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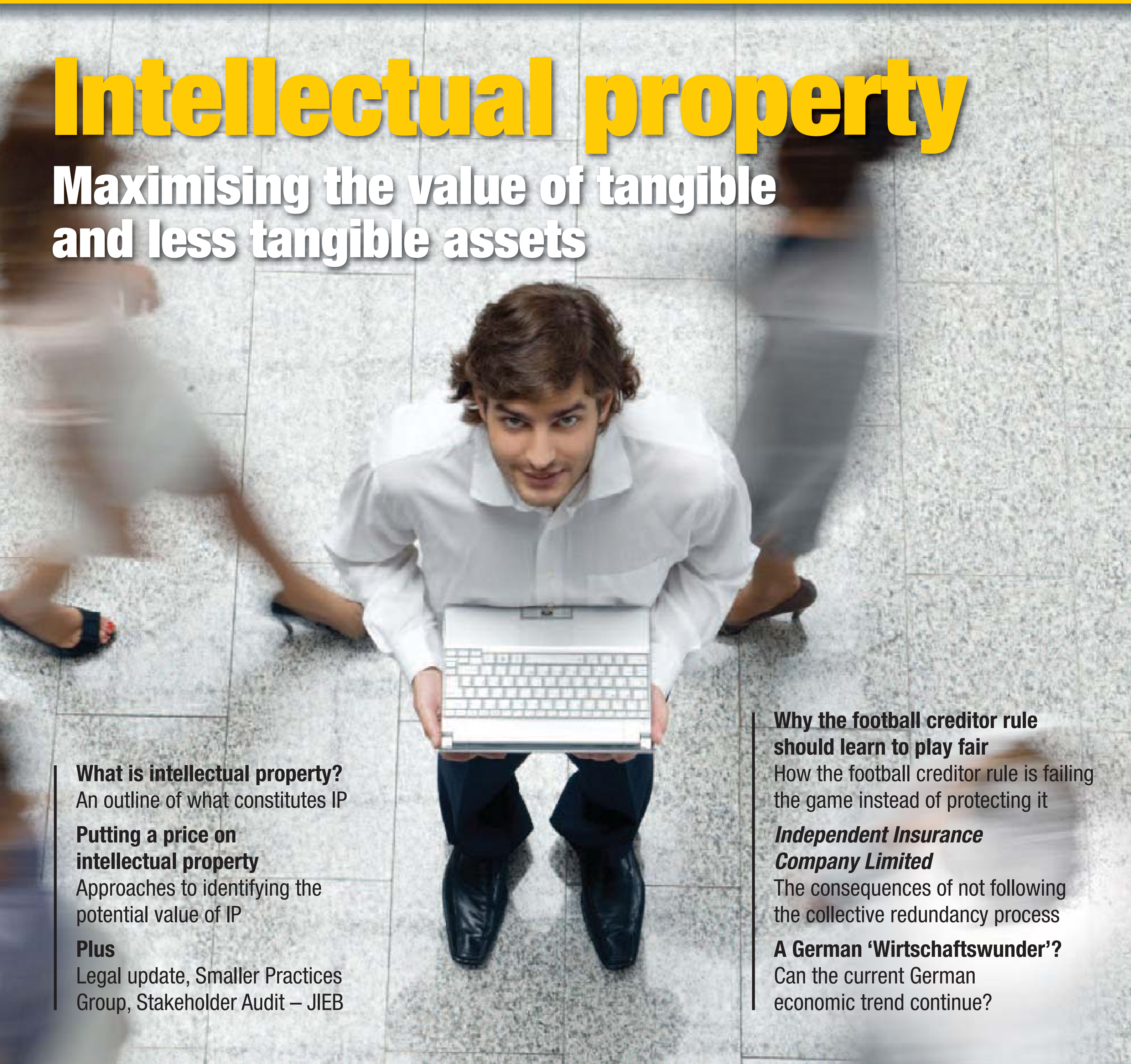
RECOVERY

Intellectual property

Maximising the value of tangible and less tangible assets



What is intellectual property?
An outline of what constitutes IP

Putting a price on intellectual property
Approaches to identifying the potential value of IP

Plus
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Readers' views are welcome. Got an opinion about a burning issue? Want to comment on articles or *RECOVERY* itself?

Please contact me on **recovery@r3.org.uk**.

Editorial

There is much to commend in this issue. For those who really did take the opportunity to go on an extended holiday during this quiet summer, Nigel Barnett's analysis of *Minmar* is worth reading. You should particularly make sure you give thought to the final section of Nigel's piece, which makes clear that neither the problem nor the solution are simple.

The General Technical Committee's responses to the allegedly non-contentious proposed changes to the Insolvency Act are also worth reading. How the legislature can be quite so confused about the difference between administration and liquidation I sometimes wonder!

Some of you will be more gluttonous for knowledge than those merely content to digest our legal update. For you I recommend detailed consideration of our fulsome analysis of the interaction between IP (intellectual property) and IPs on pages 17–24. R3's responses to proposed changes to IP regulation are explained in some detail by Frances Coulson (page 5) and Esme Harwood (page 35). The Insolvency Service is said to be in listening mode, so hopefully any confusion on this issue can be avoided.

Also, I am delighted that our note on R3's 21st annual conference (page 37) not only sets out the value delegates derived from attending but also makes the point that there were positive consequences arising from the venue being in the UK.

As I write in early August, stock markets have plunged for the seventh day in a row and scenes of criminal damage in parts of London and elsewhere are worrying many. The latest insolvency statistics have emerged and, depending on your point of view, offer some positive news. Corporate and personal insolvency figures are up (see page 6). It is likely to be some time, even with a significant fall in share prices, before the many zombie companies being kept alive by financiers not pulling the plug really start to make the insolvency profession busier. However, the more, as a profession, we add value by the constructive use of the insolvency process, the better those of us who do so will fare. Moreover, we must communicate to all the stakeholders in distressed businesses, however angry they may be at having lost money or opportunity, that what we are doing is constructive and, above all, in stakeholders' interests. We have to keep explaining to creditors and others that what we do is for them.

Chris Laughton is editor of *RECOVERY* and a partner at Mercer & Hole

Regulars

Regulars

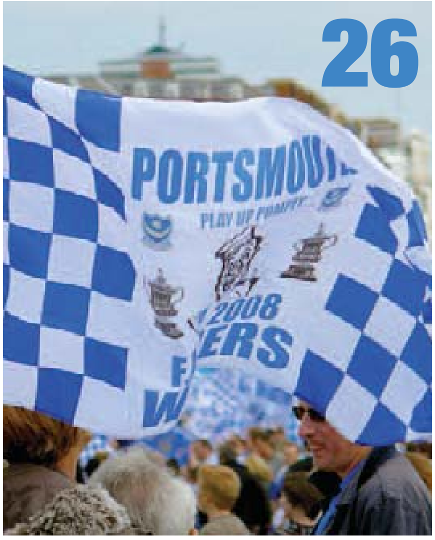
47
John Milsom

Legal update

Features

Intellectual property

Theme of *RECOVERY* Winter 2011
Professional services' firms



RECOVERY

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The past, the present and the future?

Philip Long reflects on changes in the profession – in a changing world.

After over 38 years in the profession, with the last 32 dealing with insolvency matters, it was a privilege to be asked to share thoughts about the direction of our business and the issues facing practitioners as we enter these very interesting times.

Out of the frying pan

You remember the 'firsts' in your life and in 1979 Woods (Pianos & Organs) Bolton Limited was my first receivership. Thankfully, a local pyromaniac saved the assignment from a disastrous post-appointment trading period and enabled the bank to be paid in full – and I was saved from a potential life as an auditor.

The recession of the late 1970s saw the larger general practice firms, such as PKF, enter the industry with the aim of taking a slice of the market dominated by the then boutiques in the North West: Harry L Price, Poppleton & Appleby and Parkin S Booth. There were but two choices of lawyers in Manchester: Wm F Prior and Slater Heelis. Egan Brookes of Slater Heelis dealt with NatWest and was more than happy for Tony Kirby to deal with the rest.

The banks, seeking to extend their relationships with other firms, would telephone with requests to visit a borrower and 'come up with ideas'. This was before the 1986 Insolvency Act and so the best ideas were always receivership or liquidation as bank monitoring of borrowers was not sophisticated and most businesses were in terminal decline by the time they came on the radar.

In those days, assets were free from charges and we could trade for a few weeks, usually risk free, advertise in Tuesday's edition of the *Financial Times* and sell the business to an open market within two to three weeks. Jobs were saved, businesses were taken over or merged and matters were resolved to the satisfaction of everybody – or were they?

> "…assets were free from charges and we could trade for a few weeks, usually risk free, advertise in Tuesday's edition of the *Financial Times* and sell the business to an open market within two to three weeks."

…and into the firing line

So here we are, a couple of recessions and a lot of legislation later, in a profession that is under increasing government scrutiny with a reputation that, in the eyes of some people, lies somewhere between the Kray twins and that of the used car salesmen. Where has it all gone wrong?

The free access to credit over the years and the sales-driven culture of the lending industry has meant that we no longer have those free assets, the time or indeed the ability to trade a business and seek an orderly disposal. We are in the era of the 'pre-pack' and we must be prepared to deal with the quite correct scrutiny of our actions. There is nothing bad with the principle of the pre-pack but there are a lot of bad pre-packs.

As an industry we do ourselves no favours by aligning our businesses with the serial 'pre-packers' and allowing repeat offenders to fleece unsecured creditors and HMRC. Thankfully HMRC is now a much more co-ordinated and educated creditor and we are seeing their active participation in choice for post-administration appointments of liquidator.

Professional fees

The thorny question of professional fees is regularly high on the agenda of all parties. It is always a danger if we lose sight of our fiduciary position and forget that we are dealing with insolvent businesses and other people's money. Having spent three days being examined on fees in the *Super Aguri F1* matter, I know the level of scrutiny that can be undertaken and how we must be able to justify our actions many months after the event.

As austerity measures start to bite in the future, I do feel that we will come under increasing pressure to move away from hourly rates. The recent *London Evening Standard* report of professional costs in the *Southern Cross* matter of £2 million per month does nothing to help our profile in the eyes of the public.

Yes, the media portrayal of our business is not always the best and R3 has made tremendous efforts to work more effectively with the press and with parliament to try to improve politicians' understanding of the issues we face – some of which are of our own making. I am told that an hourly rate for secretarial grade in a recent SIP9 statement was £250 – I certainly would have had trouble justifying such an amount to Registrar Jaques!

The subject of regulation will be in the forefront of our minds in the coming months as the OFT recommendations will inevitably lead to changes. We cannot justify the number of different regulators let alone continue with the mantra of self-regulation in the modern era.

> "We cannot justify the number of different regulators let alone continue with the mantra of self-regulation in the modern era."

Government and the public quite rightly expect those that cross the line to be dealt with expeditiously and de-barred from the profession. Our record of removing licences when compared to other professions would be an interesting comparison.

So what of the future?

The economic and sovereign debt uncertainty across Europe and the effect of the austerity measures closer to home will undoubtedly lead to many of the moribund companies failing – our challenge will be to find cost-effective solutions for the problems in an ever hostile marketplace.

Philip Long is the former head of corporate recovery for PKF (UK) LLP.

President's column

Frances Coulson reports on recent R3 action defending the profession.

Last issue I was outlining my plans for the presidential year – and now I can report back on some action! In June I had my first BBC interview (as president) on their breakfast show to discuss quarterly rent days. The interview focused on administrations following 'rent day' but I was able to underline the job insolvency practitioners do in seeking to rescue businesses and the need to take early expert advice when in difficulties. I enjoyed the whole experience and hope a few more are on the way.

Jackson proposals

I'm continuing to work hard on behalf of the profession to secure an exemption for insolvency litigation in the *Legal Aid, Sentencing and Punishment of Offenders Bill*. Prior to the announcement of the Bill, R3 had been liaising with The Insolvency Service on the implications of the Bill and we have been lobbying the Ministry of Justice to secure this change. We did press work on the issue, which secured a half-page spread in *The Guardian* (*Clark under fire from taxman over legal fee reforms*) and this got the Ministry of Justice to concede:

'These proceedings can bring substantial returns to creditors, including Her Majesty's Revenue & Customs. We are therefore discussing the specific implications with a view to reaching a satisfactory conclusion.'

Unfortunately the announcement of the Bill in June didn't see the insolvency exemption we wanted. This will not deter our efforts and we are working with the shadow Justice Secretary, Andy Slaughter, to achieve this change.

On the plus side, I was called as an 'expert witness' to the pre-legislation scrutiny committee of the Bill, which gave me the opportunity to explain why an insolvency exemption is necessary to deter 'dodgy' directors from running off with the company's assets. I also explained why Conditional Fee Arrangements (CFA) and after event insurance (ATE) were necessary when working with an insolvent estate. We are still awaiting the outcome of the committee and whether an exemption will be included. If it isn't, the next stage will be to table amendments to the Bill through the Shadow Justice team.

> "I have been meeting with MPs and peers to explain the negative effects increased regulation would have on… 'micro-businesses', a constituency the government is keen to protect."

Frances Coulson being interviewed on *BBC Breakfast*

IS consultation into the regulation of IPs

The Insolvency Service's consultation on regulation – another front we are fighting on. The Insolvency Service has received our submission and has now entered the 'listening phase' with their next announcement likely in the autumn.

We were keen to demonstrate that our concerns over proposed regulation were shared by the entire profession. With R3 representing the smaller IP firms, we secured representatives from the Big Four as co-signatories on a letter to the Insolvency Minister, Edward Davey MP (reprinted on page 7). The letter requested a meeting with Mr Davey to make him aware of the costs to business that the proposed increase in regulation would entail and suggested non-regulatory approaches that could be more effective at harnessing the market power of unsecured creditors.

I was pleased that the letter was written up, as we had hoped, in *The Times – Accountants demand changes to planned insolvency reforms*. As a consequence of our letter, Ed Davey has agreed to hold a stakeholder meeting to discuss the consultation's proposals. Separately, we have also written to Mark Prisk MP, minister for small businesses, where we have focused on the impact of increased regulation on the SPG community.

I have been meeting with MPs and peers to explain the negative effects increased regulation would have on those of our members who are, by definition, 'micro-businesses', a constituency the government is keen to protect. We are working with various MPs and peers to table parliamentary questions on this issue to exert pressure on the Service. Mary Glindon MP has begun the first round of these. The minister responded by saying, *'The moratorium on new regulation for micro-businesses applies to all new proposals unless waiver is agreed by Ministers taking account of all the circumstances.'* This will impact onto the proposed changes from The Insolvency Service – we'll keep you posted.

Pre-pack sales to connected parties

The government is also consulting on its proposed three-day notice to creditors in pre-pack sales to connected parties. I, with the team at R3, have already begun mobilising support for our proposals and it's clear that many stakeholders, including creditor groups, do not feel the government has hit the right note in addressing concerns over pre-packs' transparency. We are continuing to work hard with The Insolvency Service to reform these proposals and R3's policy group has developed alternative working practices to improve pre-pack transparency.

Annual conference

I was delighted to see that we had a packed conference hall on the opening day of R3's annual conference in Wales on 12 May, so perhaps the shorter travel time and early summer sunshine helped.

The theme of the conference 'Coming of Age' really struck home as I considered the challenges that lie ahead of us in the next twelve months. We are going to need all the maturity our profession has acquired to deal with some of the matters already discussed here.

I was struck by the high level of engagement from the attendees (and all our members) whose input provides meaningful survey material for us to take to ministers and the press. This process also happened during the conference at the policy group discussion sessions and we will be presenting the opinions expressed under each of the four topics in a written report.

We now at least have the attention of senior decision makers from a sustained (and persistent!) process of engagement with MPs and the media – what they do with our views remains to be seen. □

Frances Coulson is head of Insolvency & Business Recovery and managing partner at Moon Beever Solicitors.

News update

Personal and corporate insolvency increases

The quarter on quarter increase in personal insolvency of 1.2 per cent (up from 30,145 to 30,513) is to be expected, given job cuts and compulsory redundancies in both the public and private sector. Thirty per cent of people do not have any savings according to R3's latest personal debt snapshot, with many households failing to have a contingency plan for any fall in income or increased outgoings. Therefore, a swift change in circumstance such as losing a job is likely to have pushed many individuals into insolvency. In reality, the statistics may be even higher as this data does not capture the figures for those in informal insolvency procedures such as debt management plans.

The consecutive quarter increase in corporate insolvency of 2.7 per cent (up from 4,121 to 4,233) is unsurprising given the latest GDP figures revealing marginal growth of just 0.2 per cent.

Sovereign debt crisis

The situation has moved swiftly over the past few months and, at present, is still very unstable. The summit on the eurozone crisis on 21 July offered an olive branch to Greece but its proposals to stem the tide of contagion reaching Spain and Italy proved flawed and confidence in the talks seeped away within 24 hours. On 8 August the European Central Bank was obliged to buy Spanish and Italian debt. But for stability to be increased it is essential that governments activate the 440 billion euro European Financial Stability Facility, the rescue fund that will inherit bond-buying powers from the ECB if member states agree to sign up. This will mean that the fund can act pre-emptively and buy up the bonds of countries, like Italy and Spain, which do not need a full-blown rescue package.

However, sovereign debt problems were not confined to Europe as, despite Barack Obama being forced by Republican pressure to reign in spending, Standard & Poor downgraded America's triple–A rating to AA+ on 5 August, and this set off a tsunami of volatility in stock markets across the globe the following week.

The effect of this global economic turbulence, coupled with the lack of an economic growth strategy in the UK to balance the rigorous public sector cuts being implemented is likely to cause more financial pressures on individuals and businesses alike.

R3 shortlisted for Trade Body of the Year

R3 has just been shortlisted for Trade Body of the Year at this year's Public Affairs News Awards. They are the top awards of their kind, and we are shortlisted alongside two other strong contenders ABTA and EEF (the manufacturers association). The nomination highlights the public affairs and policy successes we have scored over the last 12 months.

Letters

Dear Editor,

The issues raised by the recent judgment in *Minmar* may have significant impact on the role of the IP but I believe there are some relatively simple steps that can be taken to minimise the risks, especially where there is hostility at board level and a lack of unanimity.

A practitioner's first act on getting the call is likely to be a Companies House search, picking up movement in the officers including resignations and new appointments. Within a few clicks of the mouse a full officer list is available and the diligent IP will add a copy to their file as a matter of good practice. Reporting the information is a legal requirement for the proposals with r2.33 Insolvency Rules 1986 requiring information on who appointed the IP and who the directors were at appointment. Since the proposals are to be sent as soon as reasonable practicable, but within eight weeks of appointment, the IP should be mindful of their drafting requirements from the outset.

On first attendance of the directors a comprehensive letter of engagement should be signed and returned. This should have a clause giving written confirmation from all the directors as to scope of instruction. The IP should be asking the directors if there has been any change in the composition of the board since the date of the company search. This eliminates any risk of forms being submitted by directors to Companies House but not filed on the public register.

If confirmation cannot be obtained, for example there is a hostile board member, the articles of association will affirm voting rights of the members of the board, an insolvency procedure may be a 'Reserved' matter, which requires unanimity. Look also for a chair's casting vote and for any dispute resolution mechanisms. If there is no such clause or if one is not satisfied there is either board unanimity or sufficient vote under the articles, exercise caution before taking the appointment; separate legal advice may be advisable.

The moral here is that putting the company into administration, whether or not in hostile circumstances, is one of the most significant acts a board will undertake. Given the strict application of para 31 of sch B1 in previous judgments such as *Re G-Tech*, IPs must ensure full and correct procedure. Ask the question over and over, do we have a quorate board with effective authority to appoint. Shortcuts risk being out of office, out of pocket and the professional embarrassment of getting it wrong.

Samantha Hawkins is a senior insolvency manager at David Exell Associates.

Mr Edward Davey MP
Employment Relations, Consumer and Postal Affairs Minister
Department for Business, Innovation and Skills
1 Victoria Street, London SW1H 0ET

24 May 2011

Dear Minister,

In your role as Minister responsible for insolvency, we would like to request a meeting with you to discuss The Insolvency Service consultation on regulation, which risks imposing considerable costs on the creditor community and insolvency profession at a time when Government policy centres on reducing regulation.

