Autumn 2024

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Please contact me at editor@r3.org.uk.

> **"While pre-packs have become a way of life for many of us over the past 20 years, concerns about them remain"**

From the editor

I hope you had a good Summer. We ease you back into things with our Autumn edition looking, as our theme, at the current state of prepackaged administrations – 'pre-packs'.

The latest evolution of pre-packs is the introduction of the concept of the evaluator's report, which came into existence in 2021. What do the evaluators think of the process? Matt Jukes found out by interviewing three of them, Johnny Abraham, Stuart Hopewell and Kevin Murphy.

While pre-packs have become a way of life for many of us over the past 20 years, concerns about them remain, which Peter Walton identifies in his article in this edition. On the other side of the debate, Nick O'Reilly extols the virtues of the pre-pack and Jonathan Dunn at FRP gives a real life example of where the pre-pack has effectively operated to keep air ambulances in the air.

I trust you have all read each of the 533 pages of the *BHS* judgment (yes, of course I have...). In case you have not, Joe Curl KC, who acted for the successful liquidators, helpfully summarises Mr Justice Leech's far-reaching judgment for you.

Following a recent legal statement by the UK Jurisdiction Taskforce (UKJT) on digital assets and their interaction with insolvency law, Nick Price of Osborne Clarke reviews that statement and the current state of play with the increasing influence of digital assets, such as cryptocurrency, on our profession.

Thames Water's financial travails are well publicised, so Prav Reddy at Katten Muchin Rosenman UK reviews the updated special administration regime for water companies and how it might work. Notwithstanding its 18th century roots, modified universalism continues to evolve, and Katie Longstaff at Radcliffe Chambers looks at some recent decisions as cases in point.

In a busy edition, our colleagues at R3 also assess the impact of a new government on our profession, Maria Strong, the vice chair of R3's SPG Committee, looks at the agenda for the upcoming SPG Forum in November and, with a continued increase in office-holders assigning claims to litigation funders, Caleb Bompas at Manolete looks at legal challenges to assignments and how to avoid them.

Hopefully this edition will both educate you and eradicate your post-summer blues!

Neil Smyth is a partner at Mills & Reeve and is the editor of *Recovery*

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R3 matters

Legal updates

Dates for your diary

Special Focus: Turnaround Management

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Representation is key for the future

The UK's insolvency and restructuring profession is adaptable, and has the problem solving traits to benefit from upcoming global changes, says **Tim Cooper**

There's no doubt that the president's itinerary in the first quarter is intense. Kickstarting the year was the Annual Conference in St Andrews, followed by a tour of the countries and regions of R3 to engage with members and hear more about what's going on across the UK. Then came a series of business media interviews to advocate for the profession and a great deal of work representing the UK's profession on the international stage.

It could not have been a better start to my year in office and to make good on my presidential aims for the year and beyond.

Regionally and nationally

I have been delighted to attend three regional events since my appointment: hearing about future economic challenges and an update on director disqualification in the Midlands; participating in a mock s236 private examination in Southern and Thames Valley; and returning 'home' to learn what the Scotland Committees have planned for the rest of 2024.

> **"It is vital that R3 maintains its presence and profile on the international stage to ensure the UK profession continues to benefit from our highly respected system and standards"**

Visiting the remaining regions and countries is a key priority and I look forward to the next set of events in the autumn. There will be a lot to discuss, so make sure you are there to hear the latest news and updates.

On the global stage

One of my key aims for this year is to promote the reputation of the UK profession globally. The first opportunity came quickly at INSOL International's conference in May, which I attended on R3's behalf.

> **"The appetite for use of new restructuring processes, especially in the mid-market following the recent example of Tasty plc, is increasingly a hot topic in many jurisdictions"**

A key message I want our members to appreciate is that, of INSOL International's global membership, the UK's membership through R3 is the largest single constituent part. As such, R3 carries significant weight, influence and respect on the world stage, and the UK's profession and restructuring regime were ever-present throughout the conference.

We came away with significant learning points from the member association roundtable, attended by myself and R3 CEO Caroline Sumner. It is vital that R3 maintains its presence and profile on the international stage to ensure the UK profession continues to benefit from our highly respected system and standards.

From the technical and educational sessions, there was much for us to think about. There are going to be huge economic, technological and sociological changes over the next months and years, and coming together at events like this gives us a chance to discuss them, share experiences and gain insights into how we will tackle them. These changes will affect us all. Adaptability, commerciality and problem solving are traits that set the restructuring and insolvency professions apart, so all our UK members stand to benefit from the opportunities and challenges these global changes present.

Emerging opportunities

The TMA's International Symposium and Annual European Conference in June provided an opportunity to engage with an international delegation working from a different but highly relevant angle on financial distress.

Restructuring support was a key topic of discussion here, as representatives from the different European jurisdictions shared details of the progress they had made towards introducing – and in many cases, refining – formal restructuring processes.

There was a lot of interest in how the UK's restructuring plan is evolving alongside similar developments in Europe. The appetite for use of these new processes, especially in the mid-market following the recent example of Tasty plc, is increasingly a hot topic in many jurisdictions.

Insights into Horizon

Attending the SPG Forum is always a highlight for any president and I am delighted that this year the Forum committee have invited former sub-postmaster Lee Castleton to be the keynote speaker.

Lee will be speaking about his experience as a subpostmaster and his involvement to date in the Post Office Horizon inquiry.

Given how high-profile this case has been, the potential policy implications it could have for the bankruptcy process and the powerful human-interest element of the Post Office Horizon inquiry, this talk promises to be one not to miss at this year's event.

Out of the blocks

It would be remiss of me to write this column without mentioning the general election. At the time of writing, the new Government has taken office and the R3 team is looking forward to seeing what Sir Keir Starmer and the Labour party have planned for their first parliamentary session.

The policy and public affairs team have already begun to reach out to the new MPs and the insolvency minister, Justin Madders MP, to help them understand more about the work of the profession – and have asked me to encourage you to get in touch if you'd like some help arranging a meeting with your local MP.

Tim Cooper is a partner at Addleshaw Goddard LLP and president of R3

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Legal Q&A

Nicola Rout answers your insolvency queries

Q What do I need to know about the Economic Crime (Transparency and Enforcement) Act 2022?

A The Economic Crime (Transparency and Enforcement) Act 2022 (ECCTA) introduced wide-ranging reforms to enhance the accessibility and transparency of corporate information held by Companies House, largely driven by the conflict in Ukraine and the rise in complex ownership structures. Such structures often involve international investment, which has led to an inability to ascertain the beneficial owners of companies or properties. These reforms include:

1. Widening the scope of Companies House's power, enabling it to request further information and reject filings. Companies House will now be 'an active gatekeeper' rather than acting as a passive post box. It will be able to levy financial penalties.
2. Protecting the personal information of directors and persons of significant control from public view.
3. Introducing identity verification for all directors, persons of significant control and registerable officers of relevant legal entities. It will be a criminal offence to act as a director unless their identity has been verified. The company that permitted the unverified director to act will be criminally liable.
4. Disqualification of directors with three or more breaches of company legislation, including non-compliance with filing obligations.

> **"A company needs to have a registered email address designated for communications with Companies House, but it cannot be an info@-type address"**

> **"The Information Sharing Regulations provide that the registrar may disclose information to anyone acting as an IP, including the Official Receiver"**

5. Filings at Companies House can now only be done by a verified officer of the company or an authorised corporate service provider. False or misleading filings will be a criminal offence.
6. A company needs to have a registered email address designated for communications with Companies House, but it cannot be an info@-type address. IPs should ensure they have control of such addresses or see that they are changed upon appointment.
7. Statutory registers will be held at Companies House, which should make delivery up of records easier for IPs.
8. Companies with more than 250 employees, over £36 million of turnover or over £18 million in assets will become liable under a new offence of failure to prevent a fraud if the company is unable to prove that it took reasonable steps to prevent a fraud.

Q Are there any provisions of particular application to me if I have undertaken an appointment?

A The Information Sharing (Disclosure by the Registrar) Regulations 2024 came into force on 22 May 2024 and relate to the powers conferred in s1110F(1)(c) of the Companies Act 2006, which was inserted by section 94 of the ECCTA.

Section 1110F(1)(c) states that the registrar may disclose information to any person in connection with the exercise of the registrar's function, to a public authority in connection with the exercise of its function or to a person of a description and for a purpose specified in regulations made by the secretary of state.

The Information Sharing Regulations provide that the registrar may disclose information to anyone acting as an IP, including the Official Receiver. Information can be shared if it would assist with making an application to court in respect of:

1. Fraudulent trading
2. Wrongful trading
3. Adjustment of withdrawals
4. Transactions at an undervalue
5. Preferences
6. Extortionate credit transactions

There are other additional provisions under Scottish insolvency law.

The registrar may disclose any information to an IP if the registrar is satisfied that it is necessary to help an IP trace, realise or recover property in judicial or administrative proceedings relating to insolvency law where the assets of a debtor are subject to court supervision or control for the purposes of a reorganisation or liquidation.

This section will override other powers introduced by the ECCTA to protect personal information, and is designed to strengthen the transparency and integrity of the registers held at Companies House. It further demonstrates a commitment to the prevention of unlawful activities, in particular economic crime.

It will also assist in any investigation into the directors of the insolvent company and enable the IP to ascertain whether there are claims to be made. This perhaps points to a new willingness by Companies House to become more engaged in legal proceedings and enables IPs to exercise their powers of investigation, making claims against directors easier to pursue.

At the time of writing, it is unclear as to how information requests will be made to the registrar and whether there will be a prescribed process.

Nicola Rout is an associate at Thompson Smith and Puxon

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Recent case summaries

The latest insolvency update from **Amanprit Kaur** and **Raghav Trivedi**

Sian Participation Corp v. Halimeda International Ltd [2024] UKPC 16

A loan was advanced by Halimeda International Ltd for £140 million to Sian Participation Corp (SPC). The loan agreement contained an arbitration clause stating that "any claim, dispute or difference of whatever nature arising under, out of or in connection with this agreement" shall be referred to arbitration under the London Court of International Arbitration Rules.

The loan was not repaid and the outstanding debt reached £220 million. Halimeda applied to the court for the appointment of liquidators. The British Virgin Islands court was not satisfied that the debt was disputed on genuine and substantial grounds. As such, the court made a liquidation order against SPC.

> **The court held that the approach in *Salford Estates* should not be followed, and that the practice of companies courts in England and Wales to stay or dismiss a petition where an arbitration or exclusive jurisdiction clause governed the debt should cease**

SPC appealed the order under s162(1)(a) of the Insolvency Act 2003 (British Virgin Islands), relying on the decision in *Salford Estates (No.2) Ltd v. Altomart Ltd [2014] EWCA Civ 1575*, where it was decided that a winding-up petition will be stayed irrespective of whether the debt is genuinely disputed on substantial grounds if it is covered by an arbitration clause.

The Privy Council dismissed the appeal. Lord Briggs and Lord Hamblen reinforced the point that winding-up petitions did not trigger s9 of the Arbitration Act 1996, and found that *Salford Estates* had been wrongly decided. The legislative policy of the 1996 Act did not require a stay pending arbitration where the debt was not genuinely disputed on substantial grounds, and slavishly following that approach would cause unnecessary delay and costs.

The court held that the approach in *Salford Estates* should not be followed, and that the practice of companies courts in England and Wales to stay or dismiss a petition where an arbitration or exclusive jurisdiction clause governed the debt should cease. The court did, however, outline that different considerations would arise if the relevant agreement or clause were framed in terms that applied specifically to a creditors' winding-up petition.

Hobson v. OAS Realisations (2022) Ltd [2024] EWHC 1491

This is a controversial decision of His Honour Judge Matthews on the meaning of the concept of 'unsecured creditors'. In this case the joint administrators of OAS had, by and large, completed the administration. However, they had concluded that HMRC would be paid a dividend as a preferential creditor but there were insufficient realisations to enable distributions to unsecured creditors.

Under such circumstances, the joint administrators were legally advised to convert the administration into a CVL by way of a notice to the registrar of companies under para 83(3), schedule B1 of the Insolvency Act 1986. This was on the basis of para 83(1), schedule B1 of the IA86 which states, *inter alia*, that this paragraph applies where an administrator thinks that the total amount that each secured creditor is likely to receive has been paid and a distribution will be made to unsecured creditors of the company.

Upon registration of the notice, the joint administrators' appointment would cease and the company would be wound up. The joint administrators duly served the notice, which was registered. However, doubt arose as to whether the preferential creditor fell into the definition of an 'unsecured creditor' for the purposes of para 83 and, on that basis, numerous declarations were sought by the joint administrators that, in effect, demonstrated that the registered notice was valid.

> **It remains to be seen whether the decision in *Hobson v. OAS* will be the subject of criticism or affirmed down the line considering… that it does not sit well to hold a mistake as to law as being enough to hold a registered notice valid in these circumstances**

The court relied on s248 IA86, which defined a secured creditor as a creditor holding a debt secured over property. According to the judge, an unsecured creditor was the opposite of this (that is, did not hold such security). Therefore, while listed as a preferential creditor, HMRC was an unsecured creditor.

Even more curiously, the court stated that if it was wrong about that, given that the joint administrators thought they satisfied para 83(1) schedule B1 IA86, that was enough for the registered notice to be effective and valid.

It remains to be seen whether this decision will be the subject of criticism or affirmed down the line considering (a) that the machinery of the IA86 treats preferential creditors differently to ordinary unsecured creditors and (b) that to hold a registered notice to be valid and effective because an administrator *thinks* they have complied with the legal requirements but they are *in fact* mistaken about that does not appear, in my view, to be a sound reason.

Amanprit Kaur and **Raghav Trivedi** are barristers at St Philips Chambers

Landmark judgment based on ‘extreme and unusual’ facts

Serious misconduct at BHS led to the largest ever award for wrongful trading and the first successful application of misfeasant trading. **Joe Curl KC** explains the implications

The final year in the trading life of BHS presents perhaps the most factually bizarre episode in the story of the British high street’s decline. This episode has just been the subject of a 533-page judgment by Mr Justice Leech, following a trial late last year of various claims brought by the liquidators of BHS Group (Tony Wright and Geoff Rowley of FRP Advisory, instructing Ben Larkin and Adam Brown of Jones Day) against some of its former directors.[1]

The judgment explores the last 13 months of trading by BHS, between the acquisition of the BHS Group by Retail Acquisitions Limited (RAL) on 11 March 2015 and its entry into administration on 25 April 2016. The judge found that BHS Group had been wrongfully trading within the meaning of s214 of the Insolvency Act 1986 from 8 September 2015 onwards, during its last seven months of trading. Further – and perhaps the most interesting aspect of the judgment – Leech J found that, had the directors complied with their fiduciary duties, then the BHS Group would not have continued to trade after 26 June 2015 (about 10 weeks earlier) and would have entered administration. This latter finding involved a practical application of the ideas around ‘insolvency-deepening activity’ of the kind explored in the Supreme Court’s judgment in *BTI 2014 LLC v. Sequana SA*[2] in 2022 and forms the focus of this article.

