

RECOVERY

Professionals in trouble

As the recession deepens even some professionals are feeling the pinch

Brendan Barber, TUC General Secretary

Better communication makes for effective management of insolvency situations

Professional practices could be victims of the downturn

Red flags to watch out for

Trading on a private school

The human face of insolvency

Changes to insolvency advertising

The IS is reviewing its policy

Trust busting: advice for creditors

The protection afforded offshore trusts

Interview Peter Sargent, new R3 president

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How to avoid becoming a wolf's dinner
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Plus

Legal update, Economic snapshot: Yorkshire Region, and new R3 membership benefits



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Editorial

We need to catch up. The media and public perception have moved on. Insolvency practitioners were always going to be a target for anger and misplaced envy in a sharp economic downturn, but the situation is seriously exacerbated by our collective failures. Why do we not communicate better about the good we do, the skilful and courteous service we provide and the value we produce? Why do our (far too many) regulators not swiftly, efficiently and effectively stamp out behaviour among our number that is, or is perceived to be, inappropriate?

We have some world-class practical minds in the profession and they should turn to addressing these issues. Pre-packs are widely misunderstood and heavily tarnished by occasional actual or perceived abuse. Clear and timely communication with creditors, every time (remembering that almost invariably it is creditors generally for whom we act), and intolerance of abuse are needed. Fees are often also dealt with poorly, with inadequate transparency on the one hand and a statutory and regulatory regime better suited to the 19th than the 21st century on the other.

Let's be more joined up. R3's political and media communication has improved noticeably in recent years (although there is no room for complacency), but the profession needs far more influence with law makers. Our regulatory system is lamentable, beset as it is by unfortunate accidents of history and institutional self-interest. Yet it is not beyond redemption. The Insolvency Service could achieve a great deal in co-operation with the profession, significantly expanding collaboration on policy and on creating law that works well. At the same time we could introduce an infinitely more unified and respectable regulatory system.

Dealing with the problems effectively is in all our professional and commercial interests, even if we, as IPs, have to pay more for the better regulation. Clear communication in every case and regulation that gives comfort to users and observers of the profession will mean we can concentrate on and enjoy the good work we do, and be paid properly and without rancour.

C. Laughton



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



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Brendan Barber, TUC General Secretary

Better communication between union representatives and IPs, says Brendan Barber, can be the most effective way of managing an insolvency situation.

Recessions wreck lives, put strain on families and damage communities. This one will be no different, with estimates that the Insolvency Service this year will deal with around 200,000 redundancy payments and other claims.

Insolvency practitioners are on the front line. When they rescue a business, it is not just good for creditors, shareholders and the wider economy, they will stop lives being ruined, homes being repossessed and families breaking up.

Working together

The TUC is keen to find ways of working with The Insolvency Service and R3 to promote good employment practices, to increase genuine communication between practitioners and union representatives and to ensure that workers' interests are better protected during the economic downturn.

There is nothing worse than finding out that you have lost your job from the breakfast news with your family. Such 'cornflake' redundancies are not just cruel, but make staff co-operation harder to secure and the bad PR can make rescue more difficult.

In insolvency situations unions will naturally work to protect the interests of the workforce, by seeking to avoid job cuts, secure decent severance packages and access to training.

Unions communicate with the workforce effectively

But trade union representatives also keep members informed of developments. Sharing information with union representatives on a regular basis is the most effective way for insolvency practitioners to communicate with the workforce.

Unions tell us that some practitioners are reluctant to share information with unions because they are worried about confidentiality, for example about possible buy-outs. Yet government guidance confirms that the disclosure of information about proposed redundancies, including information about a plant closure or possible takeovers, to union representatives for consultation purposes will not breach stock market rules.

Where confidentiality is necessary, union reps can be made subject to confidentiality obligations. Every day union reps are told information in

confidence – and respect that. They can see that leaking information can jeopardise future prospects of saving members' jobs.

And when they know that there are real prospects, unions will be in a position to reassure affected employees that genuine efforts are being made to maintain employment. When they know that the picture is bleak and that closures or redundancies are inevitable then they can help victims make plans and access training.

The legal obligation

But providing information and consulting with workforce representatives is not just good practice, it is a legal obligation. Where collective redundancies (more than 20 employees being laid off in a 90 day period) are proposed, the law requires insolvency practitioners to inform and consult with workforce representatives. In unionised

Consultation should also cover issues such as ways of avoiding redundancies, of reducing the number of dismissals involved and mitigating the effects of the dismissals. Consultation should be genuine and must be undertaken *'with a view to reaching agreement'* with the union or employee representatives. The European Court of Justice has ruled that this involves 'an obligation to negotiate and envisages compromise and change' (*Junk v. Kuhnel* [2005] IRLR 310).

Effective consultation with employee representatives must begin in good time and provide unions with the opportunity to influence the outcome. They should be able to present alternative options, respond to financial difficulties and explore opportunities for redeployment and training. The TUC takes the view that the issuing of an insolvency notice should trigger the duty to consult.

“The TUC takes the view that the issuing of an insolvency notice should trigger the duty to consult.”

workplaces the consultation must take place with union representatives. In other workplaces, practitioners must inform and consult with either existing consultation forums or with specially appointed or elected workplace representatives.

Failure to comply with these duties will have serious financial implications for the organisation, with employment tribunals having the power to make protective awards of up to 13 weeks' pay per affected employee.

Consultation

Representatives must be given sufficient written information to be able to engage constructively in consultation. The types of information that must be provided include:

- the reasons for the proposed redundancies;
- the numbers and descriptions of employees it is proposed to make redundant;
- the total number of employees employed by the employer at the establishment;
- the proposed method of selecting the employees for redundancy;
- the proposed method of carrying out the dismissals, taking account of any agreed procedure, including the period over which the dismissals are to take effect;
- the proposed method of calculating any redundancy payments.

The consultation must start at least 30 days before the redundancy notices take effect where the company is proposing to make between 20 and 99 employees redundant and at least 90 days before the redundancy notices take effect where 100 or more redundancies are proposed. No notices of redundancy can be issued to affected staff before the consultation has been completed, although consultation with individual employees can take place at the same time as the collective consultation.

If there are to be job losses unions will also expect Jobcentre Plus to be involved from the start to make the most of their Rapid Response Service (RRS), but this too does not always happen. RRS can help workers get ready to claim benefits and provide access to jobs or training elsewhere.

No insolvency will be without pain for staff. But there are both moral – and important legal – duties to get it right. □



Brendan Barber
is General Secretary
of the TUC.

President's column

Peter Sargent sets out his agenda for his presidential year and has three key aims in mind.

To start, I must congratulate Nick O'Reilly on his year as R3 president. He is certainly going to be a very hard act to follow. In particular, his work in getting insolvency on the political and media agendas has been fantastic. I will be working hard to make sure that all of the good work continues and we keep up the momentum started by Nick.

So what are my plans for the year as R3 president?

I see myself as having three main issues to maintain and raise the profile of R3 and us IPs as members. In essence: ensuring value for R3 members, financial education and shaping the perception of IPs.

- Firstly, and perhaps it doesn't sound very exciting, I want to ensure that R3 keeps providing value for money to members. And what does this mean in practice? Well it's about continuing to promote IPs and what we do to the press and politicians; producing timely and quality technical updates, and taking the lead on the production of SIPs; providing relevant quality courses and networking opportunities; and being proactive and providing you with what R3 thinks you need. Which is why, like Nick, I'll be doing a tour of the regions this year to try and meet as many members as possible and to listen to what you want R3 to be doing on your behalf.
- The second issue I'll be promoting this year is education. I want R3 to be part of educating the world at large on what we as IPs do and educate individuals and businesses to seek advice early, rather than adopting the ostrich approach. I've been working with the *ifs*, *School of Finance* on their schools' initiative for a

few years in schools in Huddersfield and Leeds and I am delighted that R3 is trying to encourage more IPs to sign up to this project. Pupils are fascinated by our professional 'war stories' and this makes for a very rewarding experience. So far over 50 R3 members have volunteered to go into schools but we want more of you to be involved, it would show a real commitment to the education of future generations by our profession if we could get 100 members to go into schools.

- And finally, I am starting my year as R3 president with Britain in a recession for the first time since the 1990s. This puts us in the eye of the storm as IPs individually and for R3 as a representative body. We are already seeing negative comments about IPs and I am sure that you've all

“The three main issues for R3 are ensuring value for R3 members, financial education and shaping the perception of IPs.”

been told many times 'I bet you're busy!' R3 hopes to continue to work with The Insolvency Service, the regulatory bodies and maintain our press and public affairs activities to make sure that IPs are seen as part of the solution rather than a focus for blame or frustration.

My presidential diary is already getting full with meetings and events. I am particularly looking forward to catching up with old friends and new when I visit the regions over the next 12 months. I look forward to seeing you soon. □

R3 news

2009 R3 AGM and results of elections for R3 council

The 2009 R3 AGM was held on Friday 24 April 2009 at the offices of Vantis in London. Nick O'Reilly stepped down as R3 president to be succeeded by Peter Sargent, Begbies Traynor, Halifax, with Steven Law, Ensors, Ipswich, becoming vice-president in Peter's place.

At the AGM, the results of this year's elections for the R3 council were announced. The successful candidates for the two vacant national places were:

Mark Andrews
Louise Brittain

The successful candidates for regional places were:

Eastern: Chris Williams
London & South East: Stephen Grant
North East: Jim James
North West: David Gray
Northern Ireland: Joan Houston
Scotland: John Hall
South West & Wales: Richard Hill
Southern: Julie Palmer
Yorkshire: Robert Brown

Turnout in this year's elections was almost 23 per cent. This is believed to be the highest on record.

Voting this year was done electronically for the first time. Members were sent an e-mail giving them log-in details. Generally, things seem to have gone smoothly. We received a very limited number of queries relating to the process and it is the intention that the same system will be used in 2010. Not only has the turnout risen but the amount that R3 has had to spend has fallen.

The Lite Conference

This took place on 13-14 May at the Crowne Plaza Hotel, Chester. It was a highly successful event attended by members from all parts of the country.



Peter Sargent
is a partner at
Begbies Traynor.

Piece Hall, Halifax



News update



Manchester Town Hall

£15,000 or less to be written off by the Official Receiver and avoid full blown bankruptcy. It is estimated that up to 50,000 people could turn to DROs as a way out of financial difficulty.

Peter Sargent, president of R3, commented, 'We believe that it's imperative that applicants consider all their options and understand the implications of a DRO.' He also remarked that the large number of people who could seek relief in this way would, 'put a massive burden on intermediaries and regulators'.

Q1 2009 statistics from the IS

The full force of recessionary conditions is demonstrated by the recent insolvency statistics. From Q1 2008 to Q1 2009 there has been a 55.3 per cent increase in corporate insolvencies and a 19 per cent increase in personal insolvencies.

There were 21,824 corporate insolvencies in the UK in 2008, an increase of 6,050 from 2007, and 106,544 personal insolvencies in 2008, down by 101 from 2007.



RECOVERY JobsOnline

R3 and GTI Media have launched a new service to R3 members. An electronic update featuring jobs from individual companies and recruitment agencies is being sent direct to members every month. To advertise jobs and ensure they are seen by 98 per cent of the insolvency sector contact Brendan McGrath 01491 826262 or Brendan.mcgrath@groupgti.com.

BRC urges action on credit insurance

Half of large retailers and over 40 per cent of small and medium-sized ones say the reduction or withdrawal of trade credit insurance has undermined their ability to trade. The findings, in the British Retail Consortium's (BRC's) *Credit Conditions Survey* published on 17 April, were used to try to influence the government to take action.

In the Budget, the chancellor announced a plan for 'top-up' insurance but Jane Milne, BRC business director, said, 'The 'top-up' scheme is... too little too late. Matching the trade credit insurance that private insurers are willing to provide is vital to helping fundamentally sound businesses weather the recession. But the unannounced detail confirms this safety net will be denied to companies whose cover was cut before 1 April, meaning the plight of many is being ignored.'

Director disqualifications at record levels

The number of directors disqualified rose by 9 per cent in the last financial year (2008–2009), according to figures from The Insolvency Service. This represents an increase from 1,145 to 1,252.

The average length of disqualification also reached a record level, rising 12 per cent to 6.5 years. Of the 1,252 directors barred, 203 were disqualified for 10 or more years. All are entered on a public registry that can be searched freely on The Insolvency Service's website.

Disqualified directors can also face up to two years in jail if they fail to pay a charge imposed by BERR for its costs incurred in bringing the disqualification proceedings.

New aid initiatives to help struggling SMEs

The Big Four accountancy firms and law firms Addleshaw Goddard and Halliwells in Manchester have pledged staff time worth an estimated £250,000 so far, to advise SMEs how to cope with the recession. The scheme is being run by the Chamber of Commerce in conjunction with Manchester City Council.

Essex County Council is setting up a bank to help SMEs struggling to obtain finance. £50 million will be set aside for loans of up to £100,000 for companies that have been trading for at least a year. The Bank of Essex could be set up within a year after going through the necessary legal and regulatory work. The initiative will work in partnership with Santander.

Trading goods and services with other business members is the thinking behind Bartercard. The system was set up in Australia, in 1991, and now operates in nine countries with over 75,000 trading members. It could prove a useful tool, particularly with smaller businesses or clients from cultures where bartering is more commonplace uk.bartercard.com.

In a similar vein, but based solely in the UK, Local Exchange Trading Schemes (LETS) are local community-based mutual aid networks in which people exchange all kinds of goods and services with one another, without the need for money letslinkuk.net.

Debt relief orders

DROs came into effect in England and Wales from 6 April. They allow borrowers who meet certain criteria to have a debt of

Insolvency Services figures: February 2009

Year	UK corporate insolvencies*	UK personal insolvencies
1992 (last peak)	29,783	36,794
2002	19,141	30,587
2006	17,819	107,288
2007	15,774	106,645
2008	21,824	106,544
2009 (predicted)	30,000	125,000

*Reflects the total number of company liquidations, receiverships, administrators and CVAs

Budget news

Business rescue procedures were announced in the Budget.

The Insolvency Service will consult on two important proposals:

- giving large and medium-sized companies breathing space while they seek legally binding CVAs with their creditors, without first having to place their companies into administration
- giving absolute priority to new money lent to companies in CVA or administration.

Business minister, Pat McFadden, said, 'Giving more businesses extra breathing space... and could make all the difference between a firm staying in business or entering insolvency – preventing the knock-on effects that failures have on employees, directors and creditors.'

For further comment on the Budget, including pre-packs, see the technical update on page 12.

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To whosoever hath, to him shall be given

What protection does the client of an insolvent firm get through the mechanism of a money trust? The judgment in a recent case raises questions that will have to be answered in the fallout from Lehman.

Key issues

- Financial Services Authority (FSA) client money rules do not override trust law principles.
- Only clients whose money is paid into a segregated account can claim on the account.
- Segregated clients may also be entitled to full payment of paper profits accrued at the date of the administrators' appointment.
- FSA to review compliance with the Client Assets Sourcebook (CASS).

The High Court has explored the rights of clients over the accounts of a failed broker, holding that the FSA's rules do not give any significant rights that weren't available under the general law. The decision may have implications for those hoping to make similar recoveries from Lehman; but it may not be entirely helpful.

Potential impact of *Re Global Trader Europe Ltd* on LBIE

The administrators of Lehman Brothers International (Europe) (LBIE) have posted a note on the internet referring to a recent decision of the High Court about the insolvency of another financial services company. The administrators said that although the LBIE client money situation is more complex, the judgment could be relevant to a number of the legal issues that have arisen in LBIE's administration. As a result, the administrators say that they are analysing the judgment and its potential impact on LBIE's treatment of client money claims.

The judgment is *Re Global Trader Europe Ltd* [2009] EWHC 602 (Ch), which concerned a company that offered spread betting and contracts for differences to its clients. The company went into administration, then liquidation. Clients had paid margin to the company to support their trading relationships. Global Trader was regulated by the UK Financial Services Authority and subject to its Client Money Rules. Under the FSA Client Money Rules, which are set out in the Client Assets Sourcebook, a regime is imposed upon firms to protect client money, in particular in the event of a firm's insolvency, so that client money does not form part of the firm's own insolvent estate (and is not, therefore, available for

distribution to the company's unsecured creditors). The CASS provisions require client money to be held on trust and set out the terms of such a trust, as well as requiring such trust monies to be segregated from the firm's own funds. The judgment is detailed and contains an analysis of the Client Money Rules that were in operation prior to 1 November 2007 and contained in CASS 4, in addition

amount on deposit with Lehman Brothers Bankhaus AG, itself subject to insolvency proceedings in Germany since November 2008.

The issues before the court in *Re Global Trader* were whether and, if so, to what extent, clients had proprietary claims to the money held by the company, whether or not it was held in segregated accounts. If clients did have proprietary

“Under the FSA Client Money Rules, which are set out in the Client Assets Sourcebook, a regime is imposed upon firms to protect client money, in particular in the event of a firm's insolvency, so that client money does not form part of the firm's own insolvent estate.”

to the rules applicable after this date and contained in CASS 7 as a result of Directive 2004/39/EC on Markets in Financial Instruments (MiFID). A further streamlining of the Rules has just taken place and came into effect on 1 January 2009.

The company operated on the basis that, under the FSA's rules, it was only required to hold the money of private customers (or retail clients following implementation of MiFID) in a trust account and therefore some £2 million was held in segregated client accounts. Margin received from intermediate customers (or, following MiFID, professional clients) had not been placed in segregated client accounts, although the court found that the company had failed to follow correctly the client money opt-out provisions under the pre-MiFID rules that permitted it to use the money for its own purposes, therefore concluding that the funds attributable to intermediate customers ought to have been segregated. The liquidators had over £20 million in the company's own accounts, with estimated claims against these funds totalling over £36 million, of which approximately £25 million represented the claims of the professional clients. In the context of LBIE the stakes are substantially greater with an estimated US\$2.1 billion segregated prior to the appointment of administrators of which they advise they have recovered approximately US\$1 billion with a similar

claims, then the money would be distributed to those with those claims, and would not therefore be available for unsecured creditors. If clients did not have proprietary claims, they would rank as unsecured creditors alongside, for example, the company's trade creditors, receiving a significantly lower dividend.

The questions that arose for decision

Did clients whose margin should have been paid into segregated accounts but was in fact just paid into the company's general accounts have any proprietary rights over the money in those general accounts? If not, should the liquidators be ordered to transfer money into segregated accounts thereby giving clients proprietary rights in priority to unsecured creditors?

The judge decided that the clients had no such rights. The funds received by the company were, initially at least, held in trust but, unless those funds had in fact been paid into a segregated account or could still be identified in the company's hands, the clients were now unsecured creditors only. No decision was reached as to whether it was possible to identify through tracing client funds that had not been segregated but it seemed highly unlikely, since the company's accounts had a high turnover and were frequently overdrawn. The judge had no difficulty in establishing that there had been either a breach of the rules regarding segregation >>

of client funds (which gave rise to a claim for breach of trust) or a failure by Global Trader to pay sums due under its contractual arrangements with clients, giving rise to a debt, but neither of these breaches would elevate clients to the position where they were entitled to share in the segregated assets.

For the clients whose funds had not originally been segregated, should the liquidators transfer into segregated accounts sums representing the profits made by the clients on transactions to the extent that this had not been done before the company went into administration?

The judge again decided that the liquidators should not do so. Until money was actually segregated, clients only had a contractual right to be paid their profits. Clients therefore ranked as unsecured creditors for these purposes.

On the day that the company went into administration, the company had instructed its bank to pay a large sum into a segregated account in order to replace a sum that had been withdrawn in error. That payment had not been made. Should the liquidators now make that transfer?

Once more, the judge answered no. If the transfer had been made, it would have stood; but until the transfer was in fact made, clients had only a contractual right to that payment.

Who was entitled to the money that had been segregated – all clients or only those clients whose money had been actually paid into the segregated accounts?

The FSA's rules (CASS 7.9, now CASS 7A) term administration a 'primary pooling event'; as a result of which clients are entitled to be paid a sum that is rateable to the client money held for them. The judge decided that the clients for whom the segregated money was held were those whose money had been paid into the segregated accounts, not those whose money should have been paid into the accounts. If money had been paid into the account but then withdrawn improperly, the losses would be suffered rateably by all clients; but if a client's money had not been paid into the account at all, the money was not held for that client and the client had no right to share in the segregated funds. Claims on the segregated accounts were therefore much reduced. In the context of LBIE the administration also constituted a primary pooling event. In circumstances where a shortfall arises in the client money pool, then according to the FSA rules, all the clients who have a claim in the pool would share pro rata in relation to their original entitlement. The administrators of LBIE have already made the point that the FSA rules provide for the costs of distribution

to be paid from the pool, so that even if they recover all monies, the clients will suffer some shortfall in relation to these costs.

Should a sum representing profits made by the segregated clients upon a notional closing of positions at the time of the appointment of the administrators be added to the segregated accounts?

