profession. In times of political uncertainty, such as Brexit, these themes may be subject to change.

Careers supplement

CAREERS SUPPLEMENT
See inside for JIEB results 2018

RECOVERY

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

Publishing assistant Amandine Riche
Tel: 01491 828939, amandine.riche@groupgti.com

Advertising Jack Roberts
Tel: 01491 828900, jack.roberts@groupgti.com

Associate director Brendan McGrath

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Extra serving of CVA for UK restaurant group

The Boparan Restaurant Group is seeking to enter creditors voluntary arrangement (CVA) for the Giraffe and Ed's Easy Diner brands, according to an announcement on 4 March. The Boparan Group bought the loss-making brands from Tesco in 2016 and said in a statement that 'despite sales improvements' at some of the restaurants it was forced to seek a CVA. If the arrangement is approved by creditors, 13 of the sites will see a rent reduction, while 27 sites will face closure.

The Boparan Group is owned by Ranjit Singh Boparan, known as the 'Chicken King' for his business supplying poultry to the UK's major supermarkets.

The Group owns several restaurant chains including Harry Ramsden's fish and chip shop, Cinnamon Collection, Giraffe and Ed's Easy Diner. The Group also rescued Bernard Matthews via pre-pack administration in September 2016.

The UK's restaurant sector has seen a massive rise in CVAs over the last year. A report by Linklaters suggested that there were 12 CVAs in Q1 2018, compared to 17 over the entirety of 2017. Over-saturation of the market, over-expansion and rising costs and business rates are thought to be contributing factors.

Source: Sky News

Gender biased financial advice

Research from King's College London suggests that an adviser's gender is likely to influence the recommendations they make to high net worth clients. The study by Dr Ylva Baeckstrom offered a series of fictional scenarios, posed by men and women, to a number of finance professionals and asked them to rate each client according to their likely financial knowledge and degree of control over their investments.

The results found that, while clients were rated equally knowledgeable, female advisers recommended lower risk portfolios to women, and rated them as having less control over investments than their male equivalents. The highest risk portfolios were more likely to be offered by male advisers to their male clients.

The findings echo a study from last year in which men were found to be more likely to seek professional financial advice about retirement than their female counterparts. Dr Baeckstrom has stated an intention to expand the study in future to cover financial advice given to those on moderate incomes.

Source: FT Adviser

A message from the Chief Insolvency and Companies Court Judge

This note relates to Practice Direction 51U – disclosure pilot for the Business and Property Courts (the disclosure pilot).

The provisions of the disclosure pilot apply to the insolvency and companies list. The disclosure pilot does not apply to Practice Direction 51P that provides the procedure for insolvency express trials.

The disclosure pilot applies to part 7 proceedings with statements of case. Part 7 claims without particulars of claim and part 8 claims are expressly excluded from certain of its requirements. Forms of originating process familiar to users of the insolvency and companies list, such as petitions and applications, are not 'statements of case' for the purpose of the disclosure pilot. An exception is made for petitions issued for relief pursuant to sections 994–996 of the Companies Act 2006 and/or for winding up on the just and equitable ground, since these are analogous to part 7 proceedings with statements of case.

The court may, as part of its case management powers, consider it appropriate to order disclosure in proceedings commenced by part 8 claim, petition or application, either of its own motion or on the application of a party. As the disclosure pilot replaces part 31 of the Civil Procedure Rules, such disclosure will be in accordance with the disclosure pilot's provisions.

Obituary notice

Norma Rosetta Foster sadly passed away on 25 November 2018, aged 71. She passed at home after a short illness. She was professional to the end.

Moves in the profession

Chris Tate FCA, has joined Moore Stephens South's restructuring and insolvency team as a director. Chris' experience includes due diligence work, solvent disposals, investigations and business advisory assignments for banks and other stakeholders.

Report suggests banking and finance hires on the rise

A new report suggests a moderate level of hiring in the finance, compliance, legal and accountancy sectors despite Brexit uncertainty. The Morgan McKinley 2019 Salary Guide suggested that there had been a decrease in those seeking new work, possibly attributed to a need from organisations to hang on to staff amid uncertainty, but a rise in new roles to meet current demands.

Voluntary insolvencies highest on record

The latest Insolvency Service statistics for Q4 2018 state that Individual Voluntary Arrangements (IVAs) have risen to their highest level since 2010. Over 71,000 IVAs were registered in 2018, up from around 60,000 in 2017. To read more about changes in the IVA marketplace, see pages 8 and 31.

*If you have a story that you'd like featured in RECOVERY, please contact **matthew.jukes@groupgti.com**.*

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President's column

Stuart Frith reviews a year of positive change within R3 and looks ahead to a year of future opportunity and uncertainty for the profession.

After an unforgettable, energetic and very enjoyable 12 months, this is my last column as president of R3. I'm handing over the reins to Moore Stephens' Duncan Swift in April but, before I hang up my chain of office, I wanted to look back over a year of change for R3 and the profession.

In May 2018, at R3's Annual Conference in Vilamoura, I said that I would spend my year boosting the next generation of insolvency talent and helping to progress R3's strategic review.

It feels like I have been talking about the strategic review non-stop over my term. It has been a recurring theme of these columns and visits to R3 member meetings across the country. I've enjoyed hearing members' views on what they want from R3 and where they want to see our association go next.

From feedback to action

There is an enormous amount of work going on to turn all the feedback we've had into action. We are looking at everything from R3's membership options and how we represent those working outside of statutory insolvency procedures to how R3 can continue to deliver top quality, practical training and career-long learning.

I have also been speaking to R3's 'new professionals' committees to see how we can enhance support for those starting out in the profession. I am determined that R3 harnesses the energy that is out there and represents everyone across the profession, no matter the stage of their career. The more we can get new professionals involved, the better.

Duncan, along with Emma Lovell, R3's chief executive, will be using R3's upcoming Annual Conference at Slaley Hall (in Northumberland on 22–24 May) to announce the next stages of the review and R3's vision for the future. There have been significant changes at R3 since the review started, but now is the point that members will see and hear about real differences in the association. I am thoroughly looking forward to hearing what Duncan and Emma have to say – and to hear what members think.

The wider framework

While R3 changes, the insolvency and restructuring framework is changing around us. There are structural changes in the profession, such as the rise of restructuring and work outside of statutory insolvency, as well as changes to policy and the legislative landscape.

Although Brexit has caused parliament's legislative gears to grind to a halt, the government has been busy laying the groundwork for when normal service (eventually) resumes. The insolvency and restructuring framework has not been exempt from this work.

Last August saw the announcement of plans for the introduction of new insolvency tools and promises to review office-holders' toolkits. The government started its review of whether it should ban sales to connected parties from administrations (linked to the Graham review of pre-packs). Consultations took place on the powers of the Pensions Regulator and plans to introduce a 'breathing space' for indebted individuals. Meanwhile, at the budget, there was a surprise return for Crown preference.

> **"I am determined that R3 harnesses the energy that is out there and represents everyone across the profession, no matter the stage of their career."**

Expect to see further work from government in all these areas this year. We are anticipating progress on things that have already been put to consultation, such as breathing space, the corporate insolvency reforms and pre-packs. We are awaiting, with some trepidation and curiosity, consultations on issues like Crown preference. Expected fresh developments for 2019 include a review of the possible introduction of a single regulator for the insolvency profession and clarity on the eventual shape of Brexit. And maybe, just maybe, a general election and more uncertainty will also be on the cards.

This year could also see rising insolvencies and a corresponding increase in focus on the work and value of our profession. The perception is that our services may be more in demand, although I have been through similar periods of perceived growth which have not, for one reason or another, materialised.

Whatever 2019 brings, remember that R3 is here to support your profession. We are looking at how we can better represent those working in insolvency and restructuring – all of you, no matter which part of our broad church you belong to. We will continue to make sure your views are heard – and acted on – when the government considers new legislation and regulation. This year, we'll be looking to help the profession respond to increased interest and scrutiny with a project on professional ethics and research on the value of the profession's work.

Find out more about our recent work on Brexit, corporate insolvency reform, breathing space and the Pensions Regulator on page 37.

An inspiring membership

It has been both inspiring and illuminating to have a first-hand view of the work the R3 team does on behalf of members. To them I extend my heartfelt thanks for their boundless enthusiasm and unstinting support. To our members, I am grateful to have had this opportunity to serve R3 as your president. I was fortunate to join the executive in Andrew Tate's year as president and to succeed Adrian Hyde, both of whom were prime movers in galvanising the spirit of change within R3 – I have enjoyed endeavouring to follow in their examples. I have been also very lucky to have an excellent vice-president in Duncan, and it is to him that I pass on the mantle with my very best wishes for his year in office.

Finally, I have been struck by the strength and depth of R3's membership, and the people who are willing to commit their time to making this profession, and the insolvency and restructuring framework, better. Please keep doing what you do and taking the time to contribute to our aims and ambitions. This is a profession to be very proud of indeed. □

STUART FRITH is president of R3 and a partner at Stephenson Harwood.

Whispers, greed and mistrust: why the uncertainty over IVAs?

Andrew Smith shares his opinion on the current state of IVAs: it all boils down to a matter of trust.

Anyone looking at the Insolvency Service's most recent figures might conclude that the individual voluntary arrangement (IVA) is beginning to fulfil its potential as an affordable, achievable debt solution that balances the ability of debtors' to repay with the rights of creditors to be repaid. But the picture isn't simple. Or rosy. The future of personal insolvency practice is at stake – and it is the use of IVAs that has brought this about.

> Appropriately arranged, an IVA is likely to be swifter and cheaper for a debtor than a debt management plan from a free-to-client provider.

There are now around 70,000 IVAs a year, compared with just over 40,000 in 2015, but this is not cause for undiluted celebration. Nor does it represent the full extent of the opportunity for IVA providers.

The good, the bad and the ugly

There is no doubt that an appropriate IVA is an excellent solution to unsustainable personal debt. Appropriately arranged, an IVA is likely to be swifter and cheaper for a debtor than a debt management plan from a free-to-client provider. But, there are clear concerns in the free debt advice sector, from the government, creditors and IPs, that not all IVAs are appropriately arranged.

Many free advice sector advisers say that they are seeing more and more clients in IVAs that, they feel, should have been offered a debt relief order (DRO) instead. Some believe that the IVA has only been put forward because the client's income and expenditure has been manipulated by a lead generator and insufficiently checked by the IVA firm to which the lead was passed. There is no doubt that the anger over mis-sold IVAs continues to rise, despite the measures that the Insolvency Service and the RPBs are putting in place.

Do IVAs work?

Fundamental to whether a personal debt solution is fit for purpose must surely be whether it works. IVAs give people in debt a high degree of certainty, when affordability is properly calculated. The undoubted grind and effort involved in fulfilling an IVA is rewarded by the debt forgiveness that comes with completion. An IVA motivates people to repay. When achieved, it is rehabilitative – the effort of getting to the end helps people to bring good money management back into their lives. And, with the end usually five years away, the client can see the light at the end of the tunnel right from the start.

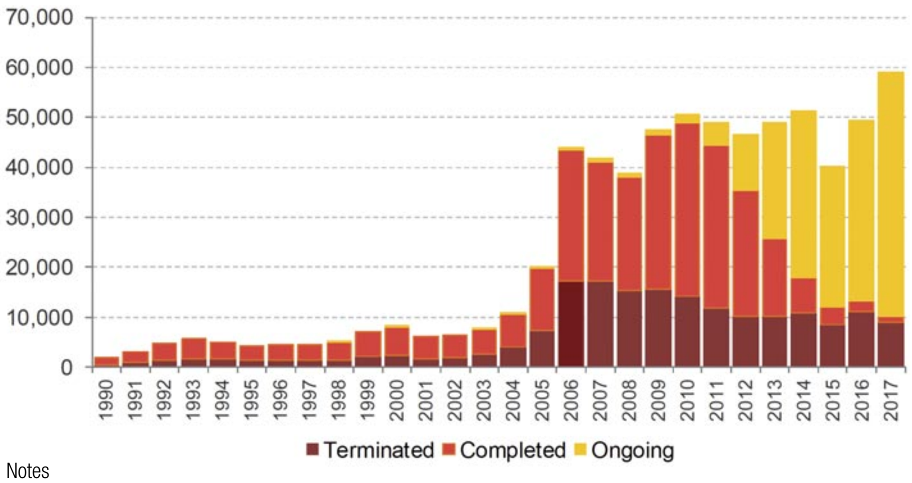
But, in practice, are IVAs working? Insolvency Service figures for 2017 (the most recent available) show that first-year failures have continue to rise for the fourth consecutive year. Around one in ten fail within a year of a creditors' meeting. The two-year failure rate is getting close to one in five (18.4% in 2016). It's this two-year failure rate that has really rocketed away – it's now close to levels last seen before the IVA protocol was introduced in February 2008.

> There can be little profit in seeing a quarter of a firm's caseload go west in the first three years of its life.

It seems counterintuitive. Surely, if client contributions have been properly calculated, the first year should be the easiest? Motivation is high, fewer unexpected changes in circumstances will have occurred and inflation won't have eaten into affordability. Mis-selling, say some, is the reason so many people fail so soon and face the uncertainty of having no debt solution in place.

Others say it's greed: fail in the first few years and the debtor won't usually benefit. Only the IVA firm gets a fee. Really? With the lead-generator fees many firms pay and average monthly contributions often at £100 per month (or

FIGURE 1: IVAs by year of registration and outcome status as at 31 December 2018, England & Wales[1]



Notes

[1] Excludes IVAs which were subsequently revoked or suspended. Source: Insolvency Service January 2019.

lower) there can be little profit in seeing a quarter of a firm's caseload go west in the first three years of its life.

Change is going to come

These problems aren't new and solutions are being put in place. Creditors, consumer representatives and insolvency practitioners have worked together to evolve the IVA protocol. That now requires the marketing of IVAs to be done to standards that are close to those set by the FCA. The Insolvency Service has set out new standards for monitoring volume IVA providers and has reviewed the RPBs' practices and clearly pointed out where the process is weak and the remedies or penalties poor or non-existent. The largest regulator in the space appears to have taken up the challenge and has announced plans for significant increases in regulation, involving continuous risk assessment of major firms *(see page 31 for more details)*.

Will this be enough? Calls for greater reform won't cease until the figures show that far fewer cases are failing early. That won't be tomorrow. During the interim there will be continued demands for IVA regulation to become an FCA matter.

> **Calls for greater reform won't cease until the figures show that far fewer cases are failing early.**

I think these will fall on deaf ears as it now seems clear that the Insolvency Service and the FCA are working in tandem: the issue of the FCA's 'Dear CEO' letter to 'debt packagers' (IVA lead generators), hot on the heels of the Insolvency Service's review of RPBs' monitoring practices in the IVA space, smacked of coordination. But, those calls will only stop if the RPBs are seen to grasp the nettle. Firmly, and soon.

If not, then I think we may see the Insolvency Service consider further reform and possibly even think about using its power to impose a single regulator. This may be good or bad, but debate around this issue would bring significant change.

There should be more IVAs

There really ought to be more IVAs – that's more than my opinion. It's something I hear representatives of public bodies and debt advice agencies say, frequently. But it isn't going to happen while distrust persists.

The opportunity is huge. Only one in five of the UK's 8 million-plus people in debt are getting the advice and solutions they need. Bringing more people into the advice loop should make IVAs more commercially realistic for firms – most free-to-client advice is, rightly, focused on those with the lowest incomes. And, often wrongly, it appears most IVA-lead introducer activity is also targeted at this audience – one of the reasons for the ever-declining disposable incomes in IVAs that creditors' lament.

Research from the Money Advice Service (which became part of the Single Finance Guidance Body in January) shows that around half of the people in debt have incomes around the national average. If IVA providers put marketing efforts into customers at this level, they'll see better returns, as long as their IVAs are realistic and sustainable. So, there is the opportunity both for the larger market and for smaller firms that can show low early termination rates to grow their IVA numbers and to be appropriately rewarded for managing them well. But the biggest opportunity is yet to come.

Beyond the statutory repayment plan

Soon – probably in two years' time, the debt breathing space and the statutory debt repayment plan will be a reality (expect the Insolvency Service to make a strong bid to manage the latter). This will encourage thousands more to seek debt advice – many more who are suitable for IVAs than debt repayment plans, which will take longer and cost more. But, if IVAs are to be recommended, the trust issue needs to be fixed. It's likely that the bodies looking at the quality of debt advice (like SFGB) will help here – rumours abound that there are concerns about the infrequent recommendation of IVAs that their debt advice quality work will address.

The final hurdle

IPs need to start looking quite differently at IVAs and to go beyond putting in place and managing a debt solution. Public policy now wants to see people getting holistic advice that goes beyond getting people out of debt, recognising that restoring people's financial capability takes more. The free sector now understands this well, having had it drummed into them by the Money Advice Service for some time.

The solution is to make the IVA bigger and cleverer, using the digital opportunity to do so without adding to the cost of IVA administration. Open banking, for example, makes it possible to respond to changes in client circumstances the day they happen – not waiting months until annual review.

> **The solution is to make the IVA bigger and cleverer, using the digital opportunity to do so without adding to the cost of IVA administration.**

The insolvency profession needs to work more closely and transparently with the debt advice sector and with creditors. It needs to make IVAs fit for purpose by doing all that can be done to ensure every arrangement put in place is sustainable. It needs to work to make sure sustainability lasts throughout the life of an IVA and it needs to look beyond what many see (probably wrongly) as cheap, easy leads; making sure people at all income levels hear about IVAs and get the best advice journey.

