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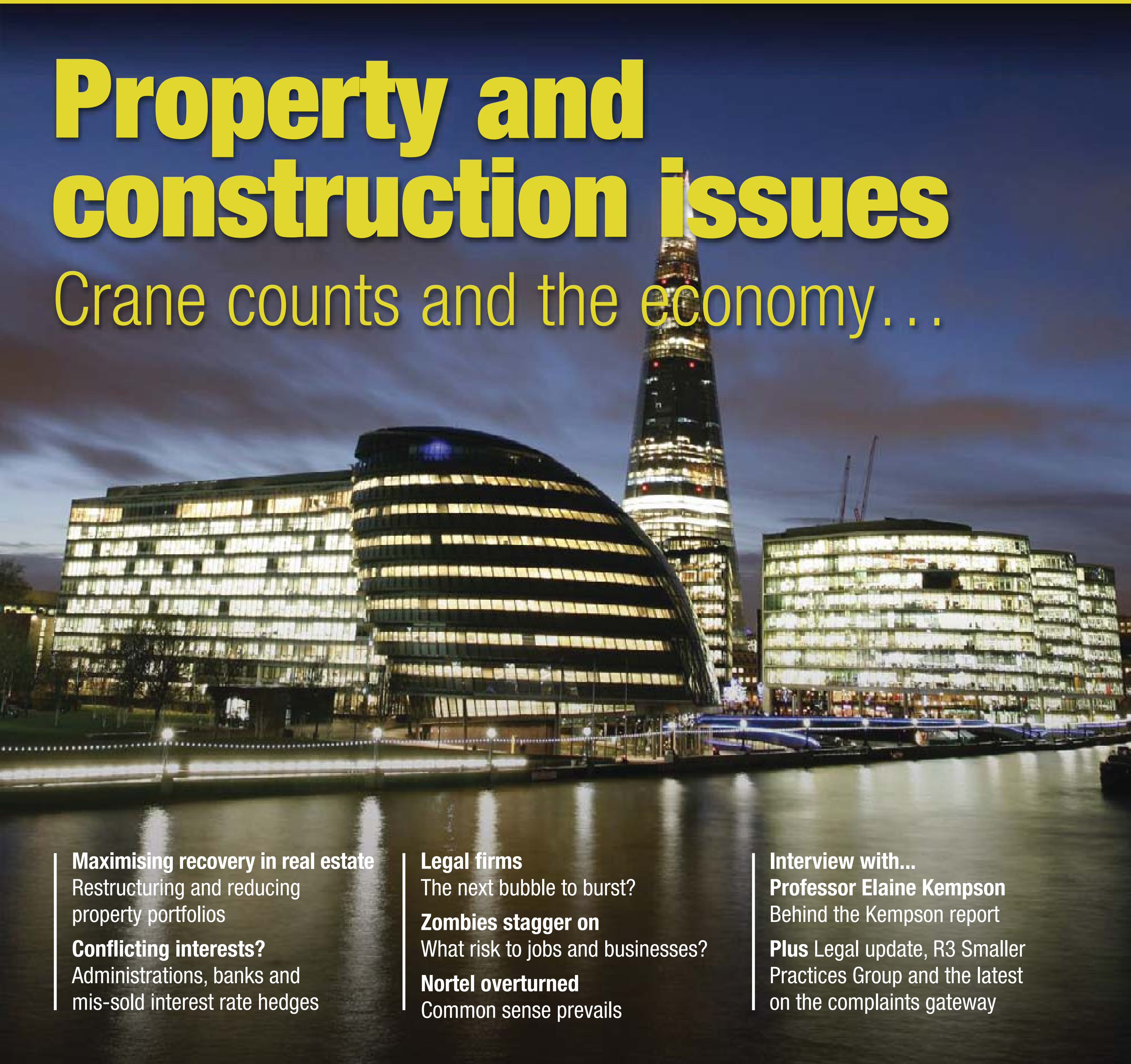
Autumn 2013

RECOVERY



Property and construction issues

Crane counts and the economy…

Maximising recovery in real estate
Restructuring and reducing property portfolios

Conflicting interests?
Administrations, banks and mis-sold interest rate hedges

Legal firms
The next bubble to burst?

Zombies stagger on
What risk to jobs and businesses?

Nortel overturned
Common sense prevails

Interview with...
Professor Elaine Kempson
Behind the Kempson report

Plus Legal update, R3 Smaller Practices Group and the latest on the complaints gateway insolv

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What do you think?

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

From the editor

From a variety of property and construction issues to an interview with Professor Kempson about her review of IPs' fees (page 35), this edition of *RECOVERY* covers a lot of ground. It's right that it should, coming at a time when R3's research into zombie businesses (p24) reports a rise in the number of businesses showing acute signs of distress. I'm beginning to detect signs of more insolvency activity – but that might just be that there are fewer of us around to do the work in August!

Whether or not the profession is to be busier, it's appropriate that we are entirely up to speed with relevant legal developments. Part of *RECOVERY's* raison d'être is to provide you with relevant and timely legal analysis in our legal update section and through additional feature articles. Three pieces in this edition strike me as worth drawing particularly to your attention.

Neil Smyth (p20) usefully explores an administrator's liability for the company's post-appointment breach of contract, identifying that an administrator is protected from tortious liability for inducing a breach in respect of purely personal contractual rights provided that he has acted in good faith in the course of his duties, but that the defence of legal justification cannot necessarily be relied upon where proprietary rights are involved.

Mike Pavitt and Sarah Wheadon (p12) point out the potential criminal liability that could attach to an IP who through knowing assistance or encouragement materially contributes to the commission of a breach of s216! They go further, not only outlining the law and regulatory requirements, but also suggest some practical steps – including not turning a blind eye.

And finally, the duties of administrators, including in relation to potential conflicts of interests, in cases where interest rate hedging products may have been mis-sold is the subject of an important article by Tina Asgarian and James Clarke (p28).

All in all, plenty to get your teeth into on the autumn return to work!

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

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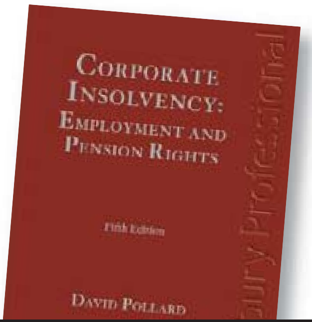

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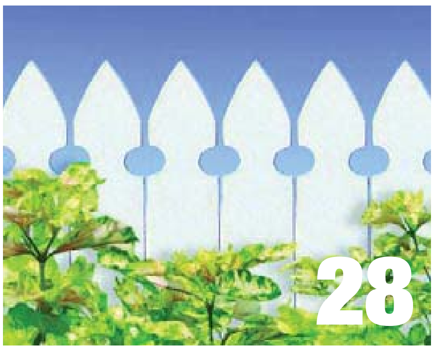

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The law firm bubble

…is it about to burst? **Steve Cottee** examines the issues at hand.

The legal profession has been for a long time largely immune to the rapid technological and commercial changes that have already swept through the banking and accountancy worlds. As it stands, there are 126,000 practising solicitors in England and Wales spread over nearly 11,000 law firms. The legal profession has not seen the consolidation that has already happened in other professions. Indeed, there are law firms outside the top 150 that would have enough turnover to be in the top 50 of accountancy practices. The number of law firms has, in fact, increased since 2007–08, while the number of accountancy firms has fallen by over 10 per cent in the same period.

Protected perceptions

Why then has the legal profession been protected from commercial reality for so long? A key factor has been that banks have always been very keen to lend to law firms, often on an unsecured basis. One of the reasons is that law firms hold very large client account balances, which are attractive to banks. And there was no large law firm failure following the financial crisis of 2007–08, which helped reiterate the perception among the banks that law firms don't go bust. The high-profile collapse of Halliwells in 2010 was seen by many lenders as purely a property issue as opposed to there being any deep underlying problems with the firm or the legal market in general. The failure of Dewey & Le Boef was also seen as very much a US-specific issue.

The perception that law firms don't fail continued until the start of February 2013, when Cobbetts, an old established, respectable law firm with 70 partners and four offices in Leeds, Manchester, Birmingham and London, went into administration. A number of banks and secondary lenders are now beginning to recognise that if a firm such as Cobbetts can collapse, then there will be a large number of other firms facing similar problems. The failure of Cobbetts has been combined with a sharp increase in the number of Solicitors Regulation Authority (SRA) interventions into law firms already this year. The SRA has warned that its forecast of 30 interventions this year is likely to be a significant underestimate. In the first quarter alone the SRA closed 15 practices, including Blakemores and Atteys, which has intervention costs of several million pounds, already exceeding the SRA's intervention budget. The SRA has also revealed that more than 30 out of the top 200 UK law firms are in financial difficulty and they are in intense engagement with 160 firms at risk of failure.

The number of law firms coming into the intensive care units at the banks is already starting to increase. Also rather worryingly, 1,300 firms have recently been put at risk following the collapse of the Latvian insurer Balva.

Changes ahead

On top of all this, the UK legal market is going through the greatest upheaval that it has ever experienced. This year alone we have seen a squeeze on legal aid, banning of personal injury fees and changes to the recoverability of conditional fee agreement (CFA) success fees. Competition is also gradually being introduced via alternative

> "The SRA has revealed that more than 30 out of the top 200 UK law firms are in financial difficulty and that they are in intense engagement with 160 firms at risk of failure."

business structures with the Co-op being the first major consumer brand to receive approval from the SRA. Clients are also seeking more for less and there is an oversupply of lawyers. Many larger firms have never been able to replace the fee income they lost in 2008, and find themselves occupying expensive properties they signed up to in the good times on long leases, which now have vacant floors and are dragging down profits. At the smaller end of the profession, many partners are struggling to retire as they are unable to afford expensive run-off cover themselves and cannot find a successor practice or younger partners to take their place.

Critical times ahead?

The autumn is a key time for many law firms. Firms will have paid their partners' tax bill in July, followed by an inevitably quiet August, and the partners will come back to the office in September facing a rent quarter date, and having to pay a large professional indemnity insurance premium on 1 October. Such PI insurance premiums are often funded by secondary lenders. It is unlikely that this lending will be as freely available as it was before the failure of Cobbetts. As firms cannot continue to trade for more than 90 days without insurance cover, this could lead to a number of law firm casualties during the autumn and winter. Many legal commentators are already suggesting that the legal profession is about to experience its own liquidity crisis and are asking which firm will be the law equivalent of Lehman Brothers. Even if we do not see anything as dramatic as that, it certainly appears likely that a significant number of law firms (big and small) will fail over the next 12 months and those in the restructuring world are going to be asked to deal with more of these complicated situations than ever before. ◻

STEVE COTTEE is a partner at Pinsent Masons LLP.

President's column

Liz Bingham considers the summer's events and the importance of bringing young IPs into the R3 fold.

Summer has a reputation as the UK's 'silly season', the time when journalists and MPs head off on their holidays, leaving bored editors a little short of news to report. However, politicians and journalists clearly decided to stay at their desks this summer and carry on working.

It's certainly been a busy period for the insolvency profession as far as regulation, reviews, court cases, and consultations relating to fees, consumer credit, and administration expenses – to name but a few issues – begin to reach key stages.

Concerns

I'm very pleased to say that the government has taken on board our concerns about the transfer of responsibilities for consumer credit licences from the Office of Fair Trading to the new Financial Conduct Authority. Legislation originally suggested that, after the switch, individual insolvency practitioners may need their own consumer credit licence to offer pre-appointment advice. After concerns were raised by R3, the government is now proposing an exemption for insolvency practitioners providing debt advice when given in anticipation of a formal appointment.

Reviewing fees

Similarly, I'm pleased to see that Professor Elaine Kempson's recent review of insolvency practitioners' fees found that the current fee regime works well in the majority of cases. Having worked closely with Professor Kempson on her review, we look forward to collaborating with The Insolvency Service on further developing the review's conclusions.

The fees issue is probably one of the more emotive aspects of insolvency, particularly for those looking from the outside in. For consumers and creditors, it can be difficult to see it as 'fair' that an insolvency practitioner may receive a fee from an insolvency case while they lose out.

With the insolvencies of famous high street names continuing to hit the headlines, the fees issue is one that will continue to attract attention. As president, I've already spoken to the BBC about fees, as well as to the *ONE Show* about phoenix companies – another contentious and, for the general public, easy to misunderstand issue – and I hope I've been able to provide some balance to the debate.

Researching reforms

Coming up this autumn, we'll be keeping an eye on the government's Deregulation Bill, which is slowly winding its way through Parliament. Among other things, the Bill contains proposals for re-introducing limited licensing of insolvency practitioners for either corporate or personal insolvency work.

As with a lot of government legislation it wouldn't be a surprise to see policies from recent announcements, such as Vince Cable's proposals on director disqualification, tacked onto the Bill as it goes along. In the case of director disqualification, this would be welcome.

One of Dr Cable's proposals was for other regulators to have the power to disqualify directors, as well as The Insolvency Service. It will be interesting to see the reaction to this proposal both in Westminster and elsewhere, but we would welcome any move that would better and more quickly ensure that directors in need of sanction are excluded from the marketplace. Additionally, we're pleased to see that the proposals for remedial education for disqualified directors echo suggestions made by R3 for several years.

> "Diversity isn't simply a matter of how the profession looks; it's about how it thinks."

In a similar area to the Deregulation Bill, the government is currently consulting on the implications of its Red Tape Challenge for the regulation of the insolvency industry; this consultation is being carried out alongside the much-anticipated government pre-pack review. R3 will be responding to both consultations this autumn.

Also this autumn, R3 will be publishing the results of our research into the impact of the Jackson legal reforms on the insolvency industry. A lot of our members have raised concerns about the potential of the reforms to limit insolvency practitioners' ability to pursue directors and third parties through the courts for money that belongs to creditors.

I'd like to say a big 'thank you' to all those members that took the time to fill out the survey; I appreciate the effort you've put in, and all your responses will hopefully help us secure a long-term exemption for insolvency practitioners from some of Lord Jackson's proposals.

A changing profession

In my first 'President's column' I mentioned that I hoped to put the spotlight on the profession's rising stars, so it was fantastic to welcome so many young insolvency practitioners to the President's Reception in July. It was an excellent evening, and I hope everyone – young and 'older' – grabbed the chance to make new acquaintances. We'll be following this up in September, with a round table for insolvency practitioners to discuss how to bring younger and more diverse talent into the profession.

