R3, the Association of Business Recovery Professionals | **www.r3.org.uk/recovery** **Autumn 2019**

RECOVERY

Regulation and risk

Mining for returns: a crypto-exchange administration
Going behind the scenes of a UK cryptocurrency exchange administration

An investigation – not what the doctor ordered?
Find out how effective a doctor's note is when applying for an adjournment of insolvency proceedings

An interview with… ICC Judge Catherine Burton
The ICC's newest judge talks about leaving private practice for the bench

28 days later: evaluating the proposed moratorium
The Irish examinership process offers some prescient insights into current government proposals for England & Wales

Restoring faith in retail CVAs?
Read the property sector's thoughts on recent CVA trends

Practical hacks for GDPR
An information law expert answers IPs' major questions on Europe's big data protection regulation

Heavy lies the crown for lenders
New powers for HMRC could mean new headaches for ABLs

Channel flaw: *Brewer & Anor* v. *Iqbal*
One IP's unfortunate handling of channel broadcasting rights provides best practice tips for all

Set-off in insolvency: the legal Hydra
A complete guide to the complexity of criss-crossing claims in court

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

From the editor

How we do what we do as IPs is discussed in at least four of the articles in this issue. Ion Fletcher of the British Property Federation expresses the view on page 7 that retail CVAs are increasingly misused, specifically that retailers opportunistically shed underperforming properties without tackling their wider business challenges. He suggests engagement with the BPF's Insolvency Committee and mentions a CVA engagement guide listing ten 'red flag' clauses to which landlords will object. Of course, retail CVA proposals should not unfairly prejudice landlords or any other creditors: they should set out a reasonable compromise between the company and its creditors, recognising any underperformance of both the business and the properties it occupies. Engagement, without pre-conditions, is fundamental to achieving agreement of CVAs. What's your view?

Brewer v. *Iqbal* by Mena Halton on page 10 (a case in which I declare an interest as an expert witness) illustrates how not to do what we do. Looking forward, the moratorium forming part of the government's proposed corporate insolvency reforms is compared by Mark Woodcock on page 14 with the Irish examinership regime: he concludes that 28 days is simply not long enough for a plan to be presented and considered. The specialist forensic pursuit of allegedly fraudulently misappropriated bitcoin in the Cubits administration is outlined by Allister Manson and Nicholas Parton on page 30.

Three articles might fall under a heading of dispute resolution. Most contentiously, on page 32, Alyson Reilly and Nora Wannagat examine the failed adjournment on medical grounds of a s236 examination. On page 28, Simon Duncan considers the interaction of insolvency set-off, legal set-off and equitable set-off – not so simple, offering plenty of scope for argument! At the less contentious end of the spectrum, Carolyn Jones and Mena Halton on page 34 discuss mediation in a commercial and insolvency context.

We come next to regulation, the theme of this issue. Many readers will have received, and hopefully responded to, R3's survey on IP regulation, and/or will be attending one of R3's forums in early September. These are members' opportunity to feed their thoughts to R3 in order to ensure that its response to the current government consultation on the issue is properly informed, as our president, Duncan Swift, points out on page 4. Another area of regulation covered in this issue (on pages 16 and 22 by Hannah Drozdz and Claire Williams respectively) is GDPR; and on page 40 Antoniya Mercer offers guidance on anti-money laundering compliance. Our intention is that readers should find these guides to be of practical assistance in negotiating the regulatory challenges IPs face in these areas. On the subject of red tape (or is it money grabbing?) on page 19 Neil Smyth and Zak Virgin discuss HMRC's proposed secondary preferential status, emphasising the challenges this offers to the asset-based lending market.

Having returned from your summer rest or activities, enjoy all these and our other reflections on restructuring and insolvency in 2019 – and don't miss our interview with ICC Judge Burton on page 47!

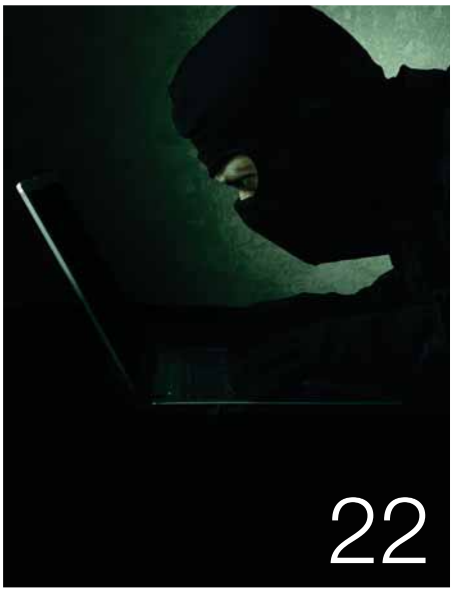
C. Laughton

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

Regulars

Legal update

Regulation and risk



Features

Dates for your diary

R3 matters

Themes of *RECOVERY* 2019

WINTER Financial services

We do the best we can to keep you up to date with the main issues that affect the profession. In times of political uncertainty, such as Brexit, these themes may be subject to change.

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President's column

Duncan Swift has been out meeting the profession, talking Crown preference with HMRC and calling on the government to act on company directors and regulation.

The first three months of my R3 presidency have flown by. Since I took over from Stuart Frith in May, a new prime minister has been appointed, the government has launched a flurry of initiatives and consultations and the (new) Brexit deadline has drawn closer.

Westminster and Brussels aren't the only places where things have been busy – R3 HQ has as well. The political changes have kept our public affairs team working flat out, our events team delivered the Annual Conference and then moved on to their usual array of courses and regional events, and our rollout of the strategic plan has meant staff and regional committees have been busy helping with its delivery.

On the move

As with my predecessors as R3 president, I've been keen to get out and about to meet R3's membership, to understand what's affecting you, our members, locally, and to help the staff at HQ determine how R3 can best help, support and represent you. Here's a snapshot of some of my activities:

> It's clear there's a significant amount of disquiet in the UK's business community about what the government is proposing.

The Annual Conference in May gave me an opportunity to catch up with a large number of members from across the regions. Despite a busy couple of days, I had the chance to catch up with people I've known for years, as well as the opportunity to meet those who I hadn't crossed paths with before. Thank you to everyone who attended and contributed to make it a great conference.

It was great to see all the young professionals coming through at the JIEB graduation ceremony, which I attended in June. My congratulations again to them all on obtaining their insolvency licences.

In July I attended the North West region's barbeque – a great opportunity to catch up with old contacts and meet some of the established and newer members of the profession in the region. And, thankfully, the weather held!

I've a lot more regional visits planned as the year unfolds, so I hope to see you soon.

It's not just members I've been catching up with. I have also met with journalists from the *Financial Times* and *The Sunday Times* to talk about the value of our profession's work, and to flag our members' views on everything from the insolvency framework to CVAs, pre-packs, corporate insolvency reform, and Crown preference.

Crown preference

Speaking of which, earlier this summer, the government included its proposals to restore HMRC's preferential status in the draft Finance Bill 2019–20.

Having chaired an R3 roundtable, kindly sponsored by Squire Patton Boggs, on this issue in May, it's clear there's a significant amount of disquiet in the UK's business community about what the government is proposing. At the roundtable, representatives of the business community, lending and investment representatives, banks, and members of the insolvency and restructuring profession, took turns to deliver warnings about the consequences of the proposals for business rescue and business lending. HMRC officials attended the roundtable and heard this feedback for themselves.

There's some partial good news: the government has listened to R3 and has dropped plans to include tax penalties within HMRC's preferential claim. While that's a 'win', we continue to press for further concessions. If the government won't drop its policy, it needs to at least cap the age of eligible tax debts, or it should allow existing floating charges to retain their priority status relative to HMRC's new claim.

We'll continue to work with the wide range of stakeholder groups opposed to this policy, to try to get the government to change course. I am also due to meet a number of MPs and peers to discuss R3's concerns in the autumn. This issue is covered in more detail in the Press, Policy and Public Affairs team's column on page 39.

Proposals for Companies House

Over the summer, the government has been consulting on plans to strengthen the role and powers of Companies House. R3 has been calling for government to do more to make sure company directors are who they say they are and live up to their responsibilities for some time, and some of the measures proposed in the consultation will help do this. Along with other R3 members, I had the chance to speak to BEIS officials about the proposals in July, and it was encouraging that the officials understood the role of our profession, which extensively relies upon the accuracy of Companies House records.

Proposed regulation

We have also seen the launch of the long-awaited review of the regulatory framework for the insolvency profession. The government is very much in listening mode on this issue: officials have insisted that they want to hear from stakeholders before taking a decision.

As I wrote in my last *RECOVERY* column, it's important our profession is committed to high standards. Effective regulation helps us get on with the job of

> R3 has been calling for government to do more to make sure company directors are who they say they are and live up to their responsibilities for some time, and some of the measures proposed in the consultation will help do this.

promoting economic regeneration, resolving financial distress for businesses and individuals, saving jobs and creating the confidence and public trust that underpin trading, lending and investment.

R3 will be contributing to the government's review, and to do this properly, we want to hear from you. We're holding member forums in London and Leeds on 9 and 11 September, respectively. Please email events@r3.org.uk to book your free place so that you can come along and tell us what you think about insolvency regulation and how it should develop.

DUNCAN SWIFT
is president of R3 and a partner at Moore Stephens.

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Restoring faith in retail CVAs?

Ion Fletcher argues against misuse of the process and urges consultation with the British Property Federation.

Empty shops blight our town and city centres – and everyone is the poorer when a high street becomes void of life and loses its role as the beating heart of a community.

Ensuring our high streets not only survive but thrive in future is a larger issue than the fortunes of retail and CVAs, but retailers and property owners, as well as local and central government leadership and support, will be critical to their success.

> It has been disappointing to see a growing number of retailers seeming to take a short-term approach in misusing the CVA process.

Success is ultimately predicated on mature and long-term partnership. So, it has been disappointing to see a growing number of retailers seeming to take a short-term approach in misusing the CVA process, putting at risk our shared ambitions for vibrant town and city centres by harming the relationships between retailers and property owners, and undermining trust in the legal system that sets the framework within which we all operate.

CVA bad practice must stop

Retailers are our customers and ensuring a sustainable future for the retail sector is equally critical to the property sector's, and the UK's, future. We understand that retailers are facing often quite fundamental and acute challenges, as shoppers change their habits and competition intensifies. Property owners will want to support them, where possible, to restructure and restore their businesses to long-term health. That's very much in the spirit of partnership.

But we are seeing CVAs becoming a tool to opportunistically shed under-performing assets within a portfolio – to enable a tenant to walk away from their lease liabilities – without that business tackling its wider challenges. This CVA bad practice is unfair and undermines those businesses who are acting in good faith, and it must stop.

Any CVA must be transparent – indeed I would argue that it should be seen as an opportunity to set out a positive vision for the future that partners and creditors can understand and buy into, even if it requires them to absorb often large losses. To do that, proposals must be – and be seen to be – credible. Those affected need to have sufficient information, and time to digest it, to assess the proposals before being asked to express their view.

We encourage any retailer considering a CVA, and its IP, to meet with the BPF's Insolvency Committee as early as possible in the process – ideally before the decision to go ahead with a CVA has even been made – to give property owners the chance to voice their interests and concerns and flag any proposals that will be difficult to support.

This engagement with our Insolvency Committee, which comprises a wide selection of property owners from our membership, helps to ensure that IPs have a helpful sounding board as they advise their clients and ensures that property owners' interests are better understood in the process. It never means the BPF has 'approved' a CVA.

Not a tick-box exercise

Nor is it necessarily an indication of good practice. Providing little information or giving an unreasonable deadline for engagement is not meaningful engagement. Nor is launching a CVA almost immediately after meeting with our Insolvency Committee, when it's clear there has been little attempt to make meaningful changes that reflect concerns raised by property owners.

Engaging with the BPF before launching a CVA must not become simply tokenism or a tick-box exercise, and we will be clear in saying so if this happens.

Red flag clauses

Through a better dialogue, the BPF has been able to influence the approach taken in CVAs and to highlight the potential proposals that are likely to be particularly difficult for property owners affected by the CVA to support. For a retailer acting in good faith that should be really helpful insight.

As part of the discussion, there will always be give and take. But there are also red lines. The BPF has developed a CVA engagement guide that includes our top ten red flag clauses – clauses that IPs or retailers may ask for but are considered as totally unacceptable to a property owner. For example, rental discounts must not survive the termination of the CVA and dilapidations should not be compromised to a percentage of rents or another fixed sum.

> Only those who can work together will unlock mutual opportunities, to see our high streets become more able to adapt and innovate.

Mutual opportunities

The retail sector requires bold and innovative leadership, and the support of its critical partners – the owners of their stores and warehouses.

Only those who can work together will unlock mutual opportunities, to see our high streets become more able to adapt and innovate, to truly embrace advances in technology, to lead the charge for a more positive outlook for our urban centres, and to better mitigate the impact of political instability and macro-economic peaks and troughs. □

ION FLETCHER is director of finance and commercial policy at the British Property Federation.

R3 events, courses and conferences

Your training needs, covered.

The R3 2019 programme is packed with training opportunities to suit all levels of experience and designed to fit in with busy schedules. Our highly regarded and valued courses are delivered by leading experts from in and around the insolvency, restructuring and turnaround world.

Don't miss the chance to attend a topical and informative breakfast briefing, a comprehensive half-day course or an in-depth full-day course.

SEPTEMBER

5 SEPTEMBER

Environmental Issues in Insolvency

Breakfast briefing, London (Addleshaw Goddard)

In two recent Scottish cases, *Dawson International* and *Doonin Plant*, the Scottish Court of Session has grappled with the thorny issue of the ranking (in the insolvency waterfall) of an entity's environmental liabilities. Are they debts? Are they expenses?

10 | 19 SEPTEMBER

Core Tax for Insolvency Professionals

Half-day course, London (Squire Patton Boggs) & Manchester (Weightmans LLP)

Don't miss the opportunity to hear from HMRC direct about the main ways where HMRC may seek to recover a tax debt outside of insolvency. No tax course would be complete without a mention of HMRC's preferential creditor status. Hear from R3 about what this means in practice and when it will come into force.

19–20 SEPTEMBER

Northern Conference

Conference, Knutsford (Cottons Hotel & Spa)

The 2019 Northern Conference follows the theme of 'Northern Powerhouse or Poorhouse?' and will include discussions around the resurgence of the Northern Powerhouse; a case study on Carillion, the UK's biggest ever liquidation; and an engaging panel session on ethics and conflicts within the industry.

Northern Conference – Cottons Hotel and Spa.

24 SEPTEMBER

Pensions & Insolvency

Half-day course, London (Stephenson Harwood LLP)

At this half day course we will be taking a look at recent restructuring situations where the pensions scheme was a major stakeholder along with hearing about recent regulatory developments.

26 SEPTEMBER

Practical Introduction to Insolvency – Day 1

One-day course, London (etc.venues Prospero House)

Day one focuses on personal insolvency, Bankruptcies, IVAs and DROs with topics including the decision making and voting processes for IVAs, practical investigation techniques, IPA/IPOs, antecedent transactions, the realisation of the matrimonial home and Pensions.

OCTOBER

2 OCTOBER

Pensions & Insolvency

Half-day course, Birmingham (Gateley Plc)

At this half day course we will be taking a look at recent restructuring situations where the pensions scheme was a major stakeholder along with hearing about recent regulatory developments.

3 OCTOBER

Directors' Duties

Half-day course, Leeds (Gateleys)

A series of experts are brought together to discuss topical issues, technical updates and practical tips for those involved in advising directors or anyone whose work involves pursuing civil litigation against directors.

10 OCTOBER

Practical Introduction to Insolvency – Day 2

One-day course, London (etc.venues Prospero House)

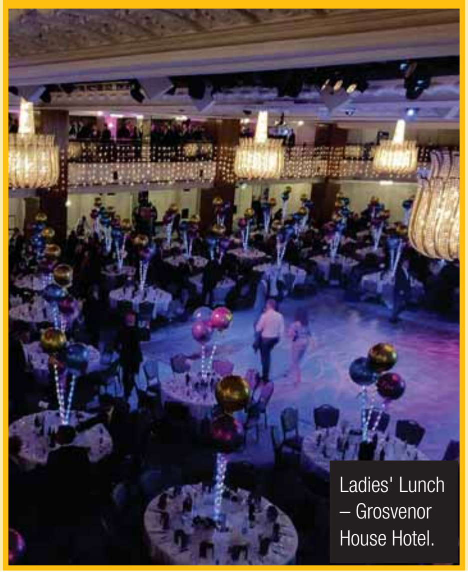
Day two will provide an understanding of the key fundamentals of rescue procedures, looking at the pitfalls of the administration appointment process, CVAs, the mechanics of pre-packaged sales, SIP16 disclosure, post-appointment trading and the sale of the business and assets.

11 OCTOBER

R3 Ladies' Lunch

Social Event, London (Grosvenor House Hotel)

The 2019 R3 Ladies' Lunch provides an opportunity to network with senior professionals and business leaders from across the insolvency, restructuring and turnaround world. With over 750 guests in attendance, this is the chance to mix with those who influence and shape our sector.



Ladies' Lunch – Grosvenor House Hotel.

