Winter 2020

R3, the Association of Business Recovery Professionals | **www.r3.org.uk/recovery**

RECOVERY

30 years of R3

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

From the editor

I write this column in the middle of lockdown two on what has undoubtedly been a year to forget for society. However, there are reasons to be cheerful. It appears that Christmas is back on, vaccines are on their way for 2021 and we have a birthday to celebrate.

Yes, R3, formerly the SPI, is 30 years old and we devote this edition to that event. Jo Tacon of R3 looks back at the history with various past presidents and what has been achieved in that time on page 14 onwards and CEO Liz Bingham reflects on the organisation's evolution on page 19. Matt Jukes talks to members on their involvement in R3 (page 20) and Chris Laughton reflects on the last 30 years (page 22), while Sarah Patterson looks to the future (page 23).

While I am editing the Winter 2020 edition of *RECOVERY*, John Alexander looks back at where it all began with the first edition of the *Insolvency Practitioner* on page 24. I wonder what that is worth if you still have one?!

Leaving the celebrations for one minute, we continue to keep up with current developments. Digby Hebbard and Oliver Tobin look at the current position on the interaction between adjudication and insolvency processes on page 8. Alison Goldthorp looks at the effect of CIGA on page 30 and Alex Rogan looks at the restructuring plan used by Virgin Atlantic on page 34. James Walton reviews the role of fixed charge receivers on page 36.

While 2021 will undoubtedly be a busy year for restructuring professionals looking to save businesses in financial distress, one of the biggest challenges is likely to be the re-instalment of Crown preference and the effect that that will have on obtaining HMRC's buy in to restructuring solutions like CVAs and the moratorium process, as well as the ability to refinance, particularly with ABLs who are already reserving against the wall of tax debt that is building up as a result of the pandemic. Gordon Thomson and Damian Webb give us the latest on its effects on page 38. By the time this edition drops on your doormats, HMRC will be a preferential creditor again.

The Finance Act 2020 is best known for re-introducing Crown preference, but it also brought in personal liability for directors in respect of tax liabilities. Timothy Jarvis and Robert O'Hare look at these provisions on page 42. Bounce back loans, CBILs and furlough payments are flying out the door, but what will be recovered? Frances Coulson looks at the fraud position on page 40.

In our regular contribution from INSOL Europe, we hear from new president, Marcel Groenewegen (page 47), while this edition's interview is of the head of the Insolvency Service, Dean Beale, conducted by Colin Haig, on page 54.

Notwithstanding everything that is going on, I hope you can raise a glass and let off a party popper or two to celebrate R3's birthday in recognition that everything that the organisation has done in developing and promoting our industry as well as developing us as restructuring professionals.

I hope you and your families can still have a relaxing and enjoyable Christmas and New Year before we push on again in 2021!

NEIL SMYTH is a partner at Mills & Reeve and is the editor of *RECOVERY*.

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Advertising features

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President's column

Colin Haig explores R3's successes after a tough year for the entire world.

Since the last issue of *RECOVERY*, the circumstances in which we do business have continued to change rapidly. While the volume of new insolvencies hasn't been what we might have expected in this kind of economic climate, the political and legal landscape has continued to alter as a result of government decisions, plans and responses to the Covid-19 pandemic.

As a result, R3 has never been busier. These issues have given us plenty of fuel for our discussions with stakeholders and our briefings with MPs, peers and journalists, as well as ensuring we have a number of updates to provide about key changes in case law, best practice and legislation.

On top of this, we've returned to running regional events (and it was great to virtually catch up with everyone at those I attended). We've made huge inroads in laying the groundwork for the launch of the R3 Training Academy – our new learning and development offering. And we've run our first ever virtual conference in the form of SPG Week. I hope those of you who attended enjoyed it – I certainly did.

> Given the key role HMRC plays in insolvencies, we'd welcome them adopting a constructive approach to sensible, well-structured restructuring proposals.

Changing measures

One of the bigger changes that occurred since June was the government's decision in late September to temporarily extend some of its Covid-19 insolvency measures and introduce new support for businesses.

These will be welcome, but while the extended insolvency measures are in place, the government needs to address how it will manage increasing levels of corporate debt and whether HMRC will provide any further flexibility to Covid-hit businesses.

Given the key role HMRC plays in insolvencies, we'd welcome them adopting a constructive approach to sensible, well-structured restructuring proposals, as their support at this time is and will continue to be very significant.

Evolving offerings

Earlier in this piece I mentioned our Training Academy – R3's new learning and development offering, which will provide online courses, webinars, certifications, and, when we're allowed, the face-to-face training courses we provided pre-pandemic.

We're looking to launch this in January and hope it will build on and complement the R3 training courses that have been the bedrock of many insolvency and restructuring professionals' career development over the last 30 years.

I hope our Training Academy will become the go-to place for insolvency and restructuring professionals looking to learn and grow – and for firms looking to develop their staff. Look out for our Virtual Training Festival in January, where we'll be offering free access to a number of our new online courses as part of the Training Academy's launch.

Helping the UK get back to business

Our work on our Back to Business UK campaign – a programme designed to improve understanding of the profession and encourage directors and consumers to seek early advice – has continued.

Alison Goldthorp, the co-chair of R3's Back to Business UK Committee, presented at CCR magazine's virtual conference about the restructuring options for distressed companies, and how credit and collections professionals can support them.

We have also launched a new CVA standard form, which we hope will make it easier for small businesses affected by the Covid-19 pandemic to enter a CVA. While this form isn't intended to be a template or panacea, we hope it will provide a foundation for directors' proposals and, by doing so, enable more small businesses to benefit from CVAs.

I'm also delighted to be able to tell you we're set to partner with both the Federation of Small Businesses and the Institute of Directors to run a number of webinars looking at how the profession can help distressed businesses and emphasising the importance of seeking early advice. These webinars will be promoted to both organisations' members and will, we hope, improve understanding of the profession among directors of small and larger businesses, and encourage them to engage with us as soon as they see signs their business is struggling.

A huge thank you to all those who have supported the campaign so far – especially Alison Goldthorp, Paul Zalkin, Mark Phillips QC – and Stewart Perry and the General Technical Committee (GTC), who developed the CVA standard form.

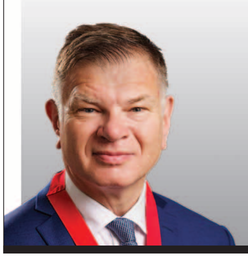
> We're set to run a number of webinars looking at how the profession can help distressed businesses and emphasising the importance of seeking early advice.

Remembering our achievements

This coming year marks R3's 30th anniversary. Although the time leading up to it hasn't been anything like we would have expected, I think we can be proud of what we've achieved: the introduction of our member webinar programme; the series of online regional meetings and the delivery of our first virtual conference; the 26 mentions of the profession's concerns about the return of Crown preference during parliamentary debates; the briefings we've given to top-tier national and trade journalists about the profession and its work; our regular updates and insights into the rapidly changing policy, professional and legislative landscape; and the fact that our Press, Policy and Public Affairs Team won In-House Team of the Year at the PRMoment Awards.

This year has been a strange one, but it's also been a bumper one. And there's a lot in it we can be proud of, as we can be proud of the previous years before it.

If our paths don't cross before the festive season starts, have a good one. See you in the new year.



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Breaking new ground for adjudication

Digby Hebbard and **Oliver Tobin** explore the changes in the construction and adjudication landscape for companies facing insolvency.

Given the historical prevalence of insolvencies in the UK construction sector, IPs will inevitably have been involved with construction companies. Construction insolvencies could, however, be more complicated than for other sectors because parties to construction contracts are subject to a unique form of dispute resolution, namely, adjudication.

Introduced under the Housing Grants, Construction and Regeneration Act 1996, adjudication is essentially a desktop exercise whereby an independent 'industry professional' adjudicator considers submissions and normally determines a dispute 'on the papers' within four to six weeks. Prior to this, construction companies would regularly fall into insolvency because cash due was withheld pending resolution of 'upstream' claims and the companies could not continue to trade long enough for the dispute resolution process, such as arbitration, to be completed.

Therefore, a key driver for the introduction of adjudication was to create a regime whereby disputes were resolved quickly such that cash would continue to flow through the supply chain. Adjudication was, in principle, an effective tool for IPs to utilise.

Adjudication is limited to disputes arising under construction contracts. Adjudication is also cost-neutral because the adjudicator does not usually have the power to award costs due to be paid. Adjudicators' decisions are temporarily binding, so if a party believes the adjudicator made the wrong decision at law, they are permitted to commence proceedings to open up and overturn the decision.

> "The insolvency and construction landscape has recently changed by virtue of the Supreme Court's decision of June this year in *Bresco*."

If a losing party does not comply with an adjudicator's decision to pay, the successful party can apply to the court to enforce the decision by way of summary judgment. In most cases, the courts will enforce an adjudicator's decisions unless an adjudicator has acted outside his/her jurisdiction and/or breached the fairness principles enshrined in the rules of natural justice.

Until recently, companies in liquidation were not permitted to refer disputes to adjudication because the courts held the adjudication and insolvency statutory regimes as incompatible. The insolvency and construction landscape has recently changed by virtue of the Supreme Court's decision of June this year in *Bresco Electrical Services Ltd (in liquidation)* v. *Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25.

This article summarises the key points from the judgment and the practical implications. Broadly, the scenario for construction companies remains complicated.

Bresco v. *Lonsdale*

Lonsdale, a building services contractor, sub-contracted works to Bresco. Bresco abandoned the works and entered liquidation in 2015. In 2017, Bresco and Lonsdale exchanged details of their respective claims. Bresco's liquidator had, like many other liquidators in such circumstances, engaged a third party to pursue the company's debts. In June 2018, Bresco commenced an adjudication against Lonsdale. Lonsdale immediately referred the matter to the High Court and the judge held that the adjudicator did not have jurisdiction to decide the dispute[1] and also granted a permanent injunction restraining the adjudication on the basis that it was futile to permit the adjudication to continue where the decision could not be enforced as a result of Bresco's insolvency. This was the manifestation of the incompatibility between the regimes.

> The Supreme Court did not accept that companies in liquidation should be excluded from a statutory right to adjudicate where cross-claims had been asserted by the responding party.

Bresco appealed. The Court of Appeal, relevantly, upheld the injunction[2] and reiterated the basic incompatibility between adjudication and insolvency because an adjudicator's decision in favour of the company in liquidation, where there was a cross-claim, was incapable of enforcement and therefore it was just and convenient to continue the injunction.

Bresco appealed again. The Supreme Court considered the purposes and characteristics of the statutory adjudication and insolvency regimes. The Supreme Court overturned the finding on the injunction.[3] The court's underlying reasoning was that the insolvency and adjudication regimes were not incompatible and it would be inappropriate for courts to interfere with the statutory right of insolvent companies to adjudicate.

As to jurisdiction, the Supreme Court did not accept that companies in liquidation should be excluded from a statutory right to adjudicate where cross-claims had been asserted by the responding party. The court determined that the underlying dispute under the construction contract is not replaced by a dispute in the insolvency.

A key part of the court's judgment was that, although it found that in such circumstances adjudicators will have jurisdiction and injunctions were inappropriate, these factors did not affect the courts' discretion when it came to deciding whether to enforce the adjudicator's decision. The material extract from the judgment is:

'Where there remains a real risk that the summary enforcement of an adjudication will deprive the respondent of its right to have recourse to the company's claim as security (pro tanto) for its cross-claim, then the court will be astute to refuse summary judgment.'

The Supreme Court indicated in this regard that enforcement could be subject to the liquidator providing undertakings such as ring-fencing any enforcement proceeds.

The Supreme Court's judgment appeared to pave the way for liquidators to pursue claims through adjudication, although how they would practically do so remained to be seen. We now have a fairly clear indication following a recent High Court decision in *John Doyle Construction (in liquidation) Ltd* v. *Erith Contractors Ltd* [2020] EWHC 2451 (TCC), which, in short, means that companies in liquidation seeking to enforce adjudicators' decisions have a high bar to overcome.

John Doyle v. *Erith*

Doyle was engaged by Erith to carry out landscaping works. Before completing the works, Doyle entered voluntary liquidation. Doyle's liquidator asserted that Doyle was due sums under the contract and also purported to assign its claim against Erith to a third party, who subsequently commenced an adjudication against Erith on Doyle's behalf. The adjudicator awarded Doyle c. £1.2m. Doyle commenced proceedings in the High Court seeking to enforce the adjudicator's decision.

The judge acknowledged the potential injustice where a company in liquidation obtains summary judgment and the money paid to it would not subsequently be available to be repaid, should it turn out that the adjudicator was wrong. The key elements necessary to justify summary judgment were:

1. the decision of the adjudicator would have to resolve all the different elements of the overall financial dispute between the parties;
2. mutual dealings on other contracts, or other defences, if they have not been taken into account by the adjudicator, will be taken into account by the court; and
3. there is no 'real risk' that summary enforcement of the adjudicator's decision would deprive the paying party of security for its cross-claim. The court's litmus test for adequate security was a safeguard to place the losing party (in the adjudication) in a similar position to the one which it would be in were the successful party to be solvent.

Here, the security proffered by Doyle (an alleged letter of credit and an after-the-event insurance policy) was found to be inadequate because such security would not place Erith in a similar position to that which it would occupy if Doyle were solvent. Accordingly, the court refused the claim for summary judgment.

> Companies in liquidation seeking to enforce adjudicators' decisions have a high bar to overcome.

Where to from here?

Bresco confirms companies in liquidation now have an unfettered right to refer their claims under construction contracts to adjudication. However, it is submitted that this is unlikely to lead to a flood of IPs exercising that right because, as *John Doyle* acknowledges, although it is in the public interest for liquidators to pursue such debts cost-effectively, an adjudicator's decision is of no benefit unless it can be enforced. In this regard, companies in liquidation will need to meet, and overcome, the high practical thresholds for enforcement set out in *John Doyle*.

Accordingly, IPs contemplating adjudication to recover debts will need to give careful consideration to matters such as the scope of the dispute between the parties and, in particular, any counter-claims that may be brought, and then, perhaps most critically, the level and forms of security that can be provided and whether that obligation renders as disproportionate bringing the claim in the first place.

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1 Because Bresco was in liquidation and Lonsdale had asserted cross-claims; and the dispute between the parties was not one under the underlying construction contract, but rather, a dispute under the Insolvency Rules for the net balance.
2 Overturned the High Court's finding on jurisdiction.
3 And upheld the Court of Appeal's finding on jurisdiction.

Legal Q&A

Emma Gateaud and **Chris Mo** provide answers to queries arising from a recent judgment on s236(3) of the Insolvency Act 1986.

Q I am the liquidator of a company and I am investigating the company's dealings. I am looking to obtain certain documents as part of my investigations, but the documents are in the hands of someone outside of England and Wales. Can I apply to the English court for an order, requiring that person overseas to deliver up the documents anyway?

A The short answer is no, unless that person is resident in the EU. The position was recently confirmed in the High Court decision of *Re Akkurate Ltd (in liquidation)* [2020] EWHC 1433 (Ch) (*Re Akkurate*).

Under s236(3) of the Insolvency Act 1986 (IA86), the court can require specified persons to provide an account of their dealings with the company or any records relating to the company's business and affairs in their possession or control. Such persons include officers of the company and any person whom the court thinks capable of giving the relevant information.

> "Sir Geoffrey Vos (the chancellor) concluded that s236(3) must be interpreted as a purely domestic insolvency provision with no extraterritorial effect."

A key issue in *Re Akkurate* was whether s236(3) has extraterritorial effect. Having considered conflicting first instance decisions, Sir Geoffrey Vos (the chancellor) concluded that s236(3) must be interpreted as a purely domestic insolvency provision with no extraterritorial effect. The chancellor emphasised that he came to this conclusion based on a strict application of the doctrine of precedent and interpretation of statute. In particular, he was bound by the decision in *Re Tucker (a bankrupt)* [1990] Ch 148 (*Re Tucker*), where the court considered s25 of the Bankruptcy Act 1914, which contained substantially similar provisions to s236 of IA86 and resolved that they carried no extraterritorial effect. *Re Tucker* has been considered in the Court of Appeal and the House of Lords without disapproval and the chancellor saw no room for the lower courts to come to a different interpretation when IA86 deploys substantially the same wordings. The chancellor further observed that, though there may be compelling reasons for thinking s236 ought to have extraterritorial effect in the contemporary commercial environment, that does not alter the legal analysis unless and until the Supreme Court rules otherwise.

Q Given s236 is itself a purely domestic insolvency provision, can the English court make orders against EU resident parties for production of documents?

A The territorial scope of domestic insolvency provisions can be extended to the EU by Regulation (EU) 2015/848 on insolvency proceedings (for proceedings commenced on or after 26 June 2017) and its predecessor Council Regulation (EC) 1346/2000 (together, the European regulation). Under the European regulation, jurisdiction to open insolvency proceedings is conferred upon the court of the member state where the insolvent company's COMI is situated. That court then applies its domestic law to the insolvency and this jurisdiction is recognised by other EU member states.

In *Re Akkurate*, it was not in dispute that the insolvent company's COMI was in England. The chancellor noted that it is clear in EU case law that the jurisdiction conferred by the European regulation also includes the jurisdiction to hear and determine actions which derive directly from the insolvency proceedings and which are closely connected to them. It was held that proceedings under s236(3) derive directly from insolvency proceedings and are closely connected to them. It follows that the European regulation applies and confers extraterritorial jurisdiction on the English courts to order production of documents against EU resident parties. On this basis, a s236(3) order was made in *Re Akkurate* against two companies incorporated and operating in Italy.

Q How does the court exercise its discretion in scoping an order for production of documents under s236(3)?

A It is a balancing exercise between the reasonable requirement for liquidators to carry out their functions on the one hand, and the need to avoid oppression to the respondents on the other. A document request is not necessarily unreasonable simply because it would be inconvenient for the respondent, causes them a lot of work, exposes them to future claims or because the respondent is an outsider of the company. However, these are all relevant factors that the court will consider. In *Re Akkurate*, the chancellor redrafted the requested order by narrowing the categories of documents to be delivered up. The chancellor specifically took into consideration that the respondents were in Italy and that they were not company insiders.

Q What happens when the Brexit transition period comes to an end?

A When the transition period comes to an end at 11.00pm UK time on 31 December 2020, unless alternative arrangements are put in place with the EU, the UK will lose the benefit of the automatic recognition afforded to English insolvency proceedings in other EU member states under the European regulation – save for insolvency proceedings opened before 31 December 2020. Recognition of future English insolvency proceedings in the EU, including a s236(3) order for production of documents, will likely require applications to the courts of each country where recognition is sought. □

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Recent case summaries

The latest insolvency update from **Jamie Holmes**.

PERSONAL INSOLVENCY

***Yu* v. *Cowley* [2020] EWHC 2429 (Ch)**
Trustees in bankruptcy pursuant to bankruptcy proceedings in Hong Kong applied for recognition of the bankruptcy order in England under the 2006 Cross-Border Regulations. This was granted following a contested hearing on 8 January 2020, after the debtor was served with the application at his home in Hong Kong on 11 December 2019.

On an appeal permitted on only this single ground, Fancourt J held that the English court had power to retrospectively authorise service of the recognition application on the debtor outside of the jurisdiction. In other words, although it is necessary for an application to be made to the English court for a debtor to be served outside of the jurisdiction, that application need not be made prior to the debtor having in fact been so served.

Permission to appeal had been refused as to whether the judge below had properly exercised their discretion to grant such retrospective permission and so this was not considered on the appeal. However, it was suggested that this discretion is 'likely' to be exercised where (a) the applicant can show sufficient reason why no application was made in advance and (b) the debtor and all others (as relevant) receive the documents in good time, and are able to act without detriment.

> Fancourt J held that the English court had power to retrospectively authorise service of the recognition application on the debtor outside of the jurisdiction.

Although one of a number of further points that the court did not need to decide in light of the above, the court noted that it would have held on the trustees' alternative submission that the debtor had in any event voluntarily submitted to the jurisdiction. The debtor had contested the hearing not merely on the basis that it should be dismissed due to the point as to service. Rather the debtor had sought an adjournment with directions for evidence, the principle purpose of which was to allow him to engage with the merits of the application (and not merely the service issue).

CORPORATE INSOLVENCY

***Fakhry* v. *Pagden* [2020] EWCA Civ 1207**
In 2015 three companies were, by majority votes, placed into members' voluntary liquidation and liquidators appointed. Final general meetings in 2016, again by majority, approved the liquidators' final account and the companies were dissolved. Minority shareholders had raised concerns prior to and at these latter meetings as to the management of some of the investments and asset transfers to associated companies. However, the liquidators were not persuaded they should take any steps as to these.

In 2018 some of the (former) minority shareholders successfully applied for the companies to be restored and for new liquidators to be appointed to investigate the concerns mentioned above. This application was made without notice to the former liquidators, or the other (former) shareholders.

The former liquidators and other shareholders applied to set that order aside and failed.