An earlier decision in the case had determined that the notional profits and losses of those clients with segregated money should be quantified as at the date of the administration. The judge admitted that he did not *'find it easy to decide what the correct position is on this aspect of the case'* but concluded that money should be transferred by the liquidator into the segregated accounts to cover, in full, the shortfall arising from the overall profit that resulted from the notional closing of positions.

Should any profit made by a segregated client between the notional closing of their position and the actual closing of their position be placed in a segregated client account?

The court concluded that while the segregated clients should have the full protection of their segregated status until the appointment of the administrators, including the benefit of increases in value in their positions until that date, the protection should not continue after that date. The segregated clients should therefore be treated as unsecured creditors in respect of any profit that accrued after the administrators were appointed. At the same time, under the terms of trading between Global Trader and its retail clients (ie segregated clients) any loss that had been incurred could be set-off, in full, against any money held for the client in the segregated accounts.

So how does this decision affect those with assets still held by Lehman?

This is, as LBIE's administrators have said, not easy. However, it appears to indicate that, in order to be able to share in any segregated client monies that LBIE may hold, any particular client will need to show that its money is actually in a segregated account. In practice, it is likely the client will be reliant on the books and records of Lehman recording that some of the money held in the client account is held 'for the client'. In particular, the case illustrates that the FSA's Client Money Rules do not override the trust law principle that a person will only have a proprietary interest in money held by a third party if the money is still identifiable and that this is usually only possible if the money is segregated. If the client's money was never paid into the segregated account, even if it was meant to be (whether under the FSA rules or as a result of an express agreement) then there is no basis upon which such a person can claim a

proprietary interest in the segregated funds. The administrators of LBIE have already indicated in their FAQs for Trust Property dated 19 March 2009 that *'LBIE's policy was to segregate monies as Client Money that it understood to belong to the underlying customers of affiliates, but not the monies that belong to the affiliates themselves. Depending upon legal interpretation of the Client Money Rules post MiFID, namely whether there is a requirement to segregate affiliates' monies as Client Money, there could be a potentially significant under-segregation in relation to affiliates' Client Money entitlement.'*

In *Re Global Trader* the judge also makes reference to the fact that if a client's money has not been paid into the client account (in breach of the FSA's rules or of an express agreement) then the client may have an additional claim under section 150 of the Financial Services and Markets Act 2000 or for breach of trust, but this will only result in it being an unsecured creditor in the administration of LBIE. It will be in no different position than if there had been no obligation to place the money in a client account and the client had a claim in the administration of LBIE in the normal course.

The decision that those with monies in the segregated accounts should also be paid notional profits until the date of the appointment of the administrators in full may simply be a quirk of the earlier decision as to the date at which entitlement to monies in the segregated accounts should be assessed. If so, it may be that the earlier decision will not be followed in the administration of LBIE. Or it may represent a more general principle (as is suggested by the judge in paragraph 118 of the decision) which states that the further shortfalls *'were brought about by the administration and the impact upon it of binding legal rules'* in which case it really is a case of *'for whosoever hath, to him shall be given, and he shall have more abundance: but whosoever hath not, from him shall be taken away even that he hath.'*

The regulatory consequences

The UK regulators are well aware of the issues that have arisen in respect of Lehman. HM Treasury has established an Investment Bank Insolvency group to determine whether changes to insolvency procedures are necessary to resolve some of the issues that are emerging from the failure of Lehman Brothers. In particular, the group will investigate whether legislative, regulatory or market solutions are required to ensure the expeditious return of client assets in any future investment bank insolvency or if there is a necessity to strengthen market infrastructure. This group will, no doubt, take into account *Re Global Trader* and any subsequent decisions in respect of Lehman.

In the meantime, the FSA has highlighted an increased focus in this area. In a 'Dear Compliance Officer' letter on

20 March the FSA reminded firms of the record-keeping requirements in CASS. It will visit a number of firms in the second and third quarters of 2009, specifically focusing on CASS compliance. Following implementation of MiFID, firms need not segregate money held as collateral on the basis it is subject to a title transfer

The judgment in *Re Global Trader* clearly highlights the substantial risk that, where the client money trust requirements are not satisfied in an insolvency event, investors are not afforded any additional protection as a result of the FSA Client Money Rules. Whether a client gets protection through the mechanism of the

Those clients whose money is not segregated or who suffer from a shortfall in the client money account will have to ascertain their eligibility to claim for limited amounts under the Financial Services Compensation Scheme and prove as an unsecured creditor for any balance.

However, the FSA has previously taken regulatory action against senior management when there has been a breach of CASS. It has in some instances imposed prohibition orders preventing the individuals involved from continuing to work in the industry and in one instance it imposed a fine on the finance director of the firm. In a situation where there has been a failure of a significant firm and it has subsequently been discovered that there is a shortfall on the client accounts, disciplining a senior manager within the firm may be an attractive option for the FSA if it is subject to political pressure to be seen to take action. □

“The judgment in *Re Global Trader* clearly highlights the substantial risk that, where the client money trust requirements are not satisfied in an insolvency event, investors are not afforded any additional protection as a result of the FSA Client Money Rules.”

collateral arrangement. However, FSA guidance provides that firms must also comply with the client's best interest rule, which, in the FSA's view, means that the firm must, for retail clients, transfer to the client (or, presumably, to the client account) collateral that is no longer necessary. In the consultation on MiFID implementation, the FSA said it would be sensitive to firms seeking to 'push the envelope' by using the exemption for title transfer collateral arrangements to avoid providing client money protections to retail clients.

trust is wholly dependent on the good faith and operational integrity of the firm. The threat of FSA sanctions on firms may not be sufficient to ensure compliance.



Adrian Cohen (far left) and David Steinberg (centre) are partners in Insolvency and Restructuring and Simon James (left) is a partner in Litigation and Dispute Resolution at Clifford Chance LLP.

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Recent case summaries

Corporate and personal insolvency update from Stefan Ramel.

Corporate insolvency

Energy Holdings (No 3) (in liquidation), (1) James Robert Tucker (2) Jeremy Spratt v. Gold Fields Mining LLC [2009] EWCA Civ 173 (Mummery, Rimer, Sullivan LJJ)

Facts: On 31 March 2005, the creditors of Energy Holdings (No 3) (in liquidation) approved a CVA proposal made under the IA 1986. Under the terms of the CVA, the deadline for the submission of claims by C's creditors was 45 days after 31 March 2005, namely 16 May 2005. Gold Fields Mining LLC was the assignee of a creditor of C. The assignor first learned of the CVA in around January 2007. GFM's claim for \$230 million was not received by the CVA supervisors until 16 July 2007; they rejected the claim. GFM applied to court to overturn that rejection and at first instance was successful. The supervisors appealed. Clause 23.5 was the provision in the CVA on which the case turned. It envisaged two scenarios in which late submission of a claim would not debar the creditor from receiving a distribution: (i) if the court or the supervisor considered that the failure



particular drafting of clause 23.5 of the *Gold Fields* CVA. In reaching its decision, the court was very aware of the uncommon dual contractual and statutory nature of a CVA and the fact that a CVA binds those creditors who did not have notice of the CVA meeting. In effect, the court in *Gold Fields* sought to construe clause 23.5 in a

carried thanks to the votes of several relatives and associates of D whose debts were founded on alleged loans. C challenged the decision of the meeting and alleged that vote-rigging had taken place. C also sought declarations that N, an IP who was the proposal nominee, had failed to meet the appropriate professional standards in respect of the preparation of the proposal, his failure to adjourn the creditors' meeting and the level of N's participation in the subsequent litigation initiated by C.

Held: C's challenge was successful. The judge found that some of the votes cast by D's relatives should either have been rejected entirely or admitted for a smaller amount, such that the majority in favour of the proposal would have been 73.52 per cent. The proposal would have been rejected; as a result, the judge did not order a further meeting. He did go on to find that N had fallen short of the expected professional standard insofar as his preparation of the IVA proposal and his participation in the ensuing litigation were concerned, but not in respect of his conduct at the creditors' meeting on 29 March 2007.

Comment: In *Tradition*, N found himself, from a very early stage, at the centre of a hotly contested dispute between D and his family and C, a substantial creditor that had raised numerous queries concerning the adequacy of the information supplied by D to N. In those circumstances, the judge was critical of N for summoning a creditors' meeting before more detailed investigations of the debts of D's relatives had been undertaken. The lead evidence on behalf of D in response to C's legal challenge was, in the first instance, given by N; the judge accepted that this was manifestly inappropriate. The legal costs of the litigation have not yet been dealt with by the judge; in the light of his findings in respect of N's conduct, there is a risk that N will be liable for the costs of the litigation. *Tradition* contains a thorough analysis of the duties of an IVA nominee both before the creditors' meeting is summoned, but also if litigation ensues; it is essential reading for all prospective nominees and supervisors. □

“*Gold Fields* is an important decision, which contains valuable guidance for practitioners on the construction of standard terms that govern CVAs.”

to lodge the claim in time was not due to the creditor's lack of diligence or his wilful default or (ii) if the creditor did not know of the CVA meeting and, within 28 days of learning of the CVA, lodged his claim. GFM clearly did not fall within (ii); it claimed to fall within (i).

Held: The supervisors argued that category (i) only applied to creditors who had notice of the CVA meeting, and that creditors who did not have notice of the CVA were catered for by (ii) exclusively and thus could not come within (i). The High Court and the Court of Appeal rejected the supervisors' arguments; the court ordered the supervisors to adjudicate on GFM's claim notwithstanding the fact that it was submitted after 16 May 2005.

Comment: *Gold Fields* is an important decision, which contains valuable guidance for practitioners on the construction of standard terms that govern CVAs, and in particular CVA clauses that impose a deadline for creditors to lodge claims with the supervisor. The court in *Gold Fields* recognised that, although conditions such as the *Gold Fields* clause 23.5 are intended to promote certainty and finality, they can be subject to exceptions, as exemplified by the

manner that would ensure its practical effect made good commercial sense. On the particular facts of *Gold Fields*, this meant that clause 23.5 would not be construed in a manner that was unjustifiably disadvantageous only to those creditors who did not have notice of the CVA.

Personal insolvency

Tradition (UK) Limited v. (1) Eaitisham Ahmed (2) Andrew Andronikou (3) Kashif Ahmed (4) Saeeda Ahmed (5) Samina Ahmed (6) Tahir Bhatti (7) Hornby Street Limited (8) Discount Designer Wear Limited [2008] EWHC 2946 (Ch) (Andrew Simmonds QC, sitting as a deputy judge of the High Court)

Facts: On 13 February 2007, D made an IVA proposal under IA 1986 to his creditors; he obtained an interim order under section 252 of IA 1986 on 27 February 2007 as a result of the presentation by C, a creditor, of a bankruptcy petition on 23 January 2007. C was a spread betting company to whom D was alleged to owe £4.7 million. The IVA proposal was approved by 77.94 per cent of the creditors at a meeting held on 29 March 2007. C voted against the proposal. It transpired that the proposal was only



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Technical update

Richard Heis outlines the changes to law and practice that are on the way.

In his foreword to the latest edition of a compendium of insolvency legislation, the Hon. Mr Justice Blackburne, says: *'The world of insolvency law and practice is never static and, in the midst of the most turbulent financial period that I can remember, the legislative structures established in this country to deal with corporate and individual business and financial failure are being tested as never before.'*

Certainly insolvency law seems to be in a state of perpetual change. Since its implementation on 29 December 1986, the

Budget 2009 announces that the Insolvency Service will consult on:

- *providing for new funding lent to companies in Company Voluntary Arrangement (CVA) or administration to have absolute priority status, to allow firms in difficulties to access the funding they need to get back on track; and*
- *extending the moratorium on creditor action against small companies trying to agree a Company Voluntary Arrangement to medium and large companies, so giving them breathing space to try to reach agreement with creditors.*

administrations, by virtue of the administration expense regime, and the administrator's power to grant security. If it is suggested that new lenders should be able to take security in advance of existing secured creditors, against their wishes, this would be a substantial infringement of existing creditors' rights, and is likely to raise serious concerns among the lending community. There is a tendency to look to the United States for examples of how we could improve our own insolvency procedures. Under the US Bankruptcy Code, any funding secured by an equal or priority charge over an asset which is already charged, requires court approval, and is only permitted if there is 'adequate

“To prevent creditors from being treated unfairly through abuse of pre-pack sales, the Insolvency Service will also publish a report in June 2009 on the operation of the first six months of the regime monitoring pre-pack sales and will then publish further follow-up reports on an annual basis.”

Insolvency Act 1986 has been modified or affected by more than a dozen pieces of further legislation, and the Insolvency Rules have been subject to a similar process of constant amendment. Now it looks as though more change is on the way.

The Budget Report

The Chancellor's *Budget Report* on 22 April 2009, included the following statement:

'The government will work to ensure that the regulations and procedures for dealing with troubled companies work to facilitate company rescues whenever they are appropriate, that the maximum economic value is rescued from companies that get into difficulties, and that the knock-on effects of company insolvencies on their creditors are minimised.'

To prevent creditors from being treated unfairly through abuse of pre-pack sales, the Insolvency Service will also publish a report in June 2009 on the operation of the first six months of the regime monitoring pre-pack sales and will then publish further follow-up reports on an annual basis.'

Clarification needed

The *Budget Report* is light on detail, but raises a number of interesting questions. The problems of funding administrations and company voluntary arrangements are well known, and it is to be welcomed that the government has recognised this. However, it is not clear from the *Budget Report* what 'absolute priority status' is supposed to mean. To an extent, priority funding is already available in

Technical Bulletin

Technical Bulletin 86 was issued in April. Its contents included:

- Special Resolution Regime for Ailing Banks and Building Societies
- New Insolvency Advertising Regime
- Debt Relief Orders
- Insolvency Deposits and Fees – Increases and Amendments
- Pension Protection Fund – Notifications of Insolvencies
- Pre-packaged Sale did not Transfer Employees under TUPE
- Prescribed Part – Disapplication Should be the Exception not the Rule
- Administration – Court of Appeal Refuses Leave to Bring Proceedings to Terminate Occupation Licence
- Directors and Controlling Shareholders as 'Employees' – Guidance from the Court of Appeal
- Transport Companies in Administration and Vehicle Operators Licences
- Fire Risk – Advice from the London Fire Brigade.

protection' of the interests of the existing charge-holders. However, this is an area that is notoriously fraught with difficulties. Moreover, the system of corporate lending in the United Kingdom is very different from that in the United States, and simply importing selective elements of the US Bankruptcy Code is neither advisable nor practicable.

The proposals to extend the moratorium on creditor action to all companies would presumably involve the

column is being written shortly after the Budget Statement, and it is possible that by the time this edition of *RECOVERY* appears in print, the consultation will have been issued, and we will have a clearer idea of exactly what is being proposed.

Timetable for Insolvency Rules' change

Members will also be aware of the exercise that has been under way for some time to consolidate and streamline the Insolvency Rules. During the course of this exercise, it

to revise its timetable, which is now as follows:

- 6 April 2010 – Legislative Reform Order and Insolvency (Amendment) Rules 2010 to implement the full programme of modernisation measures proposed, by way of changes to the Insolvency Act and the existing Insolvency Rules;
- 6 April 2011 – Consolidation of the Insolvency Rules by publication of a completely new set of Insolvency Rules together with several smaller insolvency statutory instruments.

Finally, it is worth noting that lack of available funding during an insolvency process is often a key reason for effecting a disposal by way of a pre-packaged sale. The purpose of the disclosure requirements set out in Statement of Insolvency Practice 16 is to assist practitioners in taking the necessary steps to satisfy themselves that the process can be properly justified. We await with interest the publication of the Insolvency Service Report in June. □

“... substantive changes to the Rules... include a legislative reform order to make necessary changes to the Insolvency Act that will allow the Rules to provide for matters such as electronic delivery of insolvency notices, and use of websites for sending reports and other documents to creditors.”

extension of the existing Schedule A1 procedure, and is likely to raise the same questions regarding the role of the nominee as have been raised in relation to small companies.

In a statement issued the same day as the *Budget Report*, the Insolvency Service announced that it would be consulting further on these proposals in June. This

also became clear that some substantive changes to the Rules needed to be made. These include a legislative reform order to make necessary changes to the Insolvency Act that will allow the Rules to provide for matters such as electronic delivery of insolvency notices, and use of websites for sending reports and other documents to creditors. This has led the Insolvency Service



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Legal Q&A

Arun Chauhan answers your insolvency queries.

I am the trustee in bankruptcy for A. The bankruptcy petition was presented in excess of five years ago. Recently a transaction has been discovered where A had sold shares in his company to a person (B) who appeared to be an unconnected party. This transaction was in fact a concealment of the start of a number of transactions leading back to connected parties to A for nil consideration. The creditor (C) who has discovered the fraud wants me to pursue a claim to set aside the original share sale from A to B and the subsequent transactions from B to other connected parties. Am I out of time?

The setting aside of transactions at an undervalue in bankruptcy is governed by S339 of the IA 1986, which gives the trustee a statutory cause of action. S339, however, does require that the transaction in question has been to a connected party and to have occurred within five years ending on the day on which the bankruptcy petition was presented. The transactions have to be to an associate of A as defined by S435. In this case, S339 would leave you time barred.

S8(1) and 8(2) of the Limitation Act 1980 (LA 1980) may assist in that it permits an action to set aside, as being one prescribed by statute, be brought within six years if for money and for twelve years for non-monetary claims. Time would run from the date of the bankruptcy order. Guidance can be found in *Re Priory Grange (Walthamstow) Ltd* 2001.

If the transaction is not one that occurred within six or twelve years respectively of the types of transaction one would consider setting aside, the better angle would be for C to consider an action pursuant to S423 of the IA 1986, even if C may have become a victim despite the transaction being made without C in mind (*Random House v. Allason* (2008)).

As to accrual of the right of action the Court of Appeal (CA), in *Hill v. Spread Trustee* (2007), stated an action under S423 accrued when a person acquired the status of a victim of the transaction. If the claim is brought by the trustee time runs from the bankruptcy order; if brought by C, it shall be from the time he became a victim, ie from when the fraud was discovered re the share sale transaction.

In the case of *Giles v. Rhind* (2008), the CA confirmed a claimant is able to rely on concealment to extend the limitation period, whenever it began. The



“The setting aside of transactions at an undervalue in bankruptcy is governed by S.339 of the IA 1986, which gives the trustee a statutory cause of action.”

court held by making the transfer with the relevant intent, A had deliberately committed a breach of duty when the breach was unlikely to be discovered for some time, (deemed concealment) within S32(1) of the LA 1980. This permits C as the creditor to rely on the extension of the limitation period.

It is therefore more beneficial to reach into the past pursuant to S423, which would be on behalf of all creditors.

I have been appointed liquidator of a company and received a claim from a creditor seeking to establish their status as a secured creditor pursuant to an unregistered debenture. It is alleged the director of the company fraudulently removed plant and machinery that stood as security for the debenture. How should I deal with this creditor?

Demonstrating to a creditor you are taking all reasonable and practical steps of investigation as to company assets is important. The primary approach must be to consider the security interest, and whether it could properly be considered as a type of security set out in the 1986 Act. If the charge doesn't fall within one of the specified categories, the non-registration will make it void against you as the liquidator. The creditor must be informed of the consequences regarding priorities and their being an unsecured creditor. Do carry out careful investigation to ensure registration has not been overlooked by the company.

Presuming the creditor didn't undertake registration, you would need to investigate the director's removal of the plant and machinery from the company's premises. Your conduct could be challenged in court if you haven't taken steps that would otherwise have been reasonable. If there is no evidence from the director that items in question do not belong to the company, consideration must be given as to whether a claim is to be brought for misfeasance (section 212 of the 1986 Act) against the director, or a claim he entered into a transaction at an undervalue thereby defrauding creditors (section 423 of the 1986 Act).

It is open to the creditor to seek permission from the court pursuant to section 424(1)(a) of the 1986 Act to bring the claim against the director seeking to pierce the corporate veil. It's imperative to keep a watching brief on such proceedings to ensure any recovery is distributed for the benefit for all creditors as a whole and not just the party itself.

Fraud within the insolvency regime is a common thread and more so in this financial climate. Liquidators must always be open to fraudulent schemes within a company and in respect of the motive for the company's formation, to assess whether that in itself constitutes a fraud, or a façade to evade liabilities to potential creditors (*Hare v. Commissioners of Customs & Excise* (1996)). □



Arun Chauhan is a partner and joint head of the Fraud & Asset Recovery department at Challinors.