15 OCTOBER

Challenging APNs

Breakfast briefing, Bristol (Ashfords LLP)

During this breakfast briefing, we will look at where APNs have been used, what they are and how they can be challenged. We will also look at the unsuccessful attempts to set them aside in cases of in *Rowe* v. *HMRC* and *Vital Nut* where the Court of Appeal upheld HMRC's use of APNs and Partner Payment Notices.

17 OCTOBER

Blockchain & Cryptocurrencies

Half-day course, London (Pinsent Masons)

The blockchain world is expanding on a daily basis; new firms continuously enter and often fail. Presented by insolvency practitioners actively involved at all stages in blockchain and cryptocurrency development, this half-day course will cover both the theory and the practice required of any practitioner operating in this turbulent field.

29 OCTOBER

Restructuring Day

One-day course, Manchester (Doubletree by Hilton)

This provides an overview of the key issues involved in a restructuring from assessing the financial picture, to understanding the impact of the security position. It covers some of the common tools used to achieve a restructuring from out-of-court approaches, the use of CVAs and schemes, to pre-pack administrations.

For more information on our training, networking and social events please visit **www.r3.org.uk/events**

What's on in your region…

NOVEMBER

5 NOVEMBER

Developments in Directors' Duties

Breakfast Briefing, London (Eversheds Sutherland)

In this breakfast briefing, Hugo Groves of Enterprise Chambers will provide a practical review of recent decisions in relation to the duties of directors of insolvent companies and the claims that office-holders or companies may bring against delinquent directors. Hugo has many years' experience of dealing with insolvency related matters including those with an American and cross-border element.

7 NOVEMBER

Introduction to Insolvency Work Series – Day 3

One-day Course, London (etc. venues Prospero House)

Day three includes DMPs for meetings, preparation of the Statement of Affairs, antecedent transactions and practical points of investigations and interviewing directors and how and when barristers can assist IPs.

20 NOVEMBER

Complex Restructuring

One-day course, London (America Square Conference Centre)

Delegates will gain an in-depth insight into some of the most recent and high-profile cross-border cases in the market and hear sector analysis and commentary from some of the leading experts in the field.

26 NOVEMBER

Introduction to Insolvency Work Series – Day 4

One-day course, London (etc. venues Prospero House)

Day four includes disqualification of directors, CDDA reports and prosecution of delinquent directors and the complex area of partnership insolvency, including administration, liquidation and bankruptcy processes.

13–15 NOVEMBER

SPG Forum

Conference, Oxfordshire (Heythrop Park Resort)

The SPG Forum is the essential conference for insolvency practitioners, restructuring experts and their staff in small and medium-sized practices.

SPG – Heythrop Park Resort.

DECEMBER

5 DECEMBER

Employees in Insolvency

Half-day course, London (Stephenson Harwood LLP)

This half-day course will set out the current practice regarding employees in insolvency in terms of case law, RPS guidance and good practice.

10 DECEMBER

Introduction to Insolvency Work Series – Day 5

One-day Course, London (etc. venues Prospero House)

Day five will cover the technical and challenging area of tax, focusing on VAT/PAYE and NIC compliance, basic corporation tax computations, TUPE, submitting ERA claims and the sensitivities of making staff redundant.

EAST

19 SEPTEMBER

Golf Day

We are delighted to invite both golfers and non-golfers to the R3 Eastern Region Golf Day at the prestigious St Ives Golf club in Cambridgeshire. The golf club is perfectly set up to provide a fun and entertaining afternoon.

SOUTH WEST & WALES

19 SEPTEMBER

Women's Group Dinner

The R3 South West & Wales Women's Group will be hosting their black-tie dinner on 19 September and the theme will be Mexican Fiesta! The evening will commence at 19.00 with networking and drinks, followed by a formal dinner and entertainment. Bookings can be made for single places or tables of ten.

27 SEPTEMBER

Golf Day & Cycling Event

Join your fellow professionals for a day of networking at the R3 South West & Wales Golf Day and Cycling Event. The Golf and Cycling event will begin at 13.00 with bacon rolls and coffee. There will then be a shotgun start for the golfers at 14.00 and we will play in a Texas Scramble format. The cycling event organised by Shawbrook Bank and Blake Morgan will also start from the golf club at 14.00, following a guided route, with support vehicle, around the Bristol countryside for approximately 40 miles with a stop for cake and networking.

SCOTLAND

3 OCTOBER

Scotland Annual Dinner

The event to attend in the restructuring and insolvency calendar in Scotland – this year the theme is 'Brexit does Eurovision' – a relaxed evening to network within restructuring and insolvency in Scotland! This fun night allows all levels of the profession to enjoy good food, wonderful surroundings and have fun in great company! Our dress code is black tie with a nod to your table's Eurozone country.

For more information on our training, networking and social events please visit **www.r3.org.uk/events**

Channel flaw: *Brewer & Anor* v. *Iqbal*

Mena Halton examines an extreme example of an administrator being held personally liable for breach of fiduciary duty.

Eight years after the fact, an IP has been held to account by the court for his careless approach to the sale of specialist assets and questionable loyalty to the company and its creditors. The judgement, not to mention the three-quarters of a million pounds penalty personally payable by the IP in *Brewer & Anor* v. *Iqbal*, offers valuable lessons on an IP's duty to identify and instruct specialists for valuation and marketing where necessary, the meaning of single-minded loyalty and the obligation to take proper notes and records of processes.

In his judgement, Chief ICC Judge Briggs considered the fiduciary and other duties owed by an IP when acting as administrator.

Case background

ARY Digital UK Ltd (the company) was a television broadcaster, operating three channels. The company acquired electronic programming guides (EPGs) by agreement with British Sky Broadcasting Ltd (BSB) – these EPGs essentially provided the right to broadcast on a particular television channel for a fixed term.

By April 2011, the company was insolvent. Mr Iqbal was introduced to the company and these discussions led him to believe that the company would file for administration. He contacted Edward Symmons about valuing and selling the company's assets on or about 19 April 2011 and was appointed as adviser to the company on or around 6 May 2011. On 19 May 2011, Mr Iqbal filed a notice of intention to appoint administrators on behalf of the company.

On 20 May 2011, Mr Iqbal instructed Edward Symmons to sell the company's assets, stating that he had agreed £40,000 with the current management in respect of the EPGs, and that if no interest was shown by any third party, he would like to conclude the sale on or before 27 May 2011. An advertisement was posted on Edward Symmons's website on 20 May 2011 under the heading 'machinery sales'. Edward Symmons provided a desktop valuation dated 20 May 2011, but this did not include a valuation of the EPGs. In the following days an offer was made by a third party for the company's computers and televisions, which was too low to be acceptable, and given Mr Iqbal's instructions, an invoice to ARY Network Ltd (ANL) (a connected company) was raised on 27 May 2011 for all the

> "An advertisement was posted on Edward Symmons's website on 20 May 2011 under the heading 'machinery sales'."

company's assets in the sum of £57,500 plus VAT. The sum of £40,000 plus VAT was attributed to the EPGs and the invoice paid by ANL.

Following the sale, Mr Iqbal made a report and put proposals to creditors pursuant to paragraph 9 of schedule B1 of the Insolvency Act 1986 recommending the company should enter into CVL and that he should be appointed liquidator. The report stated that Mr Iqbal had instructed Edward Symmons for the purpose of valuing and selling the company's assets, and their valuation was a maximum of £17,000 insitu and £5,000 excitu.

> The reliance on information provided by the directors was said to have taken the form of failing to obtain a proper valuation prior to selling the EPGs.

At the meeting of creditors in July 2011, the creditors rejected his proposals and the company entered into CVL with IPs other than Mr Iqbal appointed as liquidators.

The claims

The liquidators claimed that Mr Iqbal, in effecting the sale of the company's assets shortly after he was appointed administrator, acted negligently or in breach of his equitable duty of care, breach of trust, fiduciary duty or statutory duty to obtain the best price. It was asserted that the EPGs were worth considerably more than the sale price of £40,000 plus VAT. The liquidators relied on the status of the purchaser (being the 'current management' or an associated entity of the company) and that having instructed Edward Symmons to advertise and sell the EPGs, Mr Iqbal preferred information provided by the directors of the company who had an interest in the purchase. The reliance on information provided by the directors was said to have taken the form of failing to obtain a proper valuation prior to selling the EPGs, accepting a valuation provided by the directors or accountants on their behalf and acquiescing in a very short marketing time frame to suit the directors.

Mr Iqbal defended the claims in full; he contended that he achieved a proper value, bearing in mind the sale was forced due to the financial circumstances of the company, he relied on advice from Edward Symmons and asserted that, even if he failed to obtain the best possible price, the loss to the company was simply the loss of a chance of obtaining an improved offer from another willing purchaser.

Mr Iqbal denied he was engaged for the purpose of selling the company assets to ANL saying the reason for asking Edward Symmons to raise the invoice was that ANL was the only party to make an offer for the EPGs and the management of ANL had informed him they wished to proceed with an immediate purchase. Mr Iqbal feared the sale would be lost if he did not agree immediately and believed that BSB would switch off the channel within a week for non-payment of fees, leaving the EPGs with no value.

Mr Iqbal expressed his concern there was 'a very real risk of the company being wound up by a creditor', failing to appreciate the moratorium imposed by schedule B1 Insolvency Act 1986. He also confirmed in evidence that he did not keep attendance notes, did not use an Outlook diary, did not regularly keep a written diary, failed to appreciate the applicability of SIP 16 and failed to have any regard to SIP 13.

Both parties brought expert valuation evidence. The judge preferred the valuation evidence of the liquidators' expert, who also gave evidence that BSB operates a policy of not switching off channels for 60 days (information that would have been available to Mr Iqbal had he made enquiries).

The expert evidence came from a very experienced IP whose testimony, accepted by the judge, was that a competent IP should have complied with his code of ethics and obtained 'knowledge and understanding of the entity…' and acquired 'an appropriate understanding' of the complexities of the business. In the opinion of the expert, a competent IP would have established during their investigations that an EPG was a specific category of intangible asset with a 'restrictive but competitive market'. A competent IP would also have established and acted on knowledge that 'there were specialist EPG acquisition and sales agents operating in that market'.

In reliance upon *Re Charnley Davies* (No 2) [1990] BCLC 760, counsel for Mr Iqbal submitted that the claim was for a breach of duty of care and skill, not for a breach of fiduciary duty; that a complaint of breach of duty of skill and care in selling assets of a company is a claim in professional negligence. Mr Iqbal accepted that he owed a duty of care but argued he exercised reasonable skill and care in disposing of the assets; he placed reliance on a well-known firm who assisted in selling the EPGs. Counsel for Mr Iqbal submitted that if Mr Iqbal was found to have relied on professional advice, he was not liable if that advice appeared to be competent and the steps he took in reliance were not outside his powers. Counsel for the liquidator did not disagree with the proposition but argued that breaches of loyalty by a fiduciary cannot be disguised as a breach of care and skill, referring to the explanation of the common law duties in *Davey* v. *Money* [2018] Bus LR 1903 at paragraphs 385 to 393 and the explanation that:

'The starting point for any analysis is that the office and role of an administrator is a creation of statute, and paragraph 69 of schedule B1 to the 1986 Act expressly provides that in exercising his functions under the schedule, the administrator of a company acts as agent…'

The distinction between a claim in breach of duty of care and skill and a claim in breach of equitable duty is significant in two respects; common law principles of foreseeability and remoteness do not apply to equitable compensation for breach of fiduciary duty, and, as the remedy for a breach of fiduciary duty is usually one of an account, the loss is assessed at the date of judgment rather than the date of breach. The parties were agreed that where a party stands in a fiduciary position to another, not every duty owed to the other is of a fiduciary nature.

The judgment, breach of care and skill

Mr Iqbal's failure to appreciate the applicability of SIP 16 and failure to have any regard to SIP 13 were found by the judge to be strong indicators of a failure to act with due care and skill. The judge held that Mr Iqbal was entitled to rely on the directors to appraise him of the company's finances, its assets and liabilities, but his reliance on them crossed the permissible line; he had placed too much reliance on

> A competent IP would also have established and acted on knowledge that 'there were specialist EPG acquisition and sales agents operating in that market'.

the directors to provide a value for the EPGs, approval of the marketing and the timing of the sale. Mr Iqbal was held to have failed to exercise reasonable care and skill in the following respects:

- Failure to properly ascertain the value of the EPGs by failing to obtain a proper valuation prior to sale.
- Failure to understand the nature of the intangible asset, and the true value of the EPGs, which led to the misplacement of an advertisement. Further, Mr Iqbal did not seek to negotiate with the directors and merely accepted their first offer.
- The advertisement was inadequate as it failed to refer to the EPGs, the channel numbers that were for sale, the likely audience numbers and the use of the EPGs by the ARY Group.

»

- Mr Iqbal instructed Edward Symmons to raise an invoice for the purchase by the directors just days after he was appointed and the EPGs advertised. This was contrary to the advice received from Edward Symmons.
- Although Mr Iqbal claimed that Mr Lynch of Edward Symmons agreed he should sell the EPGs before the May bank holiday, there is no attendance note to support this. Mr Iqbal should have kept an attendance note and cannot complain that he is unable to support his position with evidence.
- Taking into account the interests of the connected company, ARY Network Ltd, and failing to take account of, or giving due regard to, exposing the assets to a specialist market for a reasonable period potentially prejudicing the interests of creditors.

> "The factual matrix of this case is unusual, an extreme example of a total failure to properly value and market specialist assets."

- Failing to make reasonable investigations into the market for EPGs or ignoring such enquiries.
- Failing to take specialist advice from a person in the EPG industry, to advertise in publications or websites to attract purchasers of EPGs (not plant and machinery) for a reasonable period of time.
- Failing to recognise that the directors could not provide independent advice on timing, advertisement, price or any other matter, yet heeding their advice.

Breach of fiduciary duty

In addition to his failure of duty of care, the judge found that Mr Iqbal was also in breach of his fiduciary duties as the law recognises simultaneous overlapping duties from a single set of facts that may be concurrent but not coextensive.

The judge held Mr Iqbal to have breached the wider fiduciary duty concerning decision making as follows:

- Mr Iqbal's admitted failure to act with 'single-minded' loyalty to the company as he was also acting in the interests of ANL. Mr Iqbal chose not to expose the EPGs to the market for a reasonable time – his explanation being that the EPGs would be switched off, based on advice from the directors. This was evidence of serving two masters and failing to act with loyalty to the company.
- The judge held that Mr Iqbal failed to take account of matters he should have

when deciding on the sale of the EPGs, namely the interests of creditors, and took account of matters he should not have, namely the perceived risk of switch off without making inquiry of BSB, the concern of winding up even though the company was in administration and the director's need to transfer money from abroad before the bank holiday weekend.

The judge assessed the award on the basis of equitable compensation for breach of fiduciary duty, accepting that the award is measured by the objective value of the property lost, determined at the date when the account is taken and with the benefit of hindsight (*Libertarian Investments Ltd* v. *Hall* [2014] 1HKC 368).

The judge accepted expert evidence brought on behalf of the liquidators that the current value of the EPGs is circa £2m, and, taking into account an appropriate discount for relevant factors, concluded that £743,750 represents equitable compensation for the breaches of equitable duty. An order was made for payment by Mr Iqbal of £743,750, plus costs.

Conclusion

The factual matrix of this case is unusual, an extreme example of a total failure to properly value and market specialist assets combined with apparent disregard or even ignorance of the relevant SIPs and a complete absence of attendance notes, but the judgment is a helpful analysis of the duties owed by an administrator.

It is perhaps stating the obvious that attendance notes should be kept and the appropriate SIPs considered; in addition, a contemporaneous record of decisions and the reasons for those decisions in the circumstances that applied at the time may avoid subsequent challenge with the benefit of hindsight.

An administrator needs to check whether there are specialists who can advise on the value of specialist assets and the marketing of those assets to ensure the administrator fully understands the nature of the assets; information provided by directors may not be accurate and is no substitute for expert advice. With unusual assets, that expert advice may be more difficult to source and one avenue might be to consider those experts instructed by IPs on other insolvencies in the relevant sector. For example, the liquidator's valuation expert had valued and marketed EPGs in a number of administrations.

> "The administrator must act for the benefit of the creditors as a whole, not any particular creditor or class of creditor, and not the directors or their connected entities who will often be the parties wishing to purchase assets."

In terms of the wider duties as fiduciary, the administrator must act for the benefit of the creditors as a whole, not any particular creditor or class of creditor, and not the directors or their connected entities who will often be the parties wishing to purchase assets. It might be said that an asset is worth what someone is prepared to pay for it, but that must only be after the asset has been exposed to the correct market and in reliance upon the appropriate expertise. ◻

The author's company funded the liquidators to trial in this case.

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Recent case summaries

Latest insolvency update from **Blair Leahy** and **Tom Leary**.

PERSONAL INSOLVENCY

***Promontoria (Chestnut) Ltd* v. *Bell* [2019] EWHC 1581 (Ch)**

The creditor brought an appeal against orders setting aside statutory demands served on Mr and Mrs Bell on the basis that the creditor held some security in respect of the debt claimed in the demand.

The statutory demands sought payment of £170,000 under a personal guarantee in respect of the company's indebtedness under a loan facility. The guarantees imposed secondary liability on Mr and Mrs Bell for the company's loans and contained standard provisions to the effect that the creditor could release or deal with any security without affecting the guarantor's liability.