As the consultation closes and the Government considers its response, we are keen to make you aware of the costs to business that the proposed increase in regulation would entail and discuss non-regulatory approaches that could be more effective at achieving the stated policy aim of harnessing the market power of unsecured creditors.

As a profession, we welcome and have consistently pressed for greater unsecured creditor engagement in insolvency, and support various measures in the consultation to increase transparency over fee-setting and ensure consistency and visible independence in the regulatory regime. However, the degree of increased regulation proposed elsewhere in the consultation is disproportionate and would have a raft of unintended negative consequences, including decreasing returns to creditors. The cost of the proposed reforms to the business community is higher than the stated benefit of intervention in the market through increased regulation.

The Office of Fair Trading (OFT) report that led The Insolvency Service to launch this consultation found that the insolvency market and regulatory regime works well in the majority of cases but could work more effectively in a minority of cases. The proportionate response would therefore be to make improvements to the regime, looking to non-regulatory solutions where possible, rather than wholesale revision and the imposition of regulation. While it may be tempting for The Insolvency Service to use the OFT report as an opportunity to bring about radical changes, this does not represent a reasonable policy reaction. Moreover, reaching for a regulatory solution before exploring non-regulatory approaches directly contradicts cross-Government policy.

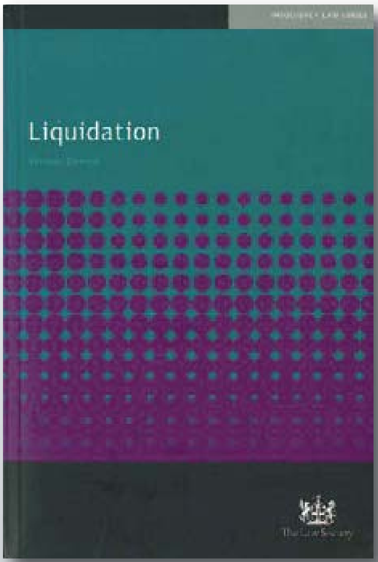
We very much hope you will be able to meet with us to discuss these issues further.

Yours sincerely,

Frances Coulson, R3 President
Richard Heis, Partner, KPMG
Tony Lomas, Partner, PwC
Neville Kahn, Partner, Deloitte
Alan Hudson, Partner, Ernst & Young

The above letter was sent to Mr Edward Davey MP, via R3, by senior insolvency professionals to voice their concern about The Insolvency Service's consultation on regulation. It is reprinted here for the benefit of all R3 members.

Recent publications reviewed



Edition: First

Author: Vernon Dennis

Publisher: Law Society

ISBN: 978-1-85328-873-9

Price: £39.95

Liquidation

Liquidation is the second title in The Insolvency Law Series and provides a practical and authoritative commentary to the three forms of liquidation: members' voluntary, creditors' voluntary and compulsory. The book details the origins of the liquidation process together with a comprehensive guide to the types of corporate insolvency procedures including pre- and post-commencement issues for shareholders, directors, creditors and liquidators.

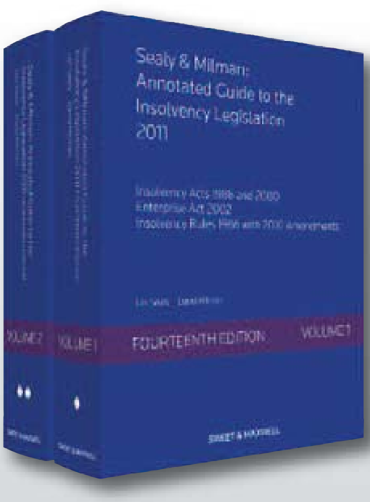
The book examines the main differences between voluntary (members and creditors) and compulsory liquidation detailing the circumstances and considerations in engaging each process. It then provides a step-by-step guide to the liquidation process explaining the processes involved in the appointment of a liquidator, voting, realisation of assets and the role/powers of a liquidator. It also sets out the practical effect of a company's entry into liquidation including the implications for employees, the management of the business and the effect on the company's property. The final chapter details the conclusion of the liquidation incorporating remuneration issues.

The book also offers an extremely useful and practical guide for creditors and directors as to their duties, rights and remedies on a company's entry into liquidation. Each chapter provides an extensive summary of the leading cases and sets out the relevant legislation including specific provisions of the Insolvency Rules involved with each process.

The commentary is supplemented by at-a-glance guidance checklists in the appendices, which provide an excellent summary of the nine chapters and make the book extremely user friendly.

In an economic climate where corporate insolvencies are rising each year, the book provides a comprehensive review of the statutory liquidation procedures and is therefore an excellent source for practitioners at all levels advising on the initiation or the conduct of the liquidation processes.

Prav Reddy is an associate in the Corporate Recovery Department at Charles Russell LLP.



Edition: 14th

Authors: Len Sealy & David Milman

Publisher: Sweet and Maxwell (Thomson Reuters (Professional) UK Ltd)

ISBN: 978-0-414-04811-9

Price: £230 (Vols 1 & 2)

Sealy & Milman: Annotated Guide to the Insolvency Legislation 2011 (14th edition)

It is now six years since the Guide split into two volumes, to cover the extensive legislation with which modern insolvency practitioners have to be familiar. This means the Guide – originally a conveniently sized single volume containing not much more than the 1986 Act and Rules and the CDDA – continues to grow towards the weight and status of a full encyclopaedia.

The breadth of material covered is certainly extensive and as a desk-side resource, the Guide contains most of the references and material that practitioners are likely to need. Volume 1, which covers the 1986 and 2000 Acts, the Enterprise Act 2002 and the 1986 Rules (as amended), tends to be used more often and is highly regarded for its annotations. These deal mainly with the key points from relevant case law and sometimes provide helpful cross-references to other statutory provisions. The recent amendments to the 1986 rules were extensive. The editors of the Guide do expect readers already to have some familiarity with these amendments. The changes are not always marked emphatically, for example the changes to the rules dealing with where bankruptcy petitions are presented under IR 6.9A and 7.10ZA.

The extent of those changes and the recent developments in case law, particularly those in relation to landlords' rights and cross-border insolvencies (covered mainly in Vol 2), show the importance of keeping up to date. For many practitioners, the publication of the Guide each May is a very helpful annual refresher. The publishers also provide an online version of the Guide through Westlaw, for those who require more frequent updates.

Mark Parkhouse is a solicitor, advocate and insolvency practitioner.

When is an appointment not an appointment: should we gamble on *Minmar*?

A controversial decision has caused great debate within the profession. Nigel Barnett explains.

Sometimes a decision comes along that causes practitioners and lawyers alike to shake our heads. If the decision is right, does that mean our current practices and procedures are wrong? What does it mean for past appointments? What should we do in the future?

The case of *Minmar (929) Limited* v. *Khalatschi* [2011] EWHC 1159 (Ch), a judgment handed down on 8 April, is such a decision. In this case, the chancellor found that an out-of-court appointment of administrators by the directors of a company was invalid.

This was because:

- the directors did not follow the company's articles and approve the appointment at a properly convened and held board meeting; and
- the directors did not give notice of intention to appoint to the company.

But doesn't paragraph 105 of schedule B1 to the Insolvency Act 1986 allow a majority of directors simply to 'decide' to appoint? Also, when there is no prior qualifying floating charge (QFC) holder, why do directors have to give notice of intention to appoint to the company's shareholders? Surprising in a number of respects, this decision needs explaining. The danger for practitioners is that invalid appointments are nullities that cannot be rectified by a quick trip to court for a remedy under either r7.55 (dealing with defects in appointment) or paragraph 104 of schedule B1 (validating an administrator's actions). This was confirmed in *Frontsouth (Witham) Ltd (in administration)* [2011] EWHC 1668 (Ch) (See Recent case summaries, page 14).

Background

The facts are complex. Ultimately, they did not impact on the points of principle decided by the chancellor. In summary: the company's shareholders tried to appoint some further corporate directors (C) to the company as part of a share option agreement. Later, C appointed administrators. One original director tried to get the administrators removed. The company's articles said directors had to act unanimously in writing or by majority decision at a validly called meeting. To call a meeting they had to give enough notice to the other directors and have a quorum of two.

C had not called a quorate meeting validly under the articles but, as they seemingly represented the majority of the total number of directors, made the appointment.

The directors' decision

C did not argue that there was a valid board meeting. Instead, they relied on paragraph 105 of schedule B1 to the Insolvency Act 1986. This says:

'A reference in this schedule to something done by the directors of the company includes a reference to the same thing done by a majority of the directors of a company'.

C also relied on the commentary on this paragraph given by Sealy & Milman in their *Annotated Guide to the Insolvency Legislation*. This says:

'References in earlier legislation to an act done by the directors have been construed as requiring either that the directors should act »

unanimously or that a meeting be duly convened at which a decision is reached by the requisite majority ... Under the present provision a meeting is not required'.

The chancellor rejected this interpretation. He accepted that, while paragraph 105 meant not all directors had to approve the appointment, they still had to comply with the company's internal decision making process. The chancellor felt if the Enterprise Act (which introduced paragraph 105) had meant to allow a majority decision without observance of the usual formalities it would have made that clear.

Interestingly, the chancellor did not find it necessary to decide who was and was not a director at the time of the meeting. Had he done so he might never have had to consider the interpretation of para 105.

> Following *Minmar*, those advising the directors of a company will have to consider carefully its articles to ensure a valid board meeting is constituted before they decide to appoint.

Following *Minmar*, those advising the directors of a company will have to consider carefully its articles to ensure a valid board meeting is constituted before they decide to appoint. If advising the shareholders, *Frontsouth* confirms the shareholders must abide by the articles. Where regulation 70 of 1985 Table A applies, the directors must make all management decisions, unless directed otherwise by special articles of association or special resolution.

That is not the end of the story. The real sting in the tail of *Minmar* was delivered by the chancellor in a second question that he did not need to answer given his ruling on the first. In doing so, he went beyond a mere *obiter* comment. His judgment on this issue is already resulting in urgent cases coming before the courts to make administration orders retrospectively where an out-of-court appointment may be invalid.

Notice to the company

The second question was whether the appointment was invalid because the directors had not given notice of intention to appoint to the company.

The relevant parts of the Insolvency Act:

Paragraph 26(1): Where the company or the directors intend to appoint an administrator, they must give notice of intention to appoint *'to any person who may be entitled to appoint an administrative receiver or administrator under paragraph 14'*. In other words, the holder of a QFC.

Paragraph 26(2): *'Such notice as may be prescribed'* must *'also'* be given to *'such other persons as may be prescribed'*.

Rule 2.20(2): As well as those mentioned in paragraph 26, the appointor must give notice, among others, to bailiffs, process servers and distrainers. They must also give notice to the company (if the company is not intending to make the appointment).

Paragraph 28: This prohibits making an appointment unless *'the person who makes the appointment has complied with any requirement of paragraphs 26 and 27'*.

Paragraph 30: This sets out specific provisions applicable to *'a case in which no person is entitled to notice of intention to appoint under paragraph 26(1) (and paragraph 28 therefore does not apply)'*.

The chancellor rejected the argument that the appointor only has to give notice to the additional people mentioned in rule 2.20 where they are obliged to give notice to a QFC under paragraph 26(1).

He read paragraph 26(2) as a standalone obligation. He said this was indicated by the word 'also'. The appointor had to comply even if paragraph 26(1) did not apply. However, the chancellor found himself 'unable to reconcile the inconsistency' between the words in paragraph 30 in parentheses (which suggest paragraph 28 does not apply where there is no floating charge-holder) and the 'clear words' of paragraphs 26 and 28.

The chancellor found an appointor must give notice of intention to all the prescribed people in every case. This despite acknowledging there was no prescribed form for this in the rules! Nor was there a prescribed time period for giving notice (which he thought must mean a 'reasonable period' of notice should be given). Despite all this, he could see no reason why those listed in r2.20 should receive notice of an intention by the directors of a company to appoint administrators if there is a QFC, but not otherwise.

There are, of course, good policy reasons why these persons should not receive the same notice as a QFC holder, which are consistent with the rationale of the 'rescue culture'. Indeed these provisions have recently been considered pragmatically in *Hill* v. *Stokes plc* [2010] EWHC 3726 Ch D (Bristol). In *Stokes* the administrators accepted the directors should have given notice of their intention to appoint administrators to the landlords under paragraph 26(2), but contended that this failure was not fatal to their appointment. Judge McCahill QC found that failure to send notice of intention to entitled persons (here landlords who had distrained against goods and property) did not invalidate the appointment of the administrators.

The judge in *Stokes* set out five reasons this was so:

1) There is no minimum period of notice for the prescribed persons. Contrast this with the clear five business days' notice given to a QFC holder. That period allows the charge holder to appoint its own administrator or otherwise come to an agreement with the company or directors in relation to its choice. In seeking an explanation for this stark contrast, the judge said: '*One could be forgiven for thinking that the reason for notifying them is for information purposes, rather than as a prerequisite for the making of the order, in order to save them from stumbling innocently into an enforceable interim moratorium, once the notice of intention to appoint has been lodged*.'
2) The requirements of r2.20(2) are not absolute. The rules only require the company or directors to give notice to entities they actually know about. That qualification is not consistent with a reading of the requirement so strict that non-compliance would make an appointment invalid.
3) Only a copy must be given to the prescribed persons of the notice of intention to appoint under r2.20(2). The original goes to the QFC holder. The prescribed form, 2.8B, expressly states that it is to be given to the qualifying charge holder (whose details must be set out), but does not require any reference to giving notice to the prescribed persons.
4) The effect of not complying with r2.20(2) may be different depending on who missed out. For example, it would make sense to warn a landlord to prevent him inadvertently interfering with the interim moratorium. That would not necessarily provide an explanation for the notice to be given to the company (if the directors are making the appointment) or the supervisor of a voluntary arrangement.
5) If there is no QFC holder and therefore no requirement to give notice of intention to appoint under paragraph 26(1), then paragraph 28 does not apply. That is clear from paragraph 30.

> At the time of writing, the unease and uncertainty being felt in the insolvency world as a result of *Minmar* is amply demonstrated in *Derfshaw Limited & 6 Others* [2011] EWHC 1565 (Ch).

The judge in *Stokes* did say directly that, if there were no QFC holder the appointor still had to give notice under paragraph 26(2) and r2.20(2), it was clear from paragraph 30 that failing to do so did not invalidate an appointment.

It appears the chancellor had not seen the *Stokes* judgment. There is an argument for distinguishing *Stokes* because it relates to an appointment where there was a QFC holder. However, given the judge's contrary view in *Stokes* about how paragraphs 26 and 28 work, at best we are left with two decisions that conflict on a key point of statutory interpretation.

At the time of writing, the unease and uncertainty being felt in the insolvency world as a result of *Minmar* is amply demonstrated in *Derfshaw Limited & 6 Others* [2011] EWHC 1565 (Ch). The administrators in seven separate cases where the directors of a company had made the appointment, without (in the absence of a QFC holder) giving notice to the company itself, sought retrospective administration orders dating back to their original purported appointment. The judge considered it appropriate to grant the order in the circumstances. Tantalisingly, the parties put the decision in *Stokes* as well as *Minmar* before the judge, but the administrators chose not to seek to argue that *Minmar* was wrongly decided. Instead, understandably for reasons of 'speed, expense and certainty', they chose to accept the decision in *Minmar* (and that their appointments were invalid), and to start again with retrospective court appointments.

> If… the appointment is back-dated for 364 days, the court can immediately make a further order under paragraph 76(2) extending the administration.

Practical impact on appointments with no QFC holder

Often *Minmar* will have little adverse impact, other than a requirement on the directors to hold a valid board meeting to make their decision, and then give notice of their intention to appoint administrators to the company. However, the practicalities involved may still be awkward. In practice, no-one else need know about the decision to go into administration. Unless, as in *Minmar*, there is a board dispute, or one between the board and the shareholders, giving notice to the company should be a formality.

But what if there are prescribed persons other than the company? It seems to be outside the spirit of the administration regime as revised by the Enterprise Act to give creditors such as distraining landlords or those seeking execution against a company advance notice of an impending administration. Crucially, they would get the notice without the benefit of the interim moratorium. Paragraph 44(3) states that an interim moratorium is triggered only where a notice of intention to appoint is filed at court 'in the prescribed form'. But there is no prescribed form for what we might call a '*Minmar* notice'. There is a real risk the creditor would simply accelerate his self-help remedy, or even file a winding-up petition to prevent the company making an out-of-court appointment (potentially improving his leverage even further).

This issue is exacerbated by the lack of any practical guidance (in the rules or the decision in *Minmar* itself) as to exactly how the company should give notice. There is no prescribed form or notice period. Presumably, it would need to give notice in writing following the prescribed form 2.8B as closely as possible and include the statutory declaration under para 27(2). As for the notice period, the chancellor decided it must be a 'reasonable' period. In a case of real urgency, could that reasonable notice be condensed to a few hours to ensure a creditor does not take adverse action before the appointment is made?

Even then, it is unclear whether, if a form of notice is given, it should be filed at court. That filing would not trigger a moratorium on the words of paragraph 44(3), but it might still be required under paragraph 27(1). Can, or indeed must, a prescribed person consent before the notice period expires, so the (home-made) notice of intention and notice of appointment can be filed together, as is often done in practice? When the appointment is finally made (using form 2.9B) should you make reference on it to the *Minmar* notification?

If you find yourselves in the same position as the practitioners in *Minmar*, do not think the court can remedy the appointment using r7.55 or paragraph 104 of schedule B1. *Frontsouth* is clear this is not possible. The judge suggested a partial solution is making a fresh appointment with retrospective effect. Paragraph 13(2) of schedule B1 provides an appointment of an administrator by the court takes effect: (a) at a time appointed by the order, or (b) where no time is appointed by the order, when the order is made.

The appointment cannot be back-dated for more than a year, because in that case the maximum period of one year for an initial appointment of administrators would already have expired. If, on the other hand, the appointment is back-dated for 364 days, the court can immediately make a further order under paragraph 76(2) extending the administration.

This was first done in *G-Tech* [2011] EWHC 1565 (Ch) and recently (in similar circumstances to *Minmar*) in *Derfshaw*.

The court has given no further guidance. Presumably, there are many more live administration cases in the same position as those dealt with in *Derfshaw*. R3 has already warned its members to 'be careful to ensure that, where appointments are made by the directors, the correct procedures have been followed', but there will be plenty of debate for some time yet about what those correct procedures are.

We understand *Minmar* is not being appealed. Subsequent cases have taken *Minmar* at face value. Only a judgment of a higher court or a change to the Insolvency Rules is likely to resolve the uncertainty this case creates. Until then, administrators cannot take comfort that a disgruntled creditor won't use *Minmar* to attack their appointments. Nor will future administrators want to take the gamble of accepting an out-of-court appointment by directors when they do not yet know for certain how to comply with *Minmar*, absent accepting a (costly and delaying) court appointment.

This article reflects the law at 28 July 2011.

The author would like to acknowledge the assistance of Ian Fox and Zoë Thirlwell in writing this article.

Nigel Barnett is a partner at SNR Denton.

Technical update

More amendments to insolvency law? R3's response to the proposed non-contentious changes to the Insolvency Act 1986.

The Insolvency Service has recently issued a consultation entitled *Proposals for technical amendments to the Insolvency Act 1986 and other related insolvency legislation*. The intention is to identify desirable technical amendments to primary legislation. We thought it would be helpful to provide a brief description of the suggested amendments put forward by The Insolvency Service and our response to date, not only to inform but also to seek readers' ideas. In doing so, it should be appreciated that this consultation is unlikely to lead to a result in six months; time for new Acts of Parliament on relatively arcane subjects is rare and precious!

The Insolvency Service's proposals are indeed largely uncontroversial; but there is one that raises a fundamental point of policy: should administration and liquidation be different? In the hope that you will read a little further we shall deal with this item first.

Should administration and liquidation be different?

