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**Spring 2018**

# RECOVERY


**Virtual world, real disruption**
As technology evolves, those left behind need the help of an IP

**Pre-packs – *patronus* or *dementor*?**
Ahead of the government review, are pre-packs closer to the light or the dark?

**Riding the roads of disruption**
The gig economy is changing how we think about workers, and restructuring professionals can benefit

**The Insolvency Express Trials Pilot – use it or lose it!**
Find out which cases are eligible for the scheme and act to make your voice heard

**A bridge too far? The *Rule in Gibbs* – a cross-border disruptor**
It's not just new developments that disrupt; long-standing rules can create complications of their own

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A breakdown of a year full of change for the insolvency profession

**An interview with… Chief Insolvency and Companies Court Judge Nicholas Briggs**
The official for the Insolvency Court speaks to RECOVERY on the essential matters affecting the profession and the judiciary

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**The blight of rogue advisers**
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# From the editor

Prompted by our cover theme of disruption, my comments below on administrators' duties originate from just one of the articles in this issue.

Professor Peter Walton notes on page 22 that pre-packs are widely regarded as a useful restructuring tool. However, so-called sunset clause regulations could be brought in by the government some time before March 2020 to prohibit sales of a business by an administrator to connected parties.

The driver for such a restriction is a perception of abuse, a perception that derives from threats to ethical principles. For example, a self-review threat can arise if an administrator has been insufficiently robust pre-appointment in advising the directors to act in the interests of the creditors as a whole or insufficiently clear post-appointment in explaining to creditors why the transaction was in their best interests. Once such a perception could be established in the mind of a reasonable and informed third party, the insolvency practitioner has to consider safeguards, which would include not taking the administration appointment. The solution to this conundrum is simply for the profession to be straightforward, communicative and robust about pre-packs, convincing stakeholders of their propriety so that the threat from the 'sunset clause' abates.

Some observers have suggested that the decision in *Re VE Interactive*, which Professor Walton discusses, is a threat to connected party pre-packs. It may indeed encourage some dissatisfied participants to challenge administrators, but hopefully it will also encourage administrators to apply safeguards that reduce the level of self-review (and other) threats.

On the subject of how administrators act, to what extent can administrators act as if they were receivers when pursuing objective (c) 'realising property in order to make a distribution to one or more secured or preferential creditors'? The answer is best illustrated by comparing the receiver's ability to realise property immediately with the obligation on an administrator to take care when deciding when to sell.

A receiver does not have to consider whether there is an alternative to any step he takes that would harm the interests of the creditors of the company as a whole. By virtue of para 3(4), schedule B1, an administrator always has to consider the interests of the creditors as a whole. Administrators have to act as such – they are not quasi-receivers.

C. Laughton

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

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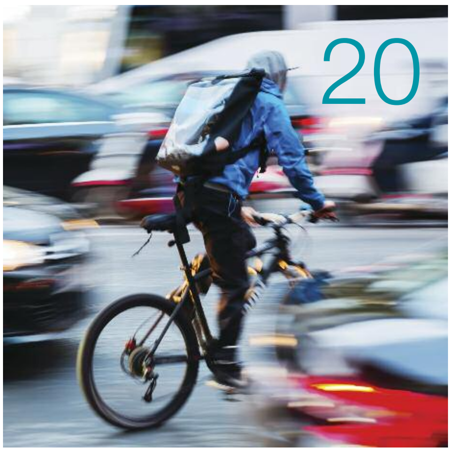

# R3 matters



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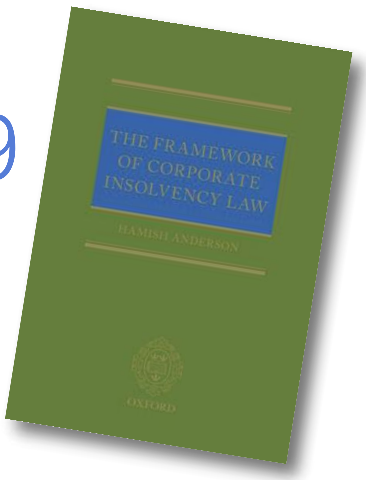



# RECOVERY

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**Playtime over for Toys 'R' Us talks**

Stricken children's toy retailer Toys 'R' Us has filed for administration after failing to find investors to take on its £15m tax bill. In mid-February Sky News reported that advisers to the company were desperately seeking a rescue deal and were working through the weekends ahead of the 27 February tax bill deadline to progress talks with bidders. It is now in administration and 3,200 jobs are thought to be at risk.

It is understood that the company is meeting with officials from the Pension Protection Fund (PPF). The company's fund has an estimated deficit of £30m, according to a PPF assessment.

The retailer's American parent company filed for Chapter 11 Bankruptcy protection in September of last year, but its UK arm was thought at the time to have weathered the difficulty. The UK business was undergoing a restructuring as part of a CVA to close a quarter of its 105 UK stores, cut 800 jobs and force rent reductions at certain locations. The most recent accounts for the business showed an operating loss of £500,000 on up to sales of £418m.

*Source: The Guardian*

**Fashion retailers in danger of coming apart at the seams**

The UK's clothing retailers are feeling the strain, with 19 per cent demonstrating early warning signs of insolvency, according to research by Moore Stephens. Of the 35,078 retailers analysed by the firm, 6,580 are showing early signs of financial distress, which could include a fall in revenue or poor payment history. Rising business rates and the introduction of the national living wage are thought to be contributing factors to pressure on the industry.

# Large NI constructor split by insolvency

A major Northern Ireland construction group has placed four of its subsidiaries into administration. Lagan Construction Group's finances had been hit by a number of factors, stated chairman Michael Lagan, including delays to new projects, lengthy contractual disputes and instability caused by a joint venture partner in the UK. The group was one of Northern Ireland's largest and longest established building and civil engineering firms, established 50 years ago.

The four subsidiaries being put into administration are Lagan Construction Group Holdings Limited, Lagan Construction Group Limited, Lagan Building Contractors Limited and Lagan Water Limited. The group employs around 800 people, with up to 200 jobs expected to be at risk as a result of the insolvency.

Lagan works in the energy, roads and education sectors on a variety of projects across the UK. It signed a deal to redevelop the campus of Ulster University as part of a joint venture with Portuguese firm Somague in 2015. Liability for payments to subcontractors and completion of the £250m project are expected to pass to Somague under the terms of the joint venture.

The remainder of the Lagan Group and its 26 other subdivisions are expected to continue trading as normal.

*Source: Construction News*

# Lawyer stashed cash pre-bankruptcy

The former lawyer who was struck off for multiple professional misconduct charges over false allegations of abuse against British troops by Iraqi citizens tried to offload approximately half a million pounds in assets prior to declaring himself bankrupt.

Phil Shiner, the former director of Public Interest Lawyers (PIL), sold a commercial property for £245,000, which he paid to the company, and transferred ownership of his £300,000 house, guitars and artwork to a family trust in December 2016. In January 2017 he sold another commercial property for £305,000, transferring the funds into PIL's accounts; he then paid money from the company's accounts into a personal pension fund and a family trust account. In March 2017 he petitioned for his own bankruptcy and asserted that he was unable to pay creditors.

Shiner has since had his bankruptcy extended and the Official Receiver has managed to reclaim £483,538. The total owed from Shiner's estate is almost £6.5m.

*Source: Law Society Gazette*

### Restaurants eaten by insolvency

Insolvencies in the restaurant industry have jumped by 20 per cent in the last year, according to Moore Stephens. In the year ending September 2017, there were 984 insolvencies in the sector, up from 825 the previous year. An over-populated marketplace, rising produce prices as a result of the weak pound, increasing business rates and the introduction of the national living wage are all thought to have impacted on the industry. High-profile names such as EAT, Byron and Jamie Oliver's Barbecoa have all announced closures or cutbacks in 2018.

### Meat supplier in administration

The meat supplier that caused the Wetherspoon pub chain and Jamie's Italian restaurants to pull products from menus in January over food hygiene concerns has collapsed into administration. Russell Hume was under investigation by the Food Standards Agency (FSA) when it collapsed, leading to the loss of 266 jobs.

The firm's directors attributed the administration to the actions of the FSA, which had made it harder for the supplier to trade. KPMG has been appointed administrators and attributed some of the company's financial problems to the January recall of products over hygiene issues, which had caused many customers to use alternative suppliers. The administrators are seeking a buyer for the business and its assets.

Rusell Hume supplied meat to hotel chains, restaurants and pubs across the UK from production sites in Liverpool, Birmingham, London, Boroughbridge, Exeter and Fife.

*Source: BBC*


### Estate agent in liquidation

An East Anglia-based chain of estate agents has gone into liquidation, with the loss of 21 jobs. Kudos Residential, which traded as Hunters, went into creditors' voluntary liquidation citing a tough market, overly rapid expansion and a large HMRC debt as the causes. Liquidators have been appointed from Price Bailey, while staff from William H Brown estate agents are assisting to move over contracts from landlords and tenants.

*Source: Eastern Daily Press*

# Remembering Ian Bradbery

Ian Bradbery, a former R3 president and partner at one of the Insolvency Practitioners Association's founding member firms, passed away on 29 November 2017 after being diagnosed with lung cancer.

Ian was a certified accountant and an insolvency practitioner member of the Insolvency Practitioners' Association of long standing. He reached significant levels of practice and professional status, becoming president of his local District Society of Certified Accountants and also the Society of Practitioners of Insolvency in 1993, the precursor to the Association of Business Recovery Professionals.

His career began while working in a high street bank before joining the Official Receiver's Service in Reading, where he qualified as a certified accountant.

He joined Highley & Co of Reading as an insolvency manager in 1969 and had reached partner level by the time he left to join Bradley-Hole Croydon & Co in Brighton in 1979.

Bradley-Hole Croydon & Co was a founder member of the Insolvency Practitioners Association and Ian's professionalism matched the firm's status as one of the leading specialist insolvency practices in the South East.

Ian quickly gained the respect of the professional community and, while continuing to take an active appointment role in insolvency cases, he also assisted the Chartered Association of Certified Accountants in managing their insolvency practitioners. He also became an examiner for the Joint Insolvency Examination Board, marking countless exam papers, and held a leading role on the disciplinary committee of the ACCA.

His tireless work in promoting the insolvency profession was endorsed by his appointment to various IPA and Society of Practitioners of Insolvency (SPI) Committees, culminating in his appointment as president of the SPI in 1994.

As an insolvency practitioner, he not only discharged his professional duties with care and independence, he was also sympathetic to bankrupts and company directors without once compromising his principals or his professional obligations.

His many insolvency assignments took him all over the South East of England and on his travels he so enjoyed the pit stops at various 'Happy Eaters', so he could indulge in his favourite meal of liver and bacon; given that his wife Sue didn't share his passion for the dish, it was the only way he could indulge.

In his professional duties he was able to defuse tense situations with his calm approach and was never intimidated by aggression from debtors and creditors alike. He always got the job done properly.

With the dawn of May 1986 and the wholesale changes in insolvency legislation brought about by the Insolvency Act of that year, he led the relatively small Bradley-Hole Croydon & Co team into a merger with Moores & Rowland and was soon contributing to the insolvency profession on a national scale.

By the early 1990s his service was recognised by his appointment to office with the SPI and he took on this role with his typical pragmatic and professional manner, dealing with all that came his way.

Ian was a talented golfer and his retirement from practice enabled him to spend more time developing his golfing skills. Not only did he play regularly, he became secretary of a local golf club whereby his skills from his professional life were soon evident.

Ian was a devoted father to his two children and will be sadly missed.

**ANDREW WHITE** is director and founder of White Maund.

# All change please

**Nicky Fisher** explains how it feels to be a smaller firm holding up under the weight of change.

When you pull into your station at the end of the line, inevitably a jovial voice booms over the tannoy: 'All change please.' I always find this an odd statement to hear when I'm on a train. All of us, as passengers, know that we need to get off at the end of the line, and most of the time we are not changing trains, merely getting off and going on our merry way.

However, with legislation, when we hear that message we have no choice but to change and to do what the voice from above wants us to do.

### New rules, old behaviours

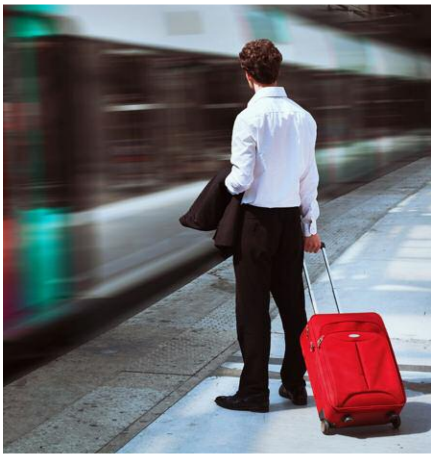
The Insolvency (England and Wales) Rules 2016 (new rules) have been in force now for almost a year. The things that we did naturally and effectively for many years are a thing of the past and suddenly, for many of us, nothing comes naturally anymore. One of the biggest changes is the move from physical creditor meetings to meeting by correspondence or virtual meetings. The change was designed to increase creditor engagement at a time when it had been steadily declining. So, have the new rules made any difference to creditor engagement? I can't say that I have noticed. There have been some rather frustrating experiences:

- To date I have had one case where a creditor asked for a meeting and once called didn't bother to turn up.
- I have not had any creditors' committees formed.
- I have had the odd creditor vote against my fees.
- Some creditors have voted, but certainly no more than would have voted under the old regime.

### The price of change

Following on from auto-enrolment in pension schemes for all eligible workers in the UK, most insolvencies will now be required to have pension schemes. These will need to be sorted out in one way or another and will require a specialist knowledge that an IP may well not possess. The result is that IPs will need to employ the services of pension advisors, adding yet another cost to the insolvency.

There are a few specialist insolvency pension advisors out there and I commend their invaluable advice to you. They will provide you with questionnaires to give to directors at the outset of your involvement and generally advise for a fixed fee once you get appointed. They also offer free in-house training for you and your staff, which is helpful.



> As a small boutique firm, many of the changes in this article are simply an administrative burden and a cost that adds no value whatsoever.

In addition to the new rules coming into force we have the General Data Protection Regulation (GDPR) and new anti-money laundering legislation coming in on top of Financial Conduct Authority (FCA) registration, fire risk assessments, health and safety checks and more that, as employers, we will have to comply with. Invariably, the IP is not qualified in these fields, which necessitates the engagement of other professionals and all of which creates yet more cost that someone has to pay for.

Speaking of money, I mentioned creditors being unwilling to vote for IPs' fees above. I wonder how many others out there reading this have found the same? When the occasional creditor does vote, they are often only owed a small amount, that they still vote against! Adding this to the cost of a pension specialist, fire assessment, GDPR and FCA registration etc, as an IP you run the risk of taking on a job and never seeing a penny without making an application to court.

Maybe the rules should be changed to allow IPs to be paid a *de minimis* maximum amount (say £6,000) such as is used by the Official Receiver, who takes his or her fee without deference to any creditor authority whatsoever? This would save a lot of time and court applications.

### The final question

How many IPs' reputations have been damaged and how much time has been spent dealing with shareholders who have recently had to pay statutory interest on their HMRC debts in an MVL?

If HMRC had not taken so long to grant permission to bring a liquidation to a close, many of these MVLs would have been long finished before HMRC started imposing this charge back in September 2017. Did the taxman know something we didn't? Statutory interest at eight per cent in the current market is high and, when it is charged on debts that are payable in the future, it can be a difficult thing to justify and explain to shareholders.

In most instances the statutory interest on my affected cases amounted to well under £2,000. Fortunately we always paid the tax as soon as the exact figure was known and, given the saving that the shareholders would have made on their personal tax bill, the liquidation would still have been beneficial to them. This, however, is no consolation to them and I have had to deal with a number of irate shareholders. I am certain I have lost future work for failing to have a crystal ball.

### End of the line?

As a small boutique firm, many of the changes in this article are simply an administrative burden and a cost that adds no value whatsoever. I wonder how many small firms will want to continue and how many practitioners will decide to reverse their firms back into a larger firm in the coming years?

When I expressed my views to the CEO of my local Chamber of Commerce she said, 'Oh no. That would be awful. Where are people going to go for advice? You provide such a valuable service.' Valuable service or not, when the voice says 'all change', we have to do what it says. □

**NICKY FISHER**
is a partner at Herron Fisher LLP.

# President's column

**Adrian Hyde** closes his term with a reflection on a year in which the insolvency framework and the work of the profession has been the centre of attention.

This first column of 2018 is also my last as R3 president: I'll be handing over the reins to Stuart Frith (Stephenson Harwood) in April. Looking back over my year in the hot seat, I've had a slightly different experience than my immediate predecessors as I've been the first president since Frances Coulson in 2011 to be in the role while insolvencies have been on the rise.

## In the spotlight

Increasing insolvencies means increasing attention on the insolvency framework and the work our profession does. At the moment, barely a week goes by without reports of a big name insolvency in the offing, whether it's a major public sector contractor, an airline or a popular – but not popular enough – high street name.