The Court of Appeal unanimously allowed an appeal: holding that no final decision should have been reached on the restoration of the companies, the appointment of liquidators or their proposed investigations without meetings of the companies' (former) members. It directed that such meetings should now be convened, with the matter then coming back before the court. In the meantime the present (new) liquidators were to remain in office.

The judgment highlights principally both (i) that where a company is solvent, decisions as to its liquidation (among other things) are a matter for its members voting by majority but that (ii) this general rule and starting point can be overstated.

Practical guidance was also given on a number of aspects of how such applications should be brought in future. First, any newly appointed liquidator should remain neutral, unless any grounds for their removal criticised them personally. Second, the other (former) shareholders had standing to oppose such an application. Third, as did the former liquidators, who must be joined to it and served.

> The Court of Appeal held that no final decision should have been reached on the restoration of the companies, the appointment of liquidators or their proposed investigations without meetings of the companies' (former) members.

Three further important features of this case to bear in mind are as follows, which might result in a different outcome in another case.

First, the former liquidators and members did not seek to contend at this stage that there were not matters worthy of investigation by the new liquidators, although the court gave guidance as to how such submissions might be advanced in another case.

Second, the majority had passed the earlier resolutions without most having been aware of the minority's concerns. As such, on the facts of this case, it could not be said that the majority had dismissed the minority's concerns with informed consent, so as to preclude the minority from now seeking to raise these.

Third, because the point had not been taken before the judge at first instance, the Court of Appeal would not itself decide whether the minority should have pursued other forms of relief prior to the dissolution, such that they should now be precluded from their present course. □

JAMIE HOLMES is a barrister at Wilberforce Chambers.

R3 ACHIEVEMENTS 2020

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30 years of representing the profession

Jo Tacon speaks to three decades of R3 presidents to find out how one meeting in 1989 paved the way for an association that would go on to be one of the loudest advocates for the insolvency and restructuring profession.

Any visitor (pre-lockdown) to R3's office on Aldersgate Street, a stone's throw from the Barbican in the City of London, will be familiar with the 'wall of fame' in the main meeting room – framed photographs of all of R3's past presidents dating back to 1990, when it was founded as the Society of Practitioners of Insolvency (SPI). The first SPI presidents had a lot to deal with, from the early 1990s recession to scrutiny of the fledgling profession in the wake of a string of big-name insolvencies, from BCCI to the Maxwell empire.

To mark the 30th anniversary of SPI/R3's founding, *RECOVERY* spoke to numerous past presidents to find out about the history of the organisation, their year in office and what being president meant to them, personally and professionally.

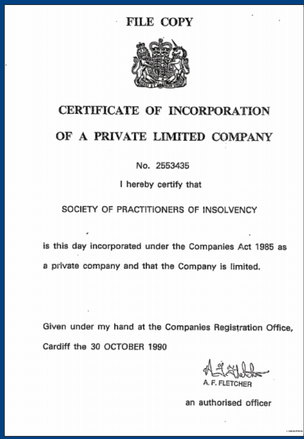
The genesis of SPI

The Society of Practitioners of Insolvency came into being as an official entity on 30 October 1990, with Stephen Adamson, Roy Adkins, Ian Bond and Richard Turton named as its directors, Nick Milner as company secretary, and John Verrill and Bruce Manford signing the statutory declaration of registration.

Ian Bond was SPI's first president, as well as one of its founding directors, spending around 15 months in office, from late 1990 until early 1992. 'SPI's founding goes back to the Insolvency Act 1986, which brought in licensing and exams for IPs. Six separate bodies of accountants and lawyers, plus the Insolvency Practitioners Association and the government's Insolvency Service, were authorised to issue licenses,' recalls Ian.

'Of the 2,000-odd licenses issued, the overwhelming majority were ICAEW and IPA. Probably less than 1% of the members of the accountancy and legal bodies were interested in insolvency. Thus these separate bodies had little incentive to provide comprehensive insolvency training for their members. The IPA had developed a training programme for its members and students but the other bodies were understandably reluctant to delegate responsibility to the IPA for training and general representation of the insolvency profession. It therefore seemed sensible to develop a separate independent body to take over these roles. After a few months of discussions, the ICAEW and the IPA agreed to form SPI with the hope (eventually realised) that all the other licensing bodies would in due course support it.'

Mark Homan, president in 1993–1994, adds that it made sense to set up a single organisation to represent the insolvency community. 'With such a small profession, key resources to make the professional framework function effectively were stretched and some of us could see that duplication and rivalry would not be in the profession's best interests,' says Mark.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CERTIFICATE OF INCORPORATION

OF A PRIVATE LIMITED COMPANY

No. 2553435

I hereby certify that

SOCIETY OF PRACTITIONERS OF INSOLVENCY

is this day incorporated under the Companies Act 1985 as a private company and that the Company is limited.

Given under my hand at the Companies Registration Office, Cardiff the 30 OCTOBER 1990

A. F. FLETCHER

an authorised officer


Ian Bond 1990–1992


Nigel Hamilton 1992–1993


Mark Homan 1993–1994


Ian Bradbery 1994–1995

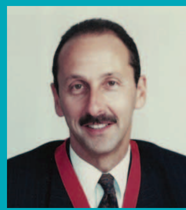

Allan Griffiths 1995


Colin Bird 1995–1996


Gordon Stewart 1996–1997


Brendan Guilfoyle 1997–1998


Murdoch McKillop 1998–1999


Alan Bloom 1999–2000


Stephen Gale 2000–2001


Roger Oldfield 2001–2002


David Buchler 2002–2003


John Verrill 2003–2004


Gareth Hughes 2004–2005


Ron Robinson 2005–2006

Editor recovery@r3.org.uk


Tony Supperstone 2006–2007


Patricia Godfrey 2007–2008


Nick O'Reilly 2008–2009


Peter Sargent 2009–2010


Steven Law 2010–2011


Frances Coulson 2011–2012


Lee Manning 2012–2013


Liz Bingham 2013–2014


Giles Frampton 2014–2015


Phillip Sykes 2015–2016


Andrew Tate 2016–2017


Adrian Hyde 2017–2018


Stuart Frith 2018–2019


Duncan Swift 2019–2020


Colin Haig 2020–2021

“R3 had played an important role in my personal and professional development and to be elected as president gave me a real sense of achievement.”


Liz Bingham (President 2013–2014; R3's current CEO)

“Our first general secretary (an ex-army man) went back to Bosnia “for a more peaceful life”!”


Mark Homan (President 1993–1994)

“Being president was the pinnacle of my professional career and no-one can take that away from me.”


Steven Law (President 2010–2011)

“Being R3 president was a great honour and a privilege for me at a time when I was perhaps closer to the end of my career than the beginning! The association has been an integral part of my professional life, from when I attended the first SPI conference in my home town of Harrogate in 1990 right up to the present day.”


Stuart Frith (President 2018–2019)

The government was also keen to 'deal with a profession speaking with one voice,' he adds. Ian Bond notes that the Insolvency Service's inspector general, Peter Joyce, 'was very engaged'. Representing the breadth of the profession was vital, says John Verrill (president 2003–2004): 'It was especially important that smaller firms could have a form of representation, not just the bigger firms with more resources.'

The genesis of SPI came about in Vancouver, Canada, of all places, at an INSOL conference in 1989, when key players came together and agreed to transfer all insolvency activities (except for licensing and discipline) to a new body. Mark says: 'A draft constitution was hammered out in a series of side-bar meetings during the conference, each version typed up by an increasingly harassed secretary in Price Waterhouse's Vancouver office. It was very much a group effort.'

SPI launched with a bang, with a party held at the Howard Hotel in London, attended by 'the great and the good', including John Redwood, who was then minister for insolvency at the Department of Trade and Industry (DTI), Ian Bond recalls. In its early days, the newly-formed organisation shared an office on Long Lane near Covent Garden in London with the IPA – Ian was concurrently president of the IPA – although SPI soon moved into its own office. The young association required a lot of work to get off the ground in its early years. Mark says: 'Our first general secretary (an ex-army man) went back to Bosnia "for a more peaceful life"!'

Ian observes that the first year was 'touch and go': 'We got a bit of cash from the Institute and the IPA to set up SPI, but the finances were a concern at first and we needed to sell lots of courses. Thanks to a marketing campaign, it took off.' He spent a lot of his year-plus as president on the road (or in the air). 'As well as attending all the regional group meetings in England and Wales, I also spent time in Edinburgh, Belfast and Dublin to try to cement relationships with their accountancy bodies and attend some of their seminars,' says Ian. 'In addition, I was able to promote SPI at conferences in New York, Calgary, the Algarve and Moscow, and we also had a successful first SPI annual conference in Garmisch-Partenkirchen in Bavaria.'

A highlight of Ian's presidency was the first annual dinner at Guildhall with 700 guests, where he gave a speech from the top table, 'where every prime minister and every lord mayor of London has done the same thing for very many years'.

SPI rapidly gained momentum, with a strong demand for its courses and events, and playing a key role in representing the profession to the government. Mark says: 'The new structure enabled us to react [speedily] to developments in the Paramount Airways case, and make representations to government about the financial exposure that practitioners were subjected to by ill-thought-through statutory drafting.'

"Together with R3's Council [and staff], you really can make a difference to positively influence the policy framework and to promote better understanding of the work that we perform, how we perform it and its benefits."

Duncan Swift
(President 2019–2020)

"Having the opportunity to meet smaller practitioners and understand the needs of the profession as a whole was very valuable to me. I really enjoyed the unique insight I got from being president."

Patricia Godfrey
(President 2007–2008)

"I met all sorts of interesting people: journalists, MPs, policy makers, politicians and, of course, fellow insolvency professionals – it was all very illuminating, and you could see that people would listen to you because of your role."

Giles Frampton
(President 2014–2015)

After ten years as SPI, in Alan Bloom (president 1999–2000)'s year in office, the organisation's name was changed to R3, following its first-ever strategic review. After some initial teething troubles, it all worked out. He explains: 'We decided that we needed to look beyond insolvency to take on the fact that companies were being restructured outside formal processes. Steve Gale (president, 2000–2001) and I went on a road trip to explain the change to members and it received a mixed response, to say the least. At the Yorkshire meeting, Steve suggested he take the lead on the presentation, as, being from Yorkshire, they were "his" people – they nearly ran us out of town! We joked about that for years.'

Promoting and defending the profession

Many of the past presidents who spoke to *RECOVERY* talked of how the organisation had put them at the heart of discussions about the future direction of insolvency and restructuring – from the days of SPI, all the way to R3's recent campaign against secondary preferential status for HMRC.

Ian Bond says that parliamentary engagement could sometimes be tricky, as 'ministers didn't tend to last very long with the brief; virtually every nine months or so we would get a new minister'. However, building a strong relationship with a sympathetic MP paid dividends. 'There was an MP for Tynemouth, Neville Trotter, who was a chartered accountant and an insolvency guy; we used to meet him regularly and he put us in touch with other MPs and ministers,' adds Ian.

Gordon Stewart, president in 1996–1997, also underlines SPI's unique position in the profession as an interface with the government of the day: 'My first challenge came almost immediately at my first council meeting as president. We had settled a new version of SIP 9 (on IP remuneration) and the Insolvency Service told us on the afternoon before the meeting that they didn't much like it. What to do? My recommendation to the council was that the profession was self-regulating and, if that meant anything, we had to have the courage of our convictions. But we were not insensitive to the views of the Insolvency Service and I said I would make an appointment to go and see its head, Peter Joyce, to explain what we were doing and why. That seemed only the polite and courteous thing to do. We agreed to differ but Peter was a gentleman about it.'

At times, SPI's, and then later R3's, influence has proved vital in forestalling unworkable legislation. Roger Oldfield (president 2001–2002) says that R3 was instrumental in setting the timetable for administrations in the Enterprise Act 2002 as 12 months before an extension was needed, rather than the three months that the Insolvency Service had initially drafted: 'At our final meeting in the Department of Trade's office in Victoria Street I spoke very forcibly of the idealism of the DTI and [how] it was impractical for virtually all administrations other than pre-packs to be completed in three months. With the vocal support of Mark Andrews, representing insolvency lawyers, the British Banking Association and the association representing asset-based lenders, the Insolvency Service backed off and the 12 months went into the Act, not three months.'

Steven Law (president 2010–2011) mentions R3's work to defend the profession from criticism over supposedly 'unjust' fee levels, following a market study by the Office of Fair Trading (OFT), which led to a spate of negative media headlines. 'In fact, the OFT, in presenting the survey, stated that fees were not found to be too high. R3 led the case for greater engagement with unsecured creditors, pointing to the profession's success in rescuing businesses and saving jobs. Vince Cable, the business secretary, called for a consultation and R3 submitted a robust and positive defence of the value of the work carried out by IPs,' he explains.

The amendments to the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 put forward by Lord Justice Jackson contained a bombshell for the profession: sections 44 and 46 were inserted into the Act, and banned the recovery of success fees in conditional fee agreements and after-the-event insurance premiums for winning parties, meaning that an office-holder's ability to pursue cases of wrongdoing by directors was hampered by the reforms. R3 led the charge against 'Jackson', and managed to obtain a two-year exemption for the profession.

Frances Coulson (president 2011–2012) was heavily involved in the Jackson campaign: 'Thanks to R3's work, we were able to speak to many influential people on this topic. A particular highlight for me was being directly involved in changing the mind of Lord Mackay, a towering legal figure who was Lord Chancellor early in my career, on the need for an exemption for the insolvency profession. He started out strongly opposed to the idea, but in the end was one of the cross-bench group of Lords who signed the exemption into law, which is something of which I am very proud. It's a good example of the value of R3, giving us two years' grace.'

The bridge between government and profession

Working closely with the Insolvency Service is a running theme in SPI/R3's history, and the close ties between the two organisations have allowed the profession to put its point across and to be listened to – a dialogue that continues to the present day. Andrew Tate (president 2016–2017) says: 'There were a number of notable events during my period as president. On the negative side, the Insolvency Service announced without warning that it was going to keep more work in-house and was changing the fee structure for the Official Receiver's work. This was immensely disappointing and caused great upset among members. There was a huge amount of work to deal with this. On the positive side, the Service announced a consultation on the new measures including the moratorium, which was hugely exciting. The team at R3 rallied around on both counts and were a fantastic support to me, getting feedback from the membership, preparing briefing papers and helping prepare me personally for important meetings.'

Liaising with other bodies is another integral component of the post, as Lee Manning (president 2013–2014) illustrates: 'The interaction between R3 and the Pension Protection Fund regarding its approach to supporting the restructuring of underfunded defined benefit schemes and improved engagement with the profession, as well as the approach of the British Property Federation towards retail CVAs, both set the tone for a better understanding of the positions adopted by the respective parties. I believe this has led to a more "user friendly" and constructive approach to restructurings where pension liabilities or landlords are asked to accept a compromise.'

Giles Frampton (president 2014–2015) adds: 'I met all sorts of interesting people: journalists, MPs, policy makers, politicians and, of course, fellow insolvency professionals – it was all very illuminating, and you could see that people would listen to you because of your role.'

Duncan Swift, R3's immediate past president, concludes: 'It was realising that R3 is the only organisation that truly represents, protects and promotes our profession that spurred me to aspire to the role [of president]. Together with R3's Council [and staff], you really can make a difference to positively influence the policy framework and to promote better understanding of the work that we perform, how we perform it and its benefits.'

Along with lobbying, working with the media to promote understanding of the profession's work and balancing negative coverage is another long-running part of the president's job. Ian Bond says: 'When the Maxwell problems became big news, I was wheeled out to talk about how liquidation works, what an administrator is and so on, so SPI got quite a lot of publicity from that.'

Adrian Hyde (president 2017–2018) also dealt with the fall-out from a major case: 'During my year in office, Carillion collapsed, which was a very notable event; it resulted in a lot of press interest, including a brief TV interview on BBC News. R3 were excellent at co-ordinating the calls with journalists, making all the arrangements, and ensuring that I was fully briefed.'

The media's scrutiny of the profession unfortunately sometimes tips into unbalanced coverage. Gordon Stewart had to deal with hostile journalists from the investigative TV programme *Dispatches* turning up at the 1996 conference in Malaga: '[The *Dispatches* journalists] were looking into the shady and unregulated world of debt managers without drawing a distinction between those cowboys and our regulated profession. As it happened, I had organised as a speaker someone who advised on hostile media and so we retained him to help deal with them. On advice, I refused to be interviewed in Malaga but I did offer to sit down with them in London. The interview was two hours of short-pitched, hostile bowling, which was intense, but I felt comfortable I had remembered where my off-stump was throughout.' Luckily, nothing further came from the programme, despite his footage being 'twisted' as part of an attempted 'hatchet job': 'In that context we were pleased we had done the best that could be done.'

John Redwood MP (left) and Ian Bond at the launch of SPI in 1990.

Patricia Godfrey (president 2007–2008) also had an eventful year, thanks to the start of the global financial crisis: 'At times when the profession gets really busy, as it is now, the spotlight is on us. The media has a knack for spinning isolated incidents in less positive directions, while ignoring the good work that is being done. I went on the *Today* programme on Radio 4 to talk about retail collapses; having listened to John Humphrys many times, it was quite daunting! You don't realise that you will only get to give a very short snapshot of what you want to.'

Peter Sargent (president 2009–2010)'s year was likewise coloured by the fallout from the credit crunch and subsequent recession: '[It was] a time when if you couldn't get money from a cashpoint machine it wasn't you who didn't have any money, but the bank who was a bit short of cash. With the brilliant help of the PR & Comms team I spent plenty of time talking to the media in print, on the radio and on TV. I felt very privileged and lucky to be president at a time when insolvency, turnaround, rescue, whatever you call it, was centre of attention.'

Nick O'Reilly (president 2008–2009) had to deal with the fallout of the Lehman Brothers collapse: 'R3 provided press content and MP briefings so that people understood the great work our members carried out in difficult circumstances.'

Frances Coulson was frequently on various TV and radio programmes, though she was 'somewhat disappointed to find the BBC didn't do hair and makeup, unlike Sky!'

Events, courses, conferences, and community

A key underpinning of an area of practice as specialist as insolvency and restructuring is sharing knowledge in order to get the best possible outcomes, and this has always been a vital part of SPI/R3's roles within the wider profession. Alan Bloom observes: 'It is virtually unknown outside insolvency and restructuring for accountants to get together across firms and share ideas – you'd never get tax partners doing it, for example. Insolvency and restructuring professionals have always taken the view that a positive outcome is the most important thing, so learning from each other at every level is very important; obviously we compete, but not on the technical side. SPI and, later, R3 has always been at the heart of creating an environment of sharing.'

SPI/R3's educational offering developed as the profession matured. Mark Homan says: 'When I started to specialise in 1971 much was un-codified. It was the efforts of people like Bill Mackie, Ian Bond, Monty Eckman, Roy Adkins, Ian Watt, Nigel Hamilton, Gerry Weiss and many others involved with the Cork Report and the introduction, through the 1986 Act, of administrations, exams, licencing and SPI's quality training and technical programme that changed all that. I believe we created the foundations of a true profession.'

The annual conference is a fixture in the profession's calendar, and many presidents wax lyrical about the opportunity it presents to build bonds with peers. Alan Bloom says: 'Through SPI I started making professional friends, who became friends for life. SPI was a family, really, and having a three-day conference with a couple of days either side helped strengthen bonds.'

> During my period of presidency the joy of meeting so many new people and travelling to different districts and appointments was beyond what I imagined. In a small profession the ability to make so many friends has been incredibly rewarding.

David Buchler
(President 2002–2003)

> I had been involved in R3 and SPI since 1991 and I always thought I was a good representative of what the IP on the street was feeling. I wanted the chance to represent their views and was lucky enough to be chosen as president.

Nick O'Reilly
(President 2008–2009)

> A particular highlight for me was being directly involved in changing the mind of Lord Mackay, a towering legal figure who was Lord Chancellor early in my career, on the need for an exemption for the insolvency profession.

Frances Coulson
(President 2011–2012)

Alan's annual conference in Killarney, Co Kerry, was certainly memorable for all who attended: 'The main thing anyone remembers from that conference is the boat trip on a nearby lake for the partners and spouses of the conference attendees, who set off in good weather and high spirits, only for a sudden storm to appear. The boat was rocking all over the place and people felt very unwell, while their partners were sitting obliviously in a nice dry room listening to a conference session. They all took it in their stride, luckily.'

Giles Frampton also had a memorable experience at 'his' conference in Vilamoura in 2014: 'In the opening session I compèred a debate about the UK's place in Europe between [journalist and pro-EU commentator] Bill Keegan and [former chancellor and noted Brexiteer] Nigel Lawson, which was both entertaining and interesting, and a privilege to have taken part in. As I was walking him to his taxi afterwards, Nigel said that while there was of course no prospect of the UK leaving the European Union, you never knew! This was almost a year before the fateful referendum promise appeared in David Cameron's 2015 election manifesto.'

Being president means being in the spotlight, which can be a double-edged sword, as Gareth Hughes (president in 2004–2005) remembers: 'I still recall the Rt Hon William Hague and Digby Jones making fun of me at the Annual Conference when my slide presentation all went wrong, and Jack Dee thanking me for what he thought was a pretty awful introduction to the Annual Dinner!'