It is proposed that sections 213 and 214 of the Act should be amended so that fraudulent and wrongful trading actions could be pursued in administration and administrative receivership. The first point of principle is that, hitherto, administrative receivership is an appointment undertaken on behalf of a floating charge holder rather than the body of creditors as a whole. Under existing law investigation, pursuit of misdemeanours and any fixed or floating charge surplus, is to be dealt with by a liquidator. If administrative receivers were able to bring wrongful and fraudulent trading actions they would need powers to investigate and to distribute to unsecured creditors, presumably with the result that they would acquire an increased range of responsibilities to the whole body of creditors, even though there may be no return to the unsecured creditors. In short administrative receiverships would look rather like administrations.

Whether floating charge holders would be concerned by such a change is a moot point. It is possible to envisage funds, which would otherwise have been available to the charge holder, being absorbed by the costs of investigation. On the other hand there might be cases where the charge holder would welcome such investigation. Furthermore the rules governing the use of floating charge funds in liquidation (rules 4.218A to E) could be extended to cover both administrative receivership and administration. In practice the number of administrative receiverships has reduced as pre-September 2003 floating charges fall away so the impact of such a proposal being implemented may in fact be relatively slight, which raises the question: why make such a change?

Extending sections 213 and 214 to administrations seems to us to be a curious proposal because from a practical point of view pursuing such claims is likely to be a lengthy process and from a broader perspective it further blurs the distinction between administration and liquidation, which may or may not be desirable.

Dealing with the practical issue first, in the context of a fraudulent or wrongful trading case the administration duration of 12 months is likely to be a woefully inadequate timescale. Moreover there is a sense of haste in the requirement under paragraph 4, schedule B1 of the Act, which requires that the administrator 'must perform his functions as quickly and as efficiently as is reasonably practicable'. Neither of these statutory provisions rests easily with the pursuit of wrongful or fraudulent trading actions. While we appreciate that the court may grant an extension to the administration that represents a cost, a move to liquidation might be simpler and cheaper.

The distinction between administration and liquidation

The second and much wider issue is the distinction between administration and liquidation. There is a distinct diversity of view between those who think that administration is appropriate in every case and those who do not. At the outset the process of putting a company into administration is quicker than liquidation and, critically, provides a moratorium. The process is self-evidently useful and permissable, where the survival of the company is a reasonable prospect or where only the preferential creditors and floating charge holder have the principal interest in the outcome (unsecured creditors may have an interest through the prescribed part; fortunately the wording of paragraph 3 (1)(c) of schedule B1 does not preclude such an interest). It is more difficult when the proposed administrator has to consider whether a better outcome would be achieved for creditors as a whole than would be the case in liquidation. There is a range of factors to be considered. If he or she is subsequently found to be in error the office holder is likely to run a regulatory risk and presumably the validity of the administration itself could be in doubt. By contrast no opinion regarding the likely outcome is required prior to the

"If administrative receivers were able to bring wrongful and fraudulent trading actions they would need powers to investigate and to distribute to unsecured creditors."

appointment of a liquidator. The reason for this difference seems to lie in the appointment process; creditors are disenfranchised to allow a speedy appointment and in turn the office holder must justify the process. This seems to be a fair trade.

The 12-month time limit

As readers of our article in the summer edition of *RECOVERY* will be aware, we are not so sure that the other contrasting feature of administrations, the 12-month time limit, is such a good idea, particularly if the policy intention is to make liquidation and administration similar processes other than in respect of the initial appointment.

After appointment the two processes are in many respects similar involving asset realisation, the agreement of claims and distribution. Disclaimer, however, is only possible in liquidation. Claims regarding onerous assets cannot be dealt with in administration. We see no reason for this distinction and note that the Special Administration Regime for investment companies allows disclaimer. Our submission to The Insolvency Service suggests that disclaimer be allowed.

Both processes involve investigation. The administrator has investigation powers under sections 234 to 236 and in this context the proposals regarding fraudulent and wrongful trading seem sensible. However, there is no proposal to allow administrators to take actions for misfeasance under section 212 of the Act. We think this extension of the administrator's powers should be given consideration.

Other proposals

Turning to the other proposals, the first requiring further comment is an amendment to section 288 of the Act to replace the *requirement* on the bankrupt where there is a creditor's petition to deliver a statement of affairs with a *power* for the OR to request one. In practice it appears that the OR usually releases the bankrupt from this obligation. At first sight this seems rather odd since a statement of affairs should provide a full financial picture and in its absence it is difficult to see how the OR would be able to undertake its administration. In practice, however, the OR issues a Preliminary Information Questionnaire that provides information about the bankrupt's estate and is verified by a statement of truth; hence the proposal is seen as uncontroversial.

Another interesting proposal is the exclusion of the details of individual non-corporate creditors including, name, address and amounts owed from statements of affairs. This is intended to 'alleviate data protection concerns' and is therefore to be welcomed. We have suggested that such liabilities should be categorised by the type of creditor and a careful distinction made between the trading names of sole traders and their given names so that inadvertent breaches of the new provisions are avoided.

Two amendments are proposed to section 216 dealing with prohibited names. The first is to cover website names where the name is so dissimilar that it would not be caught by the existing provisions of section 216 and the second is to cover companies that enter administration or administrative receivership but do not exit as a going concern.

The other proposals include:

- the replacement of statutory declarations with statements of truth
- determining the movement from administration to creditors voluntary liquidation by reference to filing at court rather than on registration at Companies House
- an amendment to paragraph 54 (1) (a) of schedule B1 to allow a revision of the administrator's original proposals even though there has been no initial creditors' meeting
- amendments to paragraphs 78, 98 and 108 of schedule B1 so that consent from secured creditors is only required from those who respond to the invitation to give or withhold consent
- an amendment to paragraph 98 (3) of schedule B1 so that the administrator may obtain release by approval rather than by a separate formal resolution
- repealing the Deeds of Arrangement Act 1914.

If anyone has suggestions for further uncontroversial technical amendments please contact either one of us.

> "Claims regarding onerous assets cannot be dealt with in administration. We see no reason for this distinction and note that the Special Administration Regime for investment companies allows disclaimer. Our submission to The Insolvency Service suggests that disclaimer be allowed."

The future of cheques – a reprieve

Members may be aware that the Payments Council has been consulting on the proposed phasing out of cheques. This exercise was originally expected to be completed by 2018. However, the timetable was thrown into doubt in the light of concerns expressed by the Treasury Select Committee in June. In a major change of policy, the Payments Council has now announced that cheques will continue after all. In a statement issued on 12 July, the Payments Council said:

'Given the continued confusion and alarm that the target date on cheques is causing customers and organisations alike, the Payments Council has decided that cheques should continue for as long as customers need them and the target for possible closure of the cheque clearing in 2018 has been cancelled.'

In view of the difficulties the abolition of cheques would have caused to insolvency practitioners, this is welcome news.

Technical Bulletin

Technical Bulletin 96 was issued in July.
Its contents included:

- Administration – notices of intention to appoint and notices of appointment
- Invalid administration appointments – important High Court decision
- Administration – failure to obtain FSA consent invalidates appointment
- Administrators allowed to set bar date for submission of expense claims
- Special administration regime for investment banks
- FSA publishes insolvency cooperation guidance
- English court sanctions scheme of arrangement for foreign company
- IVAs – nominees' and supervisors' fees held to be VAT exempt
- 'Books and papers' includes computer records
- Transfers of undertakings – no cap on a week's pay for calculating compensation
- Transfers of undertakings – dismissal by administrator was automatically unfair
- Licensing Act 2003 – time limits for dealing with lapsed licences
- EC Insolvency Regulation – assets held in UK to be distributed according to UK law
- EC Insolvency Regulation – conflicting insolvency procedures
- Bribery Act 2010
- Retention of title – disposal of goods by administrator did not amount to conversion.

Giles Frampton (left) is a partner at Richard J Smith & Co and John Francis (right) is the technical director at R3.

Recent case summaries

Corporate and personal insolvency update from Carly Sandbach.

Corporate insolvency

***In the matter of Frontsouth (Witham) Ltd (In Administration) & Anr* [2011] EWHC 1669 (Ch)**

Facts: On 26 January 2009, the directors of BHWL appointed administrators (A) in respect of BHWL, by way of an out-of-court appointment pursuant to para 22(2) of Sch B1 Insolvency Act 1986. By virtue of para 76(1), the appointment ceased to have effect after one year, unless validly extended.

In January 2010, A's term of office was about to expire, so they sought a six-month extension of their appointments by consent under para 76(2)(b). By virtue of para 78(2), the consents required were from the 'secured creditors'. There were two secured creditors: the bank, and a company known as WHHL. A obtained consent from the bank but not WHHL.

Notwithstanding the above, the administration of BHWL continued on the assumption that it had been validly extended by consent.

Subsequently, A applied for and obtained, an order further extending the administration by a period of 12 months, such application being made on the footing that the first extension had been validly made. A now sought a further 12-month extension.

Held and comment: If the original extension of the administration was invalid then the original term of office of A had expired by effluxation of time on 27 January 2010. It followed that unless the defect in their appointment after that date could somehow be waived, the court now lacked jurisdiction to grant the further extension sought, and the previous extension would have been made without jurisdiction, and was therefore a nullity.

The court considered whether it could waive the relevant defect under r7.55 Insolvency Rules 1986 and declare A's acts to have been valid pursuant to para 104.

The court rejected the notion that r7.55 could be used to remedy a fundamental flaw such as a failure to satisfy one of the statutory prerequisites for appointment.

The court then considered the partial solution afforded by the line of authority starting with *Re G-Tech Construction Limited* suggesting that an administration order can be 'back-dated' pursuant to para 13(2). Of course, that jurisdiction only allows an order to back-date up to 364 days since otherwise the maximum appointment period of one year would already have expired.

While the court was willing to exercise such a jurisdiction in the present case, in

light of the chronology, this would leave a period of a few months during which there was no effective appointment, and to which no solution curing the defect in appointment could be found in law.

> "The court rejected the notion that r7.55 could be used to remedy a fundamental flaw such as a failure to satisfy one of the statutory prerequisites for appointment."

The case helpfully clarified a significant point of principle about the extent of the power of the court under rule 7.55 to waive a defect in appointment, and importantly left intact the oft-criticised jurisdiction identified in *G-Tech* to make 'retrospective' administration orders.

Personal insolvency

***In the matter of Martin Ruiz (A Bankrupt)* [2011] EWHC 913 (Fam)**

Facts: During divorce proceedings, the appellant wife (W) obtained an occupation order and freezing order against the respondent husband (H). In breach of the freezing order H ran up credit card debts of approximately £66,000, and thereafter petitioned for his own bankruptcy. A bankruptcy order was made without notice to W. W discovered the bankruptcy order several months later. Thereafter in the ancillary relief proceedings, the district judge ordered that W should receive a lump sum equal to the surplus after the bankruptcy debts and costs had been paid.

W appealed and applied to annul the bankruptcy order. By the time of the appeal, the amount required to clear the bankruptcy had virtually extinguished the value of the family's assets.

Held and comment: The court considered that at the time the bankruptcy order was made, H was in fact unable to pay his debts as they became due, and there was no immediate prospect of his being able to do so. His motivation had not been to frustrate W's legitimate claims. The court further found that the district judge when considering what financial order to make, had balanced the interests before him, in circumstances where he had no power to interfere with the bankruptcy order. Accordingly, W's application for annulment and her appeal were dismissed.

However, importantly the court took the opportunity to propose some guidance as to how the present circumstances, which highlight the tensions between the competing jurisdictions of bankruptcy on the one hand, and ancillary relief on the other, might be avoided in the future. Firstly, where a spouse or civil partner considered that a bankruptcy order ought not to have been made, they should act *immediately* to have it annulled or suspended before the costs of the bankruptcy eat into the family assets. Secondly, it was proposed that where the court was faced with a bankruptcy petition, particularly by a debtor who was not being pressed for payment, and where it was apparent that divorce proceedings were on-going, it should consider whether to adjourn the petition to allow notice to be given to a spouse who might be affected; and further, that even where adjournment was inappropriate, the bankruptcy order should at least be served on the spouse when it was made, in order that they were immediately aware of what was going on. ◻

Carly Sandbach is a barrister at Exchange Chambers.

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Legal voice

Are you an R3 member? Could you write the Legal Q&A column? If you have advice you could usefully share with your fellow professionals please contact **Sarah Houghton** at GTI (**sarah.houghton@groupgti.com**).

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

Legal Q&A

Jeremy Boyle answers your insolvency queries.

I have been appointed as a trustee and the bankrupt owns a holiday home in Mallorca with substantial equity. The bankruptcy order contains the following statement: *'And the court being satisfied that the EC Regulation does apply and that these proceedings are main proceedings as defined in Article 3 of the Regulation'*. Do I have to appoint an abogado[1] to commence proceedings in the local court for possession and sale of the Mallorcan villa?

This is a query that is becoming increasingly common and the answer lies in the EC Regulation on Insolvency Proceedings. The Regulation came into force throughout the EU (with the exception of Denmark) on 31 May 2002. The purpose is to improve the efficiency of cross-border insolvency proceedings within the EC by simplifying formalities concerning the recognition and enforcement of insolvency orders.

The bankruptcy order makes clear that the proceedings are considered as main proceedings for the purposes of the Regulation and are not therefore merely territorial proceedings.

The general principle is that *'the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened'*.

As the bankruptcy order contains the statement you refer to above, article 4 means that English law takes precedence. As such the Mallorcan villa vests in you as the trustee. Accordingly you could apply to the Mallorcan court or the relevant court in England for your order for possession.

Article 16 of the Regulation states that any judgment opening the insolvency proceedings in one member state shall be recognised in all other member states.

Practically speaking, you should perhaps use a firm with a fluent Spanish speaker, or an abogado, as there can be practical difficulties with foreign courts accepting the Regulation. We have found that Spanish banks will often not enter into any dialogue, unless the bankruptcy order and certificate of appointment have been translated into Spanish and sealed with the Hague Apostille.

Also of general interest is the recent decision in March this year by the Supreme Court of the Netherlands, in *Re France (in Bankruptcy)*. This confirms that an order of the English bankruptcy court, pursuant to section 366 of the Insolvency Act 1986, is a judgment capable of recognition in other member states, pursuant to Article 25 of the Regulation.

I am a liquidator and obtained judgment against a director (D) for damages for wrongful trading and misfeasance. D has since declared himself bankrupt and I understand that he set up a trust just three months after I issued proceedings against him. I am the largest creditor and I wonder whether I should try and get myself appointed as the Trustee in Bankruptcy.

As a general rule, both the civil and criminal courts will closely examine a trust where the settlor is later pursued by a creditor. In D's case, the trust deed will come under even closer scrutiny.

I say this because it appears that no sooner had the ink dried on your application, than D was taking advice to set up the trust. Whoever is appointed as the trustee should seek to build up a timeline of events running up to the trust deed and the subsequent bankruptcy.

> "If there are grounds to show that the trust is a sham, it is open for the court to find that D has not created a trust at all."

If there are grounds to show that the trust is a sham, it is open for the court to find that D has not created a trust at all. A declaration of trust may be held to be ineffective as a sham, as the parties intended not to create a trust, but instead to give a false impression to third parties (see *Hitch* v. *Stone* [2001] EWCA).

Another useful weapon in your armoury is section 423 of the Insolvency Act 1986, which relates to transactions which are entered into with the intention of defrauding creditors. Such transactions occur, so far as is relevant in the instant case, where a person: (i) enters into a transaction/makes a gift on terms that provide for him to receive no consideration; or (ii) enters into a transaction for a consideration the value of which is significantly less than the consideration provided by himself.

A settlement is a transaction that may be set aside using this provision, if D transferred assets for the purpose of putting them beyond the reach of a person *'who is making or may at some time make'* a claim against him: IA 1986, s 423(3). This would therefore certainly seem to apply here, in circumstances where D was facing a potential judgment.

The advantage of this section is that there is no need to show dishonesty, beyond an intention to prejudice creditors: *NatWest* v. *Jones* [2001] 1 BCLC 98 (affirmed [2002] 1 BCLC 55).

The requisite intention is gathered from objective facts known to the settlor (*Lloyds* v. *Marcan* [1973] 1 WLR 1387), even against his denial on oath that he had such an intention: *Moon* v. *Franklin* [1996] BPIR 196.

Further, the intention to prejudice creditors need not be the only purpose behind the transaction: *Chohan* v. *Saggar* [1992] BCC 306. It suffices if the intention was a real or substantial purpose, and not a mere by-product of the transaction; but there is no need for it to be the dominant purpose: *IRC* v. *Hashmi* [2002] 2 BCLC 489. Accordingly even if D swears blind that his dominant purpose was to provide a trust for his family this does not prevent a successful claim.

It is also important to note that section 423 covers transactions intended to prejudice future creditors so given that D settled the trust and then went bankrupt, it's likely that a prima facie case under this section could be made out.

D may also be guilty of committing a crime (see sections 352 and 357 of the Insolvency Act 1986). Further, any professionals who helped D with the settlement could also be implicated in the crime.

[1] Spanish lawyer.

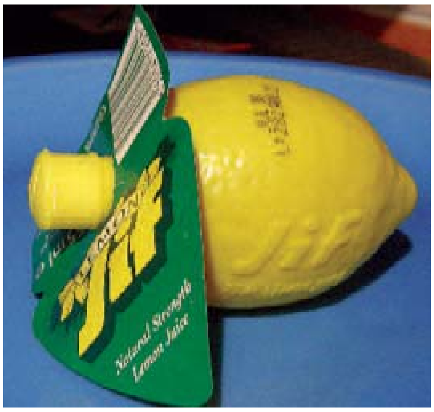
Jeremy Boyle is the founding partner of Summit Law LLP.

What is intellectual property?

Rosemary Downs outlines what constitutes intellectual property – in both tangible and less well defined areas.

The 'knowledge economy' has become a focus of UK economic development. The emphasis is on the intangible assets to be derived from intellectual property, but this umbrella term covers a basket of specific and nebulous items.

It's the legal protection available that gives an intellectual property asset the bulk of its inherent value. The main components of 'intellectual property' and their UK legal protection are identified below.



Patents

Patents protect new and inventive technical features of new products/processes. Registration lasts 20 years. An application is filed at the Intellectual Property Office (IPO), but objections can be lodged. The process of registration is quite involved.

To qualify, an invention must be new, involve an 'inventive step' and be capable of industrial application (exclusions include computer programs and methods of doing business). Patents are costly to obtain and maintain. An application necessarily includes public disclosure of technical detail, which could enable a competitor to develop a competing product without infringing the patent.

Patents are worth pursuing as they give a virtual monopoly. They are an essential asset in some industry sectors, eg the pharmaceutical industry, justifying the years of research necessary to bring in a new product.

Trade marks

A trade mark is a sign or mark used to distinguish products or services from others.

It can be a brand name (BIRO), a house mark (WINDOWS), a logo, a trading style or packaging format. It can also consist of the shapes of products/packaging (the Jif lemon bottle), and colours (the multicoloured Google lettering), as well as even smells, sounds and slogans. However, some can be more difficult to register.

Trade mark/name owners can apply for a UK or a Community trade mark (CTM). A UK-registered trade mark is only enforceable in the UK, while a CTM is enforceable in all EU countries. Both registrations last for ten years, but are renewable on payment of a further fee. To be eligible to be registered, a trade mark must be: capable of being represented graphically, distinctive in some way, capable of distinguishing goods or services (and not legally excluded).

Once again, registration helps to provide a virtual monopoly (at least in the 'classes' of product/service in which it has been registered).

> "It's the legal protection available that gives an intellectual property asset the bulk of its inherent value."

An alternative (not available in patents) is to keep a trademark unregistered. An unregistered trade mark can still be legally protected in a legal action called 'passing off'. This requires proof of an established reputation in the mark (so a newly minted mark for a new business can't be protected in this way), a misrepresentation that could potentially mislead the public and proof of damage, for example financial loss or damage to goodwill. There are usually difficulties of proof in an action for passing off and thus it can be expensive.