Insolvency is often the prism through which all sorts of corporate issues are explored in public. Whether it's corporate governance, late payment, difficulties maintaining pension schemes or lending practices, insolvency can be a dramatic demonstration of the consequences of the business community getting any of the above wrong. And while the cause of the insolvency may be the real public policy issue, it's not unusual for the insolvency framework to be placed under the microscope, too.

As central a part of our economy as insolvency and restructuring is, it's a part that's often misunderstood or mischaracterised. Yes, there are ways the framework could be improved, but a lot of the 'noise' insolvency attracts can be traced to confusion about how and why things work the way they do.

With increasing insolvencies, a big part of my role has therefore been an explanatory one. This has taken me to TV and radio studios, or behind the scenes for meetings with MPs, journalists, the civil service, and others. Ensuring everyone has the right level of understanding helps make sure there is a fair and accurate portrayal of how UK insolvency works and of the value of our profession.

## My manifesto

I started this year with three objectives: to raise the profile of our profession's work to combat fraud; to shed light on the work of the profession outside of statutory insolvency procedures; and to stick up for the profession and make sure we're listened to.

The last of these has been a particular focus of mine. As well as the educational work, I've been working with R3 to take up the profession's concerns about tax and the Official Receiver with HMRC and the Insolvency Service, and to make sure policymakers introduce changes in response to those concerns. As you'll have seen from my previous columns, progress has been made.

And we've been pushing for policy change, too. We've made clear to the government how Brexit could affect our profession's ability to handle cross-border insolvencies and what needs to be done to avoid Brexit from stopping us getting on with the job. I'm pleased that the government's Brexit objective – to seek 'an agreement with the EU that allows for close and comprehensive cross-border civil judicial cooperation on a reciprocal basis, which reflects closely the substantive principles of cooperation under the current EU framework' – matches what we've called for.

Elsewhere, we've been pushing the government to continue with its work to introduce a series of corporate insolvency reforms, first proposed in 2016. The proposed reforms could do with tweaking, but, broadly, they would make a positive difference to the reputation and effectiveness of our insolvency and restructuring framework.

> "While we may have one of the world's best insolvency and restructuring frameworks, we can't stand still. If we don't reform, others will."

## The need for reform

While we may have one of the world's best insolvency and restructuring frameworks, we can't stand still. If we don't reform, others will. We're already seeing changes in places like Singapore, and the EU is set to introduce its own reforms. If the UK economy is to thrive post-Brexit its economy needs to be as attractive and competitive as possible – corporate insolvency reform is a key part of meeting that challenge.

Progress on introducing the reforms has been slow: Brexit continues to dominate the policy agenda, which makes it difficult for other issues to get attention. But, with Carillion hitting the headlines in recent weeks, our calls for insolvency reform have started to be noticed and MPs have begun asking the government about its reforms. Small signs of movement, but signs of movement nonetheless.

On fraud, there has been progress, too. A personal highlight this year was the opportunity to meet the fraud minister, Ben Wallace MP, to talk about the work of our profession and where we fit in with the fight against fraud. Encouragingly, the minister is very engaged and understands the role our profession can play in helping to pick up the pieces after fraud takes place, or in disrupting fraudulent networks. Hopefully the minister's attitude spreads throughout government.

## Support for the profession

Finally, and apt for this 'disruption' focused edition of *RECOVERY*, a word on restructuring and advisory. The shift towards work outside of statutory insolvency procedures is one of the most significant changes for our profession in the last few decades. It's a positive change, and has seen our profession utilise its skills and experience to support businesses in innovative ways.

During my year as president, there has been work across R3 to develop the support we offer to those throughout the profession, including people working outside statutory appointments. This is something that we'll be looking at as part of R3's strategic review, which is taking place this year. Whether it's technical help, new courses and training, or help in dealing with the spotlight increasingly placed on advisory and restructuring, R3 can help. As the insolvency world changes, it's important R3 changes with it.

It's been an honour to have had the opportunity to be R3 president over the past year, to have had the opportunity to make sure our profession is supported, represented and listened to, and to have had the opportunity to shape how we will support and represent our members in future. I wish Stuart the very best in the role over the next 12 months. ◻

**ADRIAN HYDE** is president of R3 and a partner at CVR Global.

# Recent case summaries

Latest insolvency update from **Katherine Hallett**.

## CORPORATE INSOLVENCY

***Re Southbourne Trading Co Ltd*, unreported, [1 December 2017]**

The court rescinded a winding up order made upon Southbourne Trading Co Ltd (the company) and dismissed HMRC's petition because it had not been validly served (and there was a genuine dispute on substantial grounds).

HMRC sent a process server to the company's registered address, which was a suite on the fifth floor of a multi-occupancy building with no general reception desk. The server did not find the company's buzzer, but instead followed someone into the building. He then left the petition on an unmanned reception desk for a business centre. The company's director denied receipt: the company did not attend court when the winding up order was made.

> There was such confusion within the documents provided by HMRC that the court had no confidence in their accuracy.

The court found that the server had been in the wrong part of the building. HMRC knew that the company's office was on the fifth floor – it could and should have given the server proper instructions. There was a buzzer outside the building that would have given access to the company's office: the server should have looked for it. He did not serve the petition. He had not even reached the correct floor.

A petition had not been served and the company was entitled to have it treated as a nullity and set aside as per *Re Calmex Ltd* [1989] 1 All ER 485. Where an unserved petition was advertised, the court could also order its dismissal (*Re Signland* [1982] 2 All ER 609).

In addition, the court held that there was a genuine dispute on substantial grounds. There was such confusion within the documents provided by HMRC that the court had no confidence in their accuracy. HMRC changed what it had said about payments received from the company. HMRC had not produced a reconciliation of the company's alleged tax debts and credits in one document; had it done so, it would have been easier to ascertain its case.

Despite having eight months in which to prepare a case, and knowing that quantum was in dispute, HMRC had not set out its case clearly. The evidence was inadequate. Furthermore, once the server's evidence had been received, HMRC should have agreed to treat service as invalid. Costs were ordered against HMRC on an indemnity basis from the date of compelling evidence of non-service.

This case is interesting because service by process servers on companies is frequently in issue: their efforts to serve and the quality of their evidence varies. The court has reminded practitioners that (a) process servers must be properly instructed and (b) the evidence of service must be actively checked for adequacy.

## PERSONAL INSOLVENCY

***Pickard & Nilsson* v. *Constable*, unreported, [2017] EWHC 2475 (Ch)**

A district judge's (DJ) decision was overturned on appeal for having failed properly to consider the alternative of a shorter period of suspension on an application by trustees in bankruptcy for possession and sale pursuant to s335A IA 1986. The DJ had ordered a postponement of sale until the death of, or earlier permanent vacation of the property by, the bankrupt's husband, who was in his 60s and had a health condition. There was no evidence that justified that conclusion: a period of 12 months was substituted.

The equitable interest in the property was shared 50:50 between the wife's trustees and the husband. The husband suffered from an autoimmune condition. However, there was no evidence brought before the DJ from a medical expert who had examined the husband recently: evidence of fact was given by the husband himself and his carer.

It was conceded that there were 'exceptional circumstances' pursuant to s335A(3) (and ss(2) therefore applied), but the trustees argued that the DJ's conclusions were unsupported by evidence. The judge agreed. He also found that the DJ had reached his decision based on a 'feel' of the whole case that the husband should not be evicted. This led the DJ to draw conclusions from the evidence that supported the decision, rather than objectively deciding what could properly be inferred and whether it justified the decision.

Furthermore, the judge held that the DJ had erred in the exercise of discretion as to the length of the suspension of possession: he had not properly considered a shorter period. The judge went on to summarise the kind of evidence a respondent such as this would have to produce in order to succeed with a further suspension application.

Where a medical condition is in issue, the medical evidence must be up to date and should address the condition itself and the effect an eviction would have on it. When the grounds relied upon include a lack of availability of alternative accommodation, the evidence must address the special housing needs that arise as a result of the medical condition (eg ground floor accommodation). The cost of suitable alternative accommodation

> Where a medical condition is in issue, the medical evidence must be up to date and should address the condition itself and the effect an eviction would have on it.

should be addressed, as should the financial position of the respondent. Usually, it would also be prudent to include evidence from the local authority in relation to any rehousing duty.

Thus, even where there are 'exceptional circumstances', the court will still afford the interests of the creditors paramount importance. This decision casts doubt on whether it would ever be proper to suspend possession for a period spanning many years to the detriment of the creditors. ◻

**KATHERINE HALLETT** is a barrister at Three Stone.

# The *Rule in Gibbs* – a cross-border disruptor

**Adrian Cohen** and **Gabrielle Ruiz** look at a recent case concerning the International Bank of Azerbaijan and implications for cross-border insolvency.

When we think of the ordinary meaning of 'disruptor', we associate the word with something new upsetting the status quo. In this article we consider how a disruptor can also be a long-established rule – in this case the English *Rule in Gibbs*, which may be seen to be preventing a more universal approach to cross-border cooperation in insolvency and restructuring cases.

In recent years we have become used to employing internationally renowned restructuring techniques in one jurisdiction to compromise claims of debtors incorporated in another. This flexibility has been put to good use in many significant restructurings and has established the concept of 'good forum shopping'. In this regard, the English scheme of arrangement has become a restructuring tool of choice for many distressed situations with an international focus – English restructuring professionals have been capitalising on the ability to export the benefits of schemes. Of course at present with all eyes focused on the Brexit negotiations, the continuing ability to export English insolvency and restructuring techniques is being put to the test.

> The English scheme of arrangement has become a restructuring tool of choice for many distressed situations with an international focus, as English restructuring professionals have been capitalising on the ability to export its benefits.

In this article we are not going to look at the implications for schemes in a post-Brexit world, not least because much has already been written on that subject, and we are of the view that schemes will continue to be popular, providing a flexible, predictable, and efficient mechanism for implementing an international restructuring. We are instead going to look at cross-border insolvency from the other end of the telescope, where foreign proceedings are seeking recognition, relief, and cooperation, before the English courts.

## Cross-border recognition under English law

There are several ways to access the cooperation and assistance of the English court depending upon the origination of the proceedings. Certain jurisdictions benefit from the cooperation afforded to relevant countries under section 426 Insolvency Act 1986 and there is also common law recognition.

While the UK remains part of the EU (and, if it turns out to be the case, an equivalent regime during a further transitional period) the Recast European Insolvency Regulation (recast EIR) provides an automatic recognition framework for main and secondary proceedings throughout EU member states. For proceedings taking place outside of the EU, the Cross-Border Insolvency Regulations (CBIR) – based on the UNCITRAL Model Law on Cross-Border Insolvency Proceedings – are the simplest way of seeking cooperation and assistance from the English courts. However, in a recent decision of Hildyard J in the matter of the *OJSC International Bank of Azerbaijan* [2018] EWHC 59 (Ch) (*Azerbaijan case*) the limits of the relief available under the CBIR were highlighted.

In the *Azerbaijan case*, a foreign representative appointed under Azeri law in the context of restructuring proceedings sought the continuance of a stay against two of the bank's creditors: Sberbank (sole lender under a facility agreement); and Franklin Templeton (the beneficial holder of notes). The facility agreement and notes are governed by English law. Neither of the parties had participated in the restructuring plan in Azerbaijan, and both opposed the application for a permanent stay in England. They sought counter-applications for the stay to be lifted so they could enforce their claims in England. It was recognised at the outset of the judgment that the case raised questions regarding the tension between the *Rule in Gibbs* (named after the case *Antony Gibbs Sons* v. *La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399) and foreign proceedings recognised in England under the CBIR.

## The *Rule in Gibbs*

By way of reminder this rule provides that where a debt is governed by English law, it cannot be discharged or compromised by the law of a foreign insolvency proceeding unless the creditor agrees to a discharge. The rule has been criticised by commentators as being out of step with the modern, universal approach to cross-border insolvency cases. In addition, and as commented upon in the *Azerbaijan case*, the approach of the English courts could be seen to be at odds with the English court's expectation in relation to schemes of arrangement. For example, it is expected that courts elsewhere will recognise and give effect to English schemes, which may have the compromise of foreign law-governed debt as their purpose.

> The *Rule in Gibbs* provides that where a debt is governed by English law, it cannot be discharged or compromised by the law of a foreign insolvency proceeding unless the creditor agrees to a discharge.

In the *Azerbaijan case* the relief sought was not limited to a continuance of a stay in accordance with continuing proceedings under Azeri law, but sought to have the English stay extended even after the restructuring proceedings in Azerbaijan came to an end. Sberbank and Franklin Templeton argued that, effectively, this would prevent them from exercising their substantive English law rights and went beyond procedural relief available under the CBIR.

## CBIR: procedural or substantive effect?

Despite arguments that the continuance of the stay only amounted to procedural relief within the ambit of the CBIR, Hildyard J concluded that the CBIR do not empower the English court to vary or discharge substantive rights conferred under English



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law. In reaching this conclusion he considered the English court's approach to the CBIR in *Fibra Celulose SA* v. *Pan Ocean Co Ltd* [2014] EWHC 2124 (*Pan Ocean case*). In addition, Hildyard J also took into account the approach more generally to the English court's jurisdiction in *Rubin* v. *Eurofinance SA* [2013] AC 236, (*Rubin*) that, while the English court should do all it could to assist with foreign proceedings, it could not without an express mandate import other laws.

Significantly, in this case the temporary relief granted by a stay under the Model Law was designed to suspend a substantive right, to give time for a liquidation or plan of reorganisation to be put in place – wholly different from a permanent stay, which would have the effect of trumping a substantive law right.

> The CBIR (which was originally designed as a framework to facilitate cross-border cooperation in a procedural sense) cannot be used as a 'backdoor entry' to undermine substantive legal rights.

In Hildyard J's view, even had he concluded that there was jurisdiction to grant the stay, he would not have exercised his discretion. This was on the basis that the *Rule in Gibbs* was binding upon him and that any substantive alteration of that rule would require some substantive provision of English law (either at common law or by statute) to usurp it.

### The English approach – too territorial?

From a domestic perspective, in a post-Brexit world, maintaining the *Rule in Gibbs* may have some advantages. Not least in that it will encourage more restructurings where the debt is governed by English law to be the subject of an English procedure either as a standalone mechanism or in parallel with a local composition process. This will be the case for European insolvency and restructuring cases, where the automatic benefits of the recast EIR may, over time, fall away. This of course may be good news, but also has the potential to make restructurings more expensive, and potentially to give rise to a greater propensity to a territorial approach to restructurings where the debt is governed by English law.

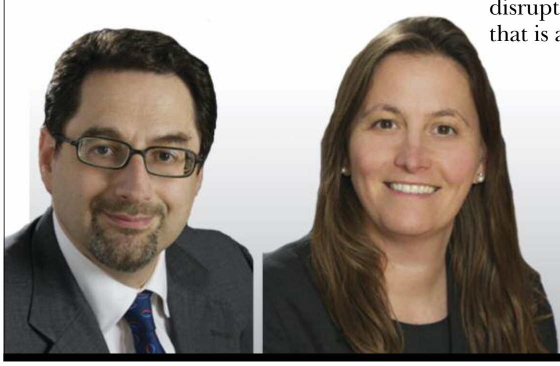
### The US approach – more universal

Such an approach may also be considered to be at odds with the application of the UNCITRAL Model Law in other jurisdictions – most notably in the US, where the courts have, on a regular basis, given effect to foreign law plans in a restructuring context without any separate or parallel plans in the US (pursuant to Chapter 15 of the US Bankruptcy Code, which enacts the UNCITRAL Model Law. This has included cases where the governing law has been changed from New York law to English law, in order to access the English court's jurisdiction to sanction a scheme of arrangement to restructure. Had the roles been reversed, the English courts would have been prevented from doing so as a consequence of the *Rule in Gibbs*.

The flexibility of the UNCITRAL Model Law and its lack of prescriptive rules as to which law should apply result in different interpretation and application. While the International Bank of Azerbaijan may consider the English court's approach unhelpful to its cause, and understandably that the *Rule in Gibbs* is outmoded and disruptive, Sberbank and Franklin Templeton no doubt are content with the decision that English law has protected their contractual rights. From their perspective, they may consider that their contracted entitlements have been upheld and treated in a predictable and certain manner. In this respect they may consider that they have been rightful beneficiaries of the *Rule in Gibbs*. In particular, that the CBIR (which was originally designed as a framework to facilitate cross-border cooperation in a procedural sense) cannot be used as a 'backdoor entry' to undermine substantive legal rights.

