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Summer 2018

RECOVERY

The court system

Whether to follow the smoking gun: litigation You think you've got a cast-iron case, but is it always worth chasing with litigation?

How small firms can face up to bigger challenges in court Advice for smaller firms that need to navigate the country's struggling court system from R3's Smaller Practices Group

Transatlantic court-ing behaviour: the US v. the UK A look at the involvement of the courts in Chapter 11 bankruptcy proceedings and how it compares with administration

Monarch: the aerodynamics of an airline insolvency An administration that started at 4.00 am one Monday, later involved the repatriation of 80,000 people and is causing the government to rethink airline insolvency

A leap forward for law AI Predictive coding for disclosures has now been used through to full trial. What does this mean for the future?

Mixed messaging A communications professional offers his insights on how to get creditors to read the material you send them

An interview with… former Chief Bankruptcy Registrar Stephen Baister The former head of the Bankruptcy Court talks about the nature of insolvency, law and his dislike of spiralling costs

3–0 to the landlords: administrators watch out The landlords seem to have prevailed in obtaining pre-CVA rent: what does this mean for future CVAs?

When is it last orders at licensed premises? The Licensing Act goes well beyond 'just pubs' and IPs would do well to know how

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

From the editor

As our new president, Stuart Frith, writes on page 8, 'Shaping the Agenda' was the theme of this year's R3 Annual Conference. For those who missed it, do plan to attend next year. If the quality is anywhere near as high as it was in Vilamoura, you'll be in for a treat.

One pair of British and German presenters on Brexit agreed that we need to keep the benefits of the European Insolvency and Judgments Regulations in the interests of both UK and European-centred cross-border restructurings. Another such pair argued about football (and pre-insolvency proceedings), but agreed that R3 members should fight to stop Brexit! I was attending the conference on behalf of INSOL Europe and it struck me that the pan-European association of restructuring and insolvency professionals will become even more relevant to any of us from the UK encountering European cross-border matters, whatever the outcome of Brexit.

In separate presentations, Mr Justice Norris reminded us that administrators had to make decisions and the courts would not give directions that do it for them, while Mark Phillips QC explained that, nevertheless, one could if necessary seek directions to confirm that a very significant decision was rational and within the administrator's powers.

Developing technology was addressed thought-provokingly in another couple of sessions. You can get a taste of it in our article by Robin Ganguly on page 38 about artificial intelligence.

Sadly it fell to Stuart to lament the passing in recent weeks of Geoff Kinlan, Chris Garwood, Frank Simms and Shay Bannon, all stalwarts of our profession.

Turning to this issue of *RECOVERY*, our theme of the court system mirrors the first of Stuart's themes for his presidential year, as he explains in his column on page 8. Chief ICC Judge Briggs explains some recent court changes on page 29 while his predecessor, Stephen Baister, reminisces on page 54; but for some really practical thoughts on IPs' evidence in court, James Latham's piece on page 24 is a must.

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

Regulars

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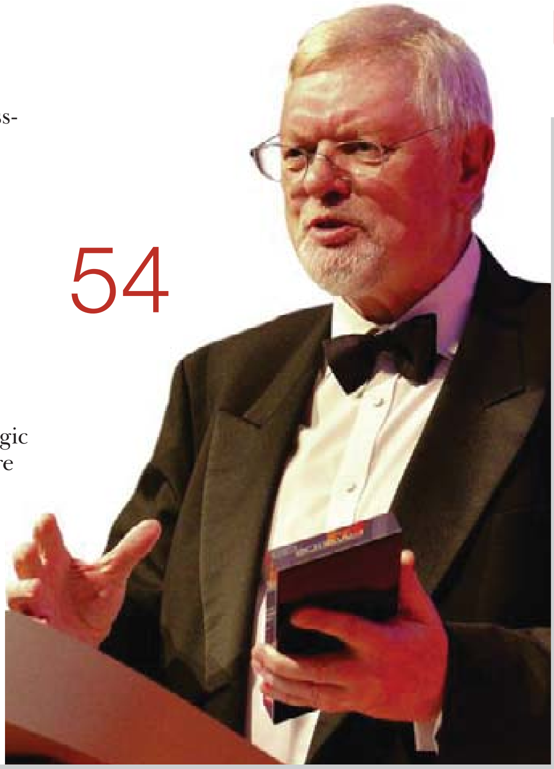

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Themes of *RECOVERY* 2018

AUTUMN	**Data and cybersecurity**
WINTER	**Where does the UK fit now?**

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RECOVERY

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Game over
for controversial retailer

Online video game retailer Gameseek has gone into liquidation, leaving a number of customers with orders that will never be fulfilled. The website ceased functioning over the early May bank holiday and posted an error message suggesting the site was down for maintenance. Customers were sent letters after the weekend announcing that the site had gone into liquidation and informing them of their status as creditors. Joint liquidators have been appointed from Dow Schofield Watts Business Recovery LLP to handle a creditors' voluntary liquidation.

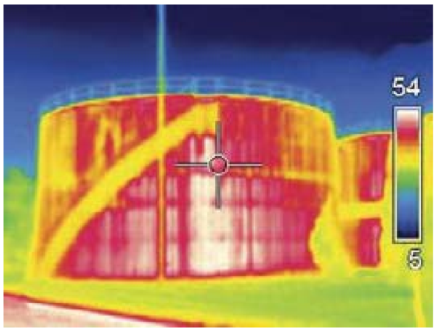
Gameseek received significant media attention in 2017 when it began listing pre-orders for the Nintendo Switch games console at around £80 less than the recommended retail price. CEO Stephen Staley said that he wanted to cancel the orders, but 'couldn't bear the thought of asking people for more money'. The site was also criticised for its use of cyclonic deals, where users were told of large discounts on products live on the company's Facebook page, but were then redirected to a countdown timer on Gameseek's website. Staley described the deals as a 'loss leader'.

Source: Eurogamer

Mapping out a rescue

A Wiltshire-based mapping services company has been rescued from insolvency via a pre-pack administration deal. MANS Location Services provides equipment for purposes such as cable location, thermal imaging and water leak detection. The business had become over-burdened with debt and run into cash flow difficulties when joint administrators from Quantuma were appointed in early May. HMG Water Solutions, a subsidiary of Heath Morgan Group, purchased the business as a pre-pack, saving all jobs at the business.

Source: Insider Media



Handbags withdrawn

The luggage and handbag retailer Bags Etc has been placed into liquidation. The chain had 58 shops across the UK and Ireland and employed 350 people in shop floor and warehouse roles. Liquidators appointed from CVR Global stated that a number of loss-making stores in suburban areas could not compete with larger central shopping centres and online retailers, leaving the company in financial difficulty.

Source: Retail Gazette

Editor recovery@r3.org.uk

Four-figure charity fundraiser from R3 north east

Members of the north east arm of R3 swapped figures for fundraising to bring in over £1,700 for The Percy Hedley Foundation.

R3 North East chose the Percy Hedley Foundation as its dedicated charity last year. Its members, who are drawn from many of the best-known names in the region's professional services community, took on a number of different fundraising activities, including raffles, quiz nights and a golf day.

Once the money raised had been added up, a cheque for £1,780 was presented to Sheila Coltman, corporate partnerships manager at The Percy Hedley Foundation, in front of dozens of R3 North East members at their annual general meeting. 'All the things that we do and the plans we have for the future wouldn't be possible without the help of individuals, groups and organisations like R3 North East,' Coltman said.

The Percy Hedley Foundation plays a crucial role in improving the lives of children, young people and adults with cerebral palsy and communication difficulties. Its specialist and personalised care and education services allow more than 1,000 people to become as independent as possible and to lead full and active lives.

Neil Harrold, outgoing chair of R3 in the north east and a partner at Hay & Kilner Law Firm, said: 'The Percy Hedley Foundation has been providing invaluable assistance and advice to families across our region for generations, and we're very pleased to be supporting the fantastic work that it does through our members' fundraising efforts.'

Facebook data filchers file for bankruptcy

The political consultancy under fire for its use of private data taken from Facebook has filed for Chapter 7 bankruptcy in the US. Cambridge Analytica, and its parent company SCL Elections Ltd, said that it would shut down immediately in an announcement in May due to a strong decline in business. The company has been dogged by allegations that it improperly used the data of 87 million Facebook users starting from 2014 and may have used the information to influence the outcome of the US presidential election and the UK's referendum on membership of the European Union. Cambridge Analytica denies wrongdoing, but has attributed the loss of business to ever-increasing legal fees and negative media coverage, which has left it with no clients.

The UK business began insolvency proceedings at the beginning of May to place the company into administration. The Information Commissioner's Office has stated that it will continue criminal and civil investigation of the business despite its closure and will monitor all successor companies. Despite the closure of Cambridge Analytica, many of the company's directors are listed on the board of relatively new company Emerdata, which claims to undertake data hosting, processing and other related activities.

Source: Reuters

Catering fabricator serves up liquidation

An Oldham-based catering fabricator has filed for liquidation. Joint liquidators have been appointed to Aspull Catering Equipment & Services to oversee a voluntary winding-up of the business. Aspull was formed in 1993 as a design and manufacturing company, providing serving counters and other fabrications to the catering trade. Liquidators said that company could not continue by reason of its liabilities.

Source: Catering Insight

Editor recovery@r3.org.uk

Redundancy regardless at BiFab

Union leaders have announced that most of the remaining workers at the recently-rescued BiFab engineering yards have been given redundancy notices. The Scottish government intervened in BiFab's administration to offer it a £15m loan in November last year to keep it from insolvency. Canadian firm JV Driver acquired BiFab through its subsidiary DF Barnes, which the government said would allow BiFab to seek new work in construction and fabrication in the marine sector.

The union announcement coincides with the end of the company's last contract to construct platforms for offshore wind farms. With no more projects remaining and no new work currently in place, the Canadian company is letting workers go. It is thought that it will take months to secure new work for the yards in Methil and Burntisland. The government has said that it will continue to support the efforts of DF Barnes to give BiFab the best chance of securing new work, and will work with the unions to support workers through the Partnership Action for Continuing Employment (PACE) initiative.

Source: BBC

Good vibes for crowdfunders

Ticketing platform Vibe has been bought out of administration by its founder, who later offered free shares in his new business to the platform's original crowdfunders.

The Vibe Ltd was placed into administration at the end of April 2018, after a fundraising drive for £1m failed to raise the required capital. Founder Luke Massie intervened to buy the company from administrators and formed a new company Vibe Group Holdings Ltd, encompassing Vibe Tickets and Vibe Pay, a new peer-to-peer payment platform.

Massie has now stated that he will 'gift' equity in the new business to crowd investors in The Vibe Ltd who are set to lose out as a result of the administration. Massie said that it was 'the right thing to do'. Vibe Group Holdings Ltd has already seen investment from entrepreneur Scott Fletcher MBE and Vela Technologies Plc. It is expected to raise more in the future.

Source: Businesscloud

In memory of
Elizabeth Arakapiotis

It is with great sadness that we announce that our beloved partner, colleague and friend Elizabeth Arakapiotis passed away peacefully following her brave fight with breast cancer on 16 May 2018.

Elizabeth was born in North London in 1973 and lived and worked in the Whetstone community she served throughout her adult life. She attended Queen Elizabeth's Girls' School and furthered her education at university in Bristol. She joined Kallis & Company in May 1995, undertaking on-the-job training and worked towards both her ACCA and JIEB qualifications. Elizabeth successfully achieved membership of the ACCA in 1999 and the Association of Business Recovery Professionals in 2002 to become a licensed insolvency practitioner. She became a partner in 2003 at the age of 30.

Elizabeth advised and helped countless directors, debtors and bankrupts over her 23 years in the profession. Her strength was her innate ability to assess the facts, extract the relevant information and recommend the best strategy for each situation seamlessly. She took great pride in her work, and her technical expertise and straight-talking nature meant she was able to deliver complex financial advice in a simple, straightforward manner.

Lizzie, as she was known to her colleagues and clients, was the backbone of the office. She will be fondly remembered for her beaming smile and the enthusiasm that she brought with her every day of the week. With an eye for detail like no other, Lizzie had overall responsibility for the firm's caseload management. She also took great satisfaction in working closely with the team to maintain the evolution of the firm's systems and procedures to keep up to date with the latest legal developments.

Life as an insolvency practitioner encounters many hurdles, challenges and unfamiliar situations. For us all at Kallis & Company, having Lizzie by our side was a blessing. No matter what issue arose, Lizzie knew the right answer or exactly what needed to be done to get to it. She was a unique mentor, always prepared to give a helping hand and words of encouragement. This approach meant her decades of experience, technical ability and clarity of thought have rubbed off on all those who had the opportunity to work with her.

Lizzie leaves behind her husband Adam, her two children Alexander (7) and Theodora (5), her mum Vasso, her sisters Anna and Zoe, her brother Andreas, her in-laws, godchildren, nephews, niece, and wider circle of family, friends and colleagues. Her brother Andreas will be taking up the mantle of continuing her good work at Kallis & Company.

A caring and beloved family woman, a cherished partner, colleague and friend, Lizzie will be missed by all who were fortunate enough to have known her. Donations in memory of Lizzie can be made to the North London Hospice at: **www.justgiving.com/fundraising/elizabetharakapiotis**.

By her colleagues and friends at Kallis & Company Insolvency Practitioners.

President's column

Stuart Frith takes up the mantle of R3 president, outlines the current government consultations and asks members old and new to make their voice heard at R3.

The first few weeks of an R3's president's year in the hot seat are always very busy. Ahead of R3's annual conference, my year began with INSOL in New York. I joined 175 fellow delegates from the UK – the vast majority of whom were R3 members and constituted the largest contingent from any single jurisdiction of the 860 delegates who were present. I was pleased to have some time with INSOL president Adam Harris, Claire Broughton its CEO and Jason Baxter the COO, together with representatives of member associations from around the world. It was fascinating to hear from them and to learn from their experiences, particularly in relation to the strategic reviews that they have been carrying out and which, of course, our own association is currently involved in.

The fact that your membership fee also includes membership of INSOL is something which, surprisingly, is not as widely known among R3 members as would be expected. Our relationship with INSOL is very important and I look forward to working with Adam, Jason and Claire in developing it further.

No political upsets… yet

While, unlike my predecessors, I have not yet had to cope with the effect of a snap election and the imposition of a conference-disrupting government purdah period, a flurry of insolvency and restructuring-related government and parliamentary consultations and reviews have been launched. R3's position as a voice for the profession is something we both cherish and take very seriously. Our committees have the ability to influence our lawmakers and regulators. Now that a year has passed since the general election, matters involving the area in which we practise have moved back up the parliamentary agenda.

Most notably, in late March, the government published a consultation on corporate governance and insolvency. Included within were proposals for tough new powers on the sale of insolvent subsidiaries, measures to prevent 'value extraction' – the government's euphemism for asset stripping – and new powers for the Insolvency Service to enable them to disqualify directors of dissolved companies. Among the proposals are plans to extend directors' responsibilities for a subsidiary beyond the date they sell it and the potential for making them personally liable for repaying creditor losses should the subsidiary later fail.

> "I want to shine some light on the way the insolvency and restructuring framework and the UK justice system work together."

The consultation follows on from a number of high profile insolvencies, which the government believes have raised questions about corporate governance. Many of the case study examples included within the consultation document may sound somewhat familiar.

Whether the remedies the government has put forward are the right ones remains to be seen. While the focus on director behaviour is useful, some of the new powers may prove difficult to actually use, while there is a risk that the new liabilities and risks could have a serious dampening effect on business sales, investment and rescue.

Regardless of their merits, one of the interesting things about the proposals is their relevance for the restructuring and advisory world. This is just one example of the growing political and regulatory interest in restructuring work outside of statutory insolvency procedures. As the importance of non-statutory work grows, so too will the likelihood of political intervention in response to perceived problems.

R3 has been gathering members' and stakeholders' views on this consultation over the last few weeks and will be making sure that they are heard by the government. Likewise, R3 has been working on responses to the recent consultations and reviews on airline insolvencies, pre-pack reforms, economic crime, defined benefit pensions, and tax and insolvency. For more information on these, head to R3's website. We need to hear from you so that we can accurately represent your concerns to the appropriate government bodies leading these processes.

Annual conference and my year as president

I would like to say thank you to everyone who took part in and supported this year's R3 Annual Conference, which took place at the end of May. Its theme was 'shaping the agenda', which gave me the chance to set out what I want to achieve as R3 president this year and, also importantly, gave R3 members and others the chance to shape the future of the association as we continue with our strategic review. There will be more on this later.

There are three key things I will be focusing on as president. The first is driven by my background as a solicitor. It will come as no surprise that I want to shine some light on the way the insolvency and restructuring framework and the UK justice system work together.

> The trends identified by the strategic review will be translated into a new strategy that will define new objectives and approaches for R3 to take.

The effectiveness of the insolvency and restructuring framework is bound with the efficiency and effectiveness of the UK's court system. This extends across access to justice issues for petitioning creditors or debtors, the courts' ability to quickly and cost-effectively process cases and whether or not the judiciary has the right level of expertise and experience to assess cases. With the court system going through its own period of change – with budget cuts, e-filing and other technological advances, as well as facing further demands on its time in future as a result of Brexit and the potential introduction of new insolvency procedures – I want to make sure the profession has a chance to get its views across on developments in this area.

Diversify and grow

The second thing I want to spend some time looking at is how we can improve our diversity as a profession, and how R3 can improve its own diversity. I fervently believe that it is important that R3 reflects and represents everyone across our profession – whether you're looking at background, professional experience, gender or sexual orientation – and that our profession reflects the diversity of the businesses and individuals we work with. Change won't happen overnight and a lot of the challenges we have in our profession are shared across the services sector. But we have to start somewhere, and it's important that people who look and sound like me don't sit on our hands but take steps to help others have the same opportunities we've enjoyed.

All at R3 are in a position to help give members of our profession who are at the start of their careers more of a say. While senior members of the profession are well-represented within R3, on R3 committees and at R3 events, it's important that tomorrow's senior members are represented too. If more junior members of the profession are not engaged with, we are not using a very valuable resource. In my own professional life one of my real privileges is to work with talented young professionals, and my experience with R3 is no different. However, with that privilege comes the obligation to encourage and to listen. I want to make sure that R3 members feel that R3 represents them, whatever their background, and to make it clear that anyone, regardless of their background, has the opportunity to get involved with R3's work.

Strategic review

Finally, it will be my responsibility to ensure R3's strategic review effectively sets up our organisation for the future.

R3 plays a valuable role in promoting, developing and supporting the insolvency and restructuring profession. We punch well above our weight as an organisation. As the insolvency and restructuring world changes, it's imperative that R3 changes with it. R3 can't stand still and expect to have the same impact.

To make sure that R3 continues to evolve, deliver value for its current members and appeal to new ones, the association has been actively undertaking a strategic review since the start of this year. It will help R3 make sure that the association and its work are, and will remain, relevant to all of our members, whichever part of the profession they are in and at whatever stage of their career they have reached. The review will help ensure that, strategically and operationally, we are fit and ready for the future. Leaving aside the valuable information gathered at the Annual Conference, over 80 interviews have already been conducted with stakeholders from the broad constituency R3 represents. We have conducted a workshop involving the members of the R3 Council who travelled to London on the Saturday after the AGM when I was appointed and everyone at R3 is very grateful for the time given by all of those who have participated so far.

The trends identified by the review will be translated into a new strategy that will define new objectives and approaches for R3 to take. I want to make sure that not only do members have a chance to engage in the review, but also that members *feel* that they are part of the strategic review in a tangible way, defining the direction in which we are heading. This extends beyond the review – members need to feel they have a direct and constructive relationship with R3 as their membership organisation.

Make your voice heard

From my own experience, and as my predecessors as president and fellow council members can testify, the more you put into R3, the more you can get out of it. This is your organisation. It is there to represent your interests, to give you a chance to develop your network, to improve your skillset and to give you a direct say on the legislation and regulation that affects you. I want it to keep delivering value for members. To do that, we need to hear from you.

> This is your organisation. It is there to represent your interests, to give you a chance to develop your network, to improve your skillset and to give you a direct say on the legislation and regulation that affects you.

Last month's annual conference was an opportunity for R3 members and others to have their say on what matters to them and what they want to see from R3. We're still digesting the feedback from conference, but it was both encouraging and inspirational to hear so many of the delegates talk so passionately about what R3 means to them. If you missed conference, do not worry, there will be plenty more opportunities over the rest of the year to get involved. We want to hear from you about what matters to you and what you need from R3.

It's going to be an exciting year for us all. I am very much looking forward to the challenges that lie ahead. ◻

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

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

Legal Q&A

Pippa Hill answers your insolvency queries.

Q A special manager has been appointed in respect of my client's contractual counterparty. What does this mean, and what powers do they have?

A The special manager regime in the Insolvency Act 1986 has been getting a reasonable amount of attention recently, not least because of the appointment of partners from PwC as special managers of various entities within the Carillion group.

The power to apply for the appointment of a special manager for a company arises under s177 of the Insolvency Act 1986 where the company has been placed into liquidation (or a provisional liquidator has been appointed).

> The special manager's powers are not prescribed in the Insolvency Act, and therefore can be tailored to suit the appointment.

The application to court for the appointment of a special manager needs to be made by the liquidator themselves (or the Official Receiver, if no private liquidator has been appointed). The liquidator is entitled to make that application:

'where it appears to him that the nature of the business or property of the company, or the interests of the company's creditors or contributories or members generally, require the appointment of another person to manage the company's business or property' (s177(2) of the Insolvency Act).

