

RECOVERY

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From the editor

You may see 'the perception of the insolvency profession' as an introspective theme, but IPs fail to understand stakeholders' perception of the profession at our peril. As Olivia Lancaster suggests at page 18, how we are seen and the extent to which we are understood (or not) goes hand in glove with our considering stakeholders' needs properly and communicating with them effectively. In order really to engage with and involve the many disparate stakeholders we encounter it is crucial for us to understand their thoughts and motivation. Paul Moorhead's insights on page 26, gained through careers firstly as a businessman whose company went into CVL and secondly as an IP, also emphasise that stakeholder engagement and communication are central to the IP's role in order to sweep away preconceptions and to demonstrate the value IPs bring to the cases we administer.

Corinne Ball shares on page 20 a US cross-border bankruptcy attorney's perspective of English insolvency, concluding that both the US and the UK have imperfect systems that nevertheless achieve a reasonable and equitable balance among the competing interests of all the stakeholders involved. These systems will continue to evolve, but meanwhile those of us operating within them must remember that our role involves much more than the implementation of a process: we must achieve and be seen to achieve that reasonable and equitable balance (which will often involve our consulting with stakeholders, agreeing the balance and convincing them of the value we delivered in achieving it).

Professor G Ray Warner (page 22) goes further, comparing the US Chapter 11 with the European Commission's *Recommendation on a New Approach in Business Failure and Insolvency*. I share his view that the EC Recommendation advances conformity while limiting creativity: it smacks of tinkering to address the lobbying of special interest groups such as employees and secured creditors, meanwhile overlooking how ineffective this renders the underlying insolvency tools.

Further examples of the impact of new or developing law on insolvency procedures are explained by Mike Woollard on page 12, in relation to The International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015, and by Stuart Frith and Tony Beswetherick on page 14, in relation to maritime law. Both articles describe secured claims defeating insolvency law, bringing to mind Professor Warner's observations that 'secured credit cares only about its own recovery. It is not concerned about worker rights, society or national industrial policy'.

Ken Baird and Katharina Crinson (page 10) identify IPs as, increasingly, creative business advisers. The changing nature of credit is likely to mean the continuation of that trend as insolvency stakeholders' interests broaden. With enlightened reform of insolvency legislation and regulation, we could help significantly to boost economic value, not only through facilitating rescue but also by stimulating entrepreneurship.



C. Laughton

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

Regulars

1 From the editor

Chris Laughton

Let's demonstrate the value IPs bring to the cases we administer.

4 President's column

Phillip Sykes

The insolvency gap between genders.

6 Opinion: Who pays the piper?

Vernon Dennis

Litigating for the benefit of creditors – the future of insolvency litigation.



Legal update

9 Legal Q&A

Lee Sennett

Your insolvency queries answered.

10 Legal update

Ken Baird | Katharina Crinson

The insolvency profession in the 21st century – from undertakers to renovators?

12 Technical update part I

Mike Woollard

Planes and boats, not trains.

14 Technical update part II

Stuart Frith | Tony Beswetherick

Shipping and insolvency: two regimes on a collision course?

17 Recent case summaries

James Morgan

The latest insolvency update.

The perception of the insolvency profession

18 The power of communication

Olivia Lancaster

The perception of restructuring and insolvency practitioners.

20 English insolvency and English practitioners through American eyes

Corinne Ball

The insolvency laws of both England and the United States.

22 Re-imagining rescue: the view from the United States

G. Ray Warner

An analysis of the European Commission Recommendation on business failure and insolvency from a US perspective.

25 Considering the public interest

Bree Taylor

The lessons learned from the appeal tribunal in the MG Rover case.

26 A fresh start

Paul Moorhead

The insolvency process from both sides of the coin.



R3 Matters

37 R3 events, courses and conferences

39 R3 contacts

40 SPG Forum 2015

Andrew Tate | Faye Robinson
SPG Forum preview and an update on recent developments in the bonding market.

Advertising

38 Advertisers' index

**Themes of
RECOVERY 2015**

WINTER Financial services



Features

29 Bolder the better?

Maria Kyriacou
Examining the new insolvency laws in Cyprus.

30 Successfully defending challenges to bankruptcy petitions

Victoria Prince
Lessons from *Gate Gourmet v. Gary Morby* [2015] EWHC 1302 (Ch).

32 Where are you heading this summer?

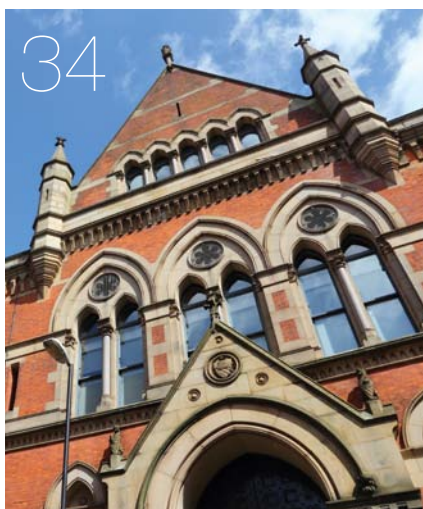
James Harrison | Alex Fox
Bankruptcy tourism and the case of the Banana King.

34 How complete is complete?

Kathryn MacLennan
The background behind a landmark decision regarding mis-selling claims in IVAs and its potential implications for the industry.

36 ATE – top tips

Sanjay Desai
The key do's and don'ts of getting on cover.



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Editor

Chris Laughton, Mercer & Hole

Editorial board

Theo Anderton, Lester Aldridge LLP

Nick Cosgrove, R3

Alan Hudson, EY

Cynthia Matthews, R3

Kevin Murphy, CVR LLP

Dan Redstone, Addleshaw Goddard

Graham Rumney, R3

Michael Rutstein, Jones Day

Phillip Sykes, Baker Tilly

Bree Taylor, Fladgate LLP

Peter Thompson, HSBC

Publishing manager Sandra Kessell

Tel: 01491 828939, sandra.kessell@groupgti.com

Publishing assistant Naomi Osinnowo

naomi.osinnowo@groupgti.com

Advertising manager Brendan McGrath

Tel: 01491 826262, Fax: 01491 833146

brendan.mcgrath@groupgti.com

Advertising executive Will Nevill

Designer Rhys Jones

Production Rebecca James, Paul Hinnell

Printed by Stephens & George

Forthcoming themes & advertising

www.r3.org.uk/recovery

RECOVERY is the quarterly magazine of R3, the Association of Business Recovery Professionals, 8th Floor, 120 Aldersgate Street, London EC1A 4JQ

Tel: 020 7566 4200, association@r3.org.uk, www.r3.org.uk

RECOVERY on the web

RECOVERY is distributed to R3 members as part of their membership benefits. After an issue of the magazine has been sent to members, a PDF of the previous issue is uploaded onto the R3 website. This is so that the information may be disseminated to all the insolvency and restructuring community. www.r3.org.uk/recovery

Published on behalf of R3 by

GTI Media, The Fountain Building, Howbery Park, Benson Lane, Wallingford, Oxon OX10 8BA
www.groupgti.com, Tel: 01491 826262

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President's column

Phillip Sykes considers the insolvency gap between genders.

Overhauled by the Cork reforms in the 1980s, the personal insolvency regime has continued to evolve since. Access has been widened with the introduction of debt relief orders (DROs), while the 2002 Enterprise Act heralded easier to enter individual voluntary arrangements (IVAs) and changes to bankruptcy.

One of the biggest changes to personal insolvency over the last decade and a half, however, has not been how the regime works, but who uses the regime.

What we have seen is women having gone from making up a disproportionately low number of insolvencies to a more proportionate distribution. Women make up 51 per cent of the population, but in 2000 they accounted for just a third of insolvencies; in 2014, they accounted for 52 per cent of insolvencies. Last year, there were 22.2 insolvencies for every 10,000 women and 21.2 for every 10,000 men – the first time that women were more likely to enter an insolvency procedure than men.

The size of the insolvency 'gap' between men and women depends very much on the insolvency option.

With bankruptcies, the least changed part of the personal insolvency landscape, the balance between men and women has remained relatively consistent: in 2000, 28 per cent of bankruptcies involved women, but by 2014, this had 'only' risen to 40 per cent. Notably, men of all age groups remain more likely to enter bankruptcy than women.

With IVAs, much changed in the early 2000s, and with DROs, introduced in 2009, things are quite different. Women are responsible for 51 per cent of all IVAs, while 64.4 per cent of DROs last year involved a woman (a proportion little changed since they were introduced).

It is the evolution of the structure of the insolvency regime that has been one of the key drivers of these changes. Simply put, the insolvency regime has become better at dealing with different kinds of problem debts and circumstances; and this has helped women much more than men.

Bankruptcies remain the best route for dealing with high-value debts or sudden drops in income that could be caused by job loss, business failure, or sudden or large liabilities. Given the make-up of the labour market, it's perhaps not surprising that men tend to feature more than women in bankruptcies.

According to the government's Burt Report on women in enterprise, published

in February this year, women majority own just a fifth of businesses and are a third less likely to start a business than men. Men are more likely to be employed too, and thus be in a situation to be affected by job loss: 79 per cent of men are in work, compared to 69 per cent of women (this gap, like the bankruptcy 'gap', is closing).

Moreover, men are more likely to be employed in the private sector and women are more likely to be employed in the public sector. This might be one possible explanation of why the male bankruptcy rate peaked higher and then fell faster than the female bankruptcy rate after the

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Bankruptcies remain the best route for dealing with high-value debts or sudden drops in income that could be caused by job loss, business failure, or sudden or large liabilities.”

financial crisis: private sector job losses peaked and fell relatively quickly; public sector job losses are being drawn out over the course of this decade.

As bankruptcies cater for the type of debts more likely to be experienced by men, so IVAs and DROs are useful for the type of debts more likely to be experienced by women.

Costs of living

Women earn less, on average, than men and are, on average, more reliant on benefits payments than men: according to the Fawcett Society, a gender equality charity, benefits form one-fifth of the average woman's income and one-tenth of the average man's. Those on low incomes, or reliant on fixed benefits, are more susceptible to the pressures of rising costs of living, and have been the prime beneficiaries of the introduction of DROs.

IVA numbers too are influenced by the cost of living, and also by consumer spending debts. Here, findings from a recent R3 survey on differences between the factors in insolvencies involving men and women are instructive. Asked to pick the most common factors behind insolvencies, 85 per cent

of R3 members said the accumulation of consumer debt was a common factor in insolvencies involving women, compared to 75 per cent who said the same for men. Other factors more likely to affect women than men included the cost of living (23 per cent for women, 11 per cent for men) and family-related costs (22 per cent and 8 per cent).

The changing make-up of those using the insolvency regime highlights the importance of keeping the regime updated to meet different needs over time. Removing barriers to the formal insolvency regime has helped people deal with their debts within the bounds of transparent and well regulated processes; it is likely that the thousands of people, mainly women, who have used a DRO since they were introduced in 2009 would previously have been 'locked out' of the insolvency regime.

By continuously evolving, the regime can continue to meet different needs and help those with problem debts – for their own benefit and for the benefit of their creditors and wider society.

Football insolvencies

On the subject of reforms to the insolvency regime, in June, the Football League changed its rules on insolvencies to secure a better deal for unsecured creditors. Many of the changes follow recommendations made by R3's Policy Group during meetings with football stakeholders and parliamentary events hosted by R3. We are obviously delighted with the changes: although rare, football insolvencies tend to be high profile and can give a misleading impression of how the insolvency regime works, as a result of the Football Creditors Rule.

Non-football creditors should not be left empty handed, and the fact that they often ended up in this position thanks to the Football Creditors Rule has been addressed in a manner that recognises the inequality of the Rule when compared with the objectives of the UK's insolvency regime. Many thanks to all involved. □



PHILLIP SYKES is the president of R3 and the head of London restructuring and recovery at Baker Tilly.

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Who pays the piper?

Litigating for the benefit of creditors – the future of insolvency litigation.



A cause of action is an asset of a particularly unusual nature, realisation of which can often strain relations between the insolvency practitioner and the creditors. Immediately post-insolvency creditor feelings may be running high and the wish to see instantaneous action that metes out retribution and not just brings compensation may be evident. However, the commercial imperatives of the IP (are proceedings worthwhile in terms of legal merit and recoverability, and of proportionate cost v. benefit?) often lead to lengthy investigations and dull creditor engagement. Conversely, creditors may be excluded from decisions regarding litigation, the claim being conceived in the confines of confidentiality and legal privilege, and by using available realised assets, commenced without consultation. Where ultimately the action provides little return or no return to creditors but recovery of costs and expenses, litigation may be perceived as being run for the benefit of the

IP and the lawyer. Into this combustible mix comes the question of funding.

It will have escaped no one's attention that on 26 February 2015, the government granted an eleventh hour reprieve to the insolvency profession; announcing that insolvency litigation will continue to remain 'for the time being' outside of the scope of the reforms introduced by the Legal Aid,

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Where the action provides little or no return to creditors, litigation may be perceived as being run for the benefit of the IP and the lawyer.”

Sentencing and Punishment of Offenders Act 2012 (LASPO).

No win no fee agreements, known as conditional fee agreements (CFAs), and the recoverability from the losing party of CFA success fees and after the event (ATE) insurance premiums have played an important part in the shaping of the litigation practices of both IPs and the lawyers acting for them. These arrangements remove creditor risk, limiting or extinguishing diminution in the insolvent estate and allowing a potential recovery where none was otherwise present.

Has the reprieve, however, stopped the profession from embracing change and developing innovative ways to litigate and provide return to creditors other than by use of the CFA model?

Is the recovery of CFA success fees here to stay?

LASPO removed the ability of claimants in commercial litigation cases to recover the CFA success fee and insurance premium

from their opponents, a measure driven in part by the growth in personal injury litigation and the consequent response of the insurance industry.

While the funding of commercial litigation is outside the scope of this article, it has been argued that despite the returns to the claimant being potentially reduced, the absence of CFA success fee recovery has not significantly altered litigation volumes. However, while a solvent claimant can make an informed decision as to whether to provide ongoing funding or alternatively, bear the additional cost of the success fee and premium from any reward, for the IP the costs will be borne from a recovery that would otherwise go to creditors.

In support of its campaign to see exemption extended, R3 estimated that should the exemption to LASPO be lost there would be a consequent fall in insolvency litigation with a cost to creditors estimated to be at £160m. Why is this?

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R3 estimated that should the exemption to LASPO be lost there would be a consequent fall in insolvency litigation with a cost to creditors.”

Firstly, in lower value claims – the fact that success fees and premiums would be deducted from the final award would make many uneconomic. Secondly, the respective bargaining positions of the parties would alter, making litigation less attractive: the defendant tactically employing delay and obfuscation as a means to ‘sweat out’ the claimant. In contrast, however, where the defendant faces the prospect of increased costs through a success fee and ATE premium, this delaying tactic has significant cost implications and risk.

Despite these compelling arguments it is questionable whether the government’s announcement marks a permanent change in attitude. As a result the insolvency sector must remain alive to the possibility that the exemption will be removed and will need to consider the alternatives.

Creditor funding

As the ultimate beneficiaries of the action, should the creditors not fund the claim? Indeed it is arguable that the CFA model has allowed major creditors such as financial institutions and government bodies (who have the ability to fund and may be advocating that action should be taken), to shirk responsibility and withdraw funding from cases, pushing the risk and capital costs to the IP and legal team.

In many cases, however, it is the

collective nature of the insolvency process and the need to coordinate a potentially disparate body of creditors that provides obstacles, with many creditors taking the not unreasonable view that they have already suffered the economic loss of the insolvency and would have no wish to speculate to accumulate.

In certain limited circumstances creditors may provide funding, but without an assignment of the causes of action the economic interest in the final award remains with the creditors as a whole, which acts as a potential disincentive for individual creditors to provide funding.

Third party funding

Over the past decade, the litigation funding market has been developing apace offering litigants an alternative to CFA arrangements. The announcement in February is, however, an indication that the government does not feel that the insolvency industry has embraced the funding industry and/or that the funding industry has not developed sufficiently to meet the challenges presented by insolvency cases.

While in the months leading up to the potential loss of the exemption some funders developed product lines (often tied to ATE coverage) to deal with lower value claims, a significant take-up did not result/was not necessary.

What potential developments might we see should the LASPO exemption be permanently lost?

Litigation funding

The provision of funding by a specialist funder or by potentially a single creditor clearly has its place. A significant advantage is that the funded party does not suffer the perceived lack of fire power that faces those who need to engage a legal team on CFA (particularly where the success fee cannot be recovered from the opponent).

The most significant problem in funding insolvency litigation is that the costs of proceedings can often be high; even in cases of low value, complex issues of law and fact often arise. This can mean that after deduction of the costs the funder’s percentage recovery from the award is limited. As a result, funders will seek to ensure that there is a high ratio of potential damages to costs; meaning in practice they are looking at high-value claims. Potentially where costs are recoverable from the losing party, this poses less of a problem, although clearly an IP will only take on a case where the funding costs and the irrecoverable costs (eg the office-holder’s fees) will still result in a significant return to creditors. As a result litigation funding fails to provide a solution in many cases.

Portfolio funding

Due to the difficulties in pursuing low-value insolvency cases funders may increasingly look at a model that sees a portfolio of cases being funded. The portfolio may

consist of cases linked by the same IP and lawyer, or consist of claims of a similar type. For the funder this provides a different type of risk assessment, requiring a close analysis of the team working on the cases, their competence in the type of litigation being pursued, and overall success rates, as opposed to the merits of the individual cases.

Work in progress funding

A short leap from portfolio funding is work in progress funding. Here the funder would simply provide an advance against the lawyers’ work in progress secured against recoveries. For the law firm this overcomes the significant cash-flow problems that arise in taking on CFA work, providing certain working capital and de-risking taking on work of this type. The cost of finance, however, will eat into the profitability of the work being undertaken and for some practices the loss of control over certain recoveries will be difficult to integrate into their practice model.

Hybrid CFA/DBA

Since LASPO and following the US-inspired model, damages based agreements (DBAs) have been available; anecdotally, however, they do not appear to have been significantly taken up. A DBA can see a legal team rewarded with up to 50 per cent of the damages and in high-value cases this could see significant return. The concept of a DBA does not, however, sit comfortably within the UK legal system, which sees the recoverability of the legal costs from the losing party underpinned by the indemnity principle. In contrast, a CFA retains a link to the value of the work actually being carried out, with the uplift/success fee compensating for the risk being taken.

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The provision of funding by a specialist funder or by potentially a single creditor has its place.”

If any success fee were to be payable from the potential damages one might see a move to tie the legal team into a percentage recovery from the damages. A hybrid CFA and DBA could arise with minimum and maximum recovery levels being calculated based on the eventual award. The need to define levels of success would require a great degree of sophistication at the outset of the arrangement, but may have application in some cases.

Assignment of claims

While the assignment of claims to parties potentially interested/involved in the »



litigation has been an option often utilised by an office-holder, the presence of specialist funds seeking to obtain a profit on investment has provided for a different dynamic. However, significant development

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The cost of finance will eat into the profitability of the work being undertaken...”

of this form of asset realisation is currently hindered as claims deriving from the office-holders' appointment and brought by the office-holder (eg Insolvency Act 1986 ss213, 214, 238 and 239) are not capable of assignment (see *Oasis Merchandising Services Limited* [1997] 2 WLR 764).