Diversity isn't simply a matter of how the profession looks; it's about how it thinks. A diverse profession means an innovative profession, one that challenges perceived wisdom and business as usual. The business world is incredibly diverse, and our profession needs to be diverse to serve it.

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

Buried treasure

Former property magnate Simon Morris has been sentenced for burying gold and £1.5m in offshore bank accounts in an effort to conceal it from creditors following the collapse of his property empire, Morris Properties.

He pleaded guilty to fraudulently failing to declare eight one-kilogram gold bars and six Credit Suisse bank accounts. He also admitted to failing to disclose property to the official receiver between 8 October 2009 and 14 December 2010.

The court heard how he paid £727,979 into one account following the re-mortgaging of his house in 2008. He transferred a further £591,901 from the sale of another property and then, in February 2009, deposited the gold bars, at that time worth US$31,000 each.

The prosecutor, Simon Batiste, said that Morris had signed false declarations, first to his creditors as he attempted an Individual Voluntary Arrangement with them, and then to the official receiver upon his redundancy.

The ex-director of Leeds United football club has agreed to pay £500,000 to the trustee of bankruptcy. Batiste indicated that the creditors had accepted the sum, resulting at best in a tuppence-in-the-pound offer.

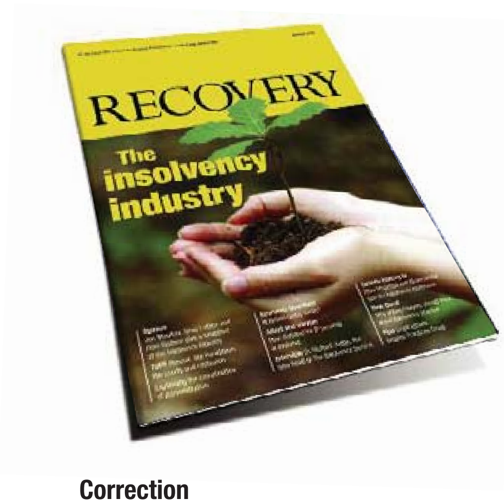
The Bank of Ireland called in its debts of £2.6m in October 2008 and put 12 of Morris' companies into administration over their concerns about his operating methods.

Morris was handed a suspended 20-month prison sentence and was ordered to do 200 hours of unpaid work.

Medical testing company goes into liquidation

Insolvency practitioners McAlister & Co are realising the assets of medical testing equipment company Assaymetrics. The company had backing from Finance Wales and an investigation has been launched into the reason for its insolvency. Assaymetrics was based at the Cardiff Medicentre and most of its intellectual property rights and technical equipment have been bought by Cambridge-based TTP LabTech.

After being appointed liquidator by the company's creditors, Sandra McAlister of McAlister and Co Insolvency Practitioners told Wales Online research companies were finding the current economic climate particularly difficult. She said she would be contacting creditors and customers owed money as part of the insolvency process. Read more at **walesonline.co.uk**.



Correction

We are sorry to have misdescribed Louise Verrill and Patricia Godfrey in the summer 2013 edition of *RECOVERY* when reporting their being awarded honorary membership of INSOL Europe and we are happy to set the record straight.

Louise is a past president of the Insolvency Practitioners Association, a past president of the Insolvency Lawyers' Association, a past editor of *Eurofenix* (INSOL Europe's journal), a member of the Executive Committee of the Editorial Board of Eurofenix and a partner at Brown Rudnick LLP in London where she heads the European Bankruptcy and Corporate Restructuring Group.

Patricia is a past president of R3, a past president and a council member of INSOL Europe and chair of its Lenders' Group, and a partner the Banking, Finance and Restructuring team at Nabarro where she heads the Restructuring and Insolvency team.

Banks to be more bankrupt friendly

Banks will be exposed to fewer financial risks from undischarged bankrupts who open a bank account, if an amendment to insolvency law announced by Business Minister Jo Swinson is approved. The efforts to enable undischarged bankrupts to open a bank account and receive wages, pay bills or shop online, follow concerns from consumer representatives that aspects of the old law prevented people from making a fresh start following bankruptcy.

Ms Swinson said: 'I am pleased that we are now closer to removing barriers that have prevented banks from providing bank accounts for bankrupt people in the past. A bank account is not a luxury in this day and age, but a necessity. Most everyday transactions take place online including shopping, paying for utilities and receiving salaries. Last year, over 30,000 people were declared bankrupt and a similar number took up Debt Relief Orders, and it is only right that they get a chance to have bank accounts.'

Banking representatives have been concerned that a trustee in bankruptcy could make a claim against them if a bankrupt person failed to declare any of the funds going through their bank account.

The amendment to safeguard the banks was included in the draft Deregulation Bill published on 1 July and will mean that unless a bank has received a specific notice from a bankruptcy trustee about an asset that will benefit the estate and which the trustee is interested in, they are protected against claims from that trustee.

Read more at The Insolvency Service press centre **insolvency.presscentre.com**

Missing trader disqualified for 12 years

A man who allowed his company to play a missing trader role in VAT fraud has been disqualified from acting as a director for 12 years following a decision by the High Court. Benjamin James Harbour, whose Watford-based company sold PlayStations, cannot promote, manage or be a director of a limited company until 2025. The court was told that Harbour Brands Ltd sold PlayStations wholesale bringing them VAT-free from other European countries but charging VAT to a single UK customer. No provisions were made for payment of VAT to HM Revenue & Customs during the four months the company traded.

The judgment followed an investigation by a specialist team of The Insolvency Service, whose involvement started with the winding up of the company for unpaid VAT.

For more details and further cases, visit The Insolvency Service website at **www.bis.gov.uk/ insolvency/**

Burford Capital and Manolete Partners announce strategic partnership

Insolvency litigation financier Manolete and Burford Capital Limited, the world's largest provider of investment capital and risk solutions for litigation, have announced that a new relationship between them will enable Manolete to continue its strong growth as a leader in the UK insolvency litigation market and increase Burford's exposure in the business. Manolete buys claims direct from insolvent companies and funds individual insolvency practitioners to pursue claims in their own name.

Read more at **manolete-partners.com**

A victory for common sense

Denise Fawcett considers the overturned Nortel decision.

On 24 July 2013 the Supreme Court gave its judgment in the appeal against the decision of the Court of Appeal in the cases of *Nortel* and *Lehman*.

The question for the court to decide was where, in the order of priorities of payment out of a company's assets, liabilities arising under the Pensions Regulator's (tPR) 'moral hazard' powers will rank in an insolvency process.

The Pensions Act 2004 allows tPR to impose liability for a pension scheme debt on a company with a defined benefit pension scheme (employer) or, more importantly, those connected and associated to the employer, for example group companies. tPR may require group companies to make a payment to the scheme (under a Contribution Notice or CN) or to provide support to the scheme (under a Financial Support Direction or FSD). Unless tPR uses its powers under the Act companies other than the employer would ordinarily have no direct liability to the scheme.

Insufficient resourcing

A company may be subject to an FSD where the employer cannot pay 50 per cent of the pension scheme deficit (on a 'buy out' basis) whereas any or all of those companies connected and associated to the employer, together with the employer, can pay 50 per cent or more of the debt. For this purpose (and put simply) the ability to pay is calculated as to the market value of the net assets of the companies concerned. If this state of affairs exists the employer is 'insufficiently resourced' and, if reasonable to do so, tPR can impose an FSD on a group company. It can also be used where the employer is a service company. A CN may be imposed where events occur that are materially detrimental to a pension scheme or where an obligation to support a scheme under an FSD is not complied with.

Prior to the decision in this case there had already been a controversial extension of the categories of liability that may be considered to be expenses, also arising in the Nortel line of cases in *Goldacre (Offices) Limited* v. *Nortel Networks UK Limited*, where rent falling due in the period of an administration was deemed to be an administration expense. Insolvency professionals began to question where this progression towards giving certain categories of liability preferential status may end.

As a result of the first instance and Court of Appeal's decision, an office holder's remuneration would rank behind any liability imposed by tPR. At the time of

> "Having lost preferential status, HMRC potentially saw its debt being overshadowed…"

the appointment there may be no indication that tPR may be contemplating using its powers. In the July 2012 'Statement from the Pensions Regulator on Financial Support Directions and Insolvency' tPR stated that, in most circumstances, it would not object to an application to subordinate any liability under an FSD or CN behind the office holder's remuneration. However, by the time the issue arises, the office holder may have incurred substantial fees and be unable to easily exit the administration. Insolvency practitioners may be forgiven for refusing to accept an appointment with only a non-binding statement of intent to rely on.

Lenders nervous

Lenders reliant on floating charge realisations saw the value of their floating charges potentially disappear when lending to companies in a group with a pension scheme attached to it. Understandably, lenders have become nervous about lending to companies where pension scheme issues may arise. This could lead to the demise of corporate groups that have a legacy of a defined benefit pension scheme. This cannot be in the interest of the corporate, its creditors or the pension scheme.

Having lost preferential status, HMRC potentially saw its debt being overshadowed by a large liability ranking above unsecured creditors.

Obligation

All in all, the position was unsatisfactory. However, the Court of Appeal seemed bound to decide the case as they did. To be provable in an insolvency a debt arising after the insolvency event must be subject to an obligation incurred before that date (Insolvency Rule 13.12(1)(b)). While tPR can use its powers against an employer it is unlikely to do so where the employer already has an obligation to the scheme for the full amount of its liability. It is more likely that the powers will be used against those companies that have no existing obligation to the scheme. When imposed post insolvency, how could that liability arise out of a pre-existing obligation?

Sensible outcome

Before providing his analysis of the law, Lord Neuberger expressed the view that the sensible and fair answer would be to find that the liability under an FSD or CN issued after an insolvency event would be a provable debt and therefore rank pari passu with other unsecured creditors.

So how did Lord Neuberger achieve the outcome that he felt was sensible? Well, he decided that being a member of a group of companies that was insufficiently resourced meant that the company was at risk of receipt of an FSD and was therefore well within the FSD regime prior to the administration.

He overruled authorities that the Court of Appeal was bound to follow, including *Re Bluck* (decided in 1887 and until now good law) and *Glenister* v. *Rowe* in which a liability for costs arising after bankruptcy, in proceedings issued before bankruptcy, was found not to arise from a pre-bankruptcy obligation and not provable in the bankruptcy.

End of a trend

While not part of the reasoning of the Supreme Court, it is of equal importance that Lord Neuberger did not agree with the Court of Appeal's view of what would constitute an administration expense and as to the effect of *Toshoku Finance UK plc [2002]*. He considered that a necessary disbursement, payable as an expense, arises out of something done by the administrator or, if arising under statute, its terms make it clear that liability to make payment falls on the administrator.

The world of insolvency and finance can breathe a sigh of relief and hope that this decision marks the end of a trend towards an elevation of the status of liabilities in insolvency. ◻

DENISE FAWCETT is a partner at Pitmans LLP.

Recent case summaries

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

Personal insolvency

***Petrodel Resources Ltd* v. *Prest* [2013] UKSC 34**

Facts: Petrodel Resources Ltd owned seven residential properties. Mr and Mrs Prest contested ancillary relief in matrimonial proceedings. In such Mrs Prest obtained an order that the seven properties be transferred to her. The Court of Appeal found that such an order should not have been made since there were no legitimate grounds for piercing the corporate veil. Mrs Prest appealed to the Supreme Court, which considered whether the first insurance court had power to make the order it had.

The Supreme Court confirmed that the jurisdiction of the courts to pierce the corporate veil arose in very limited circumstances. It arose only where a person was under an existing legal obligation or liability or subject to an existing legal restriction that was deliberately evaded or whose enforcement was deliberately frustrated by interposing a company under the person's control. Mr Prest had acted improperly in many ways, but his actions had not evaded or frustrated any legal obligation to his wife, nor had he concealed or evaded the law in relation to the distribution of assets of the marriage upon its dissolution. Accordingly the piercing of the corporate veil could not be justified by reference to the general principle of law. Further, a broader principle did not apply in matrimonial proceedings by virtue of section 24(1)(a) of the Matrimonial Causes Act 1973.

> "Mr Prest had acted improperly in many ways, but his actions had not evaded or frustrated any legal obligation to his wife..."

Therefore the only basis on which the company could be ordered to convey the properties was if they belonged beneficially to Mr Prest by virtue of the particular circumstances in which they came to be vested in the company. Mr Prest and the company had failed to comply with orders for disclosure regarding the properties. A proper inference to draw from such was that the company did not hold the property as both legal and beneficial owner but rather that it held such as legal owner

on resulting trust for Mr Prest. There was no reliable evidence to rebut such. As a result the judge had been entitled to make the order he did.

This case, while not in the insolvency arena, is likely to be of assistance to insolvency practitioners when dealing with competing claims to assets by the estates of companies and directors, or third parties. It is also worthy of note as regards inferences to be drawn when determining beneficial interests in property.

Corporate insolvency

***In the Matter of GP Aviation Group International Ltd (In Liquidation)* [2013] EWHC 1447 (Ch)**

Facts: The liquidator of GP Aviation Group International Ltd commenced misfeasance proceedings against the former directors of the company. At a later date HMRC raised discovery assessments against the company for corporation tax. At the directors' request, the liquidator caused the company to appeal against the assessments. The liquidator did not have the means to finance the conduct of the tax appeals and had doubts as to the merits of such.

The liquidator informed the directors that unless the appeals succeeded he would allege in the misfeasance proceedings that they were liable to account to the company for the debts created by the assessments. The directors requested the liquidator to assign the appeals to them. The liquidator sought directions pursuant to section 167 of the Insolvency Act 1986 as to whether he was able to do so.

His Honour Judge Pelling QC found, having considered a number of authorities that appeared to consider the issue by way of obiter comments or implication, that there was no binding authority that determined whether a right of appeal was a right of property pursuant to the Act.

The judge therefore considered the definition of property pursuant to section 436 of the Act. He noted that such was cast in the widest terms. Despite such, however, he held that the right to appeal against tax assessments was not property capable of being sold within the meaning of the Act. In reaching such decision the court considered the position if the insolvent had been a bankrupt, where an assignment would not be permitted, and the classical definition of a chose in action, which a base right of appeal did not fall within. Further, the court considered whether a right of appeal was a chose in action itself or a remedy available for its enforcement. The court considered the right of appeal fell into the later category and was not capable of being assigned separately to the liability to pay the tax.

> "The liquidator did not have the means to finance the conduct of the tax appeals and had doubts as to the merits of such."

As a result the right to appeal available to the company could only be exercised by the liquidator because he then became the only agent of the company entitled to do so, not because such was a property interest. Further the decision as to the pursuit of the appeal was solely for the liquidator. ◻

CLAIRE JACKSON is a barrister at Kings Chambers.