Founded in 1928, the BHS Group was acquired in 2000 by Taveta Group, a vehicle of Sir Philip Green. By 2010, however, BHS was heavily loss-making and looked like an outmoded relic, overtaken and undercut by competitors. Its accumulated losses for the five years to 2014 amounting to £442 million. It also had an enormous deficit (£514 million on a buy-out basis) on its two defined-benefit employer pension schemes. Without ongoing financial support from Taveta, BHS was insolvent: the intercompany debt between the two grew from £81 million to £256 million over the same five-year period.

Serial bankrupt

During 2014, having failed to negotiate a cut-price restructuring of the pension schemes with the Pensions Regulator (which would have released Sir Philip, among other associated entities, from their potential liability under the ‘moral hazard’ regime to be compelled to make a contribution towards the shortfall), Sir Philip quietly put BHS up for sale. The evidence at trial indicated that the only credible expressions of interest were conditional on a permanent resolution to the pension deficit. Internal emails from Taveta at this time referred to the need for “Father Christmas” to take BHS Group off their hands.

There can be few British people over 40 who have not at least been in a branch of BHS at one time or another. One of those few was Dominic Chappell – a sometime car dealer, would-be property developer and serial bankrupt. Mr Chappell had no background in retail of any kind prior to negotiating to acquire BHS. His acquisition vehicle, RAL, was newly incorporated and had no assets. RAL acquired the BHS Group for £1 on 11 March 2015. There was no pensions resolution prior to completion and

> **“When questioned about where the £7 million had gone, Mr Chappell pretended it was on deposit with Bank of China and maintained this pretence for several months”**

all the pension liabilities remained with the group: little wonder that Taveta's internal code name for the RAL connection was "Project Rudolph", an obviously facetious reference to their search for Father Christmas. No less significant than the pension millstone, Arcadia Group (another of Sir Philip Green's vehicles) retained a first-ranking qualifying floating charge over the BHS Group to secure £25 million of intercompany debt, which meant no third-party lender could have one.

Reduced to a sentence, the liquidators' case was that BHS Group had only been able to maintain cash flow solvency with Taveta's support and RAL had no way of replicating that support either from its own resources (it had none) or by obtaining sustainable finance in the market; an insolvency process was inevitable from the outset. This view was supported by the advice provided to RAL by its professional advisers immediately prior to acquisition, which was expressed in unusually strong terms. In one typical example among many, RAL's solicitors advised four days before completion "...amongst other matters arising from the pensions issues within the group, there is a high insolvency risk in respect of the group should the acquisition proceed without adequate funding...".

Misappropriated proceeds of sale

The only external funding arranged by RAL prior to completion was an ultra-short-term loan of £5 million obtained from a bridging lender of last resort (Allied Commercial Exporters, known as 'ACE') on terms that required a repayment of £2 million in five days and the balance (and a further £1 million in interest) after 60 days. RAL defaulted immediately and was forced to restructure on still more onerous terms at the expense of BHS. The professional costs of acquisition – as well as various payments to Mr Chappell and his associates – were paid using £7 million misappropriated from the proceeds of the simultaneous sale to ACE of a property belonging to BHS Group. When questioned about where the £7 million had gone, Mr Chappell pretended it was on deposit with Bank of China and maintained this pretence for several months.

Matters of corporate governance did not improve and the following year of trading was a festival of misappropriation and self-interest on the part of RAL. The continued trading was funded by what the liquidators described as a "degenerative strategy" of short-term facilities that were fully-secured on the real property assets of the BHS Group, which was unable to grant a first-ranking floating charge because Arcadia had taken one on completion. Because trading was heavily loss-making, each such facility could only be repaid by refinancing with another similar facility. That process was degenerative because each refinancing had to be bigger than the last, in order to pay a fresh tranche of costs and fees, and to repay the enormous interest incurred on the previous facility.

> "Although Leech J's decision under s214 has led to what appears to be the largest award ever made since wrongful trading was introduced, it is the trading misfeasance claim that appears to have attracted most attention"

The liquidators brought proceedings under both s214 (wrongful trading) and s212 (misfeasance) against Chappell and two other directors: Lennart Henningson, a long-standing associate of Chappell's, and Dominic Chandler, a criminal barrister with no corporate governance experience who had been appointed group general counsel. For the purposes of wrongful trading, the liquidators submitted that the only real question was when the directors "knew or ought reasonably to have concluded that there was no reasonable prospect" that the BHS Group would avoid liquidation or administration for the purposes of s214(2)(c) in order to establish that they were wrongfully trading within the meaning of that section.

Six dates (described as the 'knowledge dates') were proposed. The most significant were 17 April 2015 (the first knowledge date, about five weeks after acquisition), 26 June 2014 (the third knowledge date, which coincided with a refinancing called ACE II, entered into to pay rents falling due on the midsummer quarter day), and 9 September 2015 (the sixth knowledge date, coinciding with the date of another refinancing known as 'Grovepoint', whose security essentially extinguished much of the last of the BHS Group's real property assets). In parallel with this, the liquidators sought relief under s212 on the basis that the directors had been misfeasant, that they had acted in breach of duty by continuing to trade after each of the knowledge dates. Leech J referred to the latter claim as "the trading misfeasance claim". Although Leech J's decision under s214 has led to what appears to be the largest award ever made since wrongful trading was introduced[3], it is this latter aspect – the trading misfeasance claim – that appears to have attracted most attention.

Who has the most skin in the game?

The trading misfeasance aspect was influenced by some of the discussion in the Supreme Court judgment in *Sequana*. Although *Sequana* did not directly concern s214, the court considered in some detail whether the common law development of the principle that a director must have regard to the interests of a company's creditors when that company is insolvent, or something close to it, is constrained by the existence of the statutory remedy for wrongful trading in s214. Lord Briggs explained that, while the interests of creditors were inevitably paramount once insolvent liquidation or administration was inevitable (i.e. the subject matter of the knowledge condition in s214(2)(c))[4], the respective triggers for wrongful trading and the duty to have regard to creditors arose at different times and had different consequences:

"...prior to the time when liquidation becomes inevitable and section 214 becomes engaged, the creditor duty is a duty to consider creditors' interests, to give them appropriate weight, and to balance them against shareholders' interests where they may conflict... This is likely to be a fact-sensitive question... It may well depend upon a realistic appreciation of who, as between creditors and shareholders, then have the most skin in the game: i.e. who risks the greatest damage if the proposed course of action does not succeed."[5]

Developing the distinction between wrongful trading and misfeasance, Lord Hodge discussed the following hypothetical example in *Sequana*, which Leech J identified as having "direct application" to the BHS case and proved to be particularly influential in the judgment. Lord Hodge observed[6]:

"...A reasonable decision by directors to attempt to rescue a company's business in the interests of both its members and its creditors would not in my view involve a breach of the common law duty [to have regard to creditors]. But there may be more egregious circumstances in which the absence of a remedy

'The internal code name for the sale was "Project Rudolph", an obviously facetious reference to [the] search [by Taveta, Sir Philip Green's vehicle,] for Father Christmas'

What has happened to the key protagonists

Following the sale of BHS in 2015 and its collapse the year after, MPs 'symbolically' voted in 2016 to strip the former owner of the company, Sir Philip Green, of his knighthood, but the non-binding vote was not subsequently acted upon.

Also in 2016, Green was called before a parliamentary select committee investigating the sale of the business and its £571 million pensions deficit. At the beginning of 2017, Green agreed to pay £363 million into the company's pension schemes to keep them out of the Pensions Protection Fund.

In 2019, the Insolvency Service disqualified the former 90% shareholder of BHS's acquirer RAL, Dominic Chappell, from acting as a director of a company for 10 years. The same year, Green's Arcadia Group, which once owned brands including BHS, Topshop and Miss Selfridge, announced a pensions deficit of £300 million.

In November 2020, Chappell was found guilty of failing to pay more than half a million pounds in tax and was sentenced to six years in prison. The Arcadia Group also entered administration in the same month.

In December 2020, the joint liquidators brought wrongful trading and misfeasance claims against three former directors of BHS: Dominic Chandler, Dominic Chappell, and Lennart Henningson.

Chappell was released on licence in 2023 having served half of his sentence, but he was recalled to prison in April 2024, after a breach of the licence conditions in relation to some consultancy work he did for Marco Pierre White and his son, Luciano, to establish a chain of restaurants.

After a five-week trial in December 2023, culminating in a judgment on 11 June 2024 (*Re BHS Group Ltd*), Lennart Henningson and Dominic Chandler were held liable for wrongful trading and were ordered to pay £6.5 million each. Together they have been ordered to pay a further £5.6 million for individual misfeasance transactions that breached various directors' duties.

The liquidators' claims against Chappell are being heard separately. At the end of June 2024, at a hearing for Chappell's case, it is understood that Leech J said that the former BHS director should pay the sums contained in a draft order which included £21.5 million for a wrongful trading claim, £17.5 million for breach of fiduciary duty, plus costs and interest. The order is still subject to final approval by a judge and has not been published yet.

Matt Jukes

beyond section 214 would appear to be a lacuna in our law...[Lord Hodge then gave an example of a balance sheet insolvent company engaging in a risky transaction that jeopardised the company's remaining assets]...The shareholders, whether present or future, would probably have nothing to lose from the adoption of the very risky transaction as a last roll of the die because the likely alternative would be a formal insolvency from which they would receive nothing. A requirement that the directors consider and, if the facts of the particular case require it, give priority to the interests of the company's creditors in their decision-making in such circumstances appears to be a necessary constraint on the directors."[7]

This type of strategy was memorably (and it is suggested accurately) referred to in oral argument in *Sequana* as a "bet the farm type strategy" and was described in Lady Arden's judgment as "insolvency-deepening activity"[8].

Insolvency-deepening activity

Strikingly, Lady Arden considered that the example posited by Lord Hodge would constitute misfeasance, even without any need to consider the interests of creditors.[9] The majority on this point did not go quite as far as that[10], but, as Leech J observed when exploring these ideas in his judgment in *Re BHS*, the "critical point is that both Lord Hodge and Lady Arden were agreed that 'insolvency-deepening activity' can amount to a breach of duty by directors even though insolvent liquidation is not inevitable and there is no liability under s214"[11].

Applying this reasoning to the circumstances of the BHS Group, Leech J decided that the directors' decision to enter into ACE II in June 2015 provided "a good example" of insolvency-deepening activity. Had the directors complied with their fiduciary duty and considered the interests of creditors, Leech J held, then they would not have entered ACE II in June 2015 and would have concluded that it was in the interests of the BHS Group to enter administration immediately. Accordingly, while insolvent liquidation or administration was not inevitable before 9 September 2015, it was nonetheless a breach of fiduciary duty to undertake an onerous refinancing on 26 June 2015. Leech J held:

"*If the directors had considered the interests of the BHS Group's existing creditors to be paramount or had put them before the interests of RAL, then I have no doubt that they ought to have concluded that it was in the interests of creditors to put [BHS Group] into administration immediately. They should have appreciated that ACE II was damaging to the interests of creditors...because of its onerous terms and because of its degenerative effect on the BHS Group's assets...*"[12]

Although derived from recent Supreme Court authority, the decision on the misfeasance aspect in *Re BHS* appears to be the first time these ideas have been applied in practice. What real significance Leech J's finding of liability proves to have remains an open question at the time of writing, as his judgment on the question of the appropriate quantum for misfeasant trading has not yet been delivered.

Further, an application for permission to appeal remains a possibility. While the judgment contains much that is helpful to IPs seeking to hold wrongdoers to account, it should be emphasised that the facts of the case as they emerged at trial were of an extreme and unusual nature, involving a staggering level of overt wrongdoing on the part of Chappell that is rare in a business of comparable size. Each aspect of Leech J's decision was heavily fact-sensitive and, although positive for the professional, practitioners should not assume that its reasoning can necessarily be widely applied.

The author acted as counsel for the liquidators at trial in Re BHS, along with Ryan Perkins from South Square.

1 *Re BHS Group Limited and others; Wright and Rowley and others v. (1) Chappell (2) Henningson (3) Chandler* [2024] EWHC 1417 (Ch).
2 [2022] UKSC 25, [2024] AC 211.
3 Judgment under s214 was entered against Mr Henningson and Mr Chandler in Leech J's main judgment for £6.5 million plus interest each (cumulatively): *[2024] EWHC 1417 (Ch), [1153]*. In a subsequent judgment (delivered orally on 25 June 2024 and which has not been published at the time of writing), Leech J further entered judgment against Mr Chappell for £21,500,000 plus interest. The total judgment against Mr Chappell, which included various other heads of wrongdoing, was £49.8 million.
4 [2022] UKSC 25, [2024] AC 211, [165]-[177].
5 [2022] UKSC 25, [2024] AC 211, [176].
6 [2024] EWHC 1417 (Ch), [more than 544,00 businesses], [990]-[992], [1111]-[1113].
7 [2022] UKSC 25, [2024] AC 211, [238].
8 [2022] UKSC 25, [2024] AC 211, [289].
9 [2022] UKSC 25, [2024] AC 211, [329]-[330].
10 See Lord Briggs (with whom Lord Kitchin agreed) at [204] and Lord Hodge JSC at [243]-[245].
11 [2022] UKSC 25, [2024] AC 211, [546].
12 [2024] EWHC 1417 (Ch), [990]-[991].

Joe Curl KC is a barrister at South Square

‘The lack of definition of the qualifications to be an evaluator is controversial’

Since the introduction of the Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021, which require the approval of creditors or an independent evaluator if a sale is to go ahead within the first eight weeks of administration, the popularity of pre-packs has soared. Latest figures from the Insolvency Service show the number of SIP16 statements has risen 171% from 201 in 2021 to 545 in 2023, while the number of pre-packs involving a sale to a connected party has risen 210% to 329 over the same period. The data also shows there was only one case in 2023 where the independent evaluator’s opinion on the ‘reasonableness of grounds and consideration of transaction’ was not satisfied. In our special focus on pre-packs in this edition **Matt Jukes** speaks below to three pre-pack evaluators – Johnny Abraham, Stuart Hopewell and Kevin Murphy – about how their role is changing; on page 20, Pete Walton expresses his concerns about the pre-pack process; Nicholas O’Reilly puts the case for value of pre-packs on page 24; and, on page 26, Jonathan Dunn tells how one truly life-saving pre-pack was made to fly

Q How has the process changed since the introduction of the Administration (Restrictions on Disposal, etc. to Connected Persons) Regulations 2021?