Reduce early terminations, and do everything possible to eliminate sources of distrust, and it's easy to see IVA numbers doubling, or more.

ANDREW SMITH is a director of The Insolvency Panel Ltd (TIP).

R3 events, courses and conferences

Training by the profession, for the profession.

The R3 2019 programme is packed with training opportunities to suit all levels of experience and schedules. All courses are of exceptional quality and delivered by leading experts from in and around the insolvency, restructuring and turnaround world. Don't miss the chance to attend a topical and informative breakfast briefing, a comprehensive half-day course or an in-depth full-day course.

Also coming up in May is the **29th R3 Annual Conference**. Back in the UK for the first time in eight years, the conference boasts an unrivalled technical programme filled with practical content, topical updates and thought leadership. With a saving of up to £400 compared to 2018, more content over three days and even more networking opportunities, you can't afford to miss it.

MARCH

14 | 19 MARCH **Asset Tracing, Fraud and Forensics**

14 March: *Half-day course, Manchester (TLT Solicitors)*
19 March: *Half-day course, London (Ashfords LLP)*

New programme, new content and new speakers. Hear from experts at the cutting edge of fraud and forensics – international enforcement, 'machine learning', offshore recoveries and much more. Programme available to view online now.

21 MARCH **R3 Annual Dinner**

Social event, London (8 Northumberland Avenue)

Join R3 to celebrate and reflect on the collective accomplishments of R3 and the insolvency and restructuring profession. Take the opportunity to entertain clients and network with over 250 guests at this prestigious black-tie event.

26 MARCH **Receivables & ABL Financing**

Half-day course, London

An essential guide on the nature of asset-based lending, its advantages and disadvantages, and the issues that can arise upon a business failure, including the difference between assigned assets and those subject to security.

28 MARCH **Eastern Conference**

Conference, Cambridge (Madingley Hall)

The inaugural Eastern Conference will bring together insolvency, restructuring and turnaround professionals from in and around the Eastern and Midlands regions, and provide the opportunity for valuable discussion, debate and networking.

8 Northumberland Avenue, home to the R3 Annual Dinner 2019

Madingley Hall will host the inaugural Eastern Conference for insolvency, restructuring and turnaround professionals

APRIL

4 APRIL **Issues with Retail CVAs**

Breakfast briefing, London (Burges Salmon LLP)

A new breakfast briefing on one of the most talked about and controversial insolvency topics from 2018. A panel will be challenged to answer difficult questions including: are CVAs fit for purpose and what makes a 'successful' CVA?

30 APRIL **SPG Technical Review**

Full-day course, Leeds (Hilton Leeds City Centre)

A packed programme of practical content, practical guidance and technical updates. These courses are uniquely designed and offer an exceptional quality, diverse programme. Hear from the Insolvency Service, the IPA, Insolvency Support Services and expert lawyers, accountants and IPs.

MAY

8 MAY **Issues with Retail CVAs**

Breakfast briefing, Birmingham (Pinsent Masons)

A new breakfast briefing on one of the most talked about and controversial insolvency topics from 2018. A panel will be challenged to answer difficult questions including: are CVAs fit for purpose and what makes a 'successful' CVA?

9 MAY **SPG Technical Review**

Full-day course, Exeter (Sandy Park)

The first time in Exeter! A packed programme of practical content, practical guidance and technical updates. These courses are uniquely designed and offer an exceptional quality and diverse programme. Hear from the Insolvency Service, the IPA, Insolvency Support Services, expert lawyers, accountants and IPs.

22–24 MAY **R3 Annual Conference – Broadening Horizons**

Northumberland (Slaley Hall)

The 29th R3 Annual Conference has returned to the UK offering exceptional value, exceptional content and unrivalled networking opportunities. It is the number one forum for the insolvency, restructuring and turnaround community to discuss and debate concerns and opportunities facing the profession in the year ahead. The programme features inspiring keynote speakers Dharshini David and Debra Searle MBE, and is available to view online now.

Slaley Hall in Northumberland will play host to the R3 Annual Conference 2019

For more information on our training, networking and social events please visit **www.r3.org.uk/events**

What's on in your region…

JUNE

4 | 13 JUNE Practical Introduction to Insolvency Work Series
4 June: *Full-day course, Leeds (Doubletree by Hilton Leeds)*
13 June: *Full-day course, Leeds (Doubletree by Hilton Leeds)*
Back by popular demand, the R3 Introductory Series has returned to Leeds for the first time since 2016! The series delivers **practical** and **dynamic** training for junior staff, covering insolvency basics alongside the vital practical skills that junior professionals need on a day-to-day basis. Engaging speakers will guide delegates through real-life case studies, providing context and a greater depth of understanding of how insolvency practices can be applied in the work place.

5 JUNE Aviation Insolvencies
Breakfast briefing, London (Squire Patton Boggs)
An overview of the recent high-profile airline failures, the critical issues arising and the lessons that can be learned. This briefing brings together the experience of IPs who have dealt with recent failures such as Monarch, Silverjet and Cobalt Air.

11 JUNE Core Tax for Insolvency Professionals
Half-day course, Manchester (Squire Patton Boggs)
Dealing with tax correctly is a fundamental requirement in the restructuring and insolvency profession. This course is a firm favourite in the calendar and is an essential date for anyone who has a need to understand tax as it interacts with insolvency.

18 | 25 JUNE Personal Insolvency Forum
18 June: *Full-day course, Birmingham (etc.venues Maple House)*
25 June: *Huddersfield (Cedar Court)*
The forum addresses the key issues and challenges facing insolvency practitioners in the personal insolvency cases market, offering practical insights, technical updates and personal experiences on the range of everyday challenges faced by office-holders in personal insolvency cases.

20 JUNE Life Post-Brexit – Insolvency Issues
Breakfast briefing, London (Wedlake Bell LLP)
The effects of Brexit will continue to be seen for many months. This important briefing will look at what has changed for the insolvency profession and what those changes mean day to day.

27 JUNE Environmental Issues in Insolvency
Breakfast briefing, Leeds (Eversheds Sutherland)
In two recent Scottish cases, the Scottish Court of Session (Outer House) grappled with the thorny issue of the ranking (in the insolvency waterfall) of an entity's environmental liabilities. Are they debts? Are they expenses? This briefing will review the interplay between insolvency law and environmental law, exploring, and attempting to reconcile, the decisions.

JULY

2 JULY Practical Introduction to Insolvency Work Series
Full-day course, Leeds (Doubletree by Hilton Leeds)
Back by popular demand, the R3 Introductory Series has returned to Leeds for the first time since 2016! The series delivers **practical** and **dynamic** training for junior staff, covering insolvency basics alongside the vital practical skills that junior professionals need on a day-to-day basis. Engaging speakers will guide delegates through real-life case studies, providing context and a greater depth of understanding of how insolvency practices can be applied in the work place.


Ambassadors Bloomsbury will host the R3 & INSOL Europe's International Restructuring Conference

4 JULY Aviation Insolvencies
Breakfast briefing, Manchester (Squire Patton Boggs)
An overview of the recent high-profile airline failures, the critical issues arising and the lessons that can be learned. This briefing brings together the experience of IPs who have dealt with recent failures such as Monarch, Silverjet and Cobalt Air.

9 JULY Directors' Duties
Half-day course, London (Addleshaw Goddard)
Directors' duties in the twilight zone: advising on compliance and prosecuting breach. Practically focused advice from the perspective of both directors and office-holders, including a guide to dividends and disguised remuneration and defence strategies for misfeasance claims.

11 JULY R3 & INSOL Europe's International Restructuring Conference
Conference, London (Ambassadors Bloomsbury)
A truly international one-day conference with speakers from around the world who have first-hand experience of recent high-profile cross-border insolvencies and restructurings. They will provide an analysis of the 'cutting edge' cases and dynamics of this fast-paced sector.

NORTH WEST

20 MARCH
North West Regional Breakfast Meeting – Brexit: What You Need to Know
08:00–09:30, JMW Solicitors LLP, Manchester
An essential update on Brexit and the impact of policy issues on the insolvency profession. Plus, the impact that Brexit is likely to have on asset recoveries within Europe.

SCOTLAND

20 MARCH
R3 in Scotland – Question Time
17:30–21:00, Grant Thornton, Glasgow
A Brexit Summit for Scottish Insolvency & Restructuring. A panel of speakers will address what Brexit will mean for insolvency and restructuring in Scotland.

30 APRIL
R3 in Scotland Golf Day
08:45–17:30, The Renaissance Club, North Berwick
Experience the prestigious and exclusive benefits of The Renaissance Club. The day includes breakfast, lunch, full use of the club's leisure facilities and the option for accommodation at a reduced rate.

EAST MIDLANDS

29 MARCH
East Midlands Women's Group Spring Lunch
12:00 til' late, Trent Bridge Cricket Ground, Nottingham
Enjoy a wonderful lunch, raise money for Guide Dogs for the Blind and hear our fabulous keynote speaker, **Robin Ince**, at this not-to-be-missed annual networking event.

WEST MIDLANDS

16 MAY
West Midlands Women in Business Spring Ball
19:00–02:00, The ICC, Birmingham
An outstanding networking event with no interruptions. Includes a drinks reception, four-course dinner, live band and DJ. Bookings close 1 May 2019.

For more information on our training, networking and social events please visit **www.r3.org.uk/events**

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Legal Q&A

Lindsay Hingston answers your insolvency queries.

Q A liquidator has requested information about an insolvent company, but we owe a duty of confidentiality to another client. If we were to require them to obtain a court order, would we have to pay their costs for doing so?

A It is unlikely that there would be adverse costs consequences for requiring a liquidator to obtain a court order under s236 of the Insolvency Act 1986 (the Act) where there are genuine concerns that providing the requested information may be in breach of confidentiality or legal privilege.

Costs incurred in relation to s236 of the Act are governed by r12.22 of the Insolvency Rules 2016. Rule 12.22(3) states that the liquidator's costs are to be paid as an expense of the insolvency proceedings *unless* the application was necessary because information has been unjustifiably refused by the respondent, in which case the court may order that the respondent pay these costs. Any other costs incurred by the respondent in providing the required information are at the court's discretion.

> Where possible, a party required to provide information to a liquidator should co-operate while minimising their own expenses.

The High Court recently considered r12.22 in the context of information required from a firm of solicitors in *Re GP Cars (Herts) Ltd* [2018] EWHC 2639 (Ch). The appellant law firm held relevant information, having previously acted for a third party in a transaction with an insolvent company. While it provided a file for a single transaction where the insolvent company had been the client, the firm refused to share a number of other documents citing its professional obligations to the third party.

The court considered that there was a genuine concern that the requested documents gave rise to issues of confidentiality and privilege and that it was sensible that the law firm required the protection of a court order. The law firm's conduct was deemed not unjustified and the liquidator's costs were to be borne as an expense of the liquidation. However, while it was within the court's discretion to allow the firm its legal costs as a liquidation expense, the court refused to exercise this discretion due to delays and costs incurred as a result of the firm's handling of the request. Furthermore, and in line with previous cases, the court held that the law firm could not recover the cost of locating, reviewing and redacting the required documents.

The case is a reminder that, where possible, a party required to provide information to a liquidator should co-operate while minimising their own expenses.

Q My contract has a termination right for insolvency and the counterparty has entered administration. Is this all I need to know or are there points I should consider before relying on the termination right?

A Before exercising a contractual right to terminate for a counterparty's insolvency, you should consider whether there are alternative grounds for termination. If the counterparty has committed, or is likely to commit, a material or 'repudiatory' breach of the contract, then it may be preferable to exercise your common law right to 'accept the repudiation' and thereby terminate the contract. This is because a party terminating a contract for a repudiatory breach may be able to claim damages for the resulting loss of bargain.

This point was dealt with in *Phones4U Ltd (in administration)* v. *EE Ltd* [2018] EWHC 49 (Comm). EE was party to a trade agreement that authorised Phones4U to sell devices and services on EE's behalf. EE exercised its contractual right to terminate the agreement for counterparty insolvency when Phones4U went into administration. Phones4U subsequently brought a £65.6m claim against EE for payment obligations that survived the termination of the agreement. EE counterclaimed £200m for the loss of bargain that it had suffered from early termination.

The court held that, for loss of bargain to form part of a damages claim, the contract must have been terminated for the breach of contract giving rise to the damages claim and in exercise of the common law right to terminate. As EE's letter of termination only referred to the contractual right to terminate upon an event of insolvency, EE could not thereafter sustain a claim for loss of bargain.

But be careful: if you purport to exercise your common law termination right and it is later found that the facts complained of did not constitute a repudiatory breach, you could yourself have committed a repudiatory breach of contract. You also need to be careful if you

> If you purport to exercise your common law termination right and it is later found that the facts complained of did not constitute a repudiatory breach, you could yourself have committed a repudiatory breach of contract.

want to have your cake and eat it by stating in the termination notice that the contract is terminated on the basis of both a repudiatory breach and the contractual right to terminate. If the specified consequences of terminating for an insolvency event are incompatible with terminating for a repudiatory breach, purporting to do both will not constitute a valid termination under either. ◻

LINDSAY HINGSTON is a senior associate in the global restructuring and insolvency practice at Freshfields Bruckhaus Deringer LLP.

Argue now, pay later?

Kate Rogers examines the decision in *Victory House General Partner Limited* v. *RGB P&C Limited* relating to interim payments in insolvency proceedings.

The interaction between the construction adjudication process and insolvency processes, both pre- and post-commencement of the insolvency processes, has been a hot topic for the courts recently. The High Court has revisited the issue of how adjudication decisions between construction companies should be treated within the winding-up procedure of the Companies Court. The court examined when it was, and was not, appropriate to use the winding-up procedure on a petition based upon an adjudication decision. The Court of Appeal have also subsequently clarified the interaction between adjudication, liquidation and company voluntary arrangements (CVA).

Victory House General Partner Limited (Victory House) subcontracted RGB P&C Limited (RGB) on the development of a boutique hotel in Leicester Square pursuant to a JCT design and build contract 2011 (the build contract). The initial anticipated cost to Victory House was £6,670,000. By early 2017 Victory House had paid £8,183,875.20 and the work had been subject to several delays. The parties fell into dispute. Following three adjudications RGB petitioned for the winding up of Victory House (the petition). Victory House sought injunctive relief to restrain the advertisement of the petition.

Adjudication and adjustment

The Housing Grants, Construction and Regeneration Act 1996, as amended by the Local Democracy, Economic Development and Construction Act 2009 (the 1996 Act) provides the statutory scheme for payment within a construction contract (the statutory scheme), by which each interim payment stage is a payment on account pending final resolution on the final account, known as the final statement.

> "This recent development in the law of adjudications gave confirmation that one adjudication can supersede another, in certain circumstances, on the same facts."

The decision of an adjudicator is binding upon parties until the dispute is finally determined by legal proceedings; arbitration (if arbitration has been agreed to by the parties); or by agreement between the parties.

The effect of a second adjudication between the same parties was considered by Coulson J in the Technology and Construction Court (TCC) in *Grove Developments Limited* v. *S&T (UK) Limited* [2018] EWHC 123 where he held (at paragraph 78) that an adjudication that turned on the timing of a pay less notice does not prevent a subsequent adjudication from considering the *value* of the claim. One adjudication could determine payment must be made in full but if, before it is paid, a second adjudication values the work lower, less is payable than originally awarded. This recent development in the law of adjudications gave confirmation that one adjudication can supersede another, in certain circumstances, on the same facts.

Background: the disputes

The build contract provided for staged payments (monthly in this case), as per the statutory scheme.

RGB referred an interim payment application (that Victory House had refused) to adjudication (adjudication 1). Without any » consideration of the value of the work actually done, the adjudicator awarded RGB the full sum claimed (incidentally for reasons that neither side had contended for). RGB also applied for summary judgment in the TCC to enforce the adjudication 1 decision (alongside proceedings brought by Victory House to challenge adjudication 1). The joint matters came before Ms Joanna Smith QC sitting as a deputy judge. The deputy judge gave summary judgment for RGB in the full sum of adjudication 1: £682,802.88 (the judgment). This formed the basis of the petition debt.

"The position taken by Victory House was that, although judgment is given to enforce an adjudication award, it is without prejudice to the fact that the court does not determine the underlying liability."

The works on the boutique hotel completed around 1 September 2017 (albeit Victory House had lost all faith in RGB's ability and its agent served notice that RGB was not required to complete the snagging works – these were taken care of elsewhere). On 21 November 2017, RGB served a referral notice to commence a second adjudication (adjudication 2). This deals with the value of the completed works and was, in effect, the final application for payment by RGB, given the stage that the project had reached.

RGB claimed a final amount in adjudication 2 of £3,030,993.74. Victory House contended that:

- This sum was grossly over inflated; and
- on a proper valuation of the works there has already been an overpayment of at least £950,874.07 plus VAT, possibly more.

The decision in adjudication 2 was received on 7 February 2018. The adjudicator decided that:

- The value of the completed works (excluding disruption) for interim payment purposes was £7,087,027.59 plus VAT.
- As a consequence of that decision, and in consideration that Victory House had already paid over £8m to RGB, no further sums were due from Victory House to RGB.

The final account between the parties was yet to be submitted (the final account). However, given that adjudication 2 had dealt with the full total of the works, it was effectively a final state of the account between the parties, albeit on an interim basis, until the final account was taken. The final account covers the entire costs of the

project, including costs and losses claimed by both sides. The final account will supersede all earlier interim accounts and applications for payment. It follows that in any situation such as this, the ultimate balance of the account between the parties cannot be resolved until the final account has been prepared and adjudicated upon (if the parties cannot agree).