> The creditor argued that the security of the third-party mortgages was in respect of the company's indebtedness and not in respect of the personal liability of Mr and Mrs Bell.

In addition to the personal guarantee, Mr and Mrs Bell executed third-party mortgages over properties owned by one or both of them to secure *the company's* lending to the bank. Each of the mortgages contained a clause negating any personal liability on the part of the mortgagor to pay to the bank the company's liabilities.

Mr and Mrs Bell successfully applied to set aside the statutory demands under rule 6.5(4)(c) of the Insolvency Rules 1986 on the basis that the creditor held 'some security in respect of the debt claimed in the demand' and had not specified in the statutory demands the nature of the demand or the value put on it by the creditor.

The creditor argued that the security of the third-party mortgages was in respect of the company's indebtedness and not in respect of the personal liability of Mr and Mrs Bell.

The court rejected the creditor's submissions, noting the long-standing principle that secured creditors could only participate in the bankruptcy to the extent of the unsecured part of their debt unless they were willing to give up their security for the benefit of the general body of creditors. In the present case, although the company's debt to the creditor was separate from the debt owed by Mr and Mrs Bell under the guarantee, the security in respect of the company's liability would discharge Mr and Mrs Bell's liability under their guarantee and was therefore (in the broad sense) rooted in the same debt as claimed in the demands. It followed that the third-party mortgages should be treated as a security 'in respect of the debt claimed in the demand'.

CORPORATE INSOLVENCY

***Hyde and Murphy (as joint liquidators of One Blackfriars Limited)* v. *Nygate (in his capacity as representative of the estate of James Joseph Bannon, former joint administrator of One Blackfriars Limited) and Rayment (as former joint administrator of One Blackfriars Limited)* [2019] EWHC 1561 (Ch)**

The joint liquidators of the company applied to amend their claim against the company's former administrators, having received disclosure in the case. The former administrators opposed amendments setting out a new case that the former administrators were negligent in failing to pursue a rescue of the company as a going concern contrary to paragraph 3 of schedule B1 to the Insolvency Act 1986. The alleged loss was £250m.

The former administrators opposed the amendments on the basis that (i) they put forward a 'new claim' for the purposes of section 35(1) of the Limitation Act 1980 that did not satisfy the conditions in section 35(5) and the CPR r17.4 because it did not arise out of the same facts or substantially the same facts as were already in issue and was accordingly time-barred; and (ii) in any event, as a matter of general discretion, permission to amend should not be granted in light of the prejudice to the former administrators and the lateness of the amendment.

The joint liquidators accepted that if the proposed claim was a 'new claim', which did not satisfy the requirements of section 35(5) and the CPR r 17.4, it would be statute barred.

The joint liquidators argued that they were entitled to rely on a special and more generous amendment rule that applies to insolvency proceedings and, applying that specialist rule, their claim was not a 'new claim'. The court rejected that submission, finding that there was no reason to treat a claim under paragraph 75 of schedule B1 differently to a part 7 claim for the purposes of assessing whether an amendment involved a 'new' claim. In any event, the court found that, even adopting a broader approach, the proposed amendment would still be a 'new' claim.

The joint liquidators then argued that the 'new' claim arose from the same facts or substantially the same facts as were already

> The joint liquidators then argued that the 'new' claim arose from the same facts or substantially the same facts as were already in issue. The court disagreed.

in issue. The court disagreed. Ultimately, the 'new' claim was fundamentally different in character to the existing claim (which concerned alleged failure to pursue objective 2 at all and a failure to pursue objective 3 competently). The claim for failure to pursue objective 1 involved a completely new breach and completely new counterfactual case of loss and damage, raising entirely different facts to those already in issue. It followed that the proposed 'new claim' was time-barred. □

Other amendments have been permitted.

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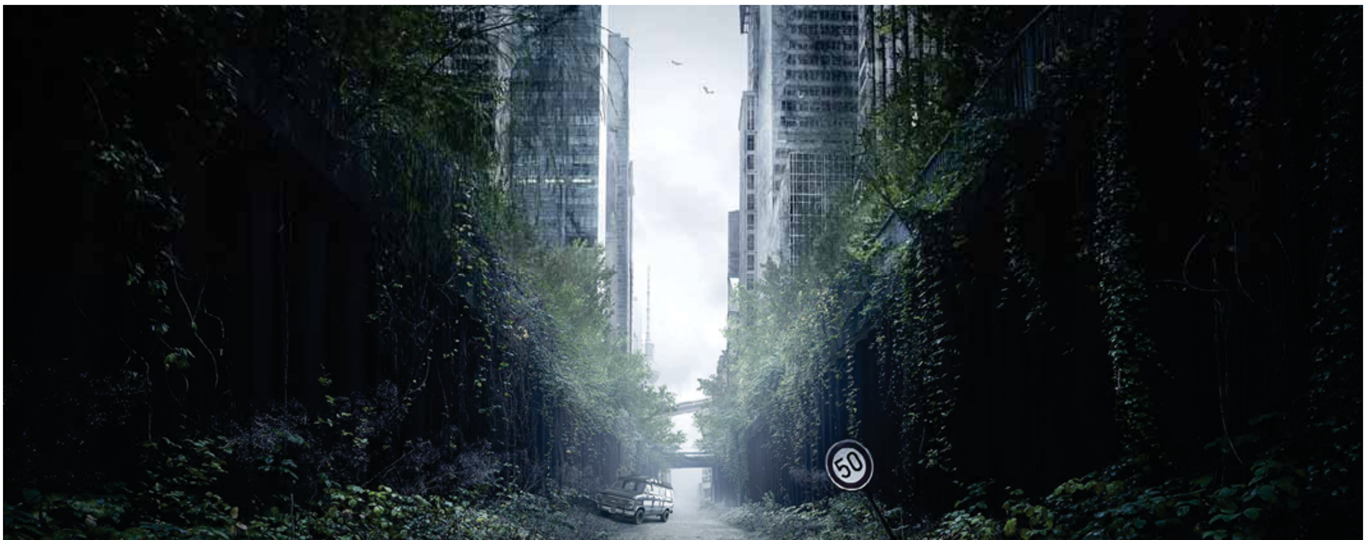

28 days later: evaluating the proposed moratorium

Mark Woodcock casts his eyes across the Irish Sea to compare examinership and the UK government's latest moratorium proposals.

In August 2018 the Department for Business, Energy and Industrial Strategy published a response to its consultation *'A Review of the Corporate Insolvency Framework (2016)'*. The consultation asked for views on the creation of a new moratorium period for financially distressed (but ultimately viable) companies whereby creditors, including secured creditors, would be prevented from taking action against a company while preparations are made for restructure. The UK government has obtained formal submissions from over 40 stakeholders, including R3.

As an Irish insolvency specialist, it is clear to me that the proposed new moratorium has striking similarities to the Irish examinership regime, and this article will consider and compare the current UK regime, the new proposals and examinership.

Write off or restructure

There is a perception (based on some reality) that the current UK administration regime generally results in the liquidation or dissolution of a company, even if the business is sold as a going concern before that happens. It appears that the new proposals are an attempt to find a restructuring solution that is affected before a company slips into a level of insolvency from which it is too difficult to recover.

The proposed UK procedure provides for court protection for a company for 28 days, and the appointment of a person to be known as a 'monitor' to consider rescue options. This moratorium may be extended by a further 28 days if the monitor confirms that the qualifying conditions continue to be met and beyond 56 days where there remains a good prospect of achieving a better outcome for creditors than might otherwise be possible. The second extension must be approved by more than 50% of secured and unsecured creditors.

In order to be granted the moratorium, the company must have a *'reasonable prospect'* that rescue will be successful and must have sufficient funds to carry on its business, meeting current obligations as and when they fall due, as well as any new obligations that are incurred during the protection period.

> The new proposals are an attempt to find a restructuring solution that is affected before a company slips into a level of insolvency from which it is too difficult to recover.

During the moratorium the directors remain in control of the company and it can continue trading. This will be facilitated by legislation to prohibit the enforcement of 'termination clauses' by suppliers where such a clause allows a contract to be terminated on the grounds that one of the parties to the contract has entered a formal insolvency. It is proposed that contractual licences, such as those used in software or patents, will also be covered. However a supplier may seek permission from the court to terminate a contract where the failure to do so may lead to its own insolvency.

The monitor's primary function

The role of the monitor appears to be limited in scope to functions necessary to support the integrity of the moratorium process and ensure creditor interests are protected. Under the UK proposals, monitors will have immunity from claims stemming from erroneous termination providing they act in good faith. A monitor's most important function is to prepare a rescue plan.

The new proposals provide for a rescue plan formulated by the directors to be sent to creditors and shareholders and filed in court. The rescue plan may be in the form of a debt restructure, a company voluntary arrangement, a formal insolvency process or some other agreement with creditors. Creditors and shareholders may submit counter-proposals if they disagree with the directors' proposal and the court may permit any such counter-proposal to be put to creditors and shareholders. Creditors can also challenge class formation if they do not accurately reflect the rights and interests of the different classes. If satisfied, the court will confirm that a vote on the rescue plan may be conducted. If no challenges are brought or no counter-proposals permitted by the court, then creditors and shareholders will vote on the rescue plan. Creditors may challenge the moratorium, either on the grounds of the qualifying conditions not being met (or the company being ineligible) or unfair prejudice to creditors, at any time during the moratorium. The court will then arrange a second hearing at which it will consider whether the necessary requirements have been met and will make a decision whether or not to confirm the rescue plan and make it binding on affected creditors and shareholders.

Approval of a rescue plan

At least 50% of creditors must vote and 75% of voting creditors will be required in each class of creditor to support the rescue plan. A rescue plan allows for a 'cross-class cramdown' onto both secured and unsecured creditors. In practice this means that a dissenting class of creditors must be

> The role of the monitor appears to be limited in scope to functions necessary to support the integrity of the moratorium process and ensure creditor interests are protected.

satisfied in full before a more junior class receives anything under the restructuring plan. However, the court may approve a rescue plan which departs from this absolute priority rule approach where it considers (a) it is necessary to achieve the aims of the restructuring and (b) is just and equitable in all the circumstances. Therefore, dissenting classes of creditors (even senior creditors) may be bound to an arrangement where the court considers it is in the best interests of all stakeholders. This is a key provision.

It is expected that typical outcomes from a moratorium will be that a company agrees an informal restructuring with creditors, a rescue procedure such as a company voluntary arrangement or a liquidation procedure.

Existing Irish regime – examinership

There has been a similar process in operation in Ireland for many years called examinership. This provides companies with 70 days of court protection from creditors[1] (usually extended to 100) while a scheme of arrangement (a scheme) is prepared by the examiner for the various classes of creditors. In our experience, a moratorium of only 28 days is unlikely to be sufficient to enable a plan to be prepared and considered. As stated above, the Irish regime starts at 70 days and is usually extended to 100 days. We would expect most moratoriums to be extended by the court beyond the 56-day period if the UK's experience is similar to that in Ireland.

The process is similar to a moratorium in that it commences with an application by a company to court for protection and the appointment of an examiner. The company must demonstrate to the court that it is, or is likely to, become insolvent, but has a 'reasonable prospect of survival'[2]. The application must include a report from an independent accountant confirming that the company has a reasonable prospect of survival provided certain conditions are met[3]. The examiner takes on the role of examining the affairs of the company, engagement with creditors and crucially, devising the scheme of arrangement. The reporting accountant and examiner are different people from different firms, which adds a layer of protection. The examiner does not usurp the executive function of company directors (as an administrator does in the UK), but provides advice and guidance.

There is rarely any challenge to the conduct of an examiner (albeit the appointment itself is often challenged by creditors). Given the proposed role of a monitor is similar to that of an examiner, we would assume there would be limited challenge in the UK, particularly given the proposed immunity save in cases of bad faith.

In practice the examiner seeks investment that is used to pay dividends to the different classes of creditors. There are two requirements for a scheme to be approved, (a) the support of at least one class of creditors (by simple majority in value) and (b) that no class of creditors is unfairly prejudiced. This means that creditors must be offered more than they would obtain in a liquidation.

> The Irish regime starts at 70 days and is usually extended to 100 days. We would expect most moratoriums to be extended by the court.

Consequently, secured creditors tend to obtain the highest dividend as they would receive at least the value of their security in a liquidation and unsecured creditors receive the lowest dividend, as they usually receive next to nothing in a liquidation.

Having met with all creditors and obtained the support of at least one class of creditors the examiner then applies to have the scheme approved by the court. If the court is satisfied that no dissenting creditors have been 'unfairly prejudiced' (obtaining less than they would in a liquidation) the court can impose the scheme on all classes of creditors, whether they approved it or not. There is no absolute priority rule in Ireland so unsecured creditors can get paid their dividend even if preferential creditors did not support the scheme. If the scheme is approved, the creditors are paid the dividend in the scheme and the company exits examinership with a clean slate.

Conclusion

The UK proposals for a moratorium appear to draw on the most constructive pre-insolvency restructuring initiatives from a number of sources and appear very similar to the examinership process in Ireland. The key similarity between examinership and the proposed moratorium is that the directors remain in control and the company continues trading, unlike the administration process. This appears to be the most important distinction and most likely to give the company the best chance of survival.

> The key similarity between examinership and the proposed moratorium is that the directors remain in control and the company continues trading.

The shorter time period afforded for the restructuring is crucial as it serves to focus the parties' minds and creates a collaborative process whereby everyone commits to agreeing a scheme (in Ireland) or a rescue plan (in the UK) to ensure the survival of the company. However, the 28 days proposed is arguably too short a time unless it is a 'pre-pack' arrangement.

The proposal for a moratorium is a welcome initiative in the world of corporate governance in the UK. The proposals' reliance on already existing voting thresholds and similarity to the Irish examinership process will allow the UK courts consider a rich jurisprudence in making determinations on contentious moratoriums.

1 Section 520 Companies Act 2014
2 Section 511 Companies Act 2014
3 Section 511 Companies Act 2014

MARK WOODCOCK is a solicitor and head of the insolvency and commercial litigation department of Fieldfisher's Ireland office.

▶ LEGAL VOICE The nature of the advice given is general and neither *RECOVERY* nor the writer is responsible for any consequential loss arising in connection with information given in this publication.

Legal Q&A

Hannah Drozdz gives an in-depth answer to one of the biggest GDPR questions.

Q Do administrators have to comply with subject access requests?

A Well… it depends.

Under GDPR, individuals have a right, subject to certain exceptions, to access their personal data held by a controller. If the controller fails to comply with that request, unless they fall within one of the exceptions, the individual can go to court to enforce their rights and bring a statutory compensation claim. In addition, the Information Commissioner's Office (ICO) has powers to issue an enforcement notice and impose financial penalties.

> As controller, the administrator will have GDPR obligations, and *must* comply with any subject access requests for that data.

Administrators (or liquidators) will be controllers for data they hold while performing duties where they are not acting as agent of a company, but as principal (see *Re Southern Pacific Personal Loans* [2013] 2485 (Ch)). For example, where the office-holder receives and adjudicates on proofs of debt, the administrator does so as 'administrator' and not as an agent of the company. In fulfilling this task, the administrator will possess and retain data about the individuals claiming to be creditors, some of which will be personal data. The administrator will be a controller of that data. As controller, the administrator will have GDPR obligations, and *must* comply with any subject access requests for that data.

The cost of compliance

So – how about an administrator's obligations where the company in administration is the controller?

Well, until recently, the courts had not considered this. In the *Southern Pacific* case, this was the question the liquidators had asked the court. They faced the competing issues of a lack of funds and the high cost of complying with the requests. However, the court left the question open for another day. The judge decided the liquidators did not need the records in question for the purposes of the liquidation, therefore destroying the records was the solution to avoiding the costs of compliance with future subject access requests in this case. He did confirm that:

'[office-holders] are not personally responsible for compliance with the provisions of the [Data Protection Act] in respect of the data processed by the company, including but not limited to [SARs] made under section 7'

In the recent hearing arising out of the administration of the Cambridge Analytica group, the court was once again faced with a subject access request question. Here, the company had not complied with a subject access request from the claimant and the ICO issued an enforcement notice to the company in administration. The administrators did nothing to comply with the enforcement notice, nor did they seek to set it aside through an appeal. They did this because:

- the enforcement notice was addressed to the company as the data controller (rather than the administrators);
- the ICO previously seized and had custody of the servers on which the data was held; and
- the company had no staff to comply with the request.

The claimant, a data protection campaigner, complained to the court. The court recognised that the practical ramifications for office-holders of the *Southern Pacific* decision had not been 'worked through'.

The court said the question was not: 'What as [*sic*] do we as administrators have to do [*sic*] meet our obligations under the enforcement notice?'; *Southern Pacific* answers that question. Instead, the administrators should have asked: 'What does [the company] have to do to meet its obligations under the enforcement notice? What can we, within our powers of management as administrators, do to enable [the company] to meet those obligations? Is it in the interests of the creditors as a whole that we should bring about those actions?'