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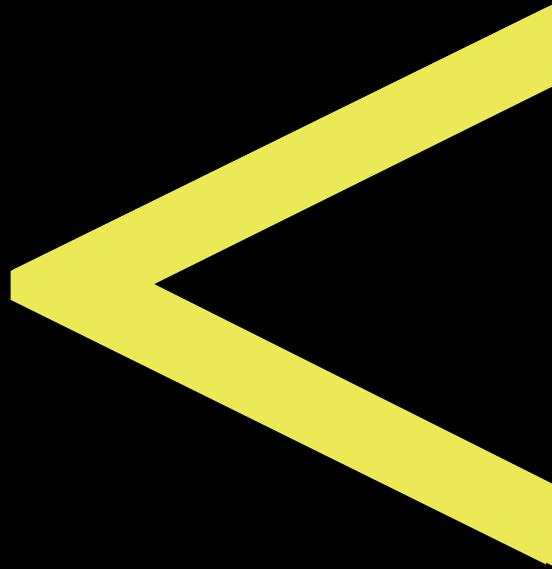
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The LLP movement and liability issues

The advantages of LLPs outweigh those of partnerships in most cases.

Limited Liability Partnerships (or LLPs) have been available as a business vehicle since 6 April 2001. There are nearly 47,000 LLPs on the English Register, a mark of the new vehicle's success. The roots of the LLP law go back to 1996 and the plan by two top accounting firms to use a new LLP law being promoted by the States of Jersey to meet their need for limited liability. The main features of the legislative period from 1996 to 2001 were: (i) that the UK law would require the LLP to be a body corporate and to file accounts prepared under UK GAAP; (ii) that LLPs would not

drawings and other members' distributions is an important part of effective risk management in the modern LLP and is not always observed. Tax reserving, which is very common in large professional practices, puts those funds, set aside to pay members' future tax bills, at potential risk in insolvency because they are mingled with the other funds of the LLP and vulnerable to being part of the pool of cash available to general creditors. The provisions of the 1986 Insolvency Act are broadly applied to LLPs and particular care needs to be had of the clawback provisions on allocations paid to members while the LLP was insolvent or had no reasonable prospect of avoiding insolvency.

numbers. But the driver to limited liability now is Y generation recruitment. 'Why be in a partnership if you can have limited liability?' the new talent joining the professions ask. Add to that the way so many other businesses have chosen the LLP model, and it seems surprising so many partnerships still survive. One of the reasons is the inability of smaller partnerships to avoid personal guarantees if they convert to an LLP.

PI cover is still the first line of defence

We remain of the opinion that the UK LLP liability shield is ostensibly strong and that our courts should afford those using it good protection. This assumes that those trading in LLPs use appropriate engagement terms, have reasonable PI cover, and that those contracting with LLPs understand the nature of the LLP or themselves have limited liability. PI cover is still the key to protection because the LLP is a line of last resort and the business will be lost.

There are appointments that are personal that cannot be held by an LLP itself. Among these are appointments taken by insolvency practitioners (IPs). The law states that these appointments are personal. When their partnerships decided to convert to LLPs, IPs faced a situation where they were remaining exposed to claims personally while others would enjoy the LLP's liability shield. However the IPs, as partners, were exposed to audit and tax advisory risk under joint and several partnership principles. Because the LLP would protect them from those risks the LLP was still attractive. Claims against IPs are rare. Indemnities from PI insurance and the estate are often 'adequate'.

Looking back to 6 April 2001, we are sure few would have predicted that there would be 37,000 LLPs just eight years later. The LLP has been a great stimulus to wealth production in the UK. We forecast more buoyant years ahead for the LLP. □

“Lord Goldsmith urged the Minister of State to put into the LLP Act specific provisions saying that negligent members would be liable and could not avail themselves of the LLP veil. The government refused to do so.”

be restricted to the regulated professions, as originally planned; and (iii) that in return for full financial disclosure UK LLPs would have a more robust liability shield than many overseas LLP models, especially those from the USA where individual liability was written into the laws. The original consultation paper had stated that individuals who were negligent would be personally liable.

The continuing rise of the LLP

Today the LLP is the preferred business model for all top advisory businesses that do not have outside capital. It is flexible, avoids lots of corporate strictures that are in conflict with owner-managed businesses, and is tax-transparent. Indeed all people businesses that distribute earnings as profits in a year should be LLPs unless there is some good reason to the contrary.

In a loss scenario members of an LLP would be at risk for their capital, which would be forfeit in the same way as share capital, and for all other monies left by them in the LLP or lent to it at the time of default. However, monies that have been properly allocated to them before default and loans should rank equally with other creditors of the LLP absent a contract to the contrary. Making clear allocations of

The LLP's liability shield remains untested in our courts. Views as to its strength are mixed. Some feel that professional advisers always owe a fiduciary duty to the clients they advise, making piercing the LLP's corporate veil relatively easy. Lord Goldsmith intervened in one of the debates on the LLP Bill to warn the government of a case before the House of Lords, which would mean that the LLP's shield would *prima facie* be adjudicated as strong; his Lordship urged the Minister of State to put into the LLP Act specific provisions saying that negligent members would be liable and could not avail themselves of the LLP veil. The government refused to do so.

Now LLPs are common place. The top accounting firms are all LLPs as are most major law firms. For many firms LLP status is a comfort in the recession, despite the fact that they may have to publish bad



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Issues facing the legal profession

Steve Billot examines the causes of the financial problems besetting some legal firms and suggests that change and possibly insolvency may be the future.

As a profession we are starting to see an increasing number of troubled legal service firms approaching us for advice about their financial problems. In this article we will look at some of the causes of this, try to understand the implications for the sector and consider the possible insolvency options that some of the more distressed firms may have to consider using.

Background to the market

The legal market is highly fragmented with almost 10,000 firms of which 84 per cent is made up of four partners and below (2007 figures).

In our experience, the equity partners in the smaller firms are usually in their mid to late 50s and the majority are men. Succession is now a real challenge for partners who want to retire but are not able to. In addition most of the smaller firms are still run as partnerships with joint and several liability for all those who hold themselves out to be a partner irrespective of whether or not it is on an equity or salaried basis.

Historically, this has been a heavily regulated and protected sector. To be a partner of a law firm (or member of an LLP or Limited Company hereafter collectively called law firms) you have to be a qualified solicitor – so the only commercial

competition has come from similarly trained and skilled people. This has led to a lack of external competition as only solicitors can practice law.

The recent passing of The Legal Services Act has changed this. Since 31 March 2009 firms have been able to form legal disciplinary practices and form alliances with non-solicitors, with certain constraints. More radically after the

manager or senior cashier is responsible for the production of management information. Very few solicitors understand how a law firm actually works at a business level. They are not trained to understand financial matters, frequently do not recognise the difference between profit and cash, and rarely budget in a meaningful way.

Therefore the firms are usually run by cash management and are reactive to

“The Legal Services Act... means that since 31 March 2009 firms have been able to form legal disciplinary practices and develop alliances with non-solicitors, with certain constraints.”

relevant guidance and rules are established by the Law Society (probably in 2011–2012) non-solicitors will be able to become owners of law firms. This is commonly known as “Tesco Law”. In reality some large organisations may well establish legal services divisions and some law firms may seek external capital (via both private and public means) in order to finance and grow their businesses.

Practice management

Unfortunately, many small firms (ten partners and below) lack sophisticated practice management. Often the office

problems. When the cash runs out they think about chasing debtors, cutting costs or, eventually, talking to the bank. This is often an area where our advice can help firms to improve on their working-capital management and thereby save them from more serious problems.

In addition, very few firms have the skills and experiences needed to manage in a downturn. Even though the housing market started to decline in late 2007 many domestic conveyancing firms did not shed staff. The reason for that was quite simple. In the previous ten years their biggest problem was finding and keeping quality

conveyancing staff. They were worried that if they lost staff and the turnaround was a short blip, then they would not be able to do the work when the market recovered. As a result many conveyancing firms did not start shedding excess staff until summer 2008 by which time they had incurred substantial losses.

Merger mania – points to look out for

In the last year or so we have seen an increasing number of mergers taking place. Some of these have been ill considered and poorly implemented and as a result the consequence of the merger to both previous practices has been disastrous. Defensively merging without ensuring that the newly created business is properly managed can be financially disastrous. It is, therefore, much better in many cases not to have a merger but to have one party actively take over the other. That way business cultures are imposed and proper financial management can be implemented.

Funding for legal firms

For the last 20 years this sector has not been a problem for banks who have also had the benefit of the credit balances held on behalf of clients, substantial transmission income and local reciprocity from the solicitor clients.

As a consequence, if practices underperformed or were inefficient in managing their working capital they could easily obtain additional facilities from either their bank or other funders. For the bank the threat was not that the business would fail but that another bank would take the business if additional support was not given.

Over time this has resulted in many small legal firms becoming more and more heavily geared as partners have drawn out more cash than the business has generated. The recent turmoil in the global financial markets has now made access to capital more difficult and lenders are looking to understand the viability, working-capital cycles and cashflow requirements of a practice before lending it any money.

The traditional partnership model historically did not enable banks to have security over the assets of the firm. In more recent times banks have taken fixed

charges over debtors and sometimes work in progress to seek to improve their position. That security though is, in itself, largely unenforceable and is only a help in establishing a priority over other creditors should the business fail.

The increasing number of LLPs and limited companies that are now being used by solicitors means the banks can enhance their security by taking debentures over the business assets.

Even the granting of a debenture provides only limited power to the bank. The only people who can currently operate as owners of a law firm are solicitors. Therefore, the appointment of administrators, unless there is an immediate disposal by way of a pre-pack to a 'successor practice', will need to involve an insolvency practitioner solicitor.

An insolvency process

Legal practices will, unfortunately, now fail in increasing numbers, which is something that the sector has never previously experienced. Professional practices fail for lack of cash not usually a lack of profit. Their problems can quickly escalate and

fact that many are run as partnerships means that this is a very specialist area. All too often the financial pressures lead to internal disputes, which can lead to the disintegration of the firm.

So what options may be available? Firstly, this is driven by the nature of the firm. For partnerships we are seeing an increasing number of Partnership Voluntary Arrangements being proposed (with and without interlinking IVAs for the partners). Most firms do not have a large number of unsecured creditors so the arrangements usually only need the consent of the bank and HMRC who make up the majority of the debt.

In some cases the practice itself may not be viable and therefore will need to be taken over by another firm and the dividend in the Voluntary Arrangement will be from the realisation over time of the WIP and debtors.

With the increasing number of LLP and Limited Companies now being used as trading vehicles we have seen the use of all of the corporate routes as well. The first few CVAs have been approved as well as some administrations with a pre-packed disposal

“The issues and complexities surrounding the failure of a legal practice are probably greater than for any other industry.”

frequently the firm and its bank will be faced with the challenge around whether or not to pay wages. If a practice ceases without control then there is the likelihood that the Solicitors Regulation Authority (SRA) will intervene in order to protect clients' interests. This is something they only do as a last resort but we are already seeing an increasing number of interventions. The costs of intervention are usually a first charge on any assets the practice has. In effect this means that there is little, if any, value in WIP and debtors and therefore creditors face a total loss.

The issues and complexities surrounding the failure of a legal practice are probably greater than for any other industry. The regulations of solicitors, their interaction with clients, for whom they may hold considerable sums of monies, and the

to a successor practice (subject of course to all the transparency that route requires). The heavily regulated nature of the profession makes it unlikely that a firm would be traded for long (if at all) while it was advertised for sale.

Future change

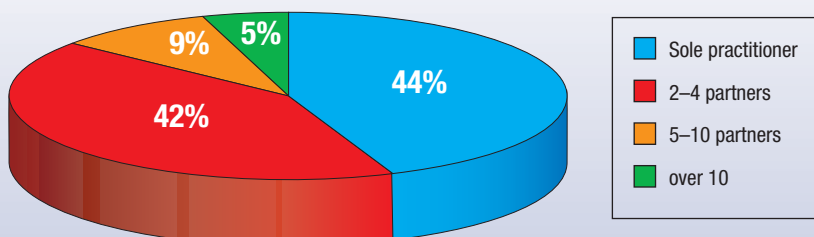
We are now going to see many more legal firms require assistance. Some academics anticipate that up to 4,000 of the 10,000 current firms will not survive. We think that this is probably an overestimation but would not be surprised if over 2,000 firms will not exist in their current form within the next three to five years.

Each troubled firm will need to have its business model tested, its management improved and its cash controlled if it is to survive. The overgeared, demographically challenged firms will be unlikely to survive and for them a controlled takeover may be their best hope. For those that run out of cash the threat of intervention will loom and it is for them that the multitudinous insolvency options await. □



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Background to the market



Professional practices could be victims of the downturn

Peter Varley waves some red flags to keep a look out for.

A number of high profile and small independent professional practices throughout the UK, including solicitors, accountants, architects, surveyors and estate agents, could see their businesses struggle in 2009.

The period of sustained growth has come to an abrupt end following unprecedented turmoil in the financial markets. Newspapers are littered with headlines on restructuring, refinancing, profit warnings and bankruptcy – all a reminder of the volatile economy we are currently in, with no signs of immediate recovery.

The consequences of the collapse in economic confidence are now working their way through the rest of the economy and many firms look set for a period of falling profits, tight credit and little, if any, growth.

Early warning signs – what should the banks be looking out for?

We expect warning signs to increase in light of the credit crunch and counterparty risk. In the current downturn timely financial information is vital for banks to assess the financial viability of professional practices. This involves management accounts, regular financial statistics – billings, cash collection and personal performance measures, such as chargeable hours, recoveries etc. Red flags to watch out for include:

Does the practice have a small number of significant clients or are the clients in sectors or service lines that are currently suffering?

The economic downturn has meant that certain sectors are more affected than others, such as real estate, construction, retail, media, automotive and airline. Practices exposed to businesses in these industries may already be feeling the pinch, but is it evident yet or is there worse to come?

Professional practices are prone to the threat of client losses as firms enter into a new era of competitiveness in terms of service offerings and fees or, worse still, through clients going into administration or insolvency.

We expect that professional services firms may want a number of 'core' clients to provide a reasonably constant source of work year in, year out. The impact of too much change may indicate substantial



effort is being made to get new clients but insufficient effort is being made to keep existing ones.

In many professional practices that have recurring fees, the challenge over the next 18 months may be to retain what you have rather than invest significant resources in targeting clients for one-off transactions that are unlikely to result in a consistent flow of work.

importance of cash and may delay paying bills. Meanwhile, partners may be getting their drawings (although this can be managed to a degree), salaries will be paid and rent will be due. A cash squeeze can arise rapidly if a professional practice does not manage its cash flow well. Although borrowing is not expensive at current interest rate levels, banks may not extend or even maintain credit to a professional

“In the current downturn timely financial information is vital for banks to assess the financial viability of professional practices.”

For businesses with large transaction teams or those reliant on one-off work the changes have already been made, with staff moved to counter-cyclical areas and, where this has provided insufficient relief, cuts in headcount have inevitably occurred. If these actions have not been taken the partners may be denying a problem that could make the subsequent surgery more painful or cause the failure of the business.

Has the practice seen its cash position deteriorate over the past year?

In a downturn, clients understand the

practice that is not managing its cash. If this occurs, partner drawings may be substantially reduced and there may need to be a requirement for a capital injection.

A deterioration in the cash position (or increase in the overdraft) can be caused by a number of factors, not simply extended terms taken by clients or bad debt; professional practices are complex organisations and a worsening cash position needs to be explored and understood. Are projections reliable and can the practice and its bankers anticipate cash flow problems?

Approach	Advantages	Disadvantages
Wait and see, despite not having enough work to keep everyone busy.	Keeps team intact for an upturn. Maintains morale in the short term.	Staff underutilised and inefficient. Profitability declines.
Lowball on fees to win available work.	Retains team for an upturn and keeps some cash rolling in to pay fixed overheads.	Threatens profitability in short and medium term.
Reduce partner and staff levels to match work.	Protects profitability in the medium term.	Requires expensive hires to recover staffing levels on an upturn. Morale and profits suffer in short term.

Are the partners taking a cut in their initial allocations?

Hopefully, most practices have relatively low fixed costs and can reduce headcount in difficult times. However, sometimes this can only go so far, with very little further scope but to take a reduction in profit allocations. Is this causing problems elsewhere? Is the bank's private client team communicating with the professional practice team? Are the partners' personal circumstances (and indebtedness) known to the bank or are these spread across a number of banking institutions? Where possible transparency should be sought.

Has the practice seen its key financial ratios deteriorate in the last 12 months?

The key areas to focus on when assessing the performance of a practice may include:

- billing levels and frequency
- recoveries on billing
- WIP levels and age
- debtor levels and age
- chargeable hours by staff
- cash collections.

It is not possible to look at any area in isolation as these items are closely linked but do have different dynamics in different professional practices. Some have low charge out rates and expect high average hours while others have high rates but expect a lower number of hours or lower recoveries.

Troubled practices often lose control of working capital. It is important that when fee income is falling, debtors should follow pace, if not, it may mean that clients are delaying payment. For example, a significant unexplained rise in debtors over fee income highlights poor working capital management, which would soon have an impact on cash.

Have any of the partners moved to more profitable firms in the past 12 months?

In the current downturn a firm can be expected to lose a number of its partners. The challenge for the management is not to prevent this but to ensure that the 'right' partners go. Inaction may almost certainly result in the 'wrong' partners leaving.

Has the investment in geographical expansion or new service lines failed to produce any tangible results?

Substantial costs with no clear results or coherent strategy may concern certain partners, especially if the management

seems more concerned by these investments than the issues affecting the more established and profitable parts of the firm.

Has the professional partnership taken new, larger, office space within the past two years?

If a practice has been paying rental costs that are five to ten per cent more than their competitors, they have to outperform them in all other areas just to keep up with them. When fit-out costs, business rates and service charges are included, space cost may account for around 15 per cent of a firm's overheads.

A sign of the uncomfortable times we are going through

In the current economic climate cash is king. We have seen profitable practices face cash shortages due to the fact that profit and cash are two different things. The root of the problem is that whereas the timing and the quantum of payments is generally predictable, this is not the same for income.

It is vital that the pattern of cash inflow meets the pattern of cash outflow. In the case that it does not, the practice may need to obtain additional finance to meet the gap, through the partners themselves or from the bank.

- Business is taken on that may have a low margin or represent an unacceptably high bad debt risk. This project would have been easier to transact in better markets or the client would ordinarily have been avoided.
- Has there been a change in the mix of work? The value of work done might be high but is it of a contingent nature? In this case, clearly set out risk management parameters are necessary to approve contingent fee work; do these exist and are they being adhered to?
- Partners do not push for fee increases and are quick to take a fee decrease rather than lose a client – all too easy when competitors are pitching their services at seemingly unsustainable rates.
- Partners delay billing to avoid a difficult conversation or are slow to recognise a write off on a client/project.
- Debtor risk is high but clients are given extended terms or take extended terms as the professional adviser is often seen as a non-essential supplier.
- Staff and partners do not charge their time to avoid showing significant write offs against tight fees.

However the recessionary times manifest themselves, the professional practice and its bankers need to

“In the current economic climate cash is king. We have seen profitable partnerships face cash shortages due to the fact that profit and cash are two different things.”

Many professional firms are only just beginning to see their results being hit, but there is great concern about what the future holds and what steps are necessary to protect their profits. League tables have appeared showing job cuts – a sign of the uncomfortable times we are going through. The table above outlines various approaches adopted by professional practices to survive through 2009.

Are the bankers monitoring the actions being taken by their clients? Which category do they fall in and what are the implications?

Difficult markets put pressure on partners, which manifests itself in many ways.

understand the dynamics within the business and have a mechanism for measuring performance and anticipating future activity levels so that the impact of the actions referred to above and the more obvious impacts of reduced turnover are apparent before it is too late. □



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Desperate times for auditors?

The possibility of litigation against auditors is growing and, whether operating at home or abroad, they need to be vigilant and ensure their processes are well managed.

'Sorry but desperate times call for desperate measures'

That statement was not the start of a party political broadcast, but an apology in a letter of claim to a company's advisers. It encapsulates the increased litigation risk facing professionals in the current economic climate.

This article addresses the implications of that climate for auditors, in terms of the potential for claims (with a particular focus on actions by liquidators), the various commercial pressures facing auditors and the recent trend for claims against international networks.

Basic legal principles

Auditors owe their duties to the company and its shareholders as a body (*Caparo Industries Plc v. Dickman*) not to the public or an individual shareholder.

Their duty reflects the fact that the purpose of an audit is to provide an opinion on whether or not the audited company's financial statements show a true and fair view of its financial position, so that the company's shareholders are fully informed at the company's general meeting.

If it breaches its duties an auditor will be liable for the financial loss that its breach has caused. Every case is different, but, in broad terms, this means putting the company (or other third party if it can establish it properly relied on audited financial statements) back into the position it would have occupied had the auditor done its job. Thus in the case of a fraud on the company, the negligent auditor would be liable, not for the full amount stolen, but for the consequences of not spotting the fraud during the negligent audit.

Until recently (see 'Defences' below) an auditor's potential liability in damages for a breach of duty could not be limited – originally a *quid pro quo* for the ability to audit being limited to members of recognised bodies.

Circumstances prompting claims

The traditional sources for claims against auditors are:

- corporate collapse; and
- fraud.