The government is, however, proposing to allow the assignment of such office-holder claims, a move that is currently due to be introduced with a raft of Insolvency Rule changes in April 2016. This move could well be the key to opening up new opportunities for funders and providing an alternative to the CFA/ATE model.

Firstly, IPs whose practices are more aligned to debtor-led liquidations may find it beneficial to treat causes of action as any other company asset and simply seek to realise value by assignment. While some investigation and valuation (ie assessment of the merits) will be necessary, these practices may prefer to provide an increasingly commoditised cost-effective service and not tie up staff in longer term

(and possibly more specialist) litigation/recovery work.

Where specialist funds take on a larger number of cases, economies of scale will result; with the fund possibly employing its own specialist in-house team of IPs and lawyers to run its acquired actions, as opposed to relying on external advisers.

Alternatively, rather than the fund running the actions, one might see joint ventures between a fund and IPs: the funder providing working capital to the increasingly specialist IPs who would take forward the assigned claims. This would have an attraction to practices that have grown on reliance of creditor services and/or are reliant on the legal team's engagement on a CFA. Of course, there is nothing to stop the fund and the IP insisting that the legal team continues to work under a CFA.

Most radically, the alignment of interests between the fund, the IP and legal teams could be met by the development of alternative business structures, providing a special purpose vehicle possibly created by a fund or in which a fund has a stake.

Conclusion

The government has provided for the continuation of the insolvency exclusion to LASPO for 'the time being'. With pressures on the insolvency industry over costs and remuneration, there is an inference that creditors do not receive adequate returns. Perhaps allowing the assignment of office-holder claim is in reality a means of promoting the market/the private sector to find a solution to this problem. However, while this is a solution that may see directors of failed companies being pursued more regularly, this will not necessarily lead to any better return to creditors.

As a result, despite the eleventh hour reprieve, this is no time for the insolvency profession to rest on its laurels. The profession must remain alive to the reputational damage suffered if it does not

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The concept of a DBA does not sit comfortably within the UK legal system.”

pursue active engagement with creditors and evidence that litigation is conducted on their behalf. Furthermore, irrespective of whether the CFA/ATE exemption remains, potential significant change will arise with the entry of new funders/products into the insolvency litigation market. These changes should be embraced and the innovation that the industry has consistently shown must be at the fore to ensure that this important form of asset recovery is not lost for creditors. □

VERNON DENNIS

is the head of business recovery and reconstruction at Howard Kennedy Solicitors.



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Legal Q&A

Lee Sennett answers your insolvency queries.

Q I am the sole shareholder of a company that went through a members' voluntary liquidation and was subsequently dissolved. It now transpires that there is an asset of value in the company but it will take between 12 to 18 months to realise. Is it possible to restore the company and give control back to management?

A A shareholder has standing to apply to court for an order restoring the company to the register pursuant to section 1029 of the Companies Act 2006 (CA). Section 1032 CA provides that *the effect*

“It should be possible to make the restoration application and the stay application at the same hearing (to save costs).”

of an order by the court for restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register. As such, a company that was in liquidation prior to dissolution will continue to be in liquidation once it is restored.

The application to restore would be accompanied by an application under s108 of the Insolvency Act 1986 (IA) for an order re-appointing the liquidator (or, if appropriate, a different liquidator).

In order for control of the company to be returned to the directors, an application to stay the liquidation would need to be made. Section 147 IA provides for the stay of a liquidation, but this only applies to compulsory liquidations. However, the court should be able to extend this to voluntary liquidations:

- Section 112 IA states that *'the court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partially to the application on such terms and conditions as it thinks fit, or may make such other order on the application as it thinks just.'*
- In the case of *Re Calgary and Edmonton*

Land Co. Ltd [1975] 1 WLR 355, Megarry J held that *'the jurisdiction is discretionary, and it lies on those who seek a stay to make out a sufficient case for it. In particular, the words "satisfied," "just and beneficial," "satisfaction of the court" and "ought to be stayed" seem to me to indicate that the applicant for a stay must make out a case that carries conviction.'*

In a solvent liquidation, the applicant should be able to make out a case that

- (1) no creditors would be prejudiced by the stay
- (2) the liquidator's fees and expenses have been paid in full and
- (3) you are the sole shareholder (and the only party with an economic interest).

So there would seem to be a good case for an order staying the liquidation. It should be possible to make the restoration application and the stay application at the same hearing (to save costs). However, in such an instance, it will be necessary to ensure that the Treasury Solicitor is in agreement. Arguably, the Treasury Solicitor should not concern itself with the stay application but there is a risk the court will seek their consent.

As a completely alternative suggestion, you may want to consider the liquidator's power to distribute in specie.

Q I currently have a debenture containing fixed and floating charges over the assets of a company. It has transpired that the company has a number of property assets and I was wondering whether I could register the debenture at the Land Registry rather than take new legal charges.

A The preference is always to take fresh legal charges where possible (utilising the further assurance clause in the debenture) so to avoid any priority issues that could arise. Generally speaking, where there is an existing debenture in place the options will depend on when the property was acquired by the company:

1. Where the relevant property has been acquired after the date the debenture was granted it will be necessary to request that new legal charges are executed and registered against the title. This is because it is only possible to grant an equitable charge over future acquired property. A

new legal charge is required to perfect your security and ensure your priority over other interests in the property. In the absence of granting new legal charges, you could consider registering a restriction against the property. It should also be possible to register a unilateral notice in respect of the equitable charge. This is an imperfect solution (as registered security is the preferred option) but should prevent the disposal of the property and, quite possibly, the registration of any additional security.

2. If the property was acquired before the debenture was granted, it may be

“The usual course is for the property to be specifically listed in the schedule to the debenture.”

possible to register the debenture and rely on the legal charge contained therein. The usual course is for the property to be specifically listed in the schedule to the debenture, but if it can be evidenced that the borrower was the registered proprietor of the property at the time the debenture was granted, the Land Registry will usually accept the application. It would also be advisable to register a restriction at the same time. It should however be noted that you would take subject to any entries on the register between the date of registration and the date the property was acquired. ■



LEE SENNETT is an associate director at Osborne Clarke.

The insolvency profession in the 21st century – from undertakers to renovators?

Ken Baird and **Katharina Crinson** look at how the role of the IP has changed and the regulatory implications.

Over the last two decades, the role of insolvency practitioners (IPs) has undergone an immense change. From a job that started as a corporate undertaker, being called in primarily to oversee the orderly distribution of a company's assets to creditors in the prescribed order, we now look to IPs as advisers in corporate turnaround.

The Enterprise Act 2002

Perhaps the biggest change in the move from liquidation to rescue was the introduction of the Enterprise Act 2002 in September 2003. The previous administration regime was a clunky and often expensive tool. Office-holders had to produce lengthy reports prior to their appointment and had no ability to make distributions to creditors, both of which significantly impeded the use of the procedure. The Enterprise Act changed this. With a streamlined appointment process, the flexibility of the out of court appointment – at relatively low cost, the severe curtailment of the administrative receiver regime and the ability to make distributions, the use of administration as a rescue tool increased dramatically.

This is demonstrated by comparing the 744 administrations that took place in 2003 (encompassing a large proportion of pre-Enterprise Act appointments) to the following year, with more than double the appointments at 1,602. Correspondingly and predictably, the use of receivership almost halved in the space of the year (with 1,261 receivership appointments in 2003 and only 864 in 2004). See the graph opposite.

The IP as business adviser

But it is not only the type of appointment that has changed the role of the IP, it is also the way we use IPs today. In today's world, the threat of insolvency is often sufficient to effect an ultimately consensual deal. For this threat to be effective, the IP needs to be closely involved in contingency planning and be prepared to take an appointment.

This does not ultimately mean that an appointment will take place, and, indeed, the aim is most often to avoid this, but all steps must be in place for an appointment to be taken if necessary. The role of the IP has thereby morphed from pure appointment taking and due execution to an advisory role. The IP will be closely involved in advising the board of directors, the company or a lender in the run up to a deal, whether it closes consensually or by way of appointment. In addition to the 2003 reforms to administration, the fact that pre-pack administrations are now fully recognised has also assisted the IP's new role. The threat of implementing a deal by way of consensual restructuring or pre-pack provides much more leverage. So what challenges face IPs in the modern world?

Regulatory challenges

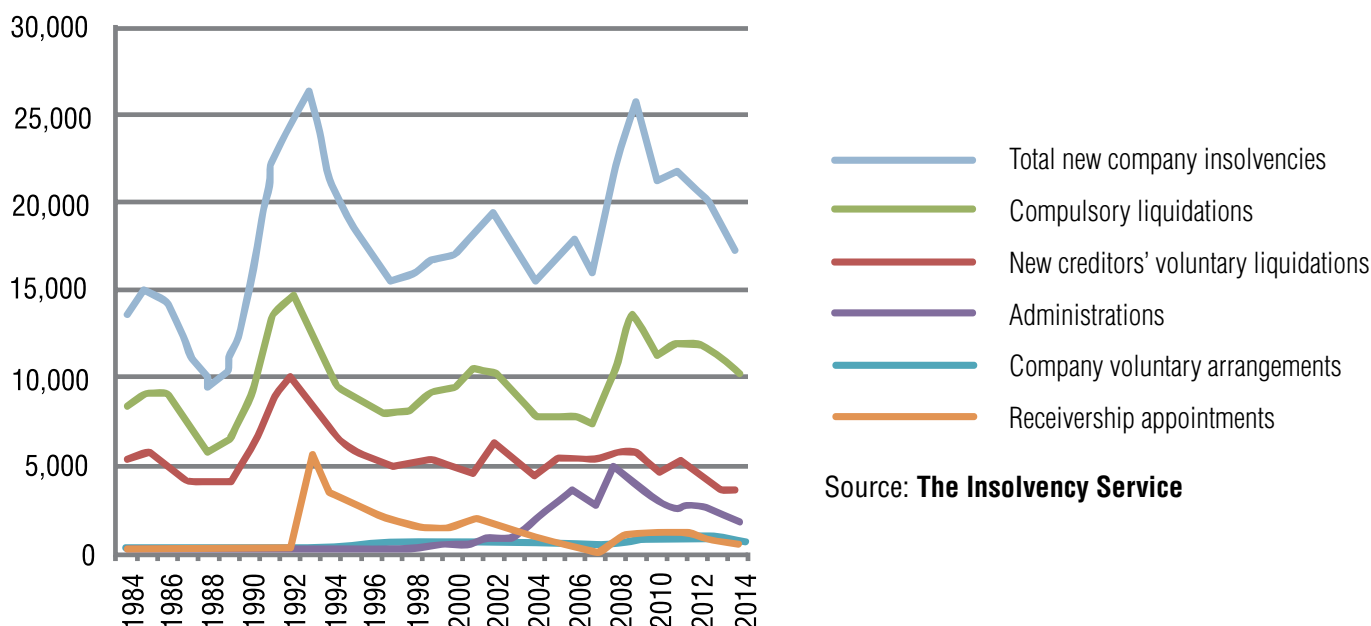
The new role as business adviser results in new challenges for IPs. As IPs are more involved in advising prior to appointment, the spotlight has focused on whether and when – given such a role – they should be able to take an insolvency appointment. There is a renewed emphasis on the code of ethics for IPs as well as 'soft' regulation introduced by the government. Before taking on an appointment, an IP should consider whether acceptance creates any threats to compliance with the fundamental principles set out in the ethics code. In particular, IPs will need to consider whether an appointment would pose any self-review or self-interest threats. An example of a self-review threat is where an IP or his practice has carried out professional work of any description (see ICAEW para. 400.13). The ethics code further asks IPs to consider not only the existence of a threat, but also the perception of others when deciding whether to accept an appointment (para 400.48). Creditors are increasingly aware of the professional conduct rules applicable to IPs and are not afraid to challenge appointments (see the latest case of *Wind Hellas*). Advisers will also need to think carefully about the choice of IP given the conflict risks. While a certain individual might be best suited as an adviser at an early

stage, it may later be determined that such a person cannot also take an appointment due to conflict.

But it is not only the ethics code that has come into focus. Due to increased pressure from creditor lobbying groups in relation to the pre-pack administration tool, the Joint Insolvency Body introduced statement of insolvency practice (SIP) 16 dealing with pre-pack administrations. The SIPs consist of a series of guidance notes issued to licenced IPs. The purpose of a SIP is to set out basic principles and essential procedures with which IPs are required to comply. While SIPs do not have the force of law, non-compliance with a SIP is a matter that an IP's regulatory body will consider for the purposes of possible disciplinary or regulatory action. SIP 16 was introduced in January 2009. This followed a spike in the use of administrations during the downturn in 2008 (with 4,822 administrations) and 2009 (with 4,161 administrations). For many creditors, SIP 16 did not alleviate concerns in relation to the use of pre-packs and in June 2014, the government commissioned Teresa Graham CBE to undertake a review of pre-pack administrations. Ms Graham recommended several changes to the current SIP 16. The government has endorsed these changes and they are expected to be implemented in a revised SIP presently. In addition, the government has created enabling legislation should IPs fail to comply with the revised SIP. The Small Business Enterprise and Employment Act 2015 contains a provision enabling the Secretary of State to make regulations prohibiting or imposing conditions on the disposal of a company's property by an administrator to a connected person. These provisions address the particular concern that many creditors expressed that prepacks were used to transfer value from creditors to essentially a phoenix company – where existing management or shareholders benefited at the expense of creditors.

The changing client base for IPs

Traditionally, a bank wishing to enforce its security over a borrower looked to IPs to take the appointment. This has fundamentally



changed due to a number of factors. First, the consolidation of the banking sector and the fact that there are fewer companies with a 'single bank' relationship. Credit is sourced from a wide spectrum of suppliers. Second, for reputational reasons, banks are now less likely to effect an appointment directly – preferring to leave the decision to place a company into an insolvency process to the board of directors. Third, and most important, the loan market has changed and with the advent of increased secondary debt trading, so have the players. The newcomers to the market, often funds specialised in distressed debt trading, are not looking to an IP for pure implementation of an appointment and enforcement process. Instead, they turn to both IPs and lawyers to assist in structuring a deal. As such, they have moved away from seeing the IP as office-holder and view the IP very much as restructuring adviser.

The insolvency professional as renovator of the law?

Over the last decade, practitioners have become increasingly creative at using traditional insolvency tools, such as administration or schemes of arrangement, to effect a debt restructuring. The use of the insolvency tool is to implement the restructuring and is not the end game. This has increased the IP's role as creative business adviser, rather than office-holder undertaker. Indeed, in certain circumstances, the insolvency tool that is part of the restructuring deal will only last for a very short time with entry and exit routes carefully planned at the outset. Unfortunately, the relative age and poor drafting of the insolvency legislation in the UK has made the insolvency tools available less flexible than the legislators intended. We have seen poor statutory drafting, particularly in relation to out of court administration appointments coupled with uncommercial first instance judgments. This has resulted in situations where a mere formality not being observed (such as the

directors giving notice of their intention to appoint administrators to the company, so essentially notifying themselves in a different capacity) has resulted in appointments being held invalid. Another example of poor first instance decisions can be found in landlord/rent cases in administrations, with decisions such as *Goldacre* and *Luminar*. The issue often is that due to the lack of funding to appeal such decisions bad cases are allowed to stand for years leading to arbitrary and uncommercial outcomes.

To a great degree, both these issues have now been fixed by either more pragmatic courts (in the out of court administration appointment case), by the Court of Appeal (in the landlord/rent cases) and by revised drafting to be inserted into the Insolvency Rules under the Deregulation Act 2015 (which partially addresses the mess that out of court director administration appointments were in).

In the context of schemes of arrangement, the legislation is sparse (a couple of sections contained in the Companies Act 2006) and practitioners have been using schemes very flexibly (including their recent application to foreign companies with the sole nexus of an English governing law and jurisdiction clause). While the English courts at first instance have shown, in this sphere, that they can be incredibly flexible and commercial, practitioners and investors have been rightly cautious in seeking consensus in contested deals and thus minimise the number of such judgments going to appeal. Most recently we have seen this in the case of *Apcoa*, where after a lengthy and hotly debated first instance hearing the parties settled prior to an already listed Court of Appeal hearing. How long practitioners will be able to continue this trend and avoid the risk of a potentially negative judgment remains to be seen.

Conclusion

The insolvency profession dealing with medium to large insolvencies and

restructurings has undergone profound changes in the last two decades. This holds true both for IPs as well as for lawyers acting in the restructuring space. For IPs, we have seen a shift from appointment taker, in charge of ensuring an orderly payout to creditors, to the role of restructuring adviser. This shift has come about partly due to legislative reform of the insolvency and restructuring tools (mainly with the Enterprise Act 2002) and partly due to the changing client base. We expect that the trend of the IP as a business and restructuring adviser will continue. This has already led to new challenges for IPs in the form of increased regulation and further challenges lie ahead, for example, where an IP is closely involved in the lead up to an insolvency as adviser and then takes the appointment. As is always the case, with new opportunities come fresh challenges. It is likely that the role of IPs will continue to evolve even further as the credit markets continue to fragment. Inevitably, an equal and opposing pressure for regulatory change will arise. It is hoped that any future regulation will be applied with a soft touch given the importance of the UK as an international base, particularly for European restructurings. □

KEN BAIRD is head of restructuring at Freshfields Bruckhaus Deringer.



KATHARINA CRINSON is a knowledge management lawyer at Freshfields Bruckhaus Deringer.



Technical update *part I*

Planes and boats, not trains.



Aircraft and ships are very expensive assets. They present legal issues not encountered with real property in that they can, and commonly do, move between jurisdictions. These issues are multiplied in circumstances of the insolvency of the owner of the asset or someone with a derivative interest in the asset. Shipping has been moving internationally for many centuries and most jurisdictions have developed rules to address the problems of insolvency and default, historically in England through the courts of Admiralty. Aircraft are much more recent assets and international agreements have featured predominantly in the development of the law. This article addresses English law as it relates to insolvencies of businesses involving both ships and aircraft.

Aircraft

The International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015 (the Regulations)¹ introduces into the law of the UK the provisions of the Cape Town Convention (the convention) and the related Aircraft Protocol (the protocol)² in so far as they relate to aircraft objects.³ Aircraft objects are airframes, aircraft engines and helicopters.⁴ Aircraft are airframes on which aircraft engines have been installed. Helicopters and their engines are not treated separately. The regulations adopt protocol Alternative A, principally enacted through Regulation 37. These provisions significantly modify

English insolvency law, particularly that applicable to administrations, in relation to the possession and use of aircraft objects and can impose onerous liabilities on insolvency practitioners. Accordingly, an understanding of these provisions is important for IPs and advisers when dealing with businesses that own, operate or have possession of aircraft objects.

The backdrop to the new insolvency provisions is the introduction through the regulations of ‘international interests’ in aircraft objects. A general explanation of such international interests is necessary because it is in relation to them that insolvency law is modified.

The regulations provide that international interests are those in uniquely identifiable aircraft equipment: granted by a chargor under a security agreement; vested in a person who is seller under a title reservation agreement; or vested in a person who is the lessor under a lease agreement.⁵

The agreement providing for the interest must be: in writing; relate to an object of which the chargor, conditional seller or lessor has power to dispose; enable the object to be identified as required in the protocol;⁶ and for a security agreement, must enable the secured obligations to be determined but not the maximum secured sum.