In this case, although the court decided the administrators had asked themselves the wrong question, it did not criticise their decision. All the evidence suggested the costs of compliance were disproportionate to the benefit to creditors as a whole. What the administrators needed to do was exercise commercial judgement, considering the ease and costs of compliance, the scope of their statutory duties to all creditors and the need not to cause unfair harm to a data subject as creditor.

Fifty shades of GDPR

So it's not black and white, but the court has given some sensible guidance to work within. Administrators (or liquidators) should not automatically disregard a data subject access request just because the company in administration or liquidation is the controller. From an insolvency law perspective, if compliance, or even partial compliance, can be achieved without too much disruption or cost, it should be – in all cases. If the cost of compliance is great (as in *Southern Pacific*), they must weigh that against the potential detriment suffered by the individual in *not* having that information. Where the individual is a creditor and they will lose out through non-compliance, the administrator has to balance their rights under paragraph 74 schedule B1 and that may tip the balance in favour of the request.

> The administrator has to balance their rights under paragraph 74 schedule B1 and that may tip the balance in favour of the request.

R3's guidance confirms that office-holders can't disclaim data as 'onerous property' simply because it imposes GDPR obligations. R3's guidance also confirms that administrators and liquidators should not destroy any personal data needed to support claims to creditors and employees for the life of the case. The usual retention policy for documents or records is in section 5.6 of *R3 Technical Bulletin 104*. Office-holders should be wary of disposing of relevant data after subject access requests have been received because of potential criminal sanctions – it's best to take specific advice in each case. ◻

For more on GDPR see page 22

HANNAH DROZDZ is a senior associate and professional support lawyer at Gateley Legal.

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Heavy lies the Crown for lenders

Neil Smyth and **Zak Virgin** examine Crown preference for HMRC and what it means for for Asset Based Lenders (ABLs) and their clients.

It was announced in the Autumn 2018 budget that legislation will be introduced to make HMRC a 'secondary' preferential creditor for certain taxes (the taxes) – PAYE (including student loan repayments), NIC (employee contributions only), CIS and VAT that are due at the commencement of the insolvency, regardless of when they were incurred – including any penalties or interest relating to the taxes.

The government completed a consultation in May this year. On 11 July 2019 it published draft legislation, which is anticipated to come into force on or after 6 April 2020 and a response to the consultation.

The only concession made following the consultation is that penalties or interest relating to the taxes will not gain preferential status. A request that only taxes incurred from 6 April 2020 should have preferential status was ignored, so taxes incurred now will have preferential status if the debtor company goes into an insolvency process on or after 6 April 2020. Companies, lenders and advisors therefore need to be approaching current financially distressed situations on that basis.

The government view

The idea is that the taxes should be preferential because they have been paid by employees and customers and are being held by the business on behalf of HMRC at the point of the insolvency process and should therefore be recovered to fund public services.

HMRC will remain an unsecured creditor for taxes levied directly on businesses and individuals, such as income tax, capital gains tax, corporation tax and employer national insurance contributions.

With preferential creditors recovering in advance of prescribed part creditors and floating charge creditors, and it being predicted that the prescribed part maximum recovery will be increased from £600,000 to £800,000, anticipated recoveries for floating charge creditors look set to decrease.

As set out in its consultation, the government 'does not expect it to have a material impact on lending' because 'financial institutions will remain above HMRC in the creditor hierarchy for fixed charges they hold over assets'. This was echoed in the response to the consultation.

It also states that 'the debts [the financial institutions] will no longer recover are a very small fraction of total lending. Bank lending to small and medium enterprises alone was £57bn in the 12 months to July 2018, compared to an estimated maximum yield of £185m a year from this measure.' Again, this was echoed in the response to the consultation.

Unsurprisingly, those lenders who rely on floating charge recoveries and/or who calculate their lending exposure based on floating charge recoveries (ie ABLs) do not share the government's view.

The ABL view

ABLs are concerned about how the proposed measures could increase the timing for claims to be processed, and therefore higher costs and lower recoveries for floating charge holders in an insolvency process.

Of greater concern is that ABLs will have to require their clients to track and report their liabilities to HMRC with more frequency, as ABLs will need to be certain of the tax position whenever they make a credit decision, particularly in a financially distressed situation.

While the proposed increase of the prescribed part impinges further on floating charge realisations, at least it is a capped figure, allowing ABLs and their clients to approach potential insolvency scenarios with more confidence and certainty of outcome.

ABLs' credit and risk processes are linked to a borrower's assets and the value that those assets might realise in an insolvency process. Their approach to lending allows them to extend credit, predominantly to UK mid-market companies, who may not be able to obtain financing solutions from other sources.

ABLs lending formulae often take into account as many of a company's fundable assets as possible and they ascribe value to (and lend against) a company's stock, raw materials and work-in-progress (normally classed as floating charge assets in the context of insolvency proceedings).

As ABLs can currently predict realisations in an insolvency process with a degree of certainty (and as a floating charge holder in priority to a number of potential creditors) they are able to work with and support a number of distressed, underperforming and improving clients (particularly around potential insolvency events).

Unsurprisingly, ABLs disagree that the planned changes will not 'have a material impact' on lending because, without clarity and certainty as to how the government's proposals will be implemented, they are concerned that they will not be able to provide the same level of support and funding to their clients.

They also fear that their mid-market UK clients will no longer be able to leverage their floating charge assets in the same way as they can at present, as ABLs will need to take into account HMRC's new preferential claims (both actual and potential) whenever advancing credit, which will reduce the amount of credit support they can provide.

This will inevitably increase the cost of borrowing and decrease the likelihood of ABLs lending to financially distressed borrowers. This in turn, will result in more insolvency processes. HMRC will also be an unsecured creditor in these insolvency processes.

Increased insolvencies

HMRC estimates a maximum increased recovery of £185m a year through these provisions in its consultation document and the response. What it does not estimate, however, is the increased tax write off it will suffer as the result of increased insolvency processes its provisions will cause.

These provisions are coming and those affected by them, including ABLs, will have to start changing their approach now, in anticipation of the changes, to best protect themselves when they come into force. It remains to be seen how this will impact the availability of credit for ABL clients and whether that, in turn, increases the number of insolvency processes. □

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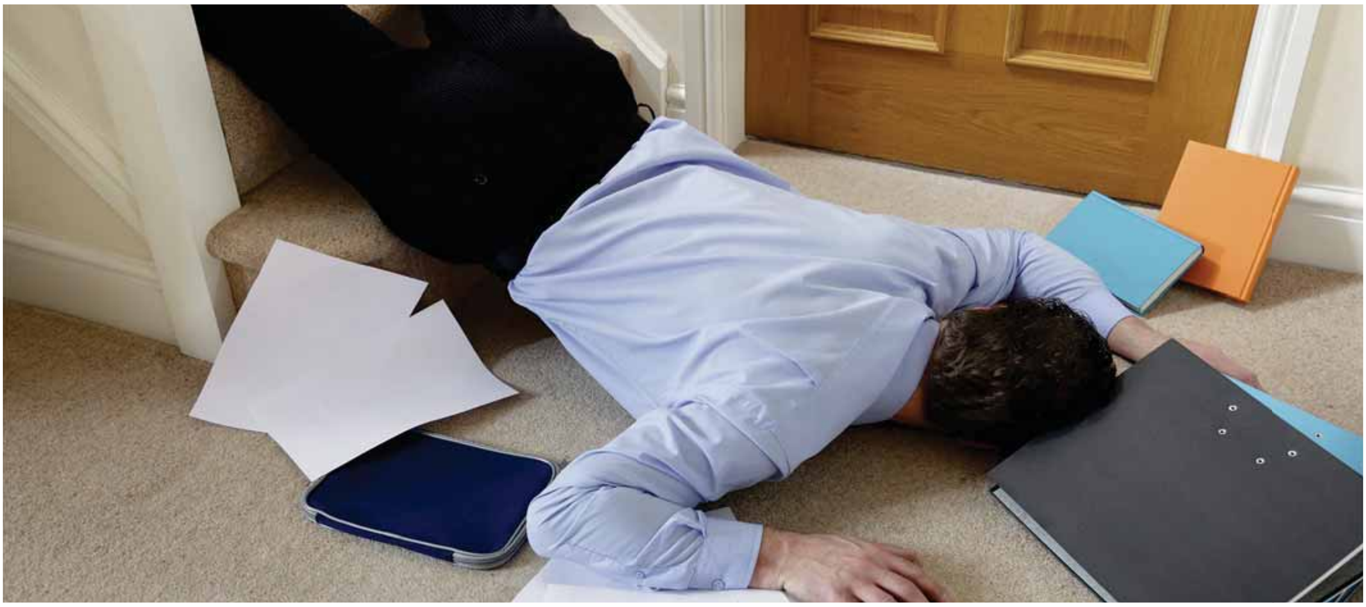

Trip hazard: health and safety

Richard Crockford and **Dino Paganuzzi** offer a refresher on health and safety law as it pertains to the IP.

Insolvency proceedings do not absolve a company from its health and safety obligations, and, while rare, there is nothing to stop the unwary IP from being dragged into the middle of a health and safety prosecution. To help you don your proverbial high-vis jacket and reach for your theoretical orange cones, below is an outline of some of the lesser known, but common, issues around health and safety legislation that may affect IPs.

The Health and Safety at Work etc Act 1974 (the Act) creates the legal framework regulating virtually all work *activity in the UK with a view to securing the health, safety and welfare of persons affected by work activity*.

The Act places non-delegable duties on employers, persons in control of works or occupiers, not to expose persons to risks to health and safety. 'Employer' in this context includes those who employ workers, whether or not they were involved in the acts or omissions that led to the risk exposure.

Like ordinary employers, as they are persons in control of workers, IPs owe duties to conduct the undertaking to ensure, so far as is reasonably practicable, the health, safety and welfare of persons in or not in its employ. The undertaking for these purposes includes the business and property under his charge.

These duties may be onerous and troublesome in relation to the IP's operation, management and control of a failed business, particularly if taking over dangerous premises and/or substances.

Risk and control

Section 4 of the Act in particular imposes a general duty on persons in control of premises to take such measures as are reasonable to ensure, so far as is reasonably practicable, that the premises, its access, egress and any plant or substance there is safe and without risks to health.

The most effective way for IPs to demonstrate that all reasonably practicable steps have been taken to ensure health and safety is to make sure that suitable and sufficient risk assessments are in place relevant to the risks involved, and that all reasonable control measures to mitigate against that risk have been applied. Indeed, subordinate legislation under the Management of Health and Safety Work Regulations 1999 imposes to conduct a suitable and sufficient risk assessment of relevant risks. Failure to do so could of itself be an offence.

> "IPs owe duties to conduct the undertaking to ensure, so far as is reasonably practicable, the health, safety and welfare of persons in or not in its employ."

In addition to direct health and safety duties, the IP may have more complex duties in relation to fiduciary duties, particularly where the company in liquidation is the subject of a health and safety or similar prosecution.

It often occurs that a company faces prosecution for alleged breaches of health and safety duties, notwithstanding insolvency proceedings. The prosecution may be brought before or after the company goes into liquidation and there is nothing to prevent a company under investigation for breach of health and safety legislation, or which has been charged with such an offence, making itself subject to insolvency proceedings.

A dissolved company ceases to exist and cannot be prosecuted, but prosecuting authorities can and do make court applications to prevent a company from being dissolved and, as necessary, restore dissolved companies to the register for prosecution purposes.

Permission of the court must be obtained to bring proceedings against a company in administration or compulsory liquidation, unless the office-holders consent to such proceedings. The court may refuse or grant permission on such terms as it considers appropriate. However, there is no statutory provision preventing prosecution of a company in voluntary liquidation. Court permission is not required and the interests of the creditors are not taken to override all other considerations.

The Health and Safety Executive (HSE), and other prosecuting authorities, will prosecute a company in liquidation if – in their view – the evidence demonstrates a breach and there is a public interest to do so. If the evidence is judged sufficient for a conviction, the public interest will usually be judged to favour a prosecution.

The HSE can, and regularly does, take and/or continue a prosecution against a company in liquidation and justify it on the basis that there is a public interest in doing so to send out messages to industry concerning the safety duties upon employers.

In those circumstances, the liquidator must respond to the proceedings on behalf of the company in liquidation or risk being held in contempt. It is often, but not always, the case that the court and the Crown accept non-participation by the liquidator. Notwithstanding such acceptance, the court must proceed with a trial on a basis that the company lays itself upon the mercy of the court, regardless of whether it has any culpability, and in full knowledge that conviction and fine will follow, which may have no financial or other implication for the company, its creditors or others to whom the company and/or the liquidator may owe a duty. Further, it might be said that the legal costs of participating in any viable defence would not be a good use of whatever funds may be available and to participate on this basis would represent a disservice to the creditors.

> "There is no statutory provision preventing prosecution of a company in voluntary liquidation. Court permission is not required, and the interests of the creditors are not taken to override all other considerations."

In those circumstances, and if the court agrees, an attendance at court by the liquidator may be dispensed with by agreement and the company found guilty in its absence and be fined regardless of its actual culpability.

Penalties

Penalties for corporate health and safety offences include very severe fines assessed by reference to the size of the organisation, the degree of culpability and the level of harm at a risk. Where a company is in liquidation and has laid itself upon the mercy of the court, the fine will either be nominal based on the company's lack of finances or it will be substantial to send out a message but in the knowledge it will not be paid. It may in these circumstances be a reasonable discharge of the liquidator's duties not to participate and to allow the public interest to be served.

Difficulties may arise, however, where others have an interest in the prosecution of the company, for example a co-defendant and/or insurer with insurable interest in the company and/or its former directors and officers.

Fletcher, in *The Law of Insolvency (Fifth Edition)* identifies in relation to the duty of a liquidator at paragraph 22-077:

'He must act honestly and impartially, serving the interests of the general body of creditors, but be mindful also of the residual interests (if any) of the contributories. He must afford all interested parties reasonable assistance and information so as to enable them to ascertain and exercise their rights.'

Therefore, the liquidator may have ongoing direct and fiduciary duties to the court, creditors, co-defendants and insurers in circumstance where others have an interest in the prosecution of the company.

When prosecuting a company in liquidation for health and safety breaches it is not uncommon for the HSE or other regulators to prosecute a director or other senior manager involved with the company for their part in the commission of the company's breach to make somebody answerable for the breach.

Companies are most commonly charged with a breach of sections 2(1) or section 3(1) of the Act and/or subordinate legislation, and a former director and/or senior manager may in addition face a charge of breach of a duty under section 37(1) of the Health and Safety at Work Act 1976 (HSWA) arising out of the same events.

Section 37(1) of the HSWA reads as follows:

'Where an offence under any of the relevant statutory provisions committed by a body corporate is proved to have been committed with the consent or connivance of, or to have been attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or a person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.'

This is a so-called 'parasitic offence' where a former director, manager, secretary or other similar officer of the company in liquidation is made complicit in the company's breaches.

For a former officer to be convicted, the prosecution must first establish that the company was in breach of its duty under the HSWA and then establish that it was attributable to the former officer's consent, connivance or neglect.

In other words, if the company is acquitted there cannot be a conviction of the former officer under section 37(1) but a failure by the company to participate in a defence would permit a conviction of the company in circumstances where it might not otherwise be convicted and this would remove a very substantial barrier to the conviction of the former officer. This might leave him unduly exposed and having to defend himself on a basis that he did not consent, connive or was not negligent in relation to undefended breaches for which the company may not be culpable but has been incorrectly convicted.

Insurers

Separately, insurers may have a vested interest in the outcome of prosecution proceedings in a number of separate ways. Firstly, a conviction of the company might increase the potential for claims to arise from those directly and indirectly involved with and/or affected by the consequences of the incident giving rise to conviction. Any such claims will impact on insurer's liabilities under their policies covering the company in liquidation or its former directors and officers would impact on creditor's liabilities if insurers declined cover as a consequence of a company's failure to defend.

Further, insurers may also have a liability to pay prosecution costs in the event of a successful prosecution. In circumstances where the company does not pursue a defence, insurers may become liable for those prosecution costs and may in those circumstances require some

> "It may be incumbent upon an IP to play an active part in proceedings with ramifications to creditors and others if he does not do so."

control over how those proceedings are conducted. Insurers may well expect a company to defend itself where it has a viable defence and may take a robust view if their liabilities are increased as a consequence of a failure to defend. Prosecution costs accumulated over a lengthy investigation can be substantial and insurers will consider the liquidator to have a fiduciary duty to limit those costs in circumstances where there is a viable defence and where a failure to do so will have a detrimental impact on their insured former officers.

In these circumstances, it may be incumbent upon an IP to play an active part in such proceedings with ramifications to creditors and others if he does not do so. □

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Practical hacks for GDPR

Cyber and information law specialist **Claire Williams** decodes some of the practical points of dealing with GDPR based on her experience answering client questions.

It has been little over a year since the EU issued its big shake up to data supervision in the form of the General Data Protection Regulation (GDPR). There has not been the expected influx of multi-billion-pound fines or the total eradication of marketing emails, but there have been some data-induced headaches, especially for IPs.

The practical issues around GDPR compliance for the IP are numerous, but this article will take a particular focus on the different data roles, asset sales, employee data and handling data subject access requests (DSARs).

> Complications arise in circumstances where the processing of data may be determined by more than one party jointly.

Which 'hat' are you wearing?