Copyright

Copyright exists from when a work is created, automatically. No registration is needed. It protects original artistic, musical, dramatic and literary works, including computer programs, sound recordings, films, broadcasts and 'typographical arrangements' (directories).

Copyright lasts for the life of the author plus 70 years, in most cases. It protects the expression, only, of an idea, not (and this is crucial) the idea itself. It does not even protect against parallel but independent development of the same idea, only against the actual copying of another's work. Ownership of copyright allows the copyright owner to prevent unauthorised use of the work, such as the making of extracts and copies.

Design rights

Design rights are typically used to protect the design of components or even fashions, but can protect the appearance of the whole or part of a product. They can be registered (through the IPO) or unregistered. A registered design gives the owner a legal monopoly. It must be novel, of individual character (and not legally excluded).

Protection lasts a maximum of 25 years, but needs renewal every five years. It is particularly useful where design is key to selling the product, and is relatively cheap. Unregistered designs also exist but last only for three years.

Confidential information

Confidential information can be intellectual property. The protection available is less formalised.

A business will usually put confidentiality protection provisions in its contracts and in addition there is a general legal right to confidentially. For that to apply, the information must satisfy three tests: (i) it must by nature be confidential; (ii) it must have been told or conveyed to the recipient in circumstances in which an obligation of confidence arises (eg it was obvious that what was being imparted was confidential); and (iii) its unauthorised use would be detrimental to the owner.

There are some controversial areas of policy associated with intellectual property such as the granting of a patent for living organisms, or whether novel computer software should be protected not only by copyright but by patent protection as well. It is a developing area, which should not be a surprise as the stakes can be high. Intellectual property is crucial for our future prosperity but so much harder to 'touch and feel', put a value on and regulate than grubby old machine tools.

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Intangible but essential: taking security over intellectual property

Joe Bannister and Edward Mathison consider some of the issues and problems arising when taking security over intellectual property rights, both from the perspective of a lender and from that of an administrator.

A company's intellectual property (IP) can be one of its most valuable assets. This is true for companies across sectors as diverse as manufacturing to internet-based companies, with no physical product, and for companies in sectors where the value and usefulness of IP rights (IPR) is more obvious, such as fashion, music and pharmaceuticals.

The value of IPR can be staggering. By way of illustration, estimates of the value of the Coca-Cola, Google and Apple trademarks run into the hundreds of billions; patents for new medicines into which a substantial amount of investment both in terms of time and money will have been made are fiercely protected; and huge efforts are made within the music, film and fashion industries to prevent the abuse of copyrighted material.

Given the significance of IPR to many companies, it is surprising that until fairly recently not many lenders have sought to take specific fixed security over a company's IPR, instead relying on the floating charge under a debenture as a general 'sweeper'. Lenders are more accustomed to taking and perfecting security over tangible assets. It is only since the rise to prominence of companies that own virtually no tangible assets and which owe their success to their IPR that the importance of taking security over a company's IPR has been recognised.

> "It is important to note that a product, such as a car, is likely to involve a 'bundle' of different IPRs, both registered and unregistered."

What is intellectual property?

So what do we mean when we use the term 'intellectual property'? Intellectual property can best be understood as a person or entity's rights in particular information and ideas, and the way in which that information and those ideas are expressed. IP includes patents, copyright, design rights and trademarks. However, other types of information can also fall within the term IP, for example, information contained in databases.

Certain types of IPR (principally patents, trademarks and design rights) can be registered at the UK Intellectual Property Office. Registration protects an IPR by conferring exclusivity on the holder, and the right to stop others using the registered IPR without permission. Other types of IPR (principally copyright, rights in information contained in databases, and rights in confidential information) cannot be registered.

Just because an IPR can be registered does not necessarily mean that the borrower has registered it. It is therefore equally important, when looking at taking security over IPR, to divide the IPR into *registered* and *unregistered* IPR, and not just *registrable* and *unregistrable* IPR.

Security over IPR – general

It is important to note that a product, such as a car, is likely to involve a 'bundle' of different IPRs, both registered and unregistered. In such instances, the finished product is likely to be more valuable than each separate IPR involved in that finished product. A lender will be concerned to ensure it has taken security over all the elements making up the 'bundle'.

IPR are intangible assets. It is therefore impossible to take a pledge or a lien over them. The security will thus take the form of either (i) a mortgage or (ii) an equitable charge, which may be fixed or floating.

Mortgage

A mortgage is an assignment to the lender of the legal title to the IPR, subject only to the mortgagor's right of redemption. Although a mortgage can in some circumstances offer the lender better protection than a charge (for example, a mortgage cannot be overreached by a bona fide purchaser without notice), a borrower is often reluctant to grant such a mortgage. This is because of concerns that the assignment may impede its ability to take action against infringers without having to join with the lender. In addition, where an English mortgage purports to cover world-wide IPR, the taking of the mortgage may in certain jurisdictions endanger the validity of the IPR in that jurisdiction.

Mortgages will be more appropriate for unregistered IP that has commercial value, as the assignment of the legal title should prevent the company from dealing with the IP in a manner that is inconsistent with the existence of the security. Where the IP is unregistered, a third party may have no notice of the security and so take a transfer of the IP free of the lender's security.

Equitable fixed charge

A fixed charge is equitable and does not involve a transfer of the legal title to the lender, nor does it require the lender to be involved in protecting or maintaining the IPR. The borrower remains as the registered holder and, therefore, it continues to be the responsibility of the borrower to maintain the IPR (for example, by paying periodic registration fees or by prosecuting or defending infringements and challenges to the IPR by third parties).

However, as legal title will not have been assigned to the lender, the lender should include various provisions in the charge to protect the security. These could include provisions preventing the borrower from creating additional security over the IPR, assigning or otherwise disposing of the IPR or granting a licence to a third party over the IPR, and provisions requiring the borrower to maintain and protect the IPR.

Overseas issues

A multinational group of companies, or a company that trades overseas, will have IPR that is registered in other jurisdictions. Although an English security document may purport to charge a company's worldwide IPR, if the overseas IPR is valuable the lender will need to see whether, on enforcement, the English security document will be recognised in the relevant jurisdiction or whether local law security is required. Taking security over worldwide IPR can be a complicated and costly exercise, and thought should be given at the start of the process as to which jurisdictions are involved and the level of protection required by the lender in each case.

Taking security – due diligence

A lender seeking to take security over a borrower's IPR should carry out due diligence on what IPR the borrower holds. A search of the various IP registers at the UK Intellectual Property Office will show whether any conflicting interests, such as third party security or licences, are already registered against the IPR; when the registration (and accordingly the protection) is due to expire; and the identity of the registered IPR holder.

A point to note is that registration does not exempt the IPR from challenge – for example by a third party disputing the uniqueness of a patent, or a competitor claiming a trademark is too similar to its own. Registration does not in itself provide 'bomb-proof' protection either for a registered IPR, or, accordingly, for the value in any security granted over a registered IPR.

For all other IPR, the lender should ask the borrower to identify what IPR it holds as precisely as possible, and to confirm that it does indeed own the IPR; the borrower may have access to IPR under a licence, rather than owning the IPR outright.

Fixed or floating charge?

To take a mortgage or fixed charge, the IPR needs to be clearly and separately identified in the security document; a charge that is expressed to be over 'all intellectual property' will not be sufficient to create fixed security over each individual IPR held by the borrower. Where the IPR can only be identified as a category or group, a floating charge will be the most appropriate form of security.

Fixed security is generally preferable to a lender than floating security. Recoveries from floating charge assets in an administration or liquidation are subject to certain deductions before they find their way to the holder of the floating charge. In addition, prior to crystallisation, a company is able to deal freely with assets that are subject to a floating charge, with the result that the lender may find that the company no longer has any IPR at the point of default.

However, the practicality or otherwise of taking fixed security will depend on the nature of the borrower's business. If the borrower needs to be able freely to trade, or licence out, its IPR, the controls that have to be exercised by the lender in order to establish a fixed charge may be commercially unacceptable to the borrower.

Even where IPR is separately identified in the charging document, and the charging document purports to create fixed security over the IPR, the security may still be at risk of being held to be a floating charge if the lender either is not given, or is given but does not exercise, control over the IPR.

Perfection

Once security has been taken, the lender must ensure that correct registrations are made. The security must be registered at Companies House within 21 days of being granted. A charge over registered IPR must also be registered at the appropriate IP register. If registration is not made at the relevant IP register, then a bona fide purchaser of the IPR may take the IPR free of the lender's security.

Perspective of an administrator

The primary consideration for an administrator will be what value the IPR has to the company, and what role it plays in the company's business. An administrator should take similar steps to those of a lender, in terms of establishing what IPR the company owns, whether that IPR has been correctly registered, and whether the company has sufficiently maintained its IPR.

In certain circumstances, the existence of valuable IPR may require a quick sale to avoid insolvency causing any diminution in value of the IPR. For example, if brand names are important to the company's business, then a pre-pack may help avoid such brand contamination. Conversely, a company may own patents that are more readily separable from the rest of the company's business, and can be sold as stand-alone assets.

> "The primary consideration for an administrator will be what value the IPR has to the company, and what role it plays in the company's business."

Another consideration will be to what extent the knowledge and expertise of existing employees is vital to using the company's IPR. If the role of existing employees is crucial, for example, in the continuing development of a patent, then again a quick sale by the administrator may be a better option than a drawn out insolvency.

Finally, an administrator should check whether any security that has been granted over the company's IPR is fixed or floating. As noted above, fixed security may be open to being reclassified as floating security if the asset is found to have remained under the control of the company, rather than the lender. The administrator would need to check the terms of the security and lending agreements and then ask how the IPR has been dealt with in practice. Should any purported fixed security be recharacterised as floating, the administrator would be able to freely deal with the company's IPR without requiring permission of the lender or a court order.

The importance of IPR to a company's business is a common factor explaining why lenders should look carefully at taking security over IPR, and why an administrator will give consideration to the nature of a company's IPR in deciding how to conduct his strategy.

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Dealing with licences of intellectual property rights on insolvency

Liquidators and administrators need to consider carefully the legal and commercial circumstances in cases involving intellectual property rights.

This article considers the effect of insolvency on licences of intellectual property rights (IPR) and, in particular, the options available to liquidators or administrators (each an insolvency practitioner (IP)) of an insolvent licensor or licensee. The article assumes that the underlying contract is subject to English law and the licensor and licensee are companies that have been incorporated in England and Wales.

Termination: not automatic

The Insolvency Act 1986 (IA 1986) does not provide for automatic termination of contracts in the event of insolvency. However, under English law, it is possible for the parties to agree that a licence will terminate either automatically or on the service of notice in the event of either party's insolvency. It is common for IPR licences to contain such a provision in favour of a licensor in order for the licensor to maintain control over the licensed IPR. Such clauses are usually broadly drafted to contain references to the usual recognised English law insolvency processes.

The option to terminate on insolvency vested in the licensor will therefore be triggered by the insolvency of the licensee. Any moratorium that may be imposed by the IA 1986 as a result of insolvency, for example on administration, would not prevent the licensor terminating the licence. The challenge for any IP appointed to the licensee, assuming the licence is of value to the insolvent estate, is to negotiate with the licensor to try and prevent termination of the licence. At the very least this is likely to require the licensee to continue to pay the licence fee as an expense of the liquidation or administration; however, in practice a licensor of IPR will be reluctant to keep a license in place where the licensee enters an insolvency process.

Even if there is no right to terminate on insolvency, the licensor is likely to be able to terminate for repudiatory breach of the licence due to some indirect consequence of the licensee's insolvency, for example in relation to any failure by the licensee to pay the licence fee. Therefore, the IP will need to make a rapid assessment of the value of the licence and whether to take steps to ensure that the licensee continues to perform its obligations.

On the licensor's insolvency, the licensee is unlikely to have contractual rights to terminate. From the licensor's point of view, maximising the value of the insolvent estate is paramount. The IP's first job is to ascertain what value there is for the insolvent estate in the licence (perhaps with a view to a sale of the underlying IPR subject to the licence to a third party or possibly even a sale of the IPR to the licensee itself). The revenue stream needs to be balanced with the licensor's ongoing

"On the licensor's insolvency, the licensee is unlikely to have contractual rights to terminate. From the licensor's point of view, maximising the value of the insolvent estate is paramount."

obligations (if any) under the terms of the licence, and if the licence is of value, the IP will need to ensure that the licensor performs its obligations so that the licensee does not have grounds to terminate the licence for a reason other than insolvency.

Disclaimer

On liquidation (not administration) a liquidator's powers of disclaimer, under section 178 of the IA 1986, allows a liquidator to disclaim 'onerous property'. This includes unprofitable contracts or any property of the insolvent company that is unsaleable or not readily saleable or is such that it may give rise to a liability to pay money or perform any other onerous act. A liquidator may, by giving the prescribed notice, disclaim any onerous property even if he has taken possession of it, tried to sell it or otherwise exercised rights of ownership in relation to it. However, a contract is not necessarily onerous just because it is financially disadvantageous or because the company could have made a better bargain. Where the line is to be drawn as to what amounts to onerous property and therefore capable of being disclaimed is not always clear. If a contract is capable of being disclaimed, it is a decision for the liquidator to be exercised at his discretion in the same way and subject to the same considerations as the liquidator's other powers in respect of the insolvent company are to be exercised.

A licensor of IPR is likely to have few or no ongoing obligations and, aside from the payment of renewal fees, it will be rare for a licensor of IPR to have any onerous ongoing obligations. However, much will depend on the IPR the subject of the licence. If it concerns, for example, a worldwide brand licence with trade mark registration in hundreds of countries around the globe the administration cost and renewal fees could be significant, and disclaimer may therefore be an attractive option. But if the renewal fees are not paid within the stipulated time periods this would materially affect the value of the IPR, which could in itself be detrimental to creditors.

The IA 1986 provides that disclaimer does not, except so far as is necessary for the purpose of releasing the licensor from any liability, affect the rights or liabilities of any other person. Arguably, if the licensee continued to pay the ongoing licence fee, it is possible it could continue to exploit the licence. However, if the liquidator disclaimed the obligation to pay the ongoing renewal fees, the underlying IPR would lapse meaning that the licensee would rapidly lose the exclusive right to use the IPR with competitors suddenly able to exploit the brand. As well as prejudicing the value of the underlying IPR, any party suffering loss as a result of a disclaimer may prove for the loss in the winding up, and in this situation this could result in a significant unsecured damages claim against the licensor, the potential for which the liquidator should take into account.

> "If the liquidator disclaimed the obligation to pay the ongoing renewal fees, the underlying IPR would lapse meaning that the licensee would rapidly lose the exclusive right to use the IPR with competitors suddenly able to exploit the brand."

Deciding whether or not to disclaim, if available at all, is complicated and the arguments vary. It is a balancing exercise for the liquidator.

Sale of the rights: what are the risks?

If the licence is not terminated or disclaimed, the next issue for the IP to consider is whether to assign or otherwise transfer its interest to realise value for the insolvent company's creditors. The IP will look to obtain the best value that can reasonably be obtained, whether the relevant interest is transferred on its own or as part of the sale of the business and assets of the insolvent company. Where the licensee is looking to transfer its interest, it is likely that the licence will contain a prohibition on the licensee assigning the benefit of the licence without consent, and the IP will need to address this issue in discussions with the licensor.

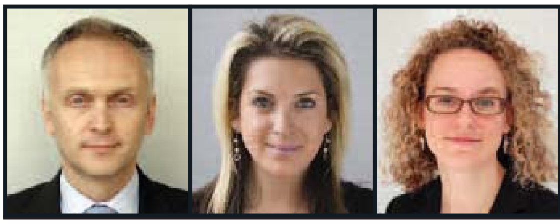
An issue may arise if, at the time of entering the licence, the licensee was granted the option to purchase the IPR in the event of the licensor's insolvency. Any licence that gives the licensee the option to buy the underlying IPR on the happening of certain events can be fraught with difficulty and likelihood of challenge, and the IP of the licensor should explore whether the licensor can refuse to honour the option if it is not in the best interests of the company's creditors to fulfil it. If the option to purchase by the licensee was for anything less than full market value, it may be open to challenge as a transaction at an undervalue under section 238 of the Insolvency Act 1986 (if entered into within the relevant period prior to insolvency). Alternatively, any contractual provision providing for the transfer of an asset from the owner to a third party upon the owner's insolvency is potentially void for offending the 'anti-deprivation' rule, which is a contravention of the *pari passu* principle under the IA 1986. To have any chance of being upheld, the proposed transfer would have to be for fair value. Even then the IP could consider refusing to honour the agreement, in which case the licensee would only have an unsecured damages claim (subject to injunctive relief and any rights of specific performance).

IPR are commonly used by companies in the context of financial arrangements as security, including in relation to the funding of pension scheme deficits. In a licensing context, although less common, the licensor may have granted the licensee security over the IPR to cover any damages claim that could arise should the licensor breach the terms of the licence. The IP should investigate the validity of such security, for example was it granted at the same time as the licence. If granted subsequently, could it be challenged as a preference? If valid, then that will give the licensee a degree of control over the sale of the IPR that the IP will need to deal with.

> "The decision-making process as regards any licences of IPR requires an equal measure of legal and commercial consideration."

Dealing with licenses of IPR on insolvency

IPR are complex and licensing agreements even more so. As a licensee or licensor of IPR, particularly in this economic climate, you are advised to make sure that the licence itself has clear provisions as to what happens in the event of the insolvency of either party, and ensure such provisions do not offend the IA 1986. As an IP appointed to an insolvent licensor or licensee, you are constrained by the situation as you find it on appointment, and the decision-making process as regards any licences of IPR requires an equal measure of legal and commercial consideration.



Julian Turner (left) is a partner and Rachael Davis Stollar (centre) is an associate; they are both in the Restructuring & Insolvency Group, Olswang. Sarah Wright (right) is a partner in the Intellectual Property Group, Olswang.

Patents and insolvency: some things to consider (and some words of warning)…

Intellectual property rights are a key asset class. Insolvency practitioners need to ensure they understand how they operate – in different jurisdictions – in order to get the best results in a realisation process.

Intellectual property rights (IPRs) have, over the last decade or so, risen to unparalleled prominence as an asset class. We are way beyond the era when patents were only really important for companies carrying out expensive research and development work, eg in the pharmaceuticals industry, or copyright was only really important for companies active in the creative industries, such as media and advertising.

IPRs are important for all businesses and may be absolutely fundamental to the business models of some. And as the importance of IPRs (which feature as an intangible asset class in company financial statements) has increased, so has the value ascribed to them; this has happened to such an extent that businesses now routinely rely on IPR valuations to demonstrate their worth, both to investors and financiers. It therefore follows that in an insolvency situation, the IPRs of a distressed business may be valuable, and in some cases the most valuable of its assets to be realised (although valuation is another subject altogether).

Against this background, it's clear that insolvency practitioners should preferably have more than a rudimentary knowledge of IPRs, and how they 'work', not least so that they know that specialist advice may well be required as part of the realisation process.

> "The IPRs of a distressed business may be valuable, and in some cases the most valuable of its assets to be realised."

What is a patent?

As the title of this article makes clear, the focus here is on patents, as opposed to dealing with the whole range of IPRs. This is for two reasons. Firstly, there is a diverse range of recognised IPRs out there – not just the well known ones such as patents, trade marks, design rights and copyright; but some more obscure ones, for example: plant variety rights, utility models and semiconductor chip topography rights, and other 'quasi' IPRs, such as know-how and trade secrets. The legal position varies significantly across this range (such that a full analysis would consume far more space than is available in this journal!). Secondly, patents throw up some specific issues that merit particular focus and consideration.

However, before launching into some of these issues, it is important to be clear on what a patent comprises. In summary, a patent is a registered monopoly right granted to protect a (patentable) invention. Patents are granted on a country by country basis, and are hence territorially limited in scope. They are also limited in duration, with a maximum life of 20 years from the filing date (at least so far as European patents are concerned), subject to payment of the relevant annual renewal fees. In practice, a patent enables the proprietor to prevent third parties from carrying out certain acts, by reference to what is 'claimed' in the patent.