The convention provides for the establishment of an International Registry for registration of international interests.

The regulations⁷ set out the priority of competing interests. Broadly, a registered

interest takes priority over unregistered interests and registered interests take priority from the time of registration.

Ownership and other rights and interests in an aircraft engine are not affected by its installation in, or removal from, an airframe.

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Shipping has been moving internationally for many centuries and most jurisdictions have developed rules to address the problems of insolvency.”

Regulation 17 contains two exceptions to these priority rules. Possessory liens for work done on aircraft objects under the express or implied authority of persons lawfully entitled to possession of the objects and rights to detain aircraft under enactments, have priority over international interest whenever registered. The exceptions apply whether or not insolvency proceedings have commenced.

‘Insolvency proceedings’ are defined as: ‘*liquidation, bankruptcy, sequestration or other collective judicial or administrative insolvency proceedings, including interim proceedings, in which the assets and affairs of the*

debtor are subject to control or supervision by a court (or liquidation committee)'.¹

It seems clear that administration is included by the generic reference to collective insolvency proceedings.² Regulation 36 provides that an international interest is effective in an insolvency if it is registered in accordance with the convention and the protocol before the time that the insolvency proceedings are deemed to commence under the applicable law. The rules on transaction avoidance

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It provides that after an 'insolvency-related event' a 60-day 'waiting period' starts.”

applicable to the insolvency proceedings and the procedural rules relating to the enforcement of rights to property under the control or supervision of the insolvency office-holder remain.

The definition of insolvency office-holder includes not only an IP appointed (whether or not on an interim basis) but also a debtor in possession.

Regulation 37 is the core of the modifications to English insolvency law insofar as it relates to aircraft objects subject to international interests.

It provides that after an 'insolvency-related event'³ a 60 day 'waiting period' starts, following which the insolvency office-holder must either give possession of an aircraft object that is subject to a registered international interest or elect to cure all defects under the relevant agreement and must perform all future continuing obligations.

The 60-day waiting period seems likely to increase the leverage for the holder of an international interest, particularly given the obligation to have cured all defects during that period if the aircraft object is to be retained for longer.⁴

Regulation 37 (4) provides that until the creditor is given the opportunity to take possession of the aircraft object the insolvency office-holder must preserve the object and maintain it and its value in accordance with the agreement. This does not preclude its use 'under arrangements designed to preserve the object and maintain its value'.⁵ The linking of these obligations with the provisions of the relevant agreement probably imposes an obligation to ensure that the aircraft object is kept in the condition required by the agreement and, if it is not in that condition at any point during the waiting period, to put it in that condition. On the face of it that obligation is a continuing one so it is arguable that any retention of the object

during the waiting period, for however long, gives rise to the obligation. On that basis an IP would be wise to ensure that any aircraft object that he did not intend to put in condition was returned before he took office. This implies a thorough pre-appointment audit of the condition of aircraft objects.

The definition of insolvency related event seems to apply to a notice of intention to appoint administrators but there is no delineation between the obligations falling on the company while it remains debtor in possession and the obligations of the IP once appointed. They are both the 'insolvency office-holder'.⁶ Indeed, it seems more than likely that, on appointment, the practitioner will take on the obligation of remedying any pre-existing deficiencies in relation to maintenance and value preservation.

Regulation 37 (3) provides that it refers to the insolvency office-holder only in his official, not personal, capacity and funds expended on maintenance and preservation and curing defects are designated as administration expenses.⁷ However, that may not protect an administrator in circumstances where the costs involved exceed the assets not subject to fixed security and security international interests.⁸ The lack of distinction between the actions of the company and those of the administrator during the waiting period may well mean that the expense incurred by the company in maintenance and preservation after notice of intention qualifies as an expense of the subsequent administration. If so, this would seem to be the case whether or not the IP ensured that the aircraft object was handed over prior to his appointment.

The 'official capacity' formulation will not necessarily protect an administrator if the assets available to pay administration expenses prove inadequate. The obligation to maintain is a statutory duty and case law in other areas shows that office-holders may be personally liable for breach of statutory duty.⁹ It might be thought that the appropriate reaction to these provisions would be a pre-packaged insolvency sale. There are a number of cautionary points to this approach:

1. paragraphs 71 and 72 of Schedule B1 do not apply to the regulation, so a court-sanctioned disposal of aircraft object is not possible notwithstanding a market price sale;
2. paragraphs 43 and 44 of Schedule B1 do not apply after the end of the waiting period; and
3. the obligations relating to maintenance, preservation, cure and the performance of continuing obligations are statutory duties whether or not possession has been given to a purchaser.

In all these circumstances, unless consent can be obtained from the holders of international interests, the administrator will want to be very clear that any purchaser in a pre-packaged sale fully indemnifies him

for the risk of loss and that the purchaser or his guarantor has and will maintain adequate assets to cover that obligation.

The many difficulties imposed by the regulations on rescue through administration would seem to argue, in cases where the values justify the cost, the use of Companies Act schemes to deal with businesses reliant on aircraft objects. □

¹ SI 2015 No 912.

² The Convention on International Interests in Mobile Equipment signed at Cape Town on 16 November 2001.

³ The regulations come into force on the date specified in Article XXVIII of the protocol. Article XXVIII of the Aircraft Protocol provides that it 'enters into force on the first day of the month following the expiration of three months after the date of the deposit of the eighth instrument of ratification, acceptance, approval or accession, between the states that have deposited such instruments' and, in the case of other states, 'on the first day of the month following the expiration of three months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.' This date will be notified in the London, Edinburgh and Belfast Gazettes. It will also be possible to find out the date on which the Cape Town Convention and Aircraft Protocol enter into force for the United Kingdom by referring to the relevant page on Gov.UK. 1 November 2015.

⁴ See Regulation 5 of the regulations for definitions of the assets within these descriptions.

⁵ See Regulation 5 referring to the detailed provisions in the Convention.

⁶ Regulation 7 and Article VII: manufacturer's serial number, the name of the manufacturer and its model designation.

⁷ Regulations 16, 17 and 31.

⁸ It is probable that the definition does not apply to schemes under the Companies Acts as English case law on schemes indicates they are not insolvency proceedings.

⁹ Defined in Regulation 37(13) as 'the commencement of insolvency proceedings, or the declared intention to suspend or actual suspension of payments by the debtor where the creditor's right to institute insolvency proceedings against the debtor or to exercise remedies under the Cape Town Convention is prevented or suspended by law or State action'.

¹⁰ Regulation 37(6).

¹¹ Regulation 37(5).

¹² Regulation 5 and 37(3).

¹³ Regulation 37 (12) (b) and (c).

¹⁴ It is not clear that the salvage principle under *Re Regent's Canal Ironworks Company* (1875) 3 Ch.D. 411 will apply. It is also unclear whether a security international interest must necessarily be a fixed charge.

¹⁵ See for instance *Inland Revenue Commissioners v. Goldblatt* [1972] Ch 498.



MIKE WOOLLARD is a consultant at King & Wood Mallesons LLP.

Technical update *part II*

Shipping and insolvency: two regimes on a collision course?

It is no secret that the recent global recession had a catastrophic effect on the shipping industry. Overcapacity coupled with a dramatic reduction in demand caused charter rates to reduce by as much as 85 per cent. The appetite to lend into the industry dried up with banks seeking to 'extend and pretend' until conditions improved due to the difficulties of restructuring the debt in view of the nature of the underlying assets. Pressure upon lending institutions to confront the issues has seen some instances of private equity houses acquiring bank debt and seeking to leverage the asset in order to make a return on their investment. A familiarity with admiralty claims and their peculiarities is therefore of increasing importance to insolvency practitioners, as is an appreciation of the way that the two regimes interact with one another. It is an area that is not free from confusion. The rules of priority that apply to admiralty claims are likely to be counterintuitive to those of us more used to the statutory scheme enshrined in the Insolvency Act 1986 of looking after the secured creditors first, with unsecured creditors taking their chances of a dividend in accordance with the principle of *pari passu* distribution.

Further, the authorities are somewhat limited, no doubt because of the reduction over the years of vessels sailing under the British flag (meaning that vessels are commonly owned by a company incorporated in a foreign jurisdiction and subject to a foreign insolvency jurisdiction). This article will attempt to steer a course through these troubled and confusing waters.

What are maritime claims?

As a first step, it is helpful to identify two particular categories of maritime claims that can give rise to rights against a vessel (a claim *in rem*) and may have particular interest from an insolvency standpoint:

- **Maritime lien** – this is a species of charge that attaches to a vessel. The holder of a maritime lien is akin to a secured creditor who has 'super priority' including over the rights of a pre-existing ship mortgagee. The lien arises automatically when the cause of action accrues. It will arise in respect of claims for services done for a

vessel and damage done by it – such as claims for salvage of property, seamen's wages, and in respect of damage caused by the vessel.

- **Statutory lien** – this lien, which is more accurately described as a statutory right of action *in rem*, arises when the creditor issues its admiralty claim form. The types of claim that give rise to such a lien are identified in s20 of the Senior Court Act 1981 and include claims arising out of any agreement relating to the carriage of goods on board a ship.

Maritime claims can be asserted by arresting the vessel as a precursor to securing its sale. In broad terms, once the vessel has been arrested and then sold pursuant to a court-ordered process the proceeds will be applied first in meeting various costs, namely:

- the payment of the Admiralty Marshal's costs and expenses;
- the costs of the arresting party; and
- the costs of the party that obtained the order for appraisal and sale.

After those costs have been met, the remaining proceeds are distributed in the following order:

- holders of maritime liens;
- holders of possessory liens;
- mortgagees;
- the holders of statutory liens.

In the highly unlikely event that there is anything left, the remaining proceeds are available to meet any claims *in personam* against the vessel owner. There are broadly similar rules that apply in Australia, Canada, Hong Kong and Singapore. Other

a right *in rem* against the vessel may be of crucial importance. As will be appreciated, therefore, maritime claims of the sort discussed above have the potential to confer upon a claimant considerable advantages. Such claims may provide a claimant with rights, which even take priority over an existing ship mortgage. Interestingly, and perhaps surprisingly, for those who are steeped in the principle of *pari passu* distribution, such rights are largely respected under our insolvency regime.

Maritime liens and insolvency

The holder of a maritime lien is treated as a secured creditor and so its rights to pursue the vessel and to claim its proceeds are largely unaffected by the insolvency of the ship owner. In this respect, the rights possessed by the holder of such a claim are dealt with in much the same way as those of the holder of a fixed charge security in a conventional insolvency situation. Thus, if a winding-up order has been made against the ship owner, the automatic stay will apply under s130(2) of the Insolvency Act 1986, which means that a creditor with a maritime lien will need the permission of the court in order to commence the action. If the claim is in respect of a maritime lien where the cause of action accrued prior to the commencement of the company's insolvency, permission will be forthcoming in accordance with the usual attitude displayed by the English courts in relation to the enforcement of pre-existing security.

In this context it is unlikely to matter whether the insolvency proceedings relating to the vessel owner have been commenced in a different EC member state. This is because article 5.1 of the EC Regulation on Insolvency Proceedings (No. 1346/2000) provides that the opening of proceedings in another member state will not affect the rights *in rem* of creditors seeking to enforce such claims. Although the Regulation does not contain a general definition of a 'right *in rem*', the question whether a creditor possesses a right of such quality is likely to be a matter to be determined by our domestic law, and in such circumstances it would be surprising if creditors that English law treats as being secured creditors, would fall outside that definition. Such a conclusion also falls in line with article 5(2), which contains an illustrative list of specific



This article will attempt to steer a course through these troubled and confusing waters.



jurisdictions may vary, but the similarities often persuade creditors to pursue claims in jurisdictions with rules akin to our own. If the ship-owning company has no other assets, it is obvious that the availability of

rights *in rem*, and includes a person with the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds.

The position is likely to be the same, if the company has entered into insolvency proceedings in a non-EC state and the foreign office-holder obtains recognition of his appointment from the English court under the Cross-Border Insolvency Regulations 2006. In that event, any stay imposed as a result would ordinarily mirror that which is imposed by s130 of the Insolvency Act 1986.

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A familiarity with admiralty claims and their peculiarities is of increasing importance to insolvency practitioners.”

Statutory liens and insolvency

Although, as set out above, this category of maritime claim does not have quite the same status as a maritime lien, on present authority it would appear that a creditor who has issued proceedings prior to the winding-up petition will be treated as if it is a secured creditor. That was the issue decided in *Re Aro Co Ltd* [1980] 2 WLR 453. A creditor had issued an admiralty action *in rem* in England against a vessel and an action *in personam* against the vessel's owner prior to the presentation of a winding-up

petition against the vessel's owner. The ship was not arrested by the creditor because another creditor had already arrested it, and instead the creditor entered a caveat in the caveat book against the vessel. The vessel's owner subsequently entered compulsory liquidation in England. The arresting creditor obtained the sale of the vessel by the Admiralty Marshal and the monies were paid into court. The creditor applied to court for permission to continue the action *in rem* against the vessel and *in personam* against the owner notwithstanding the liquidation. The Court of Appeal held that the claimant should be treated as a secured creditor because it had initiated its writ prior to the commencement of the liquidation and was therefore in a position to arrest a vessel (and had therefore encumbered the vessel). The creditor was therefore permitted to continue its action as, being a secured creditor, it stood outside the liquidation. That analysis was followed in *Re Lineas Navieras Bolivianas SAM* [1995] BCC 66, which is discussed further below.

What is the position if the creditor issues its claim after the company has been wound up? One would expect that in such a situation the creditor cannot claim to be entitled to any security. To enable it to do so would be to subvert the insolvency scheme entirely. But what about the situation where the claim form is issued after presentation of the winding-up petition but before the making of the winding-up order? That question fell for consideration in *Re Lineas Navieras Bolivianas SAM*. The case involved a ship that was arrested in Liverpool. The ship owner was registered in a different jurisdiction but wound up by the English court under its powers pursuant to s221 of

the Insolvency Act 1986 to wind up a foreign company as an unregistered company. The liquidators sought to argue that the ship should only be encumbered by the statutory liens of those creditors who had issued their claims prior to the presentation of the petition and not those who had issued later. It was argued that any other result would mean that an unsecured creditor might be able to obtain an advantage over other creditors even after insolvency proceedings had been commenced. This was rejected by the judge on the grounds that the ship had been arrested by another creditor,

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If the ship owning company has no other assets, the availability of a right *in rem* against the vessel may be of crucial importance.”

which had obtained an order for sale prior to the presentation of the petition. It was said that as a result, any rights to the vessel were converted into a claim to the proceeds of sale, which were under the control of the Admiralty Court and subject to its procedures. For that reason, since the claim was in relation to those proceeds of sale, the claim was not against the company or its property, and so fell outside the scope of the stay imposed by s130. The judge held that if she were wrong she would in any event give permission for the claims to continue. This >>





decision has been the subject of criticism, not least because new claims *in rem* can still be brought against the proceeds even after the ship has been sold pursuant to the Admiralty Court procedure, a situation that is difficult to reconcile with the conclusion that the proceeds of sale cease to represent the property of the company. Ultimately, however, the judge's view that permission would be granted for the creditor to continue the proceedings demonstrates a commitment to the admiralty regime. It is an illustration of the way in which an otherwise unsecured creditor can significantly improve its position in the twilight period before formal insolvency commences notwithstanding that it results in the depletion of the assets that would otherwise be available for the general body of unsecured creditors.

Lifting the stay on proceedings

A trend that is worth noting, particularly as it is discernable from a number of shipping-related disputes, is the apparent readiness of the English courts to grant permission for creditors to determine their disputes against companies in foreign insolvency proceedings through the contractually agreed machinery for dispute resolution rather than through the foreign insolvency machinery. A series of cases have seen such a result where one of the parties to an agreement containing an arbitration agreement has entered foreign insolvency proceedings, which have then received recognition from the English court under the Cross-Border Insolvency Regulations 2006. In such cases, where the

foreign insolvency proceedings are 'main proceedings', there will be an automatic stay on proceedings against the company or its property in England and Wales to the same extent as that imposed by s130 of the Insolvency Act 1986. The court in exercising its discretion whether to lift the stay is required to do that which is just and fair in the circumstances. Although the usual stance of the court in the context of an English liquidation is to require creditors to utilise the liquidation proof of debt machinery in order to establish their claims against the insolvent company (eg *Bourne v. Charit-Email Technology Partnership* [2009] EWHC 1901 (Ch)) one can detect a greater robustness in requiring compliance with the contractual machinery in a foreign insolvency situation. Thus in *Cosco Bulk Carrier Co Ltd v. Armada Shipping SA* [2011] EWHC 216 (Ch), the court gave permission for creditors to commence arbitration proceedings to determine a complex shipping issue rather than leaving the creditors to establish their claims before a Swiss bankruptcy court. So too in the recent case of *Seawolf Tankers Inc v. Pan Ocean Co Ltd* [2015] EWHC 1500 (Ch), two companies were given permission to commence London arbitration proceedings against a shipping company that was in the Korean equivalent of administration despite the Korean office-holder's objection.

From the point of view of companies operating in the shipping sector, which have deliberately chosen arbitration in London as the forum for resolving their disputes, this apparent tendency to uphold their agreement notwithstanding

a supervening insolvency, is likely to be a welcome development.

Conclusions

Despite the troubles affecting the shipping industry and the inevitable insolvency issues that have arisen as a result, there has been little recent consideration of whether or not the primacy given to certain categories of maritime claim should continue to bind liquidators. The position therefore appears to be settled in favour of the shipping regime, at least for now. The potential for further conflict between these regimes is obvious, however, and the office-holder must be alert to the prospect of creditors taking unilateral action in order to improve their place in the order of priority. Furthermore, the continued existence of a stay to permit time to restructure a business should not necessarily be taken for granted. ▣

STUART FRITH

is a partner at
Stephenson
Harwood LLP.



TONY BESWETHERICK

is a barrister at
20 Essex Street.



Recent case summaries

Latest insolvency update from **James Morgan**.

PERSONAL INSOLVENCY ▾

***Bell v. Birchall* [2015] EWHC 1541 (Ch)**

It is not uncommon for an insolvency practitioner to find that part of the assets under his control is held on trust for one or more third parties. Where work is required to investigate the entitlements of those parties and then to distribute the funds appropriately, the IP will frequently apply for an order that his remuneration and expenses be paid out of those funds pursuant to the jurisdiction identified by Edward Nugee QC in *Re Berkeley Applegate (Investment Consultants) Ltd* [1989] 1 Ch 32. As Mr Nugee concluded at 50H:

The authorities establish...a general principle that where a person seeks to enforce a claim to an equitable interest in property, the court has a discretion to require as a condition of giving effect to the equitable interest that an allowance be made for the costs incurred and for skill and labour expended in connection with the administration of the property. It is a discretion which will be sparingly exercised; but factors which will operate in favour of its being exercised include the fact that, if the work had not been done by the person to whom the allowance is sought to be made, it would have had to be done either by the person entitled to the equitable interest...or by a receiver appointed by the court whose fees would have been borne by the trust property...; and the fact that the work has been of substantial benefit to the trust property and to the persons interested in it in equity...

But the recent decision of HHJ Pelling QC in *Bell v. Birchall* provides a salutary warning to IPs of the limitations on the court's jurisdiction.