Since the judgment in the *Azerbaijan case* was published on 18 January 2018, the Azeri court has granted a further application to extend the restructuring proceedings for 180 days. At the time of writing it is not yet known how that may impact the case and a further hearing was due before the English court on 25 January. From a legal perspective there may be some disappointment if the *Rule in Gibbs* is not given any further judicial scrutiny in particular in the context of a modern and universal approach to cross-border insolvency cases. As it stands, and even if the *Azerbaijan case* stay is allowed to continue on a temporary basis, it seems clear that the *Rule in Gibbs* still stands and acts as a disruptor to the kind of cross-border relief that is available under the CBIR. □

> It seems clear that the *Rule in Gibbs* still stands and acts as a disruptor to the kind of cross-border relief that is available under the CBIR.



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# Shaking up the profession: 2017

**Caroline Sumner** reviews a year of massive change for the insolvency profession.

Big changes to the insolvency profession took place last year and we thought it would be interesting to produce a round-up of the key issues that were faced down by R3's General Technical Committee (GTC) in 2017. 'Interesting' is an apt description (arguably), but the real revelation is just how many technical issues arose. It wasn't just a case of new rules.

### Rules are made…

Clearly the year was dominated by the arrival of the long awaited Insolvency (England and Wales) Rules 2016 (new rules), which came into force in April 2017. Prior to the legislation coming into force

> Clearly the year was dominated by the arrival of the long awaited Insolvency (England and Wales) Rules 2016, which came into force in April 2017.

there were questions raised and fears voiced about how the many changes would be put into practice within the relatively short timeframe available. The removal of prescribed forms caused headaches across the country as standard letter packs were rewritten and a future without physical creditor meetings was contemplated. The world of insolvency was never going to be the same again.

The reality is that the profession has adapted very quickly to the new regime. The modernised terminology and fresh layout meant that the new rules were easier to follow and read (I stop short of saying understood), and the removal of physical creditor meetings as a default mechanism for seeking creditor views has compelled office-holders to consider and use the alternatives. Feedback from R3 members suggests that the meeting changes haven't caused the anticipated problems. Technology has yet to be made available to permit an effective virtual meeting for hundreds of creditors at a time, but, for smaller assignments, virtual meetings appear to be easier to run than their physical counterparts.

Implementing the new rules has not been all plain sailing. Promises of increased creditor engagement have not been fulfilled, with creditors complaining about the complexity of instructions and explanations that now have to be provided for every decision sought. HMRC has publicly said that its organisation cannot cope with the shortened timelines for decision processes and has set up a dedicated email address for pre-appointment notifications in an attempt to give it greater opportunities for engagement.

Many R3 members report that they are struggling to get fee resolutions passed by creditors when they are sent out after the initial decision process has taken place. There have also been challenges for creditors seeking to get a nominated insolvency practitioner appointed in place of the Official Receiver. Where does this leave the profession and how does it benefit creditors? A pair of scissors may be required for the red tape in future.

### … to be amended

We have already seen the issuing of The Insolvency (England and Wales) (Amendment) Rules (amendment rules) in October 2017 to correct minor typos and bring LLPs in line with other insolvency processes. However it is unlikely, given the legislative and time demands of Brexit, that we will see any further amendments to the processes covered by the new rules. What we have now is what we shall have to learn to live with for the foreseeable future. So, putting the new rules to one side, what else did 2017 bring our way?

> Technology has yet to be made available to permit an effective virtual meeting for hundreds of creditors at a time, but, for smaller assignments, virtual meetings appear to be easier to run than their physical counterparts.

### SIP-ping everything

There were a number of consultations issued by the Joint Insolvency Committee (JIC), including those on SIPs 6 and 11. These resulted in new SIPs being released right at the end of the year. SIP 6 saw the replacement of SIPs 8, 10 and 12, which were withdrawn to reflect the removal of physical creditor meetings by the new rules.

SIP 11 on handling funds was updated to address concerns that the SIP did not reflect the modern world, especially around the use of umbrella accounts in the volume IVA market. The JIC has also consulted on the ethics code amid calls that it too did not reflect current working practices and wasn't relevant to the volume IVA market. An extensive range of consultation responses was gathered by the committee, reflecting the range of opinions of those currently working within the profession. Should payments for work leads be allowed provided they are fully disclosed and transparent? Should providing insolvency services through complicated group structures be permitted to effectively circumvent the restrictions imposed by the ethics code? Should firms be licensed to act in place of the current individual licensing regime? All of these questions were raised and discussed, so it is not surprising that the JIC has taken its time to consider the feedback before it responds. The profession awaits the outcome with interest.

> SIP 11 on handling funds was updated to address concerns that the SIP did not reflect the modern world, especially around the use of umbrella accounts in the volume IVA market.

In addition to a new SIP 6 and a revised SIP 11, SIP 15 (on committees) was also updated and re-issued in March 2017, just in time for the new rules to come into effect.

## Guides and regulations

On 15 March last year, the government published a draft of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLR 2017), with a consultation paper seeking views as to whether the draft would meet the government's aims. The general election purdah (who else forgot there was a general election in 2017?) prevented the government issuing a response, and two new statutory instruments were passed with little fanfare.

The Recast EU Insolvency Regulation 2015/848 (recast EIR) came into force, in part, on 26 June 2017. The recast EIR, which deals with cross-border jurisdiction, cooperation, recognition and enforcement of insolvency proceedings in the EU, replaced the EC Regulation on insolvency proceedings (1346/2000) (original EIR), making changes to existing provisions and introducing areas of new policy. One area affected involved anti-money laundering.

The MLR 17 and the Insolvency Amendment (EU 2015/848) Regulations 2017 came into force on 26 June 2018. But what changes did these bring? It is understood that the Consultative Committee of Accountancy Bodies has updated its money laundering guidance and Treasury approval is currently being sought, but what about the long awaited insolvency annexe? Where has that got to? And where is the guidance from the money laundering supervisory bodies as to what their expectations are under the new regulations? Perhaps 2018 will make all this clear.

## Final decisions

The long awaited appeal in the case of *Green* v. *Wright (James Green (former Supervisor)* v. *James Wright* [2017] EWCA (Civ) 111, [2017] All ER (D) 13 (Mar) was finally heard, confirming that PPI did fall to be treated as a trust asset even after closure of the case. While this brought an end to the uncertainty and meant that supervisors could now close cases that were kept open awaiting the outcome of the appeal, the case raised many more questions than answers. Additional guidance for supervisors was drafted by the RPBs and R3, however the uncertainty surrounding the term 'trust' led to R3 reviewing its *Standard Conditions for Voluntary Arrangements*.The Conditions have been amended to bring the trust to an end.

*You can read more about the amends to R3's Standard Conditions for Voluntary Arrangements on page 36.*

The case of *Safier* v. *Wardell and Others* [2017] EWHC 20 (Ch) provided clarity as to the applicability of Secretary of State (SoS) fees to third-party funds in a bankruptcy. So long as the third-party funds are not paid into the Insolvency Service Account, no SoS fees are payable on the same. The general fee in bankruptcy however, in the sum of £6,000, was determined not to be discretionary and therefore would apply in all bankruptcy cases except where the bankruptcy order was annulled on the grounds that the order ought not to have been made. What has been the impact of this greatly increased fee (for the vast majority of cases) on debtors and returns to creditors in bankruptcy remains to be seen.

The Court of Appeal case *re Shlosberg* [2016] EWCA Civ 1138 clarified the way in which material subject to legal professional privilege can be used by a trustee in bankruptcy. This case held that, while the trustee can take possession of privileged documents under section 311(1) of the Insolvency Act 1986, the right to assert (and therefore waive) privilege in a document does not pass to the trustee. That right is personal to the bankrupt. While the trustee can inspect the documents and use privileged information to realise the bankrupt's estate, the trustee cannot use it outside his/her statutory functions. The latest decision in *Willmont & ors* v. *Shlosberg* [2017] EWHC 2446 (Ch) develops the discussion further, enabling office-holders to share the information where it will increase the prospect of a surplus for the estate and/or whether doing so is in the public interest.

## Courtroom dramas

Last year also saw the introduction of the new bankruptcy adjudication process and the removal of the requirement to go to court where a debtor petitioned for their own bankruptcy. The ease of access for debtors in financial distress was welcomed, but concerns continue to be raised about the appropriateness of a system under which the debtor does not need to seek independent advice before they enter bankruptcy (with all of its implications). It is hoped that a full review of the system will take place shortly.

Courts' electronic filing or CE-filing was introduced into the Rolls Building during 2017 to bring the court systems up to date. It will be interesting to see how this will be rolled out nationwide.

> *Green* v. *Wright* raised many more questions than answers.

Due to the continued collapse of the legislative body for Northern Ireland, there have been no legislative changes to report over the last 12 months. Hopefully, for the profession, this will change during 2018.

## The year ahead

What will 2018 bring? New insolvency rules have been promised for Scotland. The General Data Protection Regulation comes into force on 25 May with increased requirements to safeguard personal data. How the regulation interacts practically with insolvency legislation remains to be seen and areas of conflict have already been identified. R3 is hard at work producing best practice guidance for the profession about the GDPR, so keep reading *RECOVERY* and **r3.org.uk** for updates. The Insolvency Service reviews into bonding and pre-packs should finish this year and the published outcomes are eagerly awaited. Will there be legislative change? In the current climate it is unlikely, but what we know for certain is that there will be other non-legislative changes, one way or another, ahead. ◻

**CAROLINE SUMNER** is technical and education director at R3.

▶ If you are a lawyer and would like to write for Legal Q&A please contact: **matthew.jukes@groupgti.com.**

# Legal Q&A

## James Hillman answers your insolvency queries.

**Q I have been appointed as administrator of a company but the company's creditors have not approved my proposals within the requisite time period – what should I do?**

A A failure to obtain approval of an administrator's proposals results from active rejection by creditors or simple creditor apathy when no votes are received in favour.

Irrespective of approval or rejection, the administrator must report the outcome to the court, the registrar of companies and the company's creditors. Unfortunately, the administrator cannot simply submit revised proposals to creditors if the original proposals were rejected.

> Administrators should be conscious of the decision in *Re Parmeko Holdings Ltd* [2014] BCC 159 in which the court said that it would be inappropriate to make an application for directions in circumstances where there would be no effective purpose in doing so.

Although paragraph 55 of schedule B1 to the Insolvency Act 1986 (the Act) does not expressly oblige the administrator to apply to the court for directions where he or she reports that the proposals have not been approved, the court ruled in *Lavin* v. *Swindell* [2012] EWHC 2398 (Ch) that this was implicit in the language of paragraph 55(2).

Nevertheless, administrators should be conscious of the decision in *Re Parmeko Holdings Ltd* [2014] BCC 159 in which the court said that it would be inappropriate to make an application for directions in circumstances where there would be no effective purpose in doing so. In that case, no creditor attended the meeting of creditors but there was no viable alternative to the administrator managing the company in the vein of the specific proposals he had submitted to creditors. The court said that, in circumstances *where creditor apathy* results in a lack of approval of proposals, the administrator's report should specify whether anything useful would be achieved by seeking a directions order from the court under paragraph 55(2). If there were no benefit in doing so, the report should make it clear that the administrator does not intend to make a court application.

However, where proposals have been actively rejected, a directions application is likely to be necessary. There are a range of orders a court may make; they include an order that the administrator's appointment shall cease to have effect, an order for the winding up of the company or any other order that the court deems appropriate. Although each case will differ, it would be unusual for the court to impose on creditors a set of proposals to which they have not consented. The court is more likely simply to permit the administrator to re-submit amended proposals to the creditors for approval.

**Q A conflict of interest has arisen and I would like to resign as liquidator of a company – what steps do I need to take under the Insolvency Rules 2016?**

A The circumstances in which a liquidator can resign office are limited to those set out in r7.61(1) of the Insolvency Rules 2016.

r7.61(1)(c) specifically permits resignation where a conflict of interest arises that has the effect of preventing or making impracticable the further discharge of the duties of the liquidator.

However, prior to resigning, the liquidator must deliver a notice to creditors and invite them to consider the appointment of a replacement. The decision can be obtained by way of a decision procedure or, usefully, by the deemed consent procedure. Liquidators should note that the decision date must not be more than five business days before the date on which the liquidator intends to give notice of his resignation to the court under section 172(6) of the Act.

The notice to creditors must include:

- a statement that the liquidator intends to resign;
- a statement that under r.7.61(7) the liquidator will be released 21 days after the date of delivery of the notice of resignation to the court under section 172(6) of the Act, unless the court orders otherwise; and
- the content requirements of r15.7 (if the deemed consent process is being used) or r15.8 (if the decision procedure process is being used).

The notice may suggest the name of a replacement liquidator. It must be accompanied by a summary of the liquidator's receipts and payments.

Additionally, in a compulsory liquidation where the resignation will result in a vacancy in the office of liquidator (meaning the Official Receiver will temporarily become liquidator until the vacancy is filled), the liquidator must deliver notice of his intention to resign to the OR at least 21 days before the liquidator intends to vacate office. That notice must include details of any property of the company that has not been dealt with in the liquidation.

> Prior to resigning, the liquidator must deliver a notice to creditors and invite them to consider the appointment of a replacement.

However, it should be noted that the occurrence of a conflict of interest does not necessarily mean that a liquidator *must* resign office. There may be other ways of dealing with the conflict, which include another liquidator managing the aspect of the liquidation to which the conflict relates. This may be an existing joint liquidator of the company or a liquidator may be appointed by the court following the conflict arising. ◻

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# Virtual world, real disruption

**Henry Page** walks us through a case study of a logistics firm in administration as a result of technological disruption.

With the advent of virtual content, logistics firms associated with the storage and delivery of physical entertainment media have found themselves lagging behind the times. The problems facing certain parts of the market were laid bare during one of my team's recent assignments.

The company's circumstances included the breakup of the associated European group (insolvency proceedings were opened for group companies in Germany and France), the loss of a major contract (65 per cent of UK turnover), accumulating historical losses and the reliance on a contracting market sector (the distribution of physical entertainment media).

> The immediate concern was whether there was sufficient cash flow to continue to trade on a day-to-day basis.

On losing the contract, the directors recognised the risk of insolvency and the need for specialist advice. We were retained as the company's insolvency advisers with, among other instructions, a brief to consider the implications of commencing administration and the impact on the creditors of such a decision.

### Cash is king

The initial task was crisis management. We had to stabilise operations while sufficient information was gathered to allow for rational decisions to be made in respect of the directors' continuing to trade in the short term.

The threat of insolvency, creditor enforcement and cash flow constraints (not least as the result of the European group companies freezing intragroup payments) all added to the pressure the directors were facing in the immediate aftermath of the loss of the contract.

As is almost invariably the case with financial crisis management assignments, cash is king. The immediate concern was whether there was sufficient cash flow to continue to trade on a day-to-day basis. If cash could be managed to allow for continued trading, the directors needed to demonstrate that continuing to trade would generate an enhanced realisation for creditors.

If the immediate threats were manageable, an accelerated business review would be able to identify business strengths and opportunities which, although requiring further exploration, could provide benefit to the creditors.

The opportunities included lucrative transition rates for the managed transfer of stock to a new provider, the possibility for the protection of employment and the transfer of associated employee liabilities, and the potential to extract value from the group's reliance on an IT department necessary for the trade (albeit within insolvency proceedings) of its larger European counterparts.

Contractual insolvency breach clauses threatened the company's ability to benefit from the transition of stock, weakening the protection of employment rights. The potential impact on the estate was material, and it was imperative to ensure the actions taken by the directors were in the interests of creditors.

Our review identified business strengths including: cheap warehouse premises, accessible location, local and industry brand strength, and a dedicated, skilled and loyal workforce. Each of these strengths could provide value to the business and improve the position of creditors.

The decline in the distribution of physical media, thanks to improved broadband and on-demand, in-home streaming services, has been evident for a while (as Blockbuster found out to its cost). But disruption in associated industries, including retail and public services, provides prospective growth areas for a flexible, adaptable logistics business.

> Financially and operationally stressed businesses, trading in sectors facing disruption, need to seek advice focused on a rigorous and disciplined proposal to protect the interests of the creditors.

The exponential growth of the behemoth online retailers means that demand for storage and supply of millions of products, requiring delivery from central warehouses to end users, continues to grow. The contraction of the public sector also sees a requirement for external storage and delivery of products to substantial public sector organisations such as the NHS, local authorities and the Ministry of Defence, all of which provide further opportunities for a progressive logistics business.



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### Crisis stabilisation

Stabilising the cash crisis through immediate negotiations with the exiting client to secure premium rates and a short-term payment horizon during the three-month contracted termination period was of paramount importance.

It was evident that a managed process, spanning a period of trading prior to opening formal insolvency proceedings through to a sale of the business, provided the directors with the comfort that they were acting in the interests of the creditors.

> "Administration at the outset would have been hugely value destructive."

The crisis focused on cash flow but the outcome was reliant on adding value for the creditors by harnessing the business' strengths, maximising the immediate opportunities and highlighting the market potential to interested parties.

No one (and certainly not the advising insolvency practitioners!) wanted to be associated with a business continuing to trade post-insolvency without a documented plan to improve the return to creditors.

### Maximising realisations, minimising liabilities

The threats to the business and legacy issues arising from the break-up of the European group meant that it was unlikely that the company could be saved as a going concern.