The parties' positions

The position taken by Victory House was that, although judgment is given to enforce an adjudication award, it is without prejudice to the fact that the court does not determine the underlying liability. The judgment creates an obligation to pay, but that says nothing about the true state of the account between the parties. It is a feature of the statutory scheme that interim obligations to pay are created; however, the true state of the account between the parties is not determined until the end at the final account stage. As a result of RGB having the benefit of the judgment, they have standing to present a petition, but that does not mean that at winding-up stage the Companies Court cannot consider the true state of account between the parties.

Ultimately, if Victory House were to pay the sum ordered by adjudication 1 and thus the sum ordered by way of the judgment, it would have an immediate cross claim for return of that sum in restitution, based on the decision in adjudication 2.

While it was accepted that the statutory scheme is designed to determine who 'holds the cash' throughout the project until the point at which a final account is determined, it was not accepted that the statutory scheme prevented a cross claim argument for the purpose of the Companies Court.

RGB took the position that the sum was due and owing based on the judgement and that it should be immediately paid. RGB relied on the line of authority establishing that you cannot look behind a judgment. Victory House argued that a summary judgment on the back of an adjudication is not *res judicata* in the same way that an ordinary judgment is: the judgment determined that Victory House must pay the sum of money but what it was not saying was that there was an underlying obligation to make that payment. In fact, the underlying dispute was in large put off to part 7 proceedings. It creates the effect of a classic 'pay now argue later' clause.

"The court stated that the judgment was due and payable: it should have been paid and it cannot be disputed."

In any event, Victory House relied on a cross claim (arising out of adjudication 2) rather than seeking to dispute the judgment.

The decision

As a starting point, the court stated that the judgment was due and payable: it should have been paid and it cannot be disputed. Victory House should have complied with the court order for payment.

The court then examined the guidance from the authorities dealing with disputed debt in the context of interim payments and gave considerable weight to the recently decided *Grove Developments Limited* v. *S&T (UK) Limited* [2018] EWHC 123, with Morgan J citing that his task would have been 'so much greater' were it not for the decision in *Grove Developments*.

Grove Developments determined that one adjudication could supersede another on the same facts. If the first adjudication determined that a sum was due in full on the procedural basis that there was no pay less notice, then a second adjudication determined that the value of works was less than the sum first decided, the difference must be returned. Adjudication 2 was on a valuation basis (of the entire works) and thus had the same effect on adjudication 1 as envisaged in *Grove Developments*. On that basis, if Victory House paid the sum claimed then it would have an immediate claim to return of those monies, as in accordance with adjudication 2 it had already overpaid, which Morgan J accepted.

Newey J agreed in *R & S Fire and Security Services Limited* that you can have a cross claim against a judgment in the winding-up court, even though the statutory scheme renders that judgment payable immediately.

In *R & S Fire and Security Services Limited* v. *Fire Defence plc* [2013] EWHC 4222 (Ch) it was accepted that the statutory scheme rendered the sum awarded to the contractor in an adjudication as not open to dispute. However, despite that, the scheme is not prevented from challenge for winding-up purposes, by way of a cross claim. Newey J agreed in *R & S Fire and Security Services Limited* that you can have a cross claim against a judgment in the winding-up court, even though the statutory scheme renders that judgment payable immediately. Thus RGB would be considered to be a 'creditor' under the Insolvency Act for the purpose of presenting a winding-up petition; however, the court is not precluded in the context of its winding-up jurisdiction from going behind the adjudication.

In *R & S Fire and Security Services Limited* there was no adjudication award and no summary judgment; therefore RGB argued that its position was in fact stronger here. However, based on the comments of Newey J in the judgment, neither the adjudication nor the judgment precluded the cross claim.

The court placed considerable weight on *Re Bayoil SA* [1999] 1 W.L.R. 147. The point in the Court of Appeal was whether the established rule about disputed debts also applied to disputed cross claims. The Court of Appeal held that there could be exceptional circumstances where it would be appropriate to allow a petition to go forward even where there was a disputed debt/cross claim. However, Nourse LJ stated that the finality of an interim award and the ability of a petitioning creditor to enforce that interim award, were not special circumstances that gave the right to present (and continue with) a winding-up petition. While *Re Bayoil SA* was decided in relation to arbitration proceedings, Morgan J determined that it applied equally to the interim 'pay now argue later' basis of the statutory scheme in adjudication proceedings. The statutory scheme was not a 'special circumstance'.

RGB relied on *Re Douglas Griggs Engineering Limited* [1963] Ch 19; however, Morgan J held that this can no longer stand as good law in light of *Re Bayoil SA*.

In conclusion, the court determined that the statutory scheme was not a special circumstance within the meaning of *Re Bayoil*. Thus the petition debt could be subject to a cross claim by way of adjudication 2. Morgan J added that nothing he had said detracted from the binding nature of the judgment. However, it seemed to him that the very nature of the authorities is that, although a contractor can get a judgment and enforce that judgment, they cannot seek to wind up a company on the basis of it.

The implications of the decision

The result of the above was that *Re Bayoil SA* was followed and its principle was extended to apply to adjudication as well as arbitration. In particular, the principle was extended to the interim 'pay now argue later' basis of the statutory scheme, even when payment applications were supported by adjudication awards and then by summary judgment in the TCC for enforcement purposes.

This was the approach taken in *R & S Fire and Security Services Limited* when dealing with the statutory scheme, albeit in that matter there had been no adjudication and no judgment, thus the principle was extended by way of this decision.

The decision effectively uses *Grove Developments* as a base and then brings together *R & S Fire and Security Services Limited* and *Re Bayoil SA* to neatly redefine the principle applicable to adjudication decisions within the winding-up procedure of the Companies Court.

Further developments

Following the *Victory House* decision, the Court of Appeal heard the cases of *Bresco* and *Cannon*, dealing with matters relating to the interaction of adjudication with liquidation and CVAs.

In *Bresco*, a company in liquidation had commenced adjudication proceedings, which had been injuncted with a finding that there was no jurisdiction to commence adjudication in the circumstances. In *Cannon*, the court granted summary judgment based on adjudications pursued by a company that was in a CVA.

In *Bresco*, the Court of Appeal held that there was jurisdiction to commence adjudication where one of the parties was in insolvent liquidation (allowing the appeal on that point), but recognised the incomparability between the two processes. The Court of Appeal's solution to that issue was to agree with the first instance decision that the adjudication should be injuncted.

The result of the above was that *Re Bayoil SA* was followed and its principle was extended to apply to adjudication as well as arbitration.

On *Cannon*, the Court of Appeal applied their decision in *Bresco* and held that there was jurisdiction for adjudication where a party was subject to an insolvency process, also finding that Cannon had waived that argument in not raising it in the adjudication in any event.

On the question of the granting of summary judgment, the Court of Appeal distinguished the insolvent liquidation and CVA processes and held, if the appeal was still live, it having been withdrawn two weeks after the hearing, that it would have been dismissed and the judge's decision to refuse a stay of execution upheld.

This is welcome clarification that the adjudication of claims and cross claims in a liquidation should be done within the bounds of the insolvency legislation by decision of the liquidator, rather than by adjudication, which can be appealed to the court if disputed and the recognition that, while a CVA is an insolvency process, it is not terminal and enables continued trade under the executive control of the directors. □

KATE ROGERS is a barrister at Radcliffe Chambers.

Recent case summaries

Latest insolvency update from **Tom Leary** and **Blair Leahy**.

PERSONAL INSOLVENCY

***Dooneen Ltd (t/a McGinness Associates) & Ors* v. *Mond* [2018] UKSC 54**

Under Scots law, a voluntary arrangement usually takes the form of a 'protected trust deed' – granted by the debtor, conveying their property to a trustee for the benefit of creditors. In *Dooneen*, the Supreme Court was concerned with the construction of a standard protected trust deed and the meaning of the phrase 'final distribution' in particular.

The debtor, Mr Davidson, had granted a protected trust deed in favour of his creditors. The deed provided for a distribution of the debtor's estate by the trustee, on terms that the debtor would be discharged of all his debts upon termination of the deed. It further provided that the deed would terminate upon the final distribution of the estate.

Mr Mond, the trustee, made what he considered to be a final distribution to creditors on 5 November 2010. He was discharged by the creditors and confirmed by certificate that there had been a full distribution of the debtor's estate.

Unknown to Mr Mond, the debtor had an accrued claim against the Bank of Scotland for mis-sold payment protection insurance. In January 2015, the debtor made a claim against the Bank of Scotland (using Dooneen as his agent). The Bank of Scotland paid the compensation to Mr Mond.

The debtor and Dooneen sought a 'declarator' that the compensation belonged to them and not to Mr Mond. Mr Mond argued that he was entitled to hold the compensation as trustee under the deed on the basis that his previous distribution, overlooking the claim, had not been 'final' after all.

The two lower courts and the Supreme Court all found in favour of Dooneen and Mr Davidson. Mistaken though the trustee had been on the true construction of the trust deed, the distribution to the creditors on 5 November 2010 had indeed been 'final'. If final distribution only occurred once all the assets transferred to the trustee under the deed, known or not, were distributed, one could never be certain that the trust deed had terminated. That uncertainty was difficult to reconcile with other provisions of the deed, in particular the provisions vesting assets in the trustee and requiring the debtor to pay part of his income to the trustee as long as the trust subsisted. An absence of certainty as to the end date of the trust would carry potentially serious practical consequences for both the debtor and anyone doing business with the debtor, since he might nevertheless prove to be an undischarged bankrupt.

The Supreme Court considered, however, that this outcome was unsatisfactory and left open the possibility that, in certain circumstances, the relevant acts of a trustee might be reduced (ie set aside) by the court on a discretionary basis where they resulted from an error by the trustee as to the extent of the trust estate. In the absence of submissions from the parties on this issue, the court concluded that it would be inappropriate to consider this possibility further.

> "An absence of certainty as to the end date of the trust would carry potentially serious practical consequences."

CORPORATE INSOLVENCY

***Officeserve Technologies Ltd (in compulsory liquidation) & Ors* v. *Annabel's (Berkeley Square) Ltd & Ors* [2018] EWHC 2168 (Ch); [2018] 3 WLR 1568**

The joint liquidators of the company brought an application, pursuant to s127(1) of the Insolvency Act 1986, for the return of monies paid out after presentation of the winding-up petition. Some of the (43) recipients of the monies resisted repayment on the basis that they had provided goods or services to the company and received their payment in good faith, having been unaware of the winding-up petition. They further alleged that they had changed their position since receipt of the monies.

HHJ Paul Matthews held that good faith was not a defence to an application under s127(1) and, further, that ignorance of the winding-up petition was irrelevant. The purpose of making the payments void was to protect all creditors. A defence of change of position, or estoppel by representation, was available. It was for the recipients of the money to discharge the burden of proof in making good those defences – none of the recipients had made out those defences. As there were no applications for retrospective validation of the dispositions by the company, it followed that the court had to consider the dispositions void and order that the money be returned to the company.

A further question arose whether the return of the monies would constitute double recovery by the company, as the joint liquidators had previously settled a claim against the company's former directors in respect of alleged breaches of fiduciary duty in allowing the company to make the void payments.

The court considered that a settlement between a company and its directors concerning payments that were found to have been void under s127(1) were capable of barring claims for recovery of those payments from the recipients. However, this would depend on:

- the closeness between the two claims; and
- the construction of the relevant settlement agreement.

The claims for recovery of payments in respect of 'payments to settle debts or purchase goods or services for *the company*' were *not* closely analogous to the situations in which the claims against the directors arose and were not barred. Unlike the breaches of fiduciary duty by the directors, the loss caused by the payments to the recipients had been to the creditors rather than to the company.

As regards gratuitous payments, these were closely analogous to the situation in which the claims against the directors arose, and therefore it was a question of construction whether the settlement agreement 'extinguished the whole claim so that there was nothing left to claim from the recipient'. ◻

TOM LEARY is a barrister at 20 Essex Street.

BLAIR LEAHY is a barrister at 20 Essex Street.

The *NJM* decisions: a tricky 'tense' situation

Stephen Hill uncovers the tiny technical wording change that led to the *NJM* case and two follow-up decisions about the insolvency rules.

Three rapid fire decisions from the Insolvency and Companies Court over the course of 2018 have provided much needed reassurance for IPs and lawyers that administration appointments won't be invalidated purely on the absence of a time and date. In the process, a still-warm snippet of the Insolvency (England and Wales) Rules 2016 has largely passed into 'supreme irrelevance'. To understand how we arrived at such a situation, and how it is likely to change in future, it's necessary to go back to 2003…

> One enormously positive feature of the 2003 rules was that there was a form for each of the procedural steps of an administration – fill in the right form and you couldn't go wrong.

It's all about the timing

In the beginning were the Insolvency (Amendment) Rules 2003. Among other matters, these rules provided a complete replacement for part 2 of the original Insolvency Rules 1986. The new part 2 was necessary in view of the extensive recasting of the company administration procedure contained in the new schedule B1 to the Insolvency Act 1986, brought into force on 15 September 2003.

The 1986 version of administration, a wholly new insolvency procedure introduced on the recommendation of the Cork Report[1], allowed entry only by means of a court application. This was cumbersome, expensive and not conducive to the widespread use of administrations. From 1987 to 2002, there were approximately 275 administrations per year. One of the most important changes from 2003 onwards was the diversification of the entry routes. The court application route remained available, but was supplemented by options for appointment by a floating charge-holder (a paragraph 14 appointment), or by the company or its directors (a paragraph 22 appointment). As the legislation itself uses handy references to paragraph 14 and paragraph 22 appointments, I make no apology for doing likewise.

From 2004 to 2013 administrations occurred at an average of around 2,500 per year, and since then at around 1,500 per year. The paragraph 22 route to appointment is understood to be by far the most frequently used of the alternatives.

One enormously positive feature of the 2003 rules was that there was a form for each of the procedural steps of an administration – fill in the right form and you couldn't go wrong. This made the procedural and compliance aspects of administration very straightforward.

An issue did emerge as to which form to use and to whom it was to be delivered in relation to a paragraph 22 appointment where no floating charge-holder existed, as highlighted in *Minmar (929) Ltd* v. *Khalatschi* and further explored in subsequent cases. That, however, was a problem of the wording of the legislation and not a problem of the forms as such. It is also history, as more recent updates to the legislation have resolved the matter.

Consigned to the history books

Returning to 2005, the Insolvency Service noted that the 1986 overhaul of the insolvency legislation was approaching its 20th anniversary and was becoming untidy by reason of several amending Acts and instruments, including the major revision of the administration procedure. A project was launched to modernise and consolidate the insolvency rules and the numerous other pieces of secondary legislation underpinning the operation of the insolvency regime in England and Wales and, so far as within its remit following devolution, in Scotland also.

The project bore fruit in stages. Important updates to the English rules came into force in 2009 and 2010, with the real prize, the complete reissue of the rules as the Insolvency (England and Wales) Rules 2016 and the new Scottish Rules *(see page 32)*, due to follow into force on 6 April 2019.

An early decision in the project was that statutory forms should be abolished. Forms were perceived to have been a 19th century concept that had had their heyday in the twentieth century, but which were now ripe for consignment to the history books. New technology would allow information to be squirted down a wire and the development of such technology should not be constrained by the old-fashioned need for a form. Despite repeated protests from stakeholders throughout the project, the Insolvency Service was immovable – forms had to go. Interestingly, the registrar of companies was not of like mind and still ensures the simplicity and consistency of filings by means of prescribed forms.

The unfortunate draftsmen of the revised insolvency rules had to resort to long-winded text descriptions of disclosure requirements, where previously there had been forms contained in a schedule to the rules. This certainly did nothing to make the new rules reader-friendly and introduced new opportunities for error, confusion or uncertainty.

> The unfortunate draftsmen of the revised insolvency rules had to resort to long-winded text descriptions of disclosure requirements, where previously there had been forms contained in a schedule to the rules.

Just such an issue has raised its head in relation to appointments of administrators under paragraph 22.

From 2003 to 2017, an appointment was made on form 2.9B or 2.10B. The form stated 'Notice is hereby given that, in respect of [the company], the company/directors of the company (the appointor) hereby appoints [name(s) of insolvency practitioner(s)] as administrator(s) of the company.' At the end of the form was a box marked 'endorsement to be completed by court', with a single line for the court to complete: 'this notice was filed [court to insert date and time]'. The date and time of filing were (and are) of crucial significance, as the combined result of paragraphs 29 and 31 » of schedule B1 to the Insolvency Act 1986 is that the date and time of filing is when the appointment 'takes effect'.

Do it yourself notices

Thursday 6 April 2017 arrived and the Insolvency (England and Wales) Rules 2016 came into force. Forms 2.9B and 2.10B were no more. In their place were rules 3.24 and 3.25 respectively, which described the new notices that practitioners would have to devise for themselves. To avoid repetition we will merely refer to 3.24, applicable in those cases where the preliminary step of a notice of intention to appoint is required. Rule 3.24(1) requires the notice of appointment to contain, among many other things, '(b) a statement that the company has, or the directors have, as the case may be, appointed the person named as administrator of the company' and '(j) the date and time of the appointment'.

As regards the first of these, note the change of tense from the previous 'hereby appoint' to 'have appointed'. As regards the latter, the new requirement for the appointor to enter a date and time of the appointment appears to sit uneasily with the clear provision of paragraphs 29 and 31 of schedule B1 – that the appointment takes effect on filing with the court, a detail that the court itself continues to endorse on the document when it is filed. In the case of a paragraph 14 appointment by a floating charge-holder, there is the same change from the present tense of the old form to the past tense of the new do-it-yourself notice, but there is no requirement to enter a date and time. Paragraphs 18 and 19 specify that the paragraph 14 appointment 'takes effect' when the notice is filed with the court, consistent with the provisions relating to a paragraph 22 appointment.