Mr Bell was appointed as trustee in bankruptcy of Mr Birchall who was one of two bankrupt solicitors who had practised under the name 'Birchall Ryan'. The firm held a large number of files in relation to non-current instructions and about £250,000 in 12 client accounts. The Solicitors Regulation Authority (SRA) declined to intervene in the practice and Mr Bell said it was necessary for him to make arrangements for the files to be held securely and for the client accounts to be reconciled. He applied to court for an order that his remuneration and expenses in preserving the files and reconciling the accounts should be deducted from the client accounts.

The SRA opposed the application on the basis that Mr Bell had no role to play in safeguarding the client files or monies, as this was the responsibility of the solicitor

(who was not entitled to charge for that activity), or the SRA when exercising its powers of intervention (again at no cost to clients).

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The SRA opposed the application on the basis that Mr Bell had no role to play in safeguarding the client files or monies...”

Decision:

HHJ Pelling QC rejected Mr Bell's application. He held that the court had no jurisdiction to make the order sought because:

- (1) it applied only where the beneficiaries needed the assistance of the court to secure their rights, but such assistance had not been sought in the present case;
- (2) even if this limitation did not apply, Mr Bell did not need to carry out the work as it was the responsibility of the solicitor or, failing that, the SRA; and
- (3) such work would have been carried by either of them at no cost to the clients.

The judge went on to hold that he would not in any event have exercised his discretion in favour of Mr Bell primarily because there was no need for him to incur costs in relation to the files or client accounts: if there was concern his duty would have been satisfied by notifying the SRA that the files or the monies in the accounts were at risk.

CORPORATE INSOLVENCY ▾

***Stevensdrake Ltd v. Hunt* [2015] EWHC 1527 (Ch)**

This case concerns another salutary warning to IPs, this time in the context of personal liability for legal fees.

The claimant solicitors entered into a conditional fee arrangement (CFA) with Mr Hunt as liquidator of Sunbow Ltd in respect of the pursuit of misfeasance

claims. The claims were compromised on terms that constituted 'success' under the terms of the CFA, but there were limited recoveries.

The solicitors sued Mr Hunt (and his firm) for costs, including their success fee, of around £1m, and for an indemnity in respect of their liability to counsel for his fees. Mr Hunt defended the proceedings on various grounds below and on appeal including that (1) he was only liable to pay legal fees from recoveries and (2) he was not personally liable under the CFA. This was despite a provision in the CFA, which provided as follows:

You are personally responsible for any payments that you have to make under this agreement. Those payments are not limited by reference to the funds available in the liquidation.'

Decision:

The master granted the claimant summary judgment on the claim for an indemnity in respect of counsel's fees and ordered an interim payment of £75,000. HHJ Pelling QC dismissed the appeal against that order. As to the argument that Mr Hunt was not personally liable, the judge held that, although a liquidator is not personally liable simply by retaining a solicitor, the above provision meant that he was in the present case. It was also clear from that wording that liability was not limited by reference to recoveries in the case.

The master allowed the other grounds of defence in relation to the solicitors' fees, including estoppel, to proceed to trial on condition of a payment into court by Mr Hunt. ▢



JAMES MORGAN
is a barrister at St
Phillips Chambers.

► If you are a lawyer and would like to write for Legal Q&A please contact: matthewjukes@groupgti.com

The power of communication

Olivia Lancaster considers the perception of restructuring and insolvency practitioners.



As we know, the role of an insolvency practitioner and restructuring professional is often varied and demanding. It requires working in unfamiliar environments, at pace, to restore confidence, implement change and ultimately achieve the rescue of a company wherever possible, or where necessary to make that difficult decision to close a company.

However, the public and media perception of IPs and the insolvency industry is not so favourable with a disproportionate focus on fees earned and jobs lost rather than the outcomes achieved: jobs saved, businesses rescued, cash returned to creditors, confidence maintained.

Too often, IPs are seen as 'corporate undertakers' and it is automatically assumed that their appointment means a business is doomed. There seems to be a lack of public understanding about why an IP is engaged in the first instance, what the role entails, its challenges and the successes that can be achieved.

For example, how many media articles favourably reference an IP's work to reallocate resources (financial and human) within a business and to implement change towards more sustainable operations that have prospects for future growth and prosperity?

So, is there anything our industry needs to do to change this perception?

Moreover, is this perception, lack of understanding and how we communicate our role, negatively impacting potential outcomes?

If so, how do we ensure that we are considering the needs of all stakeholders (eg staff, unsecured and secured creditors, suppliers, customers, the public and regulators) and communicate effectively in order that we educate our wider communities on what can be achieved within an insolvency to benefit stakeholders? Today we live in a connected digital world

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Today we live in a connected digital world where live information is accessible at our fingertips.”

where live information is accessible at our fingertips, a 24/7 news cycle exists and the power and influence of social media is ever developing. Is a more innovative approach in the way we engage and communicate with stakeholders the answer?

The evolution of communication

Historically within a traditional insolvency appointment, face-to-face engagement

between stakeholders and IPs was fairly limited or non-existent and updates were provided by way of scheduled progress reports sent via post. To the layman with perhaps no previous experience of insolvency, the inclusion of many legal references to the Insolvency Act 1986 and how these shape the process implemented by the IP may be difficult to understand within the wider context of the situation. Furthermore, the messages communicated may be bleak due to a lack of funds being available to distribute to unsecured creditors. It is difficult to strike any personal chord with the readers of these reports, or convey the scale of effort that may be committed.

While this approach is entirely proper and professional, the limited interaction with stakeholders doesn't allow IPs to be presented in an especially warm light, nor does it encourage establishing any form of positive working relationship with stakeholders that can be developed throughout the process. These reports also don't necessarily address the differing needs of diverse stakeholder groups or the real-time desire for information.

Understandably, it may be difficult to provide a more optimistic overview of the events that led the company to fail and the resultant future consequences of previous actions and decisions on the business and local community. Yet if more consideration were given to how these messages could be delivered on an ongoing basis, significant

progress may be made in creating greater engagement with wider stakeholder groups and presenting our work in a more positive light.

The importance of stakeholder engagement and communication

The public sector is one particular area of the market where the focus on communication throughout a restructuring is already seen as a high priority, especially within businesses that operate in regulated fields and largely involve public and government participation. While these may be seen as the exception rather than the rule, and time and funding may not always support such an approach on private sector engagements, perhaps we can learn from the desired method required for these cases to both be and 'be seen' to be more successful in enhancing understanding of the insolvency market and engaging with our stakeholders.

Key to implementing a restructuring/turnaround plan within the public sector is the need to develop the plan alongside those who provide the service and are impacted, that:

- encourages transparency and honest communication. IPs automatically become more approachable to stakeholders;
- allows the stakeholders to feel like their differing needs have been considered as part of the overall plan, building confidence;
- ensures consistent messaging is provided to all stakeholders;
- enhances collaborative working relationships with different stakeholders, encouraging understanding and ownership of the end goals;
- encourages stakeholders to contribute their feedback to the process; and
- increases understanding and likely acceptance of outcomes that may not be their preference.

Fundamentally, if stakeholders feel that they have been involved with the restructuring and improvement process they are much more likely to take ownership of and drive implementation, that will in turn have a positive effect on future sustainability of the business after the IPs have gone. Certainly within public sector engagements, such as healthcare organisations, it has been proven that enhanced staff engagement really does deliver a better provision of healthcare services to the patients.

How to create effective stakeholder engagement and management

The following three stage approach has proved very effective in implementing a successful communications and engagement plan:

1. Upfront research to inform the engagement strategy and plans;
 - a. Who are the key stakeholders to engage with?
 - b. Understand the power, influence

and key interests of each stakeholder group.

2. Create the foundations for effective engagement;
 - a. Create a vision of what you are trying to achieve as the core focus.
 - b. Create a strategy that will allow the vision to be achieved.
 - c. Develop operational plans (both proactive and crisis management), which are reviewed and updated throughout the process to reflect any changes in the environment.
3. Implement the strategy;
 - a. Inform stakeholders of the vision and get their buy-in from the outset, listen to their feedback and consider how to involve them throughout the process (eg workshops).
 - b. Consider tailoring the communication style and method depending on the stakeholder group you are engaging with.
 - c. Consider when proactive changes may need to be made to the strategy as matters develop.

In turn there are three key principles underpinning this approach:

- be open and transparent;
- actively engage and collaborate with stakeholders; and
- be proactive to ensure stakeholders get the right information on a timely basis.



Is the method of communication appropriate considering the content of the message and has it been tailored to meet the needs of a specific audience?

Practical considerations and challenges

While the three-stage approach is clear on paper, as you continue to engage with a broader range of stakeholders, the following practicalities should be considered:

- are there local and national stakeholders – and how do you tailor to differing needs?
- how do you gain comfort that all stakeholders have been engaged with?
- has the level of power and influence been fully understood for each of these?
- is the communication method secure? while social media allows a wide range of stakeholders such as the general public, customers and employees to receive an update quickly, it does also present some risks in terms of security and how messages can be taken out of context and re-shared within different forums;
- how are costs controlled with the need to

communicate one message in a variety of forms?

- is the technology that is being used reliable?
- is the method of communication appropriate considering the content of the message and has it been tailored to meet the needs of a specific audience?
- has data protection been considered – how is the information being stored and what are the restrictions?
- how are the needs of different stakeholders being addressed? Best practice considers that information should be available and accessible to all, whether this be in the form of a different language or for an individual with a visual or hearing impairment;
- has the level of confidentiality been considered depending on the industry?
- are all messages being communicated in parallel to different groups and within a reasonable timeframe? and
- how are the local press or protest groups being engaged with to limit distress/misinformation?

Of course, the level and sophistication of the communication deployed will clearly need to be tailored for the audience. However, in any situation where financial or operational distress exist, the principles of effective communication to gain immediate cooperation and support hold true.

We can debate whether a stakeholder management plan is a 'nice to have' in many situations, but in the 21st century with the speed of communication and an information flow that we cannot always control, having a clear and relevant communication approach and strategy can impact the ability to implement change. While it may not change perceptions of the industry, it can create greater understanding and appreciation of what we are seeking to do. Consequently, if we do not engage and communicate our plans, others typically fill the void with speculation and misinformation.

Encouraging the use of transparent messaging and personalised engagement in different forums, can only enhance understanding and further educate stakeholders involved in the process about what our industry ultimately is seeking to achieve: recovery and sustainability within the economy. □



OLIVIA LANCASTER
is an executive in
restructuring at EY.

English insolvency and English practitioners through American eyes

Corinne Ball reviews her experience of insolvency practitioners and English law insolvency procedures.

I have been fortunate in my career to work on many exciting and novel cross-border restructurings and insolvencies. Among these cases, my work with English colleagues and insolvency practitioners remains fondly in my memory. Examples include *Dana*, *Collins & Aikman*, *TPG*, *Clinton Cards*, *Chrysler*, *Exide* and *Federal Mogul*. I have also worked on matters such as The Soundview Funds in the Caribbean, where liquidations are conducted on the English law model. What follows are some of my thoughts about my experiences with English insolvency practitioners and the workings of the English law-based insolvency systems.

Driving factors

The English and US systems have each been, to a large extent, driven by the capital structures of the troubled companies encountered and the identity of creditors. Complex debt structures, involving layers of secured and unsecured debt that are widely held and easily traded, have driven the evolution of Chapter 11 of the US Bankruptcy Code since its enactment in 1978 as part of what at that time was the most comprehensive overhaul of US bankruptcy law since 1938. In contrast, the English law system was developed in the context of capital structures where debt was (and is) predominantly funded and held by commercial banks on a secured basis. Interestingly, as debt structures in Europe have become more complex, involving high-yield bonds and junior lien creditors as well as banks, with holders often trading in and out of the debt, solutions that are hallmarks of Chapter 11 have become part of the English insolvency practice – notably ‘pre-packaged’ insolvency sales. By the same token, Chapter 11 has evolved to embrace a greater appreciation for, and reliance upon, restructuring professionals to monitor, if not run, Chapter 11 debtors. For instance, one might point to Bryan Marsal and his role in the Lehman Brothers Chapter 11 cases.

Perceived and real distinctions

My starting point is the supposed fundamental difference between English law insolvency practice and the US concept



of a ‘debtor in possession’ (DIP), whereby the management team that commenced the case generally continues to run the debtor’s business. I would contend that this supposed difference is overstated. After all, any use, sale or lease of property of a Chapter 11 debtor’s bankruptcy estate outside the ordinary course of the debtor’s business requires court approval on notice to key constituents, which generally include secured creditors, any official committee of unsecured creditors or shareholders and various governmental authorities (eg pension, tax and securities law enforcement agencies). As a consequence, the Chapter 11 process is extremely court-centered and relies heavily on specialised bankruptcy court judges. Not surprisingly, that dominant feature results in lawyers having a central role in the Chapter 11 process.

A second and less obvious difference between the English and US regimes is that Chapter 11 encourages, if not demands, active, direct creditor participation and negotiation. For that reason, Chapter 11 provides for ‘fee shifting’, making the bankruptcy estate responsible for paying the fees and expenses of advisers, including legal, financial, accounting and investment banking professionals, to any official committee of creditors or shareholders appointed in a Chapter 11 case and, in more exceptional cases, to individual creditors who make a ‘substantial contribution’ to a Chapter 11 case.

The appointment of an official committee means that two fiduciaries – the committee and the DIP or a bankruptcy trustee – are responsible for the resolution of the proceeding. Unlike under the English system, responsibility for the case is not delegated to a well advised insolvency practitioner. The DIP is charged with maximising value and the committee is entrusted with negotiating (and at times litigating) on behalf of its constituency to bring the Chapter 11 case to a successful conclusion.

From my viewpoint, the English system delegates the authority for implementing the restructuring or insolvency to an insolvency practitioner. While this is counter to the fundamental creditor activism encouraged by the US Bankruptcy Code, it simplifies the decision-making process and the steps needed to bring about the desired resolution for the stakeholders. Moreover, the legal cost appears to be lower in English cases. Nonetheless, an insolvency practitioner charged with running the business and resolving the case, as the sole fiduciary in that position, may need to rely on a team of financial professionals to make sure that any decisions are fully informed and rationally executed. The professional will often use employees of his or her own firm to supervise the trading of the business during the conduct of the insolvency whose cost is part of the office-holder’s remuneration. In contrast, a Chapter 11 debtor may continue during its bankruptcy case to employ salaried as well as hourly paid employees apart from any restructuring professionals that it is authorised to retain

by the court in accordance with approved compensation procedures.

In the United States, even when a DIP is supplanted by a trustee to run the business, the court-centered process continues and creditor activism is still encouraged. A consensual negotiated resolution, which to the greatest extent possible preserves the 'going concern' value of the troubled enterprise, operating under the supervision of a bankruptcy court, is the hallmark of the DIP approach to bankruptcy in the United States. Creditors expect to participate and demand justification and court approval for every significant decision. There is no deference to an insolvency expert. Thus, practice under Chapter 11 is premised in part on the cost efficacy of allowing existing management to manage the debtor's day-to-day operations, albeit with the advice of professionals on specific issues related to the bankruptcy case (eg asset divestitures and the formulation of a Chapter 11 plan). Ironically, heightened demand by creditors for 'chief restructuring officers', or CROs, and the increasing frequency with which CRO firms and their employees have become involved in major Chapter 11 cases is bringing the DIP model closer to the English one.

I recognise that the United States has adopted a radically different approach to the conduct of bankruptcies compared to other market economies, although there have been recent initiatives in some countries to introduce DIP procedures to work in concert with proceedings involving the appointment of insolvency practitioners (notably in Germany). All of that said, my interactions with English insolvency practitioners and English administrations and liquidations have invariably been happy ones. These experiences have been marked by professionalism on all sides, with the focus of attention being always, as it is in the United States, on zealously and efficiently representing any client involved in high-pressure and quickly evolving circumstances. I have admired English insolvency practitioners for their ability to add commercial and financial acumen in all manner of business scenarios and the skill with which they are able, armed with legal and other professional advice, to decide among various alternatives (perhaps all of them difficult and none ideal), often with imperfect information and in the face of legal uncertainty.

Indeed, English practitioners are increasingly assuming CRO-type roles in restructuring situations, sometimes seeking to implement restructurings through schemes of arrangement. To assume the role of management and bear the responsibility for creditors and employees, often in the public eye, is no mean feat, and my experience is that English insolvency practitioners assume that role seamlessly and confidently, and that they serve creditors and other stakeholders well. I anticipate that creditor activism will continue to test

the English model, possibly resulting in increased challenges to the conduct of insolvency office-holders after the fact, rather than preemptively. If this is the case, lawyers will be playing an increasing role in insolvency cases in England as well.

A more difficult question is how well English bankruptcy procedures fare compared to Chapter 11 cases and which regime better serves the interests of all stakeholders. The advantages of Chapter 11 are well known:

- (i) the speed and ease with which a filing can be made (online and at any time of day or night);
- (ii) the active role played by specialist bankruptcy judges in supervising the conduct of the bankruptcy and in assisting in the negotiation of a Chapter 11 plan;
- (iii) the power of the DIP or bankruptcy

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Creditors expect to participate and demand justification and court approval for every significant decision.”

trustee to affirm or reject executory contracts, with 'ipso facto' insolvency provisions (where the non-debtor party has a right to terminate a contract following the insolvency of the other) generally unenforceable;

- (iv) the ability to sell assets out of bankruptcy free of third-party interests, so as to give legal certainty to buyers regarding ownership of the assets acquired;
- (v) the readiness to assist foreign debtors; and
- (vi) the relative ease with which a DIP can obtain credit or financing by way of a DIP loan to ensure its short-term survival and to maximise the chances of a successful exit from bankruptcy.

By contrast, the perceived shortcomings of English insolvency law – viewed through the prism of a professional steeped in Chapter 11 practice – would appear to include:

- (i) the absence of a readily available DIP process that has the benefit of a moratorium/automatic stay;
- (ii) the ability of counterparties to terminate contracts upon the debtor's insolvency;
- (iii) the lack of clarity regarding an office-holder's duty to comply with contractual obligations following the insolvency appointment;
- (iv) the limited scope of liquidation disclaimer with respect to unprofitable contracts or other 'onerous property'; and
- (v) the lack of DIP financing opportunities,

including the inability of new lenders to take security with super priority status.

Downsides of Chapter 11

However, the Chapter 11 process is admittedly not without its own shortcomings. The cost to the bankruptcy estate in attempting to implement a Chapter 11 plan under which many different interest groups vie for a limited pool of assets can be enormous. Moreover, the apparent willingness of United States bankruptcy courts to assume jurisdiction over foreign debtors with little connection to the US is sometimes a source of friction with foreign creditors and courts. In addition, although expedited pre-packaged or pre-negotiated Chapter 11 cases are increasingly common under US law, these procedures are still more cumbersome than 'in/out' English prepackaged insolvencies, where an insolvent debtor's business and assets can be sold within minutes of the office-holder's appointment.

The way forward

Comparative analysis of different bankruptcy regimes is integral to the evolution and improvement of any modern system of bankruptcy jurisprudence. As part of that analysis, we should carefully consider whether a nation's bankruptcy laws and culture fit the ever-changing needs of its economic, social and political needs and attitudes. We should also inquire whether such laws:

- a. encourage innovation and economic progress and lead to an efficient application of economic resources;
- b. leave creditors exposed to the possible recklessness, negligence or dishonesty of management; and
- c. serve the interests of the many or the few.