So far as Europe is concerned, there are currently two types of patent that can be obtained – national patents and European patents. National patents are granted by the various domestic patent offices, whereas European patents are applied for, and granted, centrally by the European Patent Office. However, once granted, a European patent 'matures' into a bundle of national patents in each of the various European countries that have been designated during the application procedure. So, in the UK you can have both stand-alone, national (normally referred to as GB) patents and European (normally referred to as EP(UK)) patents. They both have the same status and are governed by the same substantive law.

Patent ownership and licensing issues

While matters may have been straightforward when originally structured, untangling the position once a company has become insolvent can present a number of headaches for office-holders and their advisers. Having outlined some of the key basics behind patents, what follows is a selection of considerations and complexities that may be relevant when encountering them. For instance:

- Is the patent co-owned or subject to any licences?
- If the patent is licensed, is the licence non-exclusive, exclusive or sole?
- Is the licence perpetual, irrevocable or worldwide?

At first glance, these questions might seem quite straightforward, but they each contain traps for the unwary.

> "In the UK a co-owner is not permitted to assign his or her share in the patent to a third party without the other co-owner(s)' consent, whereas in Germany no such consent is required."

Firstly, one might think that looking at the patent office register for a patent will reveal the ownership/licence status. Well, perhaps, but not necessarily; changes of ownership and licensing status are only recorded on the patent office register if the relevant forms have been completed and all other formalities complied with. And while there may be concessions applicable in circumstances where a bona fide purchaser for value acquires rights in a patent without notice of a previous (unregistered) transaction in the UK, it

cannot be presumed that the same is true everywhere else in Europe. Additionally, because patents are national rights, it is possible for their ownership/licence status to vary from country to country, so just because the UK 'part' of a European patent is owned by a single proprietor doesn't mean that the same is true of any other 'part', which could be co-owned and/or licensed, and hence subject to competing interests.

Additionally, if a patent is co-owned, then it is worth bearing in mind that co-owners have different rights as against each other in different jurisdictions. For example, in the UK a co-owner is not permitted to assign his or her share in the patent to a third party without the other co-owner(s)' consent, whereas in Germany no such consent is required. In the USA, a co-owner is entitled to grant licences to third parties under the patent without the consent of the other co-owners, whereas in the UK (and Germany) such consent *is* required.

If the patent is licensed, then a range of further issues come into play regarding the nature of the licence. In particular, if the patent is subject to one or more non-exclusive licences, then there is likely to be much greater flexibility to license the patent (on a non-exclusive basis) in the future. However, if the patent is subject to an exclusive licence (ie a licence to the exclusion of all other persons *including* the proprietor) or a sole licence (ie a licence to the exclusion of all other persons *except* the proprietor), then it will be necessary to assess precisely how far the exclusivity extends; is it limited geographically or by reference to particular acts (such as the provision of services or product lines)? Such limitations will be of significance, since it may be that a licensor has reserved particular territories and/or acts to themseves, whereas, in relation to any acts and territories where there is an exclusive licence in place, the relevant licensees (subject in certain circumstances to licence terms to the contrary, and again to jurisdictional variations) may have rights to enforce the patent and/or sub-licence rights under it without the consent of the proprietor.

Other licence terms that need to be carefully considered are those relating to scope. In particular, is the licence expressed to be perpetual, irrevocable or worldwide? If so, then what does each of these terms really mean when taken in context? For example, a worldwide licence under a European patent can only extend to cover those countries in which the national parts of the European patent are actually in force (which may in fact be a very limited number). Similarly, a perpetual licence will only last for so long as the underlying patent(s) remains in force (requiring the payment of escalating annual renewal fees to maintain them), although licences to associated know-how may indeed be perpetual. Furthermore, while a patent licence may be stated to be 'irrevocable', what happens if the patentee allows a patent to lapse, such as through non-payment of a renewal fee (which leads to a *de facto* termination of the patent licence) and how is this dealt with under the terms of any licence?

Insolvency considerations

The extent of some potential complexities where patents are concerned has been highlighted above. Where the IPRs in a bust company are known or thought to represent a material proportion of its overall business and/or asset value, it should be clear that expert advice should be sought at an early stage (and, as appropriate, in multiple jurisdictions) to ensure that the value is both preserved as necessary (for example, by an immediate need to pay renewal fees due) and then realised to best effect.

The very fact that IPRs are a key asset class may of itself influence the choice of insolvency procedure for the company. It may be decided that liquidation would potentially inflict more damage on the value of the IPRs than administration (especially in the case of brands and other goodwill-related rights), hence the latter process may be initiated to maximise values. Conversely, if the company is a licensee under a patent that contains onerous terms (such as in terms of royalty and/or renewal fees or demanding maintenance or quality control obligations), liquidation may be favoured because of the statutory right of a liquidator to disclaim 'onerous property'. The need to have available funding to meet renewal and royalty payments should also be factored into the strategy, especially if there might be a period of extended trading.

With care and advanced planning, it should be possible to avoid what can otherwise be a minefield for the unprepared. This short article only addresses patents and only some of the key issues that can arise. When the parallel position of trade marks and other IPRs is brought into the picture for the most IP-rich of companies, it should be self-evident that having an informed IPR strategy can make the difference between a best outcome for creditors and one that is disappointing. In an era when they are receiving close scrutiny from many quarters, it is hoped that this article will give office-holders useful guidance in relation to the risks inherent in one particular danger area.

"Having an informed IPR strategy can make the difference between a best outcome for creditors and one that is disappointing."

Brett Israel (left) is a partner in the International Corporate Restructuring and Insolvency Group and Rob Williams (right) is a partner in the International Intellectual Property Group of Bird & Bird LLP.

Putting a price on intellectual property

Steve Mason discusses approaches to identifying the potential value of intellectual property.

Types of intellectual property

The first step in valuing intellectual property is to gain an understanding of what you're dealing with. Intellectual property falls broadly into two categories: statutory or technology based. Statutory comprises patents, trademarks, copyright and brands, and technology includes software, databases and domain names (URLs).

With statutory intellectual property it is critical that patents, trademarks and brands are registered (or registered as pending) at the patent office for them to have any significant value. Registered patents and trademarks are territorial, restricted to either country or area, and can be bought, sold, assigned, licensed or split. A registered patent normally lasts for 20 years with renewal fees payable after five years. Trademarks are normally renewable on the tenth anniversary of the filing date and every ten years thereafter.

Copyright is a more complex area of statutory intellectual property as it does not protect ideas, names or titles but gives the creator or author control of content. Copyright is automatic when material is created and the length of term of protection varies depending on the type of copyright. In general, if copyright is created in the course of employment the employer is the first owner, but in the event of insolvency, copyright can be bought, sold or transferred by an insolvency practitioner.

Technology-based intellectual property is in many ways more straightforward. With regards to web domain names it is important to establish the name of the registrants using registers like Nominet. Similarly with software, it is vital to establish that the insolvent company owns the intellectual property (ie the source code) and that it does not run on third-party platforms or require operational licences. In the majority of cases, unless software is proven and income producing, its value is likely to be speculative, unless there are exceptional circumstances.

In selling databases, insolvency practitioners need to be mindful of the Data Protection Act 1988, and usually a legal sale contract is drawn up to protect the practitioner.

How is the value of IP determined?

Depending on the type of intellectual property, there are numerous valuation pitfalls that insolvency practitioners can encounter.

When it comes to patents, for example, valuation challenges commonly arise when patents have been registered by companies for products or inventions that are not yet income or royalty producing. In these situations it is difficult to predict likely value as there is no track record on which to base an opinion.

> "Valuation challenges commonly arise when patents have been registered by companies for products or inventions that are not yet income or royalty producing."

When valuing trademarks, qualitative issues affect value, such as brand recognition, longevity, market share, geographical area, and current and potential use. With regards to copyright, value is tied to the predicable life of the underlying work and the level of income generated. The nearer the work is to the end of its life, then the lower its value.

Valuing software is more straightforward. There is a series of key considerations that must be satisfied before valuation of the software can be determined using approved methodology:

- the fact that it is owned by the insolvent company
- it does not run on third-party systems
- key staff who understand the software can be retained
- it is proven and income producing
- it does not operate on any form of licence
- there is adequate documentation as to its specification.

What methods are used to value IP?

There are three main methods of valuations of intellectual property, the most reliable of which is the 'various income-based approach', also known as the 'economic benefits valuation' or 'discounted cash flow analysis'. This method considers the value of an intangible asset based on the expected income attributable during its remaining economic life. The value of the intellectual property is represented as the present value of the future stream of economic benefits. Various formulae have been developed to assist in this calculation, but it is nonetheless difficult to accurately estimate future income and economic life when competitor products can be developed to compete, and potentially have a detrimental effect on revenues of the original.

The alternatives to this method are 'market-based comparables' and the 'cost method', though the simplicity of the former makes it largely unreliable. The cost method takes into account the cost invested to date, and the estimated cost of replicating the patent or software if developed from scratch by a third party. However, the effectiveness of this method is also questionable, as one also needs to reflect likely revenues that might be generated or, for example, how much is required to complete or adapt the technology in question.

> "As a rule, the valuation of intellectual property is a judgmental exercise."

Valuation of intellectual property is a judgmental exercise and by its nature needs to rely upon sound data and information. With the best will in the world, the required level of data is often not available in insolvent situations and where possible marketing should always be undertaken in order to establish the true market value in each case. □

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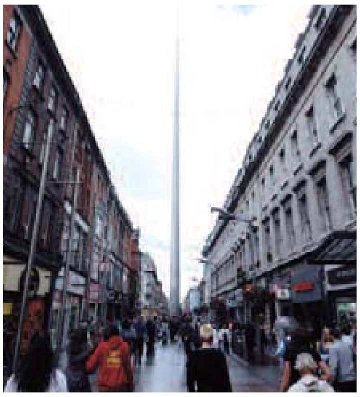

Football creditor rule: is it fair and should we care?

Michael Fiddy argues that the football creditor rule, applied fairly, provides some predictability in an uncertain world and that it should be upheld.

Football is a success story. Football in England is a success story. It is an industry that generates mass wealth and is truly market leading. Football has its own set of rules both on and off the pitch that have generated significant wealth for UK plc via numerous channels.

Not only is football a financial success story, it provides a significant social function and, more importantly, it provides a topic of conversation upon which everyone can have an opinion. In the opinion of the governing bodies, the members of the Premier League and the Football League, the football creditor rule plays a role in maintaining the sporting integrity of their competitions. They also have numerous other rules that play a role in preserving sporting integrity, all of which in one way or another form a matrix of rules that create an environment for success.

Maintaining sporting integrity

The rules of the Premier League and Football League, by slightly different methods, provide for certain 'football creditors' effectively to be paid before the general body of unsecured creditors. In the Premier League, the rule allows for a club entering administration to have its membership share suspended. The Premier League can then make payments from broadcasting money to discharge debts due to certain football creditors including the FA and its clubs, other UK leagues, the PFA and any employee of the suspended club. To retain its League status the suspended club must meet certain criteria, including to have discharged all its football creditors and to have successfully agreed a company voluntary arrangement with its wider creditors.

It is well established law that sporting bodies can have their own rules and this has been played out in the cases of *International Shooting Union* v. *Quigley* and *Bradley* v. *The Jockey Club* among others.

Provided those rules are not applied in an unfair, *ultra vires* or irrational way, the courts will not interfere. Perhaps the most useful legal summary of this position is in *Quigley* *'…rule makers and the rule appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable. They must emanate from duly authorised bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accretion. An official should not be confronted with mutually qualifying or even contradictory rules that can only be understood on the basis of the de facto practice over the course of many years of a small group of insiders…'*

The status of football creditors

It is the opinion of some that the football creditor rule is unfair as it has the effect that a football club will not survive following an insolvency event unless the football creditors are paid in full. Some therefore conceptualise this as having the effect of giving the football creditor preferential status. It is a fact that because of the way football clubs' finances are structured, if a club becomes insolvent, there is little return for unsecured creditors. Football is not unique in this respect; ask the unsecured creditors of insolvent house builders. The sense of unfairness is that people want to characterise football creditors as purely unsecured creditors. To argue that football creditors are like other unsecured creditors is like arguing that a bank would be an unsecured creditor if it wasn't for the fact they have a debenture. In fact, the football creditor rule has a not dissimilar ultimate impact to that of TUPE in that it is a part of the price of survival of a business. Just as the existence of a debenture gives the bank priority in certain circumstances and TUPE preserves rights post insolvency, the existence of the football creditor rule is part of an environment within which people can decide to invest or not.

The rules of football creditors are not a secret and create a challenge to all parties who lend/invest in the football sector.

The football creditor rule, and the way it is applied, is universally understood. It is arguable that its impact is more generally understood than the impact of a debenture or the rule of TUPE. To date, HMRC and unsecured creditors have unsuccessfully sought to persuade the court that the rule is unfair, for example in the case of Portsmouth Football Club. HMRC's current challenge is stayed pending the outcome of the Supreme Court's decision in the case of *Lehman Brothers Special Financing* v. *Belmont Park Investments*. In this action Belmont (representing a consortium of Lehman investors) is claiming super-priority status and that it should be paid ahead of other creditors pursuant to swap agreements entered into with Lehman prior to its insolvency. Belmont has been successful at first instance and at the Court of Appeal.

UK plc and HMRC have been net benefactors from the growth in revenues in the football industry. It is established law that organisations can have their own rules and, provided they are applied fairly, they will be upheld. ◻

> "The football creditor rule has a not dissimilar ultimate impact to that of TUPE in that it is a part of the price of survival of a business."

Michael Fiddy is a partner at DLA Piper UK LLP.

Why the football creditor rule should learn to play fair

Lee Manning reports on the how the football creditor rule is failing the game instead of protecting it.

Both the Premier League and the Football League are key advocates of the football creditor rule (the rule) who argue that it protects members by making sure all money owed stays in the game. They advance the theory that the rule is designed to preserve the integrity of the competition.

This might carry some weight if professional football was all about competition and operating within a 'level playing field' but both leagues would be the first to support the argument that football has to be run with sound business principles, as is reflected in their self-imposed 'fit and proper' test for persons seeking to take ownership of a professional football club.

It is impossible to ignore the inconsistencies of professional football where money talks and success is measured firstly by the contents of the trophy cabinet and secondly by the financial performance of the underlying business. While investment in top players cannot guarantee success, the biggest spending clubs invariably hog the limelight, leaving the also-rans to fight their own battles.

The holy grail of reaching the Premier League and then trying to stay there may have resulted in the financial demise of numerous clubs including Southampton, Ipswich, Leicester City, Crystal Palace, Bradford City, Wimbledon and Leeds United, all of which have found it difficult to recover, not least because of legacy obligations of the rule that has drained them of vital cash flow in future seasons, as the new owners pay for the mistakes of their predecessors.

The rule and regulations

By far the largest liabilities of a football club (perhaps with the exception of secured debts in relation to stadium rebuilding) relate to contractual obligations to players and other clubs for deferred transfer fees.

If the leagues truly believe that the rule was introduced to preserve integrity of competition and to stop a club from purchasing a player, only to subsequently renege on that debt, then why does the rule only apply to member clubs of the FA and not to overseas clubs?

Why is it that the rule that protects all employees of a defaulting club for arrears of remuneration, extends that super priority to cover all amounts that are due in future under a player's contract of employment but does not extend to any other employee, including managers and coaching staff?

Why should a club that willingly sells a player with an element of the fee deferred and paid in stage payments be given super priority for the debt when it was free to negotiate the terms of sale and could have insisted in cash up-front?

The club selling the player could retain title to their contract until it was paid in full, thereby forcing the defaulting club to either sell the player to settle the debt, or be obliged to return that player (or the rights to his contract) to the vendor.

Similarly, when considering players, an office-holder should have the right to cancel a player's contract if they can justify this for economic reasons at the outset of their appointment as they would in any other insolvency to better achieve the purpose of rescuing the business. The player should have no more or less protection under TUPE (Transfer of Undertakings (Protection of Employment)) than any other employee. They would also gain the benefit of becoming a 'free agent', thereby giving them the right to negotiate their own terms with another club and often secure a handsome signing-on fee. At the very least, a player will retain a significant unsecured claim with which to vote in any CVA proposals, as the leagues correctly insist that a club must exit insolvency through a duly approved CVA.

Finally, the argument that virtually every insolvent club has survived because a CVA has been approved by the requisite majority, ('so what is all the fuss about?') in my view doesn't hold water.

A football club is a community asset and the future of even the smallest professional club attracts a vastly disproportionate amount of media attention relative to the size of business that it represents. Given that the vast majority of unsecured creditors (excluding HMRC) are likely to be local suppliers, they have little choice but to support the CVA, no matter how derisory their dividend, or face public opprobrium for voting it down.

Improving the rule

What typically emerges from an administration, is a club drained of cash and burdened with onerous player contracts, facing set-off by the leagues of any subsequent broadcasting monies (usually the lifeline of a club) until all its debts to other clubs have been repaid.

What is required in these inequitable circumstances is some form of compromise of the rule that will demonstrate to the creditor community that the leagues are prepared to apply football creditor rules that are appropriate. For example, the credit extended by a selling club could only have super priority for say 25 per cent of the outstanding fee but this privilege should extend to overseas clubs as well.

> "What is required in these inequitable circumstances is some form of compromise of the rule that will demonstrate to the creditor community that the leagues are prepared to apply football creditor rules that are appropriate."

Super priority for player contracts could be limited to no more than 12 months of the unexpired contractual term and only cover basic wage payments and signing-on fees that accrue during that period.

Clearly, there are many ways of massaging the football creditor rule to give it better balance but I doubt that the leagues will be persuaded to move easily from their entrenched position.

Lee Manning is a partner at Deloitte.

Failure of the hotel owner: please do not disturb

Separating ownership from the operation of a hotel can cause a conflict of commercial interests. Jeremy Goldring explains.

One of the now common features of the hotel industry is that the owner of the property (owner) will have delegated day-to-day control of the hotel to a subsidiary of a well-known brand (operator).

The operator's commitment to, or investment in, the hotel will be substantial – from signage and advertising to provision of expertise, and it will have a strong interest in protecting its brand.

While the hotel business is running satisfactorily, the operator may not be focused at all on the financial circumstances of the owner. But, if the owner enters administration, the operator faces potentially disturbing consequences.

Loss of control

Under a typical hotel management agreement, the operator will be authorised to contract with third parties as agent for the owner, and will usually have signing rights to make payments out of the owner's bank accounts for the day-to-day running of the hotel, together with almost unfettered discretion to manage the business.

Administrators have powers and duties. They have *power* to do anything they consider to be necessary or expedient for the management, affairs, business and property of the owner and have a *duty* to take control of all property they think the owner is entitled to. They must perform their functions in the interests of creditors as a whole, unless their objective is limited to realising property in order to make a distribution to secured or preferential creditors, when they have a lesser duty to not unnecessarily harm the interests of creditors as a whole.

Administrators will be reluctant to allow the operator to continue to manage the business unsupervised and unfettered. But, any interference, whether that be in relation to the operation of the owner's bank accounts, as regards hiring or firing employees or denying access to the premises, is likely to constitute a breach of the owner's obligations under the management agreement.

Operator's remedies

The operator may not be a current creditor of the owner, but will have a contingent claim as a consequence of the breach. Its remedies will be:

1) Challenging the administrators' conduct, on the grounds that they are acting so as to unfairly harm the interests of the operator, or that they are not performing their functions as efficiently as is reasonably practicable (a conduct challenge); or
2) Seeking leave to issue proceedings for damages against the owner, coupled with an application for an injunction to restrain the owner from breaching the management agreement (an injunction challenge).

The operator will have no remedy (other than as representative of creditors as a class) for breach of duty by the administrators, since that duty is owed for the collective benefit of creditors.

Conduct challenge

The administrators' conduct will be considered in the light of the statutory objective they are seeking to perform, their prospects of achieving it and the nature of any approved proposals. The question of whether the operator is suffering 'unfair harm' will be considered in the context of the operator's interest 'as a creditor'. The arguments will centre on the impact on the operator's prospects of seeing a return on the owner's actual or contingent liability. The 'special' factors deriving from its position as operator such as its reputation and brand image will not be relevant (except as to how they impact on the value of the owner's assets).