Like a provisional liquidator, the special manager's powers are not prescribed in the Insolvency Act, and therefore can be tailored to suit the appointment. You will need to request a copy of, and check, the order appointing the special manager(s) carefully to ensure that you know the limits of their powers. Where the Official Receiver has applied for a special manager to be appointed to, effectively, assist with the running of the liquidation then those powers may be very wide – possibly even a delegation of all powers available to liquidators under the Insolvency Act. Equally if the special manager has been appointed to cover a specific aspect of the liquidation, you can expect his or her powers to be more limited.

It should be noted that there is no express provision granting the power to act jointly and severally to multiple special managers – therefore, if more than one special manager has been appointed, you will also need to check the appointment document to find out the basis on which they can act.

Q I am acting for a qualifying floating charge-holder of a company that has been placed into voluntary liquidation. My client wasn't given any advanced notice of the liquidation. Can it be valid?

A The insolvency community has talked a lot, an awful lot, about the validity of administration appointments over the last five years or so. However, there still remain some less-often encountered questions surrounding validity of appointment of liquidators.

It is a requirement under s84(2A) of the Insolvency Act that, before a company can pass a resolution for its voluntary winding up, it must give written notice of the proposed resolution to the holder of any qualifying floating charge to which s72A of the Act applies. The resolution to wind up can then only be passed either: (a) as soon as the qualifying floating charge-holder(s) have consented to the resolution being passed; or (b) after the end of a five-business-day period (which begins on the date that notice was given under s84(2B) of the Insolvency Act).

Section 72A is the prohibition on appointment of administrative receivers by the holder of a qualifying floating charge. It adopts the meaning of 'qualifying floating charge' set out in paragraph 14 of schedule B1 of the Insolvency Act, ie a charge that: (a) either states that paragraph 14 applies to it, or purports to empower the holder to appoint an administrator or administrative receiver in respect of the company; and (b) on its own or taken with other charges, covers the whole or substantially the whole of the company's property. So, notice must be given to all qualifying floating charge-holders, whether or not their charge is enforceable at the time.

The purpose of this provision is (in similar fashion to paragraph 26 of schedule B1 of the Insolvency Act) of course to provide the charge-holder with an opportunity to trump the appointment, and appoint an administrator if it has the power to do so. In the situation outlined here, effectively the charge-holder has potentially been denied that control over the appointment of the insolvency practitioner. (I say 'potentially' because, of course, our questioner has not indicated whether or not his client would actually have had the power to make an appointment under paragraph 14 of schedule B1 of the Insolvency Act or not.)

But what effect in practice does this have on the appointment? This question in fact came before the High Court recently, in the case *Bevan and another* v. *Walker and others* [2018] EWHC 766 (Ch). In that case the judge considered that the requirement to give notice to a qualifying floating charge-holder applied, irrespective of whether the company considered the charge to be enforceable. However, he stopped short of deciding that the failure to

> Notice must be given to all qualifying floating charge-holders, whether or not their charge is enforceable at the time.

give notice to the qualifying floating charge-holder rendered the appointment invalid, recognising that the appointment was effected by the special resolution of members to appoint a liquidator, and noting that this could not be impugned if passed in accordance with the company's articles of association. It seems then from *Bevan* that, whether the client's qualifying floating charge is enforceable or not, the failure to give notice of the proposed winding up does not in itself invalidate the appointment of the liquidators. ◻

PIPPA HILL is a director in the restructuring and insolvency team at Gowling WLG (UK) LLP.

Recent case summaries

Latest insolvency update from **Katherine Hallett**.

PERSONAL INSOLVENCY

Ahmed v. *Ingram* [2018] EWCA Civ 519, [2018] All ER (D) 144 (Mar)

After presentation of a bankruptcy petition, the debtor transferred his shares in family companies to his brother (the first appellant).

Replacement trustees applied for a declaration pursuant to s284 of the Insolvency Act 1986 (IA 1986) that the transfers were void and sought to recover the loss in value of the shares. Just before trial, the appellants accepted that the transfers were void and delivered up the shares. However, the value of the shares had fallen since the transfer.

The judge at first instance concluded that the trustees were entitled to the difference in the value of the shares on 6 June 2007 (the date of the transfer) and 27 February 2015 (the date of their recovery by the trustees). The brother and his siblings appealed the decision.

The Court of Appeal concluded that s284 did not provide a free-standing right to recover the value of the shares: the remedy was restitutionary. Following *Hollicourt (Contracts) Ltd* v. *Bank of Ireland* [2001] ch 555, s284 only operated to avoid dispositions: it was silent as to the remedy then available to the estate.

The appeal court held that the judge had adopted the wrong approach in finding that the estate had suffered an actual loss on the transfer date. The judge was wrong to conclude that the appellants were fixed with liability as at the date of transfer because of a fiduciary duty to preserve the assets of the estate, without explaining why the breach had occurred or the loss.

The breach of trust by the appellants occurred when they failed (with knowledge of the bankruptcy order) immediately to restore the shares to the estate following the appointment of the original trustee. However, the fact that breach occurred on the transfer date did not mean that the loss also occurred then. That occurred on the date when the trustees would have actually sold the shares. Here, that was nearly a year after the original trustee's appointment. The appeal was allowed only as regards the date at which the shares should be valued for the purposes of ascertaining the loss suffered by the estate.

The Court of Appeal concluded that the judge was correct to hold that the shares should be valued on a fair, rather than market, basis because the shares were in companies 'owned' by associates of the bankrupt.

A number of points can be taken from this decision. After a prompt appointment of a trustee, he or she must then quickly demand the return of any non-cash asset, and take steps towards recovery. The wrongful act of the recipient of a non-cash asset must be identified in order to establish the date of breach. The loss to the estate must be identified, as must the correct basis for the valuation: this may require expert evidence. As always, any validation order application should be made promptly in order to minimise the sum due to the estate vis-à-vis a fluctuating value.

CORPORATE INSOLVENCY

MK Airlines Limited [2018] EWHC 540

This was an appeal following successful misfeasance proceedings (schedule B1, IA 1986) brought by joint liquidators of a company against one of its former administrators. This consisted of paying out company funds as administrators' remuneration in breach of the priority rules set down by r2.67 of the Insolvency Rules 1986, thereby leaving a shortfall in payments to the expense creditors.

> "Any funding agreement regarding administration expenses must be carefully drafted in order to ensure that the money does not become company money."

It was proposed that the company's business would be sold as a going concern. The potential purchaser agreed to provide funding of up to \$18m (£13m) to ensure that the company could trade in the meantime. A deed of indemnity was entered into. The administrators drew down sums from the funding facility (held in the company's account) in respect of their remuneration and disbursements. Eventually, the potential sale fell apart and the company went into liquidation.

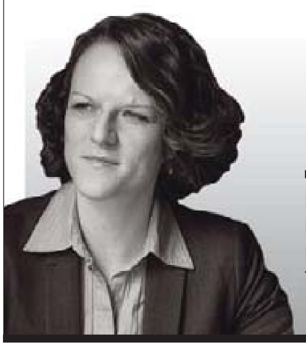
The administrator appealed against the registrar's decision that he had been misfeasant. The primary ground was that she had misconstrued the deed of indemnity and its practical consequences: the funding facility did not belong to the company, but to the administrators. Furthermore, it did not become the company's merely because it was mixed in the company's accounts.

The appeal judge confirmed that administrators must apply the company's assets in accordance with the priority rules, which require expense creditors to be paid before administrators' remuneration. However, that limitation only applies to company assets: it does not prohibit 'white knights' providing funds on terms which do not make the money freely available to the company. Nominated purposes may include the preferential payment of particular debts which would otherwise be in breach of the priority rules. Thus, the starting point was that the administrators were free to agree and act on terms pursuant to which their remuneration was paid by third parties.

Although legal title to the funds passed to the company when it was paid into its account, the priority rules relate to beneficial title. Upon a true construction of the deed of indemnity, the funds were paid on the basis that they would be used to pay certain debts and expenses: they were not freely available to the company. Any sums paid out to the administrators did not cause a shortfall in payment to the expense creditors; this was true whether or not the funds had been mixed with company money. The judge therefore reversed the registrar's finding of misfeasance.

It should be noted that, after rejecting (*obiter*) the other grounds of appeal, the judge went on to decry the time and money expended on disputes between insolvency practitioners.

The case highlights two points. Firstly, any funding agreement regarding administration expenses must be carefully drafted in order to ensure that the money does not become company money. Secondly, it would be sensible to maintain a separate bank account for such monies. ◻



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3–0 to the landlords

Administrators watch out

Lindsay Hingston and **Katharina Crinson** examine the court's decision in BHS on pre-CVA rent as an administration expense.

In March 2016, well-known high street retailer BHS proposed a company voluntary arrangement (CVA), approved by the company's shareholders and creditors, to attempt to avoid slipping into administration. A major component of the CVA was rent concession in respect of its leases. The CVA failed to rescue BHS and a month later, in April 2016, the company filed for administration. Unlike many CVAs, it did not automatically terminate when the company entered administration, so the CVA and the administration ran in parallel for a time. For part of this time, the BHS administrators continued to trade from the premises subject to the leases compromised under the CVA in furtherance of the aims of the administration. Later, BHS was placed into creditors' voluntary liquidation, which led (indirectly) to the CVA terminating in accordance with its terms in December 2016.

The case *Wright & Anor (Liquidators of SHB Realisations Ltd)* v. *The Prudential Assurance Company Ltd* [2018] EWHC 402 (Ch) stems from an application by the liquidators of SHB Realisations Ltd (formerly BHS Ltd) for directions. BHS Ltd (BHS) had been the principal trading company in the BHS group before its demise. Prudential was one of the affected landlords, holding two of the properties leased to BHS and subject to amended rent under the CVA.

> "The subject of whether a CVA can effectively vary obligations under a lease has vexed both commentators and the courts for some time."

The application

The landlords had already been paid the amended contractual rent in accordance with the CVA. The liquidators sought directions as to whether the rent reduction amount was also payable to the landlords and, if so, whether this constituted an expense of the administration. The following questions were raised:

1. Are the spring-back provisions unenforceable as a penalty in that they required BHS to pay additional sums upon breach of the CVA?
2. Do the spring-back provisions contravene the *pari passu* principle by substantially increasing BHS's liabilities to the relevant landlords following commencement of the liquidation?
3. If the spring-back provisions apply, would the landlords be entitled to claim the rent reduction amount as an expense of the administration, given that they only fell due upon termination of the CVA, which was after the period during which the administrators were using the premises for the benefit of the administration?

The penalty question

A contractual provision will be unenforceable as a penalty if it is a secondary obligation that applies upon a breach of primary obligation by the defaulting party and imposes a detriment to the defaulting party out of all proportion to the legitimate commercial interest of the non-defaulting party in enforcing the primary obligation (*Cavendish Square Holdings BV* v. *Talal El Makdessi*; *ParkingEye Ltd* v. *Beavis* [2015] UKSC 67).

The liquidators argued that a CVA operates as a contract and contractual interpretation principles, including the law on penalties, apply. The effect of the CVA was to vary the lease and extinguish BHS's liabilities for the rent reduction amount, meaning that the effect of the spring-back provisions was to impose new obligations » on BHS to pay these additional sums. These obligations had arisen upon a breach of the CVA by BHS (which had given rise to the termination) and so were unenforceable as a penalty.

The court disagreed with the liquidators and termed their analysis flawed for (at least) three reasons:

1. **Similar to – but not – a contract**: while a CVA has contractual effect, it does not have every attribute of a contract and the law of penalties does not apply.
2. **No penalty**: on the facts, there was no penalty as the spring-back provisions protected the legitimate commercial interests of the landlords in the success or failure of the CVA.
3. **No variation**: there was no variation of the leases as a matter of law, meaning that the original claims had not been extinguished and there was no new liability imposed upon termination of the CVA.

> Rent is to include all sums payable for the premises in respect of the period of beneficial occupation, even if such rent is only contingent or yet to be ascertained at the time of payment.

Similar to – but not – a contract

The Insolvency Act 1986 (the Act) creates a statutory hypothesis that any creditor who had notice of, and is entitled to participate in, the decision making is party to the arrangements as though he or she had given consent. As such, the CVA has contractual effect and the court must apply a contractual analysis to issues such as the true construction of a CVA. However, it does not follow that every principle of contract law will apply to a CVA. In particular, the usual principles of contract formation are not relevant as it is the statute that brings about the arrangement.

The court concluded that the law of penalties, the essence of which concerns whether there is oppression at the time of contracting by reference to the respective negotiating power and legitimate commercial interests of the parties, was similarly impossible to apply to a CVA. The court noted that it would be odd if BHS could challenge the terms of a CVA proposed by itself as an oppressive penalty, especially as this was not one of the grounds for challenging a CVA set out under the Act.

No penalty

The penalty argument assumed that the CVA involved two separate transactions: first, the replacement of contractual rent with amended contractual rent and second, upon termination of the CVA, new obligations to pay the rent reduction amount. The court rejected this analysis. The CVA proposed a reduction in rent for a limited period to allow time for BHS to find a solution to its impending insolvency on the basis that, if such a solution could not be achieved, the landlords' claims would be restored in full. BHS only obtained the benefit of the rent reduction because it was combined in a single transaction with the termination provisions, and the landlords had a legitimate commercial interest in the success or failure of the CVA. There was no oppression in unwinding the CVA if the company could not be rescued.

No variation

The court noted that, at law, variation of a lease granted by deed can only be by deed, and a CVA was not a deed. As such, the CVA had not varied the leases; BHS's obligation to pay the rent reduction amount had not been extinguished and was therefore not recreated as a new obligation upon termination of the CVA. Instead, the CVA essentially operated as a temporary waiver of part of BHS's rent obligations for a specified period, the length of which was partially determined by the CVA termination provisions.

The *pari passu* question

The liquidators further argued that the spring-back provisions infringed the *pari passu* principle: that statutory provisions for pro rata distribution may not be excluded by a contract that gives one creditor more than its proper share (*Belmont Park Investments Pty Ltd* v. *BNY Corporate Trustee Services Ltd* and *Lehman Brothers Special Financing Inc* [2011] UKSC 38).

The liquidators argued that this was the case because, if the original contractual claims were to spring back, this would give the landlords a considerably greater sum in the administration or liquidation than if the amended contractual rate continued to apply.

Having concluded that the effect of the CVA was to create a temporary waiver of the obligation to pay the rent reduction amount rather than to extinguish this obligation, it follows that the court rejected this argument. It was 'quite wrong' to characterise the rent concession as final and the unwinding as conferring an advantage on landlords.

Administration expenses

Schedule B1 to the Act sets out that an administrator's remuneration and expenses are to be charged on and payable out of the property of which the former administrator had custody or control before ceasing to be the administrator. Such amounts are payable in priority to any floating charge and any unsecured debts.

The administrators had continued to trade from some premises for the benefit of the administration while the CVA was concurrently in operation. For that period, the administrators accepted that the rents and other sums were payable as an expense of the administration (following *In re Lundy Granite Co, ex P Heavan (1871)* LR 6 Ch App 462 and *Pillar Denton Ltd* v. *Jervis* [2014] EWCA Civ 180).

The question arose as to whether, on the subsequent termination of the CVA and unwinding of the rent concessions, the full amount of rent due under the leases had become payable as an expense. The liquidators resisted this argument on the basis that the rent accruing during the period of possession for the purpose of the administration was the reduced amount due under the CVA.

The court sided with the landlords on this point, too. Rent is to include all sums payable for the premises in respect of the period of beneficial occupation, even if such rent is only contingent or yet to be ascertained at the time of payment. The court gave the example of a rent review, which had not yet been implemented at the time of an administrator's beneficial use of the property. If the rent review resulted in a higher rent being payable, then it would be payable as an expense – assuming that the rent review would be retrospectively applied under the lease. Similarly, the court noted that supplemental rents and other incidental payments due under lease and

> While a CVA has contractual effect, it does not have every attribute of a contract and the law of penalties does not apply.

hire-purchase agreements were payable as administration expenses in addition to ordinary periodic payments in *Re Atlantic Computer Systems Plc* (No 2) (1990) BCC 454.

Given that the unwinding provision in the CVA stated that the landlords would have their claims against BHS restored as if the CVA had never been approved, they were entitled to the full original claims under the leases that were deemed not to have been compromised or released.

Comment

The commercial purpose of a CVA is usually to attempt to rescue the company, as was the case for BHS. The landlords agree to reduce the rent burden to give the company time and liquidity to implement a turnaround. From the landlords' perspective, it is entirely consistent that if the turnaround fails and the company subsequently enters into insolvency proceedings, their full rights should spring back. Why should a landlord have a lesser

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claim against the company in administration simply because it attempted to help the company avoid that very outcome?

For this reason, it is not unusual for CVAs to automatically terminate upon administration or liquidation, and for the landlords' rights to be restored upon termination (see, for example, the recent Prezzo CVA, although contrast this with the Toys 'R' Us and New Look CVAs in which the compromises are expressed to survive termination). This case is helpful in confirming that, subject to drafting and the circumstances of the matter, such spring-back provisions are capable of being enforced.

The court's decision was influenced by its conclusion that the effect of the CVA was to temporarily waive certain obligations under the lease, rather than to vary the leases. The subject of whether a CVA can effectively vary obligations under a lease has vexed both commentators and the courts for some time. Ben Jones and Barry Gross posed this question in the autumn 2014 edition of *RECOVERY*. Part of the argument lies in the often-cited view that only a deed can vary a document executed as a deed – the BHS judgment makes clear that a CVA is neither a deed

> "For the BHS administrators, the case will have significantly increased the expense bill they had otherwise anticipated and provided for."

nor a contract, although it is operated as a contract. Authority cited for this proposition (although not cited in the BHS judgment) is section 52 of the Law of Property Act 1925. This, however, only requires that conveyances of land (or of any interest therein) are void for the purpose of conveying or creating a legal estate unless made by deed. If a variation does not convey or create a legal estate then a variation other than by deed should be possible: as is the case with reducing the amount of rent payable under a lease. See also the observations made by Laurie Heller in the *Property Law Journal* in 2005.

For the BHS administrators, the case will have significantly increased the expense bill they had otherwise anticipated and provided for. Given the automatic termination provisions common in CVAs, it is relatively rare for there to be a concurrent CVA and trading administration. However, the same principles will apply to any upwards rent review that has retrospective effect (as specifically anticipated by the judge). Administrators will need to be mindful of this when calculating and providing for expense payments. ◻

The essential rent facts of the BHS CVA

A CVA is a statutory process that allows a company to compromise its unsecured creditors upon the consent of the requisite statutory majority (where otherwise the consent of every creditor would be required). In a strategy that is proving increasingly popular in the challenging retail sector, BHS implemented a CVA with a view to significantly reducing the (unsecured) rents payable for its stores.

Categorisation of premises

As is common for retail CVAs, BHS's arrangement divided premises into three categories according to their economic viability:

- Category 1 premises were subject to the least interference, being the premises considered by the company to be viable.
- Category 2 premises were considered viable if a rent reduction could be achieved. Landlords were to receive 75 per cent (Category 2A) or 50 per cent (Category 2B) of the rent and 100 per cent of other contractual amounts, such as insurance and service charge, for three years from the date on which rent was next payable.
- Category 3 premises were considered to be uneconomical. Landlords were to receive 20 per cent of rent payable, a further 5 per cent of rent in lieu of dilapidations and 100 per cent of contractual amounts in respect of insurance and service charge for 10 months from the next rent date. After this, BHS would have no liability to the relevant landlords unless it elected to remain in occupation.

Rent concession

The CVA provided that, during the 'rent concession period' (broadly, three years), BHS would pay the 'amended contractual rent' instead of the contractual rent that would accrue under the leases without the CVA. The difference between the contractual rent and the amended contractual rent would be the 'rent reduction amount' imposed by the CVA.

A key point: the'spring-back' provisions

The CVA provided that, upon its termination, the compromises in effect under its terms would be deemed to have never happened. The landlords would have their full original contractual claims against BHS restored.

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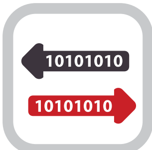
Your burning GDPR questions… answered

Annabel Gillham and **Mercedes Samavi** have been listening to IPs voice their GDPR concerns and have come back with some key guidance.

The GDPR is now in effect, as of 25 May, but – as many readers will know – this is just the beginning. Many companies and firms may have already put in place the initial framework for the new data protection regulation, but insolvency in the UK is a highly specialised area with its own challenges, and IPs are asking fundamental questions about their role and relationship with insolvent companies in the light of data protection and its related requirements.

> An agent IP will have an ongoing duty to ensure that the company complies with all applicable laws (including the GDPR).

In this article, we deal with the questions that have dominated the conversation among IPs in the run-up to the GDPR's implementation.



Am I a data controller or a data processor?

Where the IP is appointed as a liquidator or administrator and acts as the company's agent, the company (not the IP) is data controller of company data, and so the responsibility for company data still lies with the company. That position (following the case of *Re Southern Pacific*[1]) does not change under the GDPR. Nevertheless, an agent IP will have an ongoing duty to ensure that the company complies with all applicable laws (including the GDPR). Where an IP is acting as principal (for example, a trustee in bankruptcy where the bankrupt's assets vest in the trustee), the IP will likely be the data controller in respect of personal data processed in the business/estate. IPs will also be data controllers in respect of practitioner data, which will include creditor data (such as creditor claims and proofs of debt), internal marketing lists, records of appointment (including personal data on directors) and data used in court proceedings specific to IPs (eg to set aside preferences or transactions at an undervalue).