Conclusion

In my view, the insolvency laws of both England and the United States, while imperfect, achieve a reasonable and equitable balance among the competing interests of all stakeholders involved. I anticipate that our systems will continue to evolve in response to the expanding global economy. ▣

CORINNE BALL

is a partner and co-head of the business restructuring and reorganisation practice at Jones Day, New York.



Re-imagining rescue: the view from the United States

An analysis of the European Commission Recommendation on business failure and insolvency from a US perspective.

It is an exciting time to be involved in insolvency law in Europe: there are a lot of changes going on, not least the European Commission's *Recommendation on a New Approach to Business Failure and Insolvency*, which was issued a little more than a year ago.

So what is the US view of what is happening in Europe? While I can't speak for everyone in the United States, I think I can sum up our main view in a word. That word is 'competition'.

For a long time Chapter 11 was the only option if you wanted to reorganise a global business. It was open and transparent. It provided a very flexible process that could be adapted to almost any situation.

It gave everyone a voice. Even the disorganised general creditors were given a committee that could assert their interests. That committee could employ lawyers, accountants and investment bankers to level the playing field. And, the fees for their services were paid out of the bankruptcy estate with no direct cost to the creditors.

Chapter 11 allowed the business to continue operating with existing management and with little disruption as it shifted into the formal bankruptcy process. There was a comprehensive moratorium, forced contract assumption and rescue financing. These tools helped to preserve

and it preserved value for stakeholders. Importantly, it also became a reasonably effective cross-border restructuring tool given that the United States has a very low threshold for asserting jurisdiction over an entity. Basically, if any property, even a tiny amount, were located in the United States, then the US courts could take jurisdiction of the case.

And significantly, the United States had the world's most important economy so virtually every major creditor or counterparty of a global enterprise had interests in the United States that required it to obey the orders of the US courts.

What has changed?

One change is that we added a number of special interest provisions and exceptions that make Chapter 11 less useful as a tool to save businesses. At the same time, we have allowed the costs to balloon to the point that it may no longer be an attractive restructuring option for many enterprises.

But the other issue is competition. It started when the English embraced the rescue culture. Changes in its insolvency laws and innovative uses of pre-packs and schemes of arrangement provided a quicker and cheaper way to restructure the finances of an enterprise without interrupting its operations. Then, taking a page from our play book, the English courts interpreted their jurisdiction so broadly that virtually any enterprise from any nation could come to London to reorganise.

The English competition did not just take cases away from the US courts, it also took away cases from other EU courts. I suspect that is why Europe has become so interested in rescue.

For the United States, London has mostly taken away some of the global enterprise cases we used to get. And many of those arguably had no business being in the US courts anyway. We really haven't seen our local enterprises or global enterprises that we think of as American flock to London for their restructurings, although I suspect we may eventually see that too.

However, that is not the case for other EU countries. London's liberal rescue tools have been used by many enterprises that other EU member states view as local enterprises. Competition is now underway to create a local rescue scheme that could lure German companies back to Germany,

Spanish companies back to Spain and Dutch companies back to the Netherlands.

Competition can be a good thing. It can also be a bad thing. We may become so afraid that our nation will lose its place in the insolvency world, and of depriving our insolvency professionals of lucrative fees, that we design our laws to attract insolvency business rather than to achieve the best insolvency results. The European Commission recommendations merely invite all EU nations to join in the competition for restructuring cases.

The need for a single EU-wide law?

Harmonised laws, or even inconsistent laws, might be okay for businesses operating in only a single nation. Except for small entrepreneurs, strictly local businesses are becoming very rare in the EU. They will become even rarer as you move closer to the goal of a single market.

Two hundred years ago, when the founders of the United States created our common market among our states, they recognised the bankruptcy laws had to be uniform. That idea is enshrined in our Constitution.

With our adoption of the UNCITRAL Model Law and the growth of cross-border cases, we have had to accept some non-uniformity in insolvency outcomes

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For a long time Chapter 11 was the only option if you wanted to reorganise a global business.”

the business' going concern value, and sometimes even increased it.

Chapter 11 provided an environment where the stakeholders could negotiate a workout, and it included some pretty strong incentives to reach a compromise. It included an active judge on call to rein in dishonest or stupid management. It included an expedited dispute resolution process that could promptly address almost any legal issue facing the enterprise.

Chapter 11 saved businesses, saved jobs

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We added a number of special interest provisions and exceptions that make Chapter 11 less useful as a tool to save businesses.”

for global businesses operating in our market. But under the Model Law, we have discretion to reject those outcomes if they are too divergent from our own law. The EU Insolvency Regulation does not give your member states that option.

I understand there are serious political problems with implementing an EU-wide insolvency law at this point in the EU's

development. The harmonisation that the Recommendation advances may be the best that can be expected as a practical matter.

But that is not what the Recommendation and commentary about it says. I read that one justification for mere harmonisation is that it would not be proper to impose an EU-wide law because the local insolvency laws reflect the deeply held cultural views of each member state.

That reasoning appears hollow to me because, as a practical matter, every EU country already is subject to the English insolvency laws. COMI can be shifted easily or the governing law of debt instruments can be amended in order to use the English restructuring tools. And it seems that the recent revisions to the EU Insolvency Regulation will institutionalise that practice, not eliminate it.

Having said that, I do recognise that international cooperation involves more process than product. Viewed as a process, the European Commission's Recommendation is a major step towards a uniform European insolvency law. It will no doubt nudge member states to enact more similar rescue laws. As that occurs there will be less resistance to a single uniform law. But there also will be less need for it.

Re-imagining rescue: what are we trying to rescue?

The assumption behind the European Council Recommendation is not an invitation to be creative and design completely new rescue models. Instead, the Recommendation includes a list of traditional rescue tools and directs member states to align their laws to those traditional rescue models. This is a document designed to advance conformity and to limit creativity; not one to encourage new innovation.

Here I feel like we are ships passing in the night. As Europe and much of the rest of the world race to copy us and adopt rescue regimes, we have moved to a quick-sale model. We file Chapter 11, but rather than use the restructuring tools it provides, we instead use our s363 to sell the viable parts of the business as a going concern.

Your Commission Recommendation does not address this type of business rescue. It should.

Section 363 not only permits a sale but, more importantly, it permits a sale free and clear of liabilities that might otherwise follow the business. This can be an effective tool for cleansing a business that has legacy costs that otherwise would make it unattractive to any buyer.

The Commission Recommendation speaks of the need to preserve jobs and focuses on the impact of rescue on society. This is another place where we are travelling in opposite directions. As you try to add these goals to your insolvency systems, we have been removing them from ours.

Our thinking in the United States focuses solely on maximising value. That is not a bad goal, but the only value that

gets into the equation is measurable dollar value and even then only the dollar value return to the parties with a debt or equity stake in the enterprise. No soft values such as the impact of failure on the workers and communities, or our national industrial policy count.

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Competition can be a
good thing. It can also
be a bad thing.”

Insolvency and rescue in a changing world

The US lending markets have changed. The new lenders are not banks and are much more focused on reality and maximising their economic returns.

Also we have a very active distressed debt market. In fact there is not enough distressed debt to meet the demand. You may have seen some of our players come to Europe looking to acquire distressed debt and distressed assets. Many times we do not need to use bankruptcy to write down debt since the holder bought it at a deep discount and has expectations that match the debtor's ability to pay.

These players make rescue much harder. They are not the traditional creditor we think about who is looking to salvage what they can from a bad lending decision and who may have an on-going relationship with the debtor. They often buy into the debt with an ulterior motive beyond making a reasonable return on their

investment. They are often not easy rescue cases and the 'let's get together and work things out' theory that most restructuring laws are based on will not work.

The European Commission Recommendations focus on creating pre-insolvency systems, but even there the view is that insolvency must be imminent and that the pre-insolvency system must prevent it. Why is insolvency even relevant? Is this merely a vestige of your earlier punitive systems that viewed failure and insolvency as a wrongful act committed by a business?

Fault v. solution

If you move away from a fault-based model of failure and focus instead on a solution-based model, you may see rescue as merely part of a single continuum of tools for addressing problems that a business might encounter. The English scheme of arrangement is a good model for this. Mostly it is used to address financial restructuring problems faced by businesses that are »



successful. But it can also address a financial restructuring that is needed because the business is in distress.

Insolvency and burdensome debt loads may be the most pressing current problem that the business is facing, but insolvency usually is not the type of thing that 'happens' to a business – like a fire or other calamity. Instead, the insolvency problem is usually nothing more than the result of some other business problem that was not addressed in a timely fashion. If you recognise that, you might envision your rescue regime more broadly. You also might decide that the rescue tool should be available long before the underlying business problem has metastasised into an insolvency problem.

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Why do you think asset securitisation structures that shift an operating company's income stream into a bankruptcy remote special purpose entity are so popular?”

The Commission Recommendation fails to recognise that bankruptcy and secured debt go together. I do not envy your problem. One goal of the Recommendation is to help create a single credit market that flows freely across borders. But if you want a single credit market you don't just need uniform or harmonised insolvency laws, you also need uniform or harmonised secured credit laws, at least for movable and intangible property.

Secured debt and bankruptcy

Secured debt is another reason our Chapter 11 is not working well. When Chapter 11 was adopted, one famous scholar declared that it was the 'death of secured credit'. Our history has been a running battle between secured debt and bankruptcy. In our 1978 Bankruptcy Code, the public policy of business reorganisation trumped secured credit. It took a while, but in 2001 our states revised their secured credit laws, our UCC Article 9, to greatly enhance the security rights of creditors. I've criticised those changes in an article that called that revision the 'Anti-Bankruptcy Act'.

Now a secured creditor can effectively opt out of the reorganisation process or co-opt it for its own purposes because it controls the bankruptcy case. Make no mistake, secured credit cares only about its own recovery. It is not concerned about worker rights, society or national industrial policy.

Other opt out strategies have also gained traction in the United States. Why do you think asset securitisation structures that shift an operating company's income stream into a bankruptcy remote special purpose entity are so popular?

Take the case of LTV, a major steel manufacturer. In that case a large amount of going concern value could be preserved by continuing the business operations for a short period of time after the bankruptcy filing. But there was no free cash because all of the accounts receivable had been securitised and sold to a bankruptcy remote special purpose vehicle. The bankruptcy judge used procedural arguments to temporarily override the purported ownership rights of the securitisation parties so the going concern value could be realised.

Lenders similarly use complex corporate structures to keep essential assets out of the shared pool. During the recent financial crisis the credit markets froze forcing General Growth Properties, one of our largest shopping mall operators, to file Chapter 11. For lending purposes, each shopping mall property had been placed in a different legal entity and the lenders refused to upstream the cash from rental income that was necessary to rescue the enterprise. In an opinion that has been criticised by commentators, the bankruptcy judge overrode those limitations. The end result was not merely the avoidance of a wave of value-destroying liquidations of shopping malls around the country, but a successful restructuring plan that even returned billions of dollars in value to shareholders.

We don't just do our reorganising in Chapter 11 plans anymore. No buyer wants to acquire a business if it comes with potential massive successor liability risk. We use our §363, which provides for a sale of the business free and clear of obligations, to continue business operations free of old debt. As I mentioned, the Commission Recommendation does not address this tool.

Can you do an §363 sale to an entity created solely for the purpose of continuing the business without the liabilities? That is exactly what was done in the General Motors bankruptcy case, and the Chrysler case was not much different. Again, our bankruptcy judges permitted these sales even though most observers think they pushed beyond the limits of our statute. Fortunately our bankruptcy judges have been willing to push the envelope to do what a true rescue regime should do. But they will only do that in exceptional cases. They saved GM and Chrysler and the rest of the American automotive industry: the US supply chain and Ford's US operations would have collapsed had they not.

Threats and tools

While the lack of a rescue process inhibits rescue, the real threats to business rescue

are that the tools we are using are not up to the task. The European Commission Recommendation pushes the idea of creating a framework for a negotiated workout. That is an important goal. But the Recommendation is deficient in not providing the essential tools to preserve a viable but distressed business.

Where are the tools to block 'opt out' strategies? Where is the override of bankruptcy termination clauses in contracts? Where are the standards for addressing legacy obligations? Where are the standards for super-priority rescue financing?

Over-indebtedness is a problem that threatens the survival of the business. But most likely it is merely the symptom of

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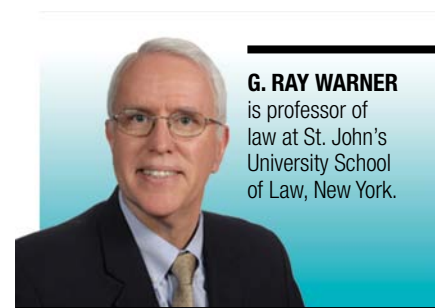
While the lack of a rescue process inhibits rescue, the real threats to business rescue are that the tools we are using are not up to the task.”

deeper problems. If you want to re-imagine rescue, then identify those problems and design a system that addresses them.

Just like our half-century-old Chapter 11, the rescue systems advanced by the Commission Recommendation are simply too weak to address even the existing opt-out strategies. I hope you can design more robust rescue systems that balance the interests of stakeholders with those of society. But, unless it is an EU-wide system or the jurisdiction rules limit forum shopping, the cases will simply move elsewhere to avoid it.

As your American competitor, I hope you can come up with some ideas that we can copy. □

This article is an extract of a key note speech delivered to the INSOL Europe Academic Forum at Nottingham Trent University, June 2015.



G. RAY WARNER
is professor of
law at St. John's
University School
of Law, New York.

Considering the public interest

Bree Taylor considers the lessons learned from the appeal tribunal in the MG Rover case.

In July 2013 the Financial Reporting Council Disciplinary Tribunal (tribunal) made 13 findings against Deloitte & Touche and one of its partners, including that they had failed to consider the public interest before accepting or continuing their engagements relating to two transactions in relation to the MG Rover group of companies. The decision caused much anxiety among members of the profession who struggled to understand the tribunal's reasoning and the implications for the profession as a whole. In January 2015, the appeal tribunal overturned 8 out of 13 the tribunal's findings including on the public interest issue. The appeal tribunal was critical of the tribunal's reasoning and analysis. This article provides a brief summary of the issues.

Background

In 2000, BMW was looking to divest itself of MG Rover Group Limited (Rover) and ultimately accepted a bid from a group known as the 'Phoenix Consortium' made up of, among others, four former directors of Rover who came to be known as 'the Phoenix Four'. The bid by the Phoenix

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The bid by the Phoenix Consortium was much publicised and promoted as being a saviour of the business and a preserver of jobs in the Midlands.”

Consortium was much publicised and promoted as being a saviour of the business and a preserver of jobs in the Midlands. There was a great deal of public and press interest in the transaction and the people behind it.

Deloitte & Touche (Deloitte) advised the Phoenix Four in connection with the purchase of Rover and subsequently provided corporate finance advice on various transactions.

Rover collapsed in 2005 with the result that thousands of jobs were lost. Some of the transactions that had taken place prior to the collapse and on which Deloitte advised came under scrutiny.

Tribunal findings

In July 2013 the tribunal held that the conduct of Deloitte had fallen short of the standards reasonably to be expected of a member of the ICAEW in various respects in relation to the transactions on which it advised the Phoenix Four. There were findings in relation to breaches of Fundamental Principle 2 (objectivity in all professional and business judgments) and Fundamental Principle 4 (due skill, care and diligence). One of the specific findings was that in relation to two transactions, Deloitte and the partner involved had failed to consider adequately the public interest before accepting or continuing their engagements and thereby failed to act in accordance with Fundamental Principle 2 and the guidance in the Guide to Professional Conduct under the heading 'Safeguarding Objectivity'.

The tribunal's findings can be summarised as follows:

- Rover was a 'public interest company';
- Deloitte was aware of the public interest; (the tribunal having decided that they did not accept the Deloitte partner's evidence on what he understood of the public interest);
- the public interest aspect was relevant to Deloitte as a member firm;
- in light of the above, the allegation was proven.

The tribunal did not say anything about what Deloitte did or failed to do by reason of its failure to take account of the public interest.

Appeal tribunal findings

In January 2015 the appeal tribunal found the tribunal's findings on the public interest issue to be troubling and wrong. The appeal tribunal set out all of the guidance that is available in the relevant versions of the ICAEW Guide to Professional Ethics and concluded that it was vague and unhelpful. The appeal tribunal found as follows:

- there is nothing wrong as such with being involved in something that takes profits or assets out of a company;
- it is absurd to suggest that accountants are not free to accept a new engagement in respect of a proposed transaction because it might cause a risk to UK businesses;
- there is no legal duty on accountants to consider the public interest when approached by a client wishing to engage the accountant in respect of a lawful transaction where the accountant is not being asked to act unlawfully;
- it is in the public interest for the work of accountants to support the propriety and

orderly functioning of commerce, not to assume the role of the market regulator or government in deciding which bidder in a corporate transaction has the public interest on their side. It does not follow from a failure to consider the public interest that an accountant acts with a lack of objectivity.

Outcome

The appeal tribunal overturned the tribunal's findings on the public interest charge and some of the other charges but upheld certain other findings including those in relation to conflicts of interest and contingency fees in relation to one of the transactions on which Deloitte advised.

Comment

There is nothing so disruptive and confusing to a profession as rules or guides that seek to impose strict standards of conduct backed with very serious sanctions for non-compliance in an ill-conceived, vague and/or confusing manner. The ICAEW guidance on the public interest issue is quite unlike anything that exists in, for example, the Solicitors' Code of Ethics or the Bar Standards Board Handbook, neither of which suggests that solicitors or barristers must 'select' their clients on the basis of outside perception. Further, the concept of public interest does not have a natural and ordinary meaning. It means different things in different contexts and even if the guide defined what exactly is meant by public interest, this would not avoid the problem that the guide encourages members to 'consider' and 'bear in mind' the public interest with absolutely no explanation of what this means and how it should impact on conduct.

The ICAEW Guide to Professional Ethics has been replaced by the Code of Ethics, which provides statements of principle about the responsibility of the accountancy profession to act in the public interest by taking into consideration the public interest when deciding when to accept an engagement. ■



BREE TAYLOR
is a partner at Fladgate LLP.

A fresh start

Licensed insolvency practitioner **Paul Moorhead** offers his perspective of the insolvency process from both sides of the coin.

Insolvency practitioners are highly trained, professionally qualified, licensed experts who use their experience and expertise to implement often complex formal insolvency procedures. The World Bank reports that the UK has one of the best insolvency regimes in the world, using yardsticks that include returns to creditors, cost and speed of insolvency procedures. So why is the profession under such close scrutiny? Is there any justification for the criticism that is levelled at us? And what can we do to improve the public's perception of what we do?

From the other side of the coin

Like the majority of IPs, my career path was more to do with accident than design. I clearly remember my first encounter with an IP: I was the director of a family-run textile business that had lost a major customer and was struggling to find a way to survive the sharp drop in income that followed. I asked a friend for help and he introduced me to someone called an 'insolvency practitioner'. At the time I had a vague idea what an IP did: something to do with going bust – and football clubs – but I had the certain belief that this would mean the end of the business. I was right – the business went into creditors voluntary liquidation. I also had the expectation that the creditors, the largest of whom were family members, would receive something back after the assets were sold and the company's debts were collected in. Sadly, this would prove not to be the case. Despite working with the liquidator to find buyers for the company's specialist machinery, the costs of the liquidation soaked up much of the realisations and, with the exception of the debenture holder, creditors were left unpaid.