However, having stabilised the business through the management of the immediate cash flow issues, a five-pronged business improvement plan was initiated:

1. achieve the benefits of transition through the continuation of trade during the termination period
2. organise the employees to deliver the contractual wind-down services, and maximise TUPE protection
3. compartmentalise and sell the IT division to the larger German counterpart
4. approach market-specific competitors to test the industry's appetite for a pre-administration sale
5. undertake an accelerated M&A (AMA) assignment, in conjunction with appropriate agents, to identify potential business acquirers.

The negotiations on transition rates and payment terms were successful. This not only delivered timely ongoing cash flow but also generated a profit, reducing the deficit to creditors.

An ongoing provision of service to the major client ensured that the employees working specifically on its contract at the transfer date benefitted from employee protection and transfer rights. The transfer

of several employees was accepted by the new provider, while a considerable number accepted a union-approved compensation payment. The expected return to the creditors, as a result of continuing to service the contract until the transfer date, increased dramatically.

The sale of the IT business unit prior to formal insolvency proceedings also generated cash and transferred employee liabilities to the acquiring party. The receipt of a lump sum of cash improved the position of creditors, while the transfer of employees to the new business reduced claims in the overall estate.

The initial aspects of the value enhancement plan proved successful and improved the expected return to the creditors. During the transition period, approaches were made to industry competitors – the only parties who may have been interested in a share acquisition. As was anticipated, none of those approached were interested in progressing a pre-insolvency transaction because of the historic liabilities that they may have become exposed to.

### The solution

The direct approach to competitors and the wider AMA assignment confirmed that the problems facing the company prevented a non-insolvency transaction being completed.

However, the exercise highlighted a number of interested parties and, once the benefits of the transition and disposal of the IT unit had been realised, a post-administration sale could be pursued.

Trading continued for some 16 weeks in administration in order to achieve the best available sale of the business and assets. The creditors approved the strategy set out in the administrators' proposals, following which a sale of the business was concluded.

The sale continued the theme of minimising liabilities and maximising realisations, seeing the novation of client contracts (avoiding non-performance claims against the estate), protection of employment (removing employee claims from the estate), maximising the realisation of book debts and generating consideration for the business, both immediately on completion and through a deferred payment schedule.

### Don't panic!

Changing industries need adaptable businesses. It can be difficult to keep up with the pace of change while facing financial stress but not adapting can prove fatal.

Providing a business with the breathing space to assess threats and identify opportunities, as well as to build on strengths and react to weaknesses, will allow the directors to navigate their business during difficult periods.

Financially and operationally stressed businesses, trading in sectors facing disruption, need to seek advice focused on a rigorous and disciplined proposal to protect the interests of the creditors.

> "We had to stabilise operations while sufficient information was gathered to allow for rational decisions to be made in respect of the directors' decision to continue to trade in the short term."

In this instance the directors were focused on the protection of creditors through the commencement of an administration process, however administration at the outset would have been hugely value destructive. By managing the immediate cash flow threat, undertaking a business review and setting out the value enhancement programme, the deficit to creditors fell dramatically, culminating in the approval of the administrators' proposals and conclusion of the sale of the business. □

**HENRY PAGE** is a corporate advisory partner at Mercer & Hole.

# Tour and travel trouble

**Claire Mulligan**, **Dino Paganuzzi** and **Laura Smith** look at disruption from travel companies in distress and offer advice on how to handle it.

The travel industry has experienced a significant amount of turbulence over the last year or so, which has led to insolvency practitioners and lawyers piloting the industry through some of its troubles.

In 2017, the disruption began with the insolvencies of Alitalia, which initiated insolvency proceedings on 2 May 2017, and Air Berlin, which filed for insolvency in mid-August 2017. Shortly afterward, Monarch Airlines Limited and Monarch Travel Limited landed their own cases of financial distress on the UK's doorstep, while leaving some 110,000 customers stranded abroad.

This article will examine what happens when a travel or tour operator opens insolvency proceedings and what the key considerations are for the IP or the operator.

### Repatriation of customers

The key stakeholders involved when a travel company is in distress will usually include the Civil Aviation Authority if flights are needed or an airline is in distress, and the Association of British Travel Agents (ABTA) if a tour operator/travel agent is in distress. They will work closely with the government to work out how best to repatriate UK nationals.

If customers have simply purchased flights then there is no duty to repatriate. However, if a tour operator is involved and a package has been sold, as defined by the Package Travel Regulations 1992, then there is likely to be a duty to repatriate and the operator will need to work with the authorities such as the Civil Aviation Authority (CAA) in this instance to get passengers home.

When dealing with an insolvent travel provider, consider whether urgent repatriation of customers back to the UK is required and, if so, how the logistics of this are to be achieved and whether the assistance of a designated regulatory body and/or government department is required.

> “The ongoing administration of Monarch has identified a number of immediate practical matters that insolvency practitioners will need to consider when dealing with a business in distress within the travel sector.”

One of the primary issues for the newly-appointed administrators of Monarch to address was the mechanics of repatriating some 110,000 Monarch customers back to the UK. This was achieved with the cooperation of the CAA and the Department for Transport. In the event some 86,000 people were repatriated at a cost of £60m. Prior to their appointment, the joint administrators had agreed a services and funding agreement with the CAA to provide for the repatriation of customers.

Usually, if the passenger numbers affected are high, then the government will intervene to secure resources. This may include laying on additional aircraft to ensure the passengers are not stranded overseas, but then the question becomes who will foot the bill for the extra aircraft: the taxpayer, the CAA or the ABTA? Should those who do not obtain travel insurance and who buy unregulated packages, or those who buy flights and accommodation separately, be afforded the same repatriation rights as those who have paid extra for travel insurance and for a properly regulated package under the Package Travel Regulations? In reality those who do not have the benefit of a package holiday under the 1992 regulations will be left to fend for themselves at their chosen resort and will have to buy their own replacement flights home.

### All about image

Public relations are clearly going to be key if the business is to be sold on as a going concern. If there is no confidence in the brand, future customers will not book with the operator.

Monarch clearly had good PR. After the last-minute rescue they continued to trade and operated at extremely competitive seat costs compared to other airlines. For this reason it is difficult to determine the ultimate cause of the demise of the company, whether it was simply low sales or that the profits on those sales were not enough, but clearly a positive advertising campaign to secure customer confidence and goodwill is essential to survival.

In the event of a distressed business, it is important to ensure quick accessibility of information to customers and stakeholders. A major factor in this is a web and media communication plan. It may be worth considering whether to retain the company's existing website to redirect web traffic automatically upon appointment.

> "Those who do not have the benefit of a package holiday under the 1992 regulations will be left to fend for themselves at their chosen resort."

A plan might include several points of contact:

- **a dedicated website** updating customers of the latest information regarding the cancellation of any services going forward and details of any planned repatriation scheme for customers returning to the UK;
- **designated overseas and UK helpline telephone numbers** for customers to access for further information;
- **a dedicated insolvency portal website** in relation to the insolvency process to be used as an effective source of information and point of contact for key stakeholders in the company and its business including the following:
  - dedicated email addresses for employees, press enquiries, landlords, secured creditors, trade and other creditors and in relation to the sale of business and assets;
  - accessible links to all statutory notices and reports filed at Companies House;
  - ensuring that creditors are also provided with an email address and documentation via the insolvency portal/designated website to **submit details of their claims** to office-holders.

Depending on the scale of the insolvency you are dealing with, consider setting up any broadcast interviews (local and/or national level), print or online interviews and, as appropriate, any Facebook broadcasts in order to ensure wide coverage for the benefit of sharing information with customers and stakeholders of the company.

## Practical specifics

The ongoing administration of Monarch has identified a number of immediate practical matters that insolvency practitioners will need to consider when dealing with a business in distress within the travel sector, as set out in the following text.

### 1. Message agreement with the regulator

In the administration of Monarch, the CAA's website referred enquirers (whether customers, employees or creditors) to the relevant telephone numbers, websites and email addresses of the joint administrators for enquiries to be dealt with accordingly. The CAA website also provided updates in terms of advising that all future holidays and flights provided by the companies in administration were cancelled and would no longer operate. The CAA also confirmed, via its website, its programme of repatriation for Monarch customers back to the UK over a two-week period, which was provided at no extra financial cost to passengers.

### 2. Addressing employees

It can be necessary at the outset of an administration to make a significant number of redundancies in relation to a company's workforce. Where such a situation arises consider:

- setting up meetings at the company's designated operating locations to inform employees of the current positon in relation to ongoing employment;
- bringing specialist advisers to such meetings who can answer questions and provide information to employees regarding their current situation;
- retaining an element of the company's HR team to facilitate with the outplacement of staff;
- opening and maintaining dialogue with any company unions;
- for staff who have been made redundant, providing ongoing support to them in terms of information and contact details as to how they can submit employment claims against the company and to the Redundancy Payments Service, detailed FAQs and providing job fairs and/or CV writing sessions.

### 3. Information technology

It will be important to make a quick assessment of those IT systems of the company that are essential to retain as may be needed to support the repatriation of customers, notifications to customers, and the ongoing HR, financial and operations infrastructure of the company. Once the key IT systems are identified, consider securing necessary physical IT assets and speaking with each IT supplier to agree ongoing terms of supply and reduce the risk of any data/system access being revoked.

### 4. Taking action to preserve value

The recent Court of Appeal decision of 22 November 2017 held that Monarch Airlines Limited remained an air carrier within the scope of Council Regulation (EEC) No.95/93 of 18 January 1993 on common rule for the allocation of slots at community airports. This decision will allow Monarch's administrators to obtain the rights to airport infrastructure facilities at prime specific times at Luton and Gatwick airports this summer and to exchange those slots for less valuable slots with other operators and receive balancing payments, thereby realising value for the benefit of the administration estate.[1]

> "It will be interesting to see what requirements this review will recommend for the sector to adopt in future to prevent any costly repatriation schemes having to be funded by government."

It will be important therefore to evaluate key company assets at an early stage to identify whether any immediate action needs be taken in relation to them to preserve value going forward for the insolvent estate.

## The future for airline insolvency

Peter Bucks has recently been appointed chair of the independent insolvency review set up by the government following the administration of Monarch. According to transport secretary Chris Grayling, the review is aimed at exploring options for a new framework to deal with the failure of airlines and travel companies so that airlines can be wound down in an orderly fashion and passengers repatriated or refunded with minimal or no government intervention[2]. A final report is anticipated by the end of this year.

It will be interesting to see what requirements this review will recommend for the sector to adopt in future to prevent any costly repatriation schemes having to be funded by government. ◻

[1] *Monarch Airlines Limited* v. *Airport Coordination Ltd* [2017] EWCA Civ 1892

[2] Travelweekly – 26 January 2018 www.travelweekly.co.uk

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# Riding the roads of disruption

**Neil Smyth** and **Anna McCaffrey** explain why restructuring professionals may find opportunities in the fast lane of the gig economy.

It is a tough market out there. Profit margins are squeezed, costs are increasing, interest rates are rising and competition, particularly for the leisure/retail pound, shows no sign of abating. The current plethora of retail/leisure CVAs is evidence of this.

It is no surprise therefore, that in our technology-rich world, businesses are looking at every angle to stay ahead of the game, cut costs, stay profitable and survive until the post-Brexit nirvana, which we have all been promised, arrives.

Technological advances are occurring at breakneck speed and entities in all industries and sectors are looking at how technology can be used to enhance turnover, profits and margins. These advances will be, to a certain extent, at the expense of employees. Recent opinion from the Centre for Cities think tank suggests that automation will replace one in three jobs in the north of England by 2030 with similar ratios for other areas of the country.

At the heart of most businesses' costs is the wage bill. If you have workers and/or employees, you have to pay them the national minimum wage and they will have certain legal rights. In addition, you also need to provide for pension contributions, holiday and sick pay, maybe a company car and, possibly, medical insurance. Engaging workers and/or employees is an expensive business and the obvious solution is to keep costs down – have fewer workers or don't have any workers at all. Welcome to the world of the gig economy.

The so-called 'gig economy' encompasses a wide range of businesses and operational models, but at a basic level it generally refers to labour models whereby individuals are paid for each 'gig' in which they provide services, rather than receiving a fixed or regular fee or wage (for example, drivers receive payment for each ride, couriers for each delivery, etc).

Customers' fluctuating demands for services dictate how many opportunities there may be to be paid for 'gigs', meaning that flexibility is a core element of most gig economy operating models. In addition, the individuals providing the services are generally viewed by the companies who engage them as self-employed contractors.

### Changing workforce, changing approach?

Every action has a reaction. Traditionally, the self-employed made up a smaller section of the workforce and tended to receive higher daily rates than their employed colleagues, perhaps

> "The so-called 'gig economy' encompasses a wide range of businesses and operational models, but at a basic level it generally refers to labour models whereby individuals are paid for each 'gig', rather than receiving a fixed or regular fee or wage."

compensating for not having rights to paid holiday, sickness and other benefits. Over the last few years there has been a marked increase in the number of self-employed people (particularly in the gig economy), many of whom earn the same or perhaps even less than comparable employees, but who don't have the same legal protection as workers or employees.

In the last couple of years a social backlash against concepts like zero-hours contracts has become more visible as a strengthened opposition party veers more to the left of the political spectrum and record low unemployment rates have been coupled with wage deflation and a longing for more permanent employment and higher pay. This was evidenced by last year's Taylor Report, as well as recent legal decisions in respect of gig economy employers such as Uber and Deliveroo.

### Workers' status claims

Disputes over the status of individuals engaged in the gig economy have led to high profile litigation for the likes of Uber, Deliveroo and courier companies. At the heart of these disputes is the need to determine the nature of the relationship between the individual providing the service and the gig economy company.

In the UK there are three basic categories for people who provide services. At one end are 'employees' who have the most legal protection (for example, protection against unfair dismissal, maternity and family leave rights, holiday pay and sick pay), but are under the control and supervision of their employer.

At the other end of the scale are self-employed individuals, who have little legal protection as they are essentially in business on their own account, but have a high level of flexibility (for example, in terms of choosing when and if to accept work) and pay tax and national insurance contributions at different levels from an employee.

Between these two extremes (unlike many other countries) we have a 'middle category' called 'worker'. Worker status does not give full employee rights, but it does give individuals the right to 5.6 weeks of paid holiday per year and to the national minimum wage, which is currently set at up to £7.50 per hour for people aged 25 and over and is set to rise again in April 2018. For some, it may also result in a right to pension contributions in accordance with the auto-enrolment rules.

To date, the employment tribunal and employment appeal tribunal have concluded that Uber drivers are workers and are not genuinely self-employed. The key issues in the Uber litigation revolved around the control that Uber allegedly has of its drivers. The fact that Uber controls key information (in particular regarding the passengers' destinations); can potentially take disciplinary action against its drivers who cancel trips, take poor routes or who receive poor ratings from passengers; that Uber decides on the fare charged; and that payment of the fare does not go directly from the passenger to the driver but via Uber, were all found to be relevant to the concept of control over the driver, ultimately leading to a finding of worker status.

> In our technology-rich world, businesses are looking at every angle to stay ahead of the game, cut costs, stay profitable and survive until the post-Brexit nirvana, which we have all been promised, arrives.

Similarly, cases to date involving couriers (eg in claims involving City Sprint and Addison Lee) have also concluded that, in those cases, there was a sufficiently high level of control to lead to a finding of worker status. Similar conclusions were reached in relation to plumbers in the Pimlico Plumbers litigation (demonstrating that workers' status issues extend beyond the technology players in the gig economy).

At the time of publication, Uber are appealing to the Court of Appeal, and the Supreme Court is due to deliver its judgment shortly on the Pimlico Plumbers' appeal. However, pending those appeal decisions, Deliveroo is, to date, the only case to buck the trend and find that individuals were self-employed, primarily because Deliveroo drivers are able to substitute other individuals to complete a delivery job they have accepted (or are yet to accept). Whether or not the Deliveroo case signals a turning of the tide against the general line of litigation to date remains to be seen.

### The Taylor review

Public and media attention on worker status and the gig economy led last year to the prime minister asking Matthew Taylor to carry out a review into modern working practices. He and his panel carried out months of research and received submissions from employers, lawyers, individuals, trade unions and organisations such as the Chartered Institute of Personnel and Development (CIPD) and the Law Society.

The Taylor review was published in July 2017 and contained a number of key proposals, including:

- retaining the UK's three-tier approach to employment status, but renaming those workers who are not employees 'dependent contractors'
- proposals to ensure that gig economy workers are paid properly for the work they do through national minimum wage changes
- allowing rolled up holiday pay for dependent contractors
- making statutory sick pay a right for all
- better information sharing and transparency
- quick and cheap determinations of employment status

The Taylor review does not change the current three-tier approach in the UK to employment status: employees, workers or self-employed independent contractors, although the review recommends that those workers who are not employees should be renamed 'dependent contractors', to make their position clearer.