SH: Referral to a third party is now mandatory for any sale to a connected party within eight weeks of administration [it’s not just pre-packs]. Recommendations issued by the Insolvency Service actively encourage more communication between all parties. We at Pre-Pack Pool fully support this and have noticed a much better exchange of information, particularly between administrators and evaluators.

Johnny Abraham is managing director of J9 Advisory. He is an ICAEW fellow and chartered accountant. His previous employers include PwC, Begbies Traynor and Barclays Commercial Bank.

KM: Hopefully stakeholders have greater confidence in the pre-pack process because of the introduction of the connected party regulations. The regulations create a mechanism that allows an independent person access to the full details of the specific transaction and enables them to provide an objective viewpoint on the reasonableness of whether it should proceed. This applies, without exception, to every pre-packaged connected party sale in administration, which I think should be of comfort to creditors and other stakeholders.

JA: The involvement of an evaluator enables improved consideration and commercial terms for the benefit of creditors. In some cases, where the proposed administrator has tried but been unable to secure such terms, I have also highlighted errors in contracts or asked for contract wording to be strengthened around certain commercial terms.

Q Is there enough competition in this area at the moment to maintain ethics and objectivity?

SH: Since the new regulations came into force, there has been a marked increase in the number of businesses offering reports. Many appear to be a single, individual operator. Apart from administrators having a responsibility to check an evaluator’s suitability, there is no specific regulation. With the growth in the ‘market’, this may be an area worth consideration in future.

KM: It is over three years since the regulations came in and, whilst the number of connected party disposals have risen year-on-year, there does seem to be sufficient competition to deal with the volume. The market will ultimately determine the level of competition.

JA: There are a number of evaluators across the UK, however, in my opinion, there should be a strengthening of the regulation around who can act, and the qualifications and experience that they should have, as currently this is open to abuse.

Q How often do you communicate with IPs directly and why?

SH: We approach IPs usually because of incomplete information being provided by the applicant. With their permission, contact is made by a director of the Pool in the first instance. Information can then be passed to the evaluator. We do not contact an IP as a first step or accept direct instructions from an IP.

KM: I approach the IP on every engagement as they will have relevant information to allow me to form an opinion. Given the nature of the information that the IP holds, I consider it illogical not to approach them: how else can you know that you are forming your opinion on full and accurate information?

Whilst responsibility for making the application for an evaluator’s report lies with the connected person(s), the information provided by the applicant is simply the starting point. Obtaining accurate and quality information from both the applicant and the IP are critical elements to form an opinion.

IPs are often reluctant to share commercially sensitive information with an evaluator who, after all, is engaged by the connected party purchaser, when the deal has not yet been (and cannot by definition be) completed prior to the receipt of the report. I often sign NDAs to get access to the required information so I can properly form an opinion.

JA: I make direct contact with the proposed administrators on every single transaction that I evaluate, as there is certain commercially sensitive information that needs to be reviewed in order to provide an opinion on any proposed transaction.

Q In the regulations there are requirements for clarity of information to creditors. How do you provide this clarity?

SH: The aim of an evaluator's report is to provide an opinion as to the 'reasonableness' of the transaction. The summary explanation of what information was relied upon and the reasons for the decision should provide clarity.

KM: The content of the evaluator's report is prescribed in the regulations; a copy of the evaluator's report is included with the administrator's proposals and becomes a matter of public record when filed with the Registrar of Companies. The regulations are specific and require extensive information to be provided. My reports are drafted to ensure that they meet all the requirements of the regulations relevant to the case in hand and, therefore, I consider that the information I provide to creditors is clear and accurate, [and] relevant to the circumstances of the case.

JA: To me, creditors and other stakeholders need to know that a thorough review has been undertaken by someone who understands the process. Where I have requested an improvement to the terms of a transaction in order to provide a positive report, this is noted in the report so that there is transparency on the value that has been added by the process. On the rare occasion that the consideration and grounds of a transaction have been reasonable but there have been 'red flags' that I feel should be raised, this has also been noted where I believe it would be in creditors' interests.

Kevin Murphy is director at Compass Evaluator Reports. Prior to his work as an evaluator, Kevin was an insolvency director at Leonard Curtis, and remains a non-appointment-taking licensed insolvency practitioner. He has also been an adviser to a buy-and-build acquisitions group and has held a number of non-exec advisory roles.

Q How many applications have you rejected?

SH: The Insolvency Service report for 2023 indicates that only one negative report was issued in total. The Pool issued four negatives in 2023, but two were subsequently approved by a 'second opinion' and one was abandoned.

KM: Occasionally, an application will be made but falls by the wayside rather than a formal case-not-made decision being made. This can happen for numerous reasons. Either the buyer has been outbid [or] cannot raise the necessary funding, or simply wishes to withdraw their interest.

On one occasion, I was asked to give a second opinion when a previous evaluator provided a case-not-made opinion. I was able to deal with the reasons stated by the earlier evaluator for his opinion, which regarded confirmation of the assets being acquired, the consideration being paid, and the identity of both the company going into administration and the proposed purchaser. I provided a case-made opinion that preserved jobs and significantly increased consideration compared to the alternative available option.

JA: Three of the transactions I have reviewed have received a negative opinion. In one case, the company was placed into a creditors' voluntary liquidation; in another, an alternative buyer completed a transaction; and, in the other, the proposed administrator went on to complete the transaction in any event.

Q What qualifications are required to be an evaluator?

SH: Whilst there is no specific qualification, the Insolvency Service guidance states that the administrator must be satisfied that the evaluator has sufficient knowledge and skills to provide the report. All Pre-Pack Pool evaluators are professionally qualified individuals, with an average of 30 years' business background in accountancy, insolvency and directorship.

Stuart Hopewell is a director of Pre-Pack Pool, fellow of the Chartered Institute of Credit Management and was part of the working group to establish Pre-Pack Pool following the Graham review. Stuart provided answers for this article on behalf of Pre-Pack Pool's 20 evaluators.

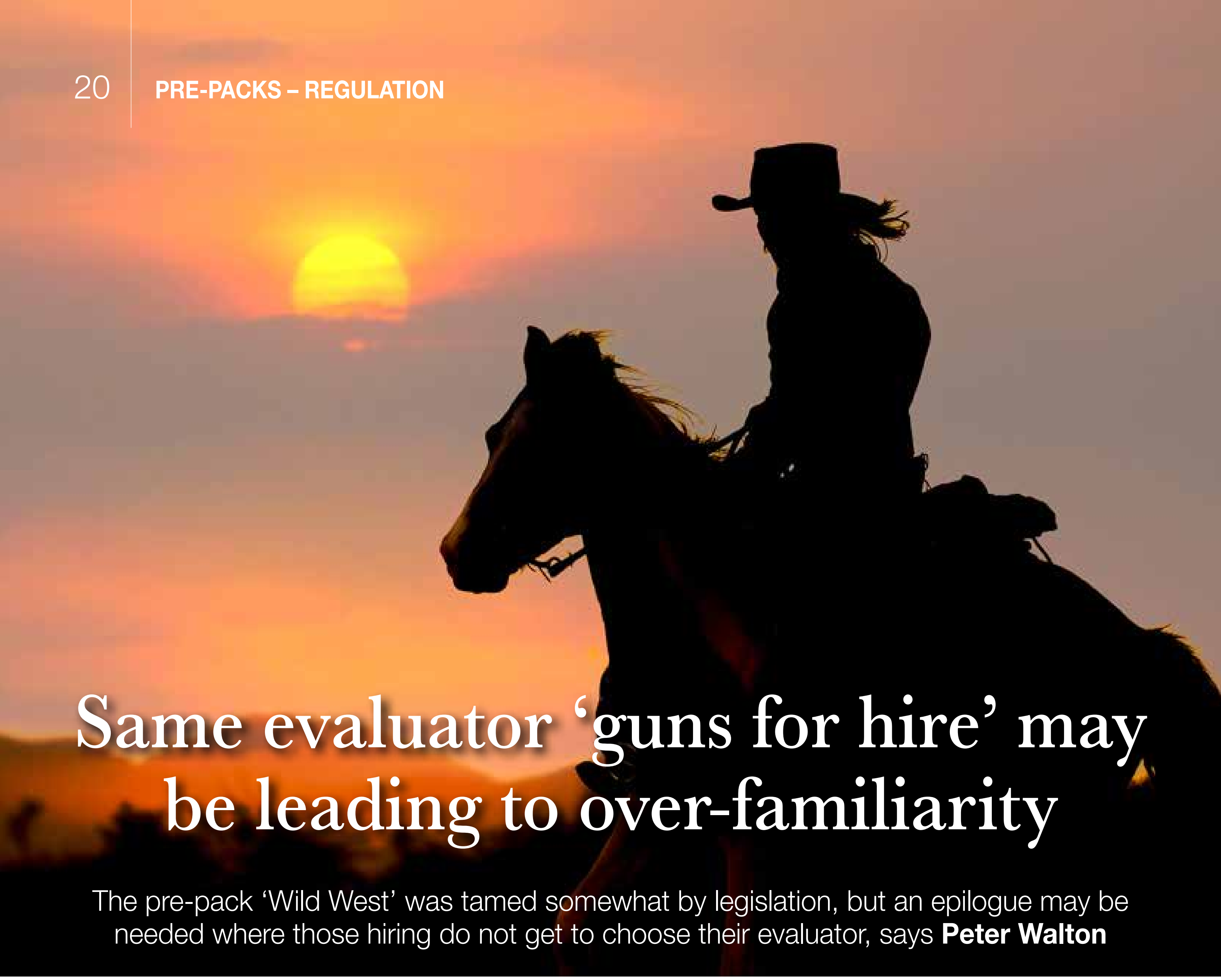
KM: The lack of definition of the qualifications to be an evaluator is a controversial aspect of the regulations, especially when you consider that the evaluator is effectively being asked to assess the work of highly regulated, highly qualified insolvency practitioners.

I think that anyone who acts as an evaluator requires adequate skills to be able to understand and evaluate the nature of the information they are provided. An evaluator also ought to be someone who can assess whether they have been presented with the appropriate information and will ensure that they obtain it if that is not the case.

Attributes such as professionalism, diplomacy and respect for confidentiality are certainly key, and an administrator can refuse to accept the report of an evaluator who they consider does not have the relevant skills and experience to act as such.

JA: In my opinion, an evaluator should hold a relevant professional qualification, and they should have a significant level of experience of working in the rescue and restructuring sector. For example, I am a fellow chartered accountant with experience in the industry, and an understanding of both the purchaser and administrator side. This technical and commercial experience is essential to evaluate the more complex transactions that have been completed.

Matt Jukes is managing editor of *Recovery* magazine



Same evaluator 'guns for hire' may be leading to over-familiarity

The pre-pack 'Wild West' was tamed somewhat by legislation, but an epilogue may be needed where those hiring do not get to choose their evaluator, says **Peter Walton**

Once upon a time in the West Midlands, back in 2004, I presented a paper at the inaugural Midlands Insolvency Lawyers' Association seminar (on some forgotten subject). Also starring on that occasion was the wonderful Peter Cranston of Eversheds. Peter spoke eloquently about something he referred to as 'pre-packaged administration'.

I remember being as impressed by Peter's presentation as I was confused by its content. I chatted to him afterwards to make sure I had understood what he had been talking about and had heard correctly; there was indeed a practice whereby an IP negotiated the sale of an insolvent company's business – often to the existing management team, prior to taking the appointment as administrator of the company – and executed the sale on day one of the administration. I was so blown away that I decided to saddle up and write something.

The result of my endeavours came to light in 2006 in a journal article in which I raised some concerns about conflicts of interest. I suggested that for pre-packs to fit in with general equitable and professional principles, either the creditors' consent should be sought or some independent body should opine on the fairness and reasonableness of the proposed sale before it happened. The article was, unusually, the subject of an immediate rebuttal by R3 in the same edition of the journal. This rebuttal took me a little by surprise, but I interpreted it as a sign that I was onto something.

Under constant fire

I was then invited to what appeared to me to be a very posh 'question time' event, chaired by a BBC journalist and hosted by Ernst & Young. I was genuinely excited to be included in what was clearly a major national debate on an important topic. My wife, a much shrewder operator than me, did warn me that it looked like a set-up, but what did she know? I had (unrealistic) dreams of having my train fare paid, lavish refreshments being laid on and being welcomed by the profession with open arms. In the rather incongruous spirit of spaghetti westerns from the 1960s, the event was entitled *The Good, the Bad and the Ugly*.

> "[The 2010 change] did not target the fundamental topic of the potential for the administrator acting where there was a conflict of interest and duty"

I imagined I had been invited to play the role of 'the Good' as I rode into town to save the profession from a terrible fate. It didn't exactly work out that way. The reality was that I was there to be gunned down and my character portrayed as a particularly unpopular mixture of 'Bad and Ugly'. I came under constant fire, was attacked personally and was generally hung out to dry.

Creditors feel disenfranchised

I obviously failed to learn any sensible lessons from this experience as I continued to comment on specific issues raised by pre-packs. One, in particular, was the problem of how an administrator's fees could legitimately be paid if a large part of their activities occurred prior

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> **The issue of pre-packs caused the Government finally to act. It hired an experienced 'gunslinger' in the form of the marvellous Teresa Graham CBE who assembled her posse to chase down an effective solution to the issue**

to appointment, and not therefore in their role as administrator. This issue was recognised by Parliament in 2010 when it bolted on a provision allowing for pre-appointment fees to be paid as part of the Insolvency Rules. This addressed one issue but, as I wrote at the time, it did not target the fundamental topic of the potential for the administrator acting where there was a conflict of interest and duty. Other government consultations came and went, again with me shooting bullets from the sidelines but none hitting home.

Later, as the pre-pack phenomenon looked to spread around the common law world, I co-authored (with Mark Wellard) an article comparing the UK regime with that in Australia, where Australian practitioner independence rules appear to rule out pre-pack deals (our article was later cited with approval by the Federal Court of Australia).

Creditors often feel disenfranchised from the pre-pack process and there was no reliable way of showing that the sale was a good deal for creditors or that the sale price and its terms were reasonable. In the absence of creditor consent, we noted the possibility of a 'pre-pack panel', which could be asked to select an independent assessor to opine on the merits of the proposed deal.

Disquiet in the UK popular press blew up. The issue of pre-packs caused the Government finally to act. It hired an experienced 'gunslinger' in the form of the marvellous Teresa Graham CBE, who assembled her posse to chase down an effective solution to the issue. I (along with my then colleagues, Chris Umfreville and Paul Wilson) formed an important part of that posse. Our job was to provide the ammunition to allow Teresa Graham to fire some shots and bring peace to the jurisdiction.

As is well known, the Graham review from 2014 was accepted by the then Government and professional practice rules were tightened up to ensure connected party pre-packs only happened following a reasonable attempt to market a business where sensible valuations had been conducted.