> "The administrators' conduct will be considered in the light of the statutory objective they are seeking to perform, their prospects of achieving it and the nature of any approved proposals."

Injunction challenge

Damages caused by post-administration contractual breaches should not be payable as expenses but even if they were, owners are unlikely to have floating charge assets of substantial value from which to meet administration expenses.

In *Astor Chemical Limited* v. *Synthetic Technology Limited* [1990] BCC 97, the administrators intended to cause Syntech to breach its contractual obligation granting Astor exclusive distribution rights of the company's products. Both leave to issue proceedings against the company in administration and an injunction preventing it breaching the contract were granted.

The administrators' problem was that their evidence did not convince the court that creditors of the company would be significantly better off if the agreement were breached. Conversely, it was clear that an award of damages to Astor would have been an inadequate remedy.

For an operator, the result will turn on what, exactly, is the intended breach and what are the potential outcomes for creditors. Similar to a conduct challenge, the administrators' objective, their prospects of achieving it and any approved proposals, will be pertinent. To resist an injunction the administrators will have to persuade the court that the intended breach of the management agreement will be of significant benefit to the creditors who have an economic interest in the realistic potential outcome.

Non-disturbance agreement (NDA)

Anticipating the risk of being excluded from operating the hotel, either during an administration trading period or upon a sale of the hotel following the enforcement of security, operators have negotiated NDAs (sometimes called direct agreements) with the owner's lenders. These vary considerably but will contain provisions designed to penalise the lender in some way if the operator is excluded from managing the hotel.

The effect is that administrators might find themselves in a difficult position, where the secured creditor wishes the operator to remain in situ but the administrators think the outcome would be enhanced if the operator were excluded (for example, if the best offer for the hotel were made by a competitor of the operator). If they were to acquiesce to the lender's wishes, then unless there is no prospect of any return for unsecured creditors, there is a risk of a successful conduct challenge brought by an aggrieved creditor.

In practice, it is quite likely that administrators will want to maintain the status quo if they wish the owner to keep trading, and it should be possible to agree

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some temporary variations to the management agreement pending a sale of the hotel. However, a proposed sale of the hotel to a buyer prohibited by the NDA may lead to litigation – in the shape of an application to force the secured creditor to release its security. The outcome of that will again depend on the realistic potential estimated outcomes for creditors as a whole.

Creditors

The management agreement will usually authorise the operator to sign all purchase orders as agent for the owner, and to use the owner's income generated by the business to defray these expenses. The operator thus creates liabilities of the owner to parties who will be unsecured creditors of the owner at the onset of administration.

Naturally, the operator will wish to honour these liabilities – it and the counterparties may well consider themselves (albeit legally wrongly) to have commercial relationships with each other, which the operator will not want to jeopardise. Unless justifiable as constituting a 'ransom' creditor, administrators will not want the assets of the owner to be used to make payments. Nor will they want the operator to cause new liabilities to arise, which just conceivably might rank as expenses if the company receives a benefit.

It has often been said that administration is merely procedural, and does not interfere with the substantive rights of the parties. The management agreement subsists unless or until repudiated, terminated under its terms or varied by agreement. The exercise of contractual rights is not prevented by the moratorium.

Furthermore, it is a well established principle of agency law that an agent is indemnified by its principal, and has a common law lien over the principal's assets it is in possession of, in respect of expenses incurred in the carrying out of the agency, whether in its name or that of the principal.

It might be argued that following the crystallisation of a floating charge over the owner's receivables, the proceeds (being cash balances in accounts maintained by the operator), as well as the uncollected receivables, can no longer be used. The counter argument is that the receivables are and always were subject to the operator's rights under the management agreement. And an NDA will often include a provision whereby the owner's lender permits the operator to continue to use the accounts relating to the business nothwithstanding insolvency. The result is that the charge would crystallise only on the net asset.

Consent of the administrators or leave of the court would be required for the operator to enforce his or her lien. If refused, they would not lose their substantive, proprietary rights. The effect is that the operator is likely to be permitted access to the cash balance at the point of administration. Access to the uncollected receivables would depend on the untested question whether the operator's right to receive a debt could be regarded as being in possession of it. The question is untested, but the answer, in turn, goes to whether the owner is entitled to the receivables, and whether the administrators are duty-bound to exercise their power to take control.

The problem is that the delegation of these rights to the operator appears to result in an interference with the *pari passu* distribution principle. In the absence of any other ground on which to permit the administrators to take control, it is possible that the court would declare that the provisions are ineffective as a matter of public policy – but the issue is far from certain.

A similar order can be made against any person who was knowingly or recklessly a party to the carrying on of a business with the intent to defraud creditors, which can occur when liabilities are incurred without sufficient regard to whether or not they will be met.

If the operator complying with a management agreement were to qualify as a 'director', provided the hotel business itself is profitable and the position of creditors is not worsening, the risk of wrongful trading is low (particularly if apart from the owner's lender and suppliers who will be protected by the operator's lien, there are few). But for fraudulent trading, to accept booking deposits when the owner may at any time be placed in administration may be regarded by a court as reckless. One way to mitigate risk would be to place deposits in a ring-fenced trust account, to enable customers with contractual bookings to get their deposits back if the owner failed but that would cause a dent in cash-flows and may constitute a breach of the owner's banking arrangements.

> "Anticipating the risk of being excluded from operating the hotel… operators have negotiated NDAs… with the owner's lenders."

It is possible that the operator has contracted with third parties as principal (intentionally or inadvertently, for example by not disclosing the agency) and will remain liable notwithstanding the owner's administration. The express or implied right to reclaim under the terms of the management agreement together with the common law lien (assuming consent or leave would be granted) will allow the operator to deduct the value from cash it is holding on the owner's behalf.

Directors' duties

Directors' duties to the company must be complied with for the benefit of creditors as a whole when the company is on the verge of insolvency. 'Director' includes any person who performs functions normally associated with a director; as well as 'shadow' director, being a person in accordance with whose directions or instructions the directors of a company are accustomed to act.

It is thus conceivable that an operator, acting pursuant to the terms of a management agreement, could be regarded as a director of the owner, particularly if managing with almost unfettered discretion the owner's only asset.

In relation to what constitutes a *de facto* director the courts have found it difficult to postulate any one decisive test, and what is involved is very much a question of degree. To mitigate the risk, an operator should track the owner's solvency and if concerned think carefully about the interests of its creditors.

Wrongful and fraudulent trading

Wrongful trading occurs if directors of a company fail to take every step that they should have taken to minimise the loss to creditors at a time when they knew, or ought to have concluded, that the company had no reasonable prospect of avoiding insolvent liquidation, and can result in a court ordering them to contribute to the assets of that company.

Early planning can help to preserve value

Administrators of a company that own and operate a hotel are legally well equipped, and will usually be able to determine and dictate the future business strategy quickly.

The position is quite different where the hotel is independently operated, and a power struggle can readily develop, as each of the operator, the administrators and the owner's lender may have different commercial agendas. Several complex legal issues may arise. Solutions achieving all commercial objectives or at least acceptable compromises may take time while the parties assess, negotiate and document their positions.

From a practical and value-preservation perspective, it will be preferable for lines of communication to be opened well in advance of a potential appointment. The dynamics described here can then be addressed in a calmer, less time-critical environment and pre-agreed plans rolled out if necessary, minimising disturbance to the business and its stakeholders. ◻

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Independent Insurance Company Limited

If the collective redundancy process is not followed what are the consequences for employers and insolvency practitioners? The case of *Independent Insurance Company Limited* provides clarity.

Obligation to inform and consult

When proposing to make collective redundancies (20 or more at one establishment) within 90 days, employers have the obligation to inform and consult about the dismissals with appropriate representatives of the affected employees. The information and consultation process must start at least 30 or 90 days before the first dismissal depending on the number of redundancies proposed (although it may take longer). It will involve consulting on ways of avoiding the dismissals, reducing the numbers of employees to be dismissed and mitigating the consequences of the dismissals.

Appropriate representatives are:

1) trade unions recognised in relation to the affected employees; and/or
2) employee representatives, either specifically elected for the process (in accordance with the Trade Union & Labour Relations (Consolidation) Act 1992 (TULRCA)) or who are already elected representatives who have authority to represent some or all of the affected employees in relation to the collective redundancy process.

The information process requires the employer to provide in writing certain information about the proposed redundancies (including the reasons for the proposals, the numbers and descriptions of employees affected, the method for selecting those to be made redundant, the method of carrying out the dismissals and the proposed method of calculating redundancy payments).

Failure to inform and consult

If the employer fails to inform and consult with the appropriate representatives then, unless the employer can show it has a 'special circumstances' defence, it may be held liable to the affected employees for the failure.

A special circumstances defence can apply where there were special circumstances that rendered it not reasonably practicable for the employer to fully comply with its obligations to inform and consult, but it took all such steps towards compliance as were reasonably practicable in the circumstances. This defence has been interpreted very narrowly by the employment tribunals and the fact the employer has become insolvent will not in itself amount to special circumstances.

If the employer is held liable by an employment tribunal for failing to inform and consult, a declaration to that effect will be made and a protective award of up to 90 days' pay per employee may be made. The employment tribunals interpret protective awards as punitive rather than compensatory. As such, they will start at 90 days' pay and only reduce this figure should there be mitigating circumstances for reducing the award.

Who can bring a claim for failure to inform and consult?

If there is a recognised trade union and/or elected employee representative they can bring a complaint in the employment tribunal on behalf of their constituency. For a trade union this will be those affected employees in respect of whom it is recognised and, for an employee representative, the affected employees he or she is elected to represent. If the trade union or employee representative brings a successful complaint for a protective award, this will be for the benefit of the representative's constituency.

Notwithstanding that the relevant provisions of TULRCA have been in force since the 1990s, the question that has remained unanswered until now was: if there are no trade unions or employee representatives and an affected employee brings a successful complaint in the employment tribunal who else can benefit from that protective award? Some employment tribunals made a protective award in respect of all affected employees, while others limited the protective award to those who brought complaints.

Independent Insurance case

This question has been answered by the Employment Appeal Tribunal (the EAT) in the case of *Independent Insurance Company Limited (in provisional liquidation)* v. *J Aspinall and T O'Callaghan* (UKEAT/0051/11/CEA).

Shortly after Independent Insurance (IICL) went into provisional liquidation in June 2001 it made a large number of redundancies including 360 at its Cheadle office (including the claimants). Multiple claims alleging breach of the collective consultation legislation followed. There were no recognised trade unions. While IICL contended it elected employee representatives for the collective redundancy process, the employment tribunal held that it had not done so and held that IICL failed to inform and consult in accordance with TULRCA. The claims had been stayed for several years pursuant to section 130 of the Insolvency Act 1986. During this time, of the 360 made redundant over 100 claimants had their claims struck out, around 100 settled their claims with IICL and 150 did not bring claims. This left only two claimants in this case.

The employment tribunal's decision

The employment tribunal duly made an award of 90 days' pay but in respect of all

> "If the employer is held liable by an employment tribunal for failing to inform and consult a declaration to that effect will be made and a protective award of up to 90 days' pay per employee may be made."

360 former employees, rather than just the two remaining claimants.

The wording of section 189 of TULRCA describes a protective award as an award in respect of '*one or more descriptions of employees who have been dismissed as redundant*' and in respect of whose dismissal the employer has failed to inform and consult. The employment tribunal considered in the light of this wording that it was not limited to make a protective award only in respect of the two remaining claimants. It concluded that clear words would have been used in TULRCA if it had been parliament's intention to limit the scope of a protective award to the individual claimant. It also determined that the employment tribunal cannot properly interpret the relevant legislation by having regard to the practical consequences of such an interpretation.

Appeal to the EAT

IICL argued that TULRCA has the effect of conferring representative remedies on representative claimants (ie trade unions and elected employee representatives) for the employees they represent and individual remedies on individual claimants.

The employment tribunal was wrong to adopt an unduly literal construction of the relevant provisions without considering whether such a construction produced an absurd result having regard to the practical effects of such a construction. Had it done so it would have appreciated that parliament did not intend the provisions to bear the construction that the employment tribunal placed on them.

The relevant wording of TULRCA can bear two interpretations (ie that the protective award can be made in respect of (i) the complainant only; or (ii) all those who were made redundant). IICL outlined a number of unattractive practical consequences of the latter interpretation favoured by the employment tribunal:

1) the complainant would be acting, without authority, on behalf of others despite not being an elected representative and with no obligations to other affected employees contrary to the position of an employee representative or trade union;
2) it cannot have been parliament's intention that a complaint, if unsuccessful, only applies to the individual complainant but, if it is successful, becomes a representative claim (some of those who benefited from the protective award had had their claims previously struck out);
3) an individual complainant could otherwise obtain a protective award that is more far reaching than an employee representative's complaint (or that of a trade union) if the representative's constituency was less than the number of affected employees;
4) an employer may wish to advance different arguments in relation to the 'special circumstances' defence in respect of different groups of employees;
5) it would be futile for a respondent to compromise a complaint in respect of a protective award where there are other employees who could bring such a complaint which, if successful, would benefit all affected employees; and
6) employees who bring complaints may seek to negotiate compensation in excess of a protective award knowing the employer may pay a premium to settle the complaint and avoid having to pay many more protective awards.

> "If there are no trade unions or employee representatives and an affected employee brings a successful complaint in the employment tribunal who else can benefit from that protective award?"

The EAT's decision

The EAT agreed with IICL and held that where an individual claimant seeks a protective award the employment tribunal only has jurisdiction to make an award in his favour and cannot make an award that benefits other redundant employees. The EAT considered it would be an amazing sea change in the legislation to give an individual (who is not an employee representative) a representative remedy. Parliament would not have intended the anomalies outlined above.

What does this mean for employers and IPs?

This case provides clarity for employers, insolvency practitioners (IPs) and the employment tribunals that where an individual claimant is not an employee representative any protective award that is made can only be made for his or her benefit and not for other affected employees.

This could result in a multiplicity of individual complaints, perhaps in different employment tribunals, as claimants cannot rely on another (unless they have an employee representative) to bring a complaint on their behalf.

Employers should no longer face the spectre of an employee threatening to make a complaint on behalf of others where they are not an employee representative unless the employer meets his or her financial demands.

This case also provides clarity for employers and IPs regarding the potential financial consequences of a breach of the collective redundancy process. Clearly to minimise or eliminate liability the employer should comply fully with the information and consultation process outlined in TULRCA. If that is not possible and an insolvency related special circumstances defence is unlikely to be successful then the questions when assessing the financial consequences are:

> "This case provides clarity for employers and insolvency practitioners and the employment tribunals."

1) How many affected employees are likely to benefit from a protective award brought by a trade union or an employee representative, if such representatives are in place? and
2) Would the total amount of the protective awards be different if no representatives are in place and employees have to bring their own claims?

The reality for IPs is that the collective redundancy process (including election of employee representatives, where necessary) must be followed, if at all possible. Following a letter from Pat McFadden MP, the then Minister for Employment Relations and Postal Affairs, in March 2009, IPs have been strongly encouraged by The Insolvency Service to comply with TULRCA in the case of collective redundancies. This relates both to the obligation to notify the Secretary of State of the proposed redundancies within the required time limit (where IPs are personally liable), as well as the collective redundancy process outlined above. ☐

Andrew Taggart (left) is a partner, Christine Young (centre) is a senior associate and Laurence Elliott (right) is a partner at Herbert Smith LLP.

A German 'Wirtschaftswunder'?

Why is the German economy at full steam while other European economies are flagging?

Since the ending of the economic crisis in mid 2009 Germany has been enjoying an exaggerated boom in business. With a growth rate of 3.6 per cent in 2010, the best performance since its reunification, Germany has been the star performer in the euro area, and the impressive pace is continuing. The reasons for this extraordinary business cycle are manifold.

Beneficiary of the global recovery

Due to its heavy export bias the German economy was intensely stimulated by the strong recovery of the global economy and the revival of world trade in the second half of 2009. Germany's subsequent over-performance can be mainly attributed to the rebound in investment activity as well as the restocking boom.

Germany is the leading producer of capital goods, which account for over 45 per cent of its total exports. Therefore, the rebound in the investment cycle, particularly in the emerging markets, benefited Germany's exporting industry, given its role as the world's outfitter. Due to the high uncertainty in 2009, investments in machinery and equipment were cancelled or massively reduced; in Germany alone investments plunged by 23 per cent. But this 'investment backlog' was resolved globally in 2010 and 2011. With its strong orientation on emerging markets Germany profited twofold, which is documented by the scale of exports to China. Almost 70 per cent of exports to China consist of machinery and transport equipment, which expanded by 45 per cent last year, while Germany's total exports increased by 'only' about 20 per cent.

Furthermore, the German economy benefited from the global restocking boom. During the last recession production was cut back sharply. Globally, inventory levels were slashed in order to improve working capital. Due to the surge in production in 2010 inventories had to be built up again. Germany was one of the main beneficiaries of this strong national and international restocking boom. In 2010 inventory-building and investment in equipment generated 22 per cent, and 28 per cent respectively of the GDP growth of 3.6 per cent, with an additional 30 per cent coming from net exports.

Beneficiary of a relatively weak euro

As strange as it may sound, in contrast to state finances, German companies have been a large beneficiary from the euro-crisis due to their strong export orientation. The relatively weak euro has made German goods more competitive in countries outside the euro area. If Germany still had the D-Mark, the ongoing boom would probably have been choked off immediately. The corresponding negative impact of the economic situation of the European periphery states is only marginal because the cumulative share of exports to the so-called PIGS (Portugal, Italy, Greece and Spain) is only five per cent of total exports.

Beneficiary of pre-crisis 'homework'

Another major reason for the V-shaped recovery in Germany lies in the public and fiscal reforms that were implemented during the last decade. They include comprehensive corporate tax, and labour market and pension reforms.

Since the end of World War II, Germany has always been a high-priced technology leader. This business model worked for many years, as long as customers were willing to pay a premium for German products. However, during the 1970s and 1980s labour costs continued to increase significantly without being offset by a commensurate surge in productivity. Germany finally lost its competitive edge during the 1990s, after the stimulating effects of the reunification phased out.

> "Changes in labour laws, such as 'Kurzarbeit', have made German companies more flexible."

It took the country a couple of years to regroup, but the turnaround began in the last decade. Trade unions showed a lot of restraint and social laws in Germany were adjusted. The labour income share in Germany came down eight per cent between 2000 and 2007. Accordingly, slowly but surely, unit labour costs began to fall and German companies regained ground.

Additionally, improvements in labour laws have made German companies more flexible. Probably the best example is the implementation of an instrument called 'Kurzarbeit'. This short-time work scheme allows companies to adjust the total work time of its work force and the associated costs without having to terminate any employment contracts. Companies can rapidly improve their cost structure in bad times. At the same time, employees only suffer marginal financial disadvantages due to a subsidy by the state. This instrument prevented huge layoffs and probably a bloodbath of insolvencies during the last crisis. Furthermore, it gave Germany a jump start in the current recovery, because businesses could also adjust immediately to the strong rebound in demand.

But not only have the underlying political and fiscal conditions tilted the playing field in favour of Germany. Many German companies have also significantly improved their competitiveness by undergoing immense operational restructuring and reorganisation measures in the last decade. Aggressive cost management without sacrificing technological leadership has helped German companies to further improve their leading position in the global markets.

Continuity of its economic dominance?

Due to its strong orientation towards the booming export markets as well as a much more competitive set-up, Germany's economy seems to be very robust. And on top of that private consumption is finally gaining momentum. On the other hand a lot of the before-mentioned factors were one-offs and the global growth is losing momentum. The biggest risk for the German economy is a 'double dip' recession in its major export markets, namely the US, China and India. The US economy is still currently very labile, and the Chinese and the Indian economies are decelerating due to continuous monetary tightening. The German dependency on exports might abruptly turn into a disadvantage if the geopolitical and economic turbulences continue.