An insolvency practitioner's extensive powers and onerous duties come into existence upon his or her appointment as office-holder in a particular case. Furthermore, the role is contentious to a greater or lesser extent according to the

> Note the change of tense from the previous 'hereby appoint' to 'have appointed'.

circumstances of each case, but will not infrequently entail the commencement of litigation in the name of the insolvent company, or indeed in the administrator's own name as office-holder, and may very often require a sale of land where legal formality is everything. It is imperative for the practitioner to know, and to be able to demonstrate, that the appointment is valid and to be sure of the timing of the appointment.

So the questions inevitably came to the fore: did the change of tense referencing the appointment signal an underlying change in the appointment process? And how was the appointor to state a date and time of an appointment that would only take effect upon a filing with the court? In most cases, but inevitably not all, it will be simple enough to choose a date when the appointment decision is formally made and to file the notice the same day, but the exact timing is not amenable to that approach.

Step forward the challengers

Enter three cases that have emerged from the courts in remarkably rapid succession. Each of the cases was allocated to the Insolvency and Companies List in the Business and Property Courts of the High Court, so there are no issues as to differing levels of seniority of the courts.

Firstly, *Ross and Higgins (as joint administrators of NJM Clothing Ltd)* v. *Fashion Design Solutions Ltd* was heard by HHJ Klein in Newcastle in March 2018. Each of the subsequent two cases referred to the *NJM* decision, so this is our starting point.

HHJ Klein held that the appointment of an administrator was a four-step process. First the directors decide in principle to appoint. Next, if applicable, they give the statutory notice of intention to appoint to any qualifying floating charge-holder. Thirdly the appointment is 'made' by the directors, but only 'takes effect' at the fourth stage when the notice is filed in court. This interpretation creates a period of limbo between the appointment being made and taking effect, raising questions as to the powers and responsibilities of the administrators and directors respectively; and as to the correct starting date for measuring the timescales of the administration going forward; culminating in the vitally important matter of automatic expiry on the anniversary. This treats the notice of appointment as a recording of an event that has occurred, rather than the instrument of appointment that is inchoate until filed in court, as held under the previous legislation in *Fliptex Ltd* v. *Hogg*, which concerned a paragraph 14 appointment.

> The notice of appointment in respect of *NJM* stated 'the administrators' appointment was made on the date and time this notice is filed with the court'.

The notice of appointment in respect of *NJM* stated 'the administrators' appointment was made on the date and time this notice is filed with the court'. If valid, this reduced the period of limbo to a moment of time as the notice was being filed. HHJ Klein declined to rule whether this was a proper way of completing the notice, but, if it wasn't, he was content to apply r12.64 to confirm that the defect or

irregularity did not invalidate the appointment. This was satisfactory for the case in front of him, but unfortunately provided no helpful guidance as to whether it was legitimate to avoid the period of limbo by stating the date and time in this manner. A routine need to apply to court for confirmation of appointment would be a regrettable waste of time and money, in addition to creating a degree of uncertainly until the confirming order had been obtained.

> **A routine need to apply to court for confirmation of appointment would be a regrettable waste of time and money, in addition to creating a degree of uncertainly until the confirming order had been obtained.**

Next to appear was the decision of 2 October 2018 of HHJ Paul Matthews sitting in Bristol in *Re Towcester Racecourse Company Ltd, Orton and Wright Administrators of Towcester Racecourse Company Limited (in Administration)* v. *Towcester Racecourse Company Ltd (in Administration)*.

The appointment was stated to be made 'on the date and at the time endorsed by the court'. HHJ Paul Matthews carefully reviewed *NJM*, noting that HHJ Klein had not ruled that such a formulation was wrong; rather he had said that, even if it were assumed to be wrong, the irregularity should not invalidate the appointment. HHJ Matthews felt able to take the view that it was allowable to specify the appointment as being made by reference to a specified future event (ie the filing) and accordingly there was no defect in the appointment and no need for a declaration of validity. He could see no objection to the making of the appointment being precisely coincident with the filing, so there was no need for there to be even a theoretical moment of time between it being made and taking effect.

Third in the sequence was *Re Spaces London Bridge Limited*, a decision of Nugee J on 18 October 2018. Although this discusses *NJM*, there is no mention of *Towcester Racecourse*.

The notice of appointment was in the present tense – 'The directors…hereby appoint…' – and no date and time was stated. Nugee J affirmed the analysis of HHJ Klein that there are the separate steps of the directors making the appointment and the appointment taking effect. However, where HHJ Klein had said it was 'difficult to see what purpose [disclosure of] the date and …time of the appointment satisfies', Nugee J robustly described this information as a 'supreme irrelevance'. He concluded that r3.24(1)(j) is to be construed as requiring the notice to specify when the appointment takes effect. On that basis it is not only permitted but required, if the directors are to state anything in this respect, that the date and time of the appointment is 'the date and time specified below as the date and time when the notice is filed'. The absence of any date and time on the notice other than that endorsed by the court was not a defect. Nugee J went on to say that even if he was wrong on this and there was a need for the date and time of the directors' act of making the appointment, its absence would not be fatal to the validity of the appointment.

Supreme irrelevance?

In conclusion, where does this leave us? It seems to be a matter of problem solved. Nevertheless, in discussion with counsel following the handing down of the decision, Nugee J said 'Although the result was obviously right, it is quite tricky working your way through bits and pieces of it.' One cannot help but be a little nervous that some future case could go to the Court of Appeal with uncertain result. After all, why would the insolvency rules include a 'supreme irrelevance'? Perhaps the court of first instance simply missed the point!

> **One cannot help but be a little nervous that some future case could go to the Court of Appeal with uncertain result.**

Meanwhile the Insolvency (Scotland) (Company Voluntary Arrangements and Administration) Rules 2018 have faithfully followed the Insolvency (England and Wales) Rules 2016 verbatim, so there is also a risk of the Scottish courts being asked to depart from the English view.

Perhaps the opportunity could be taken when the next amendments to the rules are made, to include a one-liner repealing the 'supreme irrelevance' of rules 3.24(1)(j) and 3.25(2)(k) and requiring instead standard wording specifying that the appointment takes effect upon filing. ◻

[1] Insolvency Law and Practice, Report of the Review Committee, June 1982, Cmnd 8558

STEPHEN HILL is an associate director in advisory quality and risk management at Grant Thornton LLP.

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Navigating the rough seas of uncertainty

Ben Wildsmith explains how to spot the harbingers of uncertainty and how advisers can support clients during difficult times.

Uncertainty is one of few certainties we have in 2019; the UK economy is facing a considerable set of unknowns, with many worrying options still on the table.

Of course, it's not uncertainty per se that affects business, but the changes in behaviour it produces. At the time of writing we don't know the specifics of what will happen next with Brexit or many of the other global economic and trade uncertainties. Brexit will have a very specific impact on corporate behaviour that is hard to predict. What we do have is some indication of what will happen if uncertainty persists.

How uncertainty may play out

Uncertainty's most obvious impact is on business, consumer and investor confidence, the effect of which is clearly seen in EY's latest 'Quarterly Analysis of Profit Warnings'.

UK consumer confidence held up after the EU Referendum, driving economic growth. Yet it dipped significantly at the end of 2018, hitting the lowest level for five years, according to market research firm GfK. This fall in confidence led to a leap in profit warnings from consumer sectors, driven primarily by a rise in 'new' warnings from companies in previously robust areas, such as online retail and 'experience' spending.

UK business confidence has been subdued for a while. Even so, the increase in Brexit and other geopolitical worries, combined with fears of a global slowdown, have shaken confidence again and added new areas of stress – including areas exposed to slower Chinese growth. The FTSE technology and hardware sector issued its highest number of contract-related profit warnings in Q4 of 2018, as new spending dried up.

> "The sectors we're seeing most distress in now are those where falling confidence meets existing regulatory and structural issues – in particular in automotive and retail."

Meanwhile, falling investor confidence led to a record 22.6% average drop in share prices on the day of a profit warning in Q4 2018, as investors positioned themselves in the fittest companies. This is a fraction higher than at the time of the financial crisis in late 2008.

But what's really notable is what happens when this lack of confidence collides with other issues. The sectors we're seeing most distress in now are those where falling confidence meets existing regulatory and structural issues – in particular in automotive and retail.

Where we could see uncertainty play out:

- Consumer spending
- Business-to-business spending
- Investment decisions
- Currency volatility
- Capital availability – raising and refinancing
- Labour costs and skill shortage
- Increasing cyber threats
- Trade wars & increasing protectionism
- Environmental concerns.

How to manage during uncertainty

Sector and specific company triggers will determine the scale and speed of change affecting business and management responses. As advisers it is our role to support businesses and their management, so for this next section I will look at important areas to address.

Know your business

The better and timelier the information (driven by effective technology and systems), the better the decision making. Management information and flash results should be available as close to period ends as possible to ensure that time isn't lost when the business needs to respond to change. Board or operational meetings work much better close to the start of the month with up-to-date information.

> Uncertain times present opportunities and having access to cash will greatly aid performance.

Businesses need to ensure that their KPIs are well defined and aligned with the business' and management's needs – knowing what is important and making it available. What has worked in the past in this regard may not now, so be prepared to change. Time spent getting KPIs right, and periodically checking their relevance and calculations, is essential.

Amazingly, we find that most businesses spend the largest proportion of board meetings glancing backwards at historic data, rather than looking forwards. Typically, less than 50% of the information in a board pack looks forward. Ultimately, these meetings should always be casting an eye ahead to the next challenge.

A good board pack will be available in a timely manner before the meeting and will include quality information to understand performance and manage the business. Actions should have an ownership and timeframe so they can be monitored.

Establish plan A (and B)

A successful business should have a clear plan agreed upon by the senior management and well-communicated to the wider employees and stakeholders.

Short-term uncertainty unsettles businesses, but companies shouldn't lose sight of long-term goals. A good strategic plan will: include an organisational review (including people); cover market dynamics, customers, routes to market and the supply chain; look at the impact of technology and change disruption; consider capital expenditure, funding structures, sales and exit plans; and contain financial forecasts for next three to five years, together with a timetable of actions to achieve this.

Good plans force a business to consider and reflect on where it is, where it wants to get to and how it will get there. They are not easy to produce and may cause friction and debate, but they are vital to ensure businesses stay relevant.

Businesses should always have contingency plans available, but these are obviously even more essential in times of heightened uncertainty and threat to ensure that management teams will be calm and in control should a crisis arise. The important areas to address are cash preservation; customer and creditor support; funding lines; plans to address staffing requirements, capital expenditure and overheads; M&A activity; and details of liquid assets.

Build a quality management team

The delivery of any plan depends on the quality of the senior management team – in my view, this is the single most important factor in assessing a company, no matter how good the business is, its market position and opportunities.

The team (not just one leader) needs to be able to lead the business and execute its plan. The management team should be trusted by investors, lenders, customers, suppliers and employees alike. Each of these stakeholders will have a slightly different agenda, but nonetheless the objective is to build success through trust and partnership with the management team and the business.

Considerations when assessing the quality of management and compliance might include: the systems and control environment; board governance; the quality of management information; and the diversity of the team, and their ability to challenge each other (including the CEO), their culture and interaction with the wider senior team.

In times of uncertainty there is a need to adapt, change, progress and evolve plans. We'd therefore expect to see an active management team, with the board debating and seeking solutions to problems and challenges. A quiet and unresponsive management team represents a red flag, regardless of the current performance of the business.

Create sustainable debt structure

Businesses need to understand the importance of choosing the right funding partner – one with the best facilities that can provide maximum flexibility to run the business in the most dynamic way. The credit market remains open for most businesses, but signs of tightening are starting to develop and waiting is unlikely to improve matters for the company or the availability of debt. If the debt-structure is sub-optimal, management teams should look to make changes now. Headroom in liquidity is essential to help businesses ride set-backs. Uncertain times present opportunities and having access to cash will greatly aid performance.

Focus on cash

The (current) easy availability of debt has led to more businesses taking their eyes off of cash, especially in the short term. This shift has seen management teams focusing on EBITDA, sale multiples and annualised cash generation, which increasingly leads to an ill-equipped management team missing looming cash shortfalls or cash pinches. The quality of cash-flow and the ability to mitigate short-term needs may also be diminished.

Cash remains king, and its generation is a sign of a healthy business. Low cash generation indicates leakage and needs to be investigated and understood to avoid further issues.

Looming dangers

There are growing concerns around the leverage levels and exceptional liquidity of the last few years, which could mask underlying issues and poor profitability. In 2018, EBITDA multiples in leveraged deals reached their highest levels since the time of the financial crisis in 2007. Moreover, 88% of European leverage loans issued were 'covenant-lite' in 2018, compared with 7% before the crisis. Standard & Poor's latest forecast for the average first-lien recovery rates for European debt instruments now stands at 58%, well below the long-term historical average of 73%.

> The delivery of any plan depends on the quality of the senior management team – in my view, this is the single most important factor in assessing a company.

This isn't the only way that restructurings could play out differently to 2007. The roles of restructuring support teams in the main banks have shrunk, as has the appetite to be directive and instigate action. Add to this the rise of alternative lenders and debt funds that have yet to encounter notable non-performing debt, and we're in more uncharted and unpredictable territory. This makes the role of the adviser, to lead all parties through the process, much harder.

Key areas of focus during uncertainty:

- Quality of management information
- People and quality of management
- Long-term and contingency plans
- Suitability of capital and debt structure
- Cash management – in good times and bad.

BEN WILDSMITH
is a partner in transaction advisory services at EY.

POST-BREXIT GERMANY

A protective shield for restructuring: insolvency proceedings in Germany

Peter Jark and **Tom Braegelmann** continue *RECOVERY*'s look at insolvency proceedings outside of the UK with a explanation of the workings and future developments of Germany's insolvency code.

The prospect of a 'no-deal' Brexit looms on the horizon and, at the time of writing, there is no clear indication as to what will truly happen post-29 March 2019. Without significant legislation connecting proceedings between the UK and Germany, it may be of professional interest (and soon professional necessity) to understand how German insolvency proceedings are carried out.

> To counter the rampant flouting of the requirements, the so-called debtor-in-possession proceedings *(Eigenverwaltung)* were strengthened via ESUG and a new 'protective shield proceeding' was introduced.

While the corporate breathing space proposals are still in the works for the insolvency regime in England and Wales, the word that is keeping the profession abuzz in Germany is 'restructuring'.

The law for restructuring

On 1 May 2012, Germany introduced the 'law concerning the further facilitation of the restructuring of companies' or *Gesetz zur Erleichterung der Sanierung von Unternehmen* (known as ESUG).

ESUG was ostensibly introduced in response to criticism from international banks and investors about the country's insolvency system. The legislature felt it necessary to enable managers and shareholders of German companies to apply as early as possible for a form of debtor-in-possession proceedings under the German Insolvency Code, or *Insolvenzordnung* (InsO), to enable them to restructure a company when needed.

Under German statutory law, there is a requirement for companies with their centre of main interests (COMI) in Germany to file for insolvency proceedings within a three-week period after a reason to file for insolvency has been found. Prior to 2012, this requirement was rarely met – companies frequently filed too late, often by more than year – which caused damage and disruption to businesses and commerce. Neither relevant criminal charges nor civil liabilities had the effect of increasing the likelihood that filing would occur within the set timeframe.

To counter the rampant flouting of the requirements, the so-called debtor-in-possession proceedings *(Eigenverwaltung)* were strengthened via ESUG and a new 'protective shield proceeding' was introduced. Both of these proceedings gave more power to the existing management in order to swiftly undertake a restructuring process under the provisions of the InsO.

The goals set by lawmakers for the changes introduced through the ESUG were widely met. Larger companies, even if still deemed to be small- to medium-sized entities, often use the new powers under the InsO to restructure the company prior to a regular insolvency proceeding taking place. Below we have outlined a brief description of the protective shield proceeding introduced under the ESUG.

> The goals set by lawmakers for the changes introduced through the ESUG were widely met.

The protective shield proceeding

According to s270b (the protective shield proceeding) of the InsO, a debtor company now has the possibility to file for a 'protective shield' if the debtor is in imminent illiquidity or over-indebted. The rationale is that, in such a scenario, the business still has enough liquidity to finance a restructuring.

An application for a proceeding according to section 270b InsO has to be accompanied by a couple of essential, well-prepared documents. One of the most important is to provide a restructuring concept that demonstrates that a restructuring of the company is not hopeless. This concept must define the purpose of the company in the future, taking into account all restructuring measures and possibilities under the German insolvency code. Such a concept must be written, or at least confirmed, by a professional who is either a tax adviser, an auditor, a lawyer or an individual with a comparable qualification. Further, this professional must have experience in matters related to insolvency proceedings. When the application is made the court will appoint a trustee *(sachwalter)*, who needs to be different from the professional who wrote or confirmed the concept of restructuring for the company. This trustee can be brought forward by the debtor and the court must appoint this trustee unless it is obvious that the appointee is not capable of performing the duties in this role – likely grounds for refusal is that the trustee is not experienced in matters related to insolvency law. The responsible court will then set up a preliminary creditor committee. It is advisable that this is all well-prepared and pre-discussed by the debtor and debtor's restructuring counsel. The usual way would be that a limited number of groups are represented including the works council *(betriebsrat)* that represents the employees, one large and

> Despite the fact that regular insolvency proceedings have to be made public online in Germany, a protective shield proceeding does not need to be published online.