Data obligations fall on data controllers, who determine the purposes and means of processing personal data, and data processors, who are responsible for processing personal data on a controller's behalf. The first question for an IP is, therefore, what role(s) do they have in relation to any personal data that may be being processed?

Sometimes the roles are reasonably clear. In relation to personal data held by an insolvent company, the IP is an agent of the company and the company continues to be the data controller. Conversely, the collection and use of creditor information by the IP during the course of the appointment is determined by the IP or their firm, making them a controller of that data.

Complications arise in circumstances where the processing of data may be determined by more than one party jointly, where an IP takes responsibility for relevant contracts, or where company data is transferred to an IP's systems and used by the IP for their own purposes or not kept segregated from other data the IP is holding. Whether the IP is a controller, processor or otherwise in relation to such data may need to be explored and confirmed rapidly if a data subject attempts to exercise their rights or a breach occurs.

Company data compliance

Some companies have taken significant action to achieve GDPR compliance, but others – and struggling businesses are more likely to come within this group – have made limited or no effort. IPs should consider who within the company is best placed to provide compliance information and should be careful to ensure that (where possible) their knowledge does not become inaccessible while still needed.

Loss of knowledge could severely hinder, or even prevent, efforts to rescue a company or to sell its assets. As made clear by the Information Commissioner's Office (ICO) in July 2019 when announcing almost £300m in intended fines for GDPR non-compliance against British Airways and Marriott Hotels, 'organisations must be accountable for the personal data they hold' and this requires buyers of companies and data assets to conduct 'proper due diligence'. Buyers now seek much more comfort regarding data compliance than was previously seen.

> After recent changes, personal liability can now be incurred by officers of a data controller if misuse of the marketing list took place with the 'consent or connivance' of that officer.

A particular point of note is that GDPR, combined with the Privacy and Electronic Communications Regulations (PECR), have imposed additional constraints on the use of marketing databases – potentially one of the most valuable assets a company holds.

Under PECR it is only permitted to carry out unsolicited direct marketing via recorded calls, SMS, email or fax if the person targeted by the message has specifically consented to receive direct marketing via each of those channels. Fines for breach of PECR can be large: in June 2019 EE was fined £100,000 for sending over 2.5 million direct marketing messages to customers without consent. Also, after recent changes, personal liability can now be incurred by officers of a data controller if misuse of the marketing list took place with the 'consent or connivance' of that officer, or was 'attributable to any neglect on the part of the officer'. Post-appointment marketing should be undertaken with care.

Gathering and selling tangible assets

Security is a big concern, as a personal data breach (a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data) may trigger a variety of obligations for the company and the IP.

> A major issue with many DSARs is that they are drawn extremely widely – seeking 'all my data' over several years.

When employees leave the company, their IT and building access should be removed swiftly. Access for those who remain should be properly limited. Data incidents can be caused by unnecessary granting of administrator permissions – only those who actually need such rights should have them.

IPs should look to collect all company electronic devices (telephones, computers, laptops) to ensure that the personal data they contain is secured against damage or loss. IT assets may be suitable for resale, but caution is required: in 2013 an NHS trust received a £200,000 fine for failing to wipe patient details from decommissioned computers. Where sale is not viable, devices should be securely destroyed by specialist firms.

Sale of non-technological assets may also have data implications. Data breaches have resulted from the abandonment, sale and/or theft of filing cabinets. In 2017 the ICO fined a county council £60,000 for leaving files in a cabinet sent to a second-hand shop.

Selling data assets

As mentioned, marketing databases can be very valuable.

Whether a list can be sold to another party depends upon what is being sold (including whether it is personal data at all), for what purpose, and what consents were obtained from the relevant individuals by the company. The ICO's position is that the sale of marketing lists is only permitted if the company has the consent of the listed individuals to pass on their details. Further, buyers (and other transferees) may only use the list for recorded calls, texts or emails if the people on the list have *specifically* consented to receive those messages from the buyer.

IPs and employee data

Where a business is being rescued, taken over or transferred, IPs still need to properly safeguard employee data. Where data rooms are set up, an IP should keep in mind GDPR's Data Protection Principle 1, which requires that all data processing has a legal basis under GDPR, is fair and is conducted transparently. Some employee data may be required to be shared with a buyer by law, while other data sharing may simply be necessary in the legitimate interests of the various parties – in both cases, thought should be given as to what is being provided. Employees do occasionally object to the sharing of their data, and the time and cost of handling those complaints can be significant. Equally, it is important to recognise that a refusal to share data when possible may be off-putting to buyers and thwart attempts to realise the company's assets.

If a company is simply closing down, or the company is holding employee data not required by a buyer, IPs should consider whether the data needs to be retained or even transferred to another entity for safekeeping. If a DSAR has been made, an IP should not destroy any data that is responsive to the request made, as to do so is prohibited by the Data Protection Act 2018 (DPA). The prohibition remains in place until the DSAR has been answered and any complaints about the disclosure made have been handled.

Practical difficulties of DSARs

If a DSAR is received and the IP is required to comply (see the Legal Q&A by Hannah Drozdz on page 16 for more on DSARs), the relevant data controller must process the request with alacrity. Even a four to five-day delay in getting started can mean it is not possible to meet the statutory disclosure deadline (one calendar month). Although a possible two-month extension may be available, the ICO has made it clear that the extension should be rarely used and applies only to the most complex DSARs.

A major issue with many DSARs is that they are drawn extremely widely – seeking 'all my data' over several years. The more adventurous specifically request data that is harder to search and provide, including SMS messages, audio and CCTV recordings. It is possible to reject these DSARs on the basis that they are excessive in nature and would require a wholly disproportionate amount of resource. However, to reject one an IP needs to arrange for at least preliminary searches of emails and other data sources, so that the number of documents and likely cost of the exercise can be evidenced.

Locating the personal data of the requestor requires the design and implementation of appropriate searches, followed by the collation, review and redaction of the responsive documents. While searches are usually carried out covering at least the name(s) and initials of the requestor, IPs may find that they have limited search capabilities leading to unexpected results. One example seen was a search for 'MS', which recovered over two million documents – it picked up every single Microsoft document on the system.

> IPs may be able to limit costs by using electronic platforms to de-thread and de-duplicate the pool of documents for review.

IPs may be able to limit costs by using electronic platforms to de-thread and de-duplicate the pool of documents for review. The technology is unlikely to be available in house, so for any sizeable DSAR (around 6,000+ documents), it may be best to seek external assistance. A number of firms offer DSAR processing services.

Review of the documents and application of appropriate redactions is vital. A data subject's right is to their own personal data, not to specific documents or to exempt data. A variety of exemptions to the right of subject access are provided for in the DPA. Although it can be tempting to simply provide a requestor with compete documents that mention them, an IP who does so risks accidentally waiving privilege, adversely affecting ongoing negotiations or breaching the data rights of third parties. Given that data subjects who are caused distress by the inappropriate handling of their data may seek damages, not redacting all exempt data may mean incurring the cost of reporting and handling the resulting breach. □

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Using technology to mitigate risk

James Boyle suggests technology can alleviate some of the pressures of risk and regulation.

It seems as though the number of risks facing our business is forever increasing and there is greater emphasis on us taking steps to deal with them. But what's the best way of going about alleviating these risks?

A risk we will always face is human error. No matter how well trained we are, no matter how much of an expert we are in our respective fields, there is always room for human error. What we can do is invest our expertise in the technology that we use so that it can be applied as a tool to decrease our chances of running into bother.

Man versus machine

The area of regulation and especially the regulators themselves have been hot topics this past year, with debates leading to the Insolvency Service investigating the idea of having a single regulator. One thing that has come out of that almost immediately is an increased demand on reports being made available to certain regulators. Rather than rushing through data and panicking when reports are due, why not invest time now setting report parameters and putting a process in place that will mean that, come due date, reports can be produced in minutes by following the process and extracting the correct data?

> No matter how well trained we are, no matter how much of an expert we are in our respective fields, there is always room for human error.

Now, think about how this can be done by a human hand (in minutes), and how quickly this could be done by machine? The technology exists to have reports running on an automated basis off parameters set by the user and presented in the manner that the user wishes to view the data. We can be turned off from using software as at the outset it usually requires an investment of time and money. However, if we think further ahead, the initial investment of time and money pales in comparison to the long-term savings. One example of this would be the implementation of automated management information reports. Taking an insolvency practice as an example, these could range from a simple report highlighting overdue tasks on all cases, to a more complex report showing how actual-time costs are comparing to the time costs estimated on the statement of affairs. The real-time saving comes in having these reports run on a schedule and being sent to you rather than you having to go and find them. With an increased stringency on reporting by the regulators and the frequency at which these reports are required, another option would be to use a service that builds these reports for you on a scheduled basis. The main benefit here is the saving on time and the associated costs in having a member of staff build these detailed reports when required by the regulator.

Automation versus compliance

On 25 May 2018, the phenomenon that is the GDPR came into our lives. Since then we have seen extraordinary fines handed to some of the world's largest software companies in respect of their handling of customer data – a clear sign that we all must ensure we remain GDPR compliant.

While we must ensure we are compliant, how can we also ensure that we don't lose out on efficiencies that we depend on to drive our business forward? Fortunately, there are functionalities available to use that do just that. The introduction of open banking has 'opened up' (pardon the pun) great possibilities for the insolvency sector, whether that be in streamlining a firm's everyday banking activities or in gathering essential information in the building of a case. Existing technologies such as automated credit checks, automated anti-money laundering and know your customer searches and online asset searches also aid the efficient gathering of data. However, as noted previously, it's imperative that we remain GDPR compliant.

> There will always be a smart process or an intuitive product that will take a risk, nullify it and then create opportunities for us.

Thankfully the solution does not have to be complicated. In fact, there are solutions that encompass all of the efficient tools noted above and also carry out the required consent checks, which in turn follow up in setting the correct controls against the case (for example contact preferences). Not only does this mitigate the risk of receiving a hefty fine in respect of GDPR, but it also ensures the data collected is accurate, alleviating the risk of human error.

While it may seem like we are becoming more and more exposed to risk with each passing day and that our workload will suffer as a result of the safeguards we'll have to put in place, there will always be a smart process or an intuitive product that will take a risk, nullify it and then create opportunities for us. The key is to find what will work for you! □

JAMES BOYLE has worked with Vision Blue Solutions since November 2011 and has managed the marketing and sales process since 2013. James has worked closely on many of Vision Blue's UK projects and has a keen interest in the personal insolvency sector.

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Set-off in insolvency: the legal Hydra

Simon Duncan provides a guide to criss-crossing monetary claims.

The editors of the *White Book* express concern that the courts have not taken the opportunity to define set-off as 'any monetary cross-claim raised by a defendant to a claim brought against them'. However, it is not the definition of 'set-off' *per se* that causes the difficulty or renowned complexity of this area of the law.

Different types of set-off

A set-off can occur wherever there are criss-crossing monetary claims. Which set-off applies is a function of the facts that give rise to the set-off claim. Whether the set-off prevails is a function of the law that applies to that type of set-off.

IPs in England & Wales are familiar with insolvency set-off. Insolvency set-off is both 'automatic' and 'self-executing' rather than procedural in nature (*Stein* v. *Blake* [1996] AC 243.) The set-off account is taken when the company goes into liquidation. It is not possible to contract out of, or waive, the operation of insolvency set-off. The current statutory provision that applies in company liquidations is Insolvency Rule 14.25. The claim and the cross-claim must be mutual, that is, in the same right and the same interest.

> "What is less widely known is that on any particular set of facts, other set-offs may be available."

What is less widely known is that on any particular set of facts, other set-offs may be available. This may be so both in insolvency and outside of insolvency. In particular, both legal set-off and equitable set-off may be operative.

Legal set-off

The term 'legal set-off' is used here to refer to independent or statutory set-off. This is a right of set-off, originating from the Statutes of Set-off enacted in 1729 and 1735 but now enshrined in the rules of court. Legal set-off does not require that there be any connection between the claim and the cross-claim. However, those claims must be liquidated and due. The claim and the cross-claim must also be mutual claims.

Legal set-off can sometimes apply in insolvency when the insolvency set-off provision does not apply. For example, where A has a claim for costs provable in B's bankruptcy. B has a damages claim against A for personal injury. B's claim does not vest, being excluded by statute. B could not rely upon insolvency set-off because the claim and cross-claim were not mutual. B relied instead upon legal set-off. The effect of the set-off was that the other creditors were better off because, until then, A's claim for costs ranked for a dividend in B's bankruptcy, which would have reduced the amount available for the other creditors (these are the facts taken from the Australian case of *Davies* v. *Gertig* ((No 2) [2002] SASC 257)).

Equitable set-off

Equitable set-off refers to a type of set-off developed independently by the court of equity. Originally it arose where the defendant could show that the demand of the claimant was 'impeached.' This would typically occur when there were cross-claims arising from a contract and it was inequitable for the claimant to insist on his terms without giving credit for any balance due to the defendant. However, more recently, it has been suggested that equitable set-off is available whenever the cross-claim arises out of the same contract or is closely related to the claim (*Geldof*

Metaalconstructie NV v. *Simon Carves Ltd* [2010] EWCA Civ 667.)

Though the cross-claim does not need to be liquidated and of known amount, the claim and the cross-claim must be mutual (in this jurisdiction). The prevailing view is that equitable set-off is a substantive defence, but it does not extinguish either claim or cross-claim until judgment.

Does insolvency set-off displace equitable set-off? On a very narrow view, if insolvency set-off applies then equitable set-off cannot apply at the same time.

The wider question is when an insolvency set-off claim fails, can an equitable set-off arise in its place?

This issue arose in the recent important Australian decision, *Hamersley* v. *Forge* [2018] WASCA 163. The Court of Appeal had been asked to consider that if the insolvency set-off provision did not apply, it nevertheless had the effect of automatically ousting any other form of set-off. The court noted the 'potential vitality' of equitable set-off, notwithstanding the insolvency of one of the parties. The starting point was *Ex Parte Stephens* ((1805) 32 ER 996). S had instructed her bankers to sell some annuities and invest the proceeds. They carried out the sale but kept the proceeds for themselves, without informing S. Later, S's brother, J, borrowed £1,000 from the bankers on the security of a joint and several promissory note given by S and J. When the bankers went into bankruptcy, the trustees in bankruptcy sued J on the note. J could not rely upon an insolvency set-off because J did not have a claim against the bankers. S had a claim but was not being sued on the note. Note that at that time, insolvency set-off was not considered to be automatic and self-executing, otherwise S could have relied upon insolvency set-off without waiting to be sued.

"The wider question is when an insolvency set-off claim fails, can an equitable set-off arise in its place?"

S and J brought proceedings claiming that S be at liberty to set-off what was due to her against what was due on the note. Lord Eldon LC made the order.

In *Hamersley*, the Court of Appeal took the view that the concealment of the fact that S was a creditor gave rise to an equity that prevented the bankers from suing S on the note. S did not lose that equity when the bankers went into insolvency. This was not an equitable set-off in the strict technical sense, but an example of equity being interposed in the action at law brought against J. Nevertheless it does strongly suggest that insolvency set-off cannot be exclusive of any other set-off where the provisions of the set-off section have not been met.

Competing set-offs

If a set-off is at issue between two parties, one of whom is in insolvency, the IP will need to know whether insolvency set-off applies in accordance with the insolvency set-off provision. This can be a difficult enquiry. Consider, for example, the complexity arising within the wave of mis-selling claims against banks. The banks were creditors in the insolvencies but obliged to pay compensation for having mis-sold the financial products that caused the insolvencies. Some banks relied upon insolvency set-off to reduce their liability to pay compensation. Other banks relied upon their security to recover the compensation. Set-off and the role played by security is a live academic debate, with conflicting authorities on this point too. Similarly, a third party may have acquired an interest in one of the claims by way of an assignment. The assignee and the cross-claimant will both want to know whether set-off survives the assignment.

Set-off has been likened to the Hydra of Greek mythology. The analogy is a good one because when one head is removed, another is still capable of attack. If the claim and/or the cross-claim fall outside of the insolvency set-off provision, then it should not be assumed that there will not be any other set-off. There might be a legal or equitable set-off either way, in other words in favour of the office-holder against him. This does not depend upon whether or not the set-off has been articulated as such. It may be 'inherent' and attached to the claim. There is a detailed body of law that attaches to this situation too and advice should be sought. ◻

"Set-off has been likened to the Hydra of Greek mythology. The analogy is a good one because when one head is removed, another is still capable of attack."

For further information see 'Is Insolvency Set-off an Exclusive Code?' by the same author in *Butterworths Journal of International Banking and Financial Law*, March 2019.

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Mining for returns: a crypto-exchange administration

Allister Manson and **Nicholas Parton** examine the administration of the Cubits cryptocurrency exchange following its catastrophic €35m loss in February 2018.

Bitcoin (BTC) is officially ten years old this year, and is the world's most prolific and established cryptocurrency. Over the last decade, BTC has repeatedly defied its doubters and despite a string of setbacks, from Mt Gox in 2014 to Quadriga earlier this year, nothing has so far managed to derail it.