The incidence of both increases in hard (or desperate) economic times. Factor in the growing use of Conditional Fee Arrangements and introduction of third party funding and a rise in the volume of claims against auditors seems inevitable.

An additional issue for auditors is the fact that their own (legitimate) actions can prompt corporate collapse and therefore a



risk event. For instance, part of the audit function is to assess whether or not the audited business can remain a going concern in the coming financial period. In poor economic conditions that role is, simultaneously, all the more difficult and important. The Auditing Practices Board has issued guidance and emphasises the need not to prompt concern at a company's finances (thereby potentially triggering collapse), while nevertheless ensuring

powers under sections 234–236 Insolvency Act 1986, for example to compel third parties to deliver up property, books and records to which the company appears entitled and to apply to the court to summon any person to give an account of his dealings with the company.

In seeking to recover assets or losses, the auditor may be a soft target. While the directors may have been responsible for the company's failure, and might have

“ In deciding whether to pursue an auditor, the liquidator will be looking for evidence of missing documentation... It must assess whether or not the picture being painted by the directors and employees (who may be covering up) is accurate. ”

genuine problems are identified and protecting the auditor from a potential omission claim, a Catch 22 if ever there was one. The Financial Reporting Council preaches a pragmatic approach, but ultimately the matter remains a question of judgment for the auditor.

Liquidators' claims

The risk of claims by liquidators is prevalent in the current climate. However, the substance of those claims is not unique. The company or shareholders can bring the same types of claim. This reflects the fact that the liquidator is essentially pursuing a claim for the company. Thus, for example, the liquidator need not prove that creditors relied on audited accounts to pursue a claim, as he or she is claiming for the company, not the creditors.

A liquidator has an obligation to realise assets for distribution, to investigate reasons for the company's failure and to pursue parties responsible for an insolvent collapse. It has extensive investigatory

moved assets out of the company, a liquidator must assess the cost of pursuing delinquent directors against the prospect of recovering assets. Conversely, the auditor will generally have professional indemnity insurance. This enables the liquidator to justify the cost of a recovery action.

In deciding whether to pursue an auditor, the liquidator will be looking for evidence of missing documentation and must consider whether or not it can prove (on a balance of probabilities) that the reasonable auditor, following audit procedures, should have discovered the company was, as the case may be, technically insolvent or had suffered fraud. In so doing the liquidator must assess whether or not the picture being painted by the directors and employees (who may be covering up) is accurate.

Experience shows a clear preference for pursuing auditors as opposed to tracking assets. There is a rich history of auditors being pursued following large

company failures – classic examples being *Barings v. Coopers & Lybrand & Ors* and *BCCI v. Price Waterhouse*.

If a liquidator uncovers fraud, he or she must consider whether or not to pursue the fraudster (who, most likely, has dissipated stolen assets and, following arrest, has no ability to fund repayment), or the (insured) auditor who allegedly failed to spot it. Inevitably therefore, frauds by individuals leave an auditor vulnerable.

Where the fraud is essentially by the company, it has been unclear how

proportionate limits. However, their preference may be hindered by the robust stance of the Securities and Exchange Commission (SEC) in the US, which has stated it will not accept any LLAs entered into by English companies registered with the SEC. Lobbying is ongoing but if the SEC will not change its approach, one option would be for LLAs to be made mandatory under English law, which would effectively oblige the SEC to accept them. In practice that might lead to a fixed cap, if only for legislating convenience.

“Recent developments in the US challenge the basic premise [of operating or participating in an international network] and have potentially far-reaching consequences.”

accountable the auditor will be. Some clarity was brought by the Court of Appeal in *Stone & Rolls Limited v. Moore Stephens*. The claimant was essentially a one-man-company controlled by a Mr Stojevic. He and the company defrauded Komerčni Banka SA of \$174 million. Reassuringly for the auditors, Moore Stephens was not liable for the consequences, as the court found that Stone & Rolls was the perpetrator, not the victim, of the fraud.

The decision still leaves open the possibility of auditors being liable for failing to identify fraud by individuals in large organisations. To borrow from Lord Justice Mummery in *Stone & Rolls*, it will not be the case that ‘the knowledge of the fraudulent mastermind and the knowledge of his creature company are identical in targeting the victim’. The company is the victim.

Defences

Given the economic and other risk factors outlined above, might auditors be forgiven for considering ‘desperate times’ applies to them? Need they resort to ‘desperate measures’ in response? While recognising the risks, in our view, this would be an overreaction, particularly for well organised and well risk-managed auditing practices.

The most basic defence is the common law principle that an auditor, in common with all professionals, need only exercise a reasonable standard of care when assessed against his peers (*Bolam v. Friern Hospital Management Committee*).

Also, sections 534–536 Companies Act 2006 now permit limited liability agreements (LLA) between auditors and audit clients. An LLA does not alter the extent of the auditor’s duty, nor the consequences of breach, save for applying a cap on recoverable damages. The Act does not prescribe the nature of the cap; it is for agreement between auditor and client, and must only be fair and reasonable in all circumstances of the case. It might be a fixed sum or a sum proportionate to the auditor’s fee. Institutional investors and their representatives (such as the Association of British Insurers) favour

Other action that can be taken by auditors to minimise risk, include ensuring terms of engagement are clear, that fee arrangements are transparent and that auditors, despite cost pressures, continue to invest in their staff and systems. Experienced staff will be at a premium, a fact now appreciated by banks caught out by the financial downturn.

International networks

Many accounting practices operate or participate in international networks. These are generally structured as associations of independent firms, linked together by a non-trading umbrella entity, with neither profits nor risks shared, but member firms benefiting from referrals and general networking. The umbrella administers the network and may monitor measures intended to ensure consistency of approach and standards. The independence of member firms is the key to the arrangement, particularly important to those members practising in less litigious jurisdictions, and who have no desire to participate in the risk of members inhabiting more risky regimes, the US being the obvious example.

Recent developments in the US challenge the basic premise outlined above and have potentially far-reaching consequences.

In 2007, Banco Espirito Santo (BES) obtained a \$521million judgment against BDO Seidman of New York, for ‘grossly negligent’ auditing of BES’ factoring company, Bankest. BES also sued BDO International, the relevant umbrella, alleging that it was vicariously liable for BDO Seidman’s acts and omissions. The case against BDO International failed, but

BES has appealed and the appeal is listed for late May 2009. Separately, in New York, former investors in Parmalat are suing Deloitte Touche Tohmatsu (DTT) as principal of Deloitte Italy, the former auditor of the failed Parmalat. DTT sought summary dismissal but failed.

Finally, the trustee of collapsed US sub-prime lender, New Century Financial, has filed suit in California against its auditor, KPMG LLP, and in New York against KPMG’s international parent, alleging it failed in its watchdog role and is responsible thereby for the acts of KPMG LLP as its agent.

The feature common to all those cases is the plaintiffs’ attempt to prove that the umbrella had control over the local member. According to BES’s lawyer – ‘*BDO International controls BDO Seidman right down to how they type their letters*’. BDO robustly rejects this and points out that the only area in which its network has a common approach is in transnational audits, which that of Bankest was not.

It is premature, pending trials, to draw conclusions and consider implications. Our view currently is that there is only a low risk of any such litigation developing in the UK, as courts here have traditionally required a claimant to demonstrate the existence of a direct duty and the causal link between any breach and the alleged loss. The danger for UK-based umbrellas (and UK members) is of a judgment against the umbrella in the US, which a claimant then seeks to enforce against other network members. As the current US litigation is clearly focused on the concepts of control and agency, the practical response of international networks should be to ensure that their structural agreements do not devolve to the umbrella the right to control the acts of its members. Similarly, we consider it important that no individual member can be considered to exert overt influence on the direction of the network as a whole. Indeed, it seems to us to be important to have clear evidence of the absence of control. At a practical level, while recent years have seen moves towards closer integration of international networks, these cases could reverse that trend.

Mount a persuasive defence

In our view, the current climate gives cause for concern, in that the volume of claims is likely to rise, but the well-managed accounting and audit firms will still be confident of mounting a persuasive, as opposed to a desperate, defence. □



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Trading on a private school

Businesses come in all shapes and sizes. Robert Smailes describes how he dealt with one where the work in progress moved and breathed.

In the current climate of criticism of practitioners who rush into pre-pack sales without considering the alternatives, maybe there needs to be someone monitoring all those ongoing trading jobs that bring their own unique problems and ultimately lead you into the inevitable no-win situation.

My twenty-five years in the industry has seen me involved in trading every possible type of business from the small family-owned concern all the way up to a championship football club, where saving on the kitchen costs of pre-match entertainment pales into insignificance when the manager wants to spend your cash on some wayward striker. But nothing compares to trading on a private school.

How do you solve a problem like Maria?

My appointment was over a private school situated in Derby formed in 1844 housing 190 students comprising co-education for children age 2–11 and a senior school for girls aged 11–18. It was clear from the start that saving the school would call for not only a significant period of trading but also

some radical steps to halt a decline in the school's fortunes, which had seen a steady reduction in numbers.

So how do you trade a school? Well it is not all cash-flows and funding. The first obvious realisation is that you are not making widgets in the factory and your

understand your proposals and vote them through, in a school everyone has an opinion (and not necessarily the same one) from the local MP, to the council, the teachers, the school governors and the previously mentioned parents. At the first meeting of so-called creditors, of the 100

“It was clear from the start that saving the school would call for not only a significant period of trading but also some radical steps to halt a decline in the school's fortunes.”

stock in trade, and indeed the work in progress not only moves and breathes but come with parents who don't really care about creditors interests – but want to know why Maria is now in a class of four as all her friends have left. And they have found out from the school playground 'bush telegraph' that the horrible insolvency man wants to close the school and build a housing estate.

This is the first main issue. Unlike the administration of a factory where your only real problem is whether HMRC is going to

or more who attended not one creditor was present. Indeed not many creditors' meetings are accompanied by homemade cakes from the home economics class.

Debt collecting

Trading was a challenge. Where could I get funding from? The bank declined, saying they thought the school was a dinosaur. Factoring was another hurdle, as I tried to explain that what was for sale was education, and no there are no ROT issues. But wait, what did it say on the tin? A

private school, surely that means chunky, regular school fees with no 90-day wait after the issuing of the invoice. Think again, having sent my lovely little lad to a private school and paid incredibly large fees on their due dates is it too much to

school. What could go wrong? Well plenty. Having been told that the council would expedite any application quickly and that they would do all they could to make it a successful one, an application was put forward. Unfortunately, the hearing was

private schools in the UK showed sufficient interest to make an offer. Indeed the company visited the school, addressed both parents and teachers and provided their vision for the future. Once again all attempts to conclude a sale failed and, on the day of exchange, the deal collapsed.

This was probably the beginning of the end. The members of the council opposed to the new scaled-down scheme believed to the bitter end that someone would save the school and, although the vote for the second application was much closer, there was no second chance.

“I would challenge anyone not be caught up in the emotion of that evening with the children standing outside the town hall awaiting the result.”

believe that everyone does the same? Well yes, it is. And what was worse is that, prior to the administration, a large number of parents didn't feel obliged to pay fees until the red letter day, so post appointment was the perfect reason to just let the school suffer more by treating it as a further opportunity to avoid payment.

Indeed one of my first tasks was to provide a clear path to collecting debts by instructing a debt collection agency to take over the role of chasing the arrears. However, that did not deal with the problem completely and telling a parent based in Africa that we were left with no option but to ask Julie to pack her bags and leave the school was one of many tough decisions taken in the first few months.

Faith in the future

But it was not all bad. A couple of private investors placed me in funds to allow trading to continue and that meant some positive things could happen, including the long overdue maintenance of some of the more tired classrooms and a complete refurbishment of the chapel based on the school premises. After some lengthy consultations with many interested parties it was decided that, to stop further decline in numbers, planning consent would be sought to redevelop part of the site. At the time, this seemed the best of all worlds as a number of quality properties would be built, which included some affordable-housing dwellings. This would allow the school to have the finance to move forward and continue to educate pupils from the remaining part of the site, knowing they would be able to trade out of financial difficulties and modernise the school.

New classrooms, sports facilities and a change in the school's philosophy to co-education would allow the school to progress and leave a legacy for the next 100 years. After receiving no interest from any other parties to purchase the school, it was decided to appoint a team of professional planners to assist in the application and proceed at great haste.

The power of persuasion?

Initially the school received favourable soundings from the local council. In addition, a visit by me to the Houses of Parliament to meet with the local MP for the area confirmed the initial enthusiasm that there was a real desire to save the

adjourned twice with a subsequent delay of some four months. This put serious pressure on the school to continue to trade and a loss of confidence was felt by both teachers and parents.

The time was spent meeting and greeting the local community to allow them to understand the plans and how it would affect them. As a result, my role changed from an IP to an MP and, although I



stopped short of kissing babies, many a hand was shaken and indeed many a sermon undertaken to convince the council that this was a one-stop shop and without planning the school would close.

The fateful night came and, accompanied with a night-time vigil of the children at the school holding lanterns, the meeting eventually came to order. What was clear to me was that this was no longer a 'trader' and real lives and communities would be changed for the better or worse by the outcome. I would challenge anyone not be caught up in the emotion of that evening with the children standing outside the town hall awaiting the result.

No result

The result? An overwhelming 'No'. But with the added complication that local councillors stated that a scaled-down version of the original application might succeed. By this time class sizes had dwindled so much that some lessons could have been held in a telephone box instead of a classroom. Even the non-payers were moaning and were looking for their next freebie elsewhere.

During the next six months a further application was put forward and, during that planning stage, a company that runs

History lesson

The rest, as they say, is now history – the school got sold to a developer, but not before the renovated chapel was vandalised. Creditors received 100 pence in the pound after I discharged the costs and repaid the soft loans that were provided by individuals who wanted the school to survive and truly believed that it should.

I never went back to the school but was told that the developer got immediate planning consent for a much bigger development. Well it would. There was no school left so there was much more room! The irony is that the development is still, after a number of years, only partly completed due mainly to the current economic climate.

Good or bad job?

Well the administrator paid the creditors in full, thus complying with one of the requirements necessary to place a company into administration – so job done. However, real people suffered not by lack of effort or care but because a council could not be convinced by an administrator, a solicitor, an architect, a group of planners, a board of governors and, last but not least, a 100 plus students that giving planning consent for a small plot of land was no real sacrifice and in the great words of insolvency it was 'fair, fit and feasible' to allow a school to survive.

All I know is in 18 months I drove around ten thousand miles trying to find a real solution to the mess I inherited, and it is the one job I would have done anything to change the outcome of. As I said at the outset, it is not always pre-packs and widgets, sometimes an insolvency job can change the way you are and the person you are for better or for worse. Ironically I was asked to advise another school some two years later. Did I? Of course. All IPs are eternal optimists. Now I'm wondering if they ever thought of getting fees paid up front? □



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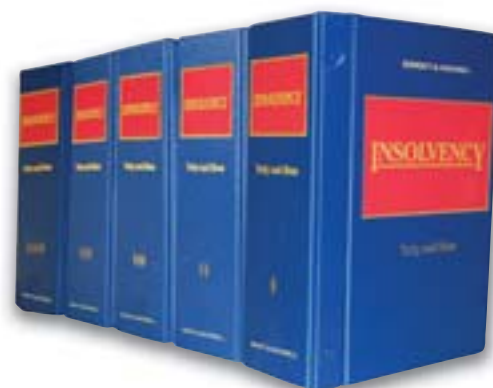
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Changes to insolvency advertising

As the types of media available to publicise key insolvency events such as an appointments and creditors' meetings have grown, Neil Ogilvie explains that The Insolvency Service has responded by introducing a new advertising regime for insolvency proceedings.

The Insolvency Service has been reviewing the insolvency secondary legislation to ensure that the legislative framework remains fit for purpose. Among the suggestions considered has been a request to review the advertising requirements that cost several hundreds of pounds per case, regardless of whether there is any benefit.

The historical policy reasons for advertising events such as the appointment of an officeholder, or the summoning of creditors' meetings was to try and ensure that all creditors were aware of the proceedings and assets were fully disclosed. Such details are normally provided to the officeholder at the onset of the insolvency proceedings and, in the majority of cases, a full disclosure can be expected. An officeholder will know from experience when full information is not forthcoming and can judge whether additional publicity is warranted.

Easier access to information

Since the Insolvency Rules came into force in 1986, the internet has brought a dramatic change to the way in which business and insolvency news can be accessed. Searches of various internet sites can now offer insolvency particulars on the financial position of a company or insolvent debtor. The credit reference industry, HM Revenue and Customs and financial institutions are among those that subscribe to the download of information from insolvency notices, which must be placed in the *London Gazette*. The public at large can search the *Gazette* online for those same particulars through its website, free of charge. Insolvency particulars for companies must be filed at Companies House and websites maintained for the insolvent company must now disclose the existence of insolvency proceedings. Details of personal insolvencies can be accessed, free of charge, via the Individual Insolvency Register on The Insolvency Service's website.

In the light of these developments and other changes such as the greater geographical spread of creditors, The Insolvency Service questioned whether

creditors still derive any value from local advertisements in all cases. After consultation, we concluded that a better-targeted advertising regime could be provided by replacing mandatory local advertising with a discretion that the officeholder can exercise on a case-by-case basis according to business need. The expectation is that in most cases there will be no such need and therefore financial savings can be made, which we expect to be passed on to creditors.

New advertising regime

Accordingly, amendments to the Insolvency Rules were brought into force on 6 April 2009 that introduced a new advertising regime and most notably, a new discretion for officeholders in insolvency. Equivalent changes have been

of the mill cases but rather in cases where there are clear benefits or a business need identified. The discretion might be exercised in cases, for example, where the officeholder cannot satisfactorily determine the full extent of the assets or liabilities.

Where there is high interest from the public in a case, practitioners might wish to work with local or national newspapers, as appropriate, to get stories into the press. This would help to raise the profile of the practitioner and the work that he or she does as well as bringing that case to the attention of the public.

As the initiative is designed to provide a more flexible, cost-effective and tailored approach to insolvency publicity, the expense of placing any

“Since the Insolvency Rules came into force in 1986, the internet has brought a dramatic change to the way in which business and insolvency news can be accessed.”

made to sections 95 and 98 of the Insolvency Act, which also came into force at the same time. The new advertising regime retains requirements for mandatory gazetting in all cases and has even introduced some additional requirements to gazette in response to requests from stakeholders for:

- the appointment and termination of appointment of a provisional liquidator; and
- the dismissal of a winding up petition.

Dealing with the new discretion

The big change for the profession is not in gazetting but in dealing with the new discretion that has been given to officeholders to decide when to place any additional publicity in a particular insolvency case and, if so, the best medium for this.

The Insolvency Service has issued guidance to assist with the exercise of this discretion. In a special issue of *Dear IP*, published on 13 March 2009, The Service advised that it would not expect this discretion to be used routinely in run

form of additional publicity should be weighed against the likely benefit to be achieved. Additional advertising will no longer have to be by newspaper advertisement so other forms of media advertising, including internet, radio, print media or even television will in future be an option, if deemed most appropriate to meet the purpose of the advert (given the cost and likely effect).

The situation in Scotland

From 6 April 2009, The Insolvency (Scotland) Amendment Rules 2009 has provided equivalent revision to insolvency advertising procedures in the Insolvency (Scotland) Rules 1986 for administrations and CVAs only. □



Neil Ogilvie is a senior policy adviser at The Insolvency Service Policy Unit.



Southill Finance Limited *(in Liquidation)* – looking back in anger

A recent case throws light on how far conventional time periods of investigation may be stretched where losses are concerned.

The current climate

It has been 17 years since the end of the last official recession during which time, barring the dot.com collapse, companies around the world have experienced unprecedented growth. During a boom, few people complain about the handling of companies that generated high returns. However, as the boom recedes and finances become stretched, losses come to light from actions that may have occurred many years in the past. The passage of time will have taken many of these actions beyond conventional limitation periods and out of the scope of insolvency recovery actions. The recent case of *Southill Finance Limited (in Liquidation)* [2009] EWCA Civ 2 provides a timely reminder that, in certain instances, the limitation period may be extended. Here, the applicants sought to challenge actions of the finance director dating back to the 1980/90s, a number of years before the company was wound up and more than 15 years before the case was heard.

Actions available to swell the insolvency estate – look-back periods

The insolvency of a company triggers a number of potential actions under the Insolvency Act 1986. This gives the

opportunity to challenge and avoid transactions at an undervalue (s238) and preferential payments to creditors (s239) and to launch actions for fraudulent (s213) or wrongful (s214) trading.

However, preferential payments may only be set aside if they take place within the six months prior to the onset of insolvency, or two years if to a 'connected person'. Transactions at an undervalue

effect of which was, to the knowledge of the director at the time of the transaction, ultimately to leave the company unable to pay its creditors. A liquidator of a company that was cash rich in a boom period may, however, be hard pressed to prove that a director had this knowledge. An action for wrongful trading involves establishing that at a point in time prior to the commencement of the winding up of the

“ Here, the applicants sought to challenge actions of the finance director dating back to the 1980/90s, a number of years before the company was wound up and more than 15 years before the case was heard. ”

must similarly have been entered into up to two years prior to the onset of insolvency. Both actions must be brought within six years of the company entering administration or liquidation.

