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Spring 2013

RECOVERY

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New procedures in the energy sector

Floods and failing businesses
How IPs can claim from insurance

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

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

From the editor

Our president reminds us (page 5) that there are 160,000 zombie businesses in the UK, preserved by forbearance and low interest rates. Henry Shinners, a past JIEB prize winner, echoes the concern (on page 2 of our Careers and professional development supplement) noting that resources currently tied up in zombie companies need to be recycled to contribute to economic growth. These are thoughts I think it important to endorse.

Our excellent technical update column (page 12) explains the European Commission's proposals for revision of the European Insolvency Regulation. Since that column was written, but before *RECOVERY* went to press, The Insolvency Service issued a call for evidence on whether the UK should opt in to the revised Regulation. Given that there seems little choice between opting in to the revisions and opting out of the Regulation entirely, R3 will be strongly making the case for opting in. The consultation document notes a new mechanism for the inclusion or otherwise of procedures in Annex A of the Regulation, from which it could be inferred that if the UK does not notify schemes of arrangement to the commission, schemes will not fall under the Regulation (which is my guess as to what will happen).

The advice on page 34 from David Baxendale to consult and plan (as clearly happened in the carbon credits and waste disposal cases on pages 16 and 22) is invaluable. In these days of scrutiny of professional activity, in relation to both outcome and costs, the value of consulting and planning properly prior to an engagement should not be underestimated.

That old theme of regulation is still with us. On the plus side, R3's views on director disqualification, pre-packs and 'holding rescue to ransom' were front and centre in the latest Business, Innovation and Skills (BIS) Select Committee Report on The Insolvency Service. One to watch this year will be the Kempson review of IP fees, which I know R3 is engaged on already. There is likely to be a questionnaire coming from Professor Kempson on this, which I would urge you to complete.

C. Laughton

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

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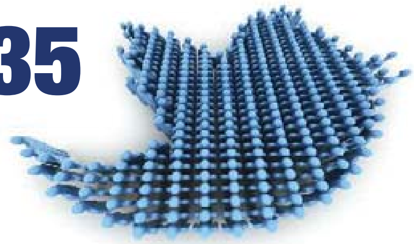

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SUMMER	The insolvency industry
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RECOVERY

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Calling time on the loan sharks

Payday loans should be better regulated and the spiral of debt halted, says **Stella Creasy MP**.

High cost credit companies, with rates of interest of 4,000 per cent and more, are now in every town centre across the country – there are 18 in my own constituency in Walthamstow alone – causing misery for thousands of people. They are profiting from the pressures on household incomes caused by the rising cost of living, unemployment and wage freezes. Data from the Office of National Statistics shows how families are being squeezed much more this time than in previous recessions, as they experience both falling household incomes and rising inflation. Predictions are that wages will stay flat for years to come, offering little respite to look forward to.

It is no surprise therefore that 80 per cent of such loans are taken out to cover the basic costs of living – food, travel, housing and energy. R3's own figures show that five million Britons expect to have to use such credit in 2013. Yet one in three of these loans are being used to pay off another payday loan – showing how British families using this credit often get caught in a spiral of debt. Many know such loans are toxic but have little alternative – research by consumer group Which? shows half of all borrowers who have taken out a payday loan have taken out credit that it turned out they couldn't repay – with 57 per cent having missed a payment.

This is a situation many predicted and one that could have been avoided. For three years many have been trying to warn the government that they needed to protect British consumers from these legal loan sharks. In particular campaigners have been calling for Britain to follow the lead of most other countries in introducing a cap on the cost of credit, and therefore give British consumers the same protection others around the world enjoy from being caught into a cycle of debt borrowing in this way. Now as debt engulfs the household budgets of so many, we see the consequences of the government's choice not to act.

Due to pressure from campaigners, the Office of Fair Trading has been monitoring this industry. These studies have revealed serious concerns over the adequacy of affordability checks, the number of loans that aren't repaid on time and the continued rolling over of loans. Little wonder, according to the National Audit Office, the failure to tackle the problems with these companies cost us £450m last year alone. In November 2012, the Financial Ombudsman Service reported a significant rise in the number of complaints made about payday loan companies. Yet despite review after review,

> "Appetite for change is strong and has been key to this campaign."

recommendation after recommendation, the high-cost credit industry continues to fall out of the grip of its regulators – claiming they can be trusted to put their own house in order and operate in the interests of British consumers. They have resisted the call to cap the costs of credit, continually citing their own voluntary codes of conduct and claiming caps would lead to more illegal lending. In fact, evidence from around the world shows the reverse is true, as countries with caps have both lower levels of illegal lending and lower levels of personal debt while maintaining a short-term credit market.

That's why across the country people are taking action through the Sharkstoppers campaign to challenge this industry and the myths they peddle. In partnership with Unite, Community, the Co-operative Party and the Movement for Change, activists have been helping raise awareness among their local community of affordable alternatives to the legal loan sharks. Whether it's teams of volunteers handing out leaflets to potential borrowers on the high street introducing them to their local credit union or passing motions in their local councils to try to slow the growth of these firms on our high streets, action is being taken by thousands to help the people struggling in their communities as they find themselves short of cash from getting into further financial difficulty. Last year these campaigners successfully convinced the government to give the new Financial Conduct Authority the power to cap the costs of credit if companies are shown to behave in ways detrimental to consumers. With this new regulator not due to take over until 2014 we must be clear in our message – taking action must start now.

With the financial pressure increasing on families and the rapid growth of this industry in the UK because of the lack of regulation it's clear such a further delay could be catastrophic.

That's why we are calling on the current regulator – the OFT – to set out now what it sees as an irresponsible level of lending so that when the new regulator, the Financial Conduct Authority, takes over, there is clarity as to how and what it should use its new powers to enforce. We believe this guidance should cover what is an acceptable cost of credit, the need for real-time credit checks and reporting, and reform of the use of continuous payment authorities to protect consumers from fraud.

R3's own research shows that the appetite for change is strong and has been key to this campaign – 93 per cent of the population believe changes are needed in order to protect consumers and 65 per cent support a cap on the total cost of credit. With the costs of living continuing to rise and further cuts to tax credits and benefits due this year we cannot allow the legal loansharks to make 2013 a window of opportunity for these companies.

It's time for the OFT to get ahead of these lenders and help relieve the pressure on all those households who will again this month find themselves with too much month at the end of their money and so falling into the arms of the payday lenders who show no signs of scaling down their aggressive marketing and advertising. The success of the Sharkstoppers campaign in changing the public debate on this matter in the face of a well funded industry so far shows what we can do when we work together – in 2013 we have to redouble our efforts to end legal loan sharking in this country and give British consumers the protections they deserve. ◻

STELLA CREASY is Labour MP for Walthamstow.

President's column

Lee Manning considers where the current retail crisis will take us.

I've been especially busy with the day job in the past few months, as well as taking R3 meetings with the Treasury, Bank of England and the new insolvency minister. Republic and Blockbuster followed HMV, Comet and Jessops into administration – two more big name casualties of the growing crisis besetting retailers. While the UK high street is experiencing wholesale changes with unsettling consequences for employees, it does, however, offer an important opportunity to reallocate capital. The collapse of the Republic fashion store chain, which was only acquired in 2010 for £300m, is a stark reminder that the ongoing shrinkage of disposable income for young 'affluent' consumers is forcing them to move away from upper mid-market and top-end labels to more affordable clothing.

> "A healthy economy requires activity at both ends of the economic cycle…"

Casualties, collapses and e-commerce

Clearly, I can't talk about specifics as the administrator of Blockbuster, but I think we are seeing the conclusion of the clearing-out cycle that began with the collapse of Woolworths in 2008 in terms of the retail footprint. The casualties have, in the main, been retailers where the business model has been severely challenged by the maturing e-commerce market such that the delivery method of their core products to customers cannot survive on the scale these businesses operated in a principally bricks-and-mortar operation. Their challenge is more difficult to fix than, for example, a fashion retailer buying the wrong ranges for a few seasons or failing to brighten up its stores. They face a technology competitor to their business model which is far greater than any business competitor.

Stagnation and stability

Low insolvency rates are good for employment, which is a key concern following the many retail administrations. However, while businesses exist in distress and corporate insolvencies remain low the economy continues to stagnate. A healthy economy requires activity at both ends of the economic cycle – it needs business growth and expansion, as well as the recycling of capital following business failure.

R3 research reveals there are 160,000 zombie businesses in the UK: that is, businesses only able to pay the interest on their debt but not the debt itself. These businesses are being kept alive by the forbearance of banks, other key creditors and favourable interest rates, which is enabling them to stay afloat but make no in-roads on their debt. One in ten retailers also currently exists as a 'zombie'. The big retailers we have recently seen enter administration were well known to have been in a precarious situation for some time, with the Christmas and January trading periods as their last chance.

> "This research has resonated with the press… as well as analysts, government officials and many banks."

This research has heightened R3's profile and secured us some very significant meetings over the past few weeks. R3 statistics on zombie businesses prompted a meeting with Treasury officials in January. It also provided an opportunity to discuss the insolvency process in general and proposals to enhance the UK's business rescue culture.

The Bank of England used R3 zombie figures in its financial stability report. It also held an 'Insolvencies, Forbearance and Productivity' meeting, which I attended. We discussed distressed companies surviving the recession, lender forbearance and the implications of this on the UK's productivity. R3 has received many enquiries around this piece of research; it has resonated with the press (notably the *Financial Times* and, for the first time, *The Economist*), as well as analysts, government officials and many banks.

Discussing fees with the insolvency minister

I also met the insolvency minister, Jo Swinson, to discuss the government's review of IP fees. I explained at length the process by which fees are agreed, why IPs provide value for money and highlighted the personal liability of IP work. She appeared receptive and I hope we will develop a constructive relationship. We are also contributing to the Kempson Review of fees, which has just begun, and it will be vital that we all respond to the questionnaire that is being worked on. The high street may be dramatically altering, but I am hopeful that the insolvency regime won't also change too much with it.

Let's end on a success, though, the BIS Select Committee's review of The Insolvency Service contained many direct points made by R3 in their submission, notable on pre-packs and director disqualification. This really proves the value of all this press, policy and parliamentary work and there are more details on this victory over the page. ◻

LEE MANNING is president of R3 and a partner in the Restructuring Services division at Deloitte LLP.

R3's views feature prominently in the Business, Innovation and Skills Committee Report on The Insolvency Service

In a significant achievement for R3 and its members, our views on director disqualification, pre-packs and 'holding rescue to ransom' were front and centre in the latest report on The Insolvency Service, which highlighted the dangers of underfunding. We share the report's belief that disqualification rates should increase; 10 years ago 45 per cent of 'D1 reports' sent to The Insolvency Service by insolvency practitioners (IPs) led to a disqualification of a director, today this has dropped to just 21 per cent. An increase in resources and efficiencies such as electronic reporting would see more 'delinquent' directors prosecuted, thereby protecting well run UK businesses.

On pre-packs, R3 strongly supports the suggestion of providing feedback to insolvency practitioners where the SIP 16 report (explaining the pre-pack to creditors) has been judged non-compliant to prevent repeated mistakes. IPs should be informed of what precisely The Insolvency Service expects to be included in the SIP 16 report. Our members believe these changes will produce better SIP 16 compliance and will go some way to improving confidence. R3 believes there are further measures that should be introduced in order to boost transparency and confidence in the pre-pack process, such as giving creditors the option to appoint an independent liquidator to examine a connected party sale.

The committee recommended increasing the £525 upfront bankruptcy fee; however, R3 does not see how this will make it any easier for individuals to enter bankruptcy, with the numbers of individuals entering this formal insolvency procedure decreasing 24 per cent over the last 12 months. R3 supports the recommendation for the fee to be paid in instalments, which would remove this financial barrier to bankruptcy. Finally, R3 supports the creation of common regulatory standards and a single gateway for complaints, providing this is done with further education of the public and creditors on the fee-setting regime for insolvency practitioners.

R3 welcomes the government's announcement on the continuation of supply to businesses in insolvency

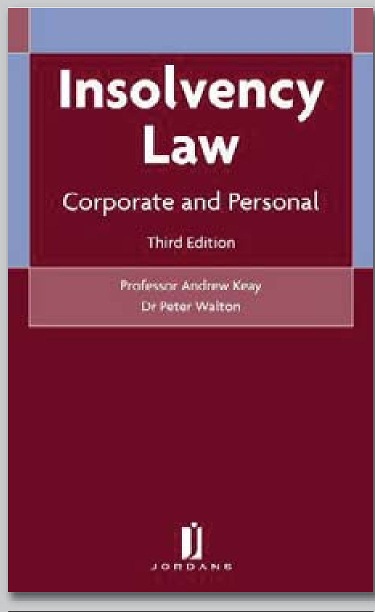
R3 President Lee Manning comments:
'We are delighted that the government has tabled an amendment to the Enterprise and Regulatory Reform Bill to prevent IT suppliers taking advantage of an insolvency situation by increasing their charges as a condition of supply. R3 has been campaigning on this issue for over two years and our research reveals that more than 2,000 businesses a year could avoid closure if suppliers continued to supply at the pre-insolvency terms.

'This victory for common sense recognises that legislation has not always kept pace with changes in public utilities ownership and highlights the importance of IT when running a business in the 21st century. Struggling businesses need a flexible and up-to-date insolvency regime to allow them the best chance of survival.

'This announcement comes on the back of the BIS Select Committee recommending that the government issues a consultation on the continuation of supply to businesses in insolvency, which we had previously welcomed.'

Aeroco Components jobs saved

Jobs at Aeroco Components have been saved following a pre-pack administration agreement with Aeroco Group International, owned by William Sheil. The Manchester airport-based aircraft repairs firm administration was being handled by RSM Tenon. Under the agreement 26 people will retain their jobs at the company, which repairs commercial aircraft.



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Insolvency Law: Corporate and Personal

An accurately written and comprehensive general guide to this complex area of law, this book is suitable for students and practitioners alike. It is set out in a user-friendly format, comprising a clear table of contents, which is broken down into sub-headings to direct readers as fast as possible to the relevant area of law.

The book covers all the core areas associated with insolvency, i.e. company administration, receivership, company and individual voluntary arrangements, and bankruptcy. The text is broken down into ten parts, each of which is followed by a referencing section, giving it a neat and uncluttered appearance thus adding to its systematic layout.

At a time when cross-border insolvencies are continuing to dominate, this latest edition appropriately addresses the issue. Chapter 25 deals with the main approaches to cross-border insolvency. It touches on the main developments in international insolvency, the Insolvency Regulations 2000 and gives discussion to whether or not other nations will follow suit in adopting UNCITRAL, now that the world's leading economic powers have.

Chapter 26 looks at European insolvency proceedings, focusing on the European Union's efforts to streamline cross-border insolvency practice. The book devotes a large chapter to this topic, as EC Regulation on Insolvency Proceedings 2000 has become an increasingly important part of insolvency law in the UK and the jurisprudence flowing from the regulation has broadened somewhat. Furthermore, it explains the 'COMI', the proceedings involved: namely the secondary and territorial proceedings, as well as the responsibilities and obligations of the liquidators in company insolvencies. However, it is worth noting that not all the case law is addressed, on account of the sheer quantity requiring a separate text on this topic alone.

As already indicated, this text offers a broad and practical authority on insolvency law. The explanation throughout is digestible and concise, giving the reader a clear understanding of the topic, without overwhelming them with too many intricate details. Its clear and easy-to-follow layout makes it an ideal choice as a core text for someone new to this area.

LILY MANSER is a student at Buckingham Law School.

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Cows moo in regional accents...

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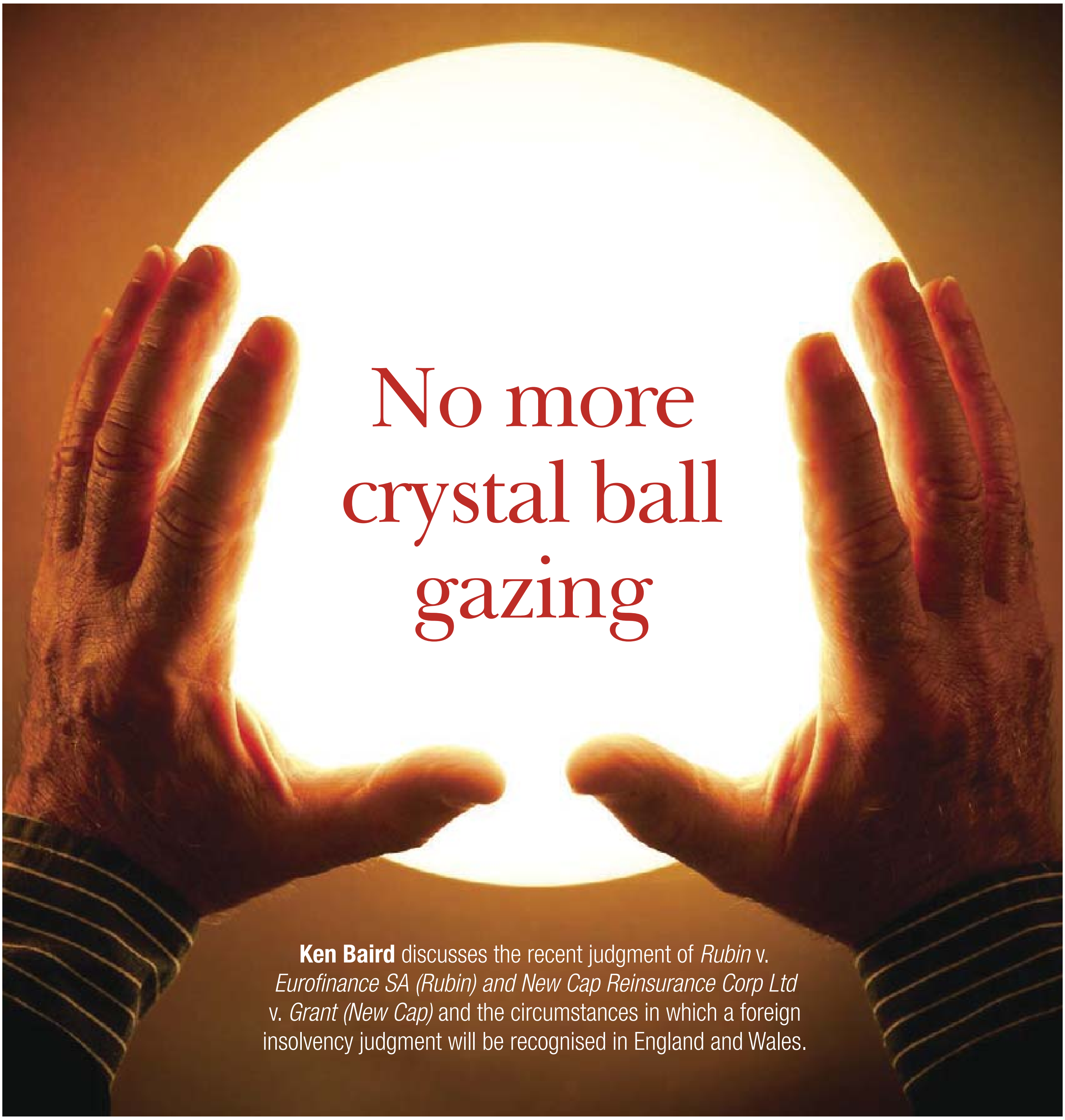


No more crystal ball gazing

Ken Baird discusses the recent judgment of *Rubin* v. *Eurofinance SA (Rubin) and New Cap Reinsurance Corp Ltd* v. *Grant (New Cap)* and the circumstances in which a foreign insolvency judgment will be recognised in England and Wales.