But, in a variation on the saying about looking and quacking like a duck, the review says that the absence of a requirement to perform work personally is no longer an automatic barrier to basic employment rights: 'ultimately, if it looks and feels like employment, it should have the status and protection of employment'.

In February, the government published the 'good work plan' in response to the Taylor review, promising that 'millions of flexible workers will receive new rights under major government reforms as the UK becomes one of the first countries to address the challenges of the changing world of work in the modern economy'.

The government response notes that it intends to act on 'all but one of Matthew Taylor's 53 recommendations' (having rejected the Taylor review's proposals to reduce the difference between the National Insurance contributions of employees and the self-employed).

However, the government intends to consult on all proposed changes to existing law prior to implementing any legislative reforms, so the detail of how things may change for those involved in the gig economy is still very much an unknown quantity. Whether or not, following consultation, the promised government reforms will in practice lead to significant changes in this area remains to be seen.

### What next for restructuring professionals?

So what does this all mean for those in the restructuring industry reading this article? Well, we would suggest opportunity. How businesses manage their workforce costs in this competitive market, and in light of the recommendations of the Taylor review, the government's response to that review and the current state of case law, may be crucial in determining the viability of those businesses.

There is equal pressure on entities to keep pace with technological advances, which will often be at the expense of workers. As part of that, they will need to look at how they potentially reduce their workforces in the most cost-effective way, while at the same time navigating the political and legal pressures around how those workers and employees are treated.

Now, more than ever, therefore, the role of the HR director is increasingly important to board decisions in a distressed situation and a potential target for the provision of work to restructuring professionals.

The skills that restructuring professionals possess will be required by businesses who are suffering the disruption that they have historically visited on their industries, sectors and competitors as profit margins based on low employment costs are squeezed by legal changes and a shift of social and political opinions.

> The role of the HR director is increasingly important to board decisions in a distressed situation and a potential target for the provision of work to restructuring professionals.

This is not to mention the additional disruption that will be caused to those businesses relying on the spending habits of the general public as automation suggests lower employment and a reduction in discretionary spend in the future.

All of this will result in opportunities for restructuring professionals – helping the disruptors and non-disruptors alike, across various industries and sectors, manage their way through these turbulent and quick-changing times. □

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# Pre-packs – *patronus* or *dementor*?

**Peter Walton** asks are pre-packs a shining light or a rising darkness for administrators?

As fans of Harry Potter will be aware, a *dementor* is a dark creature that glories in decay, draining happiness and hope from people and creating an atmosphere of misery and disturbance. A *patronus*, on the other hand, is a positive force of hope and happiness providing the desire to survive. The purpose of this note is to consider whether the magic of a pre-packaged administration is more *patronus* than *dementor*.

It is widely, but not universally, accepted that pre-packs often produce the best result for a company in financial distress. They often permit an ailing business to be sold at a higher price than in liquidation, which safeguards the future of that business as a trading entity with minimal disruption and jobs saved.

### The Graham review

The *Graham Review into Pre-pack Administration (2014)* recommendations, among other things, aim to make pre-packs more transparent and to ensure, as far as possible, that pre-packs are used, and seen to be used, to provide the best price achievable for the business. There is clearly a conflict of interest in existence where pre-pack administrators are instructed by a company's directors and then decide to sell the business to those directors. To manage this conflict, under the *Graham* recommendations, pre-pack administrators are to ensure that where a sale to connected parties is concerned, appropriate steps are taken to ensure that the business is properly exposed to the market so that the best consideration possible may be secured.

### *Re Ve Interactive Ltd* [2018] EWHC 186 (Ch)

In this case, the court effectively delivered an *expelliarmus* spell to remove and replace the administrators of a Unicorn company, which had entered a pre-pack sale of its business to connected parties.

The court pointed out that, from the date of the decision to pre-pack, a conflict of interest arose, as it will always arise when a company's directors seek to purchase a company's business. On the facts of the case, there were serious issues to be investigated. First, whether the circumstances of the pre-pack were such that the directors had breached their duty by favouring their own interests at the expense of other options. Secondly, whether the administrators breached their duties of reasonable skill and care with the result that loss was caused to the company by a sale at an undervalue.

"Although impossible to prophesy what the government will pull out of its Sorting Hat, it seems possible that the *Graham* recommendations will become compulsory."

In removing and replacing the administrators the court pointed out a number of matters requiring investigation, including: whether the business was marketed with due diligence; whether the directors took advantage of information that they did not share; whether this lack of information effectively prevented a level playing field for possible rival bidders; and the role of the administrators' firm.

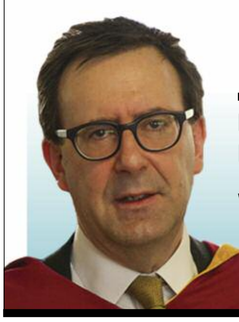
The case highlights the risks run by administrators who enter into a pre-pack sale to connected parties. Administrators need to be careful in such circumstances to provide the correct advice, ensure an appropriate marketing and sale process and intervene if necessary to prevent directors taking unfair advantage of their privileged position. Administrators must assess any sale objectively. On the facts of the case there was no cause for creditor confidence in the administrators being able to investigate the issues raised. They had 'lost perspective of their role'.

Other options short of replacing the administrators were not considered: for example, the appointment of an additional administrator who would be specifically and only responsible for the investigations. Interestingly, this solution was recently adopted by the Australian Federal Court in a non-pre-pack voluntary administration (*Re Ten Network Holdings Ltd* [2017] BPIR 1707). An *obiter* statement in that case highlights a fundamental difference in the Australian approach to pre-packs to that of the UK courts. In considering a theoretical connected party pre-pack where the administrator is involved in the pre-pack planning stage, O'Callaghan J comments at [23] that in Australia: '… it is difficult to imagine a situation in which the taking of such an appointment … would ever be countenanced.'

### Prophecy

As the government considers the future of connected party pre-packs, *Re Ve Interactive* comes at a difficult time for proponents of the *status quo*. If administrators are not seen to be following the terms of the *Graham* recommendations, designed to deal with the apparent bias of a pre-pack administrator, it is difficult to see how the government will continue to allow them to act both in the planning of a pre-pack and its subsequent execution.

Although impossible to prophesy what the government will pull out of its Sorting Hat, it seems possible that the *Graham* recommendations will become compulsory. Equally possible, the government may decide to prevent the same insolvency practitioners acting both pre and post appointment. Although this latter option may increase costs, it might restore any wavering confidence in pre-packs producing the best overall result for creditors. Pre-packs may finally be seen as more *patronus* than *dementor*. □



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# Creative destruction is the essential fact about contentious insolvency

**Mark Beaumont** suggests disrupting traditional funding models to benefit cases.

Creative destruction is a term coined by the economist Joseph Schumpeter to define the forces unleashed by capitalism that he, Karl Marx and others thought would eventually lead to its demise as a system. This did not happen. In fact, capitalism being what it is, the phrase has been repurposed and reinterpreted as a description of how businesses rise and fall – the concept has even been embraced as a vital strand of the free market economy.

Creative disruption is therefore now thought of as the process whereby inventive start-ups emerge in established markets to unseat large, highly profitable incumbents that lack the incentive to innovate.

> "For all the reasons below, and I'm sure many more too, the market for funding and ATE has remained both small and lacking in innovation."

## A need for innovation

Lord Justice Jackson has a decent claim to be the most disruptive figure in the world of litigation funding. The Jackson Reforms led to both success fees and ATE premiums becoming irrecoverable in contentious insolvency.

Such major regulatory change is often the catalyst for disruption in related markets. Have we seen the expected innovation among both funders and insurers over the last few years?

No, I don't think we have. There have been some interesting developments, but I would hardly characterise them as revolutionary. What might be the reasons for the lack of progress?

- Funding and insurance have high financial and/or regulatory barriers to overcome, which has protected incumbents and made it harder for small innovators to emerge.
- Consumers are often a driver for change: parties identify a poorly served group and develop products and services to meet the latent demand. Because IPs tend to rely on solicitors for access to funding and insurance, they have not been well-placed to influence product development.
- Funders have developed very high margin products and new entrants tend to be attracted by the high margins, rather than the desire to expand the market. Funders are not typically set up for managing volume.
- Insurance firms have a ready market with third-party litigation funders and have therefore seen their product development driven more by funders than other potential clients.
- Brokers have traditionally been paid their fees by insurers and funders, so there has been no incentive for brokers to push for more cost-effective products.

For all the reasons above, and I'm sure many more too, the market for funding and ATE has remained both small and lacking in innovation.

## Do it yourself

This is frustrating, as clearly there is a large amount of contentious insolvency work that would benefit from better insurance and funding options, particularly for elements of work in progress (WIP) and disbursements. This is particularly true of lower-value disputes, which can sometimes need just small amounts of funding to be able to issue claims and then settle relatively quickly.

So, until funders radically alter their pricing structure, it seems to make more sense to 'create' your own products by pulling together the best of what's available in the market:

- Claims under £100,000 might benefit from giving an assignment for an upfront fee or a share of recoveries. Claims can be pursued aggressively and creditors and professional fees paid.
- Claims in the £100,000 to £3m range will typically involve a mix of CFAs, insurance for both adverse and some own costs, and disbursement funding for court fees and experts. This allows insolvencies with no funds at all to issue claims and be funded to trial, which can be key to decent early settlements.
- Claims over £3m have the widest range of funding and insurance options available to them. Approaching funders directly with these cases will lead to funding, but usually not on particularly attractive terms. Economically attractive funding and insurance packages should be sought out, particularly as that makes settlement much easier than expensive funding.
- Litigation can be a valuable source of funds back into an administration or liquidation, so explore the full market to ensure that claims are actively pursued, and funded, in the most economic fashion.

> "At the very least, insolvency practitioners should be keen to make sure all avenues have been explored before writing off a potential source of funds."

## Don't let them off the hook

There are far too many instances of defendants walking away with their ill-gotten gains, when any number of funders and insurers would have been happy to underwrite the costs and risks of taking them to court. At the very least, insolvency practitioners should be keen to make sure all avenues have been explored before writing off a potential source of funds.

Annecto Legal is owner-managed and has spent the last five years helping IPs maximise the value of litigation assets. We are advocates of expanding the market for funding and insurance by creating new low-cost solutions that give even the lowest-value claims a chance. We are happy to discuss any potential claims and give quick feedback on the options available, and the costs of those options. □

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# The GDPR does not (yet) compute for IPs

**Matt Jukes** reports back on IP concerns about the upcoming General Data Protection Regulation (GDPR).

The latest round of European data protection regulation is touted on the EU GDPR portal as the most important change to data privacy regulation in 20 years. Ostensibly it is heavily targeted at the social media giants – entities that hold private and personal data on millions of individuals – but is bringing every business, organisation and public service across the EU along for the ride and the insolvency profession is no exception.

In Spring 2018, R3 played host to the inaugural meeting of the Insolvency GDPR Forum to bring members of the profession together to pool knowledge, eke out hidden answers to the burning data protection questions and establish how practitioners may be preparing for the regulation coming into force on 25 May this year.

## Background

The GDPR updates the existing Data Protection Directive, which came into force in 1995, prior to the advent of the internet as a medium for mass communication and amusing cat videos. The regulation states that it aims to strengthen individuals' rights to be informed about the collection and use of their personal data, to request and receive such data held about them in a convenient format and to have the right to be forgotten should they choose. Data breaches will need to be reported within 72 hours to the Information Commissioner's Office (ICO) and data handling and protection processes will need to be clearly documented. A company found in breach of the GDPR may be fined up to four per cent of global turnover or a maximum of €20m, whichever is greater.

To read more about the background and impact of the GDPR, see Annabel Gillham and Mercedes Samavi's excellent article *GDPR: data protection detail* on page 15 of the Autumn 2017 issue of *RECOVERY*.

## Knowing too much?

One of the key concerns raised at the Insolvency GDPR Forum was what data should be kept upon an appointment. As an office-holder you may be faced with hoards of data on day one that (under GDPR) may need to be used, passed on or destroyed according to the situation and data type – does the IP immediately assume accountability for all information held, past and present, upon appointment? Do the obligations differ depending on what type of appointment is made?

In such a situation Annabel Gillham, of counsel at Morrison & Foerster, suggests that you start by asking yourself questions: 'You do have an obligation to think about what data is flowing through an organisation as an IP. Ask yourself: do I need to be handling this data? And, what legal basis do I have?' suggests Gillham. 'The easiest basis is consent, but consent can be withdrawn. Then there is compliance with a legal obligation, which may be the case for many IPs in some situations. If it is pertinent for an IP to use that data to make and process claims, then it may fall into the category of "processed in order to comply with a legal obligation".'

> The question that needs to be asked is: have you, as the agent for the business, taken all the steps you reasonably can to keep the data safe?

Customer data that may be a prime candidate to be sold on by an office-holder, may require a certain degree of due diligence as well. Mercedes Samavi, an associate at Morrison & Foerster, recommends following the paper trail: 'Businesses should be writing to customers and other concerned individuals to obtain their customers' consent for selling their data. If a business has written to 10,000 customers, and it receives 2,000 replies negating consent but has 8,000 replies giving consent, you have a clear paper trail demonstrating that the appropriate steps have been taken regarding the data, and the business can sell those 8,000 customers' data in confidence,' says Samavi.

## Breach of the (IPs') peace

Data breaches potentially pose a somewhat larger headache for IPs when taking a first look at the inventory. The issue arose at the Insolvency GDPR Forum in the form of a hypothetical question: you are appointed as liquidator over a small building company with listed assets of 23 laptops. When the inventory takes place, there are only 15 laptops listed. Does that count as a breach and how detailed do you have to be when reporting to the ICO?

The interpretation at the moment seems to be that it will involve a conversation with the ICO as soon as possible. 'If you are aware of a data breach then you have to report it,' says Gillham. 'You have a stricter obligation under GDPR to notify the ICO and the individuals whose data has been compromised.'

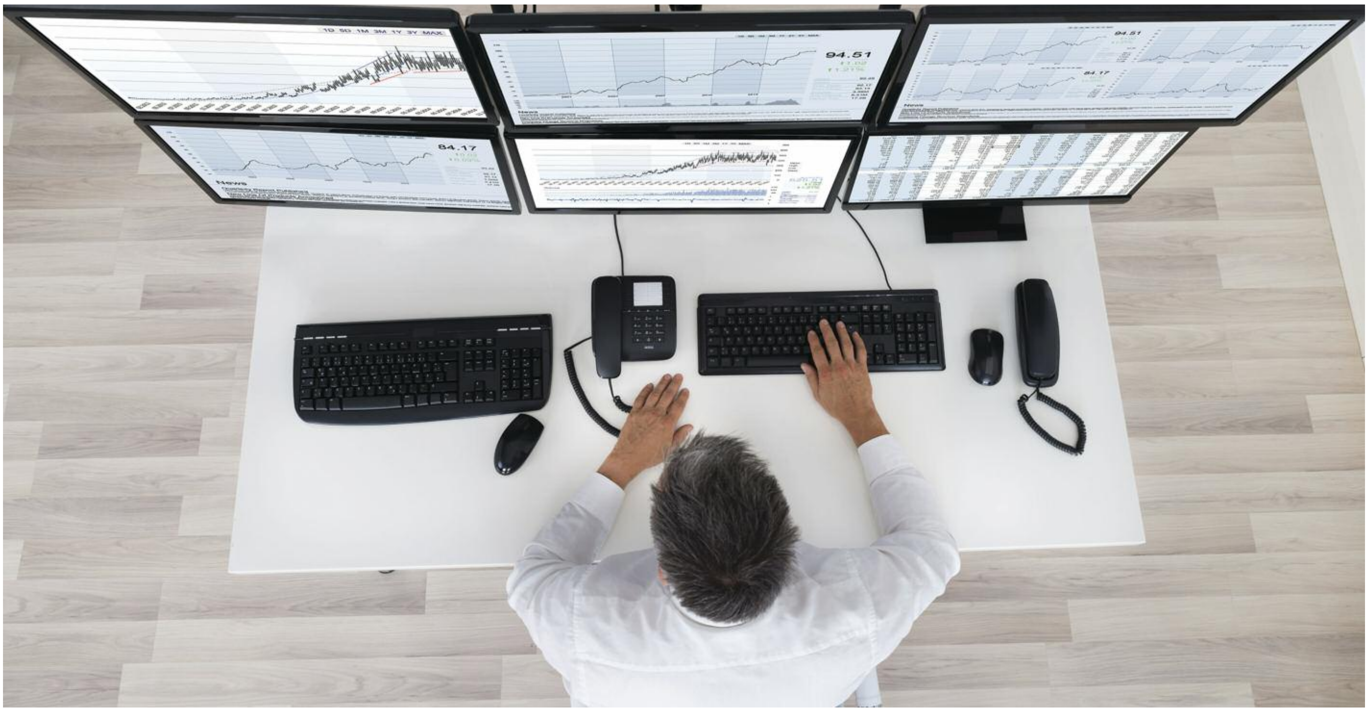
The accountability, not to mention the real capacity of the IP to act, is called into question again. Without the laptops, it may not be possible to determine the individuals that are affected. Likewise, the data may be encrypted, so anyone accessing the 'missing' laptops may not be able to see the data held on them. The question that needs to be asked is: have you, as the agent for the business, taken all the steps you reasonably can to keep the data safe?