What are my registration requirements?

Heads up: the registration requirements for the Information Commissioner's Office (ICO) have changed under a new payment model, which is underpinned by the Digital Economy Act. Data controllers are still obliged to pay the ICO a fee, depending on

> Trustees in bankruptcy should be aware that they could well be held responsible for failure to comply with the GDPR as a controller of company data.

the size of their organisation, however there is no longer a requirement to provide the ICO with details of the processing activities.

You should register with the ICO as a data controller of practitioner data. In addition, any company or sole trader for which you are appointed as liquidator or administrator should maintain a registration with the ICO – at least for as long as the business continues to trade.

What documents should I provide to individuals when I am appointed?

Privacy notices. For any individual whose personal data you handle as data controller (such as individual creditors, company directors or bankrupts), you should provide him or her with a notice, setting out (among other things):

- Who you are.
- What personal data you hold on him or her.
- Why you are processing his/her data, and on what lawful basis under the GDPR.
- Whether you are disclosing his/her data to any third parties, or making any cross-border transfers.
- That individuals can exercise their rights over their personal data (eg the right to access data or the right to be forgotten).
- How he/she can contact you if they have any questions or objections to your processing activities.

> “Data controllers are still obliged to pay the ICO a fee… however there is no longer a requirement to provide the ICO with details of the processing activities.”

Service provider contracts. If, in your capacity as a data controller, you are entering into any contracts with third-party vendors, such as payroll providers or secure asset-disposal providers, you should make sure that you incorporate the GDPR's article 28 processor obligations into the contract; this is a requirement under the GDPR, and has been introduced to ensure that data processors only process personal data in accordance with the data controller's explicit instructions.

In some situations, the privacy notice and service-provider contracts will need tailoring to the specific individual or third-party service provider (as the case may be); however, in most situations, you will be able to rely on template language to help speed up the process and, importantly, keep you GDPR-compliant.

What do I do if I receive a subject access request?

As a first step, you should consider whether you are data controllers in respect of all or part of the data requested, having regard to the *Southern Pacific* principles. So, where requests are made for data being processed as part of the insolvency proceedings (eg by directors, creditors or bankrupts), IPs will be controllers of that data and responsible for responding. Where the request is for company data, IPs should consider (as an agent of the company) the company's response.

IPs should then:

- If there are doubts, confirm the identity of the person requesting data (eg by requesting identification documentation). The one-month deadline for responding runs from when identity of the requestor is confirmed.
- Consider whether the request is manifestly unfounded or excessive – if so, write to the individual requesting clarification of the request, or consider not responding on that basis.
- Consider whether it will take more than one month to respond to the request; the deadline can be extended by up to two months if the request is complex or the individual has sent a number of requests.
- Consider whether any exemptions apply that will restrict the scope of the response. These exemptions are set out in section 15 and schedule 2 of the current draft data protection bill (which at the time of writing we expect to become the Data Protection Act 2018) and may exempt an IP from responding where (for example) there is a duty to protect the public from financial loss due to the conduct of a bankrupt, or from dishonesty or where the data is covered by legal privilege.
  - If no exemptions apply, individuals have the right to access their personal data and to be informed about:
    a) the purposes of the processing
    b) the categories of personal data processed
    c) the recipients to whom personal data is disclosed
    d) the envisaged retention period
    e) the existence of any automated decision-making.
  - If the IP concludes that there is a reason not to provide the personal data requested, let the individual know why (within one month) and inform the individual of the right to complain to the ICO or enforce legal rights.

Remember that no fee can be charged to the individual for dealing with the request, unless the request was manifestly unfounded or excessive (for example, large quantities of repeat requests).

Responding to data-subject access requests will remain a potentially time-consuming and costly task. As a practical point – to minimise cost and exposure – upon appointment as liquidators, IPs should prioritise ensuring that the company only retains personal data which is required for the purposes of the liquidation (including dealing with any claims that might be made in the liquidation).

Can I sell the company's marketing lists?

Yes, subject to certain conditions. The ICO has stated that *'if a business is insolvent, or being closed down or sold, its customer database can be sold on without prior consent'*. However, you must make sure that the buyer understands that it can only use the information for the same purpose for which it was collected by the original business. In other words, the buyer's use of the information must be within the reasonable expectations of the individuals within the marketing list. For example, if the marketing list contains information originally obtained for marketing health insurance to individuals, the list should only be sold to another health insurance business providing similar health insurance products; the list shouldn't, for example, be sold to a pet insurance company.

> “In most situations, you will be able to rely on template language to help speed up the process and, importantly, keep you GDPR-compliant.”

How does the GDPR affect the due diligence I need to do on an insolvent company?

Data protection compliance should be towards the top of your checklist when considering whether to take an appointment. If a company or sole trader » has complied with the GDPR, it will have the records and policies in place to show compliance, so an assessment can be made fairly quickly. Administrators seeking to sell the business should be aware that data protection compliance will be at the top of a potential purchaser's due diligence list (particularly in data-heavy organisations) and will affect pricing. Liquidators should be aware of the risk that trading on a business, or making long-term decisions over the use of personal data, could lead to the risk of accepting more liability for data protection compliance (similar to environmental claims – although the position has not yet been tested in respect of data protection compliance).

Is it my responsibility to secure or securely destroy personal data contained in the company's assets?

The practical answer is *yes*. The GDPR has not changed this. From an insolvency perspective, it is your duty as an IP to:

- Secure books and records; evaluating a company's personal data will be part of this.
- Investigate what assets there are and what recoveries can be made.

> Responding to data-subject access requests will remain a potentially time-consuming and costly task.

In terms of data management, you may be required to discard personal data that is not required for the purposes of a liquidation; for example, you will not be required to satisfy a subject access request where the company no longer retains the relevant personal data (see our response to question four above).

And of course, there are potential reputational ramifications if there is a data breach on your watch, both for the company and, potentially, for you as the IP.

Will I be made responsible if the company is penalised by the ICO?

Trustees in bankruptcy should be aware that they could well be held responsible for failure to comply with the GDPR as a controller of company data. If a bankrupt has failed to comply with the GDPR, the trustee should put in place a compliance programme as a priority. The trustee would be well advised to have template paperwork that can be quickly tailored (such as privacy notices, emails seeking fresh consent where necessary, etc). Liquidators and administrators step into the shoes of directors (for data protection purposes) as agents of the insolvent business. There is potential liability under the incoming UK Data Protection Act similar to the current position, whereby directors, managers, officers or 'any person acting in that capacity' could be held liable for an offence committed by a company with their 'consent, connivance or neglect'.

What should I do if I become aware that company devices containing personal data may have been stolen or lost?

As a result of the GDPR, all data controllers in the UK now have an obligation to notify the ICO (and other EU regulatory authorities if the breach occurs in another EU country) if there is a personal data breach, *unless* the breach is unlikely to result in a risk to the rights and freedoms of individuals. Such notification has to be made within 72 hours after becoming aware of the breach. In addition, data controllers should notify affected individuals if the risk to their rights and freedoms is considered to be high.

In practice, this means that you should assess whether any personal data breach (eg as a result of a device being stolen, lost or destroyed) is sufficiently significant to trigger the GDPR notification requirements for the company. Nowadays, it's more and more common for company devices to contain a lot of personal data; therefore, even the loss of one laptop or phone could cause significant data issues.

Do I need to change my practices in relation to my own marketing contacts?

Not necessarily. If you have previously obtained your own contacts with valid consent, you have a record of this and you have given them adequate opportunity to unsubscribe, you may not need to ask those individuals for fresh consent under the GDPR to send them marketing materials. For GDPR purposes, you can consider relying on the 'legitimate interests' basis for marketing activities in a business-to-business context.

> To try to mitigate your risk of complaints, always include an easy, accessible and free opt-out mechanism in each marketing communication.

To try to mitigate your risk of complaints, always include an easy, accessible and free opt-out mechanism in each marketing communication.

You should note that electronic direct marketing (such as email, SMS or social media) is predominantly governed by the Privacy and Electronic Communications Regulations, which are due to be replaced by the ePrivacy Regulation within the next year. So the rules for your marketing practices could change in the near future.

Because of the generality of this article, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. ◻

[1] *Re Southern Pacific Personal Loans Ltd* [2013] EWHC 2485 (Ch)

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Whether to follow the smoking gun: litigation

Denise Fawcett warns IPs to weigh up the risks and prepare before embarking on litigation.

You look through a company's records and find the 'smoking gun' – that piece of evidence you could only have dreamed of. You know you have a cast-iron case! Is it time to crack open the champagne? Or maybe you need to put it on ice while you think it through first? Any litigation is likely to be a big endeavour and one that you need to consider carefully.

In order to work it out, let's start at the end and work backwards.

> Freezing orders are not commonplace and are only likely to be sought in cases with large amounts at stake and where funding is not an issue.

Enforcement

Assuming that the end result of the 'smoking gun' is a successful litigation, does your 'target' actually have any money? Consider employing an enquiry agent to find out what assets the target has before you go any further.

Ask yourself 'will judgment have to be enforced abroad?'. Are there reciprocal enforcement rights in the relevant jurisdictions and how difficult or costly will it be to enforce against assets outside the jurisdiction? And will the target's money or assets still be there in a year's time when you have won the case?

Should you get a freezing order, pre-action, to prevent the dissipation of assets? Injunctions are expensive to obtain and are discretionary based on whether it is just and convenient to make the order. The court will want to see that there is an underlying cause of action, meaning that time, and therefore costs, will need to be expended putting together all the necessary evidence and a legal basis for a claim. The applicant will need to give an undertaking to pay damages to the respondent if it is found that the freezing order shouldn't have been made. Accordingly, freezing orders are not commonplace and are only likely to be sought in cases with large amounts at stake and where funding is not an issue.

Adverse costs

Even in the clearest cut cases this is a risk. Perhaps an offer of settlement was unreasonably rejected, perhaps not all heads of claim were won, perhaps an interim application was lost, perhaps the witnesses let you down on the day or perhaps the judge just didn't get it – there are many reasons why an adverse costs order could be made. Trustees in bankruptcy suffer these orders personally as they bring the litigation in their own name. The same applies in administration and liquidation where the office-holder's cause of action is taken in their own name (eg preference).

Office-holders are usually entitled to be indemnified from the company's assets (this can be disapplied by the court) but that only assists if there are funds to be indemnified from.

Orders for costs against a company in administration or liquidation have 'super-priority' over other claims in the process unless the court orders that they are an expense. This will affect preferential claims and floating charge realisations.

> Consider taking out insurance in stages rather than insuring the whole case in order to limit the amount of the premium payable.

Note the requirement in rules 7.111 to 7.115 of the Insolvency (England and Wales) Rules 2016 to seek the approval of preferential creditors or floating charge holders before costs above £5,000 are incurred in relation to specified claims.

While it is rare for an administrator or liquidator to be ordered to pay a costs order personally in a claim by the company, the court can make such an order, for example, where it was not

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reasonable to pursue the claim and does not have to limit the order to the assets available to pay them. That said, it is generally considered that the appropriate remedy for a defendant is a security for costs order (see below) rather than a third-party costs order.

After-the-event (ATE) insurance should be considered, but getting cover is dependant upon the merits of the case. If the premium is deferred, it must be paid if the case is won. The premium can be in region of 40 per cent of costs covered and for smaller claims this can be disproportionate.

A great deal of time can be spent putting together the information required to obtain ATE insurance which can, again, be prohibitive. A solicitor or barrister will have to confirm that the chances of success are within the insurance company's tolerances (eg 65 per cent or more). This means incurring costs on investigations, counsel's opinion and solicitors.

> "LIPs often have little incentive to settle (as they are not incurring costs) and may pursue defences that a person properly advised would not."

Once obtained, the insurer will have an interest in everything that happens in the case and will be entitled to payment of a deferred premium if the case is settled early. Consider taking out insurance in stages rather than insuring the whole case in order to limit the amount of the premium payable. Of course, this carries the risk that further insurance is not available at a later stage, for example if the merits of the case change.

Security for costs

Where the company is the claimant, the first thing that an office-holder may have to deal with is an application for security for costs. If cash security is not available, the existence of ATE insurance may defeat an application. However, the terms of the policy will be scrutinised by the court and if it could be set aside (for example if the case advanced is found not to be factually true) then it will not be sufficient for the purpose of providing security.

An order may be refused if the defendant is using the application to stifle a genuine claim, but this means having to persuade the court about the merits of the case at an early stage and opposing the application adds another layer of costs. If security could easily be provided then the court is likely to conclude that that claim is not going to be stifled by an order for security.

Litigants in person (LIPs)

If a target is not represented then the adverse costs risk is minimised (provided they remain LIPs throughout). However costs can still be claimed – financial loss for time reasonably spent or, in the absence of such loss, an hourly rate currently set at £19 per hour plus disbursements (which may include counsel's or expert's fees) and the costs of obtaining any legal advice that falls short of formal representation.

LIPs often have little incentive to settle (as they are not incurring costs) and may pursue defences that a person properly advised would not. While the court will not allow a LIP to ignore procedural rules, he or she is likely to be given leeway by the court.

Litigants in person often slow an action down and create more work and costs for the represented party. Correspondence is likely to be protracted, hearings may be adjourned more than may ordinarily be the case and even where a litigant in person has an obligation to file documents and bundles at court, the represented party may have to do this to ensure that a hearing runs smoothly.

Funding

Many solicitors and barristers will take on cases on conditional fee arrangements (full or partial). It may be necessary to fund an initial opinion from counsel so that the lawyers are comfortable as to the merits of the case first. If fees are conditional upon recovery then the lawyers will also be interested as to the financial means of the target.

Litigation funders may provide funding and provide or arrange ATE insurance but claimants should expect to give up a large proportion of any recoveries. There are a variety of funding arrangements on the market but this is outside the scope of this article.

Success fees and ATE premiums can no longer be collected from the opposing party.

Litigation risk

It is highly unlikely that any solicitor or barrister will give any case a 100 per cent chance of success. This is because of litigation risk, based on any number of factors including: witnesses not coming up to proof under cross-examination; judges not seeing the case the way the claimant does; unexpected evidence coming to light and documents being discredited, among a list of many others. Cases only get to trial because both parties think that they are right but it is not possible that they will both be victorious.

Mediation

Mediation is a useful way to settle a case and avoid the risks of litigation. The process can be costly since the parties must still present their position, provide key evidence and have a very good understanding of their case as well as a good idea of possible outcomes.

Costs may be wasted if there is no settlement but it is worth considering, or at least having a settlement meeting, not least because the courts expect it such that it is almost impossible to avoid some form of alternative dispute resolution procedure.

> "All of the risks of litigation can be best addressed by proper investigation of a claim at the outset."

Timing is crucial: too early and the parties may not be ready (in terms of understanding the strength of their case and the issues or being psychologically ready to settle); too late and the costs of the proceedings will have been wasted or one party may be feeling confident and wish to proceed to trial.

Assign the claim

If there is no appetite to take a claim then perhaps the claim can be assigned (eg to a creditor). Failing that, there are companies that make a business out of buying claims.

Unless a claim is sold outright there is still a risk that a costs order could be made against the assignor so it is important to make sure that the assignee has the means to pay any costs order and to get a meaningful indemnity.

Preparation is key

All of the risks of litigation can be best addressed by proper investigation of a claim at the outset so as to be in a position to assess the merits, apply for ATE insurance or funding, get a conditional fee arrangement in place, oppose a security for costs application, present the best case possible in a mediation and keep costs risks to a minimum.

A well presented and evidenced letter of claim can also lead to an early settlement, leaving you to kick back and enjoy that glass of cold champagne!

DENISE FAWCETT is a partner at Pitmans LLP.

At the mercy of the court

James Latham lays out the dos and don'ts for an IP about to step up to the stand.

Not every IP will be required to attend court, but many do. For some it is second nature; for others it is an alien and unwelcome diversion from mainstream work. This article sets out some dos and don'ts for everyone but is written with IPs in mind who may be less accustomed to a forensic environment.

> It is important to be an active participant in the preparation of your evidence: don't just leave it to your solicitors.

An IP's contact with the court will generally be as a witness, so it is on that role that I intend to concentrate.

Making a statement

Most straightforward cases will begin with the IP giving written evidence in the form of a witness statement; but, even in a case which starts with pleadings (statements of case: points of claim, points of defence and points in reply), there will be witness statements at some stage. Your solicitors, and possibly counsel, will usually do the actual drafting, but your input is vital. In the end it is your evidence, so it is important that you are happy with it in form and content. It is highly likely that you will be cross-examined, possibly quite closely and fiercely, so it is vital that you can stand by your evidence under pressure.

The first thing to remember is that it should be in your own words. There is a tension here, because your lawyers will want to mould your words so as to direct them to the relevant legal points. A good lawyer will know how to do that, and a good witness statement will be the product of constructive collaboration. It is important to be an active participant in the preparation of your evidence: don't just leave it to your solicitors.

Before you sign

Don't sign a witness statement if you are unhappy with any of the content. Raise questions with your solicitors and iron out problems before you sign. Not everything can be put right later and in many cases your witness statement will be the first thing the judge reads, so it must read convincingly.

Make sure you have the whole witness statement in front of you when you sign it. Never sign the last page and leave your solicitors construct the final version around it. You will be signing a statement confirming that the contents of your witness statement are true, which includes the references to the accompanying documents and exhibits. Check that these are included, as are any documents you refer to. In short, make sure that what you say in the statement of truth is, in fact, true!

> Turn up looking like a professional and not as though you are on the way to the pub.

Multiple witnesses

It is worth giving some thought to who is going to give the witness statement – you may need more than one. If your case only requires putting the documents before the court, it is probably enough for the office-holder to provide all the evidence in one witness statement. But if the case is factually more complex, consider whether some or all of the evidence is better given by your manager who has had day-to-day conduct of the insolvency and its facts, many of which you may not be able to give evidence about at all.

> **Always answer the question you are asked, not the one you wished had been asked.**

If there is an important but isolated issue of fact – such as who said what in a telephone conversation – make sure your evidence about what was said comes from the person who had the conversation. Clearly you will need to see that your manager or other member of staff is confident about giving evidence, but in some cases (such as a one-to-one conversation) you may not have much choice. The more direct the evidence is, the more persuasive it is. Direct evidence from Ms Smith about what a former director said to her is more cogent than you giving evidence about what Ms Smith told you the director said.

Avoid weasel phrases

The next error is so common that you may be aware of it already. If you do give evidence of something you have been told by someone else ('evidence of information and belief' as it is still sometimes called) make sure you say *who* told you and that you *believe* what you were told. The 'who' should be a human being. 'The bank' or 'HMRC' is not a source; the person who communicated with you is.

Avoid what I call 'weasel phrases': 'it was clearly understood that…' (which usually means that it wasn't) and 'I would have done this or that' (which implies that you didn't). Formulations like these annoy the judge and weaken your evidence. For the same reason use the active and not the passive voice as much as you can. 'I did this' carries more conviction than 'This was done'.

Finally, keep your evidence as short and to the point as you can. You may want to get all sorts of things about the defendant off your chest, but if they are not relevant they will simply waste time and distract everyone involved (including the judge) from what the case is really about.

Before the trial

It's an obvious point, but re-read your witness statements (you may have put in evidence in reply to the defendant's). It may be a year or more since you made them and you need to be on top of your material. Read the defendant's evidence too. A confession that you have not looked at the evidence recently is likely to be met with a sigh from the judge and a short command to step outside and do so. You are going to be cross-examined by a barrister who will probably have spent some time reading what you have written and whose whole purpose may be to undermine what you say and your credibility, sometimes so subtly that you won't even notice that it's happening.

Don't go to the other extreme, though, by learning your evidence off by heart or repeating pre-learned phrases like a parrot. You must prepare without rehearsing. Your solicitors may help you, but never let them coach you in the way you see it being done in American TV trials: that is not allowed here.

In the days before trial it is also worth thinking about a settlement. The door of the court casts a powerful shadow, and many defendants get last-minute cold feet and come up with an offer. It is as well, then, to have your figures at your fingertips. 'I haven't thought about it' or 'I haven't got my costs to hand' may mean you miss the golden opportunity to settle, and save time and money for yourself and the creditors.

At the trial

Turn up looking like a professional and not as though you are on the way to the pub. You are an office-holder and an officer of the court, and you should present yourself as such. My recommendation is that you wear a suit and tie.

Before you are cross-examined make sure you correct any errors in your witness statement – your advocate will generally have checked this with you in advance. Don't worry if the mistakes are minor: the court will understand. (Of course, it may be quite different if you have made a major mistake that goes to the heart of your case.)

If you have had to come to court it is probably because you (and your other witnesses) are going to be cross-examined by someone who knows what he or she is doing and has been through the papers with a fine-toothed comb. Don't let them get under your skin. Give your answers calmly and neutrally. If they ask you a question that is rambling or too long, ask them to break it down (the judge will usually support this). Always answer the question you are asked, not the one you wished had been asked. Be brief and stick to the point: remember, the more you say, the more you can get wrong. Equally, however, back up your answer when you need to with supporting facts and matters.

Never answer a question with another question ('Well, what would you have done in my position?'). Your cross-examiner will simply say that they are there to ask the questions, not to answer them. You will feel put down, because that is exactly what they have done to you.