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Corporate Insolvency: Employment and Pension Rights (fifth edition)

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- **Author** David Pollard
- **Publisher** Bloomsbury Professional
- **ISBN** 978-1-84766-887-5
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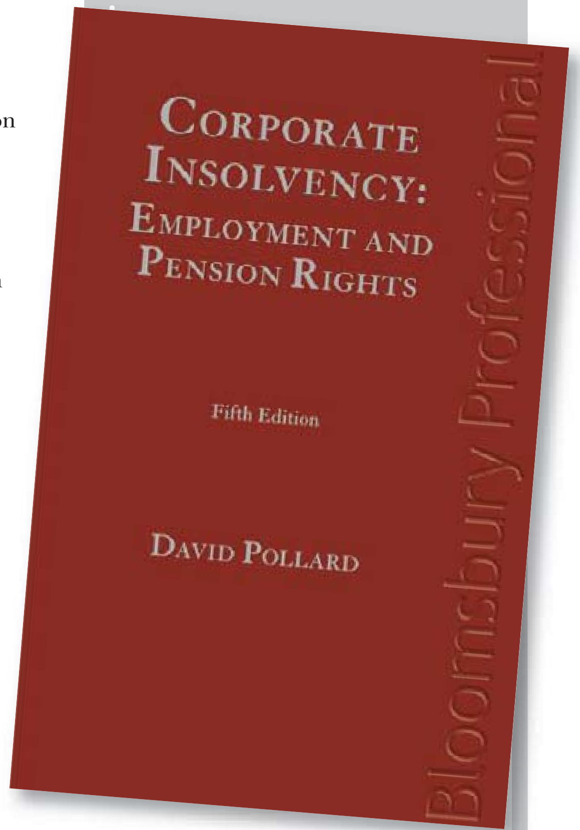


This book deals with the effect under English and Welsh law of the formal insolvency of a company on its employees and their employment contracts and on their pension rights and any occupational pension schemes. There are 70 informative chapters, all of which have been written in a very accessible and clear manner. The preface informs the reader that the purpose of the fifth edition is to bridge the gap between the Insolvency Rules 1986 and the distinct areas of employment law and pension law. The author has succeeded in this by setting out the law and practice in an objective and black letter approach.

> "As the chapters have been given very clear titles you can also dip into the book and find the relevant section to help you."

These complex areas of law attract specialist practitioners. The practising IP or insolvency lawyer is expected to have a clear understanding of how these relevant areas of law interface with each other and be able to respond to queries, often while at the coal face, while dealing with the many areas covered in this edition. This can be as basic as a query about the minimum wage or as complex as whether TUPE 2006 will protect the terms and conditions of employees in insolvency events.

Since the fourth edition was published in 2009 the following changes and additions have been made to the text;

- Determination of the Pensions Regulator using its 'moral hazard' powers (mainly in insolvency cases)
- The issue on what is and what is not an insolvency expense (and so gets a super priority) and the Nortel/Lehmans case, judgment delivered July 2013
- Case law on who is or is not an employee or worker
- Case law on how to identify an employer for pensions purposes
- The new pensions auto-enrolment provisions
- Cases on the moratorium on legal proceedings once an administration or court winding-up starts
- Cases on the new insolvency provisions in TUPE 2006 – again with Supreme Court
- Clarification from the Court of Appeal as to when a liability for an employee dismissed before a transfer will transfer to the transferee
- Changes to the employer debt provisions on pensions and case law clarifying how the debt calculation is to be carried out
- The Equality Act 2010 and cases on the potential for joint and several liability on those who help unlawful discrimination

The chapters read in a chronological and sensible manner. This is useful if you are reading the book from a purely academic perspective but as the chapters have been given very clear titles you can also dip into the book and find the relevant section to help you with a thorny issue at hand.

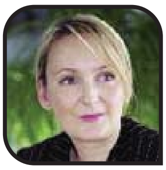
Further, the book provides very useful tables that set out a 'summary of issues'. Other useful tables include the transition from administration to liquidation and provable debts when the business has continued to trade, along with author explanations and clear guidelines to work to.

Those who are fans of flow charts will be delighted to see that the author clearly sets out the complex section 75 Pensions Act 1995, as modified by the Pensions Act 2004, debt. The flow chart sets out an 'is it a multi-employer scheme' logic flow giving the practitioner a basis from which to start and quickly come to a conclusion.

There are a plethora of abbreviations used across the three distinct areas of law and the abbreviations index helpfully splits the abbreviations into classifications; when reading the tables and flow charts it is made simple to flick to and fro; however, due to the classifications one may not know exactly where to go in the abbreviations section.

David Pollard gives the reader an impressive list of statute, statutory instruments and cases, all of which have been cited in the black letter text of the book. An IP may feel there are too many footnotes to the text but these are immensely useful to the lawyer reader, and I recognise the correct citation is required for further analysis and research into the more subtle areas of law.

This is a great reference book and I am sure I will be referring to it many times in the future. It could also be useful to those sitting the notoriously difficult insolvency exams. I would recommend it is added to the reading list of all IPs and insolvency lawyers who wish to gain an in-depth knowledge or have a useful reference book to hand. □



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Legal voice

Legal Q&A

Mike Pavitt and Sarah Wheadon answer your insolvency queries.

Q At an s.98 meeting two weeks ago I was appointed voluntary liquidator of an insolvent company that had ceased to trade, its staff having all been made redundant. Pre-appointment the sole director mooted a figure to buy back the business, approved by agents, which would have produced a reasonable dividend. Realistically there is no other buyer. He received all the usual s.216 warnings but having stalled me all this time he now insists he will only buy through a virtually identically named NewCo set up shortly before liquidation, of which he is already sole registered director and shareholder. He has made no attempt to give notice to creditors or to apply to court, and his attitude is dismissive. Can I still proceed with the proposed sale?

The short answer is yes, but not without running real risks you cannot safely or consciably ignore. This situation demands caution and a level of urgent action before you proceed towards the sale as proposed, not only to ensure that you stay on the right side of the criminal law yourself, but also to satisfy your regulatory requirements. Depending on the particular circumstances, best practice may dictate that you refuse to complete the sale as envisaged.

To begin with, the director is in clear breach of s.216 Insolvency Act 1986; the constituent elements are there and none of the exceptions apply. Specifically, he has not given valid IR 4.228 notices before acting in the prohibited way so cannot do so now; he has not applied to court for permission within the strict time limit of 7 business days after liquidation (IR 4.239); NewCo has not been known by the prohibited name continuously for 12 months (IR 4.230).

> “Their first duty is, of course, to obey the law.”

It is a common misconception that this is the director's problem, and his alone. A liquidator will often seek to justify a laissez-faire approach by saying things such as, ‘my first duty is to the creditors’, whereas in fact their first duty is, of course, to obey the law, s.216 sets out a serious criminal offence (up to two years' imprisonment on indictment); this is not some minor regulatory infringement. Even if the sale were negotiated by an agent on your behalf, so far as the law is concerned you are fixed with that knowledge from the point your agent becomes aware of the details. To minimise the risks, we suggest the following approach.

Rule 1. Take the high road

A liquidator must avoid aiding, abetting, counselling or procuring the offence, which would carry the same penalty as the offence itself. You are liable to prosecution if, by your conduct, you cause or materially contribute to the commission of the offence, including by knowing assistance or encouragement. While it would perhaps take an extreme example for such a prosecution to be brought against a liquidator, particularly where that liquidator is reporting the criminal conduct at the same time, we are all aware that there are those operating around the fringes of the insolvency profession who will present a ‘fully worked out package’ for directors, which may tread perilously close. Clearly as regulated professionals operating in a position of trust, it is the duty of every qualified insolvency practitioner to preserve public confidence in the system by distancing themselves from anything that could be seen to encourage prohibited phoenixism, whether actively or by omission. It is no part of a liquidator's duty – notwithstanding the duty to get in and distribute the estate – to come within a hundred miles of doing anything that assists in or exacerbates the commission of a criminal offence. If in any doubt or discomfort at all as a result of anything you are asked to do as liquidator, you should commit to nothing with the director pro tem until you have had an opportunity to take any appropriate confidential legal advice that you feel you may need.

Rule 2. Observe your reporting obligations

Under s.218(4) IA 86 you must 'forthwith' (not a word used lightly in statute) report to the Secretary of State 'any criminal offence in relation to the company for which a company officer is criminally liable'. Since December 2012 we have had a 'new' consolidated *Dear IP* Chapter 20.10, which suggests that some offences can be dealt with in the D1 report, but only if this does not result in 'any significant delay'. Here creditors are likely extending credit to NewCo right now, or will the minute you complete the sale, so we would suggest that a delay of more than one business day from this point would be significant. As voluntary liquidator you are the only person of any standing in a position to protect the potential victims of this crime, and failure to do so could in certain circumstances result not only in regulatory action but also in a claim in damages for breach of duty under s.212 IA 86. If in doubt, report, and retain careful written records that you have done so in the manner set out in the *Dear IP*.

Rule 3. Practical steps

To advise in detail on the proper course here would require a closer examination of the background facts and a careful balance of risks, given the potential for criticism whatever course you choose. As a profession we are the first to criticise when directors are allowed to abuse the privilege of limited liability and/or when adverse reports do not result in prosecution. If we turn a blind eye to it here we expose ourselves to a charge of hypocrisy. We have a legitimate interest in promoting fairness and transparency in insolvency solutions, so best practice suggests at least that you write to the director complaining of the offence and suggesting in the most urgent terms that he take independent legal advice before you complete the envisaged sale. Although it is not for you to advise him, he may (at the court's discretion) still be able to secure the court's permission prospectively (though such an order would not absolve him of the earlier offence and would on these facts likely be heavily packed with conditions). The alternate, clean name, vehicle with proper notices route would probably work too, but would not be without difficulty. In extremis, you might feel you have to refuse to complete any sale other than to an unconnected party. If in doubt, you may wish to take your own legal advice, to which expense the creditors would not reasonably be able to object given your potentially conflicting duties.

I have been appointed trustee in bankruptcy of the sole shareholder of a limited company two months after her bankruptcy. It appears on investigation that the bankrupt filed her resignation as sole director just a few days before my appointment, backdated it to the date of her bankruptcy and at the same time someone else was appointed director, possibly a family member. Apart from the shares there is a 50 per cent interest in a valuable overseas property and a possibility the bankrupt may look to annul by IVA or payment in full. When, if at all, should I report my suspicions that the bankrupt has committed a disqualification offence?

You have grounds already for suspicion that the bankrupt is or has been acting as de facto or shadow director in breach of her disqualification under s.11 Company Directors Disqualification Act 1986, a strict liability offence capable of being charged even after an annulment of the bankruptcy. There may also be an aiding and abetting offence on the part of the 'family member'.

As to evidence of commission, your duty as trustee is to assist the Official Receiver in the performance of his functions under s.305(3) IA. *Dear IP* Chapter 20.10 directs you to report potential criminal offences so identified to the relevant Official Receiver as soon as possible, but you are also directed to include within your report 'sufficient evidence to establish that a *prima facie* case exists'. In the context of a bankruptcy disqualification, that 'suggested' evidence includes the 'director's explanation'. This is a little curious as the bankrupt here would presumably deny that she was a director but there is a definite expectation that the trustee will seek explanations from the bankrupt and/or the continuing/new director before filing his/her full report, notwithstanding that the Official Receiver should automatically have given all appropriate warnings to the bankrupt before the handover.

These requirements afford a trustee in bankruptcy a somewhat greater discretion than a voluntary liquidator enjoys, in determining when and how they should report on possibly criminal conduct. In theory, this division of roles should better allow a trustee to keep focused on taking appropriate steps to realise the value of the shares and of the interest in property. That said, the distinction may become blurred if, for example, an investigation into the breach of disqualification were to reveal other behaviour, actionable at the behest of the trustee, such as that the bankrupt had during those two months either alone or with others engineered the asset stripping of the company in which the estate holds the entire shareholding. As such, quite independently of the general duty on the office holder to co-operate in the prosecution of offences, it may be appropriate for you to maintain an active role and interest in any investigations being undertaken, particularly if there is likely to be a conviction that could be of value to you as trustee in any civil proceedings against third parties.

"It may be appropriate for you to maintain an active role and interest in any investigations being undertaken."

MIKE PAVITT is lead insolvency partner at Paris Smith LLP.

SARAH WHEADON is a partner and head of business crime and regulatory at Paris Smith LLP.

Technical update

Employment issues.

Recently it seems that the sleeping hound of employment law has been well and truly prodded with a distinctly mixed set of results. Technical Bulletin 102 referred to three cases. In the first (*Secretary of State for Business Enterprise & Skills* v. *McDonagh and Ors UKEAT/0287/12/LA* and *Secretary of State for Business Enterprise & Skills* v. *Pengelly and Ors UKEAT/0312/12/LA*) the Employment Appeal Tribunal (EAT) held that employees of a company in a company voluntary arrangement (CVA) were not entitled to payments from the National Insurance Fund in respect of claims arising in a subsequent liquidation following the CVA's failure. Apart from being manifestly unfair on the employees concerned (a point acknowledged by the court) it also raises the spectre of employees voting against a proposed voluntary arrangement because they are concerned by the consequences of failure.

"The consequence is that where 20 or more redundancies are contemplated it is necessary to consult. You have been warned!"

In the second case (*I Lab Facilities Ltd* v. *Metcalf & Ors UKEAT/0224/12/RN*) the EAT held that only the employees 'affected' by a transfer required to be consulted about that transfer. This constitutes rather better news for the rescue culture in that a potential purchaser of part of an ailing business is less likely to be put off by the possibility of facing claims for a failure to consult and to provide information about a transfer from those who would not be affected.

The third case (*AEI Cables Ltd* v. *GMB & Ors UKEAT/0375/12/LA*) was also encouraging. Protective awards are a recurring problem; the courts have held that consultation needs to be genuine and timely and insolvency is not a 'special circumstance'. In this case, however, the EAT held that it was unreasonable to expect an employer to trade while insolvent to enable it to provide information and to consult employees. It therefore accepted that in these circumstances there should be some mitigation and reduced the protective award from 90 days to 60 days.