The simplest way to acquire BTC is to buy it on a BTC exchange, such as Coinbase or Binance. Once you've passed the anti-money laundering (AML) and know your customer (KYC) checks, you will be allowed to deposit cash at your chosen exchange and the exchange will convert that into BTC (or other cryptocurrency of your choice). Most exchanges also offer to store your BTC for you in a personal wallet (more of that later).

The growth of Cubits

Dooga Ltd, trading as Cubits, was a BTC Exchange, trading platform and storage facility – and became one of the fastest-growing platforms in Europe, following its launch in 2015. Its clients comprised both corporates and individuals. The trading platform allowed customers to buy, sell and trade BTC.

However, not content simply to grapple with the risk profile and volatility of BTC itself, Cubits decided to specialise in catering for the online gambling industry. Cubits provided a very fast and smooth BTC conversion service to up to 500 different online gambling platforms, enabling their clients to quickly convert their BTC into cash for betting purposes.

Cubits' technical operations were based in Germany, where its technical team were predominantly located, whereas its executive C-suite employees were predominantly located in Malta, a destination that is actively courting blockchain-based businesses. None of the employees supporting the business were employed directly by Dooga Ltd.

By mid-December 2017, when the BTC price was circa $20,000 and trading volumes were at record highs, Cubits was profiting handsomely from the 100,000 individual clients and 5,000 corporate clients that it was servicing.

> "It is absolutely essential to get to grips with the technical aspects of these types of assignment as early as possible, using external consultants if necessary."

The alleged fraud

In February 2018, the accounts of three Chinese users were compromised. The three customers had, in the days leading up to the alleged fraud, amassed €27m worth of BTC in their accounts. Their trading patterns were atypical, and they had not initiated the two-factor authentication security protocol recommended by Cubits. Their passwords were changed immediately prior to almost all the BTC being removed.

The Chinese customers had transferred the money to purchase the BTC via a well-known third-party payment service, who were Cubits' main payment provider in Asia. It is alleged that the payment provider, on hearing the allegations of its customers being hacked, purportedly returned their funds. The money for the BTC was never remitted to Cubits and, worse still, the BTC had gone.

The payment provider subsequently refused to honour the BTC purchased and some €7m of outstanding amounts owed to Cubits for unrelated BTC transactions. Faced with serious liquidity issues, Cubits' management employed forensic investigators and local lawyers to help them recover the missing assets.

The results were fruitless, and only served to worsen the company's liquidity problems. In December 2018, some ten months later, Steven Parker and Trevor Binyon, of Opus Restructuring & Insolvency, were appointed joint administrators and Opus Pear Tree was instructed to conduct a forensic investigation into the fraud.

Forensic challenges of crypto

What do you do when you're faced with an alleged fraud concerning the loss of €35m worth of BTC when the former staff have scattered and certain management isn't cooperating?

- Firstly, we recommend setting up a system for third parties to provide relevant information, while giving them the option to remain anonymous.

- Secondly, we recommend piecing together a picture of those occupying key positions within the business, identifying those who are uncooperative and those aligned to them.
- Finally, we recommend working closely with former employees to gather as much information as possible about the inner workings of the business.

BTC tracing – where to start?

Frustrated by the lack of cooperation from certain former staff and management, who had not given the administrators access to the transactional records or the keys to the company's crypto wallet, the forensic team sought to piece together the transactional history of the Cubits' wallet from public sources.

The team was able to verify BTC transactions from the blockchain (a centralised repository of all historic BTC transactions, globally). However, without the customer identifying information, it was not possible to decipher which transactions belonged to whom. Several specialist cyber investigators were hired to work hand-in-hand with its own forensic accountants. Using proprietary software, the team was now able to trace the BTC allegedly stolen in multiple frauds committed against the company, as well as trace BTC that left the wallet in the lead-up to the administration.

The forensics team had encountered a disproportionate number of BTC transactions being sent through 'tumblers/mixers' – essentially money laundering services for BTC – to exchanges. Exchanges are, on the whole, not easy to communicate with and some actively encourage an aura of mystique.

The forensic team worked alongside the administrators' legal advisers or law enforcement agencies (depending on which stream of BTC being traced). The team made requests to the exchanges in conjunction with the tracing reports and evidence our forensic accountants had produced to reveal the identity of the account holders that had received the BTC.

The exchanges also revealed whether the account-holder had any funds remaining, or if the BTC was transferred onwards in its cryptocurrency state. If this was the case, the forensic team resumed the tracing until it hit another exchange/known account; or, if the BTC had been converted into FIAT, they began the more 'vanilla' asset tracing and recovery exercises.

Lack of transactional data

One of the most helpful factors in situations of insolvency is that the company's former suppliers still want to receive payment. So, if you have no accurate information as to where servers are located and no one will provide this information, you can wait. The company's former suppliers will likely get in touch with you once they begin chasing their debtors. This can lead to ransom payments, but with careful management and considered negotiation these can be often be mitigated. Once resolved, you're able to gather the data and proceed with the investigation and recovery of assets.

Insolvency learning points

- It is absolutely essential to get to grips with the technical aspects of these types of assignment as early as possible, using external consultants if necessary: to use the jargon of the tech world, these types of business are at the 'bleeding edge' of technology and modern techniques for identifying and securing assets need to be applied.
- With that in mind, ensuring that you have a team that understands the systems and is able to access them is of critical importance: obtain and update online bank details, logins and passwords, access codes and secret keys on day one.
- Be mindful of the potential value of intellectual property and software, particularly in cutting-edge industries. Employ advanced techniques to ensure the intellectual property is captured and retained.
- Actively seek out intelligence to identify potential strategic allies and then work to develop positive relationships with the contacts identified.
- Be mindful that the very status of BTC as an asset or property has still yet to be comprehensively defined by the English courts.

Similarly, we were able to identify over 30 different account-providers worldwide, including some in territories where the company had never had any customers. The administrators have been able to recover €1.4m from accounts based all over the world and this process is still ongoing.

Administrators can also utilise section 236 orders in order to compel the company's former officers and employees to assist them, either in the provision of information or in the recovery of assets.

Other bitcoin challenges

One interesting feature of Cubits' BTC investors, which seems to be a feature of other insolvencies involving cryptocurrency, is their attachment to what they perceive to be 'their' bitcoins. Possibly due to the highly traceable nature of the asset class, individual creditors often talk in terms of getting their BTC 'back', rather than monetary distribution. This is not currently possible under insolvency legislation – claims for lost BTC in previous insolvencies have been calculated using the BTC price at the date of administration and have been eligible for a monetary distribution *pari passu* with other unsecured creditors.

Under English law, BTC is neither property that a party can take physical possession of, nor does it create a property right that can only be obtained or enforced through legal action because it is intangible in nature, being either information or data, and numerous English authorities have affirmed that information or data is not property.

However, the recent case of *Liam David Robertson* v. *Persons Unknown*, is helpful in that the Commercial Court granted an asset preservation order over more than £1m of bitcoin stolen in a spear phishing attack, clearly deeming the BTC to be assets. Indeed, in an insolvency context, BTC is more likely to fall within a debtor's property, as the definition of property in insolvency is extremely wide: however, it is important to stress that its status has not yet been properly defined.

In its judgment in *B2C2* v. *Quoine Pty* (2019), the Singaporean court found that proprietary claims may be made against BTC, so it will be interesting to see how this plays out in this jurisdiction.

The forensic team conducted a proprietary claim analysis on the cash held by Cubits at the date of administration, but given the lack of customer identifying information for BTC transactions, and the administrators' lack of control over the company's BTC wallet(s), it has not yet been possible to assess whether any potential proprietary claims on the BTC held by Cubits at the date of administration will be deemed valid under the law.

This may prove to be an interesting debate, as the claims of creditors with highly traceable digital assets are set against the stark reality that the company did not segregate its clients' BTC into separate 'wallets' but instead ran a sole, company-wide wallet: in effect, mixing all their investors' BTC together.

The future of cryptocurrency?

The restructuring profession is likely to face more and more of these types of cases and we hope that the advanced asset tracing and recovery techniques that we have employed pave the way for others to follow.

Simon Ridpath, Jason Freedman and Aziz Abdul of Charles Russell Speechlys LLP contributed to this article.

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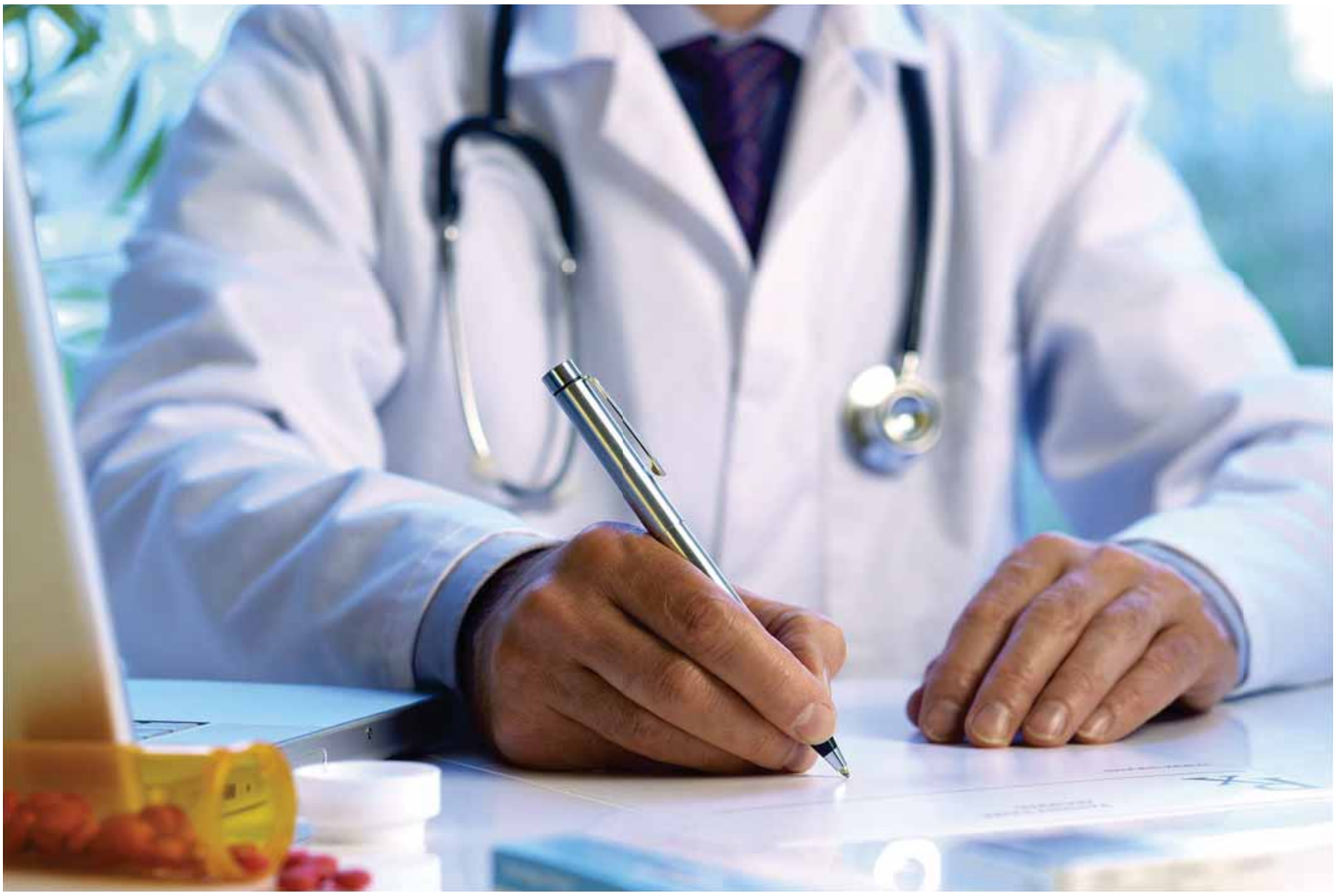

An investigation – not what the doctor ordered?

Alyson Reilly and **Nora Wannagat** examine a recent ruling where the subject of a s236 investigation tried to adjourn on medical grounds.

Is a handful of doctors' notes enough to temporarily frustrate the powers of the Insolvency Act 1986 and avoid a court visit? One former shadow director and subject of a s236 application gambled that it was, but the court took a very different view. Below we look at *Paul Atkinson and Glyn Mummery* v. *Sanjiv Varma* (Unreported, 15 April 2019) and what factors are taken into consideration when an application for a medical adjournment is made for a private examination.

Case background

The joint liquidators of an insolvent company had applied for a private examination under s236 Insolvency Act 1986 of the company's (on the joint liquidators' case) former *de facto* or shadow director Sanjiv Varma. He was to be questioned about his suspected involvement in the misapplication of company funds in the sum of £7m. The private examination was listed for 16 April 2019. However, on 11 April, Varma applied for an adjournment on medical grounds. He said that he had been living with diabetes for 25 years. In addition to blurry vision, he claimed was experiencing high blood pressure and chest pains. Varma's application was first heard on 12 April 2019 and then adjourned, allowing him the opportunity to further substantiate his medical evidence. On 15 April 2019 the hearing of his application resumed. He relied on two letters written by his GP, stating that the symptoms were caused by stress and recommending 'complete bed rest' for a week. He also relied on a letter from a cardiologist, who briefly explained the symptoms, Varma's heart rate and blood pressure, and that further tests had been ordered. It also recommended that he should avoid stress, adding that he should avoid court appearances or 'interactions with lawyers'.

> "There is, to date, no reported case on medical adjournments of private examinations."

The judgement on medical adjournments

Varma's application was dismissed, as the evidence he had provided was deemed insufficient.

There is, to date, no reported case on medical adjournments of private examinations. In exercising its discretion, the court applied the general principles on medical adjournments, as set out by Warby J in *Decker* v. *Hopcraft* [2015] EWHC 1170 (QB), [21]-[31]. In particular, these require careful scrutiny of the medical evidence. The court must also consider reasonable accommodations that could enable the applicant to participate in the hearing, as well as the nature of the hearing, the issues before the court, and the role of the applicant.

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The medical evidence provided by Varma fell short of what was required in *Decker* v. *Hopcraft*, which gave guidance as follows:

Where a litigant in person makes an application to adjourn on medical grounds for the first time, the court should be slow to dismiss this application. However, there are qualifications to this:

- The court has discretion, and no one can force the decision on it.
- The court must scrutinise the medical evidence before it carefully. The evidence must identify the medical attendant and give details of his familiarity with the patient's medical condition. It should detail all recent consultations. It must identify not only what the patient's medical condition is, but also which features of that condition prevent participation in the hearing process. A patient's inability to work does not automatically mean they cannot attend court.
- A recent prognosis is required.
- The evidence should 'give the court some confidence that what is being expressed is an independent opinion after a proper examination'.
- Even if it meets these criteria, it is treated as expert evidence and no judge is bound to accept expert evidence.

> In the present case, the medical evidence simply consisted of a recommendation. No serious risk to Varma had been properly identified.

- There is not always a straightforward yes or no answer to whether a litigant can participate in the hearing. Reasonable accommodations may enable someone who is in ill health to participate effectively. The court needs evidence on whether or not this can be done.
- The question of whether effective participation is possible depends not only on the medical condition of the applicant, but also on the nature of the hearing, the nature of the issues before the court, and the role of the party concerned.
- Where it appears to the court that one side is bound to succeed, it is less likely that proceeding will represent an injustice to the litigant.

In the present case, the medical evidence simply consisted of a recommendation. No serious risk to Varma had been properly identified. Further, suitable accommodations could be made for him; he would have the opportunity to monitor his blood sugar, take regular breaks and consider the questions put to him calmly.

Lessons for IPs

Private examinations can be an extremely useful (and comparatively cost-effective) information-gathering tool. However, where the examinee is concerned that their answers may unearth some wrongdoing on their part, they will have a strong motivation to avoid attending. IPs should be alert to the possibility that such an examinee may apply for a medical adjournment, sometimes on spurious grounds.

One of the factors in *Decker* v. *Hopcraft* is the nature of the hearing. Private examinations differ from many other hearings in that they may be conducted without any underlying litigation, and the examinee is compelled to participate in the process in a way that ordinary civil litigants are not. Non-attendance is a contempt of court and may lead to a custodial sentence: *Griffin* v. *Robinson* [2013] EWHC 4624 (Ch). These factors may militate in favour of granting an application for a medical adjournment more readily.

In resisting such an application, IPs should pay particular attention to the quality of the medical evidence and the requirements in *Decker* v. *Hopcraft*. Mere recommendations to avoid stress will be insufficient, even where they specifically refer to court appearances. By their very nature, it is unavoidable that private examinations are likely to be stressful for participants (especially where there is a suspicion of wrongdoing on their part). IPs

> IPs should pay particular attention to the quality of the medical evidence and the requirements in *Decker* v. *Hopcraft*.

should also be ready to suggest accommodations that can be made to reduce any medical risk to the examinee. The examination itself will be overseen by the judge and this, in itself, is a safeguard to the examinee's wellbeing. It is helpful, in resisting an application, if the IP can show the court that information sought must be obtained sooner rather than later. The court is likely to engage in a balancing exercise. In the present case, the court was concerned not only that the symptoms were largely 'self-reported' but also that the examinee ought to show that (in the case of diabetic symptoms) the illness was not caused by his own failure to manage his condition.