How much

To be clear, I am not suggesting that the liquidator did anything wrong. I have no doubt that his time costs and expenses were properly incurred, authorised and paid. I was simply unprepared for the level of costs involved in winding up a company. In hindsight I probably had unrealistic expectations about the level of fees and how much money would be available to creditors when the liquidation had run its course. I think my experience of instructing an IP was fairly typical.

Apart from instructing a solicitor to deal with some minor legal issues and asking an accountant to prepare annual accounts, I had had little involvement prior to this point with the professional services sector. This meant I was unprepared for the costs involved in engaging qualified and regulated professionals to deal with complex matters.

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In hindsight I probably had unrealistic expectations.”

Despite my introduction to the insolvency profession in somewhat unhappy circumstances, I became fascinated with the work of the insolvency profession and I decided to pursue a new career as an IP. I have no regrets. Despite the occasional 'the grass is always greener'-type daydreams, I have found my second career to be more challenging, intellectually stimulating and rewarding (in every way) than my first.

Trust and responsibility

I recall a conversation with a fellow member of the insolvency profession a few years ago during which he told me about a lucrative insolvency appointment that meant he was able to afford the new conservatory that he and his wife had been planning. Another member of the profession overheard the conversation and said, 'I hope you don't let creditors hear that story.' Now, I have no doubt that he diligently went about his work as office-holder and that the conservatory was paid for using fees that were properly incurred and drawn. But there is no avoiding the fact that there is a direct link between the fees drawn by an IP for the work he does and the amount of cash that may be available to pay a dividend to creditors. Moreover, IPs are in the enviable position of being able literally to write their own cheques for the work that they do with, in most cases, the minimum of scrutiny and oversight by creditors. We are trusted to go about our work in a responsible manner and to adhere to the letter of the legislative and regulatory requirements. IPs' fees have come under increasing scrutiny, culminating in the Kempson review and the introduction of the new fees rules in



October. IPs must be careful to ensure that they have not only stuck to the rules, they have also been mindful of the spirit of those rules and, crucially, that they can demonstrate the value that they created through their involvement in a case.

So the quantum of fees in insolvency procedures is obviously a key area of concern for creditors. But I believe that another issue is at least as important to creditors and other stakeholders in an insolvency: the perception of fairness. We live in a world where market forces decide the fate of commercial enterprises and where individuals have the freedom of choice to incur debt and to utilise credit facilities. Sometimes those decisions turn out to be unwise; sometimes sheer bad luck throws a spanner in the works. In my experience, very few business owners make decisions with

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I have found my second career to be more challenging, intellectually stimulating and rewarding than my first.”

the intention of defrauding their creditors or ripping off their customers. It is often the business owner who has most to lose when a business fails. It is often the business owner who sees the most value in the assets of the failed company and who is therefore likely to want to buy back those assets in order to start afresh with a new enterprise. The legislation does not forbid this and the regulatory guidance acknowledges that this is an acceptable course of action, subject to certain safeguards. But this is probably the area where I hear the most concern from creditors and disquiet from members of the public.

Mistrust of IPs

I recently received a letter from a creditor in relation to an ongoing case where I am liquidator. The creditor had read my report of the section 98 meeting, which included my disclosure under SIP 13 of a sale of the company's assets to its directors as well as details of the Royal Institution of Chartered Surveyors (RICS) qualified valuer who advised me on the sale. As well as raising concerns relating to the directors' conduct prior to liquidation, the letter stated that the writer was 'surprised' at the sale and they hoped that sale had not taken place 'at an under value'. I often bemoan the fact that I rarely receive information from creditors about the conduct of directors so I was grateful for the information; however, I was also taken aback by the tone of the letter and the inference that I had dealt

with the company's assets improperly. The disclosures in the report appeared to raise, rather than allay, the creditor's concerns. While this is admittedly an isolated incident, it points to an underlying mistrust of IPs and how we work.

New legislation

The voices calling for change in the insolvency profession are getting louder. After many years of relatively little legislative tinkering, we are now facing a raft of new provisions and the prospect of revised Insolvency Rules next year. The recently enacted Small Business, Enterprise and Employment Act 2015 (SBEEA) shines an interesting light on the policy developments in relation to the insolvency profession. From my viewpoint, the subtext of the Act is that IPs should be focused on generating value for creditors and should not become side-tracked by cumbersome formalities that do not add tangible benefit to the insolvency process. Some amendments to the insolvency legislation appear sensible, for instance in relation to extensions to administrations, sweeping away the requirement for sanction for the exercise of certain powers, or the requirement for creditors to prove for small amounts. Other aspects of the new legislation appear to send the wrong signals to creditors: they can choose to opt out of the insolvency procedure altogether by choosing to not receive any information from the office-holder. The abolition of the requirement to hold meetings in relation to personal and corporate insolvency also suggests that policymakers are accepting that creditor apathy is here to stay. Rather than seeking their input into the procedure, it tacitly confirms the belief that many creditors already hold: that it is a waste of time to engage with IPs in relation to formal insolvency procedures.

A key area in which IPs may demonstrate the value that they bring to a case is where they use their insolvency 'toolkit' to chase down assets or recover funds into the estate, for distribution to creditors. However, IPs' ability to take such action is at risk. The Jackson reforms threaten the ability of IPs to embark on litigation. In addition the SBEEA includes provisions to allow the courts to make compensation orders against delinquent directors on the application of the secretary of state. Such an order has the potential to short-circuit the concurrent insolvency proceedings and to side-track the office-holder, potentially threatening an opportunity that the IP may have for seeking to make a recovery from the director for the benefit of the insolvent estate as a whole. The long-term future for IPs may be less certain than we might like to think.

My experiences

I don't share my story of how I became an IP with every prospective client I meet, but there are times when I am told that, 'You

have no idea what it's like to lose your business'. At these moments my colleagues leave the room as I regale the insolvent business owner with my tale of previous woe and the story of how I became an IP. I hope it helps them to understand that, aside from the basic human empathy that surely we all have, I clearly recall my experience of going through an insolvency. Hopefully this informs my work as an IP and makes me a better practitioner. But is that enough to cut through the apathy, mistrust and folk lore that swirls around IPs as we go about our work? One thing is for sure: we have to always keep in mind the need to engage with all stakeholders, in the hope that clear and open communication will sweep away preconceptions and to demonstrate the value that we bring to the cases that we administer.

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It tacitly confirms the belief that many creditors already hold: that it is a waste of time to engage with IPs.”

When I meet businesspeople for the first time outside of work and I tell them that I am an IP, they tend to fall into two categories. The first will look mildly uncomfortable and state that they hope they never meet me again (at least, not in a professional capacity). Those in the second group wistfully describe a previous insolvency-related problem. They are always more keen to chat. Perhaps the only way that public opinion of the insolvency profession will really change is if a majority of the population has experienced an insolvency procedure and seen it for what it is: a fresh start, coupled to pragmatic debt relief, an equitable distribution of realisations and the opportunity for sanction for the small proportion of delinquent directors or bankrupts. But with insolvencies steadily decreasing, this will not happen any time soon. ■



PAUL MOORHEAD
is a director at
Moorhead Savage.



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Bolder and better?

Maria Kyriacou examines the new insolvency laws in Cyprus.

In April 2015 the Cyprus parliament approved a new package of insolvency laws, aimed at streamlining and modernising the existing system and promoting a rescue culture. Reform of the insolvency framework forms part of the adjustment programme agreed at the time of the 2013 banking crisis, and is essential for the resolution of non-performing debt, which is currently estimated to amount to €27.6bn, almost 50 per cent of gross loans in the banking sector.

For the first 50 years after gaining independence in 1960 Cyprus enjoyed uninterrupted prosperity. Insolvencies were few and far between, and there was no reason to modernise the mechanisms set out in the Bankruptcy Law and the Companies Law, which were a legacy of British colonial rule and closely resembled the corresponding United Kingdom legislation of the mid-twentieth century. The new package includes amendments to both laws, together with new laws introducing new voluntary arrangement provisions for individuals and licensing and regulation of insolvency practitioners. The most noteworthy changes are as follows.

Companies

The majority required for a proposed voluntary arrangement to be binding on all creditors has been lowered from a majority in number representing three-quarters in value to a simple majority in value of those voting. Similarly, only a simple majority is now required for a vote of members to be binding on all members. The sanction of the court is required for any proposal to become effective.

The Companies Law has also been amended to introduce a process called 'examinership', which is akin to the administration process in the United Kingdom. This provides for the appointment of an IP as 'examiner', whose role is to develop restructuring proposals and agree them with stakeholders during a four-month moratorium in which the company is protected from creditor action. In addition, the following changes

regarding liquidation have been made:

- the minimum debt required for a creditor to petition for winding up on the basis of a statutory demand has been increased from €854 to €5,000;
- compulsory liquidations must be completed within 18 months from commencement unless the court grants an extension;
- a liquidator can be appointed by the court as well as by the creditors, and the Official Receiver can be appointed as the permanent liquidator in a compulsory liquidation;
- a liquidator must be a licensed and regulated professional IP;
- the liquidator can apply to the court for an order bringing the liquidation to an end and dissolving the company if the assets are insufficient to cover the cost of liquidation;
- a court can make an order authorising the liquidator to dispose of assets subject to a charge if it is satisfied that this would be advantageous.

Individuals

The court has the power to order a 95-day moratorium on enforcement action by creditors to give time for the debtor to agree an arrangement (known as a personal repayment plan) with them. If approved by the necessary majority of creditors and the court, the arrangement will be binding on the debtor and all creditors, subject to dissenting creditors' right to be heard before the court. No proceedings can be commenced to enforce a guarantee within two years after the date of implementation of a personal repayment plan by the primary debtor.

The court can impose a rescheduling in small cases where aggregate liabilities are no more than €350,000 and individuals with minimal assets and income may apply to the court via the government insolvency service for an 'order for debt relief' of up to €25,000.

Discharge from bankruptcy is automatic after three years on the condition that all the debtor's assets are sold and the proceeds distributed to the creditors.

There are new criminal sanctions against fraudulent alienation of assets prior to bankruptcy and non-disclosure of assets.

A change for the better?

The changes are undoubtedly bold but they have been criticised as a charter for abuse, given the absence of an established, experienced insolvency profession and all the regulatory and other infrastructure that develops with it. The requirement for a simple majority in value for a 'cram-down' of liabilities introduces substantial scope for abuse. There is no detailed guidance on implementation of the new provisions in the form of regulations or statements of required practice, and the only safeguard appears to be the requirement for the court to approve any arrangement before it becomes binding.

The increased involvement of the courts, not only in the review of corporate voluntary arrangements but in all the other matters outlined above, is likely to be a particular pressure point and area of vulnerability. Delays are endemic in the Cyprus courts and proceedings typically take several years to complete. Judges have little experience in insolvency matters, and are likely to consider matters very deliberately and at length in order to avoid coming to a wrong decision. Appointing more judges will not deal with the issue of lack of experience. Increasing the courts' involvement seems more likely to aggravate delays in the insolvency process than to streamline proceedings. It is to be hoped that these concerns turn out to be unfounded, and that the new legislation achieves its aim of helping to rehabilitate the real economy. ■



MARIA KYRIACOU is a partner at Andreas Neocleous & Co LLC.

Successfully defending challenges to bankruptcy petitions

Lessons from *Gate Gourmet v. Gary Morby* [2015] EWHC 1302 (Ch).

The facts of this decision will sound familiar to many insolvency practitioners: the debtor attempted to challenge both the statutory demand and the bankruptcy petition served on him by the creditor, relying in particular on technical points concerning effective service of the petition, jurisdiction and security.

Background

Mr Morby had entered into a share purchase agreement with Gate Gourmet containing various warranties. Gate Gourmet brought proceedings against Mr Morby for breach of warranty, which were eventually settled with Mr Morby agreeing to make payments in instalments to Gate Gourmet, secured by way of a second legal charge over Mr Morby's property in France.

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Mr Morby attended with a friend, and on his account instructed his friend to take the papers from the process server.”

When Mr Morby failed to make one of the payments, Gate Gourmet served him with a statutory demand, valuing the security at £0. Mr Morby applied to set aside the statutory demand on the basis that the debt was secured. The County Court, hearing the application, made an order that a single joint expert be instructed to value the property, and that Mr Morby would be debarred from relying on any valuation evidence unless he granted the expert access to the property.

In the event, Mr Morby refused access to the property and the matter came back before the County Court, where the judge found that the onus of proving the security issue lay with Mr Morby such that his application to set aside the statutory demand was dismissed and permission

granted to Gate Gourmet to present a bankruptcy petition.

Mr Morby was present at this hearing, as was a process server instructed by solicitors for Gate Gourmet. Mr Morby was pointed out to the process server during the hearing. As soon as permission to present a bankruptcy petition was granted, a trainee at the law firm representing Gate Gourmet attended the High Court to file the petition for bankruptcy. The petition was accepted and stamped as 'received' on that day but not approved by the court or sealed for a further few days.

Service of the petition

Although the parties differed in their accounts of service, it was common ground that Mr Morby agreed to meet Gate Gourmet's process server at Heathrow Airport, knowing that the purpose of this meeting was for the petition to be served on him, and that they did in fact meet. Mr Morby attended with a friend, and on his account instructed his friend to take the papers from the process server, which he did, and then read out the contents of the petition to Mr Morby. Mr Morby, objecting to the address provided in the petition, instructed his friend to pass the papers back to the process server, and then, the process server being unwilling to take them, to put them in the rubbish bin. Mr Morby accepted that he received the petition by email that day.

The process server's account differed in that he stated that he had passed the petition to Mr Morby, whom he recognised from the County Court hearing, who in turn passed it to his friend. The judge hearing the bankruptcy petition described the issue between the parties as *one of touch*, ie whether the petition had touched Mr Morby during this encounter, or not.

Was service effective?

The judge ruled that it was unsafe to rely on witness statements alone to determine the issue of touch, in the absence of cross-examination, but found that where a debtor instructs his agent to receive the petition (on his case), has attended the meeting knowing that the purpose of it was for him to be served, and has engaged with the process server on the contents of

the petition, this is sufficient for personal service to be effected.

If there was a defect in service, was it curable?

In the alternative, the judge considered whether Rule 7.55 of the Insolvency Rules 1986 could be applied to Rule 6(14) to cure any defects in service should there be any doubt about whether personal service had been effected properly. Following a detailed analysis of the conflicting case law, the judge considered that the better view is that it can cure such irregularities depending on the circumstances. He set out a three-stage test to determine whether the court should exercise its discretion to waive any defect or irregularity of service, as follows:

1. Are there insolvency proceedings on foot? If not, Rule 7.55 does not apply.
2. If the defect were cured, is the court satisfied that this would cause no substantial injustice? Substantial injustice would be caused if, for example, the recipient of documents could be confused as to the nature of the proceedings, or where a document was unrecognisable as a statutory demand.
3. If injustice would be caused, is this something that could be remedied by the court?

In the circumstances of this case, the judge found that 1) was satisfied as a petition had been presented and that with regards to stage 2), it was actually Gate Gourmet who had suffered the injustice, not Mr Morby, as the chronology of the case demonstrated. As a result of these two findings, it was not necessary to consider stage 3).

Jurisdiction

Mr Morby also challenged the petition on the ground that there was no jurisdiction pursuant to section 265 of the Insolvency Act 1986. The judge clarified that the date the petition is presented, for the purposes of jurisdiction, is the date that it is delivered to the court for filing, not the date when it is sealed and issued (which in this case was a few days after it was filed, by which time Mr Morby had left

the country). The fact that the petition was stamped 'received' on a date Mr Morby was unarguably within the jurisdiction, having been in attendance at the county court hearing, and that a solicitor of the senior courts provided sworn evidence that the petition had been filed then meant that this ground had been satisfied.

It is worth noting that another basis for jurisdiction was held to be satisfied as a result Mr Morby selling his shareholding

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The judge ruled that it was unsafe to rely on witness statements alone to determine the issue of touch.”

in a group of companies – this amounted to him carrying on business in the jurisdiction. This business was deemed to be continuing since the settlement agreement with Gate Gourmet resulting from breaches of the SPA remained unperformed in part. In effect, the outstanding debt that formed the basis of the petition also acted as a basis for jurisdiction.

Key points of practice

Some key lessons can be learned from this case. In particular, IPs and other professionals dealing with technical challenges to service and jurisdiction may want to make their positions more robust by doing the following:

Service

- Ensure that those effecting service know what the debtor looks like, either by pointing them out in person, or by providing them with a photograph in advance.
- Ensure that process servers routinely confirm the identity of the debtor before effecting service.
- Where the process server makes an appointment to meet the debtor, make sure the debtor knows that the purpose of the meeting is for them to be served.
- Send the statutory demand or petition by email immediately after service to ensure that the debtor has every opportunity to receive the document and no injustice will be caused to them if a defect in service is later cured.
- Have the process server make a note of their recollection of service as soon after the event as possible and send it to those instructing, following this up with a sworn statement where service becomes contentious.
- If there is any conflict in the evidence concerning service, suggest to the court that it hear oral evidence from both parties in order to determine the matter and arrange for the process server to attend the hearing.
- Defects or irregularities of service can be cured. Parties acting for creditors should

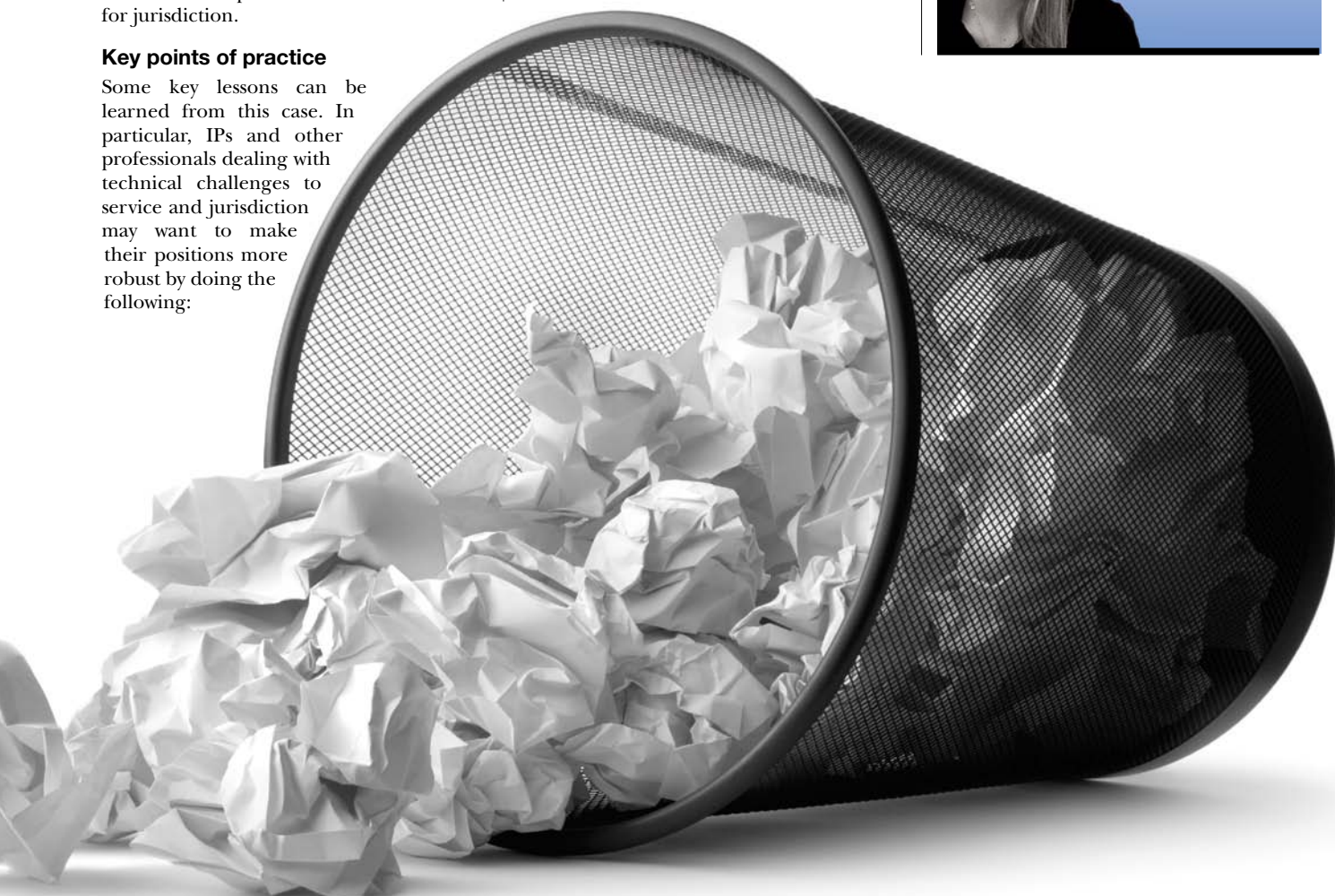
do their utmost to show that the debtor will not suffer an injustice if the court exercises its discretion in this way or that any such injustice can be dealt with by the court.