Fair warning

The hound, however, is still awake. In a further case dated 30 May 2013[1] (*USDAW* v. *Ethel Austin Limited in administration UKEAT/0547/12/KN* and *USDAW and Ors* v. *Unite the Union & Ors UKEAT/0548/12/KN)* the EAT turned its attention to s.188 Trade Union and Labour Relations (Consolidation) Act 1992. The section refers to the requirement to consult 'where an employer is proposing to dismiss as redundant 20 or more employees at one establishment…' By contrast the relevant EC Directive 98/59 provides that consultation is required when at least 20 employees are to be made redundant 'whatever the number of workers normally employed in the establishments in question'. The EAT decided that in order to give effect to the directive the court was required to delete the words 'at one establishment' from s.188 TULR(C)A. The consequence is that where 20 or more redundancies are contemplated it is necessary to consult. You have been warned!

More EU insolvency measures on the way?

The European Commission has been very active in the field of insolvency lately. Readers will be aware of the proposed amendments to the European Regulation on Insolvency Proceedings that were the subject of this column in the spring 2013 edition of *RECOVERY*.

But it doesn't stop there. The commission is an enthusiastic proponent of the view that reducing the stigma of failure and encouraging the adoption of more liberal insolvency regimes by member states can stimulate the flourishing of enterprise and help to ameliorate the effects of the economic crisis. In the summer 2008 edition of *RECOVERY* Richard Heis examined the commission communication entitled *Overcoming the Stigma of Business Failure – for a Second Chance Policy.*

Entrepreneurship

The thrust of the paper was as follows. Growth and jobs depend on support for small and medium-sized enterprises, and the fostering of a more entrepreneurial culture. Entrepreneurship is inherently risky, but essential for a properly functioning market economy. Addressing the negative consequences of business failure and its negative image will help to boost enterprise and promote innovation and job creation. The paper set out measures that member states were encouraged to adopt in order to achieve this. It was gratifying to note that the UK was in the forefront of adopting measures that met with the commission's approval.

"On the aggregated index of the efficiency of the legal framework and procedures, the UK came out top."

Since that time, the commission has continued its work on this subject. In January 2011 it published a report entitled *Business Dynamics: Start-ups, Business Transfers and Bankruptcy*. This study set out to analyse the effects of certain legal and administrative procedures on entrepreneurial activity and ease of business in different EU member states. These included insolvency proceedings, and the extent to which failed entrepreneurs were afforded a second chance. The study concluded that:

- there is no evidence of a significant correlation between the level of entrepreneurship and the level of efficiency of bankruptcy procedures;

- differences in legal systems (common law or civil law or and its variants) were not correlated to the level of efficiency in insolvency procedures;
- whether the bankruptcy framework is debtor or creditor friendly does not seem to have an impact on the efficiency of bankruptcy procedures;
- the best performing countries complement an efficient legal insolvency framework with early warning systems;
- early warning systems have a positive effect on both employment and enterprise 'birth-rates';
- the need for second chance opportunities is not adequately recognised by member states.

Interesting results

The study, which was based on desk research, surveys and economic analysis, threw up some interesting results. In terms of the ex-ante efficiency of insolvency law the UK came second, behind Slovakia and ahead of Denmark. On the index of the efficiency of insolvency procedures, the UK came second to Sweden. On the aggregated index of the efficiency of the legal framework and procedures, the UK came out top.

Harmony rules

Another area that the commission has been examining is the possible harmonisation of certain areas of insolvency law across member states. In the autumn 2010 edition of *RECOVERY* we noted the study conducted by a committee set up by INSOL Europe at the request of the European parliament's Committee on Legal Affairs. The committee published a 158 page 'note' setting out its findings. According to the abstract, the note *'identifies and outlines disparities between national insolvency laws, which can create obstacles, competitive advantages and/or disadvantages and difficulties for companies having cross-border activities or ownership within the EU.'*

This report led to the European parliament resolution of 15 November 2011, which made recommendations to the commission for harmonisation of national insolvency and company law in certain areas.

These two strands came together in the form of a communication from the commission to the parliament, the council and the European Economic and Social Committee, dated 12 December 2012, entitled *A New European Approach to Business Failure and Insolvency*. The commission notes that the scope of the insolvency regulation is confined to cross-border issues, and does not seek to harmonise national insolvency laws. In its communication the commission identifies a number of areas where differences in national insolvency laws could create legal uncertainty and an unfriendly business environment, creating a less favourable climate for cross-border investment. The commission suggests that action may be needed in the following areas.

> "Any moves towards harmonisation will mean further significant changes to the UK insolvency regime."

- A second chance – the need to create a framework to allow honest entrepreneurs a second chance, and to differentiate between honest and dishonest bankruptcies.
- Period of discharge – reduce the period of discharge to a maximum of three years, to provide the opportunity for a second chance.
- Rules relating to the opening of proceedings – different rules as between member states can affect the ability to obtain relief, or to put in place out-of-court restructuring plans and avoid formal insolvency.
- The capacity for creditors to commence proceedings against a debtor.
- Filing and verification of claims – different rules can disadvantage creditors.
- Promoting restructuring plans.

The commission considers that special attention should be given to SMEs to give them a chance to tackle economic difficulties.

This was followed in July this year by a consultation launched by the commission intended to identify areas where divergences between national laws can create obstacles to rescue and present other disadvantages such as the risk of regulatory arbitrage. Respondents are asked to comment on examples of such divergences under the following broad headings:

Second chance for entrepreneurs in honest bankruptcies
- Supportive measures to promote a second chance.
- Discharge periods facilitating a second chance.

Conditions for opening insolvency proceedings
- Insolvency test and timeframe.
- Entities that are eligible as debtors and that can file for insolvency proceedings.

National legal frameworks for restructuring plans

Special arrangements for SMEs

Status, power and supervision of liquidators

Directors' duties and liability and professional disqualifications
- Directors' duties and liability in the vicinity of insolvency.
- Disqualifications in the context of insolvency proceedings.

Avoidance actions

One difficulty with this is the unsatisfactory way in which the commission conflates personal and business failure. It is questionable how far reducing the stigma of personal bankruptcy can promote enterprise in an economy where the majority of individual bankruptcies are caused by personal rather than business debts, and most businesses of any substance are incorporated. Furthermore, the concept of discharge has little relevance in the context of corporate insolvency.

Please respond to the consultation

Any moves towards harmonisation will mean further significant changes to the UK insolvency regime. The results of this consultation will therefore be particularly important. The consultation runs until 11 October, and members are encouraged to respond. UK respondents made up the greatest proportion of responses to the commission's consultation on the effectiveness of the Regulation on Insolvency Proceedings, and this was reflected in the commission's eventual proposals for amendments. The consultation can be completed online and can be accessed via: **http://ec.europa.eu/justice/newsroom/civil/opinion/130624_en.htm**

[1] Since writing this article it has been revealed the Secretary of State is to appeal the Ethel Austin case.

Feedback

Technical Bulletin 102 was issued in June. Its contents included:
- Registration of company charges
- Consultation on collective redundancies
- Threshold introduced for charging orders
- The Supreme Court rules on 'balance sheet insolvency'
- Administrator personally liable for legal costs
- Application for suspension of discharge – proper and improper use
- Cross border assistance under s.426 IA 1986 – Court of Appeal decision
- Employment Rights Act – no entitlement to claim in second consecutive insolvency
- 'Affected employees' in a TUPE transfer
- Protective awards and insolvency as a mitigating factor

Bulletins 103, on privilege and access to information, and *104*, on the capture, storage, maintenance and destruction of records, were issued in June.

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Property & construction

Maximising recovery in real estate

While the property market looks set to turn a corner, the market still remains problematic. **Paul Zalkin** explores the enforcement options available to lenders.

Putting aside considerations such as adverse publicity or complications arising as a consequence of interest rate hedges, the overriding objective of a lender with security over a distressed property asset will be to maximise recoveries, at the least cost, within an acceptable timeframe.

This sounds simple and is no different to any other corporate recovery situation. The means by which that objective is met, and the degree to which the outcome is successful, will depend upon a range of factors and a series of strategic decisions taken at the outset.

In short, the story of successful property recovery work is one of thorough planning, project management and effective teamwork.

Enforcement – what are the options?

Assuming all options are available under the lender's security, one of the first questions will be whether to appoint an administrator over the whole company, its assets and undertakings or to appoint a receiver over the asset – whether under the Law of Property Act 1925 (an LPA) or under the powers contained within the lender's fixed charge instrument (an FCR).

The significant procedural differences between receivership and administration are well rehearsed:

- a receiver is appointed to the asset only, whereas an administrator is appointed over the whole company and has a statutory purpose defined by paragraph 3 of Schedule B1 Insolvency Act 1986;
- in most circumstances, a receiver will act as agent of the borrower (unless that agency status is lost following the appointment of a liquidator) with a primary duty of care to the lender, whereas an administrator is agent of the company and owes a duty of care to the creditors as a whole;
- a receiver contracts in a personal capacity in performance of their duties (albeit often with a suitable indemnity from their appointer) whereas an administrator is agent of the company and has no personal liability;
- the receiver's powers will be limited to those set out in Law of Property Act and the security document but will typically include the power to take possession of and sell the asset, the power to collect rent, the power to enter into contracts and the power to trade or manage the asset under their control. On the other hand, as an officer of the court, an administrator has an additional range of powers and duties, including – crucially – powers designed to secure cooperation from third parties, the ability to deal with floating charge assets and the ability to investigate and pursue antecedent transactions.

> "The story of successful property recovery work is one of thorough planning, project management and effective teamwork."

- An administrator is in a stronger position to recover VAT suffered on certain costs arising during the process, has the benefit of a moratorium against proceedings which might otherwise frustrate the outcome, is legally entitled to take possession of a company's books and records, has control of a company's tax affairs, control over its employees and control over both the fixed and floating charge assets. These powers and rights are not available to a receiver.

In theory, the benefits of an administration seem compelling. However, it must be remembered that with administration comes higher compliance costs and potential prescribed part leakage in respect of floating charge rental receipts and post-appointment tax liabilities. That said, on balance, administration is often a more appropriate process in all but the most simple of situations.

Administration v. receivership

Any evidence of the degree to which lenders favour one procedure over another is largely anecdotal.

The official data for the number of receivership, administration and Company Voluntary Arrangement appointments in England and Wales between 2003 and 2012 (Scottish appointments are excluded from this analysis because the receivership regime does not apply, as such, in Scotland) shows receivership accounting for 46 per cent of appointments in 2003.

This was followed by a sharp decline over the following five years, possibly as a consequence of the simplification of the administration appointment regime after 15 September 2003.

Since 2009 the proportion of receiverships has increased slightly to an average of 26 per cent (as a proportion of total appointments), but the data would still seems to suggest that, given a choice, lenders favour the wider ranging powers and more holistic approach afforded by administration.

What key factors influence lenders?

Is the situation simple?

Of course, 'simple' is a wholly subjective term. At one end of the scale, the sale of freehold residential property owned by an individual, with clean title, no environmental issues and vacant possession could reasonably be described as 'simple'.

If that freehold were owned by a company and the property had a sitting tenant, the situation would immediately become slightly less 'simple', especially if the director was not prepared to deliver up a copy of the tenancy.

Add in a myriad of additional layers of complexity – corporate structures and debt, personal and cross collaterised guarantees, restrictive covenants, the existence of leases, taxation, VAT, capital allowances, plant and machinery requiring statutory inspections, environmental issues, the ongoing cooperation of employees of the asset owning company, the existence a trading business enhancing the underlying value (a care home for instance), premises or other statutory licences, non-cooperative shareholders and directors – and the term 'simple' no longer applies.

All of the issues listed above may compromise the effective management and sale of more complex property assets so, when they become a consideration – and when the lender has a qualifying floating charge – the recommendation will often be to appoint an administrator as a more robust recovery tool. It may mean bearing some additional compliance cost; however, 12 months down the line, when a sale by a receiver is being frustrated by a truculent director withholding records, it would seem a small price to pay.

Managing risk

The risks adopted by any receiver when dealing with more complex scenarios, especially when development land or part built property requires completion, or where, for instance, continuity of trade within a property portfolio is a factor, need to be considered.

A lender's security will generally provide that a receiver acts as agent of the borrower, albeit with a primary duty of care to the appointing lender. Nonetheless, a receiver contracts with personal liability and thus assumes considerable risk when undertaking more complex or contentious property work.

> Bearing some additional compliance cost would seem a small price to pay when a sale by a receiver is being frustrated by a truculent director withholding records.

Unless covered by a full indemnity, this could encourage a receiver – whether an agent or an insolvency practitioner – to adopt a more cautious approach in their dealings, to the detriment of the lender's overall outcome. However, as agent of the company contracting without personal liability – and with the benefit of an indemnity from the assets of the company – this is less of a consideration for an administrator.

Can the lender recover rent?

A critical point that has come to the fore for many lenders when enforcing property backed security is the degree to which rental receipts can be controlled and captured under their fixed charge. Here a potential anomaly arises between treatment of the rent in receivership and administration.

A receiver appointed over an income generating property asset under a lender's fixed charge should be able to collect rent and distribute those funds to the appointing bank. However, unless that rent was subject to a valid deed of assignment, or paid into a blocked account and mandated to the lender, an administrator appointed over the same property asset is likely to collect the rent as a floating charge company realisation, subject to dilution by way of general expenses of administration, unrelieved capital gains and corporation tax liabilities, preferential claims and the prescribed part.

VAT

The treatment and recoverability of input VAT suffered on costs and expenses in receivership and administration is another hotly debated commercial topic influencing lenders in their decision-making processes.

The technical complexities of this debate are an article in themselves but, the key point is that, while a receiver can now offset input VAT against outputs collected on rental receipts and property realisations, they cannot reclaim a net refund. An administrator, on the other hand, is in control of a company's VAT return and can recover net refunds for the benefit of the estate.

Of course, where input VAT is likely to be material (for instance, when incurring significant costs in completing a building development) and a lender has a qualifying floating charge, a simple solution might be the appointment of a receiver followed by an administrator to work concurrently so the administrator can recover the receiver's VAT. This, in itself, is not without its issues but is a workable solution.

An agent or an insolvency practitioner?

An administrator must be a licensed insolvency practitioner; however, in scenarios where the appointment of a receiver is under consideration, a lender can choose whether to instruct a property agent or a licensed insolvency practitioner.

Certain situations do not require the appointment of an insolvency practitioner, the argument being that they simply add an extra layer of cost and duplicate effort with the insolvency practitioner appointing an agent to manage and sell the property in any event. It is a good point when applied to some situations, but there can be no 'one size fits all' solution and there are certainly real benefits in adopting a collaborative project management approach, whereby agents and insolvency practitioners work together to deliver the best outcome using the right team.