Where, on the other hand, the examinee has sufficient evidence to meet the *Decker* criteria and time is not of the essence, an adjournment should be considered to save time and costs.

Finally, where an examinee has attempted to avoid the private examination on spurious grounds, IPs may be entitled to seek costs against him. In the present case, after his application for an adjournment failed, Varma admitted himself as a walk-in patient to the local hospital the next day (the day of the private examination itself). By default, an order was made adjourning the examination and requiring him to provide evidence showing his condition was not self-induced and genuinely precluded him from attending the examination. When Varma failed to provide satisfactory medical evidence as ordered, a cost order was made against him. □

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Mediation matters

Carolyn Jones and **Mena Halton** consider the way in which mediation works as a form of dispute resolution in the commercial sphere.

Mediation is a form of alternative dispute resolution (ADR) – alternative, that is, to a trial in a civil court before a judge. There are other forms, including arbitration and expert determination, and all are well established in the UK. Of these three forms of ADR, mediation is the most flexible and party-driven process.

Traditional definitions of commercial mediation all include the same key ingredients. Mediation is voluntary. No-one can force the parties to come to mediation or to remain at a mediation session if they do not wish to be there. Judges in proceedings before the courts of England & Wales have the power to stay a case for mediation but not to order a party to participate. Such an order can look like a strong coercion, but the principle remains the same. Mediation is consensual. The parties need to agree on their choice of mediator, the venue for the mediation, the terms on which the mediation will proceed and how the process will run on the day. Once the mediator has been selected, the parties may wish the mediator to steer the process more or less strongly, and any successful session will need a degree of guidance to stay on track and achieve the best results. However, the mediator cannot and should not dictate.

> “Mediation is voluntary. No-one can force the parties to come to mediation or to remain at a mediation session if they do not wish to be there.”

Mediation is confidential and non-binding and is conducted on a ‘without prejudice’ basis, at least until a settlement is reached, so that the parties can speak freely, explore options and explain their concerns without fear of retribution or of prejudicing their strict legal entitlements. Most importantly, the mediator is chosen because he or she is an independent, neutral third party, to whom the parties can disclose sensitive and relevant information on a strictly confidential basis. Mediation works, principally because the mediator is put in a position of receiving such information from both sides, which can reveal the barriers to settlement and, accordingly, possible ways around those blockages.

Emphasis is usually placed on the need for the discussions to take place in good faith. Many forms of mediation agreement provide expressly for the mediator to terminate the session if they come to the conclusion that one or other of the parties is acting otherwise.

The standard form of mediation is facilitative, in which the mediator does not offer a view on the right commercial settlement or the correct legal analysis of the dispute. Increasingly, however, parties do prefer a more evaluative style and can request this expressly. They should be aware however, that this can cut both ways: parties sometimes ask for the mediator to take an evaluative approach when all they really want to hear is that the other side has a weak negotiating position or has adopted a poor stance in the discussions and that their own case is a sure-fire legal winner!

> The beauty of mediation is its flexibility and the way in which it can be applied and adapted to suit the dispute.

Mediation in insolvency disputes

The beauty of mediation is its flexibility and the way in which it can be applied and adapted to suit the dispute. Many IPs do in fact conduct mediations themselves, even if they do this very informally between stakeholders in a business failure. The introduction of a neutral third party, sometimes a fellow IP from a different firm, also happens without necessarily committing the parties to a more organised and structured mediation. However, there is no reason at all why an accredited mediator should not be called in far ahead of any threat of legal action. For instance, if terms are agreed for a sale, a wind-down or a rescue such as a company voluntary arrangement and the agreement starts to unravel, early intervention can prevent a total breakdown. More usually, mediation is deployed where litigation is threatened or instigated, as a means of saving costs and reaching a brisk conclusion. All that is required is that it is clear who needs to be involved and that the parties agree to try it.

Why should parties agree?

There are features of insolvency disputes that lend themselves especially amenable to mediation. Insolvency processes are often seriously challenging in terms of time and costs, so using an alternative form of dispute resolution that is quick and cost-effective can make a significant difference to the outcome of the whole case. IPs are often involved in a dispute for purely professional reasons. They are acting as the bankrupt/company's agent in bringing a claim to which the insolvent party is entitled or pursuing a claim as office-holder because the interests of creditors or public policy require them to do so. They have no personal axe to grind and they don't wish to get too closely involved. However, litigation is a creature that has no respect for such niceties and once its tentacles wrap around a dispute, it is all too easy for the IP to feel that the conflict has become personal. Mediation can help narrow the issues, de-personalise the dispute and, ideally, bring it to a conclusion even before that stage is reached. Attempting mediation is the best possible answer to the charge (often levied, frequently unfair) that the IP is running a case for fee income. Barriers to settlement also frequently include a significant power imbalance or an information gap. Insolvency disputes are especially prone to these and mediation, properly conducted, is a great way of removing those blockages.

Flexibility and negotiation

Mediation has proven to be conducive to settlement. The flexibility of mediation works well in insolvency litigation. Parties who are not party to the litigation can attend and contribute; for example on an assigned wrongful trading claim, participation by the IP (who has investigated the matters giving rise to the claim), together with the asignee and the legal team, is invaluable to negotiated settlement. Often, the claims are against the former directors of the company and their D&O insurers may wish to attend.

> It is all too easy for the IP to feel that the conflict has become personal. Mediation can help narrow the issues, de-personalise the dispute and, ideally, bring it to a conclusion even before that stage is reached.

Former directors who have fallen out will have separate legal representation and responses to the claims. Mediation can accommodate a number of camps and, where relations have broken down, the mediator can work to bring all parties to agreement. As there is no set format, the parties can come together in a plenary session at the outset, thereafter there can be lawyer-only or principal-only sessions as the parties prefer. On occasion, the parties may not meet at all during the mediation, but this is not a bar to effective mediation.

> Regardless of the relevance to the claims, it is important to listen to what the other party has to say.

Mediation provides an opportunity for the parties to speak openly. Former directors faced with claims can feel aggrieved and wish to tell their story in their own words. Regardless of the relevance to the claims, it is important to listen to what the other party has to say. Mediation works for a variety of reasons, not all of them commercial – one often cited is that the parties have been able to air their grievances fully and feel really heard, possibly for the first time.

The process ensures that all parties consider fully the strengths and weaknesses of their relevant positions and the costs that will be incurred if settlement is not reached. The parties can strength test points with the other side through the mediator. The reality of the situation is brought into focus.

In terms of the commercial realities, if a defendant or proposed defendant agrees to settlement terms following a mediation, he has agreed to obligations that he can meet and the likelihood is that he will pay the settlement sum. Mediation significantly increases the prospects of successful dispute resolution while reducing costs and litigation risk. □

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Mis-selling, misfeasance and insolvency

Mark Beaumont explores methods of recovery from mis-selling and misfeasance.

Misfeasance in one dictionary is defined as: 'a transgression, especially the wrongful exercise of lawful authority.' Synonyms: *dishonesty, dishonest dealings, unscrupulousness, deceit, deception, duplicity, double-dealing, fraud, fraudulence, misconduct, lawbreaking, crime, criminality*.

Of course, under the Companies Act 2006, directors can be held personally liable for losses caused to creditors where misfeasance has occurred: if the company fails, an IP can investigate the directors' actions leading up to the time of insolvency.

Many misfeasance claims are pursued against errant directors, with significant funds returned to creditors as a result. However, there are a growing number of financial businesses failing and not all IPs will be familiar with every way that funds can be recovered.

> "Many misfeasance claims are pursued against errant directors, with significant funds returned to creditors as a result."

Compensation and regulation

There are businesses regulated by the Financial Conduct Authority that have failed after advising members of the public to invest in off-plan property schemes, often overseas. Many of these schemes have failed but, as the property investments were unregulated, there may be limited options for IPs wishing to investigate. However, despite the investments being unregulated, the law says that the advice itself *was* regulated. This means a claim for compensation for bad investment advice can be successful if brought against the independent financial advisory firm.

When claims are upheld by the Financial Ombudsman Service then the company is required under law to pay compensation to the claimant. Given the circumstances, professional indemnity insurers almost never cover negligent investment advice and that can mean the outcome for the firm is insolvency.

> "The IP should consider whether misfeasance can be attributed to directors of that company and therefore create a route to financial recovery."

Until recently, individually regulated persons were not held responsible for financial mis-selling in the UK, but the regulated companies were. This allowed directors to start new financial advice firms in the knowledge that it was permissible and that no action would be taken against them personally for their previous negligence. However, if that negligence directly caused professional indemnity insurance to be withdrawn, and ultimately for the business to fail, could that be misfeasance?

Financial services regulations penalise negligent advice to invest in unregulated, high-risk schemes but where this leads directly to insolvency and creditors lose out, the IP should consider whether misfeasance can be attributed to directors of that company and therefore create a route to financial recovery.

Bringing claims for misfeasance (or anything else) will often require specialist legal advice and, potentially, funding for lawyers and disbursements or after-the-event (ATE) legal expenses insurance to protect from adverse costs risk. Annecto Legal provides access to the relevant expertise and products to be able to pursue these and other cases cost-effectively.

There are scores of funding and insurance markets active in the UK litigation field and Annecto Legal assists in navigating this fast-moving market, as well as assisting with the preparation of applications and discussing the various products and their pros and cons. Annecto's independent view can be helpful for IPs that want to make sure they are reaching a wide market to secure the best terms.

Cover the costs

Whether seeking a small level of adverse costs cover to try and encourage a defendant to settle or seeking full funding and ATE for more complex cases, there is a large market for both funding and ATE in the UK. Annecto Legal assists IPs and their lawyers in identifying the right markets for their case and assists in preparing the case for underwriters to ensure quick turnaround.

> "Annecto Legal assists IPs and their lawyers in identifying the right markets for their case and assists in preparing the case for underwriters to ensure quick turnaround."

If you're interested in finding out more about financial mis-selling claims or other potential litigation assets in insolvent businesses, please do make contact: we are happy to discuss the various different funding and insurance models available to practitioners and we also offer training sessions to firms that wish to better understand the options available in the market, and to best make use of them.

MARK BEAUMONT is co-founder of Annecto Legal Ltd, a national broker of after-the-event (ATE) legal expenses insurance and a wide range of funding for litigation and arbitration claims. Annecto is happy to assist with smaller claims under £100k as well as mid-market, large-scale and complex cases. Contact Annecto Legal on 0800 612 6587 or Mark Beaumont on mark.beaumont@annectolegal.co.uk or 07730 217 643.

Local initiatives, national challenges

Alastair Beveridge, president of INSOL Europe, introduces a new regular column with a round-up of recent news and future initiatives.

One of the key outcomes of our recent strategic review was the introduction of a development committee, designed to help with both increasing membership but also for us to be a bit more bespoke with our members in their own countries. The idea was that over time we would appoint INSOL Europe country co-ordinators for each country and that specific plans for each country would be developed. Candidates for a number of countries have been sourced and approved and plans for those countries are currently being developed. We are looking forward to supporting those plans as we deliver on our Taskforce 2025 plan to put this initiative at the centre of our long-term agenda.

> "In the past, restructuring and insolvency activity has been closely tied to the credit cycle. Today, that seems to be far less true."

INSOL Europe in Bern

Not long after the development committee was approved, Thomas Bauer, our council representative for Switzerland, called me with a request. He told me that the Swiss Association for Insolvency Law (SchKG-Verienigung Association LP), which he was then the president of, was holding its annual meeting in Bern in February and he thought it would be a good opportunity for INSOL Europe to be presented to his Swiss constituents. I agreed to go and was privileged to attend a meeting of about 60 members, including several judges. The hospitality was excellent, and I was able to catch up with Daniel Staehelin (INSOL Europe president in 2012), who had founded the Swiss association some 20 years ago, as well as Sabina Schellenberg (who was on the council for the young members' group until October 2018). I also met new colleagues, some of whom I hope will join INSOL Europe.

The event had an innovative panel session in which one of the local lawyers asked three judges to give views on the issue of whether or not judges should assist in any way individual bankrupt debtors who were unable to afford legal counsel or understand the process they were going through. This resulted in a lively philosophical discussion with lots of interaction, a bit of humour and good-natured debate – if I had spoken German and understood what was being said it would have been even better. Thanks again Thomas for the invitation, hospitality and the chocolate and biscuits (my kids loved them).

On a more serious note this is exactly what the organisation wants to do more of – support local initiatives, to make more people aware of what our organisation does and how it can help but also to ensure we are close to the key insolvency and restructuring issues and debates which go on in every country every day.

Our country co-ordinators for the UK are Frances Coulson (fcoulson@moonbeever.com) and David Rubin (david@drpartners.com) who are ready and waiting for your suggestions.

Future challenges

Professionals in our field have a reputation for being focused on the timing of the next recession, and for good reason. In the past, restructuring and insolvency activity has been closely tied to the credit cycle. Today, that seems to be far less true. The cycle still matters, but activity is increasingly driven by a steady drumbeat of disruption, even when overall macroeconomic factors are strong. New technology, rapid-fire shifts in consumer behaviour, changing regulation, potential trade barriers and tectonic changes like Brexit all threaten companies and entire sectors.

My firm does an annual survey of experts in the field of restructuring. We ask over 300 lawyers, bankers, advisers and others globally about what they expect to see and why. Our most recent survey showed that the three sectors where it was expected there would be the most challenges are:

- Retail: driven by changes in consumer behaviour, economic challenges and disruption.
- Oil & Gas: although the vast majority of those surveyed had last year predicted oil being above $55 per barrel, it has hovered around $50 per barrel and this creates continued challenges throughout the value chain.
- Automotive: here it is a combination of consumer preferences, technology changes and China.

It appears therefore that disruption is here to stay and will challenge us all. If we have experience of specific industries or sectors we will be best placed to help and deliver value to our clients' challenges.

Annual Congress 2019

Our next Annual Congress will be held in the wonderful city of Copenhagen from 26–29 September, which is now just a few weeks away. Registrations are still open (online at: **www.insol-europe.org/events/event-details/198**) and we encourage you to join us to debate *'(Un)necessary preventive restructuring frameworks: where are the limits?'*. We are also preparing our dazzling gala dinner and show at the famous 19th century 'Wallman's Circus Building', another reason not to miss our iconic annual event.

> "If we have experience of specific industries or sectors we will be best placed to help and deliver value to our clients' challenges."

*For more information about INSOL Europe, visit: **www.insol-europe.org**.*

ALASTAIR BEVERIDGE is president of INSOL Europe and a managing director at AlixPartners.

Preference, policy and the press

James Jeffreys and **Stuart McBride** explain how R3's Policy, Press and Public Affairs team is fighting for members' voices to be heard.

R3's Policy, Press and Public Affairs team has had a busy few weeks. The change in government has meant we have had an array of new ministers to write to and brief on key insolvency issues, and a number of announcements have been made about a range of policy issues that will affect the insolvency profession.

Crown preference is one. Updates to the most recent round of proposals, which will restore HMRC's preferential creditor status in insolvencies, were included in the draft Finance Bill, alongside plans to tackle those in business who attempt to avoid their tax liabilities through the misuse of corporate insolvency procedures.

Within the Crown preference proposals was a win for R3: the previous plans to include tax penalties within HMRC's preferential claim were dropped. However, further concessions are needed. In its current form, this policy will damage business recovery, business funding, and the Treasury's balance sheet.

Continuing the fight

We'll continue to campaign for these proposals to be dropped, or – at the very least – for tax debts eligible for a preferential claim to be capped in terms of age and existing floating charges to retain their priority status.

Both the press and the public affairs team have been busy making sure the views of R3 and its members are heard on this issue. We've written to key MPs from all parties and held a roundtable event, which was kindly sponsored by Squire Patton Boggs, to allow a range of stakeholders from the profession, the business community, banks, other lenders and key creditor groups (as well as representatives from HMRC) to discuss the government's proposals. We have a number of face-to-face briefings with parliamentarians coming up, too.

On the media side of things, we were quoted in a piece on the Crown preference proposals in *The Times*, and R3 president Duncan Swift met journalists from *The Sunday Times* and the *Financial Times* to brief them on the proposals and their potential consequences for business rescue, business finance and the economy.

This work will continue as the Finance Bill begins its legislative journey through the House. Feedback on elements of the bill need to be submitted by September so they can be reviewed over the autumn of this year and the spring of 2020, before the bill is ratified and receives royal assent later in the year.

> **Within the Crown preference proposals was a win for R3: the previous plans to include tax penalties within HMRC's preferential claim were dropped.**

Reviewing insolvency regulation

Another key policy area that's been front of mind for the PPP team is the government's plans to review the UK's insolvency regulatory framework.

This review covers the part of the Small Business, Enterprise and Employment Act 2015 that allows the secretary of state to create a single, independent regulatory body in place of the current system for IPs. This power expires in 2022, and the government is looking to determine whether it should consult on a move to a single regulator, or consider other improvements to the regulatory framework.

This is a crucial issue for the profession, and the government has been clear it is willing to listen to feedback before it takes the next step. The PPP team will be responding to the consultation and working with a range of parties in the meantime and, as Duncan mentions in his column, we'll be running member workshops to get your views on what future regulation may look like, so hopefully we'll be seeing (and hearing) some of you very, very soon.

Power for Companies House?