## No protection from data protection?

Much of the above will need clarification by the time the regulation comes into force in May. In what circumstances are directors truly entitled to the 'right to be forgotten'? To what degree does the GDPR determine a liquidator's responsibility as a data controller? Will IPs have to increase fees to account for the disposal of data? How will firms have to adapt their policies on the use of public wifi and company mobile phones? And, most importantly, to what degree will IPs be held accountable if a company has 'misplaced' data?

The Insolvency GDPR Forum deemed it unlikely that there will be dawn raids on the morning of 25 May 2018, so hopefully there will be more time to address such matters before the ICO breaks out its newly-polished battering ram. In the meantime, R3 will be hosting breakfast briefings on the GDPR on 13 March in London and 19 April in Manchester. You can also join the online discussion about the GDPR and how to comply as an insolvency practitioner at **insolvency-gdpr.co.uk**.

**MATT JUKES** is publishing manager of *RECOVERY* magazine.



# Communicating, the new rules way

**Andrew Haslam** examines how communication with creditors functions under the new rules and asks whether it will really increase engagement.

As insolvency professionals will know, on 6 April 2017, the Insolvency (England and Wales) Rules 2016 (new rules) were released, replacing the Insolvency Rules 1986 (old rules). As the new rules transcend all insolvency procedures, both corporate and personal, this is arguably the biggest change in insolvency legislation since 1986 and an attempt to make the rules fit for purpose in the modern world of insolvency.

> Many of the national firms, who would tend to deal with larger appointments and lengthier creditor lists, have chosen to follow the deemed consent process...

Probably the biggest change brought in by the new rules is to the decision-making procedure, including a move away from physical meetings towards meetings by correspondence, virtual meetings and a deemed consent process. One reason put forward for this was to increase creditor engagement in an insolvency process. So, has it worked?

## Liquidation

I think it important to recap how a decision process was undertaken using the old rules and remind ourselves of what creditor involvement was required. In corporate insolvency, the most prevalent form of process a creditor would be exposed to would be liquidation, either voluntary or compulsory. If we take a compulsory liquidation first, after the obtaining of a winding-up order (usually made following the presentation of a winding-up petition by a creditor), the Official Receiver (OR) would initially be appointed as receiver and manager of the estate and proceed to interview the directors. If the OR considered there were assets to realise or other matters identified that required the appointment of an external liquidator, they would convene a physical meeting of creditors at the OR's office. This would need to be circulated to creditors at least 14 days in advance of the meeting. The chair of the meeting was the OR and directors were not usually in attendance, with the main purpose of the meeting to appoint a liquidator.

In a voluntary liquidation, the board would convene a meeting of members to pass resolutions to both wind-up and appoint liquidators, followed by a physical meeting of creditors on a minimum of seven days' notice, plus a day for postage and a day for receipt. Shareholders latterly required 14 clear days' notice and all notices usually were circulated on the same day, so it would be usual for creditors to receive more than a fortnight's notice of a meeting, unless the shareholders consented to shorten their notice period, which was unusual. The chair of the creditors' meeting was a director and this meeting was often attended by the majority of, if not all, the board of directors. The meeting of creditors in a voluntary liquidation was the creditors' opportunity to receive the directors' report and financial information relating to a company. They could then question the directors regarding their conduct in relation to the company's operations before confirming the appointment of the liquidator chosen by the members or appointing an alternate.

> We always place documents we require returned by creditors at the rear of the circular so they can be easily detached and returned.

The new rules now clearly set out a decision-making process that encompasses all insolvency processes, both corporate and personal, which have dispensed with physical meetings in favour of correspondence or virtual meetings and a deemed consent procedure. All of the new methods avoid the necessity for a physical meeting at all, unless requested by creditors if they meet one of three prescribed thresholds.

## From conference to computer screen?

The main thrust of this change in procedure appears to revolve around the engagement of creditors, with the line of thought appearing to be that with virtual meetings rather than physical meetings, a creditor who wishes to engage in the meeting process will be more inclined to attend a meeting via a medium such as video conferencing or a telephone conference call, than they would be likely to physically attend a meeting that could be a significant distance away.

This needs to be set against the fact that in the modern world, with increasing pressure on time, creditor involvement in insolvency processes was and is expected to continue to fall. Even the new rules may not be able to have a positive effect on creditors' engagement in the insolvency regime.

> In the modern world, with increasing pressure on time, creditor involvement in insolvency processes was and is expected to continue to fall.

The new rules and analogous legislation provide for a significant amount of paperwork to be circulated to creditors when calling a virtual meeting. This could include notice of the virtual meeting, voting on the establishment of a liquidation committee, proxy form, proof of debt, opting to receive no further correspondence, opting to receive all future correspondence by electronic means and possibly more. This significant amount of paperwork can cause confusion for creditors and lead to a lack of engagement. Some practitioners have sought to place documents in a pack in a specific order, with documents for return placed at the top of the pack for ease of use. In my team's case, we always place documents we require returned by creditors at the rear of the circular so they can be easily detached and returned. I am aware that some practitioners have even resorted to copying documents for return on coloured paper to allow creditors to distinguish them easily.

In addition, the new rules have re-scheduled the notice period for creditors. As detailed above, this usually was more than 14 days. However, the new rules allow for creditor notices to be sent five business days in advance of the decision date, with two days' postage, and the statement of affairs to be delivered one business day before the meeting.

### Different methods for different creditors

It has been suggested that creditors generally fall into one of several generic groups, these being professional creditors, HMRC, employees, creditors with a specific point to raise and creditors who are attending for interest. A professional creditor, usually an insolvency practitioner or solicitor representing a client would, under the old rules, either utilise their creditor services team and physically attend creditor meetings as instructed or try to find a local contact to attend on their behalf. The new rules make it easier for them to attend virtually, but, I would think, will not increase engagement as a client's instructions will be followed regardless. With HMRC, issues have been encountered with the reduced notice period as, given the volume of correspondence that HMRC deals with, it has been found that meeting notifications are not being received and reviewed prior to the meeting in fact taking place. As such, HMRC has now created a dedicated meeting email inbox for IPs to send decision notifications. Therefore, at least in the short term, the new rules seem to have restricted HMRC's ability to engage in the process.

Taking both employees and general creditors, if there is a specific reason for a creditor to want to take part in the decision, then it may be that the ability to now 'dial in' rather than physically attend a meeting would help increase their engagement. However, if such a creditor had a burning desire to attend, then, in my experience, they would ensure that they did so. Creditors who have no desire to engage in the process will continue not to do so regardless of the process.

It has also been noted that the new rules, especially in the common voluntary liquidation process, allow for the nominated IP to have their appointment agreed by deemed consent, thus avoiding the requirement for creditor involvement at the appointment stage at all. Of course, this still leaves the IP without any fee resolution for either the statement of affairs or liquidators' fees, which can then be requested at a convenient stage, usually immediately after appointment or at a landmark stage in the progression of the case. This possibly could be after the conclusion of the investigation, and decision can be reached by correspondence. If this route is chosen, then creditor involvement is reduced to the return of a proxy form, possibly some months after the date of liquidation. It is appreciated that creditors can request a physical meeting, but this puts the onus on what is usually a schedule of unsophisticated trade creditors who do not have knowledge of insolvency legislation and usually would not read the complex pack of information that has been circulated, other than to review the statement of affairs to see if they are likely to receive any dividend.

The regional firms who deal with the more routine insolvencies and smaller creditor numbers appear to have taken the decision to call virtual meetings and garner creditor engagement. However, many of the national firms, who would tend to deal with larger appointments and lengthier creditor lists, have chosen to follow the deemed consent process for the appointment of the liquidator and then call for additional meetings by correspondence. It has been indicated that this is due to such matters as technology restrictions regarding the number of creditors who may wish to be involved at a virtual meeting, protecting IPs against complaints from excluded creditors and ensuring that only the correct stakeholders are in attendance. Thus, the new rules could be seen to restrict IPs from proper engagement with creditors in the process altogether, which is the exact opposite of the intention.

### On the front lines

At the coal face, we do not yet seem to have found any significant differences in the amount of creditor engagement within the new insolvency regime. Professional attendance will always be requested by creditors in specific circumstances. Once HMRC has procedures in place it is not thought that its requirement to question directors who it deems have not acted in the correct manner will be influenced by meetings being physical or virtual due to national network, and a dissenting creditor will always want to be heard.

> The regional firms who deal with the more routine insolvencies and smaller creditor numbers appear to have taken the decision to call virtual meetings and garner creditor engagement.

The group of creditors that treats all insolvency correspondence with apathy and simply files documents in the waste is the group that the new rules appear to be targeting, via creating a change in mentality, but it might be that it will take more than a change in the insolvency rules to prompt this.

The new rules have not yet been in operation for 12 months and as such, it is still early in the day, so it would be interesting to re-visit this question in a couple of years to truly see if the new rules have had the effect of increasing creditor involvement in the insolvency regime.

**ANDREW HASLAM**
is a partner at FRP Advisory LLP.

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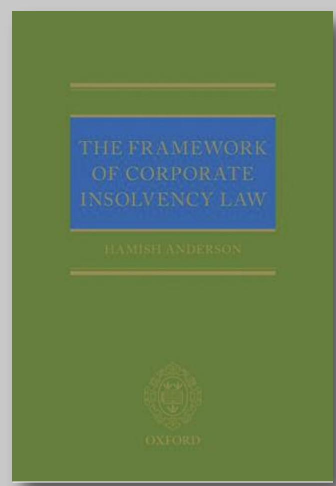



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- **ISBN** 978 0 19880 531 1
- **PRICE** £125.00


> "Characteristically clear, balanced and erudite, *The Framework of Corporate Insolvency Law* is an exploration of the regime in England & Wales, including its developments since the Cork Report was produced in 1982."

# *The Framework of Corporate Insolvency Law*

Among his previous contributions to insolvency literature was Hamish Anderson's tenure as a respected editor of *RECOVERY*. His latest work is in a different league. Characteristically clear, balanced and erudite, *The Framework of Corporate Insolvency Law* is an exploration of the regime in England & Wales, including its developments since the Cork Report was produced in 1982.

The book is about 'why'. Why do we do what we do in the way that we do it? What is the explanation for – or at least the history behind – our corporate insolvency regime?

In a work that displays careful thought and prompts more, the author recognises an increased focus on the rescue and rehabilitation of companies in difficulty, but questions how far supporting failing businesses yields longer-term benefits in the wider economy. All this in the context of acknowledging Henry VIII's introduction of procedures for rateable distribution among creditors!

One of the book's delights is its analysis of fundamentals, such as a six-point guide to s123 IA 86, illustrated by reference to developing case law. Digging deeper, the reader will uncover gems, such as the fact that provisions of the Partnership Act 1890 still govern aspects of the ranking and priority of debt in corporate insolvency proceedings through the mechanism of r14.2(4)(b) IR 16.

A theme is the three principal corporate insolvency procedures – liquidation, administration and CVA – and their similarities and differences in purpose and mechanism. One suspects the author enjoyed setting out the reminder that a company subject to any one of these procedures could move to any other. Commenting dryly on the procedural expansion in recent years he notes that 'procedures are now even more unnecessarily Byzantine than they were before'.

An example of the thought-provoking aspects of the work is the reminder, by reference to judicial authority, that the debts of a company survive beyond its date of liquidation, but they are subjected to the statutory trust resulting from the duty of distribution imposed on the liquidator. Another is the proposition that ROT goods sold by an administrator on terms that the purchaser will honour valid claims for a reasonable period may engage the administration moratorium during that period. A third is the conundrum of when time stops running for limitation purposes in a distributing administration.

The author does not refrain from criticism of the regime: 'the small company CVA procedure has been a failure'; or of plans for its development, when he suggests that if concerns about pre-packs continue despite their propriety being recognised by the courts and their use being subject to detailed and carefully considered regulatory measures, 'some more radical solution would be required than the making of regulations pursuant to the paragraph 60A power [limiting sales to connected persons]'.

> "In my view this scholarly, yet practical, book should be required reading for all insolvency practitioners."

A discussion of expenses implicitly highlights the distinction between the broad, non-technical meaning of the word 'disbursements' in the rules (eg r3.51(2)(g)), and the narrower definition 'costs met by and reimbursed to an office-holder' in SIP9.

Finally, the book explores the 21st century ebbs and flows of modified universalism and the impact of that concept on modern cross-border insolvency law. It goes on to observe that the 'characteristically Anglo-Saxon cocktail of [cross-border insolvency] measures' we enjoy 'works in a piecemeal, and sometimes haphazard, fashion'.

In my view this scholarly, yet practical, book should be required reading for all insolvency practitioners. □

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

# The Insolvency Express Trials Pilot – use it or lose it!

**Frances Coulson** calls on readers to support the scheme by speaking out for, or making use of, the pilot scheme.

The Insolvency Express Trials Pilot (IET) is an excellent innovation by the Insolvency Court in London to attempt to reduce the time taken to get to a hearing as well as minimise the costs of an action, both of which benefit parties (and creditors).

The IET was initiated in April 2016 for a period of two years. When *RECOVERY* first carried an article by then registrar Briggs announcing the scheme it was described as a procedure 'made for litigants of the Insolvency Court to elect for a streamlined procedure with reduced case management, limited disclosure, and early hearing and a fast decision'.

> It would be a shame if, having lead the way, the London Insolvency Court loses its own innovation through lack of publicity/use.

## The criteria

If a case is likely to take two days or less at hearing/trial before a bankruptcy registrar, and adverse costs recovery is limited to £75,000 (including any CFA uplift and disbursements but excluding VAT and court fees), the applicant can mark the claim for the IET upon issue. Practice direction 51P sets out the scheme under rule 51.2 (b) in the Bankruptcy and Companies Courts of the Chancery Division of the High Court (now the Business and Property Courts).

The other limitation is that the matter must be commenced by an application notice, require limited directions rather than full case management and need only limited disclosure.

It is ideally suited to many fairly simple claims where, in effect, the application is accompanied by the applicant's evidence (as it must be to qualify for the scheme) and in reality all that is needed is evidence in reply (then possibly answer), and a trial with deponents attending.

The application cannot exceed 15 pages. It must state the relief sought, give a description of the nature of the dispute, a summary of the issues likely to arise in the application, the applicant's contentions – including material facts upon which the applicant intends to rely, which must be stated with adequate particularity – and the legal grounds for the relief sought. It must also exhibit relevant documents (hence limited disclosure is likely to be limited to anything the respondent wants to produce).

On issue, the directions hearing will be allocated no more than 45 days (just over six weeks!) from date of issue with a time estimate of 30 minutes.

## Objections

The respondent can object to the use of the procedure, but then must file and serve brief reasons for such objection no later than 14 working days before the directions hearing. The applicant must file and serve any reply to the respondent's objection no later than seven working days before the directions hearing (these must also be brief – two sides of A4, 12pt font, 1.5 line spacing). Objections will be dealt with at the directions hearing

At the directions hearing the registrar will give binding directions and fix the final hearing, between three and six months from the date of the directions hearing, with an agreed time estimate, and it won't very easily be vacated.

Aside from general insolvency claims, it is ideally suited for s236/366 applications, where often inertia by the respondent, or some fear of a data breach in complying with those sections, is the only reason for failing to provide information. It can thus cut short the period taken for naturally sequential investigations in fraud/misfeasance cases, enabling a speedier resolution.

## Speak up for innovation

However, as stated in the practice direction itself, the pilot is set to end on 1 April 2018 and the rate of uptake has been limited so far. The matter will rest with the Civil Procedure Rules Committee as I understand it, as to whether to extend the scheme. I commend its use. I understand that several county courts have emulated it with their own schemes, and it would be a shame if, having lead the way, the London Insolvency Court loses its own innovation through lack of publicity/use. □

> It is ideally suited to many fairly simple claims where, in effect, the application is accompanied by the applicant's evidence and in reality all that is needed is evidence in reply, and a trial with deponents attending.

To read a little more about the insolvency court and the Insolvency Express Trials pilot scheme, read our interview with Chief Bankruptcy Registrar Nicholas Briggs on page 39.

**FRANCES COULSON** is a senior partner at Moon Beever, a past R3 president and is chair of R3's Fraud Group.

# Release the value in your case management system

**John Smith** says that talking to your CMS providers can work wonders for avoiding disruption and increasing efficiency across a practice.

Achieving efficiency does not happen overnight. It takes time to put the foundations in place to allow a practice to increase productivity and business performance levels. Steve Jobs once said: 'Simple can be harder than complex: you have to work hard to get your thinking clean to make it simple. But it's worth it in the end because once you get there, you can move mountains.'