The facts in *Rubin*

Eurofinance SA was a company incorporated in the British Virgin Islands. It established a trust company, which operated a sales promotion scheme in the United States and Canada. In 2005 Messrs Rubin and Lan were appointed as joint receivers over the trust (the joint receivers) and commenced insolvency proceedings with the US Bankruptcy Court in New York on the basis that the USA was the location of the trust's creditors and assets. The liquidation plan, approved by the US court, gave the joint receivers exclusive jurisdiction to prosecute all causes of action and using these powers they brought proceedings against Eurofinance in respect of fraudulent conveyances and transfers. Eurofinance did not appear or indeed submit to the jurisdiction of the US court and summary judgment was entered against it. The joint receivers then made an application to the High Court in England for recognition of the US judgment under the Cross-Border Insolvency Regulations 2006 (the CBIR). The CBIR have implemented the UN Model Law on Cross-Border Insolvency in Great Britain. The joint receivers also applied for an order from the English court to enforce the judgment in England.

The facts in *New Cap*

A Lloyd's syndicate had entered into reinsurance contracts with an Australian reinsurer, New Cap. New Cap made a lump sum payment to the syndicate in consideration for its release from liability under the reinsurance contracts. New Cap subsequently went into liquidation and the liquidator brought proceedings against the members of the Lloyd's syndicate to challenge the payment as a preference. The Supreme Court of New South Wales found in favour of the liquidator and made an order setting aside the payment. The syndicate members neither appeared before the New South Wales court to defend the proceedings nor did they have any assets or presence in New South Wales. They had, however, participated in the New South Wales insolvency proceeding by submitting a proof of debt and taking part in creditors' meetings.

The New South Wales court issued a letter of request to the English High Court requesting its assistance to enforce the judgment under s.426 of the Insolvency Act 1986 (the IA 1986) or that the liquidator be allowed to bring proceedings in England to set aside the payment. Section 426 of the IA 1986 provides for the co-operation of the UK courts and other 'relevant countries' in insolvency related matters (Australia being a 'relevant country'). The New South Wales court also pleaded for assistance under the common law in general.

The cases in the High Court and Court of Appeal

In *Rubin*, the High Court held that the principles of private international law applied and because the defendants were not in the US at the time of the proceedings, nor had they submitted to the jurisdiction of the US court, the judgment was not enforceable in England. The joint receivers successfully appealed and the Court of Appeal held that judgments in bankruptcy and insolvency proceedings are a separate category of judgment and not governed by the rules of private international law, which prevent enforcement of a judgment if a defendant does not submit to the court's jurisdiction. Instead, on grounds of justice and public policy, such judgments should be actively enforced by courts to ensure that unitary bankruptcy proceedings may be brought by office-holders in one jurisdiction, which could receive worldwide recognition. The court drew on principles advanced by Lord Hoffmann in cases such as *Cambridge Gas Transportation Corpn* v. *Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26 (Cambridge Gas)* and *Re HIH Insurance (McGrath and others* v. *Riddell and Another) [2008] UKHL 21*.

> "The Supreme Court of New South Wales found in favour of the liquidator and made an order setting aside the payment."

In *New Cap*, the court at first instance upheld the requests of the New South Wales court under both s.426 IA 1986 and the common law. The syndicate members appealed arguing that the proper way to enforce the New South Wales judgment was through registration under the Foreign Judgments (Reciprocal Enforcement) Act 1933 (the FJA 1933). In contrast to the High Court, which held that the FJA 1933 did not apply to orders made in insolvency proceedings, the Court of Appeal found the FJA 1933 to apply and that the judgment was registrable under it (but had not been registered). Further, according to s.6 of the FJA 1933, registration would preclude the judgment being enforced under the common law. However, the Court of Appeal gave relief to the liquidator because assistance under s.426 of the IA 1986 is not technically enforcement of the foreign order, but the making of an equivalent English order.

The Supreme Court's decision

The Supreme Court held that, from the perspective of the insolvent estate, there is no difference in principle between a contractual action (e.g. for the repayment of monies owed to the insolvent estate) and an avoidance action (e.g. an action to recover a preference payment). Both claims are *in personam* claims (that is, personal claims) that would have a similar benefit for the insolvent estate. The court considered that the relevant question was not whether there was a distinction in principle but whether, as a matter of policy, there should be a more liberal rule for recognition of avoidance judgments, in the interests of the universality of bankruptcy. The Supreme Court discussed the decision of the Privy Council in *Cambridge Gas*. In that case, Lord Hoffmann who gave the lead judgment held that bankruptcy proceedings could not easily be classified as being either judgments *in personam* or judgments *in rem*.

As Lord Hoffmann explained: 'Judgments *in rem* and *in personam* are judicial determinations of the existence of rights: in the one case, rights over property and in the other, rights against a person… The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors... Bankruptcy… is a collective proceeding to enforce rights and not to establish them.'

The Supreme Court (Lords Collins, Walker and Sumption) held that *Cambridge Gas* was wrongly decided (Lord Mance preferred not to express a view on this point and Lord Clark expressly disagreed) and that there should not, in principle, be a separate category of cases (namely insolvency avoidance proceedings) for the purposes of recognition of foreign judgments. Lord Collins gave the following reasons:

- It was difficult to see a difference of principle between a foreign judgment against a debtor who owed monies to an insolvent company (which would be enforceable only on traditional private international rules) and a creditor who is to repay monies as a result of an avoidance action.
- If a distinction was made between *in personam/in rem* and insolvency proceedings then the English courts, when faced with a request for recognition, would have to decide on whether the foreign court was the competent court to deal with the insolvency in the first place. The formulation of rules on which courts are to be regarded the courts of competent jurisdiction has the hallmarks of legislation and such formulation should be left to parliament and not to judicial innovation.
- The reason for the limited scope of the common law's recognition of foreign judgments is that there is no expectation of reciprocity on the part of foreign countries. To achieve reciprocity would usually require lengthy negotiation and consultation.
- In the appeals before the court, there was not likely to be a serious injustice if the court did not sanction a departure from the common law rules on recognition of foreign judgments.

It is interesting to note that the court also considered that the introduction of judge-made law to extend the circumstances when foreign judgments will be recognised in the UK may 'be only to the detriment of United Kingdom businesses without any corresponding benefit'. In Lord Collins' view it would not be desirable that a defendant should be in a dilemma whether to face the expense of defending enormous claims against him in a foreign jurisdiction where he has no presence – or not doing so and being at risk of having a default judgment enforced against him in England.

> "Jeremy Paxman might have noted that the rather cautious approach of the court in this area could be viewed as an unhelpful inclination to draw back from an opportunity…"

Can foreign judgments be enforced under the CBIR 2006?

Given that the Supreme Court concluded that a foreign insolvency judgment could not be recognised as a special case and would need to follow the ordinary, private international law rules on recognition, the court then turned to the question as to whether a foreign judgment in insolvency proceedings can be enforced under the CBIR 2006. The Supreme Court stated that the CBIR 2006 are silent in relation to the enforcement of foreign judgments and that it would be surprising if this issue was to be dealt with by implication. The court held that the CBIR 2006 are not designed to provide for the reciprocal enforcement of judgments.

The Supreme Court then turned to the question as to whether the judgment could be enforced with the assistance of section 426 of the IA 1986. In similar vein, the court held that section 426 of the IA 1986 did not apply to the enforcement of foreign judgments. Given this judgment it » was unnecessary for the court to deal with the question of how the FJA 1933 related to section 426 in this regard.

What amounts to submission to the jurisdiction?

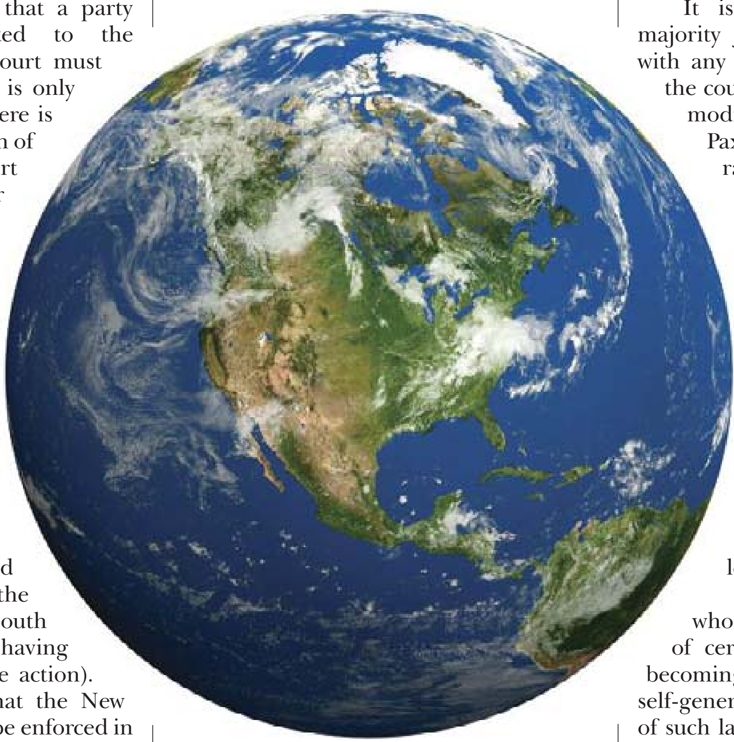
Given the Supreme Court's decision that the private international rules on recognition of a foreign judgment applied it was necessary to examine whether any of the defendants had submitted to the jurisdiction of the foreign court. The general rule in England is that a party alleged to have submitted to the jurisdiction of the foreign court must have taken some step which is only necessary or only useful if there is no objection to the jurisdiction of the foreign court. The court will consider the matter objectively.

In relation to *New Cap*, the Supreme Court held – relying on the case of *ex p Robertson, In re Morton* (1875) LR 20 Eq 733 – that a creditor submits to the jurisdiction of a foreign court by choosing to submit a proof of debt in the insolvency proceedings and this is what the syndicate had done. Therefore the syndicate members were held to have submitted to the jurisdiction of the New South Wales court (despite not having participated in the avoidance action). The court therefore held that the New South Wales judgment could be enforced in England under the FJA 1933. The ambit of the FJA 1933 was extended to Australia by means of the Reciprocal Enforcement of Judgments (Australia) Order 1994, which covers judgments in respect of a 'civil or commercial' matter. The Supreme Court concluded that insolvency proceedings were civil and commercial matters for these purposes.

In relation to *Rubin*, the Supreme Court found that no party had argued that the appellants had submitted to the jurisdiction and while it would be possible to construe such arguments it was not necessary to explore the issue further.

Judgment of Lord Mance

Lord Mance agreed with the majority judgment, but did not agree that *Cambridge Gas* was wrongly decided. Lord Mance considered that *Cambridge Gas* could be distinguished on its facts as a judgment giving effect to the distribution of the insolvent company's assets. Given this narrow focus, he considered that it did not cover the present facts, which involved avoidance claims giving rise to high-value *in personam* liabilities, and therefore reserved his opinion on whether *Cambridge Gas* was correctly decided.



Judgment of Lord Clarke

Lord Clarke dissented from the majority in relation to *Rubin*. He considered that the common law should be developed to permit enforcement and recognition of avoidance proceedings as part of foreign bankruptcy proceedings which the foreign court had jurisdiction to entertain. Confining this principle only to avoidance proceedings would in his opinion be an incremental development of existing principles and an application of the principle of modified universalism. The court would examine the facts on a case-by-case basis taking in account public policy and the interests of justice.

> "The uncertainty generated… resulted in many practitioners finding it impossible to give clients clear advice on hugely significant strategic decisions…"

Analysis

The issues examined by the judgment have generated a significant schism in the legal profession (and evidently within the judiciary). At its core the issue is whether universalism is desirable and, if so, how it should be implemented in English law. Commenting on the decision feels like being the editor of *Newsnight* and one is left with no choice but to present a balanced view on the grounds of fairness and the disagreement within the legal profession.

It is important to note that the majority judgment does not provide us with any strong indication as to whether the court is in favour of the principle of modified universalism or not. Jeremy Paxman might have noted that the rather cautious approach of the court in this area could be viewed as an unhelpful inclination to draw back from an opportunity presented by *Cambridge Gas* to make universal recognition the norm rather than the exception.

What is, however, apparent from the judgment is that the court does not consider that the common law is the appropriate way in which to implement universalism, it being more a matter for legislation.

Without doubt there are many who view the decision as a sprinkling of certainty over what was otherwise becoming a very unpredictable and fast self-generating body of law. The high point of such law making was without doubt the Privy Council's finding in *Cambridge Gas* that judgments in the context of an insolvency are neither *in rem* nor *in personam* but that insolvency proceedings are 'collective proceedings to enforce rights' and as such are *sui-generis* 'hybrid' proceedings, which form a class of their own. The uncertainty generated by *Cambridge Gas* resulted in many practitioners finding it impossible to give clients clear advice on hugely significant strategic decisions relating to the outcome of bankruptcy proceedings and issues such as submission to jurisdiction. The certainty afforded by this decision is perhaps to be welcomed over the requirement for practitioners to have a crystal ball on their desks. □

KEN BAIRD is head of Freshfields Bruckhaus Deringer restructuring and insolvency team.

Recent case summaries

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

Personal insolvency

***Timothy James Bramston* v. *Abraham Rafael Aryeh Haut* [2012] EWCA Civ 1637**

Facts: Mr Haut was made bankrupt in April 2011. He then proposed an IVA to his creditors. This was withdrawn by way of a court order. In March 2012, a second proposal for an IVA was made. However, the one-year anniversary of the bankruptcy would occur before such an order could be considered by the bankrupt's creditors. The bankrupt therefore requested his trustee to apply to suspend his automatic discharge from bankruptcy for six weeks to enable the creditors to consider his second proposal. The trustee refused. The bankrupt therefore applied, with the support of the majority of his creditors, to suspend his discharge pursuant to s303 of the Insolvency Act 1986. This was granted without notice to the trustee. The trustee sought to set aside such an order.

> "The power to suspend discharge was therefore penal in nature."

At first instance such was refused as Arnold J held that the court had jurisdiction to consider the application to suspend the bankrupt's discharge from bankruptcy as the trustee had refused to exercise his direction to make the application on a Wednesbury unreasonable basis *([2012] EWHC 1279 (Ch))*. The trustee appealed against this decision.

Held: The Court of Appeal held that the decision by Arnold J was incorrect and resulted from an error by the judge in his application of s279 of the Act to the facts before him and his improper use of the Wednesbury test.

Kitchin LJ commented that a purpose of the power to suspend discharge from bankruptcy was to extend the period of the bankruptcy and thereby to ensure that a bankrupt continued to suffer the disabilities arising from an undischarged bankruptcy until he complied with his obligations under the Act. The power to suspend discharge was therefore penal in nature and was to be used for purposes connected with the functions of the trustee to realise and distribute the bankrupt's estate.

This was not the purpose of the bankrupt's application. He sought the suspension of his discharge not to benefit

his trustee but rather to give him time to put an IVA proposal to his creditors, and thereafter to secure the annulment of his bankruptcy order. That was outside the scope of the jurisdiction conferred by s279 of the Act. Rather the bankrupt should have made his application under s252.

Further the court commented that the Wednesbury unreasonableness test was not the appropriate test to apply to the case and the judge should have considered whether the trustee acted perversely. This was not the case.

The appeal was therefore allowed.

Corporate insolvency

***Wright Hasall LLP* v. *Duncan Morris (Administrator of Marketbalance Ltd & Phoenix Insurance Management Limited)* [2012] EWCA Civ 1472**

Facts: The claimants had acted under a conditional fee agreement on behalf of the two above named companies, which were in administration. After not being paid, the claimant sued for its fees under the agreement, naming the administrator of the companies as the defendant. At the resulting trial the judge held that liability was established against the defendant, as administrator of the companies, with damages to be assessed. An argument then ensued as to whether such meant that the administrator was personally liable for the costs or whether the reference to him as administrator meant that the liability imposed on him by the order was in fact imposed on the estates of the companies. An insolvency application was brought to interpret that order and Cooke J found that the administrator was not personally liable to pay the sums under the order as whilst the order identified him as the defendant it was only in his capacity as administrator and the parties had proceeded at trial on the basis that the liability was that of the companies and not the administrator personally.

Held: The Court of Appeal held in the insolvency application that the administrator was personally liable for the judgment debt because he had been the only named defendant in the contract claim. The simple fact that he was sued as administrator of the companies did not support findings in the insolvency application that he was sued as agent for the companies rather than in his personal capacity.

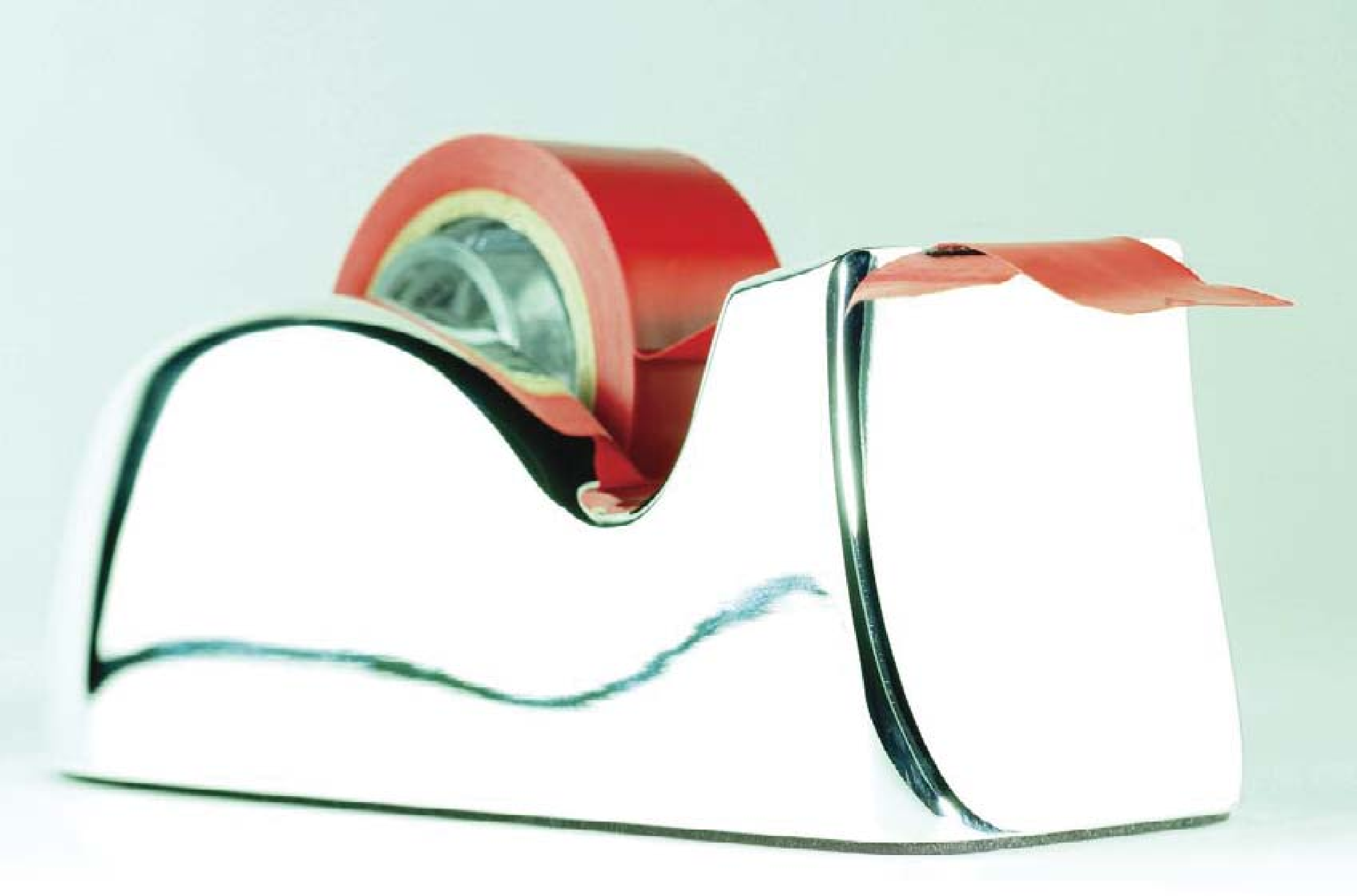
> "The parties had proceeded at trial on the basis that the liability was that of the companies and not the administrator personally…."