Project management

Much of the value added by an insolvency practitioner when acting as receiver or administrator is derived from their ability to take on the role of project manager, acting as 'ring master' overseeing the development, agreement and implementation of strategy while impartially selecting the best team of agents to deliver the specialist work streams.

While this may strike some as less cost effective than an agent working alone, that is generally not the case. Once appointed, the receiver can run a 'beauty parade', selecting and appointing a team of diverse professionals driven to deliver the best outcome at least cost.

That team might include one firm of agents as property manager, another as asset manager, a third as quantity surveyor and another as planning consultant. Day-to-day responsibility for marketing strategy and sales negotiation will be delegated to an investment agent – possibly from an altogether different firm to the property or asset manager. In some instances the role of asset manager may be undertaken by the secured creditor, particularly where sophisticated distressed property investors hold the senior debt.

The insolvency practitioner, when acting as project manager, benefits from an ability to negotiate hard on fees while acting as central resource to drive activity and ensure common objectives are met.

Conclusion

In the context of my opening statement about a lender's overriding objectives, there are a number of questions that should be asked at the outset when exercising security over a distressed property asset.

How simple is the situation and would the more restricted powers of a receiver be sufficient to deal with the legal and practical considerations at play? Could a receiver's liability status adversely affect the outcome by limiting the scope of their work? Is there potential for leakage of the lender's recoveries in relation to rent and VAT? And finally, would the circumstances be better suited to the appointment of an agent or insolvency practitioner, who may deliver a better outcome by adopting a project management approach which, rather than putting them at odds with the agents, will allow them to work collaboratively for the good of all concerned?

> Much of the value added by an insolvency practitioner… is derived from their ability to take on the role of project manager, acting as ring master…

Ultimately each situation will be different and, while there is no simple way of measuring how decisions are taken, the fact remains that lenders have panels of both agents and insolvency practitioners for a reason. There is room at the table for all parties and, ultimately, the best outcomes are those where a collaborative approach and teamwork drive the agenda.

PAUL ZALKIN is head of property solutions at Moorfields Corporate Recovery.

Who needs a disclaimer?

Neil Smyth considers contractual obligations and personal liability in the light of recent cases.

Everyone reading this article is likely to know that the one thing liquidators can do, that administrators and receivers cannot, is disclaim onerous property pursuant to section 178 of the Insolvency Act 1986 (the Act).

A combination of the credit crunch and the rise of internet shopping have seen the high street hit hard and various insolvency processes implemented with a view to restructuring and reducing property portfolios. These situations, coupled with the current legal position following the *Goldacre* and *Luminar* decisions, have seen the rise in calls for administrators, in particular, to have the ability to disclaim what are perceived to be onerous leases.

As this article explores, however, while administrators and receivers do not have the statutory power to disclaim, two recent cases have supported the administrator's ability to ignore a company's contractual obligations and avoid personal liability for doing so, where to do so is in the best interest of creditors, suggesting that the right of disclaimer is not required in administration in certain circumstances.

The *Said* v. *Butt* principle and receivership

In *Said* v. *Butt* [1920] All ER Rep 232, it was held that a director of a company who caused his company to act in breach of contract was not guilty of the tort of inducing the breach of contract provided that he acted bona fide in the course of his duties as a director. This rule was applied in *Welsh Development Agency* v. *Expert Finance Company Ltd* [1992] BCLC 148, by a majority in the Court of Appeal to a receiver appointed by a debenture holder. Therefore, receivers, acting as agents of the company, are not liable for a claim for inducing a breach of contract (unless they acted in bad faith or beyond the scope of their authority).

> "There is some uncertainty about whether a receiver can always safely disregard a contract."

However, when disregarding a contract, the receiver must consider whether this would have a detrimental impact on the realisation of assets or would impair the company's ability to trade. If this were the case then the contract could not be safely disregarded (*Airlines Airspaces Ltd* v. *Handley Page and Another* [1970] 1 All ER 29).

The court's stance

There is some uncertainty about whether a receiver can always safely disregard a contract. In contrast to the decision in *Airlines Airspaces*, in some cases the court has enforced certain contracts against a receiver. This appears to be the court's stance where there is a contract that could be subject to an injunction or an order for specific performance.

However, it is generally accepted that a receiver is under no obligation to adopt the current contracts of the company and, as such, is free to disregard them. However, in practice, a receiver must be mindful of a number of issues before he or she can safely disregard a contract.

First, he/she must be satisfied that in disregarding the contract he/she is acting in a bona fide manner and not outside the scope of his/her power. When assessing this, he/she must consider whether disregarding the contract could have an adverse impact on that company's ability to trade or compromise the successful realisation of the company's assets.

Second, the receiver should contemplate whether the contract is one that could be subject to a specific performance order. If it is, the mere status of receiver will not prevent the court from making such an order. Therefore it is imperative to have regard to the factors that the court would consider when assessing whether a specific performance order would be appropriate.

Administration

In *Lictor Anstalt* v. *Mir Steel UK Limited* [2011] EWHC 3310 (Ch), David Richards J (whose decision was upheld last year by the Court of Appeal ([2012] EWCA Civ 1397)) heard an application by the claimant to join administrators to proceedings and an application by the first defendant for summary judgment against the claimant.

As part of those applications, the judge considered whether administrators could rely on a defence of justification for a claim in tort for inducing a breach of contract. The judge also considered whether the administrators could rely on the rule in *Said* v. *Butt* to hold that they would not be personally liable for inducing a breach of contract where acting in good faith in the course of their duties.

As noted above, the rule in *Said* v. *Butt* was extended beyond directors to receivers by the Court of Appeal in *Welsh Development Agency* v. *Expert Finance Company Ltd*. David Richards J could find no difference

> "Lord Hodge… could not see how administrators could perform their statutory duties in many insolvencies if legal justification could not be pleaded."

between an administrator appointed under schedule B1 to the Act or a receiver appointed by a debenture holder. He therefore held that administrators could rely on the rule in *Said* v. *Butt* to avoid personal liability for breaching personal contractual rights, provided they acted in good faith and within their statutory powers.

However, at a summary judgment application stage, the judge was not prepared to extend the principle and the defence of justification to the defendant, to the detriment of the claimant's purported proprietary rights, although he conceded that he saw force in the argument.

Despite the fact that administrators can rely on the rule in *Said* v. *Butt*, David

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Richards J highlighted the importance of the defence of justification for purchasers who want to be certain that they are buying assets free from third party rights. The judge made it clear that it was only *purely personal contractual rights* under consideration as schedule B1 to the Act provides for an administrator applying to court for permission to sell assets that are subject to proprietary rights.

David Richards J thought that the absence of similar provisions in schedule B1 relating to purely contractual rights was more likely to be because the legislator thought that administrators did not need court sanction to sell assets free of purely contractual restrictions. The judge was not therefore prepared to hold, as a matter of English law, that the rule in *Said* v. *Butt* extended to administrators ignoring contracts containing proprietary rights.

Breaches of contract

Legal justification was considered further last year in the Scottish case of *Joint administrators of Rangers Football Club plc* [2012] CSOH 55. The administrators asked the court for directions on whether they could be prevented from breaching contracts under which Rangers sold the income flow generated by season ticket sales. The concern was that these contracts were likely to have a significant effect on the price offered by interested purchasers.

Lord Hodge thought that administrators would have the defence of legal justification for inducing the company to breach a contract if the administrators could reasonably satisfy themselves that the continued performance of the contract (i) would impede the achievement of the administration's objectives and (ii) was not in the interests of the company's creditors as a whole.

Lord Hodge noted David Richards J's caution in *Lictor Anstalt* v. *Mir Steel*, but he could not see how administrators could perform their statutory duties in many insolvencies if legal justification could not be pleaded. The judge went on to express his opinion that third party purchasers, responding to an invitation to treat from an administrator acting properly within his powers, could rely on an administrator's defence of legal justification to avoid liability for inducing breach of contract.

Lord Hodge also thought it highly unlikely that a court would lift a moratorium to allow a creditor to pursue a purely contractual claim against the company as that creditor should be treated the same as all the company's unsecured creditors.

No sign of acceding

Conclusion While the clamour for an administrator to be able to disclaim increases, the legislator shows no sign of acceding to this view. The *Rangers* case, as a Scots law judgment, is only persuasive in the English courts and so we still await English law authority on the issue of legal justification across the board as regards administration.

> "Administrators now have additional authority behind them…"

However, administrators now have additional authority behind them pursuant to the *Lictor* decision in support of them relying on the rule in *Said* v. *Butt* to avoid personal liability for breaching purely personal contractual rights, provided they acted in good faith and within their statutory powers and it may well be that authority will follow David Richards J's comments on an administrator's ability to disregard contracts with proprietary rights attached.

With thanks to Lucy Osler and Matt Sherr of Taylor Wessing LLP.

NEIL SMYTH is a partner in the restructuring and corporate recovery group at Taylor Wessing LLP.

Removal of bulk solvent storage tank, following decontamination

Cleaning up distressed assets to unlock creditor returns

Specialist environmental liabilities and decommissioning risks consultant **Des Kelly** explains how cleaning up manufacturing sites ahead of asset disposal can maximise creditor return.

In an already challenging commercial property market, the true value of many industrial property assets is often hidden during an insolvent sale process. It is usually the case that time invested in evaluating and cleaning up industrial and commercial sites and properties can remove a major 'drag' on the eventual value of a property. The biggest unknown in the sale of an industrial property asset is usually the cost of responsibly clearing and securing a factory or site to adhere to the myriad of legal requirements regarding health and safety and environmental damage.

Hazardous materials

A building or property can be undervalued by assessing a worst case estimate for remedial work; typically an excessive provision that can be removed with proper evaluation or even treatment. This is where professional evaluation of the required clean-up and even undertaking the work ahead of the sale can prove a worthwhile investment by an IP. In particular, manufacturing plants, especially those where the storage or use of hazardous materials has caused potential contamination, can benefit greatly from this preparation ahead of disposal and this proved particularly true when pharmaceutical manufacturer Phoenix Chemicals went into administration and a safe and effective closure of manufacturing facilities in Bromborough, Wirral, was required as part of the administration.

> "Full decommissioning of the plant required safely removing in excess of 100 tonnes of hazardous chemicals."

Decommissioning

Phoenix Chemicals specialised in the development and manufacture of active pharmaceutical ingredients. To achieve a sale, the environmental permit had to be surrendered by the administrator, proving the site had been decommissioned and remediated to the satisfaction of the Environment Agency (EA). Decommissioning releases assets such as plant and machinery for sale and remediation removes the liability of ground contamination, which can affect the sale price of the land. Full decommissioning of the plant required safely removing in excess of 100 tonnes of hazardous chemicals and the administrator employed our firm of specialist consultants to provide a dedicated team to undertake specialist decontamination and a temporary health and safety manager to coordinate additional contractors working on the site.

We also managed the environmental permit for the site, which required regular liaison with the EA, including managing the inventory of chemical wastes removed and site investigation works to determine the extent of ground contamination resulting from previous site activities.

The process

Winterhill Site Ops began by auditing the plant to understand the former production processes and to determine what stage of plant run-down and clean out had already been achieved by Phoenix Chemicals. The firm also identified a number of factors that had the potential to affect the cost and timescale of the project. Importantly, these included the potential for ground contamination, which, if not addressed, would delay the surrender of the environmental permit. Regulatory liaison also played a key part in the project planning. The site operated under an environmental permit and was classified as sub-COMAH (Control of Major Accident Hazards) due to an inventory of hazardous chemicals.

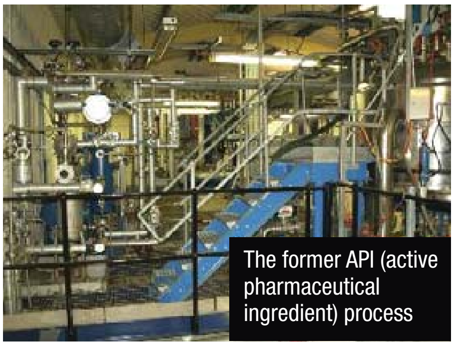
Because of their experience of decommissioning sites with hazardous chemicals, Winterhill Site Ops, with agreement from the EA and Health and Safety Executive (HSE), were able to take on all responsibilities relating to health, safety and environmental issues associated with the closure of the site. This included taking on the role of CDM coordinator under

> “The ground conditions underlying the site were assessed to determine whether there had been deterioration since the time of granting the permit.”

Construction (Design and Management) Regulations 2007. The consultants went on to manage the decommissioning works, which included systematic decontamination of all vessels, pipelines and reactors. The cleaning procedure was verified using swab samples and documented to provide evidence prior to sale. After decontamination, the consultants started the decommissioning phase to allow the corporate recovery firm to maximise the re-sale values of plant and machinery. This complex process included: isolating chemical, mechanical and electrical supply; providing supporting documentation and tagging individual items; assessment of contractor competence; induction of contractors on site; issuing permits for contractor activity; and supervision of contractor activity. In addition, the consultants had to undertake tool box talks to highlight specific health and safety requirements; plan regular site meetings for specific tasks; liaise with neighbouring sites regarding access; manage inventory of waste chemicals and document the removal of all equipment and scrap metals from the site.

Targets surpassed

In order to surrender the environmental permit, the ground conditions underlying the site were assessed to determine whether there had been deterioration since the time of granting the permit. After assessment of the ground contamination the consultants undertook a number of remedial measures to reduce the contaminant concentration by 97.5 per cent, surpassing the remedial target set by the EA.


The former API (active pharmaceutical ingredient) process


Storage of hazardous chemicals


Removal of decommissioned equipment

At the end of the process, Winterhill Site Ops supplied a report to support the surrender of the environmental permit detailing the former process; management procedures; the decommissioning process;

> “The industrial units were cleared of manufacturing equipment and returned to vacant industrial units for sale.”

site investigation works and the remedial measures taken to return ground conditions to the original baseline. The EA accepted that the regulated facility had been returned to a satisfactory state and the permit was surrendered.

The outcome

As a result of the process, the industrial units were cleared of manufacturing equipment and returned to vacant industrial units for sale; the plant and machinery were subsequently sold following the removal of the full inventory of chemicals and the contaminated ground beneath the site was remediated to the satisfaction of the EA enabling the environmental permit for the site to be surrendered. The remedial works rendered the site as fit for purpose and the contaminated land liability was removed, greatly improving the potential for selling the site. □

DES KELLY is the managing director of Winterhill Site Ops.

Crunch time for zombie businesses

R3 communications manager **Nick Cosgrove** examines the decline in the number of zombie businesses and the rise in the number of businesses in distress.