Editor recovery@r3.org.uk

one small unsecured creditor. The parties must agree to take up this role in the preliminary creditor committee.

Despite the fact that regular insolvency proceedings have to be made public online in Germany, a protective shield proceeding does not need to be published online – a deliberate decision by the ESUG legislator not to adhere to the usual obligations under the InsO. Obviously there is a necessity to publish a notice of proceedings in case security measures are ordered by the relevant court. This is usually done to ensure that all creditors are aware of the circumstances, but is not necessary in case of an early application.

Since members of the preliminary creditor committee are not allowed to talk about what happens or is discussed by the creditor committee, and due to the fact that a protective shield proceeding does not have to be publicised online, the whole proceeding can be handled in much the same way as a confidential letter.

The EU directive

As is quite well known, the EU's examination of various member states' pre-insolvency tools found them all wanting – though it did acknowledge that Germany was on the right path with ESUG. From that review, a new restructuring directive was proposed.

On 1 October 2018, the EU reached a tentative compromise on the upcoming pre-insolvency restructuring directive. A consolidated English language text was published on 17 December 2018 and to date we are still waiting for the translation in all other official EU languages. While the details still need to be hammered out within the European parliament, it is widely expected that this pre-insolvency restructuring directive will become law around early or mid-2019. Individual member states have already begun drafting their proposed implementation legislation side by side with the final drafting. Details to be addressed include: what majorities you need for a restructuring plan with a mandatory haircut (debt-for-equity swap); how employees are protected; and the scope, duration and possibility of an extension of the envisaged moratorium or automatic stay. It is already clear that the new automatic stay or moratorium will be a significant measure and will be implemented early in the pre-insolvency stage.

> “The main debate now hinges on the question of whether the implementing legislation shall become part of the insolvency code or whether there shall be a separate code that will distance pre-insolvency and insolvency proceedings.”

This is new territory for Germany and its banking sector in particular. Questions remain as to how securities are to be treated in this context, with the German government being of the opinion that they are not weakened by all of this. It remains to be seen whether the remaining member states, once the drafts of their directive-implementing legislation become public, may learn from each other's approaches in a kind of 'best efforts' exchange of legislation ideas. In Germany, the main debate now hinges on the question of whether the implementing legislation shall become part of the insolvency code – under the rule of the traditional insolvency courts and utilising the German IP's powerful toolkit – or whether there shall be a separate code that will distance pre-insolvency and insolvency proceedings. Only time will tell.

PETER JARK is a partner at BBL Bernsau Brockdorff & Partner Rechtsanwälte.

TOM BRAEGELMANN is an attorney at BBL Bernsau Brockdorff & Partner Rechtsanwälte.

Post-Brexit cross-border insolvency law bingo: what will still apply?

Alan Bennett examines the Insolvency (Amendment) (EU Exit) Regulations 2019 and current provisions for a 'hard' Brexit.

On 23 June 2016 the United Kingdom voted to leave the European Union (EU) following a referendum with a 72% (30 million) voter turnout. What followed has been two years of uncertainty that has harried the UK's businesses, professional services and overall well-being. This magazine is due to reach you as the Commons holds yet another 'meaningful' vote on Brexit, just two weeks from the originally scheduled leave date of Friday 29 March 2019.

> In practice the recast regulation has allowed insolvency practitioners to act without unnecessary cost or delay across borders.

Parliament may vote on deal, no deal or extension, but what happens in parliament is no guarantee of what happens between the EU and UK negotiators. The government has already increased its preparations for a 'no-deal scenario' and published a series of technical notices for businesses and professionals entitled 'How to prepare if the UK leaves the EU with no deal'. Less literature has been made available regarding the outcome of a hard Brexit. Most significantly for IPs, on 31 January 2019, The Insolvency (Amendment) (EU Exit) Regulations 2019 (EU exit regulations) came into force, providing the biggest insight to date in to the government's legislative plans for the future of cross-border insolvency.

Given all of the above, it is important to look at the current legislative frameworks relating to cross-border insolvencies in comparison to the recently enacted EU exit regulations to conclude what certainty (if any) they now provide.

The current position

To allow us to understand the impact that Brexit will have on cross-border insolvency proceedings it is necessary to set out the current position for comparison. Although the substantive insolvency law of a country is left to its individual jurisdiction, cross-border proceedings are principally governed and assisted in England and Wales by:

- the Cross-Border Insolvency Regulations 2006 (CBIR);
- the EC Regulation on Insolvency Proceedings No 1346/2000 (the EC);
- the Regulation (EU) 2015/848 on Insolvency Proceedings (recast)(recast regulation);
- s426 (4) of the Insolvency Act 1986 (IA); and
- common law.

EC and recast regulations

As a current member of the EU, the EC and recast regulations are directly applicable under EU Law, forming part of the domestic law of the UK, without the need for implementation in the member states.

As such both regulations prevail over the IA and exist as the primary legislation for determining the proper jurisdiction, applicable law and mandatory recognition of insolvency proceedings in other EU member states. Applying directly to insolvencies beginning on or after 26 June 2017, the recast regulation has both outbound and inbound effects by allowing automatic recognition for proceedings commenced in another member states, and by providing the gateway for access to insolvency proceedings cross border for those proceedings commenced in the UK.

> The primary purpose of the EU exit regulations is to retain the legislation in a form that will operate effectively and efficiently following exit day.

By providing mutual recognition for and application of member states' insolvency laws if an individual or company

has its centre of main interest (COMI) in a member state's jurisdiction then that country can host 'main proceedings', which will then be automatically recognised across the EU. In practice this regulation has allowed insolvency practitioners to act without unnecessary cost or delay across borders.

The Insolvency Act 1986

As prescribed by s426 (4) of the IA, courts in countries that are defined as 'relevant countries' can apply to the UK courts for assistance in insolvency proceedings.

> "For the majority, recognition of English insolvency proceedings will require court involvement, which is likely to involve additional delays and costs."

Although the provision is largely out of scope of this article, s426 provides the courts with broad discretion to give assistance to these 'relevant countries' under either English law or that of the relevant foreign jurisdiction. Except for the Republic of Ireland, the remaining 20 'relevant countries' are not members of the European Union and therefore the section's usefulness post-Brexit is limited to incoming insolvencies from a limited list of jurisdictions.

The consequence of a 'hard' Brexit

In preparation for the Brexit deadline, on 13 September 2018 the UK government published the first of its 'how to' guides on the consequences of a 'no deal' Brexit, which specifically dealt with the handling of civil disputes involving EU countries.

Dedicating just two paragraphs to cross-border insolvency, the government confirmed that in the event of a 'no deal' Brexit the 'majority of the insolvency regulations that cover the jurisdictional rules, applicable law and recognition of cross-border insolvency proceedings, would be repealed in all parts of the UK.

The primary purpose of the EU exit regulations is to retain the legislation in a form that will operate effectively and efficiently following exit day. On analysis, the guidance was not far wrong, with the regulations removing the automatic recognition of insolvency proceedings commenced in the UK for EU member states by repealing the majority of the recast regulation, which relied on reciprocity and implementing a modified version of the jurisdictional rules.

Although seemingly counterintuitive, this ensures that the UK is not allowing the benefit of automatic recognition to member states. The logic behind this is almost certainly based on the lack of reciprocity. Under the recast regulation, automatic recognition comes with key safeguards and certainties around choice of law, for example:

- rights in rem are dealt with in the law of the member state where the assets are situated;
- set-off is governed by the law applicable to the insolvent debtor's claim;
- detrimental acts (clawback provisions) are subject to the law of another member state.

Therefore, at present there is certainty that assets located in, for example, Sweden that are subject to security cannot be affected by a UK insolvency process. When the UK is no longer in the EU it is unclear how foreign courts may deal with issues surrounding the safeguards above. This therefore leaves the decision on recognition to a UK judge, who can make a decision based on knowledge of how the foreign court is likely to deal with issues arising from these safeguards.

On implementation of the EU exit regulations, the focus will revert to the pre-existing jurisdictional tests as prescribed by the IA. Therefore, if the debtor's COMI is in the UK, if it has an 'establishment' in the UK or if a test set out in existing domestic insolvency law is met, then the UK courts will have jurisdiction to open proceedings. This will help to ensure that there is no narrowing of the UK courts' jurisdiction following the country's exit from the EU, while allowing the process to be transparent for those across borders.

The difficulty however will come from the variety of approaches in different member states to the recognition of UK insolvency proceedings, since the approach is far from consistent with a mixture of

> "The loss of automatic recognition means that applications will need to be made to the EU courts to have orders recognised in cross-border cases."

legislation and common law across the countries. For the majority, recognition of English insolvency proceedings will require court involvement, which is likely to involve additional delays and costs.

Comment

In summary, the loss of automatic recognition means that applications will need to be made to the EU courts to have orders recognised in cross-border cases. In the event of a 'hard' or 'no deal' Brexit, the position of recognition for outgoing insolvency proceedings is likely to enter a lengthy period of ambiguity and uncertainty, while UK insolvency practitioners navigate their way through various aspects of domestic law. It is hoped this period of ambiguity will be brief, as it will have a significant impact on the conduct of insolvency proceedings – potentially harming returns to creditors, the continuation of business and the preservation of employment, which could undermine the attractiveness of UK-based businesses. ◻

This article was written and designed prior to March 2019. Every effort has been made to ensure that the information is as up-to-date and relevant as it can be within the constraints of a quarterly publishing process.

ALAN BENNETT
is a partner at Ashfords LLP.

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Behind the scenes: the first years after qualification

Natasha Brodie shares her experiences of the JIEB and beyond.

Natasha Brodie qualified as an insolvency practitioner in 2016 and went on to take her first appointment just a year later. Now she shares her experience of the qualification process, her insights into day-to-day work and her advice for future students.

What inspired you to pursue a career in insolvency?

As a child I didn't dream about a career in insolvency; I decided early in life to be a barrister. I liked the thought getting my teeth into cases, considering strategies and getting results. Having completed a degree in classics at Nottingham University, I had had enough of student life. The thought of going on to complete a law conversion course followed by a pupillage no longer appealed to me.

It was through insolvency-related work experience that I found what I was looking for: an array of cases that required me to think outside the box, consider the facts and find the thread leading to the crux of the matter.

What was your experience of the training and qualification process?

I'm a natural cynic and, given the practical nature of insolvency, I struggled with the concept of lecturers who didn't have current boots-on-the-ground experience.

When I took my exams, I had the flexibility of either taking all of them in one sitting or to take two exams together followed by the third.

I haven't yet found anybody who can explain why this complicated exam structure was necessary or why taking the exams one at a time was deemed to be such an advantage that it couldn't be permitted.

Now there are different considerations: the latest brainchild is that individuals can hold a specific personal or corporate licence. It seems strange that an insolvency practitioner does not have to study restructuring and insolvency as a whole; it's like obtaining qualifications to teach English literature but not language. It seems logical for those only intending to take on personal insolvency work to apply for a personal insolvency licence, but having no requirement to take both exams (especially given that the third exam has been dropped) seems bizarre.

I took the first two papers in November 2014 and got the results in March 2015 (why does it take so long?!).

Eleven days before the final exam I had an emergency appendectomy and was hospitalised for four days. On being released from hospital, I contacted the exam board to request a larger table so I could avoid bending down and straining my stitches. Apparently, 'computer says no'. Thoughtfully, the email response suggested that I submit medical evidence and they would advise me on the arrangements that could have been granted had I applied sooner – who could have predicted that eight days wasn't enough time to set up an additional table? Staggering really, given the insolvency industry needs to be prepared to act on a moment's notice. Fortunately, an extra chair was negotiated and, better still, I passed.

You became an appointment-taker quite early on in your career. How did that happen and what was your experience of your first appointment?

I became an appointment-taker 'quickly' because I have a kind and understanding boss who wants me to succeed and I fulfilled the licensing criteria. I have a sounding board and a good support structure in place to consider situations as they arise and act appropriately.

Starting to take appointments when the new rules were coming in meant that all insolvency practitioners were wading through the deemed consent/virtual meeting/'how many tens could force a physical meeting?' quagmire. As the appointments process was undergoing the first major changes for over two decades, all IPs were covering new territory simultaneously, which I would say was a benefit.

How have you found the type of work you've undertaken so far?

In an SME firm the work is extremely varied and gives you the broadest understanding of a case as a whole. I have worked on a range of personal and corporate insolvency cases including liquidations, administrations, IVAs and bankruptcies. No case is ever the same and each brings with it a different dimension of the job.

What have been the positives of working in insolvency so far?

Working in insolvency is fascinating. It gives you insight into a range of circumstances from the obscure to the sublime to the ridiculous – it would keep a team of anthropologists occupied for a lifetime.

What opportunities do you see for work for the profession in future?

Who can say? I think there will be a greater shift towards professionals who understand why businesses struggle (or, in the worst case scenario, fail) and can give guidance and strategies to avoid pitfalls.

Are there any essential skills for the job that you feel are often overlooked?

The most essential skill in this profession is being able to look at a full set of facts objectively and apply common sense. It sounds so obvious but if it were more common it would result in cases being resolved faster and in a more cost effective manner for all parties.

What advice would you give to those looking forward to the JIEB exams this year?

Study topics from the past papers, remember that 'contact the HR department' is not a satisfactory response for an employee question and take question predictions with a large pinch of salt (unless they are from those writing the questions!).

NATASHA BRODIE is a director at Valentine & Co.

Career progress

Two 2016 JIEB qualifiers share their experiences of the examination and life as qualified insolvency practitioners.

Vicky Ryan

Vicky worked for PwC prior to her JIEB qualification and has remained with the firm. She was promoted shortly after the exams to the post of senior manager in the insolvency management team. Despite never thinking of herself as a 'prize winner', Vicky received the JIEB Insolvency Practitioners Association Prize for First Place in 2016.

What sort of work are you undertaking at the moment?

PwC is a bit different to a lot of other firms in how we deliver our insolvency work. In a lot of places everyone does everything: pre-appointment work on the advisory side and trading/sale of business. You're trying to juggle statutory and compliance and 'long tail' tasks at the same time. We split it – the delivery team are involved right up front and will typically deal with trading and sale of business; my team deals with literally everything else, cradle to grave.

How did you study for the JIEB exams?

I just tried to be as organised as possible. We were the first year doing the 'WebExes' offered by BPP and I like that approach of chipping away at study during the year, rather than backloading the whole lot of it. I am different to some of my peers. I know some were studying late into the night at times. I took two months off before the exams and each day would be a normal working-hours day of study. On the odd day when I wasn't feeling it, I would stop at 2.00 pm. One of the things I found helped was just being nice to myself and not forcing myself to keep going if it wasn't happening for me that day. I was also careful to keep up with my extracurricular stuff. I like to run and I play badminton, so I was quite determined not to let the exams interfere with that.

How did you celebrate winning the IPA prize?

The results were released on my birthday and I had decided not to look because, like 99% of people who sit these exams, I wasn't confident that I had passed. At 11.30 am I turned off all electronic devices. I got to around 12.05 pm before deciding 'I can't do this' and started switching on phones and iPads. I'd passed and felt quite proud of myself, but within about five minutes one of my colleagues phoned me with some choice words asking what I'd done. I'd passed, but I didn't know I was on the prize-winners list – he was trying to direct me to look at it and laughing at my disbelief.

It had actually snowed for the PI exam. Being the resourceful insolvency practitioner that I am, I got on my bike and cycled to the exam. I sat there in my socks and shivered through the exam, but that wasn't the lowest of my three marks!

Luke Brough

Luke is a manager at Booth & Co, a small independent practice operating from offices in Wakefield and Sheffield. He won the R3 Smaller Practices Group Prize for the highest mark achieved by a candidate from a smaller practice in 2016.

Could you tell us a little bit about your current work?

I deal with a mixture of corporate and personal work from initial consultation right through to closure. As a smaller practice, most of the cases we deal with tend to be SMEs.

I'm currently trying to build up a network of contacts to generate a bit more work for the firm and promote our Sheffield office more. I suppose the next logical step would be to start taking appointments, but I'm not in any rush to do that.

How significant were the JIEB exams in building your career?

I'm lucky that I work for a family-owned practice where there is perhaps less of a corporate hierarchy and therefore less top-down pressure than there is at larger practices. As a result, passing the exams hasn't really changed my day-to-day work as much as it may have for others. It did result in a promotion and has given me more confidence in terms of speaking with and meeting directors, individuals and other professionals.

How did you juggle studying and other commitments?

I was enrolled on face-to-face courses, which helps because a lot of the work was done during seminars. I didn't have to refrain from doing things that I enjoyed, so I still did things like going with my pals to the Euro 2016 football tournament in France.

I think it is important to separate study and home life as much as you can. I used to come to the office an hour early to study before everyone would arrive. I did try to study after work but found that it was easier to digest information in the morning. I did several past papers and attempted questions to time. It is crucial to practise making a point quickly and efficiently, especially now the exam is computer based.

I also went to our Sheffield office early on Saturday mornings to study – this meant that when I was at home I didn't feel guilty about not opening the books.

What advice do you have for future students?

One of the key bits of advice I got from Neil Taylor was to make sure you bag the 'easy wins'. Don't prioritise a question that you're not sure about and let it eat away at time allocated for other questions you're more confident at answering.

How did you celebrate winning the R3 Smaller Practices Group (SPG) prize?