Government not convinced

The voluntary Pre-Pack Pool was created out of the Graham review, with two members of the working party designed to implement it appointed as directors. The Pool, when used, provided unsecured creditors with the comfort that an independent party had opined that a pre-pack sale to a connected party was reasonable. A member of the Pre-Pack Pool would be allocated to the case to review the supporting documentation provided by the applicant. The applicant did not choose the individual opining on the deal.

Of course, the voluntary Pre-Pack Pool scheme was given a number of years to see if it worked effectively. Teresa Graham wished the system to be voluntary. Legislation would only be introduced if the voluntary system did not work. The final scene as written is, of course, that the Government was not convinced that the voluntary system worked. It repeated much of the research from 2014 and concluded that legislation was needed.

We therefore now have the Administration (Restrictions on Disposal etc. to Connected Persons) Regulations 2021 which came into force on 30 April 2021. The regulations contain a specific requirement where there is a 'substantial sale' to a connected person either to obtain the approval of the creditors (as part of the statement of the administrator's proposals) or the approval of an independent evaluator (such as the Pre-Pack Pool) in order that such sales may go ahead within the first eight weeks of the administration.

> **The [regulations'] provisions are intended to make it difficult for a connected party to 'shop around' for a positive report without disclosing other reports**

The evaluator's qualifying report must contain certain prescribed provisions – most importantly, a statement that the evaluator is (or is not) satisfied that the consideration to be provided for the relevant property and the grounds for the sale are reasonable in the circumstances. An evaluator must have the benefit of professional indemnity insurance and must themselves be satisfied that they have relevant knowledge and experience sufficient for the purposes of making a qualifying report. A copy of the qualifying report must be given to the proposed administrator who must also

'I was then invited to what appeared to me to be a very posh 'question time' event ... my wife, a much shrewder operator than me, did warn me that it looked like a set-up'

be satisfied that the evaluator had sufficient relevant knowledge and experience to make the qualifying report. Where a previous report has been made, the evaluator is required to consider it in their report. This provision and various related provisions are intended to make it difficult for a connected party to 'shop around' for a positive report without disclosing other reports.

No choice of evaluator

Has the new system wiped out the possibility of bandidos doing whatever they like? Well, we don't know. Perhaps some evaluative research is in the offing to measure its effectiveness. Tales from different stakeholders suggest the problem may not have been resolved.

The point I made nearly 20 years ago was that either the creditors should be asked to approve such sales or that an independent party should be asked to approve (or not) the deal. The ability for those engaged in a connected party pre-pack to choose their own evaluator may be leading to a degree of over familiarity with the same guns for hire being approached.

One of the benefits of the Pre-Pack Pool was that those approaching it had no control over the identity of the individual who carried out the evaluation. That independence appears to be lacking under the new system. If tales from the Wild West prove to be based on fact, the 2021 system may need an epilogue where those hiring do not get to choose their evaluator.

Peter Walton
is professor of insolvency law at the University of Wolverhampton

Connected parties may be the best, or only, purchaser for rescue

Pre-packs get a lot of bad press and face challenges from newer restructuring tools, but they remain a useful device, and often provide the best outcome, says **Nicholas O'Reilly**

I confess that I am a big fan of pre-packs and have been involved in a large number of pre-pack transactions throughout my career. Used correctly, the process can provide rapid balance sheet restructuring and allow companies that are operationally successful, but incorrectly financially structured, to stay in business and provide valuable goods and services. They can also provide the best level of return to creditors and employees. Pre-packs get a lot of bad press, but sometimes they are the only solution for a failing business to continue to provide employment for staff, continuity of supply to customers and a chance for suppliers to recover losses.

> **It is the resale of businesses that causes unease with the pre-pack process**

Pre-packs have been around all of my career. Pre-2002, they were used as a sales route for companies in administrative receivership. Concerns were quite rightly raised about the extent (if any) of a marketing exercise prior to sale, but when acting for an appointor it sometimes provided the best result for them to have business continuity in order to recover funds from the debtors' ledger.

Media, creditor and public concern

The Enterprise Act 2002 effectively abolished the use of administrative receivership and paved the way for the cheap and accessible out-of-court appointment of administrators. Pre-packs started to be used in conjunction with administration appointments. Public disquiet voiced in the media about the use of pre-packs intensified as the number of insolvencies increased at the time of, and following, the 2008 financial crisis.

> **If the purchaser wants deferred terms, make sure that the upfront payment exceeds the breakup value of the assets as the deferred element is uncertain**

The various insolvency regulators – through the joint insolvency committee – sought to allay some of the concerns by issuing the first version of Statement of Insolvency Practice 16 (SIP16). This sought to make IPs give more information about the rationale behind pre-pack sales and for

IPs should remember that a pre-pack offer should exceed the breakup value of the assets such information to be provided to creditors quickly post-sale. A copy would also be sent to the licensing body for the IP so that they could monitor compliance with the SIP.

The Insolvency Service issued reports for the first three years of operation of SIP16 showing that approximately 25% of all administrations involved a pre-pack sale and that compliance was generally good on transparency and timely reporting. But the concerns from the media, creditors and the public remained.

When the coalition Government came to power in 2010, Vince Cable was given the role of business minister. He asked Teresa Graham (who had held multiple posts advising the Government on regulation) to produce a report with recommendations regarding the use of pre-packs. She reported back in June 2014 with recommendations for minimum requirements for marketing pre-sale and the introduction of voluntary evaluation of the sale by an independent third party. These recommendations were accepted in full by the profession and the Government.

Unfortunately, between 2014 and 2020, the voluntary evaluation route was not widely used. This was for various reasons. In my opinion, the work required of a purchaser (especially a connected party) is quite time-intensive. The purchaser is seeking to keep the staff, suppliers and customers onside while, at the same time, setting up a new company and obtaining PAYE references and a new VAT number. As soon as they were told that they should have an independent evaluation of the sale, but it was voluntary, they decided not to open themselves up to scrutiny.

Due to the low take-up of voluntary evaluation, in 2020 the Government decided to legislate to force compliance with independent scrutiny of a proposed transaction. This applied to connected-party transactions where the Government believed the scrutiny was most needed. The legislation came into force on 30 April 2021 by virtue of the Administration (Restrictions on disposals etc to connected parties) Regulations 2021.

> “RPs offer the advantage that creditors have an opportunity to consider the proposed route forward before it is enacted – unlike pre-packs where creditors only usually find out about the sale after it has completed”

How to keep your licence

Today, the process post-legislation is well signposted, and practitioners know the expectations of them and connected purchasers. The six principles of marketing set out in the updated SIP16 – introduced following Graham's report – mean that creditors (and evaluators) should be able to take comfort that the best offer was accepted based on other parties having had an opportunity to bid and carry out due diligence.

Once the marketing has taken place, the decision about which offer to accept then falls to the prospective IP. The assets will have been valued by chattel agents or property agents instructed by the prospective IP. Remember that a pre-pack offer should exceed the breakup value of the assets.

> “I would hate for sales to connected parties to be outlawed as there are lots of examples from my career where the businesses have gone on to continue successfully”

Also, an IP should question the period of payments of the assets. If the purchaser wants deferred terms, the IP needs to: make sure that the upfront payment exceeds the breakup value of the assets as the deferred element is uncertain; seek security for the deferred consideration; and also seek anti-embarrassment clauses in case the purchasers want to sell on the assets in a short period of time to make a profit on their purchase. It is the resale of businesses that causes unease with the pre-pack process.

Having decided upon the terms of an offer and identified the preferred bidder, the next decision is whether the purchaser is a connected party. For the purposes of the pre-pack regulations, a connected party is defined in s435 and para 60(A)(3) of schedule B1 of the Insolvency Act 1986. If the sale is to a connected party and is made within the first eight weeks following the administrator's appointment, then a report is required from an independent person known as the evaluator.

The evaluator must be an independent person with business experience and appropriate professional indemnity insurance. They are required to form an opinion on whether the consideration provided and the grounds for the substantial disposal are reasonable in the circumstances. My experience is that there are a number of people who have set themselves up as able to act as evaluators, and the reports provided have been well thought out, providing comfort for creditors and other stakeholders when they look at the transaction post-sale. Whether such reports will ever fully satisfy creditors remains to be seen.

Empirical data is limited due to the low number of administrations as a result of the Covid-19 pandemic and the financial support schemes offered to keep businesses operating.

Stakeholders like RPs and CVAs

One of the areas to look at in future is the introduction of restructuring plans under the Corporate Insolvency and Governance Act 2020 and the changes that legislation made to the Companies Act. The use of a restructuring plan (RP) allows a business to continue under the same ownership without the same level of negative criticism as a pre-pack. RPs offer the advantage that creditors have an opportunity to consider the proposed route forward before it is enacted – unlike pre-packs where creditors only usually find out about the sale after it has completed.

The same also applies to the use of company voluntary arrangements (CVAs). Landlords, creditors and other stakeholders like restructuring plans and CVAs as they can comment on and make amendments to a proposal before an arrangement is enacted and voted upon. Even if their vote does not change the outcome, at least their views have been heard.

To return to where I started, I am a big fan of pre-packs. They are an important tool for an IP when dealing with a distressed company. An IP's main objective is to realise the most money for a business and its assets, and sometimes a pre-pack sale is the best way of achieving rescue. Sometimes the best and (often) only purchaser willing to pay a reasonable price for the business and its assets is the existing management.

I would hate for sales to connected parties to be outlawed as there are lots of examples from my career (and I am sure from other sales) where the businesses have gone on to continue successfully providing employment for staff, taxes for the Government and business opportunities for suppliers, while providing valuable goods and services for customers.

Nicholas O'Reilly is restructuring and insolvency director at MHA

‘Everyone felt a moral obligation as we sought effective solutions’

Air ambulances across southern England were almost grounded until insolvency professionals managed to get a pre-pack to fly, says **Jonathan Dunn**

Specialist Aviation Services (SAS), a provider of critical air ambulance services in the South of England, required new investment last summer, starting an accelerated M&A process that would go down to the wire.

SAS provides operations for charities over an area that stretches from Somerset and Dorset in the west to Kent and Essex in the east. Any interruption to its operations had the potential to put lives in danger.

Last year, SAS’s 184-strong team performed over 5000 critical flights. And, with pilots flying at night in adverse weather conditions and using improvised landing locations, its operations were among the highest-risk and, consequently, most heavily regulated in the UK.

In addition to its air ambulance services, the business also offered maintenance and third-party fleet management, including maintenance contracts with London Air Ambulance (which operates its own fleet), as well as the Kuwait Police’s flying wing and the Royal Bahraini family in the Middle East.

> **It was a process which would, in normal times, take many months but, in this case, would have to be achieved within weeks to avoid any disruption to operations**

Unsustainable overheads

The business had reported sustained losses over several years and since late 2020 had been undergoing both an operational and financial restructuring.

The restructuring had shifted strategy, including a move away from aircraft ownership to a leased model. It also expanded its service to leverage its in-house capabilities, offering maintenance contracts, such as those in the Middle East, for the first time.

Good progress was made with the restructuring; however, the business was unable to meet the costly overheads that come with aviation operations – especially one with such a high risk and regulatory profile.

This ultimately proved unsustainable for the company’s owners – a Dutch family office that had provided significant financial support over many years.

Seeking an exit, in late 2021 it instructed a corporate finance boutique with sector expertise to sell the wider SAS group, which also included a profitable Belgian subsidiary. Ultimately, this proved unsuccessful.

When my restructuring colleague, partner Andrew Sheridan, and I were introduced to the business last autumn, the situation

would have been familiar to any insolvency professional.

SAS was a loss-making business with a cash forecast that dictated the need for an accelerated process, with a sale needed before the end of the year. While there was a need to act swiftly, discretion was of the utmost priority, given the potential operational disruption that could occur.

SAS's management team was dedicated to doing the right thing, but were also battle-weary after a challenging few years and the previous unsuccessful sale process. Furthermore, the COO had already given notice and was due to leave in December 2023, while the CEO would follow in January 2024.

Added to this, the nature of the company's operations limited its options for new investment. In particular, because SAS operated in such a highly regulated sector, any buyer of the business would need to be approved by the Civil Aviation Authority (CAA), making the CAA a key stakeholder whose buy-in would be critical in securing a solution.

It was a process which would, in normal times, take many months but, in this case, would have to be achieved within weeks to avoid any disruption to operations.

This was unprecedented and would require significant support from the CAA to fast forward the approval process.

Lives at stake

To compound the time pressure, any new owner would have to have complete confidence that all SAS's critical infrastructure – including its headquarters at Gloucestershire Airport, supply chains, key staff and aircraft – would be secured in any transaction. Without these resources, they would not be able to deliver the critical lifesaving services they would be obliged to provide in taking on the business.

In practice, this required multiple novations and assignments to be negotiated and executed simultaneously on completion, rather than post-transaction as is more common practice.

> **The simultaneous completion of more than 60 ancillary documents was required on the final day. It also involved the CAA granting temporary approvals**

> **Ultimately, while every deal is important, especially to those whose livelihoods hang in the balance, SAS was a special case**

Finally, and most importantly, there was the added pressure that lives would be very much at stake should SAS fail. Without a successful sale to a new owner and timely regulatory approvals, multiple air ambulances across southern England would be grounded, potentially for many months. The prospect that these services would not be available was unthinkable.

Race against time

Within days of being formally instructed, and with just eight weeks to complete a transaction before SAS ran out of cash, we moved quickly to identify and make approaches to potential interested parties.

Within two weeks, a number of bids had been secured and, while there was a viable offer on the table, it was increasingly obvious that more time would be required to complete such a complex transaction.

We worked with SAS's management to approach the organisation's charity customers seeking additional funding that would provide the imperative additional cash runway needed. Thankfully, two of SAS's customers were able to quickly step up to pledge their support and obtain the requisite approval from the Charity Commission in an expedited manner.

With the required funding in place, SAS could continue operating flights while multiple negotiations proceeded in parallel. That meant ensuring all parties were aligned in their support, including the CAA approvals that would be vital to SAS continuing its operations without disruption.

The process was further complicated by the fact that many stakeholders were based in different jurisdictions. SAS's aircraft supplier Leonardo SPA, for example, was headquartered in Rome, so all agreements were subject to Italian law, while engine supplier Pratt & Witney was based in Quebec and subject to Canadian law.

The buyer also travelled to the Middle East to meet with key decision makers there, while negotiations were required with the secured creditor to disentangle SAS's UK business from the wider group and ultimately obtain the release of security required to complete the transaction.

Finally, there was the need to reassure and retain SAS's invaluable specialist team, especially after the buyer's involvement was publicly announced, as required due to the buyer's listed status.

The right result

All this hard work proved worthwhile when, on the last day of January, we completed the pre-pack sale of SAS's business and assets to Gama Aviation, an AIM-listed British company that provides aviation support services for individuals, corporations and government agencies.