Representing the profession

Being SPI or R3 president was a career highlight for many holders of the office, despite the demands of the role – and of holding down a 'day job' at the same time. John Verrill observes: 'I was happy and privileged to become president, and during my year I held my own in terms of my contribution to my firm – it was demanding but rewarding. If you're looking for a quiet life you don't stick your head above the parapet and volunteer for positions like president of R3!'

Murdoch McKillop (president in 1998–1999) somehow managed to fulfil his duties while mainly being based in south-east Asia for the year: 'While for others to judge, I believe I discharged my responsibilities properly but it did require a great deal of planning and help.'

In the pre-Zoom days, remote communications could be tricky. Murdoch says: 'There was some sort of meeting I could not make so Steve Gale, who was deputy vice president, arranged for me to go into the Herbert Smith office in Hong Kong to use their video arrangements. It was still pretty basic then. The general consensus was that I was actually in a space station thanks to the jerky movements!'

Presidents get to see the breadth of the profession, which many find invaluable. Patricia Godfrey says: 'One thing I really liked about the role was getting out of London, getting to know the regions and Scotland, Wales, and Northern Ireland, meeting people and understanding the dynamics in their areas. Most of what I did was very corporate-focused, so having the opportunity to meet smaller practitioners and understand the needs of the profession as a whole was very valuable to me. I really enjoyed the unique insight I got from being president.'

David Buchler (president in 2002–2003) concurs: 'During my period of presidency the joy of meeting so many new people and travelling to different districts and appointments was beyond what I imagined. In a small profession the ability to make so many friends has been incredibly rewarding.'

The bird's eye view of the issues facing the profession is noted too by Phillip Sykes (president 2015–2016): 'I think the thing I most appreciated as president was the opportunity to meet colleagues all across the country and get a deeper understanding of the challenges facing the profession. At the same time, I was also massively impressed by the professionalism and dedication of the team at R3 and the work they put in to represent the profession and ensure that our concerns are properly reflected to government and RPBs.'

Being president comes with some privileges, as Tony Supperstone (president 2006–2007) relates: 'Probably my proudest moment was at the ceremony for JIEB students. Magically, in just the year that I was R3 president, my oldest son passed his exams and so I was able to present him with his certificate. Normally the inspector general of the DTI would have presented them but I was allowed to break with tradition for this special occasion.'

From 1990 to 2020

With the challenges brought on by the pandemic, R3 still has an indispensable role to play in bringing the profession together. As Duncan Swift says: 'The pandemic's economic waves only further underline the importance of R3 to represent, protect and promote our profession and to demonstrate the benefits of the work that we perform.'

With all that has happened this year alone, and with Brexit on the near horizon, there is certainly enough to keep R3's current president, Colin Haig, and his immediate successors (Christina Fitzgerald and Nicky Fisher) on their toes. ◻

JO TACON is communications officer at R3.

Changing times, evolving approaches, same values

Liz Bingham reflects on 30 years with an organisation that continues to evolve.

I must admit, when I walked through the door of the Café Royal for my first R3 course in 1992, I didn't think it would lead me down a path that resulted in being the CEO of the organisation as it celebrates its 30th anniversary.

I suppose, in part, I have the late Stephen Adamson to thank for that. Stephen will be known to many readers as one of the people who helped found R3 and a leading figure in the profession. He was also head of practice at Arthur Young McLelland Moores & Co (now EY) and he believed that getting involved with R3 would be good for me developmentally, and encouraged me to find ways I could do it.

I took his advice. I was one of the 'founding witches' who set up the Ladies' Lunch. I sat on the Membership and Member Services Committee (as it was then). I attended conferences, courses and networking events. I became a council member, deputy vice president, vice president and then president. And then I became CEO at the start of this year.

> We became a broader church – one that supported the entire breadth of the insolvency and restructuring profession.

In that time, I saw the profession change and grow. Rescue and consensual restructuring became a greater part of what we did and continue to do. More boutique firms entered a market that was previously dominated by what was the Big 8 and the Tier A firms. Our work became more complex and more international – and more closely scrutinised as the profession grew in number and in profile, and as the scale of our work increased.

Supporting an entire profession

R3 evolved as well. We became a broader church – one that supported the entire breadth of the insolvency and restructuring profession. We became a force for campaigning – whether that was against the LASPO Act, our campaign on the football creditors' rule, or our most recent efforts to prevent the reintroduction of Crown preference. And we became much more member-centric – thinking about how what we said was received and remembered, and thinking about what we did through our members' eyes to ensure we supported the profession as best as we possibly could.

But we never strayed from our roots. Excellent technical content was, is and will always be at the heart of R3. So will our events, though we are likely to have to hold more of them virtually – at least for a while. Our lobbying and representation work to educate stakeholders, journalists and parliamentarians about the profession and how it helps people, businesses and the economy was, is and will continue to be a core part of what we do and how we support the profession.

I think it's clear that the profession will change in future. Those of us who have been a part of it for the last 30 years will move on, which is why the next generation of professionals are such an important focus for R3 as they are the lifeblood of the profession and will be the industry leaders of the future. The Covid-19 pandemic will change how the profession operates – whether that's through virtual meetings becoming commonplace, the development of new ways of working, or new legislation that's introduced by government. And the continued rise of AI will make completing certain tasks more efficient than they have been historically.

And as the profession evolves, so will R3. We've come so far and achieved so much in the last three decades, but there's still more we can and will do.

In the future, I'd like R3 to be recognised as the insolvency and restructuring equivalent of the IoD. Some may see us as having that role and recognition already; I'd like more.

Members that make it work

The breadth and depth of our membership – and the quality of insight and opinion we get from it – give us the kind of credibility when we talk to parliamentarians, business bodies and journalists that not a lot of other organisations have. The members who attend meetings with those stakeholders can always demonstrate how the profession helps people, businesses and the economy, and how it is a critical part of the business lifecycle in the UK.

Alongside that recognition from government, business and industry, I'd like membership of R3 to be seen as a key part of someone's personal brand – what makes them so good at what they do – and as valued by bosses and colleagues throughout the entire profession as it was at my firm when I was first encouraged to become involved with the association.

> You've made us what we are today. And whatever form the future takes, you'll help us get to where we want to be.

That will require some work on our part and it's already underway. We're evolving our approach to member communications, building on the success of our virtual events and webinars from this year, and launching a new learning and development offering in the form of our Training Academy in early 2021. We'll continue to produce top-quality technical content, promote and defend the profession with government, the media and industry, and, when conditions permit, return to running the events and networking opportunities we've become renowned for.

R3 has evolved enormously since the days when it was first founded. It will continue to do so as the world in which we and our members work changes. We welcome any thoughts and ideas from you about how we can keep evolving. You've made us what we are today. And whatever form the future takes, you'll help us get to where we want to be.

LIZ BINGHAM is the chief executive officer of R3.

A conversation with the founder members

Matt Jukes speaks to R3 members about the association's 'pearl' anniversary, and their thoughts on three decades of work while part of R3.

The pandemic may be making it a busy and stressful time for insolvency practitioners, but it is worth taking a moment to appreciate just how different the world is today from when the Society of Practitioners of Insolvency (SPI) was first conceived in 1989 and registered in 1990. Border guards at the Berlin Wall had first allowed people to cross unchallenged in 1989, heralding the structure's fall the following year; Tim Berners-Lee (now a Sir) spent a good deal of 1989–1990 trying to persuade his colleagues at CERN that a global hypertext system he dubbed the 'world wide web' would be a good idea; and, at the end of 1990, French and British tunnel workers came face to face under the English channel, marking the first land connection between mainland Europe and the UK.

Each of these events doubtless had knock-on impacts on how R3, the profession and the world would work in the coming years, perhaps even how it would handle some of the landmark insolvency cases that you can read about in Chris Laughton's retrospective of the last 30 years on page 22. The thing that has remained the same since the SPI was first founded (see page 14) has been its core mission – to represent the profession to the wider community and, at its very heart, to serve its members.

> The 1986 Act allowed real regulation to improve the insolvency profession from what many regarded as a "wild west" show.

David Buchler

It is one of the great honours of *RECOVERY* to have had members of the profession share their unique expertise over the years, whether on the front lines of insolvency litigation, corporate or personal insolvency work, or tackling issues that affect the profession as a whole. For this 30th anniversary edition, we asked three professionals who have been part of the association for the last three decades to share their insights on being part of R3, their most memorable or perspective-changing cases and their expectations for the future of the profession.

On joining R3

David Buchler, chairman of Buchler Phillips and former R3 president, recalls the atmosphere and the first drive to join R3:

'When I became an insolvency practitioner in the 1970s, there was no real compliance or regulation throughout the profession, and insolvency was full of contradictions and anomalies. The 1986 Act allowed real regulation to improve the insolvency profession from what many regarded as a "wild west" show and, while there were a number of regulators appointed, all the regulators got together to ensure the appointment of R3, not as a regulator, but as the trade association for the entire community of the UK's insolvency and restructuring professionals,' he says.

In fact, this sense of the wild west being tamed by the Insolvency Act is something that has been echoed throughout the years whenever *RECOVERY* has interviewed founder members about their life in the profession. Many speak of it as somewhat of a

Editor recovery@r3.org.uk

watershed moment, where the old world of a frontier town had finally achieved legitimacy in the eyes of centralised government.

While it was always going to be a difficult ask of members to recall the exact circumstances that drew them to join a fledgling membership organisation 30 years ago, for many 'newly minted' professionals, the opportunity to network and learn was invaluable. Mark Sands, managing director at Quantuma, started his networking experiences with R3.

'I was a very young, early sitter of the JIEB exams – I passed in 1991 and sat it when I was only 24, so it is likely that I joined SPI as a JIEB qualified member of the profession, although I did not obtain my licence or take appointments for many years after that,' recalls Mark. 'I remember attending local regional events and that provided me with my first opportunity to network and make contacts – other than when I attended meetings of creditors, which in those days were always held at 11.00 or 11.30 am and followed by a pint in the bar of whatever hotel they were usually held in!'

"I remember attending local regional events and that provided me with my first opportunity to network and make contacts."

Mark Sands

The R3 Annual Conference has become a focal point for networking in the profession. While trade bodies the world over provide such opportunities, the size of the UK profession, combined with the commonality of regulation and a professional ideals or 'a professional ideal', means that it provides an opportunity not afforded to many other sectors. Louise Brittain, a partner at Azets, explains:

'The R3 conferences were the best opportunity to do a lot of networking in a short space of time and get together as a profession,' she says. 'As a profession we are lucky in that generally we get along with each other and enjoy each other's company. I think when you spend your working life crisis-managing everyone else's crises, you really value and enjoy the opportunity to interact as a profession.'

The work

There are some cases, such as the fall of global financial giant Lehman Brothers, that create enough work to draw the entire profession into their orbit. While you can read about some of these in this edition of the publication, we asked R3's founder members which cases stood out most to them over the last three decades.

'I have been lucky enough to work on a lot of high-profile cases but the few that stand out the most are the MPs Jonathan Aitken and Neil Hamilton, the celebrity Kerry Katona, Adam Faith and footballer Bruce Grobbelaar – plus a lot of great complex frauds involving a lot of very interesting characters. It's never been dull!' says Louise.

Mark Sands, who specialises in personal insolvency, has a different perspective.

'In the world of personal insolvency, it has to be *Hill* v. *Haines* – a case that to this day I strive to pick away at and find ways around it or to differentiate cases from it. I would love to overturn it but none of my cases warrant that – yet!' says Mark. 'Matrimonial breakdown and insolvency unfortunately go hand in hand so often that a divorce and bankruptcy is likely to be happening at the same time. *Hill* v. *Haines* was an attempt to show that such divorce settlements were all transactions at an undervalue. The trustee lost – the court decided that whatever the husband (it is nearly always that way around) lost when the house was given to his ex-wife had to be equalled by the rights the wife gave up. So there are now many bankruptcy cases with no assets simply as a result of the timing of a divorce.'

Support during working life

All three of our contributors referenced the support the association has provided over the years – something that they are keen to stress to new and future members of the profession. David notes: 'Some of the largest and most challenging cases that Buchler Phillips has dealt with have always had the support of R3 in the profession and this invaluable support is something that the new generation of members should ensure is prevalent over the next 30 years,' he said.

Mark agrees: 'I've been able to hone my skills and represent the profession, whether through serving on a committee or attending, presenting or networking at R3's training and conferences – which are excellent.'

Support for the future

This year has seen some seismic changes in the insolvency landscape, with the introduction of the Corporate Insolvency and Governance Act, the beginnings of the shift away from debtor-in-possession proceedings and a pandemic that has fundamentally changed the global economy. It seemed only appropriate that we ask those that have stayed the course of the last 30 years to reflect on the past under the association and hint at what they feel may be the shape of the next 30.

'The profession has moved on markedly over the last 30 years since 1990. R3 has provided constructive, technical and educational support for myself and all of the profession,' says David. 'It can be proud of the contribution it has made, not only to its members, but also to the Insolvency Service and to the government in responding eloquently to so much that has been raised for discussion, for the benefit of the whole profession.'

"I think when you spend your working life crisis managing everyone else's crises, you really value and enjoy the opportunity to interact as a profession."

Louise Brittain

The discussion between R3 and the government has been key, ever since its founding in 1990. If you flick through the pages of this publication, you'll come across several references to the work of the Press, Policy and Public Affairs team, who lobby on a regular basis to make members' concerns known. It is also, however, in the hands of the profession as to how they are perceived and Louise suggests that no matter how much gets done, there is no guarantee of recognition.

'I really hope that the business world starts to recognise the huge amount of skill and contribution the profession can add to the economy,' she says. 'We do a very tough job in very difficult circumstances and we all really try to make a difference. A huge amount of advice is given by the profession free of charge and it never ceases to amaze me at the innovative ways IPs find to maximise returns to creditors. I really don't think the profession ever gets enough credit for what we do.'

In 2020, the pandemic may have shut down the idea of working in office spaces for some companies altogether, the hyperloop technology is being tested that could one day connect commuters between countries' capitals in a matter of minutes and we're awaiting the rollout of 5G. Who knows what R3 and the profession will look like in another 30 years' time? But, as long as the same sense of community and cooperation remains, doubtless the profession will be able to adapt.

MATT JUKES is publishing manager of *RECOVERY* magazine.

Looking back...

over 30 years of the insolvency profession

Chris Laughton looks back to a profession armed with new legislation yet devoid of internet, which over 30 years rose to the challenge of more legislative and regulatory development, and is continuing to learn the art of effective communication.

By 1990 the new Insolvency Act and Rules from 1986 had bedded in, IPs all had licences and the SPI was formed as a trade body for the whole profession. As the 1980s closed, memories of the corporate insolvency provisions of the Companies Act 1948 and of the Bankruptcy Act 1914 were fading, insolvency was moving on from liquidators such as 'Hissing Sid' Caplan – described in Parliament as a former bankrupt who had served time for handling stolen goods and defrauding creditors – and JIEB was formed so that IPs entering the regulated profession would be qualified by examination rather than being grandfathered in.

Those were the days of no internet (HTML, URLs and HTTP were all invented in 1990) and few mobile phones. I remember closing down a branch of BCCI in July 1991 and reporting back to the office from a public phone box!

Later that year Robert Maxwell's demise generated a slew of insolvencies – administrations, liquidations, bankruptcies and receiverships. The fees, particularly those of the receivers of the deceased's estate, attracted parliamentary and judicial criticism. In 1997 Mr Justice Ferris described the level of the receivers' fees as shocking and the minimal return to creditors as shameful. SPI's president said: 'While we cannot comment on the details of what is an unusual and untypical case, we warmly welcome many of the principles set out in the judgment.' Those principles were developed in the Ferris report on insolvency practitioners' fees and were set out in SIP 9, first published early in the new millennium.

Rescue, recovery and renewal

By the time I became editor of *RECOVERY* in 2001, SPI had become R3 and I joined in promoting the rescue culture and the business recovery profession. Rescue, recovery and renewal remain relevant today, as does my other editorial theme: the crucial importance to IPs of clear communication.

The year 2002 saw a variety of other developments. The Enterprise Act introduced schedule B1 of the Insolvency Act and abolished the Crown's preferential status and the European Insolvency Regulation came into force. My early experiences of COMI involved dismissing 12 Parisian employees of the French branch of an English company. As administrator I did so in person, in French (in compliance with French law). Secondary insolvency proceedings were then opened in France, but I was able to identify that the money in the company's French bank account fell into the English estate and was not available to the French liquidator. How so? Because the bank's COMI was at 54 Lombard Street in London!

By the mid-noughties the practice of insolvency would have been very recognisable to 2020's new IPs, although bank-led administrations (not too dissimilar to the administrative receiverships of the 1990s) remained common. That changed with the banking crisis, but administration still failed, on the whole, to become the rescue tool that the Enterprise Act envisaged. Today, to most of the press, politicians or the public, administration means going bust. Did we as a profession do as good a job of promoting the rescue culture as we could have done?

Lehman and Madoff were headline insolvencies in 2008 – respectively the largest bank failure and largest Ponzi scheme in history. Such was their scope that many UK insolvency professionals were involved in the clean-up. Some still are.

Pre-packs and pressure

Pre-pack administrations became more common after the financial crisis, partly because they were less costly than trading administrations. Their relative lack of transparency, some misperceptions and some allegations of abuse gave rise to discontent being reported in the media, which attracted the attention of politicians. In 2013 the Graham review was commissioned. It reported the following year, producing further revisions to SIP 16 and the creation of the Pre-Pack Pool. The current government's proposed new regulations on substantial disposals in administration to connected parties underline the difficulty the insolvency profession has encountered in explaining to aggrieved creditors and the wider public the merits of pre-packs. Can we be more adept at conveying the message that losses arise from the insolvency and not from the mechanism of its resolution?

As 2020 moves into 2021, coronavirus and Brexit disruption will give rise to a heavy burden of business restructuring and many insolvencies. R3 will support IPs' efforts to do the best for all creditors, giving us a public voice, and our regulators should ensure that we all make those efforts.

How would I sum up the last 30 years of insolvency practice? Professionals who are passionate about using their unique combination of skills and knowledge to preserve and enhance value for all the creditors of an insolvent (or near insolvent) entity have continued to serve our economy well. Communicating better with all our stakeholders would serve us well as an objective for the next 30 years. □

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

Looking forward...

to the future of the insolvency profession

Sarah Paterson writes that the future challenge for IPs is to make sure that the new suite of legislation is mobilised in such a way that the profession can make full use of it.

IPs can look back, with some nostalgia, on the stable corporate insolvency world of the 20th century and early noughties, in which they retained relationships with one or two leading banks, advised the bank if a borrower ran into distress and took an appointment to sell the business or the assets if a corporate rescue could not be achieved. As the 21st century has progressed, financial markets have undergone profound structural shifts. The world of corporate insolvency that has emerged from this process of change is infinitely more complex and significantly harder to navigate.

At the same time, the Insolvency Act 1986 provides numerous hooks on which to hang a claim against the IP. Comfort is provided by the overall legislative scheme, which envisages a division of labour between IPs, who take commercial decisions, and the courts, which determine difficult legal issues, encapsulated by subjective standards in the statute and deference to the IP's commercial decisions by the courts. But perhaps even more comfort has been taken historically from the close relationship between IPs and the major banks, with the mutual understanding of what each side expected from the other. It would hardly be surprising if IPs have become both more liability conscious and more defensive as these relationships have become more complex and other interests have intervened.

Independence *with* expertise

Yet, it is crucial that looking at the toolbox through a liability lens does not constrain the IP from carrying out their role in the way that is most beneficial to the company and its creditors. There is a real risk of a destructive cycle, in which liability concerns steadily erode the role that IPs are willing to assume, and those outside the profession respond by questioning whether it continues to offer value for money as a result. At the same time, legislation increasingly contemplates the potential for others to step into roles that ought properly to belong to the licensed members of the profession – so the risks here are quite stark.

The solution, I suggest, is not to ignore the undoubted risks of liability in an increasingly confrontational market, but to ensure that the dominant narrative is one of the IP as a highly adaptable and expert resource for companies and their creditors and, by extension, their stakeholders, their communities and the public. The new part A1 monitor clearly needs to be independent, but independence without expertise is of little value to the struggling SME and those exposed to it. The creditors do not just need a second pair of eyes: they need all of the monitor's expertise to help the struggling debtor to shape a strategy for the case; to intermediate with those at the negotiating table; and to achieve a sustainable corporate rescue with limited resources. Anyone who has acted as a CVA nominee knows this. I would advocate for an expansive reading of the legislative scheme, from which a 'useful' monitor can emerge.