Concessions and calmness

Don't be afraid to concede the occasional proposition if it seems right. You will gain points for objectivity and for being truthful. Your advocate will have a chance to put things right when they come to your re-examination.

If, like most of us, you suffer from *esprit d'escalier* and think of something later that you wish you had said when answering an earlier question, raise it when there is a gap ('Sorry, could I just go back to something I said earlier?'). The court will understand that it is often hard to think on your feet.

If you are dealing with accountancy points, do so clearly, simply and avoid jargon. The chances are that you are now the expert and everyone else is a layman. Use your expertise to clarify rather than bamboozle.

> **If you have had to come to court it is probably because you are going to be cross-examined by someone who knows what he or she is doing.**

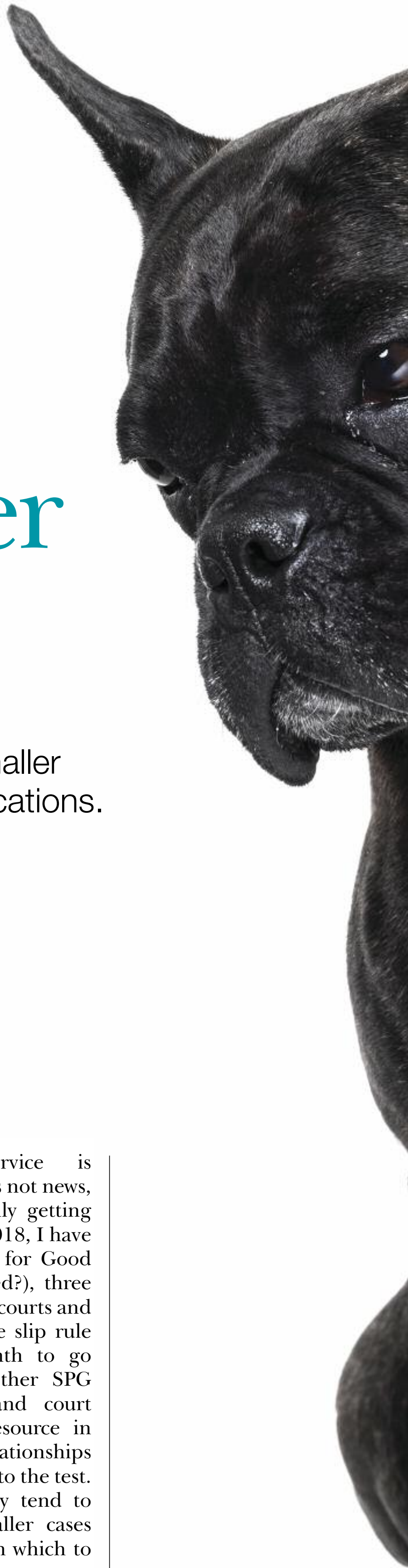
When the defendant and his or her witnesses are being cross-examined, sit as quietly and impassively as you can. The judge will hear you tutting and see if you are rolling your eyes. That kind of behaviour never goes down well and you may get a telling off.

Above all, tell the truth. Advocates and judges are adept at sorting the truth from lies. It is what they are there for.

No one expects…

Finally, always expect the unexpected. Most trials proceed smoothly and tediously to their inevitable conclusion. Others take unexpected turns because of something a witness says or some vital document that has just come to light. Don't panic and trust your legal team. They are there to deal with situations like this. Often what seems to be a sudden turn for the worse is, in the end, not as bad as it seems. □

JAMES LATHAM is a partner at Moon Beever.



How small firms can face up to bigger challenges in court

Kevin Lucas, an **SPG committee member**, offers help for smaller firms walking into the legal maze of courts, costs and communications.

The courts service is struggling – this is not news, but sadly it is only getting worse. So far in 2018, I have had a case listed for Good Friday (when the court is closed?), three files have been 'lost' in different courts and a simple amendment under the slip rule took the best part of a month to go through. From speaking to other SPG firms this is quite typical and court problems take up a lot of resource in smaller firms, even putting relationships and goodwill with legal advisers to the test.

As SPG firms we obviously tend to handle smaller cases and smaller cases invariably have fewer assets with which to cover the costs of good advice, support or representation for dealing with the court system. Being informed enough to have a meaningful conversation with your adviser can make the difference between a very surprising or frustrating outcome, and a more reasonable one (even if you lose).

The landscape for smaller firms in the courts is ever changing and your ability to stay on top of these changes can make or break a case. Below, I have tried to answer some common queries and provide some comments on being a litigant in person.

> Being informed enough to have a meaningful conversation with your adviser can make the difference between a very surprising or frustrating outcome, and a more reasonable one.

What has changed in the court system?

The number of courts across the country has reduced sharply since 2010, as part of a government programme of closures and consolidations to reform the court service. As a result, some insolvency jurisdictions have changed and some courts have changed their names.

County courts still exist – see schedule 6 of the Insolvency (England and Wales) Rules 2016 – but in July 2017 name changes took effect at the Rolls Building of the High Court (part of the Royal Courts of Justice (RCJ)) and certain district registries (Birmingham, Bristol, Cardiff, Leeds, Liverpool, Manchester and Newcastle). The chancery division of the High Court has disappeared under the umbrella of the new Business and Property Courts. The Bankruptcy Court, where most insolvency work takes place, has been renamed the Insolvency and Companies list (heard in the Rolls Building at the RCJ).

The rationalisation of insolvency courts was ostensibly designed to improve outcomes for IPs by utilising the focused skill sets of particular judges, and the new *Practice Direction on Insolvency Proceedings*, released on 25 April 2018, really does try to make this happen, however the reality is likely to remain that there are too few judges, not enough court staff and too many cases. One annoying practical aspect remains, which is that each court retains its own procedural guides – why there cannot be an identical set of rules in every court is beyond me.

How do I communicate with the court?

Electronic filing (e-filing) has been compulsory for those with legal representation with the RCJ since April 2017. Even a notice of intention to appoint administrators or a notice of appointment must be filed electronically (unless it is out of hours when r3.20 to r3.22 must be followed). Originals must be retained and despite this some things must still be in paper – eg trial bundles. You can personally register for e-filing directly at **efile.cefile-app.com/register/new**. Faxes are not allowed. This process is supposedly being rolled out to other district registries this year.

You may email the courts, but there are conditions that must be met. They are too long to list here, but can be found on the government's justice website: **www.justice.gov.uk/courts/email-guidance**. The relevant email addresses can be found on **courttribunalfinder.service.gov.uk/search** but, at the time of writing, these have not all been updated with details for the renamed courts, so choose carefully (go for civil, county or chancery if it's not obvious). Postal correspondence is acceptable, but only if you're willing to accept the risk of documents failing to arrive or being misplaced by the court or its mail room.

Communicate early! You should send documents at least two business days in advance of a hearing otherwise it may not make the court file. Include bold headings that clearly state the parties' names, court references and the hearing date plus time, and address it to the appropriate person. Where documents are urgent make sure the word 'urgent' is the largest text on the page.

You must refer to a judge by the appropriate title in written correspondence and in person:

- Tribunal, employment, deputy and district judges are all referred to as 'judge' in written correspondence and 'sir' or 'madam' in court.
- A circuit judge is referred to as 'judge' in written correspondence and 'your honour' in court.
- A High Court judge is always referred to as 'judge' in written correspondence and 'my lord' or 'my lady' in court.
- In the new Insolvency and Companies Court (part of the High Court) a judge is referred to as 'judge' in written correspondence and in court.
- A High Court master is always referred to as 'master'.

> Not having representation at a hearing can lead to you being on the receiving end of a goodness-knows-what outcome.

Can I just ignore some hearings?

Err… no. We are professionals, often officers of the court, and we need to behave appropriately. You may be thinking about skipping that hearing for the dismissal of a winding-up petition where a CVL has happened, but don't.

Not having representation at a hearing can lead to you being on the receiving end of a goodness-knows-what outcome. You will have no idea who attended the hearing or what was said, but more importantly the court and its judges will consider this disrespectful, which is » likely to impact on a judge's view of you. Employment tribunal judges will often demand that IPs respond and engage, even if it is only to acknowledge that there is no objection to a case proceeding.

There are a number of options open to you when you need to have representation in court.

You can make representation via an advocate (barrister or solicitor), in person or even in writing to be placed on the court file, depending on the hearing and the context. For example, you can write to the court as opposed to arranging representation to ensure a winding-up petition is dismissed after a CVL has gone through – I haven't had one go wrong in 15 years.

Should I attend a hearing?

The decision on whether to attend is too often based on two factors above anything else: 'will I get paid?' and 'can I be bothered?'. If these are your criteria, you need to read the next paragraph.

Consider this: you and your staff know 100 per cent of the information about your case; your solicitor knows what you've told them, say 25 per cent; and your barrister knows even less, say 10 per cent. So, when it comes to dealing with the issues, statements from the other side or queries from the judge during the hearing, who is best placed to answer: someone with 10 per cent of the knowledge, someone with 25 per cent or someone who has *all* of the knowledge?

> "Being a litigant in person is not something any IP should fear, but it is something that requires great confidence to do."

Some judges do have a negative view of IPs and I can't say I blame them when so few show the court the appropriate hearing-participation courtesy that it deserves.

My personal experience of attending hearings is that it helps your chances of a positive result later on. If you're lucky, you'll even get a moment of amusement when a judge suggests to counsel to turn around and ask their client (who has been nodding enthusiastically in response to the judge's query) for the answer that counsel could not provide.

Who can stand up in court and speak?

You will only speak at the hearing if you are a litigant in person, the only person from your team present or when you are giving oral evidence, possibly in cross examination. If you have a solicitor or barrister, they must speak on your behalf.

Being a litigant in person is not something any IP should fear, but it is something that requires great confidence to do. I witnessed one IP acting as a litigant in person – the court took the view that this IP was a professional litigant in person; not your Mr Average without representation. The case was a poor one to begin with, but this was compounded by the IP's failures to address the court correctly, show appropriate respect for the judge, properly prepare and organise and concede that the case should be withdrawn. It was unsurprising when the judge came down on the IP like a ton of bricks on costs.

Smaller firms may be tight on resource, but just as not spending and representing yourself can go wrong, attempting to pay less for a more junior counsel has risks too and can prove to be a false economy. I have had situations where a junior barrister's technical ability or delivery have either let me down or caused me to squirm in my seat, wondering if I would have been better off representing myself.

Which court should I use?

Where this is a first issue of proceedings:

Personal insolvency cases will be heard at the county court nearest to the debtor's residence or place of business in the immediate six months prior to the issue of proceedings. If the HMRC debt exceeds £50,000, you will go to the Rolls Building of the RCJ. In London, all cases with greater than £50,000 in debt are heard at the Rolls Building. Debts of less than this amount will be heard at the county court in central London.

Update your templates

The documents you submit to the court should bear the correct heading in the top right hand corner. What this is depends on where you are:

The High Court

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
[OF ENGLAND AND WALES] |
IN [LOCATION] | [IN WALES]
INSOLVENCY AND COMPANIES LIST (ChD)

Key:
1 for the Rolls Building.
2 insert name of district registry (other than Cardiff).
3 for Cardiff

The county courts of central London, Birmingham, Bristol, Cardiff, Manchester, Newcastle, Leeds, Liverpool, and Preston:

IN THE COUNTY COURT AT [LOCATION]
BUSINESS AND PROPERTY COURT LISTS

All other county courts:

IN THE COUNTY COURT AT [LOCATION]
IN BANKRUPTCY (only for proceedings under part IX to XI)

After the relevant court details you should state:

in the matter of [relevant company or other person] and of the Insolvency Act 1986.

Corporate insolvency cases will be heard at the Rolls Building or district registry. Only in cases where the issued share capital is less than £120,000 will the case be heard at county court. See IR16 7.8, 8.9, 8.20, 9.22, 10.11, 10.48, 12.3, 12.4, 12.5; and IA86 1A, 2, 117 for more details.

To find the correct county court based on postcode visit **courttribunalfinder.service.gov.uk/search**, select bankruptcy and enter the company or debtor's postcode. This system has some gremlins – a recent search for Chichester in Sussex listed the nearest county court as Essex! The closures aren't that bad yet.

> "Use a district registry where possible to ensure you have a judge with far more direct knowledge or experience of insolvency."

It is important to get the right court; otherwise proceedings may be struck out (although the case should be transferred to the right location). If proceedings are already ongoing, you must return to the same court with subsequent applications. Appeals are made to the courts listed in schedule 10 of IR16.

Why should I use these courts?

Use a district registry where possible to ensure you have a judge with far more direct knowledge or experience of insolvency – this also means shorter waiting times than at the RCJ.

Judges in county courts have such a diverse range of cases to deal with that it is unlikely they would have had the opportunity to gain in-depth experience or knowledge of insolvency, which can lead to unpredictable outcomes and undertaking a case can become a bit of a lottery. I once lost a case because the judge made a presumption with no evidence in front of the court (evidence is not in front of the court unless in written or oral submissions). Sadly the high costs of an appeal to the district registry or the High Court were unjustifiable as there would have been little chance of recovering them from the apparently penniless defendant. ◻

KEVIN LUCAS is a director at Lucas Johnson and is a member of R3's SPG committee. .

The evolution of the specialist insolvency courts

Chief Judge Briggs of the newly christened Insolvency and Companies Court explains why the decision was made for the Chancery Division to give way to more modern terms.

The judicial system has changed from time to time, has sometimes been dynamic (the introduction of the Judicature Acts), but now it is progressive. Perhaps the pace of change has been faster and more dramatic in the Chancery Division since the publication of the *Chancery Modernisation Review 2013*.

Recognising expertise in insolvency

Lord Justice Briggs (as he was) spent considerable time taking soundings around the country, collecting and studying data and reporting on findings with recommendations. He recorded that the majority of the insolvency work in London 'including matters raising substantial issues of both fact and law' was undertaken by registrars. He reported that

> "Earlier this year recognition and change came together, by renaming the registrars in bankruptcy as Insolvency and Companies Court judges. They do what it says on the tin."

'the registrars offer a greater depth of experience in insolvency matters than is available in all or most courts outside London. It is only the registrars who do this work full time, even in London'. The majority of his recommendations were implemented by the time he produced the *Civil Court Structure Review 2015*, which reiterated some of his earlier findings, noting a change in jurisdiction for the registrars. If it had not been recognised before, it was then recognised that England and Wales had specialist Insolvency and Companies Court judges.

The chancellor of the High Court, Sir Geoffrey Vos, has spearheaded progressive change, conceiving and implementing the Business and Property Courts of England and Wales, an umbrella for High Court business and property work. In a stroke, what were to the public unintelligible and incomprehensible names and titles, such as the 'Chancery Division' were swept away. Electronic CE-filing was introduced in London and made compulsory for professional users; it is spreading through the country. Now when a party issues in the Business and Property Courts, the user will need to choose one of the ten specialist lists. One of those lists is the newly-formed insolvency and companies list. To accompany these changes, the chancellor introduced a new Business and Property Courts practice direction. One effect of the practice direction is to reduce dramatically the number of county court hearing centres that may hear and determine specialist work such as insolvency.

Distribution of business

Earlier this year recognition and change came together, with the renaming of the registrars in bankruptcy as Insolvency and Companies Court judges. They do what it says on the tin. The *Insolvency Practice Direction 2018* signals more change. Perhaps the most significant is the distribution of business and appeals. Westlaw explains:

'in relation to distribution of business, there is now a four-tier system in place. The first tier comprises those applications that may ***only*** *be listed before a High Court judge… The second tier comprises those applications that may* ***only*** *be listed before a High Court judge (as defined) or an ICC judge but* ***not*** *before a district judge (DJ) sitting in a district registry or the county court…. The third tier comprises those applications that may only be listed before a High Court judge (as defined), ICC judge or (with the consent of the supervising judge for the circuit in which the DJ is sitting) a DJ sitting in a district registry... The fourth tier comprises the remainder of insolvency business.'*

As Andrew Keay, professor of corporate and commercial law at Leeds University, recently commented:

'The advent of the Insolvency and Companies Courts in England and Wales is a very innovative and welcome development that recognises the amount of litigation undertaken in the fields of insolvency and company, as well as the specialty nature of these critical and interesting areas of the law. We now have specialist Insolvency and Companies Court judges who hear appeals and have considerable insolvency jurisdiction in London. So often novel points of law and/or practice present themselves in insolvency and company law and to have a specialised judiciary handling them makes sense. Save for perhaps the well-known bankruptcy judges in Southern New York, I know of no other jurisdiction that embraces such an approach, which may, in some places such as the American States, be due to the existence of a federal system of government and justice.'

Specialist courts for specialist laws

The Insolvency Act 1986 was a response to the report and recommendations of the Cork committee tasked with reviewing insolvency law and practice in the late 1970s. The report influenced the policy behind the Act, bringing together in one statute personal and corporate insolvency with a radical reconstruction of the law.

> "The recognition and evolution of our specialist Insolvency and Companies Courts in England and Wales is to be celebrated."

One recommendation was to introduce a unified system of insolvency courts to administer the specialist laws. I believe, as Cork did, that specialist courts are efficient, provide faster, consistent outcomes and reduce the likelihood of appeals. The insolvency and companies list will serve users and the economy better than generalist courts. The recognition and evolution of our specialist Insolvency and Companies Courts in England and Wales is to be celebrated. □

NICHOLAS BRIGGS is the Chief Insolvency and Companies Court Judge.

Transatlantic court-ing behaviour: the US v. the UK

Ian Wallace and **Adhuv Prinja** examine the role of the courts in US Chapter 11 bankruptcy proceedings and how it compares to an English administration.

The UK and the US have historically been perceived as leading jurisdictions in the development of restructuring and insolvency law – to the extent that dozens of local insolvency regimes around the world have been modelled on some combination of their processes. Both regimes are highly sophisticated, and feature well-developed legislation supported by decades of case law that offers both debtors and creditors alike a degree of certainty and predictability that is not always available in other jurisdictions. But while clear parallels can be drawn between the US and English restructuring processes, they are by no means identical, and certain key distinctions can be drawn when it comes to the involvement and role of the court in particular.

Which tools to compare?

Chapter 11 of the US Bankruptcy Code is one of the most well-known international restructuring tools, providing the means through which a debtor can effect a financial restructuring and serving as the principal restructuring tool in the US legal system. This court-supervised reorganisation regime allows a company to rehabilitate its business as a going concern, to maximise value and ensure the equality of treatment of creditors with similar rights. The Chapter 11 process is highly effective and powerful, particularly to an insolvent debtor, in light of its worldwide automatic stay and the ability to 'cram down' dissenting creditors, or potentially a class thereof.

> "Despite both Chapter 11 and administration having a shared goal… there is a fundamental policy divergence as to who is in the best position to achieve this."

In the English restructuring toolkit, administration under the Insolvency Act 1986 is perhaps the most obvious comparator to Chapter 11 as an analogous rescue proceeding, such comparisons being the primary focus of this article.

A distinguishing feature of the English legal system, however, is the plurality of options available to effect a financial restructuring, covering the entire range of potential court involvement.

The administration process sees the greatest level of court supervision (albeit with significantly less involvement than the US court in Chapter 11), and the administrator, as an officer of the court, performs a quasi-judicial function. At the far end of the spectrum, the company voluntary arrangement (CVA) process under the Insolvency Act 1986 generally adopts the most 'light-touch' approach. An English scheme of arrangement, a court-sanctioned process under the Companies Act 2006 with simply a directions hearing and sanction hearing conducted before a judge, represents something of a middle-ground.

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The court in Chapter 11 proceedings

A notable feature of Chapter 11 is the high degree of court involvement and the number of court hearings in a typical case.

Chapter 11 proceedings are most commonly initiated by the debtor filing a voluntary petition at court, which it must make in good faith. While there are certain thresholds to be met to access Chapter 11 (eg having sufficient connection to the court's jurisdiction) there is importantly no specific insolvency requirement. The debtor is also required to file a disclosure statement with the court setting out its assets and liabilities.

> Both regimes are highly sophisticated, and feature well-developed legislation supported by decades of case law that offers both debtors and creditors alike a degree of certainty and predictability.

The court will then remain heavily involved through the entirety of the Chapter 11 case. The voluntary petition is generally accompanied by a range of 'first-day' motions seeking orders from the court in relation to the debtor's business and circumstances – for example orders may be sought relating to the manner in which cash will be used and controlled during the case or authorising asset disposals. Each motion needs to be approved by the court, and are typically filed throughout the lifespan of a case. Where a motion is contested, further court hearings will be required to handle objections and reach a resolution. The post-petition Chapter 11 process is therefore heavily court and lawyer-driven.

The court will ultimately need to confirm the creditor-approved 'plan of reorganisation' and, following implementation of the plan, a further court filing is required to formally close the proceedings.

Each Chapter 11 case is assigned a dedicated bankruptcy judge, who carries the case throughout its duration (cases can be pre-packaged and completed in a matter of weeks, but sometimes can run for months or even years). The most sophisticated Chapter 11 judges are seasoned insolvency experts with years of practising experience, and will take a very hands-on role in directing the course of the restructuring and managing the competing interests of creditors and other stakeholders.

The court in administration proceedings

By way of contrast, while the English court plays an important role in administration proceedings, the majority of the process is conducted out of court by the administrators.

The English court is able to exercise its discretion as to whether to grant an administration application, which can be brought by the company, its directors or by a secured creditor holding a 'qualified floating charge'. In contrast to a Chapter 11 filing, both in-court and out-of-court appointment routes are available to, and used by, applicants.