To ensure Gama was able to fulfil its new obligations, the simultaneous completion of more than 60 ancillary documents was required on the final day. It also involved the CAA granting temporary approvals to Gama while permanent approvals were arranged.

Crucially, the deal meant that the air ambulance charities served by SAS were able to operate without any interruption, aside from one that had opted to make alternative arrangements. And it secured the jobs of all but two of the company's highly trained staff.

High pressure, high reward

This was a particularly complex and high-pressure transaction, which only served to emphasise the vital importance of securing engagement and support from all stakeholders. Regular, open and honest communication was essential to building trusted working relationships over a very short and fraught period.

At times, some of the challenges that were thrown up appeared insurmountable. But the nature of the business meant that everyone involved felt a moral obligation to ensure no stone was left unturned as we sought effective solutions.

It was this perseverance in the face of adversity that enabled us to find a way through. Ultimately, while every deal is important, especially to those whose livelihoods hang in the balance, SAS was a special case.

This was one of those rare deals that prompts you to properly take stock and reflect on the roles we all played in securing a future for a vital service. It's not often that we as a profession can make that claim but, when it happens, we can take some reward in it.

Jonathan Dunn is a partner at FRP Advisory

Assets held in custodian accounts likely to be most pressing issue

Despite the recent UKJT statement providing more confidence that crypto difficulties can be addressed, some matters still remain to be tested in court, says **Nick Price**

Following a lengthy consultation, the UK Jurisdiction Taskforce (UKJT) released its authoritative Legal statement on digital assets and English insolvency law providing clarity on the rapidly evolving law in this area.

The release marks the third such statement from the UKJT – a panel comprised of senior judges, lawyers, commissioners, and regulators – and focuses on how digital assets can, and should, be treated in the event of insolvency.

Recently the news has been peppered with as many stories of crypto platforms collapsing as with their successes, with the well-publicised cases such as the Chapter 11 bankruptcies of Celsius Network and FTX, and the liquidation of Three Arrows Capital, bringing the treatment of digital assets during an insolvency into focus.

Alongside these headline-grabbing, multi-billion-dollar matters, the reality is that there is a lot of crypto-related insolvency work ongoing already. While the media focus is on big cross-border work, practitioners are seeing plenty of work involving digital assets at the personal level, with bankrupt estates increasingly containing cryptocurrencies, such as Bitcoin and Ethereum holdings, alongside more traditional assets.

Crystallisation of prevailing views

As regulation slowly progresses towards stablecoins (a cryptocurrency tied to another asset class, such as a currency, to keep a steady value) being used for payment services, and with firms increasingly offering custody services and adopting digital assets as investments, the reality is that IPs will need to navigate digital assets in the near future, if they are not already.

The statement is therefore timely: it provides a credible and accessible crystallisation of the prevailing views on the challenges of addressing this new asset class in the existing insolvency framework. In confirming the status quo, the statement provides the reassurance that English insolvency law is "entirely capable of convenient and sensible application" to digital assets.

Practitioners who have been grappling with these issues will take comfort in the UKJT's approach and the wider conclusions should be influential in giving market participants confidence.

Easily transferrable assets

The Crypto Fraud and Asset Recovery Network (CFAAR) was one of a number of groups that provided feedback to the UKJT consultation preceding the statement. CFAAR is a professional network of IPs, lawyers, forensic accountants, and other asset recovery specialists focused on crypto asset disputes. CFAAR's view is that insolvency legislation offers a powerful tool for upholding justice within financial systems and should be applied to digital assets. CFAAR was pleased to see a number of its views reflected in the statement.

> "The key guidance from the statement is that office-holders should be transparent with creditors about the approach they propose to take when selling volatile digital assets, as early as possible, and with their consent where possible"

However, further consideration needs to be given to the possibility of how the strong investigation powers of the insolvency process could be deployed to ensure that assets can be recovered (and claims administered) where the insolvency has arisen as a result of acts of fraud or cyber scams and, in particular, to prevent the dissipation of easily transferable, but highly volatile, digital assets.

CFAAR's submissions also highlighted the need for the industry to ensure that it is skilling up appropriately to ensure that all practitioners are putting in place training and processes to ensure they can respond efficiently when digital assets feature in their appointments.

What did the statement conclude?

- **Property status of digital assets:** the UKJT previously concluded in its 2018 *Legal statement on cryptoassets and smart contracts* that digital assets are capable of being property in English law, and there are now multiple court decisions to uphold that as the status quo. Not only did the statement confirm the position, it went further: the breadth of classification in s436(1) Insolvency Act 1986 is more encompassing than the common law, making the inclusion of digital assets all the clearer in insolvency proceedings.
- **Application of COMI:** the well-established COMI test applies for determining the appropriate jurisdiction for insolvency proceedings arising from digital assets. The statement drew significant practical guidance from cases like *Zipmex* in the Singapore High Court, emphasising the importance of the debtor's commercial activities and the practical administration of the assets. The statement does caution that this is different from identifying the location of the digital assets themselves, which may be a much more complex exercise.
- **Proprietary claims:** as digital assets are property, claims to digital assets can be proprietary, allowing for the recovery of the assets themselves, rather than just their monetary value, and for recovery to be in priority to the firm's unsecured creditors. Where digital assets are held in trust (particularly in custody scenarios, whether held in fully segregated wallets for individual users or relying on omnibus wallets that hold multiple users' funds) this analysis is likely to be crucial. Other common law jurisdiction decisions have provided guidance here[1], which the statement adopted with the cautionary note that any analysis will be fact-specific.
- **Statutory demand and winding-up:** digital assets cannot be the basis of a statutory demand or winding-up petition. They do not yet have the credit and currency of money and fluctuate in value against fiat currencies; they cannot be expressed as 'money sum'; they are not money. Alternative approaches for debt recovery will need to be employed.

'The statement drew significant practical guidance from cases like *Zipmex* in the Singapore High Court, emphasising the importance of the debtor's commercial activities and the practical administration of the assets'

Notably, the statement leaves open whether that status might change in the future – and given the proposal for stablecoins to be used for payments, that issue may need to be addressed sooner rather than later.

- **Office-holders' duties:** IPs as office-holders must, of course, exercise their powers in the interests of creditors. How this applies to obtaining the best price reasonably obtainable may raise challenges when selling volatile digital assets. However, these issues are not new (albeit they may be more prevalent) and the statement confirms they can be resolved by reference to existing principles, including by the distribution in specie. The key guidance from the statement is that office-holders should be transparent with creditors about the approach they propose to take, as early as possible, and with their consent where possible.
- **Avoidance of transactions:** the statement confirms that the existing provisions for setting aside transactions at an undervalue, preference transactions and transactions defrauding creditors apply to digital assets. Practical difficulties arise in how these transactions are to be unwound: the immutability of the blockchain prevents a literal unwinding, but the UKJT's view is that a court order to render a practical same result – by way of an equal and opposite transfer – should be available when required.

> **The application of the COMI test may be more difficult where the entity holding digital assets is decentralised or a decentralised autonomous organisation (DAO), with a non-traditional corporate status**

- **Tracing and mixing:** the rules of tracing under the general law and statutory regimes, such as the FCA's client assets sourcebook, can be applied to allocate shortfalls when digital assets are pooled, which will be crucial for ensuring equitable distribution among creditors when digital assets belonging to different persons have been mixed.
- **Investigatory powers:** the statement highlights the extensive powers to gather in digital assets or their monetary equivalent, including compelling disclosure of private keys or other necessary information.

Uncertainty over DAOs

What does the statement not address? Although the statement covers a broad range of issues, it does not cover all the potential challenges: it is only when these matters are tested before the English courts that real certainty will arise.

For example, the application of the COMI test may be more difficult where the entity holding digital assets is decentralised or a decentralised autonomous organisation (DAO), with a non-traditional corporate status. DAOs allegedly 'democratise' governance, with members or users voting on how it is run via the blockchain, often managed by a computer. With the Law Commission's recent scoping paper admitting there is little consensus on what DAOs are, and how they might be established[2], and declining to make any firm proposals on clarification, that uncertainty is likely to persist for the time being – notwithstanding the recent successes in the HectorDAO receivership in the BVI.

Further, although the statement addresses the jurisdiction of the insolvency, it does not provide any guidance on the question of how to establish the location (and applicable jurisdiction) of the digital assets themselves. Although previous cases have suggested that the domicile of the owner of the digital assets should prevail, a more authoritative statement on this matter may follow when addressed further by a court.

The most pressing practical issue is likely to be how digital assets are to be recovered where they are held in a custodian account without an express trust being declared, or where they have been transferred by mistake or in breach of duties. The English courts or legislators will likely need to clarify the approach to the imposition of constructive trusts and proprietary remedies.

However, in the meantime, CFAAR believes the statement will provide market confidence that any perceived difficulties in handling digital assets can be addressed. It should also give confidence that the existing insolvency regime and participants have the necessary technical and legal framework to ensure that IPs and supervising solicitors can deal with these emerging asset classes.

1 Particularly, *Ruscoe v. Cryptopia Limited (in liquidation) [2020] NZHC 728, [2020] 22 ITELR 925 (New Zealand)*; *Quoine Pte Ltd v. B2C2 Ltd [2020] SGCA(I) 02 (Singapore)*; *Re GateCoin Ltd (In liquidation) [2023] HKCFI 914 (Hong Kong)*

2 Law Commission, 'Decentralised autonomous organisations (DAOs): A scoping paper' July 2024

Nick Price is a partner in Osborne Clarke's disputes team and treasurer of CFAAR

‘Method of last resort’ provides additional tools and flexibility

Amid Thames Water’s financial distress, **Prav Reddy** explains how the new water industry SAR goes beyond the sale of assets to make rescue as a going concern the primary goal

The Government has implemented legislative updates to the water industry special administration regime (Wisar) to align with recent insolvency and restructuring developments.

Special administration regimes seek to address challenges faced by key industries providing statutory or public services whose continuity is essential to the stability of the UK economy. Examples include higher education institutions, investment banks, energy suppliers and air traffic licence companies. Each regime is bespoke to the particular business or industry and includes amended primary objectives outside of the standard administration regime to ensure that consumers are protected from any disruption and facilitate an orderly resolution of financial and operational issues faced by the particular business.

The secretary of state (or the Welsh ministers) can apply to the High Court for a water or sewage company to be put into special administration on the following grounds:

1. Insolvency: where a water company is or is likely to become unable to pay its debts (the insolvency ground); or

2. Performance: where a water company has failed to carry out its statutory functions or licenced activities in a way that is “*serious enough to make it inappropriate for the company to continue to hold its appointment or licence*” (the performance ground).

Wisar applies to any water company: (i) holding an appointment as a relevant undertaker or (ii) that is a qualifying licensed water supplier, qualifying water supply licensee, or qualifying sewerage licensee. Notably, Wisar does not extend to other entities within a water company’s wider group, including holding companies, which are not regulated by Ofwat. Wisar only applies to companies in England and Wales. There is no current plan for similar legislation in Scotland and/or Northern Ireland as water and sewage providers in these jurisdictions are state owned.

Key legislative changes

Rescue objective: for water companies entering Wisar on the insolvency ground, the primary objective is to rescue the company as a going concern. Previously, the objective of the special administration was focused on the transfer of the company’s undertakings to a new entity.

> **“The focus on regulatory collaboration should prohibit any sales to connected companies or parties involved in the mismanagement or failures of the business”**

Restructuring tools: special administrators are able to use modified versions of the restructuring tools available under existing legislation such as a CVA, restructuring plan or scheme of arrangement, to facilitate the rescue of the company as a going concern.

Hive down: special administrators can now conduct a ‘hive-down’ of the business, by way of transfer of certain or all of the company’s business and assets to a newco subsidiary, followed by the sale of the subsidiary’s shares to a new purchaser. The new hive-down structure has been implemented in order to maximise value of the business on a sale.

Application of schedule B1 of the Insolvency Act 1986: the Act now applies to Wisar with certain modifications which include:

- The requirement for the special administrator to obtain the consent of the secretary of state prior to the disposal of ‘protected land’ owned by the company;
- With permission of the court, the special administrator has the ability to dispose of property subject to a fixed charge for an ‘appropriate value’. The appropriate value may be less than ‘market value’, which could disadvantage secured lenders.
- The grounds on which the special administrator’s conduct can be challenged are narrower than in a standard administration and focus on whether the purpose(s) of the special administration is being achieved as quickly and efficiently as reasonably practicable.
- Unlike a standard administration, the special administrator is not required to seek and/or obtain creditor approval of its proposals.
- The special administration may only move to a CVL or dissolution of the company with the consent of the secretary of state or Ofwat.
- Any financial support (grants, loans or indemnities) provided by the secretary of state to the company during the period of the special administration will be repayable in priority to and ahead of the special administrator’s fees and expenses.

Future proofing

Against the backdrop of Thames Water’s significant financial and operational challenges, and the announcement of the water (special measures) bill[1], which includes criminal sanctions against water company executives for a breach of water quality regulations, the introduction of Wisar will be welcomed as a tool to ensure the continuity of essential services amidst financial distress.

The regime provides additional flexibility to maintain continuity for customers while maximising value through modified restructuring tools under existing insolvency legislation and the new hive-down sale process. The focus on regulatory collaboration between key stakeholders should prohibit any sales to connected companies or parties involved in the mismanagement or failures of the business that led to the appointment of a special administrator.

Ultimately, the implementation of Wisar will take place as a method of last resort. Recent events surrounding Thames Water and the energy sector highlight the need for more robust and preventative measures regarding operational and financial oversight to be implemented at an early stage.

Dominique Hodgson also contributed to this article.

1 The water (special measures) bill was announced in the King’s Speech on 17 July 2024

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Care needed over procedures to resolve complex title disputes

A case involving land acquired by two directors later found to be in breach of their duties provides useful guidance for office-holders on procedure, says **Radford Goodman**

In the recent case of *Kendall v Ball [2024] EWHC 746*, the administrators of two companies – Sherwood Oak Holdings Ltd (Holdings) and its subsidiary, Sherwood Oak Homes Ltd (Homes) – sought a declaration that certain land was held on trust for the companies by its former directors.

The case provides a useful illustration of how proprietary remedies can be available in response to a breach of duty by a director even where the breach does not involve the misappropriation of pre-existing corporate assets. The judgment also includes observations by ICC Judge Greenwood as to the appropriate procedure to use when seeking to resolve a complex dispute concerning the beneficial ownership of property.

Background

Homes and Holdings were involved in the development of certain land that they owned. An additional piece of land providing access to the main site was to have been purchased by Holdings but, in the event, it was transferred to the directors personally. The purchase monies, however, came from an account in the name of Homes. Around five months later, Homes and Holdings were put into administration by one of their lenders.