If the problem with the new part A1 moratorium is that the role of the IP appears, at least at first sight, to be narrowly drawn, the problem with the scheme of arrangement and the restructuring plan procedure is that no role is explicitly contemplated for the IP at all. Yet, the IP can perform an invaluable role in both procedures in guiding the court on what is most likely to happen if the compromise or arrangement is not sanctioned – a point that Mr Justice Snowden recently alluded to in the *Sunbird* case. And there is ample opportunity for the profession to showcase its adaptability and expertise in other ways. The restructuring plan procedure does require two court hearings and I am only too aware of the widely held view that it is a large company tool. Yet, the problem with the CVA is the threshold vote that must be achieved – leading to damagingly lengthy negotiations and the temptation to agree an unsustainable plan just to win the vote. The problem with the connected party pre-packaged administration is the visceral reaction of creditors when the directors appear to have saved their own livelihoods while choosing which pre-filing liabilities to assume and which to abandon – no amount of evaluation will ever solve this emotional reaction. In the right hands, the restructuring plan has the potential to steer a middle ground of consultation and disclosure with the fallback of a non-negotiated settlement if agreement cannot be reached. It is a valuable tool, and the insolvency profession has the expertise to adapt it in a wide range of situations.

Divided we stand?

The division of labour between the IP and the court is a brilliant, world-leading innovation of English corporate insolvency law. There is every reason to consider that it can continue to thrive in the dramatically new world of restructuring and insolvency, finding new expression in an increasingly complex corporate insolvency law toolbox. It is for the profession to make this happen, by promoting and proving itself as a highly adaptable and expert resource for debtors and their creditors for the future. □

SARAH PATERSON is an associate professor at LSE.

The birth of *RECOVERY*

John Alexander, *RECOVERY's* first editor, recalls its inception and the legal articles that broke new ground for a trade publication.

RECOVERY can trace its origins back to the Insolvency Practitioners Association (IPA) and the Insolvency Act 1986 (IA86), which created the need for IPs to be licensed and established the IPA as a Recognised Professional Body (RPB) authorised to issue insolvency licences (I still have my licence, which was granted then – number 005!). It was not long before there was a perceived tension between the IPA's role as a regulator and an RPB, and the profession's need for an 'independent' trade association to separately represent the interests of the practitioner.

Independence and income

The Society of Practitioners of Insolvency (SPI) was thus established to provide, both nationally and regionally, technical support and training for the profession as well as social activities, culminating in the Annual Conference. SPI subsequently changed its name to The Association of Business Recovery Professionals, known as R3, to cater for an increase in turnaround and restructuring professionals (*you can read more about this starting on page 14*).

> "Being a full-time IP, I could not write it all myself. I established a small editing committee that largely agreed on the main topics to be covered in each issue."

Many of the members of the council of the IPA, including me, became council members of SPI, resigning from our IPA roles in order to maintain a degree of independence. However, SPI had no guaranteed source of income, as it was not issuing licences for which it could charge a fee, so it was reliant on the support of major firms who, for a time, were happy to pay membership fees to both organisations for their staff. In the early days of SPI we struggled financially and were very worried about the potential reputational damage to the profession if we went under! Pressure built up on the regional societies of SPI to raise money and it was the London region, the largest society, of which I was then chairman, that established the Ladies' Lunch to balance the calendar with the Annual Dinner. They were both big earners for SPI. However, we needed further income and we looked to maximising advertising revenue from its journal.

The journal, now known as *RECOVERY*, began as a newsletter of the IPA, written largely by Stephen Adamson.

He asked me to take on its editorship and establish it as the quarterly professional journal of the new SPI, initially entitled *Insolvency Practitioner*, to support the work of SPI, promote the profession and make some money. It eventually changed its name after the SPI became R3. However, being a full-time IP, I could not write it all myself. I established a small editing committee that largely agreed on the main topics to be covered in each issue and, more importantly, was made up of individuals who were responsible for writing or commissioning the content of each section, much as it is currently organised. I also, for a bit of light relief, established a 'games' page, commissioning chess and bridge problems for each issue as well as a crossword that incorporated hidden insolvency-related clues. We appointed an agency to source adverts to ensure the journal was profitable and thus contributed to the financial wellbeing of SPI and later R3. For many years this proved to be a successful formula.

Reflecting the focus of the profession

The section that I think was most popular and extended to a large part of the journal was the legal updates and related articles. Probably the two most significant elements of the IA86 were the licensing of IPs and the creation of the office of administrators. It was expected that administrators would be appointed in cases where there was no floating charge holder able or willing to appoint an administrative receiver so that potentially viable but insolvent companies would have an alternative to liquidation. In those days administrative receiverships were looked upon as 'a good thing' as they enabled many businesses to be saved that might not otherwise have been. However, like much well-intended legislation, there were many unintended consequences, which in the case of the IA86 resulted in many cases being brought before the courts that would have a significant impact on IPs. These cases were going through the courts in the early 1990s and were the main subject of many of our reports and articles in SPI's journal.

> "Like much well-intended legislation, there were many unintended consequences, which resulted in many cases being brought before the courts that would have a significant impact on IPs."

Two of the most contentious cases we reported on at the time were that of *Re Charnley Davies Ltd* [1990] BCLC 760 and *Re Paramount Airways Ltd* (No. 3) [1991] 4 All ER 267. *Charnley Davies* was favourable to the profession; *Paramount Airways*, not so much. *Charnley Davies* provided comfort in that it held that an administrator would only breach a duty of care if an ordinary, skilled practitioner would have acted differently. Mr Justice Millett's ruling in *Paramount Airways*, however, threatened to make administrations completely unworkable as it in effect negated Mr Justice Harman's ruling in the case of *Re Specialised Mouldings Ltd* 1987 [unreported]. The IA86, in short, made liabilities incurred by an administrator (and administrative receiver) in office under contacts of employment 'adopted' by him, a charge on the company's assets in priority to any other type of creditor and the administrator's (and administrative receiver's) remuneration and expenses. IPs were thus going to run the risk of not being paid themselves or being able to pay their professional advisers, including lawyers, and other expenses if they could not trade successfully while in office to cover all these liabilities. For the five years following *Specialised Mouldings*, IPs paid the wages of the employees they used but, by writing a letter in a format approved by Mr Justice Harman confirming they were not 'adopting' employment contracts, IPs were able to avoid paying other contractual entitlements, such as pay in lieu of notice and redundancy, and were thus able to keep trading viable businesses until such a time as they could be refinanced or sold on as a going concern. Mr Justice Millett brought all this to an abrupt end when he decided administrators could opt out of employment contracts, but the *Specialised Mouldings* form of letter was ineffective. The administrators appealed to the Court of Appeal but in 1994 it upheld Mr Justice Millett's decision, as did the House of Lords, in essence, in 1995. However, by that time Parliament had enacted emergency legislation, the Insolvency Act 1994 (IA94), which gave administrators and administrative receivers a 14-day grace period after which they were only liable for the wages and contributions to occupational pension schemes arising after their appointment and in respect only of employment contracts that they adopted. The IA94 was not retrospective so for almost three years, and subsequently for all on-going cases, IPs had to decide whether to continue trading in the hope of a successful outcome so all costs and claims could be covered, or cease trading immediately on their appointment. In effect, they overcame the problem by doing a 'pre-packed' sale of the business and assets, where possible, immediately upon their appointment so as to avoid all liabilities arising from Mr Justice Millett's decision. Our journal broke new ground at the time when I interviewed Mr Justice Millett for *Insolvency Practitioner* and, having had to get permission from the Lord Chancellor, he wrote an extensive article for us that explained his reasoning for giving the judgment that he did. We were privileged to have Mr Justice Millett's report on shadow directors in our first issue, but it was previously unheard of for a judge to go beyond the words of his formal judgment to expand and explain his thoughts further in the public arena – something that is now commonplace.

I am delighted to continue receiving *RECOVERY* quarterly, and see that it is still at the cutting edge of reporting on the professional issues of the day. I wish it well for the next 30 years.

JOHN ALEXANDER was the first editor of *Insolvency Practitioner* (now *RECOVERY*), and is director of John Alexander Advisory Ltd.

MARSH

What Keeps You Awake at Night?

From risks such as liabilities to third parties, to lost or damaged assets, and Health and Safety Executive investigations and prosecutions – Marsh's Restructuring and Recovery Practice can provide you with certainty in uncertain times.

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MARSH & McLENNAN COMPANIES

Our 40th birthday present: a new remote control

Deborah Baxter reflects on Turnkey's 40-year evolution as leaders in insolvency software, and the big shifts of 2020 that will shape the industry for years to come.

We're not the only ones celebrating a milestone this edition. This year marks 40 years of Turnkey Computer Technology Limited – and it's also the year we launched IPS Cloud.

This easy-to-use web interface hides a powerful system, including deep integration with third-party providers. Wherever automation and AI take the industry, IPS Cloud is ready.

With no servers to maintain or software to install, IPS Cloud is also ideally suited to supporting virtual teams. Perfect for a world where many of us have forgotten what the office looks like.

It started with the superbrain

Dr Barry Wood learned to program at college in the early 1960s – we're talking punch cards and rooms full of whirring tapes. Barry founded Turnkey in 1980, spurred by the launch of the brilliantly named Superbrain computer in 1979 – affordable computing had finally come to the world of business.

Barry's first landmark sale was to Arthur Andersen. The firm was impressed not only by the accounting system he pitched, but by the fact he could single-handedly haul some rather heavy pieces of valuable kit up several flights of stairs.

> Today, some 90% of the UK corporate insolvency market uses Turnkey IPS, along with the world's top 19 accounting firms.

The request to build a system for insolvency practitioners was borne from this contract. The idea soon took off, with a number of large accounting firms signing up as founding clients. Word spread quickly through the close-knit insolvency practitioner community – computerisation had come to case management.

Today, some 90% of the UK corporate insolvency market uses Turnkey IPS, along with the world's top 19 accounting firms. And throughout those firms, we have 6,500 users – their detailed feedback informs every feature we introduce, benefitting the entire industry and every type of user.

The company is now led by Tony Wood, who shares his father's passions for efficiency, technology and client satisfaction – although he draws the line at single-handedly lugging washing-machine-sized computers up four flights of stairs. Health and safety has also moved on a bit in the last 40 years.

A transformational year

The pandemic has definitely affected the way we work at Turnkey, but it's not stopped us investing to best support our customers.

We're halfway through a large-scale internal transformation, which has included refurbishing our East Kilbride headquarters and increasing our headcount by 20% over the last two years.

We're looking at operations too, with even more investment in customer relationship management to make sure we keep on delivering the support you need. We've also moved to agile development, so we can deliver product promises even faster than before.

Has it all been easy? Of course not. And there's a further change to come, as we support more and more insolvency practices with digital transformation. In fact, we'd argue that digitalisation has shifted from 'nice to have' to fully-fledged strategic must-do.

That's why we're already working with the major third-party vendors, including banks, compliance experts, emerging technology specialists and key government agencies. All to make sure the shift to digital delivers on its full promise, and supports your vision for the future.

IPS Cloud and your journey to digital

All those years ago, Barry talked about the promise of a truly paperless claims process. Today – finally – it's here. But that's only a small part of the transformation that's happening.

Enter the Creditor Portal, which is underpinned by IPS Cloud.

'Paperless' might be the obvious appeal, but it's far from the only one. For many practitioners, the true benefit is the ability to streamline and coordinate complex processes, with an instant view of resource allocation, case paths and transaction statuses.

Together, IPS Cloud and the IPS Creditor Portal form a secure platform that gives all your stakeholders the ability to access – and publish – digital case information. This is proving to be especially persuasive in encouraging hardened traditionalists away from pens, paper and cheques. Some are even ready to ask the franking machine to enjoy a well-earned retirement.

> Until then, we'll keep on Zooming and Teaming our way through this evolutionary transformation and look forward to shaping the digital future for anyone wishing to join the party.

Of course, we're not stopping there. Our users tell us what they need, and we build those needs into our development roadmap – expect even more automation of routine processes and AI-powered insights as time goes by.

Celebrating the future

Turnkey has come a long way since that first big sale. Yet our values and ethics remain intact. We continue to focus on our clients – increasing their efficiency, reducing their operating costs and improving their processes.

As for our 40-year anniversary? We can't wait to celebrate with our clients when it's safe to do so. Until then, we'll keep on Zooming and Teaming our way through this evolutionary transformation and look forward to shaping the digital future for anyone wishing to join the party. □

DEBORAH BAXTER is commercial director at Turnkey.

R3 Training Academy

The new R3 Training Academy is set to launch in January 2021. We look forward to welcoming you on this exciting venture and we'll be kicking off with the Virtual Training Festival in January

5 FREE INTRODUCTORY SESSIONS FROM 18-22 JANUARY 2021

FREE Virtual Training Festival

18-22 JANUARY 2021 - 17:00-18:00 EACH NIGHT

To celebrate the launch of the Training Academy on the 18th January 2021, R3 is hosting a free weeklong Virtual Training Festival to showcase the new courses on offer.

The Virtual Training Festival will be open to all, from new professionals to senior members of staff, and free to attend. The festival will host five free introductory sessions over a week that showcases our training on a range of soft skills, insolvency and restructuring topics. Each session offers the opportunity to sample the new virtual training experience and get a feel for how the new R3 Training Academy can benefit you. Sessions will include:

- **A session from the insolvency and restructuring bootcamp**
- **A live virtual classroom**
- **Overview of our 21-chapter Introduction to Insolvency course**
- **Plus more...**

Thanks to our Virtual Training Festival Sponsors:

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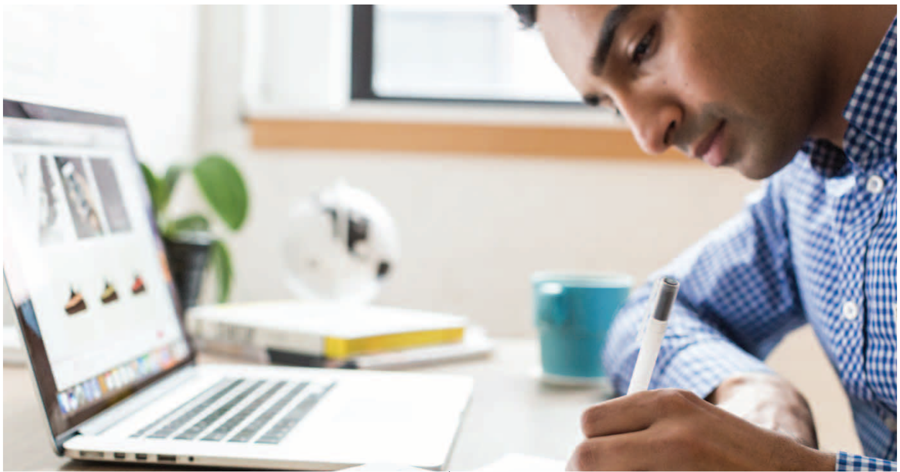
To register your interest, please visit www.r3.org.uk/training-academy or email training@r3.org.uk

What does R3 Training look like in 2021?

Robert Beer unveils a bold new frontier in online training for insolvency and restructuring professionals.

This turbulent year has had a huge impact on learning and development. More than ever, organisations are required to support staff working remotely and ensure staff at all career levels are equipped with capabilities to do their job effectively while providing opportunities to develop new skills and knowledge.

Organisations are asking themselves important questions for 2021: how should we prepare the workforce for a busy year ahead with a likely increase in demand for insolvency and restructuring services, and what problems can we anticipate? The R3 Training Academy will address these organisational needs by delivering topical and timely training products.



A new training platform

R3 has always been on hand to support the training of individuals in the profession, and 2021 will bring about new opportunities delivered on a training platform that is coherent with the changes we are embracing. It is uncertain when we will next be able to deliver face-to-face training; hence, virtual training has become more important than ever. This is why R3 is making important investments in new training products to ensure that the profession retains the opportunity to strengthen skills and knowledge.

The new R3 Training Academy is set to launch in January 2021 and will position R3 as the key provider of online training for insolvency and restructuring professionals throughout their career trajectories. The Training Academy will help individuals to realise their potential by nurturing and advancing practical skills and attitudes needed for a profession that's becoming increasingly sophisticated and technologically advanced.

We have all experienced online video conferencing fatigue. This is why we are making virtual training products that are immersive, engaging and fun in the new Training Academy. R3 has developed many new courses in a variety of formats that cater for different styles of learning. We have created relevant and practical content that tracks the latest developments in the profession. Our materials are designed and delivered by experienced subject experts, with access to additional online resources.

> "The new R3 Training Academy is set to launch in January 2021."

Virtual Training Festival

To coincide with the Training Academy launch, R3 will be hosting a free week-long Virtual Training Festival starting on 18 January. The Virtual Training Festival will host five introductory sessions that cover a range of soft skills, insolvency and restructuring topics. Each introductory session will give you the opportunity to sample the new virtual training experience and gain an understanding of how the R3 Training Academy can benefit you.

The festival will showcase the range of training courses that are on offer:

- Virtual classrooms: live and interactive classes with break outs, case studies and quizzes.
- Bootcamp series: learn fundamental topics over six to eight weeks. Each weekly one-hour session is delivered as a live 30-minute online presentation, 20-minute case review and 10-minute Q&A.
- Certifications: gain recognised R3 certification throughout your career journey in insolvency and restructuring. This expert-certified training will also help employers to develop their teams' skills sets. Study at your own pace, in your own time.

To find out more about the new R3 Training Academy and to register for the free Virtual Training Festival, please visit our website **www.r3.org.uk/training-academy**.

Please contact Robert Beer at robert.beer@r3.org.uk if you have bespoke training needs for your organisation.

From R3's CEO Liz Bingham

I am thrilled to have welcomed Robert Beer to R3 to build our exciting new Training Academy and I am grateful to the Trustees of The Barbican Trust who have made this possible. At a time when the world of restructuring and insolvency is expected to swell its ranks of professionals and when we have to work with the most significant legislative change for 20 years, access to quality training has never been more important. As the leading trade body for the profession, R3 is uniquely positioned to provide that quality training as a natural extension of the world-class technical and policy work that we undertake for our members. Whether a new professional or a seasoned campaigner, I hope that our members will actively participate in our training events.

ROBERT BEER is head of training at R3.

CIGA: real hope for rescue or another false dawn?

Alison Goldthorp explores the many benefits and potential pitfalls of this year's huge reform to insolvency and restructuring law.

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Trailed as the greatest change to insolvency and restructuring law for over 20 years, the Corporate Insolvency and Governance Act 2020 (CIGA) came into force on 26 June 2020. The overarching objective of CIGA is to promote the rescue of companies in financial difficulties, and it is the legislative package to support the extensive financial measures introduced to support British businesses over the months since the pandemic began.

So, does CIGA succeed in promoting rescue?

CIGA seeks to promote rescue in a number of ways, through a combination of temporary measures and permanent measures. The three permanent measures are the introduction of a new 'moratorium' procedure; a process for the compromise or arrangement between the company and its creditors that is becoming known as the 'restructuring plan'; and new provisions extending the existing prohibition on the termination of contracts for the supply of essential goods and services by reason of insolvency (so called 'ipso facto' clauses) to all contracts for the supply of goods and services unless exempted.

So are those measures working in practice? Let's look at the effect of the measures introduced so far.

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Restrictions on winding-up petitions and statutory demands

The temporary measures introduced a new additional condition to be satisfied for the petitioning creditor when presenting a petition under s124 of the Insolvency Act 1986 on the ground specified in s123(a) to (d). The petitioning creditor has to have reasonable grounds for believing that:

(a) 'coronavirus has not had a financial effect on the company, or
(b) the facts by reference to which the relevant ground applies would have arisen even if coronavirus has not had a financial effect on the company.'

This requirement is treated as having come into force on 27 April 2020, currently continues until 31 December 2020 and may yet be extended 20 further into 2021.

The court then considers whether the requirement is satisfied when deciding whether to make a winding-up order. At the same time, legislation preventing the service of statutory demands was introduced.

These measures have had the effect of preventing creditors from pressing for payment of supplies for many months. As a result, the increasing arrears of rent and payments for goods and services supplied during and after the first lockdown remain unpaid. There have been very few winding-up petitions this year and this, coupled with general forbearance from lenders and the significant tax deferrals granted by HM Treasury, mean that the insolvency statistics published by the Insolvency Service show fewer formal insolvencies than last year, notwithstanding that the country is in a recession.

In short these temporary measures have had the effect of preventing the winding-up of many companies during the course of 2020, with the result being that those companies continue to trade. However, this has been at a cost to the suppliers and landlords who have not been able to exercise creditor pressure and push for payment of amounts due and payable many months ago, and they themselves are suffering financial pressure as a result. There are likely to be significant increases in formal insolvency when the temporary measures end during the course of 2021.

The new restructuring plan

CIGA provides that a company in financial difficulties may propose a compromise or arrangement to classes of creditors and/or members (restructuring plan). The procedure is similar to the existing process for the approval of a scheme of arrangement under part 26 of the Companies Act 2006. It is a rescue procedure and CIGA amends the Companies Act by introducing a new part 26a. This new procedure has already been used in restructurings of Virgin Atlantic and Pizza Express and is being considered by many businesses as a way of restructuring their liabilities as they emerge from the pandemic.