Treacey LJ commented that the trial judge in the contract claim could only have given judgment against a party to the action before him. The administrator, and not the companies, was the defendant to the action. Accordingly, the liability had been imposed on the administrator personally in the contract claim.

There was no reason to change such as there was no authority that provided that either the liability of a defendant sued in representative form was not personally liable on a judgment against him or that naming a defendant 'as administrator' recognised that he was sued as agent rather than in a personal capacity.

The appeal was therefore allowed. □

CLAIRE JACKSON is a barrister at Kings Chambers.



Technical update

The European Insolvency Regulation – proposed changes.

In the Autumn edition of *RECOVERY* we mentioned the review of the EC Regulation on Insolvency Proceedings being carried out by the European Commission, and the rather disjointed consultation and evaluation exercise intended to inform the commission's report on the application of the Regulation. The report (COM (2012) 743 final) was published in December, together with proposals for various amendments to the Regulation (COM (2012) 744 final). The commission sees its proposals as 'a first step towards an EU "rescue and recovery" culture'.

Based on the evaluation, the commission concludes that the Regulation is generally regarded as successful and that its fundamental policies are largely supported by stakeholders. Nevertheless, the report identifies certain shortcomings, which the commission believes would benefit from adaptations to the Regulation. The report notes that problems have been identified in relation to the scope of the Regulation, the rules on jurisdiction, the relation between main and secondary proceedings, the publication of insolvency-related decisions and the lodging of claims. In addition, the absence of specific rules for the insolvency of members of groups has been subject to some criticism.

In response to the public consultation the commission received a total of 134 replies from all member states except Bulgaria and Malta, with the UK (21 per cent), Romania (20 per cent) and Italy (12 per cent) representing more than 50 per cent of all respondents.

The following are the key elements of the commission's proposed reforms.

Scope

As part of the drive to encourage a European rescue culture, the proposal would extend the scope of the Regulation by revising the definition of insolvency proceedings to include what the commission calls 'hybrid' (debtor in possession) and 'pre-insolvency' (restructuring) proceedings. It is not clear exactly what proceedings this would cover. The commission lists a number of proceedings provided for in national laws but which are not included in Annex A of the Regulation. This list includes schemes under Part 26 of the Companies Act 2006 (despite the fact that Companies Act schemes are most frequently used in circumstances that have nothing at all to do with insolvency). R3 has argued against bringing such proceedings within the scope of the regulation. One particularly useful feature of Companies Act schemes is that they can be used to modify the rights of financial creditors in cases where the company concerned is domiciled elsewhere in the EU and may not have an establishment in the UK. This is because financial contracts are often specifically expressed to be subject to English law, which means that the English courts have jurisdiction to modify or compromise the rights of creditors under those contracts. There have been a number of cases of Companies Act schemes being put into place for foreign companies, for the benefit of the enterprise and its creditors generally. If such schemes were to be brought within the scope of the regulation, it would only be possible to use them where the company concerned had an establishment within the UK, that would mean that many of the cases which have benefited from such schemes in the past would no longer be possible.

> "The proposal… gives foreign creditors at least 45 days… to lodge their claims…"

Furthermore, if hybrid or pre-insolvency schemes were opened in another member state where the company had its

Centre of Main Interests (COMI), this would require recognition in other member states and could therefore prevent the use of a Companies Act scheme in the UK in circumstances where it might otherwise achieve the best outcome for creditors.

Jurisdiction

The proposal retains the concept of COMI and adds a provision for determining the COMI of natural persons. It also requires the court opening proceedings, whether main, territorial or secondary, to examine whether it has jurisdiction, and to specify the grounds on which its jurisdiction is based. Where no court is involved it is for the liquidator to undertake the examination. Foreign creditors are given the right to challenge the decision opening proceedings. This is intended to reduce the cases of forum shopping 'through abusive and non-genuine relocation of COMI'.

Secondary proceedings

Several modifications are proposed to the provisions relating to secondary proceedings.

The court hearing the application to open secondary proceedings would be obliged to hear the office-holder in the main proceedings, and would be able to refuse or postpone the opening of proceedings. The courts in the respective proceedings would be obliged to communicate and cooperate. The proposal would abolish the requirement that secondary proceedings must be winding-up proceedings.

Publication of proceedings and lodgement of claims

The proposal provides that certain minimum information about the insolvency proceedings have to be published in an electronic register freely accessible by the public, and provides for a system for the interconnection of national registers, to be accessed via the European e-justice portal.

The proposal provides for standard forms, available in all official languages, for the lodgement of claims, and gives foreign creditors at least 45 days following publication of the notice of the opening of proceedings to lodge their claims, regardless of any shorter period applicable under national law. Legal representation will not be necessary for lodging a claim in a foreign jurisdiction.

Insolvencies of groups

The proposal creates a specific legal framework to deal with the insolvency of members of groups, while maintaining the existing approach of treating each company as an individual entity. The proposal introduces an obligation to coordinate proceedings relating to different members of the same group by obliging office-holders and courts to communicate and cooperate in the same way as is proposed for main and secondary proceedings. In addition, each office-holder would have standing to be heard and make submissions in proceedings relating to other members of the same group. The commission has therefore adopted a procedural approach to dealing with the problems of group insolvencies, and has resisted any more mechanistic approach of consolidating proceedings.

> "So far, the consensus seems to be that the proposals are broadly in line with the UK's views."

At the time of writing (late January) The Insolvency Service has begun a series of stakeholder meetings to discuss the proposals in detail. So far, the consensus seems to be that the proposals are broadly in line with the UK's views, and it is understood that the UK insolvency regime generally is well regarded by the commission. A number of points have already arisen from detailed examination of the proposals, and The Insolvency Service will be taking up detailed drafting points with the commission as they emerge from discussions at the stakeholders' meetings. There may also be some limited general consultation on specific issues.

The proposal for an amended Regulation will now pass to the European Parliament and the Council of the EU for negotiation and adoption. No timetable has yet been set. However, under Title V of Part Three of the Treaty on the Functioning of the European Union (relating to Freedom, Security and Justice) the UK must tell the European Commission whether it will opt in to the proposed changes to the Regulation by a fixed date: in this case by 10 April 2013. Were the UK not to opt in but the Council determined that the revised Regulation was only operable in its entirety then the time to make a decision can be extended. Were the revised deadline to pass without the UK opting in to the revised Regulation then the Regulation would no longer apply to the UK. R3's comments in response to the commission's consultation are available in the members' section of the R3 website.

The Red Tape Challenge

Members will be aware of the Red Tape Challenge, an initiative led by the Cabinet Office to identify ineffective, burdensome or unnecessary regulation. The review was carried out in stages, each one concentrating on a particular 'theme'. Insolvency was the subject of its own theme launched last Autumn, and R3 submitted detailed suggestions on ways in which the insolvency regime could be improved and made more efficient. R3's suggestions included:

- Improving the administration process by removing the uncertainty surrounding notice requirements and expenses, allowing disclaimer, abolishing automatic terminations after one year, and allowing a specific date to be set for conversion to CVL.
- Extending the provisions of section 233 to cover other suppliers of essential services, and prevent the use of force majeure to extract ransom payments.
- Requiring secured creditor consent only from those who actually respond to an invitation to give consent.
- Abolishing the requirement to pay moneys into The Insolvency Service's Account in bankruptcies and compulsory liquidations.
- Establishing a *de minimis* limit for the payment of dividends.
- Abolishing the need to maintain an IP record.
- Extending the fraudulent and wrongful trading provisions to administration.

These and other suggestions were included in a detailed paper, which is available in the members' section of the R3 website.

Standard Terms and Conditions for IVAs

Members are reminded that the R3 Standard Terms and Conditions for Individual Voluntary Arrangements have been amended and updated, and the new version is available on the members' section of the R3 website.

Technical Bulletin

Technical Bulletin 101 was issued in February. Its contents included:

- Security for the payment of tax
- Employment Rights – Increases in Statutory Limits
- Collective redundancies and Form HR1 – a reminder
- Cross-border enforcement of insolvency orders
- Surrender of lease – effect on reinstatement and repairing liabilities
- Trustee in bankruptcy held liable for sale of property at an undervalue
- Payment of trustee's expenses where bankruptcy order set aside
- Bankruptcy order annulled on grounds that debtor's COMI was outside the UK
- Conflicts of interest – a cautionary tale
- PPI mis-selling claims – guidance for practitioners
- IVA Standard Terms – revised version.

GILES FRAMPTON is a partner at Richard J Smith & Co.

JOHN FRANCIS is the technical director at R3.

Legal Q&A

Keith Mahoney answers your insolvency queries.

I am the administrator of a limited company and have produced my proposals to creditors. The creditors oppose those proposals and are now calling for the company to be placed into compulsory liquidation. The majority of creditors have made it clear that they are not prepared to consider revised proposals. What should I do?

You must make an application to the court for directions under Paragraph 5.5 of Schedule B1 of the Insolvency Act 1986. It was recently held in the case of *Lavin and Others* v. *Swindell* [2012] EWHC 2398 (Ch) that an application to the court is mandatory in these circumstances. On the particular facts of *Lavin and Others* v. *Swindell* the court exercised its discretion to make a winding-up order of its own initiative, despite that discretion only being exercisable cautiously and in exceptional cases.

I have been appointed liquidator of a company, having been proposed by a firm of solicitors who are valued referrers. Those solicitors are instructed by the petitioning creditor in relation to a claim against the company that includes damages for breach of contract. I have been asked by the petitioning creditor to appoint the same firm of solicitors to act for me in the liquidation. Can I do so?

No. If you appoint a firm of solicitors that also acts for the major creditor there would be a risk of a conflict of interest. This is particularly so where part of the creditor's claim is for damages, as the extent of the provable debt remains in dispute. It was held in the Scottish case of *Re Quantum Distribution (UK) Limited* [2012] Scot CSOH191 that in circumstances such as these it is inappropriate for one firm of solicitors to advise both creditor and liquidator.

“If you appoint a firm of solicitors that also acts for the major creditor there would be a risk of a conflict of interest.”

I understand that the limits on payments under the insolvency provisions of the Employment Rights Act 1996 are about to increase. What are the new rates?

From 1 February 2013 the limit on the weekly amount payable will increase to £450 and the limit on the statutory guaranteed payment (payable to employees laid off work) will increase to £24.20 per day. The minimum basic award for unfair dismissal will increase to £5,500 and the maximum compensatory award for unfair dismissal will increase to £74,200. The maximum amount allowable for a week's pay in calculating the basic or additional award for unfair dismissal or redundancy will increase to £450.

I was appointed trustee in bankruptcy of an individual who has appealed against the making of the bankruptcy order. If the appeal is successful how will my costs be paid?

A trustee in bankruptcy is entitled to recover expenses incurred from appointment to notification that an appeal has brought the bankruptcy to an end, but must make an application to the court under section 363(3) of the Insolvency Act 1986 in relation to expenses after notification.

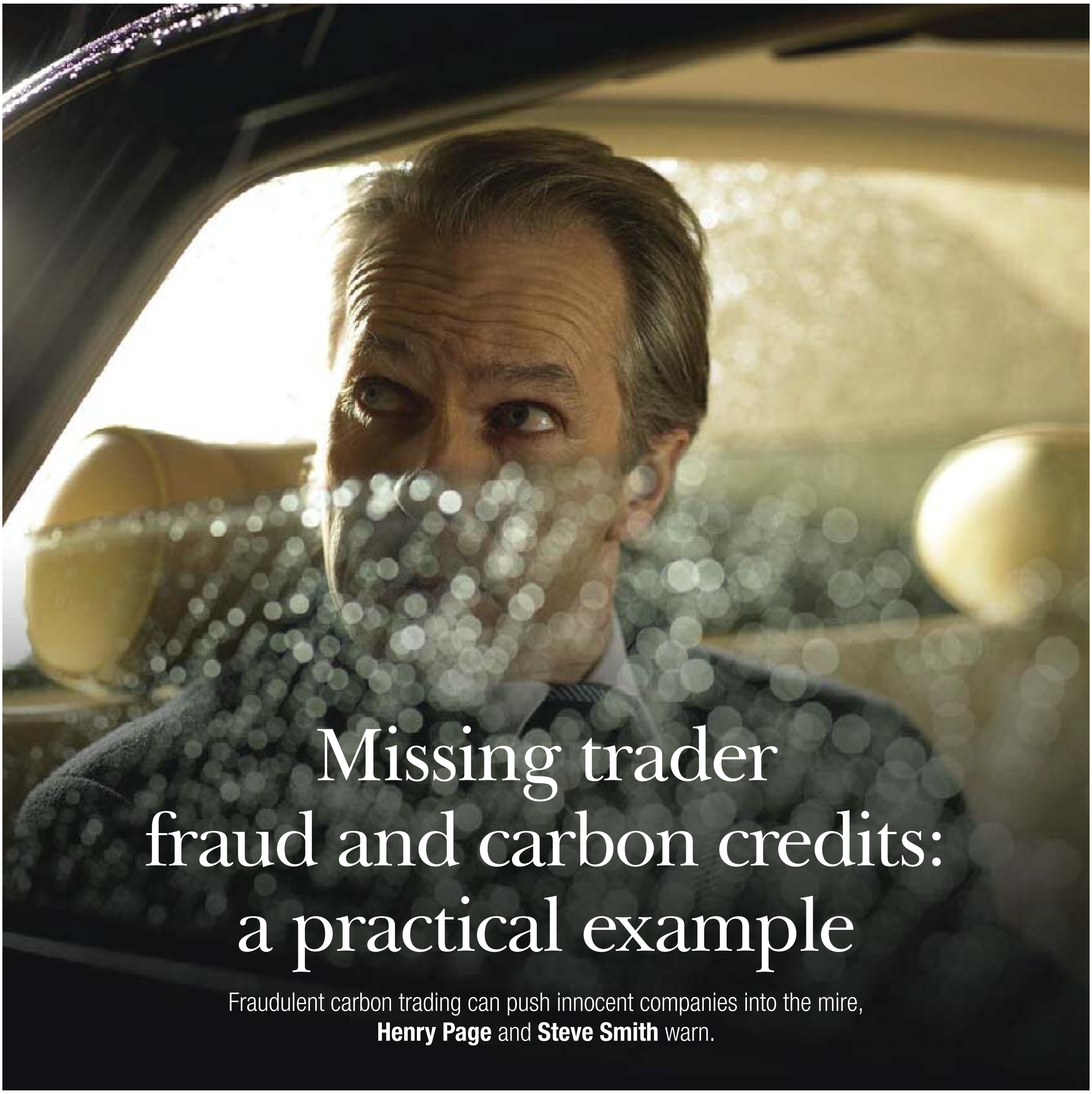
The recent case of *Appleyard* v. *Wewelwala* [2012] EWHC 3302 clarified the law in this area, addressing the absence of a specific provision in the legislation dealing with payment of costs when a bankruptcy order is appealed. It was ordered in *Appleyard* that the (re-vested) bankrupt estate be charged with the amount of the trustee in bankruptcy's expenses up to the point that the trustee was notified of the successful appeal.

I was appointed administrator of a company after the company had instructed solicitors to (successfully) oppose a winding-up petition filed by a creditor. Those solicitors have sought to recover their costs as an expense of the administration. Should I pay them?

No. Unpaid solicitors' fees cannot rank as an expense in an administration. To rank as an expense an obligation must fall within one of the categories set out in Rule 2.67 of the Insolvency Rules 1986. It was held in the case of *Neumans LLP (a firm)* v. *Andronikou and Others* [2012] EWHC 3088 (Ch) that the court does not have the power to order an administrator to treat as an administration expense a liability that falls outside the Rule 2.67 categories. ◻

KEITH MAHONEY is a solicitor and lead partner of the insolvency team at Meade King LLP.

The Environment



Missing trader fraud and carbon credits: a practical example

Fraudulent carbon trading can push innocent companies into the mire, **Henry Page** and **Steve Smith** warn.

A missing trader fraud can cause serious problems for any company that is involved in an associated transaction chain as HM Revenue & Customs (HMRC) seek to recover the lost VAT. An example of the impact of an alleged missing trader claim is the recent liquidation of a commodity trader, which had begun trading in carbon credits when a market for such securities emerged. The assessments and penalties raised by HMRC were a major factor in the company's insolvency. Despite ceasing to trade in carbon credits when it became aware of the issues surrounding the market, the company could not recover from the hangover caused by being party (however innocently) to a number of alleged missing trader VAT frauds. Although carbon credits are no longer subject to VAT and missing trader fraud has therefore been eliminated from the carbon credits market, the principle applies to any high-value VATable goods or commodities.

Understanding the company's business followed the initial instruction to advise in relation to its solvency, part of which included becoming familiar with carbon credit trading and the market. Carbon credits were designed to be a 'green' initiative to try and get businesses to either offset or reduce their carbon output. The basic premise behind tradable carbon credit certificates is to generate an implicit price for the production of carbon dioxide, or other greenhouse gases (GHGs), and therefore encourage investment in low-carbon technologies and processes.

> "As energy consumption increases, the implicit cost of emissions will increase."

Selling on and purchasing unused units

Under the Kyoto Protocol each participating country is prescribed a quota, or 'Assigned Amount', of emissions they can produce, which is recorded as a number of units equivalent to the production of one metric tonne of carbon dioxide (or equivalent GHG). Each country then sets a quota of emissions for local businesses (or operators). Should the operator produce fewer units of carbon dioxide or GHGs than their quota, they are able to sell the additional units to the market. Alternatively, should an operator expect to exceed its quota of units it may choose to purchase additional units from the market rather than being forced to undertake an immediate reduction in its emissions. A business can therefore assess whether it is advantageous to invest in low-carbon technologies and projects, or purchase additional credits at the market rate. As energy consumption increases, the implicit cost of emissions will increase, and therefore investment in new green technologies will become increasingly more attractive.

The mechanism to regulate the production of carbon dioxide and other GHGs through the operation of carbon credits, rather than through a carbon tax, gave rise to the emergence of a new commodity market in carbon credits.