The outlook for insolvencies

In 2009 the number of company insolvencies in Germany jumped by 11 per cent to almost 33,000 filings. But to the surprise of most 'participants', the number – despite its lagging character – remained more or less stable with very few high-profile cases in 2010. The first half of 2011 showed a significant reduction of around ten per cent and most experts expect the same full-year number.

The future insolvency trend in Germany will mainly depend on global economic developments. Due to the discontinuation of the one-off effects, the anticipated global economic slowdown and the likely refinancing wave the most probable scenario is a renewed increase in filings in 2012 and 2013. ◻

Carlos Mack (left) is lawyer specialising in insolvency at White & Case Insolvenz GbR and Thomas Sittel (right) is a director and head of Distressed M&A at Goetzpartners Corporate Finance GmbH.

IS consultation on regulatory reform

'Reducing red tape' is one of the Coalition's top priorities across government departments. Esme Harwood explores how this sits with The Insolvency Service's proposals to reform the regulatory framework for insolvency practitioners.

In June 2010, the Office of Fair Trading (OFT) released a market study into corporate insolvency, concluding that the market works well in the majority of cases but could work more effectively in a minority. In February 2011, The Insolvency Service (IS) launched a consultation on a range of regulatory changes.

Reflecting the need to increase external confidence in the insolvency profession, R3 supports many proposed changes: IPs should be more transparent about fees; unsecured creditors should have greater say over the choice of IP when a case moves from administration to liquidation and more influence over regulatory standards; there should be an independent appeals board to hear complaints; and the RPBs should work together to deliver visible consistency.

We are not a 'no change' profession; we are receptive to sensible improvements. But change must be proportionate and well thought through. Our principal worry is that some of the IS's key proposals are a sledgehammer to crack a nut, risking a number of unintended consequences.

R3's concerns

R3's response to the IS consultation highlights concerns that the costs of the proposed regulatory changes have been vastly underestimated, while the benefits have been greatly overplayed. According to our revised estimates, the net effect of the reforms is a cost to business, not a benefit as currently portrayed by the IS. Does a market that has been found to work well in the majority of cases warrant an increased and more complex regulatory structure?

The imposition of regulation is contrary to the cross-government priority of reducing regulation. It is also contrary to the new three-year moratorium on regulation for micro-businesses, which recognises that smaller firms struggle disproportionately to absorb increased regulatory costs. Approximately 30 per cent of businesses in the insolvency profession are micro-businesses and 90 per cent are small. It is unclear how the government's commitment to reducing regulation and protecting small firms can be compatible with the IS's plans.

One of the most ill-conceived ideas is the creation of a new body to review IP fees. Under the proposals, IP fees can be agreed by the majority of creditors but then challenged 'after the event' by a vexatious director or minority creditor. There is no requirement for a complainant to have tried to engage during the insolvency or to have an economic interest in the outcome – they can wait and 'fling a grenade' into the process at the end, penalising creditors who have made the effort to participate.

Fee complaints are envisaged to be free to the complainant and those that are not upheld will be paid out of the insolvent estate. This risks unfairly consuming returns for creditors and opening up a lucrative market for 'ambulance chasing' advisors who can jump on the back of any insolvency case safe in the knowledge that their fees will be paid either by the IP or the insolvent estate.

The IS has not estimated the impact on creditor returns and has not explained what will happen in cases where assets do not cover the complaint costs. R3 estimates that the cost to insolvent estates could be as much as £13 million per year. This should be compared to the perceived benefit of intervention, valued by the IS as an £8 million increase in the extension of unsecured credit – a figure disputed by the profession and creditors alike.

Harnessing the market power of unsecured creditors

So let's go back to the purpose of the reforms. The OFT's main concern was that unsecured creditors were individually too small to hold sway and unable to fund court cases.

The solution is not to create another system for reviewing fees that undermines the existing process. If the name of the game is harnessing the market power of unsecured creditors, HMRC and the IS's own Redundancy Payments Service have a duty to use their huge bargaining power as repeat creditors (they account for roughly a quarter of unsecured debt) for the benefit of the general body of unsecured creditors. It is within the government's gift to empower unsecured creditors – not by legislating or regulating but by fulfilling their role as large and repeat unsecured creditors.

Add this to the reforms of last year that make it cheaper and easier for creditors to engage in fee setting; a range of welcome measures that would increase transparency and give unsecured creditors more influence; and an outwardly more independent and consistent regulatory regime.

It may be tempting for the IS to use the OFT report as a springboard to bring about far-reaching changes, but this does not represent a proportionate response. The imposition of regulation runs contrary to the cross-government desire for deregulation, particularly given the vast number of small insolvency firms. We have yet to see whether the IS's radical regulatory proposals will slip under the radar or whether R3 and others can ensure that the wider government commitment to reducing regulation holds firm.

R3's full response and Impact Assessment is available at **www.r3.org.uk**

What R3 has done to represent members

- R3's response to the IS consultation was produced following two meetings of the Policy Group and a full discussion at Council
- Policy Group and GTC members analysed the IS's 'Impact Assessment' and produced revised figures
- R3 met with key stakeholders including regulators, accountancy firms and unsecured creditor groups
- A survey of the SPG community was carried out to ascertain the number of micro-firms in the profession
- R3 met with the IS to discuss overarching policy points and the detail of the Impact Assessment
- R3's president has made speeches at IPA, ICAEW and JIC events on reform of regulation
- The 'Big Four' and R3 jointly contacted the Insolvency Minister, separately requested a meeting with the Small Businesses Minister, and secured press coverage highlighting key concerns in *The Times* (Accountants demand changes to planned insolvency reforms)
- R3 will continue to communicate the themes of its response through to the expected IS announcement in the autumn.

Esme Harwood is policy and public affairs manager at R3.

Report by ComRes – Stakeholder Audit: JIEB

Peter Windatt reports on a recent study of the JIEB training and examination process.

I am the current chair of the Joint Insolvency Examination Board (JIEB) representing my Regulatory Professional Body, the Association of Chartered Certified Accountants (ACCA) as their nominated director on the board.

I am also the first chair to have actually passed the exams and I'll never forget the feeling of euphoria upon receipt of my JIE 'pass', which will remain with me for the rest of my days. I am always pleased to see the delight on the faces of successful candidates at the JIE graduation ceremonies and share in their pleasure. Praise is also due to R3 for bringing the graduation process about and enabling us to all join in the celebration of those successes. As someone who qualified before these ceremonies were thought of, I am delighted that I too will be attending something similar on my own behalf when there is a 'catch-up' ceremony for older graduates later this year.

The JIEB's examinations are a tough test of candidates' knowledge of insolvency law and practice. We make no apologies for that because passing the examination has, for some time now, been a key requisite for anyone wishing to become a licensed insolvency practitioner. Success in these examinations is therefore a significant achievement and step along that road.

Stakeholder Audit: JIEB

Last year, the independent research agency, ComRes, was commissioned to conduct a stakeholder audit of the JIEB training and examination process. The first phase of this research centred on a comprehensive survey of R3 members who had passed the exams since 2007 and students who had taken the exams in 2010. The second wave involved in-depth interviews with recent students, R3 members and the JIE Board and examiners. The findings enable R3 and the JIE Board to understand what improvements, if any, might be made to the JIEB training and exams.

I am delighted that R3 sponsored the report and I am generally pleased, for the sake of all those involved with R3, the JIE and student training, with the conclusions reached.

The contracting out process

The JIEB is administered by the Institute of Chartered Accountants in England and Wales (ICAEW) and has been for many years. When its term came to an end it was being rolled forward on an annual basis. However, the IPA (Insolvency Practitioners Association) had expressed an interest in administering the exams themselves so we embarked on a re-tendering process. Seventeen interested parties were whittled down to three, then two and finally one. It was decided that we are to remain, for the next few years, with the ICAEW as our exams and executive administration and back-office provider. As a result of this journey we do have a number of useful suggestions, from ICAEW and the IPA in particular, to help with our aim of continuous improvement

Speed of results

Unfortunately, one of the major bug-bears, the speed of issue of JIE's results, is not likely to be easily resolved – not without a significant hike in fees. When the exams were three hours in duration we were able to keep the costs of the exams at, broadly, their current level (in fact the cost has come down recently as a result of our no longer providing copies of *Butterworths* ourselves) by piggy-backing ICAEW's three-hour exams in December. When it was decided that we should add some reading time to the exams, taking their length to three and a half hours, there were no appropriate exams at around the same time – the nearest available slots were ICAEW's exams at the beginning of November and this is when they now are. The exams are for a relatively small number of candidates and to run these as 'stand-alone' would be prohibitively expensive. In addition we rely heavily upon the goodwill of our markers and moderators. The best time for them to undertake the majority of their work is over the Christmas holiday period when they are themselves off work or workloads are much reduced. The timetable for moderation has not changed from when the exams were in December – clearly this could be changed but at additional cost with markers being required to take time out of their working schedule in order to fulfil their marking role.

> "Where new, valid points are being suggested in scripts these are added to the guide and marks credited to other scripts following the same train of thought."

Quotas and marking

I would like to quash all 'quota' myths and rumours. There are no quotas. Yes, the marks are out of more than 100 and there are additional 'holistic' marks available, which means marks are, ultimately, scaled. Why are the marks out of more than 100? As part of the marking process the first few answer scripts are marked against the marking guides. Where new, valid points are being suggested in scripts these are added to the guide and marks credited to other scripts following the same train of thought. Where there is a unique suggestion that has not been seen previously or subsequently these too may be awarded discretionary marks, subject to moderation.

The issue of holistic marking has been well covered in notes to students and tutors' meetings and discussions so I won't repeat here the various issues surrounding how these are awarded.

Examiners now undertake single question marking (SQM) (one examiner marks the first question on all papers, another the second question, another the third etc). Previously, it was suggested that where a poor answer was given to an earlier question this might have resulted in examiners being influenced to award poor marks to subsequent questions because candidates had set out their stall and let themselves down – with SQM this concern should simply not arise.

Fit for the future

In summary then, the overall review has come back with a 'things are broadly okay but there is always room for improvement'. For our part, I am confident the board are anything but complacent and will continue to strive to refine and improve a system which, while it is fit for purpose, could get fitter.

Peter Windatt is a director of BRI Business Recovery and Insolvency and chair of the JIEB.

R3's 21st annual conference – 'Coming of Age'

The R3 annual conference has produced some useful feedback from members. Will Black reports.

The Welsh countryside is not usually as warm as Portugal, but it made for a very high attendance at this year's annual conference at the Celtic Manor in the Usk Valley. Staying within the UK certainly gave the conference an even more business-like feel this year, with the emphasis on the technical sessions rather than the outdoors. This was fitting at a time of slow economic recovery and a number of challenges facing the industry. For one year at least there was no 'witty' city diary piece about practitioners relaxing in the sunshine!

Policy group sessions

The conference normally follows the plenary format and can make things seem a bit one-way. This year that cycle was broken by introducing the policy group sessions, which, while a bit 'rough and ready', did provide some really useful views from the membership. We know there are diverging opinions between individual members (not usually shy in having an opinion) but there were some key areas of agreement. Only by establishing some 'consensus' on key issues, such as regulation, can we present robust defences to proposed changes to our profession.

To give you some examples, some useful lines on 'The Future of Regulation' included *'If there was just one portal that said "complain here" and we will sort out where it goes, that would deal with the problem [of perception among creditors that it's hard to complain].'* Furthermore, most of you would be in favour of time limits for dealing with complaints. During the 'Engaging with Unsecured Creditors' session, one member made the point that *'the OFT felt there had to be more regulation and law in order to address the issue [of outcomes for unsecured creditors] as opposed to just accepting that's a market condition… and one driven in the banking and lending sector rather than the insolvency practices sector.'* We also liked the suggestion of offering a free pint of beer to unsecured creditors who turn up to meetings.

Conference flow

Less 'rough and ready' was the organisation of the conference, which seemed to flow nicely and made good use of the two-day period. The technical sessions were all useful and the economic outlook was an excellent scene setter, as was the sure footed introduction by Frances Coulson, who compared her presidential year to the Grand National course. From my point of view, the session on football clubs and administrations was the most enjoyable.

Michael Portillo speaking at the conference.

Michael Portillo, clearly a polished and seasoned after dinner speaker, infused the hall with his energy mid-way through Day One. He seems to have a nice line in self-deprecation (which he didn't always have) and provided good insights on where

> *"Perception is as important as reality, because there's an outside commercial world watching how we conduct ourselves."*

the Coalition is heading. He didn't seem too bound by any party line – suggesting that economic recovery might not be at a strong enough rate to help the Coalition when they next face the electorate.

I came away from the conference tired from some late-night networking (this is clearly one of the strengths of the conference) but more confident in dealing with criticism from the wider public. Most of the delegates I spoke to seemed enthusiastic about communications work and I caught the train back to London with the words from one of the policy sessions echoing in my head: *'Perception is as important as reality, because there's an outside commercial world watching how we conduct ourselves.'*

We have set ourselves a challenge for next year to improve on Celtic Manor. However, we always strive to improve and change the conference format from year to year and we are really grateful for the support we get and the feedback received. We will reflect on the feedback in planning next year but we hope that many of you will come to the Arts Hotel in Barcelona for the 22nd annual conference, which will be held between 16–18 May 2012. The detailed planning for the conference will begin in earnest in early September and we will keep members posted on the content as it develops. Please put the date in your diaries now.

Feedback

Examples of the feedback that we have received for this year's conference include the following statements:

- Good balance of topics and presentations.
- Good interesting variety of topics and generally a very high quality of presentation. Enjoyable.
- Quality of presentations exceptionally high (and consistent). Varied programme with plenty to interest most people and some amusing moments (Michael Portillo).
- Very impressed with the consistent high quality of speakers.
- The conference was very well organised and the sessions were all interesting – really good speakers too. Clearly a lot of effort put in by all concerned.
- Good balance and interesting speakers.
- Technically, this has been the best conference in years. Also, this has been the best format ie two long days.
- Very well done to the team re content and venue etc.

Will Black is the communications manager at R3.

R3 Smaller Practices Group

Hot topic: customer service for smaller firms

As I am writing this, I have just got back from Las Vegas, my first trip to the USA. Apart from the stunningly extravagant scenery, one of the overriding impressions was the positivity of the locals and their inbuilt ability to seemingly turn a profit out of the simplest of circumstances. As an example, I went into a 'pick and mix' shop to buy some sweets to take home for the children. The shop was clean, bright and colourful. As I worked my way around, a very polite shop assistant approached me and advised that if I wanted to try any of the sweets, I could help myself. In the late lamented Woolworths, I recall seeing many signs saying 'don't try before you buy'. One of these two businesses is bust; the other is clearly making a tidy profit.

> "Treating someone as a customer doesn't always mean bending to their view but it does mean explaining the insolvency process and its implications and treating them as you would like to be treated."

A customer is a person like you

So what lessons can be learned by IPs? First, we need to address the seeming dilemma that IPs don't usually have a specific customer. If we do not have a specific, identifiable customer base, can we therefore choose to ignore the concept of customer service or should we alternatively elect to treat everyone, from directors and debtors to creditors and members of staff, as customers? In my opinion, the latter choice is naturally the right one, but what does treating someone as a customer actually mean? In my view, it means treating them as you yourself would like to be treated, if you were in their position. I firmly believe that IPs cannot be deemed to be compromising their professional responsibilities by treating people, including directors or debtors, as customers. Treating someone as a customer doesn't always mean bending to their view or, for example, not submitting a disqualification report, but it does mean explaining the insolvency process and its implications and treating them as you would like to be treated, while at the same time ensuring that you fulfil your professional duties.

We may not always get everything right or deliver the perfect service, but we can all try to do our best and if we do, in instances where we might get it wrong, the payback is that we are more likely to be given the benefit of the doubt.

Firm branding

In addition to customer service, smaller practices might also like to consider the wider topic of firm branding. The larger firms put a lot of effort into protecting their 'brand'; 'reputational risk' is high on their agenda. But do smaller firms give the same consideration to protecting their own brand? Do they even think they have one? In my view, a brand is not just about the design of the notepaper; it's about the values attached to the service and the 'user experience'. As a smaller practitioner, running a small business, this can be viewed as both an opportunity and a threat. For example, if you approached the last 100 people that you communicated with and asked them to describe your firm, what would they say about you? Would they say that your firm is approachable, helpful, polite and informative or unhelpful, dismissive and lacking in customer service? It's your choice, but which type of firm is likely to be the most successful and profitable? I know where I would rather buy my pick and mix!

Carl Faulds is managing director of Portland Business Recovery and a member of the R3 SPG Committee.

SPG Committee update

Regulation reform

The R3 SPG Committee met on 20 April 2011. One of the major issues discussed was its input into the impact on smaller practices of The Insolvency Service's proposed reforms to the regulation of IPs in its recent consultation. R3's final response to the IS consultation subsequently contains a specific smaller practices section, which challenges The Insolvency Service's assumption that the proposed reforms will have an equal impact across all sizes of insolvency practice. We have called on The Insolvency Service to explain how it intends to address the discrepancy between an intended increase in regulation of IPs and the recent Budget statement that promises a moratorium on UK regulation for micro-businesses (fewer than ten employees), of which there are a large number within R3's smaller practice members. We argue that increased regulation risks disproportionately squeezing smaller firms, potentially even pushing them out of the insolvency market altogether, and call on The Insolvency Service to look again at its calculation of the impact of new regulation on small firms as a matter of urgency.

R3 has also subsequently written to Mark Prisk MP, Business and Enterprise Minister, to highlight our concerns about the impact of regulatory increases on small and micro insolvency firms.

SPG Forum

Preparations are well underway for the SPG Forum on 17 and 18 November in Birmingham. We hope that many of you will attend the Forum this year and look forward to welcoming you to Birmingham in November.

Fee restrictions in the IVA sector

Recent developments in the personal insolvency market, in particular bankruptcy cases where members have seen creditors or their agents attempt to impose caps and restrictions on the IP's fees, were another key discussion point. The committee is concerned about what appears to be a spread of the fee restrictions in the IVA sector to bankruptcies and will continue to monitor this issue. If SPG members have any feedback or experiences that they would like to share with the committee on this or other issues, please contact Emma.Lovell@r3.org.uk.

Liz Pywowarczuk is director of Liberta Financial Ltd and chair of the R3 SPG Committee.

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Profile of R3's communications activity

Spin or silence – why communicate? Victoria Jonson explains.

Headlines such as 'Accountants demand changes to planned insolvency reforms' and 'Ruthless suppliers holding firms to ransom' are just some of those resulting from work by the communication team at R3 over the past six months. Without this engagement, maybe we would see more headlines such as: 'Last rites for 'rip-off' administrators… for unfair fees' (June 2010).

Whether dealing with suppliers, pursuing dodgy directors or objecting to parts of The Insolvency Service consultation on regulation, these R3-generated stories matter: individually each article does not produce an overnight change in opinion, but collectively, and over a sustained period, press does affect public perception about the work of insolvency practitioners (IPs).

R3 seeks to influence the way the *Daily Telegraph* in particular writes about IPs and in 2010 achieved 30 pieces of coverage with them – all with 'friendlier' headlines. We also target the regional media and in 2010 our coverage rose by 75 per cent, with journalists seeking comment from R3 regional spokespeople. The press team invests considerable time in meeting and briefing journalists. Invariably this produces more accurate copy and dismantles preconceptions, even from journalists previously hostile to IPs.

Changing perception

But does this matter? Do we care what the media and politicians think of IPs? Well yes we do, especially when there is an ongoing consultation into regulation that could have wider implications for the profession in years to come. It is perception that seems to lie at the heart of what decisions are made and this is where R3's communications team's work on public affairs comes to the fore.