The idea of zombie businesses has proven to be a perennially popular one since R3 first drew attention to the phenomenon in 2011. Setting aside the fact that the story provides an excuse for newspapers' sub- and picture-editors to pull out their favourite zombie puns and pictures, one possible reason for the popularity of zombie businesses is that, so far, the concept has raised many more questions than answers.

What exactly is a 'zombie business'? Do zombie businesses actually exist? Does it matter that we have zombie businesses? Do we really *want* to see zombie businesses disappear?

Decline and fall

R3 has been tracking the number of these businesses – those that can only afford to pay off the interest on their debt, not the debt itself – for the past year, and its latest set of results suggests that things are beginning to change. Answers to the zombie questions might soon be on their way.

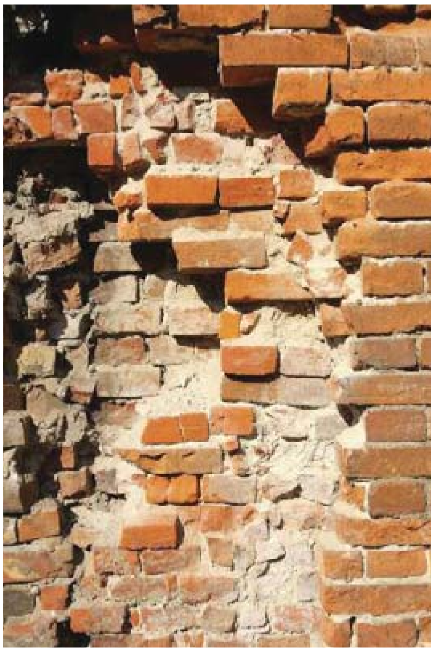
> Being unable to pay debts when due is a technical definition of insolvency.

There are now 108,000 businesses in the UK only capable of paying off the interest on their debts, down from 146,000 in June last year, and well down from the peak of 160,000 last November.

The decline in the number of these businesses has, however, been matched by a rise in the number businesses reporting even more acute signs of business distress. 137,000 businesses now report having to negotiate payment terms with their creditors, up from 130,000 a year ago; 134,000 businesses are struggling to pay their debts when they fall due, up from 110,000 in June 2012.

No more ticking along

Zombie businesses have been ticking along in large part due to the benign credit environment, but now even 'ticking along' is out of reach for some. Indeed, being unable to pay debts when due is a technical definition of insolvency.



The potential end of the zombie businesses phenomenon represents something of a conundrum. On the one hand, a jump in corporate insolvencies would be painful for those affected: job losses would rise, family businesses and personal projects will fail, and other businesses would be put at risk too. R3 research in 2009 found over a quarter of corporate insolvencies were caused by another business going bust.

At the same time, the danger for the economy is that capital and talent could be tied up in fundamentally unviable businesses that are being kept alive by cheap credit, forgiving creditors and plenty of government support. Zombie businesses, their products, owners and employees could be put to more effective use in new or different companies.

If the 'ticking along' businesses are reaching the end of the road, then the challenge for policymakers is to make sure the ripples of any spike in corporate insolvencies do not extend too far. An orderly wind-down will be needed.

Viable businesses

Either way, whether we want it to or not, it does seem that crunch time for zombie businesses is starting to draw near. With the climb in businesses with potentially terminal cash flow problems, and with the economy finally showing signs of a sustained recovery, it will soon become clear to creditors which of their struggling debtors have a viable business model, and which don't.

For some creditors, that decision point may have already arrived. The *Daily Telegraph* report that covered R3's latest zombie businesses tracker also points to regulatory pressure on banks to recognise bad debts and end forbearance.

Indeed, Q2 of 2013 saw corporate insolvencies increase for the first time in over a year. One quarterly increase doesn't mean a new trend though, so we'll have to wait and see what the next few quarters hold.

If there is a sustained peak in insolvency numbers over the next year or so, it would bring the curtain down on one of the more unique consequences of the financial crisis. Zombie businesses never

> It will soon become clear to creditors which of their struggling debtors have a viable business model, and which don't.

really turned up in previous recessions; save the last, each recession in the last 60 years has been dutifully followed by a spike in insolvencies as businesses that survived the recession by cutting back on investment failed to cope with the upturn in demand as the economy recovered.

Uncovering the cracks

The missing insolvency peak is not necessarily a bad thing: the grace period provided by cheap credit and creditor forbearance will have given some struggling businesses the chance to set themselves on the right path. But, for others, it has been a papering over of cracks. As economic conditions begin to change, this paper is being pulled away. We'll soon find out which cracks remain. ◻

NICK COSGROVE is communications manager at R3.

Protecting the industry: why it pays to complain

Sending a strong message to any company tempted to abuse the insolvency regime.

It is an unfortunate fact of the industry in which we work that insolvency practitioners are often unfairly criticised by virtue of the necessary work they do and the lack of appreciation among those outside of the industry about the constraints and controls with which IPs are required to comply. While unwelcome, such criticism in the main unfortunately comes with the territory.

However, where an IP and their work are deliberately mischaracterised, with the intended consequence that business owners and individual debtors are discouraged from seeking professional advice and assistance from an IP or that they are encouraged to stop their current insolvency procedure and enter a different one with another organisation, this is another matter entirely.

A conduit for complaint

To this extent, for a number of years R3 has been acting as the conduit for members' complaints to The Insolvency Service or the Office of Fair Trading (OFT) about so-called 'ambulance chasers' and unregulated organisations or individuals who market themselves to debtors or companies already in insolvency procedures, with a view to encouraging the debtor or directors to opt for a different procedure organised by the unregulated advisers, which ultimately may not be in the company's or the debtor's interests. Other such organisations or individuals may issue literature that seeks to dissuade directors and debtors from taking advice from IPs because the IP owes a duty to all creditors, whereas the unregulated organisation or individual claim to only work for, or owe a 'duty' to, the director or debtor.

One such example from the personal debt market is that of the activities of organisations such as the IVA Watchdog and the IVA Council, whose marketing literature suggested to debtors that they had been mis-sold an IVA and encouraged them to pay extra fees in order to switch to a different debt solution that ultimately may not have been in their interests. The OFT revoked the consumer credit licences of the four companies involved in 2011.

Ambulance chasers

In the corporate market, action is also being taken by the regulatory bodies. A recent example is that of Adam Smith Business Development Ltd and its

associated companies, Genesys 2000 Ltd and Company Corporate Transfer Ltd, which were wound up by the High Court earlier this year following an investigation by Company Investigations of The Insolvency Service. The court found that 'directors of ailing companies were misled into believing they could limit their civil and criminal liability, while creditors were misled as to the formal status of the insolvent company'. The Insolvency Service stated that 'we want to send a strong message to any company that is tempted to abuse the insolvency regime by indulging in such 'ambulance chasing' operations that we will get them.'

In addition to the two established routes for complaints to The Insolvency Service and the OFT, R3 has also begun to refer applicable cases to the Advertising Standards Authority (ASA). By way of example, at the end of 2012, R3 had received a number of complaints from members about advertisements that Mark Liddle LLP, a firm of 'insolvency advisors' based in Dorset, had included in a local business magazine. Of particular concern were articles that, in our view, sought to dissuade directors and business owners from seeking professional advice from IPs and made misleading comments about the work of IPs and the duties that directors owe to insolvent companies.

Code breached

Following a formal investigation by the ASA into one such article from October 2012, we are very pleased that the ASA upheld all of the heads of R3's complaint, concluding that the article was highly negative towards IPs, discouraged business owners from consulting them and implied that IPs would not be able to assist businesses due to the duty owed to creditors in an insolvency situation. As a result, the ASA concluded that the advert denigrated IPs, was misleading in a number of ways and made claims about the work of IPs that could not be substantiated, all of which breached the Committee of Advertising Practice (CAP) code in a number of ways.

As a result of its decision, the ASA has informed Mark Liddle LLP that all future adverts must not denigrate competitors, that any claims must be substantiated and that any statements must not mislead. We believe that this ruling is very encouraging, as it not only establishes a number of 'no-go' areas in terms of advertising that seeks to denigrate IPs and the insolvency industry, but also sends a clear message to other organisations using similar marketing techniques that their activities will not be tolerated.

While it would be nice to think that the behaviour of 'ambulance chasers' could be stopped for good, the reality is that other examples may continue to crop up in future. We would therefore ask members who encounter examples of the behaviour, marketing literature or websites of these entities to write to R3 (GRumney@r3.org.uk and Emma.Hobson@r3.org.uk) in order that we can refer such examples to The Insolvency Service, the OFT and the ASA as appropriate. We would also encourage you to refer any such examples directly to these regulatory bodies as appropriate.

GRAHAM RUMNEY is chief executive officer, R3.

EMMA HOBSON is R3's SPG manager and secretary to the R3 SPG committee.

Seaside insolvencies, hangovers and dips

Communications manager **Nick Cosgrove** considers the statistics within the last quarter's news.

Britain's personal debt hangover

The economy may have finally decided to knuckle-down with this 'sustained growth' business, but according to R3's latest Personal Debt Snapshot, significant problems remain with the nation's personal finances.

More than 20 million people – equivalent to half the adult population of Britain – are concerned about their current level of debt, up from 42 per cent in February. On top of this, one fifth (21 per cent) of British adults say they are 'very' or 'extremely' worried about their current debts, up from just 12 per cent at the beginning of the year. Meanwhile, 42 per cent of British adults say they struggle to payday, with 67 per cent of those struggling blaming the rising cost of living.

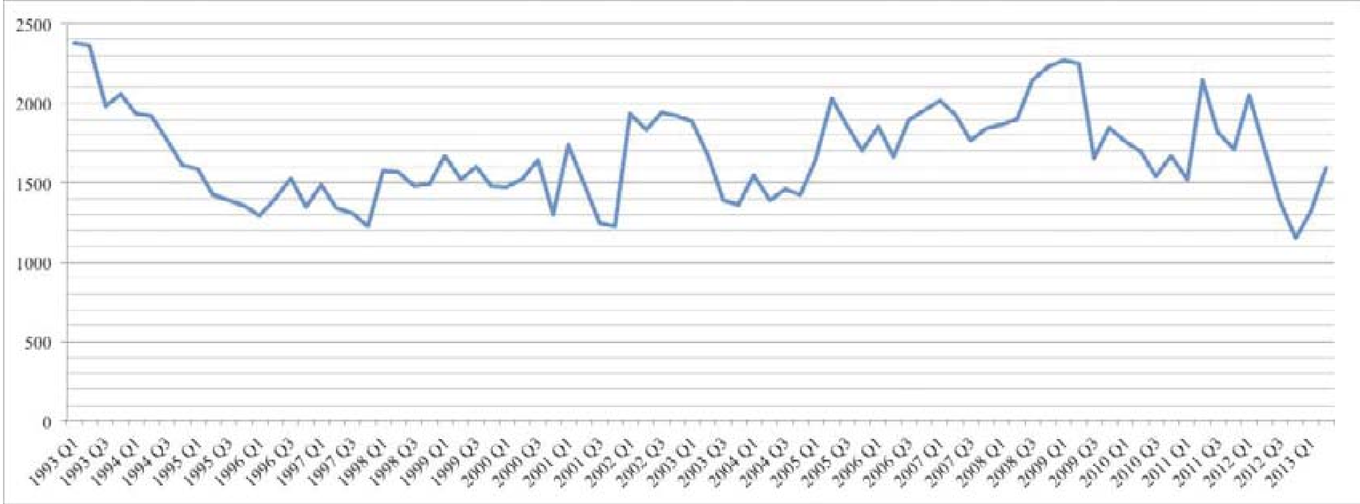
The Personal Debt Snapshot series (running since 2010) also shows that there is a gender difference when it comes to debt concerns: women are typically more concerned about their debts than men. In the last survey, 54 per cent of women said they were concerned about their level of debt, compared to 46 per cent of men. Only twice (in January 2012 and February 2013) have men been the chief worriers.

> "Only twice (in January 2012 and February 2013) have men been the chief worriers."

Unsurprisingly, personal finance concerns also differ significantly from social class to social class. The middle classes of the 'AB social grade' are easily the least pessimistic about their own financial situation, for example.

Back in April 2011, over 30 per cent of 'ABs' and 'C1s' thought their personal financial situation would deteriorate in the next six months; nearly 40 per cent of 'C2s' thought the same, as did over 40 per cent of 'DEs'. While the earlier pessimism has dissipated for all social grades, this is most obvious for the 'ABs'. Today, under 15 per cent of 'ABs' are pessimistic about their personal finances, compared to 20 per cent of 'C1s', over 15 per cent of 'C2s', and over 30 per cent of 'DEs'. Incidentally, pessimism has increased

Winding-up petitions by quarter



over the last six months for all social grades but one: the 'ABs'.

Payday loans dip

One of the few brightspots in the latest R3 Personal Debt Snapshot was the dip in the potential demand for payday loans, the biggest since R3 began tracking payday loans in 2011 (of course, opinions on whether or not this is a brightspot may vary).

> "One of the few brightspots in the latest R3 Personal Debt Snapshot was the dip in the potential demand for payday loans."

From a peak of 11 per cent of British adults saying they were likely to take out a payday loan in September 2012, this figure has now fallen to 7 per cent.

However, every silver cloud has a darker lining: payday loan popularity is still relatively high amongst young adults, with 17 per cent of 18- to 34-year-olds likely to take out a payday loan in the next six months, compared to just 3 per cent of those aged 35 and over.

Corporate and personal insolvencies increase

The Insolvency Service published the personal and corporate insolvency statistics for Q2 2013 on 2 August, with the data showing a notable increase in both corporate and personal insolvencies. On the corporate insolvency side of things, this was the first increase in insolvencies since the end of 2011.

According to The Insolvency Service, April to June 2013 saw 5,103 corporate insolvencies in England and Wales (4,129 liquidations, 192 receiverships, 622 administrations, and 160 CVAs), up 11 per cent from 4,616 (3,681; 236; 557; 142) in the first three months of the year.

Individual insolvencies climbed 3 per cent from the last quarter to 25,717 from 25,016, although this was 6 per cent down on the same three months the year before. The quarterly rise was driven by a second consecutive quarterly climb in the numbers of IVAs (12,116 in Q2, up 9 per cent from Q1); DROs fell slightly (to 7,132, down 1 per cent), while bankruptcies continued their precipitous fall from their peak of over 20,000 in Q1 2009 to 6,469 (down 3 per cent from Q1), making them the least popular individual insolvency route for the fourth quarter running.