The administrators applied to the court under the Insolvency Act 1986 (s234 and para 63 of schedule B1) on an expedited basis[1] for a declaration that the additional land was held by the directors on trust for Homes or Holdings and an order that the land be transferred accordingly.

> **If title is in dispute, the usual [and] appropriate course would be to commence proceedings in the name of the company itself**

Procedural issues

Part of the directors' case was that the administrators could not properly use s234 or para 63 to determine an ownership dispute and, secondly, that the constructive trust case had not been "fairly stated and particularised" so as to enable the directors to understand and answer it.

First, s234(2) provides that: "Where any person has in his possession or control any property, books, papers or records to which the company appears to be entitled, the court may require that person forthwith (or within such period as the court may direct) to pay, deliver, convey, surrender or transfer the property, books, papers or records to the office-holder."[2]

The judge followed the Court of Appeal's decision in *Ezair v Conn [2020] BCC 865*[3], in which it was held that the purpose of s234 is to provide a summary remedy to enable office-holders to carry out their functions: it is not designed to be used as a means to determine complex title disputes. An applicant under s234 only needs to show apparent entitlement to the property.

The judge observed that: "If title is in dispute, the usual [and] appropriate course would be to commence proceedings in the name of the company itself."[4] However, the court is "…not precluded from finally resolving issues raised in respect of title…" and will do so in certain cases,[5] for example, where the dispute involves a pure point of law. He concluded that: "Ultimately, the decision whether or not to determine the issue is likely to depend on whether or not a summary process, without statements of case, disclosure and witness statements, is fair."

Secondly, para 63 of schedule B1 provides that the administrator of a company may apply to the court for directions in connection with his functions. The judge accepted that para 63 is broad enough to allow the court to determine disputes[6] but, as with s234, he said that whether or not it should be used for that purpose in any given case "will depend, certainly in part, on whether or not it is fair to use a summary process, without statements of case, disclosure and witness statements" and he considered that "…in many such cases, the usual and appropriate course would be to commence proceedings in the name of the company itself."

> The administrators would have to accept, however, that their claims would be "subject to the constraints inherent in the process which they have chosen – including that there was no cross-examination and no disclosure"

On the particular facts of this case, the directors' procedural objections failed. The administrators' case was found to have been clear in substance both in pre-action correspondence and in the witness statements filed in support of the application. Formal pleadings were not, therefore, necessary and, in any event, the respondents had not raised any procedural objections until just before the final hearing.

> It was alleged by the administrators that by having the additional land transferred to themselves, the directors acted in breach of their duties to promote the success of the companies and avoid conflicts of interest

In these circumstances, the judge held that it was appropriate for the court to determine the substantive issue as to title. The administrators would have to accept, however, that their claims would be "subject to the constraints inherent in the process which they have chosen – including that there was no cross-examination and no disclosure". Thus, written evidence filed by the directors could not be tested and was more likely to be accepted on its face.

The trust arguments

The first submission made by the administrators was that the additional property was held by the directors on a resulting trust because Homes had provided the purchase monies. A resulting trust arises when property is purchased by party A but the purchase monies were provided by party B and party B was acting in the character of a purchaser (that is, the party was not lending the money or giving party A a gift). The court held that, on the evidence before it, Homes had not acted "in the character of a purchaser". In particular, the parties had intended that the additional land would be acquired beneficially by the directors, rather than the companies, and there was an intention that, by some means, the company accounts would be adjusted to reflect the directors' (mistaken) understanding that it was their money, and not Homes' money, that was being used to fund the acquisition. The resulting trust claim therefore failed.

Secondly, the administrators submitted that by having the additional land transferred to themselves, the directors acted in breach of their duties to promote the success of the companies[7] and avoid conflicts of interest[8] and that, therefore, the additional land was held by the directors on a constructive trust for the companies.

The court found that the directors were in breach of both duties. In particular, the court noted that the additional land was a "valuable, integral part of the development project, required by the companies and intended to be used by them to construct the presently (and long) contemplated means of access to the site" and that its acquisition by the directors in their own names placed them in a position of 'sharp conflict'. The court held that the directors "…exploited and diverted to themselves an opportunity to acquire property which the companies themselves needed" and "failed positively to advance any good reason for having acquired the [additional land] themselves, consistent with the best interests of the companies."

In such circumstances, the court held that the directors were to be treated as having acquired the additional land on behalf of the companies and it was therefore appropriate to declare that the additional land was held on constructive trust, notwithstanding that this case did not involve the misappropriation of pre-existing corporate property.[9]

In view of the judge's comments as to the scope of s234 and para 63, office-holders and their legal advisers will need to give careful thought to the appropriate procedure to use in the particular circumstances of each case when seeking the determination of a title dispute. An application for directions will often be appropriate, even in complex cases, because of its inherent flexibility: the case may proceed on a summary basis (as here), provided it is fair to do so, or the court may, if necessary, direct the parties to deliver formal statements of case, provide disclosure, and/or produce their witnesses for cross-examination[10] as in full, adversarial litigation.

1 To enable the administrators to take advantage of a commercial sale opportunity
2 An application under s234 of the Insolvency Act 1986 is made in the name of the office-holder, not the company
3 See also *Re Cosslett (Contractors) Ltd [2001] UKHL 58*
4 An action in the name of the company would be commenced under the ordinary Civil Procedure Rules rather than by way of an application under the Insolvency (England and Wales) Rules 2016.
5 See for example, *Re London Iron & Steel Co Ltd [1990] BCC 159*
6 *Re Rodus Developments Ltd (in administration) [2022] EWHC 3232* was cited as an example.
7 s172 of the Companies Act 2006
8 s175 of the Companies Act 2006
9 Applying *Davies v Ford [2020] EWHC 686 and Re Bhullar Bros. [2003] EWCA Civ. 424*
10 See in particular rules 12.11 and 12.27 of the Insolvency (England and Wales) Rules 2016

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Limits to modified universalism creates need for more vigilance

As courts continue to draw boundaries around the use of the long-standing principle of modified universalism, practitioners need to stay informed, argues **Katie Longstaff**

Modified universalism has been described as "the golden thread running through English cross-border insolvency law since the 18th century"[1]. It is a moderated version of the principle of universality. Put simply, modified universalism requires courts, in so far as they properly can, to co-operate with the courts in the country of the principal insolvency to ensure that assets are distributed to creditors under a single system of distribution[2].

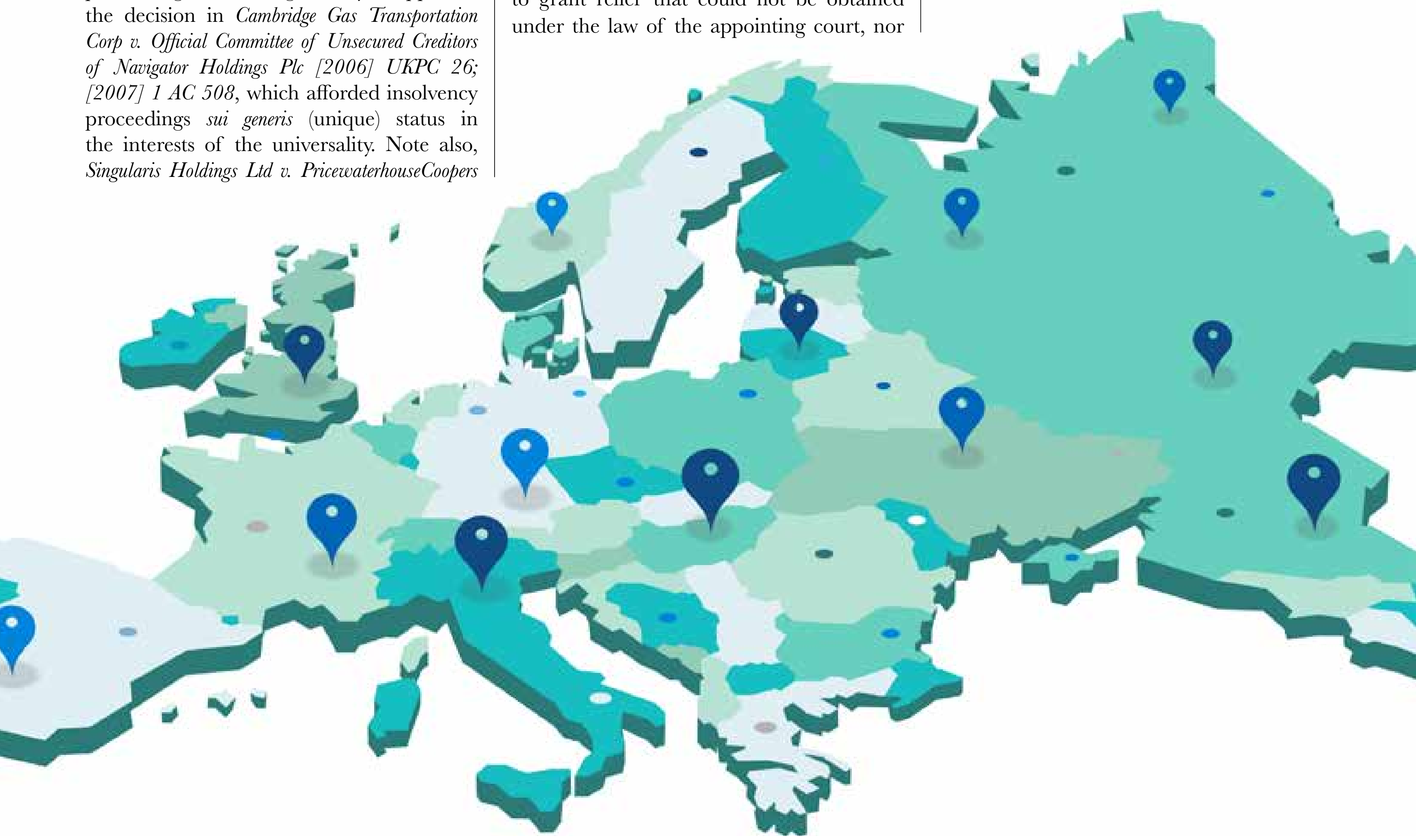
The courts have sought to confine its application in recent years – in *Rubin and another v. Eurofinance SA and others [2012] UKSC 46; [2013] 1 A.C. 236*, which decided that the common law rule for the enforcement of judgments applies equally to insolvency proceedings. The ruling thereby disapproved the decision in *Cambridge Gas Transportation Corp v. Official Committee of Unsecured Creditors of Navigator Holdings Plc [2006] UKPC 26; [2007] 1 AC 508*, which afforded insolvency proceedings *sui generis* (unique) status in the interests of the universality. Note also, *Singularis Holdings Ltd v. PricewaterhouseCoopers [2014] UKPC 36; [2015] A.C. 1675*, where it was held that courts do not have jurisdiction to grant relief that could not be obtained under the law of the appointing court, nor do they have power to assist a foreign court by doing anything they could properly have done in a domestic insolvency. That said, modified universalism remains an important principle of our common law[3] and is the foundation of our cross-border legislation[4].

> **There remain three key methods under English law for assisting insolvency proceedings in other jurisdictions: (a) s426 of the Insolvency Act 1986, (b) the Cross-Border Insolvency Regulations 2006 (CBIR) and (c) the common law**

Assistance and recognition

Since EU regulations no longer have effect in England and Wales[5], there remain three key methods under English law for assisting insolvency proceedings in other jurisdictions: (a) s426 of the Insolvency Act 1986, (b) the Cross-Border Insolvency Regulations 2006 (CBIR) and (c) the common law.

As to the recognition of judgments, recourse will be to any applicable instrument or the common law; the CBIR and s426 IA86 do not provide a legal basis for such



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recognition[6]. It is anticipated that article X to the *Uncitral model law on recognition and enforcement of insolvency-related judgments 2018* will be adopted, but debate continues to surround its potential application (and specifically that concerning the Rule in Gibbs[7]).

Limits to assistance

As the case law demonstrates, determining the extent of relief available to assist foreign insolvencies is not always a straightforward task for practitioners. This is apparent from reading the judgments *In Re HIH Casualty and General Insurance [2008] UKHL 21; [2008] 1 WLR 852*, where the House of Lords overturned the Court of Appeal's decision that assets could not be remitted to Australian office-holders under s426 IA86, where the scheme for *pari passu* distribution in Australia was not substantially the same as that of English law[8].

This can be compared to *Re AGPS Bondco Plc [2024] EWCA Civ 24; [2024] Bus. L.R. 745*, the well-documented case concerning a restructuring plan intended to benefit a group of German companies, where the Court of Appeal decided there was "*no good reason or proper basis*"[9] to depart from the *pari passu* principle. It is also worth noting that in *In re HIH Casualty and General Insurance* the court could not agree on whether a discretion to make an order remitting assets to another jurisdiction that applied a different scheme of distribution only arose under s426 IA86 or under common law as well[10].

More recently, the interplay between modified universalism and the immovables rule has provided fertile ground for argument

In Re OJSC International Bank of Azerbaijan [2018] EWCA Civ 2802; [2019] Bus. L.R. 1130 also highlights the complexity of this area. The Court of Appeal refused to grant a stay pursuant to Article 21 of the CBIR for it would contravene the common law Rule in Gibbs. Henderson LJ observed:

"The decision of the Supreme Court in Rubin [2013] Bus LR 1 is particularly instructive, in my view, because the court there firmly rejected the approach taken by this court (of which I was a member) which sought to build on the principles stated with typical brilliance by Lord Hoffmann In Re HIH Casualty and General Insurance Ltd [2008]

As matters stand, therefore, the CBIR and s426 IA86 may be deployed to "sideline or circumvent" the immovables rule, but the common law may not

Bus LR 905 and the Cambridge Gas Transportation Corp case [2007] 1 AC 508 so as to develop the common law on recognition of foreign judgments in line with the principle of modified universalism in insolvency proceedings. In essence, as it seems to me, IBA is trying to achieve a similar sort of result in the present case, by asking us to sideline or circumvent the established common law rights of the English creditors by an appeal to the principle of modified universalism."[11]

However, he continued: *"I think there could be circumstances where, to a limited extent, it might be appropriate to exercise powers under the Model Law so as to achieve the discharge or variation of an English law right in a way that is tantamount to the application of a foreign law, for example when exercising the powers to remit assets to a foreign liquidator: compare In Re HIH Casualty and General Insurance Ltd [2008] Bus LR 905, paras 18-21. In the context of the present case, however, I am satisfied that it would be wrong in principle to use the powers in article 21(1)(a)(b), or any other provisions of the Model Law as incorporated in the CBIR, so as to circumvent the English law rights of the English creditors under the Gibbs rule."*[12]

More recently, the interplay between modified universalism and the immovables rule (the rule that a foreign court has no jurisdiction to make orders in respect of English real property and rights relating to such are governed exclusively by English law) has provided fertile ground for argument[13]. In *Kireeva v. Bedzhamov [2023] EWCA Civ 35; [2023] Ch 45*, a Russian trustee in bankruptcy applied for, *inter alia*, a vesting order in respect of the debtor's London property. Neither the CBIR nor s426 IA86 applied, so the trustee had to rely on the common law. It was argued that recognition at common law served as a gateway to the courts' equitable jurisdiction or to s37 of the Senior Courts Act 1981 in accordance with the principle of modified universalism[14]. The Court of Appeal disagreed, holding that the creation of a common law exception to the immovables rule was a matter for Parliament, despite the availability of comparable relief under the CBIR and s426 IA86[15]. The trustee appealed and the Supreme Court's decision is awaited[16].