Beware fraudsters and scams

During early trading in carbon credits some parties sought to establish transaction chains where they could engineer a missing trader fraud, pocketing millions of pounds in unpaid VAT. The simplest version of a missing trader fraud is when a trader imports goods VAT-free, sells them on for a price to include VAT and then disappears

> “More sophisticated scams seek to involve more parties, or buffer companies, to increase the potential benefit of the fraud.”

before paying the tax to HMRC. More sophisticated scams seek to involve more parties, or buffer companies, to increase the potential benefit of the fraud, and are also more likely to seek to sell the goods to an innocent third party before the VAT is stolen.

Insolvency for innocents

Because carbon credits were a new commodity, regularly traded in large volumes, traded across several jurisdictions and have significant value, they provided an ideal opportunity for fraudsters to set up transaction chains in which they could abscond with significant amounts of VAT. A result of missing trader fraud is that it is often the counterparties who are unaware of the fraud that are left as the only port of call for HMRC to seek to recover the lost tax by disallowing the input claim relative to the transaction(s). This can lead to solvency issues for the 'innocent' company whose only mistake may have been that their due diligence failed to highlight the potential to become embroiled in a missing trader fraud when commencing trade with a new counterparty. The phrase 'knew or ought to have known' was used in the judgment of the Kittel case[1] when considering whether a taxable person could lose the right to deduct input tax in a VAT fraud. HMRC and the courts expect businesses to maintain systems and checks to identify and avoid involvement in potential fraudulent transactions. It is therefore important that due diligence processes are robust in order to proffer a defence should a company become unknowingly involved in a fraudulent transaction.

> “It is therefore important that due diligence processes are robust in order to proffer a defence should a company become unknowingly involved in a fraudulent transaction.”

As HMRC became aware of the systematic frauds occurring in the carbon credit market they sought to investigate more transaction chains and recover the lost tax from any party involved in the chain. The investigations were often protracted, disruptive to the ongoing business and expensive, having serious implications for a business' cash flow and solvency. Even after the law was changed so that carbon credits were no longer a target of these frauds, the investigations and pursuit continued.

Carbon credits are one of a number of assets that have been used in missing trader frauds leaving HMRC significantly out of pocket. As HMRC will seek to recover funds from all counterparties in the transaction chain, the assessments raised by HMRC can cause significant solvency issues for all involved. Being an innocent participant in the chain is not an adequate defence! ◻

Reference

1 *Kittel* v. *Belgian State* (Case C-439/04)

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SEALY & MILMAN:
Annotated Guide to the Insolvency Legislation 2013

Professor Len Sealy & Professor David Milman

CLEAR INSIGHT INTO INSOLVENCY LEGISLATION

The new 16th edition of **Sealy & Milman: Annotated Guide to the Insolvency Legislation 2013** gives you full coverage, concise analysis and annotated interpretation of corporate and personal insolvency, written by leading expert authors. This established legislation handbook provides expert annotation and clarification on the legal and practical implications of insolvency legislation.

Sealy & Milman includes additional comprehensive commentary on the very latest case law and considers the consequences of these decisions for both corporate and personal insolvency. It covers the new debt relief order procedure introduced in 2009, as well as including the 2012 Practice Direction on Insolvency Proceedings, and comments on upcoming reforms to be made via Enterprise and Regulatory Reform Bill.

Special administrations for energy supply companies

Mike Pink looks at new procedures in the energy sector.

The UK government's stated energy policies include an objective of a fundamental move away from carbon-based electricity generation over the next few decades. Achieving this will require the development of new technologies and a huge public and private sector investment. The electricity markets in particular are undergoing reform, to allow longer term financial stability for investment in infrastructure and security of supply. Inevitably, as with all disruptive changes in a market, there will be winners and losers

> "An esc administrator can only be appointed to companies that are either licensed to supply gas or electricity… to commercial or residential end users by the licence holder."

in the search for new technology (think Betamax and VHS) or business models; that is an environment where insolvency tools will be needed to ensure human, physical and financial resources of failed or failing enterprises are recycled efficiently. And, as with an increasing number of strategic sectors in the UK, a Special Administration Regime (SAR) has been developed for the energy sector – the most recent element of this is the energy supply company administration. This article looks at this new procedure.

Overview

SARs are an alternative to general administration law, used primarily to ensure uninterrupted and safe operation of essential services – whether in infrastructure, the financial sector or healthcare.

The Energy Act 2011 (EA11) effectively took the SAR that had been introduced to deal with licensed gas and electricity transmission and distribution companies[1] in the earlier Energy Act 2004 (EA04) and modified it to address the potential failure of a (major) licensed energy supply company (esc).

While the statutory framework for the esc administration has existed since EA11 was enacted in October 2011, the relevant esc administration rules are not expected to come into force until April 2013. Those draft rules were subject to consultation in the summer of 2012. (For the purposes of this article I am concentrating on the England and Wales acts and rules – though similar provisions apply to Scotland.)

Background

Prior to EA11, regulatory powers in the UK energy supply market already enabled Ofgem[2] to force the bulk transfer of customers of a failed esc to a Supplier of Last Resort (SoLR). Where a failing company, or its administrators/liquidators, were unable to find a buyer for the customer contracts in the market, Ofgem could force another esc to accept all or part of a portfolio of customers within a 48-hour period under the terms of the supply licences all market participants have had with Ofgem since deregulation back in the late 1980s. While a rather neat solution, and one that has been used effectively on a number of occasions already, it is only really viable with small scale supply

> "Like an ordinary administration the esc administrator is required to have his proposals approved by the creditors. However, there is no concept of a creditors' committee."

companies. If a large esc were to fail, the ability of other market participants to absorb a large volume of customers suddenly, without endangering their own stability, is more doubtful and risks contagion across the industry.

Ideally, a larger esc facing financial difficulty would avoid insolvency through restructuring, recapitalising or selling itself; the esc administration is seen as a back-stop provision to that and SoLR.

Key features

The SAR provisions in EA11 are an overlay of the original energy administrator provisions in EA04, which themselves modified Schedule B1 to the Insolvency Act 1986 (IA86). Most of the provisions will be familiar to insolvency practitioners who undertake ordinary administrations, indeed the esc administrator(s) need to be a licensed insolvency practitioner to accept the appointment as administrator, but there are a number of important differences. As noted above, the rules have not at the time of writing been brought into force, so some of the points below are speculative.

> "The ability to make such sweeping transfers (subject to the safeguards of secretary of state and court oversight) should facilitate an expedited sale or enable a rapid restructuring of all or part of the business."

This article cannot be a substitute for a full reading of the relevant act and rules, but some of the key practical features are:

- An esc administrator can only be appointed to companies that are either licensed to supply gas (Gas Act 1989) or to supply electricity (Electricity Act 1989) and extends to the affairs, business and property of non-GB companies that are within Great Britain. Supply in this context means supply to commercial or residential end users by the licence holder.
- An esc administration order is obtained through the court, on the petition of the secretary of state[3] or GEMA (through its operating subsidiary Ofgem). The order will only be granted if the company is shown to be insolvent (using the usual IA86 definitions) or is facing insolvency, or the secretary of state has certified that it would be appropriate to wind the company up in the public interest.
- EA11 does not disapply the provisions of IA86 that allow directors or creditors to wind up the company or place it into administration. Instead it places a requirement on the directors/creditors of a licensed esc to give 14 days' notice to the secretary of state and Ofgem of any such plans, giving time for an application for esc administration.
- Section 95 of EA11 set out the objectives of the esc administrator as being to secure:
  - a) that energy supplies are continued at the lowest cost which is reasonable practicable to incur; and
  - b) that it becomes unnecessary, by one or both of the following means, for the esc administration order to remain in force for that purpose.

  Those means are:
  - a) the rescue as a going concern of the company subject to esc administration order; and

  - b) transfers [as a going concern of the undertaking to another company or companies]
- The objective of rescue is not in itself unusual, but here it is combined with an obligation for the administrator to keep costs of supply for the company's customers to the practical minimum. Also, the provisions of EA11 specifically prevent the esc administration ending (even through moving into liquidation) before all of the customers are either safely transferred to another supplier or the esc itself is rehabilitated.
- Like an ordinary administration the esc administrator is required to have his proposals approved by the creditors. However, there is no concept of a creditors' committee. In practice, as the esc in administration is still subject to regulation as a licence holder, it will be closely overseen by Ofgem.
- Unlike some of the SARs in the financial sector, EA11 does not disapply the automatic termination of administration after 12 months under para 76 of IA86. This is in line with the short-term nature of the esc administrator's objectives.
- The esc administrator's remuneration is fixed by the court. Notice of any fee application must be given to Ofgem, the secretary of state and the creditors.

Tools

One of the most powerful tools available to the esc administrator to assist in meeting the objectives is the power to propose an 'energy transfer scheme'. With the approval of the secretary of state and the court a scheme can be effected under EA11 to transfer all or part of the esc's undertakings – business, assets and liabilities – to a new energy supply company. The power of transfer overrides a number of contractual rights of notice, concurrence or acceptance by counter parties and can make provision for the transferee (new energy supply company) to be treated in law as the transferor (old esc in administration). The ability to make such sweeping transfers (subject to the safeguards of secretary of state and court oversight) should facilitate an expedited sale or enable a rapid restructuring of all or part of the business.

I envisage the esc administrator will have to work closely with Ofgem to implement this, given the licensing requirements for both the esc and the acquiring company. It would be interesting to see this working in practice.

Given the esc in administration is likely to be insolvent, achieving the objectives is likely to require both access to funds and, potentially, the absorption of post-appointment losses. EA11 caters for this by giving power to the secretary of state to provide grants and/or loans to finance the company's activities, or give guarantees in support of third party lending. The esc administrator can also obtain an indemnity for liabilities incurred in connection with the exercise and performance of his powers and duties, and any loss or damage sustained in that connection.

Will it work?

While the legislation that will make this SAR effective is expected to come into effect in April this year, the government is hoping it will remain an academic treaty and not be needed to be put to the test. However, we live in interesting times and what once seemed unimaginable often

> "The esc administrator's remuneration is fixed by the court. Notice of any fee application must be given to Ofgem, the secretary of state and the creditors."

turns out to be all too real. Perhaps, if there is a crisis with an esc, the new SAR will provide the tools to avoid further contagion; the SAR seems to address a number of the vulnerabilities in the ordinary administration toolbox. Only experience will tell. □

1 There are 14 licensed regional electricity distribution network operators owned by six major groups in the UK plus four smaller operators. There are also eight licensed regional gas distribution networks in the UK and a number of small local independent networks.

2 Ofgem is the Office of the Gas and Electricity Markets, the UK energy regulator. It is governed by the Gas and Electricity Markets Authority (GEMA).

3 Secretary of state for energy and climate change.

MIKE PINK,
associate partner,
Restructuring, KPMG LLP.

Don't waste the potential

Mark Parkhouse and **Sarah Hawksworth** explain how a timely pre-pack prevented a waste disposal business from going down the drain.

The restrictions and regulations associated with collecting, moving and disposing of 'upper tier waste' became a significant consideration when rescuing a London based portable loo business for Kent IP Andrew Hawksworth. With tight constraints on time and funding and an overriding need to ensure uninterrupted service to clients, a pre-packaged administrator sale quickly emerged as the most effective rescue strategy.

In early spring of 2012, Mr Hawksworth was approached by the directors of a company that provided portable toilets for hire to a wide range of customers – from building construction sites to music festivals and public events taking place across London and the South East. The company was insolvent on a cash flow basis. It could not continue to trade in the short term because of a lack of further funding balanced against growing arrears in staff wages and increasing landlord pressure in the form of an unpaid statutory demand for arrears, with the next quarter's rent due imminently.

Environmental regulations

The company's core business was the delivery and servicing of portable toilets on hire at customers' sites. The removal, transportation and disposal of the associated waste requires highly regulated operations. These must be carried out in accordance with the Environmental Protection Act 1990 (the Environmental Act), and in compliance with the statutory regulations stipulated by the Environmental Agency (the agency).

> "Breaches of these regulations can carry fines and potentially even prison sentences."

Operators in this sector of the industry are regulated and controlled by the provision of a valid Certificate of Registration under the Control of Pollution (Amendment) Act 1989 (a Cert of Reg), issued in this case by the agency to the company and named designated director(s). Consultations with the agency revealed that only operators with such certification already in place – who can demonstrate the ability to comply with a strict duty of care and compliance with the industry regulations – can legally service, carry and dispose of portable loo waste.

Breaches of these regulations can carry fines and potentially even prison sentences.

A Cert of Reg may be held by individuals, partnerships or companies. A Cert of Reg is not interchangeable between different legal entities. In this case the change in the legal status of the company at Companies House (from 'active' to 'in administration' for example) could be considered by the agency to be a change of user, which would invalidate the company's own Cert of Reg. Without cash flow to engage a third party with a valid Cert of Reg to service the company's clients, or a personal Cert of Reg and ongoing facilities to ensure full compliance with the agency's demanding regulations, an IP would be placing themselves at significant risk of falling foul of the statutory obligations governing this sector. Breaches of these regulations can carry fines and potentially even prison sentences.

Assets to be managed and realised

Independent valuations of the company's assets revealed that the business had made significant losses over the last two financial years. Its main assets, largely comprising of its stock of portable toilets held in storage and off site on hire, plus its debtor book, were possibly going to be worth significant sums to stakeholders, if carefully managed and realised. The debtor book was based primarily on monies owed for existing and ongoing contracts for the portable toilets currently out at site. The value of the debts

> "Applications for a new Cert of Reg can take the agency from ten days up to two months to process."

was clearly very much dependent on the uninterrupted, daily or bi-daily servicing and maintenance of the off-site portable toilets. This service would have to be supplied by appropriate holders of a Cert of Reg. The company did not have the working capital to pay staff or suitably accredited third parties to service the off-site portable toilets. External sources of funding from third parties had already been investigated – without success. Failure to operate in accordance with customer expectations would result in significant disputes from existing clients with the subsequent negative impact on debt collection and the value of goodwill. The servicing, collection and retrieval of the off-site portable toilet stock (required, in order to be sold with the rest of the unhired stock at the company premises in order to achieve the estimated realisations) would also be subject to same Environment Act and associated regulatory restrictions. The third party costs of emptying and returning the off-site portable toilets to the company's premises would have negated the value of the hired portable toilet off-site stock in its entirety. In short, if the company ceased to trade for more than one day, the debtor ledger would be irrevocably eroded, the off-site portable toilet stock would not be worth the cost of retrieval and the outcome to creditors would be considerably diminished.

Valid certificates required

In order to achieve the statutory purpose of the administration, the administrator sold the company's goodwill and a minor proportion of its assets to a former director in a pre-pack. This purchaser already held a valid personal Cert of Reg. He could operate going forward in full compliance with the environmental standards. This arrangement

preserved in large part the value of the debtors, through an uninterrupted service to the customers. The pre-pack also avoided the risks inherent in any ongoing trading of an insolvent business and it maintained customer confidence.

The administrator had realised early on that if a buyer for the business could not be found almost immediately, who had a Cert of Reg already in place, there would be little alternative for the company other than to cease trading. Applications for a new Cert of Reg can take the agency from ten days up to two months to process. There was little opportunity to identify potential interested parties. The directors were approached to make a suitable offer for the assets. This was in fact the only option likely to preserve goodwill, fund staff costs and minimise customer disputes to the extent necessary to generate meaningful stakeholder returns. Sale negotiations took place on the basis of the purchaser/director funding the servicing of the off-site portable loos, then subsequently purchasing the company's goodwill and customer list, together with the stock of portable toilets on hire to existing customers. The sale was completed on commencement of the administration. As a result, the estimated total achieved for the company's creditors was 100 per cent greater than had the sale not been completed and had the company ceased to trade as a result.

The administrator, Mr Hawksworth said: 'This was a great outcome for the creditors of this company. Due to the necessary restrictions and industry regulations in this sector, it is not possible to see how the assets of this business could have been preserved had a pre-packaged sale agreement not been possible. Realisations to creditors have been maximised as a result of the pre-pack. This is what pre-pack administrations are for – a genuine contribution to the rescue culture.'

SARAH HAWKSWORTH is a director at Augusta Kent, insolvency practitioners.

MARK PARKHOUSE, is a partner at McClure Naismith, solicitors.

Making a business interruption claim for flood damage

Andrew Maclay looks how an IP can claim from insurance when flood tips a company into administration.

When it comes to legal claims arising from an insolvency event, an insolvency practitioner's (IP) first reaction may be to think about Insolvency Act claims against former directors for trading while insolvent or for unlawful preferences. However, in reality, your biggest and simplest claim may be a business interruption claim.

Consider a scenario in which one of the recent winter floods caused the local river to burst its banks, flooding a business's premises, leaving the warehouse under a foot of water and rendering half the company's stock unusable. As the company's credit lines were already stretched, this tipped it into administration. How should the IP go about claiming on the company's insurance?

The initial problem will probably be that the insurance company will try to disclaim the claim on the basis that the company is insolvent and it will know that the IP may have difficulty in finding information and witnesses to support the claim. Your response to this should be simply that you act for the company and to preserve all the evidence needed, obtaining all the facts and documents from relevant staff before they leave the company.

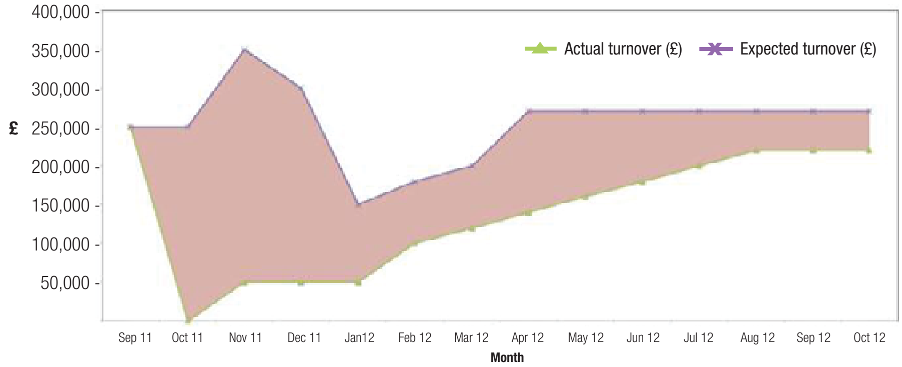
> “Obtain all the facts and documents from relevant staff before they leave the company.”

Types of insurance claim

Your first port of call will then be a loss adjuster and possibly a loss assessor, who will act for you on the claim rather than acting primarily for the insurance company. The next key issue is the type of insurance the company had.

Most companies are likely to have buildings insurance. I would hope that the building is not in an area where insurers have removed cover for flood damage so the insurance company should pay for repairing the building – though you could negotiate with them to receive a capital sum as an alternative.

Then there is stock insurance. Calculating the value of damaged stock can be difficult. If you can simply, for example, count up the number of crates of food that had to be disposed of and multiply them by the price the company would have sold them for, the calculation is easy. However, if the products destroyed were scattered around the warehouse in varying states of production, life may be more difficult. The key things you need are somebody experienced in quantifying stock losses, from your loss adjuster or loss assessor, and some reasonable accounting records.



Business interruption insurance

The most complicated type of loss is likely to be your business interruption claim – if you are fortunate enough to have one. It is this that you may need more professional help with.