A claim for fraudulent trading may allow a liquidator to look further back to a time when it appeared that the company had been carried on with the intent of defrauding the creditors of the company. An example would be a transaction, the

company, a director knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation. There is no maximum look-back period, although in practice it may be difficult to establish the relevant knowledge more than a few months prior to the liquidation. Actions for fraudulent or wrongful trading must be commenced within six years from the date of the liquidation.

Section 423 (Transactions defrauding creditors) Insolvency Act 1986 allows a victim to challenge a transaction entered into at an undervalue:

- (i) for the purpose of putting assets beyond the reach of a current or future creditor of the company; or
- (ii) which is otherwise prejudicial to the interests of such a person in relation to a claim which he is making or may make.

A liquidator or administrator may bring the action on behalf of the creditors of the company who were collectively the victims of a transaction. There is no limit on how far back in time you can go, and nor is it necessary to establish that the company was insolvent at the time. However, it will be necessary to establish that the defendant was motivated to put assets beyond the reach of creditors or that his or her actions were prejudicial to potential creditors. If the company was solvent at the time, the latter requirement may be difficult to satisfy.

Southill Finance concerned a claim under s212 (Misfeasance) Insolvency Act 1986. This provides any creditor, official receiver or liquidator with the power to apply to court where an officer of the company has misapplied or retained any money or other property of the company

he never expected to have to deal. However, the Limitation Act 1980 provides that no limitation period shall apply to an action by a beneficiary under a trust, being an action:

- s21(a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
- s21(b) to recover from the trustee trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his use.¹

Southill Finance is a case where the applicant sought to bring proceedings in relation to breaches of duty which would ordinarily have been time-barred. The case is also of note because the application under s212 was brought by a creditor of the company and not the liquidator.

The facts of the case

Southill Finance Limited (Southill) was incorporated in 1984, as the finance vehicle to a group of companies specialising in subsidence control (the Southill Group) of which Mullarkey and Broad were directors and ultimate owners. Mullarkey alleged that over the course of the late 1980s Broad had, in fraudulent breach of his fiduciary duty as a director,

Mullarkey made his application but he relied in the first instance on s21(a) of the Limitation Act 1980 – stating that Broad had acted in fraudulent breach of trust. No argument was made in relation to s21(b) – recovery of trust property. On his own case, despite prompting from the judge, Mullarkey therefore had to establish fraud or the limitation period would provide a defence to the claims against Broad.

The case was hampered by the passage of time and the incompleteness of evidence but the judge did find that Broad had received loans in breach of the Companies Act 1985, which were not repaid or disclosed on the winding up. However, the judge found insufficient evidence that Broad had used his powers in a way that established fraudulent breaches of duty. Broad's actions were not inconsistent with the possibility of honest conduct or inadvertent action rather than deliberate or reckless fraudulent conduct. Accordingly, Mullarkey had not satisfied s21(a) and so the claim was time-barred. On appeal, Mullarkey sought to change his claim and argue that no limitation period, applying s21(b) Limitation Act 1980. The court was concerned that at trial, evidence necessary to enable the court to determine whether this section was made out had not been put before the court in the first instance and refused to allow the appeal.

There may be alternatives

There are inherent practical difficulties in reaching back in time and challenging historic actions. In the case in question, the working papers of the auditor had been destroyed, the records were incomplete and the participants' recollections were hazy. However, if Mullarkey had from the outset based his case on both limbs of s21 Limitation Act 1980 and been able to prove the relevant elements of the claim and of those provisions, he may have succeeded in extending the limitation period and obtaining an order that funds be repaid. Setting aside practical difficulties, the same set of facts may give rise to a number of alternative lines of attack. In considering which to pursue regard should be had to the relevant limitation and the timing constraints. In addition, where the liquidator cannot or will not bring proceedings, there may be matters that can be pursued by others affected by the actions in question. □

“Setting aside practical difficulties, the same set of facts may give rise to a number of alternative lines of attack. In considering which to pursue, regard should be had to the relevant limitation and the timing constraints.”

or been guilty of any misfeasance or breach of any fiduciary or other duty in relation to the company. It is not necessary to establish that the company was insolvent at the time. The court can examine the officer's conduct and make an order for him to repay money, restore property or contribute to the assets of the company. Actions of this nature are ordinarily brought by the liquidator rather than the creditors themselves, as any award goes to the benefit of the creditors as a whole.

Section 212 provides a simpler procedure than ordinary civil proceedings for the recovery of property or compensation on the company's winding up but, importantly, does not create a new cause of action. A cause of action under existing law will need to be established, for example, a breach of duty of care or breach of trust. Accordingly, an action under s212 is subject to the same limitation as the underlying cause of action. Where the relevant events took place more than six years prior to the winding up, an action under s212 may not therefore be available to the liquidator or creditors.

Overreaching the limitation period

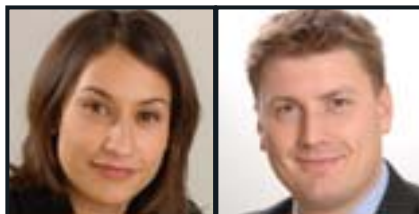
The limitation period is intended to provide a defendant with a procedural defence to a stale claim; a claim with which

come to use Southill as a vehicle to transfer property and provide unauthorised loans to himself and companies under his control outside of the Southill Group that were never fully paid or disclosed on liquidation.

Southill had ceased to trade in 1993 and was wound up in 1995. The liquidator had reported to the Official Receiver that despite his suspicions he had not found any evidence of wrongdoing. Mullarkey therefore brought the claim, acting as a creditor of Southill under an assignment of debts by Southill Group subsidiaries, seeking an order against Broad pursuant to s212.

The limitation issue

Mullarkey accepted that the limitation period would be a complete bar to the claims as the relevant breaches of duty had taken place more than six years before



Devi Shah is a partner and Jeremy Snead is an associate in the Restructuring, Bankruptcy and Insolvency team at Mayer Brown in London.



Trust busting: advice for creditors

Patrick Hamlin urges IPs to investigate the protection afforded offshore trusts as jurisdictions around the world are taking a firmer stance against malpractice.

Tax havens and offshore trusts are much in the news these days. The G20 Group of the world's leading economies threatened a new crackdown at their recent meeting in London. Are these structures really as impenetrable as they are sometimes made out to be? The answer is no. There are a number of well established legal principles that will come to the aid of creditors seeking assets that debtors have stashed away for a rainy day.

Why tax havens exist

There are a number of reasons why settlors create offshore trusts, whether in the Channel Islands, the Isle of Man, the Caribbean or any of the other offshore financial centres around the world. Businessmen engaged in high-risk ventures may think trusts are a kind of insurance policy if their business fails and creditors come knocking. In the United States, professionals such as doctors and dentists, face spiralling premiums for professional indemnity insurance against malpractice claims. Premiums may have to be paid well into retirement as limitation periods for clinical negligence claims can be surprisingly long. Such periods do not even start to run until the patient reaches adulthood. On the matrimonial front, wealthy husbands, seeing the substantial settlements that the London divorce courts

are now handing out may see an offshore settlement as the answer to the depredations of a petitioning spouse or civil partner.

Settlor husbands should perhaps bear in mind the opening words of Singer J's judgment in *Minwalla v. Minwalla* (2005) 1 FLR 771 where he made it clear that the courts will not tolerate a situation where:

'...it appears that an offshore trust with its professional trustees and associated companies with their sometimes cipher directors have been woven together to create a shroud that is designed to bury the husband's resources from view.'

Trusts may be set aside

Many jurisdictions have provisions in their insolvency law that will enable creditors to

family. His trustee in bankruptcy applied to the High Court to set aside the Jersey trust under the provisions of section 423 of the Insolvency Act 1986 on the basis that the structure was an attempt to defraud creditors. American judges too have a formidable track record of upsetting offshore trusts.

In *Foreign Trade Commission v. Affordable Media* (1999) ITCLR 73 for example Mr and Mrs Anderson (who were US residents) were involved in a fraudulent business venture. The couple put the proceeds into an irrevocable asset protection trust in the Cook Islands. Mr and Mrs Anderson were co-trustees, protectors and beneficiaries of the trust. The view of the American court was that the structure created was one that could easily be controlled by the settlor.

“In the UK the Proceeds of Crime Act 2002 contains elaborate provisions enabling a court to confiscate trust assets on a criminal conviction.”

apply to the courts to set aside trusts set up to defeat the legitimate claims of creditors. In *Alsop Wilkinson v. Neary* [1995] 1 All ER 431, Mr Neary was a partner in a London law firm. He defrauded his firm of large sums of money taken from the firm's client account and settled these funds into Jersey trusts for the benefit of himself and his

The settlor was therefore able, the judge reasoned, to repatriate the funds. The settlor in the *Stephen J Lawrence* case (1999) 2 ITCLR 283 had a similar experience at the hands of the American courts. In that case the debtor established a trust in Mauritius in 1991 and transferred to it US\$7 million. He was subsequently

declared bankrupt and was ordered to turn over the trust assets to his trustee in bankruptcy in the United States. The debtor failed to comply. The judge confirmed that, if a settlor creates an asset protection trust and is subsequently unable to repatriate those trust assets on

creditor. In that case the settlor executed a declaration of trust over his assets in favour of his wife and children and then locked up the trust deed in his safe. He ran up various debts to his bankers who knew nothing of the so-called trust. In ignorance of the document the bank obtained a charging

of the settlement, including distributions of capital to himself, to others as gifts or loans, and the making and disposal of investments. He treated the assets comprised in the trust fund as his own and the trustee as though it were his mere agent or nominee. There was a retention by [Mr Rahman]. We are unanimously of the opinion that the settlement was a sham on the facts, in the sense that it was made to appear a genuine gift when it was not.'

“Many jurisdictions have provisions in their insolvency law that will enable creditors to apply to the courts to set aside trusts set up to defeat the legitimate claims of creditors.”

bankruptcy, that self-created impossibility would not be a defence to a failure to comply with a court order. More recently in *USA v. Grant* (2006) ITEL 8, the US District Court for Southern Florida ordered the beneficiaries of trusts in Jersey and the Bahamas to repatriate the trust assets to the US in order to satisfy a tax judgment. The court reasoned that the beneficiaries had the ability to call for funds from the trust at any time and also enjoyed the power to appoint new trustees.

The circumstances of formation may render a trust invalid

How else can trustees in bankruptcy or other officeholders attack such structures for the benefit of creditors? It is important to look at the circumstances surrounding the creation of the trust. A valid trust requires certainty in three areas:

- the settlor's intention to create the trust
- the description of the trust assets
- the definition of the beneficial class.

A trust that falls foul of these rules when it is created may be ineffective. For example, if it is clear the settlor, when establishing the trust, intended to treat the trust assets as his own so that the arrangement is no more than an elaborate nominee bank account, then, provided the trustee joined in this intention with the settlor, the trust may well be a sham. This can be disastrous for the settlor. If such a trust is a sham then the assets will never have left his estate and are thus available to a creditor; divorcing spouse and, if the settlor dies domiciled in the UK, a 40 per cent inheritance tax charge from HMRC. Tax authorities are alert to this issue. In *Walker Harrison v. Compass Trust Co. Ltd* (2007) 10 ITEL 580 the Norwegian government provided funding to enable the estate of a deceased taxpayer to pursue a claim against a Cayman trust on the basis that the trust in question was a sham. The estate recovered the trust assets, the bulk of which went to discharge the deceased's tax liabilities. Or there may be some formal defect in the document such as some failure to comply with local statutory requirements or the payment of stamp duty. These remedies are available to ordinary creditors, not just tax collectors.

Midland Bank Ltd v. Wyatt (1995) FLR 697 is an example of an English court setting aside a trust at the behest of a

order. When the bank sought to enforce its charge, the court held that the debtor never really intended to benefit his wife and children and that the charging order was effective to secure the bank's interest.



A typical sham situation was described by the Jersey Royal Court in *Rahman v. Chase Bank Trust Company (CI) Ltd and others* [1991] JLR 103. The settlor's widow attacked the trust on the basis of the Jersey doctrine 'donner et rétenir ne vaut' (to give and to retain is not possible) and also on the basis that the trust was a sham as it was clear from the evidence that the deceased had taken all decisions relating to the management of the assets as if he was still the absolute owner. The Jersey Royal Court said:

'We were unanimously satisfied that the oral evidence, together with the documentation placed before us, established clearly that from the date on which [Mr Rahman] purported to constitute the settlement he exercised dominion and control over the trustee in the management and administration

The proceeds of crime

If a trust holds the proceeds of fraud or other crime then that may also be a powerful reason for breaking the trust. Thus an employee who has been guilty of corruption will hold the proceeds of that corruption on trust for his employer. If those assets have been used to purchase property and then settled into an offshore trust, the courts will not hesitate to set aside such a trust and declare that the assets are in fact held on trust for the wronged employer (see *Attorney General Hong Kong v. Reid* [1994] 1 All ER 1).

In the UK the Proceeds of Crime Act 2002 contains elaborate provisions enabling a court to confiscate trust assets on a criminal conviction. Even if no such criminal proceedings are brought (or alternatively such criminal proceedings have been brought but failed) the Crown can use civil proceedings under part 5 of the 2002 Act. The advantage of going down this route for the Serious and Organised Crimes Agency is that the standard proof in civil proceedings is lower than in criminal proceedings, proof on a balance of probabilities rather than proof beyond reasonable doubt. The legislation can be useful to a creditor since if a third party can show an interest in the assets that are the subject of proceedings under the Act, that third party may be able to recover his property. Part 5 of the 2002 Act is novel in that the court may hold trust assets to represent the proceeds of unlawful conduct (and therefore belong to another party) notwithstanding the settlor was never convicted of any crime. Indeed he or she may already be dead.

Seek advice on trust busting

The conclusion is that if a liquidator or trustee in bankruptcy comes up against offshore trusts, they should not automatically assume that such a structure is impregnable. It is important to take appropriate professional advice from a specialist contentious trust lawyer to decide whether the trust can be breached under any of the principles described above. □



Patrick Hamlin is a partner in the Contentious Trust and Succession Group at Withers LLP, London.

The Madoff scandal

David Foster maintains that the easy regulatory ride of hedge funds is unlikely to continue and the FSA will be more stringent in the future.

The front page of many newspapers in the past few months has been adorned with the name of Bernard Madoff. Mr Madoff offered investors modest returns in both up and down markets. Investors were attracted by his 'guaranteed returns' and his status as a senior figure in the US financial market over a number of decades. This led to a high number of hedge fund managers opting to invest money in his scheme. Analysts were puzzled by his ability to guarantee such returns particularly in a spiralling market. The increase in requests for withdrawals in the funds managed by Mr Madoff, following the global economic downturn, led to Mr Madoff's inability to repay on demand. It has since emerged that Mr Madoff had not invested any of his clients' money for over a decade and had, instead, deposited new funds from investors in his own business account and then paid out to clients who requested withdrawals.

So, how did Mr Madoff get away with this for so long? The accounts, estimated to be worth anywhere up to \$50 billion, were audited by a tiny firm with only three employees, one of whom was a secretary and another eighty years old. Further, hedge fund managers failed to carry out appropriate due diligence before investing in his scheme. It seems that fund managers and investors alike were happy so long as the returns remained strong.

A wave of litigation is anticipated to follow this scandal, as individual investors seek to regain monies invested and to hold regulators, hedge funds and auditors to account for failing to detect or prevent the fraud.

How are hedge funds regulated in the UK?

The Financial Services Authority (FSA) is given powers, under the Financial Services and Markets Act 2000 (FSMA), to regulate individuals and firms who are engaged in business in the UK financial markets. Hedge funds and their managers are not specifically regulated but instead fall within the general regulation of providers of financial services.

FSMA sets out four statutory objectives that the FSA must take into account in its regulation. These objectives are to:

- maintain confidence in the financial system;
- promote public understanding of the financial system;
- secure the appropriate degree of protection for consumers; and

- reduce the extent to which it is possible for regulated businesses to be used for purposes connected with financial crime.

To consolidate these statutory objectives, the FSA has set out 11 Principles for Businesses. These principles are expressed in terms of outcomes and behaviours and not in terms of processes or procedures. The FSA's move to principles-based regulation was designed to create a move away from detailed, prescriptive rules

dedicated supervisor in regular contact with the firms and they undertake periodic risk assessments. Lower impact firms are subject to baseline monitoring through regulatory returns, firm visits and market intelligence.

What remains more of a concern to the FSA, and indeed the European parliament, is the inherent risk that resides in hedge funds being able to endanger the stability of banks. The FSA is therefore less focused on whether a hedge fund may be losing

“Mr Madoff's accounts, estimated to be worth anywhere up to \$50 billion, were audited by a firm with only three employees, one of whom was a secretary and another eighty years old.”

and supervisory actions on how firms should operate their business. The emphasis is, instead, placed on the firms to be themselves responsible in deciding how best to align their objectives and processes with these principles and the statutory requirements. The FSA has not sought to authorise or regulate hedge funds. This approach is backed by the European parliament who stated that 'direct regulation of hedge funds did not seem to be appropriate'.

Some of the more relevant principles relate to the need for firms to conduct their business with integrity, and with due skill, care and diligence. They must also pay due regard to the information needs of their clients and communicate information to them in a way that is clear, fair and not misleading and arrange adequate protection for clients' assets when they are responsible for them.

The FSA believes that detailed rules have become an increasing burden on the industry's resources but how much does this conflict with the need to protect consumers and, in particular, the need to safeguard investors in hedge funds?

The FSA accepts that firms, from time to time, make errors of business judgment, timing or strategy and some simply fail to measure up to the competition. It is not expected that hedge funds will never lose money or even disappear. This is a part of the risk and reward framework that underlies all financial markets.

Nevertheless, it is the FSA's responsibility to mitigate the risks posed by hedge fund managers. It has enhanced its oversight of 31 of the largest hedge fund managers in the UK (accounting for approximately 50 per cent of assets managed). These managers have a

money for its investors and more on the interaction of hedge funds with the banking sector that finances their activities, which, itself, is central to the operation of our financial system.

Hedge funds require less consideration with regard to consumer protection than many financial institutions for the simple reason that they are currently not a product for retail consumers. Hedge fund managers are prohibited from marketing their funds to UK retail consumers, and most have a minimum entry requirement, generally well over £100,000. Overwhelmingly, investors are institutional or sophisticated individuals who are in a position to assess the risks involved and bear responsibility for their decisions in investing with a hedge fund.

Litigation risks arising from hedge fund failures following the Madoff scandal

The FSA published a Discussion Paper in 2005 entitled *Hedge Funds: A Discussion of Risk and Regulatory Engagement*. This paper was designed to further the FSA's understanding of the risks posed by the hedge fund sector.

The paper discussed in detail the significance associated with operational risks, liquidity shortfalls, market abuse as a consequence of insider trading and market manipulation and conflicts of interest. However, little to no reference is made to the risks borne out of the hedge funds' failure to carry out adequate due diligence practices before investing funds or in their failure to inform investors as to how their money has been invested and how the fund is performing.

Irrespective of the absence of specific safeguards against such failures, individual

private investors who suffer loss as a result of a contravention of the FSA rules, have, by virtue of s.150 FSMA, a cause of action in damages against the hedge fund firm. Investors are not able to sue specifically for a breach of the principles as the principles

of the risk associated with the fund, hedge fund managers must be extremely vigilant in carrying out adequate due diligence to ensure that the level of risk associated with the fund is properly ascertained. Furthermore, to protect themselves, hedge

“Hedge fund managers must be extremely vigilant in carrying out adequate due diligence to ensure that the level of risk associated with the fund is properly ascertained.”

were introduced on the basis that, as general statements, they should not give rise to civil liability.

There is, as yet, little precedent case law relating to hedge fund failures particularly as a result of hedge fund managers' failure to carry out adequate due diligence. A view can be drawn from the case of *San Diego County Employees Retirement Association v. Amaranth Advisors* (2007) in which it was concluded that investment managers may have claims brought against them by pension fund trustees where a misrepresentation of risk in the fund was communicated.

It is therefore vital that, in order to prevent claims being brought as a result of misleading valuation practices by the hedge fund managers or misrepresentation

fund managers must communicate regularly with investors to ensure that the value of the fund and the level of returns associated with the fund are in the investor's mind.

Investment managers' failure to comply with these requirements when in search of quick returns leaves them vulnerable to claims, especially in the current climate when investors are trying to restrict their liability to potential investment losses.

Future regulation of hedge funds

Hedge funds have had an easy regulatory ride to date in the UK financial market. Notwithstanding accusations of abuses of the system by investment managers against the market and their investors, there has

been only limited regulatory action. Furthermore, the FSA does not operate a zero failure regulatory regime.