The attractions of the new procedure

While the practical steps in terms of applications to court and the holding of meetings of classes of creditors and/or members are similar to a scheme of arrangement, the key difference is that the legislation allows for the cross-class cram down of creditors. This therefore changes the conversations with 'hold out' creditors, and forces them to be more realistic about their position. The way that the cross-class cram down works is as follows: if 75% in value of any one class of creditors or members approve the restructuring plan, even if the other classes vote against the plan, the court can still be asked to consider whether or not to sanction the plan. The court can sanction the plan and bind dissenting classes of creditors or members provided that two conditions are satisfied:

- the dissenting classes are no worse off than they would be in the 'relevant alternative', which in the current economic climate would usually be administration or liquidation; and
- the one class voting in favour of the plan would receive a payment or have a genuine 'economic interest' in the company in the event of the 'relevant alternative'. So they are an 'in the money' class.

The cross-class cram down feature makes this procedure far more flexible than the scheme of arrangement. It also offers more options to a company considering a company voluntary arrangement (CVA).

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Supercharged scheme and supercharged CVA?

The scheme of arrangement was largely used by large companies for financial restructurings often involving overseas companies, and was considered to be an expensive procedure. Much of the 'expense' relates to consideration of class composition and expert evidence on value. These can be complex issues if there are different classes of financial creditors, and disputes on where the 'value breaks' and which creditors are out of the money. As we have seen, the restructuring plan has already been used by large companies with others considering its use, often as part of a cross-border restructuring. Its flexibility makes it compare favourably with Chapter 11 in the United States and with the new restructuring procedures being introduced in Holland and Germany.

Will the procedure be used by SMEs?

CVAs have been much used over the last year, but they often do not resolve all of the issues facing the company, as they only bind unsecured creditors. Secured and preferential creditors need to support the plan if the business is to continue, but their support usually requires payment in full of their debt.

> In practice there will need to be a standstill with the secured creditors, which may limit the use of the moratorium for rescue if lenders start to look to use their rights to enforce.

The restructuring plan offers another option to SMEs, putting forward a CVA where there are hold-out creditors taking an unreasonable position, or where other classes of creditors need to be bound into the compromise if the restructuring is to be successful. This will become even more important when HMRC becomes a preferential creditor from December 2020. The key issue will be to keep the costs of the procedure down, and this can be achieved by the profession sharing know-how on the way that the scheme of arrangement procedure works in terms of class composition and the drafting of the plan and the documents required for the court hearings. There should be no need for detailed expert evidence for SMEs in the current economic climate. If the restructuring plan is not approved, the alternative is likely to be administration with a sale of the business and assets and realisations likely to be paid in the main to the secured creditor if there is a buyer, or liquidation. So the estimated outcome statements from those procedures will explain the outcome for the classes of creditors in those situations.

The new director-led moratorium

A handful of companies have used the new standalone procedure so far, largely, it is suspected, because of the lack of creditor pressure for the reasons indicated earlier.

The procedure is not an insolvency procedure, and gives the directors of a company the ability to apply to the court for a moratorium to give the company protection from creditors while implementing a rescue plan. During the moratorium process, the directors remain in control of the company but a 'monitor' (who is an insolvency practitioner) is appointed to monitor the company's affairs to check that the company is making the payments it is required to make in the moratorium and to keep under review whether it remains likely that the moratorium will result in *the rescue of the company* (not the business and assets) as a going concern. Companies that have no rescue plan, perhaps with terminal issues about the business and its operation, will not be able to use this procedure and will still need to go into administration.

Payments under the moratorium

The payments that the company is required to make are different to the payments required in administration.

During the moratorium, the company has a payment holiday in respect of all pre-moratorium debts that have fallen due prior to the moratorium. That payment holiday continues during the moratorium in relation to amounts that fall due during the moratorium other than in relation to six excepted categories. These categories include amounts that fall due during the moratorium and are amounts payable in respect of:

- goods or services supplied during the moratorium;
- rent in respect of the moratorium period;
- wages and salaries; and
- liabilities arising under a contract involving financial services (such as a bank loan, finance leasing agreement or bonds).

The fact that rent is payable on premises if it falls due in the moratorium, even if the premises are not being used for the rescue, is different to administration where no rent would be payable on closed premises. This may prevent companies from using the procedure as they come out of lockdown when parts of the business remain closed, where the moratorium offered by administration and the different legal position on rent payments would be preferable.

There is *no requirement* for the company to give notice to the qualifying floating charge holder of the intention to file the application for a moratorium with the court. However, in practice, the company will need to be in discussions with the secured lenders about the proposed rescue plan. The lenders retain the rights to receive any payments falling due in the moratorium and to accelerate their debt and make demand for repayment of the loan if there is an event of default in the moratorium period, and the entry into the moratorium is likely to be such an event. The loan would then become repayable in full. In practice there will need to be a standstill with the secured creditors, which may limit the use of this procedure for rescue if lenders start to look to use their rights to enforce.

Liability of the monitor

The role of the monitor requires detailed consideration and planning to ensure that he/she can reach the view that the rescue of the company as a going concern is likely, before signing the declaration required by the court. The monitor also needs to review whether the company is able to make the payments that are required during the moratorium period, and then monitor the payments being made in the period. If the payments are not being made the monitor needs to terminate the moratorium.

Many IPs have commented that they are concerned about the potential liability of the monitor. This was demonstrated in the recent poll during the presentation given on CIGA at R3's SPG Forum. The process is intentionally flexible so that the monitor could be involved in the formulation of the rescue plan, or that could be something that the directors are working on with other advisers. This is a matter for the directors to decide and the mandate for the monitor will be set out in his or her letter of engagement. The directors remain in control of trading decisions, unlike the position in administration, where the IP takes control of the business and the directors' powers cease, unless the administrator gives them specific tasks to undertake under the supervision of the administrator. Inevitably if the moratorium fails and the company goes into administration or liquidation there will be scrutiny of the decisions taken by the monitor and the directors, and no doubt case law will evolve as is the case with any new procedure. Importantly, the monitor can apply to court for directions, and those applications are likely to result in case law, which makes practitioners clearer on the potential liabilities involved.

CIGA also provides that if creditors apply to the court to challenge the decision of the monitor on the basis that it has caused them 'unfair harm', the court can reverse or modify the decision of the monitor but may not under that section order the monitor to pay any compensation.

> The moratorium process is intentionally flexible so that the monitor could be involved in the formulation of the rescue plan, or that could be something that the directors are working on with other advisers.

When will the moratorium be used?

If the company has a rescue plan, which could be a consensual restructuring, or a CVA or a restructuring plan, the moratorium could be a useful stepping stone to avoid creditor pressure next year when the temporary measures ease, and it is possible for all creditors to present winding-up petitions and lenders to decide to enforce and to stop exercising forbearance. The moratorium would give the company time to work on its cash flow forecasts and trading projections, which it needs to support the rescue plan and which are so difficult at the current time to make, with the ever-changing restrictions on

trading for so many businesses. Importantly, the company can borrow in the period provided that the monitor thinks that this will support the rescue. There are many thousands of 'good' businesses across the UK that have financial difficulties now as a result of the pandemic and the restrictions imposed on trading as a result, but which are inherently good businesses. The moratorium will be a way of buying more time for those businesses to restructure during the course of next year.

Termination clauses and ipso facto

Prior to CIGA coming into force, the Insolvency Act 1986 provided that suppliers of gas, electricity, water and IT systems could be required to continue to supply to a company in an insolvency procedure and were not entitled to terminate supply agreement by reason of, or 'ipso facto', the insolvency procedure, or insist on payment of arrears. All other types of supplier were able to terminate the supply contracts by reason of the insolvency, or to demand that arrears be paid before making further supplies. This was detrimental to the rescue of the company if its survival relied on the continuation of supplies.

CIGA and contracts of supply

CIGA significantly extends the prohibition on the use of ipso facto clauses in supply contracts and the restrictions on the ability of a supplier to terminate or do 'any other thing' because of the entry of the counterparty into an insolvency or restructuring procedure, to all contracts for the supply of goods and services unless excluded by CIGA. The exclusions relate largely to financial institutions such as banks and insurers, and financial services-related contracts.

This is a major change in English law as usually the parties to a transaction are entitled to determine the provisions of the contract that they wish to be bound by, and this legislation imposes prohibitions that change the clauses the parties had agreed to.

In practice, if the insolvent buyer does not want the ongoing supply then the company or the insolvency office-holder are likely to agree that the contract may be terminated. The supplier should communicate with the office-holder or buyer immediately upon hearing that it is in a relevant insolvency procedure to ascertain if the supply is still wanted. The company or office-holder is likely to be advised to communicate speedily with the supplier to confirm the position so as to not become liable for payment in respect of any ongoing supplies.

> Importantly, the company can borrow in the period provided that the monitor thinks that this will support the rescue.

Practical implications of the provisions

These provisions change the nature of the conversation that the company in a restructuring or insolvency procedure has with its key suppliers, and puts it in a far better position to be able to continue the key supply contracts needed for the rescue of the company or its business. In the vast majority of cases, the question of ongoing supply will be amicably resolved between the insolvency office-holder or director and the supplier. However, where ongoing supply is critical to the buyer's business and there is a large debt outstanding to the supplier, disputes could arise. These are likely to be more complex where the supply has a cross-border element (for example, the contract is not governed by English law or the supplier is not subject to the jurisdiction of the English court) or where the supplier can show that the continuation of supply without being paid in respect of its arrears will cause it severe difficulties.

> Directors need to seek advice now, as the opportunities to rescue reduce, as the cash runs out and creditor pressure increases.

So in conclusion…

CIGA clearly is assisting with rescue in a number of ways and the measures are all being used to a greater or lesser extent. The temporary measures have clearly assisted rescue of many businesses in the short term but at the price of causing financial difficulties for the landlords and suppliers with unpaid arrears. The permanent measures add to the restructuring toolkit and look to support rescue for many companies while leaving the directors in control of the company.

As is inevitable with new legislation, there are a number of issues arising and the Insolvency Service has actively encouraged feedback and has stressed that they want the new procedures to be used to rescue businesses. R3 is providing that feedback as part of its Back to Business UK campaign of which I am co-chair, so please contact us with any feedback you have and we will update you further on developments in the coming months. So while CIGA adds to the restructuring toolkit to provide more ways in which businesses can be rescued, the key practical issue remains the fact that directors need to seek advice now, as the opportunities to rescue reduce, as the cash runs out and creditor pressure increases. This is the message of the Back to Business UK Campaign. ◻

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A flying start for the restructuring plan

Alex Rogan looks at the maiden flight of the restructuring plan, highlighting the practical considerations for future cases.

Over the summer, the court sanctioned Virgin Atlantic's restructuring plan for take-off, making this the first restructuring to be implemented through the new restructuring plan introduced by the Corporate Insolvency and Governance Act 2020 (CIGA) in June 2020. The judgments from both the convening and sanction hearings provide practical guidance on how the court will treat this shiny new tool and, in particular, comfort that its scheme of arrangement-like provisions will be approached in a scheme-like way. However, given that the restructuring plan was approved by all classes of creditors, its key shiny new feature, cross-class cram down, was left untested. Unlike a scheme that requires the support of all creditor classes, this cross-class cram down mechanic will allow the court, subject to certain criteria being satisfied, to sanction a restructuring plan where a class or classes of its stakeholders have voted against it. This additional feature is expected to be a game changer for the UK's restructuring toolkit.

Why did Virgin require restructuring?

Before the Covid-19 pandemic Virgin Atlantic's business was fundamentally sound. However, following the pandemic bookings fell 89% year on year, as governments introduced travel restrictions and consumers lost their appetite for air travel, causing an acute liquidity crisis that left the airline just weeks away from running out of cash and potentially facing enforcement proceedings by bondholders. As a result, the most likely alternative outcome – had the restructuring plan not been sanctioned – would have been the airline being put into administration. This would have led to significant loss of value for all stakeholders with unsecured creditor recoveries forecast in the range of 10.5p to 21.4p in the pound.

What was the proposal?

The restructuring plan was part of a broader recapitalisation to enable the airline to continue to trade as a going concern through the reduction of the airline's debt to a sustainable level and an injection of new money amounting to c.£400m. Various parties agreed bilateral arrangements with Virgin Atlantic outside of the restructuring plan as part of its wider recapitalisation, including lessors and lenders whose claims totalled almost $1bn (£753m) under various finance lease agreements, bondholders under an airport slots securitisation and credit card acquirers owed around £350m.

> "The judgments provide guidance on how the court will treat this shiny new tool and, in particular, comfort that its scheme of arrangement-like provisions will be approached in a scheme-like way."

The restructuring plan itself affected four separate classes of creditor:

- lenders under a $280m secured revolving credit facility;
- lessors under 24 aircraft operating leases;
- certain connected party creditors that had entered into various intellectual property licensing agreements and joint venture agreements; and
- 162 trade creditors owed around £51.7m.

The substance of the plan included:

- converting the revolving credit facility to a term loan with an extended repayment schedule in return for a higher margin and lender-friendly amendments to covenants;
- in respect of the aircraft operating leases, a choice of three options was provided to lessors, all of whom chose the rent deferral option;
- in respect of the connected party creditors, capitalising all accrued and unpaid amounts in exchange for preference shares; and
- a 20% reduction in amounts owed to certain trade creditors.

A large number of trade creditors were excluded and their claims were not reduced or deferred. These included suppliers of goods and services essential to the airline's continued operation, such as airports, public bodies, insurance companies and sales agents, as well as creditors who had already agreed to a larger reduction in outstanding liabilities as of 12 June 2020, creditors owed under £50,000 as of 12 June 2020, and trade creditors that provided restructuring advice in relation to the recapitalisation.

Key takeaways from the Virgin plan

The court gave important clarifications on a number of points, which will allow practitioners to consider the restructuring plan with greater confidence in the future. The key points from both the convening hearing and the sanction hearing are set out below.

Convening hearing

Unlike a scheme of arrangement, which is available to solvent and insolvent companies, the restructuring plan is only available to companies that have encountered, or are likely to encounter, financial difficulties that are affecting (or will or may affect) their ability to carry on business as a going concern (the financial condition) and the compromise or arrangement provided for under the restructuring plan must eliminate, reduce or prevent, or mitigate the effect of, any of those financial difficulties (the purpose condition). The court had no difficulty in finding that the Virgin Atlantic restructuring plan squarely satisfied these two requirements.

One of the key questions for how the restructuring plan will be deployed going forward relates to how the court will approach class constitution. In this regard, the court noted the key differences between the restructuring plan and the scheme, and the fact that in order to effect a cross-class cram down under a restructuring plan, a company may have an incentive to increase the number of classes to ensure that it has the required single supporting class. Nevertheless, the court concluded that these differences should not be reflected in a different approach to class composition and the scheme test for class composition should be applied, namely: stakeholders should vote in the same class where their rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

> “It is safe to conclude that in circumstances where all classes have voted in favour and the cross-class cram down mechanic is not being deployed, then the court will approach sanction on a similar basis as it would for a scheme.”

Sanction hearing

The court has discretion to decline to sanction a restructuring plan if it is not ‘just and equitable’. However, there is no guidance as to what this standard means and the extent to which it will be similar to the ‘fairness’ requirement for schemes of arrangement. Following the Virgin restructuring plan it is safe to conclude that in circumstances where all classes have voted in favour and the cross-class cram down mechanic is not being deployed, then the court will approach sanction on a similar basis as it would for a scheme.

The court did, however, note that the Virgin Atlantic restructuring plan had an unusual feature. Three of the four classes of creditors had already agreed to support the restructuring ahead of the convening hearing. In relation to a scheme, the court would not ordinarily entertain an application to convene scheme meetings in these circumstances. It appeared to the court that the three fully consenting classes of creditors had been included with a view to allowing the airline to use the cross-class cram down in the event that the fourth class of creditors, the trade creditors, had not voted in favour of the restructuring plan. The court did not conclude its position on this point and specifically stated that in sanctioning the restructuring plan it should not be taken to have decided that the power to cram down a dissenting class can be activated by including within a plan a class of creditors who had unanimously consented ahead of the convening hearing. This will be a key point to resolve going forward, which will impact on the utility of the restructuring plan and how it is deployed.

Another interesting aspect of the Virgin restructuring plan that was considered at the sanction hearing related to the fairness of certain trade creditors being paid in full while other trade creditors subject to the plan faced a 20% reduction in what they were owed. The court held that the ability of a company to choose to restructure the debts of some of its creditors and not others is one of the most flexible and valuable features of the scheme jurisdiction and that this approach was equally appropriate for the restructuring plan. The important point is to ensure that where creditors, who rank pari passu with scheme or plan creditors, are being treated more favourably outside the scheme or plan, this should be fully explained so that compromised creditors are in a position to assess whether they are being treated unfairly. In this instance, the court held that the reasons for excluding certain trade creditors from the restructuring plan were reasonable (ie not arbitrary or designed to manipulate the class) and had been disclosed to creditors in the explanatory statement.

Ipso facto clause protection

An additional noteworthy element to the restructuring plan over the scheme is the application of the new prohibition on enforcing ipso-facto clauses, which was introduced under CIGA. This allows for debtors, such as was the case for Virgin Atlantic, to implement operational as well as financial restructurings through the restructuring plan with less execution risk around trade creditors terminating contracts.

Concluding thoughts

Perhaps the overarching conclusion of the Virgin Atlantic restructuring is that the courts will treat the restructuring plan in a similar manner to the scheme. This brings a considerable amount of certainty to the use of this valuable new tool. Although the cross-class cram down was not deployed, its availability allowed the restructuring to be significantly de-risked by mitigating the ability of the trade creditor class to potentially derail the restructuring should they have elected not to support the restructuring plan.

> “The availability of cross-class cram down allowed the restructuring to be significantly de-risked by mitigating the ability of the trade creditor class to potentially derail the restructuring should they have elected not to support the plan.”

Following on from the Virgin Atlantic restructuring, Pizza Express recently implemented its long-running financial restructuring through a restructuring plan, in which it also managed to secure the support of each stakeholder class and did not need to rely on the cross-class cram down. As such, the market still eagerly awaits the first deployment of the cross-class cram down mechanic to go before the courts.

In a scheme, provided all stakeholders receive adequate information with sufficient time to make an informed decision, and there is no evidence stakeholders are voting for reasons not related to their class interest, the court is slow to second guess a majority decision of the scheme meetings. However, the court will potentially be required to take a more activist approach in the restructuring plan process, and determine difficult issues of valuation and how value is allocated to different stakeholder groups where there is a cross-class cram down. The restructuring plan is notable for not having an absolute priority rule, in the vein of the US Chapter 11 rule, which addresses this value allocation point. This rule provides that no lower-ranking class of stakeholder can receive any payment under a restructuring proposal subject to a cross-class cram down unless all higher-ranking classes are first paid in full. We will have to wait and see whether the courts develop a form of the absolute priority rule as they are asked to sanction restructuring plans with a cross-class cram down. □

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The LPA receiver: a lifeline for lenders

James Walton shines a light on the role that an LPA receiver can play in helping lenders to mitigate losses and argues the difference between IPs and surveyors in the role.

The genesis of this article was conceived a long time before the *annus horribilis* of 2020. Like many lawyers working in the world of real estate debt, my caseload was no longer spent working on shiny new loans; I was starting to see a number of defaulting loans and distressed situations hit my desk and it was becoming clear that certain real estate lenders were heading for some choppy waters. The number of lenders in the market, chasing both volume and margin, was unprecedented. It was impossible to keep up with the number of bridging lenders launching into the market. Some lenders had already failed, and a busy few years lay ahead for restructuring lawyers, IPs and other professionals working in the 'distressed' real estate loan space. An idea emerged to write an article on the role of the LPA receiver, both to remind and educate on this useful tool for lenders as they faced an interesting few years ahead. And then Covid-19 hit.

What happens to the real estate finance market from here on is anyone's guess, but what is clear is that, as was the case following the 2008 financial crisis, LPA receivers will have a huge role to play in helping lenders to mitigate their losses.

The role of the LPA receiver

An LPA receiver is a receiver appointed either under the Law of Property Act 1925 or under an express power contained in a mortgage (in the latter case, the receiver is in fact a fixed charge receiver rather than an LPA receiver but in practice is often still referred to as an LPA receiver). The concept was introduced as a remedy for lenders where a borrower falls into arrears or is otherwise in breach of their loan terms. Where the borrower is so in default, the lender, provided it has been granted a valid fixed charge over the property, is able to appoint an LPA receiver to manage the property, sell it and apply the realisations towards the repayment of the sums secured under the charge.

> There is clearly a place for both surveyors and insolvency practitioners to work together in many situations.

The legal nature of the LPA receiver's role is a curious one. Although appointed by the mortgagee/chargee, and despite the receiver owing its main duties to, and being required to act in the best interests of, the appointing lender/mortgagee, the LPA receiver does in fact act as an agent of the borrower. This agency position allows an LPA receiver to exercise control of a property without incurring any personal liability. This creates a powerful tool for lenders. Provided the LPA receiver acts within the scope of the powers given either under the Act or in the legal charge, the LPA receiver will not be personally liable for any actions taken and it is the LPA receiver's principal (ie the borrower) who is accountable. This is preferable to the lender itself taking possession and assuming unwanted liabilities, for example, environmental liabilities or maintenance and repair obligations under a lease.