As matters stand, therefore, the CBIR and s426 IA86 may be deployed to "*sideline or circumvent*"[17] the immovables rule, but the common law may not. If foreign office-holders wish to get their hands on a debtor's real property, they will need to (a) satisfy the COMI or establishment requirements to engage the CBIR (most cases), (b) have been appointed in a country that is a designated territory for the purposes of s426 IA86 or (c) instigate concurrent insolvency proceedings in this jurisdiction.

Modified universalism is an important principle of English insolvency law and the courts continue to navigate the limits of its application. A key challenge for practitioners will be to keep abreast of how it continues to shape the cross-border insolvency landscape and curtail the relief available to assist foreign insolvencies.

1 *In re HIH Casualty and General Insurance* [2008] UKHL 21; [2008] 1 W.L.R. 852 at [30] per Lord Hoffman.
2 See *In re HIH Casualty and General Insurance* at [30] and *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36; [2015] A.C. 1675 at [15].
3 See *Singularis* at [19].
4 See *Re Gategroup Guarantee Ltd [2021] EWHC 304* (Ch); [2021] B.C.C. 549 at [95].
5 Save to the extent that EU law has been given effect by domestic legislation, and in the insolvency context by virtue of the Retained Insolvency Regulation.
6 See *Rubin and another v Eurofinance SA and others.*
7 The rule that contractual obligations may only be discharged or varied applying the proper governing law as set out in *Antony Gibbs & Sons Ltd v La Societe Industrielle et Commerciale des Metaux* [1890] 25 QBD 399.
8 *In re HIH Casualty and General Insurance* at [2].
9 *Re AGPS Bondco Plc* at [166].
10 Lord Scott and Lord Neuberger took the view that the discretion only arose under s.426 IA86, whereas Lord Hoffman and Lord Walker thought otherwise.
11 *In re OJSC International Bank of Azerbaijan* at [90].
12 *In re OJSC International Bank of Azerbaijan* at [90].
13 *Kireeva v Bedzhamov* at [47].
14 *Kireeva v Bedzhamov* at [44].
15 See *Kireeva v Bedzhamov* at [53]-[70] (considering s.426 and its predecessor provisions, as part of its decision that there is no common law power to vest English immovable property in a receiver) and *Allen v Derev & Anor* [2023] EWHC 387 (Ch), [2024] B.P.I.R. 255 (sale of real property under CBIR). Note that Arnold LJ dissented on the immovables appeal in *Kireeva v Bedzhamov*.
16 The Supreme Court heard the appeal on 21-22 November 2023.
17 To use the dicta of Henderson LJ in *In re OJSC International Bank of Azerbaijan* at [90].

Katie Longstaff is a barrister at Radcliffe Chambers

Fundamental change ought to be the main focus of any turnaround

Successful turnarounds should address the underlying causes of business failure, says Tony Groom

What is turnaround? Is it about saving a business? Or saving a company? Is it merely a more palatable term used to soften discussions about insolvency? Is it financial restructuring? Or is it a process of fundamental change that aims to address the underlying factors that created a need for turnaround services?

You could argue that it is about all of these, but the goal should always be to end up with a viable business. However, given that most 'turnarounds' fail, the evidence would suggest that all too often we are simply putting lipstick on a pig.

The lack of consensus on 'what a turnaround is' should be no surprise since so many firms and individuals claim to have turnaround credentials and offer turnaround services. IPs, who tend to focus on financial restructuring, often claim a successful turnaround when jobs are saved despite simply selling the business and assets to a third party. Management consultants tend to focus on cost reduction or profit improvement, which often undermines the long-term viability of a business.

Conflicts

Few roll up their sleeves and implement change themselves. Many prefer to act as advisers. This is hardly surprising given the potential for being held liable as directors or shadow directors if things go wrong – as they often do.

The issue is that we, as an industry, are not always clear about our intentions. Most of us refer to saving a business without making it clear that we are not going to save the company. Others may provide reassurance to directors while acting for creditors, leaving the directors to seek advice elsewhere. Despite such conflicts, there is no reason for us not to be transparent about our real interests and intentions.

It is no wonder, then, that turnaround and those who promote turnaround services have an identity crisis – we know what services we want to sell but are not transparent about those being offered. Therefore, directors who seek help when facing an existential crisis for the first time do not really know what they are buying.

Legislation, litigation and regulation have not helped. The Enterprise Act 2002 was intended to support the Government's promotion of a 'rescue culture'. In addition to removing Crown preference, its main initiative was to replace administrative receivership with administration as the default formal rescue procedure. As a procedure, administration provides for considering and implementing rescue options that seem sensible if there is a genuine interest in saving companies. It was intended to act in the best interests of all creditors, unlike admin receivers whose primary responsibility was to recover money for secured creditors. However, the threat of litigation and regulation have contributed to administration being used to pursue a 'better outcome for creditors' and not to trade companies with a view to turnaround. The focus has shifted to recovery for creditors and minimising the risk of litigation for the IP.

Zombie companies

Around the same time the Enterprise Act came in, those of us who specialised in saving companies in financial difficulty changed our self-defined role from 'company doctor' to 'turnaround director'. At the time we believed in rescue culture and that turnarounds offered a better outcome for all stakeholders.

In hindsight, none of us should have been surprised by the lack of appetite for rescuing companies, or that pre-packs would go on to become the default rescue procedure that professionals would use to claim successful turnaround. Rarely are real rescue options ever considered, despite the objectives of administration. Rarely do banks and IPs invite turnaround directors in to discuss the prospects for turnaround options. Instead, the answer is normally a formal insolvency procedure or, if there is a business to be saved, a pre-pack.

A recent 'red flag alert' report in April by Begbies Traynor said that there are 554,554 UK businesses in 'significant' distress. Many of these are likely to be zombie companies with good underlying businesses that are going nowhere due to a high level of debt. Despite having growth potential if they could invest in their future, all available cash will be used instead to support the debt. Directors don't know what to do, believing the only alternative to be a formal insolvency procedure. Under such circumstances hope that something may turn up is preferable – few advisers will introduce the idea of an alternative, let alone advise triage as an initial phase of turnaround.

Denial and wilful blindness

Since the global financial crisis in 2007/8 there has been the general assumption that there is a lot of turnaround work available, but this has not been the case largely because few confront the elephant in the room: debt.

Formal insolvency is regarded as the only alternative to hope for debt resolution, and has become the justification for preserving many companies that ought to be restructured. A lack of appetite to deal with debt, both among the lenders and creditors not actively pursuing it, and directors not wishing to confront it, is contributing to the general malaise – a case of extend and pretend. Denial and wilful blindness have become endemic.

Despite a focus on financial matters, many argue that a turnaround is more than a financial restructuring and ought to involve dealing with the underlying causes of the problem. Successful turnarounds generally involve myriad initiatives for addressing a large number of issues. Every aspect of a business ought to be reviewed and addressed as part of a process of introducing change in pursuit of a successful turnaround. Triage, as an approach, prioritises the implementation of turnaround initiatives. This starts with fundamental changes and over time includes smaller ones that add up to a shift of the culture to become one of continuous improvement. This is a key ingredient of a sustainable business.

Advisers and consultants tend to only focus on limited initiatives that address those areas that they are comfortable with: mainly financial restructuring and cost reduction, process optimisation, rationalisation, or assets. But most initiatives only tinker with the causal

issues such as the business model, strategy, culture, quality, sales pipeline, distribution or product-market mix. This is why turnaround directors are needed to bring a broader skill set to dealing with such problems.

One major issue for many turnarounds is a lack of sales, and this is an area few financially focused advisers are comfortable dealing with. Cutting costs is relatively easy but planting seeds for future growth is risky where business development often involves trial and error in pursuit of a successful formula for a return on investment from marketing initiatives. Managing this alongside the prospect of running out of cash if sales aren't achieved is not something most advisers are familiar with. But it is a key ingredient for future success.

Fundamental change ought to be the main focus of any turnaround but deciding what to change and then delivering it can be quite a challenge. Turnaround is not for the faint-hearted.

All too often existing directors are left in charge, whereas turnaround directors would argue that incumbents are rarely equipped to address core issues such as strategy, operational reorganisation, staff reduction, the introduction of systems and processes, culture change, stakeholder realignment or business development. Indeed, incumbent directors are often the problem, not the solution.

There are those who might argue that financial rescue without addressing the fundamental issues is *fundamentally* missing the point and, in most cases, simply kicking the can down the road to put off inevitable failure.

Consensual outcomes

That insolvency has become so regulated, and most realisable assets are encumbered, offers a glimmer of hope.

Formal insolvency procedures need IPs to advise and administer them. Regulation and compliance have left IPs managing checklists instead of businesses. The prospect of claims being brought against office-holders has made it almost impossible for them to attempt a turnaround. They are left with the only option of closing a business via either liquidation or pre-pack.

Financial restructuring is where IPs and turnaround directors might work together. Fundamental change needs appropriate finance and a financial model that supports the change.

Informal rescue procedures need turnaround directors to trade businesses while also implementing new strategies, reorganising operations, introducing systems and processes, changing the culture, dealing with stakeholders and overhauling the sales and marketing activities. Having authority and control is key. Initiating and implementing decisions, rather than advising incumbent directors, means exposure to significant risks but this goes with the territory. This gets close to defining real turnaround and turnaround services, but it does not justify turnarounds as offering a better option than insolvency. Consensual outcomes as based on informal turnarounds are more beneficial to stakeholders, albeit at the expense of those advisers that may prefer a formal insolvency process.

Tony Groom is a partner at K2 Business Partners

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RECOVERY Insights

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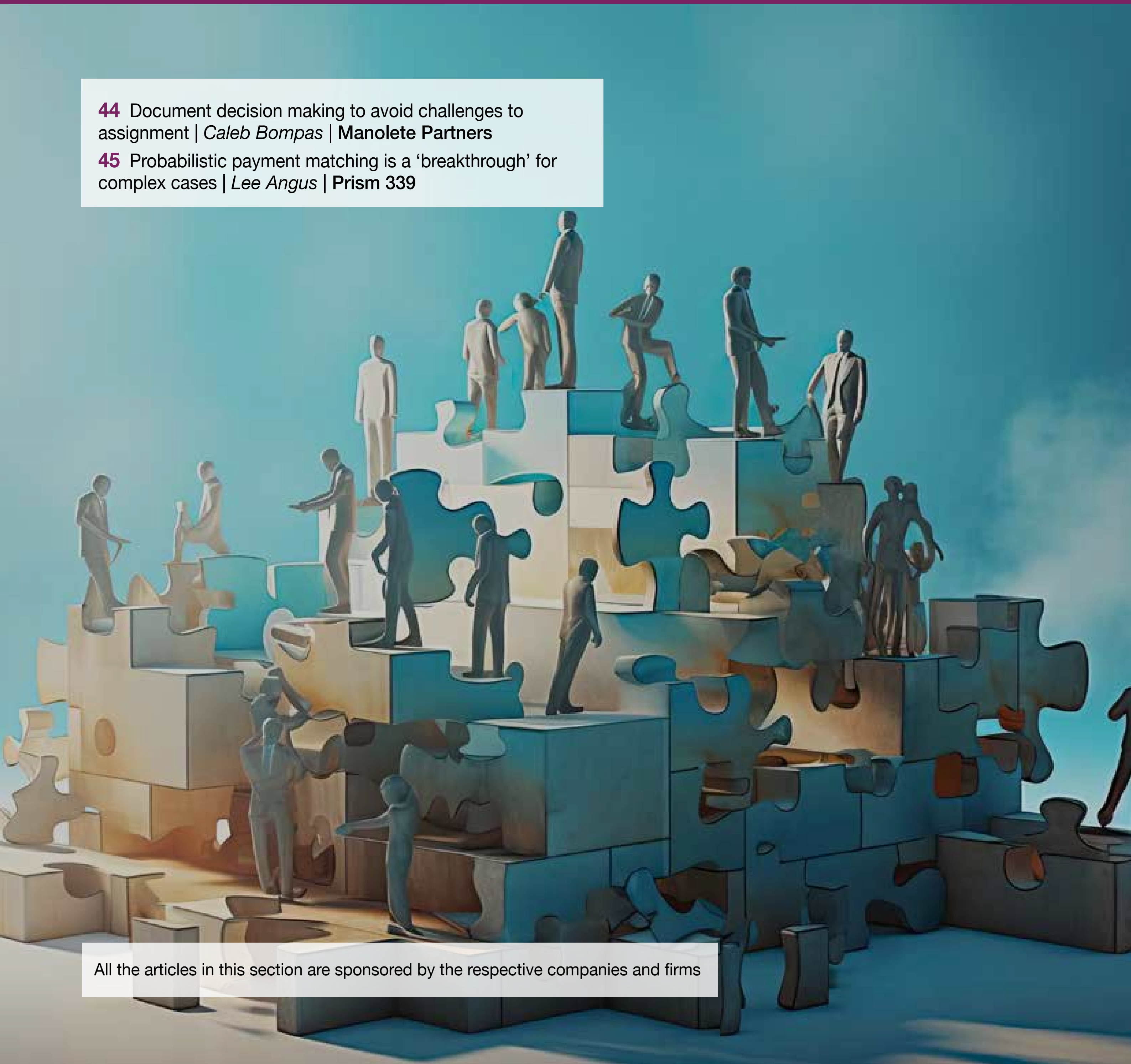

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Document decision making to avoid challenges to assignment

Unless an office-holder has gone badly off the rails, they can expect the court to support their judgment when it comes to assignment of claims, says **Caleb Bompas**

For many insolvent estates, legal claims against directors or third parties represent valuable assets and, in some cases, the only realisable assets. These claims, however, can remain untapped due to lack of funding or the complexities involved in pursuing litigation. The ability to assign these claims is an essential tool for office-holders to realise returns and should not be overlooked.

A new market for the assignment of claims has been created in recent years following the introduction of s256ZD (the ability to assign office-holder claims) into the Insolvency Act 1986, which Snowden J observed was to "*benefit society by increasing the likelihood that miscreant directors will be held to account*"[1]. As a result there has been a rise in companies that specialise in purchasing claims from insolvent estates. So much so that back in 2020, legal reviews and rankings guide Chambers and Partners saw fit to introduce a new category for companies that specialise in insolvency litigation funding.