A business interruption policy is designed to compensate a company for lost profits caused by a disaster such as a flood for a set period of time, called the indemnity period, which is often 12 months long. The calculation of the loss may depend on the wording of the insurance policy, but is generally based on the formula:

(loss of turnover x gross profit margin)
+ increased cost of working (ICOW)

In an established, continuing business, this formula works well – you simply compare the actual turnover in the indemnity period with the turnover that the company would have expected had the flood not happened – taking account of seasonal fluctuations in sales. You then multiply this lost turnover by the company's normal gross profit percentage (ensuring this takes account of all variable costs). Add any additional costs that were incurred to mitigate the loss of gross profit, these may include overtime, renting temporary premises, the extra cost of outsourcing production etc. You also need to deduct any cost savings, such as distribution costs or council tax saved.

However, life gets more difficult when the flooded business was new or growing, and there are no accurate records about the sales the company would have achieved absent the flood. In such a case, you may need a loss adjuster or forensic accountant to estimate the turnover and gross profit that would have been achieved had there been no flood – which may be based on the trend growth before the flood or business's projections or the growth rate experienced by comparable businesses in their start-up period – and then deduct the actual sales achieved. This can be illustrated graphically as the shaded area in the graph above.

> “A loss adjuster or forensic accountant can estimate the turnover and gross profit that would have been achieved had there been no flood.”

The sad reality is a flood can tip a business into insolvency and, if a business is in that position, advice should be sought. An insurance claim could turn out to be the estate's biggest asset. In overall terms, if you have suffered from a flood, check what types of claims are covered by insurance, how to calculate the claim and collect the evidence you need. If the business itself has been destroyed by the flood, you will need to negotiate a settlement with insurers, based on what would have happened if the business had not gone into liquidation. □

ANDREW MACLAY is a director of forensic services at BDO LLP.

Wet weather grumbles

Duncan Swift explains why there's plenty to be wary of when economic hardship clings to the coat tails of bad weather.

The stereotype of farmers always complaining about the weather probably applies to us all. The Met Office reports 2012 with 1330.7mm of rain as the second wettest year in the UK since records began in 1910 and only a few millimetres short of the record set in 2000. On a comparative monthly basis April and June 2012 were the wettest months recorded.

As consumers we are all experiencing above inflation increases in food costs and the media as our proxy is reporting numerous stories about the adverse impact of the substantial 2012 rainfall on crop yields and consequently upon prices we pay at the supermarket till. Much of the context to these media reports is the impact of the UK's recession reducing household incomes and our collective budget for expenditure on essentials such as foods.

> We're pretty much guaranteed a relatively poor 2013 UK harvest whatever the weather is this year.

This frequently gives the impression that it's all somehow unfair to the consumer as though the UK's recent weather has literally 'rained on the parade' and added another layer of woe on top of the UK recession. Is it really that simple though?

The scene

The UK's food supply chain is vast as depicted in this schematic contributing £89bn (7 per cent) of gross value added in 2010 and employing 3.7 million people (14 per cent national employment).[1] Any wholesale changes in costs of production or distribution at the start of, or through, this chain will clearly affect us all as consumers. >>

Chart 1: Economic summary of the UK food chain beyond agriculture[1]

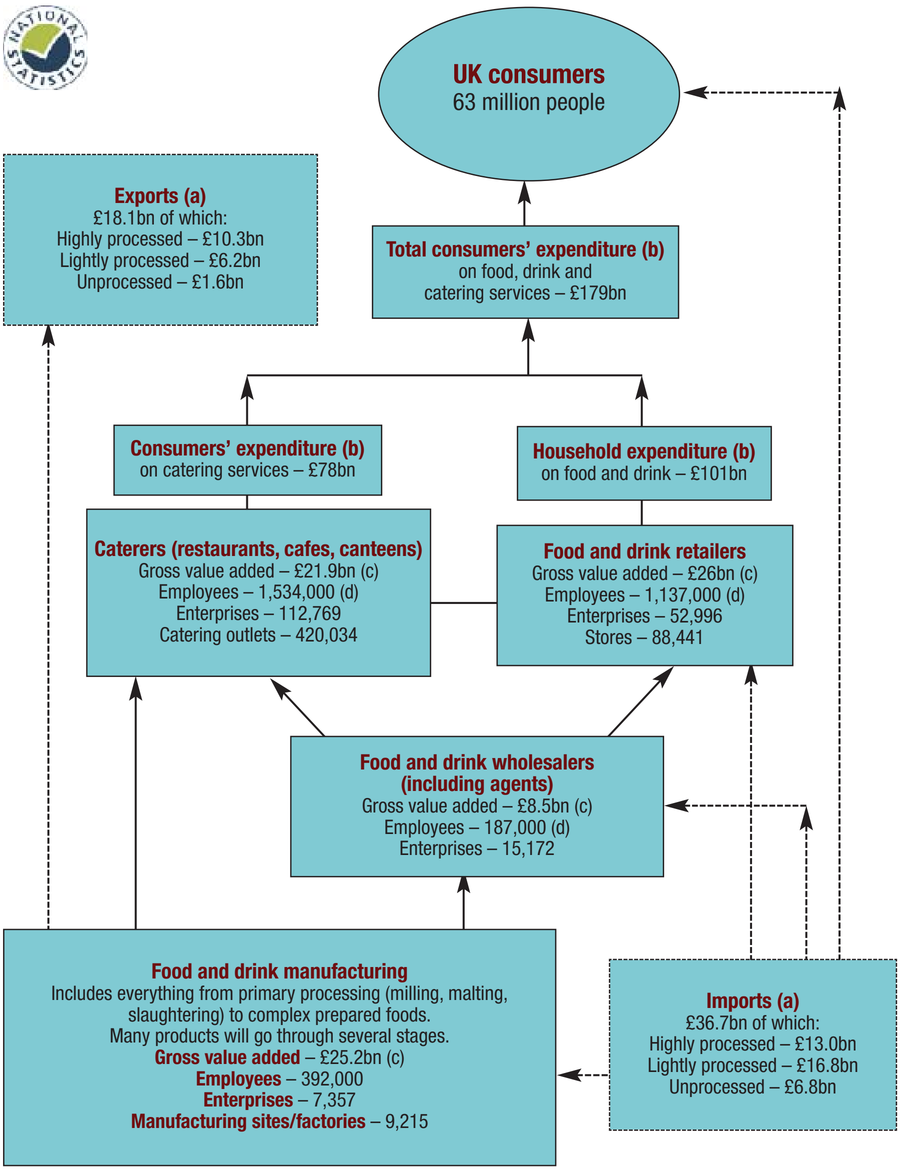
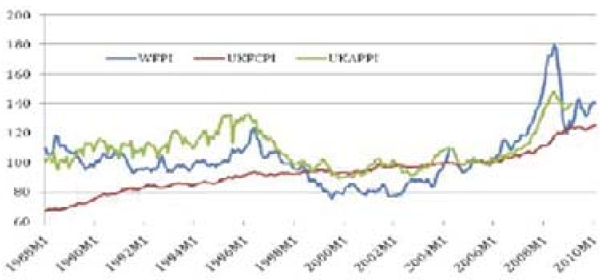


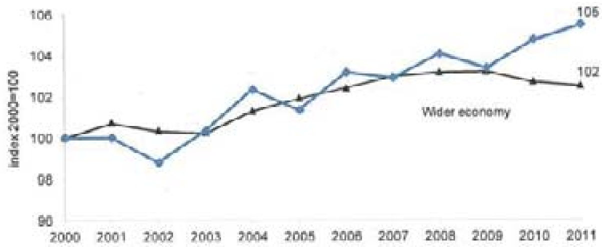
CHART 2: Indices of world food prices and UK retaild and Domestic producer prices



Source: IMF, ONS and DEFRA

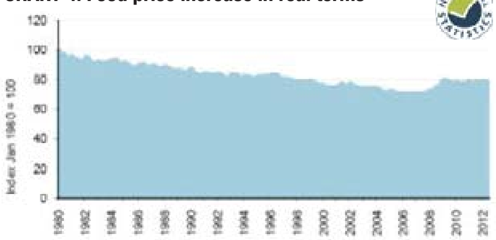
CHART 3: Benchmarking the UK food chain against the wider economy

Total factor productivity of the UK food sector compared with the wider economy for the UK



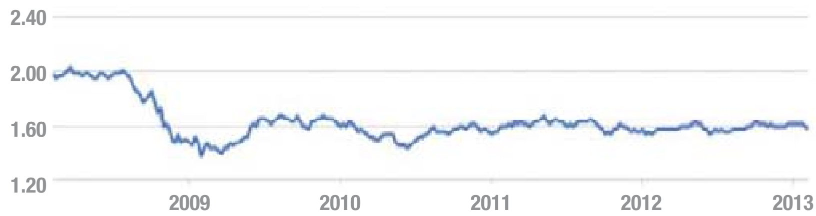
Source: DEFRA

CHART 4: Food price increase in real terms



Source: Consumer Price Indices (ONS)

CHART 5: Sterling strength against the US$



Source: Google/Citibank NA

With over 75 per cent of the UK grocery market in the hands of the Big 4 multiple retailers (Tesco, Sainsbury's, Asda and Morrisons)[2] you would expect retailer buying power allied to supermarket price wars to heap significant deflationary pressure upon the supply chain and indeed it has done.

> Expect an increase in the incidence of 'food frauds' in the supply chain, for example...

The last 30-odd years has seen overall food price deflation in real terms[3] and such food price inflation as there is (UKFCPI) considerably dampened compared with world food price inflation rates (WFPI) and the UK agricultural producer price index rates (UKAPPI) as shown in Chart 2 above.

Our food producers and processors have risen to the deflationary challenge of how to produce 'more for less' with agricultural and food processor productivity gains generally running ahead of the wider UK economy. See Chart 3 above.

However, more recently food prices have risen 12 per cent in real terms over the last five years effectively taking the UK's cost of food relative to other goods back to 1997. See Chart 4 above.

It is against this more recent backdrop that media headlines have become ever more strident:

- 'Egg prices have shot up 40 per cent over the last year…'[4]
- 'Cost of food "not going to stop" rising warns UK Chief Scientist'[5]
- 'UK's food poverty revealed; nutrition falls as fruit and veg prices rise'[6]

So what's changed over the last five years to cause this concern? Well, it's not just wet weather:

1. Over 2008/9 sterling fell by about 30 per cent against the US$, and has consistently remained 20 per cent down against the 2008 level since. See Chart 5 above.

   In the context of food prices the devaluation of the pound represents a 'double whammy'. Global agricultural commodity market prices denoted in US$ serve as the 'spot' market price so all other things being equal our pound buys 20 per cent less than it used to and fuel prices (also denoted in US$) have similarly caused our distribution and processing costs to rise significantly.
2. Global agriculture commodity market prices have also risen sharply due to a mixture of circumstances including poor cereal harvests in various parts of the world (notably Russia 2008, 2010 & 2012, Australia 2008 & 2012, Canada 2008 and US 2012) with three successive spikes experienced in the price of agricultural commodities since 2007.[7] Other global price influences include rising demand in China and India and the competing interest of bio-fuel production for arable land that would otherwise be used for food production.
3. All of the above factors have also had knock-on effects in the livestock farming sector, particularly intensive livestock businesses producing eggs, poultry, meat and milk, where animals are fed cereal-based foodstuffs.

In the context then of the food prices we pay it would appear these have been caused most over the last five years by the hardcore devaluation of sterling coupled with price spikes caused by global food commodity shortages, the latter caused by poor global harvests attributed to droughts rather than deluges.

Consumers, supermarkets and food suppliers have responded to this inflationary pressure on input and distribution costs through:

- reduced pack sizes
- reductions in expensive ingredient elements in processed foods
- short run pricing promotions masking longer run price increases
- trading down e.g. cheaper cuts of some meat and/or switching to a cheaper substitute e.g. pork instead of beef.

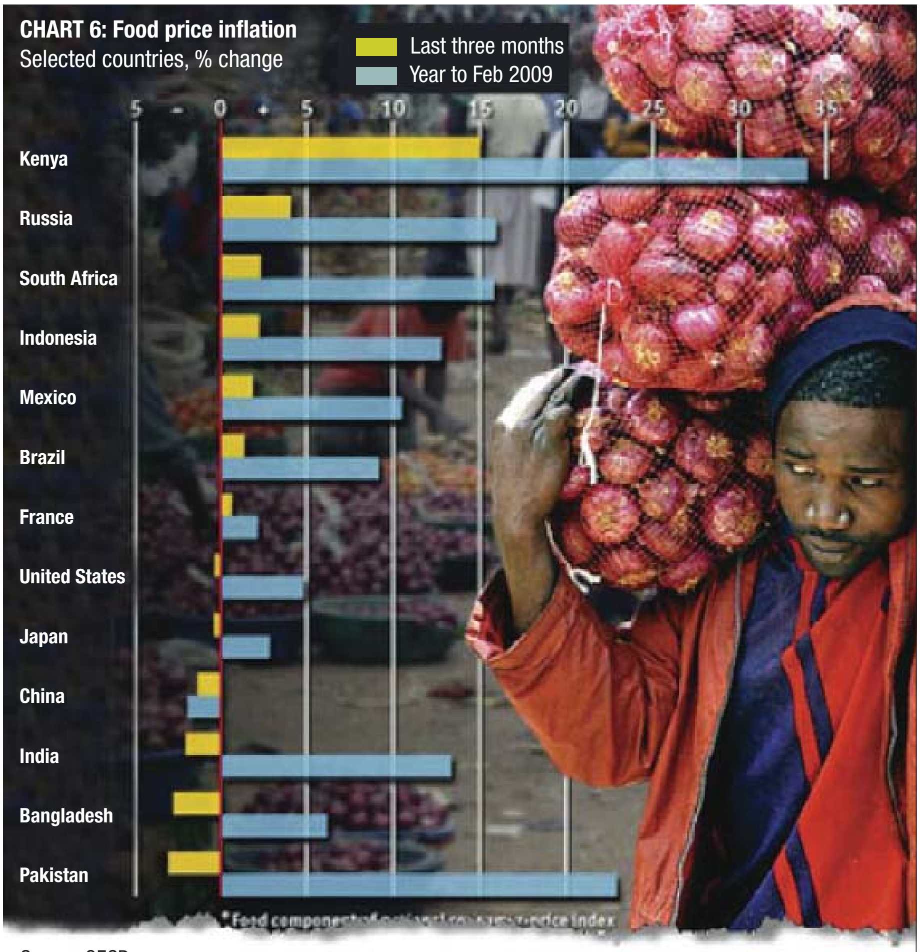
> How much of an effect will the significant level of rainfall experienced in the UK over 2012 have on our food prices?

The effects have been dramatic, for instance, between 2007 and 2010 low income households bought 26 per cent less carcase meat, 25 per cent less fruit and 15 per cent less vegetables.[8]

So how much of an effect will the significant level of rainfall experienced in the UK over 2012 have on our food prices?

We are already seeing three immediate effects:

- Price spikes in 2012 for certain fresh produce categories where significant crop yield shortages were experienced, for instance the 2012 UK potato crop yield has been reported by some industry commentators as being 25 per cent down on original expectations.[9]



Source: OECD

Managing food production and processing sector insolvencies

What factors should IPs consider in insolvency situations? Here are some specifics.

Producers

- Most farms are unincorporated businesses reliant on family owners for management and labour. Typical forms of insolvency: Law of Property Act (1925) appointments over land and buildings and Agricultural Receivership appointments over farming business assets and stock. Insolvencies are difficult as the family home is often at stake and these are old areas of law augmented by much case law notably in the area of tenant rights; specialist legal advice pre-appointment is vital.
- Good animal welfare is crucial as is an understanding of seasonality and the farming year.
- There is a good market for land: prices rose in 2012 by c.11 per cent to c.£7.6k per acre as farm consolidation continues and some overseas investors see UK land as undervalued with sterling's 20 per cent devaluation over the last five years.

Processors

- Typically incorporated businesses with fixed and floating charge security.
- Need to understand all of the key trade terms with major customers, particularly sector-specific terms.
- Early meetings with major supermarket customers are essential to agree account position and basis of any ongoing trade.
- Maintenance of food hygiene is crucial if production and trading is to continue.
- Securing proofs of delivery is essential for successful debt collection.
- Beware third party haulage and warehousing arrangements.
- Beware supermarkets' accreditation standards requiring consistency of product content and quality and setting challenging serviceability standards.
- The potential for supply disruption is acute with high-volume, short shelf-life products produced on a just-in-time basis.

- Another price spike for feed cereals producing knock-on effects in the production costs of intensive livestock enterprises (ie. eggs, poultry, meat and dairy), which were a factor in the dairy farmer protests in July 2012.
- An increased willingness on the part of the major supermarkets to lower produce standards, for instance, appearance, permitting blemishes, and uniformity with more unit weight and size variations in the fruit and vegetable aisles.

More adverse price effects of the wet 2012 will follow particularly as UK wheat plantings for 2013 were down by as much as 20 per cent so we're pretty much guaranteed a relatively poor 2013 UK harvest whatever the weather is this year.

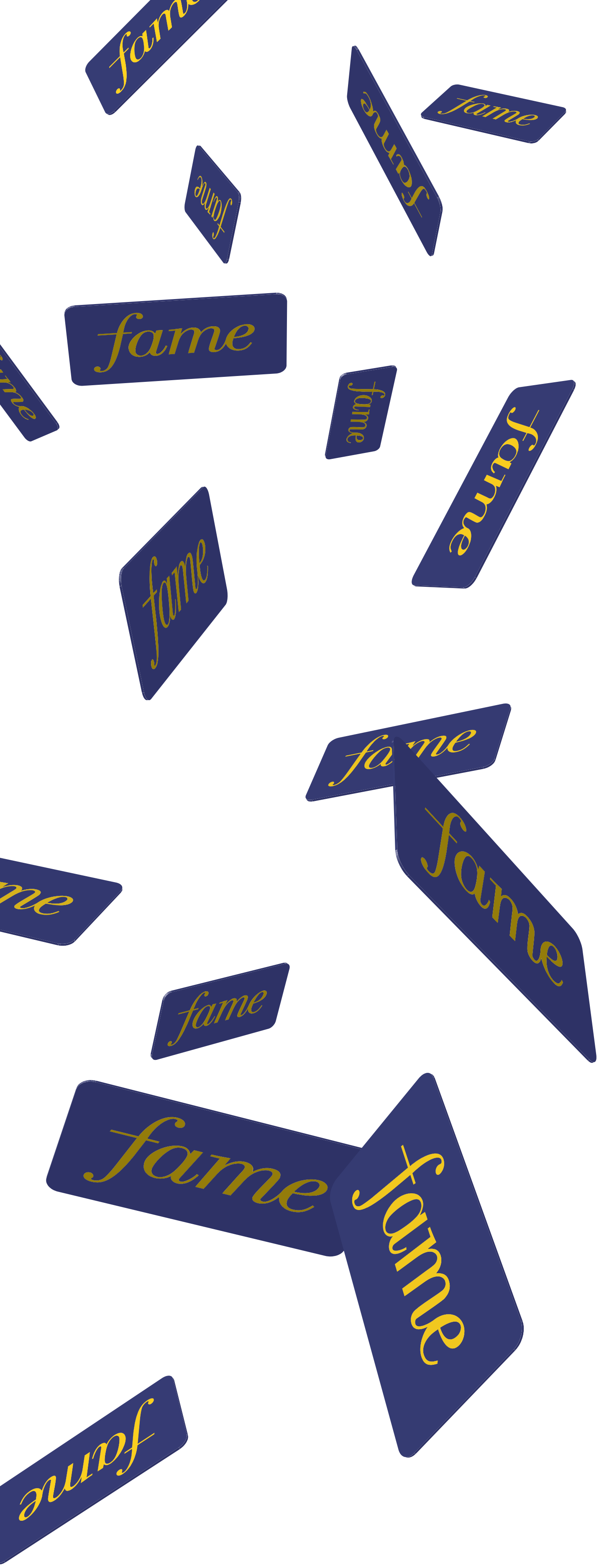
In all of this it is the food producers/processors who face the greatest pressure with rising input costs on one hand and supermarket buyers continuing to curb price increases on the other. I anticipate the attrition of food producer and processor businesses to increase as they struggle to recoup higher input costs through higher prices negotiated with supermarket buyers. I also expect an increase in the incidence of 'food frauds' in the supply chain, for example, through mislabelling of food content in terms of constituent ingredients and/or country of origin.