Spotting inefficient processes is not always easy. It requires us to take a step back from our day-to-day activities and try to view them from an outsiders' perspective.

> **"Simple can be harder than complex: you have to work hard to get your thinking clean to make it simple. But it's worth it in the end because once you get there, you can move mountains.**
> ***Steve Jobs*"**

Something that I've been guilty of myself is thinking that I'm too busy to take that step back. Thinking logically, that makes no sense at all. The reason for taking a step back is to consider ideas that would decrease time on administrative tasks and increase levels of productivity. How could I be too busy to at least think about that?

Out-of-the-box, a case management solution (CMS) is a tool that can help a practice achieve efficiency. However, remember that no two practices, large or small, will process cases in the exact same way. A regular first mistake is taking a CMS in its 'out-of-the-box' state and determining that it is not the right fit. The second mistake is not taking the time to review and understand how to amend the CMS to meet with the practice's processes.

### Not just an IT provider

We sometimes hear that a practice 'is not getting the most out of the system'. Often,

> **"CMS providers must always look to improve each client's experience of their system."**

this can be attributed to the CMS' provider being viewed simply as an IT software provider and not a trusted partner. I believe that CMS providers must always look to improve each client's experience of their system. To do so, an open channel of communication between client and provider must be sustained. This ensures that resolutions to pain points can be found, whether that is through existing functionality or new enhancements.

These pain points can be as straightforward as diary lines not appearing in line with a practice's requirements, documents not being formatted to the company's standards and core brand values or reports not meeting with the firms KPIs. Speaking from the viewpoint of a provider with many years' experience in supplying solutions to the insolvency industry, we enjoy nothing more than working with a customer to try to heal these areas of pain. What we cannot do, however, is fix something that we do not know about. Having a customer who has made the time to take a step back to think about their process and problem, and who then provides us with their initial thoughts and requirements, is invaluable. From there, we can plan and develop a solution together.

### It's worth it... we promise!

A new customer has two options when engaging with an 'off-the-shelf' solution. The first is to hope that the standard solution will fulfil your requirements. The second is to take the standard and look for ways to tailor it so that it works for your specific needs with respect to your diaries, your documents and your KPI reports.

I'm not declaring that settling for an out-of-the-box solution will always decrease productivity, but it is comparable to buying a Ferrari and driving it like a Fiesta – you're just not getting your money's worth! The tragedy of this approach is that a level of efficiency that is within a practice's reach is never attained. Fortunately, it's never too late to take that step back and begin to lay the foundations.

> **"Having a customer who has made the time to take a step back to think about their process and problem, and who then provides us with their initial thoughts and requirements, is invaluable."**

As Steve Jobs said, 'you have to work hard to get your thinking clean to make it simple.' Investing time and resources to tailor your CMS to your needs will result in your practice achieving efficiency and avoiding disruption – allowing you to go forth and move mountains. □

**JOHN SMITH** is technical director at Vision Blue solutions.

John worked in practice for 12 years prior to joining Vision Blue Solutions in 2009. As technical director, John is involved in ensuring efficiency is achieved throughout standard functionalities as well as customer-specific adaptations to documents and diaries.

# JIEB – November 2017

## A

| | | | |
|---|---|---|---|
| **Allison**, A (1008) Choppington | P | A | L |
| **Armstrong**, J (1013) Milton Keynes | | A | L |
| **Ashforth-Shaw**, O (1080) London | P | A | L |

## B

| | | | |
|---|---|---|---|
| **Barnes**, H (1073) Stourport-On-Severn | P | | L |
| **Beech**, H (1072) Knebworth | P | A | L |
| **Bell**, K (1014) Stockport | P | | L |
| **Boast**, M (1015) Warlingham | P | | |
| **Bonner**, G (1018) Belfast | P | | L |
| **Bowen**, J (1019) Manchester | | | L |
| **Brazier**, J (1102) Manchester | P | A | L |
| **Brindle**, C (1093) Poulton-Le-Fylde | | A | |
| **Brooker**, L (1101) London | P | | |

## C

| | | | |
|---|---|---|---|
| **Caten**, J (1069) Southend-On-Sea | | A | L |
| **Catley**, L (1082) London | P | A | L |
| **Charters**, A (1003) Harpenden | | A | |
| **Collinge**, O (1081) Leeds | | A | L |

## D

| | | | |
|---|---|---|---|
| **Davidson**, G (1099) Southampton | | A | L |
| **Davies**, O (1078) Loughton | P | A | L |
| **Dillon**, M (1023) Manchester | | A | L |
| **Dix**, M (1022) Market Rasen | | A | |
| **Doherty**, C (1086) Londonderry | | | L |
| **Doran**, C (1083) Belfast | P | | L |
| **Draper**, J (1098) London | P | | L |
| **Drumm**, M (1084) Magherafelt | P | A | L |
| **Dwyer**, J (1002) London | | A | |

## E

| | | | |
|---|---|---|---|
| **Evans**, J (1079) Stoke-On-Trent | P | A | L |
| **Evans**, J (1046) Manchester | P | | L |

## F

| | | | |
|---|---|---|---|
| **Fennessey**, J (1062) Glasgow | | A | |
| **Fitton**, L (1024) Bury | P | | |
| **Florence**, C (1097) Bingley | | A | L |

## G

| Name | P | A | L |
|---|---|---|---|
| **Goodhew**, I (1116) Southend-On-Sea | P | A | L |
| **Gray**, B (1064) Stoke-On-Trent | P | A | |
| **Grummitt**, T (1025) Grantham | P | | |

## H

| Name | P | A | L |
|---|---|---|---|
| **Harper**, M (1070) Glasgow | | A | L |
| **Harris**, T (1085) Leicester | | A | |
| **Henshilwood**, B (1103) Knebworth | P | | |
| **Higgs**, J (1044) London | | | L |
| **Holdsworth**, R (1026) Dronfield | P | A | |
| **Hook**, A (1115) Salisbury | | A | L |
| **Hunt**, R (1029) Grays | | A | L |
| **Hunter**, R (1088) Belfast | P | A | L |

## JIEB 2017 prize winners

**Insolvency Practitioners Association Prize for First Place**
Hollie Watson

**PricewaterhouseCoopers Prize for Second Place**
Jack Brazier

**Leonard Curtis Prize for Third Place**
Oliver Ashforthshaw

**Association of Chartered Certified Accountants' Prize**
Oliver Ashforthshaw

**ICAEW Prize**
Hollie Watson

**ICAS Prize**
Mark Harper

**BPP Prize**
Thomas Grummitt

**R3 Smaller Practice Group Prize**
Jason Evans

## J

| Name | P | A | L |
|---|---|---|---|
| **James**, C (1089) Inverness | | A | |
| **Jarvis**, A (1048) Eastleigh | | | L |
| **Jeeves**, D (1030) Seaton | | A | L |
| **Jones**, K (1076) Glasgow | P | | |

## K

| Name | P | A | L |
|---|---|---|---|
| **Keenan**, A (1075) Jersey | | A | L |
| **Khanbhai**, A (1074) Tonbridge | P | A | L |
| **Killick**, S (1104) London | P | | L |
| **Kinneavy**, G (1105) Sheffield | | A | |
| **Kippax**, S (1001) Yeovil | | A | |

## L

| Name | P | A | L |
|---|---|---|---|
| **Lane**, J (1047) London | | A | |
| **Lever**, C. (1031) Blackburn | P | | |
| **Lisle**, C (1005) Maidenhead | | A | L |
| **Lloyd**, R (1054) Cardiff | | A | |
| **Lockwood**, D (1033) Sheffield | | | L |
| **Luff**, R (1095) Nottingham | | | L |

## M

| Name | P | A | L |
|---|---|---|---|
| **Man**, S (1053) London | P | | |
| **Mand**, M (1052) Bradford | | A | |
| **McDougall**, P (1071) Larkhall | P | | |
| **Mengal**, I (1035) Borehamwood | | | L |
| **Merchant**, V (1106) Birmingham | P | A | L |
| **Millensted**, A (1121) Burton-On-Trent | | | L |
| **Mochan**, B (1124) Dumbarton | P | | |
| **Muldoon**, A (1127) Cookstown | P | | |

## N

| Name | P | A | L |
|---|---|---|---|
| **Norman**, M (1123) Hove | P | | L |

## O

| Name | P | A | L |
|---|---|---|---|
| **O'Brien**, P (1006) Swansea | | A | |
| **O'Leary**, A (1063) Dublin | P | | |

## P

| Name | P | A | L |
|---|---|---|---|
| **Perring**, D (1107) London | P | A | L |
| **Pipi**, V (1036) London | | | L |
| **Price**, A (1096) Southampton | P | | |

## R

| Name | P | A | L |
|---|---|---|---|
| **Roberts**, O (1037) Manchester | | A | |
| **Rolph**, M (1114) Aylesbury | | | L |
| **Rubin**, S (1108) London | P | A | L |

## S

| Name | P | A | L |
|---|---|---|---|
| **Singleton**, M (1039) Poulton-Le-Fylde | | A | L |
| **Starkey**, R (1058) Wakefield | | A | |
| **Smith**, D (1119) Coventry | P | | |
| **Stevens**, J (1109) Berkhamsted | P | A | L |
| **Stewart**, L (1128) Stockport | P | | |
| **Stuart**, F (1038) Great Yarmouth | P | A | L |

## T

| Name | P | A | L |
|---|---|---|---|
| **Thacker**, D (1045) Dereham | | A | |
| **Thornton**, M (1011) Harrogate | | A | |
| **Todd**, J (1117) Stockton-On-Tees | P | A | L |

## U

| Name | P | A | L |
|---|---|---|---|
| **Ulrick**, F (1068) Hessle | | A | L |

## W

| Name | P | A | L |
|---|---|---|---|
| **Walshe**, L (1065) Manchester | P | | |
| **Watson**, H (1112) Norwich | P | | L |
| **Watson**, H (1110) Manchester | P | A | L |
| **Watts**, J (1111) Norwich | | A | L |
| **Webb**, S (1042) Bristol | P | | L |
| **Wolski**, D (1043) Shipley | P | | L |
| **Wood**, S (1129) Edinburgh | | A | |

## KEY

P = personal insolvency paper passed
A = ACVAR paper passed
L = liquidation paper passed

## Analysis of November 2017 results

| Papers sat | Papers passed | | | | |
|---|---|---|---|---|---|
| | 3 | 2 | 1 | 0 | Total |
| 3 | 18 | 14 | 5 | 7 | 44 |
| 2 | – | 14 | 9 | 12 | 35 |
| 1 | – | – | 30 | 19 | 49 |
| Grand total | 18 | 28 | 44 | 38 | 128 |

# Events, courses and conferences

Find out what events, courses and conferences are coming up over the next few months.

R3 is delighted to showcase its full programme for 2018, which can be downloaded from **www.r3.org.uk**. The programme offers a wide range of exciting opportunities and high quality professional development for insolvency professionals at all levels of expertise and experience. New courses and content have been developed for 2018 to meet the continuing needs of the profession.

Courses and conferences coming up over the next few months include **R3 & INSOL Europe's International Restructuring Conference** – a technical conference aimed at all insolvency and restructuring professionals who have an interest in cross-border matters. This is a great opportunity to rub shoulders with members of the INSOL Europe network.

Not-to-be-missed half-day courses include **Asset Tracing, Fraud & Forensics** (Birmingham and London) and **Core Tax for Insolvency Professionals** (Leeds and London). Learn how to recognise the increasingly sophisticated means and methods utilised by those involved in fraud at **Asset Tracing** and get a focused view on the world of tax as it crosses into the IP's orbit of restructuring and insolvency at **Core Tax**. The breakfast briefing series continues with **GDPR** (London & Manchester) focusing on how compliance with the GDPR can be achieved despite the anomalies thrown up by insolvency legislation.

R3's regional events continue to offer excellent technical content, CPD points and networking opportunities with meetings and social events across the UK. There are two major offerings to watch out for in the coming months. Firstly, get your palate ready for the Eastern region's first social event – a **Gin Tasting Evening**, which will provide a great opportunity to entertain clients. Secondly, the ever popular **West-Midlands Spring Ball** returns this year to offer guests the chance to enjoy a fabulous evening of dining, dancing and live entertainment. The Ball has attracted over 200 bookings already and last year's Ball was a sell-out event, so please book early to avoid disappointment. See the website for full details of all regional events.

For further information on R3 courses and conferences, please visit the R3 website **www.r3.org.uk**, where you can download the 2018 programme.

## Conferences

### Northern Conference

***15–16 March, Leeds*** This year's Northern Conference and Golf Day is hosted by the Yorkshire region at Oulton Hall in Leeds, with the main conference held on Friday 16 March. The technical programme will include the Economic Outlook for the Northern Powerhouse, the General Data Protection Regulation (GDPR) for IPs, Successful Litigation Funding and other essential updates for the profession.

### R3 & INSOL Europe's International Restructuring Conference

***7 June, London*** The 15th conference between UK trade body R3 and its Europe-wide equivalent INSOL Europe will debate topical issues from current international and cross-border cases. Delegates will depart fully up to date on the main developments in this area and equipped for the next phase of cross-border insolvencies and restructurings.

## Social special events

### R3 Annual Dinner

***22 March, London*** Join over 20 firms that have already signed up for the insolvency event of the year. The R3 Annual Dinner allows you to network directly with more than 250 insolvency and restructuring professionals, lawyers and turnaround practitioners. Firms already confirmed to attend include: Begbies Traynor | Christie & Co | Credebt | FRP Advisory | Grant Thornton | Irwin Mitchell | RSM | Smith & Williamson | South Square

## One-day courses

### SPG Technical Review

***24 April, Birmingham | 17 May, Manchester | 21 June, London*** The SPG Technical Review is a one-day course uniquely designed to deliver essential regulatory, legal updates and best practice guidelines for professionals working within small to medium-sized firms. It will provide a practical review of living with the Insolvency (England and Wales) Rules 2016, the new GDPR and AML regulations as well as the usual informative legal update.

## Half-day courses

**SAVE 15% with early bird bookings on one day and half day courses!**

### Asset Tracing, Fraud & Forensics

***20 March, Birmingham | 17 April, London*** This course will involve leading experts in their chosen fields giving a variety of technical updates and practical information to assist practitioners handling cases of all sizes. Topics will include recent developments in Europe, including Brexit, and their ramifications for fraud litigation and recovery proceedings.

### Core Tax for Insolvency Professionals

***18 April, Leeds | 18 October, London*** Tax has never been more taxing with multiple changes in legislation and policy approaches. This course is aimed at bringing IPs and their relevant key staff up to speed with the world of tax as it interacts with restructuring and insolvency. This is a course that anyone who has a need to understand tax in an insolvency context cannot afford to miss.

### Restructuring in the Energy and Renewables Sector

***3 May, London*** The one constant in the energy and renewables sector is change. A number of this sector's companies have faced distress recently, from high-profile Chapter 11 restructurings in the US to smaller insolvencies in the UK. This course aims to provide a balanced understanding of the energy and renewables sector, and the issues that arise during restructurings and insolvencies within it.

### Receivables and ABL Financing in an Insolvency Context

***13 June, London*** This course will look at the structure and nature of security over the assets of a company subject to receivables and other types of ABL funding. It will also address how an office-holder can deal with debts and other assets subject to such facilities and security when a company enters an insolvency process.

## Breakfast briefings

### GDPR

***13 March, London | 19 April, Manchester*** This briefing will examine key features of the GDPR for IPs and explain why a failure to prepare for the regulation could have serious consequences.

### Regulated Businesses

***12 June, London*** As well as considering the various procedures for placing a regulated entity into an insolvency process, this briefing will discuss the special administration of certain high-profile regulated entities.

### Insolvency: Blockchain & Cryptocurrencies

***19 June, Manchester | 30 October, London*** An introduction to cryptocurrency and blockchain. Will cryptocurrency and blockchain change insolvency as we know it, or is it just hype?

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# R3 Standard Conditions for Individual Voluntary Arrangements

**Caroline Sumner** explains changes to the R3 standard terms.

R3 is pleased to announce that the *R3 Standard Conditions for Individual Voluntary Arrangements* (R3 standard terms) have been reissued with effect from 20 January 2018. The R3 standard terms required updating and amending for the following reasons:

- to incorporate changes introduced by the Insolvency (England and Wales) Rules 2016 (new rules)
- in response to comments made by David Richards LJ during the appeal of the case of *James Green (former Supervisor)* v. *James Wright* [2017] EWCA (Civ) 111, [2017] All ER (D) 13 (Mar)(*Green* v. *Wright*)
- following consideration of the implications for supervisors, debtors and creditors following the appeal in *Green* v. *Wright* and the ongoing trust of voluntary arrangement assets.

## The Insolvency (England and Wales) Rules 2016

Coming into force in April 2017 the new rules were updated to reflect modern terminology in use today. The R3 standard terms V4 have been similarly updated to reflect the terminology in the new rules (for example part VI now refers to proofs instead of claims).