On the morning of results day my car had a flat tyre, which I thought was a terrible omen. Once I found out I'd passed, my firm took me out for lunch in Wakefield and I went out with my wife in the evening for tea and a few beers. Getting the SPG prize was the icing on the cake.

Joint Insolvency Examination – November 2018

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

JIEB 2018 prize winners

First Place in Corporate Insolvency
Jessica Moore

First Place in Personal Insolvency
Benjamin Jones

Combined Top Scorer
Jessica Moore

A

Allen, J (1135) London	C	
Andrews-Walker, R (1018) Weston-Super-Mare	C	P

B

Barnes, H (1097) Stourport-On-Severn	C	
Baxter, L (1027) Hessle	C	P
Beake, J (1098) London	C	
Bedford, S (1032) Inverurie	C	P
Brennan, C (1070) Bury	C	
Brooker, L (1100) London	C	
Burton, M.C (1102) Lichfield	C	P

C

Carter, G (1071) Waterlooville	C	P
Caten, J (1050) Southend-On-Sea		P
Cox, R (1103) Plymouth	C	P

D

Dantis, D (1004) London	C	P
Davie, H (1052) Sawbridgeworth	C	P
Dhupelia, A (1104) London	C	P
Doran, C (1105) Belfast	C	

E

Easto, M (1003) Hook		P
Egginton, L (1106) London	C	P

F

Franks, L (1062) Westerham	C	

G

Gleghorne, A (1030) Lisburn	C	
Grewal, T (1059) West Molesey	C	
Grieve, G (1036) Kirkcaldy	C	P
Groom, H (1061) Bedford		P
Gross, I (1108) London	C	
Grummitt, T (1023) Nottingham	C	

H

Hacking, E.M (1109) Manchester	C	P
Harper, M (1031) Glasgow		P
Harris, T (1073) Leicester	C	
Hines, D (1110) Doncaster		P
Horishny, V (1111) Nuneaton	C	P
Hoy, M (1113) Woking	C	
Hull, M (1114) Woodford Green	C	P

J

James, S (1063) Newton Abbot		P
Jolliffe, D (1075) St Albans	C	
Jones, B (1021) Coventry	C	P

K

Keegan, K (1064) Southampton		P
Kellaway, K (1002) Caterham	C	P
Kilgour, C (1116) Worthing	C	
Killick, S.J (1117) London	C	
Kippax, S (1119) Yeovil	C	

L

Lawrence, S (1001) Tunbridge Wells		C
Lawton, C (1077) Rossendale	C	P
Lee, Y.L (1049) London	C	
Lockwood, D.V (1079) Sheffield	C	
Luff, R (1120) Nottingham	C	

M

Marchinton, R (1065) Goole	C	
Mayrs, P.R (1121) Tonbridge	C	P
McKnight, A (1082) Manchester		P
Mileham, R (1013) Essex	C	P
Moore, J (1123) Watford	C	P

N

Nairn, S (1085) Manchester		P
Norman, M (1012) Hove	C	

O

O'Hara, D (1060) Romford	C	P
O'Leary, A (1067) Dublin	C	
Ormerod, D (1019) Bury	C	

P

Pirie, J (1125) Jersey		P
Price, A (1126) Southampton	C	

R

Ramsey, A (1010) Basildon	C	
Ransley, G (1016) Southampton	C	
Redfearn, J (1128) Rossendale	C	P
Roche, H (1086) Winchester	C	
Rolph, M (1048) Aylesbury	C	P

S

Saidu, E.J (1129) Glossop	C	P
Schappach, I (1029) Hull	C	
Sexton, R (1051) London	C	
Smith, D.M (1140) Coventry	C	
Spence, R.T (1130) Woodford Green	C	P
Stewart, L (1056) Stockport	C	
Stone, P (1131) Chesterfield	C	P

T

Taylor, G (1089) Hull		P
Thielmann, J (1047) East London	C	P

V

Varney, J (1009) Croydon	C	P

W

Ward, S (1024) St Peter Port	C	P
Watson, H.D (1039) Norwich	C	
Watts, J.C (1133) Norwich		P
Wilman, M (1028) Cleckheaton		P
Worsnop, R (1134) Leeds	C	P

Y

Yarwood, P (1058) Manchester		P

KEY

C = corporate insolvency paper passed. P = personal insolvency paper passed

Analysis of November 2018 results

Papers sat	Papers passed			
	2	1	0	Total
2	32	8	9	49
1	–	52	33	85
Grand total	32	60	42	134

Don't judge a book by its cover: are you letting a job title hold back your career?

Scott Lowes writes that one insolvency administrator's responsibilities may be very different to another – and that's no bad thing.

As a recruiter, it's my job to speak with individuals to understand their requirements and learn about their career aspirations. When discussing what they are looking for, one of the most common requests is for a specific 'job title'.

Many people can strive throughout their career just to obtain a certain job title. They feel that a certain job title is holding them back and is either ruining their chance for future progression or is offering an unfair description of what they actually do within their role.

A false inferiority complex?

The big problem here is that a job title deemed as 'inferior' actually could be a step up. The new role may give you access to more complex or larger clients or offer a more in-depth role in client assignments. It's my advice that you never allow a job title to put you off applying for a certain role. That 'inferior' job title could quite possibly be the step up on the career ladder that you have been looking for!

> It's my advice that you never allow a job title to put you off applying for a certain role.

Take the insolvency sector, in which we specialise at Levitate. There is no uniform title across the sector that you can hang your hat on: an insolvency administrator at one company could have a year's experience of the profession; at another firm, insolvency administrators could have four years' experience; at yet another firm, they could have seven years' experience; and yet each of these individuals holds the exact same job title.

In much the same fashion, someone with two years' experience of corporate insolvency cases could be called an insolvency administrator, insolvency associate, insolvency executive, restructuring analyst or insolvency case manager depending entirely on which firm they work for.

Job titles can seem like a very big deal, particularly when you're seeking work, but most of the time they do not actually mean a great deal. Sure, they can make someone feel important, but a job title merely allows for a sense of hierarchy inside a certain organisation.

Imagine, for example, someone who was recently 'promoted'. As part of the promotion, they received new responsibilities and a pay rise. However, they were not given a new job title. This individual feels that they deserve a new title to go with their new responsibilities, but does it truly matter?

Development over designation

I have worked on behalf of countless clients and businesses over my 12+ years in recruitment. If I were to look at the same job title across varying sectors and businesses, each individual description of that same job title would read differently to the next. I believe that a job title should never hold you back, nor should it be your sole focus.

If you are looking to progress your career with a current employer or by exploring external opportunities, I advise you never to allow a job title to hold you back from what you set out to achieve. If your responsibilities have the potential to help your company or firm grow and for you to develop your experience, then you should do it – never mind what your job title states.

I have also known people to attain their desired job title and then stagnate, as they stop pushing themselves to develop. Securing a promotion or new job is a great achievement, but that does not mean you should rest on your laurels if you have grander aspirations. Regardless of your title, you should always assess whether what you do on a day-to-day basis is providing you with professional development.

Don't judge your book by its cover

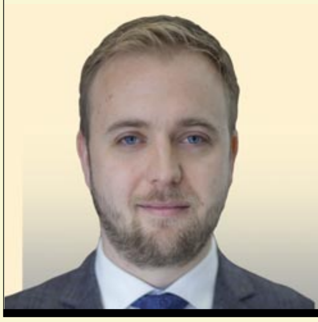
I'm not saying that job titles hold no value at all, just that there is much more to a new career opportunity than what is printed on your business card.

When it comes to job titles, don't judge a book by its cover. Do not over-rely on job titles and allow them to hold you back in the quest for a new role, a new career and a new challenge. What should be important

> If I were to look at the same job title across varying sectors and businesses, each individual description of that same job title would read differently to the next.

to you is the job role that you will have to work at on a day-to-day basis (and perhaps the salary if you are so inclined). A job title is just that: a title. At the end of the day, it only outlines a company's hierarchy and in no way defines what you are, who you are and how you do your job. Dig deeper than the title and you could find yourself achieving quicker, better career development than you ever hoped for.

My opinion on job titles is based on my 12+ years of recruiting insolvency professionals.



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

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Open banking opens up new possibilities

James Boyle explains how open banking and the possible implementation of the SFS is streamlining the process for debtors and IPs.

The current debate surrounding the adaptation of the standard financial statement (SFS) in Scotland has the SFS back into the public eye. From the outset, we were of the opinion that this new single approach to preparing a debtor's income and expenditure would have its advantages. Benefits such as:

- Set income and expenditure categories – making it more efficient when processing a debtor's income and expenditure
- No minimum and maximum options of spending guidelines, which should reduce modifications
- Single code and functionality in software across the industry – leading to possible technological competences.

> As a technology provider to the credit and debt recovery sectors, the idea of open banking was one that greatly excited us.

Making the most of SFS

However, while there were clear benefits evident to us, questions remained over the adaptation of the SFS – and those questions are still unanswered at this point. There was no clarity regarding how the SFS would be integrated into existing cases. Would it be a whole sale change for new and existing cases? Would the SFS only be used on new cases? Would it leave existing cases on the income and expenditure the format that was agreed at the proposal stage?

Adopting the process for new cases appears to be a relatively straightforward decision, but things become more complicated for existing cases. Should (and can) future income and expenditure reviews be done using the new SFS on an existing case?

If the decision is made for existing cases to run to closure, with annual income and expenditure reviews done in the initially proposed format, could that have issues? Will there be a time when the budget guidelines we use now are no longer updated year on year? What happens then?

Another thing to consider is, if existing cases must be swapped to the SFS, would there be a potential mapping exercise on the debtor's last income and expenditure? Should this be converted to the SFS and provided to the debtor, so that they have a means of comparison for when they undertake the next review? This may be unnecessary, and it would certainly save a lot of time if it could be avoided.

> Open banking can be used to populate the SFS for the debtor by giving secure access through their online banking system.

Open banking

Coinciding with the suggestion of the SFS was the announcement of the 'open banking initiative'. As a technology provider to the credit and debt recovery sectors, the idea of open banking was one that greatly excited us. We quickly identified the time- and cost-saving opportunities for our clients, as well the benefits that would be available to the consumer.

However, there were also questions as to how best integrate open banking into the everyday processes of the insolvency industry, so we decided to look into the benefits for insolvency practitioners and their clients.

In the last edition of *RECOVERY*, John Smith discussed implementing the FCA's 'treating customers fairly' (TCF) principles in an insolvency practice. The fair treatment of consumers, and deriving the best outcomes for them, are things that we as a company are passionate about. Over the past 24 months especially, we've looked at creating functionality and products that enable our clients to implement TCF principles.

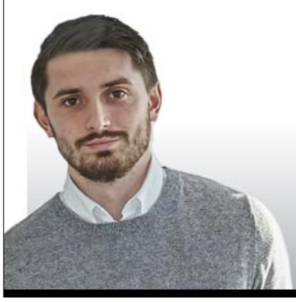
The first area we identified was during the very initial stages when a debtor is seeking debt advice. Open banking can be used to populate the SFS for the debtor by giving secure access through their online banking system. This data can then be run through an automated best advice model and the best route forward will then be suggested to the debtor.

We then found that, if one was to expand on the above, the same process could be used throughout the duration of the case. For example, if a debtor has chosen to go down the route of an IVA, come the annual review, open banking could facilitate an up-to-date income and expenditure to be supplied by the debtor in minutes.

> Open banking is a relatively new world here in the UK but one that presents opportunities in the insolvency industry.

We combined the above two ideas into our new product, Debtsense. Debtsense uses open banking to automate the completion of the SFS and gather all the relevant information from the debtor in a gamified, streamlined solution. It then runs this information through our best advice algorithm and suggests the best-suited path for the individual while also making them aware of all possible solutions available to them. We are also bringing open banking functionality into our insolvency case management system to help streamline the income and expenditure review process for our clients.

Open banking is a relatively new world here in the UK but one that presents opportunities in the insolvency industry.



JAMES BOYLE has worked with Vision Blue Solutions since November 2011 and has managed the Marketing and Sales process since 2013. James has worked closely on many of Vision Blue's UK projects and has a keen interest in the personal insolvency sector.

Strengthening regulation

Michelle Thorp explains a raft of new measures to strengthen IVA 'volume provider' regulation.

A transparent, consistent and trusted regulatory framework is important so that creditors can be confident in the outcomes of insolvency procedures. Without confidence in our insolvency framework, it would be much harder for the business community to invest in the UK's economy.

While the UK's insolvency regime is one of the best in the world, according to the World Bank (returning money to creditors quickly and cost effectively), the evolution of insolvency procedures means that the regulatory framework must always keep up with the needs of the changing business and economic environment. As our market adapts to the economic and business environment, so must regulation.

> "The evolution of insolvency procedures means that the regulatory framework must always keep up with the needs of the changing business and economic environment."

During my first six months as IPA CEO we have implemented new measures to strengthen our regulatory framework, ensuring that regulation is in line with the expectations of government (as part of its regulatory objectives for the RPBs set out in the Small Business, Enterprise and Employment Act 2015), the creditor community, and insolvent individuals and businesses. The new measures ensure that our processes focus on key areas of concern rather than bureaucracy, and are more transparent, robust and offer the best value to the creditor community. These measures will remain under review over the coming months. As part of that review, I would welcome any feedback, so please get in touch with your views via **secretariat@ipa.uk.com**.

As well as strengthening the IPA's regulatory framework, our other focus for improving regulation over the last six months has been to strengthen Individual Voluntary Arrangement (IVA) 'volume provider' regulation. The measures we introduced in January set a new benchmark for the regulation of volume IVA providers so that trust and confidence in their work can be improved.

The changing IVA market

The number of individuals using an IVA to deal with their debts has increased significantly over the last ten years, as rising consumer debt levels have increased. By way of example, more than 70,000 individuals entered into an IVA in 2018, an increase of 20% on 2017, and the highest annual level recorded. As a response to rising demand and the use of new technology, some insolvency practitioners have streamlined the IVA procedure, making it a much more accessible and cost effective insolvency procedure than before.

A volume IVA provider is classified as being responsible for at least 2% of the overall IVA market (currently just over 5,000 IVAs). The IPA regulates the majority of IPs operating in these firms. Volume IVA providers play an important role in ensuring that individuals can deal with their debts. The concentration of the market has resulted in a large number of IVAs being handled by a small number of service providers, which therefore attracts greater scrutiny from stakeholders such as creditors, the government, the press and insolvent individuals.

Enhanced regulatory regime

Working closely with the volume IVA providers, debt charities, creditors and government, the IPA implemented the new measures to strengthen volume IVA provider regulation in January. This newly strengthened regulatory system has been welcomed by the providers, who believe stronger regulation will lead to enhanced confidence. The providers' recognition that more regulation was needed to improve confidence in their work was an important part of achieving change.

New measures

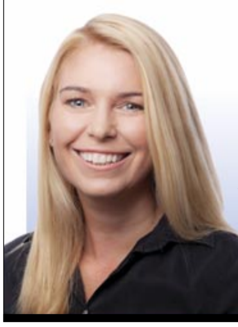
The IPA's volume provider monitoring regime now involves a concept of continuous reporting designed to provide more detailed and real time insight into operating practices; it also offers scope to cope with the number of cases under review. Inspection reports will be more focused and target key areas, enabling us to get to the heart of any concerns immediately – including, in appropriate cases, issuing sanctions. The features of the new regime include:

- continuous monitoring through monthly reporting and access to volume IVA provider technology systems to enable better scrutiny of business practices. There will be up to four regulatory visits a year (up from one);
- bespoke investigations into identified areas of concern – reviewing far more cases than we have previously been able to in any one monitoring visit;
- certain aspects of the volume IVA provider business, such as initial advice calls to debtors, will be made available for monitoring by direct access or by monthly reports;

> "The providers' recognition that more regulation was needed to improve confidence in their work was an important part of achieving change."

- volume IVA providers provide annual accounts, details of their corporate structures and other data as required;
- the IPA holds regular meetings with volume IVA providers to discuss trends and issues.

These changes will remain under close review during implementation and beyond to ensure that they achieve our collective aim of stronger regulation. I am hopeful that this new intensive, yet pragmatic, regime will provide the assurances the wider community seeks in the regulation of volume IVA providers' services. □



MICHELLE THORP is the chief executive officer of the Insolvency Practitioners Association.

Common ground: the Insolvency (Scotland) Rules 2018

Eileen Maclean breaks down the long-awaited Scottish rules for those working south of the border.

The new Scottish corporate insolvency rules will come into force on 6 April 2019. At the same time, the final suite of changes to Scottish-specific elements of the Insolvency Act 1986 will be enforced with the commencement of the Public Services Reform (Insolvency) (Scotland) Order 2016.

Two sets of rules

Due to a partially devolved corporate insolvency regime, Scotland's new corporate rules are found in two pieces of secondary legislation: The Insolvency (Scotland) (Company Voluntary Arrangement and Administration) Rules 2018 and the Insolvency (Scotland) (Receivership and Winding up) Rules 2018

"Scottish IPs are now getting to grips with provisions that are already familiar to their English and Welsh cousins."

(the new Scottish rules). Together, they will bring Scotland's corporate insolvency regime broadly in line with England and Wales from 6 April 2019 – but not entirely. Certain aspects of the Scottish procedures will remain distinct – for example accounting periods and remuneration approval processes. It is also worth noting that the new rules have no impact on personal insolvency, which continues to be subject to the Bankruptcy (Scotland) Act 2016.