After the court has granted the administration application, the process will largely be driven by the administrators and their team, together with their independent legal advisors. While court involvement persists, it is to a significantly lesser degree than in Chapter 11 proceedings. The administrators' proposals need to be filed at court and hearings are required to approve any extension of the administration beyond its 12-month duration and to approve certain interim distributions. Unlike Chapter 11 proceedings, however, an English administration process will not typically feature regular hearings for motions in respect of debtor conduct, and it is unusual for creditors to directly petition the court in the same way that they regularly would in Chapter 11.

The degree of court involvement is perhaps the single most obvious difference in terms of course of conduct between a UK and a US insolvency case. In the UK, it is the administrators who run the process with their team, exercising their discretion to adjudicate claims and monetise assets or achieve a sale of the business. In the US, all key issues are brought before the judge by way of hearing, often on a daily basis, and it is the bankruptcy court, more than anyone else, that has the final decision on all material issues. To take one recent example, at the time of writing, approximately 3,000 filings have been made on the Toys 'R' Us Inc Chapter 11 docket compared to only two filings made in respect of the Toys 'R' Us Ltd's English administration proceedings.

Who controls the process?

Another key area of divergence between Chapter 11 and administration is the question of who controls the debtor and the process.

Chapter 11 proceedings are regarded as a 'debtor-in-possession' process – meaning that existing management will typically remain in place – and no insolvency practitioner is appointed.[1] This means that management – either the existing or a new team – will maintain day-to-day control of the debtor, although major business decisions outside the ordinary course, such as disposals of material assets or incurring additional secured debt, will need to be court-approved.

The administration process follows a somewhat different path, and control of the company will pass to the administrators. The directors of the company are under a duty to assist administrators in their functions, but day-to-day control is surrendered. As the administrators are officers of the court, performing a quasi-judicial function, intense court oversight and regular hearings are therefore not required.

Despite both Chapter 11 and administration having a shared goal of being rescue proceedings and providing potential rehabilitation for the ailing company, there is a fundamental policy divergence as to who is in the best position to achieve this.

One might conjecture that this difference of approach is based as much as anything on deep-rooted cultural and historic principles: the 'American dream' where every businessperson has the opportunity to rebuild his or her fortune in the face of adversity and failure is forgiven, versus centuries of English history where risk is required to be aligned with responsibility and everyone held culpable for their actions (and debts).

> Comparisons will continue to be drawn between the US and English legal systems as the two most popular and developed forums for complex financial restructurings.

In truth this is an over-simplification and the UK and US approaches have at least as much in common as they have apart, but nevertheless this departure in overall approach has a far-reaching impact, particularly on matters such as corporate governance and board decision making. In the US, directors are arguably incentivised to file for Chapter 11 to secure protection for the debtor through the automatic stay, and to provide themselves with the exclusive platform to propose a plan of reorganisation to the company's creditors. In England, directors are faced with difficult decisions owing to the risk of incurring personal liability for wrongful trading and, in certain circumstances, may be incentivised to file for administration and cede control to an insolvency practitioner.

Closely associated with this is the differing role of the chief restructuring officer, which in English restructurings is often engaged early in the process to support the directors and have a minimal ongoing role (if any) post-filing for administration. In the US, directors are arguably less likely to relinquish control to a »

	UK administration	US Chapter 11
Who can file?	Either the debtor or a creditor with a floating charge (or the court)	Primarily just the debtor (although involuntary processes can be launched by creditors in certain circumstances)
Who controls the business?	The court-appointed administrators	Existing management (other than in rare cases where a trustee is appointed)
How much court-involvement is there?	The court usually hears the initial application and then only occasional hearings thereafter where the administrators want to receive instructions on key issues	Very high level of court involvement, with dozens of hearings over the course of a case and hundreds of legal pleadings filed
How expensive is the process?	Varies depending on complexity of the case. Typically administrations are less expensive than Chapter 11 but complex/high profile cases can still be very costly	Typically perceived as comparatively expensive, particularly for long-running cases

chief restructuring officer or other financial adviser, although in practice creditors will often condition their ongoing support for the debtor on such appointments. The chief restructuring officer or financial adviser can play a central role in the formation of the reorganisation plan both pre- and post-filing.

Regional variance

A by-product of greater court involvement in the Chapter 11 process is the risk of regional variance and there are perceived differences between filing venues in the US. Certain bankruptcy courts are seen as more creditor-friendly, while others are seen as more debtor-friendly. This is arguably a natural result of the more prominent role of the judge in Chapter 11

> Bankruptcy is viewed differently in the US. Many major corporations have been through one or more bankruptcies and there is less of a negative perception.

and the numerous filings made relating to the ongoing management of the debtor. Indeed, there are a growing number of voices in congress calling to limit the ability to 'forum shop' for Chapter 11 filings, which is currently relatively straightforward given the low requirement thresholds to entry in a particular state. It is also important to note that while Chapter 11 cases are subject to federal laws – the Bankruptcy Code and the Bankruptcy Rules – certain aspects of a case may be governed by state-specific laws.

In this regard, arguably the English Courts are more consistent than their US counterparts owing to the unitary legal system in England and Wales and the powers of the administrator being clearly defined in the Insolvency Act, versus the US judge-driven process that is more susceptible to variance.

Cultural differences

Comparisons will continue to be drawn between the US and English legal systems as the two most popular and developed forums for complex financial restructurings. This cannot be done in a vacuum, however, and the role of the courts within each system's rescue processes is perhaps rooted in the different sociological and cultural attitudes towards insolvency and debt recovery.

In England, and arguably wider Europe, there has historically been a greater stigma associated with bankruptcy, which is largely seen as the 'end of the road' for a company. Risk and responsibility are closely tied for management, and where management has 'failed' and an entity files for administration, a court-appointed insolvency practitioner is seen as the person best equipped to try to rescue the business.

Bankruptcy is viewed differently in the US. Many major corporations have been through one or more bankruptcies – leading to the terms 'Chapter 22' and 'Chapter 33' as companies repeat the Chapter 11 process – and there is less of a negative perception as regards such processes, which are considered to be an opportunity to reorganise and rehabilitate the debtor. US business culture, more so than British/European, seems to emphasise the importance of risk-taking to achieve success, and Chapter 11 is set up to provide management with a second chance to rescue the business, albeit under the supervision of a judge.

Which process is preferable?

Whether Chapter 11, with the more prominent role of the judge, the intensive role of the courts and the displacement of management, has a comparative advantage over English administration will depend on the point of view of the relevant participant.

For the debtor, the high degree of court (and consequently lawyer) involvement in Chapter 11 can mean high costs being incurred during the life-cycle of a case, and subsequently it is seen by many as the preserve of larger debtors only. Contrastingly, English restructuring processes are available to, and utilised by, companies of all sizes.

From a creditor's perspective, while Chapter 11 provides a very sophisticated tool with ultimately a relatively consistent and predictable outcome, cases can become protracted, adviser-heavy and highly litigious. The requirement for motions heard by the court in respect of debtor conduct, which are open to challenge, can mean a drawn-out and costly process, materially impacting creditor recoveries.

> In England, and arguably wider Europe, there has historically been a greater stigma associated with bankruptcy, which is largely seen as the 'end of the road' for a company.

That said, the undeniable power and flexibility of the Chapter 11 process to implement a long-term solution for a business gives it significant appeal both to debtors and creditors, and the advantages and disadvantages of either process will ultimately depend on the specific nature of the company and the circumstances of the restructuring.

[1] The US Bankruptcy Code provides for the appointment of a trustee, if required, however this is rarely used in practice and is typically only seen where, for example, there are concerns regarding fraud.

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Northern Ireland's courts in a nutshell

Michael Neill explains the court system in Northern Ireland and how closely it resembles its neighbouring jurisdiction.

Insolvency law and procedure in Northern Ireland closely follow the position in England and Wales. The principal pieces of governing law are the Insolvency NI Order 1989 (the Order) and the Insolvency Rules (NI) 1991, as amended. The provisions of both are modelled upon, and are in very similar terms to, the Insolvency Act 1986 and the Insolvency Rules 1991 – save for any necessary amendments to take into account the general law pertaining to Northern Ireland.

The differences and procedure

It is worth noting that there can be a considerable delay between amendments to insolvency law taking effect in England and Wales, and similar measures coming into force in Northern Ireland. This can, on occasion, catch out the unwary practitioner.

Jurisdiction for insolvency matters (both personal and corporate) is assigned to the High Court of Justice in Northern Ireland. Insolvency cases, with certain exceptions, are typically dealt with by the High Court master (bankruptcy). The master will be highly experienced and well versed in dealing with insolvency matters. A chancery judge is also assigned to deal with matters that are either specifically identified to be dealt with by the chancery judge (for example, administration applications) or where proceedings have been transferred or appealed to the judge from the master.

In recent years, the Chancery Division's workload of insolvency cases has increased considerably. However, despite the increased volume of cases, our experience is that the both the chancery judge and the master continue to deal with matters expeditiously and, where necessary and appropriate, will seek to accommodate practitioners in urgent matters. One advantage of the system in Northern Ireland is that even though it might appear challenging to have only one chancery judge and one bankruptcy master handling a considerable court list, the system works well and has a consistency of approach. This enables practitioners to provide informed and reliable guidance to clients in terms of both the likely approach of the court and the timescales involved in any particular case.

In Northern Ireland, judgments of the courts in England and Wales up to Court of Appeal level are not directly binding in Northern Ireland but are often very persuasive, particularly given the similarity between the insolvency laws of both jurisdictions. Any appeals from the Court of Appeal in Northern Ireland are to The Supreme Court.

> "It is worth noting that there can be a considerable delay between amendments to insolvency law taking effect in England and Wales, and similar measures coming into force in Northern Ireland."

There are a number of notable areas that often need to be highlighted to clients who are unfamiliar with the Northern Ireland court system, particularly in the context of insolvency matters. We have selected below a few areas by way of illustration:

EC regulation on insolvency

We have, on occasion, noted that confusion often reigns in relation to jurisdiction where corporates have their centre of main interest (COMI) in, say, England but are registered in Northern Ireland. This has led some to apply for administration in the English courts on COMI grounds. This is incorrect given that, at least for current purposes under the EC regulation, the UK is one member state and jurisdiction between courts within the UK is largely determined by reference to a company's place of incorporation. However it is also worth noting that under s426 of the Insolvency Act 1986, the Northern Irish court is under a duty of co-operation with a number of other countries, including in particular the other countries within the United Kingdom. This can prove an effective tool where, say, related proceedings are ongoing in different courts within the UK.

Conditional fee agreements

Unlike the other jurisdictions within the UK, CFAs are not permitted in Northern Ireland. This is a relevant consideration when contemplating insolvency-related litigation.

High Court procedure

The rules and procedures applicable to the High Court are set out in the Rules of the Court of Judicature Northern Ireland 1980. Unlike the position in England and Wales, the Civil Procedure Rules have not been introduced into Northern Ireland. As such, the use of traditional terms such as writs, affidavits and subpoenas pertain.

The above is, of course, a non-exhaustive list, but serves to highlight that despite the similarities between the jurisdictions, in terms of insolvency law, differences can and do exist.

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Scotland's insolvency courts: like England, but definitely not the same

Siân Aitken takes us on a wee daundner through the Caledonian courts and insolvency procedures north of the border.

Insolvency procedures in Scotland are similar to those in England and Wales, but there are some key differences. This article explores how the differences in Scottish court processes affect those procedures.

Scottish civil court structure

Civil actions in Scotland are heard either in one of the 39 sheriff courts, or in the Court of Session (CoS), the highest civil court in Scotland.

Sheriff courts sit within one of six sheriffdoms, each with a sheriff principal who hears certain appeals in the Sheriff Appeal Court.

The CoS is divided into the Outer House (a court of first instance) and the Inner House (an appeal court). Appeals from the Inner House go to the UK Supreme Court.

Personal insolvency

Scottish bankruptcy (sequestration) has received significant attention from the Scottish government over the past ten or more years. Procedures had largely remained unchanged since the Bankruptcy (Scotland) Act 1985, but were overhauled by the Bankruptcy and Diligence etc (Scotland) Act 2007 (commonly known, with tongue firmly in cheek, as the 'BAD Act'). The BAD Act sought to streamline systems, reduce cost and remove some of the stigma around sequestration. Further, less comprehensive, changes were made by the Bankruptcy and Debt Advice (Scotland) Act 2014 (known as 'the BADAS Act' – honestly!) and ultimately all these changes were consolidated and modernised by the Bankruptcy (Scotland) Act 2016.

Since the BAD Act, sequestration proceedings are *only* competent before a sheriff, meaning creditors can no longer petition the Outer House to sequestrate a debtor. This has the benefit of reducing the cost to petitioning creditors and any debtor wishing to defend the petition. However, historically, in complex cases or where there were relevant concurrent proceedings running within the CoS, the ability to petition the CoS was useful. In addition, it can be unclear which sheriff court has jurisdiction, whereas when petitions could be lodged in the Outer House, creditors were only required to establish jurisdiction in Scotland.

> Unlike in England, the liquidators' remuneration cannot be agreed in advance with creditors.

Continuations

Pre-BAD Act, court decisions in a sequestration action were restricted to either awarding sequestration if the requirements were met, or refusing to award sequestration if they were not. However, courts commonly allowed the sequestration hearing to continue for a period of time, eg to allow the debtor time to repay the debt. The BAD Act addressed this by allowing sheriffs to continue sequestration hearings for a maximum of 42 days to allow the debtor time to pay (or for such period as the sheriff thinks fit if the debtor plans to enter into a debt payment programme). However, it is not uncommon for hearings to be continued beyond 42 days for reasons beyond those contained within the Act.

Self-sequestration

A final BAD Act change was passing determination of debtor-led sequestration petitions from the courts to the 'accountant in bankruptcy' (the AIB – an executive agency of the Scottish government). Self-sequestration is therefore now a form-based procedure. This has the benefit of being cheaper and relieving pressure on the courts. However, it places a burden on petitioning creditors to ensure that a concurrent self-sequestration application is not in progress.

Corporate procedures

The CoS has jurisdiction to wind-up companies registered in Scotland (leaving aside COMI-based petitions). Sheriff courts have concurrent jurisdiction for companies with a registered office within their sheriffdom with a paid-up issued share capital not exceeding £120,000. Above that threshold, applications must be made to the CoS.

Insolvency actions in the CoS are automatically allocated to the commercial court, which has specialist judges capable of dealing with commercial cases quickly and flexibly.

Administrations

Generally, the procedures in relation to administrations are largely the same north

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and south of the border. Schedule B1 of the Insolvency Act 1986 applies to Scotland as it does in England, and (at least prior to introduction of the Insolvency (England and Wales) Rules 2016) the rules are very similar. However, certain court practices can result in differences.

The commercial court judges of the CoS issued a note in late 2009 outlining their approach to applications to extend administrations. They took the view that creditors should have an opportunity to object to such applications, irrespective of whether they would receive any distribution (contrary to paragraph 78 of schedule B1). While the note does not require service of the petition on each creditor, creditors should be notified of the administrators' intention to seek an extension and given the opportunity to object. It is now common practice to communicate this within the administrators' progress report (provided it is issued sufficiently closely to the proposed extension application) and to include an address to which objections can be sent.

"Very few CVA proposals are made annually in Scotland and therefore courts (particularly sheriff courts) may be unfamiliar with the necessary filings and how to treat them."

The note then stated that applications to extend for a period over 12 months will not normally be granted. It is therefore common in Scotland to extend administrations annually (at some cost) even when the administration definitely cannot be brought to an end within the next year.

Company voluntary arrangements

Scottish CVA procedures are largely the same as in England. However, very few CVA proposals are made annually in Scotland and therefore courts (particularly sheriff courts) may be unfamiliar with the necessary filings and how to treat them.

Compulsory liquidations

Scottish liquidation procedure, particularly relating to compulsory liquidation, differs significantly from England. As well as the absence of a liquidator of last resort (such as the Official Receiver), the increased involvement of the courts results in certain Scottish peculiarities.

Court processes can move at relative speed as the pressure on the court system for hearing dates is generally less than in England. Companies can potentially be wound-up less than two weeks from the date the petition was filed, with the commencement date back-dated to the filing date.

Creditor petitions in England and Wales cannot be advertised for at least seven days[1], giving the debtor time to settle the debt and prevent the winding-up. In Scotland, first orders are usually granted on the day the petition is filed, and the petition can be advertised immediately. Creditors can therefore become aware of insolvency proceedings very quickly and the damage may be done, regardless of any ability to repay the petitioning creditor's debt.

Unlike in England, the liquidators' remuneration cannot be agreed in advance with creditors. Instead, within 14 days of the end of an accounting period (six months, unless varied by the court), the liquidator submits a claim to the liquidation committee for remuneration incurred during that accounting period, without a liquidation committee or its agreement, the claim may be made to the court[2]. The liquidation committee or the court then audits the accounts and issues a 'determination' fixing the liquidator's remuneration. The liquidator or any creditor or contributory may then appeal a liquidation committee's determination to the court. Normal court appeal rules apply in relation to any court determination.

In court determinations of remuneration, the practice (which has no basis in statute) is to remit the liquidator's accounts to a court reporter (a chartered accountant) to audit. The court reporter reports his views on the amount of remuneration sought to the court. The role of the court reporter has been the subject of two recent cases[3], with the court's view of the role differing in each case. The more recent case was an Outer House decision (the previous case being a sheriff court decision) and the court's view was that it was entirely appropriate for court reporters to alert the court to concerns about the manner in which a liquidation case had been conducted as this may result in reduction in approved remuneration.

The requirement to repeatedly seek court approval for remuneration in cases with relatively low recoveries and levels of remuneration can make this procedure prohibitive. Practitioners have been known to deliberately fail to comply with rule 4.32 of the Insolvency (Scotland) Rules 1986 over several accounting periods and to only seek approval of remuneration at the end of the liquidation, together with a waiver of the failure to comply with the statutory procedure. In *Callanish Limited (in Liquidation)* ([2012] CSOH 167), Lord Hodge said that he had discussed this practice with his fellow insolvency judges and expressed concern. He encouraged liquidators to use the powers contained in what is now rule 4.68(2) of the Insolvency (Scotland) Rules 1986 to vary the accounting period to such time as would allow a fee to be drawn, taking into account likely recoveries and likely remuneration sought. He reminded insolvency practitioners of their obligation to allow the court to exercise its supervisory function in relation to remuneration. The practice has not stopped altogether since Lord Hodge's warning, but practitioners are aware of the increased scrutiny in this regard and proceed with greater caution.

Caveats

A final quirk of Scottish court procedure is an early warning system as regards certain court applications. Companies, individuals, partnerships etc (or those with an interest in such parties, eg their secured creditor) can lodge a 'caveat' in the CoS and/or any sheriff court. When any application for the appointment of a provisional liquidator or for a bankruptcy

"You might be scunnered if you attempt to navigate the system without specialist Scottish advice."

order in relation to that company, individual or partnership is filed, the court must tell their solicitors. The solicitor can then take steps to prevent the application from proceeding, or to make an alternative insolvency appointment. This can be a useful tool for borrowers and secured creditors alike.

Recommendation

As this wee gander at the Scottish system evidences, while there are similarities to the counterpart English systems, there are key differences and nuances. You might be scunnered if you attempt to navigate the system without specialist Scottish advice.

1 Insolvency England and Wales) Rule 2016 R7.10(4)(b)
2 Insolvency (Scotland) Rules 1986 R4.32
3 *S & M Livestock Limited (in Liquidation)* 2017 SC DUMF 78 and *The Provisional/Interim Liquidator of Equal Exchange Trading Limited* [2018] CSOH 35

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Securing better out-of-court settlements, sooner

Mark Beaumont looks at the way parties in insolvency disputes use funding (or the lack thereof) as a tactical tool.

As you can read for yourself, there are some great articles about the court system in this issue of *RECOVERY*. Of course no one wants to go to court if they don't have to, so let's look at why – and how – you would access the courts in the first instance when money is tight (or non-existent) in an administration.

> There is still a large gap between what IPs could be doing and what they are actually doing.

Claim, drop or wait

The preference is always to try to settle matters quickly and in a cost-effective fashion. The challenge arises when your opponent is very much aware of your financial constraints and they don't believe you will issue a claim against them. In this scenario, how likely are they to settle?

What do you do next? Are you going to issue the claim, drop it completely or let the defendants drag out pre-action correspondence without making any progress toward settlement? If you decide to issue, who will cover the disbursement costs? Will your solicitor and barrister act on full conditional fee agreements (CFAs)? Do you have a strategy to defeat a security for costs application against you?

CASE STUDY 1

An IP had been in dialogue with the defendants for some time on a claim for over £200,000, but had only managed to get a rather derisory offer to settle for around £35,000. Only when ATE insurance was secured and the IP stated their intention to issue did the defendants change their tune. Within a week of being informed of the ATE policy the defendants stated their desire to settle (before the claim was issued) and within a fortnight settled for around £135,000. We'd secured large discounts from the insurer for early settlement and so the ATE cover cost only £10,000, despite the cover being significant.

Of course, most IPs are aware of third-party litigation funding and after-the-event (ATE) legal expenses insurance, but there is still a large gap between what IPs could be doing and what they are actually doing. The consequence of this is that IPs end up writing off fees and creditors end up missing out. The only beneficiaries are the potential defendants that get to walk away with their ill-gotten gains.