The new rules also removed physical creditor meetings as the only mechanism by which office-holders could obtain the approval of creditors, introducing instead a range of decision-making procedures at rule 15.3, such as electronic voting, virtual meetings, correspondence and deemed consent.

Physical meetings have historically been used in IVAs when seeking creditor approval for the arrangement and when seeking to vary the terms of the arrangement. The previous version of the R3 standard terms (V3) (para 60) provided for physical meetings to be convened when seeking the views of creditors during the term of the arrangement.

Physical meetings of creditors were very familiar to all office-holders, but now that office-holders are required to seek the approval of creditors at the outset of the arrangement via virtual meetings (rather than physical meetings), and creditors are becoming more used to these procedures, it did not make sense to restrict supervisors to convening physical 'variation' meetings during the term of the arrangement.

The choice was made, therefore, to introduce the full range of decision making procedures introduced by the new rules into the standard terms (V4) (see para 61). This should provide flexibility for supervisors to choose the most appropriate option for seeking creditors' views depending on the particular circumstances of the debtor and the arrangement.

> **The R3 standard terms are an integral part of the voluntary arrangement and great care has been taken to ensure that they are workable and clear.**

The outcome of *Green* v. *Wright* also prompted a review of the terminology used in the R3 standard terms. In his judgment David Richards LJ commented that greater clarity was required in the use of the words 'termination' and 'full implementation'. Accordingly, we have taken steps to ensure that any ambiguities with regard to the use of these terms have been removed (paras 9, 10 and 11) from the revised version of the standard terms.

## Ongoing trust

The *Green* v. *Wright* case determined that any trust of arrangement assets continued notwithstanding the completion of the arrangement and the vacation of office by the supervisor. This was because, in order to bring a fully constructed trust to an end, there should be a specific term to this effect – in the absence of such provision, the trust will continue. While this answered the question as to whether or not PPI monies received after the arrangement had ended did still fall to be treated as trust assets, R3 considered that this actually raised far more questions with regard to the 'trust' itself.

The trust was not defined clearly by the R3 standard terms V3 (para 28). In revising the R3 standard terms V4 (para 29) we have sought to provide certainty and clarity. Certainty for the debtor that, on ending the arrangement (and the issuing of a certificate of full implementation under para 9(2)), they are released from all IVA debts and certainty for the supervisor that, on the termination or full implementation of the arrangement, their obligations have also ended (para 22). We sought the opinions of major creditor groups and were advised that they also considered that it was fairer to the debtor to provide such certainty and they welcomed the removal of the ongoing trust from the R3 standard terms. Any known assets will remain held on trust until the termination of the trust realisation period as set out in paragraph 29.

## Finality and definition

Supervisors will now, for those IVAs based on the R3 standard terms V4, be able to advise debtors that the term of the VA will be 'x' number of years (depending on the proposals) and that at the end of the term there will be finality for the debtor (providing of course they have complied with the terms of the VA and it has successfully concluded).

There will be those office-holders who consider that creditors may be missing out on potential assets and indeed fees for themselves linked to the realisation of those assets. Office-holders who wish to implement a trust post-termination or full implementation may make provision to do so in the proposals agreed by the debtor and creditors. However, such provision and the implications thereof should be clearly explained to the debtor and creditors at the outset. The full terms of any such trust will also need to be set out.

R3 hopes that members will welcome the changes. The R3 standard terms are an integral part of the voluntary arrangement and great care has been taken to ensure that they are workable and clear. However, if you do identify any issues with their practical application please do not hesitate to contact me by email: caroline.sumner@r3.org.uk.

**CAROLINE SUMNER** is technical and education director at R3.



Editor recovery@r3.org.uk

# The blight of rogue advisers

**Mark Upton** urges the legitimate insolvency profession to take a stand.

As licensed insolvency practitioners (IPs), we quite rightly take pride in the excellent work that we do with businesses and individuals facing financial distress. Our work centres on ensuring that the optimum outcome is achieved for *all* stakeholders, despite their often competing interests. IPs are heavily regulated and highly qualified. This is reflected by the law only allowing licensed IPs (and the Official Receiver) to take formal insolvency appointments. The legal and regulatory framework we work within stipulates a high degree of skill, experience and diligence: we are required to give the right advice in all circumstances.

It is therefore incredibly frustrating that, despite all of this, our market is blighted by a number of 'rogue advisers' who purport to give insolvency and other advice without any license to do so. These advisers promise to provide solutions for directors that, frankly, can never be achieved and come at a significant cost to the directors and stakeholders.

> The marketing material used and the messages these companies convey can be very appealing to a director in a difficult financial position who has not taken advice from an IP.

## Rogue propaganda

The marketing material used and the messages these companies convey can be very appealing to a director in a difficult financial position who has not taken advice from an IP. However, in the majority of cases, the solutions or options being offered are simply not available and require fees and personal guarantees to be given by directors to cover unwarranted costs.

I am sure I am not alone in having seen letters sent to directors with the following comments:

- *'We act for you, not your business's creditors.'*
- *'Be wary of any advice you get from an insolvency practitioner. They only act for your creditors whereas we are able to act solely for you.'*
- *'We can arrange for you to continue trading and keep your assets yet benefit from writing off all of your debts without any repercussions on you.'*
- *'We can help by approaching an insolvency practitioner who will take a "friendlier" approach to your situation.'*

The latter quotation is most concerning of all because anything to suggest that an IP would be complicit in allowing directors to avoid their responsibilities is incredibly damaging to the profession, the perception of our role and how we operate.

The end result of companies promoting such services is that directors are badly advised, are likely to end up in a worse financial position, may well break the law and will certainly not have a full understanding of their duties and responsibilities.

## In the public interest

So the questions arise: what can we do to ensure that directors take appropriate advice when faced with financial difficulty? And how can we ensure they are not persuaded by the marketing and messaging that 'rogue advisers' purvey?

First and foremost, these activities must be brought to the attention of the Insolvency Service. The Service has the power to petition to wind-up a business on the grounds of public interest.

In one recent example, provisional liquidators were appointed by the Official Receiver over a group of nine companies. These companies were allegedly preying on directors that, in many cases, had already started to take steps to place their company into liquidation with the assistance of an IP. It seems a 'rogue adviser' would step in to 'hijack' the liquidation process, offering to take over the liabilities of the company (OldCo) by acquiring shares and relieving the director of all 'legal and financial responsibility' for the debts of OldCo. They would then allow the director to set up a new company and carry on trading. The cost to the director was an upfront fee and a percentage of the total unsecured debt, which they would have to personally guarantee.

These particular 'rogue advisers' advertised themselves as 'unlicensed insolvency practitioners' and operated throughout the UK. It is important that they and others like them should not be confused with the many turnaround, advisory and restructuring specialists who, like IPs, genuinely work to save a business.

So, in conjunction with reporting every instance of 'rogue advice' we come across, we as a profession (and as R3) also need to be at the forefront of educating directors, particularly those of small businesses, of the value of engaging with an IP and the dangers and pitfalls of 'rogue advisers'. We should also push for the introduction of a unique identification number for directors (recorded on a central register) to highlight and identify those individuals that have one company closed down, only to start up another for the same purpose.

> As a profession we shouldn't just accept rogue advisers as part of the landscape and work around them.

## Take action

While the Insolvency Service may not always be as quick as we'd like in its investigations, its ability to take action to wind-up companies in the public interest is welcomed. Perhaps, though, there could be a clearer pathway to assist with the reporting process, akin to the complaints gateway that we have for IPs?

As a profession we shouldn't just accept rogue advisers as part of the landscape and work around them. They damage the reputation of our profession and impact the valuable work that we do. Fundamentally, they do not act in the interests of the directors and individuals that they purport to help. We must continue to report, educate and push for changes that will identify and prevent poor advice and practice, and thus eliminate this blight on our profession. □

To report examples of unregulated (rogue) advisers to the Insolvency Service for action use the following contact: Jeremy Hawksley (**jeremy.hawksley@insolvency.gsi.gov.uk**).

To report examples to the FCA, use the following contact: Domenic Sidonio (**domenic.sidonio@fca.org.uk**).

Also report to R3 for our information if possible.

**MARK UPTON** is a partner at Ensors.

# Advertisers' index



IBC: inside back cover, IFC: inside front cover, OBC: outside back cover

An interview with…

# Chief Insolvency and Companies Court Judge Nicholas Briggs

**Matt Jukes** asks the Chief Judge of the newly-christened Insolvency and Companies Court about express trials, the future of the profession and the role of judiciary.

Q **The last time you wrote for *RECOVERY* it was about the Insolvency Express Trials Pilot scheme. This is due to end in April. Could you give us any preliminary thoughts on the scheme so far?**

A Looking at the statistics, the uptake has not been as great as I had expected. One possible reason is that the court has become so efficient at listing short trials that there is little call for a short trial to become 'express'. The advantages of limited interference from the court, limited disclosure, dispensing with cost budgets and the introduction of a costs cap have, however, been attractive to some.

> The success of the UK insolvency and restructuring market is in many ways based on its pan-European effect.

Q **You asked for feedback in your article in spring 2016 – did you receive it? Are there likely to be any significant changes to the scheme as it moves forward?**

A I have received feedback from a few users of the scheme. They have been very positive and have expressed a strong desire for the pilot to become permanent, but the final decision is one for the Civil Procedure Rules committee. They will look at the statistics and decide if enough users have taken advantage of the procedure to make it worthwhile to retain. I think there is a reasonably strong argument that the pilot should be extended to give sufficient time to decide if it should become a permanent procedural feature.

Q **What do you think might change about the insolvency and restructuring profession in 2018?**

A This question is better asked of the profession itself, but from what I have heard those who tend to thrive are those who specialise. It may be that more markets open up as our future trading arrangements with Europe and the rest of the world become less certain. As far as restructuring is concerned there has been a marked increase in schemes of arrangement and cross-border mergers, which are becoming popular with a considerable number of UK companies being absorbed into European-formed companies.

**Nicholas Briggs biography**

- Nicholas Briggs left school at an early age to join the Royal Marines. Once he completed his duties, an enterprising Briggs, still not 21, decided to earn some money and save for university.
- He bought, renovated and sold property, worked offshore laying pipelines from oil rigs and did a variety of other jobs. His wife and cousin were both practising lawyers, and their enthusiasm was contagious. Briggs qualified for the Bar and joined leading Bristol set, Guildhall Chambers, under an insolvency team led by Stephen Davies QC and Jeremy Bamford. Hooked on insolvency, he set out to specialise in the area, becoming a full-time judge in 2015.

Q **R3 recorded a drop in underlying personal and corporate insolvencies last year and attributed it to a higher usage of non-statutory insolvency and restructuring options. Have you seen increased usage of such options?**

A As I mentioned, there has been an increase in schemes. However, figures for insolvency and restructuring cases heard at the Rolls building, London, show an increase in most areas. Comparing November 2017 to 1 February 2018 to the same period the year before, winding-up petitions have increased by 10 per cent; bankruptcies have seen an increase of 13 per cent; and schemes of arrangement and capital reductions have increased by 21 per cent.

> As far as restructuring is concerned there has been a marked increase in schemes of arrangement and cross-border mergers, which are becoming popular with a considerable number of UK companies being absorbed into European-formed companies.

Q **Have there been any notable trends in the number or type of fraud cases connected to insolvency?**

A We don't keep specific statistics for cases that may include an allegation of fraud. I am able to say that a significant number of disqualification cases contain allegations that are either tantamount to fraud or demonstrate a lack of commercial probity.

One place to watch for fraud is the cryptocurrency marketplace and some have already branded these exchanges as ponzi, money laundering or tax evasion schemes. Yves Mersch, a member of the executive » board at the European Central Bank, spoke in London recently and likened virtual currencies to a 'will-o-the-wisp', a malignant creature that dwelt in marshes and lured travellers 'to their untimely death and a watery grave'. Already some countries are taking action on the issue. For example, India's income tax department recently issued 100,000 notices to cryptocurrency investors suspected of concealing profits.

With wild market fluctuations, and increasing activity from central banks and regulatory bodies, it will be interesting to see what unfolds.

**Q Do you think there will be any knock-on effects to the insolvency profession and regime as a result of Brexit?**

A We know that research by the World Bank has reinforced the need for every nation and trading block to have a strong legal and regulatory insolvency framework. We are also aware of the proposals by the European Union to implement new regimes introducing stays and moratoriums, preventing dissenting minority creditors and shareholders blocking restructuring plans, and protecting new financing for restructured companies, but full harmonisation seems to be off the menu.

At this stage it is uncertain whether these proposals will be introduced ahead of March 2019 or whether the UK will implement them during its transitional period, if there is a transitional period. The insolvency profession will have to keep a keen eye on events and the European negotiations during the next few years in order to keep abreast of potential regime and market changes.

A major concern for the profession is loss of reciprocal reach. I agree with the R3 Brexit team headed by Adrian Hyde that the success of the UK insolvency and restructuring market is in many ways based on its pan-European effect. R3 has called for mechanisms to be put in place to maintain the benefits of the European Insolvency Regulation and the Recast Brussels Regulation. That would seem a sensible position to adopt. However I do not express an opinion about Brexit itself. As the Chancellor, Sir Geoffrey Vos, said in a recent address: 'Judges cannot and should not speak about the politics of Brexit... We are not paid to decide what is good for the country. We leave that to the politicians. Instead, we have to deal with the hand of cards that we are dealt. It is not our place, as I often say, to try to stand in the shoes of the dealer.'

**Q What do you see for the future of insolvency in the courts and how will its costs be paid for?**

A I cannot comment on funding – that is for the politicians. As for the future of the courts, I think the best way to answer this question is to repeat what has been said in the recent judiciary publication *English Law, UK Courts and UK Legal Services after Brexit*: 'The rule of law represents the cornerstone of liberty and democracy, and is one of the main reasons that the UK attracts global businesses and investors.

> There has to be a balance. I cannot believe that there can be serious opposition to the OR being appointed where transparency, expediency and cost efficiency are promoted.

Laws in the UK are public, so that everyone knows what they say; certain, so that everyone knows where they stand and; prospective rather than retrospective, so that they cannot be broken before they exist.

The English courts are universally recognised to be a forum where litigants can be confident that their disputes will be determined fairly on their intrinsic merits.'

**Q What do you feel is the biggest issue facing insolvency practitioners at the moment?**

A I would not want to second guess, but I would think that the pace of change is difficult to manage for all practitioners and there may be particular pressure on smaller firms where technical resources are scarce. There have been a series of regulatory and legislative changes, court rules have changed and there have been a number of practice directions. In addition, there are major changes to data protection that I expect will stretch even the best available resources.

One issue, which I have heard from several sources, is that insolvency practitioners and creditors are concerned about the Official Receiver (OR) taking too many cases or controversial appointments. There is a wide perception among IPs that the OR is keeping the easy pickings in order to fund the Insolvency Service. This was directly put to the London OR at a seminar I was participating in before Christmas. In relation to controversial appointments the example I have heard is the Kids Club Company. It is said by some to be wrong that the OR is not independent of government and an investigation into the government funding for the Club (pre-insolvency) was required. I have also heard the OR position being defended.

I would say two, I hope uncontroversial, things. First, there has to be a balance. I cannot believe that there can be serious opposition to the OR being appointed where transparency, expediency and cost efficiency are promoted. On the other hand, where there are potential complications, cross-border issues, multiple parties and investigations – particularly into a public body – perception is everything. Independence and fairness must take priority. Secondly, the conduct of an independent practitioner is highly regulated. Official Receivers do not have the same type or level of regulation. It seems to me that it would be wise to have regard to these differences when decisions are made as to whether large or sensitive insolvencies are to be dealt with by an independent practitioner or a government official.

**Q There seems to be a trend at the moment for members of the judiciary to take more time to talk to the public – not least through magazine interviews. Is there more of a culture of this lately and why?**

A My predecessor, Dr Stephen Baister, was a firm believer in being available (when possible) to give talks and chair seminars in the insolvency and restructuring world. He did so quietly and modestly all over Europe, often speaking in the native language. He also frequently gave talks to R3 and other insolvency organisations here in the UK. I wish, in so far as I am able, to follow his example.

If we speak at professional events or chairing professional seminars, the public has a chance to see, hear and ask questions of a member of the judiciary. The new Lord Chief Justice, Lord Burnett recently commented in an interview that it was important for the public to understand better what judges do, as most people get their knowledge of judges from reports of big, newsworthy cases or fictional TV dramas. I am sure that most insolvency practitioners and solicitors do know the work of the Insolvency and Companies Court Judges but at the very least the chance of interaction promotes knowledge and understanding. It enables me and other judges to receive information from court users. In this way the judiciary and users benefit.

Regarding interaction, I look forward to addressing the R3 audience in Vilamoura, Portugal in May this year. ◻

**MATT JUKES** is publishing manager of *RECOVERY* magazine.