Appointing an LPA receiver effectively creates a protective buffer between a lender and these risks. Alongside this obvious attraction, appointing a receiver can be a quick and cost-effective way to enforce security. It is not a court process and formal insolvency proceedings are not required.

Who to appoint?

Rather unusually, there are no special requirements imposed by law with regard to who can act. Subject to a few exceptions, anybody can act as an LPA receiver, but that person is usually either an IP or surveyor with receivership experience. Although not essential, lenders usually require their appointees to be registered property receivers (under the Registered Property Receivers Scheme) and fellows of Nara, the Association of Property and Fixed Charge Receivers.

So are there any advantages to appointing an IP as an LPA receiver, rather than a surveyor; and vice versa?

> Those in the 'IP as receiver' camp argue that they provide a more independent and transparent solution for lenders that will leave them less open to challenges from their borrowers.

Unsurprisingly, the view changes depending upon who you ask. Those in the 'IP as receiver' camp argue that they provide a more independent and transparent solution for lenders that will leave them less open to challenges from their borrowers. In particular, when it comes to selling the property and being seen to achieve best price (which unsurprisingly is the most common challenge made by a borrower), the IP-receiver can competitively tender for the role of the selling agent; they are not duty bound to use an in-house agency team (often, but not always, the case when a surveyor-receiver is appointed) and they can therefore challenge the agent in a way that ensures that best price for the asset is obtained. As David Shambrook, partner at FRP Advisory, explains: *'There are a number of benefits to a lender of appointing an IP as a receiver, rather than a surveyor, but a key one for me is ensuring that the right team is in place for creating and then implementing the workout strategy; the independence that an IP brings to the table is vital.'*

> Those in the 'surveyor as receiver' camp argue that they provide a more cost-effective solution, generally charging lower fees than IPs, and being less reliant upon having to outsource property-specific advice to third-party property professionals.

Those in the 'surveyor as receiver' camp argue that they provide a more cost-effective solution, generally charging lower fees than IPs, and being less reliant upon having to outsource property-specific advice to third-party property professionals. They argue that where the workout strategy is a purely property-focused one, that should be dealt with by an experienced property professional, not an insolvency professional. James Bannister, head of CRE financial solutions at loan servicer Mount Street, believes that a receiver having a real estate or surveying background is key: *'An IP will only ultimately have to seek the advice of a real estate professional and so runs the risk of adding time and costs to a process that a chartered surveyor can provide a lot quicker. For a lender, in my experience, it makes sense to appoint a receiver with a surveying background in order to ensure that all the possible avenues of recovery from the hard real estate assets are optimised.'*

On the thorny issue of whether a surveyor-receiver can prove to be a more cost-effective solution than an IP-receiver, Daniel Richardson, partner at CG&Co and joint administrator of failed peer-to-peer lender Funding Secure observes: *'I think it is a misconception that IPs acting as receivers are more costly than surveyors acting as receivers. On the Funding Secure loan portfolio, through a combination of pre-existing surveyor-receiver appointments and post-administration IP-receiver appointments, there is no marked difference in the cost of one professional versus the other. The key is getting the right professional for the right job.'*

When challenged on the question of independence in engaging other members of the same surveying practice to provide necessary services, whether it be planning, letting, valuation or sales, the surveyor-receiver will argue that, provided that they can demonstrate that the 'team' engaged is best in class, it matters not if that team comprises other professionals within the same practice as the surveyor-receiver.

There are many other arguments both for and against engaging each type of professional, but what is clear is that there is no 'one-size-fits-all' approach; each situation needs to be assessed on its own facts and the lender should carefully consider what skills sets are required to best maximise their recoveries. This is never truer than when considering whether to engage an administrator to operate alongside an LPA receiver.

Administration or LPA receivership – or both?

Where a lender has the benefit of both a qualifying floating charge and a fixed charge, and it has been decided that enforcement action is the necessary (perhaps only) option, the question arises as to whether the lender should appoint an administrator or LPA receiver. Depending upon the particular situation faced, the answer could quite conceivably be both.

There are many differences between the role of the administrator and the role of the LPA receiver, the key difference being that an administrator is empowered with taking full control of the company's assets, while an LPA receiver will only be appointed in respect of a specific charged asset. Where a lender's security comprises a floating charge over the company's assets as well as a fixed charge over a property, engaging an administrator to sit alongside an LPA receiver (which is legally possible, if the administrator consents to the appointment of the LPA receiver) can provide an effective solution for a lender. The LPA receiver can be left to focus on managing the property asset, collecting rents and ultimately disposing of the asset, in the knowledge that the moratorium created by this 'administration wrapper' is in place. The administrator will then have a more limited role insofar as the property is concerned but is able to focus on any other recovery routes that may exist in order to maximise the returns for the creditors as a whole (including the secured lender), which could include utilising the administrator's powers to investigate antecedent transactions, misfeasance actions or wrongful trading claims. Even if the administrator did want to realise the property asset, there could be circumstances where it is beneficial for an LPA receiver to do so. For example, the receiver will usually be entitled to sell the asset free of any interest or security created over the asset in breach of the terms of the legal charge (called overreaching).

> The legal nature of the LPA receiver's role is a curious one.

There is clearly a place for both surveyors and insolvency practitioners to work together in many situations. As Fergus Jack, a surveyor-receiver and partner at CBD Urban explains: *'In situations where lenders can look for recoveries outside of the primary property enforcement route, we have seen good use of a two-pronged approach, where an IP can pursue "corporate recoveries" utilising their powers under the Insolvency Act, allowing the fixed charge receiver to work out the real estate. As surveyors who have worked with IPs regularly, we've never felt hindered by working with another adviser to create this two-pronged approach and provide the best solution for the client.'*

I will leave the last word to Fergus, who hits the nail on the head as to a crucial element that I have hitherto not touched on in this article: *'Regardless of who is appointed, what is critical is having clear, timely and, most importantly, commercial legal advice to steer home the workout.'* I concur. ◻

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The law of unintended consequences: Crown preference and CVAs

Gordon Thomson and **Damian Webb** explore the impact of HMRC's promotion to secondary preferential creditor status on future CVAs.

The arrival of Covid-19 and the associated lockdown measures have had an unprecedented impact on commerce throughout the world. Companies whose revenue depends on face-to-face interaction – ie those in the retail and leisure sectors – have been hit particularly hard by the significant fall in revenue, which has driven substantial losses and cash shortfalls.

The UK government has stepped in with an admirable suite of support measures that have enabled many companies to trade through the disruption, but a considerable number have still been forced to restructure their operations.

The ongoing uncertainty surrounding the lockdown tiers and impending conclusion of the government moratorium means the pressure on retail and leisure operators – and their related stakeholders, including landlords, suppliers and employees – will only increase in the short to medium term. As a result, more businesses will be required to implement some form of formal restructuring process.

One of the primary restructuring procedures is the Company Voluntary Arrangement (CVA), whereby a company enters into a statutory contract with its creditors in order to pay a percentage of its debts and may seek to amend certain ongoing costs (ie rent).

Stakeholders, notably landlords and suppliers, have recognised the unprecedented nature of the current trading environment and the need to rapidly restructure businesses. This has allowed many companies to align their cost base with their uncertain revenue streams in order to survive.

Indeed, in Q2 2020 (the most recent data available), 69[1] CVAs were implemented. In most cases, the underlying businesses were preserved, a significant number of jobs saved and ongoing investment permitted. The stakeholders have come to understand that such short-term compromises generally deliver a better outcome than administration/liquidation and ensure the long-term future of these companies and the associated commercial relationships.

> The government's decision to implement this change is therefore thought to be driven by its inability to collect tax revenue owed to HMRC.

What change is occurring and when?

At the time of writing in early November, the primary preferential creditors in an insolvency process (including CVAs) are employees.

As a result of the Finance Act 2020, from 1 December, HMRC will become a secondary preferential creditor in relation to taxes held by a business on its behalf, ie PAYE, VAT, employee NICs and Construction Industry Scheme deductions. There will be no cap on the age of the tax debts that will be afforded preferential status.

Therefore, in any insolvency commencing after 1 December, HMRC will be paid after employees and depositors up to the Financial Services Compensation Scheme limit and ahead of any other creditors, eg floating charge holders and ordinary unsecured creditors.

HMRC's preferential status was intended to be restored from 6 April 2020, but this was delayed as part of the UK government's early business support measures to help businesses through the challenging lockdown period.

Why is this change being implemented?

HMRC is typically one of the largest creditors in an insolvency and its losses via corporate insolvencies have significantly increased since the Enterprise Act 2002 repealed its preferential status.

That change was designed to promote the rescue culture underpinning the new administration process and to reduce the incentive for HMRC to oppose rescue proposals.

However, HMRC is a statutory organisation and so considers itself to be an involuntary creditor. The government's decision to implement this change is therefore thought to be driven by its inability to collect tax revenue owed to HMRC.

Indeed, the government considers businesses to be acting as its agents in collecting the relevant taxes, which are held in a similar way to a trustee. Accordingly, they consider it unfair that other unsecured creditors should share in any distribution of such funds.

HMRC's forthcoming movement up the repayment rankings means that it will receive funds that would previously have been shared equally among unsecured creditors. The associated collections are reportedly set to rise by approximately £200m per annum.

HMRC has stated that this change means that: *'When a business enters insolvency, more of the taxes paid in good faith by its employees and customers, and temporarily held by the business, will go to fund public services rather than being distributed to other creditors.'*

What does that mean for CVAs and the wider restructuring arena?

Future proposals will have to include HMRC being treated preferentially in respect of the relevant tax debts or to seek approval from HMRC, regardless of the views of the ordinary unsecured creditors.

Our recent experience in negotiating a range of CVAs has demonstrated the importance of all stakeholders taking a form of compromise so that a viable, balanced solution is delivered.

As part of the support measures introduced by the government, the VAT deferral scheme was designed to assist businesses with their cash flow during the pandemic by allowing them to defer VAT payable between March and June 2020 until 31 March 2021.

HMRC also encouraged businesses to make use of time to pay arrangements for amounts due, or about to become due, for PAYE/NIC and corporation tax. Consequently, many companies will now be carrying a significantly higher level of debt due to HMRC than may have been the case prior to lockdown.

The reinstatement of the preferential status for HMRC means that the associated debts cannot be compromised (reduced) without their consent. While this doesn't sound the death knell for CVAs, it will constrain the restructuring options for SMEs, likely requiring additional funding support and increasing the compromises from other creditors, notably landlords and trade creditors (also likely to be SMEs).

This may undermine the achievability of a CVA, potentially triggering an increase in the use of pre-packaged administrations or other, more final procedures, which the VAT deferral scheme and other support measures were designed to avoid.

In turn, this will drive further job losses – at a time when the current support packages are coming to an end – and will significantly increase the losses to unsecured creditors. This cycle will result in a negative impact on the UK economy, which is visibly struggling under the current pressures.

What does it mean for lenders?

Lenders are typically able to support companies through the growth and turnaround phases of the business lifecycle as they can rely on floating charge assets (debtors, stock, etc) for security. The prioritisation of HMRC over these secured lenders will further reduce the limited funding available for this sector and will likely discourage much-needed investment.

Banks and other lenders may now seek to take fixed charges and may well request personal guarantees from directors. Many directors will not be prepared to provide such guarantees at a time when so many companies (particularly those in the retail and leisure space) are experiencing considerable trading difficulties and serious concerns remain about being able to emerge from lockdown. This could lead to the withdrawal of lending facilities and the potential insolvencies of numerous companies.

Indeed, there is concern that some directors may feel the best option is to put their company into administration or liquidation before HMRC's preferential status is reinstated in order to reduce the chances of lenders calling on personal guarantees.

> **"The government is not deaf to the potential impact of this change and we should hope that they will take the necessary steps to minimise any fallout."**

What can be done?

It is difficult to say how HMRC will approach proposals after 1 December, but ensuring they are properly engaged in the CVA process at a relatively early stage will likely prove beneficial.

For example, given the importance of landlords to retail CVA processes, the British Property Federation (BPF) has played a vital role in the development and implementation of these procedures over the past few years.

The BPF has managed to strike a balance between the interests of their landlords and those of struggling businesses, lending their support to credible proposals that deliver a fair outcome to the various stakeholders.

If HMRC were to adopt such a collaborative approach, perhaps establishing a committee that was to swiftly evaluate CVA proposals and to consider accepting suitable compromises, the impact of the forthcoming change in their preferential status may be managed appropriately.

In the absence of such an approach, and as with most situations involving financial distress, careful cash flow and scenario planning should be maintained on an ongoing basis and action undertaken as early as possible, including clear, timely communication with advisers and stakeholders.

Conclusion

The reintroduction of HMRC as a preferential creditor is somewhat understandable, given the associated historical losses, but the timing is unfortunate at best. HMRC arrears currently stand at unprecedented levels due to the government support measures and HMRC's formal forbearance policy. Consequently, currently HMRC will in many cases be the major substantive unsecured creditor for UK businesses.

In some cases, these liabilities will be unsustainable and, based on recent experiences, it is apparent that a significant proportion will need to be compromised to ensure the survival of the underlying businesses.

The forthcoming reinstatement of HMRC's preferential status is an unwelcome development at this time as it removes a great deal of flexibility from the average CVA process. It is probable this development will undermine returns in CVAs to other creditors, thereby undermining the viability of those creditors, in turn.

The process of prioritising HMRC over businesses and other key stakeholders, notably trade suppliers, funders and landlords, does not appear equitable noting the unprecedented challenges many of these stakeholders are facing currently.

In addition, we anticipate prioritising HMRC will encourage the utilisation of pre-packaged administrations instead of CVAs, which will inherently worsen the position for other creditors. Noting the government's proactive actions in protecting businesses and enhancing the insolvency legislation to further the rescue culture, it appears they have not fully considered the unintended consequences of prioritising HMRC's creditor status.

The government is not deaf to the potential impact of this change and we should hope that they will take the necessary steps to minimise any fallout in these particularly difficult times. □

[1]https://www.gov.uk/government/statistics/company-insolvency-statistics-april-to-june-2020

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Fraud, furlough, CBILS and bouncebacks

Frances Coulson provides an update on Covid-19 fraud, looking at how many ghostly employees could be on the books and how much they're worth.

It seems as if we have been in this pandemic for approximately 100 years, and now we have a recent return to lockdown. Looking back to March, we should remind ourselves that this is a crisis never faced before and the government has had to react rapidly to a changing, unknown threat.

Of course any crisis or chaos is like a beacon to fraudsters who, whether opportunistic individuals or part of a national, or more likely international, Serious Organised Crime Group (SOCG), invariably take advantage of a crisis to steal from everyone else. Naturally one of the biggest targets in this (and many other) countries is the tax and financial system generally. While most of us are familiar with the usual raft of tax frauds, the Covid-19 situation and the speed with which the government has had to respond in terms of cash support to businesses and individuals to prevent systemic meltdown and hardship was always going to be a supermarket sweep for fraudsters. While government aid and the speed and system of delivery was admirable and necessary, as practitioners we will need to be alive to the challenges of recouping the public funds that have been misapplied during the pandemic.

Covid-19 and employment

The coronavirus job retention scheme (CJRS) tried to relieve the hardship the pandemic created so that rather than dismiss an employee or make them redundant, an employer could place the employee on furlough leave until 31 July and have 80% of their pay up to £2,500 reimbursed by HMRC, with employers' NICs and minimum automatic enrolment employer pension contributions on that wage. While that reduced gradually, a recent change meant that a revised job support scheme (JSS) was announced in early October in the hope of saving viable jobs – any employer regardless of the sector in which it operates is potentially eligible for a grant subject to some restrictions, especially for larger employers. The latest lockdown has seen the return of furlough, albeit with some uncertainty at the time of going to press.

On 9 October, the chancellor announced a further extension to the JSS aimed at supporting businesses who are legally required to close their premises as part of local or national restrictions. This is now known as the JSS Closed scheme on the basis that it is available to businesses who are required to close by law. Large employers with 250 or more employees can access this part of the scheme without a financial impact test, but there is an 'expectation' that they will not make capital distributions if they do (how the expectation is implemented remains unclear).

> **"By June, HMRC had received 1,900 reports of fraud, 4,400 by July and 7,000 by August. That was the tip of the iceberg."**

From its inception, the CJRS supported the wages of between 8 and 11 million workers. To put that in context there were 30.5 million workers in the UK in paid employment as of September 2019, according to the Office for National Statistics (ONS).

The government was, until recently, also to pay a job retention bonus on 15 February 2021 of a £1,000 one-off taxable payment to the employer for each eligible employee that the employer furloughed and kept continuously employed until 31 January 2021. Unlike furlough pay, the bonus did not have to be passed on to the employee. In order to claim the bonus, an employee would have had to have been paid a minimum income threshold in each of the three months ending 5 February 2020. One hundred ghost employees could have equalled a further £100,000 stolen in this instance, on top of any previous furlough gains. Sensibly, perhaps, this has been withdrawn since the furlough support has been extended to March.

“When you as practitioners come across companies who have used the schemes, be aware that employers have to keep proper records of staff on furlough, including part-time hours under the more recent changes.”

There was an early change in the qualifying dates of the original scheme so that employees who had been on the PAYE books as of 19 March 2020 – as opposed to the originally announced 29 February – qualified for the support. That almost-three-week window of opportunity gave the smart fraudster a chance to add a few ghostly staff to the books. By June, HMRC had received 1,900 reports of fraud, 4,400 by July and 7,000 by August. That was the tip of the iceberg. Last month the National Audit Office (NAO) said that more than £3bn of furlough job protection money could have been stolen by criminal gangs and employers, and that up to £2bn of taxpayer money may have gone to criminals using fake companies. HMRC itself suggests that up to 30,000 companies may have committed furlough fraud. We are already seeing cases of fraud on these schemes and HMRC has acted to provisionally liquidate some companies already.

Unscrupulous employers made staff work but claimed the CJRS. Those with several companies or associates with companies could furlough staff and staff on furlough could work for someone else; staff could then be swapped and grants claimed by both employers towards wages. So staff would be working full time but the employer would be getting the CJRS. And how many of those employers will go ‘missing’? Part-time staff have also had their hours falsely inflated to maximise the grant.

Of course the government needed to act quickly and it would have been impossible to flood the already-creaking benefits system with claimants.

What about IPs?

When you as practitioners come across companies who have used the schemes, be aware that employers have to keep proper records of staff on furlough, including part-time hours under the more recent changes. Those who do not may well render the company liable to claims (or themselves personally) and of itself that would be a breach of duty. Employers are required to have sent written confirmation to employees that they have been furloughed. These written agreements must be retained for five years. Legislation, which will provide HMRC with enhanced powers in relation to the CJRS, forms part of the Finance Act 2020. To help deter further abuse of the CJRS, the proposed legislation will not only give HMRC the ability to pursue those who have broken the furlough scheme rules but it will also enable HMRC to hold company officers jointly and severally liable for CJRS abuse, where a business has become insolvent.

The legislation gives HMRC the power to claw back CJRS payments made to businesses that were not entitled to receive such payments, or which have not been used to pay employment costs. Employers will be given a 90-day amnesty in which to self-report if they have made a mistake. They will then be allowed to repay the sums received without incurring any penalties. However, following this 90-day period of grace, if HMRC considers that an employer has failed to notify a mistake, the employer will be investigated by HMRC and required to prove that they are innocent of any wrongdoing.

Penalties for wrongdoing will start at 100% of the sums incorrectly claimed. If remedial action is taken swiftly this may be mitigated but the penalty will not be less than 30%. Where HMRC has already commenced questioning then the minimum penalty will be 50%. HMRC has also warned that it will consider criminal charges in cases of deliberate misuse. There is also a risk that HMRC will seek to bring prosecutions against corporates for the offence of failing to prevent tax evasion, under the Criminal Finances Act 2017.

“As with the other joint and several provisions, this may leave practitioners competing with HMRC in pursuit of directors who may well have committed other breaches.”

As with the other joint and several provisions, this may leave practitioners competing with HMRC in pursuit of directors who may well have committed other breaches. It seems sensible for the profession to engage on an ongoing basis if possible with HMRC to ensure maximum pursuit of wrongdoers with minimum duplication but it remains to be seen how this will work.

Property and construction firms are at the centre of HMRC’s investigation into employers it suspects of abusing the furlough scheme but there will be examples in all sectors no doubt.

Of course, aside from furlough fraud, the banking system will take some hard hits albeit largely government (ie taxpayer) backed.

“There will be many challenges for IPs in the next few years and not least among these will be pursuing redress for the frauds that have occurred.”

CBILs and bounce backs

Again the government tried to provide quick and easy relief to maintain the economy as best it could, forcing banks into offering the government-backed coronavirus business interruption loan scheme (CBILS) and latterly £50,000 ‘bounce back’ loans (BBLS). While there were more difficulties with CBILS, BBLs were very easy to get and there are many reports of dormant companies seeking these loans or, even if not dormant, the loan providing a last hurrah (car or whatever) for the directors before the company collapses. The NAO again suggests that up to 60% of emergency pandemic loans made under the bounce back scheme may never be repaid, amounting to some £26bn from fraud, organised crime or default.