Decisions, decisions…

Scottish IPs are now getting to grips with provisions that are already familiar to their English and Welsh cousins: the restriction on an office-holder's ability to hold a physical meeting of creditors, and the move to creditor decisions by deemed consent (where available) or by one of a number of prescribed decision procedures such as correspondence, virtual meetings or electronic voting. Physical meetings are now only available where requested by the requisite number or value of creditors (the 10/10/10 rule).

The good news for practitioners dealing with Scottish appointments from 6 April 2019 is that a lot of creditors and stakeholders will be familiar with the decision-making process already. On the other hand, if the English experience is anything to go by, it won't necessarily increase engagement and deemed consent will be the default process.

Consolidation or duplication?

One of the driving principles behind the new rules north and south of the border was to consolidate 32 years of amendments to statutory instruments since the rules came into force in 1986. The new Scottish rules contain impressive lists of revocations, but also a fair amount of duplication across both sets.

Part 1 of each of the administration and liquidation rules defines scope, times and documents. Decision making, proxies and corporate representation, the EU regulation, and block transfer of proceedings also enjoy commonality, but under different section numbers in each set of rules.

Those familiar with the 1986 Scottish Rules will know that the current administration rules rely heavily on the liquidation rules for their provisions. The new administration rules no longer do so, and the process is set out in detail in part 3 of the new rules. The process for a CVA is similarly detailed in part 2.

There is an extension, rather than contraction, of the Scottish Rules pertaining to liquidation – part 4 of the existing 1986 Scottish rules applies to court liquidation, and then schedules 1 and 2 set out how part 4 applies to a CVL or MVL (if at all, in the case of the latter procedure), but each of these liquidation processes now has a dedicated part in the new Scottish rules.

"The CVL entry process will once again be common across the UK. Directors north and south of the border will seek a decision from creditors as to their preferred liquidator."

CVLs in Scotland

The CVL entry process will once again be common across the UK. Directors north and south of the border will seek a decision from creditors as to their preferred liquidator and gone will be the costly statutory advertising requirements and personal attendance at a section 98 meeting that, post-2017, survived in Scotland only. This provides a level playing field for all IPs, wherever they are located, and widens the choice of IP firm from a director's perspective.

Court liquidation

As you know, there are a lot of distinct Scottish terms – gratuitous alienation, for example! Here is another one: 'guddle', meaning muddled or messy. To use it in a sentence, one might say 'the new court liquidation process to appoint a liquidator is a bit of a guddle'.

In their capacity as interim liquidator, IPs will need to seek a nomination as liquidator from creditors and, if no nomination is provided, will revert to the relevant court to seek confirmation in office as liquidator. That's the easy bit, which has not significantly changed from the 1986 provisions.

> One might say 'the new court liquidation process to appoint a liquidator is a bit of a guddle'.

If, however, a nomination (or nominations plural) is received, the IP must go back to creditors with a decision-making procedure for appointment. If only one nomination is made (presumably for the interim liquidator to continue as liquidator), then a deemed consent procedure could be used. If two or more nominations are received, a decision by correspondence or virtual meeting is the next logical step, but the rules are not explicit. Practitioners therefore need to give some thought to the situation and which procedure best suits. The standard appeals (10% in value to deemed consent) and the 10/10/10 rule in relation to physical meeting requirements apply, so it could be possible, in a contentious liquidation, for deemed consent to lead to a decision procedure but still end up in a physical meeting. The familiar (and comfortable) court liquidation process has been up-ended. Deep breath everyone!

Liquidation process

Where commonality does feature, it relates to the post-appointment liquidation process. Part 7 of the liquidation rules sets out how accounting periods, progress reports and final reports will apply in future and from what date retrospectively. As a rule, the start date for progress reports in a CVL will be the date of the appointment of a liquidator and in a court liquidation it could be variously the date of the appointment of the provisional liquidator (if there is one) or the appointment of the interim liquidator in all other cases.

Relevant date for claims

Another surprise is the relevant date for claims moving from the date of the presentation of the petition in court liquidation to the date of the winding-up order. The definition of relevant date is unhooked from s129 and instead attached to the definitions in s247 of the Insolvency Act 1986. Given too that the appointment of a provisional liquidator is more prevalent in Scotland, IPs should think carefully about the consequences of their actions in the period of provisional appointment.

Remuneration and accounting periods

As those of you dealing with Scottish cases know, the process for obtaining approval for remuneration is distinct from England and Wales and invariably involves the court. The remuneration approval process will remain largely unaltered, which limits the impact of the decision-making procedures when compared to England and Wales.

A more welcome revision may be the changes to the operation of accounting periods that allow an IP to manage accounting periods, albeit with court or committee approval. The first two six-month accounting periods will remain, but thereafter a practitioner can defer a claim for remuneration without court or committee approval.

The MVL process in Scotland

So how does the MVL process fare in the new rules shake-up? The good news is that the entry process remains unchanged north and south of the border. Statutory interest is now consistent – both in terms of amount and application, but will automatically apply in retrospect to MVLs open at 6 April 2019. IPs need to review cases now for outstanding creditor claims and ensure that where these, and the corresponding statutory interest burden, might be material, they are paid in full before 6 April. If that is not possible, then shareholders need to know the quantum of back-dated interest that's going to impact on their capital return. You may also need to dust down some indemnities as well.

From 6 April 2019, the statutory rate of interest in corporate insolvency in Scotland will reduce from 15% to 8%, (in line with the judicial rate and the applicable rate in personal insolvency in Scotland) and applies in MVLs, which is not the case under the 1986 rules. Schedule 2 of the 1986 Scottish rules specifically doesn't apply rule 4.66 and 4.67 to MVLs. Scottish IPs contemplating an MVL immediately post-6 April 2019 need to be mindful that statutory interest will apply, and deal with the payment of pre- and post-appointment corporation tax accordingly.

Administration

For reasons set out already, the biggest change to the administration rules is their length. The 1986 liquidation rules, on which Scottish administrations relied, have been written out in full in the new administration rules – for example creditors' committees and claims. The Scottish administration rules are the closest to their English equivalents, but it is disappointing to see some of the glitches from the English provisions being imported directly into the Scottish rules – specifically, listing the date and time of appointment in the proposals and notice documents. There are also duplicate, but conflicting, rules on the order of priority. Watch out for more guidance on these areas in the coming months.

Key steps for your practice

Your geographical location, and your familiarity with the English rules, will dictate how much preparation your practice requires for the introduction of the new Scottish rules. You may already be familiar with the changes that the new rules are bringing, or you might need training and guidance on their introduction and implementation.

> You will also need to consider what form of decision procedure will be appropriate for the size and nature of the cases you administer and think about which platform best suits a virtual meeting provision.

You will need to amend your document packs to reflect new standard contents. You will also need to consider what form of decision procedure will be appropriate for the size and nature of the cases you administer and think about which platform best suits a virtual meeting provision. Consider too the benefits and opportunities presented by these changes in terms of cost saving to how you operate, particularly surrounding the use of websites as a principal form of communication with creditors.

EILEEN MACLEAN is an insolvency practitioner, trainer and director at Insolvency Support Services Limited.

The frontline against fraud

Grant English from HMRC talks about fraud, what it means to the tax authority and how we can all work together to ensure that crime doesn't pay.

It can often be the case that an IP is the first person outside of a company's own staff to view the books, records and banks statements of a business that is in trouble.

That means IPs are often in prime position to spot the signs of fraud or wrongdoing, and makes the insolvency sector a valuable partner to HMRC in the continued fight against tax crime and those who would enable it.

Complex, deliberate, harmful

Serious fraud covers a broad range of illegal activity. For HMRC, it means those engaged in the most complex, deliberate and harmful tax crimes – such as organised crime groups involved in large-scale smuggling or VAT fraud, payroll fraud and people that trade but intentionally refuse to tell HMRC about their income.

Our strategy is to maximise revenues and bear down on evasion, by making tax fraud less profitable through identifying, stopping and recovering losses from the most harmful attacks on our tax system.

We take all necessary steps to recover money owed, not just through criminal confiscation, but by utilising a wide range of civil enforcement and recovery tools available to us and IPs under legislation, such as the Civil Procedure Rules, Insolvency Act, Companies Act, Taking Control of Goods Act, Company Director Disqualification Act and the Criminal Finances Act.

Our Fraud Investigation Service has asset recovery teams, skilled in the proactive use of these tools, who look to disrupt fraudulent money flows, preserve assets and maximise recoveries through the most effective means.

Our civil recovery specialists often pursue recoveries through engagement and collaboration with proactive IPs, often obtaining the appointment of our own choice of IP as trustee or liquidator through the Secretary of State nomination process, or through removal and replacement.

Working with IPs

We share information with appointed IPs, enabling them to bring civil proceedings against bankrupts and delinquent directors with a view to maximising recoveries and increasing dividends for creditors. In exceptional circumstances we will consider provision of indemnity against adverse costs.

In addition, we are proactive in making reports to the Insolvency Service to assist in their disqualification investigations, and now look to pursue directors either criminally or civilly for breach of disqualification orders and undertakings under the Company Director Disqualification Act.

> "The proceeds of crime team and the joint liquidators worked together... compelling various parties to cooperate with their enquiries."

To date, we've secured some great results thanks to the cooperation of IPs. For example, we recently recovered an additional £4.8m in a liquidation – on top of the initial £16m confiscation – following the conviction of three company directors for VAT fraud. We could only do this by working closely with the liquidator, who wanted to have their voice heard in this article:

'I worked alongside the proceeds of crime team to assist HMRC's challenge to a company's administration application, resulting in my appointment as provisional liquidator. This swift action prevented over £4m being dissipated from the company's assets by the director, enhancing dividends to all creditors. The proceeds of crime team and the joint liquidators worked together where possible on this assignment, with the liquidators' powers under s236 of the Insolvency Act compelling various parties to cooperate with their enquiries. This has assisted the civil recovery process, which has enabled us to maximise and protect asset recoveries for the benefit of creditors.'

In another case, an individual convicted of human trafficking and conspiracy to control prostitution for gain had been using a hotel he owned through an offshore company to carry out his crimes. HMRC obtained a winding-up order under s221 of the Insolvency Act and shared information with the IP, enabling them to shut the 'business' down and take possession of the hotel. This resulted in recoveries of more than £700,000, alongside the obvious community benefits of closing down the establishment.

Contrived insolvency

Those who are under investigation by HMRC for serious fraud may look to enter into a contrived insolvency process – usually creditors voluntary liquidation – and a new, or replacement, company is often set up in an attempt to continue fraudulent activities.

Because our civil recovery team focus specifically on HMRC debt resulting from crime and fraud, we look to IPs to engage and work with us to identify claims against delinquent directors, shadow directors and/or those persons with significant control.

For those IPs who fail to carry their duties out to an adequate level, we can consider removal and replacement, as well as referring any serious concerns to the IP's professional body and to the Insolvency Service. However, we know that the vast majority want to help and we would like to increase our engagement with a view to closing the net more tightly on those involved in wrongdoing, and that includes money laundering.

Money laundering

Some of you may know that HMRC supervises some 24,000 businesses under the Money Laundering Regulations. Our work is vital in ensuring that businesses are suitably educated and protected against those who would target their companies in pursuit of ill-gotten gains.

When working on an insolvency, if you suspect that money laundering has taken place, then you are legally obliged to submit a suspicious activity report (SAR) to the National Crime Agency. A SAR can provide intelligence that is crucial for law enforcement and assists in preventing criminal activities.

In our experience, close collaboration with IPs has resulted in us being able to tackle fraud more effectively through increased recoveries, removing the profit from fraud.

If you suspect that a company is involved in tax crime, please contact the HMRC Fraud Hotline on: **0800 788 887**

GRANT ENGLISH is head of civil recovery at the Fraud Investigation Service of HMRC.

Knowledge is the power to fund your cases

Mark Beaumont explains that no case should be left out in the cold.

All litigation must be funded, one way or another: the aim should be to fund an action in the most cost-effective fashion to manage the risk to the IP and maximise returns to creditors.

Given this background, it may raise eyebrows that some IPs only approach one litigation funder or insurer, or even leave it to the solicitors to approach their own preferred funder. Creditors often pay the price for this and it will come as no surprise that more creditors are raising concerns in this area.

Options to fund disputes will include conditional fee agreements (CFAs) with solicitors and barristers, after-the-event (ATE) legal expenses insurance (to remove the risk of having to pay an opponent's costs) and various forms of funding for disbursements and other fees. This is before you get into damages-based agreements, work-in-progress insurance, portfolio funding and so on.

> With over 70 markets for funding and insurance, many of which offer multiple products, it would be naive (and simply wrong) to assume that every available option is the same.

With over 70 markets for funding and insurance, many of which offer multiple products, it would be naive (and simply wrong) to assume that every available option is the same. There are big differences in ease of access, upfront costs (many have none), ongoing management and reporting requirements, flexibility around settlement discussions and, of course, pricing.

IPs, solicitors and barristers often work together as a team repeatedly, and it's important that any new addition to that team (be it a funder or an insurer) is going to fit with the prevailing culture, as well as adding value. Perhaps most importantly, their involvement should certainly not be creating new problems or costs. All insurers and funders have areas of specialism or 'sweet spots' for their particular pricing or approach. There is no such thing as commoditised litigation and, until there is, nor is there commoditised funding or insurance solutions. Achieving funding in any dispute in the most cost-effective fashion requires deep knowledge of the fast-moving market for funding and insurance, where new products are created on a regular basis.

I don't believe it is possible to maximise value without this knowledge. Perhaps just as important is the need to be able to show the process for arriving at a funding solution. Without knowing the market, how would it be possible to justify the funding model chosen for any dispute? Risks grow even further if only one option was considered before committing.

Case studies

Here are some examples of differing cases, and the solutions arrived at:

- An IP was in dispute over £300,000, but the opponent was offering only around £35,000 to settle. By presenting the opponent with an ATE legal expenses insurance policy that would cover us all the way to trial, the other side immediately asked us not to issue the claim and raised their offer to £130,000 within days. A long-running battle was brought to a swift conclusion for a single fee of £11,200 to the ATE insurer, paid upon settlement.
- An IP wanted to pursue a £3m professional negligence claim but was less keen to pursue almost 50 other claims that could total just over £1m, so they sold that portfolio of smaller claims for a small upfront fee and a 50% share of recoveries. The administration will now benefit from hundreds of thousands of pounds it would not have seen otherwise.
- An IP is pursuing a director for £420,000 with some creditors potentially able to fund it, albeit reluctantly. ATE insurance was not only used to insure the opponent's costs, but also to insure the creditors' investment in legal fees. Should the case fail, the insurer pays both the adverse costs and repays the creditors' investment, which makes them far more inclined to fund it in the first place.

> Risks grow even further if only one option was considered before committing.

- An IP has quotes from two funders to finance a £450,000 costs budget on a claim of £8.6m, at which point the IP approaches Annecto Legal to arrange ATE insurance for adverse costs. The funding offers were seeking a return of up to a third of the claim value, so up to £2.8m in addition to the costs of ATE premiums and any CFA success fees. Using a more efficient structure of insurance and funding pulled together by Annecto Legal, the client was able to retain over 80% of damages, giving away a maximum of £1.7m, inclusive of the costs of funding, ATE insurance and CFA success fees.

Unlock cases

It's frustrating that funders are charging incredible fees and that clients are paying them – I really don't understand it!

We established Annecto Legal six years ago to help to 'unlock' cases that are withering on the vine due to the costs and risks of litigation. Our aim is to find the most efficient way for any case to be pursued and we have built a track record of doing exactly that. If you want to understand how we can assist, or you wish to discuss a particular case, please do get in touch.

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

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Fighting for the profession

R3's Press, Policy and Public Affairs team bring you an update on what they've done in 2018, and will do in 2019, to fight for the profession's voice to be heard.

Last year saw a raft of proposals from government for the reform of defined benefit pension schemes, many of which would impact on the profession's interaction with financially distressed businesses, pension schemes and regulators. After the initial white paper, a follow-up consultation was launched to look specifically at the powers of the Pensions Regulator (tPR).

Alongside a proposed system of penalties to tackle non-compliance, and a proposed 'declaration of intent' requirement for sponsoring employers or parent companies ahead of relevant business transactions, the follow-up consultation proposed a new 'notifiable event', where the tPR should be notified by a company where it had sought pre-appointment insolvency or restructuring advice. We were concerned that such a requirement would deter companies from seeking advice.

In February 2019, the government published its response to the tPR consultation. We were pleased to see that the government had dropped its proposal that pre-insolvency advice become a notifiable event. However, there remain points that require further clarification (including the timing of notifications and the notifiable events framework) and so R3 will be writing to the Pensions Minister to seek clarity about how these proposals will operate in insolvency-specific situations. In addition, R3 had called for reforms to the process of agreeing a regulated apportionment arrangement (RAA): while there was a nod to this in the white paper, it has not been picked up since.

Brexit regulation and policy

Amid all the high-profile goings-on in parliament regarding the UK's departure from the European Union, the considerable amount of work going on at a technical level is often overlooked.

Of key importance to the insolvency and restructuring profession is the Insolvency (Amendment) (EU Exit) Regulations 2019. This piece of legislation gives the government the means to enact a post-Brexit agreement on the UK's insolvency arrangements with the EU and to ensure a level playing field for the UK and EU professions should a civil judicial cooperation agreement prove too difficult to secure.

R3 briefed parliamentarians ahead of the debate on the statutory instrument in January. We were pleased to hear MPs speak positively about the profession's work as a result. Shadow Insolvency Minister Bill Esterson MP said: 'We have an extremely well-regarded, strong and economically successful insolvency regime in the UK and it is important that we continue to do so.' Reference was also made to R3's own Brexit policy paper.