While one quarter's worth of growth isn't enough to signal the start of a new upward trend in corporate insolvencies, it is interesting to note winding-up petitions – not recorded by The Insolvency Service – have been busily rising too. R3 research in early August found winding-up petitions had increased for two quarters on the trot since the beginning of 2013 – the first consecutive rise since winter 2008-9 – up 39 per cent from the last quarter of 2012.

Interestingly, it's not the usual suspects, for example HMRC, behind this rise: recent research from law firm Pinsent Masons found the number of winding-up petitions lodged by the taxman fell 42 per cent last year.

I don't like to be beside the seaside

Early July saw The Insolvency Service publish the breakdown of 2012 individual insolvencies by region; as has typically been the case, the UK's seaside towns, as well as the North East and South West, fared the worst. Of the ten English and Welsh local authorities with the highest individual insolvency rates, half – Torbay, Scarborough, Blackpool, Hull, Great Yarmouth – are on the coast. A sixth, Denbighshire, is home to two more seaside towns, Rhyl and Prestatyn.

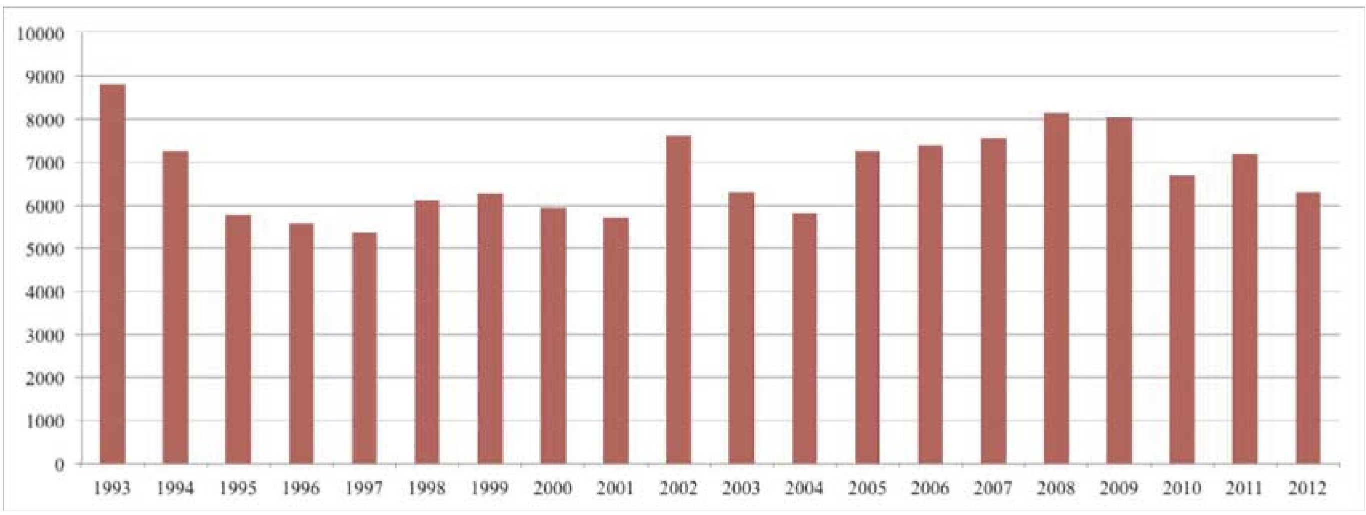
As you might expect, there's a big split in the experience of the wealthier and poorer local authorities.

Around 38 per cent of English and Welsh local authorities have above average incomes per head (according to HMRC data), and while almost half of all local authorities saw their insolvency rate increase over the last five years, just 29 per cent of these 'wealthy' local authorities saw their rate rise. On the other hand, 58 per cent of local authorities with below average incomes per head witnessed an increase in individual insolvency rates.

> "Of the ten English and Welsh local authorities with the highest individual insolvency rates, half are on the coast."

The other big difference is the incidence of bankruptcy. Bankruptcy rates are higher than IVA rates in just 7 per cent of local authorities, and 67 per cent of these authorities could be classed as 'wealthy'. Bankruptcy rates have the biggest lead over IVAs in Kensington & Chelsea (6.2 bankruptcies per 10,000 adults versus 2.6 IVAs), with other wealthy London enclaves, including Camden, Islington, and Westminster joining this club too. ◻

Winding-up petitions by year



Conflicting interests?

Tina Asgarian and **James Clarke** examine the latest developments in administrations, banks and mis-sold interest rate hedges.

Introduction

At the end of January 2013, the Financial Services Authority, now superseded by the Financial Conduct Authority (FCA), published the results of its pilot scheme review of the sale of interest rate hedging products (IRHPs) to small and medium-sized businesses. The pilot scheme findings concluded that there had been widespread and *'serious failings'* in the sale of IRHPs to small businesses in particular[1]. Of the sales of IRHPs reviewed, the FCA concluded that *'more than 90 per cent'* had failed to comply with one or more regulatory requirements.

Following the publication of the FCA's pilot scheme findings many of the leading banking institutions commenced a formal review procedure of IRHPs sold between 1 December 2001 and 29 June 2012. In conjunction with the review process, the CEOs of the banks participating in the review scheme struck an agreement with the regulator whereby they promised that only in exceptional circumstances (an amorphous discretionary power) would the banks foreclose on or adversely vary existing lending facilities without giving prior notice to the customer and obtaining their prior consent, until the conclusion of the review process.

While this temporary reprieve may be of some comfort to those small and medium-sized enterprises (SMEs) engaged in the review process, it does not assist those companies placed into administration prior to the CEO's promise, or those companies that have concluded the review procedure and now wish to exercise their rights before the courts without the threat of an administration order hanging over their head. If a company is placed into administration before it has the opportunity to pursue its mis-selling claim, then this is most likely to impact on the conduct of the administration. In a recent article published in *The Times*[2], Katherine Griffiths refers to the situation in which a bank places a company into administration (only to reap the rewards of a successful mis-selling claim by virtue of its standing as a creditor) as an *'extraordinary'* one, noting that many affected businesses view this as *'a huge injustice'*. But perhaps of even greater concern for insolvency practitioners, is the spectre of a perceived conflict of interest. As one individual quoted in *The Times* article opines, *'The bank is paying the administrator, so why would the administrator pursue a mis-selling claim against the bank?'*

> "If opposed by the company's creditors, the administrator may apply to court for directions regarding the conduct of the administration."

Investigating a mis-selling claim

In some cases, where there is a claim for mis-selling of an IRHP, companies have been able to obtain injunctive relief preventing the charge holder from appointing an administrator, as was the case in the Irish High Court decision in *Supergrace Ltd* v. *IBRC*[3]. Not all companies will be able to afford to go down this route, some may not be aware that they may be able to challenge the appointment of an administrator and others may not be able to mount a challenge before the administrator is appointed[4]. In all of these instances it will fall on the administrator to consider whether the company has a claim and how best to proceed.

It may be difficult for a newly appointed administrator – simply on the back of his appointment – to evaluate whether there might be a mis-selling claim against the company's bank. Notwithstanding vocal representations made by the officers and/or shareholders of the company, in some cases the administrator may only become aware of the existence of an IRHP when the company submits its statement of affairs. However, once the existence of an IRHP has been brought to his attention, a prudent administrator should look for key features of IRHP mis-selling. For example, customers in the property development sector appear to have been a sizeable minority of customers sold IRHPs, as they were frequently sold in conjunction with (and in some cases, conditional upon) the customer's acquisition of new property, which was financed by the bank. In addition, a failure to disclose the existence or potential size of costs to exit the product early; a mischaracterisation of the nature of the product; and 'over-hedging' – that is, either the term and/or the principal size of the IRHP exceeding those of the underlying loan – can all indicate mis-selling. Many IRHPs are linked to Libor; accordingly, some cases may conceivably also have a Libor rate-fixing element to the claim[5].

"Customers in the property development sector appear to have been a sizeable minority of customers sold IRHPs."

The potential impact of a mis-selling claim on the conduct of the administration

The prospect of bringing a mis-selling claim against the bank represents a complex and perhaps unenviable situation for an administrator. Depending on the degree to which the IRHP and the security documentation are interlinked, the existence of a mis-selling claim could have a significant impact on the conduct of the administration. At one extreme, rescission of the IRHP may result in the security instrument that gave rise to the bank's rights, such as a mortgage over freehold property, being set aside, allowing the company to exit the administration (on the grounds that it should not have been commenced in the first place). At the other extreme, the administration may continue, but if the security documentation that gave rise to the appointment is successfully challenged, the bank may find that it is relegated to the position of an unsecured creditor. In either circumstance, if a distribution is made to the (purportedly) secured creditor before the outcome of this investigation is known, the administrator may find himself in the invidious position of attempting to claw back payments, or defending himself against a negligence claim.

For those cases that fall somewhere in between these two positions, the recovery of monies paid under the swap could allow for a distribution to be made to unsecured creditors. Alternatively, a successful claim might simply be said to increase the pool of assets available for the secured creditor against whom the proceedings were commenced, resulting in nothing more than a pyrrhic victory for the company and its creditors.

The company may also be entitled to challenge the charge holder's exercise of its right to appoint an administrator, on the grounds that the mis-sold IRHP caused the company's insolvency – a situation which could arise in the case of 'structured' or 'digital' collars, under which the company pays a higher rate of interest if Libor falls below a floor[6].

Each case will, of course, turn on its facts, and there is no 'one size fits all' solution as to how best to conduct an administration if a mis-selling claim exists. Given, however, the potential impact on the conduct of the administration, IRHP mis-selling claims cannot be ignored and declining to investigate a potential mis-selling claim in order to avoid locking horns with the bank is simply not a proper option for the administrator. In many mis-selling claims the limitation period may be close to expiring, and it will be incumbent upon the administrator to protect the company's claim by either issuing protective proceedings or entering into a standstill agreement with the bank, while the administrator investigates the merits of the claim. In those cases where the company was placed in administration prior to the CEO's promise, the administrator may wish to consider whether the company should participate in the FCA review process[7] before the relevant limitation period expires. A failure to protect the company's position may expose the administrator to a negligence claim by the company following its exit from administration; alternatively, the administrator may find himself defending a challenge to its conduct by an aggrieved creditor or shareholder.

An administrator may not have sufficient time to consider whether the claim has any real prospects of success and if so how a claim of this nature may affect the conduct of the administration before he is due to circulate his proposals to the creditors and members of the company. In these circumstances, one option (bearing in mind the protection provided to secured and preferential creditors when it comes to the contents of the administrator's proposals) might be for the administrator to consider applying to the court for an extension of time for the submission of the administrator's proposal until such time as the administrator has obtained legal advice on the merits of the mis-selling claim. This would provide the administrator with some comfort as regards a potential negligence claim if the merits on the mis-selling action appear weak. This proposed course of action could be raised by the administrator at a meeting of the company's creditors and members. If opposed by the company's creditors, the administrator may apply to court for directions regarding the conduct of the administration (including an application for an extension of time to submit his proposals). If opposed by the company's creditors, the administrator may apply to court for directions regarding the conduct of the administration. While this may add to the overall costs of the administration, investigating the position early on may enable the administrator to claim an indemnity against the debenture holder for any liability that it has incurred if its appointment is invalidated.

"One possible solution might be to appoint an independent (third) administrator..."

Conflict of interest

If the administrator finds itself in a position of conflict in bringing a mis-selling claim against the bank that appointed it, the Insolvency Practitioners Code of Ethics provides useful guidance on what to do in this situation.

One possible solution might be to appoint an independent (third) administrator to deal with that aspect of the claim over which the current administrator faces a conflict of interest, without the current administrators having to give up their appointment. The appointment of additional independent liquidators (to deal with discrete aspects of the liquidation when a conflict arises) is perhaps more often seen in off-shore jurisdictions where conflicts of interest tend to arise on a more frequent basis. In our experience, provided that the appointment is court sanctioned and that suitable safeguards are implemented (for example, Chinese walls and maintaining separate court files with statements containing confidential information being kept sealed on the court file), this option can prove to » be a very effective means of managing the situation. Often, the costs associated with challenging an administrator on the grounds of conflict, combined with the costs incurred by the newly appointed administrator (and his team) in reviewing and becoming familiar with files, outweigh the costs of bringing in an independent administrator to take over the conduct of a discrete element of the administration.

Another option would be to assign the claim to an interested third party. For example the company's officers, creditors (a guarantor would be an obvious example) or an unconnected entity that specialises in the acquisition of these types of claim. Although a detailed analysis of assignments of claims (in this context) is beyond the scope of this article, before going down this route, it would be advisable to obtain legal advice, not only to determine whether the claim can be assigned but also for the purpose of making an application seeking the Court's approval of the assignment.

Conclusion

Mis-selling of IRHPs is a developing area, and one with both a high political and media profile at present, with the spotlight shining on the conduct of the banks like never before in recent history in the UK. Both for the sake of the impact on any distribution and the administrator's own risk management, it will behove administrators to tread carefully where IRHPs are identified. ◻

"Mis-selling of IRHPs is a developing area, and one with both a high political and media profile at present."