The lending scheme carried lighter checks than others and was aimed at small businesses unable to access other pandemic funding support. Hastily introduced with scant guidance at the time, the CJRS has been, according to HMRC’s chief executive Jim Harra, a ‘magnet for fraudsters’.

There will be many challenges for IPs in the next few years and not least among these will be pursuing redress for the frauds that have occurred and to which all office-holders need to be alert. □

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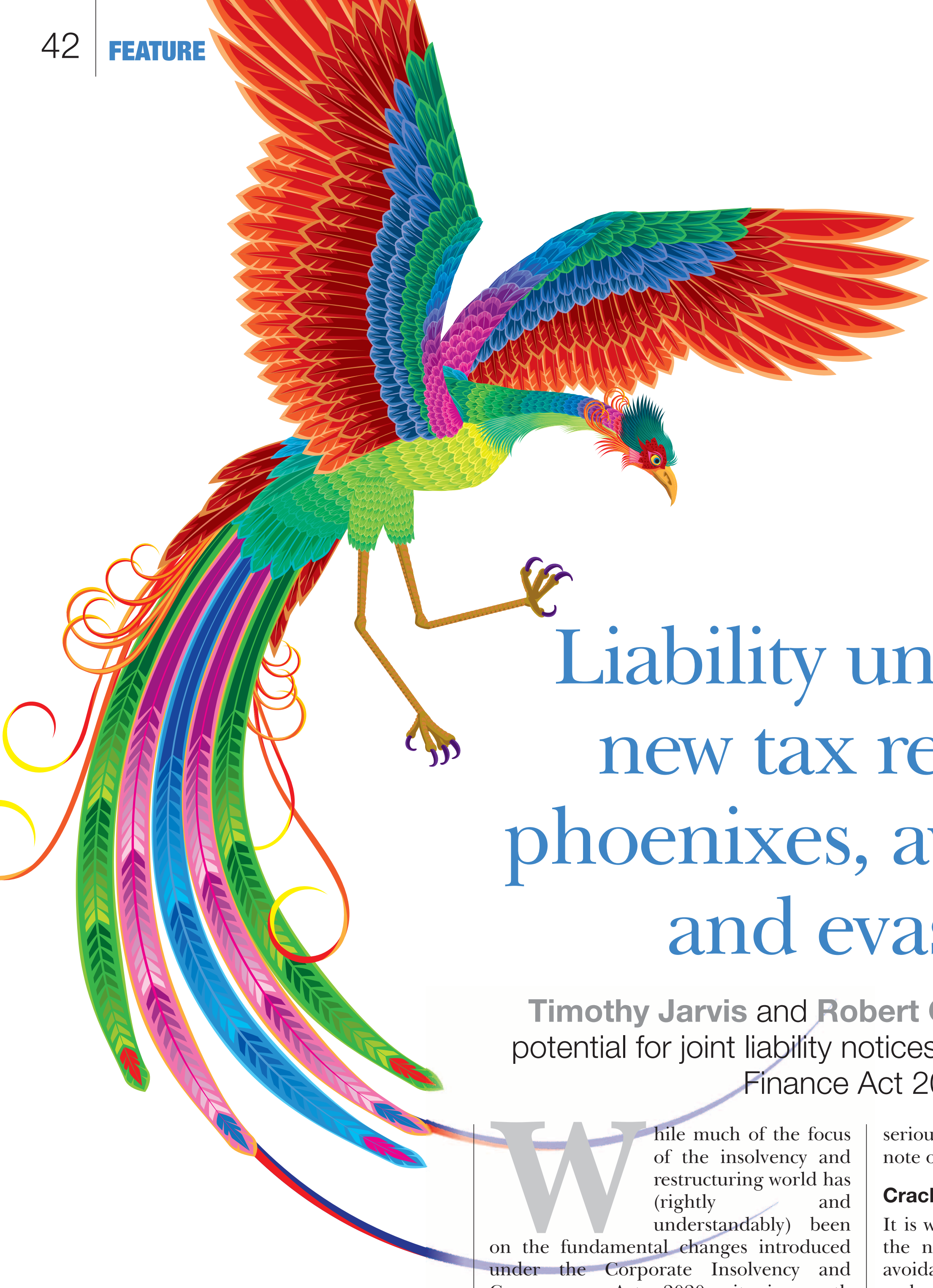

Liability under the new tax regime: phoenixes, avoidance and evasion

Timothy Jarvis and **Robert O'Hare** examine the potential for joint liability notices brought in under the Finance Act 2020.

While much of the focus of the insolvency and restructuring world has (rightly and understandably) been on the fundamental changes introduced under the Corporate Insolvency and Governance Act 2020, it is worth remembering that there have been major tax changes, too.

The Finance Act 2020 changed the tax on insolvency rules in two respects. The first, amending the Insolvency Act 1986 (and its equivalents in Scotland and Northern Ireland) to restore HMRC as a secondary preferential creditor in insolvency proceedings[1], has received plenty of coverage. However, despite having the potential to have a much greater impact, the second change, the introduction of new rules making directors, shadow directors and certain others jointly and severally liable for a company's tax liabilities in insolvency situations, has taken effect relatively quietly.

> The introduction of new rules making directors, shadow directors and certain others jointly and severally liable for a company's tax liabilities in insolvency situations has taken effect relatively quietly.

The new regime is lengthy and complex. It is intentionally broadly drafted so as to act as a deterrent. As a result, the regime has potential application in a wide, much wider than might first appear, range of circumstances and the ability to create serious personal financial burdens. This note outlines the key provisions.

Cracking down on avoidance

It is worth noting the policy intention for the new rules is to combat abusive tax avoidance (and evasion) arrangements that seek to use the insolvency laws to circumvent a tax liability.

Although not limited in scope to address a single concern, the rules arose as a response to the government's dissatisfaction with the adequacy of its powers to tackle 'phoenixism' – ie the practice of carrying on the same business through a series of companies where each company becomes insolvent but transfers its business (less liabilities, including taxes due) to a successor company. The abusive nature of such an arrangement is especially evident where value has been extracted from the company through a tax avoidance scheme. HMRC has been steadily building its powers of investigation and armoury of counteraction over the past few years; the joint and several liability rules are the latest iteration of a long-term trend.

Since 22 July 2020, in certain circumstances involving insolvency or a potential insolvency, any director or shadow director of, or any other individual otherwise connected to, a company can be made jointly and severally liable for amounts that are payable to HMRC by the company. The regime is also extended to members and shadow members of limited liability partnerships (LLPs).

HMRC has to issue a joint liability notice (JLN) to trigger the rules. Subject to numerous conditions, HMRC can issue a JLN in three broad cases:

- tax avoidance and tax evasion;
- repeated insolvency and non-payment cases; and
- cases involving penalty for facilitating avoidance or evasion.

> The new regime is lengthy and complex. It is intentionally broadly drafted so as to act as a deterrent.

Tax avoidance and tax-evasive conduct

For cases involving tax avoidance and tax evasion, five conditions need to apply:

- the company has engaged in tax avoidance arrangements or tax-evasive conduct;
- the company has entered into an insolvency procedure or there is a serious risk of it doing so;
- the individual issued with the notice was either: responsible for (or helped plan or implement) the avoidance or evasion or received a benefit knowing (or could reasonably be expected to have known) it arose as a result of the avoidance or evasion;
- a tax liability is likely to be due as a result of the avoidance or evasion; and
- there is a serious possibility some or all of that liability will not be paid.

An individual receiving a JLN relating to tax avoidance and tax evasion will be jointly and severally liable with the company for the company's liabilities to HMRC arising from the tax avoidance or evasion.

Phoenixism

For cases involving repeated insolvency (ie phoenixism), four conditions need to apply:

- during the five years prior to the issue of the notice, the individual had a 'relevant connection' with (ie was a director or shadow director of, or was a participator in) at least two 'old' companies that have become subject to an insolvency procedure or had an outstanding tax liability at that time;
- another company carries on a trade similar to that of at least two of the old companies;
- during the five years prior to the issue of the notice, the individual had a 'relevant connection' with (ie was a director or shadow director of, or was a participator in) or was involved (whether directly or indirectly) in the management of the new company; and
- at least one of the old companies still has a tax liability outstanding in an amount exceeding £10,000 and representing more than 50% of the total amount due to its unsecured creditors.

An individual receiving a JLN relating to phoenixism will be jointly and severally liable (with the new company) for any amounts due to HMRC from the new company when the notice is issued, or which arise during a period of five years from the issue of the notice, and will be jointly and severally liable (with any relevant old company) for any amounts still due to HMRC from that old company.

Facilitation of avoidance or evasion

For cases involving a penalty for facilitating avoidance or evasion, four conditions need to apply:

- the company has been charged a penalty (or proceedings have been commenced to charge a penalty) under one of several specified sets of anti-avoidance disclosure, promoter and enabler rules;
- the company has entered into an insolvency procedure or there is a serious risk of it doing so;
- the individual issued with the notice was a director or shadow director of, or was a participator in, the company when the act or omission occurred that gave rise to the penalty (or penalty proceedings); and
- there is a serious possibility some or all of that liability will not be paid.

An individual receiving a JLN relating to penalties for facilitation will be jointly and severally liable with the company for the relevant penalty.

Reviews and appeals

Individuals receiving a JLN have the right to request HMRC to review its decision to issue one and the right to appeal against it to the courts. Where a company is appealing against a tax liability that is the subject of a JLN, the individual is entitled to join the company as a party in the appeal (and can continue it if the company withdraws). Where the company does not appeal against a tax liability that is the subject of a JLN, the individual is entitled to appeal in their own name.

> Given the broad nature of the multiple regimes referenced, the overall effect is to create a very wide set of circumstances that can trigger the issue of a JLN.

Doing what it says on the tin?

The common theme in each of the three cases is that HMRC must establish the liability has arisen through tax avoidance, evasion or phoenixism. To help 'target' the rules, the new regime references existing anti-avoidance rules (including, but not limited to, the UK's General Anti-Abuse Rule (GAAR) and Disclosure of Tax Avoidance Schemes (DOTAS)) in defining its scope.

However, given the broad nature of the multiple regimes referenced, the overall effect is to create a very wide set of circumstances that can trigger the issue of a JLN. Add that to the relatively subjective extension of the rules to situations involving potential insolvencies, and the inclusion of participators, and the net result is a regime that circumvents the 'limited liability' status of companies and creates latent secondary tax liabilities for what could be a very large group of individuals (including company directors, shadow directors and its investors and shareholders, irrespective of involvement or actual knowledge of the actions of the company) across a lengthy five-year period. Furthermore, despite the after-the-event safeguards afforded by the right to review and appeal, there is little to protect genuine restructurings and insolvency situations that arise solely as a result of a commercial downturn for (however inadvertently) being caught and challenged.

With businesses struggling in the wake of the Covid-19 pandemic, the rules will demand careful and considered attention. □

[1]At the time of writing this is intended to come into effect from 1 December 2020.

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Litigation funding: a retrospective

Mark Beaumont looks back over the development of the litigation funding industry.

With R3 turning 30 years old, it seems as good a time as any to look back at the development of the third-party litigation funding industry. Many of you will be surprised to know that it developed in the 1990s in Australia and has been active in the UK since at least the early 2000s. Not bad for something that still gets referred to as a nascent industry sector.

Non-recourse litigation financing is a well-developed area, with scores of providers and a wide variety of business models and practices. Understanding this sector of the market may benefit insolvency professionals and creditors, especially when it comes to extracting maximum value from litigation assets.

> **Don't be a dinosaur! If you want to extract the maximum value from litigation assets it makes sense to explore the range of options that the market has to offer.**

The usual model for litigation funders in commercial litigation and arbitration is to make financing available to clients so that they may pursue their own claims. This allows clients to retain control over the litigation, especially important when it comes to decisions to accept settlement offers or press on with a dispute. For a variety of reasons, this is not the model that seems to me to have become most prevalent in the insolvency sector, which raises questions as to why that would be and who benefits the most.

Could you, should you?

It seems to be much more common to give assignment of claims to funders when it comes to insolvency disputes. One obvious reason for this is that you can, but, to quote Jeff Goldblum's character in *Jurassic Park* (because, well, I can, and it's also almost 30 years old): 'Your scientists were so preoccupied with whether or not they could, they didn't stop to think if they should.'

There are good reasons to assign claims to funders, but that does not necessarily mean that it should be the default position. Let's look at it from the perspective of a funder. One of their key metrics is return on investment (ROI), which is used to directly measure the amount of return on a particular investment, relative to the investment's cost. Acquiring an asset for a small upfront fee and settling it very quickly could impact ROI (on an annualised basis) much more than pursuing that case for longer and securing a much larger return. Are the interests of the IP, creditors and funder aligned in such a scenario?

In the wider litigation funding sector, it's much more common for the client to retain control and make their own decisions about what to settle for and when. Many of the funders interested in backing insolvency disputes, and there are now dozens of these entities, are willing to consider either approach, depending on the appetite of the client and the circumstances of the dispute. It can certainly benefit to stop to think if you *should*, as Mr Goldblum recommends.

Insurance and agreements

As litigation finance has developed over the last 25 years, the market for after-the-event (ATE) legal expenses insurance has evolved and matured too. ATE providers are now capable of insuring own costs as well as adverse costs, which can allow for claims to be pursued in a much more cost-effective fashion, and some will even provide funding for disbursements too. ATE and variations on it can be useful in lower-value claims or where funding is not needed for solicitors and counsel, should they be content to work on a full conditional fee agreement (CFA). It is even possible to combine ATE with own costs insurance and some level of funding to reduce the return to the funder and retain more value in the estate.

> **There are good reasons to assign claims to funders, but that does not necessarily mean that it should be the default position.**

Here at Annecto Legal we work with lay clients, insolvency professionals and lawyers to explore all options around potential disputes. This can involve suggestions around potential retainer options, as well as looking at what possible funding and insurance products are likely to be available and how they work. Our aim is to give you the information and options you need in order to make an informed choice about how best to proceed, as well as giving you feedback on pricing and how different models impact on likely settlement scenarios.

So, in summary, don't be a dinosaur! If you want to extract the maximum value from litigation assets it makes sense to explore the range of options that the market has to offer, and not restrict yourself to any one single funder, model or approach.

MARK BEAUMONT is co-founder of Annecto Legal Ltd, a national broker of after-the-event (ATE) legal expenses insurance and a wide range of funding for insolvency litigation and arbitration claims. Annecto is happy to assist with smaller claims, as well as mid-market, large-scale and complex cases. Contact Annecto Legal on 0800 612 6587 or Mark Beaumont directly on mark.beaumont@annectolegal.co.uk or 07730 217 643.

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Sharing is caring – Covid-19 and the fight for online attention

Marcel Groenewegen writes on the challenges that the 'new normal' brings along for international organisations such as INSOL Europe.

While I am writing this column from my home 'office desk' (in my case: a desk in the attic between loads of bookshelves) as the newly appointed president of INSOL Europe, it once again descended on me what an unprecedented situation we are all in. Covid-19 is still among us in a second wave, and strict preventive measures are upon us to try to get a grip on the virus as we await a vaccine to become available for the entire world.

The United States has a new president-elect and vice-president-elect, but is still struggling with the current president, who finds it difficult to accept that times have changed.

'Returning to normal' seems far away, but stays much desired. Getting accustomed to the 'new normal' and awaiting the arrival of a reliable Covid-19 vaccine is the thing we all must do and cope with.

> Many organisations (such as INSOL Europe and R3) have experienced that they are now in a constant 'fight for attention' of their members for their activities.

In the meantime, I think many organisations (such as INSOL Europe and R3) have experienced that they are now in a constant 'fight for attention' of their members (and of the wider outside world) for their activities. We have all gone through an internet and digi-tec speed course to adapt ourselves to the new world and keep the connection with our members alive.

The new world, online

For the first time in its existence INSOL Europe held its yearly conference in online form this October. The title 'Towards a new world' seems appropriate, although the new world has actually already arrived. We are now fully adapted to the digital world and will need to continuously develop our skills.

Having said that, I also feel organisations like INSOL Europe and R3 can learn from each other and should be encouraged to share digital experiences for their mutual benefit and that of their members. No one should have to reinvent the wheel and, indeed, sharing is caring.

One of the goals of the current executive of INSOL Europe is to strengthen relationships with other organisations, legislators and academic bodies.

As you may know INSOL Europe and R3 have for many years cooperated in organising joint events with interesting programmes for their respective members.

I am proud that our organisations have joined forces again and – together with the Fraud Advisory Panel – will organise a joint Fraud Conference on 2 and 3 February 2021 called 'Preparing for the new world: a toolkit for action'.

The conference will provide a counter-fraud toolkit for practitioners to help them prepare for the new world. Speakers will provide unique insights into topics related to global financial crime including tackling rogue companies, cryptocurrency fraud and digital forensics.

I encourage you all to discover your 'new digital you' and register for this conference. You can find the full programme and registration formalities at: **www.thefraudconference.com**.

> Let's all try to ensure our legacy passes over to younger generations and encourage them to join us in huge numbers. It's probably the best way to win the battle for attention.

The battle for attention

Finally, 'youth is the future', as the saying goes. As regards to digital skills, we all know the future is now and I can only admire the speed at which young people have mastered and captured the new world.

One of the most important long-term objectives for the executive of INSOL Europe is to encourage young insolvency and restructuring practitioners to participate in INSOL Europe's activities. I am sure R3 has similar initiatives. Let's all try to ensure our legacy passes over to younger generations and encourage them to join us in huge numbers. It's probably the best way to win the battle for attention.

I am confident that INSOL Europe and R3 in the end will not be beaten by Covid-19 and will emerge stronger and more coherent as organisations with interesting programmes for our members.

Please stay safe, and I take the opportunity to wish you and your loved ones happy holidays and all the best for a wonderful, but most of all healthy and harmonious, 2021.

MARCEL GROENEWEGEN is president of INSOL Europe and a partner at CMS in the Netherlands.

R3's Smaller Practices Group (SPG) Forum 2020 – staying ahead of the game

This year's SPG Forum was the first online conference in R3's history – and one of the best-attended SPG Forums to date.

Over 500 insolvency and restructuring professionals joined us for five days of virtual content that covered everything from motivating staff, major changes in legislation, the potential impact of Covid-19 on the profession, its clients and the economy to speed networking.

Chaired by SPG Committee members Trevor Binyon and Kevin Lucas, the Forum was a triumph of technology, showing that we can adapt to challenging times and deliver great content via a virtual setting.

What remained unchanged was the overwhelming positivity, camaraderie and ethos displayed by the speakers, sponsors and delegates that joined us.

Here are some of the highlights from what was an action-packed five days that delivered more than 30 hours of live and on-demand sessions, virtual networking and a bustling virtual exhibition hall. If you missed it, the Forum is available, on demand, until the end of February.

"The Forum was a triumph of technology, showing that we can adapt to challenging times and deliver great content via a virtual setting."

Covid and the economy

The opening keynote was delivered by Professor Trevor Williams of the University of Derby, a regular speaker at the Forum, who presented the economic outlook for 2021 and beyond in his usual engaging way.

It was interesting to note how deeply economic recovery was reliant on the rollout of a vaccine just as major news channels were indicating this was now moving into production. Some of the economy's current capacity will be permanently lost as a result of the pandemic and there will undoubtedly be trouble ahead.

HMRC and R3 join forces to combat fraud

Grant English, of HMRC's Fraud Investigation Service, presented a session exploring how HMRC and the insolvency profession can work more closely together to prevent losses from, and recover proceeds of, fraudulent attacks on the UK tax system, focusing specifically on supply chains in the labour market.

In a separate session HMRC outlined how they are acting to recover some of the £3.5bn of furlough and other Covid-related support payments that are estimated to have been claimed fraudulently. Where insolvency is involved and HMRC suspect fraud has taken place, office-holders will be informed within three days of appointment and provided with documentary evidence of the claims, giving everyone a potentially immediate and useful way to seek recoveries from the relevant parties.

Fireside chats

Throughout the week we saw panel discussion from special interest groups including the SPG Committee, the R3 New Professionals Committee and key R3 staff.

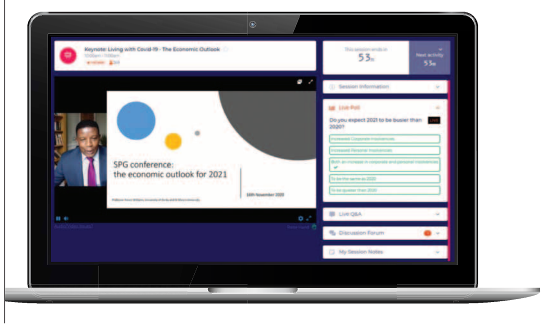
These sessions gave an insight into how these groups are representing R3 members, what to expect in the coming year, and how you can get involved by becoming an ambassador for the profession to support local and national activity.