But, after the occurrence of an investment disaster like the Madoff scandal, the speed with which the regulatory landscape can change should not be underestimated. The FSA is largely there to protect the interests of the retail consumers. And, although investors in hedge funds are more sophisticated than these retail consumers, the FSA has reinforced a commitment to prosecute where there is clear evidence of malpractice.

In 2006, the FSA fined hedge fund manager GLG Partners LP and Mr Philippe Jabre, a former managing director of the firm, £750,000 each for market abuse and breaching FSA principles. This remains the largest fine the FSA has issued against an individual. If the regulation of hedge funds becomes more stringently applied, sanctions may well exceed this. Watch this space. □



David Foster is the dispute resolution partner at Barlow Robbins LLP.

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Company Voluntary Arrangements: an antidote to pre-packs?

CVAs can be complex and time consuming but they do offer creditors choice and transparency.

It seems that pre-packs have become the regular prescription for companies that are too distressed to be rescued outside of an insolvency process but are more valuable as going concerns than on a break-up. There is an oft-forgotten alternative: the Company Voluntary Arrangement (CVA) which, after over 20 years of being largely out of the spotlight, is now reappearing in contingency planning. Although a CVA will not suit every situation, the recent Stylo and JJB CVAs show that the CVA can be a credible alternative to a pre-pack. We should welcome the choice.

CVA or pre-pack: different dynamics

A CVA is a formal procedure under the Insolvency Act 1986 that enables a company to agree with its creditors a composition in satisfaction of its debts or a scheme of arrangement of its affairs that can determine how its debts should be paid and in what proportions. It requires the approval of a majority in excess of 75 per cent in value of creditors present in person or proxy and voting to approve the arrangement.

A CVA is therefore more a restructuring tool than a conventional insolvency process, as it enables reinvigoration and continuation of the body corporate. In contrast, in a pre-pack the business and best assets are cherry-picked and liabilities are, to the extent possible, left behind with the empty shell of the body corporate. The dynamic is as a result entirely different. In a CVA, there is an inherent tension between ensuring that the proposed compromises restore viability and keeping the proposal sufficiently 'sweet' to ensure it is approved in the first place. In contrast, in a pre-pack that tension does not exist. This can have a bearing on the outcomes for creditors under the alternative scenarios.

Choice and transparency

Further, and of relevance given the basis of the recent criticism of pre-packs, CVAs give creditors a choice: they can vote for or against it, or seek to negotiate the proposal by putting forward modifications. Moreover, the CVA process is relatively transparent: the person making the proposal must disclose a host of prescribed information to the creditors, and has a duty of full and frank disclosure.

Detailed planning is necessary

The devil is in the detail, and it is the detailed planning of a CVA that reveals its complexity. The biggest problem is that unless the company qualifies as a small company the directors will need to consider carefully whether to have the CVA proposed in an administration. For any trading company, creditors will already be stretched, and the decision is a no-brainer: absent the statutory moratorium the CVA process would be quickly destabilised. However, even when spun as a means to a rescue rather than an end in itself, administration is ultimately value destructive. This is exacerbated by section 5(4) of the Insolvency Act 1986, which effectively requires administrators who have proposed a CVA to remain in office for at least 28 days after approval of the

support the CVA will depend on many factors, including where the value-break is. However, with loan-to-value covenants in credit agreements being routinely reset, breached, waived or ignored, agreeing to an arrangement pursuant to which the borrower will continue to service the debt as opposed to crystallising a loss via an enforcement may be the more palatable route.

What is the best solution for creditors?

The board will have to undertake an analysis of whether there is likely to be a better outcome to creditors and other stakeholders in pursuing a CVA. This is not an easy analysis, and it must be sufficiently robust to withstand creditor scrutiny. The board will need to prepare a credible business plan for the post-CVA business, in

“A CVA is therefore more a restructuring tool than a conventional insolvency process, as it enables reinvigoration and continuation of the body corporate.”

CVA. This sends mixed signals to creditors, who will need reassurance that the restructuring is completed and back to business as usual, as the administration may continue to disrupt trade and supply lines, add to the cost of the process and frustrate directors, who will want to get back in control as soon as possible.

Another key gating issue in planning a CVA is obtaining secured creditor support. This is because a CVA is a device for dealing with unsecured creditors: it is not possible to bind a creditor to the extent it is secured, except with its consent. Deals will have to be done to obtain, for example, a form of standstill of rights during the CVA to enable the company to promote the CVA without risk of enforcement action, as well as agreement to continue to provide facilities so that the company can trade in the interim (and post-CVA, if approved). Whether a secured creditor chooses to

order to be able to demonstrate to creditors that the business needs their compromises in order to survive – ie that the directors are cutting only as deeply as they absolutely need to. They will also need to show that the business is sustainable – ie that they have cut deeply enough, as creditors may be worse off if they continue to trade with the company rather than choosing to end their relationship now if the company is not returned to viability but is subsequently put into administration or liquidation.

CVAs are time consuming, complex and as a result they can be costly to implement. Further, the legislation does not cater well for a CVA wrapped in an administration, where there is no desire to remain in administration for longer than absolutely necessary. However, CVAs offer choice and transparency to creditors, and should therefore be considered as part of the contingency planning exercise. □



Ben Larkin is a partner and Ben Jones is a senior associate in Berwin Leighton Paisner LLP's restructuring and insolvency team.

Consumer credit counselling fulfils a need for a growing number of people

Steve Nicholson argues the case for the CCCS's charitable status and maintains that DMPs provide a cheap, practical method to help the indebted.

The Consumer Credit Counselling Service (CCCS) has never denied being a creature of the credit industry. Without the explosion in consumer credit that took place in the last decades of the twentieth century, accelerating to the high-water mark of consumer borrowing in 2005, we would not exist, ditto the Money Advice Trust and other debt charities. Debt is the flipside of the credit coin. It seems reasonable therefore, that lenders should provide a safety net to help those who for whatever reason are having difficulties repaying their debts; hence the introduction of consumer credit counselling and the Debt Management Plan (DMP) to the UK in 1993 at the instigation of a number of creditors.

DMPs are the key

DMPs are key to the success of consumer credit counselling as they provide a practical way for the over-indebted to repay their debts, particularly those with more

authorities such as OFT and BERR as well as to lenders' own trade bodies. When it is necessary we do not shy away from criticising creditor practices in the media.

The rise in DMPs

Since the introduction of DMPs to the UK by CCCS, they have been taken up in various forms by both the charitable and commercial sectors, to the extent that a YouGov survey at the end of last year estimated that there were 600,000 DMPs currently active in the UK.

Personally I doubt that the number is anything like that but what is not in dispute is that there is a large market for DMPs, although CCCS remains the UK's leading provider by quite some margin. In 2008 CCCS set up 25,590 DMPs and by the end of the year it was administering 93,720.

Only two organisations provide free DMPs for the consumer: CCCS and Payplan, which between them administer DMPs on behalf of other debt advice charities such as National Debtline and Citizens Advice. There are a growing number of profit-

made clear to consumers that signing up to a DMP with a fee-charging agency adds about 12 months to the time taken to repay the debt, and a lot of them do not mention their up-front fees until they are contacted, or after the client has taken a 'test' to establish if there is a problem. Any sweep of the internet or ad sections of the red-tops reveals a plethora of organisations purporting to offer 'free' debt advice and, yes, I know the advice is free but the solutions are not, and this should be made plain to the consumer right from the start.

Only CCCS is completely transparent about its DMP numbers, costs and fall-out rates. This is an area in which the industry swiftly needs to improve in order to increase confidence. In addition, greater transparency about DMPs would benefit the lending industry and plug the gap that third parties such as DMX are currently trying to fill.

Future regulation of DMPs

An unregulated DMP may appear out of step in the current climate and certainly regulation is under active consideration by the Ministry of Justice. Such considerations, however, predate more recent concerns about unregulated markets: rather they are an acknowledgement of the success of DMPs in helping people with debt problems over the last 15 years. Regulation, which brings transparency to the marketplace as well as empowering the consumer, is to be welcomed but not if it reduces the free sources of help available to people.

One final word about the marketplace for DMPs generally. Last year, although our clients owed less both in absolute terms and relative to their income, we were able to offer a smaller proportion of our clients a DMP. It may sound counter-intuitive, but as the recession deepens and widens across society, people's problems are becoming more complicated and the market for DMPs may be shrinking rather than expanding.

“DMPs underpin the ethos of CCCS to separate the can't pays from the won't pays and provide a robust funding stream for the charity.”

than one creditor. This both underpins the ethos of CCCS to separate the can't pays from the won't pays and provides a robust funding stream for the charity.

The funding is derived from lenders making a fair share contribution based on the money repaid to them. This is not mandatory but most lenders make it willingly, enabling us to provide support for the nine-tenths of people who need our help but who lack the means to repay their debt, as well as the one in ten who do have the money.

For those who would impugn the independence of CCCS, these proportions ought to make it clear that we put the interests of clients first. Nor are we afraid to remonstrate with creditors about their practices. In this, we work alongside the rest of the charitable sector as well as on our own, providing evidence to the regulatory

making organisations offering DMPs. Although I maintain that consumers are better off using the charitable sector, I accept that there are perfectly reputable debt management companies offering a good service at a reasonable cost.

Fees in the for-profit sector

I do, however, have two serious gripes about the for-profit sector. The first is that there are still a few rogue operators, whose practices have a borderline legality; the second is a lack of transparency in the marketplace, both about what is being offered and the take-up.

As far as I can establish, fees that these companies extract from their clients tend to be around 17.5 per cent of monthly repayment with a minimum charge of £30 and in general the first month's payment is taken as a set-up fee. It is by no means



Steve Nicholson is the chief financial officer at the Consumer Credit Counselling Service.

Riding out the storm – the German economy in heavy waters

Christof Schiller gives us the economic picture from the German perspective but concludes that the fortunes of Germany are linked to the global ones.

The general outlook

Just to quote some random headlines from news in April 2009:

- Industry output in Germany sinks for the sixth consecutive month
- Heidelberg is negotiating for government support
- Karman files for insolvency
- Government gets ready to take over HypoRealestate
- Arcelor to close down blast furnace and two galvanization plants
- Bosch announces that it will shed 300 jobs

There can be no doubt that the economic crisis has hit Germany. Every day there are similar announcements by companies saying that turnover and new orders are down by 20 to 30 per cent compared to the previous year. Steel production is even down by 50 per cent compared to 2008. And as in probably most of the countries in the world the companies have pretty much all the same story: things were difficult before Lehman and they got really bad afterwards.

The development of the stock index also indicates the scope of the decline. The German index, Dax, (the thirty largest companies traded on the Frankfurt stock exchange) has lost 37 per cent compared to a 12-month high; the M-Dax (the 50 most liquid stocks) has lost 50 per cent.

“The area hardest hit [sector] is probably the automotive industry. Despite the cash-for-clunkers programme the number of sales has decreased, especially for large and expensive models.”

The area hardest hit is probably the automotive industry. Despite the cash-for-clunkers programme (the federal government subsidises the purchase of a new car with 2,500 euros if a car that is at least nine years old gets scrapped) the number of sales has decreased, especially for large and expensive models. Vendors usually only have framework agreements, which do not guarantee certain quantities and the OEMs have been all too keen to push the problem down to the suppliers.

And now the crisis is also starting to hit the consumers. Consumer confidence until March 2009 was pretty robust but it is certain to decline in the coming months because there are signs that the crisis is hitting the job market as well, even if the job



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market has held out fairly well so far. But in March the unemployment rate increased for the first time in three years compared to the previous year. So far companies have made use of our short labour regulations to a large extent, which is the main reason why the unemployment rate has only been affected to a limited extent. The numbers of companies that have asked for short labour support has sky-rocketed. Under these rules a company can reduce the work hours of the staff and the state-funded unemployment insurance will reimburse a part of the reduced wage to the employee. In Germany, with its broad manufacturing base, a lot of companies are dependent on skilled labour and many companies would rather put their staff on short labour

but also the changes in the financing sector. Where a couple of years ago the extension of a term-loan or even fresh money in a crisis situation was a given thing, these issues can now take extensive negotiations if they work at all. Things become especially difficult if larger companies get into trouble. In these cases there is usually a bank group involved and the chances that one of the members of the group will step out of line and not agree to a refinancing is extremely high. If the rest of the group does not bridge the gap the restructuring will fail.

Another problem is the trade credit insurers. Some of them have decided to quit certain industries altogether and inform their clientele that coverage is denied for entire segments of manufacturing. This approach forces the suppliers either to assume the risk themselves or to ask the customer for cash in advance, which aggravates the difficulties for the manufacturer.

Restructuring efforts are also difficult because the lack of money has led to a reduction in potential buyers. In most insolvencies the insolvency trustee will try to find a buyer for the assets and thus the business as a whole. In many out-of-court restructurings the strategy is also to find a white knight in the shape of a new investor. But financial investors have more difficulties financing new deals and they will take a much closer look at a company than they used to before they decide to make an acquisition. Strategic investors also face the challenge that financing is hard to find even if a deal makes sense.

How will things develop?

A large part of the German industry is focused on exports. As long as the world economy is sick the same will be true for the German economy. The social security system has eased the strain on the consumers and allows industry to maintain the status quo for a while. But these remedies come with an expiration date and if things do not improve in the medium term the outlook is rather bleak. □

Changes in restructuring

The number of insolvencies has increased and several old and famous brands have filed for insolvency, such as Rosenthal and Märklin. But very large companies have also been forced into failure, ie TMD and most recently Karman, and Opel is in difficulties.

It is not only the decrease in demand that makes life hard for troubled businesses



Christof Schiller
is a partner at
Wellensiek.

Insolvency and corporate restructuring

Objective analysis of value will be key to future restructurings to enable stakeholders to share profits and minimise losses.

The concept of measuring and managing value has gained broad attention in the past, in theory as well as in boardrooms and credit committees. Academics – including authors such as Stern, Rappaport, Copeland and others – set out the theoretical concepts. Their followers in private equity then developed the practical frameworks and application for acquired businesses.

Financial engineering became the standard toolkit to increase corporate value for such investors. The strategy was based on leveraging an assumed debt capacity of a business, cash management to release working capital and more traditional concepts of performance improvement, such as reducing overheads and realisation of synergies. Astonishing rates of return were achieved – in some cases, even before an exit.

Globalisation created many opportunities to boost the revenue streams of companies while reducing their cost bases. This, combined with liquidity in debt and equity form, was the basis of optimistic planning for many leveraged buyouts.

Many of these transactions were structured with considerable leverage and involved new debt instruments to bridge the gap between equity and traditional senior facilities. Covenants linked to operational performance were scarce, and financing structures complex.

Nothing appeared to be amiss as default rates remained near historical record lows and restructuring efforts became more successful in recent years driven by an economic climate that provided attractive sale prices and plenty of liquidity to finance a variety of restructuring options.

A recalibration of fundamentals is here

Now that the next phase of the credit cycle is upon us with a vengeance, leveraged buyouts are promising to become problem cases. A recalibration of fundamentals in loan multiples, debt structures, terms and pricing is routine on every refinancing. What will this mean in a scenario of further economic decline, currency fluctuations and increased global competition?

Poor operational performance and liquidity issues have led to an increase in the complexity of restructurings. Leveraged buyouts are expected to be a major source of the next wave of restructurings. Most of these companies have aggressive business

plans with high leverage multiples meaning that failure to reach performance targets will leave companies struggling to meet covenants and repayment schedules.

Financial markets have changed dramatically since the last restructuring wave. Stable bank relationships have disappeared and lenders may have sold their debt on the markets for secondary loans. The stakeholders in a restructuring are many, their agendas not always transparent or predictable and their interests not necessarily long term.

So what are the implications for stakeholders in an underperforming company? Lenders may have transferred their debts to traders and hedge funds and may not be willing to support an ailing corporate through a risky, long-term restructuring. Management teams will see possibilities for buyouts with obvious conflicts of interest in the process of negotiation.

The playing field for all stakeholders in corporate restructurings is now less predictable. Stakeholders in troubled companies will not necessarily have the same agendas leading to much more aggressive strategies by both equity and debt providers.

traders will be confronted with illiquid markets that lock them into untradeable investments.

Traditional banks may continue to raise their interest margins to reflect the true risk of the financing involved. The withdrawal of liquidity from various markets in an economic crisis is serious. The markets for subordinated mortgages and collateralised debt obligations have shown us the new rules and principles that the markets may follow.

Valuing and understanding the available restructuring scenarios

Preservation of the intrinsic value of the business and a desire to participate in the upside will be the core focus of every corporate restructuring. This is true whether the solution is an equity-based or a bank-led refinancing, or a combination.

Traditional operational restructuring will see a revival. This may include cutting overhead costs and simplifying the portfolios of products and clients, to regain control over margins and return to the profitable core activities. But beware: opportunities to sell off a company or

“The playing field for all stakeholders in corporate restructurings is now less predictable.”

Value will drive future restructurings. Understanding the principles of valuation and value management will be the key to assessing the current position and evaluating the options that may be available to the business and its stakeholders. Scenarios that preserve value for stakeholders will be creditor-driven and include traditional M&A, balance sheet restructuring and strategies to restore the operational performance levels; simultaneously, creditors will want to incentivise management, perhaps by way of share options linked to value targets.

Private equity and hedge funds are expected to write down investments. Debt

divest parts of a troubled business may diminish further as limited liquidity and risk aversion continue to prevail.

Debt for equity swaps and convertible structures to allocate equity over time will drive future solutions. Stakeholders will need to agree on sustainable levels of debt in the context of debt serviceability and gearing.

These solutions will require a full understanding of the concept of value to negotiate and minimise the loss for all parties, and to agree on an equitable basis for sharing any loss and the potential upside. Independent and objective analysis of value will be the cornerstone of all scenarios for troubled companies and their stakeholders. □



Mike Weaver and Joachim Schulz
are managing directors in restructuring and recovery at American Appraisal.

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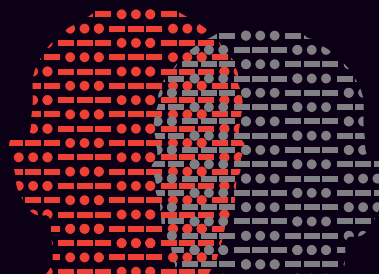
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New property service to help insolvency practitioners

Unfinished developments can pose a significant problem for officeholders. Getting the property appraised, secured and a strategy in place for the future needs prompt action, which only a full professional service can provide.

Development Project Recovery Services Ltd (DPRS) is a privately-owned company providing consultancy support and practical application to clients who find themselves in the unenviable position of taking possession of incomplete development projects. Clients are usually those who lack the time or expertise to determine and implement the strategy necessary to maximise the residual value of the project.

The DPRS management team has many years of experience in the property development industry, most recently through its successful sister company Bermac Properties Plc (Bermac). Bermac provides consultancy, management, equipment and administrative support as necessary to DPRS.

The DPRS approach

The DPRS approach is a straightforward one. Initially an appraisal of the development project is carried out (usually without charge) to identify the main issues and provide broad advice on strategy and any urgent actions required. This is often essential as, where a contractor has gone into liquidation, theft or damage can often occur to the project within a few days leading to significant additional cost for the client. This initial appraisal may lead to the need for further investigation but the following issues are considered:

- Planning: potential/cost-effectiveness of re-planning the scheme to improve value and/or marketability
- Construction: most cost-effective means of procuring completion of outstanding construction works
- Marketing: review of marketing strategy to date to include potential for re-branding/re-launching and or letting of completed units pending re-emergence of reliable selling market
- Project management: review the status of the project to identify any failings eg missing consents, easements, warranties etc, which may restrict the project from achieving its optimum value.

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Iconica, Maidstone, Kent

This project in central Maidstone comprised 24 new two-bedroom apartments in two blocks with basement carparking. The contractor went into liquidation half way through construction. The company took possession of the site and determined that direct management of the outstanding construction works by the company was the most cost-effective solution.



Ruffles Yard, Castle Hedingham, Essex

This project, in the heart of this historic village, comprised four new four-bedroom detached houses. The contractor went into liquidation half way through construction. The company took possession of the site and determined that direct management of the outstanding construction works by the company was the most cost-effective solution.



Broomfield Road, Chelmsford, Essex

This project, close to Chelmsford town centre, comprised the addition of a new second floor on this existing office building. The contractor went into liquidation in the latter stages of construction and the company took possession of the site and completed the outstanding works.



West End, Chelmsford, Essex

This project, close to Chelmsford town centre, comprised twenty-one new one-, two- and three-bedroom apartments and three small office units. When the developer experienced project management difficulties, the company took over the final project management stage and marketing the completed units.

DPRS is then able to offer a range of services to implement that strategy. Where necessary, project managers or other staff can be hired in to provide dedicated attention to the project. For illustrations of our work see case studies above or call 01245 344444. □



Andrew Temperton
is the managing
director at
Development
Project Recovery
Services Ltd

How to avoid becoming a wolf's dinner

Michael Kain tells the story of an accident that need not have happened.