For every discussion on the IP side, there is a similar conversation between the defendants and their legal representatives. Both sides will have to weigh up the pros and cons of litigation versus settlement, albeit the claim can only be pushed forward by the claimant side. From a defendant's perspective, the best policy would be to drag everything out for as long as possible and hope that the claim just withers and dies of its own accord. If you were advising a defendant isn't that what you would suggest? Would you give that same advice to the defendant if the claimant then secured ATE insurance and funding?

CASE STUDY 2

An IP is handling the administration of a business that appears to have been engaged in tax fraud. The focus for litigation is a £3m claim against a firm of solicitors that provided advice. There are another 55 claims against related businesses and individuals that total just over £1m. The IP cannot justify the time and expense of pursuing these and wants to focus on the £3m claim only. Annecto Legal agrees, and advises that the IP sells the 55 claims for a small upfront fee and a 50/50 share of any recoveries. The IP is now expecting an additional £300,000 to come into the administration via those smaller claims.

> All cases are reviewed by our own experienced underwriter before we 'go to market', thus saving IPs and their lawyers huge amounts of time.

Huge choice

There are over 20 insurers in the ATE market and well over 30 different funders, each with their own models of return, attitudes to due diligence, preferences for CFAs, willingness to fund or acquire cases, appetites for risk and preferences for jurisdictions etc. If only for peace of mind, wouldn't it make sense to ask the question next time a dispute arises? At Annecto Legal we are always happy to discuss a case and provide some pointers, or to give an indication of pricing so that an informed decision can be made. There are numerous ways to structure funding and insurance and no two cases are the same. What we do know is that there are many options now in the market and, more often than not, there's a way to make a case work.

Brokers charge a fee for the work that they do, but that fee is typically paid by the insurers and funders. The best brokers should be able to access markets (and secure terms) that more than justify any negligible cost incurred. Annecto Legal goes even further: all cases are reviewed by our own experienced underwriter before we 'go to market', thus saving IPs and their lawyers huge amounts of time while massively speeding up the process of securing funding and insurance.

Don't let a lack of money hold you back: show your opponent you will not flinch, and drive cases towards better settlements, sooner.

MARK BEAUMONT is co-founder of Annecto Legal Ltd, an FSA-regulated, full-market broker accessing litigation funding and ATE insurance for a wide range of insolvency and commercial disputes.

Time for change?

John Smith argues that it's time for England and Wales to catch up with its neighbours and link case management systems with the courts and OR.

We live in the information age, where the speed at which we have become accustomed to exchanging data has accelerated hugely. Consider how people now absorb breaking news stories – within seconds of an occurrence in any corner of the globe, we can read about it on Twitter. It's disappointing that while we can get news from the other side of the world in a matter of seconds, it is still an elongated process to exchange information with the courts, Companies House or the Official Receiver.

So, the comparison above may be a bit of a chalk-and-cheese comparison and it must be noted that the facilities currently in place are not completely inefficient. Developments were made so that court documents can be uploaded electronically. Applications for bankruptcy can be made online and sent directly to the Official Receiver. However, the question remains; can something be done to make communicating with these bodies more straightforward?

> **With the technology that's available today, exchanging information between two systems can be an effortless process.**

We've always looked to implement functionality that drives efficiency and minimises pain points for our clients. With the technology that's available today, exchanging information between two systems can be an effortless process. We have paired our case management system with various third parties using API calls and XML transfers. Essentially, this means that information from our case management system can be sent directly to other systems, without the user having to leave the system or re-input any case information.

What's being done at the moment?

Scotland's Accountant in Bankruptcy (AiB) provides functionality through its case information system (BASYS), and the AiB supervision of trust Deeds, registration and advertisement system (ASTRA) that has made communication between itself and IPs much more efficient. We worked with the AiB on integrating the ASTRA functionality into our case management system and their modern approach made it possible to build functionality that allows IPs to send relevant documents such as the Form 4 to the AiB in seconds.

> **How great would it be if a progress report form could be sent to Companies House with just a few clicks of your mouse?**

A similar approach has been taken by the Insolvency Service of Ireland (ISI). After the Personal Insolvency Act was passed in 2012, the ISI set about building a portal to allow them to process arrangements. At the outset, IPs had to re-enter their case data onto the ISI portal. We approached the ISI to provide a more efficient solution for IPs. They happily obliged and worked with us to build a solution which now means that IPs can send all of their case information from Visionblue CMS directly to the ISI portal.

What can be done in England & Wales?

The ASTRA integration work we did with the AiB means that our clients can upload forms in seconds directly from our system. They do not have to have to leave the system, load the AiB portal in their browser and work through the site to upload a saved document. They simply follow our wizard and shave time off each upload – leading to cost savings for the business. Our ideal would be that we could implement a similar process for filing forms and reports to Companies House and the courts in England and Wales. How great would it be if a progress report form could be sent to Companies House with just a few clicks of your mouse?

Our ISI integration piece in Ireland means that our users can fully qualify a lead in a streamlined process before they make a formal application. Why shouldn't we have the option to do so in England and Wales? The Official Receiver has a modern portal for submitting an application for bankruptcy already in place. My suggestion would be to take it one step further. Open the portal up so that debtor information can be sent from a case management system using a single button to submit an application.

For an integration such as this to work to its full potential, a two-way communication channel must be available. In addition to information being sent to the Official Receiver, information must be available to be sent from the Official Receiver back to the IP's case management system. This could be used when an IP has been appointed on a case to transfer initial key details, asset ETR values and ISA account transactions, etc. Our ISI integration allows for a two-way communication channel, so this can be done.

> **I have seen how beneficial these solutions have been in other jurisdictions. Is it not the right time for IPs in England and Wales to reap the same benefits?**

The framework for making the exchange of information a simpler process is available. It would take time to design and implement but in the long run would benefit all parties. I say that because I have seen how beneficial these solutions have been in other jurisdictions. Is it not the right time for IPs in England and Wales to reap the same benefits?

JOHN SMITH is technical director at Vision Blue solutions.

John worked in practice for 12 years prior to joining Vision Blue Solutions in 2009. As technical director, John is involved in ensuring efficiency is achieved throughout standard functionalities as well as customer-specific adaptations to documents and diaries.

A leap forward for law AI

Robin Ganguly explains predictive coding and technology assisted review for trial use, and how the technology might be used for insolvency investigations.

When the High Court handed down judgment in the case of *Brown* v. *BCA Trading Ltd*, it marked what is believed to be the first test of technology assisted review (TAR) for disclosure at a full trial in England. The technology is being used increasingly and, combined with recently-proposed changes to the English disclosure regime, could result in more legal cases becoming economically viable to fight and lead to greater recoveries for creditors.

TAR also has applications beyond litigation, which can be particularly useful for IPs when they are appointed to a company and need to find out key information or secure assets quickly with limited funds.

The BCA judgment

In May 2016, Berwin Leighton Paisner won the first contested application for its client BCA to use predictive coding in *Brown* v. *BCA Trading Ltd* [2016] EWHC 1464 (Ch). The case built on the progress of the February 2016 landmark ruling in *Pyrrho* [2016] EWHC 256 (Ch), in which the High Court approved the use of predictive coding for disclosure at the request of both parties. In the *BCA* case it had been alleged by the petitioner, Mr Brown, that BCA had acted in a manner that was unfairly prejudicial to his minority interest in Tradeouts, an online car-dealing platform in which BCA had purchased a majority interest in 2014. Mr Brown sought an order for BCA to purchase his shareholding and valued the shares at £20m.

> “TAR encompasses a variety of document review technologies, but the expression is primarily used to refer to predictive coding.”

The case proceeded to a 12-day trial in October 2017 culminating in a judgment in BCA’s favour. The fact-heavy nature of the case (involving broad allegations of unfairly prejudicial behaviour and bad faith) meant that the disclosure was key to deciding it. Murray Rosen QC, sitting as deputy High Court judge, found that the documents directly disproved a number of the petitioner’s allegations and cast doubt on other aspects of his evidence. He found in favour of BCA on all issues, dismissed the unfair prejudice petition and awarded BCA its costs.

Predictive coding for the uninitiated

TAR encompasses a variety of document review technologies, but the expression is primarily used to refer to predictive coding (explained below). At its most basic, the sort of keyword searching that is standard practice in electronic disclosure is a form of TAR, but things have come a long way in recent years. The starting point for an efficient TAR exercise is to whittle down the pool of documents for review as far as possible and as intelligently as possible. In addition to keyword searching and restricting by dates and custodians, this can be done by the use of technologies such as 'concept clustering' to break down the documents by topic in order to spot-check and (hopefully) eliminate large batches of irrelevant documents or prioritise the review of batches of relevant documents that have been identified.

> The end result should be that the computer identifies relevant documents in a manner that is far more efficient and scalable than a traditional (human) document review.

Once the document set for review has been circumscribed, predictive coding can be used to review those documents. Documents are reviewed for relevance by a computer rather than a human, after a human has taught it how to copy his or her decisions on relevance in a particular case. A senior lawyer reviews a 'seed set' of documents and codes them as relevant or not. The results are then analysed by the technology, which breaks the word patterns down into smaller units. The algorithm then generates further batches of documents for the human to review in order to teach the computer. Through an iterative process of refinement, it can reach an acceptable level of review accuracy that can be applied to all of the documents in the pool. The end result should be that the computer identifies relevant documents in a manner that is far more efficient and scalable than a traditional (human) document review.

Further human sampling of the output is generally needed to ensure the statistical soundness of the exercise, and the final results will usually need to be reviewed by humans in a litigation context for privilege and/or client confidentiality in irrelevant documents. The net result is that humans should need to review far fewer documents than previously.

Impact of TAR on litigation strategy

TAR can play a part in deciding whether to pursue or defend litigation before proceedings have even been issued. The possibility to perform a document review exercise more quickly and cheaply means that in certain situations it will be sensible to conduct an 'early case analysis' by assessing how the documentary evidence stacks up and feeding this into merits advice. If the proverbial 'smoking gun' is found, that may make it clear from the outset whether the case is likely to be won or lost.

In addition, there are structural changes afoot to the English court disclosure regime. In 2016 a disclosure working group chaired by Lady Justice Gloster was set up with an ambitious remit to encourage a wholesale 'change in culture' by re-writing and modernising the rules on disclosure. In November 2017, the working group issued a draft CPR practice direction intended ultimately to replace CPR PD 31, which is to be considered by the CPR Committee later this year. After that, a pilot scheme is planned to run for two years in the Business and Property Courts of England and Wales. The proposed new regime has similarities with disclosure in international arbitration and, rather than having 'standard disclosure' as the default, requires parties to disclose the key known documents on which they rely at the same time as serving their statements of case in 'basic disclosure'. The proposed regime then seeks to tailor the extent of 'extended disclosure' required (if any) to the nature of each particular case. The suggested practice direction embraces TAR, obliging parties to discuss and seek to agree the use of technology-assisted software and techniques; and permits the court to include provision in any disclosure order requiring the use of specified software tools.

While the proposed new regime offers an exciting opportunity to rein in electronic disclosure (which, due to the exponential growth of data and media in use, has by common consensus got out of hand), parties will be able to agree to opt out of basic disclosure. The 'menu' of extended disclosure options is broad

> The final results will usually need to be reviewed by humans in a litigation context for privilege and/or client confidentiality in irrelevant documents.

enough to effectively replicate 'standard disclosure' if desired, but it remains to be seen how bold parties and the judiciary will be in using the new framework and technologies to limit the size of disclosure exercises and conduct them in a more sophisticated manner. If the proposals do result in a reduction in the disclosure burden (often the most expensive portion of the costs of proceedings), this could make litigation a more attractive option for parties and a more viable one where there are limited funds, for example in an insolvent estate. Given the potential difficulty for insolvent estates in satisfying security for costs applications with after-the-event insurance as a result of the *Premier Motorauctions* appeal at the end of last year[1], a reduction in the costs of litigation will be all the more welcome.

Alternative use of TAR in insolvency

TAR is being embraced in litigation because it offers the ability to locate relevant documents more quickly and cheaply than before, however the same technology can also be harnessed in an insolvency (or other investigation) situation. By way of example, when IPs are appointed to a company they may be faced with hostile management and little

> TAR has the ability to rank the documents by relevance so that humans can begin reviewing the most relevant documents, hopefully finding what they need before the time or money runs out.

available help in establishing the workings of the business and whether there has been dissipation of assets. They may have either limited time or limited money (and often, both) to work this out in order to secure those assets. If predictive coding is employed to conduct a review of the company's books and records to search for leads, it has the ability to rank the documents by relevance so that humans can begin reviewing the most relevant documents, hopefully finding what they need before the time or money runs out. The level of review accuracy of the computer can also be manually set, so that a less refined exercise can be conducted to return more that might be of relevance (to use one analogy, like a fishing net with small holes), or a more pinpointed search can be undertaken, which might miss certain documents but not return too many 'false positives' (like a fishing net with large holes). ◻

[1] *Premier Motorauctions* v. *PwC & Lloyds* [2017] EWCA Civ 1872

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When is it last orders at licensed premises?

Niall McCann explains why it is so important for IPs to be aware of the Licensing Act, and not just when dealing with pubs.

There has been a long tradition in the United Kingdom of regulating the sale and consumption of alcohol and other related activities such as the playing of recorded and live music. In respect of England and Wales (the focus of this article) the Licensing Act 2003 (the Act) is currently the principle statute. Unless highly specialised, it is not necessary for insolvency practitioners to know licensing law in detail, but it is crucial to have an awareness of how premises are licensed and the impact of insolvency upon the validity of such permissions.

Not just pubs

To legally sell alcohol by way of retail, or to play live and recorded music (among other regulated activities), a premises licence is required. These licences can be held by individuals or corporate entities, attach to the premises or area in question and generally can be transferred from entity to entity. The hours, conditions and plan attached to a premises licence might need to be varied depending on the style of operation. The breadth of establishment that therefore could require a premises licence is very broad. It is not simply pubs, restaurants, clubs and bars. Petrol stations, cinemas, theatres, hairdressers, retail stores, cafes, lapdancing clubs, casinos, town halls, museums and art galleries may also carry out licensable activities and therefore have a premises licence.

The default is that a premises licence will be granted to last in perpetuity. If the licensable activity is only for a finite period (ie a 'pop up' restaurant or music festival), a premises licence might only be granted for a fixed period. When not time limited, there are only three ways in which a premises licence can 'cease to be': if voluntarily surrendered by the holder; revoked following a review hearing; or if it lapses. It is the last of these that is particularly important to an insolvency practitioner as the insolvency of the premises licence holder is one of the grounds on which a premises licence will lapse.

> "Petrol stations, cinemas, theatres, hairdressers, retail stores, cafes, lapdancing clubs, casinos, town halls, museums and art galleries may also carry out licensable activities."

The definition of insolvency at section 27 of the Act is as follows:

(3) For the purposes of this section, an individual becomes insolvent on:
- (a) the approval of a voluntary arrangement proposed by him,
- (b) being made bankrupt or having his estate sequestrated, or
- (c) entering into a trust deed for his creditors.

(4) For the purposes of this section, a company becomes insolvent on:
- (a) the approval of a voluntary arrangement proposed by its directors,
- (b) the appointment of an administrator in respect of the company,
- (c) the appointment of an administrative receiver in respect of the company, or
- (d) going into liquidation.

If one of these events occurs to the premises licence holder, the premises licence itself lapses immediately and no licensable activities can then be legally carried out until the licence is reinstated with there being only a 28-day window in which it can be done.

Reinstating a licence

There are two ways in which a lapsed premises licence can be reinstated: either by transferring the premises licence or lodging an Interim Authority Notice (IAN).

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A lapsed premises licence can be transferred to any person or entity that carries on, or proposes to carry on, licensable activities from the premises. No legal interest is required and, in reality, the 'nexus' between the proposed premises licence holder and the carrying out of licensable activities does not have to be a particularly strong one, with even a landlord receiving rent from a premises able to hold the licence (*Hall & Woodhouse Ltd* v. *Poole Borough Council* [2009] EWHC 1587 (Admin)).

> A lapsed premises licence can be transferred to any person or entity that carries on, or proposes to carry on, licensable activities from the premises.

Typically, unless there is to be a pre-pack sale, premises licences are transferred to other entities in the group that are not (and will not become) insolvent, shelf-companies, specialist third-party operators or individuals connected with the business. If the premises is to remain closed (and hence there is no risk of any liability) the appointment takers (where applicable) could hold the premises licence. Transfer applications are typically made online and are effective immediately with a fee of £23. Unlike a 'normal' transfer application the consent of the previous licence holder is not required, which simplifies matters. This does not mean to say that a transfer application cannot be made in advance of the insolvency 'trigger'. With proper planning and a good working relationship between the operator and insolvency practitioner, transfers can, and are, made prior to any premises licence lapsing. While consent of the outgoing holder is required, this approach does remove the risk of licensable activities taking place after a licence has lapsed but before it has been reinstated.

A sticking plaster approach?

The IAN option is only a 'temporary fix'. While the application process is similar to that of a transfer application it only reinstates a premises licence for a period of three months. If a transfer application is not made within this period, the premises licence will lapse again – for good. Furthermore, only someone with a prescribed interest in the property or who is connected to the premises licence (ie an insolvency practitioner) can apply for an IAN.

Of the two options, on the face of it, the transfer route appears the sensible choice. So, why are IAN applications made? There could be concerns that, even with only a weak 'nexus' required, an insolvency practitioner cannot satisfy the test that they are proposing to carry on licensable activities if there is no intention to trade and/or an imminent sale is 'on the cards'.

Notwithstanding which option is taken, firstly it is crucial to remember that if *any* licensable activity (even selling a single bottle of beer) takes place after insolvency but before the premises licence is reinstated, it is an offence that can lead to either six months imprisonment and/or a fine. It is also an offence to knowingly allow a licensable activity to be carried on, which could apply to an insolvency practitioner. There are two due diligence defences:

- That the illegal act was due to a mistake, or reliance on information received, or due to an act or omission by another person, or to some other cause beyond their control, and
- All reasonable precautions and all due diligence had been taken to avoid committing the offence.

Secondly, even if the premises is closed, there is no 'slip rule' should the 28 days be missed. If the premises licence cannot be reinstated a new premises licence will have to be applied for. This creates several issues, namely:

- The quickest a new premises licence will be granted is 29 days after the application is made if no objections are received. If representations (ie objections) are received, it will be within 20 working days (usually) after the representations, if the application is determined at a hearing before a licensing sub-committee.

> There is no guarantee that a new premises licence will be granted.

- Applications for new premises licences can take time to prepare. In particular, plans that comply with the requirements of the Act's regulation need to be submitted and these might not be readily available.
- There is no guarantee that a new premises licence will be granted. Often operations teetering on the brink of insolvency take shortcuts or generally 'push the envelope' to drive revenue. Such approaches can lead to increases in crime and disorder and public nuisance – both of which will encourage representations to be made in respect of an application for a new licence. Even if a licensing sub-committee is willing to grant a new licence, it could be on more restrictive terms.

New licences

If faced with having to apply for a new premises licence, it is possible for licensed premises to trade in the period between the application being made and (hopefully) being granted. Either the premises can remain open without carrying out licensable activities (eg with no alcohol being sold or given away (genuinely) free of charge) and/or Temporary Event Notices (TENs) can be applied for. TENs are standalone licences. They can last for up to a week and with a maximum capacity of 499 persons. The difficulty is that only 15 can be applied for in each calendar year and for a total of 21 days. Furthermore, even in the case of expedited TENs, five working days' notice needs to be given and there has to be a gap of at least 24 hours between each TEN. The upshot of this rather confusing procedure is that premises that have lost their licences can open for a number of days in the intervening period before a new licence is granted (if the TEN allocation has not already been used), but there will still have to be days on which licensable activity cannot take place. TENs are a way of reducing harm to the business – not a cure.

> TENs are a way of reducing harm to the business – not a cure.

The impact of insolvency on licensed premises is not simply a theoretical threat. The wording of the Act might sound draconian (why should entering into a CVA inadvertently cause a loss of a premises licence?), but the law is enforced. I have seen and heard numerous examples of premises being raided, operators in denial being arrested and insolvency practitioners being successfully sued on the grounds of professional negligence, which should be more than enough reason for practitioners to increase their awareness of licensing for the future.

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Have corporate vehicles reached their limit?

James Harrison and **Alex Fox** examine a Supreme Court decision that could embolden IPs to chase down breach of duty claims in future.

A misfeasance claim under s212 of the Insolvency Act 1986 (IA) is often a race against time to gather evidence and bring a claim before the limitation period expires. Not only can the breach pre-date the liquidation by years, but the difficulty is even greater where there is a maze of group companies and intra-group transfers. It takes time to properly work out whether a simple transfer of assets between group companies is actually a corporate shield hiding misappropriated assets.

The Supreme Court in *Burnden Holdings (UK) Limited* v. *Fielding and another* [2018] UKSC 14 has come to IPs' aid by unanimously confirming that s21(1)(b) of the Limitation Act 1980 (LA80), which is primarily aimed at express trustees, extends to directors by analogy. However in doing so, the decision raises fundamental questions of corporate legal personality and anti-avoidance measures.

The case background

The claimant was a holding company with a number of trading subsidies operating in two business areas: the supply and construction of conservatories, and a combined heat and power business. Vital Energi Utilities Ltd (Vital) operated the combined heat and power business.