As office-holders will no doubt know, every decision they take may be challenged and the assignment of a claim is no exception.

Challenging assignments

Re Edengate Homes (Butley Hall) Limited (in liquidation) [2022] EWCA Civ 626 is the leading authority on challenges to a liquidator's assignment. The Court of Appeal dismissed former director and creditor Mrs Lock's appeal challenging the validity of the assignment by the liquidator. She argued she and her family were not given an opportunity to purchase the claim (being the only asset of Edengate) as a way of essentially settling the claim. The challenge was based on s168(5) IA86 which permits a person "aggrieved by any decision of the liquidator … to apply to the court" for a decision to confirm, reverse or modify it.

The court acknowledged that there were some valid criticisms of the liquidators but held that this was not enough for the challenge to be successful. First of all, Mrs Lock's challenge as a creditor needed to be aligned with the interests of the class of the general body of creditors (that is, to maximise recoveries for the estates). Secondly, the court adopted the 'formidable' test from *Re Edennote Ltd [1996] 2 BCLC 389*: for a challenge to succeed it would be necessary to demonstrate the decision to assign was "perverse" and "so utterly unreasonable and absurd that no reasonable man would have done it".

> **"It was considered unjust to assign a cause of action where the consequence would be to submit a defendant to being harassed with regards to a claim that had no serious prospects of success"**

It is fair to say that office-holders enjoy a generous ambit of discretion in their decision-making. They are entitled to make decisions without having constantly to look over their shoulder and can generally expect the court to support them in the proper exercise of their commercial judgment.

Claims that should not be assigned

Not all claims capable of assignment should be assigned. This is a point the court made in *LF2 Ltd v. Supperstone and Shiners [2018] EWHC 1756 (Ch)* when considering a challenge by a company seeking the assignment of a claim. The judge acknowledged that office-holders have a statutory power to assign a cause of action and a duty to act in the interests of creditors in maximising realisations. He noted, however, that an office-holder should be mindful of the principle in *Ex parte James. In re Condon (1874) LR 9 Ch App 602* which holds that a court would not permit one of its officers to act in a way that would be wrong for the court itself to act (including for example, assigning a hopeless or vexatious claim).

This view is in line with the decision of *Hockin v. Marsden [2014] EWHC 763 (Ch)* where, for public policy reasons, it was considered unjust to assign a cause of action where the consequence would be to submit a defendant to being harassed with regards to a claim that had no serious prospects of success.

The decision to pursue, fund, or assign litigation claims in insolvency cases is a complex interplay of financial, ethical and legal considerations and is often 'nuanced and difficult'[2]. Office-holders have to consider what will result in the best returns for the estate; and assigning claims is just one of several options potentially available to them.

Litigation is a risky business and it is right to consider the availability of all forms of financing (and the costs, risks and benefits of the same) so that an informed decision may be made as to what is in the best interests of the creditors. Such a decision will not be immune from challenge, but unless the office-holder has gone badly off the rails, they can generally expect the court to support them in the proper exercise of their judgment. To this end, it is important for an office-holder to document the decision making process to show the rationale behind the decision. This will stand the office-holder in better stead should a disgruntled defendant or creditor seek to challenge their decision.

1 *Manolete v Hayward and Barrett Holdings Ltd [2021] EWHC 1481 (Ch) [para 11]*

2 *Absolute Living Developments Limited (in liquidation) v. DS7 Limited [2018] EWHC 1432 (Ch)*

Caleb Bompas is associate director for the London team at Manolete Partners

Probabilistic payment matching a ‘breakthrough’ for complex cases

Ledger analysis has advanced to provide data previously only available from forensic services, and can help more clearly identify fraudulent activities, says **Lee Angus**

Ever since the co-existence of double-entry bookkeeping and bankers’ ledgers, there has been tension between the independent truth and the story someone else might want to produce to deceive third parties.

The first thing we all learned in our insolvency careers is simple enough – too many zeroes in any number tend to indicate an artificial transaction, but merely profiling out round numbers would be the least anyone would expect of an analysis.

‘It is a massive time saver to be able to filter out from the banking documents the complement of the Sage ledger, and auto-compare the two for anomalies in quantum and narrative using ledger analysis software’

Defrauding creditors

Of the many insights we want to obtain in our sector, probably the one we would most want is to see what transactions fall within the ‘ordinary course of business’, and what are outside it. Identifying transaction outliers (and being able to cross-reference them with the identified associates) reveals a huge amount of antecedent claims for both reporting and pursuit at law. It is extremely difficult to profile the things that would raise the eyebrows of an honest director, but case after case shows that the power of an algorithmic approach can now produce this at a standard well above basic grades of insolvency staff.

Software can predict associates under s435, IA86, to a level that cannot be commercially attempted on most appointments. Once cross-referenced against a company’s turnover, this is another powerful filter, given that the overwhelming volume of antecedent transactions are in favour of associates (whether simple preferences, bare-faced transactions at an undervalue, or skilful transactions designed to defraud creditors). Thousands of accounts passed through analysis have revealed tens of millions in claims, with litigation identified that could not be economically found using normal methods.

Such basic analyses have been available for years, but 2024 has seen further advancements, both in ledger comparison and the comparison of multiple accounts. The format of each of these is bespoke and, while simple in appearance, provide profiles of data not commonly available to insolvent cases at any cost below major forensic services.

> “The swift extraction of 50 fraudulent entries from thousands of lines of data is a very satisfying achievement for the data technician, yet all the more rewarding to the IP with hard evidence of dozens of forgeries by a director”

Forged entries

The idea of comparing a ledger created by a director with an extract of the same transactions from a bank is a simple idea to understand, but a complex one to execute. A simple ledger from Sage of a few hundred transactions can take weeks to find among thousands of pages received from a bank. It is a massive time saver (and financially rewarding for clients) to be able to filter out from the banking documents the complement of the Sage ledger, and auto-compare the two for anomalies in quantum and narrative using ledger analysis software.

The best example we have seen of this is on a case with forged entries in fabricated bank statements. The swift extraction of 50 fraudulent entries from thousands of lines of data is a very satisfying achievement for the data technician, yet all the more rewarding to the IP with hard evidence of dozens of forgeries by a director.

This year’s major innovation has to be in comparison of multiple accounts. The insight given by showing in parallel the smallest part of all accounts (its receipts and payments), and probabilistically matching payments crossing from one account to another, has been a breakthrough in what can be achieved on complex insolvencies – especially the multijurisdictional. Auto conversion of currency and the visual representation of money transfers more clearly expose fraudulent intent in directors.

The use of carefully trained and calibrated software is a breakthrough in identifying and challenging fraud. At Prism, we have assisted hundreds of users at over 100 insolvency practitioner firms to analyse estates to the standards mentioned above, identifying tens of millions in undisclosed claims to be reported for compliance and challenged for the benefit of creditors, both domestically and internationally.

Lee Angus is a director at Prism 339, lee.angus@prism339.com, www.prism339.com

Assessing the new Government

As the dust settles on the general election, R3's committees are already analysing the potential impact of Labour's policies on the profession, says **Amelia Franklin**

All eyes were on the election this summer. From the moment the (then) prime minister, Rishi Sunak, announced the election date, our team was on high alert, tracking campaigns, dissecting debates and following the news to understand each party's pledges and their potential impact on our profession.

Also anticipating the election were two of R3's key committees – the Policy Group and the Fraud and Asset Recovery Group. In their respective committee meetings, members discussed each of the main parties' manifestos, the impact they may have on the insolvency profession and the wider economy, and strategies for engaging with the future Government.

As the dust settles after the election, we're stepping into a new political era following the landslide victory for the Labour party under Sir Keir Starmer. It's too soon to predict the exact direction of the new Government, but we know economic growth and stability are high on its priority list.

> **"One key takeaway from the public sector faculty roundtable was the need for better data sharing between government agencies and departments to tackle economic crime"**

Key ministerial appointments have already been announced and we will be writing to Justin Madders MP, the newly-appointed Parliamentary Under-Secretary of State for Employment Rights, Competition and Markets, who has responsibility for the insolvency portfolio.

Connecting with key ministers

Prior to the general election and the change in government, R3 CEO Caroline Sumner and members of the external affairs team attended the launch of the APPG for Fair Business Banking's new SME manifesto.

> **"Many more people are facing negative budgets, and reforms to assist them are needed"**

This event provided a platform for Caroline to meet with Kevin Hollinrake MP, who was then business minister, and Rushanara Ali, then shadow investment and small business minister, opening up important dialogue between R3 and key political figures just before the election.

Table talks

Since the last issue of *Recovery*, R3's external affairs team have planned and hosted two new roundtable events. In mid-May, representatives from bodies including Companies House, the City of London Police, National Trading Standards and HMRC met with R3 members for an inaugural public sector faculty roundtable.

One key takeaway from the discussion was the need for better data sharing between government agencies and departments to tackle economic crime. Voices around the table spoke in support of the creation of a central hub for public sector agencies to share contacts and report suspected fraud.

We plan to hold a follow-up event later in the year and will be inviting additional stakeholders, including local government representatives.

During Pride month, R3 brought together 11 of the diversity and inclusion champions from the R3-Insolvency Service Diversity and Inclusion Steering Group for a roundtable. Hosted by EY and chaired by R3 CEO Caroline Sumner, discussions centred on the challenges and potential solutions for attracting, retaining and advancing diverse talent within the insolvency and restructuring profession, with champions sharing personal experiences and best practices from their firms.

It's no secret that the insolvency and restructuring profession is facing an ageing workforce, which makes the attraction and retention of young and diverse talent a top priority for R3 and the wider profession. One key takeaway from the event was the importance of engaging with students earlier on in their education. While it's important to speak to young people at graduate level, there's a real opportunity to make an impact by reaching out to students aged 15 and older, offering guidance and inspiration that may help shape their career choices.

After such a successful first event, we are already planning another roundtable for October but, in the meantime, we'll be continuing our work on the Steering Group's 2024 action plan. More to come later this year!

Meeting the debt advice sector

With a consultation on reforms to the UK's personal insolvency framework expected this year, R3 CEO Caroline Sumner and our policy and public affairs team met with representatives from several debt advice services and charities in June.

Our discussions focused on our views on the future of the personal insolvency framework and what the charities are seeing from individuals seeking advice about their finances. Many more people are facing negative budgets, and reforms to assist them are needed. We will continue these discussions as the year progresses and the Government's plans become clearer.

R3 in the media

In June, R3 president Tim Cooper shared his vision for his year in office with *Insolvency Insider*, reflecting on his history with R3 and offering advice to young professionals on engaging with their trade body.

News that the R3-Insolvency Service Diversity and Inclusion Steering Group had published its action plan for 2024 was featured in a number of trade outlets in May, including *Accountancy Today*, *Insolvency Insider*, and *The Accountant*.

Media interest in insolvency statistics held strong in May and June, with our comments on the corporate and personal insolvency statistics featuring in stories in *The Times*, the *Daily Express*, the *Evening Standard* and a range of regional media outlets.

Amelia Franklin is campaigns and communications executive at R3

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The agenda for smaller practices

This year's SPG Forum forays into the challenges facing sub-postmasters, ethical challenges and how fraud affects SMEs, while still leaving time for networking, says **Maria Strong**

The SPG Forum is the flagship conference for R3 members working as either sole IPs or in smaller practices. This year, we're heading back to the Belfry Hotel & Resort in Birmingham, after the venue provided such a successful home for the Forum in 2023.

> **Lee Castleton, a former sub-postmaster, will be speaking about his experiences with the Post Office, his bankruptcy and the Post Office Horizon inquiry – as well as the impact this has had on him and his loved ones**

We are expecting more than 250 delegates from across our smaller practices community. The membership in attendance will hear from a range of expert speakers on a number of key issues directly relating to the smaller practice community, as well as having the opportunity across lunches, dinners, downtime and an optional game of golf to network and build connections with other members of the community.

From the frontline

The keynote speaker is a highlight of every SPG Forum and this year Lee Castleton, a former sub-postmaster, will be speaking about his experiences with the Post Office, his bankruptcy and the Post Office Horizon inquiry – as well as the impact this has had on him and his loved ones.

Lee's session, entitled 'Standing up for justice: a sub-postmaster's journey', will cover his experiences and highlight the critical importance of speaking up against wrongdoing in the face of adversity. I'm really pleased we've managed to secure Lee as the keynote for this event and am looking forward to hearing his views on what he thinks needs to be done to bring redress to those affected, including Lee and his colleagues.

Another highlight on the programme will be the anti-fraud session from Arun Chauhan of Tenet Compliance & Litigation. Arun will look at how fraud impacts SMEs, outline the questions that IPs need to ask in order to identify fraud, outline the resources that are available to support investigation and anti-fraud work, and outline the reforms to Companies House that have been introduced recently.

Given the human and economic costs of fraud, and that the manner in which instances of it have been committed have broadened following changes in policy and technology (especially the growth of artificial intelligence), this session promises to be one not to miss.

Exploring ethics

Ethics remains a key issue for the profession as the public and media spotlight continues to shine brightly upon it, along with being a CPD requirement for all licensed IPs.

The session at this year's Forum will focus on applying the Code of Ethics to everyday situations and will involve a presentation from Miles Hacking of Freeths, as well as table discussions about how delegates would approach hypothetical scenarios. We'll also hear from the RPBs about what they're seeing in the profession. We're finalising the details of this session at the time of writing so keep an eye on your inbox for more information.

Many moving parts

The post-pandemic years have seen a number of developments that have affected global and national economies, as well as the people and businesses that fuel them. Although this year has brought improvements for the UK economy in its opening months, we're still unclear what impact the general election has had, and what impact the US and other national elections will have in future.

At this year's Forum, Jeremy Mindell will review the economic, political and fiscal changes that have affected the global and UK economies and how they, and a range of international agreements on trade and taxation, will affect the international system and other national economies. Jeremy will also look at how this will affect businesses and business decision making over the next 12 months.

At the time of writing, the SPG Forum seemed a long time away, but we've got a fantastic programme already, and we're on course to have a conference that lives up to the high standards set by its predecessors.

Early bird member tickets for this year's Forum, which is being held between 6-8 November, are available until 13 September for £495 plus VAT, after which they're priced from £625 plus VAT. New professional tickets are £275 plus VAT and non-member tickets are £795 plus VAT. To book and for more information, please visit www.r3spg.co.uk. Please note Forum sessions and speakers are subject to change.

Maria Strong is vice chair of R3's SPG Committee and a partner at Strong Anderson

Hotel Restructuring and Turnaround

Assured Hotels offer specialist support to hotel owners and stakeholders, in both Hotel Advisory and Asset Management capacities. We have been engaged in hotel turnaround and restructuring, trading insolvent businesses and in the acquisition or disposal of hotels on behalf of our clients.

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