> "There is a good market for land: prices rose in 2012…"

In summary, the rising cost of food for consumers over the last five years is more attributable to sterling devaluation and poor global harvests. The rain levels experienced in the UK in 2012 have not helped but we should keep things in perspective as the global harvest aspects have caused far greater food price inflation problems elsewhere in the world as shown at Chart 5. □

1 *DEFRA Food Statistics Pocket Book 2012*
2 *TNS Global 2011*
3 *Financial Times 2013*
4 *The Grocer 12 January 2013*
5 *The Daily Telegraph 2 January 2013*
6 *The Guardian 13 December 2012*
7 *DEFRA Food Statistics Pocket Book 2012*
8 *DEFRA Food Statistics Pocket Book 2012*
9 *Agrimoney October 2012*

DUNCAN SWIFT is a business restructuring & insolvency partner at Moore Stephens LLP.



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Career progress

JIEB award winners talk about their career progression and the restructuring sector.

Geoffrey Jacobs

Geoff Jacobs passed his JIEB exams in 2002, winning the Pricewaterhouse prize. He is currently a director in KPMG's restructuring team.

Tell me a bit about what you are doing at the moment.

I run the Aberdeen restructuring practice and typically work throughout Scotland; this includes managing formal insolvency appointments often involving complex and high-profile businesses. I also provide advisory services such as cash management, cost reduction, contingency planning and accelerated sale processes.

What do you see as the major issues within your line of work currently?

Despite there being many recent high-profile appointments, many cases are property related. Often the only option has been a shutdown. With a lower volume of trading insolvencies, fewer young IPs are getting the rewards and experience of trading a business through an insolvency.

How did taking the JIEB help you develop your career and which parts of the training did you find particularly useful?

It helped me to get technically up to speed. Whether you work in restructuring or formal insolvency, the JIEB provides the grounding and skill set for you as an adviser to give more rounded advice and reinforces the position that you're accountable at all times.

What tips would you give to those currently taking the JIEB?

Write down the obvious points – take nothing for granted. It's good to have practical experience that you can apply to the technical questions; however, don't leave doing the JIEB until too late in your career as it gets difficult to balance study with other commitments.

Lisa Lappin

Lisa Lappin passed her JIEB exams in 2007, winning the Leonard Curtis prize. She is currently a director at McClean & Co.

Tell me a bit about what you are doing at the moment.

I'm currently working in Belfast where I am an appointment taker. I work across cases from their initial stages right to conclusion. I work on a variety of corporate appointments including CVAs, administrations, receiverships and liquidations together with bankruptcy cases. I am currently working on approximately 200 live cases.

What do you see as the major issues within your line of work currently?

The economic downturn and uncertainty are the current big issues. The fall of property prices has been a particular problem in Northern Ireland, where prices rose higher and have fallen by a larger amount than in the rest of the UK. The difficulty in getting credit is also making it difficult to refinance businesses in trouble, which could perhaps otherwise be turned around.

How did taking the JIEB help you develop your career and which parts of the training did you find particularly useful?

Primarily, it provided me with my licence to practise in insolvency. However, the JIEB also provided me with a good base to gain an understanding of the legislative requirements. This has allowed me to gain a fully rounded legal and statutory knowledge.

What tips would you give to those currently taking the JIEB?

I found taking the BPP courses and following the study plan laid down invaluable as was studying the legislation. I would say that sticking to your study plan is important; this allows you to work at a steady rate and build on your knowledge as you go along.

Kevin Pinkerton

Kevin Pinkerton passed his JIEB exams in 2007, winning the Insolvency Lawyers' Association prize. He is currently a partner at Freeth Cartwright LLP.

Tell me a bit about what you are doing at the moment.

As well as a busy case load of work for insolvency practitioners, I'm doing an increasing amount of pre- and post-formal insolvency advisory work for company directors as to their options, duties and obligations, and they are are increasingly savvy. They use the internet more and shop around for advice to get themselves out of trouble earlier on.

What do you see as the major issues within your line of work currently?

Insolvency law is fast moving – trying to keep abreast of it is a challenge. Streamlining IP regulation, with a reduction in the number of bodies involved, is afoot and making these reforms consistent and centralised is important. We must also improve the public's perception of the insolvency profession.

How did taking the JIEB help you develop your career and which parts of the training did you find particularly useful?

It allowed me to develop contacts in the insolvency profession. Studying with other people was a great way of meeting like-minded people and is crucial to career development. It was also excellent in building a solid base of technical knowledge – an absolute must.

What tips would you give to those currently taking the JIEB?

Negotiate a period of study leave with your employer in advance of the exam and study from the beginning of the course as you need to study consistently over a longer period.

Henry Shinners

Henry Shinners passed his JIEB exams in 2002, winning the Insolvency Practitioners' Association prize. He is currently a partner at Smith & Williamson.

Tell me a bit about what you are doing at the moment.

I'm mostly involved with corporate insolvency and advisory work with property aspects, consisting principally of hotels, shopping centres, residential investment property and care homes.

What do you see as the major issues within your line of work currently?

We are seeing a low volume of appointments due to low interest rates. After a recession, insolvencies have traditionally risen when the economy picks up and asset prices rise but we haven't yet got to that stage this time. With asset values depressed, achieving a decent return for creditors is difficult. Resources currently tied up in 'zombie' companies need to be recycled to contribute to economic growth.

How did taking the JIEB help you develop your career and which parts of the training did you find particularly useful?

I already had over a dozen years' experience when I took the JIEB. However, despite that experience, my JIEB training improved my technical knowledge and helped me achieve a promotion to associate director.

What tips would you give to those currently taking the JIEB?

Working together with a study buddy helps and doing question practice on past papers – knowing what examiners are looking for is crucial. Treat passing the exams as your job and commit to it accordingly.

Joint Insolvency Examination – November 2012

Congratulations to all the successful candidates.

JIEB 2012 prize winners

Insolvency Practitioners Association Prize for First Place
James Dewar

PricewaterhouseCoopers Prize for Second Place
Lorna Mode

Leonard Curtis Prize for Third Place
Christopher Flood

Association of Chartered Certified Accountants' Prize (awarded to the ACCA member with the highest mark)
Sara Danielle Stoker

ICAEW Prize (awarded to the ICAEW member with the highest mark)
Lorna Mode

Insolvency Lawyers' Association Prize (awarded to the lawyer with the highest mark)
No prize awarded this session

BPP Prize (awarded to the candidate with the highest mark in the Personal paper)
Andrew Waudby

Institute of Chartered Accountants of Scotland Prize (awarded to the candidate in the Scottish papers with the highest and sufficiently meritorious marks)
James Dewar

R3 Smaller Practices Group Prize (awarded to the candidate with the highest mark from a smaller practice)
Andrew Waudby

A

Agnew D (8036) Belfast
Almond L (8214) Crewe
Andrews M (8094) Surrey
Avery L (8201) Stoke-on-Trent

B

Bailey S (8299) Plymouth
Bathgate R (8008) Aberdeen
Begley G (8037) Omagh
Bloomfield R (8302) Norwich
Bowes T (8224) St. Helens

C

Callaghan M (8255) Leeds
Charlton E (8281) Ringwood
Croft R (8265) Halifax

D

Davies P (8066) Leigh-on-Sea
Dempsey N (8003) Aberdeen
Denny M (8175) Sutton Coldfield
Denyer E (8084) London
Dewar J (8004) Glasgow
Dunlop I (8075) London

E

Ensabella M (8157) London

F

Flood C (8161) Mayfield
Fox J (8232) Manchester
Fraser C (8217) Manchester

G

Gemmell R (8074) Hemel Hempstead
Gray R (8029) Dromore
Guthrie T (8125) Milton Keynes

H

Hall M (8280) Southampton
Harnor N (8082) London
Harrison R (8231) Stockport
Hegarty B (8035) Belfast
Hodgson C (8139) Egham
Hopkins G (8080) George Town
Hughes N A (8223) Lancaster
Huntley S (8182) Bromsgrove
Huxter L (8002) Kirkcaldy

J

James C (8166) Worcester
Jeffery R (8318) Redhill
Jobling C (8173) Banbury

K

Kaiser R (8249) Sheffield
Karia R (8097) London
Knopf E (8160) Guildford
Knowles A (8198) Stockport

L

Leigh D (8121) London
Lindley C (8272) Pontefract

M

Maher G (8070) London
Matkin L (8313) Matlock
Mills M (8088) Hatfield
Mode L (8069) Haywards Heath
Murray S (8030) Belfast

N

Nettleton J (8115) London

P

Parker R (8178) Tamworth
Paterson D (8164) Birmingham
Pattni N (8128) Stanmore
Payne D (8068) Maidstone
Pedhiou C (8153) Enfield
Prendergast A (8252) York
Prescott L (8199) Manchester
Preston A (8247) Leeds
Pritchard K (8168) St. Neots

R

Raikundalia D R (8170) Leicester
Reeds D (8129) London
Rice J A (8031) Holywood
Rimell S (8184) Birmingham
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Rudder V (8105) London

S

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Scott A (8256) Leeds
Scrivener D (8304) Ipswich
Shama A (8057) London
Shaw M (8192) Birmingham
Shukla T (8187) Birmingham
Sidoli A (8301) Cornwall
Simmons E (8138) St. Albans
Spearing J (8188) Stratford
Sterling A (8241) Altrincham
Stoker S D (8251) Castleford

T

Taylor D (8218) Bolton
Thompson H (8007) Edinburgh
Timms D (8183) Sutton Coldfield
Tinto C (8266) Leeds

W

Wallis M (8317) Derby
Waudby A (8258) Cleckheaton
White M (8091) Maldon
Whittaker A (8312) Leicester
Wilson P (8213) Holmfirth
Wylde L (8177) Birmingham

Analysis of November 2012 results

Papers sat	Papers passed				
	3	2	1	0	Total
3	48	19	20	23	**110**
2		24	40	41	**105**
1			32	61	**93**
Total	**48**	**43**	**92**	**125**	**308**

R3 Education, Courses & Conferences Committee

David White looks at how to structure your professional education and use fellow practitioners' expertise to further your career.

Once you have passed the JIEB, you still have to satisfy your licensing body that you have amassed the required level of structured continuing professional education in terms of hours or points before that body will grant you a licence. Admittedly, the requirements differ according to which body you belong but the general principle is the same. This is where the Education, Courses & Conferences Committee (ECC Committee) comes into play as one of R3's objects is advance the theory and practice of insolvency administration and to provide continuing professional education for its members. When you book our courses in preference to the commercial competition, you are supporting your own organisation and it helps us generate further funds that can be reinvested in members' benefits such as the influence we have brought to bear on government policy. Hard evidence of such work can be seen in the recent Select Committee report into the workings of the Insolvency Service, the exemptions for IPs from the Jackson reforms on litigation and the prevention of the introduction of the three-day notice period for pre-pack sales.

> "Supporting your own organisation... helps us reinvest in members' benefits."

The ECC Committee is made up of ten insolvency practitioners, eleven solicitors and one barrister. In addition, we have five regional observers, all of whom are solicitors. This group is then ably supported by the excellent in-house courses and conferences team at 120. I have given you the demographic of the committee because it is important to realise that the R3 courses programme is all about members training members.

Changes to suit your needs

We changed the way the committee works during 2012 as, after consulting with the committee members, we felt a fresh approach was needed to meeting your demands for training. As a result, the ECC Executive Committee, as sub-set of the main committee, reviews the course programme on an ongoing basis and identifies new course topics, sets budgets and reviews subsequent performance, checks up on the competition and reviews the composition of the main committee. The main committee discusses the forthcoming courses in detail with the relevant course directors presenting on their topics and reviews the feedback from past courses. We are then able to capitalise on the practical expertise within the committee to ensure the course material is both relevant and topical. All of the course directors are appointed from within the ECC Committee. It is worth noting that, given the network that we have established within R3, we are able to source the best speakers for the topics on the course programme. In addition to these changes, we now run a rolling six-month programme instead of publishing the training programme for the whole year in advance. We hope that this change will allow us to be more flexible in our planning and to respond to members' demands.

New agreement

The course programme includes a mix of half-day and one-day courses interspersed with breakfast briefings and webinars. We are also looking at working with an external provider offering a series of webinars on insolvency and restructuring. R3 will look to provide some of the speakers for these webinars and share the gross income once they are up and running. We also film a selection of half-day and one-day courses, which are sold as course DVDs. Our programme also includes the SPG Forum each autumn and the Annual Conference each spring.

> "We changed the way the committee works… we felt a fresh approach was needed to meeting your demands for training."

The ECC Committee thrives on feedback and is always receptive to ideas for course topics and content as well as looking out for good speakers. If you want to get involved, please email the team at 120 – courses@r3.org.uk – they will ensure that the ideas are passed on.

DAVID WHITE is the training director at R3.

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11–12 September
R3 Insolvency Conference
Hilton, Reading

17–18 October
R3 SPG Forum
Hilton Metropole, Birmingham

R3 events, courses and conferences

	Date	Event	Venue
March	4	North West Regional Meeting	DWF, Manchester
March	5	Introductory Series – Introduction to Insolvency and Personal Insolvency 1	Prospero House, London
March	5	Introductory Series – Introduction to Insolvency and Personal Insolvency 1	Irwin Mitchell Solicitors, Leeds
March	5	Southern Regional Meeting	The Ageas Bowl, Southampton
March	6	Introductory Series – Introduction to Insolvency and Personal Insolvency 1	Deloitte LLP, Birmingham
March	6	Healthcare Breakfast Briefing	GVA, Birmingham
March	7	The Issues of Key Stakeholders in Insolvency	Holiday Inn Bloomsbury, London
March	8	Midlands Excuse Me Lunch	Trent Bridge Cricket Ground, Nottingham
March	13	R3 Annual Dinner	Lancaster Hotel, London
March	21	Directors' Duties	Best Western Manor, Solihull
March	22	R3/INSOL Europe International Restructuring Conference	Hilton, Tower Bridge, London
March	27	Restructuring in Shipping Breakfast Briefing	Deloitte LLP, London
April	11	Yorkshire Women's Group Meeting	Deloitte LLP, Leeds
April	17	Yorkshire Regional Meeting	Crowne Plaza, Leeds
April	15	Eastern Regional Meeting and AGM	Ravenwood Hall, Bury St Edmunds
April	16	SPG Technical Review	The Queens, Leeds
April	18	Trading Insolvencies	Hilton, Paddington, London
April	18	Midlands Spring Ball	ICC, Birmingham
April	24–26	R3 Annual Conference – View from the Front	Hotel Martinez, Cannes
May	8	Intellectual Property and Insolvency Breakfast Briefing	Squire Sanders LLP, London
May	9	Trading Insolvencies	Renaissance, Manchester
May	14	SPG Technical Review	Cheltenham Chase
May	14	Introductory Series – Personal Insolvency 2 and Rescue 1	Prospero House, London
May	15	Introductory Series – Personal Insolvency 2 and Rescue 1	Deloitte LLP, Birmingham
May	16	Directors' Duties	Holiday Inn Bloomsbury, London
May	16	South West and Wales Golf Day	Marriott St Pierre Hotel, Bristol
May	16–17	Northern Conference	Oulton Hall, Oulton, Leeds
May	17	Introductory Series – Personal Insolvency 2 and Rescue 1	Irwin Mitchell Solicitors, Leeds
May	23	CPI Workshop	Ernst & Young, London

Regional events

R3 events

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

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Economics and insolvency in the Baltic region – a practitioner's view

Neil Cooper, currently court-appointed Bankruptcy Administrator of Bank Snoras, one of the largest Lithuanian banks, on reasons for optimism, despite the chill, in the Baltic states.

The three Baltic states Estonia, Latvia and Lithuania gained independence from the Soviet Union in 1990 and 1991.[1] They are now all once again fully functioning independent states within the EU and NATO. During the years of Soviet occupation, these states suffered greatly, both directly and indirectly; their languages were abandoned by Soviet order and their cultural and political elites were imprisoned and deported. It is a region where the history of the last few hundred years colours so many everyday issues that require urgent attention and forward-looking policies, free of prejudices and the baggage of the past. This is asking an awful lot, however, of individuals whose families were very often treated appallingly.

The economic crisis in a nutshell

The most obvious manifestation of this concern is the very public fear throughout the region of increasing Russian influence in the financial services sector, significant local businesses and the media.[2] In all probability, a large proportion of the constantly increasing Russian investment is completely logical and good for the economies involved in that it introduces inbound capital to economies crying out for investment while the global financial crisis is still slowing European recovery.

When the crisis first emerged, the collapses in the GDPs of the three Baltic states were among the most dramatic in Europe, ranging from 17 per cent in Lithuania to 25 per cent in Latvia: all three suffered much more than their neighbours, the Scandinavian countries and Poland.

All three governments were keen to avoid external devaluation

In terms of recovery, generally speaking, the economies of the Baltic states have fared much better than those of many southern European countries due to governments being prepared to 'take the medicine' at an appropriate stage. Estonia and Lithuania survived marginally better than Latvia initially but the timely intervention of the World Bank and the IMF in the Latvian economy in 2008[3] brought about quite drastic measures including the compulsory reduction of all state salaries, overnight increases in taxation and changes in the law.[4] As a result of the measures imposed, Latvia managed to avoid defaulting on its debt and has since made rapid strides towards economic stability.

> "The history of the last few hundred years colours so many everyday issues…"

While it was possible for their governments to achieve their fiscal austerity programmes without the civil unrest that has been experienced in southern Europe, these austerity measures were followed by considerable increases in unemployment rates. As a result, many nationals of the Baltic states have taken advantage of the mobility that EU membership offers and have sought their futures elsewhere in Europe. These have included many young and highly trained people who will be needed for the development of the countries and the cost will be experienced in the long term.

The currencies of all three states were pegged to the euro and a common cause in the region was the wish to join the euro. The crisis brought with it the risk of an enforced devaluation, which was thankfully avoided. The ambition has so far only been achieved by Estonia[5] which, of the three countries, has managed its recovery fastest. The austerity measures in Latvia and Lithuania may delay their adoption of the common currency but this is still undoubtedly on the agendas of many politicians.[6]

The economies of Lithuania and Latvia received a substantial setback at the end of 2011 with the bankruptcies of Snoras

Bank in Lithuania and Krajbanka in Latvia. These two banks were both connected to the former principal shareholders of Snoras who are currently facing extradition proceedings. Interestingly, despite the significance and high media profile of both failures, economic research some six months later showed very little impact on either economy largely due to the high percentage of depositors paid out by the states in both countries[7].

Insolvency laws

The insolvency laws of Estonia, Latvia and Lithuania were all written shortly after the independence of those states in 1991. These laws were heavily influenced, although not directly based on, the insolvency law of Germany at that time. Whereas the German insolvency law underwent a thorough review in 1999, the laws of these countries have tended to be 'patched up' since then.