The directors of Burnden were at all material times the appellants (Mr and Mrs Fielding) and three other individuals (executive directors). The Fieldings were also the controlling shareholders.

In or around July 2007, Scottish & Southern Energy Plc (SSE) offered to purchase a 30 per cent shareholding in Vital, subject to a significant number of conditions, including the complete separation of Vital from the conservatory business. To facilitate this, in October 2007 a number of pre-arranged transactions were carried out:

1. On 4 October 2007, Burnden's shareholders exchanged their shares for shares in a new group holding company, BHU Holdings Ltd (BHUH), with the shareholdings precisely mirroring the former shareholdings in Burnden.

> "The decision raises fundamental questions of corporate legal personality and anti-avoidance measures."

2. On 12 October 2007, a distribution *in specie* (ie a distribution paid using a non-cash asset) of Burnden's shareholding in Vital was approved by unanimous resolution of the directors of Burnden and by a resolution in writing of BHUH as the sole member of Burnden. The distribution happened the same day, with the transfer of the only issued share in Vital from Burnden to BHUH being recorded in Vital's register of members on that date.
3. On 15 October 2007, BHUH went into members' voluntary liquidation. A special resolution to that effect was passed on that day by the members of BHUH. The directors of BHUH made the usual statutory declaration as to the group's solvency.
4. On the same day, pursuant to reconstruction agreements made under section 110 IA, the liquidator of BHUH transferred the share in Vital to a new company, Vital Holdings Limited (VHL) and the shares in Burnden to a new company, Burnden Group Holdings Limited (BGHL). The two new holding companies issued shares to the former shareholders in BHUH, which again precisely mirrored their shareholding in BHUH and previously in Burnden.
5. On 19 October 2007, Mrs Fielding sold a 30 per cent shareholding in VHL to SSE for £6m. Of that sum, £3m was lent to Burnden and the balance was, according to Burnden's case, put towards the purchase of property for £8.3m by Mr and Mrs Fielding in May 2008.

In December 2009, Burnden went into liquidation and the present liquidator was appointed in December 2012.

The liquidator argued that Burnden did not have sufficient accumulated, realised profits to enable the distribution *in specie* of the claimant's shareholding in Vital to BHUH. Burnden subsequently amended its claim to include an allegation of fraudulent breach of trust. The appellants 'hotly contested' Burnden's claim throughout.

The claim form was issued on 15 October 2013, six years and three days after the date of the relevant breach, on the date the shareholding in Vital was distributed. At first instance, the Fieldings successfully applied for summary judgment to dismiss the claim as statute-barred under s21(3) LA80. This was overturned on appeal by Burnden and the Fieldings subsequently appealed to The Supreme Court.

Supreme Court decision

The Supreme Court proceeded on the following assumptions: that the distribution was unlawful; that the appellants' participation in it amounted to a breach of their fiduciary duties to Burnden and that, because the distribution was made to a company (BHUH) in which they were majority shareholders and directors, the distribution was one from which they derived a substantial benefit.

Section 21(1)(b) requires two elements: that the trust property is in the possession of the trustee or previously received by them; and that the trustees convert that property for their own use.

> The heart of the matter was that the appellants had procured Burnden to enter into a transaction by which it had lost the value of a business worth £10.48m in return for a loan of £3m.

1.Possession

For the purposes of s21, it was common ground (and 'clear beyond argument') that the appellant directors were to be regarded as trustees (para 11). The Supreme Court held that directors were fiduciary stewards of the company's property and owed fiduciary duties to the company as a result.

2.Conversion

The purpose of s21(1)(b) was laid down by Kekewich J in In *re Timmis Nixon* v. *Smith* [1902] 1 CH 176:

'The intention of the statute was to give a trustee the benefit of the lapse of time when, although he had done something legally or technically wrong, he had done nothing morally wrong or dishonest, but it was not intended to protect him where, if he pleaded the statute, he would come off with something he ought not to have, ie money of the trust received by him and converted to his own use.'

The appellants fell within s21(1)(b) because of their analogous status as trustees who converted Burnden's shareholding in Vital when they procured or participated in the unlawful distribution of it to BHUH. On the basis of the assumed facts, The Supreme Court dismissed the appeal.

On the back of this finding, Lord Briggs did not consider it appropriate to reach any final view about s32 LA80, which stops the limitation clock ticking where there has been fraud, concealment or mistake.

Implications

Prior to *Burnden*, it was already thought that the six-year limitation period did not apply to claims to recover trust property (such as unlawful dividends) from a director under s212 IA. Given the assumed facts, The Supreme Court's decision should not come as a surprise. As Vice-Chancellor Norris J observed in an earlier interlocutory hearing ([2014] EWHC 1908 (Ch)), the heart of the matter was that the appellants had procured Burnden to enter into a transaction by which it had lost the value of a business worth £10.48m in return for a loan of £3m.

The Supreme Court did caveat its decision by highlighting that s21 LA80 is primarily aimed at express trustees and applicable to company directors by a 'process of analogy'. The problem with analogies is that they break down on the facts. While an express trust has many similarities to a company, it is not the same. Equating the vesting of trust property in trustees to the control that directors have over company property arguably undermines corporate legal responsibility. This point was made by the appellants, who argued that from start to finish the relevant trust property (the shareholding in Vital) had been in the legal and beneficial ownership, and therefore possession, of a succession of corporate entities, namely Burnden, then BHUH and later VHL. To hold otherwise would, the appellants submitted, involve the lifting of one or more corporate veils or ignoring the separate legal personality of the companies concerned, in circumstances that fell outside the principles of *Prest* v. *Petrodel Resources Ltd* [2013] 2 AC 415.

While accepting these submissions had real force, The Supreme Court nonetheless dismissed them: notwithstanding the fact that the misappropriated property had remained legally and beneficially owned by corporate vehicles, the directors were fiduciary stewards of the company's property. However, while recognising a substantial overlap, there are fundamental differences between a company and a trust. For example, majority shareholders have much less than absolute control over company property, because of the requirement to have regard to the interest of other stakeholders such as minority shareholders and creditors.

Faced with increasingly complex and inventive group structures or remuneration strategies (such as the part-salary and quasi-dividend structure in *Global Corporate* v. *Hale* [2017] EWHC 2277 (Ch)) The Supreme Court has shown its willingness to peer behind these structures to examine the reality of the situation rather than accept them on face value. The lower courts will undoubtedly follow this approach, which should encourage IPs who are dealing with employee benefit trusts and other remuneration schemes to challenge directors. Now that the limitation bar appears to have been lowered, directors should carefully consider their insurance policies to ensure that potential claims are covered.

Notwithstanding this judicial encouragement (based on the assumed breach of fiduciary duties), these cases turn on their own facts. Specialist advice should be sought to consider the position, including the advice received by the director at the time and their reliance upon that advice. It may be the case, as was considered in the High Court in *Burnden* ([2017] EWHC 2118 (Ch)), that a director who has acted in breach of duty can no longer claim to have acted honestly and reasonably in anything but the most extreme of cases. As part of any advice, IPs should explore the opportunity for quick deals with directors who are likely to be eager to settle potential liabilities.

> The Supreme Court has shown its willingness to peer behind these inventive group structure to examine the reality of the situation rather than accept them on face value.

Emboldened IPs

The risk for directors is not isolated to the insolvency context given that their dealings with company property may now be subject to scrutiny without limitation. Therefore, even in times of bounty, shareholder-directors who want to declare dividends to extract value from their companies need to have careful regard to the structure of any transaction or risk future creditors challenging them. The decision in *Burnden* should embolden IPs and litigation funders alike.

JAMES HARRISON (LEFT) is a senior associate at Penningtons Manches LLP.

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Monarch:

the aerodynamics of a commercial airline insolvency

Mike Pink and **Jim Tucker** recount the events and consequences of the Monday they were appointed to one of the UK's largest passenger airlines.

The demise of Monarch Airlines was, inevitably, a very public event. Prior to its fall, Monarch was the UK's fifth largest passenger carrier and, on the day of its formal insolvency, had more than 100,000 passengers overseas in Europe and the Middle East, with nearly half a million more booked for future travel.

At 4.00 am on Monday 2 October 2017, KPMG administrators were appointed to the airline, in parallel with the administrations of a further nine affiliate companies.

This article focuses on some of the more interesting issues and events relating to the administration of Monarch, but equally could apply to other airline insolvencies that might occur in the UK. This is not a legal thesis; it is written as an informative guide to what happened during this insolvency from the office-holders' perspective.

Timing of appointment

For a number of regulatory, legal and commercial reasons (some of which are explained later in this article) the administration needed to commence at a time when all of Monarch's fleet of 35 aircraft were on the ground.

Analysis of the flight schedules showed that on most days the planes were all back at their five UK 'home' airports between 3.00 am and 5.00 am. The last flights inbound to the UK were scheduled to arrive around 2.30 am, but would be flying with the ever-present risk of delays. After 5.00 am, the planes on the tarmac would be boarding for the first flights out in the morning.

Thus, the commercial tension was between choosing an appointment time as early as possible after 2.30 am to give passengers expecting to fly out of the UK that morning as much warning of possible, but not so early that the appointment risked coinciding with a delayed flight in the air. Ultimately, we and the court settled on an appointment time of 4.00 am (with the judge willing to amend that order if we needed to delay the appointment for logistical reasons).

Unsurprisingly, on that Monday two of the in-bound departures were delayed and required close monitoring overnight to determine if they would definitely land by 4.00 am or whether, alternatively, either flight should be cancelled before it took off. Thankfully, both flights got on the ground before 3.30 am and we didn't need to wake the judge.

> "The administration needed to commence at a time when all of Monarch's fleet of 35 aircraft were on the ground."

Flying during administration

Monarch's entire fleet of 35 Airbus aircraft were leased, which presented its own challenges, but it was already clear that flying any aircraft – particularly commercial passenger services – during administration was going to be impracticable from the first minute. The UK's Civil Aviation Authority (CAA) immediately 'provisionally suspended' the airline's air operator certificate (AOC). Even if the authority hadn't taken that step, the administrators were very mindful that while administration places a moratorium against creditor action, in practice it is almost impossible to enforce that instantly against creditors overseas. For a commercial airliner to board passengers, luggage and crew, and fly safely, somewhere in the order of one hundred suppliers are required – from fuel suppliers to on-board caterers and cleaners – any and all of which can become a 'ransom' creditor. Flight safety from a pilot and crew perspective is also not negotiable.

Knowing you have a legal moratorium is all well and good, but it won't prevent an aggrieved local supplier at, say, an overseas regional airport parking a truck behind the undercarriage of a plane. While, ultimately, such actions can be undone through negotiation or the courts, any delay to the flight costs money – the crew and lessors need paying, the airport will charge parking fees and passengers may be entitled to delay compensation etc. Very quickly flying becomes uneconomic, even on a marginal cost or cash basis.

Added to that is the challenge of insuring a plane-full of passengers in the sky. An airline with limited liability might self-insure an element of risk using its balance sheet and insure a material level of cover in the market, but the cost of an accident could still bankrupt some companies. Absent some government immunity or indemnity, or a comprehensive and robust insurance solution, this issue alone could affect the administrators' decision whether to allow planes to fly.

While administration has its limitations, the alternatives of seeking a Chapter 11 or Chapter 15 were discounted for a number of reasons (though Chapter 11 works well in the US for its domestic airlines) and even seeking a compulsory liquidation, with a special manager-type appointment considered but ruled out as a viable option. Flying post-administration was effectively off the table.

Getting customers home

In the period leading up to Monarch's well-publicised annual licence renewal date, the CAA as regulator and manager of the ATOL scheme for protected customers had begun developing its own contingency plans should Monarch fail. The ATOL scheme provides two principal forms of protection to eligible customers – meeting their holiday costs (accommodation, etc) and repatriation costs if the operator fails while on holiday, and to reimburse those who had yet to fly. Thus the CAA's plans needed to both fly passengers home and manage a large volume of claims and payments.

A key part of their planning was to address how they would repatriate ATOL-protected customers overseas if Monarch went into administration and the fleet was grounded. That involved contracting a 'shadow' fleet of suitable size, as well as engaging with us (as potential administrators) and a number of key Monarch personnel (who did a great job under difficult circumstances) on a tripartite basis to ensure the necessary people, systems and data would be available from minute one of an insolvency to allow the CAA's plans to be implemented efficiently.

To ensure the administrators could commit to the services the CAA was going to require, we mutually established a services and funding agreement that addressed the needs of the administration. Monarch's staff demonstrated admiral professionalism and loyalty to the end, and many of the key staff worked almost 24/7 to ensure the first CAA repatriation flights could operate. Without the benefit of a special administration-type regime, we needed to ensure the estate's creditors would not be prejudiced by the administration committing resources to this exercise, so the CAA funding necessarily met all incremental costs.

The initial repatriation exercise ran for two weeks post-appointment and flew back more than 80,000 people. Some passengers found other routes home. The coordination between Monarch and the CAA teams ensured the shadow fleet operated relatively seamlessly, with the vast majority of passengers returning home on their expected itinerary.

Cabin crew to manual

Hopefully rather obvious to those who work regularly in insolvency, but it would be incredibly disruptive and value-diminishing for news of the formal insolvency of an airline to break before it has actually happened. Suppliers might take precipative actions ahead of the expected moratorium, and employees will become worried about their future and livelihood, any of which could impact operational safety.

While we would always prefer to be the first to communicate the news directly to the 2,000 staff, it was necessary to also prioritise the many thousands of passengers immediately affected by the Monday's insolvency and one of the key tools for that was via media press release. Unavoidably, while text messages had been sent to almost all staff in the early hours informing them of our appointment, the first many heard of the administration was via their radio or television.

> "Knowing you have a legal moratorium is all well and good, but it won't prevent an aggrieved local supplier at, say, an overseas regional airport parking a truck behind the undercarriage of a plane."

A core team was retained to deal with the CAA's repatriation programme (see below) and the wind-down of the group's operations, but with the fleet grounded and no buyer in the wings, it was unfortunately necessary to make a large proportion of the employees redundant immediately. The administrators held meetings at the five operational locations in the UK at 9.00 am on the morning of the administration, addressing as many staff face-to-face as possible.

Overall, and no doubt reflective of the collegiate culture of the company, Monarch's employees demonstrated admirable commitment and dignity in dealing with a most stressful situation.

Aircraft are greater than the sum…

The administrators began the process of returning planes to the 14 aircraft, engine and ancillary equipment lessors on the morning of day one. »

Most lessors were keen to terminate the leases as soon as possible as there were a number of potential liabilities they wished to avoid by getting control of their airplanes. Firstly, aircraft parked at the five UK airports would begin to rack-up 'parking' and other charges on a daily basis, which at some sites can be quite a premium. More materially the CAA, acting as collection agent for unpaid Eurocontrol (the air traffic manager for Europe) fees and NATS (the UK air traffic manager), can detain a leased aircraft to meet all of the fleet's liabilities to those agencies (a 'fleet lien'). However, if the aircraft lease has terminated before detention, the lien is limited to that aircraft's own accrued liabilities (a 'tail lien'). Thus, if a lessor acted quickly enough to terminate the lease and move its aircraft outside of Eurocontrol/CAA territory, it could minimise its risk of bearing those costs.

Other complications when returning or releasing aircraft included a number of planes having some major components swapped with other planes – engines, undercarriages, etc (these are serial-numbered and belong with specific plane packages) – and each plane has a complete paper (or electronic) record of its maintenance. For the older planes, this could consist of several hundred boxes of documents.

> Aircraft parked at the five UK airports would begin to rack-up 'parking' and other charges on a daily basis, which at some sites can be quite a premium.

Playing the slots

Probably one of the most contentious matters that arose post-appointment was to do with the realisation of value from Monarch's airport take-off and landing slots. It required an expedited hearing at the Court of Appeal to resolve, and was a 'first' in terms of a positive result for an airline in insolvency.

Airport 'slots' are fixed periods of time every day at each airport that are allocated to an airline exclusively to operate their departures and arrivals. Slots are allocated in set seasons – summer (seven months long) and winter (five months) – reflecting the variations in scheduling airlines need between their summer demands and winter. The allocations in the UK are managed by Airport Coordination Limited (ACL), a not-for-profit organisation. ACL issue slots for the season and as long as the airline fulfils certain criteria, it obtains 'grandfather' rights to the equivalent slots in the following equivalent season. Thus by

2 October 2017, Monarch had already been awarded the winter 2017/18 slots (which started at the end of October 2017), and although only six-sevenths of the way through the summer 2017 season, had already met the 80 per cent utilisation threshold criteria set by ACL. Our legal advice was that the only other criteria to be met to be awarded the summer 2018 slots was that Monarch held an air operator certificate at the end of October.

Airport slots cannot be 'sold' on their own, but ACL does permit slot exchanges so the practice has grown up for airlines to exchange slots bilaterally and, if the slots being exchanged are perceived to have different values, a cash payment makes up the difference. Taken to the extreme, an airline wanting a particular slot would typically apply to ACL for a 'junk' slot (an unattractive time slot in an underused airport) and then offer it and cash consideration to the holder of the slot it wants in exchange. Monarch's slots, particularly at Gatwick, had considerable value.

While Monarch was unable to find a buyer for the business and avoid insolvency, its marketing efforts did elicit material offers for certain sets of slots. These offers could not complete pre-appointment as they depended on the allocation of the summer 2018 slots by ACL, which was scheduled for 27 October 2017. Thus, any slot exchange was going to occur post-administration.

With the AOC suspended but not terminated we considered the position to be clear cut concerning the allocation of the summer 2018 slots at the end of October. In mid-October ACL advised us that, on the contrary, they had concluded it would be inappropriate to award those slots to Monarch, given by that time, in their view, it was a failed airline.

With ACL's normal slot allocation exercise scheduled for 27 October 2017, the court agreed that an expedited judicial review hearing was necessary as there was a material commercial issue to be resolved urgently. With the application made, ACL agreed to postpone its allocation decision until after the court hearing. A two-day hearing was convened for 6 November 2017 (within three weeks of the request).

As followers of the story in the press will know, the High Court agreed with ACL's main arguments. However, our legal advice remained strong, and the court agreed to an appeal hearing on Friday 17

> We won the appeal and with ACL's cooperation were able to execute the exchange of slots and realise over £50m for the estate.

November (again, demonstrating the flexibility of the courts) – with the court staying ACL's power to allocate the slots at Gatwick and Luton in the interim. As has been reported, we won that appeal and with ACL's cooperation were able to execute the exchange of slots and realise over £50m for the estate.

Reviewing the friendly skies

The above are by no means the only issues we have had to address, but I think they are the key issues that have the broadest interest to those in our line of work. As a footnote, the Department for Transport has announced an airline insolvency review to learn any lessons from Monarch's failure. It will be interesting to see what, if anything, may change.

MIKE PINK (LEFT) is an associate partner in the restructuring team at KPMG.

JIM TUCKER (RIGHT) is a partner in the restructuring team at KPMG.

mixed messaging

Communications expert **Adam Manning** suggests alternative methods to get your message across to creditors.

Insolvencies and restructurings can be life-changing for stakeholders, and the way they are announced and presented to everyone involved can influence the overall process for the better – if handled in the right way.

This article discusses how the insolvency profession could better communicate with stakeholders from the perspective of a public relations agency. While my comments are applicable to all insolvency procedures, I have used company voluntary arrangement (CVA) proposal documents by way of example. These have to offer cold, hard and accurate information, but should also, I believe, paint a picture.

How not to break the news

Learning of an individual's or business's inability to pay what is owed can spark concern and raise a myriad of questions for creditors all at once. Will they get all of their money back? If so, how long will it take? If not, why not? Why has this happened? What do they need to do upon learning this news?

The chances of a creditor taking in the key messages from a 250-page Word document are very slim. When emotions are running high, are people going to read every page of a CVA proposal? Probably not. This heightens the risk of a reader inadvertently missing key information and adding to the frustration of the insolvency practitioner and the other creditors.

Tell 'em what you're telling 'em

When constructing these documents, the author needs to put themselves in the shoes of each of their stakeholders to ensure that the key questions are answered early on. Not all business people are 'numbers people' and some will absorb visual information quicker. Use this to your advantage – often in business information is presented in a dashboard format for ease of access before delving into the detail and heavy text.

Stakeholder segmentation at the very start of the document can play a key part in improving communication with creditors. For example, on the first page(s), a table could be drawn up depicting the types of creditor, how each creditor is affected by the insolvency and what action they need to take next. This could also be accompanied by a diagram outlining a timeline of the CVA process. This table can be a working document too, which could be updated and sent out after a creditor meeting to ensure everybody is aware of their position and any updated actions they need to take.

Another effective approach to make the document easier to read could be organising information for each creditor using a colour-coded traffic light system. Red items symbolise 'must-read', amber 'recommended' and green 'optional'. If you have the skills or the team, why not go further and employ infographics using symbols that indicate the key elements of the company and its prospects?

> "The author needs to put themselves in the shoes of each of their stakeholders to ensure that the key questions are answered early on."

If it speeds it leads

Eye-catching headlines can play an effective role in not only breaking up paragraphs of text, but in persuading the reader to read on and to speed-read and flick between different sections of the document. Splitting up one page of solid text into a double-page spread interspersed with headlines and diagrams is the way to go when trying to engage a reader.

I've mentioned the importance of graphics and charts in the section above. It's important to note that that they should not be used 'for the sake of it' or at the expense of the facts. There are ways that visuals can still present complex factual information. For example, a pie chart would do a much better job of describing the different percentage weighting of each creditor a company owes money to, while a bar chart would sufficiently illustrate a business' year-on-year performance.