Jurisdiction

- Ensure that those filing bankruptcy petitions retain a copy from the court that has been stamped as 'received' on the date the petition was filed.
- Sworn evidence of the date the petition was filed should be served.
- Where the debtor is known to be temporarily within the jurisdiction for any purpose, every attempt should be made to fast-track filing and service of the petition before the debtor leaves the jurisdiction.
- Analyse whether the debtor can be said to have carried out business in the jurisdiction in the last three years, which will be satisfied if the debtor has unperformed obligations under previous business arrangements, including those concerning the creditor. □



VICTORIA PRINCE is a trainee solicitor at Memery Crystal LLP.



Where are you heading this summer?

Bankruptcy tourism and the case of the Banana King.

Visit England promotes tourism to England and Wales by reference to the beautiful scenery, world-class museums and abundance of culture on offer. Following the recent judgment of *JSC Bank of Moscow v. Kekhman & Ors* [2015] EWHC 396 (Ch) (*Kekhman*), it should consider adding an advantageous personal insolvency regime to this list.

The English personal insolvency regime is considered to be far more debtor friendly than other countries. For example, all debts are generally discharged after one year as opposed to three years in Ireland and six years in Germany. This has encouraged 'bankruptcy tourism' where individuals deliberately petition in England to avoid more onerous conditions in less debtor friendly countries.

Indeed, this tourism phenomenon is not limited to bankrupts: steps to move a company's centre of main interests (COMI) have increased since the Enterprise Act 2002 introduced a more favourable administration regime.

Kekhman concerned the bankruptcy of a self-made Russian billionaire and an appeal by JSC Bank of Moscow (JSC Bank) against a decision of Chief Registrar Baister to reject the application of JSC Bank and ZAO Sberbank Leasing to annul and/or rescind a bankruptcy order made on a debtor's petition by Mr Kekhman on 5 October 2012.

Background

Mr Kekhman is a Russian citizen, domiciled and resident in the Russian Federation. Known as the Banana King, he made his billions in the fruit business, building JFC Group into the leading importer of bananas into Russia, with a 40 per cent market share. JFC Group operated through various companies in Russia, Costa Rica, Cyprus, Ecuador, Luxembourg and Panama, with the overall holding company based in the British Virgin Islands (BVI). In the ultimate Russian status symbol of a Russian oligarch, Mr Kekhman was also the general director of the Mikhailovsky Theatre, one of the oldest opera and ballet houses in Russia.

JFC Group fell into financial difficulties in 2011 and sought to negotiate and restructure itself. However, all attempts failed, leading the banks to call in their loans, enforce their security and look to Mr Kekhman under the guarantees. Mr Kekhman began winding up his business and in February 2012, JFC Russia initiated insolvency proceedings. However, on 11 September 2012 JSC Bank obtained a worldwide freezing order against the BVI companies in the group.

Mr Kekhman's petition

On 25 September 2012, during a 48-hour stay in London, Mr Kekhman presented his own bankruptcy petition in the High Court (the petition). On 5 October 2012, the petition came before Chief Registrar Baister who made a bankruptcy order (the order) on the basis of:

- the absence of a personal insolvency regime in Russia;
- the availability of assets in the jurisdiction (being £200,000 cash-in-hand that Mr Kekhman undertook to make available to the Official Receiver);
- the existence of a connection to the jurisdiction in the form of an English law choice of law/jurisdiction clause in one of the guarantees;
- the opinion of Mr Kekhman's Russian lawyer that the courts in Russia would recognise the bankruptcy;
- the fact that the bankruptcy would allow for the investigation of Mr Kekhman's financial position; and
- the opportunity for Mr Kekhman's financial rehabilitation.

The law

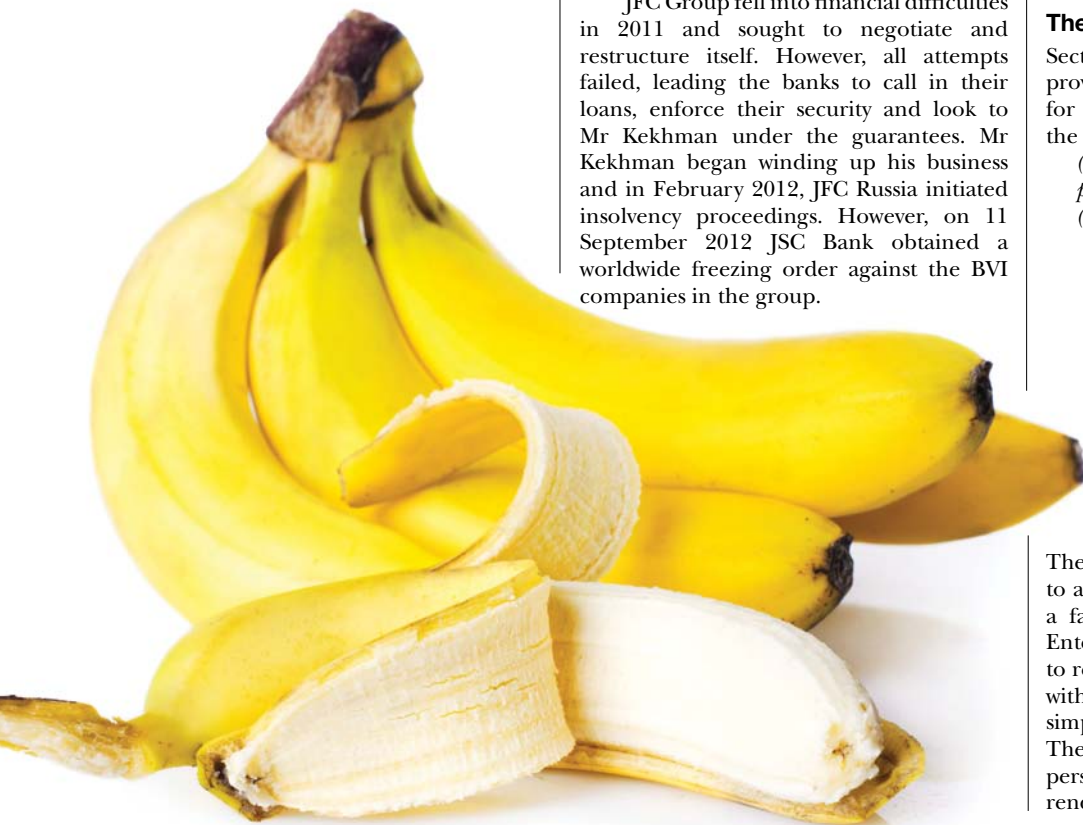
Section 264(1) Insolvency Act 1986 provides for a debtor to present a petition for his or her own bankruptcy, subject to the conditions in s265(1) being fulfilled:

(1) A bankruptcy petition shall not be presented to the court under section 264(1)

(a) or (b) unless the debtor:

- (a) is domiciled in England and Wales;
- (b) is personally present in England and Wales on the day on which the petition is presented; or
- (c) at any time in the period of three years ending with the day:
 - (i) has been ordinarily resident, or has had a place of residence, in England and Wales; or
 - (ii) has carried on business in England and Wales.

These conditions represent very low hurdles to an individual seeking to forum shop for a favourable personal insolvency regime. Enterprising individuals have been known to rent or buy a cheap property in England with no intention of ever setting foot in it, simply to ensure the conditions are fulfilled. The present case shows that simply being personally present is potentially enough to render the domicile or ordinary residence



or the place of business of the debtor irrelevant to the question of jurisdiction.

The applications to annul/rescind

JSC Bank was not content with Mr Kekhman's bankruptcy and applied to have it annulled/rescinded under s282 Insolvency Act 1986. Given the low threshold for jurisdiction, JSC Bank conceded this point and sought to dispute Chief Registrar Baister's discretion.

The application was brought on the basis that (i) the order should not have been made on the basis of the facts as they existed at the date of the order, (ii) Mr Kekhman had not established a sufficient connection with England and shown that the bankruptcy would benefit the creditors as a whole and (iii) that Mr Kekhman had breached his duty of full and frank disclosure.

In considering the applications, Chief Registrar Baister heard from Russian law experts and accepted that the order was unlikely to be recognised or enforced in Russia (despite what Mr Kekhman's lawyers had told him at the original hearing) and that the £200,000 cash-in-hand had been brought in breach of a Russian 'arrest' order (which should also have been disclosed at the original hearing).

“

Enterprising individuals have been known to rent or buy a cheap property in England with no intention of ever setting foot in it.”

However, Chief Registrar Baister declined to use his discretion to annul/rescind the order. Accepting that the arguments were finely balanced and that much of the bases of support for originally making the order had been eroded, Chief Registrar Baister held that the order still had utility when it was made and that he would likely have still made the order, even if all the facts had been properly presented. In his view, the order had utility because there was commercial subject matter on which the order could operate and it would have enabled/made possible:

1. the investigation of Mr Kekhman's affairs;
2. an orderly realisation of his non-Russian assets; and
3. Mr Kekhman's financial rehabilitation, even if only outside the Russian Federation, which was of considerable importance to an international businessman.

The appeal

Not to be discouraged from pursuing Mr Kekhman, JSC Bank sought to appeal Chief

Registrar Baister's judgment and presented no less than 13 grounds of appeal to Mr Justice Morgan. However, the primary ground was that Chief Registrar Baister had applied the wrong test. On JSC's case, Mr Kekhman needed to show three things to persuade the court to grant the order: (i) sufficient close connection, (ii) a reasonable possibility of a benefit resulting from the bankruptcy order and (iii) that there was one or more persons interested in the distribution of assets who were persons over whom the English court exercised jurisdiction.

The 'correct approach'

Morgan J dismissed Mr Kekhman's submissions, including that the court only needed to consider the utility of bankruptcy order. He held that the correct approach when considering whether to annul the order was to consider:

1. the grounds which existed at the time the order was made;
2. whether on those grounds, the order ought not to have been made; and
3. if the order ought not to have been made, whether it should annul the order.

Morgan J was not persuaded that the chief registrar had applied the right test, because he did not decide in *'terms that the bankruptcy order ought not to have been made'*, concluding that the *'chief registrar erred in principle in his approach to his jurisdiction'*. However, in re-exercising his discretion, Morgan J applied the correct test and held that Mr Kekhman's liability under the guarantee with an English jurisdiction/choice of law clause, constituted a sufficiently close connection to the English jurisdiction (where the order would lead to the discharge of this liability) and that there was a benefit to the order to both Mr Kekhman through this discharge and to his general creditors through the orderly realisation of assets.

Morgan J further concluded that the making of the order did not offend obligations of international comity. In particular, an English court could make an order that would be effective in England and in the jurisdictions that choose under their law to recognise it, but it would be wholly ineffective in a jurisdiction that, under its law, refused to recognise it. Accordingly, it was not contrary to the principles of comity for an English court to make an order which would be effective to discharge the debtor's liability under a contract which the parties had agreed should be governed by English law and subject to English jurisdiction.

Conclusion

'Insolvency tourists' jumping on a plane to declare bankruptcy in England are nothing new. While some have warned of the floodgate effect, anticipating a tsunami of foreign nationals declaring bankruptcy in England and Wales, in reality, Mr Kekhman is the latest in a long line of international businessmen who forum shop for the best

jurisdiction in which to declare bankruptcy.

In a literal interpretation of the law, the English courts have confirmed that the doors are wide open for foreign nationals looking for a more benevolent insolvency regime. While this is likely to be good news for those foreign debtors, their advisers and IPs, the question remains whether this is generally of benefit to overseas creditors. What is noteworthy about *Kekhman* is the court's decision to allow a bankruptcy that has no effect as a matter of Russian law, leaving JSC Bank and other many foreign creditors in difficulty. It appears that overseas creditors are faced with the potentially unattractive options of submitting to the jurisdiction and participating in the English bankruptcy, or staying away and seeking to enforce against assets out of the reach of an English trustee in bankruptcy.

One conclusion from *Kekhman* is never to get on the wrong side of a Russian bank – given their obvious tenacity. However, practically, an overseas creditor faces an uphill battle to seek to challenge the English court's jurisdiction. Faced with the prospect of significant legal costs and other professional fees, together with the practical difficulty of unpicking the evidence (in some cases even tracking flights and airplane tickets to see if they have been used), only those creditors with deep pockets and a point to prove can afford to challenge a foreign bankrupt's petition.

Kekhman is also a reminder to those who advise international businesses to have a timely exit strategy in place if everything goes wrong, because it can make a substantial difference. For creditors it serves as a reminder to properly consider 'boilerplate' clauses rather than simply skim over them. Morgan J placed significant weight on the fact that the guarantee was subject to an English jurisdiction/choice of law clause. If a creditor wishes to place obstacles in the way of a *Kekhman* style bankruptcy then ensuring that the choice of law/jurisdiction on their contract is in the creditor's favour is a good place to start. Finally, if you have any other ideas on how to address the insolvency tourism question – answers on a postcard please. □

JAMES HARRISON
is an associate
at Penningtons
Manches LLP.



ALEX FOX is
a partner at
Penningtons
Manches LLP.



How complete is complete?

Kathryn Maclellan explains the background behind a landmark decision regarding mis-selling claims in IVAs and its potential implications for the industry.

Earlier this year, my client was the subject of a landmark decision that could set a precedent for issues surrounding closed IVAs. The decision, made in February by the High Court in Manchester, could have wide-reaching consequences for the way in which banks, lenders and IPs manage realisations of assets post-due completion of arrangements.

How did the case first come about?

I was approached to act on behalf of an individual who had previously entered into an IVA with his creditors. The IVA had a five-year term and it had successfully concluded in January 2013. My client had complied with all obligations under the IVA and he was issued with a certificate of completion and the final report was sent to creditors. The supervisor ceased to act at this time.

Some ten months after the IVA was closed, my client was informed that two lenders had paid the proceeds of successful PPI mis-selling claims to the former supervisor.

Given that the IVA had been closed and that a certificate of completion had been issued my client took the view that the PPI proceeds in question should be paid to him and not his former supervisor.

I entered into correspondence with the former supervisor and subsequently

with his solicitors but without resolution. The former supervisor then issued an application to the court seeking direction on who was the correct recipient for the funds.

How did the court proceedings unfold?

The application was first heard in Burnley county court in October 2014. After consideration of statements from the former supervisor and my client, the court decided that my client was the correct recipient for the funds in question and an order was made in those terms.

The former supervisor sought leave to appeal, which was granted, and the matter was then heard on appeal in the High Court in Manchester in February 2015. The decision of the lower court was upheld and the supervisor was ordered to repay the funds to my client.

How did you present your client's case?

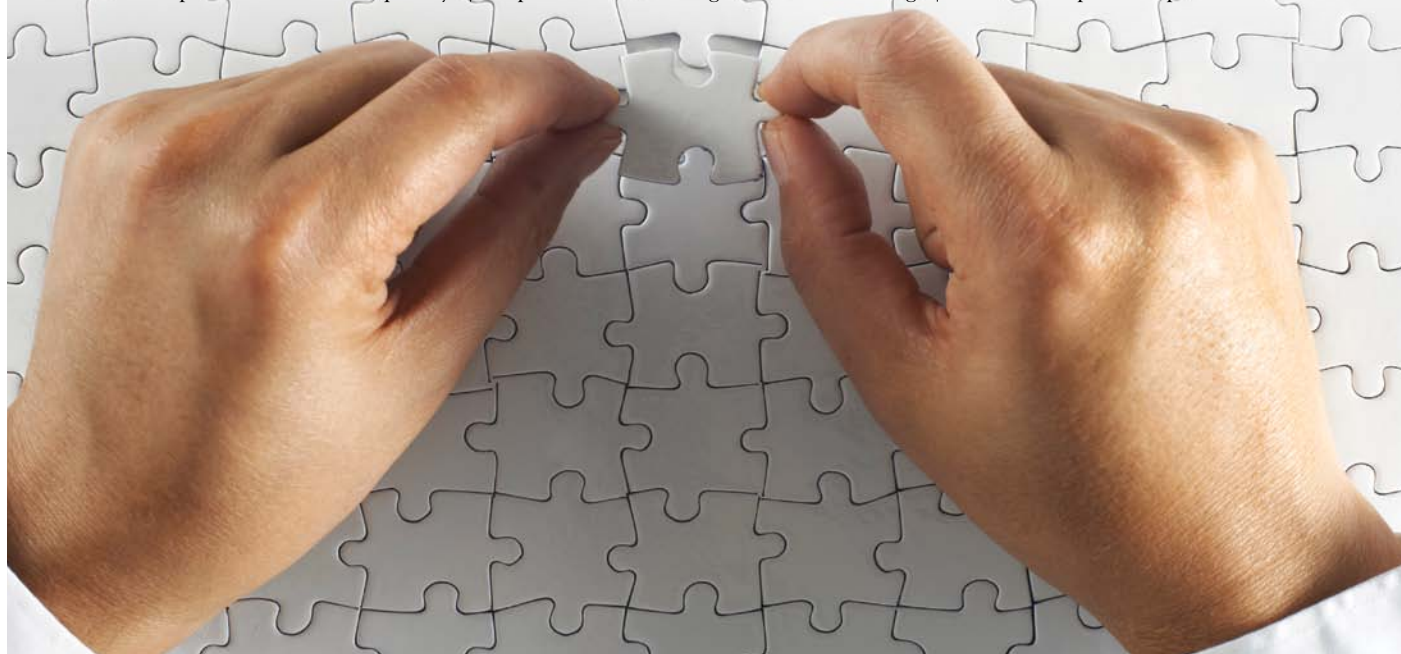
This case concerns novel issues that have not been before the court previously. My client's position was that he had complied with all his obligations under the IVA and his compliance had been confirmed to him, and to all the creditors bound by the IVA. He had received a certificate of completion and the final report from the supervisor confirming there was nothing

further to be done and that the supervisor had ceased to act. My client struggled to understand how 'complete' could not mean exactly that.