Assessments of the insolvency laws undertaken on behalf on the European Bank for Reconstruction and Development[8] show that the Estonian law was rated as high compliant; the Lithuanian law was of

> The profession has a major job to do in all three states helping to develop modern insolvency and restructuring laws.

low quality, and the Latvian law was ranked as very low quality. One common feature of all these deficiencies was the provisions relating to office-holders. Both Estonia and Latvia were rated as only being of medium compliance and Lithuania as very low compliance with the EBRD Office-holder Guidelines.

These deficiencies in the insolvency laws were not obvious while the economies of the region were relatively favourable during the 1990s and the early part of this decade.[9]

However, the economic conditions of the last few years have tended to test the insolvency laws of many nations to the limit and many have been found wanting. For the reasons stated above, the insolvency laws and practices of these states did not facilitate reorganisations or even particularly cost-effective insolvencies.

As examples of relative inefficiencies, in Lithuania, the court allowed 30 days for the bankruptcy administrator to review and agree 28,500 creditors' claims but it was still not possible to convene the creditors' assembly until six months after the bankruptcy order due the overwhelming numbers of appeals permitted by the insolvency law. The process of realising assets cannot commence until the creditors' committee resolves that the bank should be liquidated.[10]

Insolvency practice

While the region has many highly skilled lawyers and accountants, the insolvency professions remain under-developed compared with most European countries. There is considerable scope for the profession to develop along the lines of the EBRD Office-holder Guidelines. In particular, the profession has a major job to do in all three states helping to develop modern insolvency and restructuring laws and the institutional capacity to deliver them. The court systems are burdened with excessive numbers of appeals and are generally under-resourced with assistance for the judges.

Out-of court-restructuring

As many practitioners realise, out of court restructuring thrives under two opposing scenarios – when the insolvency law is so awful that the out-of-court solution is the only way for creditors to obtain any satisfaction and conversely, as we find in the UK, when the insolvency law is (fairly) sound and enforceable allowing the parties to negotiate against a fairly predictable regulatory outcome.

The states of the laws in the Baltic region did not satisfy either of these criteria and when the economic crisis hit Latvia, it was found that bankruptcy was being used to enforce undisputed debts to either low numbers of creditors or cases where the debtor clearly just needed a breathing space. In other words, situations where out-of-court solutions would be in the interests of all parties – except, there was absolutely no culture of debtors approaching their major creditors – due probably to a mixture of lack of knowledge and reluctance to admit defeat.[11]

With the active support and assistance of the Ministry of Justice, who were concerned about the pressure on the courts, and the Chamber of Commerce, the World Bank promoted the Latvian Debt Restructuring Guidelines. A critical observer would notice a distinct similarity with the INSOL International Statement of Principles for a Global Approach to Multi-Creditor Workouts.[12] Research carried out some while after these guidelines were introduced demonstrated that there had been success in saving a number of significant businesses. At the least, the practice of lenders and borrowers discussing debt rescheduling had been introduced to the Baltics: it is now being used with success to reduce the default rates of Lithuanian banks.

The future

To the extent that any of us can predict anything in the existing economic situation, the Baltic states have as sound a future as the rest of Europe. They have proved their willingness to address unpopular issues; their countries have a wealth of natural resources, histories, architectures, cultures;

> [They] have a wealth of natural resources, histories, architectures, cultures; and well educated, skilled, multi-lingual and motivated people.

and well educated, skilled, multi-lingual and motivated people. Like many similar states, they are run by young internationally-trained professional people. Lithuania is about to take the Presidency of the EU in the second half of 2013, the first of the Baltic states to do so. If only it snowed less! Minus 32 plus wind-chill is quite nippy for an Englishman, even with a big fur hat.

References

1 Lithuania obtained its independence on 11 March 1990; Latvia on 4 May 1990 and Estonia on 20 August 1991.
2 Unlike the UK where ownership of football clubs seems to cause greater concern for the public.
3 According to the FT, the total cost of the IMF bailout of Latvia was €7.5 billion.
4 The reforms were met with mild protest: windows in parliament were broken.
5 In 2012.
6 This was the leading issue in the recent Lithuanian election.
7 In Latvia over 98 per cent of depositors were paid in full. In Lithuania, about 400,000 depositors were paid in full leaving 25,000 creditors in the bankruptcy.
8 These assessments are available on the EBRD website.
9 Which with hindsight probably amounted to considerable 'over-heating' of the economies.
10 There is relief for perishables.
11 Defeat in the eyes of the debtor, not the author.
12 Available on the INSOL International website although undoubtedly, one of INSOL's least snappy titles.

NEIL COOPER is a partner in the London office of Zolfo Cooper. He is a past President of INSOL International and Honorary Life President of INSOL Europe.

The Phoenix Phenomenon: who can bring a claim?

Simon Duncan examines creditors' rights of redress and who can sue former directors for debts owed.

Introduction

Sections 216 and 217 of the Insolvency Act 1986 (the 'Act') restrict the re-use of company names and impose personal liability for debts following contravention of s216.

It is generally considered that any claim under this section must be brought by a creditor but it is often the liquidator of a company that wants to bring a claim. Can a liquidator bring a claim under s217? If not, is it possible for a creditor to assign to the liquidator the right to sue the former director for the debt owed to the company? While s217 is silent as to who may bring a claim under this section, and the practitioner texts offer little guidance, there are three cogent arguments that support the view that such a claim can only be brought by a creditor (or possibly a shareholder) but not a liquidator.

The Phoenix Phenomenon

It is helpful to recall the abuse of the privilege of limited liability that led to the enactment of s216 and s217. It was frequently observed prior to 1986 that a company would go into liquidation or receivership owing large sums to the unsecured creditors. The liquidator or receiver could sell the business of the defunct company to the former controllers of the defunct company, who would then carry on the same business through 'New Co', a newly formed company incorporated for this purpose. Of course, the unsecured creditors were left with a valueless claim against the now defunct company ('Old Co') in liquidation. New Co would cash in on Old Co's goodwill by using a very similar name. See, for example, *First Independent Factors & Finance Limited* v. *Ian Josef Mountford* [2008] EWHC 835 (Ch) the Honourable Mr Justice Lewison at paragraph 17. See also *Archer Structures Limited* v. *Christopher Griffiths* [2003] EWHC 957 (Ch) at paragraph 15, where Her Honour Frances Kirkham observes (referring to the *Thorne* v. *Silverleaf* case (below) that:

'As is clear from that judgment, the aim of these sections is eradication of the 'Phoenix Syndrome',

While ss216 and 217 as enacted are wider in scope than required to address the Phoenix Phenomenon, the mischief that they address is clearly aimed at giving those unsecured creditors a right of redress. In essence, the former directors can be made co-debtors with the company to the extent of the company's debts in liquidation.

This was not the only provision that attempted to strengthen the creditors' rights of redress; s15 of the Company Directors Disqualification Act 1986 (CDDA) also achieves this purpose.

By analogy with s15 of the CDDA and the decision in *Re Prestige Grinding Ltd* [2006] B.C.C. 421

The wording of s15(2), (3) and (4) of the CDDA are exactly the same as s217 (2), (3) and (4). They derive from the same source and they are, it is submitted, aimed at the same mischief. That is to say, s15 of the CDDA is aimed at making disqualified directors co-debtors with the company for the company's debts.

> Unsecured creditors were left with a valueless claim against the now defunct company ('Old Co') in liquidation. New Co would cash in on Old Co's goodwill by using a very similar name.

The significance for our purposes is that case law pursuant to s15 CDDA as to the standing of a creditor or a liquidator to bring a claim pursuant to this section is arguably directly relevant by analogy to the standing required to bring a claim under s217.

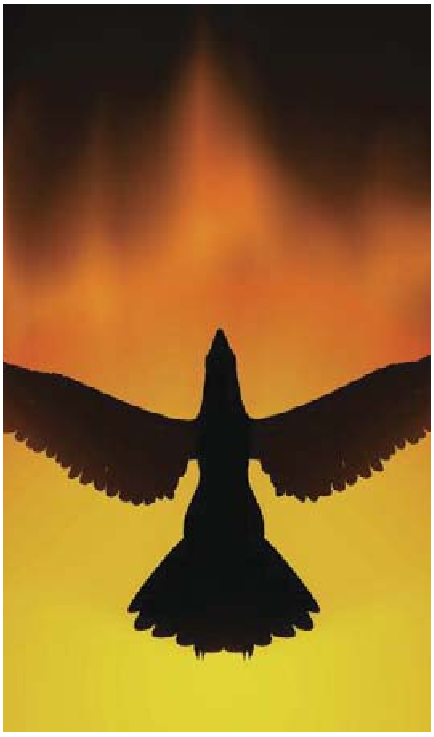
Re Prestige Grinding Ltd [2006] B.C.C. 421

Prestige Grinding Limited entered creditors' voluntary liquidation on 6 February 2004. Mrs Sharma was appointed as the liquidator. From incorporation to liquidation, the only persons to act as officers of the company were Mr Yardley and Mr Hill. Mr Yardley was appointed as a director on 1 June 2001 and resigned on 21 January 2003. He was disqualified from acting as a director for seven years on 11 February 2003. Mr Hill was appointed as a director and secretary of the company on 20 April 2000 and remained a director at the date of liquidation.

Mrs Sharma alleged that despite his disqualification Mr Yardley continued to be a de facto director of the company, and that Mr Hill permitted this. Creditor claims in the liquidation amounted to £191,795, of which £88,978 was due to HMRC.

Mrs Sharma issued an application inter alia for relief pursuant to s15 of the CDDA. The court listed a hearing to determine, as a preliminary issue, whether Mrs Sharma as liquidator had a right to bring such a claim against Mr Yardley and Mr Hill.

Before this matter fell to be determined, however, Mrs Sharma issued an application for HMRC to be joined as a



joint applicant to the originating application. This application came before Mr Gabriel Moss QC sitting as a deputy High Court judge. He ordered the joinder of HMRC as an applicant and, although this was not sought in the originating application, granted a representation order under CPR 19.6 making the liquidator and the commissioner of HMRC representatives of all the company's creditors. It was also held that the preliminary hearing would be dispensed with and both the preliminary point and the trial would be heard at the same time. The matter came before His Honour Judge Norris QC on 31 October 2005.

With regard to whether the liquidator had standing to bring a claim pursuant to s15, Judge Norris made the following observation at paragraph 11.

*'In my judgment s15 creates two separate sets of rights. To put the matter shortly and simply, it first makes the disqualified director personally responsible for all the relevant debts; and it secondly provides that the disqualified director is jointly and severally liable with the company for those debts. The first confers on the **creditor** a separate statutory cause of action against the disqualified director to supplement his contractual right against the company; the second gives the company a right of contribution from someone who by statute has become its co-debtor. **The section does not confer on the company (co-debtor A) the right to sue the disqualified director (co-debtor B) for the amount of the debt that is owed to C**. That is what paragraph 2 of the originating application seeks when it asks the court to make an order that Mr Yardley pay to the company the value of the relevant debts. But **such a right is unknown to the general law** and I hold that it cannot be spelled out of the words of the section. The personal responsibility created by the section is to the creditor and with the company. The section does confer on the company (co-debtor A) the right to recover from the disqualified director (co-debtor B) a contribution in circumstances where the general law so allows. It is that right that the liquidator has under s15 and can enforce.'* (my emphasis.)

The language of s15 (2), (3) and (4) is exactly the same as in s217 (2), (3) and (4). They derive from the same source and they are, it is submitted, aimed at the same mischief. This being so then proceeding by analogy the preferred view must be that s217 also confers a separate statutory cause of action on the creditors.

The significance of this statement should not be underestimated. Where a parliamentary statute has conferred a cause of action on a particular group, the creditors, any purported contractual assignment of that cause of action is doomed to fail.

The case law

Numerous cases have recognised that it is the creditors who have a cause of action pursuant to ss216 and 217.

In *Thorne* v. *Silverleaf* [1994] B.C.C. 109 Peter Gibson L J observed that:

'In the absence of an application under s216 (3) for leave, the court is left with no discretion on the application of the sections… and a creditor is entitled to take advantage of them…'

> The personal responsibility created by the section is to the creditor and with the company.

This was cited with approval in *Christopher Ricketts* v. *Ad Valorem Factors Limited* [2003] EWCA Civ 1706 at paragraph 18, per Lord Justice Mummery. It was also cited with approval in the *Archer Structures* case (ibid) at paragraph 15, per Her Honour Frances Kirkham.

Conclusion

The causes of action pursuant to ss216 and 217 of the Act and s15 of the CDDA have been conferred on the creditors. A liquidator has no standing to bring a claim (other than a claim for a contribution) and it is not possible to assign these causes of action to a liquidator.

This article is a synopsis of part 1 of a two-part article by the same writer that appeared in the *New Law Journal* at NLJ (2012) vol.162 No. 7530 pages 1175–1177. It is reproduced here with the kind permission of the *New Law Journal*.

SIMON DUNCAN is a solicitor at Moon Beever Solicitors.

The thrill of the unknown?

David Baxendale considers ways to minimise the risky business of insolvency practice.

When taking on any new insolvency appointment all insolvency practitioners welcome, if possible, a little planning time for them and their teams. This time will allow them to establish a communications plan and to anticipate risks and identify any health and safety or other regulatory requirements, and to then come up with a plan to address these. This planning time often involves consulting with colleagues to benefit from their situational or sector experience or as a minimum to provide technical support and an independent assessment of the potential assignment.

In certain cases the experience and learning points of previous cases in a specific sector or industry may not be there. In these cases where should the insolvency practitioner turn for help to get comfort prior to taking an appointment?

Use your network

The obvious solution is almost always to consult with colleagues and other contacts across your professional network. Prior to accepting a new appointment, an independent assessment of the case will help to identify risks associated with the business and the strategy for the specific case, and importantly help to identify steps to mitigate these risks, ranging from ensuring that the relevant licences and procedures are in place through to consulting with government bodies and legislators to seek their assistance and support.

> “The prospect of trading a private hospital as an administrator was definitely a first.”

Last year, when taking on the administration of Petroplus Refining & Marketing Limited, the company that owned Britain's third largest oil refinery at Coryton, the prospect of trading a fully functioning oil refinery was something that administrator Steve Pearson had not previously encountered. Steve said: ‘While planning time on this case was immensely useful this was uncharted territory and there were several risks to consider. The network across PwC enabled us to identify people with significant experience in the sector, and importantly provided access to the relevant departments within government, with whom we could discuss

the risks and agree ways to work with them and other stakeholders to reach a position where we could proceed with the administration and keep the refinery open while we explored options.’

Use your skills

Planning will also be hugely beneficial when taking an appointment over licensed or regulated businesses, such as pubs or care homes, or, as David Chubb encountered prior to being appointed joint administrator of the New Victoria Hospital Ltd, a fully functioning private hospital with patients under care and future operations planned. In this case, the prospect of trading a private hospital as an administrator was definitely a first for David, who said: ‘Planning time for a case like this was invaluable. We were confident that keeping the hospital open would enhance value but understandably this was not without significant risk. Consultation with management allowed a considered assessment of the risk and enabled us to then engage with key stakeholders and insurers to find a way to continue to provide all the services in administration while a buyer was sought. We were then able to successfully implement this strategy.’

Part of the skill of an insolvency practitioner is to bring situational experience of a business in crisis. There will be times when this is in a new sector, where the prior case experience or knowledge is not there. In these instances the party with best knowledge of the business is likely to be the existing management team and consultation with them will be vital to gaining a quick understanding of the business and risks it faces. Management will be able to clarify the procedures adopted by the company to deal with these risks and address any regulatory or health and safety requirements. Often the cost of continuing these procedures will be a key consideration when working out the best strategy and deciding whether to trade a business once in insolvency.

Think on your feet

In my time working in the insolvency profession I have worked across a variety of sectors ranging from turkey farmers to retailers and regulated financial institutions. This variety is what appeals to many in the profession. On all cases I have consulted with others before starting the work to assess the risk and where possible sought advice from people with prior sector experience both inside and outside of the firm. This level of planning can get you so far in terms of planning for and addressing risks before taking on a case but things will always crop up once you've been appointed.

> “I have worked across a variety of sectors ranging from turkey farmers to retailers and regulated financial institutions.”

Planning where possible is important and useful; however, no two jobs are the same and you can never plan for all eventualities. The ability to think on your feet to address issues while seeking to deliver the best outcome on a case can be one of the most challenging and rewarding aspects of our work. ◻

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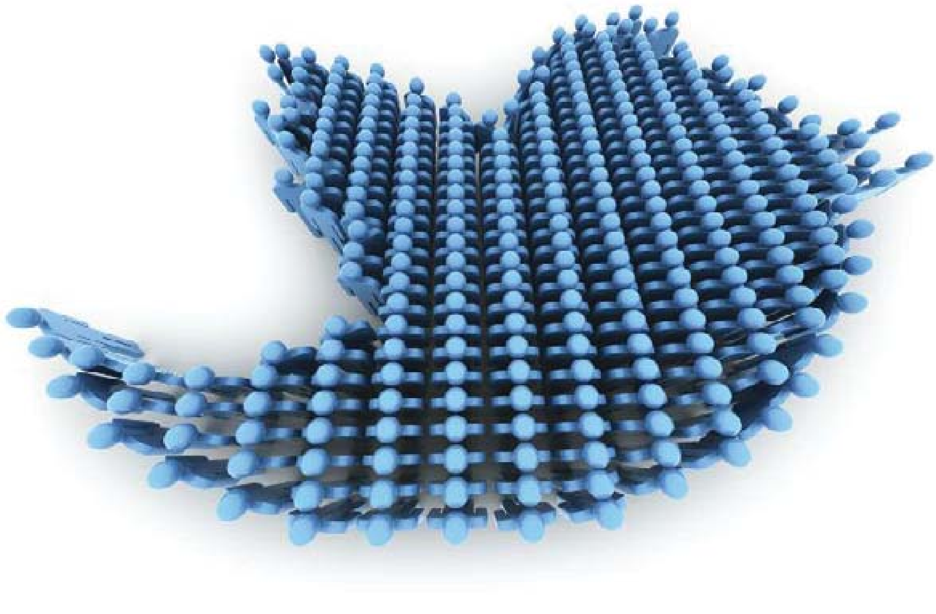
How should the insolvency profession use social media?

Will Black looks at the benefits and disadvantages of communication via social media.



The arrival of social media into the corporate world always did promise to be something of a double-edged sword. On the one hand, LinkedIn, Twitter and Facebook offer IPs and R3 new channels to communicate to creditors, journalists and politicians. On the downside, social media is a new platform for those who lose out during the insolvency process to mobilise and air their frustration.

How can the profession use it? In the GAME administration in the first half of 2012, PwC used Twitter to communicate to staff and customers. The website for Farepak attached a report to creditors and was used by the liquidators to communicate with a large customer base. The recent insolvency of Comet left behind a team of in-house social media experts, which Deloitte was able to instruct in keeping customers up to speed with developments.

Harnessing potential

However, in the middle of January, the Facebook page of HMV saw speculative comments about why vouchers were not being honoured, while awaiting the appointment of the administrators. As useful as it is as a forum to reach customers, timing is everything – social media will only work if you can post the information fast enough.

> “Like an online hydra, a defensive comment can produce another attacking one… not contributing to relevant discussion can look even worse.”