It's key to recognise that there will also be generational splits between how people prefer to receive information, which should be reflected in how insolvency and restructuring information is delivered to people to maximise engagement levels.

A streamlined approach could work if there is a central online website that everybody is driven to from their preferred communications channel, be it by post, email or text message. This website could be segmented by type of creditor and provide updates as the case progresses.

The human interest angle

Among the technical information there also needs to be a degree of humanity at the heart of the communications. Some affected parties may wish to discuss their current predicament with an insolvency expert, so it is essential that a channel of communication is offered throughout the insolvency or restructuring process – be it over the phone, an online enquiry form or via a live web chat.

At the heart of every business considering a CVA there will be humans that are possibly not at their most rational, and making sure that all their needs are addressed in the initial documentation is key.

Letters from the managing director of the affected company to stakeholders should complement a CVA proposal, adding a human touch and helping to keep creditors onside throughout the process. While stakeholders need to be made aware of the reasons for a particular business' struggles, a core part of this personal form of communication could also highlight what is being done to turn the business around or maximise returns.

Communication from the person at the top of a struggling business should also stretch to the company's employees to avoid speculation surrounding their livelihoods. While it simply isn't suitable to share a CVA proposal with a company's workforce, this technical document should be used as the basis to translate key points into layman's terms for a workforce to understand. This could focus on why the business is struggling, what it means for employees and what action is being taken to rectify the situation.

It's unrealistic to think we will get to a stage where insolvency documents such as CVA proposals drop their word count. However, restructuring the content and writing for and from the viewpoint of each of the stakeholders – who share similar questions and concerns – can help to make the process simpler and straightforward for everyone involved.

This might seem like window dressing to some – but, as any retailer will tell you, it is the window dressing that draws customers in and helps to seal the deal.

ADAM MANNING is an account manager at Advent Communications.

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Events, courses and conferences

Find out what events, courses and conferences are coming up over the next few months.

R3's education and training courses programme offers a wide range of exciting opportunities for high quality, structured professional development for insolvency professionals at all levels of expertise and experience. New courses and content are regularly developed to meet the continuing needs of the profession and provide vital CPD points.

Course and conferences coming up over the next few months include **R3 & INSOL Europe's International Restructuring Conference**, which brings together practitioners from across the memberships and beyond to share experiences and debate the topical issues that have arisen out of current international and cross-border cases. As well as popular mainstays such as the international case-law and market updates, the conference will examine whether we're seeing retreat or progress in cross-border restructuring in the wake of common law developments and the UK's decision to leave the European Union. This will be achieved by reference to practical experiences in recent and on-going cases such as *Ocean Rig* and *Oi Telecom*.

The **Practical Introduction to Insolvency Work** series is back this September by popular demand. The series consists of five one-day seminars split over a three-month period and covers a broad range of topics and critical areas of day-to-day case administration. In response to feedback from past delegates, these courses include interactive sessions that work through practical 'real life' case studies and are supported by podcasts providing a technical framework outline for each type of insolvency procedure.

Half-day courses over the summer months have a strong emphasis on practical training, drawing on the deep knowledge and experience of our speakers. Topics include **Directors' Duties** and **Restructuring in the Renewables Sector**.

Our breakfast briefings series has taken us around the country and continues with an overview of the various procedures for **placing a regulated entity into an insolvency process** on 12 June in London, followed by an introduction to **Cryptocurrency & Blockchain** and how digital currencies could impact the profession on 19 June in Manchester.

R3's large social regional events are coming up and are proving to be as popular as ever. The **North West Ladies Lunch** sold out within 24 hours, the **Yorkshire Ladies Lunch** and **London Ladies Lunch** at the Langham are hot on its heels and nearing maximum capacity – book now if you would like to attend! **Technical meetings** are being held by the North East, South West & Wales, Scotland and Southern regions between May and June, please visit the website for full details.

One-day courses

SPG Technical Review

21 June, London The SPG Technical Review provides practical help on staying compliant in areas of our ever-changing world such as GDPR and AML, as well as keeping you up to date with the latest case law and best practice. The topics covered in this course simply cannot be learned through day-to-day work – attending delegates will receive essential training from experienced professionals.

Restructuring Day

3 July, London / 13 September, Leeds An overview of the spectrum of restructuring options available when dealing with businesses of all sizes, from SMEs through to the largest corporates, and the issues that can occur. The course aims to provide an understanding of the key points involved in a restructuring from assessing the financial picture to understanding the impact of the security position.

Half-day courses

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Receivables and ABL Financing in an Insolvency Context

13 June, London The course will explain the types of ABL facilities available and how they work in practice. The speakers are among the most experienced ABL lawyers in the market when it comes to putting in place ABL facilities and dealing with the issues that arise upon business failure, including marking the difference between assigned assets and those subject to security.

Directors' Duties

26 June, London / 18 September, Birmingham This course will consider directors' duties from the perspectives of both the lawyer and the insolvency practitioner. Based on real-life examples and scenarios taken from practice, delegates will benefit from the speakers' many years of experience and practical knowledge. Attendees will have the opportunity to access knowledge and information that can't be taught from the theory books, as well as the chance to interact with our unique panel of expert speakers.

Restructuring in the Energy and Renewables Sector

10 July, London The renewables sector has faced many challenges in recent years from rapidly-developing technologies and changing subsidy regimes. A number of companies trading in the sector have already faced distress or insolvency, and the future remains unpredictable. Engaging properly with these cases will require an understanding of the particular characteristics of this increasingly important sector.

Breakfast briefings

Regulated Businesses

12 June, London As well as considering the various procedures for placing a regulated entity into an insolvency process, this briefing will discuss the special administration of certain high-profile regulated entities.

Insolvency: Blockchain & Cryptocurrencies

19 June, Manchester / 30 October, London An introduction to cryptocurrency & blockchain. Will digital currencies change insolvency as we know it, or is it just hype?

For further information on R3 courses and conferences, please visit the R3 website **www.r3.org.uk**, where you can download the 2018 programme.

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Insolvency, restructuring and turnaround: the landscape in Northern Ireland

Joan Houston reflects on tumultuous times in Northern Ireland's governance and what it means for insolvency professionals.

Heraclitus said the only constant in life is change, and that is certainly true for those of us who work in the insolvency, restructuring and turnaround space in Northern Ireland. While the underlying challenges that lead to business failure may not have changed practitioners' core work, the market and the wider environment in which we operate has seen much churn.

Starting in 2010, Northern Ireland experienced a well-publicised massive financial and property crisis. This in turn led to the sale of loan books to private equity, and debt being realised for a discount (rather than due to the devaluation of underlying property assets). The resulting impact created a significant change in the role played by the insolvency and restructuring profession – the market no longer sought an insolvency-driven regime to resolve a financial crisis. Instead, insolvency experts' work lay in the restructuring and refinancing of financial instruments or the monitoring and managing of exit strategies. The number of bankruptcies resulting from a buy-to-let strategy based upon the capital growth of assets increased, as individuals who had dabbled in property handed the keys back to lenders and sought bankruptcy protection from residual debt burdens caused by the shortfall in property values.

Challenging times

This episode continues to influence the Northern Irish market. The banks (understandably), during a period when they were reviewing and packaging their own debt books, applied a stringent regime for lending to protect their positions. This resulted in a much lower exposure from customers failing to service borrowings, and hence a much lower demand for insolvency or restructuring solutions.

In order for businesses to grow in this benign environment, they have had to focus on restructuring their operations to protect profitability and to achieve maximum leverage through strong financial planning, seeking robust support from restructuring and turnaround experts to deliver growth. This has driven much more advisory work to support and develop client bases through challenging times.

On a personal indebtedness level, the property crisis meant that people who had been made bankrupt were not able to find a mechanism to refinance or to seek annulment. As in the rest of the UK, most of the court petitions for winding up or bankruptcy are issued by government agencies – for example, HMRC, or our rating authority Land and Property Services.

> "Reform of Northern Ireland's insolvency law has also been delayed due to the absence of a legislative body, making NI law now substantially different from the laws in England, Wales and Scotland."

The repayment of government and other, much smaller, debts can lead to an annulment, but this was not possible when combined with the shortfall debts from mortgages and property sales. Currently, this opportunity is slowly returning to the personal debt market, where debts remain predominately with petitioning creditors. However, the negative equity issue remains a driver for bankruptcy as many interest-only loans approach the threshold for capital repayments, with some borrowers having simply ignored this problem, failing to accumulate any funds to repay.

Political uncertainty

The devolved administration at Stormont, the Northern Ireland executive and assembly, has now been suspended for over a year, following an end to the power-sharing agreement in January 2017. This has led to uncertainty, as well as negative financial impacts on some sectors. Reform of Northern Ireland's insolvency law has also been delayed due to the absence of a legislative body, making NI law now substantially different from the laws in England, Wales and Scotland. In the short term, the provision of web-based access to existing legislation and rules for NI insolvency law would be welcomed by the profession.

The absence of the executive has meant public-funding decisions have been indefinitely postponed, with knock-on effects for many sectors. The reduction of government contracts for capital projects, and for routine work such as maintenance of public buildings, along with a lower level of funding across all sectors in recent times has put pressure on the construction sector, for example, with aggressive pricing driving failures and many larger firms working in other markets to preserve the skills and talents in their workforce in order to maintain their ability to deliver contracts in future. The charity sector in Northern Ireland, meanwhile, is largely service-driven; uncertain funding streams and a contraction in charities' income from service provision have put many charity and social enterprises under pressure, driving consolidation and restructuring to enable survival.

Where now?

As to what the future holds, Brexit will influence how the Northern Irish economy adapts and develops. Northern Ireland will have the UK's only land border with an EU state, a fact that remains important to the negotiations taking place with the EU economically, quite apart from any political considerations. Clearly the access to UK-EU markets, and the movement of goods and tariffs in NI as a doorway to the EU, will have many interesting consequences. Whatever the future brings, the insolvency, restructuring and business advisory community will surely have a role to play, advising businesses and individuals on the best way forward. □

JOAN HOUSTON is the chief executive at Houston Hunter.

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An interview with…
Stephen Baister

The **former Chief Bankruptcy Registrar** speaks to *RECOVERY* about the 'gratifyingly grubby' work of insolvency, the current state of the court system and ever-increasing costs.

Q What drew you to insolvency work in the first place (as a solicitor) and what kept you there?

A It is an immensely interesting area of work and back in those days it was also gratifyingly grubby, which made it fun. There was a much more buccaneering spirit 30 years ago than there is now that things are more heavily regulated.

> It's a very enjoyable world and at its best a very constructive one as well – rescuing people and companies from financial difficulty and recovering stuff for creditors from the wicked, the concealing and the devious.

There were bad sides of course – people did all sorts of things that were often quite creative as well as occasionally wicked. Of course it's often the wicked things that keep you in business as a solicitor. It's a very enjoyable world and at its best a very constructive one as well – rescuing people and companies from financial difficulty and recovering stuff for creditors from the wicked, the concealing and the devious.

Q You served in the High Court for more than 20 years. You must have come across a wide range of insolvency practitioners, insolvency lawyers and various other professionals in the field. Would you care to share your thoughts on the practice of insolvency in the UK and how the profession has evolved?

A I'm sure the lawyers and practitioners learned some things from me, but I learned a lot from them as well. The standard of lawyers, particularly those at the Bar, has gone up beyond recognition, as has the standard of work done by IPs, and my admiration for them has grown exponentially over the years.

The most interesting thing about sitting in court and listening to these folk was often the feeling that I was the daftest person in the room, and yet I was the one adjudicating on their problems. It was a huge privilege. I took it seriously and tried to do it well.

Q Not every case can be interesting – how did you cope with boring cases?

A Of course some cases can be boring, but in fact most aren't. Even where you are dealing with law that is all too familiar, the facts of each case are different. And there is often a lot of human interest too. You learn a lot in court about your fellow human beings.

Stephen Baister biography

- Stephen Baister studied modern languages at Oxford and law at University College London. Upon leaving education, he joined an academic publishing house for school and university texts on foreign languages. To avoid the poverty and starvation that are the natural consequence of a publishing career, he moved to law but then 'got stuck'.
- He was admitted to the Roll in 1981 and initially began working in debt collection at a firm before moving on to insolvency litigation and undertaking a lot of work for German clients.
- In his role as a litigator, Stephen was a frequent visitor to the insolvency courts and was quite well known among the bankruptcy registrars. It was not long before they recommended he apply to be a deputy registrar, becoming full registrar in 1996 and Chief Bankruptcy Registrar in 2004 until leaving the post in 2017.

Q At an event some time ago an insolvency litigator made the statement, in a constructive criticism of legislation, that the UK was a very good (in the sense of easy) place to commit fraud. Do you agree with that?

A That's a tricky one. I'd be doubtful about whether the UK is any easier a place to commit fraud in than anywhere else. What I think may be less satisfactory here than in other countries is the standard of and commitment to prosecution. The majority of fraud isn't committed by conventional, small-time fraudsters; it's committed by large financial institutions on which there is often insufficient concentration.

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A lot of the real wickedness doesn't find its way to prosecution because there's a lack of will to bring it to court. If you take things like disqualification: there's far too often the sense that the small guys are getting disqualified while the bigger guys are getting away with blue murder. I can't say that is absolutely true, but what I can say is that the majority of cases that one tries are much less serious than those that one might expect to be coming before the court.

One suspects that these things are very much based on administrative decisions about who to prosecute rather than the law. And legislation often deals with the wrong thing. To give you an example, if you want to open a bank account, you have to produce a passport and a gas bill – because of course a criminal mastermind could never produce


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either of those documents – so it's just a piece of administrative nonsense. At the same time, we all have a strong suspicion that London financial institutions are taking deposits from crooks and dictators all over the world. It's odd that a high level of attention is given to you or me opening a bank account, but doesn't seem to be given in equal measure to the real wickedness. I can't say with my ex-judicial hat on that I know this happens. You can only pose questions about why one thing is happening and the other is not.

Q You were also part of the R3 Fraud Group at one point?

A There has been more attention given to fraud by the insolvency profession in recent years. Valuable work was and is being done by R3 to persuade government agencies to act because no one is in a better position to deal with fraud than the government institutions, HMRC, the police and the various other groups that R3 has lobbied. They all ought to be thinking about pursuing fraud civilly as well as criminally, because that's what produces money for the taxpayer.

I think we all know that HMRC has never been as active about fraud as it ought to be in its statutory obligation to collect tax. This includes, to my mind, assisting liquidators in pursuing fraud and other insolvency claims too. HMRC is slow about enforcing fraud remedies and insolvency remedies: if that weren't so, you wouldn't need the R3 fraud group to be encouraging them.

Q Is there an aspect of cross-border insolvency work that you find particularly interesting, and could you tell us why?

A All my life cross-border work has played quite a role because I had to do a lot of cross-border work before the EC Insolvency Regulation came in. As a registrar I've had an enormous amount of work as a result of the EC regulation and under s426 of the Insolvency Act, where we had cooperation with some of the old Commonwealth countries and worked together under the common law as well. With the relatively new cross-border regulations, all that has changed beyond all recognition.

Europe is the focus, and has probably occupied most of the court's time and energy over the last few years: working out things such as the centre of main interests of a company or individual. It is much more difficult in the case of an individual without a registered office presumption. Sorting out those concepts has been very challenging and no doubt will continue to be so even after the Recast European Insolvency Regulation.

The EC regulation was immensely positive in terms of cross-border work in Europe, but it's not problem-free. A centre of main interest is not always easy to ascertain. That sticks in my mind, a) because there have been so many cases on centres of main interest and in court you end up dealing with a lot of them; and b) it's obviously a concept of huge interest in terms of competition between the different insolvency regimes within Europe.

> "The odd period of stability when the government leaves things alone is not always a bad thing."

Everybody knows that the level of competition has become more active than it was in 2000. This is probably as a result of English domination of the marketplace, against which other countries are understandably fighting. Competition over things such as schemes of arrangement has caused a lot of other countries to look very carefully at their own regimes; which is, incidentally, a jolly good reason for not harmonising across Europe too much. Creative competition between regimes can produce better results than saying 'one size fits all'.

Q Do you think Brexit will have an impact on the pace of insolvency reform?

A It obviously will affect things. A huge amount is going to depend on whether the EC regulation or some version of it will be kept; and my understanding is that the profession, including R3, is working to make sure that it or something similar remains. It's important, however, to say that we did manage before the EU and we will manage again if we have to.

Insofar as leaving the EU distracts from other insolvency reform, I would say – tongue in cheek – that's probably a good thing. There has been far too much reform undertaken far too quickly in insolvency in the last 10 or 20 years. The odd period of stability when the government leaves things alone is not always a bad thing. »

Q Speaking of changes, the High Court has just undergone a major change from the bankruptcy lists to become the insolvency and companies lists. Do you think it will change the public, or the profession's, perception of the process?

A It's a bit of a branding change, which sounds as if I'm dismissing it, but I'm not. The new chancellor of the High Court was anxious that what was called the Chancery Division was not understood because it was not a particularly modern term that had meaning in the world of business and finance, particularly internationally. He wanted to project a different image in a world where competition for business and financial work is becoming more acute. Like him, I want to see the UK and the courts in London and the regions competing effectively with other countries, just as I want to see them competing for insolvency work as well – they are a big part of the country's income. So it's a rebrand with a purpose, but it is still the same work being done by the same judges to, I hope, the same high standard.

> "When you can do open-heart surgery on the street with a coat hanger and a paperclip, you can ask for £800 an hour!"

Q You must have overseen the introduction of the Insolvency Express Trials pilot scheme. Did you see much of its use and do you have any further hopes for it?

A It was my idea, although credit for its implementation must go to my successor, Chief Judge Briggs, who worked out the practice direction and brought it into effect. It's really there for the users, not for the judges' benefit. It was an experiment to speed up the trial of smaller matters – something that users are always asking for. It hasn't been used as much as everyone thought it would be, but that doesn't mean that all is lost. I always remind people: there is no reason why you can't get something tried quickly if it's a reasonably short matter and the parties concentrate on the core issues, and if the court manages the litigation pretty tightly. The other reason I wanted to introduce it was because I wanted to limit costs in certain cases. The costs for litigation now are getting out of all control and I wanted to (perhaps) try to make litigation more affordable.

Q Will we be looking at an entirely digital court system in future, such as that being trialled by the small claims courts?

A It's very hard to know what might happen next. The current proposal, as I understand it, is to have digital-only courts for cases of about £25,000 or below in value. It's difficult to disagree with people such as Richard Susskind who advocate digital courts because plainly IT is underused. However, the use of IT depends on competent procurement, and you only have to look at public IT procurement to see that the gap between expectation and reality is often very wide.

The other problem is more of a question: if these online IT systems are going to be so bloody marvellous, how come rich people aren't going to be using them? What I think will happen is that it's going to become a second-rate system for poor people, and when I say 'poor' people I don't actually mean 'poor'. About £25,000 is close to the average national gross wage – a potentially life-changing amount – and is frankly therefore much more important to normal people than it is for a bunch of Russian oligarchs, bent insurers or offshore shipowners who litigate at huge expense in the Business and Property Courts. My worry is that people will be fobbed-off with second rate courts, perhaps not run by judges, while a huge proportion of resources is devoted to the business interests of extremely wealthy people, many of whom are not even taxpayers in this country.

In the insolvency jurisdiction, almost nobody can get legal aid to defend themselves against an insolvency practitioner's claim or against a disqualification case. The number of litigants in person now is absolutely enormous, and for obvious reasons the former directors of bust businesses and bankrupts are right up there. There is something profoundly wrong about that.

Apart from the moral question, there is the fact that no representation costs the system itself a lot of money because you're constantly adjourning cases, or trials take longer and are less effective because there has been no legal filtering of the litigant's case via a lawyer.

Q Apart from the litigants in person, what do you think is the biggest issue facing the profession?

A Probably the biggest issue is the one facing everyone in professional services, which is just the sheer amount of cost. Everything costs far too much, and some of that is the product of over-regulation, but some of it, I'm sorry to say, is the product of greed as well.

What on earth does any accountant or lawyer do that's worth £800–£900 per hour? My joke in court is: 'When you can do open-heart surgery on the street with a coat hanger and a paperclip, you can ask for £800 an hour!' If you can't do things for a lower cost than that, I don't think you should be in business. It's not always necessarily of the IP's or the lawyer's making: everybody is over-regulated, and procedures are far too complex – perhaps the express trials could have solved that!

Q Given your background as a solicitor – would you recommend other solicitors go into the judiciary?

A Yes and no. The interest is high, the job satisfaction is enormous and the responsibility is heavy, bearing in mind the effect on other people's lives of what you sometimes have to decide. But pay and working conditions are deteriorating to the point where many judges no longer trust the system they serve to treat them properly. The way the government reneged on its pension promises to many judges (I largely escaped) had a seriously negative effect on morale. My advice to anyone would be to think about it very carefully – whether they are barristers or solicitors.

> "Always listen! Listen more, speak less. That's the best advice for any judge."

Q Lastly, you've been a well-respected face in the profession for some years. Is there any piece of advice that you'd give to your younger self starting out in insolvency?

Always listen! Listen more, speak less. That's the best advice for any judge and it is advice I didn't take nearly often enough. ◻

MATT JUKES is publishing manager of *RECOVERY* magazine.