After the ongoing challenges of the Crown preference proposals, the announcement that the government would consult on plans to strengthen the role and powers of Companies House was welcome. We've long called for Companies House to have greater powers to prevent people becoming company directors who shouldn't, and believe the requirement to provide formal proof of identity would go a long way towards reducing the number of corporate entities used as vehicles to mask fraudulent activity.

The PPP team has submitted a response to this consultation and arranged for R3 members to meet BEIS officials about the proposals in July – an encouraging meeting, as they came away with an understanding of our profession and how it uses the data from Companies House. We'll also continue to brief parliamentarians on this issue while the government is reviewing submissions prior to announcing the next steps.

R3 in the media

On the wider press side of things, a mixture of high profile insolvencies, requests for comments and briefings on issues like debt relief orders (DROs), British Steel, pre-packs, Crown preference and the most recent insolvency statistics, has meant that there has been lots of opportunity for R3 to share members' insights and to help promote the insolvency profession and the role it plays in personal and corporate financial recovery.

R3 has been quoted in a number of pieces in the national media over the late spring and early summer – including *The Guardian*, the *Daily Telegraph*, MailOnline, *The Times*, Reuters and the *Financial Times* – on a wide range of issues.

Our comments on the latest insolvency statistics were covered by the Press Association, *The Times*, *Scotland on Sunday* and *The Scotsman*, Reuters and the Guardian liveblog – and R3's technical director Caroline Sumner was interviewed on BBC Radio Four as part of a piece on DROs.

Looking ahead

R3 has progressed with its project on ethics in insolvency and restructuring (thanks to everyone who completed the survey), and this autumn will be kicking off research into the contribution of the profession to the UK economy.

JAMES JEFFREYS is public affairs manager at R3.

STUART MCBRIDE is communications manager at R3.

Records, risk and regulation – navigating AML

Antoniya Mercer offers a guide to risk, due diligence and reporting around anti-money laundering (AML) compliance.

Two years after the Money Laundering, Terrorist Funding and Transfer of Funds (Information on the Payer) Regulations 2017 (the AML regulations) came into force, AML is still a minefield for IPs at smaller firms, but they're not alone.

Last year, an assessment by the Office for Professional Body Anti-Money Laundering Supervision suggested that even professional body supervisors are still getting to grips with the provisions of the AML regulations. The assessment prompted the preparation of new AML strategies and remedial measures, which are likely to be felt throughout our profession.

Below, I've tried to outline some of the practical steps that should be taken around AML.

Handling the risks

The AML regulations require you to have systems and controls adequate for the size and complexity of your business, which enable you to assess the risk associated with clients, perform client due diligence, monitor existing clients, keep appropriate records and enable staff to make suspicious activity reports.

The policies, controls and procedures need to be a proportionate response to the actual AML risks that you consider relevant to your business, not ignoring low-risk clients, services or situations.

Do not be tempted to assume a tick-box approach. You need to take into account your experience and knowledge of different commercial environments and treat those of which you have no experience as normal to high risk, even if others treat them as low. Ensure you have controls in place to address risk arising from new client relationships and to monitor those relationships at regular intervals.

There are a set of simple questions that you can ask to help you assess the level of risk:

- Does the client or its beneficial owners have attributes known to be frequently used by money launderers or terrorist financiers?
- Do any of our services have attributes known to be used by money launderers or terrorist financiers?
- Are our clients established in countries that are known to be used by money launderers and terrorist financiers?
- Do our clients have substantial operations in sectors favoured by money launderers and terrorist financiers?
- Does the fact that I am not dealing with the client face to face pose a greater risk?

Document the process to show how you assess and seek to mitigate AML risk so that you can demonstrate how your risk assessment informed your policies and procedures.

Client due diligence

Your client due diligence should start with gathering information about the client's identity, their full name, date of birth and residential address. For corporates, this will include establishing the identity of the individuals who ultimately control the client.

An initial risk assessment must then be undertaken to reflect your view of the business relationship or the transaction. Consider whether to carry out standard, simplified or enhanced due diligence. Always carry out enhanced due diligence for a politically exposed person and ensure that you comply with sanctions, embargoes or restrictions imposed by the UN, UK or EU. Evidence will be required to verify the client identity from an independent authoritative source.

Client due diligence should normally be completed before entering into a business relationship or undertaking a transaction. Ongoing business relationships should be subject to due diligence procedures throughout their duration and on the occurrence of events such as change in beneficial ownership, the service provided, the client's business activity, or an increase in knowledge, suspicion or causes for concern.

You may rely on other members of the regulated sector to complete all or some of the client due diligence, but you should be aware that you will remain liable for inadequate client due diligence. You must still carry out risk assessment and ongoing monitoring. If you are asked to provide client due diligence you must ensure that the client is aware of the disclosure and has no objection to it.

If a prospective or existing client refuses to provide due diligence information and you are unable to obtain the necessary information from other sources, consideration should be given as to whether you should proceed with the work, or whether any existing relationship should be terminated. You should adopt a risk-based approach and consider making a suspicious activity report (SAR) to the National Crime Agency.

Suspicious activity reporting

You must have internal reporting procedures that enable your employees to disclose their knowledge or suspicion of money laundering and terrorist financing by making a SAR. Employees should be encouraged to exercise a healthy level of professional scepticism and judgment and, if in doubt, consult with the money laundering reporting officer. Sole practitioners with no employees have a duty to submit SARs directly to the National Crime Agency.

Record keeping

Records of client due diligence, business relationships and occasional transactions must be kept for five years and during that period they must be readily retrievable. Internal reports, suspicious activity reports and consent requests should also be kept for five years, as they would form the basis for a defence against an accusation of money laundering or terrorist financing but, as they do not form part of the working papers relating to client assignments, they should be kept separate.

Training and awareness

You should keep records of AML training given to employees, including the dates on which training was given, the individuals that received training and the results of assessments. You should create a culture in which employees are alert to the risks of money laundering and terrorist financing and adopt a risk-based approach to client due diligence. Employees should be able to apply a degree of legal and business knowledge reasonably expected from someone in their role and with their experience. □

More guidance can be found at **http://www.ccab.org.uk//documents/updated03072019AMLGuidance2018.pdf**.

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R3 Annual Conference

The end of May saw more than 250 insolvency and restructuring professionals descend on Northumberland's Slaley Hall for the 2019 R3 Annual Conference.

Coming at a time when the profession is very much in the spotlight, this year's conference provided an opportunity for R3 members to catch up with the latest trends, understand what's coming up on the horizon and raise concerns about issues affecting them.

A special mention to our keynote speakers. On the first day, BBC economics correspondent, Dharshini David, provided her thoughts on the future of the UK's economy and what it means for the profession. Our second keynote speaker, Debra Searle MBE, then provided a touching account of her 111-day lone-row across the Atlantic; she took us through her steps for staying positive, the psychological benefits of moving out of your comfort zone and the tips and tricks she uses to manage when she strays out of hers – subjects that we could all benefit from!

Thank you to all those who attended this year's conference, our speakers, the conference chair Duncan Swift, the venue staff and our sponsors.

We hope to see you all at next year's Annual Conference!

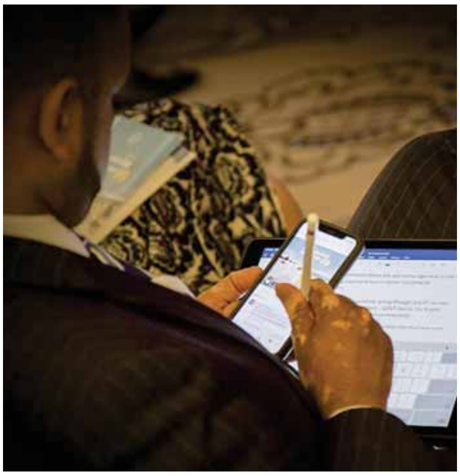
Read more about the conference in our R3 Thinks Blog over on ***www.r3.org.uk/r3-thinks****.*

Pinsent Masons' Nick Pike and RSM's Phillip Sykes bring delegates up to speed on ethical issues.

R3 president Duncan Swift, and R3 CEO Emma Lovell.

Delegates enjoying the Northumberland sunshine at the end of a packed first day.

R3 Education, Courses and Conferences co chair, Charles Turner.



The Annual Conference Gala Dinner.

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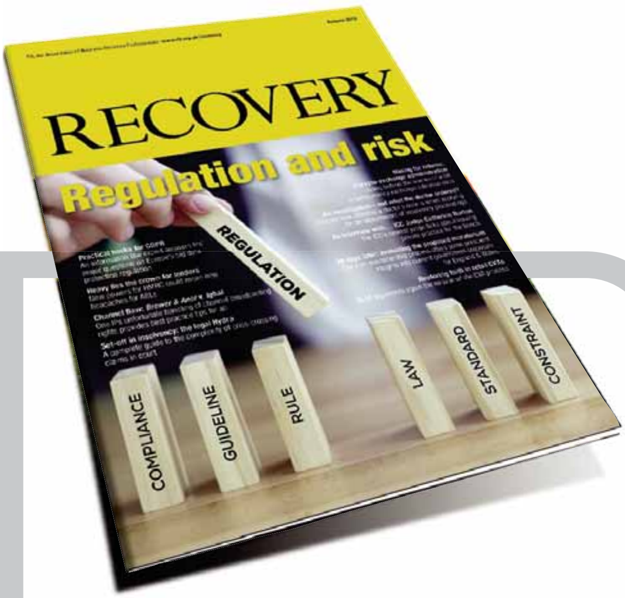

Tell them where you saw it…

Autumn edition 2019

An interview with…

newly appointed ICC Judge Catherine Burton

Former solicitor **Catherine Burton** reflects on a move from private practice to the judiciary.

Q Why did you decide to become an ICC Judge?

A Having spent a significant part of my career sharing key points from judgments with solicitors and IPs during conferences and training sessions, I'd been tempted to consider applying to become a judge for several years. However, the opportunities to do so – at least to become a specialist insolvency judge – are rare. The competition launched by the Judicial Appointments Commission (JAC) last year, just when my youngest daughter was due to go to university (enabling me to work much of the year in London) seemed too good to miss. I felt ready for a new challenge and was particularly tempted by the enlarged jurisdiction of the Insolvency and Companies Court judges. Following the creation of the Business and Property Court and the renaming of bankruptcy registrars to ICC judges, last year's new *Insolvency Practice Direction 2018* expanded the role of ICC judges, allowing us to make administration orders, most types of insolvency-related injunctions, to hear certain appeals and to appoint provisional liquidators. Almost all insolvency-related applications, including those affecting cross-border insolvencies, can now be heard by the ICC judges at the High Court in London and while I appreciated it was an ambitious aspiration, I felt compelled at least to apply.

Q How was the application and training process?

A I started my career as an insolvency litigator but over time, and particularly while raising my daughters, I spent less time in court and focused on supporting transactional and cross-border work. So before applying, I quietly shadowed the existing ICC judges to check first whether I thought I *could* do it and secondly whether I thought I'd enjoy the role. The JAC, an independent body, oversees all judicial appointments starting with a form where applicants must describe situations where they have demonstrated judicial competencies – the ability to process large amounts of information, to communicate effectively and to make decisions in challenging and complex situations. Detailed references were taken up and there was then an exam and interview before a panel comprising two non-legal, independent assessors and one judge. From shadowing to appointment, the process took just over a year.

Some of the modules offered by the Judicial College will be relevant, but due to the specialist nature of an ICC judge's work, most of my training has been 'on the job'. Following appointment, I undertook a further period shadowing colleagues who kindly permitted to join them in court, and since then, have been gradually working »

> "Before applying, I quietly shadowed the existing ICC judges to check first whether I thought I *could* do it and secondly whether I thought I'd enjoy the role."

Catherine Burton biography

- Catherine Burton preceded academic life by running a bar and restaurant in Portsmouth. Developing an interest in the often-colourful clientele led her initially to study psychology at university, which she later converted to law.
- During a gap year in Australia and Asia, Catherine worked as a paralegal at a large Australian law firm, where she assisted on an IT project taking computers into court for the first time, predominantly to help with large-scale discovery exercises.
- Despite an offer to qualify in Australia, she returned to undertake articles with Simmons & Simmons in London, qualifying during the recession in the early 90s, initially specialising in landlord and tenant insolvency litigation.
- She moved to northern England to work for Alsop Wilkinson, which later became DLA Piper. In December 2018, she was officially appointed an Insolvency and Companies Court judge by the Queen.

my way through the various types of application and trial which we have jurisdiction to hear.

Former Chief Registrar Baister was a solicitor too. Is there a balance between how many on the ICC bench are from solicitors' firms or the Bar?

The other judges are all former barristers, so I hope that my background provides some useful diversity for the team. I have not spent as much of my career in court, but I suspect that I have seen more of the day-to-day work of insolvency practitioners and the lawyers who work for them.

How have your first few months been in the role?

One of my concerns, pre-application, was how lonely I might find it, having always worked as part of a team. As a judge you are there to make decisions on your own – you often have the benefit of the arguments being expertly laid out by barristers but, ultimately, the decision is yours. Nobody wants to make the wrong decision, but in some situations, there simply is no right or wrong answer – all that is required is a decision. In others, it is important to remember that everyone makes mistakes. The law provides the safeguard of an appeal process. Most importantly for me, when determining why I should be so bold as to put myself up for a job making decisions that can have a profound effect on other people's lives, I know that whether I ultimately get it 'wrong' or 'right' I will always try my best to consider all the issues and to be as fair as possible.

> I hope that my background provides some useful diversity for the team.

There is no shortage of work for ICC judges. The challenge for the court as a whole is deploying its limited resources as efficiently as possible. We're fortunate now to be a team of six ICC judges, supported by some excellent clerks. For the past few years, the focus has shifted from personal insolvency to company work. As well as considering the types of insolvency-related applications that *RECOVERY's* readers would expect (transactions at an undervalue, challenges to VAs, directors' disqualification, injunctions, directions and cross-border recognition applications – to name just a few) our company list includes schemes of arrangement, cross-border mergers and reductions in capital, and we run four trial lists plus a popular interims list for urgent applications. That currently operates over five days each fortnight but it may be appropriate to expand it in future.

What have been the most surprising differences in moving from private practice to the bench?

Bearing in mind my concerns about the solitary nature of the role, I was delighted to discover how collegiate and supportive the ICC Judges are. We all sit on the same corridor and our doors are open most of the time. That goes for Chief ICC Judge Briggs in particular, who has been unfailingly supportive while I have been trying to learn the ropes.

One of the joys of the job, particularly when both sides provide a skeleton, is reading the first, from which the case is presented as a total slam dunk, but then moving to the second, where suddenly you see the other side of the story – knowing all the while that you'll have to decide which way to go.

Now that you're an impartial judge, you've had to give up your post on R3's General Technical Committee (GTC) after around 20 years. Could you tell us a little about your work there and what the GTC does?

I loved being a member of GTC. It meets six times a year with an agenda decided in advance – often legislative changes, draft SIPs and anything that can affect the profession, including liaising with subcommittees for HMRC, Scotland and Northern Ireland and the Smaller Practices Group. The committee provides technical support for R3's Policy and Public Affairs Team and represents the interests of its members by preparing responses to government consultations.

I often found that my view could be changed during the course of a meeting because of the opportunity to hear and understand different practitioners' experiences and views. It is a fantastic combination of skills around the table, with everyone working constructively together for the benefit of R3's members.

Could you tell us a little about your role at UNCITRAL, your view on cross-border insolvency work at the moment and how you see it changing post-Brexit (assuming it happens)?

At GTC I'd worked on a lot of legislative reform and was approached by Christine McCreath, then the Insolvency Service's delegate at UNCITRAL's Insolvency Working Group meetings. Christine's work was supported by the Service's in-house legal advisors and Irit Mevorach from Nottingham University, an outstanding academic advisor, but she was keen to swell the delegation with an 'in-practice' adviser.

It was an enormous honour to work with the delegation for five years. The Working Group met twice a year in New York and Vienna during which time it completed the third chapter of UNCITRAL's *Legislative Guide on Cross-Border Insolvency*, addressing the complex needs of corporate group enterprise insolvencies. Since then, and now going to the Commission for adoption, is a new, proposed Model Law for group insolvencies. It will be exciting, if the UK decides to adopt it, to have an opportunity one day to consider its effect as a member of the judiciary.

> I was delighted to discover how collegiate and supportive the ICC Judges are.

Obviously nobody knows what's going to happen following Brexit but I think it's fair to say we anticipate an increase in work, particularly applications from overseas office-holders for recognition in the UK. In our companies list we have already seen a phenomenal increase in solvent, cross-border merger applications: in a two-month period, we received 300 such applications. We are now collecting stats on our international work, which will enable us better to analyse the effect of Brexit if and when it happens.

What is it about the international side of the work that's appealing to you?

The majority of my work is based on the laws of England and Wales, which will always present challenges that I very much enjoy. However, particularly in private practice, once you've gained a familiarity with your own laws, it becomes increasingly easy to identify – and interesting to consider – how other countries' laws deal with the same issues and then exciting and challenging to try to make them all work as seamlessly as possible together. I still find it as humbling as it is hard to believe that I am now one of the judges allowed to decide cross-border applications in the UK.

MATT JUKES is publishing manager of *RECOVERY* magazine.

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