Let me tell you a story

Once upon a time, there was a company that fell out with a larger supplier. The resulting dispute and litigation caused the company to experience serious cash-flow difficulties. Thus, the company petitioned for an administration order and they decided to accept the bank's nominated administrators.

At a meeting of the creditors, the administrator's proposals and their remuneration were rejected. The creditors resolved that the administration should continue only for as long as it took to approve a voluntary company arrangement. To this end, the creditors invited the administrator to resign but they refused to vacate the office until their fees were agreed. So, the administrators had to apply to the court to discharge the administration and to wind up the company; orders that were subsequently made. The administrators also applied for their remuneration to be fixed at just under £240,000 plus legal fees of £90,000. A former director and creditor of the company objected to this and so it came to pass that the question of the administrator's fees went before the registrar for assessment. After an uncomfortable five-day hearing, the



so terribly wrong for the insolvency practitioner. However, just like those old fairy stories, there are lessons to be learned from somebody else's misfortunes and

What should you do about it?

The two main challenges appear to be on hourly rates and the amount of time spent. It's no secret that the general public are astonished and often disgusted at what they perceive to be the high level of hourly rates that some insolvency practitioners charge. If, however, they were to make a comparison with other professionals' fees, they would see that they are fairly standard. A solicitor acting for a client on a conditional fee agreement (no win no fee) can charge their normal hourly rate (which can be as much as £402 per hour – see Solicitors Guideline Rates 2009) and then double it if they win the case at court, making it a whopping £804 per hour!

Producing a detailed bill of costs overcomes many of the objections when it comes to a solicitor's bill. The same applies to insolvency practitioners' fees. Solicitors have traditionally used us because they know that our bills will stand the court assessment test. Having an independent person prepare the bills avoids personal criticism and they benefit from having an objective eye to pick out missed billable time and activity as well as excluding un-billable items to avoid embarrassment in court.

So, to continue with the fairy story metaphor, before going to visit your grandmother, then, you had better make sure you have packed your axe. Our skills are finely honed and we can help you with your file management techniques, time-recording and best practice. We will review matters which are ongoing and help with training and auditing to ensure forthcoming fees are fully recoverable. Finally, we can help you with preparation for court if you have assessment hearings approaching.

Remember, you might not end up wondering at the size of your grandmother's teeth but you could find yourself in front of the Big Bad Wolf justifying your fees and it's your income that could finish up getting the chop!

Don't look back and wish you'd got help – call Kain Knight Insolvency Division to talk about any issues you may have. □



Michael Kain is the chairman at Kain Knight Group Plc.

“Producing a detailed bill of costs overcomes many of the objections when it comes to a solicitor's bill. The same applies to insolvency practitioners' fees.”

administrator's remuneration was fixed at just over £86,000 and, furthermore, the unhappy administrator was ordered to pay the costs of the assessment and had to sit in the corner and only have dry bread and water for supper.

Analysing the problem

So, what went wrong for the administrator? There were a number of factors but the main problem was the enormous amount of time recorded, in particular, at senior level without adequate regard having been paid as to whether that time was justified.

Now, although this story sounds like one of those awful fairy tales you were told as a child that always contained a severe lesson in what would befall you if you were bad, it is actually a true story (except for the dry bread and water bit). This was a case that went to a hearing in 2004 and went, oh

there are ways of making sure that you aren't the poor character who gets eaten by the Big Bad Wolf!

For the past 30 years or so, I have been assisting solicitors, insurance companies and their clients in the assessment of legal costs. Today, a whole industry has grown around the disputation of legal fees and I can foresee that that is exactly what is going to happen in the future to insolvency practitioners. They may feel that they are fairly immune to challenge but it is only a matter of time before they will have to face more regulation and a creditor offensive. The government has indicated that it is considering increasing regulation to control fees and it only takes one bright spark to pick up on the 'ambulance chasing' model for personal injury and start advertising a no win no fee service to creditors.



Do you find your fees being challenged all too often?

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INSOLVENCY DIVISION

Deal or no deal?

Steve Rodell outlines a specialist agent's guide to achieving the best price in a short time and a difficult market.

Securing the best price for a business can be tricky in a buoyant market. It's even more difficult if a business is distressed, trading is tough, prices are declining rapidly and timing is tight due to third party pressures. When it comes to selling businesses, my colleagues and I at Christie + Co are right at the coal face. Specialising in the hospitality, leisure, care and retail sectors, we are currently instructed on around 100 distressed cases for banks and insolvency professionals.

retailers if they are in the right location. You need an agent who will think intelligently about whom to target in the market.

Set the right price

The need for a sound understanding of business valuation has never been greater. Valuing a business is all about being close to buyers and reflecting their sentiment in the guide price. An experienced specialist agent has probably sold or valued the same property several times in the past and will also be able to compare it with similar

business in our specialist sectors is likely to be on our radar. However, we don't take that for granted and each marketing campaign must be carefully devised to include appropriate media. While it's advisable to advertise opportunities widely, we usually secure viewings quickly with credible buyers because we know their requirements and present them with relevant opportunities. Many cyclical investors see the current market as an opportunity to do deals and realise long term growth. The day you meet a Christie + Co agent or valuer, they will have a list of prospective purchasers in mind. The moment instructions are received they can be instantly contacted.

“Even in a tough market, it's possible to create competitive bidding by correct pricing and effective marketing.”

Contrary to the media gloom, deals are still achievable and if you manage the sale process carefully, you will still get the best price for an asset.

Know the market

It's vital that you fully understand the market in which the business operates. What challenges face the industry? Who are the major operators and likely investors? Who's performing well and who's not? What are the market trends and how are customers behaving? It's important to be conscious of the national trends and issues, but local knowledge is equally important. Some geographical areas perform better than others and it's always a good idea to be aware of the local competition and be familiar with the potential local bidders. If you choose an agency that has a local presence and national exposure, it will have a much better chance of knowing the business and identifying the most likely buyers.

Assess the opportunity

A good agent will look closely at factors affecting the saleability of the business by viewing the opportunity through the eyes of a purchaser and preparing a compelling list of selling points. A business in distress does not automatically mean the business is poor. We often find distress is down to poor management or extraneous circumstances. There are always underlying factors to be considered and explained to buyers. If there's growth potential or an alternative use angle for a buyer, an experienced agent will find it. As my colleagues recently discovered, some pub businesses attract convenience

businesses recently valued or sold. While access to solid transactional evidence is preferable, the lack of recent deals means you have to rely more on local market activity, including bids and offers where deals may not have concluded. In the current market, it's a mistake to set the guide price too high and eliminate potential bidders. It is vital to attract maximum interest to ensure competitive bidding.

Target the buyer

At Christie + Co we have 16 UK agency offices, 11 international offices, and a huge multi-media marketing resource, including a website with more than 30,000 regular users. Anyone interested in buying a

Manage the process to drive the price

Even in a tough market, it's possible to create competitive bidding by correct pricing and effective marketing. Enquiries and viewings must be handled carefully to encourage offers. The internet has enabled buyers to expand their knowledge, so they tend to be better informed and much more enquiring than they used to be. The agent needs to have all the answers ready. If you can successfully identify multiple bidders, it's possible to negotiate the price upwards through the bidding process. The highest offer may not be the best offer. The agent should review all offers carefully to ensure the bidders are able to fund the purchase and move quickly to complete the deal. Effective communication throughout this process is vital.

Is selling always the best option?

At Christie + Co we are probably best known for our success as business brokers. However, around half our business is based on advisory services and selling is not always the way to extract best value from an asset. The options for each business must be assessed. Whether to turn around by instigating some sort of change, hold or exit will depend on the surrounding circumstances. There are generally more options to consider while the business is still in the control of the owner before it becomes a distressed sale at the behest of creditors. □

Anatomy of a business sale – The Great Northern Hotel, Peterborough

- Instruction to market the hotel received from Tenon Recovery at the end of February
- Sales particulars issued to 940 possible purchasers
- Property attracted 221 hits on Christie + Co website
- 171 sets of sales particulars were downloaded
- 10 parties were accompanied on property viewings, with two revisits
- 24 Confidentiality Agreements were returned by interested parties
- 14 offers were received (from six parties)
- Sealed bid process drove price upwards to exceed guide price by 10 per cent
- Deal was successfully agreed within four weeks of instruction
- Contracts exchanged and deal completed in April.



Steve Rodell is head of Bank Support & Business Recovery at Christie + Co.



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BUSINESS INTELLIGENCE

Economic snapshot: Yorkshire Region

The short-term economic prospects are testing but Andy Wood believes that a well managed company will emerge leaner and meaner in future years.

When I first entered the profession approaching twenty years ago, I was told that the general strength of the economy could be gauged by the number of cranes you could see on the horizon if you looked across the skyline of any major town or city. While this is not the most scientific approach, there is an element of logic as the construction industry is the first to suffer in a downturn, and generally one of the first to thrive when the economy starts to pick up.

Construction down

In the Yorkshire Region our cranes have decreased significantly in number and, of those still left standing, many are not in operation as major development projects



draw dividends when no distributable reserves exist, therefore generating an overdrawn loan account without the slightest understanding of the accounting entries involved in such scenarios. I believe

“The difference between this and previous recessions is the amount of personal exposure that directors in struggling companies are facing.”

are mothballed or put back for the foreseeable future where work has not yet commenced. Leeds, Sheffield and Bradford all have issues in this respect.

The region has a surplus number of flats in the residential sector, with prices plummeting and many developers and buy-to-let investors in financial difficulty as a result. The commercial sector is beginning to feel the effects of the recession as more units become available and the commercial landlords and their agents need to take a more flexible approach to rents to mitigate the effects of the deepening recession.

Personal debt up

The difference between this and previous recessions is the amount of personal exposure that directors in struggling companies are facing. It is not unusual to find directors who have personally guaranteed the bank, factoring company and landlord, and I wonder in many cases what protection they actually achieve from limited liability! The same directors in a growing number of cases have compounded their personal position by running up personal credit cards to support the ailing business or have continued to

that as a result of this recession we will see significant numbers of failed entrepreneurs who will lose personal assets through bankruptcy or at best will be tied into Debt Management Schemes for many years.

“The majority of the well managed businesses have strong order books and see the current recession as an opportunity to strengthen their business models.”

Credit uncertain

The meltdown in the financial sector specifically is causing problems in Leeds as a result of its position as a major financial sector in the UK with a number of redundancies announced, in addition Halifax is a town that has traditionally relied on the Halifax Building Society (latterly HBOS) as its major employer and the recent absorption of its business into Lloyds Group leaves much uncertainty in relation to future employment levels in the town.

Across the region the growth in call centres over the years has provided high levels of employment and again this is a sector that now is cutting back employees.

Yorkshire spirit!

But I do not believe it is an entirely gloomy outlook for Yorkshire. The vast majority of the businesses failing tend to be those who made profits despite themselves in the good times and either withdrew all surplus funds by way of dividend leaving no buffer or have failed to invest for the future. I have seen instances where the main funder has reduced or withdrawn the existing facility, but most businesses don't fail because they are bad at what they do, but because they can not adequately manage the financial side of their operations.

The feedback I get from attending various functions around the region is that the majority of the well managed businesses have strong order books and see the current recession as an opportunity to strengthen their business models. Where there are current difficulties, employees in many cases are agreeing to work shorter working weeks to reduce overheads on the basis that it is better to have a job on 75 per cent salary, then no job at all. I believe this approach is to be welcomed and encouraged, as long as all appropriate employment legislation is adhered to.

In summary I believe our region, in line with the rest of the country, faces a difficult 2009. Traditionally as the country comes out of recession insolvency practitioners remain busy as businesses

overtrade at the first signs of the infamous green shoots of recovery and therefore insolvencies are likely to remain high in 2010. However, I am confident that the Yorkshire Region will exit the recession leaner and meaner to grasp the opportunities available in the coming years. □



Andy Wood is a partner in the P&A Partnership.

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We continually striving to improve benefits for all members.
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- Priority bookings for R3 courses and most of its conferences
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- 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:

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R3 events, courses and conferences

Date	Event title	Venue
June		
1	North West Regional Meeting	TBC
2	Directors' Duties	Chase Hotel, Cheltenham
2	Legal Update	Chase Hotel, Cheltenham
3	Southern Women's Group Meeting	PricewaterhouseCoopers, Southampton
4	North East Regional Meeting	Ward Hadaway, Newcastle
5	Yorkshire Women's Group Ladies Lunch	The Metropole, Leeds
9	Liquidations	Cedar Court Hotel, Huddersfield
11	South West & Wales WG Dinner	The Council House, Bristol
11	Yorkshire Golf Day	Scarcroft Golf Club, North Leeds
12	European Issues	Grange City Hotel, London
12	North West Ladies Lunch	The Lowry Hotel, Manchester
16	Introductory Programme Rescue 2	etc Venues, London
16	Introductory Programme Rescue 2	Deloitte, Birmingham
18	Introductory Programme Rescue 2	Irwin Mitchell, Leeds
18	Directors' Duties	Copthorne Hotel, Newcastle
18	Legal Update	Copthorne Hotel, Newcastle
23	South West & Wales Regional Meeting	Bristol Golf Club, Bristol
25	Yorkshire Regional Meeting	Crown Plaza, Leeds
26	JIEB Graduation Ceremony	BMA (British Medical Association) House London
July		
2	Debt Restructuring	Holiday Inn Bloomsbury, London
6	Eastern Regional Meeting	TBC
7	Business & Options Reviews	Met Hotel, Leeds
14	Yorkshire Breakfast Seminar	TBC
14	Introductory Programme Rescue 3	etc Venues, London
14	Introductory Programme Rescue 3	Deloitte, Birmingham
16	Introductory Programme Rescue 3	Irwin Mitchell, Leeds

For further information on R3 courses and conferences, please visit the R3 website www.r3.org.uk, where you can download the full 2009 programme. Alternatively, call the Courses team on 020 7566 4234 to request a programme by post.

■ regional events ■ R3 events

R3 Directory amendments

R3 would like to apologise to the following members for incorrect details printed within the 2009 Directory. Correct details are as follows:

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IBC = inside back cover, IFC = inside front cover,
OBC = outside back cover.

Inserts: BPP, Credit Today, Sweet & Maxwell

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We are currently looking to recruit an Insolvency Practitioner who will embrace our culture and is driven to succeed in a volume based environment. The opportunities for such individuals are tremendous both in recognition and reward. We will offer the right candidate a very competitive remuneration package, true recognition within the workplace and market, continuous development and an exciting and changing environment to work within.

If you are commercially minded, pro-active and wish to take on a challenge, please contact Denise Moran, HR Director on 01923 636822 or denisemoran@moneydebtandcredit.com

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Insolvency Manager

Central London – up to £50k

MOORE STEPHENS
CHARTERED ACCOUNTANTS

About Moore Stephens

Top tier accountancy firm with an established corporate recovery team based across a network of offices. Moore Stephens has built a reputation for handling difficult assignments that require flexibility without compromising on quality. Their London office offers a full range of services including business reviews, restructuring advice and all types of formal appointments.

As part of the expansion of its court work and insolvency group, the firm is seeking an experienced individual to join at what is an exciting time for the team.

About the role

As an experienced professional you will be looking to join a firm where you can use your broad insolvency knowledge to work within a predominantly standalone role.

You will enjoy a mixed portfolio of cases (60% personal appointments and 40% liquidations) as well as a significant amount of investigation work.

As a high percentage of the work received is referred by lawyers, you will be keen to attend marketing events in order to build on these established relationships.

You will benefit from:

- the opportunity to manage your own work in an autonomous fashion
- a varied and interesting caseload
- opportunities to assist in marketing
- potential to earn overtime.

To apply

Please forward a CV and details of current remuneration to **Ava Davar** or **Scott Lavery** via bcpractice@badenochandclark.com or contact them on 020 7429 5370.

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Partner

London / South East

£Outstanding

Our client is both global in its coverage and local in its delivery of professional services, and is a top-tier firm. As a direct result of greater demand and increased focus for and upon the Recovery and Restructuring group, an additional senior executive at Partner level is required to maximise and build upon the opportunities already created by a compelling business proposition in London and the South East.

Acting as a principal and with a demonstrable track-record of winning insolvency work from businesses direct and through professional intermediaries, you will have the privilege of leading and contributing to a loyal and highly professional group of colleagues.

With experience and the appetite to engage with the mid-corporate sector, you will be comfortable with workouts involving Asset Backed lenders and bilateral parties.

As a significant fee-generator in your own right, your focus will naturally be upon sustaining your team and imbuing the most appropriate collegiate environment within the business, and developing others. Your credibility in the market place will be self-evident, and this will be reflected in where you are currently and the measure of your personal ambition.

If you believe you have the credibility and track-record of success to meet this challenge and opportunity, and want to learn more of this specific role through us, the retained consultants, then please forward a CV and covering letter, together with current remuneration details, to Simon Ponsonby at Act4 Group Limited, 15 Old Bailey, London EC4M 7EF, or email simon.ponsonby@act4.co.uk Fax: 020 7290 2722.

Change is inevitable - except from vending machines

Anon



Davies Kidd

RECOVERY RECRUITMENT SINCE 1991

Established in 1991, during a major recession, Davies Kidd has become a name synonymous with Recruitment in the world of Insolvency, Corporate Recovery, Corporate Restructuring and Turnaround. We have forged long lasting relationships with 'Big 4' and other international practices as well as with boutiques and a range of independent Insolvency Practitioners.

Through major recession, boom times and, more recently, a credit crunch the field of Corporate Recovery, Restructuring and Insolvency has continued to offer a challenging and rewarding career path to candidates at various levels and with varied backgrounds.

Whilst we deal with all levels of vacancies from Administrator through to Partner, we are particularly experienced in handling senior level appointments at Senior Manager, Director and Partner level, including teams and practice mergers, where we fully appreciate the need for tact and discretion in the close-knit world of the Insolvency Practitioner. We are also highly skilled at providing a bespoke search service on behalf of the candidate, often introducing them to organisations where vacancies may not be overtly advertised.

We provide full coverage of the UK mainland market as well as offering international experience, having made successful introductions throughout England, Wales and Scotland as well as overseas in locations as diverse as Germany, Australia, Hong Kong and Kenya. In addition to being long term regular advertisers in quality journals such as R3 we are also able to maximize global coverage through our unique website, www.big4careers.com

Much of our success at Davies Kidd has been based on repeat and referred work, both from a client and candidate perspective so whether you are a prospective job seeker looking for a career move or an employer seeking additional staff please feel free to contact one of our Partners on **020 7812 6688** or e-mail chris@davies-kidd.co.uk or jeff@davies-kidd.co.uk Alternatively, log on to www.big4careers.com for more information.

All enquiries will be treated in the strictest of confidence.

Greenfield Set-Up Opportunities

Belfast • Dublin • Leeds • Birmingham • South West • Scotland

With a number of Restructuring and Recovery specialists looking to expand their service offering and office networks throughout the UK and Ireland, several exciting business opportunities have arisen for entrepreneurial practitioners to set-up operations with leading firms and boutiques. Suitable applicants are likely to be existing Partners or Directors, as well as Partner-led teams, with strong contacts and proven business generation and team building skills. Current opportunities are available in Belfast, Dublin, Leeds, Birmingham, Scotland and the South / South West of England. All enquiries and applications will be treated in strict confidence.

Restructuring & Recovery Specialists

London £50,000 – 100,000 +

This leading international Consulting firm has a thriving Restructuring team and is looking to further strengthen its growing London presence by hiring high performing specialists at Consultant, Manager, Associate Director and Director levels. Ideal applicants will be qualified Chartered Accountants, or equivalent, who are able to demonstrate a strong record of achievement working on major Corporate assignments in a Restructuring or Recovery capacity. In all probability you will be a high-performing team player currently working within the Restructuring team of a 'Big 4', large firm or leading boutique. You will be offered a highly rewarding career path, not only financially, but also in terms of richness of experience and personal and professional development.

Recruiting For Staff?

If you are recruiting for staff at any level in the Restructuring, Recovery and Insolvency fields why not register your vacancy with us to see if we can help. We will happily advertise it for free on our own recruitment website www.big4careers.com which attracts candidates looking for career moves both to and from the 'big 4' as well as among non 'Big 4' firms. With nearly 20 years Senior level recruitment experience behind us we are also highly skilled and discrete in handling opportunities at Senior Manager, Director and Partner level.

Partner & Director Search

If you are a Partner or Director or a Team considering a career move then feel free to consult us for advice. With more than 15 years senior level recruitment experience in the Restructuring, Recovery and Insolvency markets we fully understand the 'close' nature of the market and the need for tact and discretion. We currently have Director and Partner search assignments throughout the UK and are in regular contact with a number of firms who are keen to talk to senior professionals with proven business generation skills who can add value to a Recovery practice.

Practice Mergers and Acquisitions

Looking to merge or acquire a Restructuring or Recovery team? Whether you are a sole practitioner or a team seeking a move or a firm looking to acquire a practice call us for a confidential discussion. Contact Jeff Davies or Chris Kidd on 020 7812 6688 for a confidential discussion.