[1] Financial Services Authority, Interest Rate Hedging Products: Pilot Findings, January 2013

[2] 'Swaps victims claim banks may pocket compensation.' *The Times*, 29 April 2013

[3] High Court, Charleton J, Unreported, 22 January 2013

[4] In this last example, the company may wish to consider whether there exist grounds to challenge the appointment of an administrator

[5] See for example, *Graiseley Properties* v. *Barclays Bank plc* [2012] EWHC 3093

[6] In order to avoid post-appointment satellite litigation of this nature many banks are choosing not to exercise their right to appoint administrators out of court, and instead are taking on notice applications for court appointed administrators. An analysis of the arguments for and against challenges of this nature falls outside the scope of this article

[7] The FCA has produced a flow chart to assist companies in determining whether they fall within the FCA scheme (see: www.fsa.gov.uk/static/pubs/other/irs-flowchart-2013.pdf). ◻

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R3 membership categories

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

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

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

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

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

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

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

SAVE THE DATE

11–12 September
R3 Insolvency Conference
Hilton, Reading

17–18 October
R3 SPG Forum
Hilton Metropole, Birmingham

R3 events, courses and conferences

September

Date	Event	Venue
3–6	JIEB Student Workshops	Lawrence Graham, London
4	London & South East Women's Group BBQ	The Fence, Farringdon
9	R3/ICAEW Meeting	Ravenwood Hall, Bury St Edmunds
5	North West Regional Meeting	DWF LLP, Manchester
10	Midlands Summer BBQ and Cricket Event	Blossomfield Club, Solihull
10	South West & Wales Regional Meeting	Bristol Golf Club, Almondsbury
10	Southern Regional Meeting	RSM Tenon, Eastleigh
11	North East Regional Meeting	Eversheds LLP, Newcastle
11	Scotland Golf Day	Renaissance Club, North Berwick
12	Insolvency Conference	Hilton, Reading
12	North West Women's Group Evening	Selfridges, Manchester
17	Case Management	Marriott, Bristol
24	North West Golf Day	Hazel Grove Golf Club, Stockport
24	London & South East Regional Meeting	Haberdashers' Hall, London
26	Yorkshire Regional Meeting	Crowne Plaza Hotel, Leeds

October

Date	Event	Venue
1	Introductory Series – Liquidations 1 & Partnerships	Prospero House, London
1	Introductory Series – Liquidations 1 & Partnerships	Irwin Mitchell Solicitors, Leeds
1	Case Management	Crowne Plaza, Liverpool
2	Introductory Series – Liquidations 1 & Partnerships	Deloitte LLP, Birmingham
3	East Midlands Annual Dinner	Crowne Plaza, Nottingham
10	Personal Insolvency	Renaissance, Manchester
10	London & South East New Professionals Event	Moorfields, London
10	Joint IFT/Midlands Regional meeting	Villa Park, Birmingham
17–18	SPG Forum	Hilton Metropole (NEC), Birmingham
15	Restructuring Day	Copthorne Tara, London
24	Insolvent Trusts and Deceased Estates	The Queens, Leeds
24	Southern Annual Dinner	Grand Café, Southampton

November

Date	Event	Venue
1	London & South East Ladies Lunch	Park Plaza Westminster Bridge, London
7	Personal Insolvency	Hilton Tower Bridge, London
12	Introductory Series – Liquidations 2 & 3	Prospero House, London
12	Introductory Series – Liquidations 2 & 3	Irwin Mitchell Solicitors, Leeds
13	Introductory Series – Liquidations 2 & 3	Deloitte LLP, Birmingham
13	Midlands Quiz Night	Villa Park, Birmingham
13	South West & Wales Regional Meeting	Bristol Golf Club, Birmingham
14	Construction Insolvency	Palace Hotel, Manchester
14	Property Insolvency	Palace Hotel, Manchester
14	London & South East Regional Meeting	Haberdashers' Hall, London
19	Eastern Wine Tasting Event	The Old Music Room, Cambridge
21	Insolvent Trusts and Deceased Estates	Holiday Inn Bloomsbury, London
27	Yorkshire Regional Meeting	Crowne Plaza Hotel, Leeds
28	Advanced Restructuring	Holiday Inn Regents Park, London

Regional events

R3 events

For further information on R3 courses and conferences, please visit the R3 website **www.r3.org.uk**, where you can download the full 2013 programme. Alternatively, call the Courses team on 020 7566 4234 to request a programme by post.

Train hard, fight easy

Preparing smaller firms for the challenging future.

The title of this piece might suggest to those who know I practise Thai boxing that I am seeking to recruit people for this sport! In actual fact, I wish to encourage Smaller Practices Group community members to consider how prepared they are to face the challenges of another five or more years of austerity and then to train accordingly and, hopefully, without as many bruises!

Insolvency and case administration skills

I take it as read that IPs will have the requisite insolvency, rescue and restructuring skills – albeit these can always be upgraded by attendance on our courses. Additionally, for those firms that do not have in-house compliance teams, R3's technical bulletins, alerts and the technical library on our website are there to assist you in keeping up to date with important legislative and technical changes. Likewise, the recent SPG Technical Review and the October two-day SPG Forum conference are aimed at providing important technical updates to SPG members via focused sessions on issues of relevance to you. Our more broadly appealing national courses programme also provides a comprehensive calendar of technical material covering a wide range of insolvency and non-insolvency topics.

R3 has also put in place a broad range of webinars with the intention in great part to satisfy the needs of and demand from SPG members. Recent webinars have included in-depth reviews of SIP 2 and SIP 7, recordings of which are available on the R3 website, and future sessions will cover report writing, new SIPs 3.1 and 16, and an analysis of the alternatives to pre-packs, including CVAs. Early indications suggest that smaller firm members are pleased with this alternative offering of short, snappy training sessions, which they can attend from their own office. R3 will continue this form of training for the rest of 2013 and into 2014. Suggestions for sessions and content are always welcome!

Soft skills training

Matters outside of the insolvency sphere, such as building up a practice, business support, practice management and soft skills, are no less important in business. A dictionary defines 'soft skills' as 'behavioural competencies' but they are also called interpersonal or 'people' skills. These skills include communication, conflict resolution, negotiation, personal effectiveness, creative problem solving, strategic thinking, networking, team building, influencing skills and selling skills. Who would deny that these are vital for IPs to develop their practice, build their client base and to differentiate themselves from peer group rivals?

In the past couple of years, R3's offerings have included slots at the SPG Forum, the SPG Technical Review, sessions at R3's Annual Conference and at various regional meetings. As experience has shown, we have been prepared to broaden the range of such training as and when a verifiable demand was forthcoming. As recent evidence of this shows, and acting on demand and ideas from SPG members, we will be launching some pilot courses on soft skills training across the UK towards the end of this year. Watch this space for dates and locations.

> "[We are] currently reviewing the possibility of reinstating a 'benchmarking survey'..."

Business support and practice management

Members also ask, 'How can R3 help me build my practice?' My response is to ask if they have thought about their general business management competencies: HR issues, health and safety, insurance, staff recruitment, retention, development and deployment, which are areas important to the running of a firm as much as being a good IP. Here too, R3 can assist. We have, for example, run business/practice management sessions at past SPG courses, with a session on employment issues for IPs in their capacity as employers and one on health and safety covering the IP's duties and responsibilities in relation to their own firm. The 2013 SPG Forum this October includes a session on marketing your firm, which will focus on the use of social media and how firms can effectively use the different platforms available to market and grow their business.

Your SPG Committee is also currently reviewing the possibility of reinstating a 'benchmarking survey' for SPG members. Many of you may recall that R3 ran a similar annual survey between 2006 and 2008 to assist SPG members benchmark their practice against their peers in relation to staffing levels, WIP, type of work undertaken etc. While we might not be able to ask exactly the same questions in any new survey, not least because we must be mindful of increasingly strict competition rules, we feel that a new survey could assist smaller firms understand where they sit within their regional community and also on a national level as compared to similarly sized firms. I would be very interested to hear from you about what areas you feel we should benchmark performance against, such that it would help you in running your practice.

As you might have noticed, the theme running through this article is that R3, the SPG Committee and I are here to assist you as a smaller firm member. I would very much welcome any feedback on the topics covered in this article so please get in touch at Emma.Hobson@r3.org.uk.

EMMA HOBSON is R3's SPG manager and secretary to the R3 SPG committee.

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Interview with…

Professor Elaine Kempson

Professor Kempson discusses her review into insolvency practitioner fees.

Squeezing out time from her busy schedule Professor Elaine Kempson starts this interview with an apology if she has to jump up and deal with a Skype call. She is trying to pin down travel details for a business trip to Riyadh and the task is proving problematic. This busy academic researcher, who has twice headed up reviews into UK banking codes, is in international demand.

No punches pulled

Her review into insolvency practitioners' fees, commissioned by The Insolvency Service and recently published, doesn't pull its punches. Nor, with her reputation, would you expect it to, but equally it lays to rest some of the preconceptions and misconceptions surrounding the way IPs work and, somewhat surprisingly perhaps, finds common ground between The Insolvency Service, creditors and the profession itself.

> The report, though acknowledged to be balanced, contains some bruising comments from those contributing.

'I tried very hard not to formulate any views until I had gathered all the evidence and sat down to write my report,' she says. 'That's how I would approach any piece of research… It's really important to keep that balance and to listen. I think listening is the most important thing of all.'

Round-table dialogue

In conducting her review, she asked contributors to provide her hard evidence (not just views) and sought to corroborate all the evidence she received. She promoted round-table dialogue towards the end of the review process to consider the evidence that had been submitted.

'I did ask people for any further observations based on what had been discussed at the round table and for the most part, people just came back and said what a good discussion they felt it had been.'

Bruising

Nevertheless the report, though acknowledged to be balanced, contains some bruising comments from those contributing who still felt aggrieved about the processes of insolvency, especially where they feel they don't have a voice and fees are concerned. While some creditors said they would trust any IP appointed to conduct an insolvency process, others highlighted inefficient working practices, poor staff management and time recording and said they felt that IPs tried to make every penny out of the cases they handled.

A creditors' champion

A lack of communication and understanding at the very start of the process has a significant effect on the general public's view of the insolvency profession, the report states. It is the unsecured creditors, those who are at bottom of the pile when it comes to recovering their money, that Professor Kempson feels most need assistance, support and a champion.

Involving HMRC as the unsecured creditors' champion is something she would still like to see investigated further,

> Professor Kempson is quick to scotch the idea that she has recommended 'payment by results'.

even though the body itself considers undertaking such a role to be unviable. There are still those who ponder the point of trying to educate the general public as a » whole if they only ever find themselves creditors in insolvency once in their lifetime. But Professor Kempson suggests that while her report makes many recommendations, it is up to interested parties to find the solutions.

She gives the example of a joiner, who found himself owed money when a big luxury kitchen supplier he was a sub-contractor for became insolvent.

'He said it was going to be a 400-mile round trip to go to the hearing and as he had received a letter saying he could do everything by email, he decided not to go. He's an intelligent guy and although he was able to tell me the rate in the pound he was going to get from the CVA, he didn't know whether that was reasonable but felt that it was probably all he was going to get. So he voted for the proposals. A major source of his income had been hit and that was his main pre-occupation. The issue of IP fees was not on his radar,' explains Professor Kempson.

> "The report should be the starting point for detailed discussions and [Professor Kempson] doesn't rule out being involved if invited to do so."

'Think about it, the poor unsecured creditor has never heard of insolvency practitioners and not only doesn't know what all this procedure is all about or have either the time or inclination to find out, but also he's being asked to approve an hourly rate for the work that is done by the IP… some estimate of the cost of the job would at least give him an idea,' says Professor Kempson, going on to contrast the process of appointing an IP with that of employing a building contractor.

'I wouldn't hire a builder… on the basis he was going to charge so much an hour for an unspecified period of time. That's because I don't know what he's got to do and I've no way of judging whether he's taking far too long to dig my drains.' But an up-front estimate is only one of the proposals the round-table discussions produced.

Hourly rates

'There were various suggestions made and I've tried to reflect them all in the report. There is no doubt, both the disquiet and the actual problems – and one needs to separate the two things – derive from the fact that people are just signing up to an hourly rate.'

In fact, Professor Kempson's report shows that the headline hourly rate rarely gets recovered by the IP handling the case.

'Rightly or wrongly, the hourly rates that are charged in the professions that provide insolvency services were not part of my task.'

There's an audible sigh as Professor Kempson goes on to say that it was beyond her brief to say whether accountants' hourly rates are too high.

'But that is where the criticism is levied, simply because [aggrieved creditors] don't have anything else they can latch on to.'

Professor Kempson is quick to scotch the idea that she has recommended 'payment by results' but instead her review investigates payment as a percentage of realisations.

Different fee structures

'It's not my job to design a new method of remuneration but to inform discussions going forward,' she emphasises, adding that across the world there are different methods of meeting IPs' fees.

'I think it's for The Insolvency Service and the profession to consider how that would work in a fair way to deliver the sorts of fees that are required to handle the cases properly. Nobody would want to change the basis of the fees and find as a consequence that IPs couldn't do the job as diligently as they would want to do – that would be a big mistake.'

The report has a series of conclusions and proposals for change and Professor Kempson says it should be the starting point for detailed discussions. She doesn't rule out being involved if invited to do so and given the body of knowledge and evidence she has acquired and collated it sounds as if she would be exactly the person to chair a committee to do that.

Professor Elaine Kempson CBE

Professor Emeritus at the University of Bristol, where she was, formerly, director of the Personal Finance Research Centre. She is currently a consultant to the World Bank and a consumer adviser to the Central Bank of Ireland.

An internationally known and respected authority on consumer financial issues, she has more than 30 years' experience conducting research and contributing to policy development on various aspects of personal financial services, including banking, saving and investment, insurance, credit and mortgages and pensions.

Professor Kempson was appointed as the first independent reviewer of the UK Banking Codes in 2002 and was reappointed to review the Codes again in 2004. She was also appointed, with Sharon Collard, to undertake the first independent assessment of the Financial Ombudsman Service.

Until earlier this year, she was a non-executive director of the Financial Ombudsman Service board and, previously, was a non-executive director of both the Banking Code Standards Board and of the Department for Work and Pensions, Pensions Client Board, awarded a CBE for services to the financial services industry.

Common ground

'It was not part of my contract to see things forward. If somebody asked me to I would have to think about what role I could usefully play. But I hope that the last round table we held set the tone and certainly engendered the commitment to try to find a way forward… I think there's common ground so a lot of it won't be difficult to deal with.'

Professor Kempson goes on to explain that people look as if they hold opposing views but on investigation those differences are often nuances, slightly different takes on the same issue and frequently there's more common ground than the parties would have imagined. The trick is to cut through the apparent differences between the profession and those outside it and just say, 'Let's try to understand where the common ground is by getting all the evidence in from everybody individually and then sit them down and present them with the overview. Then they can see, "We agree about this. So why are we arguing about it?".'

> "Frequently there's more common ground than the parties would have imagined."

Challenges of the job

Having conducted the first independent reviews of the banking codes and now the high-profile and thorny issue of IP fees one can't help wondering what Professor Kempson finds appealing about taking on such commissions.

'I do wonder sometimes! When you're about halfway into it you do ask yourself, 'Why did I take this on?' It's a challenge. Intellectually it's a challenge but also I'm not a very typical academic. All my work is policy related so if I think that something is worthwhile, something that really is needed and if I can help mediate in all of that, I'm prepared to try.'

'It is really satisfying. When you get to the end and everybody sits back and says, yes, actually that's a fair reflection of the situation, there's immense satisfaction in that.'

As for dealing with the stress – whether that's of completing high-profile reviews or the challenges of securing a flight and accommodation in Riyadh for another enquiry, Professor Kempson seems to have found the perfect solution.

'I live on Exmoor,' she says. □

SANDRA KESSELL is the publishing manager of *RECOVERY* magazine.

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