MPs' perceptions of practitioners are usually influenced by constituents who have been victims of insolvency and as such they are unlikely to initially have positive views of IPs. The public affairs team tries to convert detractors into supporters. Gordon Banks MP, who up until very recently was shadow insolvency minister, works with us on pertinent issues such as directors' disqualification and R3's campaign 'Holding Rescue to Ransom'. Yet just a year ago Gordon Banks regularly spoke in

Signing of the Memorandum of Understanding in parliament: (back row, from left) Darra Singh, chief executive, JobCentre Plus; Stephen Speed, inspector general and chief executive of The Insolvency Service; (front row, from left) Phil Wilson MP; Chris Grayling MP, minister of state for employment; Frances Coulson, R3 president.

parliament and to the press about poor returns to creditors and fees. Likewise, Phil Wilson MP called for regulation of IPs in 2009 but has since been instrumental in the Memorandum of Understanding between R3, The Insolvency Service and JobCentre Plus, which has helped over 30,000 employees facing redundancy. This was first signed in October 2009 and was signed by the new Coalition government in May 2011, in recognition of its importance.

> "We are making good progress on repositioning IPs from 'undertakers' to trusted professionals."

Informing politicians

Steven Law, Frances Coulson and Graham Rumney have met over 100 MPs during the last year, including key figures such as Ed Davey, insolvency minister; Jonathan Djanogly, justice minister; Chris Grayling, employment minister; shadow justice minister Andy Slaughter and Adrian Bailey, business, innovation and skills select committee chair. We are now reaping the rewards of our engagement in terms of our work on the Jackson proposals, the Consultation on Regulation and the Holding Rescue to Ransom campaign.

We are making good progress on repositioning IPs from 'undertakers' to trusted professionals – instead of regular questions and comments about fees, briefing MPs this year has led to over thirty parliamentary questions on key R3 policy issues and R3's research is quoted on a regular basis. We are delighted that R3 has been shortlisted for 'Trade Body of the Year' at the Public Affairs News Awards 2011, in recognition of our work in this field.

Intelligence gathering

Journalists and politicians would not be able to write headlines and quote key information unless presented to them in an engaging way, backed by survey findings and case studies. This is where R3's policy work comes in. Our policy group plays a key role in shaping lines for external audiences. It includes representation from our smaller practices, the 'Big Four', our general technical committee, regional representatives and R3 council. The group discusses key issues facing the profession and suggests topics for R3's campaigns – critical in enabling us to defend and promote insolvency practitioners. R3's 'policy papers' outline an issue and call for change: topics range from directors' disqualification to Debt Relief Orders.

The quarterly membership surveys are equally vital in helping to ensure our work with the media and politicians reflects the views and experiences of members. The higher the response rate, the more useful the results – so every response counts. Meanwhile our two quarterly trackers, 'The Business Distress Index' and the 'Personal Debt Snapshot' are now routinely covered in the press as well as quoted in parliament. And so this is where it all comes together as integrated communications, as they are all sides of the same equation. We will never eradicate all negative comments but we can generate some good coverage in the press and in parliament, all of which shapes public perception and those who make decisions. If you want to know what R3 is thinking, do follow us on Twitter **http://twitter.com/#!/R3PressOffice**.

Victoria Jonson is the director of communications at R3.

RECOVERY editorial board

This is the first in a series of articles about the work of the R3 committees. Who's involved? What do they do? How can you be involved?

RECOVERY

R3 (previously SPI) and GTI Media (previously GTI Specialist Publishers) were introduced by Sir John Harvey-Jones. During 2004 GTI developed a new format for *RECOVERY* and relaunched it as a professional business magazine. GTI were already publishing R3's flagship *Directory*.

The purpose of the magazine was, and still is, to provide members with technical information, articles on topics of interest, news of R3 initiatives and current events in order to keep them up to date. It is also about fostering a community of all those who work in the sector and providing a forum through which they can express their opinions, share knowledge and raise the profile of the positive work the industry does.

Over the years, *RECOVERY* has evolved in style and content, concentrating increasingly on matters of technical, commercial and regulatory importance. Since the financial crisis, it has 'taken the economic temperature' of R3 regions and countries around the world by running a series of articles from these areas; and it is interesting to observe how fiscal interlinking now means that not only Big 4 practices dealing with multinational events but also small practices, who may be dealing with holiday homes in Spain, can often have an international element to their work.

The editorial board

The editorial board of *RECOVERY* meets quarterly at the beginning of March, June, September and December. It comprises the editor, senior professionals, members of R3 staff and a publishing manager, whose mix of skills and knowledge have helped to develop the magazine over time.

Each issue of the magazine has a theme, and the themes are planned for the forthcoming year at the autumn meeting. Part of the skill demanded of the editorial board members is to be able to suggest which themes will be of interest in several months' time. A good example of how aptly this has been done recently is the 'Public sector cuts' issue of summer 2011, which was published just as the furore about Southern Cross broke.

Members of the editorial board suggest appropriate authors for specific theme articles, based on their specialist knowledge and contacts. General feature articles are selected from a list of potential

articles sent in by members keen to write, and we are always pleased to hear from would-be contributors. The legal section is highly valued and well read by members, and R3 matters keeps members up to date with what their professional association is doing for them. An example of how the magazine is constantly evolving is the recent addition of a new, regular SPG page to focus on the work being done with and for smaller practices. *RECOVERY* meetings are always lively with members keen to debate current issues.

How can I get involved?

Tell us what you like – and don't like – about *RECOVERY*, and what you'd like to read about. The magazine is here to reflect your needs and interests and we'd be pleased to hear from you. If you'd like to write for *RECOVERY* or even be considered for editorial board membership, please contact us – see box below.

Advertising and advertising features

RECOVERY is produced entirely from advertising revenue so another way in which you can make sure that you continue to receive it and ensure that your firm continues to have a high profile within the sector is by advertising.

Advertising features are a way in which suppliers of services to insolvency professionals can demonstrate their goods and services in a more fulsome manner and gain greater exposure. ◻

Send comments about printed articles, suggestions for future articles, offers to write an opinion piece or the Legal Q&A article to **recovery@r3.org.uk** or **sarah.houghton@groupgti.org**.

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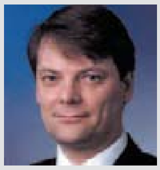

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Explains what R3 is up to and generates national press coverage on the IP profession

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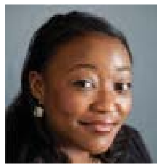
Represents younger solicitors in the insolvency sector



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Restructuring and insolvency lawyer, writes and commissions articles, identifies current legal developments

Graham Rumney, CEO, R3
R3 association-wide insight and oversight

Michael Rutstein, partner, Jones Day
Writes and commissions articles, identifies current legal developments

Peter Thompson, head of commercial recovery – London, HSBC plc
Understanding the end user public perspective of insolvency

Paul Williams, partner, MCR Corporate Restructuring
FCCA, MIPA solutions orientated recovery and turnaround specialist to the SME sector

R3 events, courses and conferences

Date	Event title	Venue
September		
6	Introductory Programme – Liquidations 1	Deloitte LLP, Birmingham
6	Introductory Programme – Liquidations 1	etc venues, London
6	Introductory Programme – Liquidations 1	Irwin Mitchell LLP, Leeds
6	South West and Wales Regional Meeting	Axtec Hotel & Spa, Bristol
7	JIEB Student Workshop – Liquidations	Lawrence Graham LLP, London
8	JIEB Student Workshop – Personal Insolvency	Lawrence Graham LLP, London
9	Annual Dinner	Park Plaza Westminster, London
12	North West Regional Meeting with the TMA	JMW Solicitors, Manchester
13	Business and Options	CCT venues, London
14	JIEB Student Workshop – Administrations, Receiverships & CVAs (Part 1)	Ernst & Young LLP, London
14	North East Regional Meeting	Tait Walker, Newcastle upon Tyne
14	Yorkshire Women's Group Meeting	Lupton Fawcett, Leeds
15	JIEB Student Workshop – Administrations, Receiverships & CVAs (Part 2)	Ernst & Young LLP, London
15	Personal Insolvency	Hyatt Hotel, Birmingham
21	Yorkshire Regional Meeting	Crowne Plaza, Leeds
21–22	SPG Scottish Annual Forum	Dunkeld Hilton Hotel
27	Insolvency Litigation	Midland Hotel, Manchester
29	North West Golf Day	Hazel Grove Golf Club, Stockport
October		
6	Personal Insolvency	Hilton Tower Bridge, London
6	East Midlands Women's Group Annual Dinner	The Carriage Hall, Plumtree
11	Introductory Programme – Liquidations 2	Deloitte LLP, Birmingham
11	Introductory Programme – Liquidations 2	etc venues, London
11	Introductory Programme – Liquidations 2	Irwin Mitchell LLP, Leeds
13	Directors' Duties	The Met Hotel, Leeds
13	Employee Issues	The Met Hotel, Leeds
13	Southern Women's Group Black Tie Dinner	De Vere Grand Harbour, Southampton
November		
1	Directors' Duties	Cheltenham Chase
1	Employee Issues	Cheltenham Chase
1	South West and Wales Regional Meeting	Aztec Hotel & Spa, Bristol
8	Introductory Programme – Liquidations 3	Deloitte LLP, Birmingham
8	Introductory Programme – Liquidations 3	etc venues, London
8	Introductory Programme – Liquidations 3	Irwin Mitchell LLP, Leeds
8	Yorkshire Women's Group Technical Update	KPMG, Leeds
10	Insolvency Litigation	Holiday Inn Bloomsbury, London
11	London and South East Ladies Lunch	Park Plaza Westminster, London
15	Midlands Quiz Night	Aston Villa Football Club, Birmingham
16	Yorkshire Regional Meeting	Crowne Plaza, Leeds
17–18	SPG Annual Forum	Hilton Birmingham Metropole
22	Construction Claims	Copthorne Tara, London
22	Mediation	Copthorne Tara, London
24	Personal Insolvency	Radisson Edwardian, Manchester
29	Construction Claims	Hyatt Regency, Birmingham
29	Mediation	Hyatt Regency, Birmingham

regional events **R3 events**

For further information on R3 courses and conferences, please visit the R3 website **www.r3.org.uk**, where you can download the full 2011 programme. Alternatively, call the Courses team on 020 7566 4234 to request a programme by post.

22nd R3 Annual Conference
16–18 May 2012, Barcelona

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R3 membership categories

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

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

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

Full members are invited to contribute to the development of insolvency, business recovery and turnaround professions at both local and national levels. Benefits include: use of the designatory letters MABRP and a certificate of membership, inclusion in the *R3 Directory* and a copy of it, membership of INSOL International.

Associate members are individuals who do not meet the requirements for full membership but work significantly within the business recovery sector.

New Professional (Student) members are individuals preparing to take the examination of the Joint Insolvency Examination Board (JIEB) or Certificate of Proficiency in Insolvency (CPI). Pass students of these exams are eligible to apply for full R3 membership.

New Professional (Networking) members are individuals who have recently joined their firm, and/or are new to the business recovery sector and wish to network with R3 members. This category receives electronic copies only via access to the R3 website.

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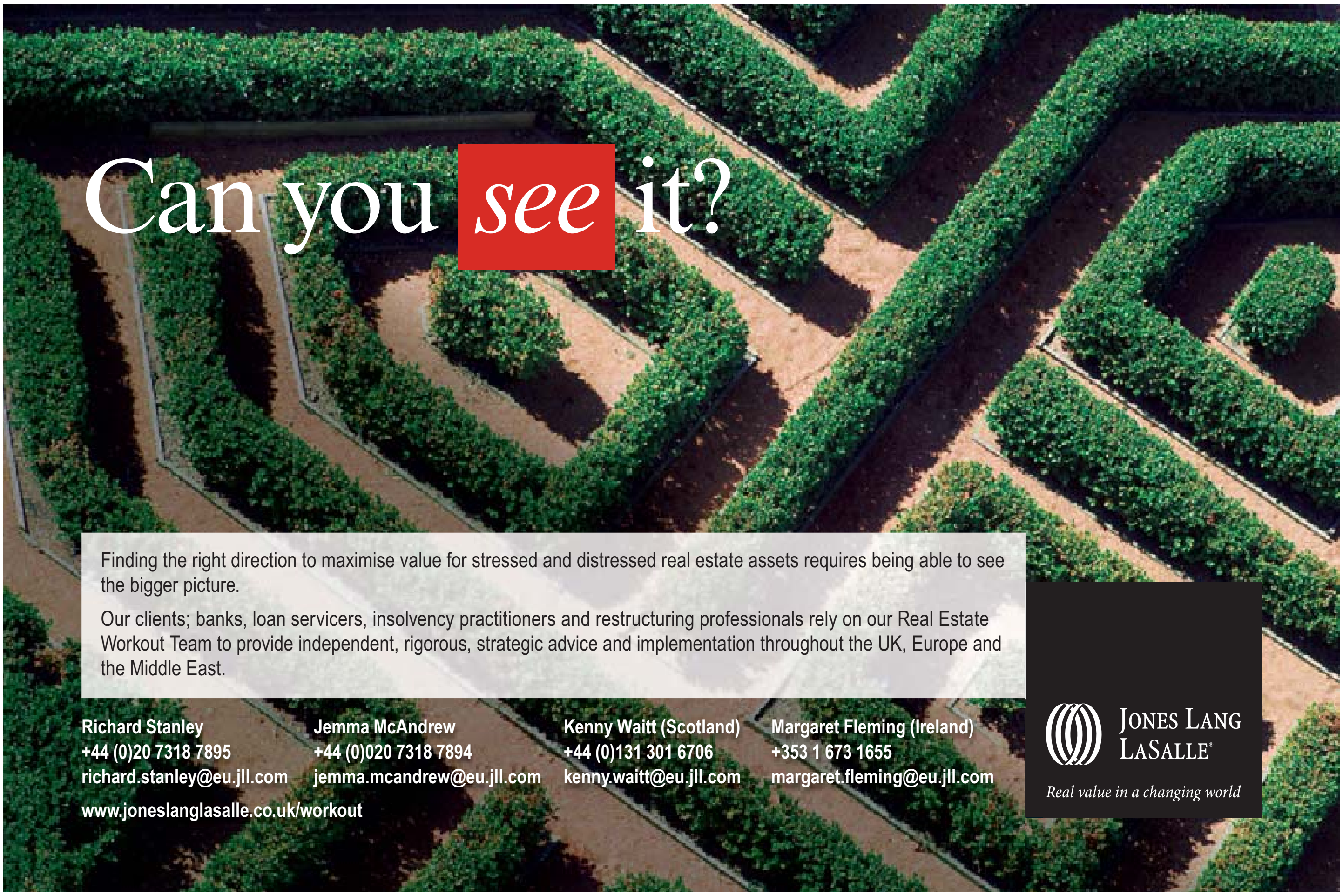
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Interview with John Milsom

John Milsom explains how he came to join the JIC, its work and its relationship with the RPBs and The Insolvency Service.

How did you come to work in the insolvency and restructuring sector?

I have a degree in geography, so I trained as a chartered accountant as a way of getting some commercial experience, but quickly discovered that much of the work that accountants do is historical, whereas insolvency people deal with live business and commercial matters. On the day I qualified as an ACA I approached the insolvency team and transferred to them. I have never regretted it, as you get to see many commercial situations, admittedly with distressed or stressed businesses. Insolvency has a heavy procedural element to it, which requires an understanding of the law and techniques. Having completed the JIEB, I joined the Insolvency Practitioners Association and worked on their Examination and Training Committee. I am now licensed by the ICAEW and they asked me to join the Insolvency Licensing Committee, which led to me being asked to join the Joint Insolvency Committee, and I was asked to be its chair from 1 January 2011.

What role does the JIC play?

Insolvency has the Act, the Regulations, the Rules but at one level very little guidance to help practitioners. There aren't that many practitioners, around 1,700 plus their staff, and Statements of Insolvency Practice were developed to help IPs ensure creditors and others receive the level of information they need to understand insolvency and exercise their rights under the Insolvency Act. SIPs are pretty important, and it's the role of the JIC to ensure that SIPs are produced, that they work and that they are consistent across each of the RPBs and, perhaps most importantly at the moment, are up to date so both the public and IPs have a clear understanding of what they are seeking to achieve, and how they can achieve it.

OK, but who agreed that?

Actually, there is a mission statement and rules agreed by each of the RPBs and The Insolvency Service, as the oversight regulator of the RPBs, as to the role of the JIC. The purpose of the JIC is to consider, maintain, improve, develop and promote insolvency standards and guidance of a regulatory, ethical or 'best practice' nature by means of debate and agreement within the committee; to discuss any such matters with any appropriate bodies; to facilitate discussion between authorising bodies in order to ensure that, as far as possible, insolvency practitioners are dealt with uniformly by such authorising bodies.

> "Clearly The Insolvency Service's consultation on the regulation of insolvency practitioners has put a question mark over the current make up of the JIC, but the JIC has already met to discuss how it would like to reorganise itself."

Is the JIC still needed given The Insolvency Service's consultation on practitioner regulation?

The JIC does have an important role to play, and therefore does have teeth in promoting and supporting the SIPs and the code of ethics. Clearly The Insolvency Service's consultation on the regulation of insolvency practitioners has put a question mark over the current make up of the JIC, but the JIC has already met to discuss how it would like to reorganise itself. As an organisation that has been running for a number of years and in line with any other such bodies, it's important that we both reflect public interest, where appropriate, and also bring lay members on to the committee to ensure that we have an external view. I will be chair for three years, but I would hope that at the end of that period the JIC will have agreed with The Insolvency Service how it works with them and other stakeholders so it has a stable platform to develop from. I mention The Insolvency Service as, clearly, they are an important factor and determine in part the need for change, and have their own policy agenda. By sharing their agenda and policies with the JIC, we can effectively work with them to develop appropriate standards with, hopefully, the minimum of fuss.

So the JIC can set standards without reference to The Insolvency Service?

It is absolutely essential that The Insolvency Service are a party to standard setting, so that they believe that they are both fit for purpose and also achieve the aims that The Insolvency Service wish them to achieve.

Why are there so many RPBs? Doesn't that make it harder for the JIC to be effective?

One of the issues for the JIC is insurmountable, and that is the fact that the United Kingdom has different insolvency legislation in England and Wales, Scotland and Northern Ireland. While devolution may be politically appealing it does create a regulatory burden that cannot be avoided.

How should The Insolvency Service ensure consistency of regulation across the RPBs while ensuring that the regulation is speedy and effective?

The JIC is working with the RPBs and The Insolvency Service to ensure a consistency of presentation and disclosure across the RPBs, which should aid creditors and other users of insolvency processes. It is recognised that each of the RPBs has its own internal by-laws, but it may be more appropriate to have a consistent level of, » for instance, publicity for IPs who have failed to achieve the required standards. By demonstrating this in an open and transparent manner other IPs can learn from the mistakes, and the public will gain a better trust of IPs.

What is the JIC currently working on, and are there plans to introduce new SIPs?

One of the actions of the JIC recently has been to review a number of the existing SIPs in order both to update them to ensure they are more relevant to IPs and also to make them as clear as possible. This review process involves full consultation with IPs but also with other stakeholders. There are currently no plans for new SIPs, but a number of the existing SIPs do require some amendment. The JIC is always keen to hear from the profession with suggestions for change to existing SIPs or the introduction of a new SIP.

If the proposal for mandatory advance notification to creditors of pre-packs to connected parties were still to be alive by the time this interview appears, how could it be laid to rest?

If law is laid down in accordance with the proposed pre-pack legislation then the first question to answer is will there still be a need for SIP 16, and the answer to that isn't clear. The profession would want a SIP as it should give guidance on disclosure, but making black letter legislation doesn't always solve the problem, as parties then spend longer looking at the letter rather than the spirit of the law. Principles-based legislation makes greater sense, as guidance can be given on what the IP might want to do. The suggested amendment on pre-packs talks about creditors advising the IP that they are not comfortable with a proposed transaction – but the IP may have little alternative, and that will cause even greater consternation and possibly complaints to the RPBs. Widening the definition of connected parties to include funders (and here I mean the clearing banks) may seriously undermine the use of pre-packs and damage the rescue culture.

> "One of the actions of the JIC recently has been to review a number of the existing SIPs in order both to update them to ensure they are more relevant to IPs and also to make them as clear as possible."

Sarah Houghton is the publishing manager of *RECOVERY*.

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