The certificate of completion confirmed that my client was released from all liabilities to creditors bound by the arrangement. This sentiment was supported by the standard terms and conditions to his proposal, which stated 'upon the issue of a completion certificate the debtor shall be released from all debts which are subject to the arrangement'. Our position was that the effect and purpose of the certificate was to extinguish any further liability between my client and the IVA creditors.

Arguments were also raised in this case with regards to the trust created by the IVA. All parties agreed that this was an all assets IVA, in that it included all assets that would form part of a bankruptcy estate unless specifically excluded. The right to claim for mis-sold PPI, if in existence at the date the IVA was entered into, would therefore form such an asset regardless of whether the potential claim was known about by the debtor at the time the IVA was entered into. The IVA also contained provision for the assets comprised within the IVA to be held on trust.

The key issue with regards to the trust was whether it terminated on due completion of the IVA or whether it continued post-completion. The case of



NT Gallagher & Son Ltd [2002] EWCA Civ 404 was considered but Judge Hodge did not find it particularly helpful to make reference to the principles in *NT Gallagher* when making a determination in this case. His judgment considered the fact that *NT Gallagher* is concerned with the effect of liquidation or bankruptcy on a trust created by a CVA or IVA and that the case is firmly rooted in the scenario of default under an IVA and what will happen to such a trust if the proposal is silent on this issue. The case makes no reference or provision for the situation where the debtor has complied and a certificate of due completion is provided to him.

“

The case makes no reference or provision for the situation where the debtor has complied and a certificate of due completion is provided to him.”

If the trust created by the IVA ended on completion then the former supervisor had no further claims on these funds as assets in the IVA. If the trust did not come to an end on completion of the IVA then there must be consideration as to who were the beneficiaries of that trust, given the effect of the completion certificate, which we argued was clearly that the debtor had no further liability to any of the IVA creditors once that certificate was in place. In short, is there an argument that even if the trust survives completion there are no beneficiaries under that trust? In which case, the funds subject to it can only be due back to the individual.

How did the judge reach his decision?

Judge Hodge considered numerous factors in reaching his decision including the trust created by the IVA and if and how this concluded, the effect and purpose of a completion certificate, the obligations on my client with regards to holding assets on trust and what assistance could be gained from the *NT Gallagher* case. He also considered the very clear difference between failure of an IVA and one that is subject to due completion. He also made reference to the *Guidance Note on Payment Protection Insurance Mis-Selling Claims* issued on 19 April 2013, particularly paragraph 4.2, which recommends an agreement between debtor, supervisor and lender as to how proceeds of a claim are to be dealt with to avoid IVAs being kept open beyond their planned duration. While this is not law, as was accepted by the parties in this



case, it does reflect the considered view of the relevant professional insolvency bodies and should be given due consideration.

In his judgment, the judge reflected this guidance and confirmed the remedy to this issue is for the supervisor and the debtor to enter into such an agreement to state how such funds are to be dealt with notwithstanding conclusion of the IVA.

Is this the end of the matter?

Not yet. Following the decision of the High Court in Manchester, the former supervisor sought and obtained permission to appeal to the Court of Appeal and a stay of the previous order made. This second appeal has not yet been listed for hearing.

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The decision does also provide some clarity on the issue of trusts.”

What could this mean in practice?

I imagine that many insolvency practitioners will be awaiting the outcome of that appeal before they consider their position with regard to those cases that they may have closed and then taken receipt of post-closure realisations. These cases will be of concern if there was no agreement in place with the debtor. With regard to live cases it is encouraging that the judgment appears to endorse the guidance that is available to IPs in terms of reaching an agreement between debtor/lender/supervisor prior

to closure and to avoid keeping cases open beyond the planned term. The decision does also provide some clarity on the issue of trusts and, in the absence of any specific provision dealing with how these are to be treated, whether these survive completion. If the decision is upheld I imagine that individuals who know of post-due completion payments being made to the supervisor will want to consider whether there was any agreement in place with the supervisor in this respect. If there was no such agreement they may question on what basis the funds have been paid to the former supervisor and on what basis he or she has given valid receipt for those funds. The decision does also have a potential impact on lenders who will have to be aware of making payments to supervisors post-closure. Lenders will want to ensure that they are discharging their debt to the correct party.

With thousands of IVA cases closing each month, in addition to those already closed, the potential for scrutiny of those cases where funds have been incorrectly paid to supervisors could be significant indeed. ■



KATHRYN MACLENNAN is a solicitor in insolvency law at Stephensons Solicitors LLP.

ATE – top tips

Sanjay Desai considers the key do's and don'ts of getting on cover.

Following a well fought campaign by the profession, the recoverability of the after the event (ATE) premium was preserved for insolvency. Our firm was proud to co-sponsor Professor Peter Walton's report. ATE provides valuable protection to the claimant from adverse costs awards. This is particularly pertinent in insolvency where the insolvency practitioners could be left with a personal liability for any adverse costs if ATE is not taken out. However, there are some key points to consider in order to obtain ATE.

Prospects of success and recovery

Though there are two distinct concepts, they are inextricably linked for the purposes of obtaining ATE cover. Regardless of the respondent's liquidity the case must be factually meritorious in the first instance. Conversely, a meritorious case is only worthwhile if the respondent has the means to satisfy any judgment against them. A win on principle is not an insurable concept.

In order to obtain cover the insurer must be satisfied that the claim has positive prospects of success. Generally, insurers would consider good prospects as meaning the claim has at least a 60 per cent prospect of success. A case having a 55 per cent prospect of success may still obtain insurance; however, this heightened risk can be reflected in the price. A case with only a 50 per cent prospect of success may not be impossible to insure but is highly unlikely to receive cover as the case will be deemed as likely to lose as it is to win. Depending on the value and complexity of the claim, insurers will often require this assessment to be confirmed by counsel. Full advice will always assist in obtaining cover. However, some insurers will accept an email from counsel that sufficiently deals with the salient points of the claim and confirms the prospects as a percentage.

Once the factual merits of a claim are established as being positive, the insurer will always consider the recoverability. They need to be satisfied that if cover is offered, the respondent has the means to satisfy any judgment against them. The insurer wants to be satisfied that their premium will be paid as well as any damages. This is particularly relevant in insolvency and became even more important post-Jackson. Therefore, when submitting a case, do consider any evidence in relation to recoverability.

Property is always a good item to provide evidence of when considering recoverability. However, do also consider who or what the respondent is and what means they may have of paying. For example, if a business, does it own

machinery and plant? If it is a professional, do they hold professional indemnity cover? Any evidence demonstrating that the defendant has means to satisfy a judgment will always be welcomed by insurance when considering an application for ATE.

In order to drive down the overall pricing of premiums, a simple tip is to insure more cases and to do so more frequently. Each of these things positively impact the insurer's overall risk. This reduction in risk will be reflected in the insurer's pricing strategy, whether on a firm-by-firm basis or in the market as a whole.

As odd as the principle may appear at first instance, the general principle is that cheaper premiums can be obtained through insuring more cases. Pricing is determined upon the risk. Each individual matter is priced based on the factors unique to that set of facts and the risks that a particular claim may be unsuccessful. Also factored in to the insurer's pricing strategy is the risk in their overall basket of claims. For example, an insurer receives 60 claims while allowing for two in six to be unsuccessful and ultimately a claim to be paid out on. If the insurer receives 100 claims and the ratio of losses is one in six then the risk decreases as the percentage of losing claims drops and, in turn, so will the pricing.

The greater the number of claims insured, the smaller the percentage of losing cases, thus the price will decrease along with the insurer's risk.

Insurers prefer claims to be insured early. They like cases to be insured pre-issue. When a case is insured early, there is greater opportunity for early settlement/negotiation, thus lowering the risk. Further to this, if a case is presented early, with 'all ducks in a row', it is a sign of good preparation with a coherent strategy to take the matter forward. Conversely, where insurance is sought at a particularly advanced stage in proceedings this is an indication that the matter is unlikely to settle and more likely to proceed to trial. Therefore, the risk to the insurer is greater and this will be reflected in the price of the premium offered.

Determining the amount and types of exposure: getting them right is key

When determining the amount of cover required one must first consider the level of coverage sought. From here, one can determine the amount. Incorrectly assessing the amount of cover may mean a top-up is required. While obviously dependent on the facts, insurers are generally loathe to offer a top-up. This can also be quite costly.

This is the first step towards determining the value of coverage required. Almost any aspect of the claim can be insured. These

will be items such as: adverse costs and disbursements, own side disbursements, and own side solicitors fees.

Therefore it is necessary to consider which combination of the above will be insured. The more insured elements mean that the insurer's costs exposure will increase. This will then mean a higher premium.

Once the level of coverage has been considered it is then necessary to accurately determine the amount of cover required. This is the key factor for insurers in pricing the risk. The higher the exposure, naturally, the higher the premium. It is imperative to get this correct. It will naturally follow that the greater the amount of cover sought, the higher the risk or potential pay out for the insurer so the greater the premium.

The insurers know who you are

Adverse selection is a real issue for many insurers. The insurers are happy to take on cases but they like to have a good spread of risk. Therefore, if they feel that they are only being given bad or risky cases to insure they will either decline cover or the prices will be driven up. As discussed above, if an insurer has a greater number of winning cases, the percentage of claims against policies will decrease. In turn this will drive down pricing.

Insurers keep records. Some insurers have identified firms, and even individual IPs, that have had a high loss rate compared to the win rate. Equally they know which practitioners do not take insurance on cases that they feel they will win and only adversely select the cases for insurance. Further to this, the insurers also keep records of which IPs or firms only seek insurance once it is clear that settlement negotiations have broken down or are not possible, so in their view, cases that represent a greater risk.

This is a genuine problem. Insurers are wise to which firms and IPs are genuine in regular use of ATE and those that only want to insure cases they feel they will lose.

While the above is not an exhaustive list of considerations for obtaining ATE, these are all key points to note. Insuring more claims earlier and spreading the insurer's risk will undoubtedly make obtaining cover a lot easier. □



SANJAY DESAI

is an associate in the restructuring and recovery risk practice at JLT Specialty Limited.

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	9 North East Regional Meeting	KPMG LLP, Newcastle upon Tyne
	10 Yorkshire Region Golf Day	Oakdale Golf Club, Harrogate
	11 R3 in Scotland Annual Dinner	Grand Central Hotel, Glasgow
	14 15 JIEB Student Workshops	Linklaters LLP, London
	15 Midlands Region Golf Day	Edgbaston Golf Club, Birmingham
	16 West Midlands Women's Group Champagne Afternoon Tea	Hotel Du Vin, Birmingham
	17 Personal Insolvency	Copthorne Tara, London
	22 London & South East Regional Meeting	DWF LLP, London
	24 North West Women's Group Champagne Afternoon Tea (Fully booked)	47 King Street West, Manchester
	29 Administrations	Holiday Inn Regents Park, London
	29 Pre-packs and SIP 16	Holiday Inn Regents Park, London
	29 Introductory Series	Prospero House, London
	29 Introductory Series	Irwin Mitchell offices, Leeds
	30 London & South East Quiz Night	Steam Wine Bar, London
October	1 East Midlands Annual Dinner	Crowne Plaza, Manchester
	8 Insolvency Litigation	Copthorne Tara, London
	15 16 SPG Forum	The Palace Hotel, Manchester
	20 Insolvency Day	Eversheds LLP, Leeds
	20 Introductory Series	Prospero House, London
	20 Introductory Series	Irwin Mitchell offices, Leeds
November	5 Advanced Restructuring	Crowne Plaza – The City, London
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	12 Midlands Annual Quiz Night	Villa Park, Birmingham
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Advertisers' index

Encompass	3, IFC
Insolvency Risk Services.....	3, 28
Manolete Partners plc	5
MGR Appraisals	38
Neil Taylor Insolvency	OBC
R3 Courses and conferences	1, 38
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Richard Mascall
richard.mascall@mgrappraisals.com

James Gregory
james.gregory@mgrappraisals.com



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MGR Appraisals, Beaufort House,
94-96 Newhall Street, Birmingham, B3 1PB
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R3 contacts

R3, 8th Floor,
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T: 020 7566 4200
F: 020 7566 4224
www.r3.org.uk

R3 Executive

President

Phillip Sykes,
phillip.sykes@bakertilly.co.uk

Vice-president

Andrew Tate,
andrew.tate@krestonreeves.com

Administration

Chief Executive Officer

Graham Rumney,
grumney@r3.org.uk

Assistant Office Manager

Tasneem Choudhury,
tchoudhury@r3.org.uk

SPG; Personal Insolvency; Fraud Group; Regional Communications Committee

Director

Emma Hobson, ehobson@r3.org.uk

Policy and Committee Support

Fay Robinson, frobinson@r3.org.uk

Finance

Finance Manager

Ryan Porter, rporter@r3.org.uk

Assistant Finance Manager

Alex Coles, acoles@r3.org.uk

Membership & Marketing

Head of Marketing & Member Services

Cynthia Matthews,
cmatthews@r3.org.uk

Marketing Executives

Fareeha Afghan,
fafghan@r3.org.uk

Deborah Smith,
dsmith@r3.org.uk

Marek Nusl,
mnusl@r3.org.uk

Membership Officer

Shemin Karim,
skarim@r3.org.uk

IT Manager

Samit Vadgama,
svadgama@r3.org.uk

Membership & Marketing

membership@r3.org.uk
T: 020 7566 4238

Communications, Public Affairs and Policy

Director of Communications

& Public Affairs
Victoria Jonson,
vjonson@r3.org.uk

Communications Manager

Nick Cosgrove,
ncosgrove@r3.org.uk

Communications Officer

Orla Hennessy,
ohennessy@r3.org.uk

Public Affairs & Policy Manager

Georgina Dowling,
gdowling@r3.org.uk

Public Affairs & Policy Officer

James Jeffreys,
jjeffreys@r3.org.uk

Education, Courses & Conferences

Head of Courses & Conferences

Angela Stannard,
astannard@r3.org.uk

Courses and Conferences Organiser

Catherine O'Mara,
co'mara@r3.org.uk

Courses and Conferences

Marketing Executive
Kirsten Scully, kscully@r3.org.uk

Courses Administrator

Maggie Dean, mdean@r3.org.uk

Regional Events Co-ordinator

Sara Calvert,
scalvert@r3.org.uk

Course Bookings

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

Technical

Technical Director

John Francis, jfrancis@r3.org.uk

Technical Officer

Jonathan Ausena,
jausena@r3.org.uk

Committee Chairs

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Ross Connock, 0117 923 4274

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Liz Pywowarczuk, Matthew Tait,
Andrew Tate, Laurence
Weeks, Cathryn Williams.

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.

Plenty to talk about

Andrew Tate and **Fay Robinson** consider worrying developments in the bonding market and preview the sessions and the speakers at this year's SPG Forum at the Palace Hotel, Manchester.

This year's SPG Forum is fast approaching – from 14–16 October we will be gathering at the hotly anticipated new venue, the Palace Hotel in Manchester. Following feedback from previous years about the quality of the facilities provided by our Birmingham venue, R3 hopes that you will be pleasantly surprised by this new venue;

“

Speaker Caspar Berry will draw on his diverse experience as a professional poker player, actor, film director, entrepreneur and commentator.”

we will also have virtually exclusive use of the entire hotel, which we hope will create a great 'community' feel to the event. We hope that, as in previous years, the SPG community will come together and actively participate in the conference – there are certainly plenty of developments in the profession to talk about!

This year's programme

In terms of content, this year's programme is packed full of exciting slots. We'll be kicking off events with an application for the appointment of a provisional liquidator and ancillary relief performed by a judge and two barristers from XXIV Old Buildings, which should be a lively start to the first day. Day one will also include a session on insolvency's place in employment tribunals led by the regional employment judge for the North West, where we will hear about the employment tribunals' approach to collective redundancies and protective awards on insolvency situations. This should be especially interesting against the background of the call for evidence earlier in the year.

Other slots on day one will include members' voluntary liquidation (MVLs)

(pitfalls, practical issues and risks); developments in technology and how to make the most of these tools in your firm; and a session exploring alternative sources of funding (including crowd funding, peer-to-peer lending and other alternative lending platforms). This year, we've also opted to include a motivational speaker, Caspar Berry, who will draw on his diverse experience as a professional poker player, actor, film director, entrepreneur and commentator to illustrate new approaches to risk and decision making. We finish the first day with an exciting panel session looking at the future of insolvency regulation, with representatives from The Insolvency Service and the Joint Insolvency Examination Board (JIEB) (among others). In the evening, you can expect a drinks reception followed by dinner, where networking and the usual camaraderie will be on the menu!

Day two's sessions

Day two will include a panel session where the leading recognised professional bodies (RPBs) will share their war stories (highlighting common pitfalls) and thoughts on other hot topics, as well as a session on Financial Conduct Authority-regulated activities, and a speaker from HMRC giving guidance on the 'do's and don'ts' of IVA and CVA proposals. We will also explore various issues surrounding tax avoidance schemes and accelerated payment notices.

The list above is not exhaustive, and the full programme of events is available on the R3 website, or by contacting the R3 Courses team at courses@r3.org.uk. All in all, we think this year's forum will be the best one yet and look forward to seeing many of you there!

Recent developments in the bonding market

Practitioners in the smaller practice classification may be aware of some worrying developments in the bonding market with, in particular, one broker recently increasing bond pricing for smaller practices.

The Insolvency Service is aware of this problem and is currently reviewing the situation. We understand that they are looking at ways in which the scheme can be

changed so that bonding is available and remains so for all licensed practitioners, and that the costs of bonding are proportionate, all the while ensuring that the interests of creditors are properly protected. As you will know, the IP bonding scheme is a mixture of primary and secondary legislation, heavily influenced by market practice. This means that changing the bonding system quickly to react to market forces is not easy.

“

Rest assured, R3 is taking an active interest in developments and will contribute as much as possible to find a solution.”

Rest assured, R3 is taking an active interest in developments and will contribute as much as possible to find a solution that is fair to creditors and allows the bonding market to provide cover to the entire IP profession at a proportionate cost.

We will update you on progress as soon as possible. □

ANDREW TATE is R3 vice-president and SPG chairman. He is head of restructuring at Kreston Reeves LLP.



FAY ROBINSON is R3's committee and policy support executive.



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Contact:

Mark Sanderson

Managing Director

Mobile: +44 (0)7771 678571

Email: mark.sanderson@willis.com

Samantha Taylor

Deputy Managing Director

Mobile: +44 (0)7956 661162

Email: samantha.taylor@willis.com

Sadie Easdown

Client Service Director -

North, Scotland/NI

Mobile: +44 (0)7943 825923

Email: sadie.easdown@willis.com

Andrew McIntosh

Client Service Director -

South/Midlands

Mobile: +44 (0)7944 918542

Email: andrew.mcintosh@willis.com

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