Those taking part in the debate agreed, and went on to approve, the legislation without calling for a vote that would have hampered the legislation's journey through parliament and on to the statute book.

R3 in the papers

In late January, this year the Insolvency Service and Scotland's Accountant in Bankruptcy released statistics for corporate and individual insolvencies in Q4 2018 and R3's commentary was widely covered in national, regional and trade titles.

> "With 2019 shaping up to be a busy year, your contribution is more vital now than ever."

The statistics showed a rise in corporate insolvencies year-on-year by 10% in England and Wales (excluding bulk insolvencies), and by 21% in Scotland. Personal insolvencies saw a similar hike, up 16% year-on-year in England and Wales and up 14% in Scotland. For companies, we highlighted the effect of continuing uncertainty around Brexit, including the impact of having to divert resources into stockpiling and the squeeze on consumer-facing businesses in sectors such as retail and restaurants. For personal insolvencies, we noted the tapering off of PPI 'helicopter money' refunds, above-target inflation in 2018 eating into pay packets, and the apparent paradox of record low unemployment coupled with personal insolvencies returning to levels last seen in 2011.

Our comments were featured in articles in *Bloomberg, The Financial Times, The Times, The Daily Telegraph, The Mirror, The Guardian, Reuters, The Scotsman* and *The Sun*, among others. Many focused on personal insolvency numbers, picking up on our comment that many people have 'run out of road' (used in headlines by *The Daily Mail*, *The Telegraph* and *The Mirror*).

So far in 2019, we have met four journalists from *Bloomberg*, *The Evening Standard* and *The Guardian*, and we are looking to meet more this year. In our meetings, we run through the issues of concern to our members and give an update on trends, as well as any specific sectors of interest to the journalist.

Looking ahead

Already, 2019 is shaping up to be another busy year on the legislative and regulatory front. As well as Brexit and pensions, we're also expecting consultations on corporate governance, the reintroduction of Crown preference and a single regulator for the insolvency profession. There is also likely to be further government work on corporate insolvency reform, progress on introducing a 'breathing space' for indebted individuals (following a consultation in January) and another look at 2016's reforms to connected party pre-packs.

The recent trend of rising insolvencies is also expected to continue through 2019. This will put the spotlight squarely on the insolvency and restructuring profession, the way it carries out its work and the value it creates for the economy. To respond to this increased interest, R3 has projects in the pipeline to look at ethical standards in insolvency and restructuring. These will establish exactly how many jobs and businesses our profession rescues, how many people have benefited from an IP's advice and how much money is returned to creditors every year thanks to the profession's work.

To make sure we are on the right page, we need R3 members' input. Come along to one of our roundtables; join one of our committees; drop us a line on Twitter (**@R3PressOffice**) or LinkedIn (**R3 Association of Business Recovery Professionals**); or email us *(see R3 contacts* *on page 38)*. We're very grateful to all those members who share their thoughts and expertise with us. With 2019 shaping up to be a busy year, your contribution is more vital now than ever. □

JAMES JEFFREYS is public affairs manager at R3.

JO TACON is communications officer at R3.

R3 contacts

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

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

R3 Executive

President
Stuart Frith, stuart.frith@shlegal.com

Vice-president
Duncan Swift,
duncan.swift@moorestephens.com

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

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

Administration

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

Finance

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

Assistant Finance Manager
Alex Coles, alex.coles@r3.org.uk

Business development

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

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

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

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

Communications, Public Affairs and Policy

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

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

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

Policy Executive
Mira Lodhia, mira.lodhia@r3.org.uk

Education, Courses, Conferences and Events

Events Organiser
Lisa Boulter, lisa.boulter@r3.org.uk

Events Team Manager
Patrick Cheek, patrick.cheek@r3.org.uk

Events Administrator
Maggie Dean, maggie.dean@r3.org.uk

Events Marketing Executive
Lucy Woolf, lucy.woolf@r3.org.uk

Regional Events
events@r3.org.uk
T: 020 7566 4234 F: 020 7566 4225

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

Technical

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

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

Committees Manager
Becky Withington,
becky.withington@r3.org.uk

Committee Chairs

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

Fraud Group
Frances Coulson, 020 7400 7770

General Technical Committee
Stewart Perry, 020 7861 4281

Membership Committee
Richard Wolff, 0345 872 6666

Personal Insolvency Committee
Mark Sands, 020 7488 8142

Policy Group
Andrew Tate, 01634 899 800

Regional Communications Committee
James Martin

Scottish Technical Committee
Eileen Blackburn, 0131 225 6366

Smaller Practices Group
Simeon Gilchrist, 020 7691 4166

R3 in Scotland

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

Regional Chairs

Eastern
Mark Upton, 01223 420 721

London & South East
Christina Fitzgerald, 020 7264 4444

Midlands
Chris Radford, 0115 983 8200

North East
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North West
Paul Barber, 0161 837 1700

Northern Ireland
Stephen Cave, 028 9024 5454

Southern
Mike Pavitt, 0238 048 2275

South West & Wales
Louise Durkan, 0117 9211622

Yorkshire
Eleanor Temple, 0345 034 3444

Regional Representatives on the R3 Council

Eastern
John Bradshaw, 01473 611 211

London & South East
Joe Curl, 020 7404 5055

Midlands
James Martin

North East
Kelly Jordan, 0191 211 7904

North West
Richard Wolff, 0345 872 6666

Northern Ireland
Michael Neill, 028 9031 4466

Southern
Neil Stewart, 0239 2981000

South West & Wales
Richard Clark, 0333 006 0000

Yorkshire
William Ballmann, 0113 218 2470

Other Council Members

Eileen Blackburn, Matt Dunham, Nicky Fisher, Christina Fitzgerald, Gareth Limb, Cathryn Williams, Joe O'Connor, Stewart Perry, Nick Pike, Mike Pink, Simeon Gilchrist, Rachel Grant, Colin Haig, Graham McPhie, Charles Turner.

May we live in interesting times

Simeon Gilchrist examines how smaller practices have come to depend on Europe ahead of Brexit and writes about more R3 discussions with HMRC.

It is often said that a week is a long time in politics; to that one could also add sport and business. Promotion success in May turns to relegation misery in January, and consistent economic growth returns to a rise in the quarterly insolvency statistics, both corporate and personal.

Perhaps it is because the 'B' word now seems to dominate every conversation and, as the government limps towards exit day (at the time of writing that is still 29 March 2019 but who knows?), it can seem increasingly as though the day-to-day business of being in practice has taken a back seat. However, work goes on at R3 and in the SPG committee – carrying forward the momentum of the SPG Forum which, incredibly, was only some four short months ago. It turns out that time is relative – who knew?

> "The automatic recognition of an office-holder's authority within the EU became as welcome as the recognition of the laws around insolvency processes."

Overseas asset ownership

In August 2017, an R3 survey suggested that 47% of members have had recourse to the European Insolvency Regulation (the European regulation) for matters of recognition or recovery in the EU, although cross-border work is usually a larger firm specialism. It turns out that 45 years' membership with the world's largest trading block has facilitated overseas asset ownership, not just the freedom to trade. Overseas assets (real property, intangible rights and even pensions) began to turn up routinely in English insolvency processes, just as European corporates and individuals from all corners began to turn up in the English courts to access those very processes.

The objective of the European regulation was a consistency of approach, but the benefit was efficiency with a concomitant saving in costs. The automatic recognition of an office-holder's authority within the EU became as welcome as the recognition of the laws around insolvency processes. While one had to respect the local process for realising a holiday home or investment asset, the office-holder's authority was not open to question, nor was the choice of law for deciding creditor participation in the insolvency process, investigations into antecedent transactions or how and when the estate would be concluded.

Exit day uncertainty

It had been proposed that, should exit day arrive without a deal, the European regulation would still pass into English law as acquired legislation. However, this would have the effect of providing our fellow European practitioners with all the benefits of automatic recognition – with no reciprocal benefit to R3 members in the EU. Unfortunately, lobbying from R3 could only highlight this disparity. So, should exit day arrive with no deal, the regulation will now fall away – the inevitable consequence of dealing with EU cross-border issues will be taking a step back into the Insolvency Act 1986 and the common law, while stepping *into* the EU will require recognition and advice in the destination jurisdiction. This may mean local recognition refusal, local asset-based appointments and competitive processes for the same entities. Uncertainty begets uncertainty.

HMRC discussions

Away from Brexit, it appears HMRC is quite confident that it has never been uncertain in its approach to claim interest in MVLs: the statutory rate please – as from the date of the liquidation, not the due date for the payment of the tax. Although the committee continues to call on SPG members for examples of interest accepted at the corporation tax default rate from the due date, there has apparently been no change of policy and the rules have always been clear. Evidence please!

And to continue the theme, discussions continue between R3 and HMRC in relation to follower notices. Perhaps there is quite a lot going on elsewhere but it is reasonably clear, at least to members, that the corrective policy intention of a follower notice has the perhaps unintended effect of diluting creditor claims where a penalty notice then lands on the office-holder's desk. There is a briefing paper on the presses but, as ever, please contact the committee with evidence.

> "The corrective policy intention of a follower notice has the perhaps unintended effect of diluting creditor claims where a penalty notice then lands on the office-holder's desk."

The next edition of *RECOVERY* will arrive on the other side of Brexit, though whether that fateful day will actually arrive is open to conjecture. Interesting times, uncertain times – who can tell them apart anymore? □

SIMEON GILCHRIST is a partner at Edwin Coe and chair of R3's Smaller Practices Group.

Advertisers' index

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

Tell them where you saw it…

Spring edition 2019

Interview with…
Stephen Cave

Stephen Cave, R3's Northern Ireland chair, talks about the sheer depth and scale of uncertainty in the region's recent history (and current climate) and how it can change the way the profession works.

Q The insolvency community in the rest of the UK is fairly tight-knit. Are things the same in Northern Ireland?

A Within the professional community here, we often refer to Northern Ireland as a 'village'. There are fewer than 50 licensed IPs operating in the region, supporting the constantly evolving banking, restructuring and insolvency sectors. Regardless of scale, the region faces the same insolvency and business recovery challenges that impact the rest of the UK.

There are some added challenges that come with our market size. You can be administrator of a company one day and the next you're supporting a corporate business in an advisory capacity, whether convincing the bank to stay on board, helping the business avoid insolvency by dealing with a crisis or simply helping it make operational improvements. I regularly describe my job as a facilitator, seeking to do the right thing for all stakeholders – successfully achieving this in a small marketplace can pay back tenfold in terms of reputation and credibility.

> "As IPs, we had to go with the market demand and become property specialists, capable of demonstrating to stakeholders what added value we could bring beyond the abilities of a commercial or residential estate agent."

Q What do you do as part of your role with R3 in Northern Ireland?

A R3 in Northern Ireland works similarly to any other region. We promote the good work that IPs do, provide networking, education and technical support to members, and lobby on behalf of significant causes to provide a voice for the profession.

I took on the role of regional chair in May 2017, at a time of a recovering economy, but with the aftermath of a deep, lengthy recession still present. While formal insolvency appointments are always and will remain a key part of an IP's role, the market was shifting and a key part of my mantra was to ensure that IPs both evolved with the market, and recognised the value their broad skills sets could bring to corporate businesses further up the distress curve.

Q You previously mentioned the UK's lengthy recession; was life as an IP in Northern Ireland much different to that of your colleagues in the rest of the UK during this period?

A Yes, most notably driven from the dominance of property and the volume of subsequent loan portfolio sales. The few years pre-crash (2004–2007 in particular) had seen an unprecedented boom in property lending from the banks and in transactional activity in this sector.

When the crash came, Northern Ireland saw a price correction of almighty proportions, much deeper and longer running than any other region of the UK. Normal trading debt in businesses was dwarfed by that of property lending and this became the trigger for a wave of insolvencies, including seeing fixed charge receiverships making a massive return as an insolvency mechanism of choice for secured lenders to realise their heavily under water property assets.

As IPs, we had to go with the market demand and become property specialists, capable of demonstrating to stakeholders what added value we could bring beyond the abilities of a commercial or residential »

Stephen Cave biography

- Stephen originally intended to take up 'plain' accountancy at university, utilising his capacity for maths, with high hopes of one day being a financial officer for a major car dealership (although possibly more for the chance to test-drive the merchandise). Instead he applied for an accounting technician post at the firm Coopers and Lybrand. The post was in the business recovery and insolvency department, which was the first step on a long and varied career in the field.
- Coopers and Lybrand later merged with Price Waterhouse to become PwC, at which he is now the leader of the business recovery services team for the firm in Northern Ireland.
- Away from the office Stephen continues to indulge what he dubs 'a bad addiction' to very fast cars… or boats… or jet skis (anything so long as it's fast), an interest he shares with his son. Beyond that he is very much a family man and enjoys spending quality weekend time with his wife, son and daughter.

estate agent. The profession locally found itself having to gear up quickly and find those skills.

Against a context where the banks had loaned all this money into the local property sector, NAMA (National Asset Management Agency) was formed in Ireland in late 2009, effectively to function as a bad bank, acquiring property development loans from Irish banks in return for government bonds. NAMA's subsequent sale of a large portfolio loan book in June 2014 to Cerberus (a US investment firm) started a wave of property loan portfolio sales in our market.

> **We should never be embarrassed about being insolvency practitioners – it's what we do and nobody can take that from us.**

For IPs, while there was a reduced number of formal insolvencies (setting aside fixed charge receiverships), there were opportunities to assist the vendor banks in preparing the portfolios for sale, given this required a skills set that understood property assets, loans, security etc.

Q So without much formal insolvency work, what did all the IPs do?

A My R3 mantra centred around 'we're not just insolvency practitioners'. I have been encouraging the profession to stand back, think and take confidence from the broad skills they have and which are needed to advise distressed businesses – having a voice at the boardroom table, advising on strategy and options, solving problems, project management and facilitating crossover with corporate finance in the transactions world.

We should never be embarrassed about being insolvency practitioners – it's what we do and nobody can take that from us. It's important that we redirect these skills to add value through a different lens, recognising that our skills set is more flexible and agile than we may think.

Q Has the economy recovered to the point where it's back to business as usual?

A It would be accurate to say that by some measures – falling unemployment and reduction in formal insolvencies – there is a distinct recovery. But economic growth is still below 1% and Northern Ireland remains the slowest-growing of the 12 UK regions.

One of the key issues at R3 events and when meeting businesses is ensuring that the growth mindset returns. It should not be assumed that the right boardroom to see a business through a recession and times of distress is also the appropriate boardroom for times of growth. Sometimes boardroom teams go into survival mode, particularly in SMEs and a lot of family-owned businesses, and forget about implementing a growth strategy.

We are two-years-plus without a functioning Assembly at Stormont, a position which quite simply can't be allowed to continue in the interests of 'Northern Ireland Plc'. The impact is real, with IPs regularly quoting examples to me in my R3 role of how they are dealing with businesses in certain sectors that are struggling to survive. Unfortunately, there are many businesses that did not act as quickly as they needed to, largely because for so long it was a case of 'wait for a resolution just around the corner'. IPs are now fighting hard to help those directly impacted to rescale and cut costs to survive, but in some cases it will inevitably be too late.

Brexit is having a similar effect in terms of uncertainty, with the added complexity in Northern Ireland of our land border with the Republic and the well-publicised backstop. While there are no clear answers, the profession is used to hurdles and has been seeking to positively support clients, helping them try to prepare for various possible scenarios and implement some 'no regret' decisions to make them more agile to deal with any hard landing.

Q Has the delay with Stormont caused any legislative headaches for the profession?

A Not really, the reality is that the insolvency regime here is very similar and has always been a mirror image of the rest of the UK. The one proviso is the timeline of implementation of changes. For example, the Enterprise Act, which came into effect in early 2003, did not get implemented here until late 2006, but the wording is in effect the same. We haven't got the latest Insolvency Rules and won't have them until we have Stormont again, but that's not affecting us on the ground.

Q For so much uncertainty in one region and a total shake up of the profession, it sounds like you've coped well. IPs have adapted, Brexit isn't so much of a concern and businesses are starting to make progress without Stormont. Does it feel like it's going that well?

A I'm in no way saying there aren't significant problems out there, but if you look to the impact of the problems directly associated with Stormont, these tend to be in specific sectors or specific businesses reliant on Stormont budgets, such as the schools' estate, major infrastructure and public works. In terms of Brexit, providing some common sense prevails, I believe the majority of businesses will be able to work their way through any implications.

The last recession went on so long, was so deep and was so property-focused that I think people are still thinking that we're only just out of that, and they're not thinking 'when will we have another downturn?'. I genuinely believe that, for the next recession, the lessons learned by IPs and the use of their broader skills set will leave us better placed to address business issues early and to stave off insolvency.

> **It should not be assumed that the right boardroom to see a business through a recession and times of distress is also the appropriate boardroom for times of growth.**

Q What advice would you give to the readers of RECOVERY looking to cope with uncertainty?

A From the IP lens, be proud of what we do. Have confidence in our skills as insolvency professionals. And change the perception of IPs as roaming the battlefield bayoneting the dead, to skilled and caring professionals, saving the wounded.

IPs also need to realise that they can step outside their own comfort zone and play their part in education and awareness at a professional level through the likes of R3 and at our own firms.

I think we have more work to do in properly educating our clients and corporates, getting a seat around the wider business table and creating relationships outside of distress. Then, when there is a problem, you are the trusted adviser. It falls back on us to make sure we've educated those businesses sufficiently and it's not just a case of 'come to us when it's too late.'

MATT JUKES is publishing manager of *RECOVERY* magazine.

Editor recovery@r3.org.uk