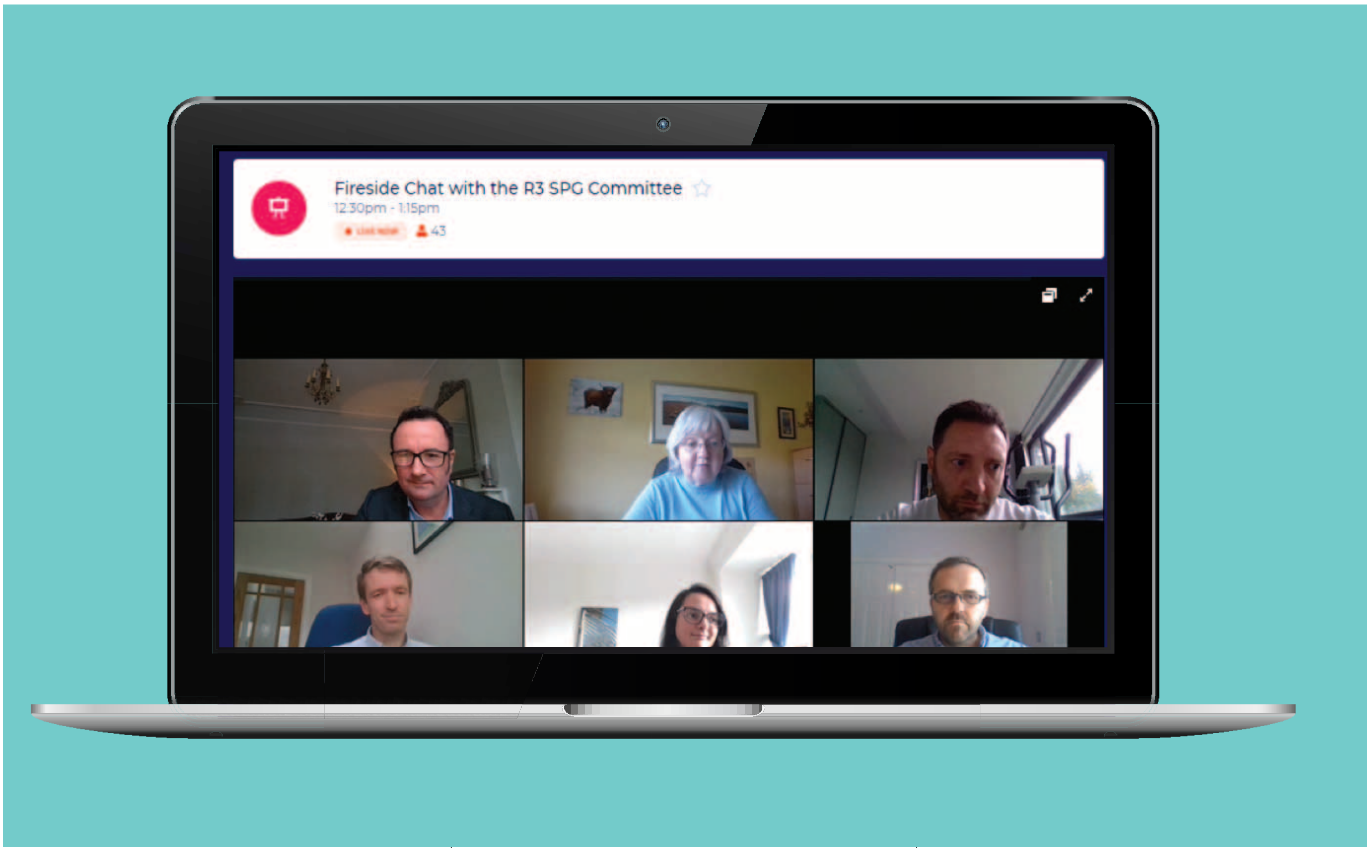
Speed networking – virtual

Delegates took part in numerous speed networking sessions under the watchful eye of R3's Gareth Fitzgerald, and our regular attendees had a chance to catch up with each other and discuss the challenges and opportunities they're facing and expect to see in the future.

During the break

The virtual hallways came to life between sessions as delegates poured out of the main conference room and into the Virtual Hub to discover how our sponsors can





support them. A special thank you goes to everyone at Postworks, Apex Litigation Finance, Peter Fenwick & Co, and LSS, and our key sponsor partners Manolete, Marsh, and IRS for supporting this event and remaining on standby throughout.

> A mixed panel of experts discussed threats to the reputation of the profession – we will all be under the spotlight next year as government support schemes come to an end and the predicted increase in personal and corporate insolvencies hits.

Informative, engaging sessions

Other speakers included representatives from the RPBs talking about how they have changed their processes to maintain the regulatory visits office-holders know so well and some of the key findings from those visits during 2020. It should come as no surprise that the key recommendation is to document everything – and to re-visit the revised Ethical Code. The Insolvency Service policy lead Paul Bannister was on hand to outline the key policy issues to expect over the next few months including the long awaited outcome of the review into IP regulation, A mixed panel of experts discussed threats to the reputation of the profession – we will all be under the spotlight next year as government support schemes come to an end and the predicted increase in personal and corporate insolvencies hits. How we as a profession act will be so important.

A joint effort

The 2020 SPG Forum was different this year. But what it did have in common with previous years was the fact that it wouldn't have happened without the support of the SPG Committee, our sponsors, our speakers, and our Forum co-chairs, Trevor Binyon and Kevin Lucas and not to mention the many delegates who attended.

Thank you to everyone who helped make it such a success – we're looking forward to the next one!

Catch up or watch again online

Delegates can view all the sessions (both the live recordings and the on-demand content) up until 28 February 2021 on the SPG virtual platform.

If you missed out this year but would like to view the content, it is available to purchase up until 31 December 2020 via **www.r3spg.org.uk**.

> In a separate session HMRC outlined how they are acting to recover some of the £3.5bn of furlough and other Covid-related support payments that are estimated to have been claimed fraudulently.

SIMEON GILCHRIST is SPG Committee chair and restructuring and insolvency partner at Edwin Coe LLP.

Campaigning on pre-pack policy and the fight against fraud

The PPP team makes headway on Companies House reform and pre-packs.

Since the last issue of *RECOVERY* two key announcements from the government have, among other things, kept R3's Press, Policy and Public Affairs (PPP) team busy: the outcome of its 2014 pre-pack review and its response to last year's consultation on Companies House reform.

These announcements have been made against a backdrop of economic uncertainty, with Covid-19 continuing to damage many viable businesses across the country, not to mention the impending arrival of Brexit-proper.

On a lighter note, this autumn we were delighted to be named In-House Team of the Year at the PRMoment Awards 2020 for our campaign against the reintroduction of Crown preference. Although the battle against the introduction of the policy was lost, the war is far from over.

Pre-pack law re-packaged

In October, the government announced it would bring in new regulations to require independent scrutiny of pre-pack administration sales. Our response – covered by *The Times* and other outlets – broadly welcomed the announcement, noting 'these reforms, while not perfect, should help to improve confidence in this important business rescue tool.'

We understand some members may take a different view, but it's worth remembering both pre-packs and the profession more generally are likely to face sharp scrutiny in the months and years ahead as the true economic hit from Covid-19 starts to be felt. With many firms having relied on government-backed emergency loan schemes, there will be an added focus to the scrutiny as MPs consider the impact of insolvencies on the public purse, particularly through pre-packs.

The government also had the power to ban sales to connected parties in pre-packs entirely. When you consider all these factors, the government's decision – while not ideal – seems workable.

However, the measures are not faultless. We have already relayed member views back to the Insolvency Service as to where improvements can be made, such as on the qualifying criteria around the proposed 'evaluator'. As some readers may have seen, R3 president Colin Haig was quoted in *The Times* highlighting the need for these criteria to be reviewed.

We will of course keep you posted on this important issue, and will continue to raise member views and concerns about the detail of the announcement directly.

Companies House reform

The government's long-awaited response to its 2019 'Corporate transparency and register reform' consultation, which sets out a series of major reforms to the role of Companies House in the corporate governance framework, was published in September. Having called for Companies House to require director ID verification for a number of years, we welcomed the consultation and the government's response. The proposals will improve the integrity of the framework and make a significant difference in the fight against fraud.

> "Both pre-packs and the profession more generally are likely to face sharp scrutiny in the months and years ahead as the true economic hit from Covid-19 starts to be felt."

In our original consultation submission, we had highlighted the need for Companies House to require ID verification of company directors and people with significant control, and were pleased the government confirmed it will press ahead with this change. Another win for the profession was confirmation that the government will retain dissolved company records for 20 years, something that previously had been in doubt.

Unfortunately, some key recommendations made in our original submission were not addressed by the government's response – most significantly, the importance of insolvency practitioners being allowed access to the proposed new 'back end' of Companies House data in order to facilitate investigations into potential wrongdoing and misfeasance. This is a key point we will re-emphasise to officials.

We will continue to call for the profession's role in the fight against fraud to be considered fully in the government's reform plans. This is now even more important given the numbers of fraud cases that have arisen from the government's Covid-19 support schemes.

R3 in the media

On the media front, the PPP team has been busy responding to requests, arranging interviews and providing briefings for various outlets including *The Times*, the *Financial Times*, the *Daily Telegraph*, *Global Restructuring Review* and *Accountancy Age*.

In October, we announced the launch of the R3 free standard form for CVAs through an exclusive story in *The Times*.

Our responses to the government's pre-pack announcement and the chancellor's announcement extending the ban on the issuing of statutory demands and winding-up petitions received good pick-up in the regional and trade press.

R3's commentary on insolvency statistics was covered in *The Times*, the *Daily Mirror*, and *Dow Jones*, as well as numerous regional and trade outlets. Our earlier research into insolvency and restructuring professionals' predictions about future insolvency numbers continued to receive coverage, including in *The Scotsman*.

Brexit and getting 'back to business'

As the deadline for exiting the EU draws nearer, we will be highlighting to members some of the changes Brexit will bring. Members can look out for an update on immediate and short-term implications for the profession, recommended actions to consider, and R3's plans for engaging with government on these issues.

Meanwhile, as part of our Back to Business campaign, we are partnering with the Federation of Small Businesses and Institute of Directors on a series of webinars for their members to highlight the key role the profession plays in business recovery and to educate directors on seeking early advice. As the year draws to an end, we will continue to support and promote the profession as it helps to rescue businesses and jobs. ◻

JAMES JEFFREYS (LEFT) is head of press, policy and public affairs at R3.

STUART MCBRIDE (RIGHT) is communications manager at R3.

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IBC: inside back cover,
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An interview with… Dean Beale, chief executive of the Insolvency Service

The head of the Insolvency Service converses with R3 president **Colin Haig** on the challenges of the pandemic, rogue advisers, transparency and the opportunities for career development with the Service.

Q It's an interesting time for the UK. What would you say are the biggest changes you've observed so far? Both in process and policy perhaps?

A As an organisation, we've had to respond to the pandemic, both operationally and as a part of government responsible for supporting the economy. On the operational front we have very quickly had to adapt to new ways of working and delivering our essential services such as the redundancy payments service. We cannot switch these off temporarily because there's a crisis going on; we've got to make sure those services continue to function for our stakeholders.

We were in a good place in terms of the IT infrastructure refresh, which has been happening over the last few years. We were not completely immersed in the whole Teams system, but we rolled it out very quickly, transitioning from being 22 offices to having over 95% of our people working from home.

That's enabled us to deliver an uninterrupted service. There have been a few modifications – we couldn't operate some of our phone lines around the redundancy payments services remotely and we've had to modify how we communicate with our users, for example, but, generally, it's been a successful transition. On the wider government side, the work we did pre-summer to introduce the Corporate Insolvency and Governance Act (CIGA) was a significant undertaking, delivered at pace.

The government had a strong ambition to ensure that when we emerged from lockdown, and government support came to its natural end, there would be mechanisms there to support businesses to be rescued wherever possible. I'd worked on some of the early consultations around introducing additional rescue tools into the UK regime as part of my policy work a few years ago. We had done a lot of the pre-work, which meant we were able to mobilise the people and the evidence that we've collated so far to be able to work really quickly on that legislation. We had fantastic input from the profession as well, from insolvency lawyers, R3 and IPs, which really helped us to land that legislation in record time. And it's heavyweight legislation – some of the biggest changes to the insolvency regime in over a decade, probably since the Enterprise Act.

Q It's not lost on us how much you've managed to get through in a very compressed timeline and I'd like to express my compliments on a job well done. And, of course, the next thing is to make sure people use it, isn't it?

A There has been a handful of moratoriums so far, which is unsurprising given that the government interventions and financial support for businesses and jobs have continued. The part 26a restructuring plan was, however, used successfully over the summer in the rescue of Virgin Atlantic, and is being used in the restructuring of Pizza Express. It's great to see that it has been valuable so far and, if the current predictions are correct, we will see an increased usage of them next year.

Q One concern that members have about using the moratorium is the fairly high benchmark that monitors need to be comfortably sure that it's going to be possible to avoid an insolvency process. It seems to R3 that if people make reasonable inquiries around who the stakeholders are and what their attitude is (ie receptive to conversation and the possibility of compromise), it should be possible to meet that standard, shouldn't it?

A The monitor has to form the view that it's likely a moratorium would result in the rescue of the company as a going concern, which is analogous to the primary objective of administration. Until 30 September there was a temporary relaxation to the entry criteria in that the monitor, in forming their view, was able to discount any worsening of the financial position of the company for reasons relating to coronavirus, but that relaxation has now ended. The purpose of the moratorium is to provide the company with a breathing space in which to explore a rescue of the company and a return to profitable trading, and this could be via a CVA, an injection of new funds or a new restructuring plan. So while the moratorium is not designed to be used by companies that have no chance of avoiding failure it does provide an opportunity for a distressed company to explore various ways in which it can be rescued, including a CVA. Obviously for the moratorium provisions to work it needs to work for the monitor. If there's anything about the schematic of it that would make it less useful than intended, then that's something we'd be very interested to continue to work with R3 in looking at. The supporting rules are still to come. The draft rules for England and Wales are now with the Insolvency Rules Committee for consultation.

Q How is the Service working to mitigate or manage the level of financial distress at the moment?

A The current restrictions on statutory demands and winding-up petitions is to ensure that companies are not liquidated as a result of the pandemic or the national lockdown restrictions. This is part of a wider government support package for businesses struggling at the moment.

We are also continuing with our plans for the new breathing space scheme, which is due in May 2021. This is a piece of work we are doing in partnership with the Treasury, and the Insolvency Service will be the delivery partner together with the debt sector in providing this new option for people in financial difficulty. Channelling people through proper debt advice at an early stage will be hugely beneficial in helping people who may be struggling financially as a result of the pandemic.

Q Can we talk about how you've been working with the profession around the economic impact of Covid-19? Are there any concrete steps that perhaps the profession could or should take to improve the way in which we're handling a situation?

A The most important thing is knowing that the industry is preparing itself to support businesses as we exit the pandemic and get back to some sense of normality.

The package of business rescue measures is part of that, and we need IPs to be using those tools effectively, as well as ensuring that there is enough capacity in the industry to deal with the possibility of increased numbers. Numbers are down at the moment in terms of formal insolvency, bankruptcy and compulsory liquidations. The restrictions placed on creditor enforcement action are helping to keep companies going through a really difficult trading period, but as we emerge from that and try and get the economy back working fully, the industry will be a really important part of that recovery process.

> "For the moratorium provisions to work it needs to work for the monitor. If there's anything about the schematic of it that would make it less useful than intended, then that's something we'd be very interested to continue to work with R3 in looking at."

Q One of the topics typically raised by our smaller practices committee is that of 'rogue' or unlicensed advisers. There are fears that the current economic situation may see a rise in the number of such 'rogue' advisers – does the service feel that is the case? And how might it be seeking to tackle a rise in so-called 'rogue' advisers?

A We use our intelligence function as a multidisciplinary department and work together across our regulatory, investigation and intelligence teams. We will use our live investigation and criminal investigation powers where it is appropriate and proportionate to do so.

Dean Beale biography

- When Dean left university he didn't know what he wanted to do. His mother had been a career civil servant in what was then known as the Department for Health and Social Security (now the Department for Work and Pensions), which offered him some insights into the opportunities that the Civil Service offered.
- Public service, without its rigid corporate structure, was an attractive career path, and allowed Dean to use his economics degree from the London School of Economics to blend law and business.
- He joined the Insolvency Service in 1993 as a trainee examiner and was put through the ACCA accountancy qualification. Once he joined, he found, as many do, that insolvency work 'kind of gets under your skin'. On his second day in the office, he had his first bankruptcy case – a taxi driver on an Inland Revenue petition. Within a few weeks, he had his first liquidation case – a double glazing company, which six months later turned into his first disqualification report.
- Dean went on to work with the Official Receiver in Birmingham dealing with more complex and bigger cases as time went on. He moved to PwC in 2000 to work for three years as a forensic accountant, before the drive for a better work/life balance moved him to return to the Service.
- He was appointed Official Receiver in Exeter, just in time for the global financial crisis to make life interesting for Official Receivers everywhere.
- By the time he'd rejoined the Insolvency Service, it had begun to move on and modernise, allowing for further challenges, a wider range of cases and career progression. He moved to London to become the assistant director for international policy working on, among other things, EU negotiations and negotiations on the UNCITRAL model law. The job, touted by himself and many others in the role previously, was the best in the department.
- With a wealth of experience of the profession under his belt, and time spent liaising with every corner of the profession, Dean moved to become chief executive of the Insolvency Service in 2019.

But we also work closely with the police, the RPBs and other regulators to disrupt these kinds of activities. It is a really important and reputational issue for the sector to be mindful of working with reputable third parties, and you undertake due diligence to give yourself that assurance. I expect the regulators to be conscious of this when undertaking monitoring visits and looking at who the work providers to a practice are, how that relationship works and ensuring that everything is above board and sits comfortably with the code of ethics for the sector. It's really important to the integrity of the industry that this is tackled by regulators and firms themselves.

> Channelling people through proper debt advice at an early stage will be hugely beneficial in helping people who may be struggling financially as a result of the pandemic.

Q So in the Insolvency Service's annual plan this year, there was mention of educating directors against misconduct, as well as providing an educational package after the fact. Can you tell us a little bit more about what plans you've got and how it might work?

A I believe we can play an important role in sharing the benefit of our knowledge and experience around the common causes of failure. We will be looking to work with other partners within government and the wider industry. There is definitely something in educating new directors when they're appointed so that they really understand what their statutory duties are and the common pitfalls and mistakes that can lead to the collapse of a company. Some of that will be around common mistakes that are made, but a big part of that is seeking advice early enough to avert a disaster.

We absolutely encourage people taking early advice where it could lead to the survival of a company and the preservation of jobs. It can mean the difference between survival and failure.

Q This year you started a quarterly scorecard and stated an aim to increase engagement with the profession. What prompted the move around this increased transparency and why do you think that's important?

A I think we do some fantastic work, but the sort of KPIs that we historically published did not always reflect the value that we were providing or the impact of our activities. We want to be transparent about what we do and we want our stakeholders to understand what we are doing or what we're not doing. This isn't about only telling the world about the good stuff. This is about being honest and open and transparent about what we do or do not do, what our performance has been and what we have produced.

The Service has evolved a lot over the years: we took on prosecution lawyers, embedded as our legal services directorate, and we do a lot of work in the criminal prosecution space. We want to be able to give our stakeholders an understanding of what we're doing and we want to be transparent around things like conviction rates, the time we take to do our work and the value of our results.

> The most important thing is knowing that the industry is preparing itself to support businesses as we exit the pandemic and get back to some sense of normality.

Q Are you getting the right sort of calibre of recruits to meet your requirements? Would you like to see an uptick in people applying to join the Service? Or have you got enough going on within your own right?

A The majority of our vacancies that we advertise now are external. I'm keen that we are able to draw on the large insolvency expertise of the UK – historically, we have not. We have brought people in and we've trained them up from scratch. That's great; we develop a real core expertise in the work that we do. But there are a lot of people out there who are doing similar work and we haven't had a great track record in recruiting experienced hires from the sector. I'd like to think that if you were somebody who wants to specialise in insolvency in your career, you would see a spell at the Insolvency Service as a really valuable part of your career development.

Inevitably this would strengthen the ties between the wider industry and the government's specialist insolvency department. It's absolutely right that we should have strong linkages. We're working collaboratively on the big overarching aim for the UK insolvency regime to be as effective as it can possibly be at supporting businesses, jobs and investment in the UK. It would be great for us to get some experienced people in from outside, bringing in fresh ideas and fresh perspectives, so I'm really keen that we try and do that.

In the new year we will be launching our five-year strategy, which will set out how we will ensure our agency is fit for the future, and how we will deliver for our stakeholders through our talented and expert workforce. An important part of this strategy will be how we recruit and develop people throughout their careers.

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Q We always like to end on a lighter note where possible. What do you do with your time when you are not running the Insolvency Service?

A I live down in the West Country in a great community where I've been involved in a lot of community groups over the years. I have helped to run the local community radio station for about 15 years now, and that has been very successful. I'm a very average guitar player but occasionally I can be seen playing cider festivals in the Somerset area, although not so much recently for obvious reasons. However, between work and family there is not a lot of free time. The Insolvency Service is a great organisation and I feel really privileged to be leading it.

COLIN HAIG is the president of R3 and head of restructuring at Azets.

R3 ACHIEVEMENTS 2020

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