'Big 4' London

Managers & Directors £Competitive

Outstanding career opportunities for dedicated Recovery specialists in the London City office of this 'Big 4' firm. There has rarely been a better time to gain exposure to a fascinating range of distressed situations, some often well-publicised and high profile. Despite the demand for services entry criteria are strict – you will need a strong profile of academic and professional achievement with a proven track record of handling Corporate Recovery assignments. Ideal candidates will be ACA, ACCA and / or JIEB qualified with at least 1-3 years (Managers) and 5- 10 years+ (Assistant Directors and Directors) relevant experience, gained in a leading professional services firm or boutique. Your skills should encompass case management, project management, staff management and marketing. Successful applicants will be heavily involved in providing an extremely varied range of services to stakeholders of underperforming businesses including investigations, reviews, restructuring / turnaround planning and insolvency procedures.

Corporate Restructuring & Recovery Managers, Senior Managers, Directors

Australia \$Aus Competitive

Excellent opportunities for qualified Chartered Accountants or equivalent with Corporate Recovery / Restructuring experience to join a leading international Restructuring practice in Australia. Openings exist from Manager through to Director level throughout their Australian network including Sydney, Melbourne, Brisbane, Perth and other locations. Previous Recovery / Restructuring experience in an internationally recognised professional services firm will be desirable.

For a confidential discussion on the market or any of these positions contact:

Jeff Davies on 020 7812 6688 or email jeff@davies-kidd.co.uk

Christopher Kidd on 020 7812 6688 or email chris@davies-kidd.co.uk

Insolvency Administrators

West Yorkshire £Flexible

Well-established, niche, independent Insolvency practice seeks Insolvency Administrators with at least 2 years experience to work on a mix of corporate and personal cases.

Corporate Insolvency Administrators

London – City £25-35,000

Outstanding career opportunities in a leading firm await Insolvency Administrators with 2-4 years Corporate Insolvency experience. The roles will suit someone who is looking for an all-round role in a progressive, professional and supportive team environment, ideal for CPI, ACCA students who can handle casework with minimum supervision.

Recovery Executive & Manager

Northern Home Counties £Competitive

Leading national / international practice with a strong Corporate Recovery coverage seeks an Executive and a Manager to join its growing team in the Northern Home Counties region. Successful applicants will benefit from a great range of experience. You will need a professional qualification (ACA, ACCA, JIEB or equivalent), with relevant experience of Corporate Recovery assignments. The Manager will also need previous Managerial experience.

Corporate Recovery Senior Manager

Manchester £Negotiable

Great opening for a proven Recovery professional to join a leading practice. Working closely with Partners you will need to be a qualified accountant and / or JIEB with several years' relevant experience including proven management skills, marketing ability and a strong background in administration and business review work.

Insolvency Senior Administrator

Bucks £Flexible

Great opportunity in a medium sized firm for an Insolvency Administrator with at least 3 years' Insolvency casework experience, particularly in Liquidations and Bankruptcies. The role will involve a mix of corporate and personal casework and could equally suit someone qualified, part-qualified or looking to qualify (full training and study support will be given).

Corporate Recovery Administrator

Surrey £Competitive

Excellent career opportunity in a leading national practice for a Corporate Recovery Administrator with at least 2-3 years experience of receivership, liquidations and administration work. The role would suit someone CPI qualified or equivalent.

Business Recovery Manager

London £Negotiable

This growing, niche Recovery boutique offers an exciting opportunity to a qualified accountant with at least 2 years post qualification experience in IBRs and Admins in the mid-markets sector. Great opportunity to grow with the firm for someone who enjoys responsibility and is able to think on their feet. The role may well suit someone coming from a larger firm who is seeking more direct involvement in the shaping of a practice.

Restructuring Senior Manager

Cayman \$US 105-130,000 Tax Beneficial

This International firm offers challenging work experience, career progression and lots of sunshine to a Senior Manager who is likely to be a qualified accountant with at least 5 years post qualification experience in Restructuring / Corporate Insolvency procedures, ideally gained in an internationally recognised firm. The role will suit a personable candidate with good commercial, technical and client relationship skills.

Senior Administrator / Assistant Manager

East London c£35,000

Excellent opportunity for an experienced Insolvency Administrator with Supervisory skills to join an established, friendly Insolvency practice. You will need at least 3 year experience including CVLs and Administrations and should be comfortable supervising up to 4 members of staff.

Corporate Recovery Manager

Midlands £Competitive

Excellent career opportunity for an established Manager to join a leading Recovery team. Covering the Midlands region between Birmingham and Milton Keynes, you will benefit from exposure to a wide range of Corporate Recovery assignments and a busy, friendly professional environment. The ideal candidate will be a qualified accountant or JIEB with good all-round Recovery skills including previous exposure to Bank work and marketing activities.

Corporate Recovery Director

Southern England £Negotiable

Outstanding 'Big 4' opportunity for an ambitious Restructuring / Recovery specialist to 'make a name' for themselves in a 'Big 4' office in the South of England. You are likely to be a qualified accountant and JIEB with at least 7 years post qualification experience and a specialist background in Recovery and Restructuring work, particularly for mid-market clients. You will need a strong history of successful delivery and a proven business development record. This role represents a great opportunity to be part of a growing national team.

CR Assistant Manager / Manager

M4 Corridor £Flexible

Expanding Corporate Recovery team of a leading professional firm is able to offer a challenging and rewarding career opportunity to an Assistant Manager or Manager with between 2-5 years Recovery experience gained in the Mid-Market sector. Based in a local office on the M4 corridor between South Wales and the Thames Valley ideal candidates will be ACA / ACCA and / or JIEB qualified and keen to contribute to and benefit from a stimulating work environment.

Banking Advisory Specialists

Leeds £Negotiable

This international firm is keen to recruit qualified accountants with good all-round Corporate Restructuring and Recovery skills to include practical experience of Bank-led Advisory work in the form of Investigations, Strategic and Independent Business Reviews. Your experience is likely to have been gained in the Restructuring department of a medium to large accounting firm or specialist boutique and applications are welcomed from newly / recently qualified level through to experienced Management levels.

Corporate Recovery Professionals

London £Competitive

This leading international boutique is expanding its Recovery and Corporate Insolvency team and is keen to recruit additional professionals with strong, relevant experience gained in a 'Big 4', leading mid-tier or specialist Insolvency practice. Suitable candidates are likely to be qualified accountants and / or JIEB with 3-10 years Corporate Insolvency experience

Working Capital Management Assistant Directors and Directors

London £6 Figure Packages

Outstanding career opportunities in a growth area of a 'Big 4' firm for experienced professionals with Senior Manager or Director level experience in leading Working Capital and Cash Management initiatives for multinational companies. You will need previous relevant experience gained in a leading Financial Consulting or Strategy House or from within a large professional services Restructuring team. With a strong international emphasis fluency in other major European languages would also be a considerable asset.

Senior Insolvency Administrator

Central London £30-40,000

Excellent opportunity for a part or fully qualified CPI or ACCA with at least 3 years Corporate Recovery experience to join a leading non 'Big 4' practice in Central London. You should be able to handle cases with minimal supervision. The successful candidate will benefit from a good range of Corporate experience in a friendly, supportive team environment with good ongoing career prospects.

'Big 4' Recovery Opportunities Assistant Manager to Director Level

London / South East £45,000 – 6 Figures

As a result of the well documented economic conditions our client, a 'Big 4' firm, is experiencing significant growth in its Recovery practice and is consequently looking to make a number of key appointments to its team in London and the South East. They are interested in talking to dedicated specialists at all levels from Assistant Manager to Director. Suitable candidates will be qualified accountants, JIEBs or equivalent with a strong experience in Insolvency, contingency planning and independent and pre-lending business review work.

Corporate Recovery Assistant Director

M4 Corridor £Negotiable

Fantastic career opportunity in an international firm for a qualified accountant and / or JIEB with broad and deep experience of handling mid market Corporate Recovery assignments including Liquidations and Administrations. The role could suit interested candidates living anywhere between South Wales and the Thames Valley. Great chance to become a key part of a growing team for someone who enjoys a fully involved role including casework, marketing and management.

Corporate Recovery Manager

Manchester £Competitive

Corporate Recovery team of a leading national practice seeks a qualified accountant / CPI / JIEB with proven Recovery experience at Managerial level. You will enjoy full involvement on a varied range of corporate casework.



Specialist insolvency appointments in the UK

Insolvency Practitioner

Manchester • £70-100,000

This fast growing and well established personal insolvency firm is keen to recruit a licensed insolvency practitioner to take appointments, administer and manage high volume IVAs. You will be responsible for operational matters, staff supervision and training, compliance issues, best practice and IT systems. The position perfectly suits an experienced and commercially minded licensed insolvency practitioner with a personal insolvency background. In return, you will be offered an extremely competitive package. Ref: 3691911
E susan.pangburn@hays.com T 0161 480 4959

Insolvency Manager

London • £50-70,000 + benefits

This role involves working for one of London's fastest growing insolvency boutiques. The firm generates high-profile corporate and trading cases and has a corporate restructuring and IBR offering. You will be responsible for purely corporate work, with the ability to handle complex trading cases. This firm is ideally placed to grow through this downturn and therefore can offer genuine progression. You will have previous corporate insolvency experience and a proven track record in staff management. Ref: 7894439

E shaila.verma@hays.com T 020 7520 5961

Corporate Recovery Manager

Birmingham, City • To £55,000 + excellent benefits

This is an exciting new role within a rapidly expanding advisory team with a major mid-tier firm. Firstly, you will get instant access to an exciting mix of good quality assignments such as IBR cases, restructuring advisory, trading receiverships and insolvency. Secondly, your personal and technical development will be closely monitored on an intensive 'future leaders' programme where talent is groomed for optimum career advancement. As a recently qualified JIEB, you will be offered opportunity for progression. Ref: 7304820

E nick.boulter@hays.com T 0121 212 1979

Insolvency Administrator

London • £15.00-£25.00 per hour

An opportunity has arisen with a Top tier firm based in Central London. Reporting to the manager and partner, you will be working on a corporate case portfolio (from conception to closure) of high profile trading administrations, liquidations, CVL's and MVL's. You will be exposed to complex independent business reviews and investigations. You will have insolvency experience gained from the profession, with exposure to corporate casework. Qualifications are not essential, although advantageous. Ref: 7894525

E matthew.woodford@hays.com T 020 7520 5961

Corporate Recovery Manager

Leeds • To £75,000

This Big 4 organisation is looking for an experienced manager to work on high profile assignments with some of the best in the corporate recovery field. You will be exposed to a wide variety of projects within a highly commercial, client-focused environment and carry out a mix of work between both advisory and insolvency. This role will provide fantastic opportunities to rapidly develop your career on a structured path. Successful candidates will ideally be working within a Top 10 firm and be looking to make their mark. Ref: 1131853

E elise.kay@hays.com T 0113 246 8363

Senior Manager

Bristol • To £70,000

This is an excellent role in a national firm offering unrivalled prospects. As a licensed insolvency practitioner, or equivalent, you will be proactive, commercial and a key networker in the local/regional market. You will be able to lead and inspire other team members and develop relationships with the business and banking networks. You will be offered a competitive remuneration package and be provided with the perfect platform to showcase your wide range of recovery skills. Ref: 2693458

E helen.robson@hays.com T 0117 929 8911

Insolvency Manager

Hertfordshire • £50-60,000

There has never been a better time for an experienced insolvency manager to join this highly successful and reputable insolvency practice. With a service proposition that is built around the delivery of a tailored service, this firm delivers cost effective solutions that are innovative. This is a highly rewarding opportunity with a firm that offers strong financial rewards, career progression and a challenging role. You will be looking to take the CPI/JIEB examinations with a view to taking your career forward. Ref: 1263693

E stephen.pyle@hays.com T 01727 843 661

Insolvency Manager

London • £50,000 + overtime + excellent benefits

Do not miss this fantastic opportunity to progress your insolvency career to managerial level. Based within a reputable insolvency and corporate recovery arm of one of the Top 20 firms, you will gain exposure to managing a varied personal and corporate caseload. This role carries a substantial amount of investigations work. Successful individuals will have significant and recent insolvency experience of managing an extensive caseload. JIEB qualification and previous exposure to proceeds of crime work will be advantageous. Ref: 7894451

E beata.malinowska@hays.com T 020 7520 5961

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Throughout the UK, Michael Page Finance has earned an unparalleled reputation in the Insolvency & Corporate Restructuring market. Our specialist consultants know the market you work in intimately and can offer qualified advice to keep your career growing in the right direction. It all adds up to making us the number one choice for promoting the careers of Recovery and Insolvency professionals.

CORPORATE INSOLVENCY MANAGER

Our client, a leading Public Practice, is looking for a strong Corporate Insolvency Manager for their Reading office. The role combines the technical excellence of managing a portfolio of cases with the soft skills needed to manage and develop a team, as well as having experience of handling UK insolvency cases. You'll be rewarded with an excellent brand name, access to some of the most complex and interesting recovery cases in the country, and a strong teamwork culture.

Thames Valley – £45-55,000

Contact Matthew Duquenoy 0118 9559034

matthewduquenoy@uk.michaelpage.com | Ref: MPRV13052774

CORPORATE RECOVERY SENIOR MANAGER

An opportunity for an experienced Corporate Recovery Senior Manager has arisen within the Bristol office of a national recovery and rescue operation. You will work closely with the Partner who has an outstanding track record in turning ailing businesses around. You will have responsibility for a team of administrators and will manage a varied portfolio of cases, progressing them from start through to closure.

Bristol – £60-70,000

Contact Nick Jones 0117 9276509

nickjones@uk.michaelpage.com | Ref: MPRV13052179

CORPORATE RECOVERY SENIOR MANAGER

Our client is looking to recruit into their growing Insolvency/Corporate Recovery team. You will be part of a market leading team, working with exceptional people on high profile assignments. The successful candidate must have previous experience operating at Senior Manager level within a Corporate Recovery role. You will need to be able to demonstrate a strong commercial outlook and possess strong communication skills. Candidates will ideally be ACA/ACCA/JIEB qualified (or overseas equivalent).

Leeds – £ Excellent

Contact Peter Macdonald ACA 0113 2437708

petermacdonald@uk.michaelpage.com | Ref: MPRV13040475

CORPORATE RECOVERY SENIOR MANAGER/ DIRECTOR TOP 20 FIRM

Offering progression towards Partnership and the chance to build and develop the firm's Recovery offering in the North West, this opportunity would be ideal for a Senior Manager within a Top 10 firm looking for greater autonomy. This firm is seeking a high calibre person experienced in bank/non-bank work to help drive the team forward.

Manchester – £ Excellent Package

Contact John Wood 0161 8335078

johnwood@uk.michaelpage.com | Ref: MPRV13032011

INSOLVENCY MANAGER

A Top 10 Accountancy Practice in Central London is looking for an experienced Manager to join their high profile Corporate Recovery team. You will currently be a Manager within Insolvency in Public Practice and have experience in most areas including Administrations (trading and non), MVLs and CVLs. Having an understanding of bankruptcy and personal insolvency would be an advantage. You will be ACA/ACCA qualified (or overseas equivalent) and the JIEB qualification is preferable. The right candidate will enjoy exposure to some of the most interesting and exciting cases in the UK as well as a highly competitive rewards package.

Central London – £55-70,000 + Bonus + Benefits

Contact Rachael Bunton 020 7269 2306

rachaelbunton@uk.michaelpage.com | Ref: MPRV13050868

SENIOR INSOLVENCY ADMINISTRATOR

A Southampton based insolvency boutique are looking for a specialist insolvency administrator to join their rapidly expanding practice. This mixed role will split between personal and corporate work and will have a high degree of client exposure. This is a fantastic opportunity for someone who wants to develop their insolvency skills, working in a very varied and hands on position.

Southampton – £20-25,000

Contact Stephen Howes 02380 206440

stephenhowes@uk.michaelpage.com | Ref: MPRV13026138

SENIOR INSOLVENCY ADMINISTRATOR

A leading independent recovery firm in Birmingham is looking to recruit a Senior Insolvency Administrator. This firm provides a full range of insolvency services including administrations, receiverships and liquidations. You will have relevant recent insolvency experience ideally gained from working within an accountancy firm. The successful candidate will have a confident manner, an enthusiastic approach and demonstrate commercial awareness.

Birmingham – £30-35,000

Contact Lucy Williams 0121 6346920

lucywilliams@uk.michaelpage.com | Ref: MPRV13053027

CORPORATE RECOVERY MANAGER

Our client is looking for a Corporate Recovery Manager to manage a substantial portfolio of clients to ensure both excellent client service and make a significant contribution towards the overall development and success of the department. You must have previous experience operating at Manager level within a Corporate Recovery team. Candidates will ideally be ACCA/ACA or JIEB qualified (or overseas equivalent).

Birmingham – Up to Mid £60,000 + Flexible Benefits

Contact Lucy Williams 0121 6346920

lucywilliams@uk.michaelpage.com | Ref: MPRV12992390

Interview with Peter Sargent

Peter Sargent may have come from a small-practice background but he relishes getting involved at a national level, and looks forward to a busy year in challenging times.

What has been your career path?

I didn't set out wanting to be an IP. But I am passionate and enthusiastic and love what I do so I am very glad that I've 'fallen into' insolvency. After a few false starts after graduating from Newcastle University, which included teaching, I was very lucky to get a place as a trainee with Revell Ward. They took me on and I found I thoroughly enjoyed insolvency. They made me a partner in 1988.

I started my own practice in Halifax in 1995 and by 2000 there were ten of us and we moved to a larger office. We were then taken over by Begbies Traynor in 2005.

So even though I am now part of a large firm, I see myself very much as a small practitioner. Most of the businesses I see are the traditional companies, built in the old-fashioned way, and 99 per cent of the work is referred to us by local professionals. I understand what it is like to make the leap into the dark and set up in business on your own, so feel I can empathise with small owner/manager companies.

How did you get involved with R3?

When I started my own practice I needed other like-minded professionals to talk to so I joined R3. Not only is R3 great from the networking side of things, but the education and training helps you keep abreast of issues and find out what's on the horizon.

I first became chair of the Yorkshire Region. Then I chaired the regional groups' committee, which meant I was elected to council. You get sucked in!



Given the current economic climate, R3, more than ever, must continue to build on our good relationships with the Insolvency Service, the RPBs and the other key stakeholder groups to demonstrate that we have an efficient and robust insolvency

“Perhaps after the recession would be a good time for a general review of the regulations, tools and techniques, and the inter-relationships between regulatory bodies; not while we are in the middle of the maelstrom?”

I was delighted to be asked to be president of R3. With encouragement and support from Rick Traynor and my wife, Jo, and lots of early morning trains from Huddersfield to London, I feel ready and am looking forward to the coming year.

What are the challenges for R3?

Internally, R3 needs to continue to provide the diverse membership with the services they demand. Relevant quality courses, networking opportunities, timely and quality technical updates, and good communications and public affairs are essential.

regime. We are currently in the eye of the storm and it is likely that when the dust settles the spotlight will be turned onto insolvency to see if it's stood up to the test. We also need to continue to work with groups such as the property and printing trade associations so that we build mutual understanding in the wider business community.

How will you deal with these challenges?

In terms of providing value for money for members, I plan to visit all parts of the country to keep talking to members to make sure we are providing what they want.

R3 will continue to develop relationships with government, media, parliamentarians and trade associations. R3 has been instrumental in setting up an All-Party Parliamentary Group on Insolvency, and this group will help R3 to be a resource for parliamentarians and build relationships. I think I am going to have a very busy year in terms of contributing to R3's press and public affairs activities if the past president's year is anything to go by!

How are IPs' interests served by having nine regulators and what is their trade association going to do about it?

The number of regulators reflects the business landscape of the 1980s, when the insolvency profession really began. The people who became involved were already members of their own trade bodies and wanted them to be involved. It doesn't matter that there are several regulators, the important thing is that self-regulation really works. We need greater transparency regarding how the regulation and enforcement is applied as this will help dispel the myth that one regulator is less stringent than another.

How do you see the industry developing over the next three years?

We are in a deep recession and there will be a slow recovery. It will probably be 2012 before it starts to feel better. R3 members will continue to be involved in turnaround and try to push companies back up the curve whenever possible, in effect 'walking the talk' of our 'motto': rescue, recovery and renewal.

The recession will stress-test the current insolvency regulations. The Insolvency Act dates back to 1986 so the licensed profession is nearly 25 years old. Perhaps after the recession would be a good time for a general review of the regulations, tools and techniques, and the inter-relationships between regulatory bodies; not while we are in the middle of the maelstrom?

What are your interests outside of work?

I walk our dog, Marley, first thing in the morning and in all weathers. I'm also a keen supporter of Huddersfield Town FC, through all their ups and downs since I was a lad in 1969. With my wife, we've become keen gardeners and pretty good at Iyengar Yoga, I can now stand on my head! □

Sarah Houghton is publishing manager of RECOVERY.



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