So how does a trade body like R3 harness this potential? Many initial conversations about implementing a social media programme were cautious and wary. There were fears social media would simply provide a platform for IPs to get attacked on fees, pre-packs or other issues.

Feeds, followers and fair comment

Since the R3 Twitter page (@R3PressOffice) launched two years ago, the reaction and comments have been largely positive. The feed has attracted over a thousand followers, mainly insolvency professionals, but also with a healthy smattering of MPs and journalists.

Twitter lends itself extremely well to announcing R3's key messages and statistics, as well as breaking news about the profession. Negative commentary about the profession tends to migrate to online news articles or LinkedIn, as it did recently with Jessops with some objections to the apparent ‘speed’ of its demise.

Disputes within the profession also get more of an airing on LinkedIn, where space allows for much more discussion and more polarised views. It is very easy to post a negative article or start a debate (invoice financing was a recent one) where personal opinions clash.

Unless the LinkedIn page is one's own, you can't really censor it as this breaks the great unwritten rule of social media – it's democratic. R3 does respond to some negative contributions on LinkedIn – especially when the organisation itself is called into question. Like an online hydra, though, a defensive comment can produce another attacking one, and the hardest task can be to take out momentum from a debate. Not contributing to relevant discussion can look even worse.

Quite often, these arguments stray a long way off from key R3 messages. Fair enough. However, occasionally some of these contributors forget that these more soul-searching discussions are not offline, and provide welcome fodder for the trade publications, which can damage the profession overall.

Social media is beneficial to our profession – broadening our audiences both within the IP community and well beyond. The rewards for giving up some control are worthwhile, but in a sense this is just as true of traditional media, where there is no control over what a journalist does with a press release or media statement. The same rules apply here. Social media holds no problems for a profession that believes in itself and can prove what it contributes. In the light of HMV's recent problem with disgruntled staff using the company's official Twitter feed to air their grievances, however, it might be as well to know who is controlling the account and how to change the password. ◻

WILL BLACK is communications manager at R3.

Cutting the human cost of insolvency

Will Black explains how a joint initiative has reduced the stress job seekers come under if an insolvency is set in motion.

When Sedgefield MP Phil Wilson saw first-hand the confusion and stress his constituents faced when made redundant as a consequence of insolvency, he instigated a system of early warnings between IPs and Jobcentre Plus. Over the last three years more than 100,000 people have been helped by the public sector and private partnership initiative between R3, Jobcentre Plus and The Insolvency Service, allowing IPs to pass on information as soon as they think there will be more than 20 redundancies in an insolvency case. This in turn enables Jobcentre Plus staff to deploy a rapid response service to find new employment, and show those facing redundancy how to claim benefits and access training.

> Unfortunately, the insolvency profession sees the human cost of business failure on a daily basis.

As Mr Wilson explains: 'Losing a job is one of the most difficult situations people can face in their lifetime. It is essential that they receive the correct information at the right time to help them find new employment. Helping over 100,000 people in the last three years is an excellent achievement and shows what can be accomplished through partnership working, without resorting to additional regulation. The Memorandum of Understanding has already helped support thousands of individuals and with many businesses continuing to struggle, it will play a key role for some time to come.'

R3 president Lee Manning stressed the importance of enabling IPs to work with expert government agencies and ensure that those facing redundancy were given as much support as possible at a very distressing time in a difficult economic climate. Highlighting the benefits the memorandum has brought, he added: 'Unfortunately, the insolvency profession sees the human cost of business failure on a daily basis. Employees face the unwelcome prospect of having to find new employment at a confusing and stressful time.'

Understanding the critical factors contributing to a business becoming insolvent helped Jobcentre Plus staff plan their own response accordingly, said Sarah Cole, of Jobcentre Plus. Her comments were backed up by The Insolvency Service's Jane Young, who said people who lost jobs through redundancy faced a stressful and confusing time.

'Advance notice from insolvency practitioners enables The Insolvency Service to plan its resources so that claims can be assessed quickly and efficiently,' she said.

By calling in the Jobcentre Plus Rapid Response Service in good time and by sharing the intelligence and expertise of the IPs and the Jobcentre Plus staff, people can be helped to move into alternative employment without the need to claim welfare benefits. In Scotland the service is being delivered through Partnership Action for Continuing Employment (PACE) and in Wales the service is called the Redundancy Action Scheme.

How it works

Last year, when Thamesteel in Kent went into insolvency, the IP, Jobcentre Plus and partner organisations visited the site and worked with employees to provide redundancy advice. One of those being made redundant, Jake Underdown, had already set up a support network and organised an event for 350 of his colleagues. JHP Employability, a partnership organisation invited to Thamesteel, offered Jake an employment solutions consultant's role as a result. Jake now works helping to support those who have been made redundant get back into work.

When a consultancy and outsourcing company in Northumberland entered administration, affecting 70 staff, the IP contacted Jobcentre Plus staff for assistance. They went on site to give a presentation to the employees and engaged with local work assistance providers to identify suitable vacancies. At the meeting, a number of employees took the offer of training and 15 of them found employment that day. ◻

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R3 Smaller Practices Group

What's the point of 'soft skills' training? More than you'd imagine…

R3 soft skills training

Having gained the necessary technical skills, a satisfying career as an insolvency practitioner becomes a journey through three key areas:

- getting the best out of yourself
- getting the best out of other people
- developing the business.

This article briefly explores how improved personal skills can enable you to achieve that.

Starting off: getting the best out of yourself

The most gifted individuals have days when time runs away from them, tasks overwhelm them and other people simply don't co-operate with them. Self-discipline becomes harder to sustain. Focusing on what's important (as opposed to what's urgent) is more of a struggle. Remaining calm and courteous in the face of obtuseness or even hostility becomes a battle we may lose.

> Most of us are not as effective as we could be and when the pressure builds our individual weaknesses are likely to become more apparent.

Most of us are not as effective as we could be and when the pressure builds our individual weaknesses are likely to become more apparent. The 'soft skills' of time management, delegation and effective communication provide the tools to see us through such periods.

It takes discipline to stand back from what has to be *done* and instead take time to consider carefully *how* to, and *who* can best help us, achieve a satisfactory result. Both strength of purpose and humility are needed to use a team to best effect.

Good quality personal skills training will raise awareness of why certain techniques work; and provide a safe environment in which to practise them. Once we know how, and have had a go, we can use those skills to be personally more effective in the workplace.

Accelerating: getting the best out of others

Do you ever feel as if you're hauling others' inertia like a dead weight, slowing you down and making everything much harder than it need be? It is quicker, easier and more satisfying for all parties if everyone is pulling in the same direction. How much more could you achieve if only you could get people working *with* you? Knowing how to:

- communicate with a range of different personalities so that they know what is needed, when, and in what detail
- build rapport, to save precious time and effort working round others' defensiveness or hostility
- develop empathy with colleagues and clients so that they *want* to work with you

means better results in less time.

What makes insolvency work both deeply satisfying and immensely difficult is the range of situations in which an IP has to work, and hence the multiplicity of skills on which an IP must draw. These include:

- negotiating with creditors
- negotiating to sell assets
- counselling clients to be able to make a decision, including listening and asking the best questions
- effective techniques such as body language and mirroring for interviewing clients and staff
- delegating different tasks and responsibilities; and motivating staff to pick up more of the burden
- giving direction and guidance to staff and clients by preparing properly, explaining effectively and following up
- skilfully combining verbal, non-verbal and written elements of communication
- leading your own team; and leading someone else's to the best destination possible.

> What makes insolvency work both deeply satisfying and immensely difficult is the range of situations in which an IP has to work.

It is a very rare individual indeed who is competent in all these areas without the need for any training. Even they, however, can move from competence to excellence. The majority of us will benefit from raised awareness of what doesn't work, increased confidence from knowing what we're doing well and the satisfaction of enhanced performance as we implement different techniques.

Good quality soft skills training will deliver all of the above.

Maintaining momentum: growing the business

Finally, in order not only to survive but also to flourish, IPs need to build and maintain a strong network of contacts and satisfied clients to refer more work. Consider whether you:

- enjoy networking (most people don't)
- are a confident and engaging negotiator
- dread the initial period of engagement with staff at a failing business (no matter how good you are at cutting away the dead wood and delivering a going concern).

If you would like to improve your performance in these three areas, soft skills training is for you.

> It is a very rare individual indeed who is competent in all these areas without the need for any training.

Skills lead to excellence

Insolvency work demands a particular personality and mental strength. To work excellently with the range of clients and staff that you are likely to encounter in your professional life requires not only these personal attributes but sustained attention to the detail of working with people. 'Soft skills' is a misnomer. It takes self-discipline, focus and an open mind to learn and apply the people skills that lead to excellence.

In the past, R3 has included soft skills slots at the SPG Forum conference and is currently considering a standalone pilot course dedicated to soft skills training. If members are interested in attending soft skills training, please let David White (DWhite@r3.org.uk) or Emma Hobson (Emma.Hobson@r3.org.uk) at R3 know, along with an indication of the type of training (e.g. networking, leadership and management, interviewing, negotiation, personal effectiveness) that interests you. The pilot will be run as a workshop at R3's offices with strictly limited numbers to ensure that the participants get the maximum benefit from the course.

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MIKE STURGESS is Chairman of SWAT UK.

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R3 membership categories

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

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

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

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

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

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

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

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Smith & Williamson

Birmingham office of Smith & Williamson announces the arrival of Andy McGill as partner in the restructuring and recovery services team.

Smith & Williamson, the tax, business services and investment management group, is pleased to announce the appointment of Andy McGill, who joins the Birmingham restructuring and recovery services team as partner.

Andy is a well-known figure in the Birmingham business community, having worked as a senior member of KPMG's corporate restructuring team for the past 20 years.

He will be based in Colmore Row but will also form an integral part of Smith & Williamson's other regional teams, particularly Worcester, to provide a full mid-market restructuring and recovery offering.

Andy commented: *"I am delighted to be joining the team; many mid-market businesses in the Midlands continue to face significant challenges in uncertain economic conditions, and I look forward to working with them to help devise the best possible solutions."*

Greg Palfrey, head of restructuring and recovery (regions) said: *"Andy is highly regarded in the Birmingham marketplace, and has a huge wealth of experience acting in both an advisory capacity to under-performing corporates as well taking formal appointments in insolvency scenarios. His appointment strengthens our corporate skillset and underpins our commitment to the Midlands mid-market."*

Smith & Williamson LLP

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A member of Nexia International.

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generator real estate solutions

Generator Group appoints Insolvency Services Director

Stewart Martin has been appointed as Director of Generator Real Estate Solutions LLP (GRES), a specialist professional consultancy that specialises in providing financial institutions and insolvency practitioners with strategic advice and support in relation to stressed and distressed property assets.

GRES is part of a niche group of companies that combines a specialist developer, funding partner and professional adviser, which can together deliver effective and innovative solutions for a wide range of property development, investment and partnership scenarios. Unlike the majority of agency-led property consultants, GRES comprises a multi-disciplinary team that includes financial as well as property professionals and is better able to respond more directly to financial institutions' and insolvency practitioners' specific needs.

The appointment of Stewart Martin comes as part of a move by London-based Generator Group to strengthen its GRES division, as demand increases across the sector for insolvency and receivership services. Stewart's focus at GRES will be to provide strategic asset management expertise to lenders and insolvency practitioners in order to enhance asset value and maximise recovery.

Stewart was previously a Director of Savills where he set up the firm's National Recoveries team. He has a strong professional background in valuation, development consultancy and landlord and tenant advisory work, specialising in LPA receivership and strategic workout consultancy. As a RICS Registered Property Receiver, Stewart has been responsible for property assets in all mainstream commercial and residential sectors, ranging from individual units to multi-let shopping centres, offices and apartment blocks, including part-built schemes.

Stewart comments:
"The economic forecast suggests that recovery will be a lengthy process. There is an expectation that lenders will increasingly take control of assets and consequently, have greater demand for strategic advice, workout programmes and LPA Receivership appointments. Generator Real Estate Solutions is ideally placed to provide lenders with robust advice about the development options available to them in order to identify the optimum exit strategy."

www.generatorgroup.co.uk

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Interview with…

Toby Perkins

Chesterfield MP **Toby Perkins** is Labour's shadow minister for small businesses. A former small businessman, he has been vocal in the House of Commons about the need to increase and ensure the vital flow of cash to Britain's small businesses and has urged for the establishment of a business bank.

What were the greatest challenges you faced as a small businessman?
The first thing, when you're setting up a business from scratch, is developing your market share and developing your expertise. I think the other thing is to stay focused on where you can add the greatest value, otherwise you haven't always got as much strategic energy going into your business as you'd like. As a self-employed person you're often jack-of-all-trades.

What are the strengths of British business?
We've got tremendous entrepreneurial spirit in this country. We're pretty technologically advanced and have a strong base in the technology industries. We also have a tremendous proud patriotism. We are very well placed on the global stage as the link between America and Europe, and with our links with South Asia, which is one of the most fast-growing and exciting parts of the world.

Is Britain a good place to do business – in the sense that dealing with people is straightforward?
When Labour left power in 2010 the World Bank said Britain was the easiest place in Europe to set up business and the fourth easiest place in the world. I think our global competitiveness continually shows that we're one of the most competitive economies, in a variety of ways. There are far more strengths to British business than there are weaknesses.

> "I think sometimes the need for confidentiality freezes out the publicity of the good work an IP has done."

As the shadow minister for small business with responsibility for insolvency, what are your key priorities for the insolvency profession at the moment? We've seen retail businesses in recent weeks having a very hard time.
From an insolvency perspective the key thing is to ensure we get the balance right between the costs of the professional failure, so there's still an incentive for people to try, and yet retain the balance between personal and corporate failure and responsibility. Many corporate organisations, corporate directors, have walked away from what have appeared to be pretty questionable practices. They've left companies behind, or bought their own companies out of administration, walking away from their debts and leaving creditors, employees and competitors often feeling pretty dissatisfied with the process. What we need to ensure is the regime encourages people to have a go, but discourages irresponsibility and ensures there is action taken in cases where people have acted irresponsibly or illegally and caused significant damage as a result.

That ties in to the next question. Would you like to see any changes in the way we treat failing businesses? Do you think the UK currently has the correct balance between protecting the public from errant directors and promoting entrepreneurialism?
Insolvency is a function of the market. Not every insolvency is a bad thing, though it's a financial catastrophe for individuals or corporations. Sometimes there are businesses that have failed to change or modernise and reform. Unfortunately HMV is one of the latest big names from »

the high street affected. The Labour Party is conducting a review, which will be reporting pretty shortly, on how the insolvency regime works and what we can learn from other systems around the world. We can, very cautiously, make sure we get the balance absolutely right between retaining the best of our current system but also ensuring deterrents written into the system are properly applied so irresponsible or dodgy directors don't feel that they can walk away with impunity having caused dreadful consequences from their actions.

"Not every insolvency is a bad thing, though it's a financial catastrophe for individuals or corporations."

I would say legislatively the balance is broadly right. In enforcement terms, we've been critical of The Insolvency Service which has been pursuing fewer of the cases insolvency practitioners have suggested they follow up. We've been critical and as part of our work in insolvency we are going to come up with some fairly innovative ideas about how we are going to improve that.

IPs spend a quarter of their time on restructuring and helping to save struggling businesses. In 2009 they saved 2 million jobs and kept 5,800 businesses going. What can the profession do to promote that side of its expertise, the side that doesn't make the headlines?

They've got a real need to strike the right balance between commercial confidentiality and sensitivity and the thirst for information among the markets, and members of staff particularly, and local press. I think sometimes the need for confidentiality freezes out the publicity of the good work an IP has done. I think if they were able to have an eye on the public relations aspect – provide a little bit more of a commentary about the actions they are taking – then they could maybe improve their reputation in the eyes of the wider general public who are not professionals – not IPs – and who don't understand the industry but are victims of the slings and arrows of misfortune that have affected their business or their debtors.

How can the resources – employees and assets – trapped in underperforming [interest only] 'zombie' companies best be brought back into the productive economy? Do you see the best course of action to let them fail or prop them up a bit more?

That's a very difficult question to answer, because in some cases you are flogging a dead horse and in some cases there is potential in there. One of the challenges facing companies like this is often the best people move on, leaving the people least likely to be able to engineer a recovery. People do move on, there will be takeovers, there will be partial takeovers and buyouts and assets will be freed, but I think when we start to see an economic recovery, and start to see interest rates go up from their historic low point at the moment, there is a real prospect that we will see businesses that have survived by just paying the interest suddenly find themselves in the most vulnerable position of all. That's going to be a challenge for whoever is in government at that time, because you could see recovery coincide with an increase in insolvencies and unemployment. That seems counter-intuitive but because of the number of zombie companies there are, that's a real danger.

Do you think there's a need to clear out the dead wood before the new shoots can start?

I think if we saw, in a recession, a really hostile programme of bank foreclosures there would be a lot of concern. There has to be a judgment, by the market, by the people lending money to a business, whether there is a long-term successful business in there, struggling to get out. Often a change of management can do wonders. A business that may seem to be on its uppers can be revolutionised.

Is enough being done to set up a business bank? Some banks, like Lloyds, seem to be making a big deal of their policy to lend to small business and to SMEs.

The evidence from the small business sector is certainly not that they think banks are willing to lend. Money is available for asset-rich companies, but businesses without significant assets to borrow against are finding the market incredibly slow at the moment. There's a real problem in terms of confidence between banks and their customers. Banks don't have confidence in the economy or in their customers' capacity to repay extended lending and the businesses don't have confidence in their banks to be anything more than a fair-weather friend. So you're seeing a lack of confidence in demand and supply.

It's a really significant challenge to UK small businesses and the reason why we proposed a small business bank, six months before it was announced as government policy. It's the reason we are investigating the lessons we can learn from countries like Germany, which have far better long-term lending to small businesses. We feel that a British investment bank offers real potential and there's more potential investigating what could be done on a regional basis, possibly through local enterprise partnerships, though they would need strengthening to enable them to do that. There needs to be a broader base – we have a very small banking sector available to lend to the vast majority of small businesses and we think there has to be a real improvement in business confidence in both the economy and the bank and a number of things need to happen before SMEs start getting the significantly greater levels of access to the finance that is needed to deliver growth in the economy.

We also need to make sure in terms of the allowances and, potentially, grants, certainly loans, available to potential investors, that there is an opportunity for greater access to equity and business angel support. There are some interesting models that already exist for alternative sources to funding but they are a very, very, small part of our economy. Even if they were to quadruple in terms of the contribution they make it would still be very much around the margins. We have an over-reliance on the banking sector and we do need the government to work with the banking sector to make sure that we improve business confidence in the banks and we ensure more money actually gets to small businesses.

"Money is available for asset-rich companies, but businesses without significant assets to borrow against are finding the market incredibly slow at the moment."

Would you like to see a prompt payment system coming into play as well?

It is a really significant issue in terms of the responsible capitalism agenda and in terms of the agenda that sees small businesses in an unfair business relationship with their larger counterparts. We think that the EU payment directive has some potential but it needs to be given some impetus by government and that, probably for the first time, is an issue they are taking more seriously.

If you were in business again now, what advice would you most like to receive?

The first is, I wish I'd known then what I know now in terms of the access to finance opportunities that exist and routes that maybe I could have explored.

The other piece of advice I would give to any small business person is to focus most on what will give the greatest return and look to delegate as much of the rest as you can.

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